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 ARBITRATOR'S FOURTH SET OF QUESTIONS TO THE PARTIES

January 28, 2022

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1 FOR CANADA

General Comment:

1. In this document, the United States comments on Canada's responses to the Arbitrator's fourth set of questions. 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 the following 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]

275. Could Canada please comment on the content of the United States' clarifications contained in its response to Arbitrator question No. 217, and its comments on Canada's response to that same question? In particular, if it cannot be assumed that importers will report in Form 7501 the relevant CVD number of companies excluded from the scope of the CVD order, how should searches of US Customs data be performed for post-original-investigation reference periods to ensure that the value of imports from such excluded companies is identified accurately?

Comment:

3. Both parties concur that regardless of whether excluded importers report an AD/CVD case number, it would still be possible for Canada to identify imports from an excluded company based on the company's name. To ensure that an excluded company's value of imports is accounted for in the model, the United States would provide Customs the excluded company's name and request the value of imports that entered under the relevant 10-digit HTS codes.

276. Could Canada please respond to the United States' comments about the use of the "General Imports" field in USITC DataWeb searches?[3]

[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.
[3] See United States' comments on Canada's response to Arbitrator question No. 222, para. 135.

Comment:

4. The United States maintains that "imports for consumption" should be used since these are the imports to which the duties are actually applied.[4] In contrast, "general imports" measures the total physical arrivals of merchandise from foreign countries, 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.

5. Further, contrary to Canada's assertion,[5] the value of "imports for consumption" is not necessarily less than the value of "general imports" for any given year. As the United States has explained, "imports for consumption" include those that have physically cleared through Customs immediately or after withdrawal for consumption from bonded warehouses or free trade zones under Customs custody. Therefore, accounting for both withdrawals and immediate imports may be larger than "general imports" in any given year.

6. Canada cites to one Commission remand determination as support for the general assertion that "imports for consumption" will likely undercount the value of total domestic consumption. As evident from the example, however, the Commission's determination to utilize "general imports" in one investigation was a fact-specific determination related to issues of reporting by U.S. importers of that specific subject merchandise.[6] Indeed, consistent with the U.S. approach, the Commission routinely uses "imports for consumption" in its investigations.[7] Further, as the United States has explained, CVD duties are only applied to "imports for consumption".[8]

7. Lastly, the use of "general imports" in the U.S. Alternative Instructions in Annex A was an inadvertent error and should be changed to "imports for consumption" to reflect the U.S. position.[9]

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[4] *E.g.*, Softwood Lumber CVD Order, 83 Fed. Reg. 347, 348 ("[U]nliquidated entries of such merchandise from Canada, entered or withdrawn from warehouse for consumption, are subject to the assessment of countervailing duties.") (Exhibit CAN-18).
[5] Canada's Response to Fourth Set of Questions, para. 5.
[6] Canada's Response to Fourth Set of Questions, para. 5; USITC Final Remand Determination in Silicon Metal from Russia, p. IV-1 n. 1 ("U.S. import statistics presented in this report are based on General Imports (as opposed to imports for consumption) due to issues with country of origin reporting and product classification reporting that result from certain U.S. importers' use of FTZs for their importation of silicon metal.") (emphasis added) (Exhibit CAN-29).
[7] *E.g.*, USITC Softwood Lumber U.S. Importer Questionnaire, p. 9 (providing the definition of "imports" as "[t]hose products identified for Customs purposes as imports for consumption for which your firm was the importer of record . . . .") (Exhibit USA-41).
[8] *E.g.*, Softwood Lumber CVD Order, 83 Fed. Reg. 347, 348 ("[U]nliquidated entries of such merchandise from Canada, entered or withdrawn from warehouse for consumption, are subject to the assessment of countervailing duties.") (emphasis added) (Exhibit CAN-18).
[9] U.S. Responses to Third Set of Questions, Annex A, U.S. Alternative Instructions, para. 1.12(a).

2 FOR BOTH PARTIES

280. The Arbitrator notes that Canada suggests using the values of 15 and 6, respectively, for the supply elasticity of Canadian imports and for the elasticity of an aggregated non-Canadian supply[10], and that the United States suggests using the value of 10 for the domestic (i.e. US) supply elasticity and the value sourced from USITC reports for the foreign (i.e. non-US) supply elasticity. Assume, for the purpose of this question only, that the Arbitrator selects the four-varieties version of the US model described in Question No. 246 to compute NI, and that the Arbitrator will instruct Canada to use a different elasticity for domestic (i.e. US) and foreign (i.e. non-US) supply. Could the parties please comment on whether the use of 10 and 6 for import and domestic supply elasticities would constitute reasonable values in the four-varieties model framework outlined in Annex A to the Arbitrator's previous set of questions to the parties?

