*UNITED STATES – COUNTERVAILING DUTY MEASURES ON SUPERCALENDERED PAPER FROM CANADA*

***Recourse to Article 22.6 of the DSU by the United States***

**(DS505)**

# RESPONSES OF THE UNITED STATES OF AMERICA TO THE FIRST SET OF QUESTIONS FROM THE ARBITRATOR

**March 9, 2021**

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## 1 NULLIFICATION OR IMPAIRMENT

**1. <u>For both parties</u>: Could the parties please explain whether a finding in this proceeding that the OFA-AFA Measure has ceased to exist with respect to Canada (owing to the retroactive revocation of the *Supercalendered Paper* from Canada CVD order) would be consistent with the Panel's findings as to the scope of the OFA-AFA Measure?**

**<u>Response</u>:**[1]

1. As an initial matter, the United States clarifies that it requests that the Arbitrator determine that nullification or impairment to Canada does not exist, a determination that is properly within the scope of a proceeding under Article 22.6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").[2] As the United States explained in the U.S. written submission, Article 3.8 of the DSU provides for the possibility of a Member to rebut the "presumption that a breach of the rules has an adverse impact" on a Member.[3] Nothing in Article 3.8 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. Further, as discussed in the U.S. response to question 6, below, Article 23.2(a) of the DSU provides context supporting this interpretation. Because the text of the DSU does not limit the right to rebut the presumption to certain proceedings, an interpretation that diminishes this right 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."[4]

2. Canada argues that the United States is attempting to re-litigate the existence of the challenged measure.[5] However, while an arbitrator under Articles 22.6 and 22.7 of the DSU may examine whether a WTO-inconsistent measure continues to exist as part of its examination of the present level of nullification or impairment,[6] the United States is not asking the Arbitrator to make a determination with respect to the existence of the measure itself. Indeed, because a

[1] As stated in the U.S. written submission, the United States' 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 Dispute Settlement Body ("DSB"). U.S. Written Submission, para. 12, n. 9. Any reference to the challenged "measure" in U.S. filings to the Arbitrator is without prejudice to the U.S. position concerning the DSB adoption procedures and existence of DSB recommendations.
[2] *See* U.S. Written Submission, paras. 16-21 (explaining that the DSU permits the Arbitrator to find that nullification or impairment does not exist) and paras. 23-27 (explaining that the challenged measure causes no nullification or impairment to Canada and is zero). *See also* U.S. response to question 4.
[3] U.S. Written Submission, paras. 16-21.
[4] U.S. Written Submission, para. 20, n. 20.
[5] Canada's Written Submission, paras. 34-38.
[6] DSU, Article 22.4. *See also EC – Bananas III (US) (Article 22.6 – EC)*, para. 4.10 ("setting the level of nullification or impairment may require consideration of *whether there is* nullification or impairment flowing from a WTO-inconsistency") (italics added).

finding of breach and a finding of nullification or impairment are two separate concepts,[7] even assuming that the measure exists (which the United States contests) and is WTO-inconsistent, it follows logically that it is possible that there is no nullification or impairment despite the existence of a WTO-inconsistent measure.

3. To be clear then, there is no inconsistency between a panel finding, based on Article 3.8 of the DSU, that a breach of a covered agreement "is considered *prima facie* to constitute a case of nullification or impairment," and a finding by an Article 22.6 arbitrator, based on its assessment of "equivalence" and the evidence concerning nullification or impairment, that the Member concerned has rebutted this presumption and nullification or impairment does not exist and is zero. This is because a panel finding presumes nullification or impairment based on an inconsistency with a covered agreement and relates to the protection of potential trade opportunity,[8] while an arbitrator's determination concerns the evaluation of the evidence based on actual trade flows and whether that presumption has been rebutted.[9]

4. The situation presented in the *EC – Bananas III (US)* dispute provides a helpful illustration. There, the panel had addressed the argument of the European Communities that since U.S. banana production is minimal, its banana exports are nil, and for climatic reasons this situation is unlikely to change; therefore, the United States had not suffered any nullification or impairment and lacked a legal interest required to bring a dispute. The *EC – Bananas III (US)* panel nonetheless found a breach by the European Communities of a covered agreement, and thus, relying on Article 3.8 of the DSU, presumed nullification or impairment. The panel thus found that a Member could pursue claims even without having to establish that there was a positive level of nullification or impairment.[10]

5. In the Article 22.6 proceeding of the *EC – Bananas III (US) (Article 22.6 – EC)* dispute, the arbitrator referred back to the panel's findings and explained that, "even if no compensation were due, an infringement finding could be made."[11] The arbitrator went on to explain:

> [A] Member's potential interests in trade in goods or services and its interest in a determination of rights and obligations under the WTO Agreements are each sufficient to establish a right to pursue a WTO dispute settlement proceeding. However, a Member's

[7] U.S. Written Submission, para. 17. *See also* Canada's Written Submission, para. 33 ("Canada does not contest that the concepts of a violation and nullification or impairment are separate concepts.").
[8] *See, e.g., EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.11 (explaining that the presumption of nullification or impairment under Article 3.8 of the DSU relates to the "notion underlying the protection of potential trade opportunities between the complaining and the respondent party").
[9] *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.12 ("[T]he benchmark for the calculation of nullification or impairment of U.S. trade flows should be losses in U.S. exports of goods to the European Communities . . ."). *See also EC – Hormones (Canada) (Article 22.6 – EC)*, para. 41 ("What normally counts for a panel is competitive opportunities and breaches of WTO rules, not actual trade flows . . . . we have to focus on trade flows. We must estimate trade foregone due to the ban's continuing existence . . . .").
[10] *EC – Bananas III (US) (Panel)*, para. 7.47 *et seq*.
[11] *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.9.

> legal interest in compliance by other Members does not, in our view, automatically imply that it is entitled to obtain authorization to suspend concessions under Article 22 of the DSU.[12]

6. The arbitrator in *EC – Bananas III (US) (Article 22.6 – EC)* also explained that in assessing nullification or impairment, "we are not called upon and do not intend to make a formal determination of nullification or impairment, but to ensure that the level of suspension of concessions is equivalent to the level of nullification or impairment."[13]

7. Here, the United States similarly requests that the Arbitrator consider whether nullification or impairment is present in assessing the "equivalence" of Canada's proposed suspension of concessions with the level of nullification or impairment.[14] As explained in the U.S. written submission and in the U.S. response to question 5,[15] Canada is unable to demonstrate or assert any losses to its export of goods to the United States. Conversely, the United States has demonstrated that Canada suffers from no nullification or impairment because no countervailing duty ("CVD") determination concerning Canadian products contains the challenged measure. Accordingly, given that the challenged measure does not nullify or impair any benefits accruing to Canada, Canada's proposed suspension of concessions is not allowed under the DSU,[16] nor is the request equivalent to the level of nullification of impairment, which is zero.

**2. <u>For both parties</u>: Could the parties please explain, as a logical matter, whether a determination of the level of nullification or impairment (NI) necessarily *includes* the question of whether there is any NI at all?**[17]

**<u>Response</u>:**

8. Article 22.7 of the DSU provides that an arbitrator "shall determine whether the level of such suspension is equivalent to the level of nullification or impairment." As a logical matter, to assess the equivalence of the level of suspension with the level of nullification or impairment, an arbitrator must first determine what the level of nullification or impairment is.[18] An inquiry into the level of nullification or impairment necessarily includes the question of whether there is

[12] *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.10.
[13] *EC – Bananas III (US) (Article 22.6 – EC)*, para. 4.14.
[14] *See, e.g.*, U.S. Written Submission, para. 15.
[15] U.S. Written Submission, paras. 23-34.
[16] *See also* U.S. response to question 4.
[17] See e.g. United States' written submission, para. 20 ("the question of the level of nullification or impairment – including whether there is any nullification or impairment at all – is placed squarely before the adjudicator that is tasked by the DSU with evaluating the equivalency of the proposed level of suspension and the nullification or impairment"); compared with Canada's written submission, para. 21 ("Article 22.6 arbitrators are tasked with ascertaining the 'level' of nullification or impairment, not its 'existence'").
[18] *See EC – Bananas III (US) (Article 22.6 – EC*), para. 4.8 ("Since the level of the proposed suspension of concessions is to be equivalent to the level of nullification or impairment, logic dictates that our examination as Arbitrators focuses on that latter level before we will be in a position to ascertain its equivalence to the level of the suspension of concessions proposed by the United States").

nullification or impairment. Because the level of nullification or impairment relates to the estimated trade foregone, the evidence could establish that that level is zero – that is, that there is no nullification or impairment.[19] This interpretation is supported by both the text of the DSU and past arbitrator decisions.

9. The text of Article 3.8 of the DSU provides for the ability to rebut the "presumption that a breach of rules has an adverse impact". As explained in the U.S. response to question 6, Article 23.2(a) of the DSU also contemplates that a determination of whether benefits are nullified or impaired may occur in an arbitration. The text of the DSU does not limit the assessment of whether benefits are nullified or impaired to a proceeding before the original panel.[20]

10. Further, as a practical matter, the ability of an Article 22.6 arbitrator to assess nullification or impairment makes sense, particularly because the factual circumstances related to the effect of a challenged 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.[21] Such is the case in this dispute. Although the original panel found a breach (and presumed nullification or impairment),[22] the *Supercalendered Paper* CVD order was revoked after the issuance of the panel report. Accordingly, it is consistent with the DSU for an Article 22.6 arbitrator, in determining the level of nullification or impairment, to examine evidence from the Member concerned that no nullification or impairment is present at the time of the Article 22.6 proceeding.

11. The arbitrator in *EC – Bananas III (US) (Article 22.6 – EC)* agreed with this reasoning and explained that "setting the level of nullification or impairment may require consideration of *whether there is* nullification or impairment flowing from a WTO-inconsistency".[23] "As to burden of proof, if the [complainant] has not convinced us that there is a positive level of nullification or impairment, then we will set the level of suspension of concessions at zero."[24] The arbitrator in that proceeding then went on to consider whether benefits were nullified or impaired.[25]

12. Accordingly, an assessment of whether Canada's proposed suspension of concessions is equivalent to the level of nullification or impairment will necessarily include an assessment of

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[19] *See, e.g., EC – Hormones (Canada) (Article 22.6 – EC)*, para. 41; *EC – Hormones (US) (Article 22.6 – EC)*, para. 42.

[20] The United States respectfully disagrees with past arbitrators that have found that "[i]t is a panel that 'deals with the establishment of the existence of nullification or impairment.'" *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.49, n. 142 (citing *US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)*, para 3.24). An interpretation that diminishes Article 3.8 of the DSU 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."

[21] U.S. Written Submission, para. 21.

[22] *US – Supercalendered Paper (Canada) (Panel)*, para. 8.5.

[23] *EC – Bananas III (US) (Article 22.6 – EC*), para. 4.10 (italics added).

[24] *EC – Bananas III (US) (Article 22.6 – EC)*, para. 4.13.

[25] *EC – Bananas III (US) (Article 22.6 – EC)*, para. 5.1 *et seq.*

whether there is nullification or impairment. In the U.S. written submission and in the U.S. response to question 5, the United States demonstrates that Canada suffers from no adverse impact from the challenged measure. Therefore, Canada's proposed suspension of concessions must be rejected as its request is not equivalent to a level of nullification or impairment, which does not exist and is zero.

**Question 3 is addressed to Canada.**

**4**. **<u>For the United States</u>: The Arbitrator notes that the United States requests it to 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".[26] Could the United States please explain the relationship between the United States' request for a determination that the proposed suspension of concessions is "not allowed" under the second sentence of Article 22.7 DSU, and its request for a determination that the proposed suspension is "not equivalent to the level of nullification or impairment" under the first sentence of Article 22.7 of the DSU, and indicate the arguments and evidence in its written submission that are relevant to each request?**

**<u>Response</u>**:

13. The second sentence of Article 22.7 of the DSU provides that "[t]he arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement." As explained in paragraph 14 of the U.S. written submission, under Article 1.1 and Appendix 1 of the DSU, the DSU itself is a "covered agreement". Canada's proposed suspension of concessions is contrary to both Articles 3.3 and 22.4 of the DSU, and is therefore "not allowed".

14. First, Article 3.3 of the DSU provides for prompt settlement of situations in which a Member considers that "any benefits accruing to it directly or indirectly" "are being impaired". Article 3.3 uses the present progressive tense. Therefore, prompt settlement of situations, including an Article 22.6 proceeding, is only required where benefits presently "are being impaired." Canada, however, cannot assert any present benefits accruing to it that "are being impaired".

15. Second, as previously discussed, Article 22.4 of the DSU establishes that the level of suspension authorized by the DSB <u>shall be equivalent</u> to the level of nullification or impairment. Paragraphs 23 through 34 of the U.S. written submission demonstrate that no benefits to Canada are being impaired, and nullification or impairment does not exist and is zero because the *Supercalendered Paper* CVD order has been revoked. Given that the level of nullification or

[26] United States' written submission, para. 27. See also ibid., paras. 14-15, 34, and 143.

impairment today is zero, a fact that Canada does not contest,[27] the only level of suspension that may be authorized today must also reflect a level of zero nullification or impairment.[28]

16. Further, as explained in the U.S. written submission, prior disputes concerning purported future nullification or impairment related to the consideration of present day nullification or impairment, and the subsequent concern of continued future application.[29] Indeed, in those prior disputes, the DSB could authorize a present request for suspension of concessions because a present level of nullification or impairment existed. Here, on the other hand, no present level of nullification or impairment exists, and therefore no authorization of suspension of concessions is possible. Instead, Canada's request solely relates to speculation about a level of nullification or impairment that might exist at some point in the future. However, an arbitrator's determination concerns the level of existing nullification or impairment through an evaluation of the evidence based on actual trade flows.[30] Accordingly, any proposed suspension of concessions by Canada is "not allowed" under the second sentence of Article 22.7 because it would not be equivalent to the level of nullification or impairment, which does not exist for Canada and is zero, as required by Article 22.4 of the DSU.

17. The United States also explained in paragraph 13 of the U.S. written submission that similar to Article 22.4 of the DSU, the first sentence of Article 22.7 of the DSU requires the arbitrator considering the matter to "determine whether the level of such suspension is equivalent to the level of nullification or impairment". Since nullification or impairment does not exist and is zero,[31] any proposed suspension of concessions by Canada would be contrary to both Articles 22.4 and 22.7 of the DSU.

**5. For the United States: Could the United States please respond to the arguments that Canada makes in paragraphs 40-42 of its written submission as to the scope of Canada's challenge to the OFA-AFA Measure?**

**Response:**

18. Canada asserts that the withdrawal of the *Supercalendered Paper* CVD order does not demonstrate that the challenged measure no longer exists or no longer nullifies or impairs benefits accruing to Canada because the challenged measure was broader than the use of the

[27] WT/DSB/M/442, para. 12.6 ("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.").
[28] DSU, Article 22.4 ("The level of suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of nullification or impairment.").
[29] U.S. Written Submission, para. 30.
[30] *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.12 ("[T]he benchmark for the calculation of nullification or impairment of U.S. trade flows should be losses in U.S. exports of goods to the European Communities . . ."). *See also EC – Hormones (Canada) (Article 22.6 – EC)*, para. 41 ("What normally counts for a panel is competitive opportunities and breaches of WTO rules, not actual trade flows . . . . we have to focus on trade flows. We must estimate trade foregone due to the ban's continuing existence . . . .").
[31] U.S. Written Submission, paras. 23-34.

measure in the *Supercalendered Paper* CVD investigation.[32] Rather, Canada argues that it asserted the "maintenance" of the measure, and the panel report determined the challenged measure was "likely to continue".[33] As an initial matter, the scope of the challenged measure and its WTO consistency are issues that are separate and distinct from the inquiry into whether the measure nullifies or impairs benefits accruing to Canada. The Panel examined the likelihood of continued application in assessing whether an "ongoing conduct" measure exists,[34] but did not make a determination that the challenged "ongoing conduct" measure nullified and impaired benefits accruing to Canada in perpetuity. The original Panel's assessment of the "likelihood to continue" within the confines of determining whether the "ongoing conduct" measure exists is therefore different from the question before the Arbitrator, namely, whether the challenged measure does, in fact, nullify or impair any benefits accruing to Canada.

19. The United States has demonstrated that with the withdrawal of the *Supercalendered Paper* CVD order, the measure ceased to nullify or impair any benefits accruing to Canada.[35] Of the nine CVD determinations utilized by Canada to demonstrate the existence of the challenged measure, *Supercalendered Paper* was the only determination involving Canada.[36] Seven involved products from China; one involved products from India.[37] Thus, with the revocation of the *Supercalendered Paper* CVD order, the benefits accruing to Canada ceased to be nullified or impaired by the challenged "ongoing conduct" measure.[38] Indeed, Canada cannot show actual trade flows of Canadian exports that have been affected by the challenged measure.[39]

20. There are, at present, no Canadian CVD determinations in which the challenged "ongoing conduct" measure affects Canada, thereby demonstrating that Canada suffers from no nullification or impairment.[40] In its written submission, Canada lists five Canadian CVD investigations to support its argument of "continuous risk" that the measure will be applied to "ongoing U.S. countervailing duty proceedings".[41] Of the five CVD investigations that Canada identifies, three of the products do not have CVD orders. For fabricated structured steel, Commerce determined that no countervailable subsidies were being provided to Canadian

[32] Canada's Written Submission, para. 40.
[33] Canada's Written Submission, para. 41.
[34] *US – Supercalendered Paper (Canada) (Panel)*, paras 7.320 *et seq.*
[35] U.S. Written Submission, paras. 23-27.
[36] *US – Supercalendered Paper (Canada) (Panel)*, Tables 1-4.
[37] *US – Supercalendered Paper (Canada) (Panel)*, Tables 1-4.
[38] *See also EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.14 ("[T]here is no right and no need under the DSU for one WTO Member to claim compensation or request authorization to suspend concessions for the nullification or impairment suffered by another WTO Member with respect to goods bearing the latter's origin or service suppliers owned or controlled by it.").
[39] *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.12; *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 41. In addition, Canada is required to come forward with evidence explaining how it arrived at its proposal and showing why its proposal *is* equivalent to the trade impairment it has suffered. *See EC – Hormones (US) (Article 22.6 – EC)*, para. 11; *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 11.
[40] U.S. Written Submission, paras. 24-27, 30.
[41] Canada's Written Submission, para. 42.

products and exporters, and therefore terminated the investigation.[42] For 100- to 150-seat large civil aircraft and uncoated groundwood paper, the U.S. International Trade Commission ("Commission") determined that the Canadian products did not cause material injury to the U.S. domestic industry, and therefore no CVD orders on Canadian products were issued.[43] The challenged measure also has not been applied in the CVD proceedings concerning softwood lumber and utility scale wind towers from Canada, which are the only CVD orders the United States has in place on Canadian products. Canada is therefore unable to demonstrate actual trade flows that "are being impaired".[44] Further, as the measure is not currently applied to any Canadian goods, then it logically follows that the measure is not "maintained" in relation to Canada, nor does it "continue" to exist in relation to Canada, because the ordinary meaning of the words "continue" and "maintain" indicate present day existence. And, Canada agrees that the measure is not presently applied to any Canadian goods.[45]

21. Canada's request for suspension of concessions is thus solely limited to a hypothetical, future nullification or impairment, making this proceeding different from past arbitrations and contrary to the DSU. As discussed above, Canada is unable to assert that its benefits "are being impaired" as contemplated by Article 3.3 of the DSU. Furthermore, as explained in the U.S. written submission, previous arbitrations have concerned present and future application of the measure to a complainant and consequent nullification or impairment.[46] In this proceeding, on the other hand, nullification and impairment does not exist, or, for argument's sake, only concerns a future, unknown level of nullification or impairment. Therefore, it would be contrary to the DSU for the Arbitrator to find Canada's proposed suspension of concessions is allowed, or is equivalent with a level of nullification or impairment that does not exist and is zero (or *arguendo*, is unknown).

22. Lastly, Canada argues that there is no basis for nullification or impairment resulting from the challenged measure to be "limited temporally, such that it only existed if the order on [Supercalendered] Paper remained in place".[47] However, this is false. With the revocation of the *Supercalendered Paper* CVD order, the measure ceased to cause any adverse impact to Canada, and no benefits to Canada "are being impaired".

**6. For the United States: Could the United States please provide its views on Canada's arguments, at paragraphs 27-30 of its written submission, that Article 23.2 of the**

[42] Certain Fabricated Structured Steel From Canada: Final Negative Countervailing Duty Determination, 85 Fed. Reg. 5387 (Jan. 30, 2020) (Exhibit USA-36).
[43] *Uncoated Groundwood Paper from Canada Does Not Injure U.S. Industry, Says USITC*, USITC News Release 18-103, Aug. 29, 2018 (Exhibit USA-37); *100- to 15- Seat Large Civil Aircraft from Canada Do Not Injury U.S. Industry, Says USITC*, (USITC News Release 18-015, Jan. 26, 2018 (Exhibit USA-38).
[44] DSU, Article 3.3.
[45] WT/DSB/M/442, para. 12.6 ("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.").
[46] DSU, Article 3.3.
[46] U.S. Written Submission, para. 30.
[47] Canada's Written Submission, para. 43.

**DSU provides context for Article 22, and confirms that the mandate of Article 22.6 arbitrators is to assess the "level" of nullification or impairment, not its existence?**

**Response:**

23. Contrary to Canada's argument, Article 23.2 of the DSU does not confirm that "the determination of a violation, together with the existence of nullification or impairment, is a determination that is made in the 'panel or Appellate Body report.'"[48] Rather, 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.[49]

24. 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 of the DSU, which provides that Members have the opportunity to rebut the presumption of nullification or impairment.

25. 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". Article 23.2(a) thus distinguishes between three types of determinations: a Member's determination "to the effect that a violation has occurred," a determination "that benefits have been nullified or impaired," and a determination "that the attainment of any objective of the covered agreements has been impeded".[50]

26. 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".

27. Contrary to Canada's argument,[51] 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. Rather, the text of Article 23.2(a) generally states, "an arbitration award rendered under this Understanding." 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

[48] Canada's Written Submission, para. 28.
[49] *See* U.S. Written Submission, para. 17, n. 13.
[50] U.S. Written Submission, para. 17, n. 13 (discussing the text of Article 23.2(a)).
[51] Canada's Written Submission, paras. 27 and 28, n. 21.

WTO adjudicators from "add[ing] to or diminish[ing] the rights and obligations provided in the covered agreements."

28. Past arbitrators have also rejected the argument that Article 23.2(a) of the DSU does not apply to Article 22 proceedings. In *EC – Bananas III (US) (Article 22.6 – EC*), the arbitrator rejected the European Communities' argument that "the reference to arbitration in Article 23.2(a) should not be read as meaning that an Article 22 arbitration can determine whether WTO agreements have been violated or whether there is nullification or impairment."[52] The arbitrator explained, "[i]n our view, while the reference to arbitration in Article 23.2(a) may be inconclusive, it is clear that the goal of Article 23 – multilateral determination – is achieved if the issue of nullification or impairment is considered in an arbitration before the original panel".[53] Thus, 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.[54]

29. Thus, Article 23.2(a) plainly contemplates that a determination "that benefits have been nullified or impaired" may be made in an arbitration proceeding. Accordingly, Article 23.2(a) of the DSU further supports the U.S. interpretation that a Member may rebut the presumption of nullification or impairment under Article 3.8 during an Article 22.6 proceeding.

**7. <u>For the United States</u>: Could the United States please comment on Canada's arguments, at paragraphs 34-35 of its written submission, regarding the relevance of Articles 21.3 and 21.5 of the DSU to the United States' arguments that the OFA-AFA Measure does not continue to exist, the withdrawal of the OFA-Measure and the United States' arguments that there is no nullification or impairment of benefits to Canada?**

**<u>Response</u>:**

30. As explained above in the U.S. response to questions 1 and 5, the United States does not seek a determination from the Arbitrator that the measure ceased to exist or that the measure has been withdrawn. Rather, the United States requests that the Arbitrator determine that there is no nullification or impairment to Canada because the measure does not continue to apply to Canada.[55] The U.S. request for the Arbitrator to assess Canada's nullification or impairment is within the scope of the Arbitrator's mandate to assess the "equivalence" of Canada's proposed suspension of concessions with the level of nullification or impairment.[56]

[52] *EC – Bananas III (US) (Article 22.6 – EC*), para. 4.12.
[53] *EC – Bananas III (US) (Article 22.6 – EC*), para. 4.12.
[54] *EC – Bananas III (US) (Article 22.6 – EC*), para. 4.8, n. 10.
[55] Canada refers to certain portions of the U.S. written submission, but the United States notes that these paragraphs as a whole related to the U.S. argument that the challenged "ongoing conduct" measure causes no nullification or impairment to Canada. *See* Canada's Written Submission, para. 34, n. 27.
[56] DSU, Articles 22.4, 22.7.

31. In its submission, Canada asserts that if a party considers the relevant measure to have been withdrawn or to have changed such that it no longer nullifies or impairs benefits to the complaining party, it must proceed in accordance with Articles 21.3 and 21.5 of the DSU.[57] Canada contends that the U.S. argument concerning the absence of nullification or impairment is an attempt to circumvent Article 21 compliance proceedings.[58]

32. Canada's arguments are without merit for three reasons. First, Canada assumes that an Article 21 proceeding is necessary to challenge the existence of nullification or impairment. As previously discussed, a Member may rebut "the presumption that a breach of rules has an adverse impact" on a Member in an Article 22.6 proceeding.

