

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

Recourse to Article 22.6 of the DSU by the United States

(DS505)

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

September 20, 2021

Mr. Chairperson, Members of the Arbitrator:

1. On behalf of the U.S. delegation, I would like to thank you, and the Secretariat staff assisting you, for your ongoing work in this arbitration, particularly during this unprecedented and challenging time.

2. In particular, I would like to acknowledge and thank the Arbitrator, as members of the original panel, for its continued work throughout this dispute. At this point, it is somewhat curious that this dispute is still called *United States – Countervailing Duty Measures on Supercalendered Paper from Canada*. Commerce¹ revoked the CVD² order on *Supercalendered Paper from Canada* in July 2018.³

3. With the revocation of that CVD order, the discovered subsidy “ongoing conduct” measure is not applied to Canada. *Supercalendered Paper* was the only CVD order involving Canadian goods that contributed to the “ongoing conduct” measure. The remaining CVD determinations utilized by Canada to demonstrate “ongoing conduct” involved goods from India and China. Further, there is no CVD order or CVD investigation on Canadian goods that involves the “ongoing conduct” measure. In sum, no benefit to Canada is being nullified or impaired in any way by a measure that is not being applied to Canada.⁴

4. So, we ask, why are we here? The central question under the DSU⁵ for this proceeding is whether Canada’s request for authorization to suspend concessions is “equivalent” to the level of nullification or impairment. As the United States has demonstrated, the answer to that question is a resounding “no”. Canada requests countermeasures for nullification or impairment that does not exist, nor can Canada demonstrate that it will ever exist. And although Canada has repeatedly cited to past arbitrations in an attempt to disguise its unprecedented request, it is clear that this is a dispute of first impression. Because Canada’s request for suspension concerns only future conduct, and there is no present level of nullification or impairment, there is no way to assess whether the methodology will generate an equivalent result. Necessarily, the future level of nullification or impairment is unknown – and may never exist. Accordingly, Canada’s request is in breach of the DSU and the Arbitrator should reject Canada’s request.

5. That being said, in the event the Arbitrator determines to award Canada with a level of suspension for some unknown, future level of nullification or impairment that may never exist, the United States also discusses how Canada’s proposed methodology still distorts any possibility for the requested level of suspension to be “equivalent” to the level of nullification or impairment, as required by the DSU. On that basis as well, Canada’s request should be rejected.

¹ The U.S. Department of Commerce (“Commerce”).

² Countervailing duty (“CVD”).

³ U.S. Written Submission, para. 24.

⁴ U.S. Responses to First Set of Questions, para. 20.

⁵ *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”).

**I. CANADA’S REQUEST FOR AUTHORIZATION TO SUSPEND CONCESSIONS
IS IN BREACH OF THE DSU BECAUSE THERE IS NO NULLIFICATION OR
IMPAIRMENT**

**A. It is Within the Arbitrator’s Mandate to Find No Nullification Or
Impairment**

6. As the United States has explained, it is within the scope of the Arbitrator’s mandate to assess the existence of any nullification or impairment. The first sentence of Article 22.7 of the DSU requires that the level of suspension shall be equivalent to the level of nullification or impairment.⁶ 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.⁷ And, an inquiry into the level of nullification or impairment necessarily includes a query into the very existence of nullification or impairment. As the United States has explained, both Articles 3.8 and 23.2 of the DSU support this interpretation.⁸

7. Further, the Arbitrator may also consider whether Canada’s request for suspensions “is allowed” under a covered agreement, in accordance with the second sentence of Article 22.7 of the DSU.⁹ As the United States has explained, Canada’s proposed suspension of concessions is not allowed under either Articles 3.3 or 22.4 of the DSU.¹⁰ Article 3.3 of the DSU provides for prompt settlement of situations where benefits presently “are being impaired.” Canada, however, cannot assert any present benefits accruing to it that “are being impaired”.¹¹ Further, as we will discuss, Canada cannot “consider” that its benefits are being impaired, as Canada now suddenly asserts.¹²

8. Article 22.4 of the DSU requires that the level of suspension authorized by the DSB shall be equivalent to the level of nullification or impairment. However, the United States has presented evidence demonstrating that the “ongoing conduct” measure has no adverse impact on Canada, and therefore any request for suspension cannot be equivalent.¹³

9. This interpretation also makes logical sense given that “a Member’s legal interest in compliance by other Members does not . . . automatically imply that it is entitled to obtain

⁶ U.S. Written Submission, para. 13; U.S. Responses to First Set of Questions, para. 8.

⁷ 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”).

⁸ U.S. Written Submission, para. 13; U.S. Responses to First Set of Questions, paras. 13-16, 23-29.

⁹ U.S. Written Submission, para. 14; U.S. Responses to First Set of Questions, paras. 13-16.

¹⁰ U.S. Responses to First Set of Questions, paras. 14-15.

¹¹ Underline added.

¹² Canada’s Response to Second Set of Questions, paras. 11-12.