Comment:

8. The United States refers the Arbitrator to the U.S. response to this question.[11] The United States has no additional comments on Canada's response beyond recalling that Canada has also proposed a value of 10 for the U.S. import (*i.e.*, non-U.S.) supply elasticity.[12] In its response, Canada acknowledges that this value "would not be unreasonable".[13]

281. Can the parties please submit signed copies of the parties' jointly proposed BCI Understanding?[14]

Comment:

9. The United States has no comments on Canada's response to this question.

282. Both parties have recently confirmed that a triggering event occurs, *inter alia*, when an affected company becomes an unaffected company. The Arbitrator assumes that Canada will be able to discern relatively easily, based on the public records of USDOC proceedings, when companies that were previously assigned either an affected individual CVD rate or an affected non-selected rate in an administrative review become unaffected companies. Could the parties please confirm, however,

[10] Canada's response to Arbitrator question No. 139, paras. 88-89.
[11] *See also* U.S. response to question 198 (describing a tiered approach to select elasticity values so that Canada will always be able to apply the model).
[12] *See, e.g.,* Reishus & Lemon Report, para. 27; Canada's Written Submission ("The United States agrees with Canada that a pre-determined value of 10 is appropriate for the elasticity of supply for all imports into the United States.").
[13] Canada's Response to Fourth Set of Questions, para. 8. n. 14.
[14] See Exhibit USA-47; United States' response to Arbitrator question No. 153, para. 74; Canada's response to Arbitrator question No. 153, para. 101.

that Canada will be able to readily discern when a company previously subject to an affected All-Others[15] rate (i.e. created in an original investigation) is assigned an unaffected CVD rate, given that companies subject to the All-Others rate are not named in any CVD proceeding segment?

Comment:

10. The United States agrees that Canada would be able to discern the companies previously under the All Others rate from the provided Customs data.[16] In the U.S. response to this question, the United States also explained a more straightforward approach to discern whether a company in a subsequent segment of a CVD proceeding was previously under the All Others rate. That is, a company that receives an unaffected CVD rate subsequent to the investigation, as contemplated by the question, will be explicitly identified by Commerce. Therefore, Canada would be able to readily discern whether a company in an administrative review had previously been under the All Others rate from the investigation by reviewing past Federal Register notices. If the company in question did not previously receive an individually-examined or non-selected rate in the CVD proceeding, then this would mean that the company was previously receiving the All Others rate. Therefore, in the rare and unlikely event that the United States did not provide Customs data, Canada would still be able to discern whether a company in an administrative review was previously under the All Others rate by reviewing the Federal Register notices from the prior segments of the CVD proceeding.

11. Although not raised by the question, Canada further raises the scenario of how it would identify companies originally under the All Others rate, and that continue to be assessed an All Others rate because there has not been a request for an administrative review.[17] That is, the only companies that Canada would not be able to identify from Commerce's Federal Register notices would be the companies that had never requested an administrative review. For only those companies, the United States agrees that Canada would need the relevant Customs data to discern the identities of the companies. In the rare and unlikely circumstance that Customs data was not provided, the United States refers the Arbitrator to the U.S. response and U.S. comment on Canada's response to question 295 concerning the alternative means to obtain a value of imports for those companies.

12. Lastly, contrary to Canada's representation, the U.S. position is not that "every triggering event would require a newly defined reference period".[18] Rather, as the United States explained,

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[15] In their submissions going forward, the parties are requested to use the term "all-others rate" only with respect to the All-Others rate created in the original investigation. All-others rates of the kind assigned in administrative reviews shall be referred to as "non-selected" rates.

[16] *See also* U.S. Responses to Fourth Set of Questions, para. 11 n. 21. Further, the United States observes that the manner in which Canada proposes to use the Customs data – identifying companies based on the Manufacturer ID and Manufacturer Name fields – further supports the U.S. position to provide the value of imports on a Manufacturer ID/Manufacturer Name combination basis. U.S. Responses to Third Set of Questions, paras. 131-132.

