UNITED STATES – COUNTERVAILING DUTY MEASURES ON SUPERCALENDERED PAPER FROM CANADA

Recourse to Article 22.6 of the DSU by the United States

(DS505)

INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

March 18, 2022

EXECUTIVE SUMMARY OF THE U.S. WRITTEN SUBMISSION

I. INTRODUCTION

1. The U.S. views on the appellate document are clearly reflected in the minutes of the March 5, 2020 and June 29, 2020 DSB meetings, as well as the U.S. communication to the DSB on April 17, 2020. In this submission, the United States will not repeat those objections. However, the United States emphasizes that its participation in this arbitration is without prejudice to its views concerning the invalidity of the appellate document and the purported adoption of recommendations by the DSB. Furthermore, the use of the term challenged "measure" in this arbitration proceeding is without prejudice to the U.S. position concerning the DSB adoption procedures and existence of DSB recommendations.

2. Canada's methodology paper demonstrates that Canada's request for suspension of concessions is contrary to the requirements of the DSU. Canada suffers no nullification or impairment from a measure that is not applied to it. Canada has also requested to suspend concessions on the basis of a formula, but this cannot generate an estimate that is equivalent to a future level of nullification or impairment because the formula simply speculates as to what duty might result from the discovered subsidy "ongoing conduct". In the event the Arbitrator proceeds to evaluate a future, hypothetical level of nullification or impairment, the United States also provides its views on conceptual and methodological flaws in Canada's approach.

II. CANADA HAS NO NULLIFICATION OR IMPAIRMENT

3. Under the terms of Article 22.7, the arbitrator considering the matter "shall determine whether the level of such suspension is equivalent to the level of nullification or impairment." Article 22.4 of the DSU requires that the "level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment." Therefore, where nullification or impairment does not exist, the level of suspension should be set at zero. To do otherwise would breach Articles 22.4 and 22.7 of the DSU because the level of suspension of concessions would fail to be "equivalent" to the correct level of nullification or impairment, which is zero.

4. The same conclusion follows from the second sentence of Article 22.7. This provision reads: "The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement." Under Article 1.1 and Appendix 1 of the DSU, the DSU itself is a "covered agreement". Article 22.4 of the DSU establishes that the level of suspension shall be equivalent to the nullification or impairment. However, a suspension of concessions that is not zero is not equivalent to a level of nullification or impairment that is zero, and therefore, Canada's proposed suspension is not allowed under the DSU.

A. The DSU Permits the Arbitrator to Find That Nullification or Impairment Does Not Exist

5. Article 3.8 of the DSU plainly provides for the possibility that the Member concerned may rebut the presumption of the existence of nullification or impairment by putting forth evidence that a breach of WTO obligations does not have an adverse impact on the complaining Member. This is because nullification or impairment and breach are two separate concepts.

6. Nothing in Article 3.8 of the DSU, which is one of the "General Provisions" of the DSU, limits the opportunity of the Member concerned to make such a rebuttal only during the original panel phase of a dispute settlement proceeding. The more logical time for a Member concerned to make such a rebuttal would be in the context of an arbitration under Article 22.6 of the DSU. In the countermeasures arbitration, the question of the level of nullification or impairment – including whether there is any at all – is placed squarely before the adjudicator that is tasked with evaluating the equivalency of the level of suspension and the nullification or impairment.

7. Furthermore, as is the case in this dispute, the factual circumstances related to the effect of a measure on the complaining Member might change over time, including after a panel report is circulated and before a suspension request is made under Article 22.2 of the DSU. Thus, it is incumbent upon the arbitrator to determine whether nullification or impairment exists as part of its evaluation of whether the level of suspension is equivalent to the nullification or impairment.

B. The Challenged Measure Causes No Nullification or Impairment

8. There is no adverse impact on Canada because the "ongoing conduct" measure does not continue to exist and be applied to exports from Canada. In the underlying proceeding, Canada used nine CVD determinations to allege an "ongoing conduct" measure; however, only one CVD determination involved a Canadian good – that is, *Supercalendered Paper*. In July 2018, the *Supercalendered Paper* countervailing duty order was revoked with retroactive effect to the beginning of the CVD proceeding. With the revocation of the order, Canada is not subject to any "ongoing conduct" and suffers from no adverse impact from the challenged measure.

9. This is a fact acknowledged by Canada in its request for authorization – the request states, "if the 'ongoing conduct' continues to exist and applies to exports from Canada in the future". As Canada itself stated at the June 29, 2020 DSB meeting, "Canada's request for authorization to suspend concessions related to 'ongoing conduct' by the United States that was not currently being applied to Canada, and would relate to future U.S. investigations or administrative reviews of Canadian goods." As it is undisputed that the "ongoing conduct" measure is not currently applied to any imports from Canada, the measure cannot "continue" to exist in relation to Canada. Rather, Canada's request solely relates to the existence and application of a measure "in the future".