¹³ U.S. Written Submission, paras. 24-25; U.S. Responses to First Set of Questions, paras. 18-20.

authorization to suspend concessions under Article 22 of the DSU.”¹⁴ Indeed, as Canada itself acknowledges, nullification or impairment and breach of WTO obligations are two separate concepts.¹⁵

10. Therefore, where the evidence establishes that the present level of nullification or impairment is zero, then there is no nullification or impairment. Accordingly, any suspension of concessions that exceeds zero is in breach of the DSU.¹⁶

B. Canada’s Level of Nullification or Impairment is Zero and Does Not Exist

11. As the United States has explained, Canada’s proposed suspension of concessions is not allowed or is not equivalent to the level of nullification or impairment because it does not exist and is zero. The United States has met its burden and demonstrated that none of Canada’s benefits “are being impaired” as a result of the “ongoing conduct” measure.¹⁷ With the revocation of the *Supercalendered Paper* order, the discovered subsidy “ongoing conduct” measure is not applied to Canada. Further, there is no CVD order or CVD investigation on Canadian goods that involves the “ongoing conduct” measure.

12. Tacitly recognizing that the DSU requires that benefits “are being impaired” for there to be nullification or impairment, Canada now belatedly asserts that the measure “currently causes nullification or impairment to Canada”.¹⁸ But Canada’s belated argument only confirms the flaw in its countermeasures request. To the extent Canada seeks to assert present nullification or impairment as a basis for its request for suspension, such a claim is inconsistent with and exceeds Canada’s request for authorization. In its suspension request, Canada asked only for “an annual level commensurate with the trade effects of any future countervailing duties on Canadian imports of any given good that are attributable to the U.S. ‘ongoing conduct’ at issue in this dispute.”¹⁹

13. Canada’s assertion that it now “considers” its benefits are being impaired²⁰ is also inconsistent with statements Canada made at the June 29, 2020 DSB meeting. There, Canada acknowledged that “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.”²¹

¹⁴ *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.10.

¹⁵ Canada’s Written Submission, para. 33. *See also* U.S. Written Submission, para. 17.

¹⁶ *See, e.g., EC – Hormones (Canada) (Article 22.6 – EC)*, para. 41; *EC – Hormones (US) (Article 22.6 – EC)*, para. 42.

¹⁷ U.S. Responses to First Set of Questions, paras. 18-20.

¹⁸ Canada’s Response to Second Set of Questions, para. 1 (emphasis added).

¹⁹ WT/DS505/13.

²⁰ Canada’s Response to Second Set of Questions, paras. 11-12.

²¹ WT/DSB/M/442, para. 12.6. *See also* U.S. Written Submission, para. 25.

14. Further, because no nullification or impairment presently exists, it is not possible to quantify the level of nullification or impairment. Absent such quantification, the Arbitrator is incapable of assessing the equivalency of Canada’s proposed suspension of concessions.

15. Canada appears to implicitly acknowledge this. Despite vaguely asserting that Canada cannot be assured that its duty rates will be calculated in a manner that is WTO-consistent and that Canadian interested parties purportedly incur “additional legal costs” due to the uncertainty associated with the measure, Canada concludes by stating that Canada “is not seeking the Arbitrator to quantify each of these adverse impacts that equate to nullification or impairment”.²²

16. It is untenable for Canada to assert that it suffers from present nullification or impairment as a basis for its request for suspension of concessions, but then state that it does not seek for the Arbitrator to quantify those adverse impacts. Canada appears to be asking the Arbitrator to do something that the Arbitrator is not permitted to do. If Canada now allegedly suffers from present nullification or impairment, then it would be necessary to quantify the amount and compare that to Canada’s request for suspension of concessions. Only by making such a comparison could the Arbitrator determine whether such a request is equivalent to the level of nullification or impairment. Further, Canada’s approach also would deprive the United States of any ability to defend its interests and challenge Canada’s request for suspension. But Canada does not even seek to demonstrate a level of present nullification or impairment – because it does not suffer from present nullification or impairment.

17. Canada’s request for suspension of concessions is thus solely limited to a hypothetical, future level of nullification or impairment, making this proceeding one of first impression and not similar to past arbitrations. As explained in the U.S. written submission, prior arbitrations awarding a formula for future nullification or impairment also included assessment of present-day nullification or impairment.²³ That is, each prior arbitrator’s consideration of a formula to calculate future nullification or impairment was based upon the arbitrator’s consideration and determination of present nullification or impairment.²⁴

18. Canada relies heavily on *US – Washing Machines (Korea) (Article 22.6 – US)* in support of its request. However, in that arbitration, Korea’s requested authorization for the “as such” measure used the same formula as that submitted for the “as applied” measure to calculate the level of nullification or impairment.²⁵ The arbitrator rejected Korea’s formula, in part, on the basis of its assessment of the “as applied” formula.²⁶ “The Arbitrator then determined that it would be possible to apply a similar model – the Armington model – to calculate the level of

²² Canada’s Response to Second Set of Questions, paras. 7-8.

²³ U.S. Written Submission, para. 30.

²⁴ U.S. Written Submission, para. 30.

²⁵ See *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 4.29.

²⁶ See *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 4.39.

nullification or impairment for [‘as applied’] and [‘as such’]” and noted that “there is no difference in the variables used in the calculations”.²⁷

19. Therefore, in prior arbitrations, the DSB authorized a present request for suspension of concessions because a present level of nullification or impairment existed and the arbitrator was then able to assess “equivalence” of the future nullification or impairment, consistent with the DSU. In contrast, here, the Arbitrator has no way to assess whether the proposed suspension is in fact “equivalent”.