[17] Canada's Response to Fourth Set of Questions, para. 13.

[18] Canada's Response to Fourth Set of Questions, para. 12.

the reference period would be the year prior to the most recent application of the challenged measure.[19] The calculation of the level of nullification or impairment would be related solely to the new application of the challenged measure in that specific segment of the CVD proceeding, and accordingly, the United States would provide the Customs data associated with the new reference period. However, a removal of the challenged measure from a previously affected company would only require modification of a previously calculated level of nullification or impairment.[20] Therefore, a removal of the challenged measure would not require the United States to provide further Customs data because the reference period would not change.

283. The Arbitrator notes the Canadian position that triggering events arise from the *imposition of a CVD order* following an investigation or the *final* results of various other CVD proceedings. The United States has not appeared to take issue with this position. In light of this apparent shared position of the parties, could the parties please clarify whether *provisional* CVDs would be taken into account in the reference period duty rate of relevant companies? As part of your response, please clarify whether provisional duties would only be imposed in an original investigation, or whether they would also be imposed in other kinds of CVD proceedings. Relatedly, could the parties please explain whether the reference period CVD rate for individually investigated companies in an original investigation and for companies subject to the All-Others rate created in the original investigation will always be zero?

Comment:

13. For the reasons provided in the U.S. response to this question,[21] the United States disagrees with Canada concerning the inclusion of provisional duties in the reference year CVD rate. The United States does not have additional comments on Canada's response.

284. In its most recent submission, the United States appears to suggest that a change in composition of the cross-owned affiliates of a hypothetical Canadian company (Company A), subject to a CVD rate affected by the OFA-AFA Measure, should qualify as a

[19] U.S. Responses to Third Set of Questions, para. 70.
[20] *See* U.S. Responses to Third Set of Questions, para. 71 n. 65.
[21] As the United States confirmed in the U.S. response to this question, both parties agree on the use of the CVD order from an investigation or the final results from an administrative review as the basis for the year prior. The facts of this arbitration proceeding are distinguishable from *US – Countervailing Measures (China) (Article 22.6 – US)*, where the arbitrator determined to use the preliminary determination as the basis for the year prior. *US – Countervailing Measures (China) (Article 22.6 – US)*, para. 3.137. In that proceeding, China argued that preliminary duties could cause distortion because the preliminary duties "suffered from the same legal flaws that the DSB identified with respect to the final determination". *Id*. at para. 3.116 n. 256. After reviewing the evidence submitted by China concerning the distortive trade impacts of preliminary duties in the determinations at issue, the arbitrator determined to use the year prior to the preliminary determination. *Id.* at paras. 3.124-3.133, 3.136. Here, in contrast, the preliminary determination from the CVD investigation would not contain the challenged measure because verification does not occur until after the preliminary determination. U.S. Responses to First Set of Questions, para. 38 (describing the precise content of the challenged measure).

triggering event that requires Canada to re-run the model to calculate a level of NI.[22] Could the parties please clarify whether the USDOC would ever change the composition of Company A's cross-owned affiliates without re-investigating Company A and thus assigning a new CVD rate to that company and its cross-owned affiliates? Based on your answer to this first question, could the parties please also clarify the extent to which a change in the composition of a company's cross-owned affiliates would ever arise as an independent triggering event?

Comment:

14. Both parties agree that a company's cross-owned affiliate determination typically would not be an independent triggering event.[23] In the unlikely event that it was an independent triggering event, the United States welcomes Canada's acknowledgement that "the changed facts regarding the cross-owned affiliate may need to be taken into account by Canada when running the model".[24] As the United States previously explained, if the composition of the group changes between segments of a CVD proceeding, it would be the U.S. expectation for Canada to use the group most recently identified by Commerce to calculate a level of nullification or impairment going forward.[25] In particular, the removal of the challenged measure in a CVD proceeding – including the "subtraction of a company from the composition of cross-owned affiliates"[26] – "triggers" Canada's obligation to terminate or modify the original level of nullification or impairment, consistent with Article 22.8 of the DSU.

15. In addition, Canada misleadingly implies that it would only be able to adjust reference period values for a change in status of a cross-owned affiliate if the United States provided disaggregated Customs data.[27] To be clear, Canada seeks entry-by-entry shipment information. However, Canada would also be able to complete the exercise by using the company-specific Customs data proposed by the United States. That is, the United States has offered to provide disaggregated Customs data on a company-specific (*i.e.*, a manufacturer ID/manufacturer name combination) basis.[28] With the company-specific data, Canada would readily be able to adjust the reference period values if the composition of a cross-owned affiliate were to change. Entry-by-entry shipment information would be both unnecessary, and also complicate and extend the time that would be needed to assess the impacted imports.

