WORLD TRADE ORGANIZATION

WT/DS505/ARB

13 July 2022

(22-5180)

Page: 1/164

Original: English

UNITED STATES – COUNTERVAILING MEASURES ON SUPERCALENDERED PAPER FROM CANADA

RECOURSE TO ARTICLE 22.6 OF THE DSU BY THE UNITED STATES

DECISION BY THE ARBITRATOR

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EC – Bananas III (US) (Article 22.6 – EC)	Decision by the Arbitrator, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB, 9 April 1999, DSR 1999:II, p. 725
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US – Supercalendered Paper	Panel Report, *United States – Countervailing Measures on Supercalendered Paper from Canada*, WT/DS505/R and Add.1, adopted 5 March 2020, as upheld by Appellate Body Report WT/DS505/AB/R
US – Tuna II (Mexico) (Article 22.6 – US)	Decision by the Arbitrator, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 22.6 of the DSU by the United States*, WT/DS381/ARB, 25 April 2017, DSR 2017:VIII, p. 4129
US – Upland Cotton (Article 22.6 – US I)	Decision by the Arbitrator, *United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS267/ARB/1, 31 August 2009, DSR 2009:IX, p. 3871
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EXHIBITS REFERRED TO IN THIS DECISION

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Exhibit CAN-3	World Trade Organization and United Nations Conference on Trade and Development, *A Practical Guide to Trade Policy Analysis* (Published 2012)
Exhibit CAN-4	Hallren and Riker, "An Introduction to Partial Equilibrium Modeling of Trade Policy", USITC Office of Economics Working Paper Series (July 2017)
Exhibit CAN-5	Head and Mayer, "Gravity Equations: Workhorse, Toolkit, and Cookbook", in Gopinath et al., *Handbook of International Economics*, Vol. 4 (2014)
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Exhibit CAN-7	Source Data 1
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Exhibit CAN-62	U.S. Census Bureau, "About USA Trade® Online", accessed March 8, 2021, <https://usatrade.census.gov/>
Exhibit CAN-63	U.S. Census Bureau, "Guide to Foreign Trade Statistics: Description of the Foreign Trade Statistical Program", accessed March 8, 2021, <https://www.census.gov/foreign-trade/guide/sec2.html>
Exhibit CAN-65	U.S. Census Bureau, "HTS Record Layout", accessed March 8, 2021, <https://www.census.gov/foreign-trade/schedules/b/2018/imp-stru.txt>
Exhibit CAN-66	U.S. Census Bureau, "USA Trade Online – Help Section", August 22, 2014, accessed March 8, 2021, <https://www.census.gov/foreign-trade/statistics/dataproducts/uto-help/uto-help.html>
Exhibit CAN-67	USITC, "A Note on U.S. Trade Statistics", accessed March 8, 2021, <https://www.usitc.gov/publications/research/tradestatsnote.pdf>
Exhibit CAN-74	Replication Files
Exhibit CAN-88	Global Trade Analysis Project, "GTAP Resources: Frequently Asked Question Details", accessed March 8, 2021, <https://www.gtap.agecon.purdue.edu/resources/faqs/faqs_display.asp?F_ID=151>
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Exhibit USA-22	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)")
Exhibit USA-24	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-27	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-31	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	Title
Exhibit USA-32	Jennifer Leith *et al*., "Indonesia Rice Tariff", Poverty and Social Impact Analysis, March 2003 ("Leith *et al.* (2003)")
Exhibit USA-33	Michael Gasiorek *et al.*, "Which manufacturing industries and sectors are most vulnerable to Brexit?", The World Economy (2019) ("Gasiorek *et al.* (2019)")
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ABBREVIATIONS USED IN THIS DECISION

Abbreviation	Description
ACE	United States' Customs' Automated Commercial Environment
AD	anti-dumping
ADD	anti-dumping duty
AFA	adverse facts available
ASM	United States' Census Bureau's Annual Survey of Manufacturers
BEA	United States Bureau of Economic Analysis
BLS	United States' Bureau of Labor Statistics
Byrd Amendment	Continued Dumping and Subsidies Offset Act of 2000
CVD	countervailing duty
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
FGO	Fontagné, Guimbard and Orefice (2021) (Exhibit CAN-139)
GATT 1994	General Agreement on Tariffs and Trade 1994
GTAP	Global Trade Analysis Project
HS	Harmonized Schedule
HTS	Harmonized Tariff Schedule
HTSUS	Harmonized Tariff Schedule of the United States
IMF	International Monetary Fund
LRW	large residential washer
NI	nullification or impairment
OFA	other forms of assistance
OFA-AFA Measure	Other Forms of Assistance – Adverse Facts Available Measure
PoI	period of investigation
PoR	period of review
PPI	producer price index
RoW	rest of the world
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Supercalendered Paper CVD Order	the CVD order in *Supercalendered Paper from Canada 2015*
USDOC	United States Department of Commerce
USITC	United States International Trade Commission

1 INTRODUCTION

1.1 Original proceedings

1.1. The present arbitration proceeding arises in the dispute initiated by Canada concerning certain measures relating to US countervailing duty (CVD) investigations.

1.2. The original proceedings in this dispute commenced on 30 March 2016, when Canada requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) concerning certain countervailing measures with respect to supercalendered paper from Canada, as well as the alleged United States' ongoing conduct of applying adverse facts available (AFA) to measures "discovered" during the course of a CVD investigation. On 9 June 2016, Canada requested the establishment of a panel pursuant to Article 6 of the DSU and Article 30 of the SCM Agreement.[1]

1.3. The Panel Report in this dispute was issued to the parties on 15 December 2017, and circulated to WTO Members on 5 July 2018.

1.4. The Panel found that challenged CVD measures applied by the United States on supercalendered paper from Canada were inconsistent with provisions of the SCM Agreement and the GATT 1994. These findings were not appealed.[2] The Panel also found that an unwritten measure in the form of "ongoing conduct" attributable to the United States was inconsistent with Article 12.7 of the SCM Agreement. That measure consisted of the USDOC applying AFA to find countervailable subsidies in relation to programmes discovered during CVD proceedings that were not reported in response to the USDOC's "other forms of assistance" (OFA) question (the "Other Forms of Assistance – Adverse Facts Available Measure" (OFA-AFA Measure)).[3]

1.5. On the same day that the Panel Report was circulated, i.e. 5 July 2018, the United States Department of Commerce (USDOC) revoked the CVD order in *Supercalendered Paper from Canada 2015* (Supercalendered Paper CVD Order) with retroactive effect from the beginning of the CVD proceeding.[4] Notwithstanding its revocation of the CVD order in July 2018, the United States filed an appeal on 27 August 2018, challenging certain of the Panel's findings with respect to the OFA-AFA Measure.[5]

1.6. The Appellate Body rejected the United States' submission that the Panel had improperly established the existence of the OFA-AFA Measure and improperly concluded that the OFA-AFA Measure is inconsistent with Article 12.7 of the SCM Agreement.[6] The Appellate Body therefore "recommend[ed] that the DSB request the United States to bring its measures, as found in this Report, and in the Panel Report as upheld by this Report, to be inconsistent with the SCM Agreement and the GATT 1994, into conformity with its obligations under those Agreements."[7] In its report, the Appellate Body also briefly addressed the circumstances of the United States'

[1] Request for the establishment of a panel by Canada, WT/DS505/2.
[2] See Appellate Body Report, *US – Supercalendered Paper* (Appellate Body Report), paras. 1.3 and 4.1.
[3] See Appellate Body Report, para. 1.2; and Panel Report, *US – Supercalendered Paper* (Panel Report), paras. 2.2 and 7.1.
[4] See Appellate Body Report, para. 5.2.
[5] Notification of an Appeal by the United States under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Under Rule 20(1) of the Working Procedures for Appellate Review (WT/DS505/6).
[6] See Appellate Body Report, section 6. One Appellate Body Member issued a separate opinion (see Appellate Body Report, section 5.3). According to this Member, the Panel erred by characterizing the USDOC's alleged "ongoing conduct" in an unacceptably vague manner, and employed inadequate evidentiary standards in establishing the elements of the OFA-AFA Measure. (Appellate Body Report, paras. 5.86 and 5.89). This Member also considered it relevant that the underlying CVD order had been revoked retroactively to the beginning of the CVD proceeding, stating that "this means that no real dispute remains to be resolved regarding any 'ongoing conduct' that may or may not continue with respect to the proceeding at issue here." (Appellate Body Report, para. 5.87). Consequently, this Member stated that "the Division could and should have mooted the relevant findings of the Panel. In lieu of that, I suggest that this decision and its interpretations should be confined to the particulars of this case." (Appellate Body Report, para. 5.87).
[7] Appellate Body Report, para. 6.10.

appeal, i.e. that the Canadian CVD order that reflected the OFA-AFA Measure had already been revoked *ab initio*:

> This revocation is not addressed by either participant in its written submissions. Moreover, at the oral hearing, both participants confirmed that there is a dispute between them regarding the existence of "ongoing conduct" and the finding of inconsistency with Article 12.7 of the SCM Agreement that remains to be resolved on appeal. Under these circumstances, we consider the United States' claims of error on appeal in light of the Panel's findings as they are in the Panel Report.[8]

1.7. The Appellate Body Report (WT/DS505/AB/R) was circulated to Members on 6 February 2020. At the DSB meeting on 5 March 2020, the United States expressed the view that the document WT/DS505/AB/R was not a valid Appellate Body report and objected to its adoption. The United States offered to join a positive consensus to adopt those aspects of the Panel Report that had not been appealed but refused to join the consensus to adopt the Appellate Body Report.[9] Notwithstanding the United States' objection, the Panel Report and the Appellate Body Report were adopted by the DSB by negative consensus.[10]

1.2 Referral to arbitration and arbitration proceeding

1.8. Article 21.3 of the DSU provides that, at a DSB meeting held within 30 days after the adoption of a panel or Appellate Body report, the Member concerned (in this dispute, the United States) shall inform the DSB of its intentions with respect to the implementation of the recommendations and rulings of the DSB. The United States did not provide any such statement of intentions to the DSB. There was thus no "reasonable period of time" determined in this dispute specifying by when the United States was required to comply with the recommendations and rulings of the DSB.[11] Canada, in a document dated 18 June 2020, requested authorization from the DSB under Article 22.2 of the DSU to suspend concessions, in view of the United States' failure to inform the DSB of its intention with respect to the implementation of the recommendations and rulings of the DSB, or to propose a reasonable period of time to comply.[12] The United States, in a document dated 26 June 2020, objected to the level of suspension of concessions proposed by Canada and noted that accordingly, as required by Article 22.6 of the DSU, the matter was referred to arbitration.[13]

1.9. Canada's request for authorization to suspend concessions was considered at the DSB meeting held on 29 June 2020.[14] The United States expressed the following views: (a) Canada's request to suspend concessions was based on an incorrect premise, namely, that there were valid DSB recommendations adopted. The United States considered that there were no such adopted DSB recommendations because there was no valid Appellate Body Report and no consensus to adopt the

[8] Appellate Body Report, para. 5.2.

[9] DSB, Minutes of the meetings held on 28 February and 5 March 2020, WT/DSB/M/441, paras. 7.3-7.7 and 7.21. Among the United States' procedural objections to the adoption of the Appellate Body Report was that, according to the United States, none of the three Appellate Body Members who comprised the Division in the appeal was a valid Appellate Body Member when the Appellate Body Report was circulated. See also Communication from the United States (17 April 2020) (WT/DS505/12) (containing similar arguments).

[10] DSB, Minutes of the meetings held on 28 February and 5 March 2020, WT/DSB/M/441, para. 7.20.

[11] Article 21.3 provides that, where it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a "reasonable period of time" in which to do so. The "reasonable period of time" can be proposed by the Member concerned and approved by the DSB, mutually agreed by the parties, or determined through arbitration.

[12] Canada's communication (18 June 2020) (WT/DS505/13). We note that Canada did not specify in its request under Article 22.2 of the DSU in which sector(s) it intended to suspend concessions. We discern, however, nothing in that document or Canada's actions surrounding its submission that indicates that Canada has requested to suspend concessions in any sector other than the goods sector. We therefore consider that this arbitration involves no claim under Article 22.3(c) of the DSU. (See Decision by the Arbitrator, *US – Tuna II (Mexico) (Article 22.6 – US)*, para. 3.22 (noting that Article 22.3(a) of the DSU "requires, *as a default rule*, identity between the sector(s) affected by the nullification or impairment caused by a WTO-inconsistent measure and the sector(s) in which a Member requests to suspend concessions or other obligations"). (emphasis added))

[13] United States' communication (26 June 2020) (WT/DS505/14).

[14] The Panel Report and the Appellate Body Report were adopted at the DSB meetings of 28 February and 5 March 2020 (DSB, Minutes of the meeting held on 28 February and 5 March 2020, para. 7.20). The DSB meeting of 29 June 2020 was the next DSB meeting that was convened after the aforementioned meetings (DSB, Minutes of the meeting held on 29 June 2020, WT/DSB/M/442, Item 12).

Panel Report and the Appellate Body Report; (b) Canada does not suffer nullification or impairment (NI) from the alleged measure, owing to the revocation of the Supercalendered Paper CVD Order, and Canada cannot say that the alleged measure continued to exist or that Canada would suffer NI in the future; (c) notwithstanding the foregoing, and without prejudice to the United States' position that no recommendations had been adopted by the DSB, the United States also objected to the level of suspension of concessions or other obligations proposed by Canada; and (d) under Article 22.6 of the DSU, the filing of the objection by the United States automatically resulted in the matter being referred to arbitration.[15]

1.10. Canada responded that the DSB had adopted the Panel Report and the Appellate Body Report in this dispute at its meeting on 5 March 2020, as reflected in the minutes of the DSB meeting and consistent with Article 17.14 of the DSU, which sets forth the negative consensus rule for adoption of reports of the Appellate Body. Canada also clarified the following: (a) its 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 US CVD proceedings involving Canadian goods; and (b) Canada sought authorization to suspend concessions or other obligations at an annual level commensurate with the trade effects of any future countervailing duties on Canadian imports of any goods that were attributable to the US "ongoing conduct" that had been found to be WTO-inconsistent in this dispute.[16]

1.11. The DSB took note that the matter raised by the United States had been referred to arbitration, as required by Article 22.6 of the DSU.[17]

1.12. The Arbitrator was constituted on 6 August 2020 and was composed of the original panelists:

Chairperson:	Mr Paul O'Connor
Members:	Mr David Evans Mr Colin McCarthy[18]

1.13. An organizational meeting was held on 21 August 2020 to discuss procedural aspects of the arbitration proceeding. On 28 August 2020, the Arbitrator adopted its timetable, in addition to its Working Procedures and Additional Working Procedures Concerning Business Confidential Information (BCI Procedures).[19] Also on that date, the Arbitrator adopted Additional Working Procedures of the Arbitrator Concerning an Open Meeting. As further described in section 2.2, below, and after consultations with the parties, the Arbitrator repealed these latter working procedures and replaced them with revised procedures.[20]

1.14. In accordance with the timetable and Working Procedures adopted by the Arbitrator, on 18 September 2020, Canada submitted a communication explaining its methodology (Methodology Paper) for calculating the proposed level of suspension. The United States filed its written submission on 13 November 2020. Canada filed its written submission on 11 December 2020. The Arbitrator sent a first set of questions to the parties for written responses on 26 January 2021, to which the parties responded on 9 March 2021. The Arbitrator sent a second set of questions to the parties for written responses on 18 May 2021, to which the parties responded on 15 June 2021. The Arbitrator sent questions to the parties in advance of the meeting on 25 August 2021. The parties responded orally to such questions at the meeting.

1.15. The Arbitrator held its meeting with the parties from 20-23 September 2021. On 1 October 2021, following the meeting with the parties, the Arbitrator sent a third set of questions to the parties for written responses, to which the parties responded on 29 October 2021 and filed comments on the other party's responses on 19 November 2021. The Arbitrator sent an additional set of

[15] DSB, Minutes of the meeting held on 29 June 2020, WT/DSB/M/442, para. 12.3.
[16] DSB, Minutes of the meeting held on 29 June 2020, WT/DSB/M/442, para. 12.6.
[17] DSB, Minutes of the meeting held on 29 June 2020, WT/DSB/M/442, para. 12.17 (referring to United States' communication (26 June 2020) (WT/DS505/14)).
[18] DSB, Note by the Secretariat (6 August 2020) (WT/DS505/15).
[19] See Working Procedures of the Arbitrator, Annex A-1 of the Addendum to this Decision, WT/DS505/ARB/Add.1; and Additional Working Procedures of the Arbitrator Concerning Business Confidential Information, Annex A-2 of the Addendum to this Decision, WT/DS505/ARB/Add.1.
[20] See Additional Working Procedures of the Arbitrator Regarding Open Meetings (Delayed Online Broadcast), Annex A-4 of the Addendum to this Decision, WT/DS505/ARB/Add.1.

questions to the parties on 17 December 2021, to which the parties responded on 14 January 2022, and filed comments on each other's responses on 28 January 2022.

1.16. On 23 June 2022, the Arbitrator issued to the parties a version of its Decision to ensure that, in the parties' views, the Decision contained no BCI. On 28 June 2022, the parties informed the Arbitrator that they had no relevant comments on the Decision. The Decision of the Arbitrator was circulated to WTO Members on 13 July 2022.

2 PROCEDURAL MATTERS

2.1. In this section, the Arbitrator addresses two procedural matters: (a) the impact of the COVID-19 pandemic on the meeting with the parties; and (b) the public presentation of the audio recording of the meeting with the parties.

2.1 Impact of the COVID-19 pandemic on the meeting with the parties

2.2. In the timetable adopted by the Arbitrator in August 2020, the meeting with the parties was scheduled to take place in March 2021, and it was assumed at that time that the meeting would occur in-person in Geneva. As March 2021 approached, it became increasingly clear to the Arbitrator that an in-person meeting held in Geneva, which would be customary, could not occur at that time due to travel restrictions associated with the COVID-19 pandemic.

2.3. Thus, on 14 January 2021, the Arbitrator sent a message to the parties indicating that, due to the COVID-19 pandemic, holding an in-person meeting in Geneva in March 2021 appeared impossible, and sought the parties' views on holding a virtual meeting instead using the Cisco Webex platform, with the possibility of at least some delegates attending from the premises of the WTO if they chose to do so. The Arbitrator further observed that given the disparate time zones of the participants, any virtual meeting would likely have to occur over multiple days with sessions held each day for a limited number of hours, and that, given the technical and complex issues before the Arbitrator, providing questions to the parties in advance of a virtual meeting appeared beneficial. The Arbitrator also attached draft Additional Working Procedures of the Arbitrator Concerning Meetings with Remote Participation for the parties' comments.

2.4. On 21 and 25 January 2021, the parties responded to the Arbitrator's message and submitted comments on each other's responses, respectively. Canada responded that, given the situation created by the COVID-19 pandemic, the meeting should be held in a virtual format, and further requested that the Arbitrator send questions to the parties in advance of the meeting at least two weeks before the meeting. Canada also agreed with the Arbitrator that, due to relevant time-zone differences, a virtual meeting would likely have to occur over multiple days with sessions held each day for a limited number of hours. Canada had no substantive comments on the draft Additional Working Procedures of the Arbitrator Concerning Meetings with Remote Participation proposed by the Arbitrator.

2.5. The United States objected to holding a virtual meeting because such a format did not, in the United States' view, allow the parties to participate in the meeting to the full extent generally envisioned under the DSU, although the United States also recognized that the DSU does not specifically prescribe how a meeting in an arbitration proceeding under Article 22.6 of the DSU should be conducted. The United States, in particular, stressed that a contemporaneous oral exchange between the parties and the Arbitrator was an important feature of such meetings. The United States explained that, due to then-current technological and logistical constraints facing the United States, such a contemporaneous oral exchange over a virtual platform such as Cisco Webex would be infeasible. The United States also considered that if one party were able to appear in person before the Arbitrator, while the other was not, then, in the United States' view, the latter would be at a disadvantage during the meeting. The United States, however, agreed with Canada that any questions that the Arbitrator intended to put to the parties at the meeting (in whatever format the meeting would ultimately occur) should be sent to the parties at least two weeks before the meeting. The United States suggested that the Arbitrator revisit this discussion at the end of April 2021 when the situation with respect to COVID-19 vaccination efforts would be clearer, and asserted that a delay in holding the meeting would not prejudice Canada because no CVD rates affected by the OFA-AFA Measure were currently applied to Canadian companies. The United States did not

comment on the Additional Working Procedures of the Arbitrator Concerning Meetings with Remote Participation at that time.

2.6. In response, Canada asserted that: (a) arbitration proceedings under Article 22.6 of the DSU are intended to proceed on expedited timelines; (b) it was entirely speculative as to when an in-person meeting could be held amid the uncertainties created by the pandemic and that the DSU does not require in-person meetings; (c) oral exchanges over a virtual meeting platform such as Cisco Webex were possible; (d) virtual meetings had been held in other WTO dispute proceedings; and (e) a material delay in the completion of the arbitration proceeding could prejudice Canada since the OFA-AFA Measure could be used at any time against Canadian firms, and Canada required a means by which to respond to such use if and when it occurred. Canada therefore reaffirmed that the meeting proceed as scheduled in a virtual format, or with a modest delay to accommodate logistical constraints.

2.7. On 1 February 2021, the Arbitrator sent a message to the parties noting that, in particular, the meeting had previously been scheduled for two days although a virtually held meeting would require more days than that to conduct, and that the parties' joint request that the Arbitrator send advance questions to the parties at least two weeks before the meeting date was incompatible with respect to a March 2021 meeting date given the short period of time between the receipt of the parties' responses to the Arbitrator's first round of questions and that meeting date. Given these logistical issues, the Arbitrator therefore informed that parties that the meeting date in March 2021 was cancelled, and that the Arbitrator would reschedule the meeting following further consultation with the parties.

2.8. On 22 February 2021, the Arbitrator informed the parties that, in the Arbitrator's view, both parties had raised relevant points in their previous communications regarding the related subjects of when to schedule the meeting and in what format the meeting should occur. In particular, the Arbitrator recognized that arbitration proceedings held under Article 22.6 of the DSU are expedited in nature and that Canada had a strong interest in completing the arbitration in a timely manner. The Arbitrator also recognized that holding a meeting that allowed for contemporaneous oral exchanges was preferable, as it enhanced the Arbitrator's ability to explore relevant issues with the parties. The Arbitrator considered that, in light of the ongoing vaccination efforts at that time, holding either an in-person meeting in Geneva or a virtual meeting whereby the parties could gather and participate in groups in their respective capitals (thus making contemporaneous oral exchanges reasonably possible) was a reasonable possibility in the foreseeable future. The Arbitrator thus delayed further consideration of the issue until April 2021. In doing so, the Arbitrator, *inter alia*, stressed that it intended to hold the meeting in a manner that would not unduly delay the ultimate completion of the arbitration proceeding.

2.9. On 23 April 2021, Canada sent a message to the Arbitrator requesting that, in light of the then-worsening COVID-19 situation in Canada and accompanying restrictions on movements of persons, the meeting be held in September 2021 by which point the COVID-19 situation in Canada would likely have improved, with the understanding that there should be no further postponement of the meeting beyond September 2021. On the same day, the United States informed the Arbitrator that it "notionally" agreed with Canada's proposal for a meeting date in September 2021, but stated that the United States still considered an in-person meeting to be the most appropriate format. The United States suggested that the Arbitrator revisit the issue of the meeting date closer to September 2021.

2.10. On 30 April 2021, the Arbitrator informed the parties that it was considering the parties' most recent communications, and that it would revert to the parties in the near future regarding when to schedule the meeting. The Arbitrator also affirmed that it would transmit questions to the parties in advance of the meeting at least two weeks before the meeting occurred. The Arbitrator further informed the parties that the Arbitrator would proceed with issuing a second round of questions to the parties for written responses in the near term so as to continue advancing its work on the proceeding before the meeting was held. The Arbitrator transmitted those questions to the parties on 18 May 2021.

2.11. Also on 18 May 2021, the Arbitrator informed the parties that, in light of the parties' previous communications, the Arbitrator would like to schedule the meeting with the parties for the week of 20 September 2021. In so doing, the Arbitrator underlined that setting such a meeting date was desirable, in the Arbitrator's view, because the meeting date had already been materially delayed,

and setting a meeting date well in advance of the meeting would allow that all relevant participants to plan accordingly. The Arbitrator, however, deferred deciding on the specific format of the meeting until a later time, but at the latest by 31 July 2021. On 20 May 2021, the parties responded that they were available for a meeting the week of 20 September 2021. On 26 May 2021, the Arbitrator set the meeting for the week of 20-24 September 2021.

2.12. On 30 June 2021, the Arbitrator asked the parties to communicate their expectations regarding how their delegations would participate in a meeting during the week of 20 September 2021, and specifically their ability to attend a meeting in-person in Geneva or to gather in groups in their capitals to participate virtually over Cisco Webex. The Arbitrator also asked the parties to again provide comments on draft Additional Working Procedures of the Arbitrator Concerning Meetings with Remote Participation, given that significant time had elapsed since the last time the Arbitrator transmitted those draft procedures to the parties for comment.

2.13. On 5 and 7 July 2021, the parties responded to the Arbitrator's message of 30 June 2021 and commented on each other's responses, respectively. Both parties indicated that: (a) while an in-person meeting format was preferable, they could not confirm their delegations' ability to travel to Geneva for such a meeting; (b) if the meeting were held virtually, the parties' delegations could gather in rooms equipped with Cisco Webex in their respective home countries; (c) that if either party could not attend an in-person meeting in Geneva then the meeting should be held virtually for all participants; and (d) that the Arbitrator should consult further with the parties in August 2021 regarding the format of the meeting. Neither party had any material comments regarding the draft procedures concerning a virtual meeting.

2.14. On 5 August 2021, the Arbitrator informed the parties that, given relevant ongoing travel restrictions due to COVID-19, and the then-recent spread of certain COVID-19 variants, the members of the Arbitrator expected to participate in the meeting from their home countries over the Cisco Webex platform, but would reach a final decision as to its mode of participation by 20 August 2021. The Arbitrator also informed the parties that a room at the WTO equipped with Cisco Webex would be available for delegates who wished to attend from Geneva. The Arbitrator asked the parties to inform the Arbitrator of their mode of participation by 16 August 2021.

2.15. On 16 August 2021, the parties both informed the Arbitrator that their delegations expected to participate in the meeting over the Cisco Webex platform from their respective home countries.

2.16. On 20 August 2021, the Arbitrator confirmed that the members of the Arbitrator would be participating in the meeting remotely over the Cisco Webex platform. In the same communication, the Arbitrator also: (a) adopted the Additional Working Procedures of the Arbitrator Concerning Meetings with Remote Participation, which had previously been sent to the parties for comment (see Annex A-3 of the Addendum to this Decision, WT/DS505/ARB/Add.1); (b) informed the parties that the meeting would be held starting on 20 September 2021 and continue, as necessary, up through 24 September 2021 in sessions lasting from 13:00-16:00 (Geneva time) each day; and (c) attached the invitation to the meeting. On 25 August 2021, the Arbitrator transmitted the questions to the parties in advance of the meeting.

2.17. The Secretariat held an individual Cisco Webex test session with each party during the week of 13 September 2021, and the Arbitrator held a joint Cisco Webex test session with the parties on Friday, 17 September 2021. The meeting with the parties was held on 20-23 September 2021 (a session on 24 September was ultimately unnecessary). All participants from the Canadian delegation participated remotely from locations in Canada. All but two members of the US delegation participated remotely from the United States. The other two members of the United States' delegation participated from a designated room equipped with Cisco Webex at the WTO. The Secretariat attended the meeting remotely from a separate room at the WTO. The members of the Arbitrator attended remotely with Cisco Webex from their respective home countries. The United States and Canadian delegations participated in a manner such that contemporaneous oral exchanges occurred as between the parties and as between the parties and the Arbitrator.

2.2 Delayed public presentation of the meeting with the parties

2.18. On 28 August 2020, following the organizational meeting and at the request of the parties, the Arbitrator adopted Additional Working Procedures Concerning an Open Meeting. These

procedures assumed that the meeting with the parties would occur in an in-person format, as is customary, in Geneva. As explained in the section immediately above, however, the meeting with the parties ultimately occurred in a virtual format, with the great majority of attendees participating via the Cisco Webex platform from their home countries. In a communication to the parties dated 20 August 2021 (i.e. at the same time as the Arbitrator confirmed that the meeting would be held in a virtual format), the Arbitrator recognized that the procedures as adopted were incompatible with the meeting's virtual format. The Arbitrator therefore proposed to the parties that the Arbitrator instead, in due course and in further consultation with the parties, adopt alternate procedures allowing for a delayed public presentation of the meeting. In communications dated 27 and 31 August 2021, the parties voiced no objection to this course of action. Accordingly, on 3 September 2021, the Arbitrator repealed the previous set of open meeting procedures, and on 6 December 2021 the Arbitrator proposed an alternate version of open meeting procedures allowing for a delayed public presentation. The parties provided comments thereon on 7 and 8 December 2021 and comments on the other party's response on 9 December 2021. The Arbitrator adopted these procedures on 17 December 2021.

2.19. The delayed public broadcast occurred on 7-10 March 2022. Pursuant to those procedures, relevant portions of the audio recording of the meeting were available for registered members of the public for a period of 72 hours. The audio recording was available through a dedicated page on the WTO website. Also on that page, and available to registered members of the public, were written versions of the parties' as-delivered opening and closing statements, and written versions of the parties' responses to the Arbitrator questions following the meeting.

3 THE MANDATE OF THE ARBITRATOR

3.1. This arbitration proceeding results from the United States' objection to Canada's request for authorization to suspend concessions or other related obligations.[21] Pursuant to Article 22.4 of the DSU, "[t]he level of the suspension of concessions or other obligations authorized by the DSB *shall be equivalent* to the level of the nullification or impairment".[22] The mandate of the Arbitrator, as set out in Article 22.7 of the DSU, is as follows:

> The arbitrator acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but *shall determine whether the level of such suspension is equivalent to the level of nullification or impairment*.[23]

3.2. The meaning of the word "equivalence" connotes a "correspondence, identity or balance between two related levels, i.e. between the level of the concessions to be suspended, on the one hand, and the level of the nullification or impairment, on the other".[24]

3.3. Thus, the Arbitrator's task in these proceedings is to examine whether the level of suspension proposed by Canada is equivalent to the level of NI sustained by Canada "as a result of the failure of the responding party to bring its WTO-inconsistent measures into compliance".[25]

3.4. The Arbitrator's assessment of the level of NI should be performed in an objective manner.[26] If the Arbitrator finds that Canada's proposed level of suspension is inconsistent with the DSU, the Arbitrator must determine the level of suspension it considers to be equivalent to the impairment suffered by Canada.[27] Any determination of NI, because it is based on assumptions, is necessarily a

[21] Recourse to Article 22.6 of the DSU by the United States, WT/DS505/14.
[22] Emphasis added.
[23] Emphasis added.
[24] Decision by the Arbitrator, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 4.1. Insofar as we refer to them in this section, we agree with previous arbitrators' statements.
[25] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 4.5.
[26] Decision by the Arbitrator, *US – Large Civil Aircraft (2nd complaint) (Article 22.6 – US)*, para. 3.6.
[27] See, e.g. Decision by the Arbitrator, *EC – Hormones (US) (Article 22.6 – EC)*, para. 12. In determining the level of NI, previous arbitrators have developed their own appropriate methodologies, based either on elements of methodologies proposed by the parties, or on an altogether different approach. (Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, para. 1.16 (referring to Decisions by the Arbitrators, *US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)*, paras. 3.115 and 3.69-3.79; *US – Gambling (Article 22.6 – US)*, para. 3.174).

reasoned estimate.[28] Previous arbitrators have endeavoured to rely on the best information or data that is available in pursuit of formulating such a reasoned estimate[29], and have declined to accept claims that are too remote, too speculative, or not meaningfully quantified.[30] Moreover, assumptions relied on by the parties should be reasonable given the circumstances of the dispute and should be based on credible, factual, and verifiable information.[31]

3.5. Finally, we note that the purpose of suspension of concessions or other obligations is to "induce compliance".[32] Other arbitrators also observed that the concept of equivalence referred to in Article 22.4 of the DSU means that obligations cannot be suspended in a "punitive" manner.[33]

4 BURDEN OF PROOF

4.1. We agree with previous arbitrators that the burden of proving that the requirements of the DSU have not been met rests on the party challenging the proposed level of suspension.[34] Accordingly, in this proceeding, the United States bears the initial burden of establishing a *prima facie* case that the level of suspension proposed by Canada is not equivalent to the level of NI. To discharge this burden, it would be insufficient for the United States to merely propose an alternative methodology that it asserts is more appropriate compared with the methodology advanced by Canada. Rather, the United States must demonstrate why Canada's methodology would result in a level of suspension that is not "equivalent" to the level of NI within the meaning of Article 22.4 of the DSU. Finally, each party also "has the duty to produce evidence in support of its assertions of fact and to collaborate with an Article 22.6 arbitrator in presenting evidence".[35]

5 THE MEASURE AT ISSUE

5.1. The measure at issue in this arbitration is the so-called "Other Forms of Assistance – Adverse Facts Available Measure" (OFA-AFA Measure). This measure was challenged as, and found by the Panel and Appellate Body to be, an unwritten measure in the form of "ongoing conduct" that was attributable to the United States. Concretely, that meant that the measure was found: (a) to be attributable to the United States; (b) to have a precise content; (c) to have repeated application; and (d) to be likely to continue in the future.[36]

5.2. The Appellate Body upheld the Panel's characterization of the precise content of the 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

[28] See, e.g. Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.54 (quoting Decision by the Arbitrator, *EC – Hormones (US) (Article 22.6 – EC)*, para. 41).

[29] See, e.g. Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.175. See also Decisions by the Arbitrators, *US – COOL (Article 22.6 – US)*, paras. 1.18 and 5.101; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, paras. 7.16, 7.19, 7.22, 7.29, 7.34, and fn 272; and Award of the Arbitrator, *US – Section 110(5) Copyright Act (Article 25)*, para. 4.28.

[30] See, e.g. Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.57 (quoting Decisions by the Arbitrators, *EC – Hormones (US) (Article 22.6 – EC)*, para. 77; *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para. 3.22).

[31] See, e.g. Decisions by the Arbitrators, *US – Countervailing Measures (China) (Article 22.6 – US)*, para. 3.40; *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.173; *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.54). See also Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, paras. 1.16 and 3.127, indicating that "'it is necessary to rely only on credible, verifiable information, and not on speculation' in calculating the level of nullification or impairment" (quoting Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.63).

[32] See, e.g. Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, paras. 5.5-5.6 (quoting Decisions by the Arbitrators, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 76; *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.3).

[33] See, e.g. Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.8; *US – Upland Cotton (Article 22.6 – US I)*, para. 4.109 (referring to Decision by the Arbitrator, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.3).

[34] See, e.g. Decisions by the Arbitrators, *US – Countervailing Measures (China) (Article 22.6 – US)*, para. 3.2 and fn 39 thereto; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 1.11; *US – Washing Machines (Article 22.6 – US)*, para. 1.14; and *US – Large Civil Aircraft (2nd complaint) (Article 22.6 – US)*, para. 4.3.

[35] Decision by the Arbitrator, *US – Large Civil Aircraft (2nd complaint) (Article 22.6 – US)*, para. 4.4.

[36] Panel Report, paras. 7.305 and 7.316.

OFA question, applying AFA to determine that such information amounts to countervailable subsidies".[37]

6 THE UNITED STATES' GENERAL OBJECTIONS TO THE LEVEL OF NULLIFICATION OR IMPAIRMENT

6.1 Preliminary issues

6.1.1 Whether the United States has rebutted the presumption of nullification or impairment

6.1. We recall that, in its request to the DSB, Canada sought authorization to suspend concessions "at 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".[38] Canada also explained that its request reflects the level of NI that Canada "*will* suffer *if* the "ongoing conduct" continues to exist and applies to exports from Canada in the future".[39]

6.2. The United States objects to Canada's proposed level of suspension of concessions or other obligations on the basis that it is neither: (a) equivalent to the level of NI within the meaning of the first sentence of Article 22.7 of the DSU; nor (b) allowed under the DSU, within the meaning of the second sentence of Article 22.7.[40] As regards both objections, the United States notes that the only instance in which the OFA-AFA "ongoing conduct" measure was found to "exist and apply" to Canada was through the Supercalendered Paper CVD order.[41] The United States further notes that, in July 2018, the Supercalendered Paper CVD order was revoked with retroactive effect from the beginning of the CVD proceeding, such that it no longer applies to Canada. The United States argues that, in these circumstances, Canada is not subject to the OFA-AFA measure; the present level of NI suffered by Canada is zero; consequently, there is no NI; and thus the level of NI must be set at zero and remain at zero.[42] According to the United States, Canada's request for suspension of concessions is solely concerned with a "hypothetical, future nullification or impairment".[43] In addition, the United States explains that there are no benefits to Canada that "are being impaired" in the present, and to allow suspension of concessions with respect to solely hypothetical, future NI is contrary to Articles 3.3, 22.4 and 22.7 of the DSU and unsupported by prior arbitrations.[44] The United States also submits that it is consistent with the DSU for an arbitrator in proceedings under Article 22.6 to examine whether a Member has rebutted the presumption of NI under Article 3.8 when assessing the level of NI under Articles 22.4 and 22.7 of the DSU.[45]

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[37] Appellate Body Report, para. 5.24 (quoting Panel Report, para. 7.316). The "OFA question" essentially comprises of a question that the USDOC includes in questionnaires issued in CVD investigations. More specifically, the OFA question "'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'". Appellate Body Report, para. 5.21.

[38] WT/DS505/13. (emphasis added)

[39] WT/DS505/13. (emphasis added)

[40] United States' written submission, paras. 13-14.

[41] United States' written submission, para. 24.

[42] United States' opening statement at the meeting of the Arbitrator, paras. 10-11; response to Arbitrator question No. 3, para. 12; No. 4, para. 16; and No. 5, para. 20; and written submission, paras. 13-15 and 24. The United States clarifies that it is not asking the Arbitrator to determine that, with the revocation of the Supercalendered Paper CVD order the OFA-AFA "ongoing conduct" measure ceased to exist, or that the measure has been withdrawn. Rather, the United States argues that Canada suffers from no NI because there are no CVD determinations concerning Canadian products that involve the OFA-AFA measure, such that the OFA-AFA Measure does not continue to apply to Canada (United States' response to Arbitrator question No. 1, paras. 2 and 7; No. 5, para. 20; and No. 7, para. 30).

[43] United States' opening statement at the meeting of the Arbitrator, para. 17; written submission, para. 31. See also United States' response to Arbitrator question No. 5, para. 21.

[44] United States' written submission, paras. 13-14 and 30-31; response to Arbitrator question No. 4, paras. 13 and 17, No. 5, para. 21; and opening statement, paras. 17-19.

[45] United States' written submission, paras. 13 (explaining that "where nullification or impairment does not exist, the level of suspension should be set at zero. To do otherwise would breach Articles 22.4 and 22.7 of the DSU") (emphasis original) and 16-21 (arguing, based on Article 3.8 of the DSU, that the DSU permit an arbitrator acting under Article 22.6 of the DSU to find that NI does not exist). See also United States' response to Arbitrator question No. 2, paras. 8 and 10.

6.3. Canada argues that the mandate of an arbitrator under Article 22.6 of the DSU is confined to determining the *level* of NI, not its *existence*. Thus, the United States is not entitled to re-litigate the existence of NI in the context of this arbitration proceeding.[46] Canada further argues that, even if the Arbitrator could re-evaluate whether the OFA-AFA measure continues to nullify or impair benefits accruing to Canada, the United States has not rebutted the presumption of NI because it has failed to produce any evidence that the measure has been brought into conformity with the covered agreements, nor has the United States provided any assurance that it will not apply the OFA-AFA Measure against Canada in the future.[47] Canada disputes the United States' contention that Canada's request is not supported by prior arbitrations.[48] On the contrary, Canada contends that its request for authorization to suspend concessions with respect to any future application of the OFA-AFA Measure to Canada is similar to requests made in prior arbitrations to suspend concessions for maintaining WTO-inconsistent "as such" measures that have yet to be applied against the WTO complainant in the future.[49] Canada rejects the United States' argument that, because the OFA-AFA Measure is not presently being applied against Canada, Canada does not have the opportunity to retaliate in the event that the measure is re-applied against it in the future. Canada notes that it only has this one opportunity to request suspension of concessions.[50]

6.4. The Arbitrator notes, at the outset, that the Arbitrator initially understood the United States to be arguing that the OFA-AFA Measure itself did not exist in relation to Canada, owing to the revocation of the Supercalendered Paper CVD order with retroactive effect to the beginning of the CVD proceeding, and that for this reason, Canada suffers no NI.[51] Following questioning from the Arbitrator, however, the United States clarified that its argument that Canada suffers no NI does not depend on the Arbitrator making a determination regarding the existence of the OFA-AFA Measure.[52] The Arbitrator, therefore, need not make any findings regarding the continued existence of the OFA-AFA Measure.[53]

6.5. The United States' argument in this context, rather, is that that Canada is not presently suffering NI, and that for this reason, the level of NI for the purpose of this arbitration must be set at zero and stay at zero. The validity of this argument depends upon the merits of following propositions: (a) present NI must exist in order for an arbitrator acting under Article 22.6 of the DSU to allow an original complainant to suspend concessions in a non-zero amount in the future that is "equivalent" to a future level of NI; (b) no present NI exists *vis-à-vis* Canada because there are currently no US CVD measures in place against Canadian firms that are affected by the OFA-AFA Measure; and (c) it is within the Arbitrator's jurisdiction to examine the existence of present NI. All three propositions must hold in order for the United States to prevail in this context. We therefore first address the United States' proposition under item (a), i.e. that present NI must exist in order for an arbitrator to allow for a non-zero level of NI and equivalent suspension in the future. As discussed below, we find that we must ultimately reject the United States' position because it not only lacks support in the text of the DSU and in prior dispute settlement practice, but it could also

[46] Canada's written submission, paras. 21-24; response to Arbitrator question No. 2, para. 5. Canada contends that the United States ignores that the panel's finding that the OFA-AFA measure nullifies or impairs benefits accruing to Canada under Article 3.8 of the DSU is predicated on the fact that the United States failed to rebut the claim of nullification or impairment (Canada's written submission, para. 37).

[47] Canada's written submission, para. 39.

[48] Canada's written submission, paras. 53-56; response to Arbitrator question No. 3, paras. 8-12.

[49] Canada's methodology paper, para. 5.

[50] Canada's opening statement at the meeting of the Arbitrator, paras. 68-69. See also Canada's written submission, para. 52.

[51] Canada also initially seemed to have shared this understanding of the United States' argument because, in its written submission, Canada submitted that any argument by the United States that the OFA-AFA Measure has ceased to exist was equivalent to an assertion that the OFA-AFA Measure had been withdrawn, and therefore no longer nullified or impaired benefits to Canada. See e.g. Canada's written submission, para. 34.

[52] United States' response to Arbitrator question No. 1, para. 2; and No. 7, para. 30.

[53] We note that even if the United States had argued that the OFA-AFA Measure had ceased to exist, we discern no way that argument could be sustained on the basis that the United States offers, i.e. the revocation of the Supercalendered Paper CVD order. This is so because the scope of the OFA-AFA Measure was found by the Panel, as upheld by the Appellate Body, to be broader than the application of the OFA-AFA Measure in any one particular instance. Indeed, we recall that the OFA-AFA Measure was found to be a measure that was unwritten "ongoing conduct", whose precise content nowhere mentions the *Supercalendered Paper* order. See section 5, above.

effectively nullify original complainants' rights to seek redress through Article 22.6 arbitrations for a wide variety of measures that are subject to WTO dispute settlement.

6.6. The United States supports the proposition that present NI must exist in order for an arbitrator to allow for a non-zero level of NI and equivalent suspension in the future, with reference to provisions of the DSU. In particular, the United States argues that to allow suspension of concessions in the circumstances of this case (i.e. where there is allegedly no present NI because the OFA-AFA Measure is not currently being applied to Canadian products) would be contrary to Article 3.3 of the DSU. The United States submits that Article 3.3 uses the present progressive tense ("any benefits accruing to it directly or indirectly" and "are being impaired"), such that the prompt settlement of situations is only required where present benefits accruing to Canada are being impaired.[54] We note, however, that Article 3.3 of the DSU is one of the "general provisions" of the DSU and expresses the principle that the prompt settlement of disputes is essential to the effective functioning of the WTO. It does not purport to define the parameters for the authorization of suspension of concessions under Article 22.7. We therefore do not consider that Article 3.3 of the DSU confines the ability of Article 22.6 arbitrators to authorize suspension of concessions in the future only where it also establishes that benefits accruing to the complaining Member are also *presently* being impaired.[55]

6.7. The United States also argues that no benefits to Canada are currently being impaired, and therefore, the level of NI today is zero and the level of suspension that the Arbitrator can authorize in accordance with Article 22.4 must reflect that level.[56] We recall that Article 22.4 of the DSU simply establishes that the level of suspension authorized by the DSB "shall be equivalent" to the level of NI. Neither party advocates that Canada should be granted the ability to suspend concessions that exceeds the level of NI arising from applications of the OFA-AFA Measure to Canadian entities in terms of direct trade effects. In our view, therefore, Article 22.4 lends no material support to the United States' argument. We discern no other provisions of the DSU that provide material support for the United States' argument in this context.

6.8. The United States also discusses four prior arbitration decisions in this context[57], specifically the same four prior arbitrations Canada referred to in its Methodology Paper.[58] In each arbitration, authorization was granted to suspend concessions in response to the continued maintenance of measures previously found to be "as such" WTO-inconsistent. The United States argues that these arbitration decisions are irrelevant for the purpose of the present arbitration because they concerned measures that were found to be "as such" WTO-inconsistent, whereas the OFA-AFA Measure was found to be "ongoing conduct".[59] In any case, the United States argues that, in these past arbitrations, which concerned purported future NI, the DSB authorized the suspension of concessions *because* "present day" NI existed.[60] We discuss each arbitration decision further below, in particular, to ascertain whether the authorization to suspend concessions with respect to future NI in each case depended on the existence of a present level of NI.

6.9. In *US – 1916 Act (EC) (Article 22.6 – US)*, the 1916 Act was found to be "as such" WTO-inconsistent. At the end of the implementation period, the United States argued that because there were no orders under the Act in place against EC products, the level of NI was zero. The arbitrator rejected this argument on the basis that it was inconsistent with the panel and Appellate Body findings that "'the 1916 Act nullifies and impairs benefits accruing to the European Communities'".[61] After rejecting the United States' argument that the level of NI was zero, the arbitrator then determined "what could legitimately be considered to constitute nullification or impairment of benefits to the European Communities" in the situation in which the 1916 Act has been found to be "as such" WTO-inconsistent (i.e. in the event that 1916 Act orders were put in

[54] United States' response to Arbitrator question No. 4, para. 14.

[55] We note that Article 3.8 of the DSU speaks only in terms of a WTO-inconsistent measure leading to "a case of nullification or impairment" that "has an adverse impact on other Members".

[56] United States' response to Arbitrator question No. 4, para. 15.

[57] United States' written submission, paras. 28-34.

[58] Canada's methodology paper, para. 5. The arbitrations are: Decisions by the Arbitrators, *US – 1916 Act (EC) (Article 22.6 – US)*; *US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)*; *US – Upland Cotton (Article 22.6 – US I)*; and *US – Washing Machines (Article 22.6 – US)*.

[59] United States' written submission, para. 29.

[60] United States' response to Arbitrator question No. 4, para. 16; written submission, paras. 28-31.

[61] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, paras. 5.48 and 5.50 (quoting Panel Report, *US – 1916 Act (EC)*, para. 6.227).

place against EC products in the future).[62] The arbitrator concluded that NI in that situation would consist of any final judgments and settlement awards entered against EC companies or their subsidiaries under the 1916 Act.[63] It declined to include in the NI any claim for a deterrent or "chilling effect" on EC companies on the basis that such a claim would be too speculative and remote (noting also that both parties agreed that the chilling effect could not be quantified).[64] It also declined to include existing legal expenses related to pending US court cases because the European Communities had not meaningfully quantified such costs.[65]

6.10. The United States distinguishes the situation in the arbitration in *US – 1916 Act (EC)* from the present case on the basis that the EC companies had entered into settlement agreements under the 1916 Act since the expiration of the reasonable period of time, and thus there was existing NI at the time of the European Communities' request for suspension of concessions.[66] In our view, however, there is nothing in the arbitrator's decision that suggests that its determination of the level of NI that would arise from the future application of the 1916 Act to EC companies was dependent on a finding that outstanding settlement awards gave rise to "present" NI. Indeed, the arbitrator found that amounts with respect to any existing settlement awards had not been quantified by the European Communities and therefore did not include them in its determination of the level of NI.[67]

6.11. Rather, it appears that it was the "as such" nature of the WTO-inconsistency that led the arbitrator to identify the factors or events that would be eligible for inclusion in a quantification of any future NI (i.e. should the 1916 Act be applied in the future). The arbitrator explains this in a section of the decision called "[o]ngoing nullification or impairment".[68] Specifically, the arbitrator recalls the "as such" nature of the WTO-inconsistency, which it distinguishes from a case where the WTO-inconsistency is only "as applied". The arbitrator notes that, given the "as such" nature of the WTO-inconsistency of the 1916 Act, each application of the Act increases the level of NI sustained by the European Communities and therefore entitles the European Communities to increase concomitantly the level of its suspension of obligations.[69]

6.12. Following the circulation of the decision by the arbitrator in *US – 1916 Act (EC) (Article 22.6 – US*) (2004), there were multiple arbitrations authorizing the suspension of concessions against the United States with respect to the Continued Dumping and Subsidies Offset Act of 2000 (Byrd Amendment), which was found to be "as such" WTO-inconsistent. The arbitrator in those proceedings took the view that the disbursements made to US producers under the Byrd Amendment were economically equivalent to subsidies that may generate import substitution production. Thus, the arbitrator considered that the benefits nullified or impaired by such disbursements could correspond to the value of exports from each of the complainants that were replaced by the United States' domestic production. Accordingly, the arbitrator determined the level of NI on the basis of an economic model that would measure the extent to which *future* disbursements under the Byrd Amendment affected exports from the complainant parties to the United States, using a model that combined a fixed coefficient *calculated on the basis of actual, past disbursements over the previous three years,* with variable amounts for future disbursements.

6.13. The United States argues that, in the Byrd Amendment arbitrations, the NI concerned "disbursements that had been made and would continue to be made" under the legislation.[70] However, there is nothing in the reasoning or approach of the arbitrator to suggest that, had there not been prior applications of the Byrd Amendment (i.e. a "current" level of NI), the United States could have successfully argued that the determination of the level of NI should exclude consideration of any future disbursements under the Byrd Amendment.

6.14. *US – Upland Cotton (Article 22.6 – US I)* concerned Brazil's request for countermeasures with respect to a prohibited subsidy under Article 3.1(a) of the SCM Agreement, which the United States had been required to withdraw without delay pursuant to Article 4.7 of the SCM Agreement. Brazil requested authorization to apply countermeasures not only in the specific amount that it had

[62] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.53.
[63] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, paras. 5.58 and 5.61.
[64] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, paras. 5.69-5.70.
[65] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US*), paras. 5.77-5.78.
[66] United States' written submission, para. 30.
[67] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US*), para. 6.10.
[68] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US*), paras. 6.14-6.17.
[69] Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US*), para. 6.17.
[70] United States' written submission, para. 30.

calculated with reference to the period from the expiration of the implementation period, but also with respect to future amounts to be calculated by reference to the same formula through which the present amount had been calculated.[71] After noting that the United States did not dispute that it would be permissible to determine the level of countermeasures through an appropriate formula, the arbitrator authorized countermeasures that consisted of a specific amount for the FY 2006, and for subsequent years, an amount that would be variable on an annual basis. This amount would depend, among other things, on the total amount of transactions under the prohibited subsidy programme for the most recently concluded fiscal year.[72]

6.15. The United States characterizes the *US – Upland Cotton (Article 22.6 – US I)* arbitration as one involving "a measure that existed at the time and could continue to exist such that an award was given for a specific calendar year, as well as for future years".[73] While this may be correct, it seems that the legally relevant factor was not that an amount of countermeasures was calculated for FY 2006, as well as for future years, but that the prohibited subsidy programme was maintained in FY 2006 and subsequently. Likewise, the OFA-AFA Measure existed and continues to exist at all relevant points in time, even if it is not presently applied to Canadian products.[74] There is nothing in the arbitrator's analysis that suggests that its decision to authorize annual countermeasures based on a formula that could be applied to future transactions under the prohibited subsidy programme turned on the fact that transactions under the prohibited subsidy programme were made in a "present" period (FY 2006).

6.16. Finally, the United States refers to the more recent arbitrator decision in *US – Washing Machines (Article 22.6 – US)* as another instance in which the measures found to be "as such" WTO-inconsistent were currently applied in US anti-dumping duty (ADD) orders involving Korean goods and would continue to be used.[75] In *US – Washing Machines (Article 22.6 – US)*, the measures at issue had been found to be WTO-inconsistent both "as applied" with respect to washing machines from Korea and "as such" with respect to exports from Korea other than washing machines.[76] The arbitrator determined the level of NI separately for the "as applied" and "as such" findings of WTO-inconsistency, respectively.[77]

6.17. There is nothing in the arbitrator's specification of the model pertaining to the level of NI with respect to the "as such" finding of WTO-inconsistency that suggests it was dependent on the WTO-inconsistent measure currently being applied in ADD orders involving Korean goods. Indeed, the arbitrator states that it decided to devise a formula that Korea could use "*if* and when" the United States applies the WTO-inconsistent ADD measures to exports from Korea other than washing machines.[78]

6.18. In sum, we do not consider that any of the four prior arbitrations offer support for the United States' argument that, where the suspension of concessions concerns an "as such" violation – or concerns any kind of measure, for that matter, including a measure characterized as "ongoing conduct" – an arbitrator determining the level of NI can include future NI only where it also determines a level of "present" NI.