20. Contrary to Canada’s characterization, the United States does not suggest that Canada has no recourse to Article 22.6.²⁸ Rather, the United States has been clear on what we see as an appropriate way forward in this circumstance and consistent with the DSU. Canada could suspend this proceeding until such time as it considers that the challenged measure is applied to its goods. Should that circumstance ever arise, Canada could resume the arbitration, and the Arbitrator would then have a basis to assess whether benefits are being impaired and the level equivalent to any nullification or impairment.²⁹ But the Arbitrator should not assess a level inconsistently with the terms of the DSU simply because Canada insists on pushing forward with this proceeding prematurely.

21. Accordingly, Canada’s request for suspension of concessions should be rejected, and no further evaluation of Canada’s methodology is necessary.

II. IN THE ALTERNATIVE, THE APPROPRIATE CALCULATION OF NULLIFICATION OR IMPAIRMENT MUST RELATE TO THE PRECISE CONTENT OF THE MEASURE AT ISSUE, AND BE FLEXIBLE AND ACCOMMODATE ALL FUTURE SCENARIOS

A. The Parties Do Not Agree on the Measure at Issue

22. To the extent the Arbitrator continues with its evaluation of Canada’s request to suspend concessions, this proceeding presents another problem distinct from past arbitrations. That is, it is clear from the parties’ submissions that 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.³⁰

23. Although Canada contends that it will be “straightforward” for it to determine when the measure has occurred,³¹ Canada seeks to broaden the circumstances where it would be entitled to suspend concessions. That is, Canada contends the measure involves Commerce’s refusal to

²⁷ *US – Washing Machines (Korea) (Article 22.6 – US)*, paras. 6.3, 6.6.

²⁸ Canada’s Written Submission, para. 52; Canada’s Response to Second Set of Questions, para. 17.

²⁹ See U.S. Responses to First Set of Questions, para. 35; U.S. Responses to Second Set of Questions, para. 1 n. 1.

³⁰ U.S. Written Submission, para. 33; Canada’s Written Submission, para. 14.

³¹ Canada’s Response to First Set of Questions, para. 11.

accept additional information and includes new shipper reviews, expedited reviews, changed circumstances reviews, or sunset reviews as CVD proceedings that relate to the measure.³²

24. However, as the United States has explained, the challenged measure has been precisely defined, and nullification or impairment must be assessed within those confines.³³ The precise content of the challenged measure, as defined by Canada itself, and as found by the original panel, consists of three parts: “[(1)] [Commerce] asking the ‘other forms of assistance’ question and, [(2)] where [Commerce] ‘discovers’ information that it deems should have been provided in response to that question, [(3)] applying [adverse facts available] to determine that the ‘discovered’ information amounts to countervailable subsidies.”³⁴ 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”.³⁵ Additionally, part three of the measure is solely limited to circumstances where Commerce uses facts available on the basis of a party’s failure to provide necessary information.³⁶ The evidence Canada presented in support of the existence of the measure before the original panel also plainly illustrates that part three of the measure does not involve Commerce’s refusal to accept additional information,³⁷ as Canada now contends.³⁸

25. Moreover, new shipper reviews, expedited reviews, changed circumstances reviews, and sunset reviews are not a part of the measure that is the subject of the original panel’s findings.³⁹ The “ongoing conduct” measure is an unwritten measure. Canada’s choice to challenge such a measure 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.⁴⁰ Before the original panel, Canada only utilized CVD investigations and administrative reviews. Canada put forward no evidence relating to new shipper reviews, expedited reviews, changed circumstances reviews, or sunset reviews. Accordingly, pursuant to Canada’s own evidence before the original panel, these types of CVD determinations cannot be a part of the challenged measure.

³² Canada’s Response to First Set of Questions, paras. 17, 45-50.

³³ U.S. Responses to First Set of Questions, para. 38.

³⁴ *US – Supercalendered Paper (Canada)* (Panel), para. 7.316.

³⁵ *US – Supercalendered Paper (Canada)* (Panel), para. 7.309, Table 1.

³⁶ U.S. Responses to First Set of Questions, para. 38 (citing *US – Supercalendered Paper (Canada)* (Panel), para. 7.313, Table 2).

³⁷ U.S. Responses to First Set of Questions, para. 56.

³⁸ Canada’s Response to First Set of Questions, para 10.

³⁹ U.S. Responses to First Set of Questions, para. 103.

⁴⁰ *Argentina – Import Measures (AB)*, para. 5.108 (“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.”).

26. The fact that the parties do not agree on the content of the measure and that it is in dispute is another basis for the U.S. request that the Arbitrator reject Canada’s request to suspend concessions.⁴¹ Indeed, if Canada were to be authorized to suspend concessions, it would be left to the sole determination of Canada as to whether the measure occurred. That is untenable.