33. Second, it is simply incorrect to assert that under the DSU a party may only proceed under Article 21.5 of the DSU if a party considers the challenged measure to have been withdrawn or to have changed such that it no longer nullifies or impairs benefits. Article 21.5 is premised on a disagreement between the parties; if there is no disagreement, that provision is not relevant. Article 21.5 also speaks of "recourse to these dispute settlement proceedings." Expedited panel review pursuant to Article 21.5 is one such procedure, but the DSU contemplates others, including consultations; good offices, conciliation, or mediation; and Article 25 arbitration. In addition, in the circumstance in which an original complaining party is applying a suspension of concessions, such action may itself breach Article 22.8 of the DSU, which could be the basis for a claim in a new original proceeding. Canada knows this well as the European Communities ("EC") in *Canada – Continued Suspension* brought a new original proceeding under Article 22.8 of the DSU to challenge Canada's maintenance of countermeasures related to the *EC – Hormones* dispute. In that dispute, Canada did <u>not</u> argue that the EC was precluded from bringing that complaint under Article 22.8 or that the EC could only bring an action under Article 21.5.[59]

34. Finally, from the outset, the United States has made its position clear – there is no recommendation of the DSB with which to bring a measure into conformity. This is because there is no valid Appellate Body report, given the fundamental breaches of the DSU in the appellate proceeding.[60] And Canada's unfounded and regrettable questioning of the timing and substance of U.S. concerns only serves to highlight Canada's lack of concern to defend the integrity and impartiality of the dispute settlement system when its narrow commercial interests are seemingly advantaged.[61] Because there was no DSB recommendation in this dispute, the

[57] Canada's Written Submission, paras. 25-26, 34-35.
[58] Canada's Written Submission, para. 26 (arguing that an Article 22.6 proceeding is "normally the last step in WTO dispute settlement) and para. 35 ("The United States cannot circumvent Article 21 compliance proceedings by asserting in Article 22.6 proceedings, without evidence, that the measure no longer exists").
[59] *See Canada – Continued Suspension (AB)*, paras. 148-156; *Canada – Continued Suspension (Panel)*, paras. 4.77-4.95.
[60] U.S. Written Submission, para. 11, n. 5.
[61] The United States also wishes to correct certain statements made in Canada's written submission. Canada's Written Submission, paras. 2 and 18, n. 9. Canada asserts that the United States did not allege that an Appellate Body member was subject to a conflict of interest until after the United States knew the results of the appeal. Canada's Written Submission, para. 18, n. 9. This is incorrect on two levels. First, the appellate document in *US -*

United States would not have sought a proceeding under Article 21.3, concerning establishing a reasonable period of time to implement a recommendation, or under Article 21.5 concerning "measures taken to comply" with recommendations.

35. Given that the challenged measure is not applied to Canada, 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. The United States also considers 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 THE APPROPRIATE COUNTERFACTUAL

**General Comment:**

36. The United States provides the remaining responses without prejudice to the U.S. position that Canada suffers from no nullification or impairment, and therefore Canada's request for suspension of concessions must be rejected.

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*Supercalendered Paper* was circulated on February 6, 2020. Although the United States did not publicly circulate its initial inquiry, the United States first submitted a letter to the WTO Director General and the Chair of the DSB on January 31, 2020, outlining the U.S. discovery of information that an Appellate Body member was not "unaffiliated with any government" as required by Article 17.3 of the DSU, and is therefore not a valid member of the Appellate Body. Minutes from the Dispute Settlement Body meeting, Mar. 5, 2020, WT/DSB/M/441, para. 7.4; Communication from the United States, Apr. 17, 2020, WT/DS505/12, p. 2. At the February 28 DSB meeting, which convened on March 5, 2020, the United States publicly informed the DSB members of this conflict of interest. WT/DSB/M/441, paras. 7.1-7.23. At the same March 5 DSB meeting, Canada agreed that the allegations with regard to the individual's affiliation with the Government of China and participation in the appeal was serious and stated that they deserve full and impartial consideration in a manner that provides due process to all parties. WT/DSB/M/441, para. 7.19.

Second, Canada seeks to diminish the seriousness of the evidence by referring to this as a mere "conflict of interest." Rather, the professional affiliation of a Chinese national with the Government of China while serving on the Appellate Body is fundamentally inconsistent with Article 17.3 of the DSU. This individual had no capacity to serve on the Appellate Body. Furthermore, as Canada is fully aware, following Canada's DSB intervention, the United States in fact proposed a rules of conduct inquiry to be performed by neutral participants in relation to the concerned Appellate Body member's participation in the appeal of *Supercalendered Paper* given that the information demonstrated that the individual was affiliated with the Government of China and seven of the nine orders that Canada used to demonstrate "ongoing conduct" concerned CVD determinations on products from China. *E.g.* WT/DS/505/12, p. 5 ("The United States therefore expects that Canada will join the United States in seeking to ensure that the integrity and impartiality of the WTO dispute settlement mechanism is maintained."). Were the individual a valid Appellate Body member, their participation in the appeal would therefore *also* have been a clear conflict of interest, and application of the Rules of Conduct would confirm the individual's disqualification from serving on the appeal. Regrettably, Canada never supported such a Rules of Conduct inquiry. If Canada were confident that no DSU or conflicts issue was presented in the appeal, it would surely be willing to agree to suspend this proceeding temporarily and support an independent inquiry into the evidence of government affiliation.

## 2.1 The General Counterfactual

**8. <u>For both parties</u>: Could the parties please confirm that they consider the proper overall counterfactual to be one in which the USDOC ceases to use the OFA-AFA Measure *vis-à-vis* Canadian companies in the future? If the answer is yes, could the parties clarify further whether they consider that the cessation of such use entails the USDOC: (a) ceasing to ask the "OFA question"[62] to Canadian companies; and/or (b) ceasing to use AFA to determine that OFA discovered during verification are countervailable subsidies? Further, if the appropriate counterfactual is one in which the USDOC does not ask the OFA question to Canadian companies in the future, does this hold any significance for what the relevant counterfactual company-specific rates should be?**

**<u>Response</u>:**

37. As discussed above, Commerce has ceased to use the challenged "ongoing conduct" measure with respect to Canadian companies at least as of the date of this proceeding, for the simple reason that no Canadian company is subject to a CVD rate in which adverse facts available is applied to other forms of assistance discovered at verification, on the basis of the company failing to provide the necessary information. Therefore, the counterfactual reveals that there is no nullification or impairment to Canada. Were the Arbitrator to consider a hypothetical situation in which the challenged measure were to affect Canada in the future, the appropriate counterfactual would be a scenario in which the challenged "ongoing conduct" measure would be removed from the rate of the affected Canadian exporters. Such a counterfactual scenario is necessarily contingent on speculation that Commerce applies the challenged measure in a future CVD proceeding affecting Canadian exports.

38. The United States recalls that the precise content of the measure, as defined by Canada and found in the panel report, 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."[63] Further, part one of the measure concerns the other forms of assistance question, which asks, whether a respondent country provided the respondent company with "any other forms of assistance", "directly or indirectly", and to "describe such assistance in detail, including the amounts, date of receipt, purpose and terms".[64] Additionally, part three of the measure, is limited to

[62] See Appellate Body Report, *US – Supercalendered Paper*, para. 5.24 (explaining that "the precise content of the alleged OFA-AFA measure as the USDOC *asking the OFA question* and, where the USDOC discovers information during verification that it deems should have been provided in response to the OFA question, applying AFA to determine that such information amounts to countervailable subsidies"). (emphasis added)
[63] *US – Supercalendered Paper (Canada)* (Panel), para. 7.316.
[64] *US – Supercalendered Paper (Canada) (Panel)*, para. 7.309, Table 1.

circumstances where Commerce uses facts available on the basis of a party's failure to provide necessary information.[65]

39. Therefore, the use of a counterfactual analysis would only be appropriate to determine the level of nullification or impairment if Commerce were to apply the challenged measure, as described above, in a future CVD investigation or administrative review affecting Canadian products. In such an instance, the appropriate counterfactual – that is, the removal of the challenged measure from the affected CVD rates – is one that most closely relates to the challenged measure itself. Accordingly, the counterfactual scenario would need to reflect all three parts of the challenged measure. Specifically, the appropriate counterfactual scenario is one where Commerce: (1) asks the other forms of assistance question, as specifically described above, then (2) discovers information during verification that Commerce deems should have been provided in response to the other forms of assistance question, and finally, (3) determines not to apply adverse facts available on the basis of a party failing to provide necessary information to determine that such information amounts to countervailable subsidies. As a result, the focus of the counterfactual inquiry is to determine the amount of the CVD rate (or lack thereof) that should be attributed to the discovered information.[66]

40. The counterfactual would not be the cessation of Commerce asking the "other forms of assistance" question, as the question itself is not the challenged "ongoing conduct" measure. Indeed, the United States recalls that before the Panel, the United States raised the issue of whether Canada was challenging the other forms of assistance question itself, the application of facts available to discovered information, a combination of both, or the application of something entirely different.[67] Subsequently, in response to a question from the Panel, Canada stated that, "[t]he formulation of a question cannot, in and of itself, violate the requirements of the [*Agreement on Subsidies and Countervailing Measures* ("SCM Agreement")]."[68]

## 2.2 Company-Specific CVD Rates

**9. For both parties: Could the parties please explain whether, in applying the OFA-AFA Measure and as part of its precise content, the USDOC uses AFA to determine whether, or to what extent, the OFA is "tied to" the production of the product in question and thus countervailable in the relevant investigation?**

**Response:**

41. As explained in the U.S. response to question 8, the precise content of the challenged measure was found in the panel report to consist of three specific parts. In particular, the third and final part of the measure involves Commerce's application of facts available to determine

[65] *US – Supercalendered Paper (Canada) (Panel)*, para. 7.313, Table 2. *See also* Appellate document, *US – Supercalendered Paper (Canada)*, para. 5.74.
[66] *See* U.S. Written Submission, paras. 45-46.
[67] *US – Supercalendered Paper (Canada) (Panel)*, para. 7.298.
[68] *US – Supercalendered Paper (Canada) (Panel)*, para. 7.181.

that the discovered information amounts to a countervailable subsidy.[69] In determining the precise content of the discovered subsidy "ongoing conduct" measure, the Panel did not conclude that Commerce uses facts available to determine whether the discovered information is "tied to" the production of the product in question, and is thus countervailable in the proceeding at issue.

42. Accordingly, whether Commerce applies adverse facts available to determine that the discovered information is "tied to" the subject merchandise is not relevant to assessing the presence of the challenged measure in a future CVD proceeding. Instead, the inquiry is limited to identifying whether all three parts of the precise content of the challenged measure are present, as described in the U.S. response to question 8.

**10**. **<u>For both parties</u>: Please assume, strictly for purposes of this question, that the Arbitrator agrees with Canada that the proper counterfactual for individual company-specific CVD rates that were affected by the OFA-AFA Measure is that the CVD rate assigned to the company should be less the specific CVD rate attributable to the OFA-AFA Measure. Under this counterfactual scenario, could the parties please explain:**

**a. whether this counterfactual scenario would have any meaningful effect on the USDOC's ability, in a proceeding occurring sometime after a prior proceeding in which the USDOC used the OFA-AFA Measure, to investigate the relevant OFA in a WTO-consistent manner and calculate a CVD rate for that OFA if it were found to be a countervailable subsidy; and**

**<u>Response</u>:**

43. As the United States explained before the Panel and during the appeal, the treatment by Commerce of information discovered at verification is a case-by-case determination that is made based upon the individual facts of each CVD proceeding. Therefore, the United States confirms that because the treatment of other forms of assistance is a case-specific determination by Commerce, in a subsequent CVD proceeding following one where the challenged measure was hypothetically applied, Commerce could treat the information in a manner that is not inconsistent with the WTO agreements.

**b. further assuming that, with the removal of the impact of the OFA-AFA Measure, a Canadian company's CVD rate drops to a *de minimis* level: (i) whether that company should be assumed to be entirely excluded from the relevant CVD order in the counterfactual; and (ii) whether the Arbitrator should assume that that company's counterfactual CVD rate would not be used to calculate the "all-others" rate pursuant to 19 U.S.C. § 1671d(c)(5)(A)(i) (Exhibit USA-4)?**

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

**Response:**

44. For the purposes of this question, if a company's CVD rate is reduced to *de minimis*, then that company's CVD rate should not be included in the counterfactual All Others rate. The United States described such a scenario in the U.S. written submission, using as an example the hypothetical counterfactual rate for Resolute in the *Supercalendered Paper* CVD investigation.[70]

45. If this counterfactual scenario were to occur in a CVD investigation, the United States considers that it would be appropriate to exclude the *de minimis* company from the CVD order. However, if this counterfactual scenario were to occur in a CVD administrative review, it would not be appropriate to exclude the company with a *de minimis* rate from the CVD order in the counterfactual, as the company could be subject to a subsequent administrative review.

46. Lastly, as explained in the U.S. written submission, it can be safely assumed that a company's counterfactual zero or *de minimis* CVD rate would not be used to calculate the "all-others" rate under the general rule of 19 U.S.C. § 1671d(c)(5)(A)(i).[71]

**c. if the answer to part (b)(ii) above is affirmative, then please explain further if that Canadian company, in reality, were the only company with a CVD rate that was taken into consideration under 19 U.S.C. § 1671d(c)(5)(A)(i), what would be the assumed all-others rate in the counterfactual?**

**Response:**

47. If the CVD rate of only one Canadian company was used originally to determine the All Others rate, and the removal of the challenged measure would reduce that company's CVD rate to *de minimis*, then, for this limited circumstance, the United States proposes that the counterfactual All Others rate be zero.

**11. For both parties: Could the parties please explain whether an assumption would be reasonable that, in a counterfactual in which the OFA-AFA Measure is not applied, the USDOC, upon discovering OFA at a given verification, would choose not to investigate the OFA to determine if it is a countervailable subsidy at all, thus not assigning any positive CVD rate specifically with respect to that OFA, in light of the apparent difficulties of doing so at that investigative stage?[72]**

[70] U.S. Written Submission, para. 54 (explaining that because the removal of the challenged measure would result in Resolute's rate being reduced to *de minimis*, the counterfactual All Others rate would exclude Resolute's *de minimis* rate).
[71] U.S. Written Submission, para. 49.
[72] See Appellate Body Report, *US – Supercalendered Paper*, para. 5.57; Panel Report, *US – Supercalendered Paper*, paras. 7.333, 7.177, 7.183, and 7.185.

**Response:**

48. The United States responds to Questions 11 and 12 together, below.

**12. For both parties: In light of the findings by the Panel and Appellate Body that the "OFA-AFA question", when asked by the USDOC, could cover forms of assistance that are not subsidies[73], could the Arbitrator adopt a plausible counterfactual scenario in which the USDOC asked the OFA-AFA question but in the counterfactual would find that the discovered OFA is not a countervailable subsidy, thus not assigning any positive CVD rate specifically with respect to that OFA?**

**Response:**

49. As explained in the U.S. response to question 8, the appropriate counterfactual scenario would be the removal of the challenged measure. The elimination of the measure will result in a counterfactual company-specific CVD rate that does not contain the application of facts available to the other forms of assistance information discovered at verification, on the basis of failing to provide the necessary information. Thus, the focus of the counterfactual inquiry is on what CVD rate (or lack thereof) should be attributed to the discovered information. Whether Commerce would investigate the other forms of assistance discovered at verification to determine if it is a countervailable subsidy, or determine that the information discovered is not a countervailable subsidy, is not relevant to the counterfactual analysis.

50. Given that this proceeding concerns an "ongoing conduct" measure that involves unknown future CVD proceedings, the United States considers that more than one counterfactual scenario is appropriate to reasonably address the various situations that may arise. Questions 11 and 12 both present counterfactuals in which no positive CVD rate is attributed to the discovered information. As explained in the U.S. written submission, if the information does not otherwise exist on the record in a future CVD proceeding, the United States considers that the appropriate counterfactual is to lower the company-specific CVD rate by the amount of the rate attributable to the application of the measure.[74]

51. However, in instances where information does exist on the record of the future CVD proceeding to generate a counterfactual CVD rate for the discovered subsidy program, the United States considers that a plausible counterfactual would account for use of such information to calculate the counterfactual company-specific CVD rate.[75]

52. In its written submission, Canada states that it cannot speculate, without evidence, as to whether, and to what extent, a subsidy would exist absent the measure.[76] This is true. Given that Canada has requested authorization to suspend concessions for a measure that is not applied to Canada, it is indeed unknown what the circumstances will be in a future CVD proceeding.

[73] See e.g. Appellate Body Report, *US – Supercalendered Paper*, para. 5.58.
[74] U.S. Written Submission, para. 46.
[75] U.S. Written Submission, para. 45.
[76] Canada's Written Submission, para. 73.

Therefore, were the Arbitrator to engage with the speculative exercise proposed by Canada, the United States considers that it would be prudent to ensure that in circumstances where the information does exist on the record in a future CVD proceeding, such information would be used in calculating the counterfactual company-specific rate. In such cases, a counterfactual scenario that ignores such information would not be reasonable, nor reflect a plausible compliance scenario.[77]

53. Accordingly, because the measure is not applied to Canada, and were the Arbitrator to seek to construct a hypothetical future scenario in which Canadian products are affected, this proceeding must account for the circumstances of those yet-to-be-known CVD proceedings. In this case, it would be appropriate to have more than one counterfactual scenario to take into account the various circumstances, as discussed above.

**13. <u>For the United States</u>: Could the United States please explain whether, when the USDOC discovers OFA at the verification stage, the USDOC is legally compelled to investigate the OFA and determine whether it is a countervailable subsidy? If so, please provide the portion of the statute or regulation that compels such investigation.**

**<u>Response</u>:**

54. As the United States explained before the Panel, the nine CVD determinations used by Canada to demonstrate the alleged measure are fact-specific, case-by-case determinations by Commerce. The original Panel report findings did not rely on either a U.S. statute or a regulation for the existence of the challenged measure.[78]

**14. <u>For the United States</u>: Could the United States please respond to Canada's assertion that part of the precise content of the OFA-AFA Measure is that the USDOC refuses to accept information regarding the OFA discovered at verification onto the record of the proceeding?[79] Further, is it the case that the USDOC, when using the OFA-AFA Measure, would, in practice, not accept such information onto the record of the relevant proceeding?**

[77] *See US – Gambling (Article 22.6 – US)*, para. 3.27 (stating that a counterfactual should "reflect at least a plausible or 'reasonable' compliance scenario") and para. 3.30 ("[T]o the extent that the estimation of the level of nullification or impairment requires certain assumptions to be made as to what benefits would have accrued, in a situation where compliance would have taken place, such assumptions should be reasonable, *taking into account the circumstances of the dispute*, in order for the proposed level of suspension to accurately reflect the benefits accruing to the complaining party that have actually been nullified or impaired.") (italics added).

[78] The Panel rejected Canada's reliance on the Trade Preferences Extension Act as evidence of the likelihood of continuation of the challenged measure. *US – Supercalendered Paper (Canada) (Panel)*, para. 7.331.

[79] See Canada's written submission, paras. 69-71.

**Response:**

55. 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. In supporting this assertion, Canada relies on two paragraphs from the panel report, one of which is a summary of Canada's arguments;[80] the other is the Panel's finding concerning the measure itself and that paragraph does not indicate that the precise content of the measure includes Commerce's refusal to accept information.[81] Further, Canada relies on a statement from the appellate document concerning Commerce's "refus[al] to accept additional information from the respondents,"[82] but that statement relies upon the same paragraphs of the panel report, which, as just discussed, does not support Canada's assertion that the precise content of the measure establishes that the information needed to calculate a counterfactual company-specific CVD rate is never available.

56. Rather, as explained in the U.S. response to question 8, 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."[83] 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. For instance, the United States observes that the excerpts from both *Solar Cells from China 2014*[84] and *Solar Cells from China 2015*[85] 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, contrary to Canada's assertion, 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.

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[80] Canada's Written Submission, para. 70, n. 75 (citing *US – Supercalendered Paper (Canada) (Panel)*, para 7.314).
[81] Canada's Written Submission, para. 70, n. 75 (citing *US – Supercalendered Paper (Canada) (Panel)*, para 7.316) ("We thus consider that Canada has established the precise content of the 'Other Forms of Assistance-AFA measure', which consists in the USDOC asking the 'other forms of assistance' question, and where the USDOC 'discovers' information that it deems should have been provided in response to that question, applying AFA to determine that the 'discovered' information amounts to countervailable subsidies.")).
[82] Canada's Written Submission, para. 70, n. 76 (citing Appellate document, *US – Supercalendered Paper (Canada)* , para. 5.77 (italics added)).
[83] *US – Supercalendered Paper (Canada) (Panel)*, para. 7.316.
[84] *US – Supercalendered Paper (Canada) (Panel)*, para. 7.313, Table 2, *Solar Cells from China 2014* ("The USDOC's verifiers explained that . . . they would take the names, dates and amounts received for these unreported grants as verification exhibits . . . ."; "With respect to Trina Solar's argument that the USDOC should use the information taken at verification . . . .").
[85] *US – Supercalendered Paper (Canada) (Panel)*, para. 7.313, Table 2, *Solar Cells from China 2015* ("Regarding Lightway's and Goal Zero's arguments that we should use the information taken at verification to calculate a subsidy rate . . . .").

57. Lastly, the United States observes that the Arbitrator's questions concerning the counterfactual highlight the essence of the problematic nature of this proceeding. As is clear from the parties' submissions, what constitutes the challenged "ongoing conduct" measure and whether the "ongoing conduct" measure occurs in a future CVD proceeding would be heavily disputed between the parties, yet that determination would be left solely to the discretion of Canada.[86] In contrast, previous arbitrations concerned measures that were readily discernable and for which a future application would not be disputed.[87] Given this fundamental difference with past arbitrations, this is another basis for the U.S. request 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 does not exist and is zero.

### 2.3 "All-Others" Rate

**15. <u>For both parties</u>: In instances where the USDOC calculates an all-others rate with reference to a simple average of the individually assigned CVD rates or from a weighted average using public sales data[88], could the parties please explain whether there is any way of discerning, at this time, which of the two would likely be closer to the actual weighted average of the counterfactual individually investigated companies' CVD rates that would be used to calculate the all-others rate in future CVD proceedings where the OFA-AFA Measure would be used? Moreover, is there any reason to believe that using either of these two options to calculate a counterfactual all-others rate would be less accurate than a counterfactual zero value for the all-others rate, as proposed by Canada?**

**<u>Response</u>:**

58. As an initial matter, if Canada would agree to suspend this proceeding until such time that the United States applied the challenged measure to Canada (if such a circumstance were to ever arise), then, in the future, when the facts are known, there may be an accurate way to assess the appropriate counterfactual All Others rate. At present, the required information is not currently available because it does not exist, and this arbitration necessarily is dependent on speculation. As a result, the potential suspension of concessions by Canada could very well exceed the actual level of nullification or impairment in the future, which would breach Article 22.4 of the DSU.

[86] U.S. Written Submission, para. 33.
[87] U.S. Written Submission, para. 32 (explaining that previous arbitrations involved Commerce's application of zeroing in its comparison methodology in AD proceedings (that is, a discernable methodology in a calculation), final judgments and settlement agreements under the 1916 Act, disbursements under the Byrd Amendment, and payments made under certain prohibited and actionable subsidies (citing *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 4.2; *US – 1916 Act (EC) (Article 22.6 – US)*, paras. 2.6, 7.7; *US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)*, para. 1.4; *US – Upland Cotton (Article 22.6 – US I*), paras. 1.13, 1.18)).
[88] See e.g. Canada's written submission, para. 81 and fns 85-86 thereto.

59. Nevertheless, as the United States explains in the U.S. response to question 26, below, contrary to Canada's representation,[89] the United States does not consider it appropriate for the parties to reassess which averaging methodology to use – whether simple average, weighted average of publicly-ranged sales values, or weighted average of actual U.S. sales values – for the counterfactual All Others rate. Rather, as explained in the U.S. written submission, the United States considers it appropriate for the counterfactual to follow the same averaging methodology – excluding rates that are zero, *de minimis*, or entirely based on facts available – that will have been used by Commerce in the future CVD proceeding.[90] Such an approach is predictable and limits the risk of disagreements between the parties.[91] Accordingly, <u>how</u> Commerce reaches a determination to utilize a certain averaging methodology is not relevant to the assessment of the counterfactual All Others rate.

60. Furthermore, the All Others rate calculation is a fact-specific exercise, and includes consideration of the subsidy rates calculated for each individually-investigated respondent and the nature of the publicly available sales data on the record of a particular proceeding. Therefore, as a general matter, there is no plausible means of discerning at this time which of the two – simple average or weighted average using public sales data – would be closer to the actual weighted average of the counterfactual CVD rate of the individually-investigated respondent(s).[92]

61. Lastly, as explained in the U.S. written submission,[93] it would not be accurate to use Canada's proposed counterfactual of zero for an All Others rate that was calculated by a simple average or a weighted average using public sales data given that the information will exist on the record to calculate the counterfactual All Others rate. The United States has submitted the All Others rate memo from the *Supercalendered Paper* investigation as an example of an All Others rate calculated using the weighted average of publicly-ranged sales data, and demonstrated that the use of zero as the counterfactual All Others rate would most certainly be less accurate.[94] The ability to calculate a counterfactual All Others rate based on information on the record renders Canada's proposed counterfactual of zero, which reflects an unreasoned assumption that is not rooted in record evidence, less accurate and not reasonable or plausible.

**16. <u>For both parties</u>: If the USDOC ever constructs an all-others rate under 19 U.S.C. § 1671d(c)(5)(A)(i) when the actual US sales data used by the USDOC to weight the relevant companies' CVD rates are not confidential, do both parties agree that in such a scenario Canada could construct the counterfactual all-others rate using the**

[89] Canada's Written Submission, para. 91.
[90] *See* U.S. Written Submission, para. 59.
[91] *See* Canada's Written Submission, para. 92.
[92] The question references paragraph 81 of Canada's written submission, which contains arguments and evidence concerning All Others rates calculated from a weighted-average of actual U.S. sales values. For discussion of an All Others rate calculated using a weighted-average of actual U.S. sales values, please see the U.S. responses further below.
[93] *See* U.S. Written Submission, para. 57.
[94] U.S. Written Submission, para. 54; Calculation of the All-Others Rate for the Final Determination in the Countervailing Duty Investigation of Supercalendered Paper from Canada ("Supercalendered Paper All Others Rate Calculation Memo"), Oct. 13, 2015, p. 1 (Exhibit USA-7).

**information available (presumably appearing in the relevant USDOC memoranda) to construct the counterfactual all-others rate? If so, and in general, how often would such data be non-confidential and contained in the relevant USDOC documents?**

**Response:**

62. As an initial matter, the information needed to construct a counterfactual All Others rate will be available on the record of a CVD proceeding, consistent with Canada's assertion that "at a minimum, the counterfactual must be derived from information or data that are available on the record."[95] The United States has explained that in some instances, the information is publicly available, and in others, the information is available, but confidential.[96] To clarify then, regardless of whether the information is public or confidential, the information needed to calculate a counterfactual All Others rate will exist and be available on the record of a CVD proceeding.