6.19. Aside from its arguments regarding the DSU and prior arbitration decisions, the United States also infers from the absence of any present CVD measure applied to Canada that used the OFA-AFA Measure that any future NI is "hypothetical" and should therefore be discounted. This argument by the United States appears to misapprehend the significance of the temporal scope of NI that may arise from the OFA-AFA Measure. This is so because it does not appear self-evident that, merely because there are no CVD determinations applying the OFA-AFA Measure that currently

[71] Decision by the Arbitrator, *US – Upland Cotton (Article 22.6 – US I*), para. 4.5.

[72] Decision by the Arbitrator, *US – Upland Cotton (Article 22.6 – US I*), para. 4.279.

[73] United States' written submission, para. 30 (referring to Decision by the Arbitrator, *US – Upland Cotton (Article 22.6 – US I*), para. 6.5(a)).

[74] Here we see that, although the United States argues in its responses to the Arbitrator's questions that the Arbitrator need not determine that the OFA-AFA Measure does not exist in relation to Canada, the alleged non-existence of the OFA-AFA Measure may be an implicit element of the overall US case.

[75] United States' written submission, para. 30.

[76] Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US*), paras. 1.4-1.5.

[77] The United States had argued, in relation to the "as applied" finding, that the actual level of NI was zero, and that this argument was rejected by the arbitrator (Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US*), paras. 3.48-3.52).

[78] Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US*), para. 4.48.

affect CVD rates on Canadian products, it follows that Canada's request to suspend concessions is limited to a *hypothetical* future NI in a manner that is relevant for this arbitration proceeding. Indeed, the Arbitrator considers it more accurate to characterize Canada's request as asking for authorization to suspend concessions when *actual* NI (in the form of effects on direct trade flows) arises from future CVD determinations concerning Canadian products and containing the OFA-AFA Measure, a measure which, as the Panel found, is a measure likely to continue in the future. Moreover, the models proposed by both parties are specifically designed to measure NI when and as it arises in the future. Such NI would not be too remote or too speculative such that it should not be quantified in accordance with the prospective model.[79]

6.20. This line of reasoning is directly supported, in our view, by the core principles of WTO dispute settlement. We recall that panels and the Appellate Body have, correctly in our view, explained that certain measures (e.g. taking the form of rules and norms) can be found to violate the covered agreements independently from their application in a particular instance, based on the reasoning that the disciplines of the GATT and WTO are intended to protect not only existing trade but also the predictability and security needed to conduct future trade.[80] We therefore note that in instances where such measures had not been applied at the time of a subsequent arbitration occurring under Article 22.6 of the DSU, the United States' approach in this context would nullify an original complainant's ability to seek redress of the violation via such an arbitration. We discern no basis upon which to conclude that such an extreme result was the intent of the drafters of the DSU, and reiterate that we find no support for such a result in the text of the DSU or in prior dispute settlement practice.[81]

6.21. Based on the foregoing, we must reject the United States proposition that present NI must exist in order for an arbitrator to allow for a non-zero level of NI and equivalent suspension in the future. It will be recalled that the United States' overall argument in this context, i.e. that the level of NI must be set and stay at zero, depends on the validity of this proposition. Accordingly, we also reject the United States' argument that the level of NI must be set and zero and stay at zero.[82]

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[79] The United States' argument may also be premised more simply on the notion that the OFA-AFA Measure may or may not be used against Canadian exporters in the future. This is true. The nature of the prospective formula itself, however, accounts for this uncertainty because it only results in Canada suspending concessions if actual NI arises. There appears no reason, therefore, to conclude that this kind of uncertainty, in this context, materially supports the United States' argument.

[80] Thus, the Appellate Body has explained that allowing "as such" claims against "rules or norms that are intended to have general and prospective application", independently of their application in any particular instance, serves the purpose of preventing future disputes by "allowing the root of WTO-inconsistent behaviour to be eliminated." (Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82. See also Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172:

> In our view, "as such" challenges against a Member's measures in WTO dispute settlement proceedings are serious challenges. By definition, an "as such" claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct – not only in a particular instance that has occurred, but in future situations as well – will necessarily be inconsistent with that Member's WTO obligations. In essence, complaining parties bringing "as such" challenges seek to prevent Members *ex ante* from engaging in certain conduct. The implications of such challenges are obviously far more far-reaching than "as applied" claims. (Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172).

[81] See Appellate Body Report, *EC – Bananas III*, paras. 251-253 (upholding the panel's finding that the EC had not rebutted the presumption of nullification or impairment, even though the United States had not exported bananas to the EC, because, *inter alia*, the United States had an interest in its potential to export bananas to the EC in the future).

[82] We also note that the United States offers that the current level of NI is zero because Canada currently experiences no *trade flow loss* due to the OFA-AFA Measure. (See United States' response to Arbitrator question No. 1, paras. 3 and 7; No. 4, para. 16; and No. 5, para. 19). We note, however, that a previous Arbitrator has explained, correctly in our view, that it did "not agree with the United States that nullification or impairment is to be limited in all instances to the direct trade loss resulting from the violation". (Decision by the Arbitrator, *US – Offset Act (Byrd Amendment) (Brazil) (Article 22.6 – US)*, para. 3.70. See also Decisions by the Arbitrators, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.110 (quoting the *Byrd Amendment* reasoning with approval); and *US – 1916 Act (EC) (Article 22.6 – US*), paras. 5.58 and 5.61 (determining the level of NI based on amounts of future settlements and judgments under the 1916 Act, rather than on the value of direct trade losses). Thus, we also have considerable doubts as to whether the United States' argument is based on a proper understanding of the substantive scope of NI.

6.1.2 Propriety of using a prospective model approach and governing principles

6.22. We note that both parties advocate the selection of a prospective model in this proceeding[83], i.e. a model that will allow Canada to calculate a level of suspension "equivalent" to the level of NI resulting from the *future use* of the OFA-AFA Measure against Canadian firms. We note that multiple prior arbitrators have determined methods of varying complexities (including formulae) through which the level of suspension would be determined in the future based on the future application of the measure at issue.[84] We discern no reason to conclude that such an approach, under the circumstances of this dispute, is incompatible with our mandate as described in section 3, above.

6.23. Canada claims that the arbitrator in *US – Washing Machines* "provided guidance on the methodological criteria applicable to the calculation of nullification or impairment in circumstances where the WTO-inconsistent measure has not yet been applied".[85] Canada recalls that the arbitrator in that dispute indicated that: (a) the calculation should result in a predictable level of suspension; (b) the method should be practical to implement and limit the risk of potential controversies between the parties; (c) the data relied on should be, as much as possible, verifiable and available to both parties; and (d) given that a future WTO-inconsistent trade remedy measure may be applied against any good, the method used to determine nullification or impairment should be "sufficiently generic to capture any variation" in the types of product and markets.[86]

6.24. The Arbitrator finds such principles to be valid in determining the level of NI, and the United States offers no objection to such use. Indeed, we note that principles (a), (b), and (d) go to the selection of a model that will reliably work in the future under varying circumstances, which, of course, is essential if a model is to yield a reasoned estimate of a level of NI. Principle (c), in our view, helps ensure that quality data is used in the calculation of the level of NI. Viewed as such, we consider that these principles are effectively embedded in our task of selecting a model that will yield a reasoned estimate of the level of NI.

6.25. We therefore accept Canada's proposal to select a prospective model with which Canada can determine future levels of NI, and further adopt the four principles discussed above to help guide our selection of the model.

6.2 Events triggering the application of the prospective model and duration of suspension

6.26. The parties disagree regarding the events that would trigger Canada's right to determine and apply a given level of suspension of concessions (which this Decision will refer to as "triggering events"[87]), and, to a limited degree, regarding the duration of any such suspension.

6.27. In its Methodology Paper, Canada indicates that its request under Article 22.2 of the DSU "reflects the nullification or impairment that Canada will suffer if the OFA-AFA measure (i.e., the ongoing conduct) continues to exist and is applied by the United States to imports from Canada in future countervailing duty proceedings".[88] Canada attaches a footnote to this language stating: "[c]ountervailing duty proceedings refer to proceedings in which duties resulting from the OFA-AFA measure could be imposed, including final determinations in investigations, administrative

[83] We recall that, as discussed in the preceding section, the United States argued that the level of NI must be set at zero and remain at zero if there is no present NI caused by the OFA-AFA Measure. However, the United States never argues that, if the Arbitrator rejected that argument, a prospective model would constitute an improper way of measuring NI in this proceeding (see e.g. United States' written submission, section IV (raising specific objections to Canada's methodology "in the alternative" to its earlier arguments in section III regarding the presence of NI), and para. 65 (acknowledging that "neither the DSU nor past arbitrator decisions preclude the possibility that an arbitrator might base the level of concessions on a formula").

[84] Decisions by the Arbitrators, *US – Washing Machines (Article 22.6 – US)*; *US – Upland Cotton (Article 22.6 – US I)*; *US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)*; and *US – 1916 Act (EC) (Article 22.6 – US)*.

[85] Canada's methodology paper, para. 6.

[86] Canada's methodology paper, para. 6 (quoting Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, paras. 4.49-4.52).

[87] See para. 6.36, below (providing a more comprehensive definition of "triggering events").

[88] Canada's methodology paper, para. 3.

reviews, new shipper reviews, expedited reviews, changed circumstances reviews and sunset reviews".[89]

6.28. Canada subsequently confirmed that, in its view, triggering events would fall into one of two baskets of proceedings: (a) a proceeding resulting in "a countervailing duty order or a final determination that imposes the AFA resulting from the OFA-AFA Measure"; or (b) sunset reviews which could extend the application of AFA".[90] Proceedings falling under basket (a), according to Canada, are those that result in the issuance of CVD orders, determinations, or final results resulting from original CVD investigations[91], "administrative reviews"[92], "new shipper reviews"[93], "expedited reviews"[94], and "changed circumstance reviews".[95] Basket (b), according to Canada, consists of "sunset reviews".[96] Canada later clarified, however, that, in its view the OFA-AFA Measure can arise in any US CVD proceeding, and triggering events should not therefore be limited to the specific proceedings currently defined under US law.[97] Canada also specifically indicates that, concretely, it is the issuance of a CVD order (in the case of an original investigation) or the final results of other types of CVD proceedings, which qualify as the triggering event.[98]

6.29. Regarding the duration of Canada's suspension of concessions resulting from a given application of the OFA-AFA Measure to a Canadian company, Canada has explained that after a triggering event, Canada would immediately calculate a level of NI and suspend concessions.[99] Canada indicates that the suspension of concessions would only remain in place for the period of time during which a CVD rate that was determined with the OFA-AFA Measure remains in place.[100]

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[89] Canada's methodology paper, fn 6 to para 3.

[90] Canada's response to Arbitrator question No. 35, para. 38.

[91] Canada notes that after the issuance of an original CVD order importers pay estimated CVDs in the amount established under that order, but final duties will only be determined and assessed at the time of a subsequent administrative review (Canada's response to Arbitrator question No. 35, para. 41). Canada also considers that "an aggregate CVD investigation or administrative review", when the USDOC calculates a single CVD rate for all companies in the country, could also qualify as triggering events (Canada's response to Arbitrator question No. 268; comments on United States' response to Arbitrator question No. 229, para. 97).

[92] See 19 U.S.C. § 1675 (Exhibit CAN-53); 19 C.F.R. § 351.213 (Exhibit CAN-54); and 19 CFR 351.213 (Exhibit CAN-100). Canada notes that administrative reviews occur upon the request of an interested party, which may occur each year following the issuance of the relevant CVD order (Canada's response to Arbitrator question No. 35, paras. 42-44). See also Canada's response to Arbitrator question No. 189, fn 34 to para. 49. Canada also notes that administrative reviews will examine the preceding "period of review", which is normally the most recently completed calendar year (Canada's response to Arbitrator question No. 35, para. 42 and fn 59 thereto). The final results of the administrative review will definitively establish the retroactive duty rate applied to imports from the period of review and simultaneously establish the same estimated rate going forward (Canada's response to Arbitrator question No. 35, para. 44).

[93] See Exhibit CAN-53, subsection (a)(2)(B); 19 C.F.R. § 351.214 (Exhibit CAN-55).

[94] Canada claims that the USDOC conducts "expedited reviews" under Exhibit CAN-55, although the validity of using this regulation for this purpose is currently the subject of litigation and thus may change in the future (Canada's response to Arbitrator question No. 35, fn 70 to para. 48).

[95] See Exhibit CAN-53, subsection (b). See also Canada's response to Arbitrator question No. 35 (generally explaining USDOC proceedings that could qualify as triggering events). Canada provides evidence that the USDOC may ask the OFA-AFA question in all such proceedings and may verify the information received (see Canada's response to Arbitrator question No. 35, fn 53 to para. 40 (original investigations), fn 62 to para. 43 (administrative reviews), fns 67 and 68 to para. 46 (new shipper reviews), and fns 71 and 72 to para. 48 (expedited reviews)). Canada asserts more generally that the scope of "changed circumstances" reviews allows for the application of the OFA-AFA Measure (Canada's response to Arbitrator question No. 35, para. 50).

[96] See Exhibit CAN-53, subsection (c) ("Five-year review"); 19 C.F.R. § 351.218 (Exhibit CAN-61) ("Sunset reviews under section 751(c) of the Act").

[97] Canada's response to Arbitrator question No. 285, para. 25. Canada more recently explained that, because the USDOC does not ask the OFA-AFA question in sunset reviews and does not conduct verification as part of sunset reviews, sunset reviews would not usually qualify as triggering events. (Canada's response to Arbitrator question No. 188, para. 46).

[98] Canada's comments on the United States' response to Arbitrator question No. 185, para. 15 and fn 13 thereto; Canada's response to Arbitrator question No. 35, paras. 40-50. Canada recognizes that, in an investigation, the final CVD determination only takes effect after the USDOC has issued a positive subsidization finding *and* the USITC publishes a positive determination as to injury to the domestic industry (Canada's response to Arbitrator question No. 124, fn 48 to para. 54). Thus, following a CVD investigation, it is the issuance of a CVD *order* that would trigger the application of the model rather than the issuance of the USDOC subsidization findings. See also Canada's response to Arbitrator question No. 35, para. 41.

[99] Canada's response to Arbitrator question No. 79, para. 169.

[100] Canada's response to Arbitrator question No. 35, para. 55; comments on the United States' response to Arbitrator question No. 285, para. 19.

Canada clarifies, however, that a delay may exist between a relevant triggering event and Canada's actual suspension of concessions following that triggering event (owing primarily to the time it takes for Canada to calculate the level of NI under the procedures the Arbitrator ultimately adopts), and therefore "Canada reserves the right to suspend concessions for an amount of time that is equivalent to the entire amount of time for which the United States applies the AFA resulting from the OFA-AFA measure."[101]

6.30. The United States generally asserts 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".[102] By way of background, the United States explains that, under the US retrospective system, a USDOC investigation results only in the collection of estimated duties going forward, referred to as "cash deposits", but it is only appropriate to trigger Canada's calculating a level of NI and the suspension of concessions once duties are actually assessed.[103] The United States clarifies that this assessment would occur as a result of an administrative review[104] if one is requested, or, if such a review is not requested, then duties would be assessed based on the CVD rates most recently established at the time the administrative review would have occurred had it been requested.[105]

6.31. Specifically with respect to the USDOC proceedings that may give rise to triggering events, the United States disagrees with Canada that "new shipper reviews, expedited reviews, changed circumstances reviews, and sunset reviews are within the scope of this arbitration".[106] In the United States' view, this is so because the OFA-AFA Measure is an unwritten measure, the existence of which was demonstrated in the panel proceeding with instances of the measure's use in only investigations and administrative reviews, and thus that evidence inherently restricts the OFA-AFA Measure's existence and/or WTO-inconsistency to the context of investigations and administrative reviews. In support of this line of reasoning, the United States recalls the Appellate Body's guidance in *Argentina – Import Measures* to the effect that "'the constituent elements [of a challenged measure] 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.'"[107] The United States further asserts that only administrative reviews can give rise to a triggering event because Canada should not be able to start suspending concessions until duties are definitively assessed on the basis of a WTO-inconsistent duty rate.[108] Finally, the United States argues that verification – the occurrence of which is necessary

[101] Canada's response to Arbitrator question No. 35, para. 53. See also response to Arbitrator question No. 123.

[102] United States' response to Arbitrator question No. 35, para. 100. (emphasis omitted) The United States further notes that it would consider suspension of concessions to be appropriate only after a CVD order is in place, rather than following a final determination by the USDOC, since an order would only be issued following an affirmative determination of injury to the domestic industry by the USITC (United States' response to Arbitrator question No. 173, para. 89).

[103] United States' response to Arbitrator question No. 35, para. 101 (also clarifying that an "investigation", in this context, according to the United States, is "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.")

[104] An "administrative review", in this context, according to the United States, refers to "annual assessment reviews under the U.S. retrospective duty assessment system, as defined by 19 U.S.C. § 1675(a)." (United States' response to Arbitrator question No. 35, para. 102).

[105] United States' response to Arbitrator question No. 35, fn 162 to para. 113; No. 87, paras. 247-253; and No. 107, para. 272. See also 19 CFR § 351.212 (Exhibit USA-18).

[106] United States' response to Arbitrator question No. 35, para. 103 (referring to Canada's methodology paper, para. 3 and fn 6 thereto). The United States further asserts that if original investigations and administrative reviews cease to exist under US law, then, logically, the OFA-AFA Measure would cease to exist as well (United States' response to Arbitrator question No. 285, para. 16). The United States also considers that aggregate investigations are also not within the scope of this proceeding because no aggregate investigations were used to demonstrate the existence of the OFA-AFA Measure before the Panel (United States' response to Arbitrator question No. 229, paras. 145-146).

[107] United States' response to Arbitrator question No. 35, para. 103 (quoting Appellate Body Reports, *Argentina – Import Measures*, para. 5.108). See also generally United States' response to Arbitrator question No. 35(b).

[108] United States' response to Arbitrator question No. 130, paras. 17-20. See also response to Arbitrator question No. 35, paras. 107 ("[t]he imposition of countermeasures may only occur for the duration of the assessment of an affected CVD duty") (emphasis omitted) and 102; and No. 87, paras. 247-253.

for the OFA-AFA Measure to arise – is not required in changed circumstances reviews, new shipper reviews, and expedited reviews.[109]

6.32. Regarding the duration of Canada's suspension of concessions resulting from a given application of the OFA-AFA Measure to a Canadian company, the United States considers that Canada should be able to suspend concessions for the duration of the application of a WTO-inconsistent CVD rate, under the caveat that Canada could only start to suspend concessions following the actual assessment of the duties collected pursuant to the WTO-inconsistent CVD rate.[110]

6.33. In response, Canada argues that neither the Panel nor the Appellate Body found that the OFA-AFA Measure could arise only in investigations and administrative reviews. While Canada does not dispute that the evidence on which Canada relied before the Panel to prove the existence of the OFA-AFA Measure was limited to examples taken from investigations and administrative reviews, Canada argues that there is no reason to conclude that the precise content of the OFA-AFA Measure includes such a limitation.[111]

6.34. Canada further responds that the United States' suggestion that only assessment of duties following an administrative review can serve to trigger Canada's right to suspend concessions "would produce results that bear no relationship to the actual level of nullification or impairment", and would "delay and even insulate the United States from suspension of concessions".[112] Canada underlines in this context that, following an investigation in which WTO-inconsistent CVDs are assigned to Canadian goods, the relevant Canadian goods are affected by the CVDs at that time as a practical matter because Canadian companies make relevant pricing and sales decisions based on those assigned CVD rates, rather than waiting months or even years for the results of a subsequent administrative review. Canada also considers that the delay in Canada suspending concessions following an investigation in which WTO-inconsistent CVDs were imposed that would result from the United States' proposal would be inconsistent with the principle that compliance should be prompt, and that the US position in this context is contrary to positions it has expressed in other arbitrations.[113]

6.35. The Arbitrator notes that the parties' arguments in this context relate to two separate but related issues, i.e. the US CVD proceedings that can qualify as triggering events and the duration of suspension with respect to any particular instance of the USDOC using the OFA-AFA Measure. We address each in turn below.

6.2.1 Triggering events

6.36. At the outset, we will first clarify what a "triggering event" is for purposes of this Decision. A triggering event, as we will use that term moving forward, is any event that either gives Canada the right to determine a level of NI and suspend concessions, or which requires a modification to a previously calculated level of NI. The parties agree that these events take three general forms, i.e. (a) whenever at least one unaffected company becomes an affected company; (b) at least one affected company is assigned a new CVD rate that is also affected by the OFA-AFA Measure; or (c) at least one affected company becomes an unaffected company.[114] Such events must occur within the

[109] United States' comments on Canada's response to Arbitrator question No. 188, paras. 24-28.

[110] United States' response to Arbitrator question No. 130, paras. 17-20. See also response to Arbitrator question No. 35, para. 107 ("[t]he imposition of countermeasures may only occur for the duration of the assessment of an affected CVD duty"). (emphasis omitted)

[111] Canada's response to Arbitrator question No. 188, paras. 40-46.

[112] Canada's response to Arbitrator question No. 124, para. 53.

[113] Canada's response to Arbitrator question No. 124, paras. 53-59.

[114] See e.g. Canada's response to Arbitrator question No. 245, para. 222; United States' response to Arbitrator question No. 245, para. 169; Canada's comments on the United States' response to Arbitrator question No. 245, para. 121; United States' comments on Canada's response to Arbitrator question No. 245, para. 157. We note that both parties have confirmed that Canada would be able to discern when a company subject to an affected all-others rate becomes an unaffected company, even though no exhaustive list of companies subject to the all-others rate exists in the record of any USDOC proceeding (Canada's response to Arbitrator question No. 282, paras. 10-13; United States' response to Arbitrator question No. 282, paras. 11-12; Canada's comments on the United States' response to Arbitrator question No. 282, paras. 10-11; and United States' comments on Canada's response to Arbitrator question No. 282, para. 10).

context of a USDOC CVD proceeding in order to qualify as a triggering event.[115] This Decision will refer to such events collectively as "triggering events". All triggering events, in our view, will require Canada to determine what the proper level of NI is resulting from the triggering event.

6.37. Regarding triggering events, the parties contest two issues: (a) which US CVD proceedings could qualify as giving rise to a triggering event (in the specific sense that it would give Canada the right to determine a level of NI and suspend concessions if the OFA-AFA Measure were used in that proceeding) as a legal matter; and (b) which US CVD proceedings could qualify as giving rise to a triggering event (in the specific sense that it would give Canada the right to determine a level of NI and suspend concessions if the OFA-AFA Measure were used in that proceeding) as a factual matter. This section addresses such legal and factual considerations in turn.

6.2.1.1 Legal considerations

6.38. With respect to the USDOC proceedings that may give rise to a triggering event as a legal matter, we recall that Canada indicates that the OFA-AFA Measure could be used in a number of different USDOC CVD proceedings, and the measure's WTO-inconsistency is not legally tied to any particular such proceeding. Thus, in Canada's view, a triggering event occurs whenever the USDOC applies the OFA-AFA Measure and a CVD rate affected by that application is imposed on Canadian imports.[116] The United States argues that, as a legal matter, the OFA-AFA Measure's existence, and thus WTO-inconsistency, may only arise in investigations and administrative reviews because the *evidence* that Canada used to establish the existence of the OFA-AFA Measure before the Panel was limited to examples taken from these two specific types of proceedings.[117]

6.39. We are not convinced by the United States' submission on this point. In our view, the United States' position conflates the scope of *evidence* the Panel relied upon to establish the existence of the unwritten "ongoing conduct" measure with the *findings* of the Panel on the precise content of that measure. It is true that a party, when attempting to establish the existence of an unwritten measure, must do so with reference to evidence adduced to a panel. However, it is for a panel to evaluate that evidence and determine whether the alleged measure exists, and whether and how that measure is WTO-inconsistent.[118] Without reference to the scope of the Panel's *findings*, therefore, the United States' argument is necessarily lacking.

6.40. Further, we find no support for the United States' position in the adopted findings in this dispute. Although the United States is correct that the relevant evidence Canada used to demonstrate the existence of the OFA-AFA Measure consisted of examples of the application of the OFA-AFA Measure in investigations and administrative reviews[119], we discern no language in either the Panel Report or Appellate Body Report indicating that the OFA-AFA Measure or its WTO-inconsistency would only arise in those two kinds of specific CVD proceedings. Rather, certain findings made by the Panel and Appellate Body appear to contradict the United States' position. In this regard, we recall that the Panel, as upheld by the Appellate Body, found that the OFA-AFA Measure was found to constitute an unwritten "measure" capable of being challenged in WTO dispute settlement (specifically in the form of "ongoing conduct") because it was attributable to the United States[120], had a precise content, had repeated application, and was likely to continue

[115] The parties agree on this point (Canada's response to Arbitrator question No. 289, paras. 38-39; United States' response to Arbitrator question No. 289, paras. 27-29.

[116] See section 6.2, above (summarizing party arguments).

[117] See section 6.2, above (summarizing party arguments).

[118] This observation is consistent with the statements by the Appellate Body in *Argentina – Import Measures* that the United States submits in support of its argument in this context. That is: "the constituent elements [of a challenged measure] 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.") (Appellate Body Reports, *Argentina – Import Measures*, para. 5.108). (emphasis added) The Appellate Body never indicated, however, that a measure's existence is necessarily limited to the specific factual circumstances reflected in the evidence adduced to support that existence. Indeed, if this were the case, it would appear to subject the determination of the existence of a measure to an arbitrary selection of such factual circumstances. For example, one could argue that the OFA-AFA Measure could only exist when used in CVD proceedings involving the exact same *products* as were involved in the CVD proceeding examples adduced to the Panel.

[119] See Panel Report, Tables 1-4.

[120] Attribution was not materially challenged by the United States in the Panel proceedings and was not a major topic of discussion in either the Panel Report or the Appellate Body Report.

to be applied in the future.[121] The Panel, as upheld by the Appellate Body, then found that the OFA-AFA Measure was inconsistent with Article 12.7 of the SCM Agreement.[122] The precise content of the OFA-AFA Measure has already been described in section 5, above[123], and nowhere does that precise content indicate that the OFA-AFA Measure, or its WTO-inconsistency, may only arise in the context of any specific CVD proceedings. In short, the precise content of the OFA-AFA Measure is silent as to the type of proceeding in which the OFA-AFA Measure may arise. Rather, the Panel, as upheld by the Appellate Body, concluded more simply and broadly that the OFA-AFA Measure, as defined by its precise content, was inconsistent with Article 12.7 of the SCM Agreement.[124] Thus, a plain reading of the Panel's relevant findings leads to the conclusion that the OFA-AFA Measure is inconsistent with Article 12.7 of the SCM Agreement whenever the precise content of the measure arises.

6.41. The Appellate Body, in our view, confirmed that understanding in its Report. In particular, we note that, before the Appellate Body, the United States challenged the strength of certain evidence used to establish the precise content of the OFA-AFA Measure because, *inter alia*, the evidence consisted of "different fact patterns, dissimilar results, and different segments of CVD proceedings".[125] The Appellate Body rejected this argument, stating that "the fact that the[] examples [provided by Canada] concern different segments of CVD proceedings *is not material, because the conduct at issue may arise at any segment where the USDOC conducts verification*. In this regard, we note that these determinations all concern the identification of information at verification."[126] We consider this to be a sufficiently clear confirmation that the OFA-AFA Measure and its WTO-inconsistency is not legally limited to any particular CVD proceeding, but arises whenever the elements of its "precise content" are present.[127]

6.42. We therefore consider that, in keeping with the adopted findings in this dispute, a triggering event occurs when the United States applies the OFA-AFA Measure (as defined by its precise content) in any CVD proceeding.

6.2.1.2 Factual considerations

6.43. The parties' second disagreement regarding triggering events concerns whether original investigations, specifically, should qualify as triggering events for factual reasons. The United States argues that original CVD investigations should not qualify as triggering events because CVDs imposed as a result of an investigation only give rise to the collection of estimated duties in the form of cash deposits which are not definitively assessed under the United States' retrospective system until the time of a potential and subsequent administrative review.[128]

6.44. We first observe that, as explained by both parties, under the United States' retrospective CVD duty system, it is true that CVDs first imposed under a CVD order arising out of an original investigation are estimated duties that are then collected going forward in the form of cash

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[121] Panel Report, paras. 7.304 and 7.332; Appellate Body Report, para. 6.5(a).

[122] Panel Report, para. 8.4(b); Appellate Body Report, para. 6.9(b).

[123] The Appellate Body upheld the Panel's characterization of the precise content of the 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". Appellate Body Report, para. 5.24.

[124] See Panel Report, paras. 7.333-7.334.

[125] Appellate Body Report, para. 5.22 (referring to United States' appellant's submission, paras. 21-22). See also United States' response to Arbitrator question No. 35, para. 102 (indicating that administrative reviews are a particular "'segment'" of a CVD proceeding).

[126] Appellate Body Report, para. 5.23 (referring to Canada's appellee's submission, para. 48). (emphasis added) We further note that the Appellate Body explained:

> [B]efore the Panel, Canada submitted that the alleged OFA-AFA measure consists in the USDOC asking the OFA question and, where the USDOC discovers information during verification that it deems should have been provided in response to that question, applying AFA to determine that the discovered information amounts to countervailable subsidies. As before the Panel, Canada contends on appeal that this alleged measure has been repeatedly applied since 2012 *whenever the relevant circumstances arose*.

(Appellate Body Report, para. 5.30 (emphasis added; fn omitted)).

[127] In this context, we underline that we have no discretion to deviate from the adopted findings in this dispute.

[128] See section 6.2, above (summarizing party arguments).

deposits.[129] The ultimate amount of duties definitively assessed for that time period, however, is decided upon the performance of a subsequent administrative review or at the time that such an administrative review could have occurred but did not. As Canada observes, however, it appears wholly reasonable to assume that the imposition of CVDs on a particular good that initiates the collection of estimated duties (as a result of, *inter alia*, original investigations) for subsequent assessment would cause changes in pricing decisions by relevant economic actors regarding that good, such that its competitiveness in the US market would be affected in a manner that, in particular, the parties' proposed models would capture as a measurable level of NI. The United States offers no rationale for why a CVD order imposing CVDs following an investigation would not have this effect, and we discern none. We therefore reject the United States' argument in this context.[130]

6.2.2 Duration and timing of suspension

6.45. Regarding the duration of suspension, the parties agree that Canada, with respect to a given level of NI, should be able to suspend concessions for only the length of time during which a given CVD rate (or CVD rates) affected by the OFA-AFA Measure that yielded that level of NI is (or are) in place.[131] We discern no reason to think that this approach is incompatible with the "equivalence" standard in Article 22.4 of the DSU, and therefore adopt this proposal.

6.46. We further note that there will be a delay between the imposition of WTO-inconsistent CVD rates and the suspension of concessions. This is mainly so because it will take Canada time to calculate a level of NI with the chosen model. Additionally, we take special note that Canada has expressly indicated that it should be allowed to suspend concessions as soon as Canada can calculate a given level of NI following a triggering event, and that Canada would do so.[132] In light of such circumstances, we thus clarify that the duration of suspension in relation to a given application of the OFA-AFA Measure will begin to run from the time when Canada first suspends concessions, not from the time of the imposition of WTO-inconsistent CVDs.[133]

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[129] See section 6.2, above (summarizing party arguments).

[130] We also note Canada's explanation that changes to the USDOC's list of companies' cross-owned affiliates during a changed circumstances review could qualify as an independent triggering event, because such a change could affect a specific company's status as affected or unaffected. (Canada's response to Arbitrator question No. 284, para. 23 (see paras. 8.73 to 8.76, below, discussing "cross-owned affiliates"). See also United States' comments on Canada's response to Arbitrator question No. 284, para. 14 (indicating that a change in composition of cross-owned affiliates would typically not qualify as an independent triggering event, although such an event could occur). However, Canada subsequently stated its view that such an effect would likely, in fact, have a negligible effect on the level of NI and therefore it would be reasonable to exclude such an event as a triggering event (Canada's comments on the United States' response to Arbitrator question No. 284, para. 17). Canada offers no material support for its claim that such a change would have a negligible effect on the level of NI. We therefore repeat that we consider that any USDOC proceeding, including changed circumstance reviews, that results in a change in the composition of companies that are affected or unaffected, can be a triggering event.

[131] "Both parties agree that Canada may only suspend concessions for the duration of the challenged measure" (United States' response to Arbitrator question No. 289, para. 27 (referring to Canada's response to Arbitrator question No. 245)). See also United States' response to Arbitrator question No. 35(c), para. 107 (explaining that the duration of suspension should last "for the duration of the assessment of an affected CVD duty") (emphasis omitted), and No. 130, paras. 17-20; Canada's response to Arbitrator question No. 35, para. 55.

[132] See e.g. Canada's response to Arbitrator question No. 123, para. 52 ("For example, if Commerce initiated a countervailing duty investigation in 2023 that ended with a final determination imposing duties by applying the OFA-AFA measure in January of 2024, Canada would start suspending concessions as soon as it has finished calculating NI and then suspend concessions a few months later in 2024."); Canada's response to Arbitrator question No. 79, para. 169 ("[I]f the United States were to apply an OFA-AFA measure in the future, Canada should be in a position to immediately calculate nullification or impairment and suspend concession or other obligations.").

[133] Canada has also indicated that Canada could effectively administer suspension of concessions under this temporal framework (Canada's response to Arbitrator question No. 123, paras. 47-52). Although the United States has indicated that it may be beneficial to specify a time by when Canada must start to suspend concessions following a triggering event, we ultimately decline to set such a deadline (United States' response to Arbitrator question No. 123, paras. 14-16; No. 185, paras. 11-13; and No. 254, paras. 172-174. See also Canada's response to Arbitrator question No. 185, paras. 30-33; comments on the United States' response to Arbitrator question No. 185, paras. 12-15; and No. 254, paras. 125-129) (all arguments against such a deadline)).

6.47. An example of this process may be useful to consider further: Assume that a CVD rate affected by the OFA-AFA Measure was imposed on only one Canadian company on 1 January of Year X, and that CVD rate is replaced by a WTO-consistent CVD rate on 1 January of Year X+1. Further assume that Canada begins to suspend concessions on 1 February of Year X. In this scenario, Canada may continue to suspend concessions until 1 February of Year X+1. We therefore note that the United States has cited Article 22.8 of the DSU for the proposition that "when an affected company becomes an unaffected company, Canada must either terminate or modify the level of nullification or impairment previously calculated".[134] In citing this provision, insofar as the United States implies that Canada, in the example earlier in this paragraph, would have to terminate suspension of concessions on 1 January of Year X+1, we disagree. Article 22.8 of the DSU, in contrast, addresses termination of suspension of concessions due to, *inter alia*, substantive compliance with the recommendations and rulings of the DSB.[135] Such substantive compliance, in this dispute, would be made with reference to the OFA-AFA Measure, the existence of which is broader than any particular instance of its use.[136] We thus consider Article 22.8 of the DSU inapposite in this specific context.

6.48. Under the circumstances of this proceeding, therefore, we consider that, with respect to a given level of NI calculated via the methodology articulated in this Decision, Canada may suspend concessions for the length of time during which a given CVD rate (or CVD rates) affected by the OFA-AFA Measure that yielded that level of NI is (or are) in place. That durational clock will start to run in a given instance when Canada first suspends concessions with respect to that level of NI.

6.2.3 Conclusion

6.49. Based on the foregoing, the Arbitrator finds that a triggering event (i.e. an event that would give Canada the right to determine the level of NI and suspend concessions if the OFA-AFA Measure were used in that proceeding) occurs when the United States applies the OFA-AFA Measure (as defined by its precise content) in any US CVD proceeding and then imposes a CVD rate to Canadian goods that is affected by that application. Canada will then calculate a relevant level of NI and suspend concessions. Canada will thereafter modify (or remove entirely) the level of suspension upon the occurrence of subsequent triggering events. Canada may, with respect to a given level of NI, continue to suspend concessions for a maximum period of time equal to the period of time during which the relevant affected CVD rate (or rates) that yielded the relevant level of NI was (or were) in place.

6.3 The appropriate counterfactual

6.3.1 Legal standard

6.50. Counterfactuals are tools commonly used by arbitrators acting under Article 22.6 of the DSU to determine the level of NI caused by the WTO-inconsistent measures.[137] A counterfactual relates to "'a hypothetical scenario that describes what would have happened in terms of trade flows had the responding party implemented the DSB recommendations and rulings'".[138] This hypothetical scenario is then "compared with the actual situation … where the Member has yet to come into compliance – in order to quantify the trade effect caused by that Member's failure to comply".[139] It may be necessary to make assumptions to answer the hypothetical question of what would happen if the original respondent, in this case the United States, achieved compliance with the DSB recommendations and rulings.[140] However, rather than prejudging how exactly the United States would have implemented the DSB recommendations and rulings at issue, or speculating on which

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[134] United States' response to Arbitrator question No. 289, para. 27.

[135] See Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.54 (explaining that cessation of suspension of concessions under Article 22.8 of the DSU pertains to "substantive compliance" with a Member's WTO obligations).

[136] See fn 53 to para. 6.4, above.

[137] Decision by the Arbitrator, *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 5.2.

[138] Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, para. 3.7 (quoting Decision by the Arbitrator, *US – Tuna II (Mexico) (Article 22.6 – US)*, para. 4.4). See also Decision by the Arbitrator, *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 5.1 (quoting Decision by the Arbitrator, *US – Tuna II (Mexico) (Article 22.6 – US)*, para. 4.4).

[139] Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, para. 3.7. (fns omitted)

[140] See e.g. Decision by the Arbitrator, *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 5.2.

would be the "'most likely'" compliance scenario[141], an Article 22.6 arbitrator should instead evaluate whether the original complainant, in this case Canada, has offered a plausible or reasonable counterfactual scenario.[142] According to the arbitrator in *US – Gambling (Article 22.6 – US)*, the considerations of plausibility and reasonableness are connected to the nature and scope of benefits that are nullified or impaired by the measure at issue.[143] We consider such previous guidance instructive.

6.51. The parties' arguments with respect to the appropriate counterfactual raise three key issues: (a) the appropriate general counterfactual; (b) the calculation of counterfactual company-specific CVD rates with respect to companies to which the OFA-AFA Measure is applied; and (c) the calculation of counterfactual "all-others" rates (and so-called "non-selected rates"[144]) in CVD investigations and administrative reviews in which the OFA-AFA Measure is applied to at least one company. We address each in turn.

6.3.2 General counterfactual

6.52. Canada argues that the "level of nullification or impairment should be determined in light of the fact that the U.S. ongoing conduct continues to exist and that WTO-inconsistent duties resulting from the OFA-AFA measure may be applied in the future to Canadian imports of any good that is subject to U.S. countervailing duty proceedings".[145] Canada proposes to measure the level of NI to Canada by comparing the real-world situation "with a counterfactual scenario in which the OFA-AFA measure is eliminated as a practice against Canadian exporters".[146] More specifically, Canada explains that this would entail a scenario in which the USDOC ceases to apply AFA to determine that OFA discovered during verification amounts to a countervailable subsidy.[147]

6.53. The United States agrees with Canada that the appropriate general counterfactual is one in which the OFA-AFA Measure is eliminated in CVD investigations *vis-à-vis* Canadian firms. More specifically, the United States explains that this would entail a scenario in which the USDOC ceases to apply AFA to determine that OFA discovered during verification amounts to a countervailable subsidy.[148]

6.54. The Arbitrator notes that the parties agree on the relevant general counterfactual. That is, a scenario in which the USDOC, while conducting a CVD proceeding involving Canadian firms, may still ask the OFA question and discover OFA upon verification, but ceases to apply AFA to determine that the discovered OFA is a countervailable subsidy. This appears a reasonable and plausible overall

[141] Decision by the Arbitrator, *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 5.2 (quoting Decision by the Arbitrator, *US – Gambling (Article 22.6 – US)*, para. 3.26).

[142] See e.g. Decisions by the Arbitrators, *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)* para. 5.2; *US – Tuna II (Mexico) (Article 22.6 – US)*, para. 4.5; *US – Washing Machines (Article 22.6 – US)*, para. 3.10); and *US – Gambling (Article 22.6 – US)*, para. 3.27.

[143] Decision by the Arbitrator, *US – Gambling (Article 22.6 – US)*, 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." (Decision by the Arbitrator, *US – Gambling (Article 22.6 – US)*, para. 3.30).

[144] The non-selected rate arises due to the fact that the USDOC will not necessarily individually investigate all companies participating in an administrative review. The participating companies that are not individually investigated are assigned a "non-selected rate" which is calculated in the same manner as the all-others rate. The non-selected rates do not replace the all-others rate, which remains active and unchanged throughout USDOC CVD proceedings with respect to a given CVD order (United States' response to Arbitrator question No. 207, paras. 67-97, and No. 253, para. 171; Canada's response to Arbitrator question No. 189, fn 35 to para. 49). The parties have explained that the USDOC identifies the companies subject to a non-selected rate. (Canada's response to Arbitrator question No. 271, para. 289; United States' response to Arbitrator question No. 282, para. 11).

[145] Canada's methodology paper, para. 9.

[146] Canada's methodology paper, para. 10. See also Canada's response to Arbitrator question No. 8, para. 13.

[147] Canada's response to Arbitrator question No. 8, para. 13. Canada does not consider that the counterfactual entails a scenario in which the USDOC ceases to ask the OFA question (Canada's response to Arbitrator question No. 8, para. 13).

[148] United States' response to Arbitrator question No. 8; and written submission, para. 45. The United States does not consider that the counterfactual entails a scenario in which the USDOC ceases to ask the OFA question (United States' response to Arbitrator question No. 8, para. 40).

compliance scenario. Indeed, the OFA-AFA Measure involves "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".[149] However, it is in fact the application of AFA to determine that the OFA is a countervailable subsidy, specifically, that is the source of the WTO-inconsistency of the OFA-AFA Measure.[150]

6.55. We therefore adopt as a general counterfactual a scenario in which the USDOC, in CVD proceedings, stops using AFA to determine that discovered OFA are countervailable subsidies with respect to Canadian firms. The application of this general counterfactual has material implications in two more specific contexts, i.e. the calculation of counterfactual individual CVD rates and counterfactual all-others CVD rates. We address these in turn below.

6.3.3 Company-specific CVD rates

6.56. Canada argues that, if the OFA-AFA Measure were to be used to calculate a company-specific CVD rate, then, in the counterfactual, that company-specific CVD rate should be reduced by the amount attributable to the subsidies found to be countervailable by virtue of the application of the OFA-AFA Measure. Canada states that the USDOC routinely has published public rates for each countervailable subsidy program for each individual respondent in a CVD investigation, and thus assumes that such information will continue to be available on the record of USDOC proceedings in the future.[151] Canada further asserts that part of the precise content of the OFA-AFA Measure is that, upon discovering an OFA at verification, the USDOC refuses to accept new information regarding such OFA onto the record, instead applying AFA to determine that the OFA is a countervailable subsidy.[152] Canada thus argues that information required to determine whether the relevant OFA is in fact a countervailable subsidy will not be on the record of the relevant USDOC investigation, and even if certain information were on the record regarding relevant OFA, it would be speculative as to whether the USDOC would have concluded, in a WTO-consistent inquiry, that the OFA was indeed a countervailable subsidy and, if it were, what CVD rate would result from that subsidy.[153] In general, Canada argues that, if the relevant information with which to calculate a counterfactual duty rate is unavailable, then the Arbitrator may use a proxy for the information, "so that an appropriate duty rate can be determined".[154] In this context, therefore, Canada effectively argues that this rate should be a proxy of 0% for the OFA-specific CVD rate.

6.57. Canada further supports its approach regarding counterfactual company-specific CVD rates by arguing that it would be a reasonable and plausible counterfactual scenario that the USDOC, upon discovering OFA at verification, would not investigate the OFA at all if the USDOC determined that it had insufficient time to properly analyse the OFA.[155] In this context, Canada notes that the USDOC has the discretion to defer consideration of information discovered during the course of a CVD

[149] Appellate Body Report, para. 5.24 (referring to Panel Report, para. 7.316). The "OFA question" essentially comprises of a question that the USDOC includes in questionnaires issued in CVD investigations. More specifically, the OFA question "'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'". Appellate Body Report, para. 5.21.

[150] Panel Report, para. 7.181 (noting that Canada conceded that "'[t]he formulation of a question cannot, in and of itself, violate the requirements of the SCM Agreement'" (quoting Canada's response to Panel question No. 75, para. 164)).

[151] Canada's written submission, para. 68. See also Canada's methodology paper, para. 10.

[152] Canada's response to Arbitrator question No. 9, para. 18.

[153] Canada's written submission, paras. 68-74.

[154] Canada's written submission, para. 63.

[155] Canada's response to Arbitrator question No. 11, paras. 23-24.

proceeding to future administrative reviews.[156] Moreover, Canada asserts that there are other counterfactual scenarios in which the USDOC would assign a zero CVD rate to discovered OFA, i.e. if the USDOC determined that the OFA was attributable to a product outside the scope of the CVD investigation, or if the USDOC determined that the OFA was not a financial contribution or was not specific.[157]

6.58. Canada also argues that, in the counterfactual, if a company's individually assigned CVD rate were to fall below a *de minimis* level in an original investigation, specifically, then the company would be excluded from the CVD order (and would further not be used to calculate the all-others rate).[158] However, Canada asserts that such a counterfactual scenario would have no impact on the ability of the USDOC to calculate a WTO-consistent CVD rate *vis-à-vis* the relevant OFA in a subsequent proceeding, such as an administrative review.[159] Canada also appears to argue, however, that in this case the company's *entire* CVD rate should be a proxy of zero, not just the OFA-specific component of the company's CVD rate.[160]

6.59. The United States asserts that the precise content of the OFA-AFA Measure found to be WTO-inconsistent is the USDOC's practice of finding that OFA discovered during verification are countervailable subsidies by using AFA. The United States thus argues that, in the absence of the OFA-AFA Measure, there are two relevant counterfactual scenarios "to reasonably address the various situations that may arise".[161] The United States asserts that the first such scenario arises "where information exists on the record of the future CVD proceeding to use for the discovered subsidy program", with respect to which "the United States considers it would be more appropriate to use such information to calculate the counterfactual company-specific CVD rate".[162] In that counterfactual scenario, in the United States' view, the company's CVD rate could decrease, increase, or stay the same.[163] The United States considers that it is neither a reasonable nor a plausible counterfactual scenario that such information, if it existed on the record, would be ignored.[164] The second such scenario, according to the United States, occurs in instances where information regarding the OFA is not on the record of the relevant USDOC proceeding. In these instances the United States agrees with Canada that the counterfactual company-specific CVD rate should be reduced by the amount attributable to the application of the OFA-AFA Measure.[165] The United States further indicates that "the information needed to recalculate the respondent's rate will be publicly available in the countervailing duty determination and the respondent's calculation memo".[166]

[156] Canada's response to Arbitrator question No. 11, para. 24 (referring to 19 CFR 351.311 (Exhibit CAN-43); Commerce, "Certain Uncoated Groundwood Paper From Canada: Final Affirmative Countervailing Duty Determination", 83 Fed. Reg. 39,414 dated August 9, 2018 (Exhibit CAN-44); Commerce, "Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Uncoated Groundwood Paper from Canada" (August 1, 2018) (Exhibit CAN-45); Commerce, "Aluminum Extrusions from the People's Republic of China: Final Affirmative Countervailing Duty Determination", 76 Fed. Reg. 18,521 dated April 4, 2011 (Exhibit CAN-46); Commerce, "Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Aluminum Extrusions from the People's Republic of China (PRC)" *(*March 28, 2011) (Exhibit CAN-47); Commerce, "Lightweight Thermal Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination", 73 Fed. Reg. 57,323 dated October 2, 2008 (Exhibit CAN-48); Commerce, "Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Lightweight Thermal Paper from the People's Republic of China" (September 25, 2008) (Exhibit CAN-49); Commerce, "Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea", 68 Fed. Reg. 37,122 dated June 23, 2003 (Exhibit CAN-50); and Commerce, "Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Dynamic Random Access Memory Semiconductors from the Republic of Korea" (June 16, 2003) (Exhibit CAN-51)).

[157] Canada's response to Arbitrator question No. 12, paras. 25-27.

[158] Canada's response to Arbitrator question No. 10(b), paras. 20-21. In this same response, Canada explains that the USDOC would not exclude a company from the scope of a CVD order due to the company's CVD rate falling below the relevant *de minimis* level as a result of an administrative review.

[159] Canada's response to Arbitrator question No. 10(a), para. 19.

[160] Canada's response to Arbitrator question No. 114, para. 21.

[161] United States' response to Arbitrator question No. 12, para. 50.

[162] United States' written submission, para. 45.

[163] United States' written submission, para. 45.

[164] United States' response to Arbitrator question No. 12, para. 52.

[165] United States' written submission, para. 46.

[166] United States' written submission, para. 46.

6.60. The United States also asserts that the precise content of the OFA-AFA Measure includes neither the USDOC applying AFA to conclude that the relevant OFA is attributable to the product under investigation nor the USDOC refusing to accept information regarding the OFA onto the record of the investigation.[167]

6.61. The United States further argues that, in the counterfactual, if a company's individually assigned rate were to fall below a *de minimis* level in an original investigation, specifically, then the company would be excluded from the CVD order (and would further not be used to calculate the all-others rate).[168] However, the United States asserts that such a counterfactual could have no impact on the ability of the USDOC from calculating a WTO-consistent CVD rate *vis-à-vis* the relevant OFA in a subsequent proceeding, such as an administrative review.[169]

6.62. At the outset, and by way of background, the Arbitrator recalls that the subject to be addressed here is how to calculate counterfactual CVD rates for Canadian companies that receive an individual CVD rate affected by the OFA-AFA Measure. We further recall that a company's individual CVD rate is the sum of potentially multiple rates assigned to individual subsidies, only one of which may be the discovered OFA that was deemed to be a subsidy by the USDOC with the assistance of the OFA-AFA Measure. Both parties agree that the subsidy-specific CVD rates comprising any individually investigated company's overall CVD rate will be discernible from the public USDOC record in a relevant CVD proceeding. We see no reason to question this shared position. Thus, it appears a reasonable assumption that it will be possible for Canada, with respect to a given Canadian company assigned an individual and overall CVD rate affected by the OFA-AFA Measure, to identify the OFA-specific CVD rate component of that overall CVD rate that was calculated in a WTO-inconsistent manner.

6.63. It will further be recalled that the relevant general counterfactual is that the USDOC, even if it asks the OFA question and discovers OFA upon verification, does not apply AFA to the OFA to determine that the OFA is a countervailable subsidy.[170] With respect to a given CVD proceeding in which the USDOC did in fact use the OFA-AFA Measure to determine that OFA was a countervailable subsidy, therefore, three main counterfactual scenarios could arise: (a) the USDOC determines, without the assistance of AFA, that the relevant OFA is not a countervailable subsidy[171]; (b) the USDOC declines to investigate the OFA[172]; or (c) the USDOC determines, without the assistance of AFA, that the OFA is a countervailable subsidy. In the first two scenarios, the USDOC would apply a zero CVD rate to the discovered OFA. In the third, the USDOC would assign an unknown positive CVD rate to the discovered OFA.

6.64. How likely it is that any one of the three counterfactual scenarios described immediately above would have occurred in a future USDOC CVD proceeding in which the OFA-AFA Measure is in fact used is speculative. Even in cases in which there are certain facts on the USDOC's record concerning the relevant OFA, it appears speculative as to: (a) whether the USDOC would consider such facts sufficient to analyse the OFA and, if it did not, defer analysis of the OFA to a subsequent CVD

[167] United States' response to Arbitrator question No. 9, paras. 41-42; and No. 14, paras. 55-57.
[168] United States' response to Arbitrator question No. 10(b).
[169] United States' response to Arbitrator question No. 10(a).
[170] See section 6.3.2, above.
[171] This could arise if the USDOC were to conclude that the OFA is not a financial contribution, does not confer a benefit, and/or is not specific. This scenario appears plausible in light of the statements of the Panel and Appellate Body to the effect that the OFA question is broad enough to cover forms of assistance that would not qualify as subsidies: "[w]hile recognizing that Canada does not contest the USDOC's right to ask the OFA question, the Panel noted that the OFA question is very broad. To the Panel, while the OFA question might pertain to necessary information regarding additional subsidization of the product under investigation, it may also pertain to a much broader range of 'assistance'" (Appellate Body Report, para. 5.58, quoting Panel Report, para. 7.181). (fns omitted)
[172] This could arise if the USDOC were to determine that there was insufficient time to properly investigate the OFA in a WTO-consistent manner in the course of the proceeding at issue. The United States itself noted in the panel proceedings that it may be practically difficult for the USDOC to properly investigate OFA at the verification stage, which may occur relatively late in the investigation. (Appellate Body Report, para. 5.57; Panel Report, paras. 7.177, 7.183, 7.185, and 7.333). See also Exhibit CAN-43 (allowing the USDOC to defer consideration of "a practice that appears to provide a countervailable subsidy" discovered during the course of a CVD investigation or review to a subsequent administrative review if the USDOC determines there is insufficient time to examine that practice in the instant proceeding); Canada's response to Arbitrator question No. 11, fn 33 to para. 24 (providing examples of the USDOC deferring examination of certain information to a subsequent proceeding).

proceeding; (b) what additional facts the USDOC might have gathered regarding the OFA had it not applied AFA; and (c) how the USDOC would analyse any facts on the record to determine if and to what extent the OFA constituted a countervailable subsidy, instead of applying AFA to reach that conclusion.[173] Thus, in a future instance in which the OFA-AFA Measure is used, we consider that any attempts by Canada to determine what any counterfactual OFA-specific CVD rate would be (i.e. zero or positive, and, if positive, of what magnitude), whether now or when the USDOC applies the OFA-AFA Measure in the future, would be a speculative exercise.