10. Canada's reliance on past arbitrations that have assessed "measures that have yet to be applied against the WTO complainant in the future" is misplaced. First, the cited arbitrations concern "as such" measures, not "ongoing conduct" measures, a distinctly different type of measure in WTO dispute settlement. Second, the arbitrations relied upon by Canada concern instances where arbitrators assessed requests where the measure at issue was currently applied and would continue to be applied. In contrast, Canada asks for the Arbitrator to consider imposing countermeasures because of a measure that is not applied to any Canadian good today. Finally, in each of the "as such" disputes relied upon by Canada, the measure is easily discernable and a future application of the measure would not be disputed. Here, in contrast, all aspects of the existence of the "ongoing conduct" measure – the precise content, the repeated application, and the likelihood to continue – were highly contested between the parties and involved the evaluation of the specific facts of multiple CVD determinations.

11. Therefore, because the measure does not continue to exist and be applied to Canadian goods, the determination that a future application of facts available constitutes the existence of the measure would be subject to dispute, yet that determination would be left solely to the discretion of Canada. The fact that such an assessment would be left to the complaining party makes this dispute distinctly different from the arbitration decisions relied upon by Canada.

12. Accordingly, the United States requests that the Arbitrator determine that Canada's proposed suspension of concessions is not allowed or is not equivalent to the correct level of nullification or impairment, which is zero.

III. IN THE ALTERNATIVE, THE APPROPRIATE CALCULATION OF THE LEVEL OF NULLIFICATION OR IMPAIRMENT

13. In the event the Arbitrator proceeds to evaluate the level of nullification or impairment, the United States also provides its views on the conceptual and methodological flaws in Canada's approach

A. Article 22.4 of the DSU Requires that the Proposed Level of Suspension Be Equivalent to the Level of Nullification or Impairment

14. Pursuant to Article 22.4 of the DSU, the DSB will not authorize the suspension of concessions or other obligations unless "the level" of suspension is "equivalent" to the level of nullification or impairment. Article 22.7 of the DSU further provides that where a matter is referred to arbitration, the arbitrator "shall determine whether the level of . . . suspension is equivalent to the level of nullification or impairment." The starting point in the analysis of a suspension request is to determine the extent to which a measure at issue is maintained following the expiration of the implementation period such that it nullifies or impairs benefits accruing to the complaining Member under the relevant covered agreement(s). An analysis of the level of nullification or impairment must focus on the "benefit" accruing to the complaining Member under a covered agreement that is allegedly nullified or impaired as a result of the breach.

15. In previous Article 22.6 proceedings, the arbitrator has compared the level of trade for the complaining party under the measure at issue to what the complaining party's level of trade would be expected to be where the Member concerned has brought the measure into conformity following the expiration of the implementation period. Canada proposes the use of a counterfactual. The United States agrees that the use of a counterfactual analysis is appropriate if the Arbitrator does not accept the U.S. argument above that Canada has suffered no nullification or impairment, but explains why Canada's counterfactual must be adjusted.

B. Canada's Counterfactual Fails to Ensure an Estimate that Is Equivalent

16. Company-specific CVD rate: The United States notes that it would not necessarily be the case that removal of the challenged measure always results in the portion of the CVD rate being reduced. Rather, the removal of the challenged measure could result in the U.S. Department of Commerce ("Commerce") continuing to find subsidization because Commerce utilizes the information from verification to find a countervailable subsidy, and therefore the respondent company's rate could stay the same or even increase. Therefore, in instances where information

exists on the record of the future CVD proceeding to use for the discovered subsidy program, it would be more appropriate to use such information to calculate the counterfactual company-specific CVD rate. If such information does not exist, then the total CVD rate for the affected respondent company will be reduced by the amount of the rate attributable to the application of the measure.

17. All Others rate: Given that the All Others rate calculation differs depending on the factual circumstances of a proceeding, to ensure that the counterfactual will accurately reflect the level of nullification or impairment, it would be appropriate that the counterfactual All Others rate be calculated in accordance with the All Others rate calculation methodology that is used in the future CVD proceeding.

18. In some instances, the information needed to calculate the counterfactual All Others rate will be publicly available. If, in a future proceeding, Commerce uses a simple average of the individually-investigated respondents or uses a weighted-average of the publicly-ranged values of U.S. sales to calculate the All Others rate, the counterfactual All Others rate would be established using the same methodology, and the information needed will be publicly available.