B. The Appropriate Counterfactual

27. In the event the Arbitrator proceeds to evaluate a hypothetical level of future nullification or impairment, an analysis using a counterfactual is appropriate. Such a counterfactual analysis involves comparing the application of the challenged measure with a counterfactual scenario in which the measure is not applied with respect to Canadian exporters. Although both parties agree that an appropriate counterfactual is one where the challenged measure is not applied to either the company-specific or the All Others CVD rate, the parties disagree, in part, on what happens when the challenged measure is removed.

28. The United States has explained why any counterfactual adopted by the Arbitrator must be flexible and able to accommodate multiple potential scenarios. Necessarily, the assessment relates to information on the record of a future CVD proceeding that is yet to be known. Canada disagrees and argues that the U.S. approach requires speculation.⁴² That incorrect assertion is tremendously ironic as Canada’s entire request to suspend concessions rests upon speculation. Again, Canada seeks an award for some future, unknown level of nullification or impairment for conduct that does not presently exist.

29. For the **counterfactual company-specific CVD rate**, Canada contends that the removal of the challenged measure equates to the CVD rate being reduced.⁴³ However, as the United States has explained, there may be alternative information that supports continuing to find subsidization. Therefore, it would not necessarily be the case that removal of the challenged “ongoing conduct” measure always results in the portion of the CVD rate being reduced.⁴⁴ In instances where the information exists on the record, it would be more appropriate to use such information to calculate the counterfactual company-specific CVD rate. Indeed, two of the CVD determinations utilized by Canada to demonstrate the existence of the challenged measure contained information on the record that the respondents had argued Commerce should utilize instead of applying adverse facts available in the final determination.⁴⁵ Only if such information does not exist, then the United States agrees that the removal of the challenged measure would result in the lowering of the total CVD rate for an individually-investigated company to which the measure had been applied.⁴⁶

⁴¹ U.S. Written Submission, para. 33.

⁴² Canada’s Written Submission, para. 73.

⁴³ Canada’s Written Submission, para. 68.

⁴⁴ U.S. Written Submission, para. 45.

⁴⁵ U.S. Response to First Set of Questions, para. 56.

⁴⁶ U.S. Written Submission, para. 46.

30. As for the **counterfactual All Others CVD rate**, Canada no longer opposes the U.S. proposal to use information on the record of a CVD proceeding to recalculate the counterfactual All Others rate.⁴⁷ The parties appear to agree that public information on the record of Commerce’s proceeding may be used.

31. Yet, Canada opposes the use of confidential information to recalculate the All Others rate. Canada argues that it is “unlikely” that Canadian respondent companies not affected by the measure would authorize Commerce to disclose the confidential information.⁴⁸ As an initial matter, Canada’s logic that companies not subject to the challenged measure would not have the incentive to provide the information is erroneous. The CVD rates of non-subject companies’ competitors could increase with the removal of the challenged measure, which is a financial incentive to cooperate.⁴⁹

32. Further, the parties have contemplated the use of confidential information, as reflected by the joint BCI Understanding. A reasonable set of instructions by the Arbitrator should provide that, where confidential information is necessary, Canada should request that all individually-examined Canadian companies authorize access to their confidential information to recalculate the All Others rate. The possibility of using confidential information should not be prematurely dismissed simply because Canada hypothesizes that these unknown, future hypothetical companies may not participate. Frankly, nothing is known at this point in time. And given that this arbitration concerns future, unknown conduct, any set of instructions that may be issued should cover all likely scenarios, which would include the scenario in which Canadian respondent companies cooperate.

33. If Canada is not able to secure the necessary authorization from all individually-investigated respondents, the United States considers it would be reasonable to use public information on the record to calculate a simple average for the counterfactual All Others rate to ensure an estimate that will more accurately reflect the benefits that might be nullified or impaired in a future proceeding.⁵⁰

34. Furthermore, the averaging methodology utilized to recalculate the All Others rate should, if possible, be the same averaging methodology that Commerce used in the specific future CVD proceeding.⁵¹ Such an approach is practical to implement and would eliminate the risk of potential controversies between the parties.

35. Accordingly, the counterfactual proposed by the United States is reasonable and plausible, and fully contemplates a variety of potential scenarios concerning the record of a Commerce proceeding. The Arbitrator should reject the counterfactual that Canada proposes

⁴⁷ See Canada’s Response to First Set of Questions, paras. 29-30.

⁴⁸ See Canada’s Response to Second Set of Questions, para. 28.

⁴⁹ U.S. Written Submission, paras. 45, 54.

⁵⁰ U.S. Responses to First Set of Questions, para. 67.

⁵¹ U.S. Responses to First Set of Questions, para. 84.

because it is inflexible and static, and will not sufficiently account for all the scenarios that could be present on the record of a future CVD proceeding.

C. The Reference Period

36. The reference period to be used to determine the value of imports should be the full calendar year prior to the date on which Commerce issued the final determination or final results that applies the challenged measure in a CVD proceeding concerning Canadian goods.⁵²

37. The United States does not agree with Canada’s contention that in instances where the value of imports or market shares during the year prior is “atypically low or even non-existent”, an alternative reference period could be used.⁵³ Canada does not explain how such a determination would be made or how Canada would determine whether the year was “atypically low”. Canada’s proposed approach would effectively allow Canada, in its sole discretion, to artificially increase the level of nullification or impairment by selecting a reference year that is beneficial to Canada. Such an approach is untenable and would not result in the level of suspension being equivalent to the level of nullification or impairment.