6.65. In this circumstance, we consider that Canada's suggestion of using a proxy of *zero* for OFA-specific CVD rates appears reasonable. This is so because it reasonably reflects the uncertainties surrounding what the counterfactual OFA-specific CVD rate(s) would be. A *zero* value, specifically, appears reasonable for two main reasons. First, even the United States agrees that, when there is insufficient information regarding relevant OFA on the record of a USDOC proceeding with which to calculate a counterfactual subsidy rate, Canada could use a counterfactual zero value for the OFA-specific CVD rate.[174] As already explained above, we do not consider that there will ever be sufficient information on a USDOC record to perform that exercise in a manner that is not unduly speculative. Second, and also as explained above, there are circumstances under which the USDOC could calculate a zero OFA-specific rate.

6.66. We further recall, however, that there are circumstances under which the USDOC could calculate a positive CVD rate for discovered OFA.[175] Also, we cannot determine, and we consider it would be unreasonable for Canada to try to determine in the future, whether, in the counterfactual, the USDOC would apply a zero or positive CVD rate to the relevant discovered OFA, and even if the CVD rate were positive, it would be difficult to determine what the CVD rate would have been.[176] Thus, we emphasize that, in these specific circumstances, a *proxy* of zero is most reasonably viewed as a placeholder for an unknown CVD rate. We thus note that the uncertain nature of this proxy would be inconsistent with an assumption that, in the counterfactual, an affected and individually investigated company would be excluded from the scope of the CVD order even if, after deducting the value of the OFA-specific CVD rate(s) from the company's overall CVD rate, the company's overall CVD rate would fall below a relevant *de minimis* threshold.[177] Indeed, such an assumption would assign undue certainty to an inherently uncertain value in this specific context, and thus reflect an unreasonable balancing of considerations.

6.67. For the foregoing reasons, we adopt a proxy of zero for counterfactual OFA-specific CVD rates. Consequently, the counterfactual overall CVD rates assigned to affected and individually investigated companies would be reduced by the amount of the OFA-specific CVD rate(s).[178] We underline,

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[173] We note that certain statements by the Panel and Appellate Body suggest that part of the OFA-AFA Measure is that the USDOC refuses to accept new information onto the record concerning the relevant OFA. ("In the final stage of the OFA-AFA measure, the USDOC refuses to accept additional information from the respondents and instead relies on AFA to determine that each discovered assistance provided a financial contribution, conferred a benefit, and was specific, all of which are necessary elements of a countervailable subsidy") (Appellate Body Report, para. 5.77, quoting Panel Report, paras. 7.314 and 7.316-7.317)). The parties contest whether such statements mean that such refusal is technically part of the precise content of the OFA-AFA Measure. It is unnecessary for the Arbitrator to resolve this issue. We consider it sufficient to note that the record indicates that such refusal to accept new information onto the record regarding the discovered OFA may well accompany the exercise of the OFA-AFA Measure. (See Panel Report, Table 2 (describing instances in USDOC proceedings in *Solar Cells from China 2014* and *Supercalendered Paper from Canada 2015* in which the USDOC declined to accept new information regarding OFA discovered at verification, and an instance in *Stainless Pressure Pipe from India 2016* in which the USDOC referenced its "practice of not collecting new information at verification")).

[174] See para. 6.59, above.

[175] See para. 6.63, above.

[176] Other arbitrators have used a proxy of zero for AD and CVD rates in similar circumstances. (Decisions by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, paras. 3.41 (and fn 123 thereto), and 4.14-4.23); *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 5.51).

[177] We note that if a zero OFA-specific CVD rate assigned in an original investigation would reduce a Canadian firm's overall CVD rate to a *de minimis* level, then the company would normally be excluded from the CVD order. (19 U.S.C. § 1671d (Exhibit USA-4), ss. (a)(3); 19 U.S.C. § 1671b(b)(4); United States' response to Arbitrator question No. 22, paras. 76-77).

[178] For example, if, in reality, Canadian Company A was assigned a CVD rate of 30%, with a Subsidy X being responsible for 20 percentage points of that rate and an OFA-specific CVD rate arising from the application of the OFA-AFA Measure being responsible for ten percentage points of that rate, Company A's CVD rate would be reduced to 20% in the counterfactual. We further note that a company's counterfactual CVD rate could be *de minimis*.

however, that this would result in no change to the companies that are within the scope of the CVD order in the counterfactual; the companies subject to the CVD order in reality and in the counterfactual will be identical.[179]

6.3.4 All-others CVD rates

6.68. Canada argues that "[t]he counterfactual scenario must also take into account the fact that the countervailing duty rate for all other exporters ('all others' rate) is calculated in a manner that includes the adverse facts available resulting from the OFA-AFA measure".[180] Canada has specified its position on what the counterfactual all-others rate should be, informed by the relevant USDOC regulations and USDOC practice regarding calculation of the all-others rate.[181]

6.69. Canada indicates that if the only individually investigated companies used to calculate the all-others rate were companies to which the OFA-AFA Measure was applied, and all such companies' CVD rates dropped to a *de minimis* level in the counterfactual, then the counterfactual all-others rate would be zero.[182]

6.70. If, in the counterfactual, only one company's CVD rate were used to calculate the all-others rate, then, according to Canada, the counterfactual all-others rate would be equal to that company's CVD rate.[183]

6.71. In instances where two companies' CVD rates are used to calculate the all-others rate, Canada asserts that the USDOC's practice is to calculate the all-others rate using either a simple average of the two companies' CVD rates or a weighted average using the companies' publicly ranged[184] US sales data, selecting the option that best approximates the weighted average of the companies' CVD rates using the companies' actual and confidential US sales data.[185] In the situation where the

[179] We therefore further note that we consequently reject Canada's propositions that: (a) if an individually investigated company's counterfactual CVD rate fell below the *de minimis* threshold in an original investigation, then all CVDs assigned to the company in the investigation and in future CVD proceedings would be WTO-inconsistent (because the company never should have been subject to the CVD order at all); and, relatedly (b) if all the individually investigated companies in an investigation would receive *de minimis* CVD rates in the counterfactual, then all CVDs assigned to all companies subject to the order would be WTO-inconsistent (because there never should have been a CVD order at all). (See Canada's response to Arbitrator question No. 114, para. 20, and No. 181, paras. 1-3; comments on the United States' response to Arbitrator question No. 241, paras. 113-115). The United States appears to suggest at one point that calculating a level of NI using CVD rates of zero may be permissible in certain specific instances, but still stresses that companies should still be assigned rates due to the presence of ADDs and ordinary duties. (United States' response to Arbitrator question No. 241; United States' comments on Canada's response to Arbitrator question No. 181, paras. 4-5). As described, however, we consider that reducing the individually investigated companies' CVD rates by the OFA-specific CVD rates is reasonable.

[180] Canada's methodology paper, para. 11.

[181] Canada's original position on this issue is that a counterfactual affected all-others rate should be a proxy of zero (Canada's methodology paper, para. 11; Canada's written submission, para. 60). Canada later nuanced its position on this issue, which we describe in more detail in this section.

[182] Canada's response to Arbitrator question No. 10(c), para. 22 (referring to Commerce, "Certain Polyethylene Terephthalate Resin From the Sultanate of Oman: Final Negative Countervailing Duty Determination", 81 Fed. Reg. 13,321 dated March 14, 2016 (Exhibit CAN-40); Commerce, "Non-Oriented Electrical Steel From the Republic of Korea: Final Negative Countervailing Duty Determination and Final Negative Critical Circumstances Determination", 79 Fed. Reg. 61,605 dated October 14, 2014 (Exhibit CAN-41); and Commerce, "Certain Fabricated Structural Steel From Canada: Final Negative Countervailing Duty Determination", 85 Fed. Reg. 5,387 dated January 30, 2020 (Exhibit CAN-42)).

[183] Canada's response to Arbitrator question No. 118(a), para. 31, and No. 181, para. 4.

[184] The parties have explained that "publicly ranged" data, in this context, refers to numerical data submitted by a company which are confidential, but have been altered by the submitting party to nonetheless be accurate to within 10% of the confidential numbers, thus allowing the altered data to appear on the public record of the USDOC proceeding. (Canada's response to Arbitrator question No. 267, paras. 281-282; United States' response to Arbitrator question No. 267, para. 203; 19 C.F.R. § 351.304 (Exhibit USA-55), section (c)(1)). Canada has explained that publicly ranged sales data should always be available for individually investigated companies from at least one USDOC record source. (Canada's response to Arbitrator question No. 181, fn 11 to para. 9. See also Canada's response to Arbitrator question No. 157; United States' response to Arbitrator question No. 157).

[185] Canada's written submission, section III(3)(b). Confidential information on the record of USDOC proceedings is protected by an Administrative Protective Order (APO), and thus, in order for the USDOC to release that data to a third party, such release requires the consent of the submitting party. (See United States' response to Arbitrator question No. 215, para. 122).

USDOC in fact had used two companies' CVD rates to calculate the all-others rate and would also have used the same two companies' CVD rates to calculate the all-others rate in the counterfactual, Canada asserts that the most appropriate counterfactual all-others rate would be obtained from using the same methodology that the USDOC had used in reality (i.e. a simple average or a weighted average using publicly ranged US sales data), using the new counterfactual company-specific CVD rates.[186]

6.72. Where the USDOC had in fact used three or more companies' CVD rates to determine the all-others rate, but would only use two companies' data to do so in the counterfactual[187], Canada asserts that Canada could not follow the USDOC's choice of using a simple or weighted average using publicly ranged data because the USDOC simply would not have made that choice in reality.[188] Thus, in this scenario, Canada argues that it would be reasonable to instruct Canada to first attempt to obtain the relevant companies' authorization to release their confidential sales data from the USDOC so Canada could apply the USDOC's methodology itself (i.e. choosing between a simple average or weighted average using publicly ranged data, whichever is closer to the weighted average using the confidential US sales data as weights). Canada proposes a deadline of 30 days to receive the confidential information from the USDOC following Canada's request to the relevant companies to authorize the release of such data from the USDOC to Canada.[189] Canada more specifically indicates that it would agree with giving the companies 15 days to provide the authorization and then ten days to the USDOC to actually supply the data to Canada.[190] If Canada does not receive the confidential information by that time, then Canada argues that it should be able to select as the counterfactual all-others rate the lower of a simple average of the relevant companies' CVD rates or weighted average of the companies' CVD rates using publicly ranged sales data as weights. Canada argues that the selection of the lower of the two rates is reasonable because it would not understate the level of NI associated with the all-others rate.[191]

6.73. In instances where the USDOC had in fact used three or more companies' CVD rates to calculate the all-others rate, and would have also used three or more companies' data to calculate the all-others rate in the counterfactual, Canada explains that the USDOC would use the companies' actual and normally confidential US sales data to produce a weighted average of the companies' CVD rates to produce the all-others rate in both reality and in the counterfactual. In this instance, Canada had asserted that the counterfactual all-others rate should be zero because Canada will have insufficient information on the public record of the USDOC proceeding to calculate an alternative all-others rate, and that unaffected individually investigated companies will be unlikely to agree to provide their confidential sales information to Canada.[192] Canada also claims 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".[193] Canada later explained, however, that it would not be unreasonable to first instruct Canada to try to obtain the confidential sales information from the relevant Canadian companies, and then, if such information is not forthcoming, to allow Canada to select the lower of a simple average or a weighted average

[186] Canada's response to Arbitrator question No. 15, paras. 28-29, and No. 181, paras. 5-6.

[187] This could happen in instances where the CVD rate of a company that the USDOC had used to calculate the all-others rate fell below the *de minimis* threshold in the counterfactual.

[188] Rather, the USDOC would have calculated a weighted average using the three or more companies' actual and confidential US sales data, as described in paragraph 6.73, below.

[189] Canada's response to Arbitrator question No. 181, fn 10 to para. 8. Canada also explains that Canada would also notify the United States of Canada's request to the companies at the same time. (Canada's response to Arbitrator question No. 182(a), para. 15). Canada further asserts that it would be inappropriate to place any deadliness on Canada's initial requests to such companies as it could interfere with the parties reaching an agreed solution. (Canada's response to Arbitrator question No. 182(a), para. 14).

[190] Canada's comments on the United States' response to Arbitrator question No. 182(a), para. 9. See also Canada's response to Arbitrator question No. 182(a), paras. 13-18.

[191] Canada's response to Arbitrator question No. 181, para. 9. See also Canada's comments on the United States' response to Arbitrator question No. 181, paras. 2-8. Canada cautions that companies unaffected by the OFA-AFA Measure will have no incentive to share such information with Canada. (Canada's written submission, para. 83). Canada argues that the arbitrator in *US – Washing Machines (Article 22.6 – US)* indicated that a respondent should not be put in the position of relying on the cooperation of private actors disclosing confidential information (Canada's written submission, para. 84).

[192] Canada's response to Arbitrator question No. 117; methodology paper, para. 11; and written submission, paras. 79-87.

[193] 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). See also Canada's written submission, paras. 58-59 and 75-78.

using the firms' publicly ranged sales data.[194] In Canada's view, using a simple average of the firms' CVD rates to determine the counterfactual all-others rate would be unreasonable because, under certain circumstances, such a simple average could significantly underestimate the actual weighted average of the companies' counterfactual CVD rates.[195]

6.74. Canada suggests that, in any instance where the USDOC calculates an all-others rate using actual and non-confidential US sales data from the relevant companies, then Canada could use that data to construct a counterfactual all-others rate. Such instances would be rare in Canada's view, however, as companies normally request confidential treatment of their US sales data in USDOC proceedings.[196]

6.75. The United States, like Canada, uses relevant USDOC regulations and practice to inform its selection of a counterfactual all-others rate.[197] In general, the United States considers that the counterfactual all-others rate should be calculated using the same methodology that the USDOC in fact used to calculate the all-others rate.[198] The United States asserts that if an individually investigated Canadian company's CVD rate dropped to a *de minimis* level in the counterfactual, then that company's CVD rate would not be used to calculate the all-others rate.[199] The United States thus observes that the number of companies whose CVD rates are used to calculate the all-others rate may be less than the number of companies that were actually examined and assigned individual CVD rates.[200] Thus, the United States agrees with Canada that if the only companies that had been in fact used to calculate the all-others rate were companies that, in the counterfactual, had *de minimis* CVD rates, then the counterfactual CVD all-others rate in that limited instance would be zero.[201]

6.76. If, in the counterfactual, only one company's CVD rate would be used to calculate the all-others rate, then, according to the United States, the counterfactual all-others rate would be equal to that company's CVD rate.[202]

6.77. The United States also further agrees with Canada that, in instances where two companies' CVD rates are used to calculate the all-others rate both in reality and in the counterfactual, the same

[194] Canada's response to Arbitrator question No. 181, paras. 10-11.
[195] Canada's response to Arbitrator question No. 18, paras. 33-34.
[196] Canada's response to Arbitrator question No. 16.
[197] The United States explains that the relevant statutory provision in this context is 19 U.S.C. § 1671d(c)(5)(A), which is Section 705(c)(5)(A) of the Tariff Act of 1930. The United States explains that "[c]ommerce looks to the same statutory provision for guidance in determining an All Others rate in a CVD administrative review." (United States' written submission, para. 49). Canada has not disputed this point and has submitted evidence lending support to the United States' position (see Commerce, "Issues and Decision Memorandum for the Final Results of Administrative Review of the Countervailing Duty Order on Certain Softwood Lumber Products from Canada; 2017 – 2018" (November 23, 2020) (Exhibit CAN-15), pp. 38-39). The United States asserts that "each countervailing duty proceeding contains calculation memoranda for the individually-investigated respondents, as well as a calculation memo for the All Others rate". (United States' written submission, para. 56).
[198] United States' response to Arbitrator question No. 26, paras. 84-85; written submission, para. 53. The United States clarifies that, if the USDOC in fact used three or more companies' confidential sales data to calculate the all-others rate, but this number drops to two in the counterfactual, then Canada could still use confidential sales data to calculate the all-others rate without the risk of other, unauthorized entities or persons to "reverse engineer" the confidential sales data because the counterfactual all-others rate in this scenario would only be known to the United States and Canada. (United States' response to Arbitrator question No. 116, para. 4). The parties are further in agreement that such reverse-engineering is not an issue in general since, *inter alia*, any confidential information would be protected by the parties' BCI Understanding. (Canada's response to Arbitrator question No. 183, paras. 21-25; United States' comments on Canada's response to Arbitrator question No. 183, paras. 18-19.
[199] United States' response to Arbitrator question No. 10(b), paras. 44-46.
[200] United States' comments on Canada's response to Arbitrator question No. 181, para. 3.
[201] United States' response to Arbitrator question No. 10(c), para. 47; No. 21, paras. 74-75, and No. 114, para. 2. See also United States' written submission, paras. 50 and 56. The United States further asserts that if a company's CVD rate falls below the *de minimis* threshold in the counterfactual, then Canada could use "a counterfactual duty rate of 0". (United States' response to Arbitrator question No. 114, para. 2). The United States also explained that a zero *de minimis* rate does not mean that under US law the companies subject to the all-others rate would be excluded from the scope of the CVD order. (United States' response to Arbitrator question No. 181, para. 4).
[202] United States' comments on Canada's response to Arbitrator question No. 181, para. 6; response to Arbitrator question No. 27, para. 86.

methodology should be used to calculate the all-others rate in the counterfactual as that used in reality (i.e. either a simple average or a weighted average using publicly ranged US sales data).[203]

6.78. The United States, however, argues that in instances where the USDOC in fact uses confidential US sales data from three or more companies to calculate the all-others rate (regardless of whether two companies' data or three or more companies' data would be used in the counterfactual), using a counterfactual all-others rate of zero, as Canada originally advocated, is neither reasonable nor plausible.[204] The United States proposes that, in such instance, Canada should use the confidential sales data of relevant companies to calculate the weighted average of the companies' CVD rates. The United States proposes that Canada ask the relevant companies to release such confidential sales data to Canada to calculate that weighted average. If such authorizations are not forthcoming, in the United States view, Canada should then use publicly ranged sales data of such companies on the USDOC record to calculate weighted average using such sales values as weights. Only if such data are unavailable for some reason should Canada be authorized to use a simple average of companies' CVD rates.[205] The United States further disagrees with Canada's proposal that, in cases where the companies do not provide authorization to the USDOC to release their confidential sales data to Canada, Canada would use the lower of the weighted average of the companies' CVD rates using publicly ranged data and the simple average of the companies' CVD rates. In the United States' view, such an approach would be biased in favour of Canada and inconsistent with the Arbitrator's mandate.[206]

6.79. In situations where Canada requests confidential information from Canadian companies to calculate the counterfactual all-others rate, the United States considers it appropriate for the Arbitrator to set a deadline for Canada to ask the relevant Canadian companies to authorize the USDOC to release their information to Canada for that purpose. The United States further proposes that a general timeline of 30 days should be established, starting from the time when the United States receives copies of the notifications that Canada provides to the companies seeking authorization to release their confidential data. More specifically, according to the United States, Canada should provide the companies two weeks (14 days) to authorize the release and use of its confidential data. The United States envisions the companies providing those authorizations to Canada, and then Canada providing them to the United States. The United States proposes that, upon Canada providing such authorizations to the United States, the United States be given either the remainder of the 30-day overall timeline to provide the data to Canada, or, at minimum, two weeks (14 days) to do so.[207]

6.80. The United States also asserts that individually investigated firms not subject to the OFA-AFA Measure may have incentives to provide such confidential information to Canada to help

[203] United States' response to Arbitrator question Nos. 10(c), 15, 23, and 32; written submission, paras. 51-52.

[204] United States' written submission, paras. 48, 56, 58, and 59; response to Arbitrator question No. 24, para. 82 (explaining that the USDOC uses this method when there are three or more individually investigated firms because it is not possible to reverse-engineer three or more firms' sales data from the all-others rate). The United States explained that the use of a simple average of the relevant firms' CVD rates to determine a counterfactual all-others rate would still be preferable to using an all-others rate of zero. (United States' response to Arbitrator question No. 18, para. 67.

[205] United States' response to Arbitrator question No. 181, paras. 2-5; comments on Canada's response to Arbitrator question No. 181, paras. 9-11; written submission, para. 58. See also United States' response to Arbitrator question No. 16, paras. 62-64. The United States confirms that if the Canadian companies provide written authorization to the USDOC to provide such companies' confidential US sales data to Canada, the USDOC could do so. (United States' response to Arbitrator question No. 117, para. 5). The United States originally proposed that, if Canada cannot secure the authorizations from all individually investigated respondents, the counterfactual all-others rate should not be adjusted. (United States' written submission, para. 58; response to Arbitrator question No. 18, paras. 66-67). In support of this approach, the United States had asserted that Canada has proposed using confidential information from Canadian companies to calculate the value of imports, and "Canada has proposed to remove companies that do not provide authorization from the calculation of nullification or impairment". (United States' written submission; para. 58 (referring to Canada's methodology paper, para. 16). See also United States' response to Arbitrator question No. 20, para. 69). Canada has argued that this US argument is "disingenuous". (Canada's written submission, para. 86).

[206] United States' comments on Canada's response to Arbitrator question No. 181, paras. 10-12.

[207] United States' response to Arbitrator question No. 182(a), paras. 6-7; comments on Canada's response to Arbitrator question No. 182(a), paras. 13-16; Canada's response to Arbitrator question No. 182(a), paras. 13-18. The United States suggests that the parties could extend such deadlines as between themselves. (United States' comments on Canada's response to Arbitrator question No. 182, para, 16).

Canada induce compliance by the United States "to eliminate the challenged measure from the rates of their competitors".[208] The United States explains that this is so because "CVD rates could increase with the removal of the challenged measure".[209]

6.81. The United States agrees with Canada that the likelihood of a firm's actual US sales data on the record of a USDOC proceeding being non-confidential is small, but if such data were non-confidential Canada could use it to construct a counterfactual all-others rate.[210] The United States also argues that Canada's reliance on previous arbitrators' decisions in this context is misplaced.[211]

6.82. The Arbitrator notes that the record indicates that the USDOC calculates the all-others rates[212] in original investigations and administrative reviews (in which such rates are called the "non-selected rate")[213] under the terms of 19 U.S.C. § 1671d(c)(5), reproduced below:

> **(5) Method for determining the all-others rate and the country-wide subsidy rate (A) All-others rate**
>
> **(i) General rule**
>
> For purposes of this subsection and section 1671b(d) of this title, the all-others rate shall be an amount equal to the weighted average countervailable subsidy rates established for exporters and producers individually investigated, excluding any zero and de minimis countervailable subsidy rates, and any rates determined entirely under section 1677e of this title.
>
> **(ii) Exception**
>
> If the countervailable subsidy rates established for all exporters and producers individually investigated are zero or de minimis rates, or are determined entirely under section 1677e of this title, the administering authority may use any reasonable method to establish an all-others rate for exporters and producers not individually investigated, including averaging the weighted average countervailable subsidy rates determined for the exporters and producers individually investigated.[214]

6.83. At the outset, and in light of this statute, it appears helpful to note five things. First, in general, the USDOC will calculate the all-others rate as the weighted average of the individually investigated companies' CVD rates, excluding any CVD rates that are zero, *de minimis*[215], or calculated entirely with facts available.[216] Second, the parties agree, and the record reflects, that where the USDOC

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[208] United States' response to Arbitrator question No. 20, para. 70. See also United States' response to Arbitrator question No. 103, paras. 265-266.

[209] United States' response to Arbitrator question No. 20, para. 70 (referring to United States' written submission, paras. 45 and 54).

[210] United States' response to Arbitrator question No. 16.

[211] United States' response to Arbitrator question No. 20, paras. 71-72; and No. 33, paras. 94-97.

[212] We note that the term "all-others" CVD rate is not a term used in the SCM Agreement. Rather it is a colloquial term and one taken from US legislation. With that understanding, this Decision will use the term "all-others" rate.

[213] United States' written submission, para. 49 ("Commerce looks to the same statutory provision for guidance in determining an All Others rate in a CVD administrative review"); United States' response to Arbitrator question No. 253, para. 171. The United States has also explained that the all-others rate, once created in the original investigation, stays in place for the duration of the CVD order. (United States' response to Arbitrator question No. 207, fn 70 to para. 79.

[214] Exhibit USA-4, p. 3. Both parties indicate that the USDOC uses trade value rather trade quantity as the weights in calculations under this statute. (Canada's response to Arbitrator question No. 17, paras. 31-32; United States' response to Arbitrator question No. 17, para. 65).

[215] The *de minimis* threshold is less than 1% in an original investigation and less than 0.5% in an administrative review (19 U.S.C. § 1671b (Exhibit USA-13), ss. (b)(4)(A) (specifying the 1% rate for investigation); Commerce, "Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Supercalendered Paper from Canada" (October 13, 2015) (Exhibit CAN-32), (specifying the 0.5% rate); United States' response to Arbitrator question No. 115, para. 3 (confirming the 0.5% rate for administrative reviews and that the USDOC would not exclude a company from a CVD order if it received a *de minimis* CVD rate in an administrative review).

[216] 19 U.S.C. § 1677e (Exhibit USA-16) addresses "Determinations on basis of facts available".

uses two individually investigated companies' CVD rates to calculate the all-others rate, then the USDOC will calculate an all-others rate using either a simple average of the companies' CVD rates or a weighted average of their CVD rates using publicly ranged US sales data of the companies as weights, whichever is closer to the weighted average had the USDOC used the firms' actual and confidential US sales data as weights.[217] Third, the parties agree, and the record reflects, that where three or more individually investigated firms are used to calculate the all-others rate, then the USDOC will use the firms' actual and usually confidential US sales data to calculate a weighted average of their CVD rates.[218] Fourth, the record indicates that the relevant USDOC record will indicate how the all-others rate was calculated.[219] Finally, the United States has confirmed, and Canada has never questioned, that the non-confidential version of the relevant USDOC record will always contain individually investigated companies' CVD rates.[220]

6.84. With such background established, we note, and the parties agree[221], that there are five relevant scenarios to address in this context. These are discussed in turn below.

6.85. Scenario 1 arises when all the individually investigated companies' counterfactual CVD rates are *de minimis*, zero, or calculated entirely with facts available. In this scenario, we consider that a proxy of 0% for the counterfactual all-others rate appears reasonable in light of the parties' agreement on the use of a zero CVD rate, and the relevant statute's terms, which generally exclude the use of CVD rates that are zero, *de minimis*, or calculated entirely with facts available in calculating the all-others rate. We further discern no other reasonable basis in the record for choosing another value.[222]

6.86. Scenario 2 arises if only one individually investigated company in the counterfactual has a CVD rate that is not zero, *de minimis*, or calculated entirely with facts available. In this scenario, we consider that determining the all-others rate based on that company's counterfactual CVD rate appears reasonable in light of the fact that this is the result that the relevant statute prescribes in such circumstances, and the parties' agreement on this score.

6.87. Scenario 3 arises if: (a) two individually investigated companies in the counterfactual have CVD rates that are not zero, *de minimis*, or calculated entirely with facts available; and (b) the USDOC had in fact used either a simple average of the two companies' CVD rates or a weighted average of the companies' CVD rates using publicly available US sales data.[223] In this scenario, we

[217] Canada's written submission, section III(3)(b) (describing this USDOC practice); United States' response to Arbitrator question No. 23, paras. 78-81 (confirming this USDOC practice). The United States explains that this practice is followed because "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". (United States' response to Arbitrator question No. 23, para. 80). In contrast, "when Commerce weight averages three or more CVD rates … 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". (United States' response to Arbitrator question No. 24, para. 82).

[218] The all-others rate will *not* be affected by the OFA-AFA Measure if the individually investigated firm(s) to which the OFA-AFA Measure was applied had, in reality, CVD rates that were determined entirely with facts available. In that instance, the USDOC would not use those firm's CVD rates to calculate the all-others rate per the applicable statute. See United States' response to Arbitrator question No. 49, fn 201 to para. 146 (explaining this scenario).

[219] United States' written submission, para. 56 (explaining that "each countervailing duty proceeding contains calculation memoranda for the individually-investigated respondents, as well as a calculation memo for the All Others rate").

[220] See United States' response to Arbitrator question No. 30, para. 89.

[221] United States' response to Arbitrator question No. 181, para. 2; Canada's response to Arbitrator question No. 181, para. 12. Both parties also acknowledge that the all-others rate could, under certain circumstances, increase in the counterfactual, but that the US model would be able to properly account for that scenario. The parties disagree as to whether the Canadian model could properly account for such a situation. (Canada's response to Arbitrator question No. 182(b), paras. 19-20; United States' response to Arbitrator question No. 182(b), paras. 8-10).

[222] We again note that the use of a proxy of zero in this context means that there would be no change to the composition of companies subject to the CVD order as between reality and the counterfactual. The United States also explained that a zero rate does not mean that under US law the companies subject to the all-others rate would be excluded from the scope of the CVD order. (United States' response to Arbitrator question No. 181, para. 4).

[223] See para. 6.83 and fns thereto, above (describing this practice by the USDOC).

consider that using the same methodology that was in fact used by the USDOC to determine the all-others rate appears reasonable in light of the parties' agreement on this score. Moreover, the parties agree that the USDOC would, in the counterfactual, have used one or the other approach according to USDOC practice.

6.88. Scenario 4 arises if: (a) two individually investigated companies in the counterfactual have CVD rates that are not zero, *de minimis*, or calculated entirely with facts available; and (b) the USDOC had in fact used three or more firms' confidential US sales data to calculate a weighted average for use as the all-others rate.[224] In this instance, as described further above, USDOC practice in this scenario would be to determine the all-others rate using a weighted average of the firms' publicly ranged US sales data or a simple average of their CVD rates, whichever is closest to the weighted average of the firms' CVD rates using the companies' confidential US sales data as weights. We therefore consider it reasonable to select a method that best duplicates that practice. We further note, however, that in order to duplicate that USDOC practice, Canada would first need to obtain the companies' normally confidential US sales data so that Canada could calculate a weighted average using such data, and the USDOC would need to receive the relevant companies' authorizations to release such data to Canada.[225]

6.89. Thus, and in light of the parties' positions in this context, the Arbitrator considers that the following procedure for Scenario 4 would be reasonable. First, Canada would first attempt to secure the relevant companies' written authorizations allowing the USDOC to release their relevant confidential US sales data to Canada. Canada would do so by sending written requests to the companies for written statements authorizing the USDOC to release such data to Canada for purposes of using it to calculate a counterfactual all-others rate.[226] Canada would copy the United States on such communications to the companies. From the date of Canada sending the written request, the companies will have two calendar weeks (14 days) to provide their written authorizations to Canada. If Canada receives *all* such authorizations, Canada will provide the companies' authorizations to the United States. The United States would then, at the time of such provision, have one of the two following time periods to provide the companies' relevant confidential sales information to Canada, whichever is longer: (a) two calendar weeks (14 days); or (b) the remainder of a 30-calendar-day clock that started to run at the time of Canada's sending the written requests to the relevant companies. All such deadlines can be extended by the parties through mutual agreement.

6.90. If Canada obtains all relevant companies' confidential sales data by the applicable deadline, Canada would then: (a) calculate a weighted average of the companies' CVD rates using the confidential sales data as weights; (b) calculate a simple average of the relevant firms' CVD rates and a weighted average of their CVD rates using publicly ranged US sales data; and, finally, (c) select whichever rate calculated under item (b) most closely approximates the rate calculated under item (a).

6.91. If Canada does not receive all authorizations from the relevant companies by the relevant deadline, or if the United States does not relay the companies' confidential sales data by the relevant deadline, the relevant options mentioned by the parties for a counterfactual all-others rate are: (i) a weighted average using the two firms' publicly ranged US sales figures; (ii) a simple average of the two firms' CVD rates; (iii) the actual all-others rate; or (iv) a rate of 0%.

6.92. In our view, and on balance, option (i), described immediately above, is the most reasonable option. This is so for two main reasons. First, a weighted average using the companies' publicly

[224] This could arise when, for instance, if the USDOC actually used the CVD rates from Companies A, B, and C to calculate the all-others rate, but in the counterfactual Company A's CVD rate fell below the *de minimis* threshold after removing the effects of the OFA-AFA Measure.

[225] Confidential information on the record of USDOC proceedings is protected by an Administrative Protective Order (APO), and thus, in order for the USDOC to release that data to a third party, such release requires the consent of the submitting party. See United States' response to Arbitrator question No. 215, para. 122 (referring to United States' response to Arbitrator question No. 101, para. 261). If, of course, the relevant firms' relevant sales data are not confidential, Canada shall utilize that information without first attempting to secure the firms' authorizations to release such data and without requesting the United States to supply it to Canada.

[226] Considering that we have already declined to set a deadline by when Canada must begin to start suspending concessions, we decline to set a deadline by when Canada would need to send such requests to companies following triggering event.

ranged US sales data ensures that the counterfactual all-others rate would necessarily inhabit the same general numerical range as would the weighted average of the firms' CVD rates using confidential US sales data, i.e. a value somewhere between the two companies' CVD rates. For this reason, this option is stronger than options (iii)[227] or (iv).[228] Second, the publicly ranged US sales data will be, in our view, a reasonable approximation of the companies' actual and confidential US sales data.[229] For that reason, we consider option (i) somewhat preferable to option (ii), as a simple average utilizes no connection to the relevant companies' sales data, a connection that the relevant statute envisions. Therefore, if Canada does not receive all authorizations from the relevant companies by the relevant deadline, or if the United States does not relay the companies' confidential sales data by the relevant deadline, the all-others rate shall be calculated using a weighted average using the relevant firms' publicly ranged US sales figures. If, for any reason, this option is unavailable, Canada shall use the simple average of the relevant firms' CVD rates as the counterfactual all-others rate.[230]

6.93. Scenario 5 arises when: (a) three or more individually investigated companies in the counterfactual have CVD rates that are not *de minimis*, zero, or calculated entirely with facts available; and (b) the USDOC had in fact used three or more companies' confidential US sales data to calculate a weighted average for use as the all-others rate. In this instance, the relevant US statute and USDOC practice supports calculating the all-others rate using the weighted average of the companies' CVD rates, using the companies' actual and normally confidential US sales data. We therefore consider it reasonable to select a method that best duplicates that practice. We further note, however, that, as with Scenario 4 further above, in order to duplicate that USDOC practice, Canada would first need to obtain the companies' normally confidential US sales data so that Canada could calculate a weighted average using such data.

6.94. Therefore, we consider that, in order to attempt to obtain such confidential sales data, Canada and the United States should follow the same procedure as that delineated in paragraphs 6.89 to 6.92, above, with respect to Scenario 4. For the same reasons as discussed in those same paragraphs, above, if Canada does not receive all authorizations from the relevant companies by the relevant deadline, or if the United States does not relay the companies' confidential sales data by the relevant deadline, the all-others rate shall be calculated using a weighted average using the relevant firms' publicly ranged US sales figures. If, for any reason, this option is unavailable, Canada shall use the simple average of the relevant firms' CVD rates as the counterfactual all-others rate.[231]

6.95. Finally, for clarity, we recall that this Decision uses the term "all-others rate" specifically with respect to the all-others rate created in an investigation. We further recall that the United States has explained that the so-called "non-selected rate" created in an administrative review is essentially an "all-others" rate created for purposes of that review, and is calculated in the same way as the all-others rate created in an investigation.[232] Thus, any counterfactual "non-selected rates" shall be

[227] The original all-others rate may fall outside the range between the relevant companies' CVD rates. For instance, suppose there were four individually investigated Firms A, B, C, and D with the respective and equally weighted CVD rates of 10%, 20%, 60%, and 70%. If firms C and D were eliminated in the counterfactual, the original all-others rate (45%) would be outside the range of what a counterfactual weighted average could possibly be, i.e. between 10% and 20%.

[228] We recall that if a company receives a 0% CVD rate then that rate will not be used to calculate the all-others rate. We further note 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" (Canada's written submission, para. 60 (referring to 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)). In such cases, zero duty rates were chosen as proxies for counterfactual duty rates, but this was so because the arbitrators felt that they lacked information with which to calculate the counterfactual duty rates. In this context, in contrast, there will likely be information on the record that could be used to calculate a counterfactual all-others rate. We therefore consider that the persuasive weight of these decisions in this specific context is limited.

[229] See fn 184 to para. 6.71, above.

[230] If, for any reason, a relevant firm's CVD rate is not publicly available, and thus unavailable to Canada, then that firm's CVD rate shall be assumed to be zero. The Arbitrator understands that this scenario should never arise, however, as firms' CVD rates are available from the public record of USDOC proceedings.

[231] If, for any reason, a relevant firm's CVD rate is not publicly available, and thus unavailable to Canada, then that firm's CVD rate shall be assumed to be zero. The Arbitrator understands that this scenario should never arise, however, as firms' CVD rates are available from the public record of USDOC proceedings.

[232] See fn 213 to para. 6.82, above.

calculated in the same manner as the counterfactual "all-others" rate, as described above, *mutatis mutandis*.[233]

6.4 Reference period

6.96. We note that the core purpose of the parties' proposed models, discussed in detail in section 7, below, is to estimate the trade impact that the imposition of WTO-inconsistent CVD rates has on Canadian exports of a relevant product into the United States. In order to do that, various data inputs are required. Two such inputs, upon which both parties' models rely, are: (a) an annual baseline of the value of imports from relevant Canadian companies; and (b) those same companies' CVD rates that were in effect during the same time. Both parties' proposed models rely on a calendar year preceding a relevant triggering event from which to take such information, and both refer to this year as the "reference period", a term which we adopt moving forward as well. The parties, however, disagree as to what calendar year the reference period should be, at least in certain situations.

6.97. Canada originally asserted that the reference period for determining the value of imports and the reference period duty rates would be the full calendar year "prior to the imposition by Commerce of duties resulting from the application of the OFA-AFA measure in a U.S. countervailing duty proceeding".[234] Canada subsequently clarified that the reference period should be the most recent calendar year preceding the triggering event in which no company whose data will be used in the model is subject to a CVD rate affected by the OFA-AFA Measure.[235] Canada asserts that the arbitrator's decision in *US – Washing Machines (Article 22.6 – US)* supports its position.[236] Responding to specific questions from the Arbitrator about the reasonableness of this approach, Canada recognized that, under its originally proposed approach, because the all-others rate created in an original investigation remains unchanged for the duration of the CVD order, if the all-others rate were an affected rate, then the reference period might become significantly outdated for triggering events occurring years after the imposition of the original CVD order. Although Canada indicates that such sequential uses of the OFA-AFA Measure are unlikely, Canada offered a revised approach that purports to remedy the potential problem of the reference period becoming significantly outdated. Specifically, Canada proposes that if the reference period would be more than five years out of date using its original approach, then Canada may, at its discretion, select a reference period from the most recent five years preceding the triggering event in which less than 5% of Canadian imports were subject to an affected CVD rate.[237]

6.98. Additionally, Canada has argued that relevant imports during that calendar year may be "atypically low or even non-existent", and thus Canada asserts that it "may be useful" to define the reference period as "normally … the calendar year prior to the year where the duties from the OFA-AFA measure are applied in a final determination by Commerce".[238] In cases of "atypical import values/market shares", Canada suggests that "an alternative reference period could be the three calendar years prior to the year where the duties from the OFA-AFA measure are applied by Commerce in a final determination or review".[239]

6.99. The United States originally asserted that the reference period should be the "full calendar year prior to the issuance of the final determination or final results by Commerce that applies the challenged measure in a CVD proceeding concerning Canadian goods".[240] This was appropriate, in the United States' view, because the value of imports during that time will have been unaffected by

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[233] We recall that the *de minimis* threshold will differ as between investigations and administrative reviews as well. See fn 215 to para. 6.83, above.

[234] Canada's methodology paper, para. 12. See also Canada's written submission, para. 180; Canada's response to Arbitrator question No. 35, para. 57 (same), No. 79, para. 170 (indicating that the reference period should reflect the value of imports that "does not reflect the WTO inconsistent duty"), and No. 125, paras. 60-61.

[235] See generally Canada's response to Arbitrator question No. 207; No. 244, para. 221, and No. 247, paras. 237-240; Canada's comments on the United States' response to Arbitrator question No. 207, paras. 42-52.

[236] Canada's response to Arbitrator question No. 247, para. 239.

[237] See generally Canada's response to Arbitrator question No. 287, paras. 30-36. See also Canada's response to Arbitrator question No. 207, para. 118, No. 247, para. 240, and No. 287, paras. 30-33.

[238] Canada's response to Arbitrator question No. 120, paras. 34-35.

[239] Canada's response to Arbitrator question No. 120, para. 35.

[240] United States' written submission, para. 47. (emphasis omitted)

the OFA-AFA Measure.[241] Responding to questions from the Arbitrator in which it was pointed out that such a reference period may actually have affected CVD rates active within it, the United States further clarified its approach. Specifically, the United States indicated that, for a triggering event in which there is an application of the OFA-AFA Measure, the reference period would be the calendar year before the triggering event, but only newly affected companies would be treated as affected companies for purposes of that model run.[242] In such cases, the United States recognizes that, if affected CVD rates were active during that reference period, the level of NI may have to be further adjusted to take into account previous applications of the OFA-AFA Measure.[243]

6.100. The United States argues that its approach is necessary in order for the reference period to reflect, as much as possible, the market conditions facing the relevant Canadian companies at the time of the triggering event and at which time the level of NI will be calculated. The United States thus argues that the Arbitrator should reject the Canadian proposal to use, as the reference period, the most recent calendar year prior to the triggering event in which no Canadian company was subject to a CVD rate affected by the OFA-AFA Measure. In the United States' view, there are circumstances under which that approach could lead to Canada using a reference period many years before the triggering event, and thus yielding inaccurate estimations of the level of NI that exists at the time of the triggering event.[244] The United States has further asserted that Canada has failed to properly explain how it would apply its formula and choice of reference period to a variety of hypothetical scenarios posed by the Arbitrator.[245]

6.101. In a specific response to Canada's revised proposal for selecting the reference period, the United States considers Canada's proposal inappropriate. Specifically, the United States argues that Canada's revised approach could still result in the use of a significantly outdated reference period, thus making it unrepresentative of market conditions at the time of the triggering event.[246] The United States also objects to Canada's suggestion that Canada be given discretion to select the reference period under its revised proposal, as this would, in the United States' view, be a procedure that is inappropriately biased in favour of Canada.[247]

6.102. Canada argues that the United States' proposal for the reference period (insofar as it results in the use of a reference period in which affected CVD rates are present) is antithetical to the core purpose of a reference period, i.e. to represent a time during which the market is unaffected by the WTO-inconsistent measure. Relatedly, in Canada's view, such an approach would likely understate the level of NI by using depressed values of imports from companies that had affected CVD rates during that reference period, and also by using affected CVD rates as the reference period duty rate.[248] Moreover, according to Canada, using such a reference period is inconsistent with the United States' own position that the US model should simultaneously modify all duty rates that are

[241] United States' written submission, para. 47. See also response to Arbitrator question No. 35(c), paras. 106-115, and No. 120, para. 7.

[242] See generally the United States' response to Arbitrator question No. 207, paras. 67-97.

[243] United States' response to Arbitrator question No. 207, paras. 71, 83, and 93, and fn 71 to para. 87; comments on Canada's response to Arbitrator question No. 287, para. 22 and fn 42 thereto, and No. 282, para. 12 (referring to the United States' response to Arbitrator question No. 207, para. 71 and fn 65 thereto). The United States further asserts that it is necessary to use the same reference period for calculating the value of imports and relevant market shares (United States' comments on Canada's response to Arbitrator question No. 202, para. 76).

[244] See generally the United States' comments on Canada's response to Arbitrator question No. 207, paras. 86-106; Canada's response to Arbitrator question No. 247, paras. 237-240. The United States indicates that when the OFA-AFA Measure is used in multiple segments of a CVD proceeding, it is likely that such multiple uses would occur in segments separated by multiple years (United States' response to Arbitrator question No. 207, para. 76).

[245] See generally the United States' comments on Canada's response to Arbitrator question No. 207, paras. 86-106.

[246] United States' comments on Canada's response to Arbitrator question No. 287, para. 20.

[247] United States' comments on Canada's response to Arbitrator question No. 287, para. 21.

[248] Canada's response to Arbitrator question No. 244, para. 220; Canada's comments on the United States' response to Arbitrator question No. 207, paras. 42-45 and fn 63 to para. 45. Canada claims that the United States' approach would inappropriately treat "legacy" WTO-inconsistent CVD rates as reference period duty rates, factual duty rates, and counterfactual duty rates (Canada's comments on the United States' response to Arbitrator question No. 207, para. 43).

affected by the OFA-AFA Measure.[249] Canada also asserts that the United States has not demonstrated how its model would remove the levels of NI previously calculated for certain affected companies.[250] Canada further argues that the United States' proposal would place a larger burden on Canada because it would always require a newly updated reference-period data set being generated for every triggering event, whereas under Canada's approach the reference period data set might remain the same for more than one triggering event.[251]

6.103. The Arbitrator first notes Canada's proposal to potentially use a three-year reference period. In essence, this is a request to disregard a year-long reference period if Canadian imports of the relevant product were unusually low for that year. Canada offers no method, however, for determining whether exports were unusually low during that year. Moreover, although it is undoubtedly true that imports of particular goods would be expected to fluctuate somewhat over time, Canada also provides no reason to think that a year-long reference period, in general, would provide unrepresentative results for any particular product or sector of products. For these reasons, the Arbitrator rejects this Canadian proposal, and considers that a year-long reference period should be used.

6.104. The question thus becomes when the one-calendar-year reference period should occur relative to the triggering event. As an initial matter, the Arbitrator considers that both parties, in the course of their arguments, have correctly identified two key and desirable attributes of the reference period: (a) representing a period of time during which relevant imports are unaffected by the OFA-AFA Measure; and (b) representing a period as close in time as reasonably possible to the triggering event. These two attributes are geared to allow the model to accurately identify the trade loss that Canada will suffer as a result of the application of the OFA-AFA Measure to Canadian companies moving forward from the triggering event. We further recall that any methodology adopted by the Arbitrator must be practical to implement.[252] For these reasons, we accept that the reference period should be the calendar year preceding a relevant triggering event if in that year Canadian companies are not subject to affected CVD rates.

6.105. The problem in this context is that the calendar year preceding a triggering event may be one in which Canadian companies are subject to affected CVD rates. The United States refers to such affected CVD rates as "legacy" affected CVD rates[253], a term which we adopt here. Legacy affected CVD rates can arise if the USDOC uses the OFA-AFA Measure in separate CVD proceedings when administering the same CVD order (e.g. using the OFA-AFA Measure in an original investigation and then using the measure again in a subsequent administrative review). If Canadian companies are subject to legacy affected CVD rates within a given calendar year, it makes that year less desirable for use as a reference period because the values of imports within it will be, to some degree, distorted by the OFA-AFA Measure. We note that both parties consider this multiple-use scenario unlikely[254], but possible. With this in mind, we move now to evaluate the parties' proposals for selecting the reference period. The parties have offered three proposals for the selection of a reference period, which we address in turn, followed by a discussion of a proposal made by the Arbitrator to the parties.

6.4.1 United States' proposal

6.106. The United States' proposal is to use the calendar year preceding the triggering event. If Canadian companies are subject to legacy affected CVD rates in that reference period, however, only newly affected companies will comprise the affected variety, and appropriate adjustments will

[249] Canada's comments on the United States' response to Arbitrator question No. 207, paras. 42-52. In particular, Canada claims that the United States' proposed adjustments will inappropriately focus on a single company's exports, and ignore the very offsetting effects that the United States has consistently advocated must be taken into account when calculating a level of NI (Canada's comments the United States' response to Arbitrator question No. 207, para. 46).

[250] Canada's comments on the United States' response to Arbitrator question No. 207, para. 44.

[251] Canada's comments on the United States' response to Arbitrator question No. 287, para. 26.

[252] See section 6.1.2, above.

[253] See e.g. the scenario in Arbitrator question No. 207(b).

[254] United States' comments on Canada's response to Arbitrator question No. 247, para. 174 (explaining that would be a "very unlikely event that there are two applications of the challenged measure in separate segments of a CVD proceeding"); Canada's response to Arbitrator question No. 287, para. 30 (explaining that it would be an "extremely rare set of circumstances where Canada would need to suspend concessions regarding more than one applications [*sic*] of the OFA-AFA measure in the same CVD proceeding").

be made to previously calculated levels of NI, which may then have to be summed with the new calculated level of NI. The main advantage of the United States' proposal is that the reference period will always be near in time to the triggering event, i.e. the calendar year preceding it.

6.107. There are two main disadvantages of the United States' proposal, however. First, legacy affected CVD rates active in that reference period will cause the value of imports of Canadian companies to be distorted by the OFA-AFA Measure.

6.108. Second, the United States' proposals for performing necessary adjustments to previously calculated levels of NI in certain scenarios appear problematic. In order to illustrate the problems with the United States' adjustment proposals, we will discuss two different hypothetical scenarios. The first is as follows: Company A and Company B receive affected rates in an investigation concluding in 2022, and the all-others rate is also affected. Company A receives a new but again-affected CVD rate in an administrative review concluding in 2024. No other CVD rates change. In this scenario, under the United States' approach, Canada would calculate a level of NI in 2022 using 2021 as the reference period. Canada would then calculate a new level of NI in 2024 using 2023 as the reference period, but using Company A only as the affected variety. Canada would then remove from the 2022 level of NI Company A's "share" of that level of NI, by assuming that that share of NI is in proportion to Company A's "share of the value of imports in the investigation".[255] Canada would then sum the remainder of the 2022 NI with the new 2024 level of NI (i.e. summing the NI arising from: (i) Company B's 2022 affected rate; (ii) the all-others 2022 affected rate; and (iii) Company A's 2024 affected rate).[256]

6.109. We discern two key issues with the adjustment strategy proposed by the United States in this context. First, the level of NI calculated for 2024 will rely on values of imports that are distorted due to the presence of the legacy affected CVD rates in the 2023 reference period. These distortions may be significant given that multiple individually investigated companies, and any companies that may be subject to the affected all-others rate, had affected CVD rates during this time. Second, the United States' assumption that the portion of NI calculated in 2022 that arose specifically due to Company A's affected rate imposed at that time would be proportional to Company A's share of the total value of imports of the relevant product from the 2021 reference period[257] (or during any period, for that matter) appears questionable. This is so because the extent to which a particular company being subject to an affected rate contributes to a calculated level of NI does not just depend on the company's value of imports, but also on the magnitude of its change of duty rate.[258]

6.110. The second scenario illustrating the problems with the United States' adjustment proposals involves the following hypothetical: Company A and Company B receive affected rates in an investigation concluding in 2022, and the all-others rate is also affected. Company C is among those companies subject to the affected all-others rate. Company C then receives a WTO-consistent CVD rate in an administrative review concluding in 2024. No other CVD rates change. In this scenario, the United States explains that Canada would calculate a level of NI in 2022 using 2021 as the reference period, and then calculate a new level of NI in 2024 by removing Company C's share of NI from the 2022 calculation. The newly calculated level of NI in 2024 would replace the old level of NI calculated in 2022.

6.111. We discern two key issues with the adjustment strategy proposed by the United States in this context. First, and as already discussed two paragraphs above, the United States does not appear to explain why it would be reasonable to assume that the level of NI arising from Company C being subject to the affected all-others rate in 2022 is proportional to its share of Canadian imports of the relevant product during the 2021 reference period (or during any period, for that matter). Second, even if that could be reasonably assumed, it is unclear how the United States assumes Company C's value of imports would be determined, at least in certain instances. In particular, in

[255] United States' response to Arbitrator question No. 207, fn 71 to para. 87.

[256] See e.g. the United States' response to Arbitrator question No. 207, para. 83.

[257] We understand this assumption to be as follows: if Company A had 10% of all Canadian imports of the relevant product subject to the CVD order in the 2021 reference period, then Canada would remove 10% of the level of NI calculated in 2022.

[258] We also note that the resulting *total* level of NI achieved under the United States' approach (i.e. summed from the 2022 level and 2024 level of NI, after adjustments) is calculated from two different reference periods, i.e. 2021 and 2023. This appears a somewhat odd result considering that the United States has consistently indicated that its model's key advantage is that it simultaneously accounts for all relevant companies in calculating a given level of NI. See, e.g. sections 7.1.2.3 and 7.2.3, below.

the absence of US Customs data, and if Company C failed to provide its company-specific information to Canada, it is unclear how Canada would determine Company C's value of imports for the 2021 reference period.

6.112. In sum, the United States' suggested approach appears to have key weaknesses. Most seriously, the proposal could lead to the use of a reference period in which significant distortions caused by the OFA-AFA Measure are present, with no mechanism in place for reasonably ensuring that such distortions are limited in scope. Further, the United States' suggested methods for performing necessary adjustments in the presence of legacy affected CVD rates appear problematic and in certain cases rely on unsupported assumptions. In light of these weaknesses, we do not consider the United States' proposal to be a viable option.

6.4.2 Canada's original proposal

6.113. Canada's original proposal is to always use the most recent calendar year preceding the triggering event in which no Canadian company was subject to an affected CVD rate. The main advantage of this approach is that the reference period will always be a period in which the values of imports of Canadian companies are undistorted by the OFA-AFA Measure.

6.114. The main disadvantage of this proposal is that it could lead to the use of a reference period occurring years before the relevant triggering event if legacy affected CVD rates are present in the year or years leading up to the triggering event, as no such year could be used as the reference period. This could be particularly problematic when there is an affected all-others rate created in an original investigation. This is so because, as the United States has explained, the all-others rate created in the original investigation stays in place and active for the duration of a CVD order.[259] We also recall that there is no published list of companies subject to the all-others rate[260], and companies can become subject to the all-others rate without Canada's knowledge.[261] Thus, if the all-others rate is affected, in order for Canada to apply its approach, we consider that Canada would need to assume that at least one Canadian company is subject to that affected rate in every calendar year following the conclusion of an investigation. This would mean that, in the presence of a legacy affected all-others rate, the reference period under the original Canadian approach will *always* be the calendar year preceding the year in which the CVD order was originally issued.

