UNITED STATES – COUNTERVAILING DUTY MEASURES ON SUPERCALENDERED PAPER FROM CANADA

Recourse to Article 22.6 of the DSU by the United States

(DS505)

CLOSING STATEMENT OF THE UNITED STATES OF AMERICA AT THE VIRTUAL MEETING OF THE ARBITRATOR WITH THE PARTIES

September 23, 2021

Mr. Chairperson, Members of the Arbitrator:

1. On behalf of the U.S. delegation, I would like to thank you, and the Secretariat staff assisting you, for your ongoing work in this arbitration, particularly during the virtual session this week. We appreciate, despite the time differences between all of us, that we have had this opportunity to virtually meet with you and present our views.

2. As is evident from our discussions this week, the issues in this arbitration are not easy ones to resolve. Canada has chosen to pursue an arbitration concerning some hypothetical, future level of nullification or impairment, despite the fact that the United States has affirmatively demonstrated that Canada's benefits are not being impaired and there is no level of nullification or impairment. With no present level of nullification or impairment, the Arbitrator cannot assess equivalence with Canada's requested level of suspension. Canada's request is in breach of the DSU and the Arbitrator should reject Canada's request.

3. We have also explained that we consider it appropriate for Canada to suspend this proceeding until such time that the challenged measure is applied to its goods – that is, if the measure ever is applied to Canada.[1] Despite Canada's protestation, suspending this arbitration proceeding would not deprive Canada of its right to suspend concessions, should it ever need to do so. By waiting until Canada's benefits "are being impaired" – if they ever are – this arbitration would be more similar to past arbitrations, including *US – Washing Machines (Korea) (Article 22.6 – US)*. That is, pausing these proceedings now and resuming them later would provide the Arbitrator with the necessary information concerning actually existing nullification or impairment, so that the Arbitrator could determine whether the level of suspension Canada has requested is equivalent to the level of nullification or impairment, as the DSU requires. It would also permit the DSB to authorize Canada to suspend concessions in a manner and at a level that is consistent with the requirements of the DSU. As it stands, and as the United States has explained, the Arbitrator should not render a decision inconsistently with the terms of the DSU simply because Canada insists on pushing forward with this proceeding prematurely.

4. In the event the Arbitrator determines to award Canada with a level of suspension for some unknown, future level of nullification or impairment that may never exist, we have also demonstrated that Canada's proposed methodology distorts any possibility for the requested level of suspension to be "equivalent" to the level of nullification or impairment, as required by the DSU. We have demonstrated that the use of a log linear formula will unnecessarily introduce additional approximation error into the estimate of the level of nullification or impairment, creating an upward bias in Canada's favor. During the session, Canada contended that it was the U.S. model that had approximation error. We do not disagree with the general observation that a model will not perfectly replicate the infinitely complex actual product market. However, both parties have agreed that an Armington partial equilibrium model is the most suitable economic tool for this proceeding. To the extent that an Armington model is not a perfect replication of reality, both parties have already agreed to some degree of "error" in the model. The problem with Canada's approach is that Canada further adds to that error by log-linearizing the exact

[1] *See* U.S. Responses to First Set of Questions, para. 35; U.S. Responses to Second Set of Questions, para. 1 n. 1.

solution of the non-linear Armington model, thereby introducing additional linear approximation error. This additional error is not present in the U.S. model.

5. We have also demonstrated that Canada's two-variety formula cannot assess the total level of nullification or impairment to Canada. That is, Canada's formula only focuses on the change in imports arising from changes in duty rates applied to subject Canadian companies. It cannot accurately account for the effects on the non-subject Canadian variety and does not distinguish between the responsiveness of domestic supply and the responsiveness of supply from importers.

6. In addition, what became apparent during the session this week is that Canada does not advocate for a methodology that will produce a reasoned, accurate estimate of the level of nullification or impairment. Rather, Canada seeks for a methodology that, ultimately, will only benefit Canada.

7. 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. 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. Such an approach is biased and incapable of ensuring equivalence.