D. The Appropriate Methodology

38. Turning next to the methodology, given the unique circumstances of this dispute – an “ongoing conduct” measure that is not applied to Canada and only relates to an unknown future application – there is no basis to select a single analytical framework to assess a hypothetical level of suspension. However, to the extent that the Arbitrator disagrees, the methodology selected must be one that has the flexibility to capture the various sources of supply, as well as account for the nuances of any product and market at issue for a specific point in time.

39. Canada’s formula cannot accomplish this. Canada’s formula is inappropriate for the multitude of potential scenarios that are possible in a future CVD proceeding. There are a number of flaws with Canada’s approach. As the United States has explained and will further demonstrate during this meeting, each one of the flaws in Canada’s proposed approach is problematic, but together, the flaws definitively cannot produce an estimate that is equivalent to the level of nullification or impairment experienced by Canada. (1) Canada insufficiently characterizes the relevant sources of supply. (2) Canada generalizes its formula such that it will not be representative of the product and market of interest by using highly aggregated, preset parameter values. And (3) Canada proposes to derive a formula for nullification or impairment from an approximate solution to an Armington partial equilibrium model, thereby inherently generating inaccurate and inflated estimates of the level of nullification or impairment.

40. Canada argues that its approach should be preferred for its simplicity.⁵⁴ However, the purported “simplicity” of Canada’s approach arises from the fact that it is not connected to the

⁵² U.S. Written Submission, para. 47.

⁵³ Canada’s Response to Second Set of Questions, paras. 34-35.

⁵⁴ See Canada’s Written Submission, para. 168; Canada’s Response to First Set of Questions, para. 70.

relevant and necessary product and market characteristics. In avoiding the complexities inherent in a real product and a real market, Canada’s formula is not simpler; it is just wrong.

41. This arbitration raises difficult issues because Canada has chosen to request suspension of concessions based upon pure speculation. There is presently no nullification or impairment, and therefore, many of the arguments are in the abstract. Today, we will demonstrate, using data from the *Softwood Lumber* CVD investigation, that each of the flaws in Canada’s approach has serious implications for the calculation of the level of nullification or impairment. These flaws build on one another, thereby resulting in an estimate that does not reflect the level of nullification or impairment experienced by Canada. With this demonstration, it cannot be clearer that Canada’s formula will not result in an estimate of nullification or impairment that is consistent with Article 22.4 of the DSU.

1. The Appropriate Model Must Contain More than Two Varieties

42. First, to accurately reflect the counterfactual scenario where the challenged measure is simultaneously removed from affected companies, and to correctly measure the effect on the total supply in the market, the model should account for domestic supply, non-subject imports from the rest of the world, and subject and non-subject imports from Canada. Given that the challenged measure is company-specific, and may, in turn, affect the All Others rate, this means that at least three Canadian varieties are needed – individually-investigated subject companies, the subject All Others rate (when affected by the challenged measure), and non-subject Canadian companies. Thus, there are a total of at least five varieties. The U.S. model has the flexibility to capture these multiple varieties. And, the United States will provide a software program to adjust the model accordingly depending on varying factual scenarios. As the United States has explained, for precision, the appropriate model must explicitly account for all of these varieties because the total level of nullification or impairment is based on the change in total imports from Canada arising from the change in total duty rates applied to all Canadian exporters, not just the change in total imports arising from changes in duty rates applied to affected companies.

43. In the name of simplicity, Canada suggests using a formula that only contains two varieties – imports from Canada and all other sources of supply – and Canada proposes to apply that formula to each affected firm individually.⁵⁵ Canada’s two-variety formula is problematic for a number of reasons. First, by failing to explicitly include each subject variety, as well as the non-subject Canadian variety, Canada’s formula does not correctly account for the changes in duties from the reference year to the application year and between the factual and counterfactual scenario. Canada’s failure to account for these changes in duties means that Canada’s formula does not appropriately adjust for the relative changes in the value of imports experienced across all Canadian companies when the challenged measure is removed from the affected Canadian companies.

⁵⁵ Canada’s Written Submission, para. 168.

44. Second, Canada erroneously groups U.S. domestic supply and imports from the rest of the world together as one variety.⁵⁶ As the United States has explained, domestic supply elasticities are typically assumed to be lower than import supply elasticities. This is done to account for the greater ability of foreign suppliers to shift supply from other markets following a change in relative prices.⁵⁷ The United States has provided empirical evidence to support this.⁵⁸ Therefore, Canada’s simplification generates imprecision by failing to define an underlying model that accounts for these differences, which are widely-accepted in economic literature.⁵⁹

45. In contrast, by accounting for all varieties, the U.S. model appropriately ensures that the effects of different duty rate changes on all Canadian companies – both subject and non-subject – are accounted for simultaneously in a single U.S. market. Indeed, Canada acknowledges that the U.S. model “completely” accounts for any effects resulting from offsetting changes in demand among Canadian imports,⁶⁰ thereby having the ability to generate a reasoned estimate. In contrast, Canada’s approach is entirely disconnected from both the factual and counterfactual scenarios, and therefore cannot generate a reasoned estimate of nullification or impairment.