19. Where Commerce has calculated the All Others rate using actual U.S. sales values of subject merchandise and the information is considered business confidential, Canada will request that the individually-investigated respondents in the future CVD proceeding provide written authorization to the Government of Canada to permit access to the relevant calculation memoranda, containing the confidential sales data, that will be on the record of Commerce's CVD proceeding for the purpose of calculating a counterfactual All Others rate.

20. Because the calculation of the All Others rate is done on a case-by-case basis, the same methodology applied by Commerce in the future CVD proceeding – taking into account the U.S. statute's requirements to exclude rates that are zero, *de minimis*, or entirely based on facts available – should be used to establish the counterfactual All Others rate.

C. The Selected Approach Must Allow for the Level of Nullification or Impairment to Be Determined Case by Case

21. The central issue in this proceeding is the impact on trade flows of the *future* application of the discovered subsidy "ongoing conduct" measure. Canada has requested to suspend concessions on the basis of a formula that is described in its methodology paper. As an initial matter, Canada's formula cannot generate an estimate that is equivalent to a future level of nullification or impairment because the product and market are unknown, and therefore Canada's formula rests on pure speculation. Indeed, given the unique circumstances of this dispute – an "ongoing conduct" measure that is not applied to Canada and only relates to an unknown future application – the selection of a singular analytical framework, as Canada proposes, to assess a hypothetical level of suspension is contrary to the requirement of Article 22.4 of the DSU

22. In the event the Arbitrator disagrees and seeks to select a singular analytical framework to set a hypothetical future nullification or impairment, the United States presents in the sections that follow considerations that should be taken into account. The methodology that is ultimately

selected must have the flexibility to capture the nuances of the particular product and market at issue at a specific point in time in order to calculate an estimate equivalent to the level of nullification or impairment with precision.

1. The Correct Methodology

23. The appropriate methodology for determining the level of nullification or impairment is to evaluate the effects of duty rate changes in an Armington partial equilibrium model. Both the United States and Canada agree that this model is the appropriate starting point.

24. Canada's formula is derived from a model with only two sources of supply – imports from Canada and supply from all other sources. It is essential to distinguish among the subject imports from Canada because in a model with imperfect substitution, when duty rates on Canadian imports are reduced, the market price of the corresponding varieties falls and the supply of each variety increases. The increase in demand for each individual subject Canadian variety will depend not only on the magnitude of the reduction in their own duty rate, but also on the magnitude of the reduction relative to other subject Canadian varieties. Similarly, if the duty rates on Canadian imports increase, the impact of the rate increase would affect all varieties.

25. Therefore, the model selected must be able to account for at least five varieties: domestic sources, non-subject imports from the rest of the world, and three Canadian varieties – individually-investigated subject companies, the subject All Others rate, and non-subject Canadian companies – because the change in duty rate of the affected Canadian companies will be at the expense of not only U.S. domestic supply and imports from other countries, but will also be at the expense of other Canadian companies. The appropriate model must account for all of these varieties because the total level of nullification or impairment is based on the change in total imports from Canada, not just the change in total imports from affected companies.

26. Furthermore, it would be more appropriate to apply the Armington partial equilibrium model directly in its non-linear form. Implementing the model in its non-linear form will avoid introducing approximation error – the difference that occurs from calculating nullification or impairment directly in a non-linear model as opposed to solving it in log-linearized formulas.

2. Canada's Formula Is Derived from a Flawed Model

27. There are several flaws with Canada's approach. First, Canada implicitly assumes domestic shipments and imports from all countries other than Canada are one variety. However, domestic supply elasticities are typically assumed to be lower than import supply elasticities to account for the greater ability of foreign suppliers to shift supply from other markets.

28. Second, Canada incorrectly places all Canadian sources into a single variety, thereby treating both subject and non-subject Canadian imports together. However, in an Armington-based partial equilibrium model, if everything else is held equal, a reduction in the duty rate on one Canadian entity results in an increase in demand for that Canadian variety and a decrease in demand for all other varieties, including Canadian varieties not benefitting from the reduction in their duty rate. When removal of the challenged measure creates changes in duty rates of varying magnitudes across several Canadian exporters, the adjustment of U.S. demand is more

complex and depends on the change in each entity's relative duty rate. As such, the model must be able to capture at least three Canadian varieties – the individually-investigated subject company, the subject All Others rate, and the non-subject Canadian companies.