8. We have demonstrated the inherent flaws in using predetermined, aggregated sector-level market shares and elasticity estimates. Such values will not result in an estimate that is equivalent to the nullification or impairment experienced by Canada. Canada has contended that these "simplifying assumptions" will not cause much of an impact on the calculation of nullification or impairment. However, when we applied real, concrete numbers from the CVD investigation on Softwood Lumber from Canada, it became clear that Canada's "simple" assumptions are economically meaningful. That is, the use of predetermined, aggregated sector-level market shares and elasticity estimates will result in a level of nullification or impairment that greatly differs from an estimate that is produced by using product-specific values tailored to the facts of the case. Indeed, in many cases, the use of predetermined, aggregated sector-level market share, will generate an upward bias in the level of nullification or impairment.

9. Even more troubling, what became abundantly clear during our session this week, is that, not only does Canada seek to secure the parameter values in its favor in advance of knowing the product, Canada also seeks to use the duty rates and value of imports that are most beneficial to Canada. That is, for the counterfactual All Others rate, Canada stated that in the event a company did not provide authorization for the use of confidential data to recalculate the All Others rate, Canada wants to use the lower value of either the weighted average All Others rate (weighted using publicly-ranged sales values) or the simple average. For the value of imports, if the parties do not come to an agreement during the consultations concerning the Customs data,

Canada wants to have sole discretion as to how the Customs data should be supplemented. And, in the rare and unlikely circumstance that Customs data is not provided, Canada again advocates to use its discretion to select an alternative data source. Indeed, Canada has openly stated in its submission, "[l]eaving this discretionary decision to Canada is justified by the fact that Canada is the complainant in this proceeding and that there is nullification or impairment to Canada . . . ."[2]

10. Nothing in the DSU provides that Canada's role as the complaining Member means that Canada can simply have wide (or possibly unbounded) discretion to do as it wants when suspending concessions. 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. Under the DSU, it is the Arbitrator's task to instruct the parties specifically what steps shall be taken to ensure that the level of suspension will be equivalent. The Arbitrator should not acquiesce to Canada's impermissible attempt to arrogate to itself authority that the DSU assigns to the Arbitrator.

11. We have explained that a reasonable set of instructions from the Arbitrator will utilize a methodology that has the flexibility to accommodate any potential future scenario, given that this dispute concerns an unknown, future CVD proceeding – that may never exist. In that sense, the United States has proposed a non-linear model widely used in the economic literature that has the ability to accommodate any number of varieties. Further, we have reasonably proposed the use of a tiered approach for sources from which to take the required parameter values to run the model. This tiered approach will ensure that, if it is available, product-specific information will be used to calculate a level of suspension that is equivalent to the level of nullification or impairment. For the value of imports and market share, we maintain the need for contemporaneous, product-specific information from sources to which Canada itself has agreed. And if the best information is not available, we have proposed backup plans, and backup plans for the backup plans. There is sufficient redundancy in the U.S. approach to ensure that Canada will not be deprived of its right to suspend concessions, if that ever becomes necessary.

12. Lastly, we observe that throughout this arbitration, Canada has contended that the United States proposes a "complex methodology." That is incorrect. What is complex is the nature of Canada's novel, unprecedented request for suspension. Given Canada's request, both parties – and the Arbitrator – are faced with the same potential factual scenarios and the same complexities, which necessitates a methodology with sufficient flexibility that can be adapted to any potential scenario. Canada's purportedly "simple" formula cannot accommodate these situations because it is not connected to any product or market, and thus cannot accurately estimate the level of nullification or impairment, as the DSU requires. In contrast, the U.S. methodology does have the flexibility to accommodate any scenario that may arise in the future.

[2] Canada's Response to Second Set of Questions, para. 145.

13. Given the amount of uncertainty around a future, unknown CVD proceeding, we again observe that all of this uncertainty suggests to us that this arbitration is premature and should be suspended. But, if Canada insists on proceeding, at a minimum, this arbitration must result in a methodology that is not biased and will be able to use contemporaneous, product-specific data to ensure equivalence, in accordance with the Arbitrator's mandate under the DSU. For these reasons, we request the Arbitrator to reject Canada's proposed methodology.

14. This concludes our closing statement. Thank you.