2. The Model Should Be Run in the Non-Linear Form

46. Canada’s methodology is further flawed because it takes an already unsuitable model and then introduces even more imprecision by solving the model in log-linear form, thereby introducing approximation error into the estimates.⁶¹ However, as recognized by the arbitrator in *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, it is unnecessary to introduce approximation error when an exact solution easily can be obtained by running the model directly in its non-linear form using the standard statistical program, Stata.⁶² Canada has shown its familiarity with Stata programming in its exhibits.⁶³ And the Stata program submitted by the United States is based on a program developed by the WTO Secretariat, which was adopted in *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*.⁶⁴ Therefore, Canada’s formula, derived from the Armington model, offers no advantage over running a properly-defined

⁵⁶ Reishus & Lemon Methodology Report, Appendix 1, p. 18.

⁵⁷ U.S. Responses to First Set of Questions, paras. 176-177 (citing Bethmann et al. (2020), p. 5 (Exhibit USA-22); Hallren & Riker (2017), p. 14 (Exhibit CAN-04); Leith et al. (2003), p. 33 n. 29 (Exhibit USA-32); (Gasiorek et al. (2019), p. 29 (Exhibit USA-33)).

⁵⁸ Riker (2020), p. 14, Table 6 (Exhibit USA-31).

⁵⁹ U.S. Responses to First Set of Questions, paras. 176-177 (citing Riker (November 2020) (Exhibit USA-31); Bethmann et al. (2020), p. 5 (Exhibit USA-22); Hallren & Riker (2017), p. 14 (Exhibit CAN-04); Leith et al. (2003), p. 33 n. 29 (Exhibit USA-32); (Gasiorek et al. (2019), p. 29 (Exhibit USA-33)).

⁶⁰ Canada’s Response to First Set of Questions, paras. 84, 85.

⁶¹ U.S. Written Submission, paras. 88-89.

⁶² U.S. Written Submission, para. 88 (citing *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 6.62 n. 246 (“Unlike solving the Armington model through a linear approximation, the accuracy of the simulation using the Armington model is not affected by the size of the duty rate changes if the model is solved through numerical iteration [that is, directly in its non-linear form].” (citing Hallren & Riker (2017) (Exhibit CAN-04))).

⁶³ Exhibit CAN-74 and Exhibit CAN-102.

⁶⁴ *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 7.43 n. 366.

Armington model directly in its exact, non-linear form, as proposed by the United States. Ultimately, Canada’s formula is neither simpler nor more practical in solution.

47. For all these reasons, the Arbitrator should reject Canada’s approach and utilize the U.S. model, which is a better-suited methodological framework for assessing future levels of nullification or impairment that is well founded in economic theory.

E. The Correct Model Inputs

48. We next turn to the model inputs. Both the Canadian and the U.S. methodology require three types of information: (1) parameter values (that is, elasticity estimates and market share), (2) U.S. consumption (that is, the value of imports and domestic shipments), and (3) duty rates.

1. A Pre-Determined Scaling Factor Results in an Estimate that is Not Equivalent to the Level of Nullification or Impairment

49. The United States has demonstrated that Canada’s use of a pre-determined scaling factor, composed of a number of fixed 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.⁶⁵ As we have explained, in economic modeling, it is essential for precision to use parameter values that reflect specific time periods, products, and industries to capture changes that may evolve over time.⁶⁶

50. Canada asserts that its approach of using a pre-determined scaling factor for the elasticities and market share is similar to that of the arbitrator in *US – Washing Machines (Korea) (Article 22.6 – US)*.⁶⁷ However, neither Korea nor the United States supported the use of a pre-determined scaling factor in *US – Washing Machines (Korea) (Article 22.6 – US)*.⁶⁸

51. The use of predetermined values based on aggregated product definitions will contribute to an imprecise and unreasoned estimate of the level of nullification or impairment. Canada appears to recognize that the use of preset parameter values is not accurate due to “aggregation bias”.⁶⁹ But Canada dismisses this issue, contending that its approach is “reasonable” since it will understate the level of nullification or impairment.⁷⁰ However, the methodology chosen must be “equivalent” to the level of nullification or impairment. It should not overstate or understate the estimate. Therefore, the Arbitrator should predetermine the source, but not the values. That is, the methodology should use data specific to the product and market at issue

⁶⁵ DSU, Article 22.4.

⁶⁶ See U.S. Responses to Second Set of Questions, para. 31.

⁶⁷ Canada’s Methodology Paper, para. 7.

⁶⁸ U.S. Written Submission, para. 95 (citing *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 4.55 (“Both Korea and the United States expressed reservations about the use of a coefficient in a formula.”)).

⁶⁹ Canada’s Response to Questions, para. 124.

⁷⁰ See, e.g., Canada’s Written Submission, paras. 128, 140; Canada’s Response to Questions, paras. 123-125, 131.

from the relevant time period. This will ensure that the methodology produces a reasoned estimate of the level of nullification or impairment.