63. Further, the United States confirms that if an All Others rate is constructed using the weighted average of actual U.S. sales data and the sales data are not confidential, then the rate could be reconstructed based on public information. The counterfactual All Others rate could also be calculated in situations where the information is confidential. Information is treated as business confidential at the request of the individually-investigated respondent.[97] Therefore, after authorization letters from the individually-investigated respondents are obtained, the confidential information can be used to calculate the counterfactual All Others rate using a weighted average of the actual U.S. sales data.[98]

64. Based on Commerce's experience, the likelihood that a respondent would not seek confidential protection for actual U.S. sales data is small. However, given that Canada has requested a level of suspension that relates to a future, unknown CVD proceeding, there remains the possibility that the actual U.S. sales data would be public if a Canadian respondent does not request business confidential treatment. Further, as discussed above, the information needed to calculate a weighted average based upon actual U.S. sales data will always be available, either public or confidential, on the record of a CVD proceeding.

**17. For both parties: In the context of assigning "weight" to data to calculate an all-others rate (see 19 U.S.C. § 1671d(c)(5)(A)(i)-(ii)), could the parties please specify whether these are weighted by trade value or trade quantity?**

[95] Canada's Written Submission, para. 75.
[96] U.S. Written Submission, paras. 57-58.
[97] 19 U.S.C. § 1677f (Exhibit USA-17).
[98] *See* U.S. Written Submission, para. 58.

**Response:**

65. In the context of assigning "weight" to data to calculate an All Others rate, Commerce relies on trade value (*i.e.*, a company's sales data).[99]

**18. For both parties: In situations where the USDOC calculates the all-others rate with confidential sales data (as the weights), would it be reasonable to assume that the counterfactual all-others rate would be a *simple* average of the relevant companies' CVD rates?**

**Response:**

66. As explained in the U.S. written submission,[100] it is more reasonable or plausible in such situations that the counterfactual All Others rate reflect a weighted average, which is consistent with the calculation method prescribed by 19 U.S.C. § 1671d(c)(5)(A)(i), and could be done without much burden to the parties through the use of BCI authorization letters. If Canada is not able to secure the necessary authorization from all individually-investigated respondents, the counterfactual All Others rate should remain the same – that is, there will be no change in duty – because there would be insufficient authorization to use the information necessary to recalculate the rate.[101]

67. However, if the Arbitrator disagrees with the approach described in the preceding paragraph, then a simple average that reflects record evidence inherently would be more accurate and more reasonable than Canada's proposed counterfactual of zero for the All Others rate. As previously explained, the information needed to calculate a counterfactual All Others rate will be available on the record of the CVD proceeding. Therefore, if Canada is unable to obtain BCI authorization letters to calculate a weighted-average of actual U.S. sales values, the United States considers it would be reasonable to consider the factual circumstances of an individual case, including the use of a simple average, to calculate a counterfactual All Others rate to ensure an estimate that will accurately reflect the benefits nullified or impaired in a future proceeding.

**19. For the United States: Could the United States please clarify to what set of exporters the "all-others" rate is applied? More specifically, is the all-others rate applied *vis-à-vis*: (a) only known but unsampled exporters in a given CVD investigation; or (b) all other exporters, whether known or unknown to the USDOC during the investigation, that did not receive an individual CVD rate?**

[99] *See, e.g.*, Supercalendered Paper All Others Rate Calculation Memo (Exhibit USA-7).
[100] *See* U.S. Written Submission, para. 58.
[101] U.S. Written Submission, para. 58.

**Response:**

68. In a CVD investigation, the All Others rate is applied to all exporters and producers not individually examined (*i.e.*, all non-examined exporters, known or unknown).

**20. For the United States: Could the United States please respond to Canada's assertions in paragraphs 82-87 of its written submission to the effect that it would be unreasonable to assume that Canada could extract confidential sales data from Canadian companies to construct a counterfactual all-others rate as proposed by the United States?**

**Response:**

69. As an initial matter, the United States highlights that both parties appear to agree that the use of confidential information is necessary to ensure a reasoned estimate of the level of nullification or impairment. Canada, from the outset, has proposed the use of confidential data for U.S. import values from Canadian companies.[102] Given Canada's acknowledgement of the need to use confidential information for that purpose, the United States considers it appropriate to also use confidential information in the construction of the counterfactual All Others rate, particularly in light of the fact that the information will exist on the record of the future CVD proceeding.

70. Canada argues that the individually-investigated companies not subject to the challenged measure will not have a commercial incentive to authorize access to confidential information.[103] Canada does not provide a rationale for this assertion. Nevertheless, contrary to Canada's assertion, given that CVD rates could increase with the removal of the challenged measure,[104] individually-investigated companies with CVD rates that do not contain the challenged measure could have incentive to cooperate with the Government of Canada in imposing countermeasures to "induce compliance" by the United States.[105] The non-subject individually-investigated companies may therefore be motivated to provide the confidential information necessary to calculate the counterfactual All Others rate to eliminate the challenged measure from the rates of their competitors.[106]

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[102] Canada's Methodology Paper, para. 14; Canada's Written Submission para. 86.
[103] Canada's Written Submission, paras. 83, 86.
[104] U.S. Written Submission, paras. 45, 54.
[105] Previous arbitrators have considered that the suspension of concessions or other obligations is to "induce compliance. *EC – Hormones (US) (Article 22.6 – EC)*, para. 39 (citing *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.3)). *See also US – 1916 Act (EC) (Article 22.6 – US)*, paras. 5.5-5.7.
[106] Furthermore, Canada's argument could also be made for the Canadian exporters subject to the All Others rate, which Canada itself has proposed to approach for authorization of U.S. import values. *See* Canada's Methodology Paper, para. 14; Canada's Written Submission, para. 86, n. 92. Given that the removal of the challenged measure could increase the All Others rate, following Canada's rationale, it is similarly unclear why Canadian exporters that have been assigned the All Others rate would have commercial incentive to cooperate with the Government of Canada to calculate the suspension of concessions and "induce compliance" for the elimination of the challenged

71. Canada's reliance on the arbitrator's rejection of utilizing certain information as the counterfactual in *US – Washing Machines (Korea) (Article 22.6 – US)* is also misplaced.[107] There, the arbitrator determined to not utilize the "W-W margins" as a counterfactual, in part, because it determined that the information "only '<u>may</u> exist on [Commerce's] administrative record'".[108] In contrast, the United States has repeatedly affirmed in this proceeding that the All Others rate calculation memoranda, both confidential (if so designated by the party) and public versions, necessarily <u>will exist</u> on the record of Commerce's administrative record, and access to such memoranda will enable the parties to calculate the counterfactual All Others rate.[109]

72. Canada also highlights that the arbitrator in *US – Washing Machines (Korea) (Article 22.6 – US)* stated that "a Member should not be obliged to rely exclusively on a private actor disclosing potentially confidential information to calculate the level of suspension of concessions".[110] To the extent Canada agrees with this statement, such a view would seem to contradict Canada's own proposal to obtain authorization from Canadian companies for the import values.[111] Furthermore, this assertion from the arbitrator in *US – Washing Machines (Korea) (Article 22.6 – US)* is in tension with the arbitrator's subsequent decision to allow for a procedure to obtain authorization from companies to determine the value of imports because such information is "normally confidential".[112] The arbitrator in that proceeding used the same portion of the decision in *US – 1916 Act (EC) (Article 22.6 – US)* for both its view not to use the "W-W margin" as a counterfactual because it may be confidential and for its view to use information not publicly available for the value of imports.[113] Indeed, the arbitrator in *US – 1916 Act (EC) (Article 22.6 – US)* did not foreclose the possibility of parties to seek access to confidential information. Rather, the arbitrator determined that where confidential information can be disclosed, it may be used for the suspension of concessions.[114]

73. Lastly, Canada misrepresents Commerce's confidentiality requirements, and asserts that the United States is seeking to "shield itself from suspension of concessions by means of information that is designated business confidential".[115] Commerce protects confidential information in accordance with Article 12.4 of the SCM Agreement. Further, under 19 U.S.C. § 1677f(b), the person that submits the information to Commerce is the one that designates the

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measure. *See* U.S. Written Submission, para. 54 (demonstrating that in a counterfactual scenario where the challenged measure is removed, the All Others rate could increase).

[107] Canada's Written Submission, para. 84.

[108] *US – Washing Machines (Korea) (Article 22.6 – US*), para. 4.19 (italicized in the original).

[109] *See* U.S. Written Submission, paras. 56-59.

[110] Canada's Written Submission, para. 84 (citing *US – Washing Machines (Korea) (Article 22.6 – US*), para. 4.19, n. 330).

[111] Canada's Methodology Paper, para. 14.

[112] *US – Washing Machines (Korea) (Article 22.6 – US*), para. 4.103.

[113] *Compare US – Washing Machines (Korea) (Article 22.6 – US)*, para. 4.19, n. 330 (citing *US – 1916 Act (EC) (Article 22.6 – US)*, paras. 6.8-6.12) *with US – Washing Machines (Korea) (Article 22.6 – US*), para. 4.103, n. 443 (citing *US – 1916 Act (EC) (Article 22.6 – US)*, para. 6.12).

[114] *See US – 1916 Act (EC) (Article 22.6 – US)*, paras. 6.12-6.13; *US – Washing Machines (Korea) (Article 22.6 – US*), para. 4.103, n. 443.

[115] Canada's Written Submission, para. 87.

information as confidential, not Commerce.[116] Thus, it would be the Canadian exporters themselves that designate certain information confidential. Once designated confidential by the Canadian company, Commerce is required to protect those Canadian business interests and may only disclose the confidential information under limited circumstances.[117] Following Canada's logic then, it would be the Canadian companies that prevent their own government from obtaining a suspension of concessions, not the United States. Therefore, Canada's argument that the United States seeks to shield itself from suspension of concessions by means of confidential information is illogical, and misrepresents the obligations that Commerce has to a party that designates information as confidential in its AD/CVD proceedings.

**21. <u>For the United States</u>: Regarding the text of 19 U.S.C. § 1671d(c)(5)(A)(ii), could the United States please explain how the USDOC "average[es] the weighted average countervailable subsidy rates determined for the exporters and producers individually investigated"? In particular, what exactly is being "weighted" and how is this weighting performed? Please provide an example to illustrate your explanation.**

**<u>Response</u>:**

74. Regarding the referenced text from 19 U.S.C. § 1671d(c)(5)(A)(ii), Commerce uses the same methodology described for purposes of 19 U.S.C. § 1671d(c)(5)(A)(i), as explained in paragraph 49 of the U.S. written submission and as illustrated in the All Others calculation memo from the *Supercalendered Paper* investigation.[118]

75. As further explained in the U.S. written submission, the determination of the appropriate counterfactual All Others rate should take into account that rates that are zero, *de minimis*, or entirely based on facts available should be excluded.[119] Therefore, for the purposes of this proceeding and determining a counterfactual, if the only individually-investigated companies are assigned CVD rates that are zero, *de minimis*, or are based entirely on facts available in the counterfactual, then the United States considers it would be appropriate for the counterfactual All Others rate to be zero.

**22. <u>For the United States</u>: Under the US law, what is the *de minimis* threshold for company CVD rates in CVD investigations: (a) for purposes of 19 U.S.C. § 1671d(c)(5)(A)(i); and (b) for purposes of determining whether a company should be**

[116] 19 U.S.C. § 1677f(b) (Exhibit USA-17).
[117] 19 U.S.C. § 1677f(c) (limited disclosure of certain proprietary information under protective order) (Exhibit USA-17).
[118] U.S. Written Submission, paras. 49, 54; Supercalendered Paper All Others Rate Calculation Memo (Exhibit USA-7).
[119] *See* U.S. Written Submission, para. 59.

**excluded from the resulting CVD entirely?[120] Please provide relevant excerpts from applicable US statutes or regulations with your answer.**

**Response:**

76. Pursuant to 19 U.S.C. § 1671b(b)(4)(A), a countervailable subsidy is considered *de minimis* in a CVD investigation if Commerce determines that the aggregate of the net countervailable subsidies is less than 1 percent *ad valorem* or the equivalent specific rate for the subject merchandise.[121] Although not applicable to Canada, the United States also notes that for countries designated by the U.S. Trade Representative as "developing" or "least developed," the *de minimis* threshold is 2 percent and 3 percent, respectively.[122]

77. Furthermore, under U.S. law, any exporter or producer for which Commerce determines an individual net countervailable subsidy rate of zero or de *minimis* is excluded in a CVD investigation from an affirmative final determination or a CVD order.[123]

**23. For the United States: Could the United States please explain whether the USDOC only uses the methodology described in footnote 1 of Exhibit USA-7 in investigations where there are only two individually examined companies that are assigned individual CVD rates (which are not zero, *de minimis*, or based entirely on facts available)?[124] If so, could the United States please explain the rationale underlying this two-company limit?**

**Response:**

78. The United States responds to questions 23 and 25 together.

79. As an initial matter, as explained in the U.S. response to question 26, the United States considers it appropriate for the counterfactual to follow the same averaging methodology used by Commerce in the specific future CVD proceeding at issue. Therefore, how Commerce determines to select the averaging methodology is not relevant to the assessment of the counterfactual All Others rate.

80. Nevertheless, the United States confirms that Commerce follows the approach described in footnote 1 of the All Others rate calculation memo from the *Supercalendered Paper* investigation in CVD investigations when there are only two individually-investigated respondents. Commerce employs this approach to protect against the inadvertent release of the individually-investigated respondents' confidential sales data,[125] which could result because of public information (*e.g.*, the individually-investigated respondents' subsidy rates) used in the

[120] *See* SCM Agreement, Art. 11.9.
[121] *See* 19 U.S.C. § 1671b(b)(4)(A) (Exhibit USA-13).
[122] *See* 19 U.S.C. § 1671b(b)(4)(B)-(D) (Exhibit USA-13).
[123] *See* 19 U.S.C. § 1671d(a)(3) (Exhibit USA-4); 19 U.S.C. § 1671e(a) (Exhibit USA-14).
[124] See generally Canada's written submission, section III.3.
[125] 19 U.S.C. § 1677f(b) (Exhibit USA-17).

weighting calculation for just two companies.[126] Specifically, if the weighted average of only two individually-investigated respondent CVD rates were used for the All Others rate, it would be possible to reverse engineer the value of the actual U.S. sales of the two companies relative to one another, thereby disclosing confidential company sales data.[127]

81. The approach described in footnote 1 of the All Others rate calculation memo from the *Supercalendered Paper* investigation reflects Commerce's efforts to reconcile the requirements of 19 U.S.C. § 1671d(c)(5)(A)(i), which prescribes a weighted average for the All Others rate, with 19 U.S.C. § 1677f(b), which requires protection of information designated as confidential by the person submitting the information.[128]

**24. <u>For the United States</u>: In instances where the USDOC uses confidential sales data to calculate the "weighted average" within the meaning of 19 U.S.C. § 1671d(c)(5)(A)(i), rather than relying on a simple average of the rates of the individually investigated companies or a weighted average calculated with publicly ranged sales data, does the USDOC only employ this method when there are more than two individually investigated companies?[129] If so, could the United States please explain the rationale for limiting this practice to instances involving more than two companies?**

**<u>Response</u>:**

82. As explained in the U.S. written submission, 19 U.S.C. § 1671d(c)(5)(A)(i) requires that Commerce determines an All Others rate equal to the weighted average of individually-investigated CVD rates, excluding any zero, *de minimis*, or rates based entirely on facts available.[130] However, in light of Commerce's concurrent legal obligations to protect information designated as confidential,[131] Commerce considers using a simple average or weighted average of publicly-ranged sales data, as discussed in the U.S. response to question 23, above, when there is a risk of disclosing confidential information. The concerns about the inadvertent disclosure of confidential information related to an individually-investigated respondent's sales data are not present when Commerce weight averages three or more CVD rates, because, in that situation, it would not be possible to reverse engineer the value of the actual U.S. sales of the companies relative to each another. Therefore, when there are three or more individually-investigated respondents, the All Others rate will be a weighted average of actual U.S. sales data.

[126] *See* U.S. Written Submission, paras. 51-52.
[127] This also presumes that the individually-investigated companies have requested business confidential treatment of such information in the CVD proceeding.
[128] *See* 19 U.S.C. § 1671d (Exhibit USA-4); 19 U.S.C. § 1677f (Exhibit USA-17).
[129] See generally Canada's written submission, section III.3; and para. 80 ("…in U.S. countervailing duty proceedings involving three or more investigated companies, Commerce uses each company's proprietary sales values to make this calculation").
[130] U.S. Written Submission, para. 49; 19 U.S.C. § 1671d(c)(5)(A)(i) (Exhibit USA-4).
[131] 19 U.S.C. § 1677f(b) (Exhibit USA-17).

**25. <u>For the United States</u>: Regarding the construction of an all-others rate in investigations with two individually examined companies, is the "practice" described in footnote 1 of Exhibit USA-7 mandated by statute or regulation? If so, please provide the relevant excerpt from the statute or regulation mandating this practice. If not, and in general, how well-established is this practice?**

**<u>Response</u>:**

83. Please see the U.S. response to question 23, above.

**26. <u>For the United States</u>: Regarding the appropriateness of deriving the counterfactual all-others rate from a simple average of the individually assigned company CVD rates or from a weighted average using publicly ranged sales data, could the United States please respond to the content of paragraph 91 of Canada's written submission?**

**<u>Response</u>:**

84. Contrary to Canada's representation,[132] the United States does not consider it appropriate for the parties to reassess which averaging methodology to use – whether simple average, weighted average of publicly-ranged sales values, or weighted average of actual U.S. sales values – for the counterfactual All Others rate. The United States considers that it would be appropriate for the counterfactual All Others rate to be determined by applying the same methodology used in the future CVD proceeding at issue, taking into account the exclusion of CVD rates that are zero, *de minimis*, or based entirely on facts available.[133]

85. For clarity then, if, in either an investigation or administrative review, Commerce uses a simple average, then the counterfactual All Others rate would be based upon a simple average. If Commerce uses a weighted average of publicly-ranged sales values, then the counterfactual would in turn use a weighted average of publicly-ranged sales values. Similarly, if Commerce uses the weighted average of actual U.S. sales, the counterfactual All Others rate would also be the weighted average of actual U.S. sales, after obtaining the appropriate BCI authorization letters from the individually-investigated respondents (assuming that such information was confidential). Such an approach – following the same averaging methodology applied by Commerce in the hypothetical, future proceeding – is practical to implement and would limit the risk of potential controversies between the parties.[134] Nor would such an approach leave room for methodological disputes, as Canada contends.[135]

[132] Canada's Written Submission, para. 91.
[133] *See* U.S. Written Submission, para. 59 ("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.").
[134] *See* Canada's Written Submission, para. 92.
[135] Canada's Written Submission, para. 92.

**27. <u>For the United States</u>: Could the United States please confirm that, in instances in which there is only one company assigned an individual CVD rate that may be considered under 19 U.S.C. § 1671d(c)(5)(A)(i), the all-others rate would be equal to that individual rate? If this is untrue, please specify how the all-others rate would be calculated in this instance.**

**<u>Response</u>:**

86. The United States confirms that in instances in which there is only one company assigned an individual CVD rate under 19 U.S.C. § 1671d(c)(5)(A)(i), the All Others rate is equal to that individual rate.

**28. <u>For the United States</u>: Could the United States please provide the text of "section 1677e", as referenced in 19 U.S.C. § 1671d(c)(5)(A)(i)?**

**<u>Response</u>:**

87. The text of 19 U.S.C. § 1677e, concerning determinations on the basis of facts available, is provided as Exhibit USA-16.

**29. <u>For the United States</u>: For each USDOC proceeding that the United States believes will trigger Canada's running the model that will ultimately be approved by the Arbitrator (see question 35 below) could the United States please explain how the USDOC calculates all-others rates in each such type of proceeding, and explain whether such methods are mandated by statute or regulation? If they are so mandated, please provide relevant excerpts from such statutes or regulations.**

**<u>Response</u>:**

88. As explained in the U.S. response to question 35, below, only CVD investigations and administrative reviews are considered part of the challenged measure. As explained in the U.S. written submission, in both CVD investigations and administrative reviews, Commerce calculates the All Others rate in accordance with 19 U.S.C. § 1671d(c)(5)(A).[136] The United States has provided the text of 19 U.S.C. § 1671d(c)(5)(A) as Exhibit USA-4.

**30. <u>For the United States</u>: Could the United States please confirm whether there are any circumstances under which a company would be assigned an individual CVD rate that is itself confidential, and thus would not appear on the public record of a relevant USDOC proceeding that the United States believes could trigger Canada to run the model that the Arbitrator will ultimately approve?**

[136] U.S. Written Submission, paras. 49-50; 19 U.S.C. § 1671d(c)(5)(A) (Exhibit USA-4).

**Response:**

89. The United States confirms that there are no circumstances under which a company would be assigned an individual CVD rate that is itself confidential, and thus would not appear on the public record of a relevant CVD proceeding.

**31. For the United States: The United States has made the following assertions: "the impact is not solely limited to the affected company's imports. Therefore, in the event an affected company fails to provide the needed authorization, the approach for the All Others rate to remain the same properly accounts for all other imports when the economic model is run".[137] Could the United States please clarify this statement? In particular, how specifically, does the calculation of the all-others rate intersect with the issue of how many "varieties" of Canadian imports should be used in the model in this context?**

**Response:**

90. In order to calculate a reasoned estimate of the level nullification or impairment, it is imperative to use a reasonable counterfactual All Others rate. Obtaining BCI authorization letters from all individually-investigated companies will ensure that a counterfactual All Others rate based upon a weighted average of actual U.S. sales data will be an appropriate reflection of a scenario in which the challenged measure is removed.

91. Further, as the United States has explained, it is critical that the number of varieties in a model be representative of the full extent of Canadian exporters, both those with CVD rates that contain the challenged measure and those with rates that do not contain the challenged measure. Nullification or impairment must take into account that, all else equal, a change in duties applied to a subset of Canadian firms (rates with the challenged measure) will increase or decrease the supply from all other sources, including other Canadian firms with rates that did not contain the challenged measure, thereby somewhat offsetting the overall level of nullification or impairment from Canada as a whole.

92. Therefore, the United States considers that the best alternative in a scenario in which BCI authorization letters cannot be obtained from a subset of Canadian exporters is a reasonable estimate of that information – that is, the original All Others rate. In contrast, Canada suggests the unreasonable and non-plausible counterfactual – to assume that the All Others rate is zero. However, Canada's approach ignores that the counterfactual is the countervailing duty that would apply with the challenged measure removed; it is not the elimination of the entirety of the countervailing duty rate applied to companies under the All Others rate. A counterfactual All Others rate of zero will result in a distorted and possibly dramatic overstatement of the level of nullification or impairment. Rather, in this instance, the use of the original All Others rate would be a more reasonable estimate of the applicable duty and better represent the full extent of duties applied to imports from Canada.

[137] U.S. Written Submission, para. 58.

**32. <u>For the United States</u>: Could the United States please respond to Canada's assertion that Canada should not be expected to "reverse engineer" a counterfactual all-others rate?[138]**

**<u>Response</u>:**

93. As explained in the U.S. response to question 26, above, the United States considers it appropriate to use the same averaging methodology that will have been used by Commerce in the hypothetical, future proceeding at issue. The information to create a counterfactual All Others rate will be available on the record of the proceeding.[139] Accordingly, contrary to Canada's representation of "reverse engineering",[140] the approach is practical to implement, and will not be subject to disagreement between the parties.

**33. <u>For the United States</u>: Could the United States please respond to Canada's assertion that "[p]revious arbitrators have found in similar circumstances that a proxy rate of zero reasonably and appropriately reflects the nature and scope of benefits that are nullified or impaired"?[141]**

**<u>Response</u>:**

94. In making the assertion referenced in the question, Canada argues for a counterfactual All Others rate of zero because Canada contends that it not always possible to determine what the All Others rate would be absent the duties resulting from the application of challenged measure.[142] The United States has made clear that the information will exist on the record of a CVD proceeding to determine the counterfactual All Others rate, regardless of whether the All Others rate is calculated based upon a simple average, a weighted average of publicly-ranged sales data, or a weighted average of actual U.S. sales data.

95. As explained in the U.S. response to question 20 and in the U.S. written submission,[143] Canada's reliance on *US – Washing Machines (Korea) (Article 22.6 – US)* is misplaced. In addition to the reasons previously provided, there are additional circumstances in *US – Washing Machines (Korea) (Article 22.6 – US)* that differ from the present dispute. In that proceeding, the arbitrator determined, "[t]here is necessarily no information on the record as to the dumping margins that would be obtained for a number of unidentified future products based upon a W-W comparison methodology to be performed by the USDOC at some future date."[144] In contrast, the United States has repeatedly explained that the information to calculate the counterfactual All Others rate <u>will exist and be available on the record of Commerce's CVD proceeding</u>. Notably,

[138] See Canada's written submission, paras. 78, 80, and 92.
[139] U.S. Written Submission, paras. 57-58.
[140] Canada's Written Submission, paras. 78, 92.
[141] Canada's written submission, para. 60, quoting Decisions by the Arbitrators, *US – Washing Machines (Article 22.6 – US)*, paras. 4.21–4.23; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 5.51.
[142] Canada's Written Submission, para. 60.
[143] *See* U.S. Written Submission, para. 30.
[144] *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 4.21.

the arbitrator's decision in *US – Washing Machines (Korea) (Article 22.6 – US)* to select zero as a counterfactual was "[i]n the absence of information".[145]

96. Canada also incorrectly relies on *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*. In that decision, the arbitrator stated that "we cannot speculate on how [Commerce] would have calculated the duty rates".[146] Here, in contrast, the United States does not advocate for the parties to determine which averaging methodology to utilize. Rather, as discussed above, the United States considers it appropriate for the counterfactual All Others rate to follow the same averaging methodology that Commerce will have used in the future CVD proceeding.