29. Third, Canada sets up its formula to have only one Canadian variety, arguing that if there are multiple groups of exporters with different duty rates, then the formula should be applied to each group separately, and the resulting amounts for each group of exporters would then be added together to obtain the level of nullification or impairment. However, when there are multiple affected Canadian entities, the model must simultaneously account for the effects of multiple changes in duty rates, which allows the model to properly account for shifts in imports across Canadian varieties, as well as between Canadian and non-Canadian varieties.

30. Finally, Canada's approach remains flawed because it unnecessarily introduces approximation error to the model. Canada's formula is derived by first solving its incorrect two-variety model through the log-linearization method. Because the Armington model is inherently non-linear, the log-linearization method introduces approximation error into the resulting estimates. The magnitude of this error increases with the size of the percent change in tariff. Under Canada's approach, approximation error is particularly problematic because Canada seeks to apply its formula multiple times, thereby compounding the issue by introducing approximation error over and over again. However, it is unnecessary to introduce approximation error when the model can be run directly in its non-linear form, with a sufficient number of sources of supply to differentiate imported varieties from their domestic counterparts and allow for nuanced treatment of changes in duties applied to different Canadian sources.

3. Canada's Use of a Pre-determined Scaling Factor Results in an Unreasoned Estimate of Nullification or Impairment

31. In its methodology paper, Canada proposes to use a formula, and to apply a limited number of pre-determined values for the "scaling factor" based on broad sectors of the U.S. economy. Canada characterizes the combination of parameter values and market shares that is multiplied by the value of imports and change in duty rates as a "scaling factor". The scaling factor that Canada calculates is based on broader categories than any specified product, and it includes pre-determined input values that would remain fixed to a specific period of time regardless of supply and demand changes in the U.S. market.

32. However, the use of such a pre-determined scaling factor, composed of a number of fixed elements, does not accord with an arbitrator's mandate to select a methodology that will result in setting the level of suspension equivalent to the level of nullification or impairment. Past arbitrators have expressed the view that the determination of nullification or impairment must be a "reasoned estimate" with assumptions that are not based on speculation. The selection of a formula with a pre-determined and fixed scaling factor would fail to capture the characteristics of a yet-to-be known product in a specific case or account for future changes in market conditions, and therefore would not result in a reasoned estimate, consistent with Article 22.4 of the DSU.

33. Canada asserts that its approach of using a pre-determined scaling factor is similar to that of *US – Washing Machines (Korea) (Article 22.6 – US)*. Canada's reliance on that decision is

misplaced because that proceeding involved an "as such" measure and dealt with consideration of a measure that existed and would continue to exist. Here, on the other hand, the dispute involves an "ongoing conduct" measure that does not continue to exist and be applied to exports from Canada. Further, in *US – Washing Machines (Korea) (Article 22.6 – US)*, neither Korea nor the United States supported the use of a formula with pre-determined scaling factors – referred to as a "coefficient-based approach" by the arbitrator in that dispute.

34. As discussed below, because the future product and market at issue are unknown, only the sources for data inputs should be pre-determined, not the values of the data inputs themselves.

D. Correct Model Inputs

35. In its most basic form, an Armington partial equilibrium model requires three types of information: (1) U.S. consumption (the value of imports and domestic shipments), (2) duty rates, and (3) parameter values (elasticity estimates and market share). As such, similar information is required to calculate nullification or impairment following either party's approach.

1. Parameter Values

36. The United States disagrees with Canada's approach of pre-determining the values of the data inputs by using sources that are based on broad sectors of the U.S. economy. Neither the elasticities nor the market shares advocated by Canada are tailored to the product that would be at issue. The elasticities are estimated for a broader product grouping than the product that would be at issue in a CVD proceeding, and therefore will not be sufficiently precise. Further, for each elasticity, Canada also uses different sources – each of which is based on different years and a different number of broad sectors – thereby generating imprecise input values.

37. Likewise, Canada's proposal to pre-determine market share inputs is flawed because Canada's input fixes a broader product segment to a year other than the base year for the calculation. The market share should be calculated by dividing imports of the relevant product by the total value of the market for the relevant product in the same year.

38. It would be more appropriate for the selected elasticities and market share inputs to be based on data reported by the U.S. International Trade Commission ("Commission") in the future CVD proceeding at issue. The Commission estimates demand, substitution, and domestic supply elasticities for every product under a CVD (or AD) investigation in its investigation report. Therefore, the elasticity estimates should be the median of the range of the estimated elasticities determined by the Commission. The United States also considers it appropriate that the Commission report in the future CVD proceeding at issue be used as the source for the data necessary to calculate market shares.