6.115. In sum, in the presence of affected legacy CVD rates, and especially an affected legacy all-others rate, the original Canadian proposal could produce a reference period occurring many years before the triggering event. Indeed, there appears no particular ceiling on the number of years by which the reference period could become outdated under this approach, and there is no mechanism in place for mitigating the risk that the reference period might become significantly outdated. Such a significantly outdated reference period would likely compromise the efficacy of the reference period in representing market conditions at the time of the triggering event. Thus, while we consider the original Canadian approach viable, it displays a weakness.

6.4.3 Canada's revised proposal

6.116. Canada's revised proposal is to use the most recent calendar year preceding the triggering event in which no Canadian company was subject to an affected CVD rate unless this would lead to a reference period "that is five years or more prior to the triggering event".[262] In that case, Canada would have the discretion to select a calendar year from the five years preceding the triggering event provided that in the selected year less than 5% of Canadian imports were subject to affected CVD rates.

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[259] See the United States' response to Arbitrator question No. 207, fn 70 to para. 79. In contrast, Canada would know at all relevant times when affected individual and affected non-selected rates are being applied to Canadian companies. This is so because the USDOC publishes the names of the companies to which such rates are applied. Moreover, when companies subject to such affected rates become unaffected, Canada would have to adjust the previously calculated level of NI to account for that removal. (See para. 6.36, above).

[260] See fn 625 to para. 8.140(c) and fn 719 to para. 8.192, below.

[261] For example, a new shipper would become subject to the all-others rate when it begins to export to the United States, an event which would not qualify as a triggering event. (See para. 6.36, above and para. 8.274, below)

[262] Canada's response to Arbitrator question No. 287, para. 33.

6.117. The main advantage of this approach is that it strikes a balance between the competing considerations of selecting a reference period that is temporally proximate to the triggering event but that is also undistorted by the OFA-AFA Measure. As under Canada's original proposal, the reference period under this revised approach could be outdated, but it would be distortion-free. The risk of selecting a significantly outdated reference period, however, is mitigated by Canada's ability to use an updated reference period if distortions caused by the OFA-AFA Measure within it are limited (i.e. if 5% or less of Canadian imports of the relevant product are subject to an affected rate).

6.118. Canada's revised proposal displays two main disadvantages, however. First, it grants Canada the discretion to select a reference period in certain circumstances, which introduces a systemic bias in favour of Canada. Second, in the event that using a distortion-free reference period would yield a reference period outdated by more than five years, Canada offers no specific guidance regarding how Canada would determine whether the 5% threshold is met in any of the five relevant calendar years, other than to indicate that Canada would rely on US Customs data in making that evaluation.[263] We accept that US Customs data could be used, in principle, for this determination. Indeed, further below in this Decision, we prescribe procedures and timelines for the gathering and verifying one year's worth of US Customs data, which was developed with extensive consultation with the parties through questions and answers during the course of this proceeding.[264] While certain of these procedures could also be used in this context, it is plain that potentially quintupling the amount of US Customs data under consideration by the parties would require significantly more burdensome data-gathering on the part of the United States and lengthy delays in the timelines already suggested by the parties for such gathering as well as subsequent verification.

6.119. In sum, because Canada's revised approach would introduce a systemic bias in favour of Canada, and in the absence of practical suggestions by Canada as to how to manage the necessary and burdensome import-data evaluation process discussed in the paragraph immediately above, we do not consider that Canada's revised approach is a viable option.

6.4.4 Arbitrator's proposal

6.120. The Arbitrator considers that there is an alternate way of selecting the reference period. Under this approach, the reference period would be the most recent calendar year preceding the triggering event in which no Canadian company was subject to an affected CVD rate[265] *unless* this would lead to a reference period, the end of which is more than five years before the triggering event. In that case, Canada would use the most recent calendar year preceding the triggering event in which the only affected rate imposed on Canadian companies was the all-others rate or in which no Canadian company is subject to an affected CVD rate. The Arbitrator proposed a similar version of this method for selecting the reference period to the parties for comment in Arbitrator question No. 287.

6.121. The main advantage of this approach – as was the case with Canada's revised approach – is that it strikes a balance between the competing considerations of selecting a reference period that is temporally proximate to the triggering event but that is also undistorted by the OFA-AFA Measure. Under this approach, the reference period could be outdated, but it would be distortion-free.[266]

[263] Canada envisions using US Customs data in this context (Canada's response to Arbitrator question No. 287, para. 33).

[264] See generally section 8.1.1.2.1, below.

[265] As already discussed further above, Canada would assume that Canadian companies are subject to an affected all-others rate in every relevant calendar year. Canada would know, however, whether companies were subject to affected individual or non-selected rates during all relevant calendar years. (See fn 259 to para. 6.114, above).

[266] If a company exports the relevant product at the time of the triggering event but did not export in the reference period, the reference period will yield a company-specific value of imports of zero for that company, thus diminishing the accuracy of the calculated level of NI. Such occurrences might be expected to increase the more outdated the reference period is (if, for no other reason, companies may enter and exit the relevant market over time). The Arbitrator raised this issue with the parties in Arbitrator question No. 287. The United States acknowledged the issue (United States' response to Arbitrator question No. 287, para. 23), and Canada did not discuss it. Neither party has indicated to the Arbitrator that it would introduce a systemic bias in favour of either party. Moreover, although we note that, under the model selected by the Arbitrator further below in this Decision, the level of NI is more sensitive to the value of affected Canadian imports than it is to the value of unaffected Canadian imports, without knowing *ex ante* which kind of company or companies (affected or unaffected) this issue might affect, we consider that it is unclear how this issue would affect the level of NI in any given instance.

Unlike the original Canadian approach however (i.e. the only other viable option before us), this approach has a mechanism to mitigate the risk of using a *significantly* outdated reference period, i.e. Canada's ability to use a relatively updated reference period if the only affected rate imposed on Canadian companies within that year is the all-others rate. The approach is also practical to implement because the times during which affected CVD rates are in place will be readily ascertainable by Canada from USDOC records.

6.122. The Arbitrator recognizes that the presence of an affected all-others rate in the reference period means that the value of imports from companies subject to that rate will be distorted by the OFA-AFA Measure. The Arbitrator considers that the risk of significant distortions arising from an affected all-others rate, however, will generally diminish over time. This is so because, as the United States has observed, the number of companies subject to the all-others rate will decrease over time as companies originally subject to that rate request (in particular) administrative reviews, and are thus assigned alternate individual CVD rates or non-selected rates.[267] Therefore, it appears a reasonable assumption that, in general and over time, even if the all-others rate were affected, the value of imports of the companies subject to that affected rate would be increasingly limited, which, in turn, would limit the distortions arising from it. Waiting at least five years following the conclusion of the original investigation before allowing Canada to use a reference period with an affected all-others rate active within it will provide at least some time for companies originally subject to the all-others rate to be assigned other kinds of CVD rates.[268]

6.123. On balance, the Arbitrator considers this proposal preferable to the original Canadian proposal (i.e. the only other viable proposal before the Arbitrator). We first note that these two approaches will always yield the same reference period (i.e. the calendar year preceding the triggering event) unless Canadian companies are subject to legacy affected CVD rates in that year. As already noted further above, the parties agree that such a scenario is unlikely. In that unlikely scenario, however, the Arbitrator is concerned that, especially in the presence of an affected all-others rate, the Canadian original proposal may result in the use of a reference period outdated by an unknown, and potentially significant, number of years. The Arbitrator's approach mitigates the risk of using such significantly outdated reference periods.[269] While that mitigation comes at the cost of introducing a risk of distortions into an updated reference period (owing to the presence of an affected all-others rate), as discussed in the preceding paragraph, it appears a reasonable assumption that such distortions will generally diminish over time.

6.4.5 Conclusion

6.124. In accordance with the above discussion, the reference period will be the most recent calendar year preceding the triggering event in which no Canadian company was subject to an affected CVD rate[270] *unless* this would lead to a reference period that ends more than five years before the triggering event. In that case, Canada would use the most recent calendar year preceding the triggering event in which either the only affected rate imposed on Canadian companies was the all-others rate *or* in which no Canadian company is subject to an affected CVD rate.

[267] United States' oral answer to Arbitrator question No. 207 at the meeting of the Arbitrator. The Arbitrator also explicitly mentioned this observation as part of a question to the parties proposing a version of this methodology to selecting a reference period. (See Arbitrator question No. 287, first paragraph). Neither party questioned the reasonableness of this assumption in their responses to that question, or at any other time.

[268] We further note that, as discussed in the subsections above, both parties have proposed, and therefore indicated their willingness to tolerate to some degree, using a reference period in which affected CVD rates are imposed on Canadian companies.

[269] The Arbitrator's proposal, of course, does not entirely remove the possibility of using an outdated reference period, as affected individual CVD rates and/or affected non-selected rates may be imposed on companies in the year or even years leading up to a triggering event. (See e.g. Canada's response to Arbitrator question No. 287, para. 31; United States' response to Arbitrator question No. 287, paras. 21-23). We further note that this was the only material objection either party raised with respect to the Arbitrator's proposed method of selecting the reference period in question No. 287.

[270] Canada will assume that Canadian companies are subject to an affected all-others rate in every calendar year. Canada will know, however, whether companies were subject to affected individual or non-selected rates during all relevant calendar years, and thus will not have to make any assumptions in this regard.

7 ASSESSMENT OF THE PARTIES' ECONOMIC MODELS

7.1. In economic terms, the level of NI is estimated as the trade decline experienced by Canadian exporters due to the application of the OFA-AFA Measure. Therefore, the appropriate methodology must be able to estimate trade that occurs with the OFA-AFA Measure (factual) having been used in a particular situation and trade that occurs with the OFA-AFA Measure not having been used in that same situation (counterfactual). The difference between the two levels of trade can be interpreted as the trade effect causally induced by the OFA-AFA Measure. In practice, the OFA-AFA Measure translates into duty rate changes that are higher than without the OFA-AFA Measure. In trade models, any change in tariffs is considered a "shock" and such trade models translate these shocks into changes in actual trade patterns, i.e. trade declines or increases. Importantly, everything else except this "duty rate shock" must be held constant such that the OFA-AFA Measure's effect can be identified in isolation from the effects of other factors. Against this background, the Arbitrator seeks to determine a methodology capable of translating the "duty rate shock" most reasonably into trade effects on Canadian exports. To that end, in this section, we first review the models proposed by Canada and by the United States, and identify their relative strengths and weaknesses. We then detail the model selected by the Arbitrator to determine the level of NI, i.e. a partial equilibrium non-linear Armington model with four varieties.

7.1 Canada's proposed model

7.1.1 Overview

7.2. At the outset, and before a critical assessment, the Arbitrator considers it helpful to provide an overview of Canada's basic methodology.[271] Canada proposes to use a formula derived from a partial equilibrium Armington model.[272] Canada proposes to determine the level of NI by measuring the trade effect of the OFA-AFA Measure, which is "equivalent to the effect on the value of U.S. imports from Canada attributable to the application of the OFA-AFA measure".[273] To this end, Canada adopts a partial equilibrium model which, as Canada asserts, is "well established in the literature on trade analysis and has previously been used for quantifying lost imports under similar circumstances".[274]

7.3. Canada's partial equilibrium model is based on the "Armington assumption". Under this assumption, consumers treat "varieties" of a good from different sources (home firms, firms located in foreign countries 1, 2, 3 …) as imperfect substitutes. The parameter governing the degree of substitutability across varieties is the elasticity of substitution. As argued by Canada, "[a] constant elasticity of substitution demand across varieties of a product from different locations allows for imports to rise and fall smoothly in response to changes in the relative price of products from different locations".[275] The Arbitrator notes that trade models assuming a constant elasticity of substitution exhibit desirable properties that facilitate mathematical implementation and are therefore well established in the relevant academic literature.

7.4. As Canada explains, the level of NI determined under its proposed methodology is equal to the change in the value of imports attributable to the duty resulting from the OFA-AFA Measure and can be obtained in general by the following formula[276]:

$$NI \equiv change\ in\ imports = value\ of\ imports \times \Delta duty \times scaling\ factor. \qquad (1)$$

In equation (1):

- the $value\ of\ imports$ (also referred to by Canada as $vimp$) is the value of Canadian exports of the relevant product subject to CVDs affected by the OFA-AFA Measure to the United States, net of any duties or tariffs. It is equal to $p_{CA}d_{CA}$, where p_{CA} is the price of

[271] Canada's proposed methodology changed in certain respects during the course of this Arbitration proceeding. Thus, this section summarizes the key aspects of Canada's proposed methodology that have remained relatively stable during this Arbitration proceeding.

[272] This kind of model was used, in different variations, in three past Article 22.6 arbitrations: *US – Washing Machines (Article 22.6 – US)*; *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*; and *US – Countervailing Measures (China) (Article 22.6 – US)*.

[273] Report Appending Canada's Methodology Paper ("Canada's methodology report"), para. 1.

[274] Canada's methodology report, para. 4.

[275] Canada's methodology report, fn 10 to para. 17.

[276] Canada's methodology report, para. 34.

the Canadian variety as received by the Canadian exporter, net of any duty, and d_{CA} is the US demand for the Canadian variety[277];

- the change in the duty rate ($\Delta duty$) can be expressed as $\frac{\Delta t}{1+t}$, where t is an *ad valorem* duty rate expressed as decimal (i.e. 5% = 0.05) , and the "Δ" notation refers to absolute changes from equilibrium levels[278]; and

the $scaling\ factor \equiv \frac{\eta+1}{(\varepsilon-\eta)(\eta+\sigma)}[\sigma(\eta-\varepsilon)-\eta(\sigma+\varepsilon)\theta_{CA}]$ is a collection of the following parameters[279]:

- the Armington substitution elasticity σ. This parameter describes the degree to which buyers are willing to substitute one source of a product for another source[280];

- the price elasticity of demand ε. This parameter describes the responsiveness of total US demand to the index of prices from all sources[281];

- the price elasticity of supply η. This parameter describes the responsiveness of supply from a given source in response to a change in the price received, resulting, for instance, from a change in the duty rate applied to the source of supply or to competing sources[282]; and

- the Canadian share of the total US market by sector[283], θ_{CA}. This is calculated, for each sector, as the product of the Canadian share of total US imports and the share of total US imports in US domestic consumption (US production minus exports to all destination countries plus imports from all source countries).[284]

7.5. Due to the fact that the level of NI is represented by the formula in equation (1) above, this Decision will refer to Canada's approach as a "formula-based approach".

7.6. The Arbitrator notes Canada's request to determine certain elements in equation (1) above now, and to determine certain elements when Canada applies the formula in the future. In particular, Canada asks the Arbitrator to pre-determine the scaling factors (one for each sector) now. They would thus be set in this Decision and remain static moving forward. Canada proposes that the Arbitrator calculate 20, or, alternatively, 98 such scaling factors in its Decision (corresponding to 20 sectors for which Canada proposes substitution elasticities, or, alternatively, to the 98 chapters in the Harmonized Commodity Description and Coding System (HS)).[285] Canada proposes that the change-in-duty rate and value of imports (*vimp*) elements be determined in the future, i.e. with data taken from the reference period (see section 6.4, above) for *vimp* and with data taken from the reference period and the time of the triggering event (see section 6.2.1, above) for $\Delta duty$.

7.7. Equation (1) is obtained from a partial equilibrium Armington model with two "varieties" of the relevant product: (a) the Canadian variety (with associated demand by US consumers denoted as d_{CA}, and associated supply to the US market denoted as s_{CA}); and (b) the non-Canadian variety (with associated demand by US consumers denoted as d_{US}, and associated supply to the US market

[277] Canada's methodology report, Appendix 1.
[278] Canada's methodology report, para. 34 and Appendix 1 thereto at pp. 18-21.
[279] The scaling factor is found in the equation immediately after equation (A10) in Appendix 1 of Canada's methodology report.
[280] United States' written submission, para. 114.
[281] Canada's methodology report, para. 20. To see this, note that the relationship between total expenditure for a product E and its price index P (a constant elasticity of substitution (CES) aggregate of prices of the product's varieties from all sources) is expressed in Canada's Armington model as $E = \alpha P^{1+\varepsilon}$, where α is a constant (see Canada's methodology report, equation A1 in Appendix 1). The elasticity of E with respect to P is then equal to $1+\varepsilon$.
[282] Canada's methodology report, para. 26; United States' written submission, para. 119.
[283] "Sector", in this context, means each sector for which the scaling factor is computed by Canada.
[284] Canada's methodology report, paras. 28 and 30.
[285] Canada's methodology report, figure 2 (20 scaling factors) and figure 4 (98 scaling factors).

denoted as s_{US}).[286] To obtain the formula contained in equation (1), Canada log-linearizes the model's equations around the equilibrium with no excess demand, i.e. $d_{CA} = s_{CA}$ and $d_{US} = s_{US}$.[287]

7.8. Canada further assumes a single supply elasticity from all sources, both domestic (i.e. US) and foreign (i.e. non-US). Canada also proposed a version of the formula derived assuming that the price elasticity of the supply of imports to the United States from Canada, η_{CA}, is different from the price elasticity of non-Canadian supply (notably, including supply by US domestic producers), η_{US}.[288] The scaling factor in the modified formula is a function of the Armington substitution elasticity, σ, the price elasticity of demand, ε, the Canadian share of the total US market by sector, θ_{CA}, and the two different supply elasticities, η_{CA} and η_{US}.[289] We note that this extension to Canada's model still implies that the composite variety containing US and non-US supply from non-Canadian sources is governed by the single supply elasticity, η_{US}. We will discuss this issue in greater detail in section 8.1.6, below.

7.1.2 Assessment

7.9. According to Canada, its formula-based approach has several strengths. Canada repeatedly stresses the model's simplicity, i.e. the practicability for implementation, and claims that it produces predictable results. According to Canada, the parameters embodied in the pre-determined scaling factors proposed by Canada "are sufficiently robust to determine with reasonable reliability the trade effects for a wide range of products and markets".[290]

7.10. The Arbitrator acknowledges Canada's claim that Canada's formula-based approach offers some advantages for its practical implementation because of its pre-determination of fixed scaling factors. In that context, we note that the formula to calculate the level of NI based on equation (1), as proposed by Canada, is expressly patterned after and identical to the formula proposed by the arbitrator in *US – Washing Machines (Article 22.6 – US)* to calculate the level of NI stemming from the United States' measures found to be "as such" WTO-inconsistent, which would operate with respect to non-large residential washers (LRWs).[291] The arbitrator in *US – Washing Machines (Article 22.6 – US)*, with reference to past arbitrations, selected the formula approach for non-LRWs applying the principles discussed in section 6.1.2, above.[292]

7.11. The arbitrator in *US – Washing Machines (Article 22.6 – US)* ultimately justified the formula-based approach, as opposed to an exact solution, for non-LRWs as the best possible available compromise between its mandate to determine equivalence between the level of NI and the level of suspension of concession on the one hand, and the fact that it is impossible to precisely determine the level of NI caused by future events on the other hand.[293] The arbitrator in *US – Washing Machines (Article 22.6 – US)* acknowledged that the proposed formula was an approximation, which, according to the arbitrator, was nonetheless preferable to an "exact solution" approach (i.e. solving the set of equilibrium conditions of the models exactly, with the help of software) for two reasons: (a) it is more practical to implement; and (b) it reduces the number of decisions to be taken by the complainant, thereby making the level of NI more predictable.[294]

7.12. However, in the *US – Washing Machines (Article 22.6 – US)* arbitration, neither party had proposed to use an Armington partial equilibrium model to measure the level of NI arising from the

[286] See Canada's methodology report, Appendix 1.

[287] The method of log-linearization is applied for a better analytical handling of systems of non-linear equations whose solutions can otherwise only be found numerically (i.e. by trial and error with the use of mathematical software). Thereby, the equations are brought into logarithmic form and then become approximately linear. Technically, log-linearization converts a non-linear equation into an equation that is linear in terms of the log-deviations of the associated variables from their equilibrium values. Such log-linearization has some desirable properties with respect to the analytical solution, such as the fact that small logarithmic deviations from equilibrium values can conveniently be interpreted as percentage changes.

[288] Canada's response to Arbitrator question No. 138, para. 84; Different Supply Elasticity (Exhibit CAN-103).

[289] Canada's response to Arbitrator question No. 138, para. 84; Exhibit CAN-103.

[290] Canada's written submission, para. 97.

[291] See Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, para. 4.58 (equation (6)) and Annex C-2 of the Addendum to this Decision, WT/DS505/ARB/Add.1.

[292] Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, paras. 4.49-4.52.

[293] Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, para. 4.56.

[294] Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, para. 4.63.

"as such" WTO-inconsistent measure, instead they made different proposals or none at all.[295] Thus, the arbitrator had to fashion the Armington partial equilibrium model on its own. In contrast, in this arbitration proceeding, not only Canada (as discussed in this section) but also the United States (as discussed in section 7.2, below) have proposed Armington partial equilibrium models from the time of their earliest submissions and discussed them in detail over the course of this arbitration.

7.13. The United States has raised several objections to Canada's formula approach. During the course of their written submissions and oral arguments at the meeting of the Arbitrator, the parties have developed their arguments surrounding such issues to a significant degree. Based on these arguments and their developments, the Arbitrator identifies five major potential issues with Canada's formula-based approach:

a. whether a log-linearized solution results in an unacceptably high approximation error;

b. whether the formula can produce illogical and extreme results, and in particular estimated levels of NI that exceed the value of imports affected by the OFA-AFA Measure;

c. whether the Canadian formula takes so-called "offsetting effects" adequately into account;

d. whether using pre-determined market-share data as part of the scaling factors can produce unreasonable results; and

e. whether Canada's proposed method of determining the level of NI in two steps, i.e. with two sequential applications of its formula, has been adequately explained.

7.14. At the outset, the Arbitrator notes that these five issues do not exist in complete isolation from each other. Rather, they are often interconnected. With this caveat in mind, in the next sections 7.1.2.1-7.1.2.5, we discuss each of these issues separately for analytic purposes, and then we provide a brief conclusion in section 7.1.3.

7.1.2.1 Approximation error

7.15. Regarding the degree to which Canada's formula-based approach could introduce an unacceptably high approximation error, we consider some brief background is in order before we discuss the parties' arguments on this score. The Arbitrator therefore notes that Canada's formula is based on an Armington trade model, whose underlying equations describe, among others, non-linear supply and demand curves. The solution to such a model can, in principle, be determined in two ways: analytically or numerically. On the one hand, due to the complexity of the set of non-linear equations characterizing the model equilibrium, analytical solutions can only be obtained using some mathematical simplifications, such as the log-linearization around the equilibrium.[296] On the other hand, determining numerical solutions of a set of non-linear equations is computationally intense and typically requires the use of computer software. We note that, over time, employing numerical instead of analytical solutions has become increasingly popular in economic modelling due to increased availability of mathematical software and processing power. The main advantage of numerical solutions is that they do not need any logarithmic transformation and therefore such solutions are exact, as they do not rely on any approximations. Thus, the terms "approximate solution" (for an analytical approach) and "exact solution" (for a numerical approach) are used in the following to distinguish between the two approaches.

[295] Rather, Korea had proposed to use a "perfect substitutes partial equilibrium model", which the arbitrator rejected as inappropriate for various reasons (Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, section 4.3.4). The United States did not propose an approach to measuring the level of NI in this context (Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, para. 4.41).

[296] As already discussed in fn 287 to para. 7.7, above, log-linearization converts a non-linear equation into an equation that is linear in terms of the logarithmic deviations of the associated variables from their equilibrium values. This method is a standard tool in economic modelling. One desirable feature thereof is that small logarithmic changes can be interpreted as percentage changes. The disadvantage of this method is that it introduces an approximation error.

7.16. Canada log-linearizes the Armington model to determine what it considers to be the appropriate formula that can quantify the level of NI. According to Canada, Canada "has provided an 'exact solution' to the linearized model proposed by Canada".[297] Canada also argues that "the United States makes no attempt to quantify the magnitude of the difference between a non-linearized and a linearized model." [298] According to Canada, "it is recognized in academic literature that the differences in model outcomes between a non-linear and log-linearized version of the Armington model for evaluating the effect of tariff changes are very small".[299] Canada also asserts that the United States' approach, which solves an Armington model non-linearly, is incompatible with the general principles that should govern the construction of the model. This is so because, in Canada's view, a non-linear application disallows the use of pre-determined scaling factors, and would also require unnecessarily complex market-share calculations.[300]

7.17. The United States argues that Canada's "simplification comes at the cost of precision by introducing an approximation error".[301] According to the United States, such approximation error necessarily arises in the Canadian approach because the Armington model is inherently non-linear, and the error increases with the size of the percent change in tariff.[302] The United States contends that, for the sake of precision, the Armington model can and should therefore be solved exactly in its non-linear form, using appropriate mathematical software to determine a numerical solution.[303] During the meeting of the Arbitrator, the United States brought forward an attempt to quantify the magnitude of the approximation error that results from Canada's approximative model solution.[304] According to the United States, using data from a past United States' CVD order on imports from Canada (Softwood Lumber), the approximation error introduced by Canada's formula is 23%.[305]

7.18. The Arbitrator considers that the parties' arguments in this context raise two relevant issues. First is the degree to which Canada's model results in approximation error. Second is whether, in order to avoid any such approximation error, using an exact solution as advocated by the United States would be too complex. We address each in turn.

7.19. With respect to the degree to which Canada's model introduces an approximation error, the Arbitrator first notes that Canada has made no attempt to demonstrate that the approximation error resulting from its model in fact is small in any meaningful way (i.e. that an approximation is essentially as accurate as an exact-solution approach), even when specifically asked to do so by the Arbitrator.[306] Moreover, the Arbitrator notes that, when asked to comment on the United States' estimation of a 23% approximation error computed using data from the Softwood Lumber CVD order, Canada only argued that its formula does not suffer from any "approximation bias"[307], in the sense that it does not "consistently generate higher levels of NI than the U.S. model".[308] Overall, in our view, Canada has provided no evidence that its formula is free of approximation error, or that, if present, such approximation error is reasonably small. More specifically, with reference to the 23% approximation error calculated by the United States, Canada has provided no evidence showing that such estimation by the United States is inaccurate. The Arbitrator is aware of the fact that this quantification is based on the United States' preferred parameter values and not Canada's. Using Canada's suggested parameter values as outlined in scenario 1 of Exhibit USA-48[309], the Arbitrator, however, estimates an approximation error which is only slightly smaller, equal to 19%. The Arbitrator considers that such approximation error is significant.

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[297] Canada's response to Arbitrator question No. 38, para. 70.
[298] Canada's written submission, para. 133.
[299] Canada's written submission, para. 133.
[300] Canada's written submission, paras. 130-132.
[301] United States' written submission, para. 88.
[302] United States' written submission, para. 88.
[303] United States' written submission, para. 89.
[304] Illustrative Table: Nullification or Impairment Under Various Models/Scenarios Using Data from Softwood Lumber from Canada (Exhibit USA-48).
[305] The approximation error of 23% estimated by the United States stems from a comparison between a scenario with an approximate solution (Scenario 4 in Exhibit USA-48) and a scenario with an exact solution (Scenario 5 in Exhibit USA-48). These estimates are based on a past US CVD order on imports from Canada (Softwood Lumber) that both parties referenced to several times during this proceeding.
[306] Canada's response to Arbitrator question No. 38, paras. 70-72.
[307] Canada's response to Arbitrator question No. 250, para. 258 (quoting Exhibit USA-48).
[308] Canada's response to Arbitrator question No. 250, para. 258.
[309] Illustrative Table: Nullification or Impairment Under Various Models/Scenarios Using Data from Softwood Lumber from Canada (Exhibit USA-48).

7.20. We also discern reasons to consider that such significant degree of approximation error may not only occur in isolated events. As noted in the preceding paragraph, Canada has not demonstrated that approximation errors arising from its formula are small, notwithstanding an invitation from the Arbitrator to do so. Moreover, it should be recalled that Canada's formula is meant to quantify the export decline that Canada would experience in the event that the United States imposed a WTO-inconsistent CVD rate. A general rule in economic modelling is that approximate solutions of log-linearized models are relatively precise for simulating small changes of input variables or parameters values.[310] Due to the prospective nature of this arbitration, however, the Arbitrator cannot rule out instances in which changes in duty rates are large enough to be associated with significant approximation errors.

7.21. The Arbitrator further notes Canada's argument that avoiding any approximation error by adopting a version of the United States' model (i.e. by adopting an exact solution using computer software) would require overly complex calculations of market shares. In the Arbitrator's view, this criticism is misplaced. The complexity of market-share calculations depends on the number of varieties that are included in an Armington model, rather than on the computation method. In our view, the two-varieties Armington model suggested by Canada could also be solved numerically without adding significant complexity in this respect. We further note that the Arbitrator invited Canada to provide an exact solution to its model, but Canada declined to offer one.[311]

7.22. The Arbitrator also notes that exact model solutions, while more complex than approximate solutions in terms of execution of mathematical calculations, overcome this particular additional complexity via the use of computer software. With the help of software, the practical implementation of exact model solutions is quite straightforward. We note that the United States uses the software STATA to solve its own model, adapting code developed by the arbitrator in *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*.[312] As Canada's exhibits show, Canada is familiar with using STATA, one of the most common software used by economists.[313] In particular with reference to the numerical model solution provided by the United States using STATA, Canada states that Canada "would have the technical expertise to adjust and execute program codes to calculate a level of nullification or impairment".[314]

7.23. Finally, we note that Canada correctly asserts that a numerical solution disallows the use of a pre-determined scaling factor. However, the Arbitrator cannot accept Canada's claim that the absence of pre-determined scaling factors is incompatible with the general principles that we have adopted governing model selection in section 6.1.2, above. Indeed, the Arbitrator considers numerical solutions to a non-linear set of equations that are transparently outlined in appropriate coding language, along with reasonable guidance as to how to select parameter values, fully compatible with relevant principles. As detailed further below, we consider that these tasks can be achieved.[315]

7.24. In sum, we conclude that Canada's approach of solving the non-linear Armington model analytically in its log-linearized form adds approximation errors that may be significant, and could be avoided using software-based numerical solution methods. We consider this a material weakness of the Canadian formula.

7.1.2.2 Extreme results under a log-linearized model

7.25. Another issue raised by the parties, which is related to issues discussed in the preceding section surrounding exact versus approximate model solutions, is whether Canada's formula can produce illogical and extreme results. More specifically, in this context, the Arbitrator uses the term "extreme results" to describe estimated levels of NI that are equal to, or larger than, the value of affected imports. Such a result appears unreasonable on its face, as it would require relevant affected imports not just to decrease as a result of the application of the OFA-AFA Measure but

[310] In economic modelling, changes are typically considered "small" if they are less than 10%. This is because $\log(1+x) \approx x$ for $x \leq 0.1$.

[311] Canada's response to Arbitrator question No. 38, paras. 70-72.

[312] United States' response to Arbitrator question No. 143, para. 41.

[313] For instance, Canada provides STATA codes in Replication Files (Exhibit CAN-74); Replication File (Adjusted) (Exhibit CAN-102); and "FGO Dataset C" (Exhibit CAN-140).

[314] Canada's response to Arbitrator question No. 189, para. 47.

[315] We also note that there is nothing in an exact-solution approach that prevents pre-determining model inputs, such as different sorts of elasticities or market shares.

disappear entirely along with additional decreases in other Canadian imports of the relevant product as well. The Arbitrator notes that such extreme results would not occur if the model were solved numerically in its non-linear form because the underlying imperfect substitutability of varieties across countries of origin inherent to any Armington model (called the Armington assumption) necessarily results in a non-linear notion of demand for a given variety. The Arbitrator, however, indicated to the parties[316] that Canada's model can produce such results if the following condition for Canada's formula outlined in equation (1) above is satisfied:

$$\Delta duty \times |scaling\ factor| \geq 1$$

In other words, extreme results occur if the product of duty rate changes and the absolute value of the scaling factor is larger than or equal to 1.[317]

7.26. The Arbitrator notes that it appears difficult to rule out that instances would occur where the above-described condition is satisfied. This is so because the largest scaling factor (in absolute terms) that Canada proposes is 6.64[318]; and in this case, a tariff change $\Delta duty \geq \frac{1}{6.64} \approx 15\%$ would produce an extreme result. We further note that it appears speculative at this time how large duty rate changes arising from the OFA-AFA Measure would be, but we note that in the case of Resolute in the Supercalendered Paper CVD order, the OFA-AFA specific CVD rate was 17.1%.[319]

7.27. Canada acknowledges that its proposed formula can provide extreme results.[320] In such instances, Canada proposes to set the level of NI equal to the value of affected imports.[321] According to Canada, such extreme results do not call into question the model's capability of providing a reasoned estimate. Rather, due to the linearization of the demand curve, Canada argues that it can be considered a strength of Canada's model to allow imports falling to zero for sufficiently high ("prohibitive") duties. According to Canada, this linear notion of demand would also be more consistent with observed trade patterns.[322]

7.28. The United States objects to Canada's arguments for several reasons. First, the United States asserts that Canada proposes an Armington model whose notion of demand is non-linear, but Canada's approximative way of solving the model effectively linearizes that demand curve. This implicit assumption of a linear demand structure is, according to the United States, theoretically unsound. Second, in the United States' view, a particular graphical illustration offered by Canada in general support of its arguments[323] is misleading as it implies Canada's model would not assume a constant elasticity of demand, whereas Canada assumes constant elasticity of demand parameters. Third, the United States argues that the same illustration implies that Canada's model would assume a linear notion of demand, whereas Canada linearizes the demand curve around the equilibrium by its tangent at the intersection between supply and demand.[324]

7.29. Canada later clarified that its proposed model does not assume a linear demand curve "*per se*" but linearizes a non-linear demand around its equilibrium value.[325] Moreover, Canada explained that Canada's initial reasoning offered on this front describes "not technically a demand curve" but "features of a demand curve".[326] Canada maintains its position that extreme results, i.e. trade falling to zero after a tariff intervention, are likely outcomes, particularly when the OFA-AFA Measure is applied to companies active in commodity-like markets.[327]

[316] Arbitrator question Nos. 191, 196, and 248.
[317] This inequality is obtained by straightforward manipulation of Equation (1), i.e. substituting the level of NI for *vimp*, noting that scaling factors are strictly negative (Canada's methodology report, figures 2 and 3).
[318] Canada's methodology report, Figure 3.
[319] United States written submission, para. 54.
[320] Canada's response to Arbitrator question No. 191, para. 65.
[321] Canada's response to Arbitrator question No. 191, para. 66.
[322] Canada's response to Arbitrator question No. 191, paras. 69-74.
[323] Canada's response to Arbitrator question No. 191, Figure 3.
[324] United States' comments on Canada's response to Arbitrator question No. 191, paras. 47-49.
[325] Canada's response to Arbitrator question No. 248, para. 241.
[326] Canada's response to Arbitrator question No. 248, para. 243.
[327] Canada's response to Arbitrator question No. 248, paras. 244-245.

7.30. In response to Canada's additional explanations, the United States reiterates its position that prohibitive tariffs in Canada's formula are a by-product of its approximative way of solving the model.[328]

7.31. The Arbitrator shares the understanding of both parties that the proposed formula by Canada can provide extreme results, i.e. that trade in affected imports could fall to zero – and actually beyond zero for affected exports – in certain situations. However, the Arbitrator understands that Armington models rule out occurrences of prohibitive duties because of their very nature resting on the Armington assumption that goods are only imperfectly substitutable across countries of origin. Consistent with that assumption, the non-linear demand structure of Armington models allows imports to asymptotically approach zero for large enough duty rate changes, and thus, in our view, adequately addresses the notion that large tariff changes could essentially – if not mathematically – prohibit imports of a given product. The extreme results reached under Canada's formula, therefore, appear not only difficult to square with the Armington assumption upon which both parties' models are based, but unnecessary as a practical matter. For these reasons, we do not consider the extreme results as compensating for some deficiency in the Armington assumption, as Canada appears to imply at times, but rather they point to a fundamental unsoundness in the functioning of the Canadian model. This is especially so given that the Canadian model can reach estimates of the level of NI that are not just equal but *exceed* the value of affected imports.

7.32. The Arbitrator further notes that an Armington model with log-linearized demand and an Armington model with non-linear demand provide approximately the same results only for small changes, i.e. for evaluations sufficiently close to the initial equilibrium. However, a linear notion of demand is *in general* inconsistent with the assumption of a constant substitution elasticity, a key assumption in Canada's proposed Armington model. Given the prospective nature of this arbitration proceeding, the Arbitrator seeks to determine a model that is sufficiently generic to capture movements along the entire demand curve. A linearized notion of demand seems to be inconsistent with this objective.

7.33. In sum, the Arbitrator concludes that the Canadian formula can be expected to produce extreme and unjustifiable results as a result of its demand linearization. We consider this a significant weakness of the Canadian formula.

7.1.2.3 Offsetting effects

7.34. By way of background, the issue of "offsetting effects" in this context arises if WTO-inconsistent CVD rates are assigned to only a subset of Canadian companies, who are exporting a given product, and that are subject to a relevant CVD order to the United States. In this scenario, in Armington trade models, the use of the OFA-AFA Measure, relative to the counterfactual situation, causes a demand shift towards those producers that are unaffected by the measure and whose prices, as charged to the final consumers, are unaffected after the application of the inconsistent measure (assuming, of course, that the affected exporters' CVD rates would decrease in the counterfactual). In other words, when CVD rates rise on certain Canadian imports due to the application of the OFA-AFA Measure, unaffected Canadian exporters would be expected to capture a portion of the business lost by the affected exporters (hence, "offsetting effects"). This is relevant for the sake of this arbitration proceeding because the level of NI is measured with respect to *all* Canadian exports of the relevant product, not just exports by affected Canadian companies.

7.35. Against that background, we recall that Canada initially proposed the following execution of its formula. For a given CVD order, Canada first multiplies the value of affected imports with duty rate changes for each Canadian company subject to an individually calculated CVD rate affected by the OFA-AFA Measure and to a group of companies subject to an all-others rate affected by the OFA-AFA Measure separately and sequentially. The final level of NI would be the sum of those products times the scaling factor.[329]

7.36. The Arbitrator notes that due to the multiplicative form of Canada's formula, it is irrelevant for the computation of the level of NI whether the formula is applied to company-specific values of imports and duty-rate changes separately and sequentially (when multiplied with the scaling factor),

[328] United States' comments on Canada's response to Arbitrator question No. 248, para. 177.
[329] Canada's written submission, paras. 120-122.

or whether the product of value of imports and duty-rate changes is first aggregated and then multiplied with the scaling factor.

7.37. The United States, noting the basic structure of Canada's formula, argues that "the model must simultaneously estimate the effects of moving from a scenario where there are rates determined using the challenged measure to a counterfactual scenario in which all affected rates have been amended".[330] According to the United States, this simultaneous estimation will properly take into account "shifts in imports across all Canadian varieties … as well as between domestic supply and imports from the rest of the world", i.e. offsetting effects.[331] The Canadian formula, according to the United States, cannot take such shifts into account due to its limited number of varieties and thus cannot yield a reasoned estimate of a level of NI.[332]

7.38. Canada responds that the United States' argument that the model "must 'simultaneously' estimate the effects of removing the OFA-AFA measure from all affected groups of exporters" is predicated on a "questionable assumption", i.e. that information on the value of imports from unaffected Canadian exporters will be available in the future.[333] Canada claims that its model can provide consistent and reasonable results with only the value of imports being available from affected Canadian producers, and regardless of whether the model is applied multiple times (e.g. twice: once for an individually investigated company and once for a group of exporters subject to an all-others rate) or applying the formula once, using "complete information for all imports" and "a weighted average change in duty attributed to the OFA-AFA Measure over all subject [i.e. investigated and subject to an all-others rate] imports".[334] Canada claims that the model proposed by the United States would reach the same results in a given instance, however it would be in a much more complicated manner.[335]

7.39. Canada further rejects the United States' argument that "Canada's methodology fails to account for the offsetting changes in demand among different 'varieties' of Canadian imports resulting from the removal of the OFA-AFA measure", and in particular how unaffected Canadian exporters would likely capture some of the market share lost by affected Canadian exporters.[336] According to Canada, such offsetting changes in demand are taken into account by the fact that the Canadian market share θ_{CA} in the scaling factor (see equation (1) in paragraph 7.4, above) is derived "using the market share of all Canadian imports (not just the imports affected by the OFA-AFA measure)".[337] In Canada's view, mechanically, the market share calculated using all Canadian imports is larger than, or at minimum equal to, the market share calculated using only the affected Canadian imports.[338] According to Canada, this implies a smaller scaling factor when the market share is based on all Canadian imports than when the market share is based on just the affected Canadian imports.[339] Canada concludes that this, in turn, "precisely captures the offsetting increase in value of imports associated with Canadian exporters who are not affected by the OFA-AFA measure".[340]

7.40. In support of its arguments in this context, Canada further claims that the level of NI calculated using Canada's methodology would be equal – "[p]rovided the elasticities of demand, supply, and substitution are consistent across the two models" – to the level of NI that would be calculated in a "linearized three-variety model that uses the market share of each variety, where the three varieties are: (1) the U.S. domestic variety; (2) Canadian imports affected by the OFA-AFA measure; and (3) Canadian imports unaffected by the OFA-AFA measure", and the level of

[330] United States' written submission, para. 85.
[331] United States' written submission, para. 86.
[332] United States' written submission, paras. 84-85.
[333] Canada's written submission, para. 118. Canada later accepted that the value of the imports from unaffected Canadian producers would be available through US Customs data but is not verifiable by Canada. See section 8.1.1.2 below. Canada, however, continued to have reservations about the availability of import data from unaffected Canadian producers in the absence of US Customs data. See section 7.8.1.2.5 below.
[334] Canada's written submission, para. 124. See also written submission, paras. 118-123; response to Arbitrator question No. 89(b)-(c), para. 208.
[335] Canada's written submission, para. 125; response to Arbitrator question No. 42, para. 85.
[336] Canada's written submission, para. 126.
[337] Canada's written submission, para. 128; response to Arbitrator question No. 41, para. 80.
[338] Canada's response to Arbitrator question No. 41, para. 78.
[339] Canada's response to Arbitrator question No. 41, para. 79 ("the magnitude of the scaling factor in the model decreases as the market share θ_{CA} increases"). Mathematically, this is indeed the case.
[340] Canada's response to Arbitrator question No. 41, para. 81.

NI can be calculated as "the sum of the changes in the values of imports experienced by the two groups of Canadian exporters".[341]

7.41. The United States responds that, under Canada's approach, the market share in the scaling factor, which uses total Canadian imports, could be larger or smaller than "a subject variety's actual market share".[342] Such errors, in the United States' view, would understate or overstate the size of the US market, and therefore also underestimate or overestimate the level of NI.[343] The United States also contends that, although, in theory, "a model that treats subject and non-subject Canadian exporters as separate varieties would account for some of the offsetting effects of the challenged measure"[344], the three-variety version of Canada's model described by Canada[345] would not be suitable to calculate a level of NI, because it does not include a different supply elasticity of imported and domestically-produced varieties, and because it is linearized.[346]

7.42. The United States also examines Canada's proof of equivalence[347], arguing that the proof cannot demonstrate the capability of Canada's formula to take offsetting effects into account.[348] In particular, the United States argues that: (a) the proof shows only equivalence between two log-linearized Armington models and not between their underlying non-linear Armington models[349]; and (b) Canadian market shares as defined in the proof of equivalence are not going to be used in Canada's proposed formula.[350]

7.43. Canada rejects the United States' criticisms of Canada's proof of equivalence.[351] Canada stresses that it does not claim that its proof would demonstrate equivalence between a non-linear two-varieties and a non-linear three-varieties Armington model. Rather, this proof would hold within the class of log-linearized Armington models.[352] Canada reiterates that the relevant market share parameter is "the share of imports from Canada in the U.S. market for the product".[353] Hence, according to Canada, the market share parameter is irrespective of the market share of affected imports.

7.44. The Arbitrator recalls that the disagreement between the parties in this context is whether the Canadian formula is able to take offsetting effects into account. In addressing this disagreement, we consider that a critical observation is that the scaling factor in Canada's formula, an element of which is the market-share parameter, remains constant whatever the share of affected Canadian imports is *vis-à-vis* total (affected and unaffected) Canadian imports. This appears a shortcoming of the Canadian formula in this context, illustrated by the following example. Consider a Scenario 1 in which all Canadian exporters of a given product were subject to the same reference period duty rates, the same factual and WTO-inconsistent duty rates moving forward from the triggering event, and would all exhibit the same change-in-duty rate. In that case, no relevant offsetting effects can be expected. Consider a Scenario 2 in which all Canadian exporters were subject to the same reference period CVD rates as in Scenario 1, but only some of them are affected by the OFA-AFA Measure, and further assume that the affected companies would experience the same change-in-duty rate as was the case in Scenario 1. In this case, offsetting effects can be expected to occur. Notice, however, that the only value that would change when Canada runs its model between the two scenarios described is the *vimp*; the scaling factor and change of duty rate stay

[341] Canada's response to Arbitrator question No. 41, para. 83. See also Canada's response to Arbitrator question No. 141, para. 92; Proof of Equivalence (Exhibit CAN-105). The proof to this claim provided by Canada to the Arbitrator can be summarized as follows: first, Canada adds the set of equations from which its proposed formula is derived one additional supply and demand function. Thereby, the model captures three varieties. Second, Canada analytically solves this model in its log-linearized version. Third, it shows after some simplifications that the same formula for the calculation of the level of NI can be derived in this setting as in the two-variety case.

[342] United States' response to Arbitrator question No. 47, para. 137.

[343] United States' response to Arbitrator question No. 47, paras. 137-138.

[344] United States' response to Arbitrator question No. 143, para. 39.

[345] Canada's response to Arbitrator question No. 41, para. 83.

[346] United States' response to Arbitrator question No. 143, paras. 39-41.

[347] See Exhibit CAN-105.

[348] United States' response to Arbitrator question No. 199, paras. 48-60.

[349] United States' response to Arbitrator question No. 199, para. 50.

[350] United States' response to Arbitrator question No. 199, para. 52.

[351] Canada's comments to United States' response to Arbitrator question No. 199, paras. 30-36.

[352] Canada's comments to United States' response to Arbitrator question No. 199, para. 31.

[353] Canada's comments to United States' response to Arbitrator question No. 199, para. 33 (quoting Canada's methodology report, para. 28).

constant. We see no convincing rationale as to why a decrease in the affected *vimp* alone as between the two scenarios somehow captures demand shifts occurring as between affected and unaffected exporters in the second scenario, as the *vimp* is sensitive to nothing more than the simple observed value of imports from affected producers during a reference period. Further, because the scaling factor is static, it cannot react differently to such different situations. This appears a compelling illustration to us that Canada's proposed formula does not seem to be able to adequately account for offsetting effects. Moreover, the fact that the level of NI is determined regardless of whether the formula is applied separately and sequentially for affected imports or all at once for all affected imports further suggests to us that Canada's model treats differential situations as one and the same.

7.45. Despite extensive discussions during the proceeding, and despite having provided both parties several opportunities to clarify their position on this issue, in our view, Canada failed to reasonably dispel doubts regarding its model's capability to take offsetting effects into account. In particular, Canada's main argument rests on a so-called "proof of equivalence"[354] that is meant to demonstrate that a three-varieties model separating between affected and unaffected Canadian imports does not provide different results than the two-varieties Armington model proposed by Canada with no such separation. In the Arbitrator's view, a separation of total Canadian imports based on tariff treatment resulting from the application of the OFA-AFA Measure is necessary to account for offsetting effects. However, the Arbitrator notes that, in this formal proof, Canada establishes "equivalence" only between the original log-linearized model and a log-linearized model with a separation between affected and unaffected Canadian imports, rather than a general non-linear Armington model (see sections 7.1.2.1 and 7.1.2.2, above, describing inherent shortcomings of log-linearized Armington models). The three-varieties version of Canada's model also results in a pre-determined scaling factor that is unable to treat differential situations as outlined in paragraph 7.44, above, differently. For these reasons, we consider Canada's overall argument on this score weak.

7.46. The arguments brought forward by the United States to the effect that Canada's formula does not take offsetting effects adequately into account are consistent and appear convincing. We consider that the method of log-linearization of the model around its equilibrium essentially rules out taking offsetting effects into account. Provided such a model solution, market shares are fixed by construction to their equilibrium values and cannot adjust endogenously.

7.47. In light of the foregoing, the Arbitrator concludes that Canada's formula is not capable of adequately taking offsetting effects adequately into account.

7.1.2.4 Pre-determination of the market-share parameter

7.48. As part of the scaling factor in Canada's model, a parameter measuring the market share of Canadian exports in the US sales denoted as θ_{ca} is factored in. The Canadian market share is represented as a decimal, for example, $\theta_{ca} = 0.3$ means that all Canadian exporters of a given product hold a market share of 30% in total US sales. As discussed in the preceding section, this share is constant irrespective of whether or not exporters are affected by the OFA-AFA Measure. We also note that, upon inspection of the scaling factor in paragraph 7.4, above, the relationship between θ_{ca} and the scaling factor is linear.

7.49. By way of background, the Arbitrator notes that, in Canada's model, the larger Canada's market share θ_{ca}, the smaller the estimated level on NI. Hence, overstating θ_{ca} leads to an underestimation of the level of NI and understating θ_{ca} leads to an overestimation of the level of NI. This is because the scaling factor (which is negative[355]) is increasing in θ_{ca} (i.e. the larger θ_{ca} the

[354] Exhibit CAN-105.
[355] See figures 2 and 3 in Canada's methodology report.

less negative the scaling factor becomes)[356], and the level of NI decreases the closer the scaling factor is to zero.[357]

7.50. According to Canada, the market-share parameter θ_{ca} has a "less direct impact on the calculated level of [NI]".[358] Canada later clarifies that the estimated level of NI does not react linearly, i.e. directly proportionately, to changes in θ_{ca} as it would be the case for changes of the value of affected imports.[359] To calculate the market shares parameters, Canada proposes to use market-share information from the United States Bureau of Economic Analysis (BEA) input-output (I-O) tables for 2018.[360] Using these tables, import shares in US consumption can be calculated and, in conjunction with US Census import data, shares of *Canadian* imports in US consumption can be derived.[361] These data cover 71 economic sectors, of which only a subset represents goods sectors.[362]

7.51. The United States objects to Canada's approach on the following grounds: (a) market-share parameters are "based on broad categories instead of the product itself"; (b) market-share parameters are not calculated taking the share of *affected* products into account; and (c) for the sake of consistency and accuracy, market-share parameters should be calculated based on the same year for which import data are sourced, i.e. from the reference period.[363]

7.52. The Arbitrator notes that, with respect to argument (a) made by the United States described immediately above, Canada contends that the "use of parameters based on broader product grouping is reasonable under the circumstances of this case", and is a natural consequence of using pre-determined scaling factors.[364] This is so, in Canada's view, because some level of aggregation and generality is needed in constructing scaling factors, as the products to which the formula will be applied are presently unknown.[365] More specifically, and relying on the statements made by the arbitrator in *US – Washing Machines (Article 22.6 – US)*[366], Canada claims that "no uniform third-party sources can be prescribed that could provide parameters at the same level of product categories for yet unidentified products."[367] This point (that some limitations will necessarily occur due to data availability), however, is discussed in greater detail in sections 7.2.2.2 and 8.1.1, below. We therefore do not address this general point further here.

7.53. With respect to argument (b) made by the United States described in paragraph 7.51, above, we note that this argument is closely related to the issue of offsetting effects, analysed in section 7.1.2.3, above. We consider therefore that the Arbitrator has adequately addressed this argument, and we therefore do not further address it here.

7.54. Finally, with respect to argument (c) made by the United States described in paragraph 7.51, above, the Arbitrator asked Canada whether it would be appropriate to source market shares from more recent BEA I-O tables.[368] In response, Canada objects to "adjusting sectoral market shares with updated information after this proceeding", because, according to Canada, "it would entail

[356] The first derivative of the scaling factor in Canada's formula with respect to θ_{ca} is $\frac{\partial\, SCF}{\partial\, \theta_{ca}} = \frac{\eta(\eta+1)(\sigma+\varepsilon)}{(\eta-\varepsilon)(\eta+\sigma)}$. Note that η and σ are strictly positive and ε is strictly negative. The entire expression is therefore positive as long as $\sigma > |\varepsilon|$ and $\eta > |\varepsilon|$, which is always the case in the parameter space that Canada suggests (see Canada's methodology report, Figure 2). This shows that larger values of θ_{ca} make the scaling factor less negative, i.e. closer to zero.

[357] Since the level of NI is equal to $value\ of\ imports \times \Delta duty \times scaling\ factor$, as the scaling factor becomes less negative, so does the level of NI.

[358] Canada's written submission, para. 157.

[359] Canada's response to Arbitrator question No. 71, para. 148.

[360] Source Data 1 (Exhibit CAN-7).

[361] Canada's methodology paper, Appendix 2, para. 5.

[362] For instance, there is non-tradeable services sectors included as well as government activities. By its very nature, trade disputes can only address tradeable sectors.

[363] United States' written submission, paras. 126-128.

[364] Canada's written submission, para. 136.

[365] Canada's written submission, para. 139.

[366] "A procedure applicable to all products requires a degree of aggregation". (Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, para. 4.80).

[367] Canada's written submission, para. 138.