97. Accordingly, Canada's reliance on past arbitrations does not support its position for the arbitrary use of zero as the counterfactual All Others rate. Canada's selection of zero for the All Others rate fails to account for the fact that the counterfactual is the CVD rate that would apply with the challenged measure removed; it is not the elimination of the entirety of the CVD rate applied to companies under the All Others rate. In contrast, the United States has demonstrated that the information will exist on the record of the CVD proceeding to calculate a counterfactual All Others rate that does not contain the challenged measure. Therefore, the Arbitrator should reject Canada's selection of zero as the counterfactual All Others rate, as it necessarily would lead to an overstated level of suspension that is not equivalent to the level of nullification or impairment, and thus would be inconsistent with Article 22.4 of the DSU.

## 3 OVERALL METHODOLOGY

**34. <u>For both parties</u>: In their submissions, both parties, at times, refer to "administrative reviews". Could the parties please explain to what specific proceedings, under US law, this phrase refers? For each type of proceeding, please briefly explain the review's purpose and what kinds of relevant determinations can be made as a result of the review. If it is more convenient, please combine your answer to this question with that of the following question.**

**<u>Response</u>:**

98. The United States responds to questions 34 and 35 together, below.

**35. <u>For both parties</u>: Could the parties please clarify which event(s) occurring in which US CVD-related proceeding(s), specifically, would trigger Canada's right to run the models that the parties propose and determine a level of suspension of concessions?**

**a. Please provide excerpts from US statues or regulations reflecting the statutory basis for the USDOC to perform any such triggering events;**

[145] *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 4.22.
[146] *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 5.51.

**Response:**

99. As explained above and in the U.S. written submission, Canada suffers no nullification or impairment, and 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 does not exist and is zero. Without prejudice to this position, the United States provides responses to the remaining questions were the Arbitrator to engage with determining a speculative, future level of nullification or impairment.

100. If the Arbitrator does not accept the U.S. argument that Canada has suffered no nullification or impairment, 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 Commerce CVD investigation only results in the collection of estimated duties (referred to as cash deposits), but not the assessment of duties. It would thus be appropriate for Canada to "trigger" the model only after duty assessment occurred. Where an administrative review is conducted, duties are assessed based on the CVD rate determined during the course of the administrative review.[147] If no administrative review is requested by an interested party, duties would be assessed based on the cash deposit rate assigned during the investigation.

101. When using the term "investigation" in the context of this proceeding, the United States is referring to a proceeding initiated by Commerce to determine the existence and degree of any alleged countervailable subsidy, as contemplated by Article 11 of the SCM Agreement.[148] The investigation begins on the date of the filing of a petition or publication of a notice of initiation and ends on the date of publication of the earliest notice of dismissal of the petition and termination, negative determination resulting in termination, or publication of an order. An affirmative determination becomes the basis for the assessment of cash deposits for entries of merchandise covered by the determination.[149]

102. When using the term "administrative review", the United States is referring to annual assessment reviews under the U.S. retrospective duty assessment system, as defined by 19 U.S.C. § 1675(a). Administrative reviews are "segments" of a CVD proceeding, initiated by Commerce at the request of an interested party.[150] Administrative reviews may be requested each year during the anniversary month of the publication of a CVD order. A determination in

[147] 19 U.S.C. § 1675(a)(2)(C) (Exhibit USA-15). For further discussion of the U.S. retrospective duty assessment system, please see the U.S. response to question 87. *See also* 19 C.F.R. § 351.212(a) (Exhibit USA-18).
[148] In the United States, a separate agency from Commerce, the Commission, is responsible for conducting investigations to determine injury and causation. Investigations by the Commission are not implicated by the challenged "ongoing conduct" measure at issue in this dispute.
[149] 19 U.S.C. § 1671d (Exhibit USA-4). For a further discussion of the U.S. retrospective duty assessment system, and the difference between cash deposits for estimated duties and assessed duties, please see the U.S. response to question 87. *See also* 19 C.F.R. § 351.212(a) (Exhibit USA-18).
[150] 19 U.S.C. § 1675(a) (Exhibit USA-15).

an administrative review becomes the basis for the assessment of countervailing duties on entries of merchandise covered by the determination and for deposits of estimated duties.[151]

**b. In answering this question, insofar as the parties use the terms used in footnote 6 of Canada's Methodology Paper to refer to the types of post-original-investigation proceedings, please only do so after explaining how such terms relate to relevant types of reviews referred to in US law; and**

**Response:**

103. The United States does not agree with Canada's assertion that new shipper reviews, expedited reviews, changed circumstances reviews, and sunset reviews are within the scope of this arbitration.[152] The United States recalls that the challenged discovered subsidy "ongoing conduct" is an unwritten measure, which imposed upon Canada a high evidentiary burden to demonstrate the measure's existence. Particularly in the scenario of an unwritten measure, the existence of which is not immediately evident and is disputed by the parties, the evidence used by the complainant defines the very existence of the measure itself. 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."[153] Here, to demonstrate the existence of the challenged measure, Canada utilized nine CVD determinations, consisting of post-2012 investigations or administrative reviews.[154] Canada brought forward no evidence relating to new shipper reviews, expedited reviews, changed circumstances reviews, or sunset reviews. Therefore, the measure, as defined by Canada, relates only to CVD investigations and administrative reviews. New shipper reviews, expedited reviews, changed circumstances reviews, or sunset reviews are not a part of the challenged measure.

104. The United States recalls the U.S. response to question 8, discussing the precise content of the challenged measure as when, "[(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."[155] The other forms of assistance question was defined by Canada as, whether a respondent country provided the respondent company with "any other forms of assistance", "directly or indirectly", and to "describe such assistance in detail, including the amounts, date of receipt, purpose and terms".[156]

[151] 19 U.S.C. § 1675(a)(2)(C) (Exhibit USA-15).
[152] Canada's Methodology Paper, para. 3, n. 6.
[153] *Argentina – Import Measures (AB)*, para. 5.108.
[154] *US – Supercalendered Paper (Canada) (Panel)*, para. 7.314 ("Canada argues that in each post-2012 investigation or review listed above . . . .").
[155] *US – Supercalendered Paper (Canada)* (Panel), para. 7.316.
[156] *US – Supercalendered Paper (Canada) (Panel)*, para. 7.309, Table 1.

Additionally, part three of the measure is limited to circumstances where Commerce uses facts available on the basis of a party's failure to provide necessary information.[157]

105. Therefore, the challenged measure is present when, in a CVD investigation or administrative review, Commerce (1) asks the other forms of assistance question, then (2) discovers information during verification that Commerce deems should been provided in response to the other forms of assistance question, and finally (3) determines to apply adverse facts available on the basis of a party failing to provide necessary information to determine that such information amounts to countervailable subsidies.

**c. As part of your answer, could the parties please explain whether the parties propose that Canada will run the model only when the USDOC places CVDs on a Canadian company for the first time using, at least in part, the OFA-AFA Measure? If this is so, when would Canada run the model if, for instance: (i) the USDOC applies the OFA-AFA Measure to different OFA programmes at different points in time against the same Canadian firm (e.g. *vis-à-vis* one OFA programme in the original investigation and *vis-à-vis* a different OFA programme in a subsequent "administrative review"); and/or (ii) the USDOC applies a CVD rate using the OFA-AFA Measure *vis-a-vis* Canadian Exporter A in an original investigation, and in a subsequent proceeding subjects a new Canadian Exporter B to CVDs using the OFA-AFA Measure? In each of these two enumerated instances, please explain what the reference period would be for the market shares and the value of imports (*vimp*).**

**Response:**

106. The challenged measure is a fact-specific determination that is both company-specific and proceeding-specific. The United States therefore considers that the model could be run after affected duties are assessed.[158] This could include Commerce's application of the challenged measure at different points in time in the same CVD proceeding against the same Canadian respondent. This could also include Commerce applying the challenged measure to one Canadian respondent in the investigation of a CVD proceeding,[159] and then applying the challenged measure to another Canadian respondent in a subsequent administrative review of that same proceeding.

[157] *US – Supercalendered Paper (Canada) (Panel)*, para. 7.313, Table 2. *See also* Appellate document, *US – Supercalendered Paper (Canada)*, para. 5.74.

[158] As explained, because the United States has a retrospective duty assessment system, the United States considers it appropriate that Canada only "trigger" the model after assessment of CVD duties occurs – either when an administrative review is not requested, or after the final determination in an administrative review is published. For further discussion of the U.S. retrospective duty assessment system, please see the U.S. response to question 87. *See also* 19 C.F.R. § 351.212 (Exhibit USA-18).

[159] However, as noted above, if the challenged measure is applied in an investigation, Canada could only run the model after the duties are actually assessed.

107. The imposition of countermeasures may only occur for the duration of the assessment of an affected CVD duty. Specifically, CVD rates for companies are subject to change under a CVD order. During a CVD investigation, companies obtain a rate for estimated duties, or cash deposits; the final determination in a CVD investigation is not the basis for duty assessment. Rather, for each administrative review of a company, that company obtains a CVD rate that becomes the basis for assessment of duties for entries during the time period covered by the administrative review, and the duty rate also becomes the cash deposit rate for all of that company's future entries. When a company does not request an administrative review, Commerce instructs Customs to assess duties at the rate established in the completed review covering the most recent prior period or, if no review has been completed, the cash deposit rate applicable at the time merchandise entered.[160]

108. Therefore, countermeasures may be imposed when the duties assessed are affected by the challenged measure. If, in a subsequent administrative review, the duties assessed are not affected by the challenged measure, countermeasures should cease. Conversely, if the company is not further reviewed in a subsequent administrative review and its entries continue to be assessed at a rate affected by the challenged measure, as discussed in the U.S. response to question 111, an adjustment for inflation may be appropriate.

109. For clarity, the United States provides the following examples.

110. If the challenged measure is applied in an investigation to company A, but in the subsequent administrative review the challenged measure is not applied to company A, Canada will have no basis to impose countermeasures because no Canadian company has been assessed a CVD duty determined using the challenged measure, and no benefits accruing to Canada were nullified or impaired.[161]

111. If company A receives an affected CVD rate in the first administrative review, then Canada could run the model after the final determination is published to establish a level of nullification or impairment. If company A is then reviewed in the second administrative review and the challenged measure is not applied to it, then Canada would not be able to continue to apply countermeasures since company A will be assessed a new duty rate and will no longer be assessed a duty rate determined using the challenged measure.

112. On the other hand, if company A is reviewed in the second administrative review and the challenged measure is again applied in determining the company's duty rate, then Canada may run the model again and impose countermeasures for the second application of the challenged measure while also terminating the countermeasures for the first application of the challenged measure. This is appropriate since the assessed duty rate for company A contains the second

[160] *See* 19 C.F.R. § 351.212 (Exhibit USA-18).
[161] This presumes that the removal of the challenged measure from the CVD rate in the investigation would continue to result in an affirmative determination.

application of the challenged measure, and no longer contains the first application of the challenged measure.

113. Continuing the hypothetical, assuming company A is assessed an affected CVD rate in the first administrative review and continues to be assessed that same rate for entries during the second administrative review,[162] if company B is also affected by the challenged measure, Canada may run the model again to account for the affected CVD rates of both company A and company B. However, Canada may not continue to simultaneously impose the countermeasures resulting from company A's affected CVD rate from the first administrative review because the effects of that rate will be accounted for in the second run of the model.

114. With respect to reference period, for either a CVD investigation or administrative review that contains the challenged measure, the full calendar year prior to the issuance of the final determination should be used.[163]

115. To execute the above and to avoid any double-counting or overlap in the application of countermeasures, if the challenged measure is applied in a CVD proceeding, 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. This approach was suggested by the arbitrator in *US – Washing Machines (Korea) (Article 22.6 – US)*.[164]

**36. <u>For both parties</u>: Could the parties please explain how relevant data kept by the US Census Bureau, the US Bureau of Economic Affairs, US Customs, and the USITC DataWeb are compiled and organized?[165] In particular, are such data "company-specific" and/or "product-specific" as the parties have used these terms[166], and/or is it organized by HTS-level (and, if so, at what HTS level)? Are there correspondence tables between these data and the HS classification? Moreover, please explain whether: (a) such data are organized by fiscal year or calendar year; and (b) such data are publicly available or confidential in nature. If the data is confidential in nature, who would need to consent to their release?**

[162] This would occur if company A did not request a review during the second administrative review. When a company does not request an administrative review, Commerce instructs Customs to assess duties at the rate established in the completed review covering the most recent prior period or, if no review has been completed, the cash deposit rate applicable at the time merchandise entered. *See* 19 C.F.R. § 351.212(c) (Exhibit USA-18).
[163] U.S. Written Submission, para. 47; Canada's Written Submission, para. 180.
[164] *See US – Washing Machines (Korea) (Article 22.6 – US)*, para. 5.3.
[165] With respect to US Customs data, please explain these aspects for the time period both before and after a CVD order is put into place (See U.S. written submission, para. 139).
[166] See e.g. Canada's written submission, paras. 144 and 171(c).

**Response:**

116. In the paragraphs that follow, the United States explains how the relevant data are kept by each U.S. agency referenced in the question.

117. **U.S. Customs and Border Protection ("Customs") Trade Data:** The United States considers that it would be appropriate for the value of Canadian imports to be obtained from Customs because this is the U.S. agency responsible for trade data on entries subject to AD/CVD duties, and it can also provide data on a company-specific, 10-digit Harmonized Tariff Schedule ("HTS") code basis for the purposes of determining the level of nullification or impairment.[167] Specifically, Customs maintains trade data through the Automated Commercial Environment (ACE) Data Portal. Data are collected on the 10-digit HTS level, as well in accordance with an AD/CVD case number, if applicable. Information for any time period can be accessed, and therefore can be organized on a fiscal or calendar year basis. The data in ACE are not publicly accessible, although individual importers and customs brokers have access to their own information. Company-based information is available through the ACE system, but it is also confidential. As explained in further detail in the U.S. response to question 101, if the Arbitrator were to adopt BCI procedures for the purpose of implementing the decision of the Arbitrator, then the United States would be able to provide to Canada, on a confidential basis, the relevant, company-specific data compiled by Customs.

118. With respect to footnote 14 of the Arbitrator's question, which asks for further information on Customs data for the time period before and after a CVD order is put into place, please see the U.S. response to question 87, below.

119. **U.S. Census Bureau ("Census") Trade Data:** The United States considers it would be appropriate for the value of total U.S. imports to be based on Census data.[168] The trade data maintained by Census is extracted from Custom's ACE data portal. The data remain compiled at the 10-digit HTS level. This information is available publicly, and the data are published on a monthly basis and organized by calendar year. Company-specific data is confidential, but under neither parties' approach would company-specific data be needed for the value of total U.S. imports. Notably, Census does not compile or maintain data specifically in respect of entries that are subject to AD/CVD cash deposits or duties, *i.e.*, it is not possible to query the value of entries subject to AD/CVD orders using Census data.

120. Census offers concordance (or correspondence) tables between the export and import HTS codes and other classification schedules, including the Standard International Trade Classification (SITC), the Standard Industrial Classification (SIC), End-Use, U.S. Department of Agriculture (USDA/AG), North American Industry Classification System (NAICS), and Advanced Technology Products (ATP/HITECH).

121. **U.S. International Trade Commission DataWeb ("USITC DataWeb") Trade Data**: As an initial matter, the United States notes that neither party has suggested the use of USITC

[167] U.S. Written Submission, para. 128 and Appendix 2, Table 1.
[168] U.S. Written Submission, para. 128 and Appendix 2, Table 1. *See also* Canada's Written Submission, para. 153.

DataWeb trade data. The United States considers that it would not be appropriate to use data from USITC DataWeb given that data are not available on a company-specific basis. The data maintained in the database also do not distinguish entries that are subject to AD/CVD duties.

122. The USITC DataWeb is a public web portal containing 10-digit HTS level trade data from Census (which is pulled from Customs' ACE portal), and is accessible to the public. The data in DataWeb can be queried by month, quarter, or calendar year, and can be queried by product by various classification systems (including HTS, NAICS, SITC, and SIC).

123. **U.S. Bureau of Economic Affairs ("BEA") Data:** The United States does not consider that it would be appropriate to use the BEA Input-Output ("I-O") data to obtain the value of U.S. domestic market share.[169] Rather, because the parties agree that the value of imports should concern the companies and product at issue, it is also important for the relevant market share to be related to the specific product.[170] This information is available in the relevant Commission report.[171]

124. The BEA I-O tables provide estimates of import and export commodity data. The estimates are publicly available annually on a calendar year basis (1997-2019), with 73 detailed commodities, and with 405 detailed commodities for the benchmark years 2007 and 2012. The estimates reflect the 2012 NAICS classification system. As discussed above, Census maintains a concordance table between the HTS codes and the NAICS codes, which provides the basis for BEA's concordance table between HTS codes and I-O codes.

**Questions 37 through 44 are addressed to Canada.**

**45. <u>For the United States</u>: The United States' proposed model, at times, calls for the use of information taken from future USITC reports. Could the United States please explain:**

**a. in instances in which Canada's right to run the model to determine a level of suspension arises as a result of an event occurring in a post-original-investigation proceeding, whether the relevant USITC report would be the report published as a result of that specific proceeding or whether the relevant USITC report would be the report published as a result of the original investigation; and**

**<u>Response</u>:**

125. The Commission publishes injury determinations both during the investigation phase and during a sunset review of a CVD order. The sunset review takes place no later than once every five years after an AD/CVD order is issued to determine whether revoking the order would likely lead to continuation or recurrence of injury. If a CVD investigation of the same product, but

[169] *See* Reishus & Lemon Methodology Report, Appendix 2, para. 5.
[170] *See* U.S. response to question 76.
[171] *See* U.S. Written Submission, para. 129.

from a different country, occurs, the Commission will again assess whether injury has occurred to the U.S. domestic industry and issue a determination. Therefore, with respect to administrative reviews (the "post-original investigation proceeding" referenced in the question), the United States considers it would be appropriate to use the Commission determination for the product at issue that is most recent relative to the period of time in which the challenged measure is applied.[172]

**b. for each type of information that the United States proposes be taken from future USITC reports (i.e. epsilon, eta_us, sigma, and domestic shipments in the notation and terminology of Table 1 in Appendix 2 of the United States' written submission), whether the USITC is legally mandated to include that information in its reports? If so, please include excerpts from relevant statues or regulations mandating such inclusion.**

**Response:**

126. Although the Commission is not required by law to include information concerning elasticities and market share in its determinations, the Commission has, as Canada acknowledges, routinely provided this information in its reports since 1987.[173] Indeed, in the two CVD proceedings for which Canada alleges "continuous risk" of the application of the challenged measure,[174] quantitative elasticity estimates were provided.[175] If the Arbitrator determines that the challenged measure might be applied in the future, in part, because of existing CVD proceedings, then existing Commission reports on Canadian products in those CVD proceedings should be considered as a source of the necessary values.

**46. For the United States: Could the United States please provide theoretical arguments in response to Canada's assertion in paragraphs 113-114 of Canada's written submission that the separation of Canadian imports into Armington varieties depending on tariff treatment following US CVD investigations is "not founded on any principled notion of demand for variety"?**

**Response:**

127. The United States has provided a practical application of a theoretical model that is well-founded in the economic literature. Contrary to Canada's assertions, the assumptions underlying

[172] *See, e.g., US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.97 (using a demand elasticity estimate from the Commission investigation on large residential washers from China); para. 3.100 (using an elasticity estimate from the Commission's global safeguard investigation of large residential washing machines).
[173] Canada's Written Submission, para. 143.
[174] Canada's Written Submission, para. 42.
[175] *Softwood Lumber Products from Canada*, USITC Publication 4749, Investigation Nos. 701-TA-566 and 731-TA-1342 (Final), Dec. 2017 ("USITC Softwood Lumber Final Determination"), pp. II-27 to II-28 (Exhibit USA-34); *Utility Scale Wind Towers from Canada, Indonesia, Korea, and Vietnam*, USITC Publication 5101, Investigation Nos. 701-TA-627-629 and 731-TA -1458-1461 (Final), Aug. 2020 ("USITC Wind Towers Final Determination"), pp. II-34 to II-35 (Exhibit USA-35).

the specification of individual Canadian varieties is consistent with economic principles and is founded on a "principled notion of demand for variety".[176]

128. As an initial matter, Canada misunderstands the purpose of having multiple Canadian varieties. The United States does not advocate for multiple Canadian varieties simply because the Canadian exporters may have different duty rates.[177] Rather, there are a number of circumstances present that, together, require the use of multiple Canadian varieties.[178] First, the subject Canadian duty rates (including the All Others rate) from the outset could differ across Canadian companies. Second, because the challenged measure is a company-specific measure, the removal of the challenged measure could elicit a different magnitude of change for each of the subject duty rates. Further, the effect of non-uniform changes among subject Canadian duty rates on all sources of supply differs from the effect of a uniform subject Canadian duty rate change. Lastly, the effect of the changes in subject Canadian duty rates on all sources of supply will need to be captured for subject and non-subject Canadian companies to obtain a reasoned estimate of nullification or impairment for Canada as a whole, and to not incorrectly limit the estimate only to the impact on subject Canadian exporters.[179] Therefore, the use of multiple Canadian varieties is necessary to account for the heterogenous impact on all sources of supply, including subject and non-subject Canadian imports, as a result of the heterogeneous change in duty rates on subject Canadian importers.

129. The use of multiple Canadian varieties is also consistent with the theory of demand underlying the Armington model. Indeed, Canada's own exhibit, Hallren and Riker (2017), introduces the Armington partial equilibrium framework explicitly by defining imported varieties in terms of trade policy treatment.[180] The example framework in Hallren and Riker (2017) includes three varieties: a domestic variety, an imported variety subject to a change in trade policy, and an imported variety not subject to a change in trade policy. In Hallren and Riker's example, the simulated change in trade policy is uniform and only applies to a single subject variety.[181] Likewise, here, if the elimination of the challenged measure modified the subject Canadian companies' duty rates in a uniform manner, there would be no need for multiple Canadian varieties.[182] However, as discussed above, the removal of the challenged measure on

[176] Canada's Written Submission, para. 113.
[177] *See* Canada's Written Submission, para. 114 ("Under the U.S. approach, imports from Canadian products would be considered different markets based solely on the tariff attributes of the imports.").
[178] U.S. Written Submission, paras. 73-76, 82.
[179] *See, e.g.*, U.S. Written Submission, paras. 73-74 (explaining the need for at least five varieties: subject individually-investigated Canadian company, subject All Others rate, non-subject Canadian imports, U.S. supply, and imports from the rest of the world).
[180] *See* Ross Hallren & David Riker, "An Introduction to Partial Equilibrium Modeling of Trade Policy," USITC Office of Economics Working Paper Series (July 2017) ("Hallren & Riker (2017)"), p. 4 (Exhibit CAN-04).
[181] Hallren & Riker (2017), p. 4 (Exhibit CAN-04).
[182] On a mathematical basis, this is only true if the initial duty rates of the individually-investigated company and All Others were identical, and the change in the duty rate was identical. In that case, there would be no need for the model to have these as two separate varieties.

subject Canadian companies could result in different magnitudes of change in duties, given that the challenged measure is company-specific.[183]

130. Canada further 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.[184] 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".[185] Here, in contrast, the focus is on the effect of a "trade policy" that differs across companies.[186] 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.

131. Importantly, the United States is not introducing an innovation in this respect. For instance, in one application of the partial equilibrium Armington framework, the Commission (2019) defines a model in which varieties are distinguished not by country, 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.[187] Moreover, the Armington model used by the arbitrator in *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)* also defined three varieties of subject-country imports, differentiated by duty rates.[188]

132. Canada also argues that the United States is treating Canadian companies as "multiple, independent markets".[189] Canada is incorrect. As explained, the United States is appropriately treating imports from Canadian companies with different changes in duty rates as imperfect substitutes from the perspective of U.S. buyers. By doing so, the United States has ensured that the effects of different duty rate changes on subject Canadian companies are accounted for simultaneously in a single counterfactual U.S. market, thus correctly representing the counterfactual scenario in which the United States removes the challenged measure. As

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[183] U.S. Written Submission, paras. 73-76, 82.
[184] Canada's Written Submission, para. 113.
[185] Paul S. Armington, *A Theory of Demand for Products Distinguished by Place of Production*, IMF Staff Papers, Vol. 16, No. 1 (Mar. 1969) ("Armington (1969)"), p. 171 (Exhibit USA-20).
[186] As explained in the U.S. written submission, the challenged measure is a company-specific determination by Commerce that may impact both an individually-investigated company and the companies under the All Others rate. *See* U.S. Written Submission, para. 75.
[187] *See* USITC (2019), U.S.-Mexico-Canada Trade Agreement: Likely Impact on the U.S. Economy and Specific Industry Sectors, USITC Publication Number 4889, April 2019, Appendix I (Exhibit USA-21).
[188] *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 6.80 (applying the Armington model with five varieties, which included three Chinese varieties).
[189] Canada's Written Submission, para. 114.

demonstrated in the U.S. written submission, Canada's approach is entirely disconnected from the appropriate counterfactual scenario, in which the United States simultaneously modifies all duty rates affected by the challenged measure.[190]

133. Therefore, alternative methodologies, such as Canada's approach, that do not introduce multiple Canadian varieties in a single model distort the measurement of nullification or impairment. This is true whether multiple Canadian varieties are omitted from the non-linear model advocated by the United States or from the linearized model on which Canada's incorrect formula is based.

**47. <u>For the United States</u>: Could the United States please comment on paragraphs 126-128 of Canada's written submission, which argues that the Canadian model provides a reasonable approximation to the offsetting changes in demand that are stressed by the United States in support of its model? Could the United States further clarify whether, in the US model, larger market shares lead to smaller proportionate trade effects in response to duty rate changes and therefore to a downward bias in the level of NI?**

**<u>Response</u>:**

134. Canada argues that it does not need to account for multiple varieties in a single model because the definition of market share that Canada proposes to use in its predetermined "scaling factor" will offset changes in demand among imports from Canada.[191] This is false. As explained in the U.S. written submission and in the U.S. response to question 46, the appropriate measure of nullification or impairment is the gain to the subject Canadian companies (if the duty rate is reduced), while also accounting for the corresponding losses to the non-subject Canadian companies. Canada's approach is incorrect because it only measures the gains to the subject Canadian importers, and fails to account for the offsetting losses to the non-subject Canadian companies, thereby overestimating nullification or impairment to Canada as a whole.