285. In its most recent submission, Canada has noted that the legal status of a particular type of CVD proceeding under US law may change in the future.[29] In light of such uncertainty, could the parties please clarify whether the Arbitrator's Decision

[22] United States' comments on Canada's response to Arbitrator question No. 268, para. 218.
[23] Canada's Response to Fourth Set of Questions, para. 22; U.S. Responses to Fourth Set of Questions, para. 15.
[24] Canada's Response to Fourth Set of Questions, para. 22.
[25] U.S. Responses to Third Set of Questions, para. 204.
[26] Canada's Response to Fourth Set of Questions, para. 23.
[27] Canada's Response to Fourth Set of Questions, para. 24.
[28] U.S. Responses to Third Set of Questions, paras. 131-132.
[29] Canada's response to Arbitrator question No. 189, fn 39.

would specify that: (a) triggering events may arise only in the *specific* types of CVD proceedings enumerated by Canada[30]; or (b) that a triggering event may arise in *any US CVD proceeding* in which the OFA-AFA Measure is used (or which could cure a company of an affected CVD rate)?[31]

Comment:

16. For the reasons provided in the U.S. response to this question, the United States disagrees with Canada that a triggering event may arise in any CVD proceeding. The United States has no additional comments on Canada's response.

286. For purposes of this question only, please assume that the Arbitrator agrees with Canada that disaggregated US Customs data should be provided to Canada in the relevant Excel spreadsheet. In light of that assumption, could the parties please comment on the accompanying revised version of Exhibit CAN-147, with added columns U-W? Could the parties please comment on whether such additional columns would be necessary, or helpful, for the parties in identifying the relevant companies to which certain values of shipments should be assigned? In particular, is it necessary for US Customs to link each shipment value to a particular company name that actually appears in a CVD order to ensure that it is clear what duty rate should be assigned to that shipment? Further, could the parties please confirm that Column Q in this spreadsheet refers to the *reference period CVD rate?*

Comment:

17. The United States has agreed to provide to Canada value of imports Customs data on a company-specific basis for the reference period. The parties agree that all of the data between columns A through Q would pertain to the reference period, consistent with the heading in the spreadsheet, "all entries to the United States from Canada under the relevant HTS codes or AD/CVD number during the reference period".[32]

18. Any additional columns pertaining to information that Canada could obtain by itself from public information, specifically the proposed columns R through W,[33] as well as Canada's newly proposed "Factual CVD rate" column, would be optional for the United States to provide. That is, Canada has agreed to provide this information to the United States in the initial notification,[34] and therefore, Canada would not need the information from Customs. Furthermore, as the United States explained in the U.S. response to this question, if the Arbitrator requires the United

[30] See, e.g. Canada's response to Arbitrator question No. 35 (enumerating specific CVD proceedings).
[31] For purposes of this question only, please assume that the Arbitrator agrees with Canada that CVD proceedings beyond investigations and administrative reviews are within the scope of this arbitration proceeding.
[32] *See* Canada's Response to Fourth Set of Questions, para. 27.
[33] *See also* U.S. Responses to Fourth Set of Questions, para. 18 (objecting to the inclusion of column V).
[34] *See* Canada's responses to questions 186 & 288. Although Canada contends that the inclusion of unaffected exporters necessitates Customs to preliminarily identify the information in columns U through W, this information would similarly be readily available to Canada through the Federal Register notices.

States to provide entry-by-entry shipment data, which may amount to thousands of entries, it may be too burdensome for the United States to make the preliminary assessment for Canada for each shipment in the limited time period that is being contemplated. Therefore, although the United States does not object to providing a preliminary assessment of the affected and unaffected entries, such an assessment should be optional and not mandatory.