[368] Arbitrator question No. 72.

changing or re-opening the calculation of the scaling factors". Canada stresses that otherwise the formula would not be practical to implement and would not result in predictable outcomes.[369]

7.55. We agree with Canada that a pre-determination of market shares is indeed a natural consequence of establishing pre-determined scaling factors. However, the Arbitrator notes that it does not consider that this issue is a material driver of model selection. Indeed, both parties' proposed models could use model parameters using data available now or in the future; what is necessary is only that model parameters be determined. Moreover, we do not consider it necessary, either theoretically or practically, to establish pre-determined scaling factors. The Arbitrator sees no reason to believe that Armington models that are solved without a constant and pre-determined scaling factor are less practical to implement, or result in less predictable outcomes, than Canada's proposed solution featuring a constant and pre-determined scaling factor. Moreover, in section 7.3, below, the Arbitrator proposes an Armington model that, being solved exactly, does not feature a scaling factor, but, in our view, is both practical to implement and results in predictable outcomes.

7.56. In addition, the Arbitrator notes that, particularly concerning data with respect to market shares, it is plain to us that taking such data from time periods closer to the relevant triggering event would more accurately reflect the market situation at the time of the triggering event than would pre-determined market shares. Hence, such future data would be leading to a more accurate estimation of the level of NI. In situations when such market shares have changed significantly over time, that effect on the level of NI would be, in our view, material. Using pre-determined market shares therefore inherently limits the accuracy of the model and represents, in our view, a weakness of the Canadian formula approach.[370]

7.1.2.5 Implementation in two steps

7.57. Canada repeatedly argues that Canada's proposed methodology is simpler and more practical to implement compared to the United States' proposed approach. In terms of the methodology's practical implementation, however, an essential issue regarding how to apply the Canadian formula could not be entirely resolved during the entire proceeding.

7.58. According to Canada, the formula in equation (1) would have to be run twice if the WTO-consistent counterfactual CVD rate differs from the reference period duty rate. Conversely, Canada claims that a second model run would not be required in case the WTO-consistent counterfactual CVD rate is equal to the reference period duty rate.[371] The Arbitrator concurs with Canada that a second run of Canada's formula would not be required if $t_{ref} = t_{con}$, where t_{ref} is the reference period duty rate and t_{con} is the WTO-consistent counterfactual CVD rate. The following discussion will therefore only pertain to cases in which the reference period and the WTO-consistent counterfactual duty rates differ, in which case Canada suggests a two-step implementation of its proposed formula.

7.59. Canada claims that, in case the counterfactual CVD rate differs from the reference period duty rate, a two-step formula run would account for the trade decline Canada experiences "attributable to the increase in the duty from its counterfactual WTO-consistent level to its factual WTO-inconsistent level".[372] The difference between the two model runs would finally determine the level of NI. The Arbitrator sought to clarify whether the use of two formula runs under Canada's methodology would mathematically simplify to the following term[373]:

$$NI = vimp * SCF * \frac{(t_{inc} - t_{con})}{1 + t_{ref}},$$

where t_{inc} is the WTO-inconsistent factual rate.

[369] Canada's response to Arbitrator question No. 72, para. 153.
[370] The Arbitrator that the above considerations do not necessarily apply to the same extent to all other model inputs. We consider it reasonable – as do both parties – that other parameters, such as certain elasticities, can be pre-determined.
[371] Canada's response to Arbitrator question No. 190, paras. 55-56.
[372] Canada's response to Arbitrator question No. 79, fn 199 to para. 170.
[373] Arbitrator question No. 127.

7.60. Canada responds that this expression would only be applicable to a subset of potential cases depending on the relative magnitude of the three individual tariff rates, and in particular to cases in which $t_{con} < t_{ref} < t_{inc}$.[374] Canada further argues that, in other cases ($t_{ref} < t_{con} < t_{inc}$, or $t_{con} < t_{inc} < t_{ref}$) *vimp* in the second model run would have to be adjusted such that it corresponds to the outcome of the first model run.[375]

7.61. Asked by the Arbitrator to further substantiate the reason, the consequences, and the exact practical execution of such a *vimp* adjustment, Canada argues that, in a standard case described by tariff order $t_{ref} < t_{con} < t_{inc}$, calculations featuring a *vimp* adjustment provide lower estimated levels of NI than a calculation without such an adjustment. According to Canada, this would be more consistent with the log-linearized approach taken by Canada.[376] Canada, however, does not specify how exactly such *vimp* adjustment would be implemented.

7.62. The United States objects Canada's proposed *vimp* adjustment, arguing that it is not consistent across estimated scenarios. According to the United States, the different formulae proposed by Canada represent different counterfactual scenarios.[377] By contrast, the United States affirms that "the counterfactual evaluated by the model should be uniform across scenarios to avoid calculating nullification or impairment based on different definitions of what would constitute compliance".[378] The United States concludes that "Canada's multi-formula approach based on the relative magnitude of the duty rates cannot generate a reasoned estimate of nullification or impairment".[379]

7.63. The Arbitrator understands that two runs of Canada's formula are required in order to isolate the negative trade effect that is associated with the inconsistent CVD rate, relative to the counterfactual WTO-consistent CVD rate, except, as argued above, in the case of $t_{ref} = t_{con}$, in which a single model run would suffice. However, and in particular, we consider that Canada has not provided a clear theoretical explanation as to why different formulae would have to be applied depending on different relative magnitudes of the three duty rates and how a *vimp* adjustment in some cases would be implemented. We note that Canada claims that the United States' methodology would "essentially work the same way".[380] While true on a basic theoretical ground, we note that the Arbitrator has a clear understanding that the United States' proposed model operates consistently across different relative magnitudes of the three duty rates. Conversely, the Arbitrator lacks such clear understanding in Canada's formula, even after having provided Canada several opportunities to clarify this point. Thus, in our minds, Canada has left an ambiguity surrounding this methodological aspect of the Canadian formula.

7.1.3 Conclusion

7.64. In sum, the Canadian formula approach displays key weaknesses. Specifically, and as discussed in the preceding sections, the Canadian formula approach introduces potentially a significant approximation error, can produce illogical and extreme results, uses pre-determined market shares which can inhibit the accuracy of the model, and does not adequately take into

[374] Canada's response to Arbitrator question No. 127, para. 64.
[375] Canada's response to Arbitrator question No. 127, paras. 66-70.
[376] Canada's response to Arbitrator question No. 190, para. 63; "Calculation in Response to Question No. 190" (Exhibit CAN-132).
[377] The United States notes that in Canada's approach "one of three different formulas […] may be applied, depending on the relative magnitude of duty rates." (United States' response to Arbitrator question No. 197, para. 28). Only the formula proposed in Arbitrator question No. 127, i.e. the formula that, according to Canada, applies if $t_{con} < t_{ref} < t_{inc}$, is, in the view of the United States, one in which "the counterfactual [is] correctly represented" (United States' response to Arbitrator question No. 197, para. 29). Conversely, the United States argues that the formula proposed by Canada if $t_{ref} < t_{con} < t_{inc}$ "erroneously [focuses] on the change from the counterfactual rate to the factual rate" (United States' response to Arbitrator question No. 197, para. 30), and that the formula proposed by Canada if $t_{con} < t_{inc} < t_{ref}$, while appropriately focusing on "the change from the factual to the counterfactual rate", incorrectly implies that "Canada will be seeking a modification from the factual to counterfactual duty rate in a future period after the market has already adjusted to the actual rates" (United States' response to Arbitrator question No. 197, para. 31).
[378] United States' response to Arbitrator question No. 197, para. 26.
[379] United States' comments on Canada's response to Arbitrator question No. 190, para. 39.
[380] Canada's response to Arbitrator question No. 190, para. 54. See also Canada's comments on the United States' response to Arbitrator question No. 197, paras. 21-22. The United States, however, disagrees with this claim (United States' comment on Canada's response to Arbitrator question No. 190, para. 36).

account offsetting effects. Also, certain methodological aspects surrounding the execution of the formula approach have not been clarified to a sufficient extent. The Arbitrator concludes that these five issues, taken together, call into question the ability of Canada's proposed model to provide reasoned estimates of the level of NI. This being the case, we turn to examine the United States' proposed model.

7.2 United States' proposed model

7.2.1 Overview

7.65. The United States argues, in line with Canada's statements on the same subject, that "[t]he appropriate methodology for determining the level of nullification or impairment is to evaluate the effects of duty rate changes in an Armington partial equilibrium model".[381] The United States, however, argues that the selected approach must allow for a more tailored case-by-case determination of the level of NI[382], rather than applying a "singular analytical framework to set a hypothetical future nullification or impairment".[383] The United States' originally proposed methodology is an Armington partial equilibrium model with the following main differences as compared to Canada's methodology[384]:

a. it includes at least five varieties: (i) domestic shipments; (ii) US imports from the rest of the world (RoW); and at least three Canadian varieties – (iii) one variety for each individually investigated and affected company; (iv) one variety for imports subject to an affected all-others rate; and (v) one variety for imports from unaffected Canadian companies[385];

b. it is solved simultaneously in its non-linear form (i.e. without log-linearizing the model's equations, see section 7.1.2.1, above) "without approximation error" using "appropriate mathematical software"[386]; and

c. does not use pre-determined scaling factors, but instead uses parameter values (i.e. elasticities and market shares) with respect to a given product to be determined in the future, essentially at the time of the triggering event (although certain elasticities might be pre-determined).[387]

7.66. As noted by the United States, "[i]n its most basic form, an Armington partial equilibrium model requires three types of information: (1) United States' consumption (the value of imports and domestic shipments), (2) duty rates, and (3) parameter values (elasticity estimates and market share). As such, similar information is required to calculate nullification or impairment following either party's approach".[388]

7.67. The five varieties approach proposed by the United States has comparably steep data requirements with respect to the determination of the following five market shares:

i. the share of total US expenditure covered by domestic shipments;

ii. the share of total US expenditure covered by Canadian imports from individually investigated and affected firms;

iii. the share of total US expenditure covered by Canadian imports from firms subject to an affected all-others rate;

[381] United States' written submission, para. 71.
[382] United States' written submission, title of Section IV.C.
[383] United States' written submission, para. 66.
[384] The underlying equations of the Armington model proposed by the United States are outlined in the United States' written submission, Appendix 1.
[385] United States' written submission, para. 76.
[386] United States' written submission, para. 89.
[387] United States' written submission, paras. 67 and 101-106.
[388] United States' written submission, para. 98.

iv. the share of total US expenditure covered by Canadian imports from firms not subject to an affected CVD rate; and

v. the share of total US expenditure covered by imports from the RoW.

7.68. The relevant market shares are the ratios between the respective shipments or imports and total market size. The latter is the sum of all product-specific shipments or imports, ensuring that all market shares sum up 100%. The United States proposes that market shares and the size of the US market be calculated in the future, using future data. The United States proposes a tiered approach that, according to the United States, would permit Canada to derive market share and market size parameters under all circumstances (see discussion in section 8.1.1, below).[389]

7.69. Initially, the United States provided an input file as well as a computer code that can readily be used to solve the five varieties model by inserting parameter values and duty rate changes, with no need for Canada to conduct further calculations.[390] In addition, in response to a question by the Arbitrator, the United States provided an input file as well as a computer code that are flexible enough to accommodate *n* varieties, i.e. that can be run with a yet unknown number of individually investigated and affected firms.[391] The computer codes are based on STATA, one of the most common software used by economists with which Canada has proven to be familiar.[392]

7.2.2 Assessment

7.70. The Arbitrator notes that the model proposed by the United States is identical to the model applied by the arbitrator in *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)* for three out of 25 anti-dumping (AD) orders. In the part of the *US – Washing Machines (Article 22.6 – US)* arbitration addressing LRWs, specifically, the Arbitrator adopted an Armington model solved in its non-linear form as well. In another recent arbitration, *US – Countervailing Measures (China) (Article 22.6 – US)*, the arbitrator adopted an identical model to the one proposed by the United States in this arbitration. We note, however, that in each of these three instances the models were applied to determine a singular numerical level of NI *ex post*. This retrospective approach allowed the arbitrators to verify existence, reliability, and plausibility of all input data. We face a different situation in that we must assess the viability of proposed models to be applied in the future. This entails additional challenges.

7.71. According to the United States, its proposed model has two main strengths. First, according to the United States, there exists an inherent need to accommodate at least five varieties "because the total level of nullification or impairment is based on the change in total imports from Canada, not just the change in total imports from affected companies" (i.e. the US model takes into account offsetting effects (see section 7.1.2.3, above)).[393] Second, the United States asserts that the numerical solution of the Armington model in its non-linear form "will avoid introducing approximation error".[394]

7.72. The Arbitrator recognizes these strengths, which have not been challenged by Canada during the proceeding. We do note, however, with respect to the separation of Canadian varieties based on their tariff treatment, Canada's view that such separation is "arbitrary" and "not supported by economic principles".[395] We disagree. Rather, such a separation is, according to the Arbitrator, necessary to adequately account for offsetting effects as described in section 7.1.2.3, above.[396] Further, the separation between US domestic shipments and RoW imports as two independent unaffected varieties takes into account different supply reactions by domestic and foreign producers. Finally, although it may be the case that the Armington model in its original version does not further separate varieties of goods based on tariff treatment (so long as parameter values are assigned to

[389] United States' response to Arbitrator question No. 69, para. 190, and No. 145, para. 47.
[390] U.S. Solution and Computer Code for the Armington Partial Equilibrium Model (Exhibit USA-1); Sample U.S. Model Data File (Exhibit USA-11).
[391] U.S. Solution and Computer Code for N-variety model (Exhibit USA-51); Data inputs for N-variety model (Exhibit USA-52); and the United States' response to Arbitrator question No. 246, para. 230.
[392] See Canada's response to Arbitrator question No. 189, para. 47. Also, Canada provides STATA codes in Exhibit CAN-74; Exhibit CAN-102; and Exhibit CAN-140.
[393] United States' written submission para. 76.
[394] United States' written submission para. 77.
[395] Canada's written submission para. 113.
[396] United States' written submission para. 74.

such varieties in reasonable ways), we discern no way in which such separation is somehow contrary to the key assumption or theory underlying Armington models, i.e. that different varieties of one and the same good constitute imperfect substitutes. It is, rather, simply an additional feature used in this specific context, which is further based on reasonable assumptions to which Canada does not object in principle, but only considers as of "secondary significance in calculating the level of nullification or impairment".[397]

7.73. During the course of this proceeding, Canada has raised other objections to the methodology proposed by the United States beyond the objection to the separation of Canadian varieties based on their tariff treatment discussed in the paragraph immediately above. These objections do not generally concern the ability of the US model to result in reasoned estimates for the determination of the level of NI *per se*. Rather, these objections focus on the practicability to implement the model and the associated future burden for Canada, including related to future availability of necessary input data. Canada identifies the following main alleged issues with the US model, as proposed by the United States: (a) the number of varieties is *ex ante* unknown, implying an additional burden for Canada when executing the model; (b) the proposal to calculate granular market shares that will rely on data that does not yet exist; (c) the model may, particularly in the absence of pre-determined scaling factors, not result in predictable outcomes; and (d) the US model requires as a discrete input the value of imports of unaffected exporters, which could be difficult to obtain. The Arbitrator assesses each in turn.

7.2.2.1 Unknown number of varieties

7.74. The United States suggests an Armington model that accommodates at least five varieties. The exact number that will be necessary is case-specific and *ex ante* unknown, however, "because there may be multiple varieties of the second category [individually investigated companies]".[398] The United States further argues that:

> It is essential to distinguish among the subject imports from Canada because in a model with imperfect substitution, when duty rates on Canadian imports are reduced, the market price of the corresponding varieties falls and the supply of each variety increases. […] Importantly, the increase in demand for each individual subject Canadian variety will depend not only on the magnitude of the reduction in their own duty rate, but also on the magnitude of the reduction relative to other subject Canadian varieties. Similarly, if the duty rates on Canadian imports increase, the impact of the rate increase would affect all varieties.[399]

7.75. Therefore, the United States considers it "more appropriate to use an Armington-based partial equilibrium model that has the capacity to capture multiple varieties of the subject imports from Canada. Multiple varieties of subject Canadian imports are necessary because the challenged measure is a company-specific determination".[400]

7.76. Canada objects to the United States' approach, asserting that "accounting for the unknown 'varieties' of Canadian imports, the U.S. model requires significantly more sources of currently unknown and unverifiable inputs". Moreover, according to Canada, "[t]he number of currently undefined inputs increases the potential of future dispute". Canada further argues that "a currently knowable effect, similar to Canada's scaling factor" of the United States' approach is not apparent. All in all, Canada considers the United States' model "impractical to implement".[401]

7.77. Canada indicates that it would have "the technical expertise to adjust and execute program codes to calculate a level of nullification or impairment". However, Canada also indicates that the practical implementation depends "on the number of varieties Canada will need to account for in the final model, and whether Canada has access to the necessary information to calibrate the model".[402]

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[397] Canada's written submission para. 152.
[398] United States' written submission para. 73.
[399] United States' written submission para. 74.
[400] United States' written submission para. 75.
[401] Canada's response to Arbitrator question No. 38, para. 72 (referring to Canada's written submission, paras. 104-107).
[402] Canada's response to Arbitrator question No. 189, para. 47.

Therefore, Canada would have to calculate market shares and duty rate changes for every single individually investigated and affected company.

7.78. The latter point raised by Canada carries some weight. The Arbitrator refers to *Softwood Lumber*, a previous US CVD order on Canadian exporters that both parties referred to several times during the proceeding, in particular in discussions surrounding Exhibit USA-48 (see section 7.1.2.1, above). The Arbitrator notes that the number of varieties in fact can become large: as shown in Exhibit CAN-127[403], in *Softwood Lumber*, already in the original investigation five Canadian companies were individually investigated. If, by chance, in another investigation the USDOC individually investigated five companies and all are affected by the OFA-AFA Measure, then implementing the model proposed by the United States to compute the level of NI stemming from the application of the OFA-AFA Measure would, therefore, require a number of varieties equal to nine.

7.79. The Arbitrator also notes Canada's former point that Canada possesses the relevant technical expertise to adjust STATA codes and input files. Moreover, the Arbitrator recognizes the United States' provision of a STATA code and input files capable to accommodate a potentially large number of varieties. In our view, the main issue in this context is not the potential problems that Canada might face when collecting data to compute market shares of potentially several varieties (an issue that we discuss in section 8.1.1, below). The main issue, in our view, is the *ex ante* uncertainty regarding exactly how many varieties to consider in each application of the model following a triggering event. If Canada had to employ the US model to compute the level of NI, under the United States' approach, as a preliminary step, Canada would need to make a determination of the number of varieties to be included and make further subsequent adjustments to the STATA code. Although we understand that Canada could perform such steps, we consider that they would still impose additional burdens on Canada.

7.80. Further below, however, we note that we believe there is a way to alleviate these concerns in the framework of an exactly solved Armington model that includes four varieties: US domestic shipments, affected Canadian imports, unaffected Canadian imports, and RoW imports. This four-varieties version of the United States' model is discussed in section 7.3, below.

7.2.2.2 Determination of market shares and market size in the future

7.81. With respect to the determination of product-level market shares and the size of the US market, Canada repeatedly asserts that such determination should be done based on currently available data (see discussion of the determination of θ_{CA} in Canada's scaling factor in section 7.1.2.4 above), and not on future data. The Arbitrator earlier concluded that it is a reasonable assumption that relevant market shares are likely to change over time[404], and should not, therefore, be determined *ex ante*. To accurately reflect market conditions going forward from the triggering event, market share and market size information should be accessed from a reference period which will occur in the future. We also note that in section 8.1.1, below, we detail procedures Canada can follow to determine relevant market shares in the future in what we regard to be a practical manner.

7.2.2.3 Unpredictability of model outcomes

7.82. Canada argues on various occasions that the model proposed by the United States would not result in predictable outcomes. This claim refers to, amongst other things, the following issues already discussed above: the non-linear solution of the model (see section 7.1.2.1, above), the absence of a pre-determined scaling factor (see section 7.1.2.4, above), and the yet unknown market share and market size parameters to be incorporated into the US model (see section 7.2.2.2, above).[405]

7.83. The United States addresses Canada's claim of the absence of predictability only insofar as the pre-determination of data sources is affected. According to the United States, no parameter value or other model input value except for the import supply elasticity should be pre-determined. Instead, in the United States' view, the Arbitrator should provide instructions on data sources from

[403] "Softwood Lumber from Canada - Countervailing Duty Rates Potentially in Place by The End of the Third Administrative Review" (Exhibit CAN-127).

[404] See section 7.1.2.4, above.

[405] Canada's response to Arbitrator question No. 42, para. 86.

which the respective values should be taken in the future. This alone, according to the United States, provides predictability.[406]

7.84. The Arbitrator views predictability as reasonably satisfied if: (a) the structural form of the model is sufficiently defined; (b) parameter values that are unlikely to change over time are pre-determined (e.g. elasticities); and (c) the sources of data inputs that are likely to change over time, or are subject to future decisions, are sufficiently precisely specified such that they can be accessed under any event. In our view, the model provided by the United States has a well-defined structural form, can accommodate relevant pre-determined parameters, and can accommodate future inputs. We therefore conclude that the outcomes of such model are reasonably predictable.

7.2.2.4 Determination of imports from unaffected exporters

7.85. Canada stresses that, under the US model, data on import values from unaffected Canadian exporters would have to be collected, an input not needed under Canada's methodology. Canada recognizes that it will usually be able to identify shipments of unaffected exporters based on data provided by US Customs.[407] However, Canada questions whether it could verify such data, or obtain unaffected exporters' data in the absence of US Customs data, since unaffected Canadian exporters may have no incentive to cooperate and share their US sales data voluntarily with the Canadian government.[408] The Arbitrator recognizes the relevance of this issue, which is addressed in section 8.1.1.2.1.5, below. As explained in that section, while Canada's viewpoint that there may be certain issues with obtaining unaffected companies' values of imports, these issues carry limited weight because, in our view, Canada has reasonable means available to obtain and/or verify values of imports from unaffected exporters.[409] We therefore do not consider this issue to materially weigh on the issue of model selection.

7.2.3 Conclusion

7.86. In sum, the Arbitrator considers that the model proposed by the United States offers significant strengths *vis-à-vis* the Canadian formula. In particular, its exact solution avoids approximation errors and extreme results, and its separation of Canadian imports based on tariff treatment allows taking offsetting effects adequately into account. The key weaknesses identified in Canada's model are thus absent from the United States' proposed model. With respect to potential shortcomings of the United States' model that Canada has alleged, the Arbitrator notes that the issue of using an *ex ante* unknown number of varieties has certain weight, but, as discussed in the following section, can be overcome with a simple adjustment to the US model of using a fixed four-variety model. The Arbitrator further notes that other objections raised by Canada (i.e. that determining market shares in the future is unreasonable, that the model does not provide predictable results, and it is unreasonable to require the use of values of imports from unaffected exporters) are unconvincing.

7.87. The Arbitrator thus concludes that the US model is superior to Canada's formula because it relies on the best information available with which to estimate level of NI. In particular, the calculation of market shares using future data that is separated into multiple varieties based on tariff treatment, and then manipulated with computer software in a sophisticated manner, carries distinct advantages. Moreover, in our opinion, future market shares can be calculated in a reasonably practical manner. The Arbitrator therefore selects the United States' model, with one minor modification, i.e. using a version of the US model in which the number of varieties is *ex ante* known, and equal to four. We describe this modified US model in the following section.

7.3 Selected methodology: four-varieties Armington model

7.88. In the section immediately above, the Arbitrator decided to adopt a version of the US model with which Canada will estimate levels of NI after a triggering event. The Arbitrator considers that a reasonable modification to the US model would be to use a version that relies not on an unknown

[406] United States' written submission, paras. 67 and 101-106.
[407] See section 8.1.1.2.1, below.
[408] Canada's response to Arbitrator question No. 87, paras. 202-203.
[409] Related to the issue of determining the value of unaffected imports is the issue of whether Canada is able to collect relevant information on relevant duty rates applying to unaffected Canadian companies. The Arbitrator is aware of this concern, which is addressed in greater detail in section 8.1.2, below.

ex ante number of varieties, but on a fixed number of varieties totalling four. The Arbitrator had asked both parties to provide comments on a version of the Armington model proposed by the United States featuring exactly four varieties, i.e. US domestic shipments, affected Canadian imports, unaffected Canadian imports, and RoW imports. Thereby, imports from all affected companies would be grouped together as a single variety, without regard to other aspects of the CVDs assigned to them. The same would go for unaffected companies.

7.89. In response to this Arbitrator proposal, the United States continued to advocate its approach with an *ex ante* unknown number of varieties and contends that the Arbitrator's suggestion is a "simplification [that] would induce some loss of precision", a loss which "would be larger to the extent that duty rates varied across affected companies".[410] Notwithstanding this, the United States provides practical suggestions on the implementation of such a four-varieties model, i.e. that the duty rate changes of the affected variety could be "proxied by trade-weighted averages of affected companies' for year-prior duty rates, duty rates with the challenged measure, and duty rates without the challenged measure".[411] In this respect, the Arbitrator notes that similar calculations would be equally necessary under Canada's suggested methodology.

7.90. Canada objected to the Arbitrator proposal because, in its view, "[g]rouping imports from Canadian producers subject to different duty rates together as one variety in the context of the United States' model would violate one of the already flawed premises upon which the United States' model is based".[412]

7.91. The Arbitrator accepts the United States' proposition as true that using a fixed four-variety version of the US model would come at the cost of some precision.[413] However, we consider that the benefit of this approach, i.e. lessening the burden on Canada in running the model (see paragraph 7.78 above, noting such burdens), on balance, outweighs the United States' concern. Regarding Canada's objection, we consider that the thrust of Canada's comments on this score have already been adequately addressed in other sections above, most notably in section 7.1.2.3, discussing key benefits of separating affected versus unaffected Canadian exports into two different varieties. Therefore, we conclude that a modification of the US model that limits the total number of varieties to exactly four – one variety for US domestic shipments, one for affected Canadian imports, one for unaffected Canadian imports, and one for RoW imports – would provide an appropriate framework to determine a reasoned estimate for the level of NI without unreasonable burden for Canada.[414]

7.92. Having now selected a four-varieties version of the US model, we now proceed to describe more precisely the structure of that model.[415] The Arbitrator thus determines that a four-varieties Armington model described by the following equations and solved by a computer software shall be applied by Canada to determine the level of NI.[416]

7.93. Total US demand for a given product takes the form:

$$E = Y \times P^{\varepsilon}$$

where the term E represents expenditure on domestic and imported varieties of the product, P is an Armington Constant Elasticity of Substitution price index, Y represents total US expenditure on the product if $P = 1$, and ε is the price elasticity of demand in the United States. The price index P is defined as:

[410] United States' response to Arbitrator question No. 132, para. 25.
[411] United States' response to Arbitrator question No. 132, para. 26.
[412] Canada's response to Arbitrator question No. 129, para. 73.
[413] United States' response to Arbitrator question No. 132, para. 25.
[414] The question arises whether and how Canada will be able to determine imports from unaffected Canadian exporters. This question is addressed in section 8.1.1.2, below.
[415] Minor modifications to the model proposed by the United States, in particular with reference to how the model is implemented, will also be considered that could reduce other relevant burdens on Canada in other sections. See in particular section 8.2, below.
[416] Both parties have submitted the equations describing their respective Armington model (see Canada's methodology report, equations (A1)-(A6) in Appendix 1; United States' written submission, equations (1)-(12) in Appendix 1). The Arbitrator closely follows the notation in Appendix I of the United States' written submission.

$$P = (\gamma_{US}^{\sigma} \times p_{US}^{1-\sigma} + \gamma_{CAA}^{\sigma} \times p_{CAA}^{1-\sigma} + \gamma_{CAN}^{\sigma} \times p_{CAN}^{1-\sigma} + \gamma_{ROW}^{\sigma} \times p_{ROW}^{1-\sigma})^{\frac{1}{1-\sigma}}$$

where γ_{US}, γ_{CAA}, γ_{CAN}, and γ_{ROWS} are demand shifters, p_{US} is the US market price of the domestic variety, p_{CAA}, p_{CAN} and p_{ROW} are the US market prices (i.e. gross of duty price) of imported varieties, and σ is the constant elasticity of substitution between all varieties. Sub-indices US, CAA, CAN, and ROW denoted the four varieties US domestic shipments, affected Canadian imports, unaffected Canadian imports, and RoW imports, respectively.

7.94. Demand functions for the four varieties of the given product are defined as:

$$d_{US} = \gamma_{US}^{\sigma} \times \left(\frac{P}{p_{US}}\right)^{\sigma} \times E$$
$$d_{CAA} = \gamma_{CAA}^{\sigma} \times \left(\frac{P}{p_{CAA}}\right)^{\sigma} \times E$$
$$d_{CAN} = \gamma_{CAN}^{\sigma} \times \left(\frac{P}{p_{CAN}}\right)^{\sigma} \times E$$
$$d_{ROW} = \gamma_{ROW}^{\sigma} \times \left(\frac{P}{p_{ROW}}\right)^{\sigma} \times E$$

where d_{US}, d_{CAA}, d_{CAN} and d_{ROW} are the quantities demanded of domestic, affected Canadian, unaffected Canadian and RoW imported varieties, respectively.

7.95. Supply functions for the four varieties are defined as:

$$s_{US} = \beta_{US}(p_{US})^{\eta_{US}}$$
$$s_{CAA} = \beta_{CAA}\left(\frac{p_{CAA}}{1+\tau_{CAA}}\right)^{\eta_{CAA}}$$
$$s_{CAN} = \beta_{CAN}(p_{CAN})^{\eta_{CAN}}$$
$$s_{ROW} = \beta_{ROW}(p_{ROW})^{\eta_{ROW}}$$

where τ_{CAA} is the total ad valorem duty rate, inclusive countervailing duties applied to the affected variety CAN; η_{US}, η_{CAA}, η_{CAN}, and η_{ROW} are the elasticities of supply of each variety; and β_{US}, β_{CAA}, β_{CAN} and β_{ROW} are supply shifters.[417]

7.96. The ten equations in paragraphs 7.93-7.95 above characterize the equilibrium with no excess demand or excess supply. The model is solved by a price vector that ensures that supply equals demand on all four sub-markets. Trade effects resulting from changes in applied duties shall be quantified by standard comparative static exercises. Such trade effects ultimately determine the level of NI. Details on the sequencing of model runs are described in section 8.2, below.

7.97. The Arbitrator determines that Canada shall solve this model in its non-linear form executing a STATA code provided by the Arbitrator (see Annex C-1 of the Addendum to this Decision, WT/DS505/ARB/Add.1).[418] The next section describes the data inputs necessary to implement the methodology selected by the Arbitrator.

8 IMPLEMENTATION OF THE SELECTED ARMINGTON MODEL

8.1. The model selected by the Arbitrator requires several input data for estimating the level of NI. These input data consist of parameter values with respect to market shares, market size, elasticities, and changes in duty rates. Section 8.1, below, provides detailed instructions for determining these inputs. For the sake of convenience, an input file provided by the Arbitrator (see Annex C-2 of the Addendum to this Decision, WT/DS505/ARB/Add.1) incorporates additional calculations that automatically transforms all input values into the format that the STATA code (see Annex C-1 of the Addendum to this Decision, WT/DS505/ARB/Add.1) requires as a source.

[417] In the Arbitrator's implementation of the selected methodology (section 8.1.6, below), there will be only two elasticities of supply: the domestic supply elasticity for US supply, and the foreign supply elasticity for non-US supply. It will be assumed that $\eta_{US} < \eta_{CAA} = \eta_{CAN} = \eta_{ROW}$.

[418] The input file and the STATA code are based on Exhibits USA-1 and USA-11.

8.2. We also note that the overall methodology calculates the level of NI as the value of a trade decline between two situations, i.e. one with WTO-inconsistent CVD rates and one with WTO-consistent CVD rates. To accomplish this, the model must be run twice. It must be noted that the input file and STATA code provided by the Arbitrator consider this issue that will be explained in more detail in section 8.2, below.

8.1 Data inputs

8.3. The Arbitrator provides an Excel spreadsheet (see Annex C-2 of the Addendum to this Decision, WT/DS505/ARB/Add.1) to assist the parties, which consists of two sheets. The first, called "Parameter Input", is organized in 13 columns, and collects all input data described in the paragraph immediately below. The second, called "Stata Input", uses the information of the former sheet, and applies some calculations with respect to market shares to provide readable input for the STATA code. This sheet also re-organizes the input such that STATA will automatically implement the calculation of NI in two steps (see section 8.2, below). Canada would not need to make changes to this second sheet.

8.4. The content of the 13 columns of the first sheet, "Parameter Input", will be subject to the instructions provided below. Columns A and B represent price elasticities of supply, which will be pre-determined and remain static (see section 8.1.6, below). Columns C and D represent CVD-order-specific demand and substitution elasticities, which will be derived as described in sections 8.1.5 and 8.1.4, respectively. The US market share (Column E) as well as values of imports of affected Canadian companies (Column F), values of imports of unaffected Canadian companies (Column G), and values of imports originating from the RoW (Column H), shall be calculated as described in section 8.1.1, below. Finally, section 8.1.2, below, provides instructions to fill in the remaining five columns (Columns I to M) respectively with duty rates in the reference period for affected and unaffected Canadian companies, factual CVD rates for affected and unaffected Canadian companies, and counterfactual CVD rates for affected Canadian companies.

8.1.1 Market shares and market size

8.5. The model described in section 7.3, above, requires four market-share parameters, one for each of the four varieties, as well as a USD value for the US market size. As the market-share parameters are not linearly independent (i.e. they must sum to 100%), the following four pieces of information are sufficient to determine the market shares and the market size parameters required as model inputs: (a) the share of US domestic shipments in domestic sales, m_{US}; (b) the value of affected Canadian imports; (c) the value of unaffected Canadian imports; and (d) the value of imports from RoW. Based on these four inputs, the Excel file provided by the Arbitrator in the Addendum to this Decision (see Annex C-2 of the Addendum to this Decision, WT/DS505/ARB/Add.1) calculates the USD value for the market size as follows:

$$Y = \frac{affected\ Canadian\ Imports + unaffected\ Canadian\ Imports + RoW\ Imports}{(1 - m_{US})}$$

and the remaining market-share parameters as follows:

$$m_{CAA} = \frac{affected\ Canadian\ Imports}{Y}$$

$$m_{CAN} = \frac{unaffected\ Canadian\ Imports}{Y}$$

$$m_{ROW} = \frac{RoW\ Imports}{Y}$$

8.6. In the next four subsections, the Arbitrator describes the procedures that Canada shall use to compute the four inputs for market share and market size calculations, i.e. items (a)-(d) in the paragraph immediately above.

8.1.1.1 Share of US domestic shipments

8.7. As an initial matter, the Arbitrator discusses the issue of m_{US}, which is the ratio of the value of domestic shipments to US domestic consumption. For ease of analysis, this section proceeds in two steps. First, we evaluate the viability of relevant data sources for calculating m_{US}. Second, we provide instructions for Canada regarding how to calculate m_{US} using the data sources selected in the previous step.

8.1.1.1.1 Selection of data sources

8.8. With respect to determining m_{US}, the United States proposes to rely on product-level market-share information. According to the United States, this information would be gathered via a three-tiered approach, "in terms of priority, from the relevant [United States International Trade Commission (USITC)] … 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, provided by USITC reports".[419] Canada has proposed no specific data sources that could be used to calculate m_{US}. The Arbitrator proposed to the parties during the course of questions and responses that 71-sector BEA I-O table data could also be used to calculate m_{US}.

8.9. This section therefore proceeds to first discuss the United States' three proposed data sources, i.e. Commission reports, data from unspecified industry/trade associations, and data that underlie BEA I-O tables. The section then discusses the Arbitrator's proposed use of BEA I-O table data.

8.1.1.1.1.1 Commission reports

8.10. According to the United States, USITC reports will contain data on the value of domestic shipments that could be used to calculate m_{US}, but the reports do not always *publicly disclose* that data. In particular, "if [the data] include information from only one or two companies, […] or from three or more companies and one company accounts for at least 75 percent of the total or two companies account for at least 90 percent of the total", such information is not publicly available.[420]

8.11. Canada therefore objects to the United States' proposal, arguing that USITC report data are "potentially unavailable, non-public, and non-verifiable data".[421] After a review of the thirty most recent USITC injury determinations, Canada asserts that "U.S. domestic shipment values were designated as public in only ten of the thirty most recent USITC injury determinations. Moreover, in three of those ten cases, the values for certain years were redacted."[422] Canada further argues that the values of domestic shipments and US consumption in USITC reports, even when available, cannot be considered necessarily reliable, as they depend on the questionnaire responses received by the USITC, which sometimes relies on quantity-based rather than value-based data.[423]

8.12. The United States responds to Canada's criticism, noting that its own review "still demonstrate[s] that 43 percent of the Commission's investigation determinations (that is, 48 of the 111 determinations) publicly reported U.S. domestic shipment information".[424] Therefore, according to the United States "there is a likelihood that the U.S. domestic shipments could be obtained directly from the Commission report".[425]

8.13. Based on the information provided by the parties, the Arbitrator notes that a significant fraction of future USITC reports' data on domestic shipments would likely be confidential and thus unavailable to Canada. Moreover, in relation to some USDOC proceedings that could qualify as triggering events, the USITC does not publish accompanying reports and therefore, CVD

[419] United States' response to Arbitrator question No. 74, para. 198, and No. 75, para. 200.
[420] United States' response to Arbitrator question No. 261, para. 186 (referring to the United States' response to Arbitrator question No. 9, para. 42).
[421] Canada's written submission, para. 153.
[422] Canada's response to Arbitrator question No. 256, para. 266; "Summary of Proprietary Treatments in Recent USITC Reports" (Exhibit CAN-150).
[423] Canada's comments on the United States' response to Arbitrator question No. 256, paras. 132 and 134.
[424] United States' comments on Canada's response to Arbitrator question No. 256, para. 208 (referring to Exhibit CAN-150; Table of USITC Investigation Determinations (Exhibit USA-54)).
[425] United States' comments on Canada's response to Arbitrator question No. 256, para. 209; Exhibit USA-54.

order-specific information on m_{US} is not gathered by the USITC at all.[426] Due to such significant limitations on availability, the Arbitrator does not consider that USITC reports present a viable source of information for US domestic shipments.

8.1.1.1.1.2 Undefined industry/trade association data

8.14. The United States also proposes that the parties could "obtain industry estimates through the most relevant trade association or private sector suppliers and consult on the use of the best information available". If the parties cannot reach agreement on the value of m_{US} within 45 days, according to the United States, Canada shall determine m_{US} based on the third tier proposed by the United States (i.e. data underlying BEA I-O tables).[427]

8.15. Canada rejects the United States' proposal, mainly asserting that the United States "cannot assure that […] information [from industry or trade associations] would be available".[428]

8.16. The Arbitrator agrees with Canada in this context that necessary and sufficient data on US domestic shipments from industry or trade associations might be unavailable in the future. Further, it remains unclear how the reliability of such data could reasonably be guaranteed at this stage and/or established in the future. With respect to the latter point, we further consider that this option has the potential to result in disagreement among the parties. Indeed, even were the parties to agree on a data *source*, the methodology of *using* that source's data for purposes of the chosen model could still be ambiguous and require complex data manipulations. In light of such issues, the Arbitrator considers that the use of undefined future sources of data is not a viable option.

8.1.1.1.1.3 Data underlying BEA I-O tables

8.17. It will be recalled from section 7.1.2.4, above, that Canada proposes to use market-share information from the BEA I-O tables for 2018 to calculate the market-share θ_{CA} in Canada's proposed formula. These data cover 71 economic sectors.[429] The United States proposes that Canada could use data underlying the BEA I-O table data to determine US domestic shipments of a relevant product, noting that these data are available at a level more granular than the 71 BEA sectors.[430]

8.18. Canada concurs that such data are, in principle, publicly available, but Canada initially responded that it is unaware "how such data would be used to calculate consistent domestic absorption and input shares by detailed commodity as implied by the United States".[431]

8.19. In response, the United States offered detailed instructions on how this can be accomplished with respect to three different types of products: (a) manufacturing products; (b) agricultural products; and (c) mining and energy products. We discuss each in turn.

a. Manufacturing products

8.20. For manufacturing products (6-digit NAICS codes falling under chapters 31-33), the United States suggests using the United States' Census Bureau's Annual Survey of Manufacturers (ASM), which includes information on 364 6-digit NAICS codes (currently, 2017 NAICS classification).[432] The United States proposes to use data from the table entitled "Summary Statistics for Industry Groups and Industries in the United States" for the reference year. The table provides information on total supply (column labelled "Sales, value of shipments or revenue ($1,000)"). According to the United States, an estimate for domestic shipments at the level of 6-digit NAICS codes would be obtained by deducting the value of exports (sourced from US Census USA Trade Online) from this value of total supply. An estimate of total domestic consumption (i.e. value of the US market) at the level of 6-digit NAICS codes would be obtained by adding total imports from the world (sourced from US Census USA Trade Online) to the corresponding estimate of domestic

[426] The United States confirms that the USITC only produces such reports in the context of investigations and sunset reviews (United States' response to Arbitrator question No. 45, para. 125).
[427] United States response to Arbitrator question No. 69, para. 190.
[428] Canada's written submission, para. 155.
[429] These include non-tradeable services sectors as well as government activities.
[430] United States response to Arbitrator question No. 69, para. 190.
[431] Canada's response to Arbitrator question No. 142, para. 94.
[432] United States' response to Arbitrator question No. 145(f), para. 54.

shipments. Next, total domestic consumption and domestic shipment estimates, calculated at the level of 6-digit NAICS codes, would be "concorded to the primary reference harmonized tariff schedule (HTS) 10-digit codes referenced in the product scope description in the relevant CVD order pertaining to the relevant product", using concordance tables between the US HTS and 6-digit NAICS codes for imports.[433] This will, in the United States' view, allow the assignment of a single value of total domestic consumption and domestic shipments to each referenced 10-digit HTS code. Based on these two values, the domestic market share of each HTS 10-digit code j in the CVD order will be

$$m_{US\,j} = \frac{domestic\ shipments_j}{total\ domestic\ consumption_j}$$

and the CVD order-specific domestic market share m_{US} will be constructed as

$$m_{US} = \sum_j m_{US\,j} \frac{M_j}{\sum_j M_j},$$

where M_j is the corresponding import value (US imports from Canada) in HTS 10-digit code j and $\sum_j^J M_j$ is the total of all imports subject to a CVD order."[434]

8.21. Canada reiterates its preference to calculate m_{US} based on BEA I-O data, noting that the United States' approach described in the above paragraph is more calculation-intensive, and that "products overlap between sources identified in the ASM and other data sources proposed by the U.S.", while "BEO I-O shares […] provide a consistent means to calculate market shares across all products."[435] However, Canada considers that that the above-described approach by the United States is technically viable. According to Canada, "a NAICS categorization-level market share for U.S. supply can be obtained. Mapped to HTS 10-digit codes, a weighted average market share can also be calculated."[436]

8.22. The Arbitrator notes that the data upon which the United States' proposal relies in this specific context are: (a) publicly available; (b) as reliable as the BEA I-O tables that are derived from these data[437]; (c) updated annually; (d) exist at a relatively granular level; and (e) can readily be concorded to HTS codes. Moreover, Canada has indicated its ability to follow the United States' suggested procedure in this context, and has presented no objection regarding why it could not be reasonably implemented. The Arbitrator has also examined the United States' proposed procedures in detail and sees no reason why they cannot be reasonably implemented, and therefore considers the United States' approach with respect to manufacturing goods to be reasonable. Detailed procedures for using this data source to determine m_{US} for manufacturing products appear in section 8.1.1.1.2, below.

b. Agricultural products

8.23. For agricultural products, the United States suggests using data from the United States Department of Agriculture's US Farm Income and Wealth Statistics, and obtaining the value of

[433] United States' response to Arbitrator question No. 246, comments on Annex A, section IV, fn 194 to para. 1.12(a). The United States notes that annual concordance tables between the US HTS and 6-digit NAICS codes for imports are currently available at https://www.census.gov/foreign-trade/reference/codes/concordance/index.html (United States' response to Arbitrator question No. 246, fn 194 to para. 1.12(a)).

[434] United States' response to Arbitrator question No. 246, comments on Annex A, section IV, para. 1.19.

[435] Canada's comments on the United States' response to Arbitrator question No. 246, comments on Annex A, para. 185.

[436] Canada's comments on the United States' response to Arbitrator question No. 246, comments on Annex A, para. 185.

[437] We note that neither party has questioned the reliability of BEA I-O table data, nor the data underlying such tables. Rather, Canada's objections regarding using the underlying data pertain more specifically as to whether such data can be manipulated in a practical manner for purposes of calculating levels of NI.

US domestic production for the reference year from the file "Annual cash receipt by commodity, U.S. and States".[438] According to the United States, however, these data are not "based on a product classification system" and therefore, a matching with HTS codes could only be conducted based on product descriptions.[439] We note that such a matching exercise, based purely on product descriptions, would likely pose significant problems.

8.24. In an apparent attempt to overcome such problems, the United States subsequently clarified that "Canada would first use publicly available concordance tables between US 10-digit HTS and agricultural products to assign the value of domestic production to each "primary reference 10-digit HTS code".[440] Canada would then obtain an estimate of domestic shipments by deducting the value of exports (sourced from US Census' USA Trade Online at the HTS 10-digit level) from the corresponding value of domestic supply. Canada would then estimate total domestic consumption by adding the value of imports from the world (sourced from US Census' USA Trade Online at the HTS 10-digit level) to the corresponding estimate of domestic shipments.[441] Finally, to compute the CVD order-specific domestic market share m_{US} Canada would use the same weighted average as described in paragraph 8.20, above with reference to manufacturing products.[442]

8.25. In response to these more detailed proposals by the United States, Canada asserted that "[d]espite multiple attempts to use the data and sources listed by the United States, Canada has not identified a method by which products covered under a CVD order based on HTS-10 categories could be mapped to a corresponding U.S. domestic agricultural product."[443]

8.26. The Arbitrator notes that Canada considers the methods proposed by the United States in this context not workable as a practical matter. The Arbitrator's own attempts in applying the United States' guidance were also unsuccessful because a clear mapping between HTS 10-digit codes and corresponding U.S. domestic agricultural product could not be established. Therefore, the Arbitrator concludes that, for agricultural products, data underlying BEA I-O tables cannot reasonably be used.

c. Mining and energy products

8.27. For mining and energy products (6-digit NAICS codes falling under chapter 21), the United States initially suggested using data from the United States' Department of Energy's Energy Information Administration.[444] According to the United States, however, these data are not "based on a product classification system" and therefore, matching of the data with HTS codes could only be conducted based on product descriptions.[445] We note that such a matching exercise, based purely on products descriptions, would likely pose significant problems.

8.28. In an apparent attempt to overcome such problems, the United States subsequently modified its initial proposal, and suggested using data "from the most recent detailed benchmark BEA I-O supply and use tables that correspond to the reference year".[446] The United States explains that these detailed tables divide the economy in 405 sectors, are produced roughly every five years, and the most recent year available is 2012. The United States goes on to describe how such data, in its view, could be technically manipulated to compute the CVD order-specific domestic market share m_{US}.[447]

[438] United States' response to Arbitrator question No. 145, para. 55. The data are currently available at: https://data.ers.usda.gov/reports.aspx?ID=17845.
[439] United States response to Arbitrator question No. 145(e), para. 51.
[440] United States' response to Arbitrator question No. 246, comments on Annex A, section IV, para. 1.12(b).
[441] United States' response to Arbitrator question No. 246, comments on Annex A, section IV, para. 1.12(b).
[442] United States' response to Arbitrator question No. 246, comments on Annex A, section IV, para. 1.19.
[443] Canada's comments on United States' response to Arbitrator question No. 246, para. 183.
[444] United States response to Arbitrator question No. 145, para. 56.
[445] United States response to Arbitrator question No. 145, para. 51.
[446] United States' response to Arbitrator question No. 246, comments on Annex A, section IV, para. 1.12(c).
[447] United States' response to Arbitrator question No. 246, comments on Annex A, section IV, paras. 1.12(c) and 1.19.

8.29. In response, Canada objects to the use of the United States' proposed data mainly on the grounds that such data could become outdated since they are only updated sporadically. Thus, according to Canada, 71-sector BEA I-O data that are updated annually are preferable to using BEA 405-sector BEA benchmark data proposed by the United States, the most recent version of which dates back to 2012.[448]

8.30. The Arbitrator notes that benchmark BEA data proposed by the United States carry the advantage of being relatively granular. However, such data could be significantly outdated. Indeed, at this writing, the most recent available BEA benchmark data were published in 2012, roughly a decade ago. The Arbitrator has serious concerns that such outdated data would not reasonably represent the market situation for the relevant product at the time of a triggering event. Accordingly, the Arbitrator concludes that this data source cannot reasonably be used for determining m_{US} for energy and mining products, particularly when more updated data appear available in another form, i.e. the BEA I-O table data, which we discuss in the next section.

8.1.1.1.1.4 BEA I-O table data

8.31. In the preceding sections, we have rejected the use of the data sources proposed by the parties to calculate the value of domestic shipments for products in all sectors other than the manufacturing sector (for which ASM data can be used). Thus, with respect to CVD orders relating to sectors other than manufacturing, the Arbitrator must therefore determine its own approach. This approach, which the Arbitrator proposed to the parties for comment in the course of questions and answers[449], is partially based on both the third tier of the approach proposed by the United States[450] and on the approach proposed by Canada to estimate market shares in Canada's model, as both make use of BEA I-O table data in some way.[451]

8.32. The Arbitrator's proposal submitted to the parties for comment[452] explained how Canada would compute m_{US} for the reference year based on information from the version relating to the reference period year of BEA 71 sectors I-O supply and use tables.[453] In particular, Canada would compute m_{US} in the relevant sector as the share of domestic shipments (output minus exports) in total supply (output plus imports minus exports).[454] Canada would then assign the relevant sector's market share to each 10-digit HTS code in the relevant CVD order that is covered by that sector.

8.33. When submitting this proposal to the parties, the Arbitrator was aware that each HTS 10-digit level covered by each BEA 71 sector would be assigned the same value of m_{US}, and that this assumption would introduce an unknown degree of approximation into the overall market-share calculation, thereby diluting the precision of the model to some degree. However, this assumption is necessary because the BEA data must eventually be mapped onto the relevant product, which is objectively described in a CVD order as a collection of HTS 10-digit level codes, a collection that, of course, will likely be significantly smaller in scope than a BEA sector.

8.34. In response to the Arbitrator's proposal, Canada made three main comments. First, with respect to harmonized schedule (HS) categories (mostly in HS chapters 98 and 99) that cannot be mapped onto BEA I-O data, Canada proposes that "the shares would be determined at the more aggregated HS-4 (or HS-2 level, if needed)."[455] Second, for HS codes that can be mapped onto certain BEA I-O sectors but for which BEA I-O data indicate no imports due to their intangible nature (e.g. such as government and certain services), market shares would be "the weighted average of

[448] Canada's comments on the United States' response to Arbitrator question No. 246, para. 182.
[449] Arbitrator question No. 246 and Annex A included in the third set of Arbitrator questions.
[450] United States' response to Arbitrator question No. 69, para. 190, and No. 147, paras. 47-57.
[451] Canada's methodology report, paras. 28-30.
[452] Arbitrator' question No. 146 and Annex A are included in the third set of Arbitrator questions.
[453] The Arbitrator notes that BEA 71 sectors I-O supply and use tables are updated annually (see United States' response to Arbitrator question No. 36, para. 124), and are available at: https://www.bea.gov/industry/input-output-accounts-data. In case these data are unavailable for the reference year specifically, Canada could use the BEA 71 sectors I-O supply and use tables available in the closest year before the reference period. In case BEA 71 sectors I-O supply and use tables are no longer available, Canada could use the 2018 BEA 71 sectors I-O supply and use tables, which Canada submitted in Exhibit CAN-7.
[454] Output and imports would be sourced from the BEA I-O "supply" table. Exports would be sourced from the BEA I-O "use" table.
[455] Canada's response to Arbitrator question No. 246, para. 234.

other HS-6 market shares within the HS-4 heading (or HS-2 chapter, if needed), weighted by the value of Canadian imports to the U.S."[456] Third, Canada notes that the Arbitrator's proposal was unclear regarding how to treat imports from multiple HTS 10-digit codes that map onto different BEA sectors. Canada, however, clearly understands that the necessary calculations must consider the sum of the imports under all HTS 10-digit codes in the CVD order.[457]

8.35. In response to the Arbitrator's proposal, the United States offered a revised version of the Arbitrator's approach. In its proposed revisions, the United States suggests calculating m_{US} based on primary HTS codes only. Moreover, the United States provides clarifications on what data from which columns should be used from BEA I-O tables. Most notably, the revision includes provisions that accommodate CVD orders containing HTS codes belonging to different BEA sectors, an issue also raised by Canada. The United States suggests using trade-weighted averages of market shares in such instances.[458]

8.36. We also note that both parties have indicated that the Arbitrator's proposal is a workable approach for Canada. Neither party presents any arguments as to why this proposal would be unreasonable for Canada to implement. Moreover, aside from the suggested revisions the parties offered modifications that are discussed in the two preceding paragraphs, neither party has offered any other viable approach to determine the US domestic shipments with respect to CVD orders relating to sectors other than manufacturing. The Arbitrator therefore considers that BEA I-O table data can reasonably be used for determining US domestic shipment market shares for non-manufacturing products. Specific procedures for using this data source for determining such market shares, taking into account the parties' suggestions discussed in the two preceding paragraphs, appear in the following section.

8.1.1.1.2 Procedures for calculating the share of US domestic shipments (m_{US})

8.37. In this section, the Arbitrator provides specific instructions for calculating m_{US}. The Arbitrator thus recalls that it has selected different data sources to be used for calculating m_{US} depending on what kinds of products are covered by the relevant CVD order. Specifically, Canada will use ASM data to determine m_{US} for manufacturing products, and BEA I-O table data for determining m_{US} for agricultural products and energy and mining products (hereinafter denoted as non-manufacturing products). With this in mind, the Arbitrator offers the following instructions for Canada to determine m_{US} with respect to any given CVD order.