135. Canada asserts that defining a common scaling factor that uses the market share of all Canadian imports will compensate for this omission.[192] Specifically, Canada argues that applying a common "scaling factor" individually to the value of imports and change in duty rate for each company directly affected by the challenged measure will result in a smaller trade effect than if scaling factors were defined for each affected company using that company's market share.[193]

136. As an initial matter, as discussed in the U.S. response to question 76, 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

[190] U.S. Written Submission, paras. 85-86.
[191] Canada's Written Submission, para. 127.
[192] Canada's Written Submission, paras. 126-128.
[193] Canada's Written Submission, para. 128.

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. In contrast, the U.S. model captures the relative position of each company by correctly defining each company's market share as its share of total U.S. expenditure on the specific product during the reference period.

137. The United States observes that in Canada's formula, it is true that for a fixed value of imports the impact of a duty reduction is smaller if the market share corresponding to that fixed value is larger. This is because a larger market share corresponding to a fixed imports value implies a smaller total U.S. market. For example, if $1 of imports corresponds to a 30 percent market share, it implies a total U.S. market worth $3.33, whereas if $1 of imports corresponds to a *larger* 50 percent market share, the implied total U.S. market is only worth $2. Indeed, estimated nullification or impairment will generally be larger in the $3.33 U.S. market (30 percent market share) than the $2 U.S. market (50 percent market share). As such, under Canada's approach, if the market share associated with total Canadian imports used in the "scaling factor" exceeds a subject variety's actual market share,[194] it will implicitly understate the size of the U.S. market, and therefore underestimate nullification or impairment associated with that variety.

138. However, Canada's line of reasoning 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 on Canada's part, given that the product and time period are unknown. The market shares Canada proposes to use in the predetermined scaling factors 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.

139. Indeed, nullification or impairment would be biased upward for any product in a hypothetical, future year in which a shock like the COVID-19 pandemic reduced the market share of importers relative to the past. Moreover, even if the market share were consistent with the specific product in the year for which the fixed market share is calculated, nullification or impairment will be biased upward for all future years if Canada's market share declines over time.

140. To illustrate, if one assumes that the COVID-19 pandemic induces substantial investment in U.S. domestic production in the widget industry, and in turn, induces a consequent decline in Canada's market share of widgets, then, under Canada's methodology, nullification or impairment attributable to a future CVD determination on widget type A will be based on Canada's competitive position in the general U.S. widget industry in 2018 and 2019, rather than the relatively diminished contemporary competitive position.

[194] That is, if the predetermined market share used in the scaling factor, $\theta_{CA}$, exceeds the actual market share of the subject variety, which would correctly be calculated as $\frac{vimp\ of\ subject\ variety\ of\ specific\ product}{total\ U.S. apparent\ consumption\ of\ specific\ product}$.

141. Further, by applying a scaling factor defined with the same market share to multiple Canadian companies with different values of imports, Canada is implicitly assuming each company operates in a U.S. market with a different total market value. This unusual assumption could only be true if each Canadian variety were competing in separate and independent U.S. markets. More importantly, here, Canada has presented no evidence that applying a common scaling factor to multiple exporters will capture the balance of gains and losses across all Canadian supplying entities due to a set of changes in duty rates in a subset of Canadian companies.

142. Lastly, in response to the Arbitrator's request for clarification concerning the implications of the U.S. model, the United States confirms that larger market shares for Canadian varieties in the U.S. model will lead to larger nullification or impairment in almost all cases.[195] However, this is because in the U.S. model, if a company has a larger market share, it implies that that company represents a larger share of expenditure in the U.S. market for the specific product. This is in contrast to the Canadian formula, where a larger market share implies that the company is operating in a smaller U.S. market.

**48. For the United States: Could the United States please explain under which circumstances the inclusion of tariffs with respect to imports from the rest of the world (i.e. US imports from countries other than Canada) would impact the level of NI of its model? In particular, would a change in the average applied import tariff rate of a certain variety change the model results and should therefore be considered?**

**Response:**

143. As an initial matter, on a mathematical basis, the level of tariffs on imports from the rest of the world will not affect the level of nullification or impairment unless the tariffs change between the actual and counterfactual scenarios. For the purposes of this dispute, the level of tariffs on imports from the rest of the world are not relevant to the calculation of nullification or impairment because they are held constant. That is, the appropriate model for calculating nullification or impairment estimates the difference between imports from Canada during the relevant time period and imports from Canada during the same time period under counterfactual conditions in which CVD rates are not affected by the challenged measure, but all other factors are held fixed. Tariffs on imports from the rest of the world are by definition held fixed between the actual and counterfactual scenarios, and therefore the model does not need to explicitly account for them.[196]

144. Although the value of tariffs applied to imports from the rest of the world do not factor into the calculation of nullification or impairment, as explained in the U.S. response to question

[195] The exception is when subject varieties have a very large initial market share.
[196] *See* Erika Bethmann *et al*., "A Non-technical Guide to the PE Modeling Portal", USITC Office of Economics Working Paper Series (March 2020) ("Bethmann *et al.* (2020)"), p. 6 ("There is no need to enter tariff rates for non-subject imports because the model assumes they remain fixed and they are implicitly captured in the parameter calibration.") (Exhibit USA-22).

67, imports from the rest of the world must still be represented as a distinct variety in the model to correctly capture the supply response of all varieties in the market to changes in duties on subject imports from Canada. As discussed in the U.S. response to question 64, domestic supply responsiveness is expected to be much smaller than the responsiveness of other importers competing with Canada.

**49. <u>For the United States</u>: Could the United States please clarify whether its model would need to be expanded in order to capture more than five varieties in the case of more than one individually investigated Canadian company? In particular, does the United States consider every individually investigated Canadian company that receives an individual CVD rate a unique variety? In this respect, could the United States please comment on paragraph 116 of Canada's written submission?**

**<u>Response</u>:**

145. As explained in the U.S. written submission, at least five varieties are needed to accurately reflect the counterfactual scenario if both an individually-investigated company rate and the All Others rate are affected by the challenged measure. That is: (1) the U.S. domestic product, (2) imports from the individually-examined Canadian company subject to the challenged measure, (3) imports from Canada under the All Others rate subject to the challenged measure, (4) imports from Canada that are not subject to the challenged measure, and (5) imports from the rest of the world.[197] To clarify, the United States does not consider every individually-investigated company that receives an individual CVD rate to need an individual variety. Rather, the United States considers that it would be appropriate to have a unique variety for each individually-investigated Canadian company that has a CVD rate <u>that includes the application of the challenged measure</u>. This is because the challenged measure is a company-specific determination, and the impact of removal of the challenged measure would differ for each impacted company.[198] The CVD rates of individually-examined Canadian companies that are not subject to the challenged measure would remain the same in the counterfactual scenario, and thus such companies could be grouped together in the model.

146. Therefore, the United States confirms that hypothetically, if the challenged measure were applied to more than one individually-investigated Canadian company, each impacted Canadian company would constitute a separate variety.[199] The U.S. model has the capacity to capture multiple varieties of the subject imports from Canada.[200] In contrast, if only one individually-investigated Canadian company is subject to the challenged measure, and the other individually-investigated Canadian companies are not impacted by the challenged measure, no additional

[197] *See* U.S. Written Submission, paras. 72-73 and Appendix I, paras. 2-4.
[198] *See* U.S. Written Submission, paras. 72-73 and Appendix I, paras. 2-4.
[199] U.S. Written Submission, Appendix I, para. 4, n. 143.
[200] U.S. Written Submission, Appendix I, para. 3 ("It is straightforward to extend this model to incorporate additional Canadian varieties as necessary (*i.e.*, if there are multiple individually-investigated companies that are subject to rate changes due to the removal of the challenged measure).").

varieties beyond the five listed above would be needed because the remaining individually-investigated companies would be considered non-subject imports from Canada.[201]

147. Canada's written submission highlights the *Softwood Lumber from Canada* CVD investigation, where there were five individually-investigated Canadian companies, along with an All Others rate.[202] In this scenario, each company that would hypothetically be impacted by the challenged measure would be a unique variety. If only one individually-investigated company were subject to the challenged measure (and the All Others rate were also impacted by the challenged measure), there would remain three Canadian varieties: the subject individually-investigated company, the subject All Others rate, and all other individually-investigated companies not subject to the challenged measure.[203]

## 4 MODEL PARAMETERS

### 4.1 Elasticity of Substitution

**50. <u>For both parties</u>: The United States expressed reservations with respect to the high aggregation of sectors in Caliendo and Parro (2015) (Exhibit CAN-06), used for substitution elasticities by Canada. The Arbitrator would like to explore the opportunity for an alternative data source with less aggregated information for Armington substitution elasticities. Should the Arbitrator decide to employ pre-determined values for the elasticity of substitution**:

**a. would the parties consider the elasticities calculated by Lionel Fontagné, Houssein Guimbard and Gianluca Orefice for 42 GTAP (Rev. 10) sectors, and available at https://sites.google.com/view/product-level-trade-elasticity, an appropriate data source to derive Armington substitution elasticities that could be used in each of the parties' proposed methodologies?**

**b. If so, would the parties "disaggregate" Armington substitution elasticities derived from GTAP at the level of HS chapters, and by which methodology?**

**c. If not, what other publicly available data source would the parties suggest?**

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[201] Indeed, if there is an instance in which the All Others rate is not affected by the challenged measure, the All Others rate would also not need to be a unique variety as it would similarly be considered under the variety capturing non-subject Canadian imports. However, such an instance would be rare given that the All Others rate is calculated based on an average of the individually-investigated companies, excluding rates that are *de minimis*, zero, or based entirely on facts available. Therefore, for ease, the United States has illustrated a scenario with five varieties.

[202] Canada's Written Submission, para. 116.

[203] *See* U.S. Written Submission, Appendix I, para. 4 (noting that the model includes "imports from Canada that are not subject to a rate change").

**Response:**

148. The United States has explained why the use of pre-determined values does not accord with an arbitrator's mandate under the DSU to select a methodology that will result in setting the level of suspension equivalent to the level of nullification or impairment.[204] Indeed, the selection of a formula with pre-determined, fixed values would fail to capture the characteristics of future product markets, and therefore would not result in a reasonable estimate, consistent with Article 22.4 of the DSU. Therefore, the United States considers it would be more appropriate to use the substitution elasticity estimates from the corresponding Commission report because it would be directly related to a specific product at issue and would be related closer in time to the relevant time period.[205]

149. Further, the United States notes that taking all the required elasticity estimates from one source is more appropriate than taking one elasticity from one academic study and another elasticity from a different source, because, as documented in Ahmad *et al* (2020), elasticity estimates can vary, even for the same sector or product, across studies depending on the assumptions made and estimation methods employed by the researcher.[206] The Commission report is the only source which provides product-specific demand, supply, and substitution elasticities based on a consistent method and approach. In fact, in past arbitrations, once the product at issue is known, prior arbitrators have also relied on Commission reports for elasticities to estimate the level of nullification and impairment, rather than elasticity estimates from the GTAP database or academic literature.[207]

150. Further, Table 2 in the U.S. written submission illustrates that studies that contain elasticities for more aggregated sectors will provide estimates likely to diverge from the elasticity of a specific product, once it is known.[208] To that end, if the Arbitrator decides to select Fontagné *et al* (2020) as a source of substitution elasticities, it is unnecessary to "disaggregate" the substitution elasticities derived from the GTAP 10 database because the authors provide the elasticities as estimated at the 6-digit HS level. Therefore, it is preferable that the Arbitrator use the 6-digit HS level data.

151. To the extent the Arbitrator determines to use an external source for substitution elasticity estimates, there are a number of published sources in addition to Fontagne *et al.* (2020) that offer estimates at a more disaggregated level than Canada's proposed source of Caliendo and Parro (2015), and Fontagne *et al* (2020) estimates for GTAP 10. Ahmad *et al.* (2020) review several of these studies and illustrates that elasticity estimates applicable to a given product can vary significantly across studies depending both on the sectoral aggregations and the methodology

[204] U.S. Written Submission, paras. 92-97, 101-103.
[205] U.S. Written Submission, paras. 115-118.
[206] *See generally* Saad Ahmad *et al.*, "A Comparison of Armington Elasticity Estimates in the Trade Literature", USITC Office of Economics Working Paper Series (April 2020) ("Ahmad *et al.* (2020)") (Exhibit USA-23).
[207] *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 7.36; *US – Washing Machines (Korea) (Article 22.6 – US)*, paras. 3.97-3.101.
[208] U.S. Written Submission, Appendix 3, Table 2.

employed.[209] The United States highlights Soderbery (2015)[210] and Ahmad and Riker (2019)[211] as two other recent contributions that employ methodologies and levels of aggregation distinct from one another and from Fontagne *et al* (2020). The below table provides descriptive statistics for the elasticity estimates in each of these studies. The table demonstrates that the median substitution elasticity estimate in Fontagne *et al* (2020) is substantially larger than the other two studies. This suggests that estimates in Fontagne *et al* (2020) are likely to exceed elasticity estimates from other published sources.

**Comparison Table 1**

| Study | Substitution Elasticity | Aggregation Level |
|---|---|---|
| Soderbery (2015) | Range = [1.0, 131],[212] Median = 1.9 | 8- and 10-digit HTS |
| Ahmad and Riker (2019) | Range = [1.2, 11.6],[213] Median = 2.5 | 6-digit NAICS |
| Fontagne *et al*. (2020) | Range = [1.3, 123],[214] Median = 8.9 | 6-digit HS |

152. Given that there is no consensus among economics practitioners on the ideal methodology for estimating the elasticity of substitution,[215] the United States suggests the Arbitrator consider multiple sources and evaluate whether the accumulated literature suggests a consensus value for an individual product. When comparing estimates, the elasticities reported in the public Commission reports for existing Canadian CVD proceedings must also be considered given that they are tailored to a specific product subject to a CVD order. In *Softwood Lumber*, the report noted a substitution elasticity of 2 to 5.[216] In *Wind Towers*, the Commission report noted a substitution elasticity of 3 to 5.[217] If the Arbitrator determines that there is "risk" to Canada for future nullification or impairment, then these existing CVD proceedings should be taken into account.

[209] *See generally* Ahmad *et al*. (2020) (Exhibit USA-23).
[210] Anson Soderbery, "Estimating Import Supply and Demand Elasticities: Analysis and Implications", Journal of International Economics, Vol. 96, Issue 1, May 2015 ("Soderbery (2015)") (Exhibit USA-24).
[211] Saad Ahmad & David Riker, "A Method for Estimating the Elasticity of Substitution and Import Sensitivity by Industry", USITC Office of Economics Working Paper Series (May 2019) ("Ahmad & Riker (2019)") (Exhibit USA-27).
[212] Figures obtained from the 8-digit HTS level dataset (Exhibit USA-25) and 10-digit HTS level dataset (Exhibit USA-26) accompanying Soderbery (2015).
[213] Figures obtained from the 6-digit NAICS level dataset (Exhibit USA-28) accompanying Ahmad & Riker (2019).
[214] Figures obtained from "Estimations results (tariff coefficient and standard errors) version 28 November 2019" from the website referenced in the question.
[215] *See* Ahmad *et al.* (2020), p. 18 (Exhibit USA-23).
[216] USITC Softwood Lumber Final Determination, p. II-28 (Exhibit USA-34). Notably, the Government of Canada's position in this proceeding, to use the larger value of 10.83 for substitution elasticity, is in contrast to its position before the Commission, where it argued that substitution elasticity for softwood lumber was no greater than the lowest end of the range of 2 to 5 identified by Commission staff. *Compare* Reishus & Lemon Methodology Report, p. 14, Figure 2 *with* USITC Softwood Lumber Final Determination, p. II-28, n. 44 (Exhibit USA-34).
[217] USITC Wind Towers Final Determination, p. II-35 (Exhibit USA-35).

153. As an illustration, Comparison Table 2, below, displays available estimates from the literature for HTS reference codes applicable to the *Softwood Lumber* and *Wind Towers* CVD orders, as well as the range of substitution elasticities from the corresponding Commission report. If the Arbitrator determines that an alternate source is more appropriate than the product-specific Commission estimates, the substitution elasticity estimate applied in the calculation of nullification or impairment should be a trade-weighted average of estimates corresponding to the relevant HTS reference codes. The United States has not taken that additional step for the purposes of this illustration. Nevertheless, for these particular CVD orders, it appears that the Fontagne *et al* (2020) estimates are systematically higher than both Ahmad and Riker (2019) and Soderbery (2015), as well as the Commission estimates. This suggests that a lower substitution elasticity value than those estimated by Fontagne *et al* (2020) would be more appropriate and consistent with the accumulated evidence for these CVD orders.

**Comparison Table 2**

| **CVD Order** | **Commission Range** | **Soderbery (2015)[218]** | **Ahmad and Riker (2019)[219]** | **Fontagne *et al* (2020)[220]** |
|---|---|---|---|---|
| *Softwood Lumber* | 2 - 5[221] | Range = 1.0 - 131 | Range = 2.9 - 5.4 | Range = 6.5 - 19 |
| | | Median = 2.2 | Median = 3.5 | Median = 12.9 |
| *Wind Towers* | 3 - 5[222] | Range = 1.3 - 2.1 | Range = 2.9 - 3.1 | Range = 3.8 - 4.1 |
| | | Median = 1.7 | Median = 3.0 | Median = 3.94 |

[218] To obtain the figures in this column, the United States took the reference 10-digit HTS numbers from the Softwood Lumber CVD order (Exhibit CAN-18) and Wind Towers CVD order (Exhibit USA-10), and then matched the numbers with the corresponding elasticity estimates from the 10-digit HTS level dataset accompanying Soderbery (2015). *See* Soderbery (2015) 10-digit HTS level dataset (Exhibit USA-26).
[219] To obtain the figures in this column, the United States took the reference 10-digit HTS numbers from the Softwood Lumber CVD order (Exhibit CAN-18) and Wind Towers CVD order (Exhibit USA-10), and then used the concorded NAICS classification dataset accompanying Ahmad & Riker (2019) to find the relevant elasticity estimates. *See* Ahmad & Riker (2019) 6-digit NAICS dataset (Exhibit USA-28).
[220] To obtain the figures in this column, the United States took the reference 10-digit HTS numbers from the Softwood Lumber CVD order (Exhibit CAN-18) and Wind Towers CVD order (Exhibit USA-10), and then matched the numbers with the corresponding elasticity estimates from the 6-digit HS dataset accompanying Fontagne *et al.* (2020) on the website referenced in the question.
[221] USITC Softwood Lumber Final Determination, p. II-28 (Exhibit USA-34). Notably, the Government of Canada's position in this proceeding, to use the larger value of 10.83 for substitution elasticity, is in contrast to its position before the Commission, where it argued that substitution elasticity for softwood lumber was no greater than the lowest end of the range of 2 to 5 identified by Commission staff. *Compare* Reishus & Lemon Methodology Report, p. 14, Figure 2 *with* USITC Softwood Lumber Final Determination, p. II-28, n. 44 (Exhibit USA-34).
[222] USITC Wind Towers Final Determination, p. II-35 (Exhibit USA-35).

154. Indeed, it is clear, when the product is known, the Commission report is the best available source. In contrast, pre-determining the elasticity values based upon academic studies will produce elasticity estimates that are demonstrably "'too remote', 'too speculative', or 'not meaningfully quantified.'"[223] Accordingly, the United States continues to consider that the appropriate source for substitution elasticity is the relevant Commission report for the future product.

**Questions 51 through 56 are addressed to Canada.**

**57. <u>For the United States</u>: In paragraph 104 of the United States' written submission, the United States argues that "[t]he Commission qualitatively estimates demand, substitution, and domestic supply elasticities for every product under a CVD (or AD) investigation in its investigation report", and that "the elasticity estimates should be the median of the range of the estimated elasticities determined by the Commission". Could the United States please describe the methodology that is used for such qualitative estimations, how the qualitative data are converted into quantitative estimates, and why the median should be used? In answering this question, please make reference to footnote 121 to paragraph 108 of Canada's written submission, where Canada claims that "the USITC's qualitative estimates have no consistent correlation with particular numerical values that would be required for use in a model for calculating the levels of nullification or impairment".**

**<u>Response</u>:**

155. The Commission has been estimating elasticities for AD/CVD investigations since 1987, and has broad experience in gathering and assessing information necessary to calculate elasticities. The Commission's approach for estimating the range of elasticity estimates is factual, systematic, and is based on relationships derived from economic theory. To determine the range of elasticity estimates for a product and market subject to an investigation, Commission staff take into account a range of factors that are likely to affect the elasticities at the time of the investigation. These include facts gathered from questionnaires issued to U.S. producers, U.S. importers, U.S. purchasers, and foreign producers;[224] and hearing testimony and briefs submitted by the interested parties. In any Commission investigation or review involving products from Canada, Canadian companies and the Government of Canada would have an opportunity to participate and provide input concerning the elasticities estimated by the Commission.[225] The Commission provides preliminary elasticity estimates to all parties of the investigation, and then considers arguments from the interested parties prior to releasing its final determination containing the final elasticity estimates. One section of each questionnaire focuses

[223] *US – 1916 Act (EC) (Article 22.6 – US)*, para. 6.10.
[224] *See* USITC Softwood Lumber Foreign Producer/Exporter Questionnaire (Exhibit USA-39); USITC Softwood Lumber U.S. Producer Questionnaire (Exhibit USA-40); USITC Softwood Lumber U.S. Importer Questionnaire (Exhibit USA-41); USITC Softwood Lumber U.S. Purchaser Questionnaire (Exhibit USA-42).
[225] For instance, in the Commission's *Softwood Lumber* investigation, the Government of Canada, several provincial governments, and Canadian companies collectively appeared at the hearing and submitted prehearing and posthearing briefs and final comments. *See* USITC Softwood Lumber Final Determination, p. 3 (Exhibit USA-34).

on questions related to economic factors that are relevant to determining supply, demand, and substitution elasticities. Those that relate to demand and supply conditions are explained in the U.S. responses to questions 61 and 66, respectively.

156. In each case, the Commission's expert economists examine the data collected on the determinants of each elasticity (that is, the factors that make the response to a price change for a product more or less elastic) as established in economic theory. For example, the cost share of an intermediate good (as an input) in the final product; the availability and closeness of substitute products; the industry's capacity utilization; and the flexibility of industrial plants in different industries to switch to production of the product under investigation.

157. The Commission questionnaires ask questions that relate to the elasticity of substitution.[226] Analysis of the responses to these questions are presented in Parts II and V of Commission reports, and include factors such as changes in purchase patterns over the period of investigation, lead times, minimum quantity requirements, inland transportation cost differences, sales price determination methods, discount policies, contract and spot sales frequency, contract terms, the share of sales that are produced to order compared to those that are sold out of inventories, market and product factors affecting purchasing decisions, how frequently purchase decisions are based on who the producer is or the country of origin of the product, the three most important factors purchasers consider in their sourcing decisions, importance of a minimum of 15 purchase factors, how important supplier qualification is and the length of time to achieve this, changes in the number of and the country of origin of suppliers in the market, the importance of purchasing domestic product, comparisons across countries on a minimum of 15 factors, cross-country product interchangeability, and factors other than price that are significant in the market.

158. Therefore, contrary to Canada's assertion,[227] the Commission's numerical elasticity estimates are derived from analysis and assessments, based upon the record of the investigation at the time. Consistent with best practices, the numerical estimates provided by the Commission staff are intended to provide a likely range within which the elasticities fall, not specific point estimates. Given that the estimates are a range, the United States considers it would be reasonable to use the median of the elasticity range. The use of estimates from the Commission in this proceeding would also be consistent with decisions in past arbitrations, including *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)* and *US – Washing Machines (Korea) (Article 22.6 – US)*.[228]

**58. <u>For the United States</u>: In paragraph 115 of the United States' written submission, the United States argues that "[t]he substitution elasticities for these broad sectors do not represent what the substitution elasticity may be for the actual specified**

[226] *See* USITC Softwood Lumber Foreign Producer/Exporter Questionnaire (Exhibit USA-39); USITC Softwood Lumber U.S. Producer Questionnaire (Exhibit USA-40); USITC Softwood Lumber U.S. Importer Questionnaire (Exhibit USA-41); USITC Softwood Lumber U.S. Purchaser Questionnaire (Exhibit USA-42).
[227] Canada's Written Submission, para. 108, n. 121.
[228] *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 7.36; *US – Washing Machines (Korea) (Article 22.6 – US)*, paras. 3.97-3.101.

**product". In paragraph 140 of Canada's written submission, Canada argues that there are differences in substitution elasticities between more broadly and more narrowly defined sectors. Would the United States agree that substitution elasticities for broad sectors tend to be smaller than substitution elasticities for products within these broad sectors, and that they result in an underestimation of the level of NI?**

**Response:**

159. Estimates of substitution elasticities for broader sectors are often smaller than estimates of substitution elasticities for smaller sectors that fall within the broader sector. The degree to which this is true depends on the methodology used to estimate the elasticity.[229] The estimated substitution elasticity for a specific product within the smaller sector may be smaller or larger than the average substitution elasticity for the broader sector. There is no clear relationship in economic theory that dictates, for example, that U.S. buyers should perceive varieties of a certain, specialized type of machinery as more substitutable than they do machinery in general. Rather, economic theory suggests highly differentiated products are less substitutable than homogeneous goods like commodities.[230] To the extent the aggregation on which the elasticity estimate is based includes products that are more and less differentiated, it will mask underlying heterogeneity in substitution elasticities at the product level.

160. Accordingly, the Commission reports are the more appropriate choice for elasticity estimates because they are specific to the product under investigation. Further, to the extent that Canada suggests that it has proposed an approach that underestimates the level of nullification or impairment,[231] it appears that Canada readily admits that its proposed level of suspension of concessions is not equivalent to the level of nullification or impairment, contrary to Article 22.4 and 22.7 of the DSU. That is another reason for the Arbitrator to not adopt Canada's proposed approach.

### 4.2 Elasticity of Demand

**Questions 59 and 60 are addressed to Canada.**

**61. For the United States: Could the United States please explain the methodology the USITC follows to estimate demand elasticities and the data sources it employs for this purpose?**

**Response:**

161. To determine the range of demand elasticity estimates for a market subject to an investigation, Commission staff take into account a range of factors that are likely to affect the demand elasticity, that is, how the quantity demanded will change in response to a change in price of the in-scope merchandise. As explained in the U.S. response to question 57, above, the

[229] *See* Ahmad *et al.* (2020), p. 10 (Exhibit USA-23).
[230] *See* Ahmad *et al.* (2020), p. 1 (Exhibit USA-23).
[231] Canada's Written Submission, para. 140.