39. The parameter estimates made and market share data used by the Commission are particularly well suited for use in a model to estimate the level of nullification or impairment because the Commission's estimates are for the specific products at issue. Further, the estimates are made after analyzing responses from domestic producers and importers, and foreign producers and exporters concerning the market of the product under investigation, as well as

arguments made by interested parties. The use of estimates from the Commission in this proceeding would also be consistent with decisions in *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)* and *US – Washing Machines (Korea) (Article 22.6 – US).*

2. Change in Duty

40. The calculation of the change in duties will need to take into account the associated AD rates. That is, if there are corresponding dumping rates applied to the product in the proceeding, they should be taken into account in the overall duty calculation. A simulated market that fails to take into account relevant antidumping duties will inevitably reflect an inappropriately high level of nullification or impairment for Canada. Therefore, the correct calculation for a company's change in duty should be the difference between all duties applied to the specific company with the challenged measure in effect, compared to all duties excluding the challenged measure applied to the specific company.

3. Value of Imports

41. For the value of imports, company-specific import data should be obtained directly from U.S. Customs and Border Protection ("Customs"). For clarity, the United States notes that for CVD investigations, because Customs does not track the value of shipments of merchandise subject to AD or CVD duties before those duties are imposed, data from Customs based on the reference HTS codes should instead be used. The use of HTS data will likely overstate the value of imports since some of the values under the reference HTS code are not subject to duties, but it remains the best available information under those circumstances. For administrative reviews, the data from Customs will be the value of shipments of merchandise subject to AD or CVD duties.

IV. CONCLUSION

42. For the reasons set forth above, the United States respectfully requests that the Arbitrator determine that Canada's proposed suspension of concessions is not allowed or is not equivalent to the correct level of nullification or impairment, which is zero. If the Arbitrator were nonetheless to proceed to estimate a future, hypothetical level of nullification or impairment, the Arbitrator should reject Canada's proposed formula because it will not result in a reasoned estimate of nullification or impairment consistent with Article 22.4 of the DSU.

EXEUCTIVE SUMMARY OF THE U.S. RESPONSES TO FIRST SET OF QUESTIONS

U.S. Response to Question 6

43. The text of Article 23.2 provides context supporting the U.S. interpretation that a Member may rebut the "presumption that a breach of rules has an adverse impact" under Article 3.8 of the DSU in an Article 22.6 arbitration proceeding. Article 23.2 of the DSU first links back to Article 23.1 by initially stating, "in such cases". Article 23.1 provides, "[w]hen Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered

agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding." The "rules and procedures of this Understanding" include Article 3.8.

44. Article 23.2(a) then provides that in the cases outlined in Article 23.1, Members shall "not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded". The latter half of Article 23.2(a) then references those determinations, stating, "[Members] shall make any such determinations consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding." Thus, Article 23.2(a) plainly provides for the possibility that a determination "that benefits have been nullified or impaired" shall be consistent with both "the panel or Appellate Body report" or "an arbitration award rendered under this Understanding".

45. Contrary to Canada's argument, the reference to "arbitration award" in Article 23.2(a) is not limited to an award from an Article 25 arbitration proceeding. The text of Article 23.2 does not provide for such a limitation. Further, an interpretation that diminishes the rights and obligations in Article 23.2(a) is contrary to Article 3.2 of the DSU, which prohibits WTO adjudicators from "add[ing] to or diminish[ing] the rights and obligations provided in the covered agreements."

46. Past arbitrators have also rejected the argument that Article 23.2(a) of the DSU does not apply to Article 22 proceedings. The arbitrator in *EC – Bananas III (US) (Article 22.6 – EC*) found that the reference to "an arbitration award" in Article 23.2(a) suggested that the issue of nullification of impairment can be determined by arbitration.

U.S. Response to Question 14

47. The United States disagrees with Canada's assertion that part of the precise content of the challenged "ongoing conduct" measure relates to refusing to accept information regarding the discovered information on to the record of the proceeding. Rather, the precise content of the measure consists of three parts: "[(1)] [Commerce] asking the 'other forms of assistance' question and, [(2)] where [Commerce] 'discovers' information that it deems should been provided in response to that question, [(3)] applying [adverse facts available] to determine that the 'discovered' information amounts to countervailable subsidies."[1] Canada seeks to change the precise content of the measure by citing to Table 2 of the panel report to argue that the evidence it submitted demonstrated that Commerce refuses to accept new information discovered during verification. However, an examination of Table 2 reveals otherwise. Excerpts from both *Solar Cells from China 2014* and *Solar Cells from China 2015* contain arguments from respondents for Commerce "to use the information taken at verification" instead of the applying adverse facts available in the final determination. Therefore, the evidence on which Canada relied to demonstrate the precise content of the measure does not establish that the information needed to calculate a counterfactual company-specific CVD rate is never available.