8.38. First, Canada shall identify the reference period (see section 6.4, above). The subsequent instructions in this section and its subsections relate to the calendar year of the reference period. If the data described below are unavailable for the reference period at the time when Canada determines the level of NI, Canada shall use data from the calendar year prior to the reference period that constitutes the most recent year with relevant data available.

8.39. Second, Canada shall identify whether a CVD order relates to agricultural or mining and energy products, or to manufacturing products. To do so, Canada shall match all the HTS 10-digit codes in the CVD order with 6-digit NAICS codes using an official correspondence table provided by the United States Census Bureau.[459] If the first two digits of the corresponding NAICS codes are 31, 32, or 33, which cover manufacturing products, Canada shall proceed with the approach outlined below under subsection (a) below. If the first two digits of the corresponding NAICS codes are something other than 31, 32, or 33, and therefore pertain to non-manufacturing products, Canada shall proceed with the approach outlined under subsection (b) below. If a CVD order covers both manufacturing and non-manufacturing products, Canada shall proceed with both approaches, each

[456] Canada's response to Arbitrator question No. 246, para. 235.

[457] Canada's response to Arbitrator question No. 246, para. 236. We further note that we provide a solution to this issue in our instructions further below.

[458] United States' response to Arbitrator question No. 246, comments on Annex A, section I, paras. 1.5-1.6, and Section II, paras. 219-220. See section 8.1.1.2.1.2(a), below, for reasons why we instruct Canada to use *all* the 10-digit HTS codes in the relevant CVD order instead of just the "primary" HTS codes as advocated by the United States.

[459] Correspondence tables can be accessed currently via https://www.census.gov/foreign-trade/reference/codes/concordance/index.html.

pertaining to the relevant products, arriving at a trade-weighted, CVD order-specific m_{US} according to the following formula:

$$m_{US} = \sum_k m_{US_k} \frac{M_k}{\sum_k M_k},$$

where m_{US_k} is the share of US domestic shipments for sector k with $k \in \{manufacturing, non-manufacturing\}$, M_k is the corresponding import value (US imports from Canada), and $\sum_k M_k$ is the total of all US imports from Canada subject to a CVD order in sector k.

a. For CVD orders covering manufacturing products

8.40. In section 8.1.1.1.1.3, above, the Arbitrator determined that Canada shall use ASM data to determine m_{US} for manufacturing products. Canada shall apply the following procedures for determining m_{US} for such products using ASM data.

8.41. Canada shall first match all the CVD order's referenced HTS 10-digit codes with 6-digit NAICS codes using an official correspondence table provided by the United States Census Bureau.[460] Once each HTS 10-digit code in a CVD order is assigned a 6-digit NAICS code and in case all HTS 10-digit codes in a CVD order match to the same 6-digit NAICS code, the CVD order-specific share of US domestic shipments shall be calculated based on ASM data referring to this NAICS code.

8.42. Canada shall access ASM data provided by the United States Census Bureau under table entitled "Summary Statistics for Industry Groups and Industries in the United States" and under the column "Sales, value of shipments or revenue ($1,000)".[461] These 6-digit NAICS code-specific data include domestic shipments and exports but no imports, and thus Canada shall access 6-digit NAICS code-specific exports and imports (for consumption) from USA Trade Online or, if these data are unavailable, from USITC DataWeb. Canada shall then calculate the share of US domestic shipments as follows:

$$m_{US} = \frac{Domestic\ shipments}{Total\ domestic\ consumption} = \frac{Sales - Exports}{Sales - Exports + Imports}$$

8.43. In case two or more relevant HTS 10-digit codes are assigned different 6-digit NAICS codes, the CVD order-specific share of US domestic shipments shall be computed as a weighted average of each HTS 10-digit product's share of US domestic shipments, using, as weights, HTS 10-digit US imports from Canada sourced from USA Trade Online or, if this data is not available, from USITC DataWeb for the reference period, according to the following formula:

$$m_{US} = \sum_j m_{US_j} \frac{M_j}{\sum_j M_j},$$

where m_{US_j} is the share of US domestic shipments for HTS 10-digit code j (common to all 10-digit codes corresponding to the same 6-digit NAICS code), M_j is the corresponding import value (US imports from Canada), and $\sum_j M_j$ is the total of all US imports from Canada subject to a CVD order.

8.44. In case only a subset of HTS 10-digit codes can be assigned one or more 6-digit NAICS codes with the first two digits being equal to 31, 32, or 33, Canada shall calculate the CVD order-specific m_{US} only based on them.

8.45. In case Canada finds that ASM data, for any reason, are unusable or are significantly outdated, Canada shall inform the United States and consult with the United States whether BEA I-O data could be used instead of the ASM data. If the United States fails to provide a viable way to overcome

[460] Correspondence tables can be accessed currently via https://www.census.gov/foreign-trade/reference/codes/concordance/index.html. See section 8.1.1.2.1.2(a), below, for reasons why we instruct Canada to use *all* the 10-digit HTS codes in the relevant CVD order instead of just the "primary" HTS codes as advocated by the United States.

[461] ASM tables can be accessed currently via https://www.census.gov/programs-surveys/asm/data/tables.html.

potential data shortcomings, Canada shall use BEA I-O data as described in the following section instead.

b. For CVD orders on non-manufacturing products

8.46. In section 8.1.1.1.1.4, above, the Arbitrator determined that Canada shall use data from the BEA 71 sector I-O supply and use tables to determine m_{US} for non-manufacturing products. Canada shall apply the following procedures for determining m_{US} for such products using such data.

8.47. Canada shall first match all the CVD order's referenced HTS 10-digit codes with 6-digit NAICS codes using an official correspondence table provided by the United States Census Bureau.[462] Canada shall assign to each HTS 10-digit code the first three digits of the corresponding 6-digit NAICS code. Once each HTS 10-digit code in a CVD order is assigned a 3-digit NAICS code, and in case all HTS 10-digit codes in a CVD order are assigned the same 3-digit NAICS code, the CVD order-specific share of US domestic shipments shall be calculated based on BEA data referring to this 3-digit NAICS code. Canada shall then access the supply and use tables provided by the BEA at the 3-digit NAICS level.[463] Total commodity output and imports would be sourced from the "supply" table, and exports of goods and services would be sourced from the "use" table. The share of US domestic shipments shall then be calculated as

$$m_{US} = \frac{Total\ Commodity\ Output - Exports\ of\ goods\ and\ services}{Total\ Commodity\ Output - Exports\ of\ goods\ and\ services + Imports}$$

8.48. In case two or more HTS 10-digit codes are assigned different 3-digit NAICS codes, the CVD order-specific share of US domestic shipments shall be computed as a weighted average of each HTS 10-digit product's share of US domestic shipments, using, as weights, HTS 10-digit US imports from Canada sourced from USA Trade Online or, if this data is unavailable, from USITC DataWeb for the reference year, according to the following formula:

$$m_{US} = \sum_j m_{US_j} \frac{M_j}{\sum_j M_j},$$

where m_{US_j} is the share of US domestic shipments for HTS 10-digit code j (common to all 10-digit codes corresponding to the same 3-digit NAICS code), M_j is the corresponding import value (US imports from Canada), and $\sum_j M_j$ is the total of all US imports from Canada subject to a CVD order.[464]

8.49. In case a given HTS 10-digit code cannot be assigned a 6-digit NAICS code with the first two digits not being equal to 31, 32, or 33, Canada shall calculate the CVD order-specific m_{US} based on the HTS codes that can be assigned a NAICS code.

8.50. In case no HTS 10-digit code can be assigned a 3-digit NAICS code or m_{US} as calculated in the described procedures equals zero, Canada shall calculate m_{US} as an average domestic shipment share over all industries applying the following alternative approach

$$m_{US} = \frac{\sum_S (Total\ Commodity\ Output - Exports\ of\ goods\ and\ services)}{\sum_S (Total\ Commodity\ Output + Imports - Exports\ of\ goods\ and\ services)}$$

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[462] Correspondence tables can be accessed currently via https://www.census.gov/foreign-trade/reference/codes/concordance/index.html. See section 8.1.1.2.1.2(a), below, for reasons why we instruct Canada to use *all* the 10-digit HTS codes in the relevant CVD order instead of just the "primary" HTS codes as advocated by the United States.

[463] BEA 71 sectors I-O supply and use tables are updated annually (see United States' response to Arbitrator question No. 36, para. 124) and are presently available at: https://www.bea.gov/industry/input-output-accounts-data. In case these tables might not be available in the reference year, Canada shall use the BEA 71 sectors I-O supply and use tables available in the closest year before the reference period. In the unlikely case in which future BEA 71 sectors I-O supply and use tables might not be available, Canada shall use the 2018 BEA 71 sectors I-O supply and use tables, which Canada submitted in Exhibit CAN-7.

[464] The Arbitrator notes that the United States proposes such a procedure, thereby addressing an issue that Canada has raised as well, and, with respect to elasticities, also agrees with.

where S denotes 3-digit NAICS codes.

8.1.1.2 Value of affected and unaffected Canadian imports

8.51. It will be recalled that two of the four market shares used in the selected model involve Canadian imports subject to CVD rates that are affected by the OFA-AFA Measure (affected Canadian imports) and those that are not affected by the OFA-AFA Measure (unaffected Canadian imports). To obtain such market shares, total values of affected and unaffected Canadian imports (Canadian imports into the United States, net of any duties or tariffs) are required. Market shares are then calculated by using such values as numerators over a common denominator which is the size of the US market for the relevant product. This section describes how Canada shall calculate the values of both affected and unaffected Canadian imports.[465] We therefore note at the outset that Canada will calculate the values of imports from both affected and unaffected Canadian companies using the same methods. Those methods, however, will vary mainly depending on what data source(s) Canada uses to calculate such values.

8.52. With that background in mind, this section proceeds in three parts. First, it describes how Canada will calculate the values of imports when the data that the parties agree should ideally be used to calculate the values of imports, i.e. US Customs data, are available. Second, it describes how Canada will calculate the values of imports if US Customs data are unavailable. Finally, it described how values of imports shall be calculated for so-called new shippers.

8.53. We also consider it helpful at this stage to recall that affected and unaffected values of imports will eventually have to be assigned relevant duty rates. How those duty rates will be assigned to the values of imports Canada determines under the procedures outlined in this section is discussed in section 8.1.2, below. It should be noted, however, and for clarity, that the model requires three different types of duty rates be determined and assigned to values of imports. Specifically, these are reference-period CVD rates (i.e. CVD rates in effect during the reference period), factual CVD rates (i.e. CVD rates that are in effect following the triggering event), and, for affected Canadian imports only, counterfactual duty rates (i.e. what the factual duty rate would be changed to in the counterfactual). This is important to remember in this context because we and the parties often describe and categorize companies according to what type of *factual* CVD rate they have following the triggering event (i.e. a factual individually assigned CVD rate, a factual non-selected CVD rate, or a factual all-others CVD rate).

8.1.1.2.1 Calculating the value of imports with US Customs data

8.54. To determine the value of imports, Canada originally proposed to obtain data directly from Canadian companies whose CVD rates were affected by the OFA-AFA Measure.[466] In response to the Arbitrator's subsequent questions, however, Canada revised its approach. Canada now proposes using US Customs data to determine the values of imports, at least as a first resort, provided: (a) the parties agree on the scope of the disaggregated data to be provided; (b) the data are capable of being verified by Canada; (c) appropriate procedures and timelines for exchanging the information are established; and (d) the parties agree on confidentiality procedures.[467] Canada also notes that the *US – Washing Machines (Article 22.6 – US)* arbitrator's methodology for calculating relevant values of imports allowed the original complainant to calculate a level of suspension even in cases where data was incomplete or the parties disagreed regarding which data should be used in that calculation. Canada considers that such flexibility should be present here as well.[468] The United States, for its part, has consistently argued during the course of this proceeding that US Customs data should be used as a first resort in calculating the value of imports.[469]

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[465] Paragraph 8.5, above, describes in detail how relevant market shares are obtained using these figures.

[466] Canada's methodology paper, paras. 13-16; written submission, section IV.C.3.

[467] Canada's response to Arbitrator question No. 86, paras. 175-176. Canada explains that US Customs keeps a comprehensive list of all Canadian companies' shipments to the United States by HTS code and value in a single database, but the database can only be accessed directly by US Customs and is not publicly available (Canada's response to Arbitrator question No. 86, para. 177, and No. 87, paras. 196-198). Canada further explains that Canada does not collect information on exports to the United States (Canada's response to Arbitrator question No. 86, para. 175).

[468] Canada's written submission, para. 175.

[469] See e.g. United States' written submission, para. 139.

8.55. The Arbitrator notes that the parties' proposals with respect on how to calculate the value of imports are lengthy. Thus, it appears helpful to address such proposals with respect to the following issues: (i) reasonableness of using of US Customs data; (ii) initial notifications following a triggering event; (iii) search of US Customs data and provision of US Customs data to Canada; (iv) Canadian verification of US Customs data and consultation procedures; and (v) party arguments concerning the values of imports from unaffected companies. This Decision addresses each issue in turn.

8.1.1.2.1.1 Reasonableness of using US Customs data

8.56. Both parties propose using data from US Customs as a first resort to calculate the value of imports. In this context, the United States generally stresses that any methodology in this context should not allow Canada to unilaterally select the model input used to calculate the value of imports[470], and that it would be most appropriate to identify the relevant imports from US Customs data (electronically collected in the United States' Customs' Automated Commercial Environment (ACE) Data Portal). This is so, in the United States' view, because "[t]his data is the most accurate data on a company-specific basis".[471] In particular, the United States considers that US Customs data is preferable to collecting sales data directly from Canadian companies because it would be more efficient than collecting information from multiple companies, and US Customs data is company-specific and organized at the 10-digit HTS level.[472] The United States claims that using such Customs data is consistent with the decisions in past arbitrations[473], and also has the benefit of eliminating the complexities associated with the obtainment of, and Canadian-US consultation regarding, information obtained directly from Canadian exporters.[474]

8.57. Canada asserts that it is most efficient to rely on US Customs data to calculate the value of imports because US Customs data are a pre-existing comprehensive dataset including all Canadian companies' shipments to the United States organized by HTS code.[475] Canada further indicates that US Customs data are always collected on a company-specific basis.[476] In sum, in Canada's view, "US Customs data are the best available data source to determine the value of imports".[477]

8.58. The Arbitrator considers that the parties' suggestion to use US Customs data, as a first resort, to calculate the value of imports, is reasonable. As the parties both observe, US Customs data are collected on a shipment and company-specific basis[478], are further organized at the 10-digit HTS code level (which means the data can be matched against the 10-digit HTS codes in a relevant CVD order), and are collected in a single comprehensive database, i.e. the US Customs ACE Database.[479] Moreover, as explained in section 8.1.1.2.1.2, below, after a CVD order is in place, the ACE Database's records should also be searchable by a unique AD/CVD Case Number which will be assigned to shipments of products that importers have determined are subject to a relevant CVD order, providing yet another useful search tool.

8.59. Moreover, US Customs data have significant indicia of reliability. In general, we observe that the United States has an interest in reliably tracking what goods enter its borders and to assess appropriate duties on such imports. US Customs is the US authority entrusted with that task.[480] US Customs data are electronically reported to Customs on Form 7501 "Entry Summary", which is filled out by importers (i.e. usually a third party not directly subject to any CVD order) in considerable

[470] United States' written submission, para. 135.
[471] United States' written submission, para. 139.
[472] United States' response to Arbitrator question No. 86, para. 242.
[473] United States' written submission, para. 139 and fn 139 thereto (quoting Decision by the Arbitrator, *US – Washing Machines* (*Article 22.6 – US*), para. 3.110 ("Given that the United States' authorities are responsible for applying anti-dumping and countervailing duties, and for collecting data on the value of imports, the Arbitrator requested the United States to provide data on the value of imports"; and referring to Decision by the Arbitrator, *US – Anti-Dumping Methodologies (China) (Article 22.6 – US),* para. 7.22).
[474] United States' written submission, para. 140.
[475] Canada's response to Arbitrator question No. 86, para. 177.
[476] Canada's response to Arbitrator question No. 87, para. 204, and No. 90, para. 209.
[477] Canada's response to Arbitrator question No. 162, para. 134.
[478] Company-specific data are important because, as described in section 8.1.2, below, reference period duty rates, factual duty rates, and counterfactual duty rates of relevant Canadian companies are model inputs. Such rates are often company-specific. Because weighted averages of such duty rates are necessary in structuring the total combined affected and unaffected Canadian varieties, and values of imports are used as the weights, the values of imports must also be company-specific.
[479] United States' response to Arbitrator question No. 36, para. 117.
[480] United States' response to Arbitrator question No. 152, para. 72.

detail.[481] Importers can incur civil penalties if the form contains errors.[482] Searches can be performed in the ACE Database with respect to any fields in Form 7501.[483] Moreover, insofar as errors may be present in US Customs data, verification and consultation procedures discussed further below can help minimize the impact of such errors.

8.60. Finally, both parties will have access to US Customs data. The United States is, of course, in primary possession of such data. These data are normally confidential and are not publicly available.[484] The parties have explained, however, that the United States can share such data with Canada if the parties agree to BCI procedures governing that exchange, and if the Arbitrator instructs the United States to share such data with Canada for purposes of implementing the selected model.[485] The parties submitted a joint draft "Understanding between Canada and the United States Concerning Procedures to Apply to Business Confidential Information to the Extent Necessary to Apply a DSB Authorization Consistent with the Arbitrator's Decision" (the BCI Understanding).[486] The parties then provided signed copies of the BCI Understanding, committing themselves to its terms.[487] Such procedures appear reasonable in scope and content, and would allow the United States to share confidential information from US Customs with Canada in order to calculate levels of NI if and when triggering events occur.[488] At this point in its Decision, the Arbitrator thus instructs the United States, pursuant to the BCI Understanding, to share US Customs data (and any other relevant data falling under the scope of the BCI Understanding) with Canada in order to facilitate Canada's calculation of levels of NI in accordance with the terms of this Decision.

8.61. In sum, the Arbitrator concludes that Canada shall use US Customs data to calculate the values of imports from affected and unaffected Canadian companies when such data are available and have been provided to Canada pursuant to the BCI Understanding between the parties.

[481] United States' response to Arbitrator question No. 174, para. 93 (referring to U.S. Customs, "Entry Summary", Form 7501 (Exhibit CAN-93). See also Canada's response to Arbitrator question No. 87, para. 199). The Arbitrator notes that the parties have explained that each 10-digit HTS code in an entry summary will have a value assigned to it (Canada's response to Arbitrator question No. 216, para. 161; United States' response to Arbitrator question No. 216, para. 123). The parties have also confirmed that the AD/CVD number, when present in Form 7501, has a value of imports associated with it (Canada's response to Arbitrator question No. 208, paras. 147-150; United States' response to Arbitrator question No. 217, paras. 124-126). The "importer of record" is responsible for completing the form which can be a number of different entities, and could even be the exporter under certain circumstances (19 U.S.C. § 1484 (Exhibit CAN-151); United States' response to Arbitrator question No. 264, para. 198).

[482] United States' response to Arbitrator question No. 174, para. 93 (quoting 19 U.S.C. § 1592 (Exhibit USA-43)).

[483] United States' response to Arbitrator question No. 174, para. 93.

[484] United States' response to Arbitrator question No. 87, and No. 101, para. 259 (quoting 19 U.S.C. § 1677f (Exhibit USA-17)).

[485] Canada's response to Arbitrator question No. 86, para. 194 and fn 220 thereto; United States' response to Arbitrator question No. 101, para. 260.

[486] Jointly Proposed Understanding between Canada and the United States Concerning Procedures to Apply to Business Confidential Information to the Extent Necessary to Apply a DSB Authorization Consistent with the Arbitrator's Decision ("BCI Understanding") (Exhibit USA-47); Canada's response to third set of Arbitrator questions, Annex A.

[487] See Jointly Agreed BCI Understanding (Exhibit USA-60); Signed Cover Letter and Mutually Agreed *Understanding between Canada and the United States Concerning Procedures to Apply to Business Confidential Information to the Extent Necessary to Apply a DSB Authorization Consistent with the Arbitrator's* Decision (Exhibit CAN-171).

[488] See United States' response to Arbitrator question No. 153, para. 75 (discussing scope of procedures). The BCI Understanding would further allow the USDOC to share otherwise confidential information with Canada if the party that submitted the information to the USDOC consents to that release. The submitting party must offer such additional consent in the case of confidential USDOC record information because such information is protected by an Administrative Protective Order (United States' response to Arbitrator question No. 161, para. 101).

8.1.1.2.1.2 Initial notification by Canada to the United States following a triggering event

8.62. Canada explains that, following a triggering event, Canada would inform the United States of Canada's intention to suspend concessions via a written notification.[489] Canada envisions the notification including:

a. a notification that Canada intends to suspend concessions with respect to a given application of the OFA-AFA Measure;

b. the names of all Canadian exporters who are then subject to relevant individual CVD rates affected by the OFA-AFA Measure;

c. the names of all Canadian exporters who are subject to a relevant individual but unaffected CVD rate, and individually investigated companies that were excluded from the scope of the relevant CVD order;

d. the names of any cross-owned affiliates of affected or unaffected companies that have individual CVD rates;

e. a request for the United States to gather data on Canadian imports of the relevant product from US Customs with reference to the HTS codes from the relevant CVD order or the relevant CVD number;

f. a list of the HTS codes from the relevant CVD order;

g. the names of affected and unaffected companies subject to non-selected CVD rates; and

h. the reference period.[490]

8.63. Canada also indicates that it would include the Excel spread sheet that US Customs will complete and then relay to Canada containing the relevant US Customs data (this spreadsheet is described further in section 8.1.1.2.1.3, below).[491]

8.64. The United States generally agrees with the scope of information that the initial Canadian notification to the United States should include following a triggering event.[492] The United States considers that Canada should also include the name of Canadian companies that are exporting to the United States under the all-others rate, to the extent such information is available.[493]

8.65. The Arbitrator considers that to fully appreciate the relevance of certain information that the parties propose be included in the initial notification, some background on the administration of US CVD orders would be helpful. Thus, we note that the record reflects that, following the imposition of a CVD order following an original investigation, each individually investigated company is assigned a specific AD/CVD number, a portion of which corresponds to the CVD order at large and a portion of which is unique to each company. There is also a specific CVD number that corresponds to the all-others rate. Further, in an administrative review, each individually investigated company is also assigned an individual AD/CVD number, as are all companies subject to the non-selected rate.[494]

[489] According to the United States, Canada's point of contact for any and all such communications regarding the calculation of a level of NI is the Legal Advisor to the US Mission to the World Trade Organization (United States' response to Arbitrator question No. 119, para. 6). Canada's point of contact would be the Executive Director of the Trade Remedies and North America Trade Division (TNE) at Global Affairs Canada, and the Director of the Trade Remedies Law Division of the Trade Law Bureau (JLT) (Canada's response to Arbitrator question No. 119, para. 33).

[490] Canada's response to Arbitrator question No. 86, para. 189, No. 154, paras. 105(i) and 106(i), No. 186, paras. 34-37, and No. 288, para. 37.

[491] Canada's response to Arbitrator question No. 186, para. 37.

[492] United States' response to Arbitrator question No. 173, para. 90, No. 186, para. 14, and No. 288, para. 26. See also United States' comments on Canada's response to Arbitrator question No. 186, para. 22.

[493] United States' response to Arbitrator question No. 186, para. 14.

[494] Canada's response to Arbitrator question No. 208, paras. 147-150, and No. 275, paras. 1-2; United States' response to Arbitrator question No. 177, para. 98, No. 219, paras. 128-132, and No. 234, paras. 157-157.

Importers report these numbers on Form 7501 in order to specify to what CVD order(s) the imported goods are subject and what CVD rates are applied to those imports.[495] However, importers are not required to report the CVD numbers of companies who were excluded from the scope of the CVD order.[496]

8.66. Thus, we note that in a reference period preceding the issuance of a relevant CVD order, the only way to identify relevant imports in US Customs data is by matching the 10-digit HTS codes present in the CVD order to the 10-digit HTS codes reported on Form 7501.[497] This is so because relevant CVD numbers were not yet assigned at the time of the reference period. With respect to a reference period occurring after a relevant CVD order is in place, then the goods in Form 7501 that are covered by the CVD order could be identified more simply by searching for the relevant CVD case number.[498] In that instance, however, an additional search would have to be performed with respect to companies that were excluded under the scope of a CVD order, since importers may not have included such companies' CVD numbers on Form 7501. The parties propose that US Customs conduct searches for the names of such companies for post-investigation reference periods. Such names would also be cross-checked against the relevant 10-digit HTS codes in the CVD order to identify imports from those companies subject to the relevant CVD order.[499]

8.67. With that background established, we note that the parties disagree over two issues that would be helpful to clarify at this stage: (a) which 10-digit HTS codes appearing in a given CVD order should be used to identify relevant imports in the US Customs data set; and (b) at what point in time to identify cross-owned affiliates of relevant Canadian companies. We address each in turn.

(a) The appropriate 10-digit HTS codes

8.68. The parties' disagreement surrounding which 10-digit HTS codes appearing in a CVD order should be used to identify relevant imports in the US Customs data set arises because, as the United States explains, a CVD order may reference two kinds of HTS codes, i.e. HTS codes under which the relevant product(s) "is"/"are" classified, and additional HTS codes under which the product(s) "may"/"might" be classified, with the latter being generally broader than the product(s) subject to the CVD order.[500] Thus, in the United States' view, to avoid undue over-inclusivity and attendant inflation of the calculated level of NI, only the former group of HTS codes should be used.[501] The United States has also more generally stated that use of HTS 10-digit level data "will likely overstate the value of imports that would be subject to AD or CVD duties under each order since some of the values under the reference HTS code are not subject to duties, but it remains the best available information under those circumstances".[502]

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[495] Canada's response to Arbitrator question No. 86, para. 178; United States' response to Arbitrator question No. 96, para. 251, and No. 106, para. 271.

[496] Canada's response to Arbitrator question No. 217, paras. 162-166, United States' response to Arbitrator question No. 217, paras. 124-126; Canada's comments on United States' response to Arbitrator question No. 217, paras. 63-64; United States' comments on Canada's response to Arbitrator question No. 217, paras. 112-114.

[497] Canada's response to Arbitrator question No. 86, para. 178.

[498] United States' response to Arbitrator question No. 86, paras. 252-253.

[499] United States' response to Arbitrator question No. 217, para. 125; Canada's response to Arbitrator question No. 275, para. 2; and United States' comments on Canada's response to Arbitrator question No. 275, para. 3.

[500] See 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 (Aug. 26, 2020) (Exhibit USA-10) ("Merchandise covered by these orders is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheading … Wind towers of iron or steel are classified under HTSUS … Wind towers may be classified under HTSUS …") (emphasis added); Commerce, "Certain Softwood Lumber Products from Canada, Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order", 83 Fed. Reg. 347 dated January 3, 2018 (Exhibit CAN-18) ("Softwood lumber products that are subject to this order are currently classifiable under the following ten-digit HTSUS subheadings … Items so identified might be entered under the following ten-digit HTSUS subheadings …"). (emphasis added)

[501] United States' response to Arbitrator question No. 178, para. 103.

[502] United States' written submission, para. 139. See also United States' response to Arbitrator question No. 155, para. 80. The United States recognizes, however, that because there is rarely perfect alignment between the written description of a product in a CVD order and HTS 10-digit level codes, HTS 10-digit level categories may sometimes be underinclusive or overinclusive *vis-à-vis* the subject product (United States' response to Arbitrator question No. 105, paras. 268-270).

8.69. Canada asserts that all HTS codes referenced in the CVD order should be used to define the relevant product, not just the "primary" HTS codes as the United States advocates. This is so, in Canada's view, because "secondary" HTS codes would still be expected to capture imports of the relevant product, and thus, if they were excluded, it would likely lead to an underestimation of the values of imports and thus an inaccurate estimation of the level of NI.[503] Canada also asserts that the United States has failed to offer any compelling explanation as to what the meaningful difference is between a "primary" and "secondary" HTS code in this context.[504] Canada further notes that it is unaware of any law or regulation governing when the USDOC would label a HTS code as a "primary" or "secondary" HTS code in this context, and also argues that there is no reason to think that the use of the word "may" or "might" signals that only a minority of the goods entering the United States under that HTS code are the relevant product.[505]

8.70. In response, the United States explains that when a CVD order indicates that a given 10-digit HTS code "may" or "might" contain the relevant product, it means that the HTS code is expected to contain a mix of the goods subject to the CVD order and goods that are not subject to the CVD order, although it is unclear whether the majority of the goods entering the United States under that HTS code would or would not be subject to the CVD order.[506] The United States thus repeats its argument that the HTS codes that "may" or "might" contain the relevant product are generally broader than the relevant product, thus leading to over-inclusivity of the values of imports if they are used in this context, and also notes that the USITC only uses the "primary" HTS codes to identify relevant imports when conducting its injury analysis.[507]

8.71. In response, Canada asserts that the United States' observation that the USITC uses only primary HTS codes in its injury analyses is irrelevant because the USITC is not trying to identify the duties applied to the relevant product, which is the issue here.[508] Canada also claims that the USITC's practice in this regard is not uniform.[509]

8.72. The Arbitrator considers that both parties' approaches in this context would lead to inaccuracies in the level of NI calculated under the chosen model. This is so because the scope of a CVD order is not defined by HTS codes, but by the narrative description of the product in the CVD order.[510] Thus, the boundaries of the scope of the relevant product can partially, but not completely, overlap with the scope of certain HTS codes. When that partial overlap is expected to occur, it appears that the USDOC indicates in the CVD order that such an HTS code "may" or "might" contain the relevant product. We thus recognize that using all HTS codes mentioned in the CVD order to search for values of imports (i.e. Canada's approach) would likely lead to over-inclusive results, whereas using only some of the HTS codes mentioned in the CVD order to search for values of imports (i.e. the United States' approach) would likely lead to under-inclusive results. Both parties agree, however, that it cannot be determined *ex ante* whether the majority or minority of goods entering the United States under such an HTS code would be covered by the scope of a future CVD order. It is therefore speculative as to whether one approach would be more or less accurate than the other in any given instance. That being the case, we consider that the United States has not demonstrated that its proposal in this context is any more reasonable than Canada's. We therefore select the Canadian proposal, and conclude that *all* HTS codes listed in the CVD order shall be used to identify relevant imports in searches of US Customs data.

(b) Identification of cross-owned affiliates

8.73. Another issue that appears helpful to resolve at this point is how the parties will identify cross-owned affiliates. The parties have explained that the USDOC identifies cross-owned affiliates of individually investigated companies, and considers such affiliates to be part of the same company as the relevant individually investigated company for purposes of imposing CVD duties. The parties

[503] Canada's comments on the United States' response to Arbitrator question No. 265, paras. 143-144.
[504] Canada's response to Arbitrator question No. 226, paras. 203-207.
[505] Canada's response to Arbitrator question No. 265, paras. 278-279.
[506] United States' response to Arbitrator question No. 265, paras. 199-200.
[507] United States' response to Arbitrator question No. 221, para 140, and No. 265, paras. 199-200.
[508] Canada's comments on the United States' response to Arbitrator question No. 221, para. 87.
[509] Canada's comments on the United States' response to Arbitrator question No. 221, para. 88.
[510] See United States' response to Arbitrator question No. 87, para. 251, and No. 105, para. 268 (referring to Exhibit USA-10; Exhibit CAN-18); Canada's written submission, para. 177 (agreeing with the United States' statements in this context)).

also have explained that the USDOC names companies' cross-owned affiliates in the USDOC public records. What entities qualify as cross-owned affiliates of a given company may change over time.[511]

8.74. Canada originally proposed that if the identity of cross-owned affiliates changes over time, Canada will use the list of cross-owned affiliates that applied during the reference period, although for a pre-investigation reference period the most recent determination of cross-owned affiliates would apply.[512]

8.75. The United States asserts that it would be more appropriate to use the most recently determined cross-owned affiliates.[513] Canada subsequently agreed with the United States' approach.[514]

8.76. The Arbitrator recalls that the reference period is, at heart, meant to resemble as much as possible the market situation at the time of the triggering event and moving forward from that event.[515] Thus, we conclude that a company's cross-owned affiliates, for purposes of determining the value of imports, should be those most recently identified by the USDOC.

(c) Conclusion

8.77. In light of the foregoing, and in light of the parties' general agreement as to the general content of the initial notification, the Arbitrator instructs Canada, following a triggering event, to send a written notification to the United States with the following information:

a. a notification that Canada intends to suspend concessions with respect to a given application of the OFA-AFA Measure;

b. the names of all Canadian exporters who are then subject to relevant individual CVD rates or non-selected CVD rates affected by the OFA-AFA Measure;

c. the names of all Canadian exporters who are then subject to a relevant individual or non-selected unaffected CVD rate, and individually investigated companies that were excluded from the scope of the relevant CVD order;

d. the names of any cross-owned affiliates of affected or unaffected companies who were individually investigated or reviewed, as most recently identified by USDOC;

e. the names of companies subject to the all-others rate, insofar as such information is known by Canada;

f. a request for the United States to gather data on Canadian imports of the relevant product from US Customs with reference to all the 10-digit HTS codes from the relevant CVD order (for a reference period occurring before the issuance of the relevant CVD order) or the relevant AD/CVD number (for a reference period occurring after the issuance of the relevant CVD order)[516];

g. a list of all the HTS codes in the relevant CVD order; and

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[511] Canada's response to Arbitrator question No. 214, paras. 157-159; United States' response to Arbitrator question No. 214, paras. 119-120, and No. 268, para. 204. See generally 19 CFR 351.525 (Exhibit CAN-143), subsection (b)(6); Commerce, "Supercalendered Paper from Canada: Countervailing Duty Order", 80 Fed. Reg. 237 dated December 10, 2015 (Exhibit CAN-121), p. 76668; and Exhibit CAN-18, p. 349.

[512] Canada's response to Arbitrator question No. 268, paras. 283-284; comments on the United States' response to Arbitrator question No. 268, paras. 147-151.

[513] United States' response to Arbitrator question No. 268, para. 204, and No. 295, para. 44; comments on Canada's response to Arbitrator question No. 268, paras. 217-218.

[514] Canada's comments on the United States' response to Arbitrator question No. 295, para. 45.

[515] See para. 6.104, above.

[516] For a reference period occurring after the issuance of the relevant CVD order, Canada shall also include a request for US Customs to search for imports by companies excluded from the scope of the relevant CVD order using the names of the excluded companies, cross-checked against all 10-digit HTS codes in the relevant CVD order. See para. 8.66, above.

h. the reference period.

8.78. Canada shall also include the relevant Excel spreadsheet specified in paragraph 8.104, below.[517]

8.79. We note, however, that Canada's ability to include all such information in the initial notification may be limited by the information available to Canada and/or the burden of collecting all such information at the time of the notification. We therefore underline that if it emerges that there are any inaccuracies concerning, or under-reporting of, the information described in the paragraphs above in Canada's initial notification, this shall not limit in any way the United States' responsibility of providing all relevant US Customs data to Canada, described in more detail in the next section.

8.1.1.2.1.3 Search of US Customs data and provision of data to Canada

8.80. After Canada has made its initial notification to the United States following a triggering event, Canada originally proposed that the United States should then have a maximum of two weeks to provide US Customs data to Canada.[518] Subsequently, Canada indicated that a period of 45 days, which had previously been proposed by the United States, could be used.[519]

8.81. Regarding the scope of the US Customs data to be provided, Canada has stated its expectations with respect to two scenarios. If the triggering event is the imposition of a CVD order following an original investigation, Canada expects that "the United States would provide Canada with U.S. Customs data for all shipments from Canada under the relevant HTS codes (i.e. those within the scope of the countervailing duty order) in the reference period".[520] If the triggering event follows from a CVD proceeding following an initial investigation, "the United States would provide Canada with U.S. Customs data for all shipments from Canada under the relevant CVD number in the reference period".[521] In both cases, in Canada's view, the United States could preliminarily identify shipments by Canadian companies affected by the OFA-AFA Measure.[522] Canada further explains that, in order for Canada to be able to verify the data provided, the United States would have to provide, at a minimum, the following fields collected by US Customs with respect to any given shipment: Entry Type; Port Code; Entry Date; Country of Origin; Manufacturer ID; Manufacturer Name; Export Date; Importer Number; Importer of Record Name (Last, First, M.I.) and Address; Description of Merchandise; HTS Code Number; Net Quantity in harmonized tariff schedule of the United States (HTSUS) Units; Entered Value; CHGS (Charges); CVD rate and HTS rate; and AD/CVD Number (when shipments occur post-CVD order). Canada believes that in certain circumstances Canada may require additional information from US Customs.[523]

8.82. Canada specifies that, generally: (a) the "HTS Code Number", "Description of Merchandise", and "AD/CVD Number" fields in Form 7501 will determine which shipments should be deemed those of the relevant *product*; (b) the "Manufacturer ID" and "Manufacturer Name" fields should determine from which *company* shipments were made; (c) the "Entry Date" field will determine which imports occurred during the *reference period*; (d) the "country of origin" field will determine which imports

[517] We note that we decline to set any deadline by when, following a triggering event, Canada must send the initial notification to the United States. We further note that if Canada is already in possession of relevant data left over from a previous calculation of the level of NI, Canada shall endeavour to not issue a repetitive request to the United States for such data (see Canada's comments on the United States' response to Arbitrator question No. 287, para. 26 (noting that Canada may have relevant data from a previous calculation of the level of NI)).

[518] Canada's response to Arbitrator question No. 86, para. 189.

[519] Canada's response to Arbitrator question No. 224, para. 200.

[520] Canada's response to Arbitrator question No. 86, para. 180.

[521] Canada's response to Arbitrator question No. 86, para. 181.

[522] Canada's response to Arbitrator question No. 86, paras. 180-181. Canada explains that "Canada will provide the United States with the names of the respondent(s) that are subject to the OFA-AFA measure and the names of the respondent(s) that are not subject to the OFA-AFA measure." (Canada's response to Arbitrator question No. 86, fn 210 to para. 180).

[523] Canada's response to Arbitrator question No. 86, paras. 182-183; response to Arbitrator question No. 219, Table 1. Canada asserts that such information is provided in Form 7501 "Entry Summary Canada's response to Arbitrator question No. 87, para. 199; Exhibit CAN-93. Canada also notes that the company's name on the form may be entered inconsistently across multiple forms (Canada's response to Arbitrator question No. 86, fn 213 to para. 185).

are from *Canada*; and (e) the "Entered value" will control the *value* of imports. The other data fields, according to Canada, are necessary for verification purposes.[524]

8.83. Canada stresses in its submissions the importance of receiving disaggregated (i.e. shipment-by-shipment) information from US Customs, in the absence of which Canada claims it could not properly verify the US Customs data.[525] Canada also underlines that Canada's main concern in this context is that errors will occur when the importers populate the fields in Form 7501, one error in particular being that importers may misspell manufacturers' names.[526] Canada also asserts that the United States provides no convincing rationale as to why the United States would be unable to supply disaggregated data.[527]

8.84. Regarding the technical format of the transmitted data, Canada asserts that the United States should provide disaggregated US Customs data to Canada in a "machine readable format" (either .cvs or .xls format) so that Canada can sort, analyse, and verify the data.[528] Both parties submitted proposals for the format of the spreadsheet.[529]

8.85. After Canada has made its initial notification to the United States following a triggering event, the United States proposes that the United States should then have 45 days, rather than two weeks, to provide the relevant information to Canada.[530]

8.86. The United States considers that it is unnecessary for the Arbitrator to specify how US Customs will perform searches for relevant shipments.[531] However, the United States considers that the fields that would likely be relevant in identifying the relevant product would include "Entry type", "AD/CVD case number", "Description of merchandise", and "HTS code number". More specifically, the United States indicates that, for a pre-investigation reference period, it will ask US Customs for data pertaining to the relevant 10-digit HTS codes, and for a post-investigation reference period, the United States will ask US Customs for data pertaining to the relevant AD/CVD case number.[532] For determining the exporting Canadian company, the United States considers that the data fields that would likely be relevant would include "Manufacturer ID" and "Manufacturer name".[533] The United States also advocates using the "Country of origin" field to identify shipments from Canada[534] and the "Entered value" to determine the value of the imports.[535]

8.87. Regarding the form of the data to be provided to Canada, the United States' most recent position is that it would "provide company-specific trade value data to Canada for all Canadian exporters of the product – both affected and unaffected companies".[536] The United States argues that this level of data aggregation for each type of company is consistent with how its model will use the values of imports from each type of company. Moreover, the United States asserts that Canada would not need further disaggregated data in order to verify information because Canada incongruously seeks to verify disaggregated data with aggregated data.[537] In particular, the United States expects that companies would not provide disaggregated data to Canada for

[524] Canada's response to Arbitrator question No. 154, paras. 103-104, and No. 166, paras. 147-154.
[525] See generally Canada's comments on the United States' response to Arbitrator question No. 219.
[526] Canada's response to Arbitrator question No. 162, para. 137, and No. 221, para. 90.
[527] Canada's comments on the United States' response to Arbitrator question No. 232, paras. 102-104.
[528] Canada's response to Arbitrator question No. 86, para. 184, and No. 154, paras. 105(iv) and 106(iv).
[529] Canada's Proposed Spreadsheet Template (Exhibit CAN-147); U.S. Response to Question 219: Excel Spreadsheet for Customs Data (Exhibit USA-53).
[530] United States' response to Arbitrator question No. 173, para. 91. Canada indicated that a period of 45 days, as proposed by the United States, could be used (Canada's response to Arbitrator question No. 224, para. 200).
[531] United States' response to Arbitrator question No. 154, para. 77, and No. 290, para. 30.
[532] United States' response to Arbitrator question No. 173, para. 85.
[533] United States' response to Arbitrator question No. 154, para. 78.
[534] United States' response to Arbitrator question No. 219, para. 130.
[535] United States' response to Arbitrator question No. 219, para. 130; comments on Canada's response to Arbitrator question No. 221, para. 124.
[536] United States' response to Arbitrator question No. 273, para. 205. The United States originally asserted that, for affected individually examined companies, the United States would provide aggregated import value data from US Customs on a company-specific basis, and would provide more aggregate data for companies subject to the all-others rate and unaffected exporters (see e.g. United States' response to Arbitrator question No. 154, para. 77, and No. 273, paras. 205-206).
[537] United States' response to Arbitrator question No. 173, para. 87, No. 175, para. 95, and No. 232, paras. 152-154.

verification purposes.[538] Further, the United States argues that the model will be run with only aggregated data for each variety of exporter[539], and that providing disaggregated data is overly burdensome.[540] The United States indicates that it will provide such data in Excel format.[541]

8.88. In order to address Canada's concerns related to misspellings in the "Manufacturer Name" and "Manufacturer ID" fields producing errors when calculating the value of imports, the United States also asserts that, in addition to US Customs providing aggregated data on a company-specific basis, US Customs could also provide aggregated information based on combinations of the "Manufacturer Name" and "Manufacturer ID" fields. The United States asserts that this additional information would aid Canada in its verification of the US Customs data.[542]

8.89. The United States further asserts that, in providing the relevant data to Canada, the United States could provide an attestation from US Customs that: (a) the reported data is inclusive of all requested information; (b) US Customs had used its best efforts to search for requested data and properly assign the values associated with relevant shipments to the relevant affected and unaffected companies; and (c) such search and assignment occurred in a manner that US Customs believes is consistent with its task of administering CVD orders and collecting duties.[543] The United States also orally confirmed at the meeting with the parties that US Customs would use its best efforts to accurately assign values of imports to relevant companies in this context.[544]

8.90. The United States also asserts that providing for minimum search criteria in this context is unnecessary, as US Customs is able to perform such searches with its own expertise.[545]

8.91. The Arbitrator notes that there are five issues to consider in this context: (a) how searches of the ACE Database should be performed; (b) once relevant records have been identified in such searches, the scope of the information to be supplied to Canada and at what level of aggregation such data should be conveyed; (c) in what technical format the data should be relayed to Canada; (d) whether to require the United States to provide relevant attestations to Canada; and (e) how long the United States should have to transmit the US Customs data to Canada following Canada's initial notification to the United States. We address each in turn.

(a) Searches of US Customs data

8.92. Regarding how US Customs should perform searches of the ACE Database for relevant import records, the parties disagree regarding whether search criteria for initial searches should be prescribed but agree on the most useful basic criteria to use for searches of the ACE Database.[546] We consider that, at least for certain information, basic minimum search criteria would be helpful to prescribe. This is so because it would give assurances to Canada regarding the scope of the initial searches done by US Customs, and because the basic search criteria are essentially agreed upon by the parties. Thus, the Arbitrator instructs the United States to perform, *at minimum*, the following searches following receipt of Canada's initial notification:

- with respect to a *pre-investigation reference period* (i.e. when an AD/CVD number would not have been assigned to relevant import shipments in the reference period), search for records that have: (a) an "Entry Date" during the reference period; (b) "Canada" as the "Country of

[538] United States' comments on Canada's response to Arbitrator question No. 219, para. 118. Based on its argument that companies will likely not provide shipment-specific information to Canada for purposes of verification, the United States, specifically, disagrees that the following fields would be necessary in order to verify US Customs data: importer of record name and address, importer number, description of merchandise, net quantity in HTSUS units, CHGS, port code, and export date (United States' comments Canada's response to Arbitrator question No. 219, para. 119).
[539] United States' response to Arbitrator question No. 232, para. 154.
[540] United States' response to Arbitrator question No. 219, paras. 128-132.
[541] United States' response to Arbitrator question No. 173, para. 86.
[542] United States' response to Arbitrator question No. 219, paras. 131-132.
[543] United States' response to Arbitrator question No. 154, paras. 77-79, and No. 231, para. 151.
[544] United States' oral response to Arbitrator question No. 231 at the meeting of the Arbitrator.
[545] United States' comments on Canada's response to Arbitrator question No. 221, para. 121.
[546] We recall that the United States has explained that searches can be performed with respect to all fields in Form 7501 (United States' response to Arbitrator question No. 174, para. 93).

Origin"; and (c) one or more of all the 10-digit HTS codes appearing in the relevant CVD order; or

- with respect to a *post-investigation reference period* (i.e. when an AD/CVD number would have been assigned to relevant import shipments during the reference period), search for records that have: (a) an "Entry Date" during the reference period; (b) "Canada" as the "Country of Origin"; and (c) the relevant CVD number. US Customs shall also search for imports by companies excluded from the scope of the relevant CVD order using the names of the excluded companies, cross-checked against all 10-digit HTS codes in the relevant CVD order.[547]

8.93. We note that these are *minimum* initial searches. The United States is free to perform other searches of the relevant US Customs data as well and present all relevant data to Canada. Thus, and if for some reason, these initial search criteria yield imports that the United States believes should *not* be included in the data set, then the United States shall nonetheless present such data to Canada but can raise its objections to such data with Canada during consultations (see section 8.1.1.2.1.4, below).

8.94. Once relevant import records have been identified, however, the parties disagree as to the scope of information regarding such records that should be conveyed to Canada. That issue is discussed in the following section.

(b) Scope of information to be supplied to Canada and degree of disaggregation

8.95. Regarding the scope of the information and, relatedly, at what level of aggregation it should be supplied to Canada, Canada's proposal is that US Customs provide Canada with the information in many different fields from relevant Form 7501 records found in searches of US Customs data. Canada further requests that such data be provided to Canada on a disaggregated shipment-by-shipment basis to aid Canada's efforts in analysing and verifying the data. The United States has indicated it should only have to provide data aggregated at the company-level, but not shipment-by-shipment.

8.96. The Arbitrator notes that the United States never argues that it would be unable provide the data fields that Canada requests in disaggregated shipment-by-shipment form or that there are any technical issues associated with doing so.[548] Moreover, although the United States has indicated that provision of shipment-by-shipment data might be overly burdensome for US Customs, the United States has provided no details as to why this would be so. It also appears reasonable to expect that shipment-by-shipment data could assist Canada in analysing and verifying the data it receives from US Customs.[549] This is especially so with respect to Canadian companies that may provide their data to Canada for purposes of verification on a shipment-by-shipment basis, a possibility that we find difficult to dismiss since we do not know how companies would transmit their data to Canada.

8.97. The Arbitrator thus concludes that US Customs data should be provided to Canada on a disaggregated shipment-by-shipment basis, with the fields from Form 7501 that Canada requests.

[547] See para. 8.66, above. We note that Canada has proposed that if the reference period is a post-investigation reference period, then the value of imports from companies subject to a factual all-others rate could be determined by searching for the AD/CVD number specific to the all-others rate (Canada's response to Arbitrator question No. 295, Revised Table 1, at p. 25). We disagree because although this would yield the value of imports for companies that were subject to the all-others rate *during the reference period*, what is needed, somewhat differently, is the value of imports from the companies subject to a factual all-others rate moving forward from the triggering event. These groups of companies could be different. Thus, Canada should simply take as the relevant all-others value of imports the residual value of imports in the US Customs data set after removing the values of imports from companies subject to other types of factual CVD rates.

[548] United States' response to Arbitrator question No. 232, para. 152.

[549] See generally Canada's response to Arbitrator question No. 163 (indicating potential ways that such fields could facilitate verification).

Exactly what those fields are and how they will be technically structured are issues discussed in more detail in the following section.[550]

(c) Technical format of US Customs data

8.98. Regarding the technical format of the information to be provided to Canada, both parties proposed different Excel spreadsheet formats for the United States to use to transmit data from US Customs to Canada.[551] The two spreadsheets are organized around the parties' proposals on this score, i.e. the United States' spreadsheet is predicated on the notion that the data will be supplied in a more aggregated form that what Canada requests, and with fewer fields.

8.99. After receiving the parties' proposed spreadsheets, the Arbitrator proposed a slightly modified version of the Canadian Excel sheet to the parties for comment.[552] Specifically, the Arbitrator proposed to add columns for the following information: (a) whether the company is subject to a non-selected rate; (b) if so, in which administrative review the non-selected rate was created; and (c) the name of the company appearing in the relevant CVD order to which the value of the shipment is assigned, unless the company was subject to the all-others rate (in which case the name of the company may not appear anywhere in any relevant USDOC record). The United States did not object to the inclusion of item (a) but considered items (b) and (c) unnecessary since "Customs data provided would be for the specific administrative review where the challenged measure was applied" and "there is already a column for the manufacturer name", respectively.[553] The United States also considered that any fields that reflected an assessment by the United States as to whether a given shipment was made by an affected company should be optional for the United States, as such fields would potentially be over-burdensome for the United States to complete under a deadline.[554]

8.100. Canada replied favourably to the Arbitrator's proposed revisions, indicating that since the United States was the party advocating the use of import data from, in particular, unaffected exporters, then the United States should have to provide the import data in a manner that facilitates Canada's calculations of a level of NI, including separation of imports from affected versus unaffected companies.[555] Canada also asserted that information regarding from which administrative review a non-selected rate came was not unnecessary, as the United States claimed, because there could be multiple non-selected rates created and active during a reference period.[556] Canada further proposed that the spreadsheet should contain the factual CVD rates of all companies at the time of a triggering event.[557]

8.101. In light of the Arbitrator's prior decision in the section immediately above that US Customs should relay data to Canada on a disaggregated shipment-by-shipment basis, the Arbitrator considers that a version of Canada's proposed spreadsheet be used, as the United States' spreadsheet proposal is based on company-specific, but not shipment-specific, data aggregation.[558]

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[550] We recall that Canada has indicated that it may require additional information from US Customs in some circumstances. Canada has not elaborated on what such information might be or proposed procedures with which such information would be requested. The Arbitrator thus considers that insofar as Canada wishes additional information to be provided that is not explicitly called for by the procedures in this Decision, Canada can raise such issues with the United States during consultations. (See section 8.1.1.2.1.4, below).

[551] Exhibit CAN-147; Exhibit USA-53.

[552] Arbitrator question No. 286.

[553] United States' response to Arbitrator question No. 286, para. 18.

[554] United States' response to Arbitrator question No. 286, para. 19.

[555] Canada's response to Arbitrator question No. 286, para. 28; comments on the United States' response to Arbitrator question No. 286, para. 23.

[556] Canada's comments on United States' response to Arbitrator question No. 286, para. 22.

[557] Canada's response to Arbitrator question No. 286, paras. 26-29; United States' response to Arbitrator question No. 286, paras. 17-20; Canada's comments on the United States' response to Arbitrator question No. 286, paras. 21-23; United States comments on Canada's response to Arbitrator question No. 286, paras. 17-18. The United States does not specifically object to an added column indicating the factual CVD rates of relevant companies, as proposed by Canada, but does propose that that information be voluntary for the United States to provide as well (United States' comments on Canada's response to Arbitrator question No. 286, para. 18).

[558] The Arbitrator notes that there was a column in Canada's proposed spreadsheet, i.e. original column P, that would have reflected ordinary customs duties. We therefore note that in section 8.1.2.1, below, the Arbitrator decides not to consider duties other than CVDs in the selected model. Thus, the Arbitrator deleted that column from the spreadsheet. All other columns from the Canadian proposed spreadsheet remain in the adopted spreadsheet.

Specifically, the Arbitrator instructs the parties to use the spreadsheet template in Annex C-3 of the Addendum to this Decision, WT/DS505/ARB/Add.1.