Commission derives estimates for demand elasticity by taking into account the responses from questionnaires issued in each investigation to U.S. producers, U.S. importers, U.S. purchasers, and foreign producers,[232] as well as hearing testimony, and briefs from the interested parties. Literature estimates of elasticities are also taken into account, if available.

162. The range of factors considered by the Commission staff follows economic theory and industry expert knowledge. The estimates consider all relevant evidence collected in the specific investigation, including responses to questions about: demand for end-use products; demand trends within and outside the United States; business cycles and conditions of competition; ability to shift purchases temporally; the percent of total income that is spent on the good; the availability of close substitutes; price impact on substitutability; whether the good is a necessary or a luxury; and the time period.[233] For industrial raw materials, semi-manufactured materials, and input components, determinants for demand elasticity include: the own-price elasticity of demand for the final product; the availability of close substitutes; the elasticity of supply of substitute inputs; the cost share of the input; and the time period.

**62. <u>For the United States</u>: Should the Arbitrator decide to employ pre-determined values for the elasticity of demand at sectoral level, would the United States consider GTAP 11 elasticities in Exhibit CAN-08 an appropriate data source? If so, would the Unites States suggest to "disaggregate" GTAP demand elasticities by HS chapter, and by which methodology? If not, what publicly available data source would the United States suggest?**

**<u>Response</u>:**

163. As the United States explained in the U.S. responses to questions 57 and 61, the Commission approach for estimating the range of likely elasticities is factual, systematic, and based on relationships derived from economic theory; the Commission reports would be the appropriate source for the elasticity of demand for calculating the level of nullification or impairment for the product of interest in a future case. Further, the Commission estimates are public and take into account comments from interested parties in the proceedings. Therefore, the Government of Canada and Canadian companies would have the opportunity to participate in the proceeding and provide input concerning the elasticities estimated by the Commission.

164. In contrast, the GTAP-11 elasticities in Exhibit CAN-08 would be inappropriate in this proceeding for several reasons. First, GTAP-11 demand elasticities are not the same demand elasticities as represented in either Canada's formula or the U.S. model. The elasticity of demand in the partial equilibrium Armington model from which both the U.S. and Canadian

[232] *See* USITC Softwood Lumber Foreign Producer/Exporter Questionnaire (Exhibit USA-39); USITC Softwood Lumber U.S. Producer Questionnaire (Exhibit USA-40); USITC Softwood Lumber U.S. Importer Questionnaire (Exhibit USA-41); USITC Softwood Lumber U.S. Purchaser Questionnaire (Exhibit USA-42).
[233] *See* USITC Softwood Lumber Foreign Producer/Exporter Questionnaire (Exhibit USA-39); USITC Softwood Lumber U.S. Producer Questionnaire (Exhibit USA-40); USITC Softwood Lumber U.S. Importer Questionnaire (Exhibit USA-41); USITC Softwood Lumber U.S. Purchaser Questionnaire (Exhibit USA-42).

methodologies are derived is the elasticity of total industry demand (that is, the demand response of all buyers – consumers, government, and firms – of the product as a final or intermediate good). On the other hand, the GTAP 11 demand elasticities are only consumer demand elasticities.[234]

165. To elaborate, the demand elasticities used in the GTAP model only represent how consumer tastes for final goods respond to a price change. As an example, the demand elasticity associated with the GTAP sector "fruits, vegetables, and nuts" (indicated by the label v_f in Exhibit CAN-08) measures only the responsiveness of final consumer demand for these goods. It explicitly does not account for the response of the processed food and other industries for which fruits, vegetables, and nuts are intermediate inputs. The use of a parameter that fails to account for the response of industries that consume a product as an intermediate good is consequential in this case; as Canada itself acknowledges, "a large portion of U.S. imports from Canada are intermediate goods, they may be used by a variety of U.S. industries and businesses to produce goods and services that are ultimately sold to consumers of the final product."[235] Yet, the responsiveness of U.S. industry and business demand for intermediate goods is not captured by GTAP demand elasticities.

166. Second, GTAP-11 consumer demand elasticities would yield imprecise damage estimates because they are highly aggregated. Putting aside the fact that the GTAP 11 elasticities are not the total industry demand elasticities required by the model underlying both the U.S. and Canada's methodologies, GTAP 11 elasticities are only available for the 65 sectors that make up the unit of analysis in the GTAP model. Canada further aggregates these elasticities into the 20 Caliendo and Parro sectors.

167. The U.S. written submission explains that using parameters that describe behavior in highly aggregated sectors to describe the market response of a specific product introduces unnecessary imprecision into the model when product-specific elasticities are available.[236] Returning to the fruits, vegetables, and nuts example, demand for a common product like potatoes, which have many intermediate and final uses, may have substantially different demand responsiveness compared to a more specialized product like fresh raspberries. Using the aggregate sector elasticity to describe the demand response in the market for either of these individual products in response to a price change would be inaccurate and lead to imprecise model estimates. Since product-specific elasticities are available in the Commission reports, it is not necessary to rely on the aggregate, sector-level measures of demand elasticities in the GTAP model.

168. Third, GTAP-11 elasticities are not representative of contemporaneous market conditions. As explained in the U.S. response to question 61, certain factors can affect demand elasticities over time. To the extent that demand responsiveness evolves with technological change, government policy, consumer tastes, and other factors, the elasticities will become

[234] *See* Thomas Hertel & Dominique van der Mensbrugghe, "Chapter 14: Behavioral Parameters," GTAP 10 Data Base Documentation, Center for Global Trade Analysis (2019), p. 4 (Exhibit USA-29).
[235] Reishus & Lemon Methodology Report, para. 24.
[236] U.S. Written Submission, paras 107-113.

increasingly unrepresentative. For example, an aggressive marketing campaign or piece of scientific research may materially change consumer tastes or industrial uses for a particular fruit or vegetable, such that the demand elasticity changes as well.

169. The United States considers it appropriate for the Arbitrator to fix the source of the parameters and elasticities, but not the values of the elasticities. Predetermining the relevant Commission report as the source would allow changes in the estimates based on current market conditions, consistent with demand for the product during the relevant time period. And, as stated earlier, these estimates have taken into consideration comments from the interested parties, including Canadian companies and the Government of Canada, if they avail themselves of the opportunity to participate. Accordingly, the United States recommends using the Commission's public demand elasticities as the source for the total industry demand elasticity in the model because, unlike the GTAP elasticities, the Commission elasticities represent the responsiveness of demand by all entities in the economy – consumers, industries, and the government. Commission elasticities are also tailored to the specific product at issue and are representative of current market conditions.[237]

170. To the extent the Arbitrator determines to predetermine the value of demand elasticity, then it is imperative to consider the elasticities reported in the existing public Commission reports on Canadian products. In *Softwood Lumber*, the demand elasticity is reported as -0.2 to -0.8.[238] In *Wind Towers*, the Commission reported a demand elasticity of -0.2 to -0.6.[239] If the Arbitrator determines that there is a "risk" to Canada for future nullification or impairment, then these existing CVD proceedings should be taken into account.

### 4.3 Elasticity of Supply

**63. For both parties: Both parties have made references to the decision by the arbitrator in *US – Washing Machines (Article 22.6 – US)* several times. Could the parties please clarify whether they consider the supply elasticity of 7.7, which was selected by that arbitrator for reasons explained in paragraph 4.78 of the decision by the aforementioned arbitrator, as appropriate for the purpose of the present case?**

**Response:**

171. As an initial matter, as explained in the U.S. written submission and the U.S. response to question 64,[240] the United States does not consider it appropriate to assume that domestic and import supply elasticities are equivalent. This assumption is contrary to standard modeling

[237] *See also* U.S. Written Submission, Appendix 3, Table 2 (demonstrating divergence between academic studies concerning broad sectors and the product-specific Commission reports).
[238] USITC Softwood Lumber Final Determination, p. II-28 (Exhibit USA-34).
[239] USITC Wind Towers Final Determination, p. II-34 (Exhibit USA-35).
[240] U.S. Written Submission, para. 121; U.S. response to question 64.

practice.[241] Rather, as discussed in the U.S. response to question 64, below, the import supply elasticity should exceed the domestic supply elasticity.[242] Further, the United States considers it appropriate for the import supply elasticity to be a value of 10.[243]

172. The United States respectfully disagrees with the arbitrator's decision in *US – Washing Machines (Korea) (Article 22.6 – US)* to select 7.7 for supply elasticity in general. In its discussion of supply elasticity, the arbitrator there does not consider the issue of two different values for import and domestic supply elasticity, and further, appears to conflate the two elasticities.[244] Paragraph 4.78 of the *US – Washing Machines (Korea) (Article 22.6 – US)* decision, the sole paragraph concerning supply elasticity for the "as such" measure, first acknowledges Hillberry and Hummels (2013), an academic article concerning import supply elasticity.[245] The arbitrator then goes on to state that the United States considers Commission elasticities as preferable.[246] Notably, however, Commission reports discuss domestic supply elasticity, and do not provide estimates on import supply elasticity. Having conflated the two issues, the arbitrator then ultimately appears to generally select 7.7 from Hilberry and Hummels (2013), a source concerning import supply elasticity, for "price elasticity of supply".[247]

173. Therefore, to the extent the Arbitrator determines to select 7.7 from Hilberry and Hummels (2013), the United States considers that such a value could only be selected for import supply elasticity. As both the arbitrator in *US – Washing Machines (Korea) (Article 22.6 – US)* and Hilberry and Hummels (2013) themselves acknowledge, estimates of this parameter are scarce in literature.[248] Further, a Commission report would not contain the value for import supply elasticity.

174. However, for domestic supply elasticity, as explained in the U.S. written submission, and as discussed in more detail in the U.S. responses to questions 65 and 66,[249] below, the appropriate source for the purpose of this proceeding is the relevant Commission reports, which provide tailored estimates of domestic supply elasticities informed by economic factors specific to the industry at issue. It would be inappropriate to use pre-determined values, which describe

[241] *See, e.g.*, U.S. response to question 64 (detailing studies that have applied this assumption); *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 7.37, n. 356 ("[A]s demonstrated by the United States, applying the Armington model using the same values for the import supply elasticities as those used for the domestic supply elasticity, rather than the value of 10, would result in a lower estimated level of nullification or impairment.").
[242] *See also US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 7.37.
[243] U.S. Written Submission, para. 120.
[244] *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 4.78.
[245] *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 4.78.
[246] *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 4.78.
[247] *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 4.78 and n. 409.
[248] *See US – Washing Machines (Korea) (Article 22.6 – US)*, para. 4.78. The United States further notes that the Hilberry & Hummels (2013) paper on which the arbitrator in *US – Washing Machines (Korea) (Article 22.6 – US)* relies explains that the import supply elasticity estimate of 7.7 is based on an econometric study published in 1983 that follows a flawed methodology. Russell Hillberry & David Hummels (2013), "Chapter 18: Trade Elasticity Parameters for a Computable General Equilibrium Model," Handbook of CGE Modeling, Vol. 1, p. 1251 (Exhibit USA-30).
[249] *See* U.S. Written Submission, paras. 121-124.

the behavior of a more aggregate sector rather than the specific product, and would not account for market changes that are likely to occur in the future.

175. To the extent the Arbitrator disagrees with the United States and predetermines the value of domestic supply elasticity, then, as discussed in the U.S. response to question 64, below, the domestic supply elasticity should be lower than the import supply elasticity. Therefore, if the Arbitrator selects the value of 7.7 referenced in Hillberry and Hummels (2013) for import supply elasticity, the value of domestic supply elasticity should be lower. To that effect, the public Commission reports in the existing Canadian CVD proceedings should be considered. Specifically, in *Softwood Lumber*, the Commission report provides for a domestic supply elasticity between 0.5 to 2.0.[250] In *Wind Towers,* the Commission report provides for a domestic supply elasticity of 2 to 5.[251] If the Arbitrator determines that there is a "risk" to Canada for future nullification or impairment, then existing CVD proceedings should be taken into account.

**64. <u>For the United States</u>: In paragraph 121 of the United States' written submission, the United States claims that "[d]omestic 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". Could the United States please support this argument with theoretical and/or empirical evidence, including from studies that are available to the broader public?**

**<u>Response</u>:**

176. The assumption that import supply elasticities exceed domestic supply elasticities is commonly applied in Armington-based partial equilibrium models in order to account for the greater ability of foreign suppliers to shift supply from other markets, but few studies empirically examine both domestic and import supply elasticities for a broad set of products. There is only one such study that the United States is aware of, Riker (November 2020), which estimates both domestic and import supply elasticities at the industry level for thirteen manufacturing industries.[252] Riker's import supply elasticity estimates uniformly and substantially exceed the domestic supply elasticity estimates.[253]

177. Further, the widespread use of the assumption that import supply elasticities are higher than domestic supply elasticities is noted in Bethmann *et al.* (2020), which states, "[t]ypically, both subject and non-subject import sources have higher price elasticities of supply than the

[250] USITC Softwood Lumber Final Determination, p. II-27 (Exhibit USA-34).
[251] USITC Wind Towers Final Determination, p. II-34 (Exhibit USA-35). Notably, the Government of Canada's position in this proceeding, to use a domestic supply elasticity of 10, is in contrast to the position of Canadian respondents before the Commission, where they argued for a <u>lower</u> supply elasticity estimate because of U.S. capacity restrictions. As a result of considering Canadian respondents' arguments, the Commission staff lowered its supply elasticity estimate from 3 to 6 in the prehearing staff report to 2 to 5 in the final determination. USITC Wind Towers Final Determination, p. II-34 (Exhibit USA-35).
[252] David Riker, "Approximating an Industry-Specific Global Economic Model of Trade Policy", USITC Office of Economics Working Paper Series, November 2020 ("Riker (November 2020)") (Exhibit USA-31).
[253] Riker (November 2020), p. 14, Table 6 (Exhibit USA-31).

domestic source."[254] Economists at the Commission also often apply this assumption in modelling exercises.[255] Further, Leith *et al.* (2003) and Gasiorek *et al.* (2019) are examples of the use of this assumption in economic research.[256] Likewise, the arbitrator in *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)* agreed that "import supply elasticities are generally more elastic than domestic supply elasticities".[257]

178. Although this common assumption is frequently applied, there may be industry-specific reasons for alternative assumptions.[258] Since the methodology at issue in this proceeding is intended for general application to an unknown and potentially wide-ranging set of products, the United States considers the "typical" assumption that import supply elasticities exceed domestic supply elasticities to be appropriate.

**65. <u>For the United States</u>: If the Arbitrator decided to employ a pre-determined value for the US domestic supply elasticity, what value would the United States consider appropriate?**

**<u>Response</u>:**

179. As the United States has explained, using a pre-determined value for the U.S. domestic supply elasticity is problematic for a number of reasons. Pre-determined values of the domestic supply elasticity are particularly disadvantaged relative to Commission report supply elasticity estimates tailored to the product under investigation and derived after consideration of information submitted by U.S. and foreign producers, U.S. importers, and U.S. purchasers.[259] In the extensive literature the United States has reviewed, academic estimates of the domestic supply elasticity with broad product coverage are all but non-existent. Existing studies employing models that require a domestic supply elasticity typically rely on a variety of sources and industry-specific information when setting a value for the domestic supply elasticity.[260] A pre-determined value would therefore have to rely on an *ad hoc* assumption about the supply response of the domestic industry that is unlikely to be appropriate for a broad range of hypothetical future products. In contrast, tailored estimates of domestic supply elasticities that

[254] Bethmann *et al*. (2020), p. 5 (Exhibit USA-22).
[255] *See, e.g*., Hallren & Riker (2017), p. 14 (Exhibit CAN-04).
[256] Jennifer Leith *et al*., "Indonesia Rice Tariff", Poverty and Social Impact Analysis, March 2003 ("Leith *et al.* (2003)"), p. 33, n. 29 (stating that the model assumes an import supply elasticity of 10 and a domestic supply elasticity of 0.3) (Exhibit USA-32); Michael Gasiorek *et al.*, "Which manufacturing industries and sectors are most vulnerable to Brexit?", The World Economy (2019) ("Gasiorek *et al.* (2019)"), p. 29 ("We assume a high but finite supply elasticity, with a value set of 6 for domestic suppliers to domestic market . . . and at 15 for other suppliers.") (Exhibit USA-33).
[257] *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 7.37.
[258] Hallren & Riker (2017), p. 11 ("Likewise, the appropriate values for the supply elasticities depend on conditions in the industry.") (Exhibit CAN-04).
[259] *See* USITC Softwood Lumber Foreign Producer/Exporter Questionnaire (Exhibit USA-39); USITC Softwood Lumber U.S. Producer Questionnaire (Exhibit USA-40); USITC Softwood Lumber U.S. Importer Questionnaire (Exhibit USA-41); USITC Softwood Lumber U.S. Purchaser Questionnaire (Exhibit USA-42).
[260] *See, e.g.* Leith *et al.* (2003), p. 33 (Exhibit USA-32); Gasiorek *et al* (2019), p. 29 (Exhibit USA-33).

have been informed by economic factors specific to the industry at issue are available in Commission reports and should be strongly preferred relative to an unnecessary, *ad hoc* assumption.

180. Comprehensive domestic supply elasticity estimates are very rare in the economics literature. To the extent they exist, they are typically specific to a small set of products. An exception is a very recent paper, Riker (November 2020),[261] which estimates both domestic and import supply elasticities for a single market industry model of the United States, similar to the model that underlines both the U.S. and Canadian methodologies. In the paper, Riker (November 2020) demonstrates a methodology for estimating supply elasticities for a single market model that generates results consistent with a corresponding global economic model. The paper estimates U.S. domestic supply elasticities and import supply elasticities for three source countries and thirteen manufacturing industries. Unfortunately, Canada is not among the countries for which the author estimates an import supply elasticity. Notably, as highlighted in the U.S. response to question 64, the magnitude of Riker's U.S. domestic supply elasticity estimates is substantially smaller than the magnitude of the import supply elasticity estimates.[262] Riker emphasizes that the use of *ad hoc* or other estimates in the literature not tailored to the product or industry being modeled will generate results that are inconsistent with the corresponding global model.[263] This finding supports the use of product-specific elasticity estimates where available.

**66. <u>For the United States</u>: Could the United States please explain in detail how the USITC estimates supply elasticities for its reports?**

**<u>Response</u>:**

181. To determine the range of likely supply elasticities for a market subject to an investigation, Commission staff take into account a range of factors that are likely to affect the elasticity, or more plainly, the ability of domestic producers to change quantity supplied in response to a change in price of the in-scope merchandise. The main sources of data the Commission uses to estimate supply elasticities for its reports are the confidential producer, importer, and foreign producer questionnaires (which contain questions specifically directed to elicit relevant information about the market for in-scope merchandise),[264] and hearing testimony and briefs from interested parties. Therefore, the Government of Canada and Canadian

[261] *See* Riker (November 2020) (Exhibit USA-31).
[262] *See* Riker (November 2020), p. 14, Table 6 (Exhibit USA-31).
[263] *See* Riker (November 2020), p. 15 (Concluding "an abbreviated single market model can still be a practical, convenient, and even accurate tool if the appropriate supply elasticity values are used. These values should not be based on ad hoc guesses.") (Exhibit USA-31).
[264] *See* USITC Softwood Lumber Foreign Producer/Exporter Questionnaire (Exhibit USA-39); USITC Softwood Lumber U.S. Producer Questionnaire (Exhibit USA-40); USITC Softwood Lumber U.S. Importer Questionnaire (Exhibit USA-41).

companies would have the opportunity to participate in the proceeding and provide input concerning the elasticities estimated by the Commission.[265]

182. The range of factors considered by the Commission staff follow economic theory and industry expert knowledge. The estimates consider all relevant evidence collected in the specific investigation, including responses to questions about supply constraints; availability of supply; availability of specific product types; product shifting; production, shipment, and inventory data; excess capacity; multi-product production facilities; industry-specific factors of product; and the time period.[266] Literature estimates of elasticities are also taken into account if applicable. This information is combined with expert knowledge regarding reasonable values for elasticity coefficients.

**67. <u>For the United States</u>: If the Arbitrator decided to use the same supply elasticity for all sources of supply (i.e. US, CAN, RoW), would a separation between "US" and "rest of the world" supply still be relevant for the calculation of the level of NI with the model proposed by the United States, in particular, when ignoring tariff changes with respect to RoW imports? In this respect, could the United States please comment on paragraph 117 of Canada's written submission?**

**<u>Response</u>:**

183. If – contrary to the evidence and standard practice described in the U.S. response to question 64 – the Arbitrator were to assume that domestic and import supply elasticities are equal, then a separation between the "US" and "rest of the world" would not be relevant to the calculation of nullification or impairment. That is, if the domestic and import supply elasticities are assumed to be equal,[267] the estimated impact on imports from Canada would be mathematically identical whether or not the United States and rest of the world are treated as separate varieties.

184. Canada erroneously argues that it is unnecessary to separate the U.S. domestic supply and imports from the rest of the world because the focus is on the impact of the removal of the challenged measure from duty rates on Canadian imports.[268] In making such an argument, Canada falsely assumes that the responsiveness of domestic and imported supply to a change in duties on Canadian imports is the same. As the United States has explained, the responsiveness of each type of supply will be quantitatively different.[269] This difference in responsiveness is

[265] For instance, in the Commission's *Wind Towers* investigation, the respondents, which included a Canadian company, commented on the U.S. supply elasticity in their prehearing brief. *See* USITC Wind Towers Final Determination, pp. 3-4 and II-34 (Exhibit USA-35).
[266] *See* USITC Softwood Lumber Foreign Producer/Exporter Questionnaire (Exhibit USA-39); USITC Softwood Lumber U.S. Producer Questionnaire (Exhibit USA-40); USITC Softwood Lumber U.S. Importer Questionnaire (Exhibit USA-41)
[267] The elasticity of substitution must also be assumed equal for this to hold.
[268] Canada's Written Submission, para. 117.
[269] *See, e.g.*, U.S. Written Submission, paras. 80-83; U.S. response to question 64.

captured in the model by allowing import supply elasticities to differ from domestic supply elasticities.

185. Furthermore, it is unnecessary to sacrifice precision to avoid complexity in this case, as Canada suggests.[270] For example, the relevant formulas to account for the change in prices and quantities under the assumption that supply elasticities vary are derived in Canada's exhibit, Hallren & Riker (2017), for the case where a single variety is subject to a change in duty.[271]

### 4.4 Import Shares and Market Size

**68. <u>For both parties</u>: In case the Arbitrator were to decide to calculate pre-determined market shares of Canadian exports in the US market by economic sector, would the parties consider GTAP sectors and GTAP-sourced trade weights as an appropriate data source? If so, would the parties consider that information from GTAP should be "disaggregated" at the level of HS chapters, and by which methodology? If not, what publicly available data source would the parties suggest?**

**<u>Response</u>:**

186. The United States strongly opposes the use of pre-determined market share values in the calculation of nullification or impairment for an unknown future CVD proceeding. If market share does not correspond to the product and time period represented by the value of imports used in the calculation, the resulting nullification or impairment estimate will be biased. In the notation used in Canada's formula: a pre-determined market share will imply that $\widehat{vimp}$ does not match $vimp$. This mismatch will induce bias into the estimate. The bias may be large, and the bias may either under or over-estimate nullification or impairment.

187. The U.S. response to question 76, below, explains that using a pre-determined market share makes Canada's formula inconsistent with the model it purports to represent. More practically, as demonstrated in the U.S. response to question 47, above, if the pre-determined market share exceeds the actual market share corresponding to the value of imports, then the size of the U.S. market is under-stated and nullification or impairment is likely to be under-estimated. If the pre-determined market share is smaller than the actual market share, nullification or impairment is likely overstated.

188. Nevertheless, if the Arbitrator determines to use a pre-determined market share, the United States suggests using a value that most closely matches the time period and product definition of the future product at issue. In this case, that would be the most recent and most highly disaggregated source of production and trade data. As such, the United States suggests calculating market shares using the sources outlined in the U.S. response to question 69 and 74

[270] Canada's Written Submission, paras. 112-117.
[271] *See* Hallren & Riker (2017), pp. 9-10 (Exhibit CAN-04). The United States observes that nullification or impairment calculated using the formulas in Hallren & Riker (2017) would still be subject to approximation error from linearization, as discussed in the U.S. written submission. *See* U.S. Written Submission, paras. 88-90; U.S. Solution and Computer Code for the Armington Partial Equilibrium Model (Exhibit USA-1).

based on the most recent available data. The United States stresses that it does not recommend presently selecting values from these sources for market share information unless the Arbitrator determines to disregard the bias associated with using a pre-determined market share and prescribes its use in the calculation of nullification or impairment.

189. The United States considers that GTAP remains an inappropriate source for market share information for a future CVD proceeding at issue. The GTAP 11 database is designed to replicate the world economy in 2017. Trade flows and production information in the GTAP database are based on trade and production data, but do not correspond exactly to these statistics. Rather, these values are adjusted to ensure the GTAP database itself is internally consistent.

**69. For both parties: With respect to the paragraph 129 of the United States' written submission, could the parties please outline appropriate modalities under which consultations to exchange relevant information could occur?**

**Response:**

190. As explained in the U.S. written submission, the United States considers it appropriate to first look to the relevant Commission report for U.S. domestic market share information.[272] In the event such information is not public, the Arbitrator may instruct Canada and the United States to then 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 on the appropriate trade association or private sector data within 45 days, or in the event that there is no data from a relevant trade association or private sector supplier, U.S. domestic market share could be obtained from BEA. Rather than using the BEA I-O data inputs themselves, which is highly aggregated, as a last resort, the United States clarifies that it considers it appropriate to use the data that underlies the BEA I-O data table. That is, for manufacturing, BEA data is derived from 6-digit NAICS codes from Census' Annual Survey of Manufactures; for mining, the data would be sourced from the U.S. Department of Energy, Energy Information Administration; and for agricultural products, the data would be sourced from the U.S. Department of Agriculture's Economic Research Service (ERS) Farm Income Forecast. This data would be more appropriate given that it is more disaggregated and will more closely relate to the specific product at issue and relevant time period.