287. The Arbitrator notes that the parties have submitted diverging views on the key question of the selection of the reference period. The Arbitrator notes that the US proposal on this score may result in the selection of a reference period, in certain circumstances, in which the values of imports are distorted by the presence of CVD rates affected by the OFA-AFA Measure. While the Canadian proposal for a reference period appears to address that issue, the Canadian proposal may, under certain circumstances, result in the selection of a reference period that precedes the triggering event by multiple years. This concern appears particularly acute when an affected All-Others rate is created in an original investigation. In that instance, the Arbitrator understands that the All-Others rate will be affected for the duration of the CVD order, thereby necessitating the fixing of the reference period as the calendar year preceding the issuance of that CVD order for all following triggering events.[35] The Arbitrator also separately recalls that the parties have indicated that the number of companies subject to the All-Others rate will probably decrease over time, and therefore if a CVD order has been in place for a number of years, the value of imports that is affected by the All-Others rate will probably have become low at the time of the triggering event.

In light of these observations, could the parties please offer their views on the following proposal for the selection of a reference period, which may strike a balance as between the parties' two proposals. The reference period shall be the most recent calendar year in which there was no company with a CVD rate that was affected by the OFA-AFA Measure, *but* the All-Others rate will not qualify as an affected rate in the selection of the reference period? Under this proposed approach, could the parties further comment on: (a) what the reference-period CVD rate would be for the companies subject to an affected all-others rate; (b) what the reference period CVD rate would be for a company that was subject to an affected

[35] For example, assume that Company A receives an OFA-AFA affected CVD rate in an original investigation in Year T. Its CVD rate is used to calculate the All-Others rate. Thus, moving forward, there is an affected Company A and an affected All-Others rate. One year later, in Year T+1, Company A is cured of its affected rate in an administrative review. It is now an unaffected company. Nine years later, in Year T+10, a new administrative review occurs. Company B receives a CVD rate affected by the OFA-AFA Measure. Further assume that Company B only entered the market five years ago in Year T+5. Under the Canadian approach, the Arbitrator understands that the reference period cannot be updated to the Year T+9 because the All-Others rate was affected during that time. This is so because Canada would select the most recent year in which no active CVD rate affected by the OFA-AFA Measure was present. Thus, the reference period of Year T-1 must be used. That reference period will yield a value of imports of zero for Company B, effectively excluding Company B from the calculation of the level of NI, even though it was Company B's affected CVD rate that triggered the calculation of NI in this case.

All-Others rate during the reference period but, upon the triggering event, was assigned a different CVD rate (i.e. individual or a non-selected rate); and (c) whether, under this approach, a calculated level of NI would always and completely replace any previous calculated level of NI?[36]

Comment:

19. The United States welcomes Canada's acknowledgement that an outdated reference period that is far removed from a new application of the challenged measure requires a solution that will involve the use of a reference period that may be "tainted" by the measure.[37] In such an instance, Canada proposes to have the "discretion" to use a more recent period where less than five percent of the total value of imports is affected by the measure if the original reference period is five years or more prior to the triggering event. However, Canada's proposal does not fully remedy the problem, and further, introduces bias into the model by permitting Canada to select a reference period that benefits Canada.[38]

20. First, Canada's proposal would still generate an arbitrary level of nullification or impairment. Canada's proposal continues to permit Canada to use a reference period beyond the year prior to the application of the challenged measure. As the United States has explained, the use of a reference period that is not the year prior to the new application of the challenged measure means that the resulting level of nullification or impairment would likely be unrepresentative of the year in which the triggering event actually took place.[39] Canada's proposal therefore continues to generate an arbitrary level of nullification or impairment that is disconnected from the counterfactual scenario that represents the remedy that Canada would seek.

21. Second, Canada's proposal is problematic because Canada suggests that it be given "discretion" to select the reference period that would be most beneficial to Canada. Indeed, Canada does not provide criteria for how it would determine which alternative reference period to utilize. Such an approach is biased and incapable of ensuring equivalence. Canada's approach is particularly troubling when also accounting for the fact that Canada has repeatedly sought discretion to select the other model inputs in this proceeding, as well as utilizing fixed elasticity estimates and market shares.[40] The cumulative effect of these proposals demonstrates

[36] In answering this question and in making any proposals on this front, the parties are asked to bear in mind, as a background fact, that Canada will presumably not know whether any companies actually exported to the United States during a particular reference period under an affected All-Others rate until Canada has already defined the reference period and receives the US Customs data for that reference period back from the United States.
[37] *See* Canada's Response to Fourth Set of Questions, paras. 33-34.
[38] *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 only beneficial to Canada).
[39] *See* U.S. responses to questions 207 & 287; U.S. comment to Canada's response to question 207.
[40] U.S. Closing Statement at the Virtual Session, paras. 7-10 (highlighting Canada's proposal to have discretion to select the counterfactual All Others rate if a company does not provide authorization, and the value of imports if Customs data is not provided).

that Canada does not seek a model that is related to the level of nullification or impairment stemming from the application of the challenged measure. Rather, Canada seeks a model that will ultimately only benefit Canada. As the United States has explained,[41] 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. 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.