[1] *US – Supercalendered Paper (Canada) (Panel)*, para. 7.316.

U.S. Response to Question 35

48. **Subpart (a):** The United States considers that Canada would be able to impose countermeasures if the challenged measure were applied in assigning a CVD rate in the final determination of either a CVD investigation or administrative review of Canadian products and a duty were, in fact, assessed. A CVD investigation only results in the collection of estimated duties, but not the assessment of duties. It would thus be appropriate for Canada to "trigger" the model only after duty assessment occurred.

49. **Subpart (b):** The United States does not agree with Canada that new shipper reviews, expedited reviews, changed circumstances reviews, and sunset reviews are within the scope of this arbitration. The United States recalls that the challenged "ongoing conduct" is an unwritten measure, which imposed upon Canada a high evidentiary burden to demonstrate the measure's existence. The Appellate Body in *Argentina – Import Measures* explained 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." To demonstrate the existence of the challenged measure, Canada utilized nine CVD determinations, consisting of post-2012 investigations or administrative reviews. Therefore, the measure, as defined by Canada, relates only to CVD investigations and administrative reviews.

U.S. Response to Question 46

50. The use of multiple Canadian varieties is consistent with the theory of demand underlying the Armington model. Canada argues that "Armington models do not typically rely on firm-level varieties," and states that academic literature typically treats individual countries as a single variety. The implication that product differentiation based on national borders is necessary for theoretical consistency is incorrect. Individual varieties in an Armington model represent products that are imperfect substitutes for one another. Defining varieties in terms of country of origin is a simplifying assumption that is frequently employed in Armington models. Armington (1969) explains that differentiating varieties by country of origin is a simplifying assumption, noting, "the assumption that products are distinguished by place of production is a very convenient point of departure". Here, in contrast, the focus is on the effect of a "trade policy" that differs across companies. By correctly treating imports from companies subject to different changes in "policy" as imperfect substitutes, the U.S. Armington model, in contrast to Canada's approach, provides the appropriate flexibility to explore such a circumstance.

51. Importantly, the United States is not introducing an innovation in this respect. For instance, in one application of the Armington framework, the Commission (2019) defines a model in which varieties are distinguished not by country, 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. Moreover, the Armington model used in *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)* also defined three varieties of subject-country imports, differentiated by duty rates.

U.S. Response to Question 47

52. Using a market share value that does not correspond to the value of imports used in the formula implies that the formula is no longer consistent with the underlying model from which it is derived. Specifically, by associating the value of imports from individual Canadian companies with total Canadian market share, Canada's formula misrepresents Canadian companies' relative position in the U.S. market, and thus misrepresents the impact of a change in duty rates.

53. Canada presupposes that the predetermined market share in the scaling factor will, in fact, exceed the actual market share corresponding to the "value of imports" of the specific product in the formula's application. This is speculation, given that the product and time period are unknown. The market shares Canada proposes to use represent Canada's shares of the U.S. market in broad categories of products from a fixed, past year. Canada's share in the U.S. market for a specific product in a future year could exceed Canada's market share in the corresponding Caliendo and Parro category, calculated using data from 2018 and 2019. If so, Canada's methodology would overestimate nullification or impairment.

U.S. Response to Question 84

54. Both AD and CVD duties affect the U.S. import price, which is the relevant price in the model because it is the price faced by the buyer. As such, both duties are relevant to the demand generated by the model. To correctly isolate the trade effect solely due to the removal of the challenged CVD measure, any corresponding AD duty must also be taken into consideration. Therefore, nullification or impairment will be overstated if the initial duty rate (t_I) or counterfactual duty rate (t_C) used in calculating nullification or impairment is not inclusive of all duties in place at the time the challenged measure is implemented. To omit the AD duties that are present in the market would artificially reduce the import price of subject Canadian varieties relative to all other imports, and thus inflate estimated demand for subject varieties. Such an approach would not produce a reasoned estimate of nullification or impairment.

U.S. Response to Question 105

55. In many cases, subject merchandise may enter under multiple HTS subheadings. Additionally, a particular HTS classification may correspond to a broader "basket" HTS category of products that include many goods in addition to subject merchandise, and therefore will be over-inclusive. Similarly, the arbitrator in *US – Washing Machines (Korea) (Article 22.6 – US)* noted that, "frequently not all imports within the referred HTS 10-digit codes are affected by the WTO-inconsistent measure. Some adjustment is therefore necessary."