8.102. With respect to that spreadsheet template, we note that columns A-P have entries for the following information: (A) Manufacturer name; (B) Manufacturer ID; (C) Entry Type; (D) Port Code; (E) Entry Date; (F) Country of Origin; (G) Export Date; (H) Importer of record; (I) Importer Number; (J) HTS Code Number; (K) Description of Merchandise; (L) Net Quantity in HTSUS Units; (M) Entered Value[559]; (N) CHGS (charges); (O) AD/CVD Number; and (P) Reference Period CVD Rate. Multiple such fields are agreed upon by the parties as necessary or helpful in identifying relevant shipments, assigning the values of such shipments to relevant companies, and/or running the selected model. We further agree with Canada that others could potentially be helpful for verification, especially if Canada receives information for purposes of verification from Canadian companies that is organized on a shipment-by-shipment basis. We further note that the United States has provided no specific reasoning as to why extracting such data from electronically filed Form 7501 and providing all such data to Canada in an Excel format would be unduly burdensome within the allotted time frame.[560]

8.103. Further in the spreadsheet template, columns Q-W have entries for the following information: (Q) Affected Respondent Company (Y/N); (R) Unaffected Respondent Company (Y/N); (S) All Others (Y/N); (T) Non-selected Rate (Y/N); (U) If yes non-selected, from which administrative review did the non-selected rate arise?; (V) If not All Others, in the view of US Customs, name of the company appearing in the relevant CVD order document(s) to which the value of the shipment should be allocated; and (W) Factual CVD Rate. Rather than being taken directly from the Form 7501 information, these fields are part of an assessment by the United States regarding to which company to assign the value of the shipment in each row and whether the company is affected or unaffected. We consider that columns that reveal what kind of CVD rate the company was assigned will assist in that endeavour. Moreover, the factual CVD rate of Canadian companies is a necessary input into the selected model. We consider that such fields should be mandatory, rather than discretionary, as the United States advocates.[561] As Canada has indicated, Canada will likely have to make these same determinations in deciding whether companies are affected or unaffected and assigning appropriate CVD rates to them when running the selected model. Particularly in light of the fact that the model selected is a version of the United States' proposed model, we see nothing unreasonable about requiring the United States to share in the burden of assessing and organizing the information necessary to run the model accurately.[562] Moreover, the United States has provided no specific reasoning as to why making such assessments in the allotted time frame would be unreasonable.[563]

8.104. The Arbitrator therefore instructs the United States to use the spreadsheet template in Annex C-3 of the Addendum to this Decision, WT/DS505/ARB/Add.1, to relay US Customs information to Canada. The United States shall fill out all columns A-W in that template when providing such information on a shipment-by-shipment basis.

(d) Attestations

8.105. The Arbitrator recalls that the United States agreed to provide the following written attentions to Canada accompanying US Customs data: (a) the data set is inclusive of all requested information; (b) US Customs used its best efforts to search for requested data and properly assign the values associated with relevant shipments to the relevant affected and unaffected companies;

[559] We note that this field, i.e. "Entered Value", shall, when summed for all shipments from a particular company, be the value of imports from that company.

[560] We note that, further below, the United States will be granted 45 days to provide US Customs data to Canada following an initial notification. That deadline, however, can be extended by mutual consent of the parties. See para. 8.106, below.

[561] United States' response to Arbitrator question No. 286, para. 19.

[562] We recall that the United States asserted that columns (U) and (V) were unnecessary (United States' response to Arbitrator question No. 286, para. 18). However, a company could be subject to a non-selected rate that was not created in a triggering event, and the manufacturer name as provided by the importer in Form 7501 may not exactly match that of the company as written in the relevant CVD order documents. Thus, we disagree with the United States that such fields would always be unhelpful.

[563] The United States asserts, without providing details, that providing such assessments could be unduly burdensome (United States response to Arbitrator question No. 286, para. 19). We note that, further below, the United States will be granted 45 days to provide US Customs data to Canada following an initial notification. See para. 8.106, below. That deadline, however, can be extended by mutual consent of the parties.

and (c) such search and assignment occurred in a manner that US Customs believes is consistent with its task of administering CVD orders and collecting duties thereunder.[564] The Arbitrator therefore instructs the United States to provide such written attestations along with any US Customs data that the United States relays to Canada in the spreadsheet template described in the section immediately above.

(e) Deadline for transmittal

8.106. Regarding a deadline by when the United States shall transmit US Customs data to Canada following Canada's initial notification, the Arbitrator considers it reasonable to follow the parties' most recent positions on this score and set this deadline for 45 calendar days following the receipt by the United States of Canada's initial notification (which can be extended by mutual consent of the parties). A period of two weeks, originally proposed by Canada, in our view, is unreasonably short given the amount of data that the United States will have to collect and analyse.

8.1.1.2.1.4 Verification of US Customs data and consultations procedures

8.107. Canada explains that, after receiving data from US Customs, it would then verify the data to ensure that it is neither under- nor over-inclusive of relevant Canadian exports, and that affected Canadian exporters were properly identified by US Customs. Canada indicates that verification ensures that the data are accurately reported by US Customs and contain no inadvertent errors.[565] Canada further explains that its concerns regarding the accuracy of US Customs data in this context are primarily driven not by concerns surrounding US Customs' behaviour in conducting searches of the ACE Database, but by the fact that, with respect to a pre-investigation reference period, the relevant HTS codes may yield an under-inclusive set of Canadian exports[566], and there may be difficulties in executing accurate searches given potential errors in the reported data in Form 7501 data fields. In particular, Canada indicates that the "Manufacturer Name" field is a free-form text field and thus company names could be incorrectly spelled at times.[567]

8.108. Canada indicates that Canada would verify the US Customs data in two ways: (a) against all or a sample of relevant Canadian exporters' (i.e. company-specific) data, which Canada would obtain directly from exporters; and (b) against non-confidential aggregated (i.e. non-company specific) data from Statistics Canada, USITC DataWeb, and/or USA Trade Online.[568] Canada clarifies that it would only verify a given Canadian exporter's company-specific data against that same exporter's company-specific data in the dataset provided by US Customs.[569] Canada would also confirm that affected exporters were properly identified, and if they were not, Canada would determine which shipments were made by affected exporters.[570]

8.109. Canada proposes that if the US Customs data were revealed by verification to be under-inclusive of shipments by relevant exporters, "Canada may supplement the U.S. Customs data with company-specific export data, obtained from the affected exporters, for products falling

[564] The United States also offered an oral assurance, at the meeting of the Arbitrator, that these three things will be done in all relevant instances of data transmittal.

[565] Canada's response to Arbitrator question No. 155, paras. 107-109.

[566] This is so because, as Canada explains, the USDOC relies on the written description of the product to define the investigation's scope, and that description may be either broader or narrower than the HTS codes covering the subject product. Canada cites several USDOC decisions in support of its position in this regard (Canada's written submission, paras. 177-179). In support of this line of reasoning, Canada provides an example of a CVD investigation in which the USDOC explained that certain HTS codes might contain subject products even though the order did not mention such codes (Commerce, "Final Scope Ruling on the Antidumping Duty and Countervailing Duty Orders on Softwood Lumber from Canada: Harmer Steel Products Co." (June 29, 2020), Commerce, "Final Scope Ruling on the Antidumping Duty and Countervailing Duty Orders on Softwood Lumber from Canada: Harmer Steel Products Co." (June 29, 2020) (Exhibit CAN-22), p. 13).

[567] Canada's response to Arbitrator question No. 162, paras. 134-137; comments on the United States' response to Arbitrator question No. 231, para. 100.

[568] Canada's response to Arbitrator question No. 86, para. 185, and No. 155, para. 109. Canada asserts that it can use these aggregated data sources to reveal large scale errors (Canada's response to Arbitrator question No. 155, para. 109; response to Arbitrator question No. 156, para. 114).

[569] Canada's response to Arbitrator question No. 160, para. 128.

[570] Canada's response to Arbitrator question No. 86, para. 185.

within the product description, but not covered by the reference HTS Codes."[571] Canada indicates that, without having obtained shipment-specific information directly from Canadian companies, Canada would be unable to determine whether a specific *shipment* is under- or over-inclusive.[572] Canada asserts, however, that Canada may still be able to determine from the written product description in the CVD order whether the relevant HTS codes are under-inclusive of relevant Canadian exports, perhaps with the assistance of consulting USDOC scope rulings.[573]

8.110. Canada explains that if Canada were to need additional data to supplement the US Customs data, Canada would provide any such supplemental data to the United States within four weeks of Canada's receipt of the US Customs data, and then Canada would consult with the United States about such data for a subsequent two-week period.[574] Canada also explains, more generally, that "[i]f verification reveals errors of any kind, Canada would consult with the United States during a two-week period" to correct any errors if possible.[575] If the parties are unable to agree on a common dataset at the conclusion of such consultations, Canada proposes that Canada would then have the discretion to correct errors in the US Customs dataset and/or supplement such data "with company-specific data obtained from affected exporters".[576] Canada would further send written explanations to the United States regarding how Canada would alter the dataset.[577] Canada asserts that leaving such discretion to Canada is appropriate because Canada is the complainant in this dispute and NI to Canada accrues due to the United States' non-compliance with respect to the OFA-AFA Measure.[578] Canada also clarifies that it would be able to share information used to verify Customs data with the United States taken from aggregate data sources and the USDOC's record documents during consultations, with the exception of data obtained directly from Canadian companies, who would have to consent to the release of their data to the United States in order for Canada to share such data.[579] Canada also considers that if consultations procedures fail to resolve any disagreements between the parties, the United States, as the party against whom suspension will occur, should not be given the discretion to ultimately pick the values of imports.[580]

8.111. The United States does not object to Canada's general proposal to allow Canada to verify US Customs data that Canada receives, and agrees with the proposed two-week consultations period. The United States also agrees that US Customs data may contain errors, such as typos in the "Manufacturer Name" and/or "Manufacturer ID" fields. The United States indicates that US Customs would use a combination of these fields, along with company-specific AD/CVD case numbers when possible, to confirm which import values should be assigned to which company.[581]

8.112. The United States asserts, however, that it would be inappropriate to allow Canada to supplement US Customs data with additional exports from affected exporters (i.e. to correct alleged under-inclusiveness of the US Customs dataset) without Canada also providing for a process through which to correct for potential over-inclusiveness of the US Customs dataset and/or a way to supplement exports from unaffected exporters.[582] Moreover, the United States argues that allowing Canada the discretion to supplement the dataset in this manner would mean that Canada would have no incentive to engage in consultations with the United States on this subject.[583] The

[571] Canada's response to Arbitrator question No. 86, para. 187. See also Canada's response to Arbitrator question No. 227, para. 209. In this context, Canada asserts that "exporters would have to engage in a process of determining whether previous exports fell within the scope of the relevant countervailing order, based on their sales information (i.e. data held by producers that is more descriptive than HTS Code data)." (Canada's response to Arbitrator question No. 86, fn 214 to para. 187).

[572] Canada's response to Arbitrator question No. 167, para. 155.

[573] Canada's response to Arbitrator question No. 167, paras. 156-157.

[574] Canada's response to Arbitrator question No. 86, para. 187. See also Canada's response to Arbitrator question No. 165, paras. 144-146.

[575] Canada's response to Arbitrator question No. 86, para. 186. See also Canada's response to Arbitrator question No. 165, para. 145.

[576] Canada's response to Arbitrator question No. 165, para. 145.

[577] Canada's response to Arbitrator question No. 165, para. 145.

[578] Canada's response to Arbitrator question No. 165 para. 146.

[579] Canada's response to Arbitrator question No. 225, para. 202.

[580] Canada's comments on the United States' response to Arbitrator question No. 221, para. 82.

[581] United States' response to Arbitrator question No. 173, para. 91, and No. 177, paras. 97-98. Canada notes that US Census corrects for other errors in the raw data received via Forms 7501 as well (Canada's comments on the United States' response to Arbitrator question No.231, para. 100).

[582] United States' response to Arbitrator question No. 173, para. 88; comments on Canada's response to Arbitrator question No. 221, para. 125.

[583] United States' comments on Canada's response to Arbitrator question No. 221, para. 129.

United States further argues that Canada should be given a deadline by when to verify the US Customs data, especially in light of the fact that Canada wishes the Arbitrator to provide a deadline by when the United States must provide US Customs data to Canada following a triggering event. The United States suggests that Canada be allowed 20 days to verify US Customs data.[584]

8.113. The United States agrees with Canada that if verification reveals any alleged errors in the US Customs data, the parties should consult in an attempt to correct such alleged errors, if possible, and that the parties should consult to reach an agreement if at any time either party considers that more time should be allotted for any particular stage of the process.[585]

8.114. The United States also points out that the data sources that Canada proposes to use to verify US Customs data have inherent limitations for that purpose. The United States asserts, for example, that Statistics Canada data are aggregated, rather than company-specific, and thus could not be used to verify the values of imports from individually investigated Canadian companies.[586] Moreover, the United States notes that it is unclear how Canadian companies would maintain and present their data to Canada if requested to do so.[587] In particular, the United States points out that if the companies denominate their sales in Canadian dollars, then converting such values to US dollars would be necessary and would likely require a prescribed conversion rate.[588]

8.115. The United States also stresses that, as a general matter, and in keeping with the principles of transparency, the preference for using verifiable data, and encouraging good faith consultations between the parties, Canada should not use any data to calculate the values of imports or verify US Customs data that cannot be shared with the United States. The United States therefore asserts that using data obtained directly from Canadian companies is problematic in light of Canada's explanation that Canada could not share such information with the United States without obtaining the consent of the company.[589] The United States also argues that "Canada should only be permitted to use company-specific data for verification if Canada is able to verify both the affected and the unaffected Canadian companies", although Canada has stated that it is unlikely that Canada will be able to verify the data of unaffected exporters.[590]

8.116. The Arbitrator notes that the parties' arguments raise three main issues in this context: (a) whether to provide for verification and consultations procedures, and if so, deadlines governing such procedures; (b) whether to place restrictions on the data Canada can use to verify US Customs data; and (c) prescribed solutions if the parties fail to agree on the relevant values of imports for relevant companies at the end of consultations procedures. We address each in turn.

(a) Verification and consultation procedures, generally

8.117. The parties agree that, in principle, allowing for Canadian verification of US Customs data and US-Canadian consultations regarding any disagreements concerning the calculation of relevant values of imports would be appropriate. We consider this common position reasonable. As explained by both parties, US Customs data are not infallible, and errors may be present in them. This is so, in particular, due to potential errors occurring when importers relay data to US Customs in Form 7501. Given the parties' comments, it would appear that the "Manufacturer Name" field may be particularly susceptible to errors, as company names may be complex at times. Thus, we consider it appropriate to allow Canada a chance to discover potential errors in the US Customs data and ideally correct them in cooperation with the United States via consultations.

8.118. We note, therefore, that the parties disagree regarding how much time Canada should have to verify US Customs data. Canada proposes four weeks whereas the United States proposes

[584] United States' response to Arbitrator question No. 173, para. 91.
[585] United States' response to Arbitrator question No. 173, para. 91.
[586] United States' response to Arbitrator question No. 173, para. 87. See also United States' response to Arbitrator question No. 156.
[587] United States' response to Arbitrator question No. 86, para. 243.
[588] United States' response to Arbitrator question No. 86, para. 243.
[589] United States' comments on Canada's response to Arbitrator question No. 193, para. 63, and No. 225, paras. 139-141.
[590] United States' comments on Canada's response to Arbitrator question No. 225, para. 140 (referring to Canada's response to Arbitrator question No. 227, para. 208 ("With respect to data for unaffected exporters required under the U.S. model, it is probable that Canada will be unable to verify the data because it is unlikely that unaffected exporters would provide Canada access to their records.")).

20 days. We consider 30 days to be reasonable, and discern no reason why 20 days is a superior option in this context.[591] We therefore adopt the Canadian position in this context, and will grant Canada 30 calendar days to verify US Customs data, from the date of receipt of such data, and to send any objections regarding the data to the United States. Moreover, and as consistent with the parties' agreement on this subject, we consider that the parties shall be given a two-week (14 calendar day) period over which to perform consultations following Canada's relay of any objections regarding US Customs data to the United States. The parties can extend either deadline by mutual agreement.

(b) Restrictions on data used for verification

8.119. We recall that the United States has argued that certain restrictions should be placed on what information Canada may use to verify US Customs data. Specifically, the United States argued that: (a) all information that Canada uses to verify US Customs data must be able to be shared with the United States during consultations; and (b) data obtained directly from Canadian exporters should not be used for verification because Canada has indicated that it would presumably be unable to obtain information from both affected and unaffected companies.

8.120. The Arbitrator recognizes the value in Canada sharing information with the United States that Canada uses for verification purposes. Indeed, the efficacy of consultations would likely be significantly aided if both parties are able to examine all relevant data. The Arbitrator therefore considers that Canada should endeavour to share all information with the United States that Canada uses for verification purposes insofar as the United States requests such information during the consultations process.

8.121. The Arbitrator recognizes, however, that Canada may not be able to share all such information with the United States. In particular, Canada has explained that information obtained directly from Canadian exporters can only be shared with the United States if the providing company consents to such sharing. Although this is the key example discussed by the parties in this context, the Arbitrator recognizes that this example reflects a potentially more general issue arising in cases when confidentiality considerations restrict Canada's ability to share information with the United States. We therefore note the United States' more general argument that Canada should not be able to rely on any information for verification purposes that cannot be shared with the United States.

8.122. The Arbitrator declines, however, to *ex ante* restrict Canada's ability to rely on any particular data when verifying US Customs data, whether due to concerns about the sharing of such data with the United States or due to concerns regarding from what subset of companies Canada might collect data with which to verify US Customs data. The ultimate goal of the verification process is for the parties to arrive at the most accurate dataset that is reasonably possible. We therefore note that even if the outright sharing of certain information with the United States may be impracticable, or Canada may obtain information from only a subset of Canadian companies, we see no reason to inhibit Canada's ability, based on its own review of such information, to draw the United States' attention to potential errors in the US Customs data set and about which the parties can consult. We further note that the Arbitrator has already prescribed certain minimum initial search criteria for the purpose of locating relevant Canadian imports during a reference period[592], and, further below, the Arbitrator prescribes additional criteria to use to resolve party disagreements over how to assign the value of imports to Canadian companies that cannot be resolved through consultations.[593] The presence of such procedures, in our view, reasonably limits either party's discretion to select the relevant dataset in this context.

8.123. In light of the foregoing, the Arbitrator instructs Canada to share with the United States all information that Canada uses to verify US Customs data insofar as the United States requests such information during the consultations process. The exception to this rule is when confidentiality restrictions prevent Canada from sharing such information with the United States, most notably in

[591] We note that, in particular, some time may be required for Canada to identify and obtain information from relevant sources for purposes of verification, including from the exporters themselves. (See section 8.1.1.2.1.4(b), below, finding that Canada may use any data it wishes to verify US Customs data, including data received directly from Canadian exporters).

[592] See para. 8.92, above.

[593] See section 8.1.1.2.1.4(c), below.

the context of Canada obtaining information directly from Canadian exporters who we understand must consent to such sharing. Thus, when Canada requests otherwise confidential information from a source, Canada shall, as part of such request, also seek the written consent of the providing source(s) to Canada allowing Canada to share such information with the United States for purposes of verification and consultations. If the United States requests information from Canada that cannot be shared due to confidentiality reasons, Canada shall so inform the United States and also provide the reasons why such information cannot be shared.

(c) Resolution of disagreements following consultations

8.124. If, at any relevant time after Canada receives US Customs information from the United States, the parties agree on the data set to be used to calculate the value of imports (whether by lack of objections by Canada or via consultations), the parties shall use that agreed upon data. We note, however, that such party agreements may not result, even after consultations occur. The Arbitrator therefore considers it necessary to prescribe procedures regarding how the values of imports should be assigned to relevant Canadian companies in the event of such disagreements, or else such disagreements might paralyze the suspension process.

8.125. Canada considers that if the parties are unable to resolve their differences at consultations, then Canada should "have the discretion to supplement the U.S. Customs data, or correct any errors, with company-specific data obtained from affected exporters".[594] This is appropriate in Canada's view because Canada is the aggrieved party in this dispute overall.[595] In doing so, Canada indicates that: (a) the companies have more data than US Customs regarding certain shipments; (b) Canada would seek attestations from the companies that the information relayed to Canada about shipments is accurate; and (c) Canada would perform such supplementation in an objective manner.[596] While Canada apparently envisions a possibility of being able to verify unaffected exporters' data in the same way, Canada generally believes that it is unlikely that Canada would be able to secure such information from unaffected companies with which to verify US Customs data.[597] Canada also asserts that minimum search criteria prescribed by the Arbitrator could be utilized in principle to resolve disagreements, but Canada favours using these as initial search criteria of US Customs data, not as a means by which to resolve differences arising in consultations.[598] Canada stresses, however, that the United States should not get the final say in how to assign values of imports.[599]

8.126. The United States originally proposed that the parties continue to consult for as long as disagreements persist, but later indicated that the parties should instead defer to the US Customs' judgment as to how to assign the values of imports to relevant companies because US Customs is the agency tasked with making such determinations and thus should be trusted as the most effective decision-maker in this context.[600] The United States also asserts that it is unclear why Canadian companies would have records of shipments that are, in the companies' opinion, subject to CVDs that were not captured by US Customs' data.[601] The United States further dismisses Canada's reliance on its status as the original complainant in this context as irrelevant.[602] Moreover, the United States asserts that if the parties are unable to agree on the values of imports at the end of consultations, then using prescribed search criteria for US Customs data could be a reasonable solution.[603]

8.127. The Arbitrator first notes the United States' proposal that consultations continue for as long as necessary until disagreements are resolved. We consider this a non-viable approach, as it could

[594] Canada's response to Arbitrator question No. 165, para. 145.
[595] Canada's response to Arbitrator question No. 165, para. 146.
[596] Canada's response to Arbitrator question No. 221, paras. 186 and 188; comments on the United States' response to Arbitrator question No. 221, paras. 92-94.
[597] Canada's response to Arbitrator question No. 227, para. 209.
[598] Canada's response to Arbitrator question No. 221, para. 176; comments on the United States' response to Arbitrator question No. 221, para. 92.
[599] Canada's response to Arbitrator question No. 221, para. 190; comments on the United States' response to Arbitrator question No. 221, para. 92.
[600] United States' response to Arbitrator question No. 173, para. 91; No. 221, paras. 136-143, and No. 230, paras. 147-150; comments on Canada's response to Arbitrator question No. 221, paras. 121-129.
[601] United States' response to Arbitrator question No. 230, para. 148.
[602] United States' response to Arbitrator question No. 230, para. 150.
[603] United States' response to Arbitrator question No. 221, para. 138.

allow such disagreements to paralyze the suspension process indefinitely. The Arbitrator therefore rejects this proposal.

8.128. We thus note that the parties have discussed three additional options in this context: (a) allowing Canada to supplement US Customs data with company-specific data obtained directly from Canadian exporters; (b) exclusive reliance on US Customs' data and also US Customs' judgment; or (c) search criteria of US Customs data prescribed by the Arbitrator that could resolve disagreements. The Arbitrator has certain common concerns regarding options (a) and (b). Specifically, they both cede ultimate authority to entities (whether parties to this proceeding, and/or Canadian companies subject to the relevant CVD order[604]) to determine the value of imports, but such entities are directly interested in the level of NI being calculated. We also note an additional issue with Canada's suggestion that Canada and/or the Canadian companies could identify shipments of products that do not fall under the 10-digit HTS codes referenced in the CVD order but that do fall under the product description in the CVD order (the latter being authoritative[605]). This essentially means that Canada and/or the companies would be issuing *de facto* scope rulings as the order's product coverage. The record reflects that such scope rulings can be involved[606], however, and thus we consider it unduly speculative as to whether Canada and/or the Canadian companies would reach the same conclusions as the USDOC, had the USDOC performed an authoritative scope ruling instead.[607] We therefore consider options (a) and (b) as unfavourable, particularly if another reasonable option exists.

8.129. We consider that such an option does exist, i.e. option (c) described in the paragraph immediately above, which suggests using prescribed search criteria to resolve disagreements that persist following consultations. The Arbitrator proposed such search criteria to the parties, and both parties recognized that such search criteria could be at least part of a reasonable solution. We further consider that the strength of this approach is that it cedes to neither party nor to Canadian companies the discretion to assign values of imports to Canadian companies, but rather provides objective and neutral criteria for such assignment. Moreover, it relies on what both parties generally agree is the best single data source for the values of imports, i.e. US Customs' ACE database.[608] We recognize, of course, that prescribed search criteria are by nature somewhat rigid, although the Arbitrator still considers that weakness preferable to allowing the United States, Canada, and/or Canadian companies the ability to assign export values to Canadian companies unilaterally. Finally, we note that the parties have both asserted that their objectivity may be relied upon to reach reasonable results under options (a) or (b), described in the preceding paragraph. We consider that the parties can fully apply the same objectivity in the context of agreeing to a reasonable dataset with the assistance of prescribed search criteria.

8.130. We therefore note that disagreements between the parties may arise as to four key issues in this context: (i) whether a shipment came from *Canada*; (ii) whether certain shipments were

[604] We note Canada's suggestion that Canada obtain attestations from companies indicating the reliability of information that such companies relay to Canada. While perhaps helpful, we note that we would consider such attestations as somewhat less reliable than those offered by the United States. (See para. 8.105, above). Indeed, unlike the United States, such companies are neither WTO Members nor are they subject to this arbitration proceeding and Decision.

[605] Canada's response to Arbitrator question No. 86, para. 187. Canada's response to Arbitrator question No. 227, para. 209. Canada's response to Arbitrator question No. 86, fn 214.

[606] See Canada's written submission, para. 178; Exhibit CAN-22; Commerce, "Antidumping and Countervailing Duty Orders on Certain Softwood Lumber Products from Canada: Final Scope Ruling on Cedar Shakes and Shingles" (September 10, 2018) (Exhibit CAN-23); Commerce, "Final Scope Ruling for Certain Hardwood Plywood Products from the People's Republic of China: Request by the Coalition for Fair Trade in Hardwood Plywood and Masterbrand Cabinets Inc." (September 7, 2018) (Exhibit CAN-24); Commerce, "Certain Tool Chests and Cabinets from the People's Republic of China: Final Scope Ruling on Quality Craft Industries, Inc.'s Products A and B" (May 21, 2018) (Exhibit CAN-25); and Commerce, "Final Scope Ruling for Certain Steel Threaded Rod from the People's Republic of China: Colonial Elegance Inc." (August 1, 2014) (Exhibit CAN-26).

[607] We also note that Canada explains that such supplementation would mainly be expected to be performed if the 10-digit HTS codes in the CVD order were underinclusive of the subject product (Canada's comments on the United States' response to Arbitrator question No. 221, para. 94). We thus recall that the HTS codes will only be the primary search tool used to identify the relevant product for pre-investigation reference periods. For post-investigation reference period the AD/CVD case number will be the primary search tool, which should, in theory, capture all shipments covered by the CVD order whether or not they fall within the scope of the referenced HTS codes (see section 8.1.1.2.1.3(a), above).

[608] We recall that the US Customs database has significant indicia of reliability (see section 8.1.1.2.1.1, above).

exported during the *reference period*; (iii) whether a shipment contained the *relevant product*; and (iv) to *which Canadian company* relevant shipments should be attributed. We address each in turn.

i. Shipments from Canada

8.131. We recall that a shipment must, of course, come from a *Canadian* company in order to be considered as part of an affected or unaffected Canadian variety. The parties have not recognized this issue as a likely source of disagreement. We note, therefore, that Canada proposed using the "Country of origin" field in the ACE Database as determinative of whether a shipment came from Canada.[609] The United States has raised no objection to this, and further listed this field among those that it considers significant for US Customs data searches.[610] We further discern no other fields that the parties have referenced as being any more relevant to this issue.

8.132. Thus, if, after consultations, the parties disagree regarding whether a particular shipment came from Canada, if the "Country of origin" field lists Canada as that country, then the shipment shall be considered a shipment from a Canadian company.[611]

ii. Shipments during the reference period

8.133. The Arbitrator proposed to the parties that if the parties disagree as to whether a particular shipment reflected on Form 7501 entered the US market during the reference period, then the "Entry Date" field on that Form 7501 for the relevant shipment will be determinative. The parties agreed with this criterion.[612] The Arbitrator therefore adopts this criterion to resolve differences following consultations regarding whether a shipment should be counted as one occurring during the reference period.[613]

iii. Shipments of the relevant product

8.134. The Arbitrator proposed to the parties the following if the parties disagree as to whether a particular shipment included the relevant product covered by the scope of the relevant CVD order:

a. for a pre-investigation reference period, all the 10-digit HTS codes in the CVD order will de determinative (i.e. all products entering under one or more HTS codes would be treated as the relevant product); and

b. for a post-investigation reference period, the relevant AD/CVD case number will be determinative (i.e. all products that have been assigned the relevant AD/CVD case number could be treated as the relevant product).[614]

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[609] Canada's response to Arbitrator question No. 154, paras. 103-104, and No. 166, paras. 147-154.

[610] See Exhibit USA-53 (listing Country of origin as search field).

[611] We note that this "Country of origin" field was already prescribed by the Arbitrator as a minimum initial search criterion (see para. 8.92, above). Thus, all shipments with "Canada" as the country of origin should appear in the dataset provided to Canada. The dataset may, of course, have additional shipments included as well if US Customs believed they should have been included at the time of the initial search.

[612] Canada's response to Arbitrator question No. 221, para. 181; United States' response to Arbitrator question No. 221 para. 139; Canada's comments on the United States' response to Arbitrator question No. 221, para. 85.

[613] We note that this "Entry date" field was already prescribed by the Arbitrator as a minimum initial search criterion (see para. 8.92, above). Thus, all shipments with an "Entry date" taking place during the reference period should appear in the dataset provided to Canada. The dataset may, of course, have additional shipments included as well if US Customs believed they should have been included at the time of the initial search.

[614] For companies that were excluded entirely from the scope of the CVD order, US Customs shall also search for the name of those companies, and for such companies, all shipments entering under one or more of the HTS codes in the relevant CVD order would be treated as the relevant product. Both parties agree with such criteria. (Canada's response to Arbitrator question No. 221, paras. 182-183; United States' response to Arbitrator question No. 221, para. 140).

8.135. The Arbitrator therefore adopts these criteria to resolve differences following consultations regarding whether a shipment should be counted as one including the relevant product.[615]

iv. Assignment of a shipment's value to a Canadian company

8.136. The Arbitrator proposed to the parties that if the parties disagree regarding to which Canadian company to assign a particular shipment of the relevant product reflected in Form 7501, the shipment will be assigned to an individually investigated or reviewed company, or a company subject to a non-selected rate[616] (whether affected or unaffected by the OFA-AFA Measure) if any of the four criteria apply that appear in paragraph 8.140(a) below. The parties had no significant objections to these criteria as written other than with respect to issues that are addressed in other sections of this Decision.

8.137. However, the United States did assert that two or more of the four criteria must point to the same company in order for the shipment's value to be assigned to that company, because using just one "would contradict the other information present that likely led to the parties' initial disagreement, and would not be appropriate".[617] Canada disagrees with this suggestion by the United States, arguing that it is impractical.[618] Canada also asserts that the United States' proposal would not work in instances where the same number of criteria pointed to different companies. Canada therefore "proposes, in case of a conflict, to assign the shipment to that company which fulfils the most of the criteria (…). Where the two conflicting companies fulfil the same number of criteria, the shipment should be assigned to an affected company".[619]

8.138. The Arbitrator agrees in principle with the United States that it would be preferable for more than one of the listed criteria to point to the same company in order for the value of the relevant shipment to be assigned to that company. The Arbitrator also agrees with Canada, however, that impasses should not arise if and when the same number of criteria point to different companies. Thus, the Arbitrator considers that a reasonable solution is, as Canada suggests, to assign the value to the company to which *most* of the criteria apply. Further, and in the absence of any other reasonable proposals from the parties on this score, we consider it reasonable to prescribe that if the same number of criteria point to different companies, then: (a) if such companies are all affected or all unaffected, US Customs shall use its best judgment in assigning the value to one of those companies; or (b) if such companies are a mix of affected and unaffected companies, US Customs shall use its best judgment in assigning the value to the (or one of) the affected company (or companies).

8.139. In this context, we are mindful of Canada's point that minor variations in spelling may exist, in particular, with respect to the Manufacturer Name and Manufacturer ID fields, contributing to the need for the parties potentially to make judgment calls regarding to which company actually named in a CVD order such shipments should be assigned.[620] These prescribed criteria are designed to mitigate, *inter alia*, that concern. Further, the United States will offer written attestations accompanying US Customs data relayed to Canada indicating that it has used its best efforts in

[615] We note that these fields (i.e. HTS codes and AD/CVD case number) were already prescribed by the Arbitrator as a minimum initial search criterion. (See para. 8.92, above). Thus, all shipments matching such codes or AD/CVD case numbers should appear in the dataset provided to Canada. The dataset may, of course, have additional shipments included as well if US Customs believed they should have been included at the time of the initial search.

[616] For purposes of this guidance, the term "individually investigated company" shall include companies that were excluded entirely from the scope of the CVD order because their individual CVD rates were found to be *de minimis* in an original investigation.

[617] United States' response to Arbitrator question No. 290, para. 33. See also the United States' oral response to Arbitrator question No. 221 at the meeting of the Arbitrator; response to Arbitrator question No. 221, para. 141.

[618] Canada's comments on the United States' response to Arbitrator question No. 221, para. 90. Canada also correctly notes that the prescribed criteria apply equally to both affected and unaffected companies (Canada's comments on the United States' response to Arbitrator question No. 221, para. 91).

[619] Canada's comments on the United States' response to Arbitrator question No. 290, para. 33. (emphasis original)

[620] Canada's response to Arbitrator question No. 221, para. 186; United States' response to Arbitrator question No. 177, para. 97.

assigning values of imports to companies in a manner consistent with its administration of CVD orders.[621]

8.140. The Arbitrator thus provides the following instructions to the parties to resolve disagreements regarding assignments of values to Canadian companies that persist following consultations:

a. If the parties disagree as to which company a particular shipment reflected on Form 7501 should be assigned after consultations occur, then the shipment will be assigned to an individually investigated or reviewed company, or a company subject to a non-selected rate[622] (whether affected or unaffected by the OFA-AFA Measure) if any of the following applies:

   i. the "Manufacturer Name" matches that of an individually investigated or reviewed company, or company subject to a non-selected rate, as written in the relevant USDOC final determination, CVD order, or final results[623];

   ii. the "Manufacturer ID" of the company was previously or subsequently assigned to a company in any other Form 7501 reflecting imports of any product during the reference period whose name matches that of an individually investigated or reviewed company, or a company subject to a non-selected rate, as written in the relevant USDOC final determination, CVD order, or final results, or it is otherwise known by US Customs that the Manufacturer ID specifically relates to an individually investigated or reviewed company or company subject to a non-selected rate;

   iii. the company-specific AD/CVD number assigned to the company was previously or subsequently assigned to a company in any other Form 7501 reflecting imports of any product during the reference period whose name matches that of an individually investigated or reviewed company, or a company subject to a non-selected rate, as written in the relevant USDOC final determination, CVD order, or final results, or if it is otherwise known by US Customs that the AD/CVD number specifically relates to an individually investigated or reviewed company or company subject to a non-selected rate; or

   iv. the relevant Form 7501 specified that the company's products are subject to a specific CVD rate that is unique to a particular individually investigated or reviewed company, or a company subject to a non-selected rate, subject to the relevant US CVD order.[624]

b. If, for any reason, the application of the guidance above leads to a conflict (i.e. the assignment of a particular value of imports to more than one individually investigated or reviewed company, or a company subject to a non-selected rate) then the value shall be assigned to the company to which most of the above-listed criteria point. If the same number of the above-listed criteria point to more than one company, then: (a) if such companies are all affected or all unaffected, US Customs shall use its best judgment in assigning the value to one of those companies; or (b) if such companies are a mix of affected and unaffected companies, US Customs shall use its best judgment in assigning the value to the (or one of) the affected company (or companies).

[621] See para. 8.105, above.

[622] For purposes of this guidance, the term "individually investigated company" shall include companies that were excluded entirely from the scope of the CVD order because their individual CVD rates were found to be *de minimis* in an original investigation. Cross-owned affiliates of such a company shall be considered to be part of that company for purposes of assignments of values of imports.

[623] For clarity, in this specific context, the term "USDOC final determination, CVD order, or final results" shall be interpreted to include any written determination by the USDOC that results in the imposition (or removal) of a CVD rate on (or from) a Canadian company.

[624] The United States has confirmed that the value of a particular shipment will be associated with an applicable CVD rate (United States' response to Arbitrator question No. 221, para. 142).

c. If application of the above guidance would not result in the value being assigned to an individually investigated or reviewed company, or a company subject to a non-selected rate, but the shipment was otherwise associated with an import from Canada of the relevant product during the reference period, then the shipment will be assigned to the group of companies subject to the all-others rate.[625]

d. If the parties disagree as to the inclusivity of the US Customs data set (i.e. whether the dataset should be supplemented with additional shipment values not contained in the US Customs data set), then the dataset shall not be supplemented.

8.141. The Arbitrator underlines that these instructions are intended as a last resort for the resolution of disagreements after the parties engage in consultations, and that the dataset as agreed by the parties shall always be the preferred dataset.

8.1.1.2.1.5 Import data from unaffected Canadian producers

8.142. As noted in section 7.2.2.4, above, Canada argued that it cannot reasonably use values of imports from unaffected Canadian exporters as a discrete input in any model selected by the Arbitrator. Canada based this argument on alleged difficulties in verifying US Customs data regarding values of imports for unaffected exporters, and, relatedly, difficulties in obtaining values of imports for unaffected companies in the absence of US Customs data. As expressed in that section, the Arbitrator disagrees with Canada that such alleged difficulties were as serious as Canada argued, and thus the Arbitrator did not consider it an issue that strongly mitigated against the use of a four-varieties version of the US model, which cannot be run without information on unaffected Canadian imports (as this constitutes one of the four varieties used in the model).[626] With the assistance of the preceding discussions in section 7.2.2, above, and also the sections above relating to the calculation of values of imports, pertaining to model selection, as helpful context, we therefore, at this point, respond to Canada's concerns on this data-related front in greater detail.

8.143. Canada argues that Canada should not have to determine specific values of imports for unaffected exporters because Canada would not have a reliable way to verify the US Customs data regarding such exporters.[627] This is so mainly because Canada considers that it would likely be unable to secure corresponding information from such exporters, as they would lack incentives to provide that data to Canada because companies whose CVD rates are unaffected by the OFA-AFA Measure may find it disadvantageous to help reduce the CVD rate of rival companies.[628] According to Canada, Canada's model thus allows for the fact that relevant information may only be available for some companies, while still providing a consistent and reasonable way to calculate the economic impact of the OFA-AFA Measure on Canadian imports.[629] Further to this point, Canada recalls that it has explained why the Arbitrator need not adopt an Armington model based on the multiple "varieties" of Canadian imports that the United States proposes.[630]

8.144. The United States argues that the mechanics of the overall calculation of NI must be made with reference to the counterfactual impact on *overall* Canadian exports to the United States.[631] This

[625] The parties agree with this approach to assigning the residual values of imports to the all-others rate, and we call recall that individually investigated companies and companies subject to non-selected rates will have been named in the relevant USDOC record documents. However, there is no list published of the companies subject to the all-others rate (Canada's response to Arbitrator question No. 221, para. 187, and No. 271, para. 291; United States' comments on Canada's response to Arbitrator question No. 221, para. 128).

[626] Canada has brought forward the argument that Canada is unable to collect such information to object to the United States' proposed model. Relatedly, the Arbitrator concluded in section 7.1.2.3 above that separating Canadian exports according to their affectedness by the challenged measure is necessary to take offsetting effects adequately into account.

[627] Canada's response to Arbitrator question No. 94, paras. 219-220.

[628] Canada's response to Arbitrator question No. 87, para. 203; Canada's written submission, paras. 83, 86, and 118. See also Canada's written submission, para. 168: "Canada's model is designed to accommodate the fact that import values may not be available from all sources. While the model requires import values only from the affected exporters, it is nevertheless capable of providing consistent results by summing the level of nullification or impairment separately calculated for different groups of exporters with different counterfactuals (i.e. exporters with duty rates attributed to the OFA-AFA measure, and exporters receiving the All Others rate)".

[629] Canada's written submission, paras. 166-168.

[630] Canada's written submission, para. 169.

[631] United States' written submission, para. 136.

is issue is discussed in greater detail in section 7.1.2.3, above. Thus, the United States argues that confidential US sales data are needed from all known Canadian exporters whether their CVD rates are affected by the OFA-AFA Measure or not.[632] The United States also contests Canada's assertion that individually investigated firms not subject to the OFA-AFA Measure lack incentives to provide such confidential information to Canada, because such producers may wish to help Canada induce compliance by the United States "to eliminate the challenged measure from the rates of their competitors".[633] The United States asserts this is so because "CVD rates could increase with the removal of the challenged measure".[634]

8.145. The Arbitrator notes at the outset that Canada's objections to using unaffected exporters' data is not due to any perceived problem in extracting the values of imports from unaffected exporters from US Customs data. Rather, Canada's objection lies in the alleged difficulty of verifying the US Customs data regarding unaffected exporters' values of imports, and obtaining the companies' values of imports at all if US Customs data is not supplied by the United States. Canada argues that obtaining unaffected companies' data directly from the companies would be difficult because unaffected exporters will have no incentive to share their export data with Canada, as there is no incentive for them to help Canada remove the OFA-AFA Measure from affected exporters.[635] The United States disagrees, arguing that unaffected exporters may have incentives to share their data with Canada and verification could plausibly occur.[636]

8.146. In our view, Canada's position has some, but limited, weight. It may be true that, as Canada claims, unaffected exporters in a given instance may view it as disadvantageous to have the OFA-AFA affected CVD rates removed from their competitors, since that removal may decrease their CVD rates and make their exports more attractive in the US market.[637] In that instance, unaffected exporters may not wish to share their export data with Canada insofar they are of the opinion that in doing so Canada could better persuade the United States to remove OFA-AFA affected CVD rates on Canadian companies. In the absence of such sharing, this would remove Canada's primary way of verifying the US Customs' data with respect to unaffected exporters and a way of obtaining the company's value of imports in the absence of US Customs data, i.e. examining company-specific data obtained directly from such companies.

8.147. We discern, however, three main reasons to doubt that Canada's concern in this context is as serious as Canada claims. First, and foremost, we note that the official US trade statistics record imports on HTS 10-digit level separated by exporting country, which can be matched to the HTS 10-digit codes in the relevant CVD order.[638] Therefore, the total value of unaffected Canadian imports for a given relevant product can always be calculated in a residual manner, i.e. the difference of total import values from Canada less the value of affected exporters. We therefore recall that Canada has asserted that it is reasonably confident that it can obtain the values of imports of affected

[632] United States' written submission, para. 138.
[633] United States' response to Arbitrator question No. 20, para. 70, and No. 103, paras. 265-266.
[634] United States' response to Arbitrator question No. 20, para. 70 (referring to the United States' written submission, paras. 45 and 54).
[635] Canada's written submission, para. 83; response to Arbitrator question No. 89, para. 207, No. 117, para. 28, and No. 252, para. 263.
[636] United States' response to Arbitrator question No. 20, para. 70, and No. 103, paras. 265-266.
[637] We note that, in certain limited instances, the removal of the OFA-specific CVD rate from the individually investigated company or companies might actually raise the CVD rate on the companies subject to an all-others rate in the counterfactual. This could occur when: (a) an individually investigated and affected exporter's CVD rate was used to help calculate the all-others rate in reality; (b) the exporter's CVD rate would fall below the *de minimis* threshold in the counterfactual and thus not be used to calculate the all-others rate in the counterfactual; and (c) that exporter's CVD rate in reality had been relatively low compared to the other individually investigated companies' CVD rates used to help construct the all-others rate. (See section 6.3.4, above (describing how all-others rate is calculated)). The United States has noted that this scenario would have in fact occurred in the *Supercalendered Paper* investigation (United States' written submission, para. 54). We recall, however, that the OFA-specific CVD rates are given only a *proxy* of zero in the counterfactual, reflecting uncertainty as to how exactly the United States would remove the OFA-AFA Measure's effects in any given instance (see para. 6.67, above). It is therefore similarly unclear the extent to which a company would view the scenario that the United States envisions (i.e. an actual increase of the all-others rate) as the most likely and act accordingly.
[638] See section 8.1.1.2.2.2(b), below (discussing such sources in more detail).

Canadian companies directly from such companies even in the absence of US Customs data.[639] Thus, even if unaffected individually investigated exporters do not provide Canada with their export data, Canada could potentially verify aggregate shipments of the relevant product to an appreciable degree with aggregated data sources, particularly those that are organized at the HTS 10-digit level (e.g. USA Trade Online and USITC DataWeb).[640] Indeed, Canada itself has indicated that it would use such aggregate data sources to expose large-scale errors in any proposed dataset from US Customs.[641] Therefore, if US Customs data are significantly under-inclusive of exports from unaffected companies, this inconsistency may still be able to be revealed through aggregated data sources and corrected for as a result of consultations procedures.

8.148. Second, unaffected companies may have an interest in assisting Canada in securing the United States' substantive compliance in this dispute more generally, i.e. the overall withdrawal of the OFA-AFA Measure at large. Assisting Canada in its suspension of concessions against the United States if and when the OFA-AFA Measure is used against Canadian companies is one of Canada's tools for helping achieve that substantive compliance. It will be recalled that the OFA-AFA Measure is ongoing conduct by the United States, and arises in any CVD proceeding involving Canadian goods in which the precise content arises going forward.[642] Thus, even if a company is unaffected by the OFA-AFA Measure at one point, it may become affected later on as a result of the OFA-AFA Measure being used in future CVD proceedings (e.g. administrative reviews).[643] Assisting Canada in securing substantive compliance from the United States more generally would remove such kinds of uncertainty for all Canadian exporters, affected and unaffected alike.[644]

8.149. Third, as discussed in sections 8.1.1.2.2 and 8.1.2.3, below, even in the absence of US Customs data, there appear other ways for Canada to reasonably derive values of imports from unaffected companies and assign them relevant duty rates.

8.150. In light of the above discussion, we consider that, while Canada's concerns about being able to obtain and/or verify data from unaffected exporters may not be altogether unfounded, such concerns appear overstated. Rather, and as discussed above, there appear to be reasonable ways for Canada to obtain, and conduct relevant verification of, values of imports from unaffected exporters.

8.1.1.2.2 Calculating the value of imports in the absence of US Customs data

8.151. In section 8.1.1.2.1.1, above, we have instructed the United States to provide US Customs data to Canada to calculate the values of imports for Canadian companies during the reference period. The United States has further asserted that it is committed to providing such US Customs data to Canada.[645] While we accept the United States' assertions as reliable, we are mindful that we have a responsibility to see to it that Canada is not left without recourse in the unlikely event that

[639] Canada's response to Arbitrator question No. 86, para. 192, No. 88, para. 206, and No. 96, paras. 224-226. See also Canada's response to Arbitrator question No. 89, paras. 207-208, and No. 161, para. 131. Canada argues that Canada could identify the companies subject to an affected all-others rate, in particular, by consulting the Canadian industry and examining public documents. With respect to identifying the Canadian companies subject to the all-others rate, Canada indicates that using public outreach and public documents (including the CVD investigation petition/application by the US domestic industry), will be particularly effective when the number of such companies is small (Canada's response to Arbitrator question No. 90, paras. 209-212).

[640] The United States further notes the possibility that Canada could use Statistics Canada to obtain the aggregated value of imports from unaffected producers, albeit at the 8-digit level (United States' comments on Canada's response to Arbitrator question No. 272, para. 225).

[641] Canada's response to Arbitrator question No. 155, para. 109, and No. 156, para. 114.

[642] See section 6.2.3, above.

[643] We further note that even if some unaffected exporters decide to withhold their company-specific data from Canada, a subset of them still may provide it. We therefore take note that Canada itself has indicated that it could choose to only verify a subset of affected exporters' data with data obtained directly from affected companies (Canada's response to Arbitrator question No. 86, para. 185).

[644] We thus note that Canada has claimed that, even though the OFA-AFA Measure is not currently affecting any US CVD rates of Canadian goods, Canadian exporters are still incurring legal costs due to the uncertainties surrounding the potential future application of the OFA-AFA Measure *vis-à-vis* Canadian exports (although Canada has not attempted to quantify such costs in any meaningful way). Canada's response to Arbitrator question No. 112, para. 7.

[645] See e.g. United States' response to Arbitrator question No. 220, para. 133.

US Customs data, for whatever reason, are not provided to Canada within the allotted time. Thus, we consider it appropriate to prescribe procedures with which Canada can calculate values of imports for affected and unaffected Canadian companies even in the absence of US Customs data, although we underline that we consider it unlikely that Canada will have to resort to these specific procedures.

8.152. Multiple methods and combinations of methods exist with which to calculate values of imports for companies and/or groups of companies in the absence of US Customs data. Moreover, and reflecting such options, the parties' suggestions on this front have evolved over the course of this arbitration proceeding, at times in a complex manner. Thus, in this context, we shall focus our attention on the parties' most recent proposals.

8.153. We therefore note that it is first necessary to define an overall structural approach for calculating values of imports from Canadian companies. We discern two basic options on this score. One is to prescribe methods for calculating values of imports with reference to whether a company is *affected* or *unaffected*. The second is to prescribe methods for calculating values of imports with reference to *what kind of factual CVD rate* a company has going forward from the triggering event (i.e. individual, non-selected, or all-others). The Arbitrator proposed the former approach to the parties in a question.[646] In response, Canada expressed a clear preference for the second approach, i.e. structuring the prescriptions with reference to factual CVD rates, and offered rather comprehensive suggestions for calculating values of imports under such an approach.[647] The United States objected in principle to neither approach, instead offering more specific comments with selected elements of such proposals.[648] We discern nothing inherently less reasonable about the Canadian preference in this context, and therefore adopt that general structural approach.

8.154. That overall structural approach having been adopted, this section proceeds in six parts. First, it addresses a threshold matter, i.e. what the "residual" category of the values of imports should be. Second, third, and fourth, it discusses procedures for calculating values of imports for companies subject to individual CVD rates, non-selected rates, and the all-others rate, respectively. Fifth, it discusses relevant deadlines in this context. Finally, it discuses consultations procedures.

8.1.1.2.2.1 Selection of a residual category

8.155. At the outset, it is important to note a key issue that arises from the absence of company-specific US Customs data. US Customs data provides Canada with a complete set (subject to verification) of Canadian imports of the relevant product from all Canadian exporters on a company-specific basis. US Customs is the only data source that will reliably return such a complete and company-specific data set. As will be further discussed in detail in this section, although there are other ways that Canada may obtain or estimate values of imports for certain types of companies, such methods will, even in combination, very likely be unable to provide company-specific values of imports for *all* companies. In order to reasonably ensure that all imports of the relevant product are included in the model, therefore, a residual amount of imports must be obtained representing the values of imports of companies for which Canada was unable to obtain values of imports via other means. This residual value would be calculated by obtaining the total aggregate value of imports for a relevant product (which can always be done by using, for example, data accessed via USA Trade Online or USITC DataWeb for the 10-digit HTS codes in the relevant CVD order), and then subtracting out from that total value the values of imports from companies for which Canada was able to calculate values via other means. This calculation yields a lump-sum residual value of imports.

8.156. Once this lump-sum residual value is obtained, however, it will be recalled that Canada must further assign to it a reference period CVD rate, a factual CVD rate, and, if necessary, a counterfactual CVD rate.[649] The question thus becomes what those CVD rates should be. During the course of this proceeding, the parties have mentioned three possibilities. The first, is to assume that any residual value of imports belongs to companies subject to unaffected CVD rates. The second,

[646] Arbitrator question No. 295.

[647] Canada's response to Arbitrator question No. 295, paras. 57-58 and Revised Table 1 at p. 25. The United States had also recognized the possibility of Canada obtaining an aggregate value of imports for unaffected exporters from Statistic Canada (United States' comments on Canada's response to Arbitrator question No. 272, para. 225).

[648] See generally United States' response to Arbitrator question No. 295, paras. 43-56; comments on Canada's response to Arbitrator question No. 295, paras. 33-38.

[649] Assignment of such rates to various types of companies is discussed in more detail in section 8.1.2, below.

proposed by Canada most recently, is to assume that any residual value of imports belongs to companies subject to a non-selected rate. The third is to assume that any residual value of imports belongs to companies subject to the all-others rate, a possibility mentioned by both parties in the course of this proceeding.[650] We address each in turn.

8.157. The first possible method is assuming that any residual value of imports is attributable to companies subject to unaffected CVD rates. The Arbitrator proposed this method to the parties in a question to the parties for comments.[651] In response, Canada indicated that this approach is impractical, and expressed a clear preference for using the second option discussed in the next paragraph.[652] The United States offered no particular strong opinions on this proposal. We consider that this option has three weaknesses. That is, the companies subject to the unaffected variety can have multiple different reference-period and factual CVD rates, which complicates the assignment of such rates to a residual value of imports when that residual, in fact, comes from different companies. Second, this method matches imperfectly with the overall structural approach we have chosen in the preceding section. That is, we have chosen a structural approach based around the type of factual CVD rate assigned to a company, not whether the company is affected or unaffected. Thus, it appears more logical to assign a residual category to a certain specific type of factual CVD rate, rather than to an affected or unaffected variety in general. Finally, and as stated, Canada argues directly against such an approach in its most recent submissions. We thus consider that this is a relatively weak option.

8.158. Canada proposes a second possibility, i.e. that any residual value of imports, when there is a non-selected rate present, is attributable to companies subject to "the factual non-selected rate at the time of the triggering event".[653] We note that Canada offers proposed guidance as to how a reference period CVD rate for such a group of companies can be calculated.[654] Canada, however, omitted from its proposals similar guidance on how to calculate factual CVD rates for a residual value of imports in this context.[655] This is a concern for us because there could be multiple non-selected rates active immediately after a triggering event, and a triggering event may or may not create a new non-selected rate.[656] Moreover, we note that a non-selected rate created at the time of a triggering event may be an affected rate, whereas other non-selected rates operating in the background but nonetheless active at that time could be unaffected. In short, it appears unclear to us what Canada means by "*the* factual non-selected rate at the time of the triggering event", as there may be *multiple* such non-selected rates, and even could be a mix of affected and unaffected rates. Without more clarity on this front, therefore, we consider Canada's proposal to be somewhat incomplete.