22. Further, given Canada's own proposal for the use of a reference period that may be "tainted" by a previous application of the challenged measure, Canada's opposition to the U.S. approach is untenable. The U.S. approach correctly represents the counterfactual scenario from an application of the challenged measure. As the United States has explained, 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, thereby ensuring a reasoned estimate of nullification or impairment.[42]

288. The Arbitrator notes that the parties appear to agree that, in its initial notification to the United States following a triggering event, Canada would include the names of individually investigated Canadian companies (whether affected or unaffected), with the United States further arguing that Canada should include the names of companies subject to an All-Others rate, insofar as that information is available. Could the parties please clarify whether Canada should also include the names of companies

[41] U.S. Closing Statement at the Virtual Session, para. 10 ("That decision on equivalence does not rest with Canada. Rather, that decision rests with the Arbitrator. The Arbitrator should not acquiesce to Canada's impermissible attempt to arrogate to itself authority that the DSU assigns to the Arbitrator.").

[42] Contrary to Canada's allegations, the U.S. approach does not understate the calculation of nullification or impairment. In support of its position, in Canada's comments on the U.S. response to question 207, Canada alleges that the U.S. treatment of Company A in question 207(b) would understate the total level of nullification or impairment because the second calculation of nullification or impairment would use Company A's legacy rate as the reference period rate, thereby underestimating the level of nullification or impairment. Canada's Comments on U.S. Responses to Third Set of Questions, paras. 45-46. However, Canada fails to recall that a new application of the challenged measure to Company A would terminate the first, legacy application of the challenged measure to Company A, and Canada would have already been compensated for that past application of the challenged measure. Therefore, Canada would not continue to be entitled to nullification or impairment stemming from the first application of the challenged measure. The U.S. approach thus captures the correct counterfactual – that is, had it not been for the new application of the challenged measure, Company A would have maintained the legacy application of the challenged measure and impacted the trade flows of the market accordingly. Therefore, with the termination of the first application, the calculation correctly isolates the level of nullification or impairment stemming from the second application of the nullification or impairment because Canada would have already suspended concessions related to the first application of the challenged measure.

subject to affected or unaffected non-selected rates (i.e. created in administrative reviews) in its initial notification?

Comment:

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

289. The parties have both clarified that one type of triggering event is when an affected company becomes an unaffected company. Could the parties please explain whether this would hold in the event that a new shipper, which, before the completion of its new shipper review, could be subject to an affected All-Others rate (at least for a short time), thereby being affected by the OFA-AFA Measure, then become subject to an individual and unaffected CVD rate in a new shipper review? Under what circumstances, if any, would this qualify as a triggering event? In particular, would this only qualify as a triggering event if some of the new shipper's value of imports had been counted as affected imports (as part of the companies' value of imports subject to an affected All-Others rate) as part of a previous calculation of a level of NI (if it were possible for Canada to make this determination)? Relatedly, could the parties please clarify whether, as a general matter, that a triggering event will only arise in the context of a USDOC proceeding, or upon the imposition of a CVD order?

Comment:

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

290. In Arbitrator question No. 221, the Arbitrator proposed potential minimum search criteria for US Customs data. Could the parties please explain whether, if US Customs were to use such criteria as an *initial* matter, as advocated by Canada[43], this might result in an overly restrictive means by which US Customs would assign, in particular, values of imports to relevant companies (see question No. 221(c)(i)-(iv)), and perhaps interfere with the parties' ability to agree on a data set that may differ?

Comment:

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

Could the parties please also comment on the addition of the following language:

[43] Canada's response to Arbitrator question No. 221, para. 176.

a. To the content of the proposed text in question No. 221(c): whenever the language "individually investigated Canadian company" or "individually investigated company" or "individually examined company" appears, such phrase shall be followed by the additional phrase "or company subject to a non-selected CVD rate"?