**Questions 70 through 73 are directed to Canada.**

**74. For the United States: Could the United States please clarify whether, in the reference year, i.e. the full calendar year before the relevant CVD proceeding, information about the market shares *m_us, m_caa, m_cao, m_cai* and *m_row* (in the notation of Table 1 in Appendix 2 of the United States' written submission) could be obtained exclusively from company-specific US Customs data? If so, could the United States provide an example to illustrate how such values could be obtained from company-specific US Customs data? If not, could the United States please**

[272] U.S. Written Submission, para. 129.

**explain whether and how information about the market shares *m_us*, *m_caa*, *m_cao*, *m_cai*, and *m_row* could be computed exclusively using HTS Customs data?**

**Response:**

191. The market share for variety $i$ is the ratio of the value of U.S. expenditure on variety $i$ to the total value of U.S. consumption, *i.e.*, the market size, denoted $Y$. Computing the market shares for a specific product in the relevant year requires product-specific data on the value of imports associated with each variety and domestic shipments (for the numerator of the imported and domestic variety market shares) and the total value of the market (for the denominator of the ratios). The total value of the market ($Y$) is the sum of the value of imports and domestic shipments. To clarify, the United States considers it appropriate to calculate the market share for each Canadian variety as follows.

192. For the market share of varieties associated with individually-investigated companies affected by the challenged measure ($m\_cai$), the numerator should be the value of imports from the company in the reference year and the denominator should be total apparent consumption ($Y$) for the specific product in the reference year.

193. For the market share of the All Others rate variety ($m\_caa$), the numerator should be the value of imports under the All Others rate in the reference year and the denominator should be total apparent consumption ($Y$) for the specific product in the reference year.

194. For the market share of the non-subject Canadian variety ($m\_cao$), the numerator should be the value of imports from Canadian companies not subject to the challenged measure and the denominator should be total apparent consumption ($Y$) for the specific product in the reference year.[273]

195. For clarity, the totality of this information is not available from Customs data since Customs only tracks imports and not U.S. domestic shipments. For the Canadian varieties, *m_caa*, *m_cao*, and *m_cai*, Customs data can be used to identify the relevant imports. As explained in detail in the U.S. response to question 87, below, in an original investigation, the reference year would be prior to the imposition of any AD/CVD measures, and Customs can track the relevant companies based on the 10-digit HTS code of the product. In an administrative review, the reference year would include entries that have been subject to AD/CVD measures, and Customs can track imports from the relevant companies based on the AD/CVD case number.

196. Further, for the subject Canadian varieties, import data from Customs could be obtained on a company-specific basis.[274] For the All Others rate variety, import data from Customs could also be obtained. This information would not need to be on a company-specific basis (although Customs could organize the information on a company-specific basis, if needed). For the non-

[273] *See* U.S. Written Submission, Appendix 2, Table 1 (detailing the sources for each data input).
[274] As explained in the U.S. response to question 101, company information from Customs is considered confidential, but the United States would be able to provide the information to Canada under BCI procedures.

subject Canadian variety, the relevant import data could also be obtained from Customs on an aggregate basis. This data would also not need to be on a company-specific basis, although for the purposes of gathering the data, Customs may need to know which Canadian companies were not subject to the challenged measure in the CVD proceeding. This Customs data would provide the relevant information necessary for calculating the numerator of the individual market shares for *m_caa*, *m_cao*, and *m_cai.*

197. Information on imports from other countries to calculate the numerator of the market share of imports from the rest of the world (*m_row*) would be based on a 10-digit HTS code of the product. This information does not need to be company-specific. Specifically, imports from the rest of the world should be obtained by subtracting the total value of U.S. imports from Canada, obtained from Census, from total imports of the specified product from the world, obtained from Census.

198. As explained above in the U.S. response to question 69, information on U.S. domestic shipment data to calculate the market share of U.S. domestic products (*m_us*) would be sourced, in terms of priority, from the relevant Commission report, industry/trade associations, and U.S. agency reported data. U.S. agency reported data would use the same sources that underlie the BEA I-O data, but on a more disaggregated basis.[275] Information for the U.S. domestic market share does not need to be on a company-specific basis.

199. For clarity, the United States provides Amended Table 1 in Appendix I of these responses.

**75. <u>For the United States</u>: Could the United States please clarify whether information about the market size *Y* (in the notation of Table 1 in Appendix 2 of the United States' written submission) is only accessible via Commission reports?**

**<u>Response</u>:**

200. The size of the total U.S. Market (or U.S. apparent consumption or *Y*) is defined as the sum of U.S. domestic shipments, U.S. imports from Canada, and U.S. imports from the rest of the world. The U.S. response to question 74, above, describes the appropriate sources for U.S. imports from Canada and U.S. imports from the rest of the world. For clarity, the United States considers Commission reports to be the appropriate source for U.S. domestic shipments to determine the numerator of the U.S. domestic market share (*m_us*). In the event the information is not public, as explained in the U.S. response to question 69, the United States also provides alternative sources.

**76. <u>For the United States</u>: Should the Arbitrator decide to use a formula-based approach with pre-determined scaling factors, so that the Canadian market share would have to be calculated with existing data, which data would the United States**

[275] *See* U.S. response to question 69.

**consider most appropriate for the calculation of $\theta_{CA}$ (in the notation of Canada's Methodology Report)?**

**Response:**

201. As an initial matter, the United States emphasizes that the formula proposed by Canada is not appropriate in this proceeding. As explained in the U.S. written submission, a formula-based approach obtained from a linearized solution of an Armington model does not estimate nullification or impairment with the precision that is easily obtainable from the non-linear solution method used in the model-based approach proposed by the United States.[276] Moreover, even if the Arbitrator prefers a linearized solution, the formula proposed by Canada is incorrect for this proceeding as it does not adequately capture the counterfactual.

202. Notwithstanding this view, the United States highlights that using Canada's market share in a fixed prior year as part of a pre-determined scaling factor is inconsistent with the underlying model from which the proposed formula is derived. In order to be consistent with the model, the market share used in the scaling factor must correspond to the "value of imports" used in the nullification or impairment calculation. Canada proposes the following formula:[277]

$$NI = vimp * \frac{t}{1+t} * \hat{t} * scaling\ factor$$

and the scaling factor is a function of $\theta_{CA}$ defined as:

$$scaling\ factor\ = \frac{\eta+1}{(\varepsilon-\eta)(\eta+\sigma)}(\sigma(\eta-\varepsilon)-\eta(\sigma+\varepsilon)\theta_{CA})$$

In order to be consistent with the underlying model from which this formula is derived, the numerator for the market share parameter, $\theta_{CA}$, must be equal to the value of imports ($vimp$) and the denominator should be total U.S. apparent consumption ($Y$) in the same year.

203. Unlike the other parameters in the scaling factor, which are obtained from external sources, $\theta_{CA}$ calibrates the Armington model to market data. This calibration ensures that results are representative of an outcome from the market under examination. More specifically, it represents the relative competitiveness of the associated variety in the U.S. market. Although solving an Armington model using the linearized solution methodology yields a formula that allows Canada's nullification or impairment to be calculated without solving the full model, it is nevertheless incorrect to base that calculation on a misrepresentation of a Canadian variety's relative position in the market during the relevant time period.

204. Moreover, as explained in the U.S. response to question 47, using a pre-determined value for market share may be to Canada's detriment. If a Canadian entity's market share increases

[276] U.S. Written Submission, paras. 88-90 and Appendix 2.
[277] *See* equation A10 in the Appendix to Canada's Methodology Paper. *See* Reishus & Lemon Methodology Report, Appendix I, p. 21.

between the year in which the pre-determined market share is calculated and the future date at which the challenged measure is applied to Canada, nullification or impairment would be biased downward. In contrast, if the future market share decreases relative to the fixed, pre-determined market share value, nullification or impairment will tend to be biased upward.

205. Therefore, the most appropriate source for the calculation of $\theta_{CA}$ is Customs import data for the numerator, and U.S. apparent consumption for the denominator. U.S. apparent consumption is the sum of U.S. imports from Canada (sourced from Customs); U.S. imports from the rest of the world (sourced from U.S. Census HTS codes, *e.g.*, total imports minus imports from Canada); and U.S. domestic shipments (sourced from a Commission report in the first instance, trade associations or private sector suppliers in the second instance, and U.S. agency data underlying the BEA I-O data table in the third instance).[278]

## 5 CHANGE IN DUTY RATE

**77. <u>For both parties</u>: Please assume, strictly for purposes of this question, that the Arbitrator were to agree with the United States that anti-dumping duties should be taken into account when running the relevant model. Could the parties please explain what events surrounding the imposition, calculation, or revocation of anti-dumping duties, would, on their own, require Canada to run the model to determine a new level of NI?**

**<u>Response</u>:**

206. The economic model should be run only if the assessed duties contain the challenged measure, as discussed in the U.S. response to question 35. AD duties should be included in the analysis as described in the U.S. response to question 83, below, if the AD duties are in place during the relevant time period. That is, AD duties should be taken into account if there is a corresponding AD order resulting in the imposition of duties. In either instance, there would only be one analysis necessary for an instance of the challenged CVD measure.

**78. <u>For both parties</u>: Could the parties please explain whether CVDs and ADs are ever placed on sets of overlapping but non-identical products? If this does occur, might this cause problems for how Canada would be expected to account for anti-dumping duties? In particular, if all of a company's exports were subject to a relevant CVD order, but only a subset of such products were subject to anti-dumping duties, how would Canada construct a *single* change of duty rate for that company?**

**<u>Response</u>:**

207. AD and CVD duties can be placed on sets of overlapping, but non-identical products. For instance, where the AD or CVD orders result from different petitions from the domestic industry, then there may be variances (*i.e.*, overlap, but not identical language) in the scope of the orders. The United States confirms that for the purposes of this proceeding it considers it

[278] *See also* Amended Table 1 in Appendix I of these responses.

appropriate to account for the corresponding AD duty when the product description in the AD and CVD orders is the same.

**Questions 79 and 80 are directed to Canada.**

**81. <u>For the United States</u>: Could the United States please comment on paragraphs 161-164 of Canada's written submission, regarding the alleged inappropriateness of considering anti-dumping duties in the model ultimately adopted by the Arbitrator?**

**<u>Response</u>:**

208. Contrary to Canada's assertions, the United States is not asking the Arbitrator to speculate whether AD duties will accompany CVDs in future cases.[279] Rather, the United States has explained that if AD duties are in fact applied to the unknown, future product at issue, they must be accounted for under the U.S. methodology. If corresponding AD duties are ignored, nullification or impairment will be overstated.

209. In the U.S. Armington framework, it is the percent change in the <u>total</u> duty rate induced by a modification of CVD rates that is relevant to the calculation of nullification or impairment. In the U.S. response to question 83, the United States defines the total initial duty as the sum of the initial CVD duty rates with the challenged measure and corresponding AD duty rates. Likewise, the total counterfactual duty rate is defined as the sum of the modified CVD rate and corresponding AD duty rates. In the U.S. response to question 85, the United States notes that any ordinary tariffs should also be added to the total year-prior duty rate, as well as initial and counterfactual duty rates.

210. As to whether including AD duties "inappropriately broadens [the United States'] own proposed counterfactual", Canada is mistaken. As previously discussed, nullification or impairment measures the value of increased U.S. imports from Canada attributable to removing the challenged measure from the CVD duty rates. The methodology used to calculate nullification or impairment should therefore estimate the difference between imports from Canada during the relevant time period and imports from Canada under counterfactual remedy year conditions in which CVD rates are not affected by the challenged measure, but all other factors are held fixed. The United States considers it appropriate that in the counterfactual, CVD rates are modified, but AD rates are held fixed. This approach controls for the impact AD rates have on both the actual and counterfactual U.S. market.

211. Further, in the U.S. response to question 84, below, the United States demonstrates that even though AD rates and ordinary tariffs do not change in the counterfactual, they are relevant to the calculation of nullification or impairment because they are relevant to the percent change in total duty rates induced by the modification of CVD rates.

[279] Canada's Written Submission, para. 162.

212. Finally, it is disingenuous for Canada to argue that "it is also speculative whether any hypothetical anti-dumping duties would have a measurable effect on the market conditions for the Canadian product",[280] while arguing that parallel future CVD duties are not speculative and form the basis for an estimate of nullification or impairment. To the extent such logic from Canada were to be adopted as a basis for not considering AD duties, then it would similarly have to apply to the same future unknown CVD duties. Indeed, from the outset, the United State has asserted that Canada does not suffer from nullification or impairment, and there is no measurable impact. Simply put, Canada's request for suspension of concessions is "too remote", "too speculative", or "not meaningfully quantified".[281] In Canada's own words, it is "speculative whether any hypothetical [countervailing] duties would have a measurable effect on the market conditions for the Canadian product."[282] Accordingly, Canada's request for suspension of concessions should be rejected. To the extent the Arbitrator disagrees, then the corresponding AD duties would need to be considered for the reasons set forth above.

**82. <u>For the United States</u>: The United States makes the following statement: "[t]hat is, if there are *corresponding* dumping rates applied to the product *in the proceeding*, they should be taken into account".[283] Could the United States please explain whether this statement means that the United States proposes that the relevant model should take into account anti-dumping duties only in the instance where such duties are placed on the same product as CVD are placed and in the same USDOC proceeding?**

**<u>Response</u>:**

213. The United States confirms that AD duties should be taken into account if they are contemporaneously present on the same product during the time period at issue. That is, if the challenged measure is applied in an administrative review for the calendar year 2019, and AD duties were applied to entries of the same product during the same time period, it would be appropriate to consider those duties in the model.

**83. <u>For the United States</u>: Could the United States please explain how Canada's formula should account for the presence of anti-dumping duties on a relevant product? Please provide an example to illustrate your answer. Please also explain how the US model accounts for anti-dumping duties. In particular, are anti-dumping duties captured by t1_caa, t1_cao, and t1_cai in the notation of the model proposed by the United States?**

[280] Canada's Written Submission, para. 162.
[281] Canada's Written Submission, para. 162.
[282] Canada's Written Submission, para. 162.
[283] U.S. written submission; para. 133. (emphases added)

**Response:**

214. Canada's formula, as the United States understands it, is to be implemented based on the description in paragraph 36 of the Appendix to Canada's methodology paper,[284] and would not account for the presence of AD duties along with the value of the initial CVD rate with the challenged measure or the counterfactual CVD rate without the challenged measure. However, AD duties must be taken into account, otherwise nullification or impairment will be overstated. The United States recalls that Canada's formula simulates the change in duty rate through the term:[285]

$$\frac{t}{1+t} \times \hat{t} \qquad (1)$$

215. Based on its description in paragraph 36, Canada defines $t$ as the duty rate prevailing in the year prior to the imposition of the challenged measure, and the term $\hat{t}$ as:

$$\hat{t} = \frac{\Delta t}{t} = \frac{t_I - t_C}{t} \qquad (2)$$

where $\Delta t$ is the difference between the initial CVD duty with the challenged measure, denoted as $t_I$ in equation 2, above, and the counterfactual CVD duty without the challenged measure, denoted as $t_C$.

216. However, the United States observes that this definition of $\hat{t}$ is not, in fact, a percent change from the year-prior duty rate, contrary to Canada's exposition of its model[286] and Canada's definition of $\hat{t}$ in paragraph 34 of Canada's Appendix to its methodology paper.

217. Rather, Canada's formula, as the United States understands it to be applied from the description in paragraph 36 of the Appendix to Canada's methodology paper, can be algebraically derived by subtracting the formula for $\widehat{vimp}$, derived from the model presented in Appendix I to the Appendix of Canada's methodology paper to evaluate the impact of imposing $t_C$ from the formula for $\widehat{vimp}$ derived from the model to evaluate the impact of imposing $t_I$.

218. With this understanding of Canada's formula, to account for the presence of AD duties and CVD duties on a relevant product, one would correctly define $t$ as the total year-prior duty, $t_I$ as the total initial duty imposed on the relevant product and $t_C$ as the total counterfactual duty. That is:

$$t = year\ prior\ CVD\ rate + year\ prior\ AD\ rate$$

$$t_I = initial\ CVD\ rate + AD\ duty\ rate, \text{ and}$$

[284] Reishus & Lemon Methodology Report, para. 36.
[285] Reishus & Lemon Methodology Report, para. 34, equation (2).
[286] *See* Reishus & Lemon Methodology Report, Appendix 1, p. 19 ("We will use 'hat variables' to refer to percentage changes from equilibrium levels.").

$$t_C = counterfactual\ CVD\ rate + AD\ duty\ rate$$

219. Under Canada's methodology as described in paragraph 36 of the Appendix to its methodology paper, the AD duty rates imposed contemporaneously with the challenged measure will cancel out in the calculation of $\Delta t$. That is, $\Delta t$ is as follows:

$$\Delta t = t_I - t_C = initial\ CVD\ rate - counterfactual\ CVD\ rate$$

220. Therefore, Canada's formula for the duty change term can be simplified as follows:

$$\frac{t}{1+t} \times \hat{t} = \frac{\Delta t}{1+t} = \frac{initial\ CVD\ rate - counterfactual\ CVD\ rate}{1 + year\ prior\ CVD + year\ prior\ AD}$$

221. As a result, if AD duties are imposed in the year prior and they are left out of the denominator, the value of the duty change term will be overstated. Since nullification or impairment is increasing in the value of the duty change term, nullification or impairment will also be overstated.

222. Similarly, in the U.S model, $t\_i$ represents the total year-prior duty rate, and $t1\_i$ represents either the total initial duty imposed, $t_I$ or the total counterfactual duty imposed, $t_C$ That is, following the notation in the U.S. written submission, for $i = cai, caa, cao$:[287]

$$t\_i = total\ year\ prior\ duty\ rate$$

$$t1_i = initial\ CVD\ rate\ or\ counterfactual\ CVD\ rate + AD\ duty\ rate$$

223. The United States clarifies that to calculate nullification or impairment it would be necessary to run the U.S. model twice. The first run would impose the initial CVD rate, and the second run would impose the counterfactual CVD rate. The difference between the total trade effects on all Canadian varieties generated by each model run would be the estimate of nullification or impairment.

224. The United States illustrates this further with the following example, where there are no CVD or AD duties applied in the year prior to the imposition of the challenged measure. Given that the data obtained from the year prior will reflect data without a CVD duty and without the challenged measure, the first run of the model would estimate the trade effects of imposing the CVD duty with the challenged measure. Therefore, the initial and counterfactual duty rates in the first run of the model are:

$$t\_i\_1 = 0, \text{ and}$$

$$t1\_i\_1 = CVD\ rate\ \boldsymbol{with}\ challenged\ measure + AD\ duty\ rate$$

[287] *See* Amended Table 1 in Appendix I, below, in which $cai, caa, and\ cao$ represent the three Canadian varieties.

225. The second run of the model would estimate the trade effects of imposing the CVD duty without the challenged measure. The model would use the same data and parameters, but in the second run the initial and counterfactual duty rates would be defined as:

$$t\_i\_2 = 0 \text{ and}$$

$$t1\_i\_2 = CVD\ rate\ \boldsymbol{without}\ challenged\ measure + AD\ duty\ rate$$

226. Nullification or impairment would be calculated as the difference between total estimated imports from Canada under the second run of the model and total estimated imports from Canada under the first run of the model.[288]

227. To the extent the Arbitrator were to utilize a corrected formula-based approach for the calculation of nullification or impairment, a formula would similarly be applied twice. First, the formula would be applied to evaluate the impact of imposing the CVD rate with the challenged measure and all other relevant duties. Second, the formula would be applied to evaluate the impact of the CVD rate without the challenged measure and all other relevant duties. Nullification or impairment would similarly be the difference between the estimate obtained from the first application and the estimate obtained from the second application of the formula.

**84. <u>For the United States</u>: Could the United States please explain whether it is the case that both anti-dumping and countervailing duties operate with respect to the export price of a product (even if they are both placed on the same product)? If this is the case, then could the United States please explain in detail the economic rationale for expecting that anti-dumping duties would influence, in a relevant manner, the calculation of NI caused by the imposition of countervailing duties? In answering this question, please make reference to your answer to the previous question as appropriate.**

**<u>Response</u>:**

228. As an initial matter, the United States confirms that if a product is subject to both AD and CVD orders, the product is subject to both duties. However, if AD and CVD duties are concurrently applied to remedy an export subsidy, Commerce adjusts to avoid the potential application of double remedies in concurrent AD and CVD investigations, consistent with Article VI:5 of the GATT 1994.

229. In an Armington model, U.S. duties do not directly affect the Canadian export price. However, 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. If $1 of imports from Canada facing a 10 percent CVD duty and a 20 percent AD duty costs $1.30 to a U.S. importer, then both duties affect the price faced by the buyer. As such, both duties are relevant to the demand generated by

[288] To calculate nullification or impairment in this circumstance, the STATA program in Exhibit USA-1 must be executed twice. Nullification or impairment is calculated as the difference between the value of the variable "NI" generated in the first run of the model less the value of the variable "NI" generated in the second run of the model as described above.

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.

230. Below, the United States demonstrates why excluding AD duties overestimates nullification or impairment in the context of the formula proposed by Canada. In the U.S. response to question 83, above, the United States explained that the change in duty rate enters the nullification or impairment calculation through the duty change term, which is marked in bold font below:

$$NI = value\ of\ imports \times \frac{\boldsymbol{t_I - t_C}}{\boldsymbol{1 + t}} \times scaling\ factor \quad (1)$$

231. In equation (1), nullification or impairment increases with larger values of the duty change term, and the duty change term will be understated if the AD duties that are in place alongside CVD duties are omitted from the calculation. To illustrate, the United States provides the following example where one assumes that the initial CVD duty rate with the challenged measure in place is 20 percent; that removing the challenged measure reduces the CVD duty rate by 5 percent; and that the AD duty rate in place at the time the challenged measure is implemented is 20 percent. Then, following the definitions provided in the U.S. response to question 83:

$$t_I = initial\ CVD\ rate + AD\ rate = 0.2\ initial\ CVD\ rate + 0.2\ AD\ rate = 0.4$$

and

$$t_C = counterfactual\ CVD\ rate + AD\ rate =$$

$$0.15\ counterfactual\ CVD\ rate + 0.2\ AD\ rate = 0.35$$

Therefore:

$$t_I - t_C = 0.4 - 0.35 = 0.05$$

232. Since Canada's formula is derived from an Armington model that is solved through log-linearization, the numerator ($t_I - t_C$) can be calculated without accounting for AD rates. That is, the numerator would remain 5 percent if one only takes into account the 20 percent initial CVD rate and the 15 percent counterfactual CVD rate (0.20 initial CVD rate – 0.15 counterfactual CVD rate = 0.05).

233. However, to the extent that AD duties are present in the year prior, omitting them from the year-prior duty rate that is in the denominator will understate nullification or impairment. Continuing the example, the United States assumes that the year-prior CVD rate was 10 percent and the year-prior AD duty rate was 20 percent. This is reflected as follows:

$$t = 0.1\ year\ prior\ CVD\ rate + 0.2\ year\ prior\ AD\ rate = 0.3$$

234. In that case, the correct value for the duty change term, inclusive of AD duties is, as follows:

$$\frac{t_I - t_c}{1+t} = \frac{0.05}{1 + 0.1\ year\ prior\ CVD\ rate + 0.2\ year\ prior\ AD\ rate} = 0.038$$

235. In contrast, if one accounts only for the year-prior 10 percent CVD duty rate, the decrease in duty rates implied by removing the challenged measure represents a much larger drop in the relative price of Canadian imports. That is, the duty change term takes the much larger value, as follows:

$$\frac{t_I - t_c}{1+t} = \frac{0.05}{1 + 0.1\ year\ prior\ CVD\ rate} = 0.045$$

236. Continuing this example and to illustrate the effect on estimated nullification or impairment, the United States assumes the scaling factor takes a value of 0.5 and the value of imports is $100 million. If the AD duties in place in the year prior are not taken into account, nullification or impairment under Canada's formula would be overstated, with a value of $2.25 million.

$$NI = value\ of\ imports \times \frac{\boldsymbol{t_I - t_C}}{\boldsymbol{1+t}} \times scaling\ factor = 100 \times 0.045 \times 0.5 = 2.25\ million$$

237. In contrast, if the AD duties in place in the year prior are properly accounted for, Canada's formula would estimate nullification or impairment of only $1.9 million.

$$NI = value\ of\ imports \times \frac{\boldsymbol{t_I - t_C}}{\boldsymbol{1+t}} \times scaling\ factor = 100 \times 0.038 \times 0.5 = 1.9\ million$$

238. It is likewise necessary to include AD duties under the U.S. approach. Since the U.S. model is solved directly in its non-linear form, nullification or impairment will be understated if AD duties are omitted from any of the duty rate variables in the model. That is, in addition to the year-prior duty rate ($t$), 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.

239. Therefore, to omit the AD duties that are present in the market, as Canada suggests, 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.

**85. <u>For the United States</u>: Were the Arbitrator to take into account anti-dumping duties placed on a relevant product, could the United States please explain why it would not similarly take into account ordinary tariffs on a product as well?**

**Response:**

240. Nearly all imports from Canada enter the United States duty free. However, to the extent there are ordinary tariffs applied to a product, the model should take them into account following the explanation in the U.S. response to question 83. That is, ordinary tariffs should be included in the total initial and total counterfactual duty rate.[289] So, if ordinary tariffs are in place in the year prior to the imposition of the challenged measure, they should be represented in the year-prior duty rate. As demonstrated in the U.S. response to question 84, omitting any concurrent tariffs (including ordinary tariffs) from the total duty rate implies a larger percent change in duty rates when CVD rates are modified, thus overstating nullification or impairment.

## 6 VALUE OF THE IMPORTS

**86. For both parties: Could the parties please explain whether, for purposes of calculating the relevant value(s) of imports, a Canadian company's data on its exports to the United States or the company's corresponding US Customs import data would be the best information to use? What are the strengths and weaknesses of each data source? Could the parties please further explain whether these two sources of data might differ? If so, why?**

**Response:**

241. The United States responds to questions 86 and 104 together.

242. For the purposes of calculating the relevant value of imports, the United States considers that a Canadian company's corresponding import data maintained by Customs would be the best information to use because the trade data is organized on a company-specific basis, and by the 10-digit HTS level and the relevant AD/CVD case number, if applicable. Further, obtaining data from a single source would ensure that all the data is collected and reported in a consistent manner, and would also be the most efficient approach because contact with only one source would be necessary. As explained in the U.S. response to question 101, adoption of BCI procedures will enable the United States to share with Canada company-specific data obtained from Customs.