EXECUTIVE SUMMARY OF U.S. RESPONSES TO SECOND SET OF QUESTIONS

U.S. Response to Question 121

56. The precise content of the challenged measure makes it impossible for the prior application of the challenged measure to Company A to continue in a subsequent administrative review of that company. In an administrative review, Commerce will issue questionnaires to the individually-examined respondents and ask questions concerning all previously countervailed

subsidies. This includes specific questions concerning the "discovered subsidies" that were "discovered" during the prior segment of the CVD proceeding. As such, an administrative review of Company A would remove the prior application of the challenged measure because Commerce's determination in the administrative review with respect to the countervailability of what were previously "discovered subsidies" would no longer be the result of the "other forms of assistance" question, that is, part one of the challenged measure.

57. There is also a very low likelihood for the measure to be applied anew to Company A because verifications do not occur in every administrative review. As such, part two of the challenged measure, Commerce's "discovery" of unreported information at verification, also would be unlikely to occur, precluding a new application to Company A's CVD rate.

58. Lastly, the United States observes that the scenario highlighted in this question further supports the U.S. position that Canada may only impose countermeasures after duty assessment occurs. As demonstrated above, an administrative review of Company A would obviate the need for countermeasures applied in response to Company A's CVD rate from the investigation because the duties assessed to Company A would not be based on the challenged measure.

U.S. Response to Question 130

59. The United States considers it appropriate for Canada to notify the DSB of the level of suspension it calculates and of any adjustment to the level of suspension for each year during the first quarter of the following year.

U.S. Response to Question 173

60. Canada attempts to justify its request for Customs data in the most disaggregated form by contending that such disaggregated data are necessary for the purposes of verification. However, Canada proposes to verify disaggregated Customs data with aggregated data. That is, if Canada obtains "all" export data directly from affected exporters as it suggests, this data would presumably be on an aggregate basis. Further, Canada also proposes to use data from Statistics Canada, but Canada acknowledges that Statistics Canada data is in an aggregate form.

U.S. Response to Question 178

61. The United States considers it appropriate only to use the primary set of 10-digit HTS codes identified in the CVD order. A CVD order may list two sets of 10-digit HTS codes. One portion lists the HTS codes that the product "is" or the products "are" currently classified under, and there may also be an additional description of the HTS codes that the product "may" or "might" be classified under. The second category of HTS codes are generally broader than the merchandise subject to the CVD order. To avoid overinclusion, only the HTS codes that the CVD order states the product "is" or the products "are" currently classified under should be used.

EXECUTIVE SUMMARY OF U.S. OPENING STATEMENT AT VIRTUAL SESSION

62. Much of the parties' argument on these issues has been in the abstract because Canada's request to suspend concessions rests on pure speculation concerning some future, unknown level

of nullification or impairment. Indeed, throughout this arbitration, Canada has dismissed the U.S. arguments by alleging that Canada's "simplifying" assumptions will not have much impact on the calculation of nullification or impairment. However, concrete numbers show that this is false. Canada's methodology cannot generate a reasoned estimate of nullification or impairment.

63. The United States has prepared an accompanying exhibit, Exhibit USA-48. The exhibit uses actual data values associated with the product and market from the CVD order on *Softwood Lumber from Canada*. The hypothetical assumes that the challenged measure is applied to a company during an administrative review. Therefore, the duty rates from the CVD order are used as the reference year duty rates.

64. The exhibit walks through several scenarios illustrating the methodological points of disputes between the parties. Specifically, the exhibit demonstrates the difference between parameter values of aggregated sectors versus product- and market-specific; same or different values for domestic and import supply elasticity; log linear formula versus non-linear model; explicit inclusion or exclusion of the non-subject Canadian variety; and the inclusion or omission of AD duties and ordinary tariffs. As is evident from the exhibit, the scenarios collectively demonstrate how each of Canada's "simplifying" assumptions tend to build upon one another. 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. Accordingly, Canada's approach cannot generate an estimate that is "equivalent" to nullification or impairment. And on that basis, Canada's suspension request should be rejected.

EXECUTIVE SUMMARY OF U.S. CLOSING STATEMENT AT VIRTUAL SESSION

65. Canada seeks for a methodology that, ultimately, will only benefit Canada. Specifically, Canada is determined to "fix" the elasticity estimates and market share in advance of knowing the product and market at issue. In doing so, Canada asks the Arbitrator to sacrifice accuracy for purported practicability. However, the need for an accurate and reasoned estimate should not be prejudiced by Canada's decision to prematurely pursue this arbitration.

66. Canada also says that it wants to reduce the number of decisions and disputes. Yet, for the remaining inputs – duty rates and value of imports – Canada advocates to wait to find out the product and market at issue, and then requests sole "discretion" to select the parameter values that most benefit Canada. 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. 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.