Comment:

26. The term "individually examined company" is consistent with the U.S. understanding that an individually examined company refers to a company individually examined in an administrative review. The United States considers it appropriate to maintain the text as proposed by the Arbitrator, but the United States also does not object to using the term "individually reviewed" as proposed by Canada.

b. The following additional language at the end of the text of question No. 221(c)(ii): "or it is otherwise known by US Customs that the Manufacturer ID specifically relates to an individually investigated company or company subject to a non-selected CVD rate."

Comment:

27. Please see the U.S. comment on subpart (a) above.

c. An additional point which would appear as Arbitrator question No. 221(c)(v): "If, for any reason, the criteria above lead to a conflict (i.e. would lead to the assignment of a particular value of imports to more than one individually investigated company and/or company subject to a non-selected rate) then the preference shall be to assign the value of imports to an affected company rather than to an unaffected company. Beyond that criteria, the value of imports shall be assigned to the company that US Customs deems appropriate."

The parties are encouraged to propose any other changes that the parties feel would increase the reliability of such minimum search criteria.

Comment:

28. The United States refers the Arbitrator to the U.S. response to this subpart of the question. The United States does not have additional comments on Canada's response to this subpart.

291. With reference to Canada's proposed search criteria for the Statistics Canada database when ascertaining a value of imports for the companies subject to the All-Others rate[44], could the parties please explain whether, for the Manufacturer Name and Manufacturer ID, Canada would not only exclude entries from individually

[44] Canada's response to Arbitrator question No. 222, Table 4.

investigated companies but would also exclude entries associated with companies subject to non-selected rates? Please explain whether any other changes to Canada's proposed search criteria for Statistics Canada, USITC DataWeb, and/or USA Trade Online would need to be made to take account of companies subject to non-selected rates.

Comment:

29. The United States refers the Arbitrator to the U.S. response to question 178 concerning the calculation of the residual value of imports for companies under the All Others rate.[45] This approach may also be used to discern the residual value of imports for non-selected companies.[46] The United States does not have additional comments on Canada's response to this question.

292. Both parties suggest that the real *level of suspension* should be maintained constant over time and that, for this purpose, an inflationary adjustment should be applied. Both parties suggest the use of industry-specific PPIs that would reflect price changes of products subject to the calculation of the *level of NI*. The Arbitrator notes that Canada would presumably be able to retaliate against goods beyond those subject to the relevant CVD order. Could the parties please therefore clarify whether it would be more appropriate for the purpose of maintaining the real level of suspension to use an economy-wide price index, i.e. the general US PPI?

Comment:

30. The parties agree that U.S. industry-specific PPIs of products should be used as an inflation adjustment to maintain the real level of suspension. The United States refers the Arbitrator to the U.S. response to this question concerning the scope of this arbitration proceeding. The United States does not have additional comments on Canada's response.

293. The Arbitrator notes that US Bureau of Labor Statistics price indexes proposed by the parties are subject to monthly revisions up to four months after original publication. Would the parties agree that preliminary data subject to such monthly revisions should not be used in the calculations of any inflationary adjustment?

Comment:

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

294. Assume, for the purpose of this question only, that a four-variety approach as outlined in Annex A to the Arbitrator's previous set of questions to the parties is

[45] U.S. Responses to Second Set of Questions, paras. 108-112. *See also* U.S. Responses to Third Set of Questions, Annex A, U.S. Alternative Instructions, paras. 1.14-1.16; U.S. comment on Canada's response to question 295.
[46] *See also* U.S. comment on Canada's response to question 295, below.

selected. Assume further that a new shipper review occurs that qualifies as a triggering event, and that the reference period is one in which no exports of the new shipper occurred. Could the parties please comment on the following hypothetical procedure for such an instance[47]:

(a) Canada would use a value of imports for the latest twelve-month period before the issuance of the final results of the new shipper review;

(b) If shipment data is not available for twelve months, Canada would annualize the observed shipment value by multiplying it with the inverse of the time period to which this data refers. To provide an example: if imports worth 120 have been observed over 9 months, the annualized imports would be $120 * \frac{12}{9} = 160$;

(c) Canada would adjust the value of imports to the price level of the reference year using an industry-specific producer price index; and

(d) Canada would add the new shipper's annualized and price-level adjusted value of imports to the value of affected imports and to the market size as observed in the reference period to derive new market share data. Subsequently, a new CVD order-specific level of NI would be determined.

Comment:

32. For the reasons provided in the U.S. response to this question, the United States disagrees with Canada concerning the inclusion of new shipper reviews and the proposed methodology for discerning a value of imports for new shippers. The United States does not have additional comments on Canada's response.