243. In contrast, Canada's approach to rely on data from all Canadian companies affected by the challenged measure leaves many unresolved issues. First, it is unclear how each individual Canadian company maintains its data. Will it be structured by HTS code? If so, by what HTS digit level? If not, will it be the company itself or the parties to this proceeding that determines which sales fall under the scope of the AD/CVD order and are subject to AD/CVD duties? Is the data maintained on a fiscal year or calendar year basis? Will the Canadian company report the value of imports in Canadian dollars or US dollars? If it is recorded in Canadian dollars, it would also be necessary to conduct a foreign exchange conversion. Such questions are not present with the use of data obtained directly from Customs. Therefore, Canada's approach of

[289] Ordinary tariff data can be obtained from USITC DataWeb, a public website.

soliciting data from Canadian companies would leave open many issues for disagreement between the parties.

244. Further, if the parties cannot agree on the relevant export data, then Canada has proposed to calculate the level of nullification or impairment solely based on company's self-reported data.[290] This means that the result of the consultation process could very well mean the use of one company's self-reported data, while another company's data may be from Customs. However, using multiple sources leaves open the possibility for inconsistencies among the data, and thus disagreement between the parties.

245. On the other hand, the United States considers it appropriate for the value of Canadian imports to come from Customs, a single, comprehensive data source where all the data has been compiled in a uniform, consistent manner and can be organized on a company-specific, 10-digit HTS level basis, or AD/CVD case number, if applicable, for any time period.

246. Lastly, it is unclear under Canada's approach, how Canada will be able to identify which Canadian companies imported under the All Others rate.[291] In contrast, the use of data directly from Customs will capture all entries that were reported under the associated 10-digit HTS reference codes, as well as the relevant AD/CVD case number, if applicable, for any time period.

**87. <u>For both parties</u>: Could the parties please explain in detail if and how Canada could use HTS 10-digit level (or some other HTS level) US import data to calculate all relevant values of imports under the Canadian and the US models, in the absence of Canadian companies agreeing to supply confidential sales information? In answering this question, please ensure to: (a) identify the potential sources of such data (e.g. US Customs, USITC DataWeb, etc.); (b) explain whether the data are publicly available, how are the data structured, and how these data could be used to calculate the relevant *vimps*; (c) explain whether and how your answer would change if the model the Arbitrator adopts includes or excludes Canadian imports from companies that were not assigned a CVD rate affected by the OFA-AFA Measure; and (d) explain whether and how your answer would change if Canada were calculating the value of imports following an original investigation or after some post-original-investigation USDOC proceeding.[292]**

**<u>Response</u>:**

247. As explained in the U.S. response to question 101, below, the adoption of BCI procedures by the Arbitrator for the purpose of implementing a decision would enable the United States to provide to Canada relevant data from Customs. As a result, and for the reasons described above

[290] Canada's Methodology Paper, para. 15.
[291] Canada's Methodology Paper, para 14 ("Canada will first identify the Canadian exporters subject to countervailing duty rates based on the OFA-AFA measure, <u>including Canadian exporters subject to the all others rate</u>.").
[292] *See e.g.* U.S. written submission, para. 139 (explaining that US Customs changes its data collection and organization of such data following an original investigation in which CVDs are imposed).

in the U.S. response to question 86, the United States considers Customs to be the appropriate source for relevant import data from Canada. In the U.S. response to question 36, the United States provides further detail concerning the trade data maintained by Customs.

248. Since Customs is the U.S. agency responsible for trade data associated with AD/CVD proceedings and can provide such data on a company-specific basis, it would remain the best available source for the value of imports, regardless of whether the Arbitrator determines to include or exclude Canadian imports from companies that were not assigned a rate affected by the measure. However, please see the U.S. response to question 109, below, where the United States explains the importance of including both subject and non-subject Canadian imports in the model.

249. Further, as explained in the U.S. written submission, the information available from Customs differs for investigations and administrative reviews.[293] The United States has a retrospective duty assessment system, and therefore, AD/CVD duties are assessed after a final duty rate based on a calculation of the actual amount of dumping or subsidization has occurred in an administrative review.[294] In an AD/CVD investigation, if Commerce issues an affirmative preliminary determination, Customs begins to collect AD/CVD cash deposits (estimated duties) at the preliminarily determined rate of dumping or subsidization. If Commerce then issues an affirmative final determination in the investigation concerning dumping or subsidization, and the Commission also issues an affirmative determination concerning material injury, then an AD/CVD order will be issued and Customs will continue to collect AD/CVD cash deposits at the rate determined in final determination of the investigation.

250. As explained in the U.S. response to question 35, after an AD/CVD order is in place, Commerce conducts administrative reviews if requested by an interested party. After the issuance of a final determination of an administrative review, Commerce instructs Customs to assess AD/CVD duties on the reviewed entries, and to begin collecting cash deposits on future entries in the amount of the AD/CVD rate calculated in the administrative review. The final AD/CVD duty rate may increase, decrease, or remain unchanged from the AD/CVD cash deposit paid at the time of entry. Customs will issue a bill for any increase in duty plus interest, or refund any overpayment plus interest as a result of a decrease of duty.

251. When Commerce instructs Customs to begin collecting AD/CVD cash deposits or duties on a product, U.S. importers report the AD/CVD case number on imported goods in ACE, in addition to the 10-digit HTS code. HTS classification numbers are listed in the scope of an AD/CVD order for convenience in assisting importers in determining whether a product may be subject to the order. However, entries subject to AD/CVD cash deposits or duties are ultimately determined by the written description of the scope of the AD/CVD orders, and are not limited to HTS classifications. The inclusion or exclusion of an HTS classification in the scope of an AD/CVD order does not determine whether a product falls under the scope of the order.

[293] U.S. Written Submission, para. 139.
[294] *See* 19 C.F.R. § 351.212 (Exhibit USA-18).

Therefore, importers report both an AD/CVD case number, if applicable, as well as the 10-digit HTS code.

252. As a result, for CVD investigations, data from Customs based on the reference HTS codes should be used instead of the AD/CVD case numbers because Customs will not yet have data according to AD/CVD case numbers since the investigation concerns entries from a past period of time.[295] Those entries will not have been assigned an AD/CVD case number, but will have a 10-digit HTS code. Further, whether for an investigation or administrative review, the data from Customs will be available on a company-specific basis. As explained in the U.S. response to question 105, the use of HTS data for an investigation will likely overstate the value of imports that would be subject to AD/CVD duties, since some of the values under the reference HTS code are not subject to duties. However, data from Customs remains the best available information under those circumstances, particularly in contrast to Canada's proposal to obtain information directly from Canadian companies, for reasons discussed above in the U.S. response to question 86.

253. For administrative reviews, data concerning entries reported under AD/CVD case numbers is available, and thus the United States considers that the data from Customs will be the best available source.[296] Notably, for administrative reviews, Canada has not provided a rationale for why it considers data from Canadian companies to be the better source.

**Questions 88 through 96 are addressed to Canada.**

**97. For the United States: Could the United States please explain whether there are differences in public access restrictions on company-specific US Customs data and US Customs data organized by HTS level?**

**Response:**

254. As further explained in the U.S. response to question 36, the data maintained by Customs in the ACE data system is on the 10-digit HTS level, and is not publicly accessible, although individual importers and customs brokers have access to their own information. Company-specific data, whether on a 10-digit HTS level or in accordance with AD/CVD case numbers, is confidential, but the United States would be able to provide the data to Canada under BCI procedures adopted by the Arbitrator for the purposes of implementing a decision in this proceeding.[297]

255. Although Census extracts the HTS-level trade data from Customs' ACE data portal and maintains a database that is publicly accessible, the public database is not company-specific. Nor does Census maintain data in a manner that can be correlated to AD/CVD orders.

[295] U.S. Written Submission, para. 139.
[296] U.S. Written Submission, para. 139.
[297] *See* U.S. response to question 101.

**98. <u>For the United States</u>: Could the United States please explain whether import-value information on the USITC DataWeb is different from, or the same as, HTS-level import data collected by US Customs? If they differ, how do they differ?**

**<u>Response</u>:**

256. Import-value information available to the public through the USITC DataWeb (and the Census database) is essentially the same as HTS-level import data collected by Customs. As explained in the U.S. response to question 36, the USITC DataWeb is a public web portal that provides 10-digit HTS level data, but the data cannot be organized on a company-specific basis. In contrast, Customs collects 10-digit HTS level data (and AD/CVD duty information, if applicable) that can be organized on a company-specific basis. USITC DataWeb does not report AD/CVD trade data information.

**99. <u>For the United States</u>: Could the United States clarify whether, after CVDs are placed onto Canadian imports following an original CVD investigation, US Customs compiles information on the value of imports of these products from only Canadian companies that have been assigned CVD rates, or from all Canadian companies exporting the relevant product to the United States whether or not they were assigned CVD rates?**

**<u>Response</u>:**

257. As explained in the U.S. response to question 36, Customs compiles information on the value of all imports matching the description of the relevant product from Canada, whether the product has an individually-assigned CVD rate or not.

**100. <u>For the United States</u>: The Arbitrator understands that the data from US Customs with which the United States advocates Canada use to calculate the relevant *vimps* is confidential in nature. If true, could the United States please explain how Canada would calculate a *vimp*, under the United States' proposed approach for calculating the *vimp*, if one or more relevant Canadian companies refused to allow US Customs to release its/their data to Canada? Please also explain how such scenarios would impact the level of NI. Please provide an example, or examples, to illustrate your answer.**

**<u>Response</u>:**

258. The United States responds to questions 100 and 101 together, below.

**101. <u>For the United States</u>: In footnote 138 of its written submission, the United States suggests the possibility that the Arbitrator establish BCI procedures as between the parties in this context. Could the United States please clarify the purpose and scope of such BCI procedures? In particular, does the United States believe that the Arbitrator should do so: (a) because such data in the possession of US Customs are confidential, and the United States believes such BCI procedures would obviate the**

**need to obtain authorization from the relevant companies to release their respective data to the parties; and/or (b) to ensure the confidentiality of that data only once the relevant companies have given their permission to release such data to the Canadian and US governments for purposes of calculation of the level of NI?**

**Response:**

259. As explained in the U.S. response to question 36, data from Customs are the most appropriate source for the value of Canadian imports, given that the ACE database maintained by Customs is a comprehensive source that collects data organized on a company-specific basis, at a 10-digit HTS level, and contains information on entries under AD/CVD case numbers, if applicable. Company-specific data is confidential and may not be released publicly.[298]

260. However, in prior WTO dispute settlement proceedings, the United States has provided Customs data to WTO adjudicators and other WTO Members participating in dispute settlement proceedings pursuant to adopted BCI procedures and under the instruction of the arbitrator. Similarly here, the adoption of BCI procedures for the purposes of implementing a decision by the Arbitrator, as well as an instruction from the Arbitrator for the United States to provide relevant Customs data to Canada, would enable the United States to provide to Canada information from Customs for the limited purpose of determining the level of suspension of concessions. As a result, it would not be necessary for individual Canadian companies to provide written authorization for Customs to release ACE import data. Though, as explained above, it would be necessary for Canada to protect the data and prevent its release to the public. Protection of Customs data and any other confidential information exchanged by the parties could be ensured by requiring the parties to treat confidential information in accordance with BCI procedures to be adopted by the Arbitrator.

261. The situation of company-specific, confidential sales information needed to calculate a counterfactual All Others rate is different. Canadian companies provide such confidential sales information to Commerce during the course of CVD proceedings and request confidential treatment under an administrative protective order ("APO"). Because confidential information submitted to Commerce during the course of an AD/CVD proceeding is protected under an APO from unauthorized public disclosure, in a WTO dispute, the information can only be released with specific authorization of the party that provided the information.[299] That is why it is necessary to obtain authorization letters from Canadian companies permitting Commerce to release the information to Canada. Commerce puts APOs in place, in accordance with Article 6.5 of the AD Agreement and Article 12.4 of the SCM Agreement, to prohibit the unauthorized public disclosure of business confidential information subject to an APO – even to WTO adjudicators and parties to WTO dispute settlement proceedings.[300]

[298] 19 U.S.C. § 1677f (Exhibit USA-17).
[299] *See* 19 C.F.R. § 351.306(a)(5) (Exhibit USA-19).
[300] *See* 19 C.F.R. § 351.306 (Exhibit USA-19).

262. For these reasons, if data for Canadian import values are obtained from Customs, all necessary import data will be available to determine the level of suspension.

**102. <u>For the United States</u>: Could the United States please explain whether it agrees with Canada's assertions that, if Canada cannot obtain confidential export data from a given company, then Canada's exclusion of that company's data from the *vimp* will necessarily lead to a lower level of suspension of concessions than if Canada had included the company's data?[301]**

**<u>Response</u>:**

263. As explained in the U.S. responses to questions 86, 87, and 101, above, if the data are obtained directly from Customs, all necessary data will be available for the value of Canadian imports, and this will enable a more reasoned estimate of the level of nullification or impairment.

264. Nevertheless, the United States confirms that under Canada's approach, excluding a company's data from the value of imports (*vimp*) will lead to a lower estimate of nullification or impairment because it implies a lower value for *vimp*. Canada's formula uses fixed, pre-determined coefficients. As such, excluding a Canadian company's exports to the United States from the calculation of *vimp* will reduce estimated nullification or impairment relative to a *vimp* that includes all Canadian exports.

**103. <u>For the United States</u>: Could the United States please explain whether it agrees with Canada's assertion that it is reasonable to expect that, if a Canadian company has been assigned a CVD rate *unaffected* by the OFA-AFA Measure, then that company would not have incentives to agree to release its confidential US sales data to the parties for purposes of calculating a *vimp*, and thus it would be unreasonable to require Canada to obtain such companies' permission to use their confidential sales information?[302]**

**<u>Response</u>:**

265. As an initial matter, as explained above, the United States considers it appropriate to obtain the data for U.S. import values directly from Customs. Under this approach, it would not be necessary to consider whether a company would be incentivized or not to share access to its information.

266. Regardless, the United States disagrees with Canada's assertion concerning the incentives of companies that have not been affected by the challenged measure. Canada incorrectly assumes that the removal of the challenged measure will reduce the company-specific CVD rate and the All Others rate. As the United States has explained and demonstrated, the removal of the challenged measure would not necessarily result in a reduction of the company-specific CVD

[301] Canada's written submission, para. 174.
[302] Canada's written submission, para. 167.

rate or the All Others rate.[303] Therefore, contrary to Canada's assertion, a company that has not been affected by the challenged measure may be incentivized to share its information to facilitate a suspension of concessions and induce the United States to eliminate the challenged measure and thereby increase the rates of its competitors.

**104. <u>For the United States</u>: Could the United States please respond to Canada's assertion that "[t]he United States fails to explain why data based on HTS codes would be more accurate than Canada's proposal to use the sales values obtained directly from the affected exporters"?[304]**

**<u>Response</u>:**

267. Please see the U.S. response to question 86, above.

**105. <u>For the United States</u>: Regarding the issue of whether use of HTS data will likely overstate the level of NI, could the United States please respond to Canada's arguments in paragraphs 177-179 of its written submission? In particular, is it possible to conclude whether it will more often be the case that HTS codes will be over-inclusive of subject merchandise or under-inclusive?**

**<u>Response</u>:**

268. As explained in the U.S. response to question 87, and as Canada acknowledges in paragraph 177 of its written submission, it is the written description of the product in the CVD order that defines the scope of the investigation.[305] Commerce provides HTS classification numbers as part of its scope description of subject merchandise to assist Customs and the public in identifying products that may be subject to a particular CVD order. HTS classification numbers included in the scope language of a CVD order published by the Commerce are typically identified during the investigation phase of a CVD proceeding, often with the input of participating interested parties, including the petitioning domestic industry, and based on the description of the merchandise subject to the order and the available HTS classifications. Commerce identifies HTS subheadings in scope language with the knowledge that there is rarely

[303] *See* U.S. Written Submission, para. 45 (explaining that other information existing on the record could be used for the rate of the discovered subsidy program) and para. 54 (providing as an example the *Supercalendered Paper* investigation, where the removal of the challenged measure would have *increased* the All Others rate). *See also* U.S. response to question 14 (demonstrating that in two of the CVD determinations utilized by Canada to demonstrate the "ongoing conduct" measure, respondents asked Commerce to use information that otherwise existed on the record of the CVD proceeding for the rate of the discovered subsidy program).
[304] Canada's written submission, para. 176.
[305] *See, e.g.*, *Utility Scale Wind Towers from Canada, Indonesia, and the Socialist Republic of Vietnam: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Orders*, 85 Fed. Reg. 52543, 52545 (Aug. 26, 2020) ("While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of these orders is dispositive.") (Exhibit USA-10); *Certain Softwood Lumber Products From Canada: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 83 Fed. Reg. 347, 349 ("Although these HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.") (Exhibit CAN-18).

perfect alignment between the class or kind of merchandise subject to a CVD order and a particular ten-digit HTS code.

269. 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, for these reasons, 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."[306]

270. Lastly, in support of its assertion, Canada selects two anecdotal examples of shipments that were determined by Customs to fall under the written description of subject products even though they entered the United States under HTS codes other than the reference codes.[307] These examples do not demonstrate that, as a general matter, HTS classification numbers will understate the value of imports subject to an AD/CVD order. Even if some importers designate subject products under an HTS classification number outside an order's reference HTS codes, it is no less true that a significant share of imports that do enter under HTS reference codes may not be subject to the order.

**106. For the United States: The United States asserts that for the *vimp* calculated immediately following the conclusion of an original investigation, "data from Customs based on the reference HTS codes should instead be used".[308] Could the United States please clarify from where these "HTS codes" would be obtained (and if they are amended over time, from where they should be obtained following such amendment), whether the presence of such HTS codes information in relevant sources is mandated by law or is otherwise customary, and at what level of specificity these HTS codes are?**

**Response:**

271. As explained in the U.S. responses to questions 86 and 87, above, the data for the value of imports should be obtained from Customs, regardless of whether the proceeding is an investigation or administrative review. For an investigation, the information obtained from Customs will be at the 10-digit HTS level. As explained in the U.S. response to question 87, when Commerce instructs Customs to begin collecting AD/CVD cash deposits or duties on a product, U.S. importers report the AD/CVD case number on imported goods in Customs' ACE portal, in addition to the 10-digit HTS code. As explained in the U.S. response to question 105,

[306] *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 4.92.
[307] Canada's Written Submission, para. 178.
[308] U.S. written submission, para. 139.

10-digit HTS codes are listed in the scope of an AD/CVD order for convenience in assisting importers in determining whether a product may be subject to the order.[309]

**107. <u>For the United States</u>: Could the United States please clarify how its proposal to use HTS 10-digit level data to calculate the *vimp* is consistent with the United States' proposal to use different "varieties" of Canadian imports? In particular, if HTS 10-digit level data used to calculate the *vimp* are not company-specific, how will the aggregated value of Canadian imports under an HTS 10-digit level be allocated among different relevant "varieties" of Canadian imports (i.e. producers subject to individual CVD rates impacted by the OFA-AFA Measure, firms subject to the "all-others" CVD rate, and firms subject to individual CVD rates unaffected by the OFA-AFA Measure)? In answering this question, the United States may want to make reference to its answer to question No. 87, above, as appropriate.**

**<u>Response</u>:**

272. As explained in the U.S. responses to questions 86 and 87, the United States considers it appropriate to use <u>company-specific</u> HTS 10-digit level data obtained from Customs as the basis for the value of imports from Canada in the event the challenged measure occurs in a CVD investigation. For an administrative review, the best available source is also Customs because it collects company-specific import data reported under the relevant CVD case number. As explained in the U.S. response to question 109, obtaining company-specific imports value data is consistent with the approach to define individual varieties of Canadian imports, as the value of imports can be attributed to each distinct variety[310].

**108. <u>For the United States</u>: Could the United States please clarify, when the United States asserts that the Arbitrator should use "product specific data"[311], that it means "company-specific data"? Is there a meaningful distinction between "product-specific data" and "company-specific data" in this context? If so, please explain what it is and its relevance for calculating the *vimp*.**

**<u>Response</u>:**

273. In the context of paragraph 134 of the U.S. written submission, it would be appropriate to assert both that the use of "product-specific" and "company-specific" data is necessary to make a reasoned estimate of the level of nullification or impairment. In the context of discussing the

[309] *See, e.g.*, *Utility Scale Wind Towers from Canada, Indonesia, and the Socialist Republic of Vietnam: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Orders*, 85 Fed. Reg. at 52545 (Aug. 26, 2020) (Exhibit USA-10); *Certain Softwood Lumber Products From Canada: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 83 Fed. Reg. at 349 (Exhibit CAN-18).
[310] Further, in the U.S. response to question 74, the United States explains that although the import data for the All Others rate variety and the non-subject Canadian companies variety could be provided on an aggregate basis, Customs may need to organize the information on company-specific basis for the purposes of gathering the relevant data.
[311] U.S. written submission, para. 134.

value of imports, "product-specific" can be understood to mean the product under the scope of the CVD order. The use of "company-specific" refers to the data that is associated with individual Canadian companies.

274. The United States considers the use of separate Canadian varieties to be appropriate for the calculation of the level of nullification or impairment. As previously discussed, this includes at least three distinct Canadian varieties: subject individually-investigated Canadian companies, subject Canadian imports under the All Others rate, and non-subject Canadian imports.[312] As a result, "product-specific" data alone is not sufficient. Rather, "company-specific" data for U.S. imports from Canada of the product at issue will be necessary to account for the value of imports under each variety.[313] This is because the level of nullification or impairment is not just a function of the increase in U.S. imports by the affected Canadian companies when their rates change with the removal of the challenged measure, but rather is a sum of the change in imports by the affected Canadian companies and the change in imports by non-affected Canadian companies.[314]

**109. <u>For the United States</u>: Could the United States please respond to Canada's assertion in footnote 175 of its written submission that "the United States appears to be arguing that the group of the affected companies should be broader than proposed by Canada"?**

**<u>Response</u>:**

275. As explained in the U.S. response to question 108, above, the United States considers it appropriate for value of imports to be obtained not only for the Canadian companies affected by the challenged measure, but also for all other Canadian companies that are not impacted by the challenged measure. This approach ensures that the full effect of the change in duty rate on Canadian companies affected by the challenged measure will be accounted for, given that the change in duty rate and corresponding relative price change will also impact imports from Canadian companies not affected by the challenged measure. That is, if the elimination of the challenged measure reduces the CVD rate, Canada's nullification or impairment is the increase in import value of Canadian companies with the challenged measure <u>minus the decrease</u> in import value of other Canadian companies. Therefore, a reasoned estimate of nullification or impairment is the <u>net effect</u> of the change in duty, and should account for both imports from Canadian companies affected by the challenged measure, as well as those not affected by the challenged measure.

**110. <u>For the United States</u>: Could the United States please comment on paragraph 3 in Appendix 2 of Canada's Methodology Report, in particular on Canada's**

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[312] *See* U.S. Written Submission, Appendix 1, para. 4.
[313] As explained in the U.S. response to question 74, the United States explains that although the import data for the All Others rate variety and the non-subject Canadian companies variety could be provided on an aggregate basis, Customs may need to organize the information on company-specific basis for the purposes of gathering the relevant data.
[314] U.S. Written Submission, para. 136.

**assumption that the 6-digit codes from HTSUSA align with six-digit codes from HS 2017?**

**Response:**

276. The United States confirms that HS 2017 is the version of the HS classification system that is currently in effect. Accordingly, six-digit codes from 2019 HTSUSA from Census align with six-digit codes from HS 2017.

277. The HS classification system is updated approximately every five years by the WTO. Given that it remains unknown when the challenged measure would be applied (if at all) to a product, the United States considers that it would be more appropriate to utilize the HS classification system that was most recently put into effect prior to the reference period.

## 7 INFLATIONARY ADJUSTMENT

**111. For the United States: Regarding Canada's request for an annual inflationary adjustment, could the United States please respond to the content of paragraph 181 of Canada's written submission?**

**Response:**

278. The United States does not object to the concept of applying an adjustment for inflation to the initial nullification or impairment level on an annual basis. However, an appropriate source for the inflation rate must be selected, such as a U.S. producer price index for the relevant industry as opposed to a GDP growth rate, deflator, or other aggregate rate. Canada has not proposed the source for an appropriate price index to calculate the rate of inflation.[315]

[315] Canada's Written Submission, para. 181.

## APPENDIX I

### AMENDED TABLE 1[316]

| Input Name | Correspondence to Model | Data Source |
|---|---|---|
| epsilon | U.S. demand elasticity $(\epsilon)$ | Commission report |
| eta_us | U.S. supply elasticity $(\eta_{us})$ | Commission report |
| eta_import | Supply elasticity for all imported varieties, $(\eta_{CAI}, \eta_{CAA}, \eta_{CAO}, \eta_{ROW})$ | Value set to 10 |
| sigma | Elasticity of substitution $(\sigma)$ | Commission report |
| Y | Total U.S. expenditure on the relevant product $(E)$ in the base year | Sum of value of domestic shipments and imports data, sources detailed below |
| m_us | Market share of domestic products: the value of domestic shipments divided by total U.S. expenditure in the base year | Domestic shipments value from Commission report |
| m_cai, m_caa, m_cao | Market share of each Canadian variety: the value of imports of each variety divided by total U.S. expenditure in the base year | Import values for each variety obtained from Customs |
| m_row | Market share of ROW imports: the value of ROW imports divided by total U.S. expenditure in the base year | Total imports from Census minus imports from Canada from Census |
| t_cai, t_caa, t_cao | Total year-prior duties for each Canadian variety | Sum of all applicable duty rates.<br><br>Ordinary tariff rates from U.S. tariff schedule |

[316] Originally submitted as Table 1 in Appendix 2 of the U.S. Written Submission.

| **Input Name** | **Correspondence to Model** | **Data Source** |
|---|---|---|
| t1_cai, t1_caa, t1_cao | Total initial or counterfactual duties for each Canadian variety | Sum of all applicable duty rates.<br><br>Initial CVD rates obtained from Commerce determinations<br><br>Counterfactual CVD rates calculated as described in section IV.D.2 of the U.S. written submission<br><br>AD rates obtained from Commerce determinations<br><br>Ordinary tariff rates obtained as described above. |