52. Specifically, the United States reiterates the need for selected **elasticities and domestic market share** inputs to correspond to the specific product and time period at issue. The United States considers that it would be most appropriate for these inputs to be based on data reported by the U.S. International Trade Commission (“Commission”) in the future CVD proceeding at issue. A Commission report is the only source for these parameters that is product-specific and issued in the relevant time period.⁷¹ All other sources only provide estimates based on more aggregated product definitions, which may have substantially different market shares and materially different responses to changes in price, as captured by elasticity estimates. The Commission has provided qualitatively estimated demand, substitution, and domestic supply elasticities for every product under a CVD (or AD) investigation in its reports since 1987.⁷² Further, the estimates are made after analyzing responses from domestic producers and importers, and foreign producers and exporters concerning the market of the product under investigation. The Commission also considers any relevant academic estimates, as well as arguments made by interested parties. Therefore, although Canada argues against the use of future Commission reports because Canada alleges that the parties will not have had the opportunity to assess and verify the data,⁷³ both the Government of Canada and Canadian companies will have already had the opportunity to opine on the parameter values in the relevant Commission report.⁷⁴ The use of estimates from the Commission in this proceeding would also be consistent with decisions in past arbitrations.⁷⁵

53. In contrast, Canada argues for the use of elasticities and market shares that are not tailored to the product that would be at issue. In fact, they are simply not tailored to any product at all. Canada seeks to have it both ways. Canada wants to suspend concessions for some future, unknown level of nullification or impairment, but Canada opposes the use of data values within future Commission reports, arguing that the values are unknown.⁷⁶ However, future impairment of benefits necessitates the use of future data values. In contrast, the use of predetermined, static values is inappropriate and will not generate a reasoned estimate. Indeed, the United States has demonstrated that the use of pre-determined parameter estimates is not in any way reflective of reality.⁷⁷

54. With respect to the **Canadian market share**, Canada’s proposal to pre-determine market share inputs is further flawed because Canada’s input corresponds to a broad product segment

⁷¹ U.S. Written Submission, paras. 104-105.

⁷² U.S. Responses to First Set of Questions, para. 126.

⁷³ See Canada’s Written Submission, para. 141.

⁷⁴ U.S. Responses to First Set of Questions, paras. 175 n. 251, 182 n. 265.

⁷⁵ *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.

⁷⁶ See Canada’s Written Submission, para. 7.

⁷⁷ U.S. Written Submission, Appendix 3, Table 2; U.S. Response to Question 50, Comparison Table 2.

with a fixed, past year.⁷⁸ As the United States has explained, the use of aggregate sector-level market shares as a proxy for product-specific market shares will not generate a reasoned estimate of nullification or impairment. Further, market share parameters can only be determined once the reference year is known. Indeed, as the United States has explained, and as we will further demonstrate in a moment, the level of nullification or impairment is likely overstated using Canada’s methodology because, in many cases, the pre-determined, sector-level market share is smaller than the actual market share for the specific product.⁷⁹

2. Value of Imports and Duty Rates

55. The last inputs needed for the model are the value of imports and duty rates. For **value of imports**, the United States is pleased that Canada has reconsidered its position and now recognizes that the data may be obtained from U.S. Customs.⁸⁰

56. With respect to **duty rates**, as the United States has explained, all relevant duties should be accounted for – that is, AD, CVD, and any ordinary tariffs. This is because in an Armington model it is the percent change in the total duty rate induced by a modification of CVD rates that determines the effect on imports.⁸¹ The United States has demonstrated 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.⁸²

3. A Demonstration of Canada’s Methodology Compared with the U.S. Methodology

57. Much of the parties’ argument on these issues has been in the abstract because Canada’s request to suspend concessions rests on pure speculation concerning some future, unknown level of nullification or impairment. Indeed, throughout this arbitration, Canada has dismissed the U.S. arguments by alleging that Canada’s “simplifying” assumptions will not have much impact on the calculation of nullification or impairment.⁸³ However, concrete numbers show that this is false. Canada’s methodology cannot generate a reasoned estimate of nullification or impairment.

58. The United States has prepared an accompanying exhibit, Exhibit USA-48. The exhibit uses actual data values associated with the product and market from the CVD order on *Softwood Lumber from Canada*. The hypothetical assumes that the challenged measure is applied to a

⁷⁸ Reishus & Lemon Methodology Report, paras. 28-30.

⁷⁹ U.S. Responses to First Set of Questions, paras. 136-138.

⁸⁰ Canada’s Response to First Set of Questions, para. 175.

⁸¹ U.S. Responses to First Set of Questions, para. 209.

⁸² U.S. Responses to First Set of Questions, paras. 228-239.

⁸³ See, e.g., Canada’s Written Submission, paras. 128, 133, 140, 157; Canada’s Responses to First Set of Questions, para. 125.

company during an administrative review. Therefore, the duty rates from the CVD order are used as the reference year duty rates.

59. The exhibit walks through several scenarios illustrating the methodological points of disputes between the parties. Specifically, the exhibit demonstrates the difference between parameter values of aggregated sectors versus product- and market-specific; same or different values for domestic and import supply elasticity; log linear formula versus non-linear model; explicit inclusion or exclusion of the non-subject Canadian variety; and the inclusion or omission of AD duties and ordinary tariffs.