295. Below appears a table with proposals regarding how Canada would calculate the value of imports and duty rates. For the purpose of reviewing this table only, the parties are asked to assume that Canada would be using a four-variety model as outlined in Annex A to the Arbitrator's previous set of questions to the parties. Could the parties please explain whether they: (a) consider any content of the below table to be unreasonable; and (b) whether the parties discern any gaps in the below content that would lead to Canada being unable to reasonably calculate the value of imports or change in duty rates in any particular scenario? Please pay special attention to the content on new shippers in your answers. As part of your answers to this question, could the parties also please explain how, in a four-variety version of the US model, the value of imports for new shippers would be incorporated into the calculations of relevant market shares? Finally, in evaluating the content of the final

[47] If convenient, please answer this question in combination with your comments on the section of Table 1, further below, addressing new shipper reviews.

column of this table, the parties are kindly asked to be mindful of their responses to question No. 287, regarding the selection of an appropriate reference period.[48]

Comment:

33. Below, the United States provides comments on Canada's Revised Table 1. As requested by the Arbitrator's footnote to this question, the United States references previous arguments from the U.S. submissions to streamline this comment. Although the United States has highlighted the major issues, the absence of a comment on an aspect of Canada's Revised Table 1 should not be construed as agreement with Canada's position.

34. For the reasons provided in the U.S. response to this question, the United States proposes the following changes to Canada's Revised Table 1: (1) the deletion or modification of the text, "or, alternatively, the most recent identification of cross-owned affiliates before the triggering event" in footnote 70 of Revised Table 1; (2) providing a hierarchy rather than permitting Canada to have discretion to select from alternative sources in the absence of Customs data; (3) the use of company-specific Customs data rather than disaggregated, entry-by-entry shipment Customs data; (4) the use of primary HTS codes rather than all relevant HTS codes; (5) the deletion of the section related to new shippers; and (6) the deletion of the use of data outside the reference period and the annualization of the value of imports for new shippers.

35. Further, in the boxes concerning the value of imports "without U.S. Customs data", as the United States explained in the U.S. response to this question, Canada should only be permitted to obtain and utilize data directly from a company if the company consents to sharing the information with the United States.[49] Further, with respect to option 3 concerning the use of U.S. sales data from the record of Commerce's proceeding along with USA Trade Online/USITC DataWeb, the United States offered additional clarifications to Canada's proposal.[50] Therefore, the U.S. clarification should be added to any accompanying footnote to the text, "adapted to the reference period per Canada's explanations".

36. In the boxes concerning the reference period duty rates "without U.S. Customs data", for the reasons provided in the U.S. response to question 283, the United States objects to the inclusion of provisional duty rates.

37. For companies under the All Others rate, in the box concerning the value of imports "without U.S. Customs data", the United States agrees with Canada's approach to option 3(b) – concerning the residual share of import values to the non-selected rate in a post-investigation period – in the limited instance where Canada was not already provided Customs data for the reference period to the investigation. That is, option 3(b) assumes that no previous Customs data

[48] If the parties have criticisms of the methods herein that have already been adequately included in answers to previous questions, please refer back to those answers rather than engaging in repetitious arguments.
[49] *See* U.S. Comments on Canada's Responses to Third Set of Questions, para. 136.
[50] U.S. Responses to Second Set of Questions, paras. 108-112; U.S. Responses to Third Set of Questions, Annex A, U.S. Alternative Instructions, paras. 1.14-1.16.

was provided in relation to an application of a challenged measure in the investigation. With respect to how the residual share should be obtained, the United States refers the Arbitrator to the U.S. instructions.[51] This understanding also applies to Canada's reference to "method 3(b), under the instructions for the 'Companies subject to a factual All Others rate'" in the box concerning the value of imports without U.S. Customs data for non-selected companies.

38. For the non-selected companies, in the box concerning the reference period duty rate "without U.S. Customs data", the United States does not agree to the inclusion of the first paragraph concerning a circumstance when the reference period is in a pre-investigation period. That is, a non-selected rate occurs in an administrative review, and therefore, a reference period would not include a pre-investigation period.

[51] U.S. Responses to Second Set of Questions, paras. 110-112; U.S. Responses to Third Set of Questions, Annex A, U.S. Alternative Instructions, paras. 1.14-1.16.