EXECUTIVE SUMMARY OF U.S. RESPONSES TO THIRD SET OF QUESTIONS

U.S. Response to Question 181

67. Only if Canada is unable to obtain the necessary authorization to access the confidential U.S. sales data does the United States consider 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, then the simple average of the firms' CVD rates should be used.

U.S. Response to Question 198

68. The United States proposes the use of a tiered approach to ensure that Canada will always be able to apply the model, ideally using product-specific information where such information is available.

69. For the **values of substitution, demand, and domestic supply elasticities**, the United States has explained the need for the elasticities to correspond to the specific product and time period at issue. As a first option, the United States considers that it would be most appropriate for the elasticity estimates to be based on data reported from a single source, that is the relevant Commission report from the future CVD proceeding at issue. If the elasticity estimates are not available in the Commission report, then the second option would be for the parties to consult and use some future source, including considering updated academic literature. If the parties are unable to come to an agreement after consultations, the parties should proceed to the third option and use a method predetermined by the Arbitrator. Specifically, for the third option for substitution elasticity, the Arbitrator has proposed Fontagne *et al.* (2020), while Canada has proposed Caliendo and Parro (2015). The United States highlighted Soderbery (2015) and Ahmad and Riker (2019) as two other recent contributions that employ methodologies and levels of aggregation distinct from one another and from Fontagne *et al* (2020). Therefore, for the third option, the United States suggests the Arbitrator use the median value of the CVD order-specific elasticities from the three academic studies with a level of disaggregation at the 6-digit level HTS or higher. The United States maintains that the Caliendo and Parro values are highly aggregated, and are therefore not suitable as a third option. For the third option for demand elasticity, the United States agrees with the Arbitrator's proposal to use the most recently available GTAP consumer final demand elasticities. For the third option for domestic supply elasticity, the United States considers it appropriate to use a value of 1.55, the median value over manufacturing industries from Riker (November 2020).

70. For the **value of U.S. import supply elasticity**, both parties have proposed a value of 10. Further, estimates of this parameter are scarce in literature. Therefore, a value of 10 should be utilized.

71. **For the value of shipments from domestic sources,** as the first option, it would be most appropriate for the value to be based on data reported in the relevant Commission report from the future CVD proceeding at issue. In the event such information is not public, for the second option, Canada and the United States could obtain industry estimates through the most relevant

trade association or private sector suppliers and consult on the use of the best information available. If the parties cannot reach agreement or in the event that there is no data from a relevant trade association or private sector supplier, then Canada as the final and third option, U.S. domestic market share could be obtained from the underlying data inputs of the BEA I-O table associated with the reference year at the most disaggregated level available.

72. **For the value of shipments from the rest of the world**, as the first option, the values from the relevant Commission report should be used because the values will correspond closer to the products under the scope of the CVD order. If the values are not publicly available, then the second option would be to apply the share of imports from Canada under the primary HTS reference codes, calculated using data from Census, to the value of imports from Canada, obtained from Customs, using the equation provided in the U.S. alternative instructions. In the very unlikely event that the data from the reference year are not available from Census, Canada should obtain the Census data from the most recent year published closest to the reference year.

73. Any reasonable set of instructions would provide for a tiered approach, as described above, to accommodate all future scenarios. Such a set of instructions would ensure that, in the best-case scenario, Canada would apply the model using product-specific information. The instructions would also ensure that if such information were not available, then Canada would also be assured of being able to run the model by having a final option.

74. Importantly, if the challenged measure were to occur under the CVD orders pertaining to *Wind Towers* or *Softwood Lumber*, for the relevant parameter values, it would be appropriate to use the Commission report for the product at issue that is most recent to the reference period. If the value is not available in the most recent Commission report relative to the reference period, then the alternative would be to use the most recent Commission report containing such a value.

U.S. Response to Question 207

75. In the U.S. model, all Canadian companies in the market will always be included in each run of the model. The subject Canadian variety will consist of companies that were affected by the challenged measure in that specific segment of the CVD proceeding. The non-subject Canadian variety will consist of companies that were not affected by the challenged measure in that specific segment of the CVD proceeding. This would include companies that have legacy affected CVD rates from prior segments of the CVD proceeding. The reference year will always be the year prior to the most recent application of the challenged measure. Canada may also continue to suspend concessions for the maintenance of a prior application of the challenged measure (a legacy application). However, 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.

76. Therefore, a "triggering event" occurs in two ways. First, there is a "triggering event" if there is a new application of the challenged measure. Second, there is a "triggering event" if the challenged measure is removed and a company's CVD rate is no longer affected by the challenged measure.