60. We would like to highlight for the Arbitrator a couple of the results that the United States discovered when running these scenarios. The table appears on pages 3 to 4 of Exhibit USA-48. Canada has contended that the differences between the “non-linear and log-linearized version of the Armington model for evaluating the effect of tariff changes are very small.”⁸⁴ The United States has explained that this is false.⁸⁵ The accuracy of a model solved directly in its non-linear form was also recognized by the arbitrator in *US – Anti-Dumping Methodologies (China) (Article 22.6-US)*.⁸⁶ Further, both Exhibit USA-48, along with Riker and Schreiber (2020), show how the approximation error inherent in a log-linearized model not only impacts nullification or impairment, but also increases with the magnitude of the change in duty rates.⁸⁷

61. Scenarios 4 and 5 in the exhibit present a hypothetical scenario involving very small changes in duty rates. That is, they assume that after an administrative review, the CVD rate is increased from a reference period value of 17.99 percent to 20 percent, whereas it would have only been adjusted to 18 percent without the challenged measure. Both scenarios use identical elasticities and market data. Scenario 4, using a formula obtained from a model solved by log-linearization, estimates nullification or impairment of \$77 million. In contrast, scenario 5, using the identical model solved exactly in its direct, non-linear form, estimates nullification or impairment of \$59 million. Therefore, 23 percent (that is, \$18 million) of the estimate produced by the log-linear formula is the direct result of approximation error, and does not reflect actual nullification or impairment.

62. Scenarios 6 and 7 in the exhibit likewise compare the same model solved by log-linearization versus directly in its non-linear form. However, these scenarios assume a hypothetical scenario involving a larger change in duty rates. Specifically, they assume that after an administrative review, the CVD rate is increased to 40 percent, whereas it would have only been adjusted to 20 percent without the challenged measure. Scenario 6 estimates nullification or impairment of \$768 million using a log-linear model. The identical model solved directly in

⁸⁴ Canada’s Written Submission, para. 133.

⁸⁵ U.S. Written Submission, paras. 88-89.

⁸⁶ *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 6.62 n. 246 (“Unlike solving the Armington model through a linear approximation, the accuracy of the simulation using the Armington model is not affected by the size of the duty rate changes if the model is solved through numerical iteration [that is, directly in its non-linear form].” (citing Hallren & Riker (2017) (Exhibit CAN-04)).

⁸⁷ Riker and Schreiber (2020), pp. 4-5(Exhibit USA-49).

its non-linear form in scenario 7 estimates nullification or impairment to be \$432 million. Thus, 44 percent (that is, \$336 million) of the calculation produced by the log-linear formula estimate is approximation error.

63. These scenarios demonstrate that, contrary to Canada’s argument, differences between the use of a non-linear and log-linearized model are economically meaningful.

64. Next, in support of its use of a predetermined market share, Canada argues that “the characteristics of the market, such as Canadian and non-Canadian market shares, have a less direct impact on the calculated level of nullification or impairment, and are unlikely to change”.⁸⁸ However, scenarios 1 and 2 in the exhibit demonstrate that in Canada’s formula, all else being equal, the use of a predetermined, sector-level market share in calculating the scaling factor has a very large impact on the estimate of nullification or impairment.

65. Specifically, scenario 1 in the table estimates nullification or impairment to be \$243 million using Canada’s proposed fixed scaling factor, which is calculated using the 8 percent market share Canada constructs for the wood sector. This is in contrast to scenario 2, which, all else being equal, uses 32.2 percent as the market share, as that is the actual market share from *Softwood Lumber*. Scenario 2 estimates nullification or impairment of \$190 million. Therefore, 22 percent (that is, \$53 million) of the estimate of nullification or impairment generated by Canada’s base model is a result of using an aggregated, sector-level market share. That is a substantial impact.

66. While this example demonstrates an upward bias of nullification or impairment, there also could be significant bias in the opposite direction. For instance, consider a year like last year, in which the COVID-19 pandemic could have reduced the market share of importers relative to prior years and reduced it below the predetermined market share. In this case, using the predetermined market share to calculate Canada’s scaling factor would produce a downward bias of nullification or impairment. Therefore, whether overstated or understated, Canada’s use of a predetermined market share in its scaling factor cannot generate an estimate that is equivalent to the level of nullification or impairment.

67. We have discussed just two of the exhibit’s results today. We may draw the Arbitrator’s attention to other scenarios when responding to questions. As is evident from the exhibit, the scenarios collectively demonstrate how each of Canada’s “simplifying” assumptions tend to build upon one another. In the example of the CVD order on *Softwood Lumber*, these assumptions produce a substantially inflated estimate of the level of nullification or impairment actually experienced by Canada. But these assumptions could also produce a deflated estimate. Therefore, as the scenarios in the exhibit illustrate, contrary to Canada’s representations, Canada’s purportedly “simple” approach greatly impacts the calculation of nullification or

⁸⁸ Canada’s Written Submission, para. 157.

impairment. Accordingly, Canada’s approach cannot generate an estimate that is “equivalent” to nullification or impairment. And on that basis, Canada’s suspension request should be rejected.

F. Conclusion

68. This concludes our opening statement. The U.S. delegation would welcome the opportunity to respond to additional questions from the Arbitrator. Thank you.