8.159. The third possible method mentioned by the parties in the course of this proceeding is to assume that any residual value belongs to the companies subject to the all-others rate. A main advantage of this approach, in our view, stems from the fact that the all-others rate is a single CVD rate that stays constant for the duration of a CVD order. This makes assigning relevant CVD rates to the residual value of imports a straightforward exercise, distinguishing it from the other two options discussed above. We also note that neither party has advanced reasons to think that assigning the residual value to an all-others rate rather than a non-selected rate (or some average of non-selected rates) would introduce any systemic bias in favour of either party, and we readily discern none.[657] Under the circumstances, therefore, the Arbitrator adopts this method as the most reasonable approach.

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[650] See e.g. United States' response to the third set of Arbitrator questions, comments on Annex A, section IV, paras. 114-115 on p. 78; Canada's response to Arbitrator question No. 222, fn 133 to para. 193.

[651] Arbitrator question No. 295.

[652] Canada's response to Arbitrator question No. 295, paras. 57-59.

[653] See Canada's response to Arbitrator question No. 295, Revised Table 1 at p. 25 (cells for "Companies subject to the factual all-others rate" "Without US Customs data", and "Companies subject to a factual non-selected rate" "without US Customs data").

[654] See Canada's response to Arbitrator question No. 295, Revised Table 1 at p. 25, last column.

[655] Canada's response to Arbitrator question No. 295, paras. 64-65.

[656] In another context, Canada indicates that the factual non-selected rate could be the non-selected rate created in an administrative review if the administrative review is the triggering event (Canada's response to Arbitrator question No. 291, para. 50). However, as noted, a triggering event might not be an administrative review.

[657] This is so, in particular, because it appears unclear whether the all-others rate would be above or below any non-selected rate, and both kinds of rates may be affected or unaffected.

8.160. Thus, the Arbitrator concludes that the residual value of imports shall be assumed to belong to companies subject to the all-others rate, whether that CVD rate is affected or unaffected by the OFA-AFA Measure.

8.1.1.2.2.2 Companies subject to a factual individual CVD rate

8.161. Canada indicates that it expects that Canadian companies receiving individual CVD rates from the USDOC that are affected by the OFA-AFA Measure will, upon request by Canada, share their confidential sales data for the reference period. Thus, Canada could calculate the value of imports from such companies in the absence of US Customs data in that manner.[658] Even if a company does not agree to share such data, however, Canada indicates that it could still calculate estimates of company-specific values of imports by relying on information on the record of a relevant USDOC investigation or administrative review, combined with data from an aggregate data source, in particular USITC DataWeb or USA Trade Online. Specifically, Canada indicates that all individually investigated companies are asked to provide publicly ranged US sales figures of the relevant product for the period of investigation (PoI) in investigations and the period of review (PoR) in administrative reviews[659], and Canada could obtain such values from the public record of such proceedings.[660] Canada would then determine the total value of imports of the relevant product from Canada during the PoI/PoR using data from an aggregate data source and divide the companies' individual sales figures by the total import value to get each company's percentage share of exports from Canada to the United States during the PoI/PoR. Canada would then query the total value of imports of the relevant product during the reference period from the same data source(s), and multiply that total value with each company's share previously obtained. That would yield the estimated value of imports for each such company during the reference period.[661] When querying the aggregate data source Canada indicates that the relevant 10-digit HTS level headings would be obtained from the relevant CVD order[662], but Canada would identify *additional* HTS codes to use in its search of the relevant database by, in particular, comparing the written description of the product's scope to the HTS codes.[663] Finally, Canada has clarified that it considers that it should have discretion as to whether to calculate a company's value of imports using data obtained directly from the company or with USDOC public record data.[664]

8.162. The United States generally agrees with Canada regarding how to calculate the values of imports for individually investigated companies in this context. Specifically, the United States agrees that such values can and should be calculated with reference to data taken from USDOC proceedings and data from USA Trade Online.[665] The United States has, however, offered what it describes as

[658] Canada's response to Arbitrator question No. 159, para. 122.

[659] The "period of investigation" (PoI) for an investigation is typically the "most recently completed" fiscal or calendar year (19 C.F.R. § 351.204(b)(2) (Exhibit CAN-52)). The period of review (PoR) is normally the most recently completed calendar year (Exhibit CAN-54, ss. (e)(1)). The period for the first administrative review can be shorter or longer than one year, as the time period extends from the issuance of the Order until the end of the most recently completed calendar year (Exhibit CAN-54, ss. (e)(1)).

[660] Canada claims that such publicly ranged figures will be available from "various record sources, such as Commerce's All Others rate calculation memorandum or respondents' initial questionnaire responses". (Canada's response to Arbitrator question No. 86, fn 217 to para. 191 (referring to 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 (Exhibit USA-7)).

[661] Canada's response to Arbitrator question No. 159, paras. 123-124, and No. 222, paras. 192-193 and fn 133 thereto.

[662] Canada's response to Arbitrator question No. 159, paras. 121-127, and No. 86, fn 217 to para. 191.

[663] Canada's response to Arbitrator question No. 86, para. 191(i)-(ii), No. 170, paras. 162-163, and No. 171, paras. 164-165. See also Canada's response to Arbitrator question No. 295, Revised Table 1 at p. 25, cell for "individually investigated/reviewed company" "Without US Customs data".

[664] See Canada's response to Arbitrator question No. 295, Revised Table 1 at p. 25, cell for "Individually investigated company" "Without US Customs data".

[665] The United States originally indicated a preference for USA Trade Online because, although the two sources rely on the same initial data, USA Trade Online is revised monthly whereas USITC DataWeb is only updated annually (United States' response to Arbitrator question No. 178, fn 85 to para. 100). The United States later explained, however, that both USA Trade Online and USITC DataWeb are updated each month with trade data from Census, although USA Trade Online "also provides the aggregate total of U.S. trade with Canada on a monthly basis in the current year" (United States' response to Arbitrator question No. 228, para. 144).

"clarifications" to Canada's proposals in that context.[666] In the United States' view, only when such sales figures are unavailable on the record of a relevant USDOC proceeding for a given company should Canada obtain sales figures directly from that Canadian company in order to calculate the value of imports during the reference period.[667] The United States also stresses that only the relevant 10-digit HTS codes referred to in the relevant CVD order should be used to obtain data from the USA Trade Online database, since Canada offers no practical way to select additional HTS codes.[668]

8.163. The Arbitrator notes that the parties both discuss the same two methods for determining the values of imports, in the absence of US Customs data, for companies subject to individual CVD rates: (a) obtaining values of imports directly from the Canadian companies; and (b) using public USDOC record data in conjunction with aggregated import data. These two methods are the only ways the parties propose, and the only ways that we discern from the record, for obtaining company-specific US import data (or reasonable estimates thereof) for companies in the absence of US Customs data.[669] We therefore consider both methods reasonable in principle for calculating such values of imports in this context.

8.164. The parties disagree, however, as to whether one of the two methods should be the preferred method. Specifically, the United States argues that option (b), described in the preceding paragraph, should be used unless the public USDOC record data is for some reason unavailable. We decline to establish such a preference because it is unclear to us that using the United States' preferred option would consistently yield more accurate figures for values of imports than if Canada obtained such data from the companies themselves. In our minds, both sources of information have weaknesses. Using USDOC record data uses publicly ranged (and therefore somewhat imprecise[670]) import data from a PoI/PoR that may also temporally intersect imperfectly with the reference period, and thus is a means by which to estimate company-specific values of imports in a reference period in an indirect manner. While obtaining values of imports from the companies themselves is a direct method of obtaining such values, it is unclear whether companies will keep their records or transmit such data to Canada in a manner most conducive to calculating a value of imports in a particular reference period.[671] It is therefore unclear to us which method may be the most reasonable in a given future circumstance. Accordingly, we consider that Canada should have discretion as to which method to use in a given circumstance. That being established, we turn to consider relevant particularities surrounding the two methods proposed by the parties.

[666] United States' response to Arbitrator question No. 295, para. 45 (referring to the United States' response to Arbitrator question No. 178, paras. 108-112; response to the third set of Arbitrator questions, comments on Annex A, section IV, paras. 1.14-1.16). Canada has indicated that such clarifications are unnecessary (Canada's comments on the United States' response to Arbitrator question No. 295, para. 48).

[667] The United States indicated that publicly ranged sales figures for individually investigated companies should always be on the record of the USDOC investigation and administrative review, and further asserts that the publicly ranged sales figures should be used for the period that corresponds most closely with the reference period (United States' response to Arbitrator question No. 157, para. 83, No. 178, paras. 105-107, No. 220, paras. 133-135, No. 272, comments on Annex A, section II, para. 224).

[668] United States' response to Arbitrator question No. 178, paras. 102-104. The United States further asserts that Canada could obtain the values of imports for groups of companies, such as unaffected companies, in aggregate from Statistics Canada (United States' comments on Canada's response to Arbitrator question No. 272, para. 225).

[669] We note that Statistics Canada is in possession of exporter-specific data which it receives from the United States, but it cannot release such individual company export information due to confidentiality issues (Canada's response to Arbitrator question No. 266, paras. 280 (specifying that Statistics Canada is in possession of fields from Form 7501 including the Manufacturer Name, Manufacturer ID, Entered Value, and Export date fields); United States' response to Arbitrator question No. 266, paras. 201-202; Canada's comments on the United States' response to Arbitrator question No. 218).

[670] See fn 184 to para. 6.71, above.

[671] The United States has raised concerns over how such companies may maintain records, e.g. by HTS code or fiscal or calendar year (see the United States' response to Arbitrator question No. 86, para. 243). Such concerns may be valid, and we expect that if Canada cannot obtain values of imports for the reference period due to such problems, then it will revert to the other method described herein (see Canada's response to Arbitrator question No. 91, para. 214 (explaining that Canada will obtain necessary product information from the companies in order "to identify with precision whether previous sales fall within the scope of the countervailing duty order")). Canada, for its part, indicates that when consulting Canadian companies, Canada will seek the same information from companies that they report to US Customs (Canada's response to Arbitrator question No. 91, para. 214).

(a) Information from Canadian companies

8.165. The parties have not offered detailed proposals for how precisely Canada should go about obtaining information from Canadian companies in the absence of US Customs data, and we see no particular need to prescribe detailed procedures. There are a limited number of issues raised by the parties' arguments, however, that warrant brief attention. These issues pertain to: (i) currency conversion; (ii) attestations from Canadian companies; and (iii) sharing of the companies' information with the United States. We address each in turn.

8.166. Regarding currency conversion, the parties recognize that Canadian companies may keep sales records denominated in Canadian dollars rather than US dollars. In the former case, a currency conversion will be necessary. The United States proposes to use the Canadian Dollar per USD, period average exchange rate in the International Financial Statistics published by the International Monetary Fund (IMF). The United States also asserts that because shipment data from Canadian companies would likely be on an annual basis, the Canadian Dollar per USD, period average exchange rate should be based on the same annual time period.[672]

8.167. Canada proposes the Bank of Canada CAD-USD conversion rate applicable at the time of export to the sales.[673] However, Canada asserts that, in its view, the source of the exchange rate is immaterial. What is material, in Canada's view, is that the time period over which the exchange rate is taken matches that of the duration over which the transactions being converted are taken. Canada notes that that latter duration will likely not be an annual one for many company shipments.[674]

8.168. The Arbitrator agrees with Canada that the source of the CAD-USD conversion rate is of minor importance. Since both currencies are converted freely at foreign exchange markets, severe discrepancies between figures provided from official sources by the United States and Canada are highly unlikely. In the Arbitrator's understanding, IMF figures rely on the same underlying data. As the United States has not demonstrated that the figures provided by the Bank of Canada might be less accurate than IMF figures, the Arbitrator decides that Canada shall use official CAD-USD conversion rates provided by the Bank of Canada. The Arbitrator further agrees with Canada that higher accuracy is achieved if the time period of the shipment can be taken into account. Hence, we instruct Canada, whenever it needs to conduct CAD-USD currency conversions with respect to the sales data of a Canadian exporter, to use the average CAD-USD conversion calculated over the same period in which the shipments have occurred, provided that Canada receives such shipment dates by the companies. If such information is not provided, we instruct Canada to use an annual CAD-USD conversion rate.

8.169. Moreover, we instruct Canada, at the time Canada requests sales information from Canadian companies, to further: (i) request the companies to provide, along with their sales data, a written attestation to the effect that the relayed sales data are accurate (which Canada has offered to request[675]); and (ii) request that the companies provide, along with their sales data, written authorization for Canada to share their information with the United States for purposes of consultations.[676]

(b) USDOC record data and aggregate import statistics

8.170. We set forth here how Canada shall obtain the value of imports for a particular company using USDOC record data in conjunction with an aggregate import data source. We note that the below-described method accords with both parties' proposals on this score. We proceed in three steps. First, we specify the overall methodology to be used in this context. Second, we address Canada's request to use additional HTS codes when identifying Canadian imports from aggregate

[672] United States' response to Arbitrator question No. 220, paras. 133-135; United States' comments on Canada's response to Arbitrator question No. 220, para. 120.

[673] Canada's response to Arbitrator question No. 220, para. 175.

[674] Canada's comments on the United States' response to Arbitrator question No. 220, paras. 77-78.

[675] See para. 8.125, above (noting Canada's proposal to obtain such attestations from companies).

[676] We have already prescribed a similar requirement in the context of Canada verifying US Customs data with data obtained from Canadian companies. See para. 8.123, above. We discern no reason to not require the same process here. See also section 8.1.1.2.2.6, below (providing for consultations procedures in this context).

data sources. Finally, we address which aggregate data source Canada shall use in this context, and prescribe relevant search parameters in each data source.

8.171. In order to calculate the value of imports for a company with a factual individual CVD rate in this context, first, and in accordance with the parties' agreement on this score, Canada shall retrieve the aggregate value of Canadian imports of the relevant product (using all the 10-digit HTS codes from the CVD order) from an aggregate data source for both: (a) the PoI/PoR of the CVD proceeding with the PoI/PoR that most closely temporally approximates the reference period[677] and during which the company's publicly ranged sales figures are available; and (b) for the reference period. Canada shall then divide the company's publicly ranged value of imports during the relevant PoI/PoR by the total value of Canadian imports of the relevant product during the same PoI/PoR. Canada shall then multiply the obtained share by the total value of Canadian imports of the relevant product during the reference period. The resulting value will be treated as that company's value of imports during the reference period.

8.172. The Arbitrator notes Canada's request that Canada, when querying the aggregate data source for Canadian imports, be allowed to search for HTS codes that are in addition to those contained in the relevant CVD order. The Arbitrator declines this request for the same reasons as the Arbitrator declined a similar Canadian request to supplement US Customs data sets with information obtained from Canadian companies. That is, and in particular, identifying additional HTS codes based on a product description could involve complex analyses, the validity of which is difficult to reasonably guarantee in advance.[678]

8.173. The Arbitrator further notes that Canada will have to retrieve the aggregate levels of Canadian imports of a relevant product during the relevant PoI/PoR and the reference period from an aggregate data source. The parties have identified three data sources that contain such aggregate data, i.e. Statistics Canada, USA Trade Online, and USITC DataWeb, although the parties primarily advocate the use of the latter two in this context. We briefly describe each below before assessing which database Canada should use in this context.

8.174. The record reflects that Statistics Canada is an agency of the Canadian government.[679] Canada has explained that a "Memorandum of Understanding with U.S. Customs … allows Statistics Canada to receive U.S. import data for statistical purposes".[680] Statistics Canada maintains its records at the 8-digit level of Canada's export classification.[681] The parties agree that Statistics Canada is in possession of Canadian exporter-specific data, and thus Statistics Canada data could be used to identify the values of imports for individual companies or groups of companies.[682] However, Canada has explained that the Government of Canada, in order to use data from Statistics Canada to calculate a level of NI, would have to request information regarding values of imports from Statistics Canada, and Statistics Canada could only relay such data to the Government of Canada for calculation of a level of NI if such data do not reveal confidential company-specific information.[683] Canada has also explained that Statistics Canada data may be unavailable for transmission where either the aggregated information discloses the activities of individual exporters

[677] Canada made this proposal in its response to Arbitrator question No. 295, Revised Table 1, fn 21. The United States also indicates that the publicly ranged sales figures should be used for the period that corresponds most closely with the reference period. (United States' response to Arbitrator question No. 78, para. 107). We consider this reasonable primarily because it is unclear whether the triggering event will be the USDOC proceeding in which a company's relevant individual CVD rate was assigned. The United States did not specifically object to this proposal.

[678] See para. 8.128, above.

[679] Canada's response to Arbitrator question No. 158, para. 117.

[680] Canada's response to Arbitrator question No. 86, fn 212 to para. 185.

[681] Canada's response to Arbitrator question No. 86, fn 216 to para. 191(ii); United States' response to Arbitrator question No. 178, para. 101.

[682] See generally Canada's response to Arbitrator question No. 218, paras. 167-170, and No. 291, paras. 47-50; United States' response to Arbitrator question No. 218, para. 127.

[683] Canada's response to Arbitrator question No. 222, para. 194 (referring to Canada's response to Arbitrator question No. 156, paras. 110-114). See also Canada's response to Arbitrator question No. 158, paras. 117-120, and No. 218, paras. 167-170.

or operational limitations limit Statistics Canada's ability to provide such data.[684] Canada has further indicated that searches for US imports of the relevant product can be performed in Statistics Canada by month and year.[685] The Arbitrator further notes that matching 10-digit CVD order codes following the US HTS classification with 8-digit codes used by Canada is not possible without a correspondence table.[686]

8.175. USA Trade Online is the portal through which the United States Census Bureau provides public import and export trade statistics.[687] It sources its import data primarily from the US Customs' ACE Database.[688] Import data are organized at the HTS 10-digit level.[689] Such data can be queried by month and year.[690] USITC DataWeb relies on US Census Bureau trade data, but uses a different search form.[691] USITC DataWeb data can be queried by month and year, and also by 10-digit HTS code.[692] Neither database contains company-specific import data.

8.176. Canada considers that USA Trade Online and USITC DataWeb are preferable over Statistics Canada in this context since the former two databases are arranged at the 10-digit HTS level, whereas Statistics Canada data are only available at the more aggregated 8-digit level.[693] However, even though "Canada agrees that the U.S. Census' USA Trade Online data may be slightly preferable to USITC DataWeb", Canada does not consider that it is necessary to prescribe one database over the other in this context.[694] The United States believes that the Arbitrator should prescribe the use of USA Trade Online in this context.[695]

8.177. We consider that Canada should use USA Trade Online or USITC DataWeb in this context. Both databases are publicly available, and organized at the HTS 10-digit level. As both parties agree that USA Trade Online is slightly preferable to USITC DataWeb[696], we consider that Canada shall use

[684] Canada's response to Arbitrator question No. 86, fn 212 to para. 185 and fn 215 to para 191(ii). Moreover, Canada indicates that multiple factors could affect the comparability of US Customs data with Statistics Canada data (e.g. valuation, scope of transactions, and corrections applied to raw US Customs data by the US Census Bureau or Statistics Canada) (Canada's response to Arbitrator question No. 86, fn 212 to para. 185). The United States also indicates that Statistics Canada manipulates its final data differently than US Census to produce its final statistics (United States' comments on Canada's response to Arbitrator question No. 218, fn 140 to para. 115.

[685] Canada's response to Arbitrator question No. 159, para. 126; No. 158, para. 120; No. 222, Table 4, first cell in last column)

[686] In this respect, Canada proposes to use the Statistics Canada's concordance between HTS10 Codes and 8-digit codes following Canada's export classification to determine the relevant 8-digit codes for the subject merchandise (Canada's response to Arbitrator question No. 156, para. 114; Statistics Canada, Concordance Between U.S. HS10 Code and Canada HS8 Code (2021) (Exhibit CAN-109). The Arbitrator notes that the record does not allow to determine whether this table will be updated in the future.

[687] U.S. Census Bureau, "About USA Trade® Online", accessed March 8, 2021, <https://usatrade.census.gov/> (Exhibit CAN-62).

[688] U.S. Census Bureau, "Guide to Foreign Trade Statistics: Description of the Foreign Trade Statistical Program", accessed March 8, 2021, <https://www.census.gov/foreign-trade/guide/sec2.html> (Exhibit CAN-63, p. 1, section 2).

[689] U.S. Census Bureau, "HTS Record Layout", accessed March 8, 2021, <https://www.census.gov/foreign-trade/schedules/b/2018/imp-stru.txt> (Exhibit CAN-65); United States' response to Arbitrator question No. 178, para. 101.

[690] Canada's response to Arbitrator question No. 36, para. 61 and fn 91 thereto (referring to U.S. Census Bureau, "USA Trade Online – Help Section", August 22, 2014, accessed March 8, 2021, <https://www.census.gov/foreign-trade/statistics/dataproducts/uto-help/uto-help.html> (Exhibit CAN-66)).

[691] Canada's response to Arbitrator question No. 36, para. 62 and fn 92 thereto (referring to USITC, "A Note on U.S. Trade Statistics", accessed March 8, 2021, <https://www.usitc.gov/publications/research/tradestatsnote.pdf>, Exhibit CAN-67). See also Canada's response to Arbitrator question No. 222, para. 192; Canada's comments on the United States' response to Arbitrator question No. 228, para. 95; and the United States' response to Arbitrator question No. 98, para. 256.

[692] United States' response to Arbitrator question No. 36, paras. 121-122, and No. 98, para. 256.

[693] Canada's response to Arbitrator question No. 159, paras. 125-126, No. 172, para. 167-168; and No. 218, para. 169.

[694] Canada's response to Arbitrator question No. 159, para. 125, No. 222, fn 132 to para. 192, and No. 276, para. 6; Canada' comments on the United States' response to Arbitrator question No. 228, para. 95.

[695] United States' response to Arbitrator question No. 178, para. 100, and No. 222, paras. 130-135.

[696] The parties appear to agree that USA Trade Online has some advantages in terms of updates to its data (Canada's response to Arbitrator question No. 159, para. 125, No. 222, fn 132 to para. 192, and No. 276, para. 6; Canada's comments on the United States' response to Arbitrator question No. 228, para. 95; and the United States' response to Arbitrator question No. 178, para. 100, and No. 228, para. 144).

USA Trade Online first, if available. If USA Trade Online is unavailable, then Canada shall use USITC DataWeb. Only if both such databases are unavailable, Canada may resort to using data from Statistics Canada.[697]

8.178. Both parties further agree that search parameters could be prescribed for aggregate data sources, insofar as they are used in calculating the value of imports. Canada proposed search criteria for USA Trade Online, USITC DataWeb, and Statistics Canada in response to an Arbitrator question.[698] The United States generally agrees that search parameters could be prescribed in this context, and also with the search criteria proposed by Canada.[699]

8.179. Particularly in light of the parties' agreement on this score, we consider that prescribing search criteria for aggregate data sources would be helpful in this context primarily to create transparency as to how Canada would go about calculating values of imports in the absence of US Customs data. Upon review of Canada's proposed criteria, we consider such criteria reasonable, with limited exceptions. We therefore adopt Canada's proposed search criteria, reproduced in substance below. In the limited instances when we considered it necessary to revise such criteria, such revisions are noted with footnotes. We also note that, in prescribing these search parameters, we further consider that if the relevant data fields were to change in the future, Canada can adapt its searches as necessary to achieve, as much as reasonably possible, the same results that would be obtained with the following criteria.

Table 1: USA Trade Online search parameters

Field	Search Parameter
Measures	"Customs Value (Gen) ($US)"
Commodity	Canada would select all listed HTS10 codes in the Order
Country	"Canada"
District	"All Districts"
Rate Provision	"All Rate Provisions"
Time	Canada would select the months and years that fall within: (i) the reference period; and (ii) the PoI or PoR and aggregate each

[697] We note that the parties have primarily advocated the use of USA Trade Online and USITC DataWeb in this specific context. We nonetheless include Statistics Canada here as a last-resort option.

[698] See generally Canada's response to Arbitrator question No. 222, paras. 191-194.

[699] United States' comments on Canada's response to Arbitrator question No. 222, paras. 133-135.

Table 2: USITC DataWeb search parameters

Field	Search Parameter
Trade Flow	"Imports for Consumption"[700]
Classification System	"HTS Items"
Data to Report	"General Customs Value"
Data Format	"Actual"
Years	Canada would select the years that fall within: (i) the PoI/PoR; and (ii) the reference period
Timeframe Aggregation	"Monthly" (Canada would separately aggregate the months containing: (i) the reference period; and (ii) the PoI/PoR).
Country Name	"Canada" (under "Select Individual Countries")
Commodities	Canada would select all listed HTS10 codes in the Order (under "Select Individual Commodities")
Commodity Aggregation	"Display Commodities Separately"
Commodity Aggregation Level	"HTS-10"
Rate Provision Code	"Use All Provision Codes"
Districts	"Use All Districts"

Table 3: Statistics Canada search parameters[701]

Field	Search Parameter
Entry Date	Canada would request data falling within: (i) the reference period; and (ii) the PoR/PoI (by month and year)[702]
Country of Origin	"Canada"
Canada's 8-digit export classification codes	Canada would request data for all 8-digit codes corresponding with all the HTS10 codes listed in the order, according to Statistics Canada's concordance table[703]
Entered Value	Statistics Canada would aggregate the entered value during: (i) the reference period; and (ii) the PoI/PoR

8.180. We finally note that if, for some reason, Canada is unable to calculate a particular company's value of imports with either of the above-prescribed methods (i.e. using data obtained directly from Canadian companies, or from USDOC record data in conjunction with an aggregate data source), then, in accordance with our discussion in section 8.1.1.2.2.1, above, Canada shall assume that the company's value of imports is assigned to the companies subject to the all-others rate.

[700] Canada proposes to rely on "General Imports" for this field (Canada's response to Arbitrator question No. 222, para. 193). The United States objects, arguing that "[i]mports for consumption" is preferable because only "these are the imports to which the duties are applied" (United States' comments on Canada's response to Arbitrator question No. 222, para. 135). Canada questions the reliability of import for consumption figures with reference to a past USITC determination (Canada's response to Arbitrator question No. 276, paras. 3-6). The United States maintains its position that imports for consumption are preferable because general imports "measure[] the total physical arrivals of merchandise from foreign countries, regardless of whether such merchandise enters the U.S. customs territory immediately or is entered into bonded warehouses or free trade zones under Customs' custody" (United States' comments on Canada's response to Arbitrator question No. 276, para. 4). According to the United States, the reliability of import for consumption figures is uncontested and responds, with respect to the referenced USITC determination, that the use of general imports by the USITC in "one investigation was a fact-specific determination related to issues of reporting by U.S. importers of that specific subject merchandise" (United States' comments on Canada's response to Arbitrator question No. 276, para. 6 (referring to Canada's response to Arbitrator question No. 276, para. 5)). We consider imports for consumption the more meaningful figure and have no reason to generally question the reliability of such data. Hence, we instruct Canada to use imports for consumption.

[701] Canada had previously offered search criteria for Statistics Canada in its response to Arbitrator question No. 159. This table represents the most recent search criteria Canada has offered in response to Arbitrator question No. 222.

[702] Canada offered these Statistics Canada search parameters in a proposal specifically regarding how to calculate the value of imports for companies subject to the all-others rate. We have thus slightly conformed that proposal to account for their role as a possible, albeit highly unlikely, source of data for aggregate import values to use in conjunction with USDOC record data in this context.

[703] Exhibit CAN-109, or future versions thereof that take updates in nomenclatures into account.

8.1.1.2.2.3 Companies subject to a factual non-selected rate

8.181. Canada proposes two methods for calculating a value of imports for a company or group of companies subject to a non-selected rate.[704] First, Canada proposes that it could obtain values of imports directly from such companies. Second, Canada proposes that Canada could obtain an aggregate value of imports for a group of companies subject to a non-selected rate from Statistics Canada. Canada considers that it should have discretion over which method to follow in this context.[705] The United States does not specifically object to Canada's proposed methods in this context.[706]

8.182. By way of background, we recall that non-selected rates arise from administrative reviews. The USDOC creates a non-selected rate when the USDOC only individually investigates a subset of companies that are subject to that review. The non-individually reviewed companies are assigned the non-selected rate, which is calculated in the same way as the all-others rate is calculated in an original investigation. Because all the companies subject to the administrative review are known, the USDOC lists the specific companies that are subject to a particular non-selected rate.[707] Thus, we note that there will likely be multiple companies subject to a non-selected rate, and Canada will be able to identify those companies from USDOC public records.

8.183. We consider both of Canada's proposals reasonable in this context. With respect to Canada's proposal to obtain values of imports directly from companies subject to a non-selected rate, we have already found such an approach reasonable in the context of obtaining values of imports from companies subject to an individual CVD rate.[708] We discern nothing less reasonable about this Canadian proposal with respect to companies subject to a non-selected rate. We consider, therefore, that Canada shall follow the same procedures contained in paragraph 8.169, above, when obtaining values of imports from companies subject to a non-selected rate.

8.184. We further consider Canada's proposal to obtain an aggregate value of imports for a group of companies subject to a non-selected rate from Statistics Canada as reasonable under the circumstances. Indeed, because companies may not consent to providing Canada with their values of imports directly, we consider it reasonable to provide Canada with an alternative way of calculating a value of imports for these companies. We also note that although Statistics Canada only keeps its records at the 8-digit (rather than 10-digit) level, aside from US Customs and the Canadian companies themselves, Statistics Canada is the only other source described on the record that possesses Canadian company-specific export data. Canada has explained, therefore, that Statistics Canada has the capability to *search* its records for company-specific values of imports but cannot *release* any company-specific data because that granular data is considered confidential. Canada has further explained, however, that Statistics Canada could likely release aggregated values of imports for multiple individual Canadian companies to overcome those confidentiality concerns.[709]

8.185. We further note that the number of companies that are subject to factual non-selected rates may be large, and that Statistics Canada may not always be available to relay values of imports for groups of companies to Canada. Such a situation could lead to high burdens being placed on Canada

[704] Canada had proposed a third method, i.e. assigning a residual value of imports to companies subject to a non-selected rate (Canada's response to Arbitrator question No. 295, Revised Table 1 at p. 25). We have, however, already rejected that approach above in section 8.1.1.2.2.1.

[705] Canada's response to Arbitrator question No. 222, para, 194, No. 272, para. 296, and No. 295, Revised Table 1 at p. 25.

[706] We consider, however, that insofar as the United States raised issues with respect to Canada's proposed methods in other contexts that we have already further discussed above, then we consider that those would apply here as well. The United States does, however, note that a residual value of imports could be calculated for a group of companies subject to a non-selected rate the same way as such a residual value could be calculated for companies subject to an all-others rate (United States' comments on Canada's response to Arbitrator question No. 291, para. 29 (referring to the United States' response to Arbitrator question No. 178, paras. 108-112).

[707] See fn 144 to para. 6.51, above.

[708] See section 8.1.1.2.2.2, above.

[709] See para. 8.174, above. In contrast to its proposals for companies subject to individual CVD rates, we note that Canada does not propose using USDOC record data in conjunction with an aggregate data source for calculating values of imports for companies subject to a non-selected rate. This appears reasonable in light of the parties' explanations that the USDOC only collects publicly ranged sales values for individually investigated companies, and, unlike for companies subject to an individual CVD rate, there is no guarantee that companies subject to a non-selected rate would have been individually investigated at any point.

to obtain values of imports directly from companies. Thus, we consider that additional flexibility for Canada should be provided in this context.

8.186. We therefore note that if, for some reason, Canada is unable to calculate a particular company's value of imports with either of these methods, or if Canada considers it too burdensome to use such options to calculate the value of imports for a company or group of companies, then, in accordance with our discussion in section 8.1.1.2.2.1, above, Canada shall assume that the company's value of imports is assigned to the companies subject to the all-others rate. If Canada does so assume, Canada shall inform the United States in writing the reasons for doing so at the time Canada relays its calculations of values of imports to the United States for consultations purposes.

8.1.1.2.2.4 Companies subject to a factual all-others rate

8.187. Canada has identified three ways it could calculate a value of imports for companies subject to a factual all-others rate in the absence of US Customs data. Specifically, Canada has indicated that Canada should have the discretion to: (a) obtain values of imports directly from Canadian companies[710]; (b) use data from Statistics Canada; or (c) calculate a residual value of imports for such companies by using aggregate import data from USA Trade Online or USITC DataWeb and subtracting out all the other values of imports it was able to calculate for all other types of companies.[711]

8.188. The United States argues that Canada should use method (c), described in the preceding paragraph, exclusively to calculate a value of imports for companies subject to a factual all-others rate. The United States also specifies that Canada should use data from the USA Trade Online database in executing this option.[712]

8.189. The Arbitrator notes parties' agreement on method (c) as explained above. That is, Canada shall retrieve the total import value of the relevant product from Canada during the reference period using USA Trade Online or, if USA Trade Online is unavailable, from USITC DataWeb.[713] From this total value, Canada shall subtract out of it all values of imports that Canada was able to calculate through other means.[714] The remainder, if there is any, shall equal the value of imports from companies subject to the factual all-others rate.[715] We see no reason to disagree with the parties as to the reasonableness of this approach, and we thus adopt it as a possibility for Canada in this context.

8.190. Canada proposes a second method as well (method (b) above), i.e. obtaining an aggregate value of imports for companies subject to the all-others rate using information from Statistics Canada. Canada would do so by requesting that Statistics Canada retrieve all values of imports from Canada of the relevant product during the reference period, and then also request that Statistics Canada subtract out from that aggregate value the values of imports from all companies

[710] Canada's response to Arbitrator question No. 161, para. 131. Canada argues that Canada could identify the companies subject to an affected all-others rate, in particular, using public outreach and public documents (including the CVD investigation petition/application by the US domestic industry), methods that may prove particularly effective when the number of such companies is small (Canada's response to Arbitrator question No. 90, paras. 209-212). Canada later indicated, however, that in a CVD investigation, Canada will be likely unable to identify all companies subject to the all-others rate without the help of US Customs data (Canada's comments on the United States' response to Arbitrator question No. 186, para. 16, and No. 282, para. 11).

[711] Canada's response to Arbitrator question No. 191, paras. 65-76, No. 222, para. 194 and Table 4, No. 272, para. 296, and No. 295, Revised Table 1 at p. 25; comments on the United States' response to Arbitrator question No. 218, paras. 65-66. See also Canada's response to Arbitrator question No. 86, fn 217 to para. 191(iii), and No. 159, para. 124.

[712] United States' response to Arbitrator question No. 178, para. 100. The United States indicates that total values of imports from Statistics Canada, because they are at the 8-digit level, would overstate the value of imports (United States' response to Arbitrator question No. 178, paras. 101 and 110-112).

[713] See para. 8.177, above (also expressing preference for USA Trade Online). In doing this search, Canada should use the search parameters in Tables 1-2, above, adapted appropriately to this context.

[714] This includes subtracting out values of imports calculated under the methods described three paragraphs below.

[715] We note that this method works because, as discussed in section 8.1.1.2.2.1, above, this value of imports is the "residual" amount.

for which Canada was able to calculate a value of imports via other means.[716] The remainder would be a value of imports subject to the all-others rate. We note, therefore, that this method is similar to method (c) discussed above, just using Statistics Canada as the aggregate data source instead of HTS 10-digit US Census data. We therefore recall that Statistics Canada data is at a more aggregated 8-digit level whereas USA Trade Online and USITC DataWeb data are accessible at the 10-digit HTS level (which can be precisely matched against all the HTS 10-digit codes appearing in the relevant CVD order). Thus, Statistics Canada data will likely be more over-inclusive of import values. This suggests that method (c) already described above (i.e. using US Census data) is superior to using Statistics Canada data.

8.191. We further note Canada's comment, however, that Statistics Canada data could be more accurate in certain situations where Canada estimated reference-period values of imports for individually investigated companies using USDOC record data in conjunction with an aggregate data source (see section 8.1.1.2.2.2(b), above).[717] It will be recalled that that method relied on an assumption that such companies' *shares* of total Canadian imports of the relevant product were constant as between a relevant PoI/PoR and the reference period to estimate values of imports in the latter period. Thus, if those values are simply subtracted out from a total value of imports for the relevant product during the reference period from USA Trade Online, this results in an assumption, to some degree, that *other* companies' market shares stayed constant as well, including the companies subject to the all-others rate. If such market shares in fact changed significantly, however, then measuring the all-others companies' values of exports during the reference period *directly* (which can be achieved with Statistics Canada because it possesses company-specific data for the reference period) may be preferable to calculating them in a residual manner using US Census data. Thus, even though Statistics Canada data are organized at the 8-digit level, it is not entirely clear to us whether using Statistics Canada data would always be less accurate than using the method discussed in paragraph 8.189, above. Thus, and on balance, we decline to prescribe a hierarchy for the use of these two methods.

8.192. Canada also proposes obtaining a value of imports directly from companies subject to a factual all-others rate (method (a) above). We consider this reasonable as well, for the same reasons that we have allowed this as a possibility in other contexts already discussed further above.[718] We note, however, that because there is no published list of companies subject to the all-others rate, even if Canada obtained data from all companies it knows to be subject to the all-others rate, Canada will necessarily not be certain that it identified all relevant companies subject to the all-others rate.[719] Therefore, while Canada is free to use this choice to the extent it wishes, if Canada uses this method to calculate a value of imports for any company or companies subject to the factual all-others rate, we consider that Canada must still apply one of the two other options discussed in the preceding three paragraphs to identify any remaining value of imports that entered the United States under the all-others rate during the reference period. We further agree with Canada, however, that it should have discretion to choose between such options in this context, as it is unclear which would be most accurate in any given situation.

8.1.1.2.2.5 Time allowed for Canada to calculate the value of imports

8.193. Canada indicates that, if the United States fails to provide US Customs data, then there should be no deadline prescribed by when Canada must calculate the value of imports. Canada argues that such a deadline would be unnecessary because it is in Canada's interest to calculate a level of NI in order to suspend concessions as quickly as possible. Canada also argues that such a deadline would be inappropriate because Canada would be "squeezed between two deadlines" were

[716] See Canada's response to Arbitrator question No. 222, Table 4 at p. 63. This includes subtracting out values of imports calculated under the methods described two paragraphs below.

[717] Canada's response to Arbitrator question No. 159, para. 127.

[718] See sections 8.1.1.2.2.2 and 8.1.1.2.2.3, above. Canada shall also follow the procedures laid out in paragraph 8.169, above, regarding obtaining attestations from companies as to the accuracy of the data provided.

[719] United States' response to Arbitrator question No. 19, para. 68 (confirming that the all-others rate covers exporters that are both known and unknown to the USDOC at the time of the relevant CVD proceeding). See also Canada's comments on the United States' response to Arbitrator question No. 186, para. 16, and No. 282, para. 11 (explaining that Canada would have trouble identifying the companies subject to the all-others rate in the absence of US Customs data).

the Arbitrator to also specify a time by when, following a triggering event, Canada must start suspending concessions.[720]

8.194. The United States argues that it would be unnecessary to prescribe a deadline by when Canada should calculate the value of imports in the absence of US Customs data, although the United States, in so arguing, may assume that a deadline would be set by when Canada must have to start suspending concessions more generally (a deadline that we have already declined to set in section 6.2.2, above).[721]

8.195. The Arbitrator declines to set a deadline by when Canada must calculate a value of imports in the absence of US Customs data. This is so because we have already concluded that Canada will not have a deadline by when Canada must start suspending concessions overall[722], and thus we consider it unnecessary to set a deadline by when Canada must calculate a value of imports in this context, particularly in the absence of either party specifically arguing to the contrary.

8.1.1.2.2.6 Consultations procedures

8.196. Canada proposes that, if Canada calculates values of imports in the absence of US Customs data, Canada would nonetheless provide its calculations to the United States and allow a period of two weeks for consultations.[723]

8.197. The United States does not take issue with Canada's proposed procedures in this context. However, the United States does assert that any information upon which Canada relies to calculate a value of imports in this context should be able to be shared with the United States during consultations.[724]

8.198. Canada responds that while Canada would always request companies to agree to share their data with the United States, such sharing should not be required considering that Canada would only need to seek such information in this context if the United States had failed to provide US Customs data.[725]

8.199. The Arbitrator considers that consultations procedures in this context would be appropriate, as it would always be preferable, in the Arbitrator's view, to give the parties an opportunity to agree on the data used to calculate the value of imports. Three issues thus arise: (a) the timeline for such consultations; (b) procedures if the parties fail to agree on certain data during consultations; and (c) whether to require that Canada share all the information with which it calculates a value of imports.

8.200. With respect to the timeline for such consultations, we consider that Canada's proposal for a two-week period of consultations following Canada's relay of its calculations of values of imports to the United States is reasonable. We also note that the United States has offered no objection to this timeline. Following Canada's provision of its calculations of the values of imports in the absence of US Customs data, therefore, the United States shall have two weeks (14 calendar days) to provide any comments on such calculations to Canada, after which the parties would consult about such comments for the remainder of the 14 calendar-day period (this period can be extended by the mutual consent of the parties). If the parties agree on the values of imports to be used (whether by lack of objections by the United States or agreement via consultations), the values agreed upon by the parties shall be used.

8.201. Regarding procedures if the parties fail to agree on certain values of imports despite consultations, we consider that Canada should have the right in this context to rely on the values that it calculated. Indeed, because these consultations occur in the absence of US Customs data, it is not apparent what other data source, other than those relied on by Canada, would be more

[720] Canada's response to Arbitrator question No. 224, paras. 199-201.
[721] United States' comments on Canada's response to Arbitrator question No. 224, para. 138.
[722] See fn 133 to para. 6.46, above.
[723] Canada's response to Arbitrator question No. 86, para. 193, and No. 223, paras. 195-198.
[724] United States' comments on Canada's response to Arbitrator question No. 223, paras. 136-137.
[725] Canada's comments on the United States' response to Arbitrator question No. 295, para. 47. Canada also clarifies that it would be able to share with the United States public data from USA Trade Online or USITC DataWeb and Statistics Canada data (Canada's response to Arbitrator question No. 225, para. 202).

reliable. Thus, if the parties fail to agree on the values of imports to be used following the consultations period described in the preceding paragraph, Canada's calculations of the values of imports shall prevail.

8.202. We further note the United States' argument that only data that can be shared with the United States for consultations purposes should be used to calculate the value of imports. In this context, we again note that confidentiality concerns may restrict Canada's ability to share certain information with the United States, and in particular data obtained directly from Canadian companies, unless the companies consent to such sharing.[726]

8.203. The Arbitrator again recognizes the value in Canada sharing information with the United States that Canada uses for calculations of the values of imports, even in the absence of US Customs data. Indeed, such sharing would allow for effective consultations, and would be in keeping with the principle of transparency. The Arbitrator therefore considers it appropriate for Canada to endeavour to share all information with the United States that Canada uses for calculation of the value of imports in the absence of US Customs data when Canada relays its calculations of the values of imports to the United States.

8.204. The Arbitrator recognizes, however, that Canada may not be able to share all such information with the United States. In particular, Canada has explained that information obtained directly from Canadian exporters can only be shared with the United States if the providing company consents to such sharing.[727] Although this is the key example discussed by the parties in this context, the Arbitrator recognizes that this example reflects a potentially more general issue arising in cases when confidentiality considerations restrict Canada's ability to share information with the United States. We therefore note the United States' more general argument that Canada should not be able to rely on any information that cannot be shared with the United States in calculating a value of imports in the absence of US Customs data.

8.205. The Arbitrator declines to *ex ante* restrict Canada's ability to rely only on data that can be shared with the United States when calculating values of imports in the absence of US Customs data. We recall that Canada will only have to resort to these alternate methods of calculating values of imports if the United States fails to fulfil its obligation to provide US Customs data to Canada. We further recall that one of the two other sources from which Canada can obtain company-specific values of imports are from the companies themselves (in addition to USDOC record data in conjunction with an aggregate import data source). We further note that the Arbitrator has, further above in this section, prescribed consultations procedures in this context during which the United States can raise any concerns it may have regarding the values of imports that Canada calculates in this context. Under these circumstances, we consider it unreasonable to prevent Canada's ability to rely on certain data because a third party (e.g. a Canadian company) declines to waive relevant confidentiality privileges.

8.206. In light of the foregoing, the Arbitrator instructs Canada to share with the United States all information that Canada uses to calculate values of imports in the absence of US Customs data when Canada relays such calculations to the United States for consultations purposes. The exception to this rule is when confidentiality restrictions prevent Canada from sharing such information with the United States, most notably in the context of Canada obtaining information directly from Canadian exporters who we understand must consent to such sharing. Thus, when Canada requests otherwise confidential information from a source, Canada shall, as part of such request, also seek the written consent of the providing source(s) to Canada allowing Canada to share such information with the United States for purposes of consultations. When Canada relays its calculations of the values of imports to the United States for consultations purposes, if any relevant information cannot be shared with the United States for confidentiality reasons, Canada shall also provide the United States with a written summary of the reasons why such information cannot be shared.

8.1.1.2.3 A special case: new shippers

8.207. In response to specific questions by the Arbitrator, the parties have offered their views regarding how to calculate a value of imports for a Canadian company that is the subject of a new

[726] See para. 8.121, above.
[727] See para. 8.121, above.

shipper review that is also a triggering event.[728] We include discussions of new shippers here separate from the other discussions regarding values of imports above because, as will become apparent in the course of this section, new shippers present a special case in this context. This is so because with *new* shippers it may be reasonable to assume that new shippers would not have been exporting during the reference period (or at least not the entirety thereof), requiring a differently tailored approach to calculating their values of imports. That being said, we proceed to examine the parties' positions with respect to this special case.

8.208. Canada asserts that new shipper reviews can qualify as triggering events and that each party's model could accommodate their inclusion. In line with its general proposal on the reference period, Canada explains that the reference period for a new shipper would be the most recent calendar year preceding a triggering event in which no Canadian company was subject to a CVD rate affected by the OFA-AFA Measure.[729] Canada recognizes, however, that complications in this context could arise due to the fact that "new" shippers are just that, and thus they would have a limited history of exports to the United States. Notwithstanding such complications, Canada asserts that import values will likely be available for a new shipper to calculate the level of NI, as the new shipper has to demonstrate that it made *bona fide* sales prior to making the request for a new shipper review. More specifically, in Canada's view, it may be questionable as to whether the new shipper would have exported the relevant product for the full calendar year that comprises the reference period, even if that calendar year is the calendar year preceding the issuance of the final results of the new shipper review. However, according to Canada, it is reasonably likely that the new shipper would have exported the relevant product for the full twelve-month period immediately preceding the issuance of such final results, or almost all of that twelve-month period.[730] According to Canada, this is due to the USDOC's rules governing the timelines surrounding new shipper reviews.[731] Canada further explains that Commerce routinely extends new shipper reviews, which means that there is frequently an extended time period during which the new shipper may accumulate import values before the publication of a new shipper review's final results.[732]

8.209. Against that background, Canada has most recently indicated that the first step in determining the value of import for a new shipper would be that, in Canada's initial notification to the United States, Canada would request US Customs data regarding the following: (a) the value of imports for the reference period of the new shipper; (b) the value of imports for the new shipper during the most recent twelve whole calendar months immediately preceding the issuance of the final results of the new shipper review that comprises the triggering event; and (c) the date of the new shipper's first shipment to the United States. In Canada's view, if the new shipper's first shipment was before the beginning of the reference period, then the US Customs data from the reference period should be used to calculate the value of imports of the new shipper the same as for any other company. However, according to Canada, if the new shipper's first shipment was made at least one month after the beginning of the reference period, then the new shipper's value of imports shall be taken from the twelve-month period preceding the issuance of the final results in the new shipper review. Moreover, Canada asserts that if the date of the new shipper's first shipment to the United States occurred after the beginning of the twelve-month period specified under item (b) above, then Canada would annualize the new shipper's value of imports. Canada would treat the value (or annualized value) of imports during the twelve-month period preceding the issuance of the

[728] The parties also agree that a new shipper review could qualify as a triggering event even if the new shipper was not assigned an affected CVD rate. This would occur, in the parties' view, if the new shipper had previously shipped under an affected all-others rate *and* such shipments were factored into a previous calculation of the level of NI (Canada's response to Arbitrator question No. 289, paras. 38-39; United States' response to Arbitrator question No. 289, paras. 27-29; and Canada's comments on the United States' response to Arbitrator question No. 289, para. 28).

[729] Canada indicates that the duty rate for new shipper's shipments prior to the issuance of the final determinations would be the all-others rate (see Canada's response to Arbitrator question No. 207, para. 140).

[730] Canada's response to Arbitrator question No. 207, paras. 140-142. Canada indicates that the new shipper would only not have made shipments in the twelve-month period preceding the review if the new shipper made its first shipment and initiated the new shipper review in very close proximity, as the new shipper review itself would normally take nine to ten months to complete (Canada's response to Arbitrator question No. 207, fn 94 to para. 140).

[731] Canada's response to Arbitrator question No. 207, paras. 140-142.

[732] Canada's comments on the United States' response to Arbitrator question No. 243, paras. 117-119. Canada provides examples of five new shipper reviews dated between 2016 and 2020, inclusive, in which USDOC extended the timeline of the review beyond the 9-month timeline. (Canada's comments on the United States' response to Arbitrator question No. 243, fn 144 to para. 118; response to Arbitrator question No. 207, para. 52).

final results as the new shipper's value of imports during the reference period.[733] Further, in response to a specific question and proposal from the Arbitrator, Canada agreed that, if the new shipper made no shipments during the reference period, then the new shippers' value of imports should be price-adjusted to the reference period (i.e. the general CVD order-specific reference period for the calculation of NI, from which all other companies' data are taken) using an industry-specific producer price index (PPI).[734]

8.210. Regarding that last type of adjustment, Canada had previously proposed that such an adjustment would occur by Canada calculating the ratio of the new shipper's annualized value with the remaining value of imports associated with the all-others category of exporters over the same time period, and then apply this ratio to the value of imports for the all-others category of exporters in the reference period. This would yield, in Canada's view, a reasonable estimation of what the new shipper's value of imports would have been in the reference period.[735]

8.211. In the absence of US Customs data, Canada envisions obtaining the same information from the company as Canada would have received from US Customs, described in paragraph 8.209, above, and would use those data in the same manner as described in the paragraph immediately above to calculate the new shipper's value of imports for the reference period. Canada also considers that it could use data concerning the new shipper's shipments from the public record of the new shipper review.[736]

8.212. At the end of all such calculations, Canada explains that it would then add the annualized and price-adjusted value of imports from the new shipper to the value of affected imports and to the market size observed during the reference period.[737]

8.213. In Canada's view, if the new shipper's value of imports cannot be obtained by any method already described above, then the new shipper will be assumed to be an unaffected exporter, which means that the new shipper review would not qualify as a triggering event and any previously calculated level of NI shall remain unchanged.[738]

8.214. Canada asserts that the new shipper review would affect neither the all-others rate nor the level of NI associated with the companies subject to the all-others rate in the reference period.[739]

8.215. The United States notes that, as a factual matter, the new shipper could not have made exports during the original investigation's PoI.[740] However, according to the United States, the new shipper must have had shipments of the relevant product to the United States to request a new shipper review, and a new shipper must request a new shipper review within one year of its first shipment to the United States.[741] The United States cautions, however, that new shippers may well have very limited shipments to the United States before a new shipper review is completed.[742] Also,

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[733] Canada's response to Arbitrator question No. 295, Revised Table 1 (cells regarding new shippers' value of imports in the presence of US Customs data).

[734] Canada's response to Arbitrator question No. 294, para. 55.

[735] Canada's response to Arbitrator question No. 207, para. 142.

[736] Canada's response to Arbitrator question No. 295, Revised Table 1 at p. 25 (cells regarding new shipper's value of imports in the absence of US Customs data). Canada further advocates that the new shipper's reference period CVD rate should be the factual all-others rate that was in effect during that time, whether it was affected or unaffected by the OFA-AFA Measure.

[737] Canada's response to Arbitrator question No. 294, para. 55, and No. 295, para. 67. We note that Canada had offered prior, yet not as specific, proposals on how to calculate the value of imports for a new shipper (Canada's response to Arbitrator question No. 207, para. 142).

[738] Canada's response to Arbitrator question No. 295, Revised Table 1 at p. 25 (cells regarding new shipper's value of imports in the absence of US Customs data). Canada further advocates that the new shipper's reference period CVD rate should be the factual all-others rate that was in effect during that time, whether it was affected or unaffected by the OFA-AFA Measure (Canada's response to Arbitrator question No. 295, Revised Table 1 at p. 25).

[739] Canada's response to Arbitrator question No. 207, para. 144.

[740] United States' comments on Canada's response to Arbitrator question No. 207, para. 103. Canada agrees with this observation (Canada's response to Arbitrator question No. 289, para. 38).

[741] United States' response to Arbitrator question No. 277, para. 3 (referring to Exhibit CAN-55).

[742] United States' response to Arbitrator question No. 277, para. 3. The United States clarifies that, if a new shipper does not request a new shipper review, it can still later request an administrative review (United States' response to Arbitrator question No. 277, para. 4). Canada agrees with this observation (Canada's comments on the United States' response to Arbitrator question No. 277, para. 5).

the USDOC will initiate a new shipper review "in the calendar month beginning after the end of the six-month period beginning on the date of the countervailing duty order under review, or the end of any six-month period occurring thereafter if the request for review is made during that six-month period".[743] The United States also asserts that, as a general matter, the USDOC will provide preliminary results in a new shipper review within 180 days after the initiation of the new shipper review, and the final results within 90 days after the issuance of the preliminary results (i.e. a total period of roughly nine months). The United States explains, however, that the USDOC can extend the 180-day period to 300 days, and the 90-day period to 150 days (i.e. to a total period of approximately 15 months).[744] The United States has further confirmed that the record of a new shipper review will contain publicly ranged US sales values for the new shipper.[745]

8.216. Against that background, the United States argues that neither party's model can accommodate a new shipper review as a technical matter. This is so, in the United States' view, because a new shipper, by definition, "is a company that did not previously export subject merchandise, and thereby requests a review to receive an individual CVD rate".[746] Therefore, according to the United States, a new shipper will likely not have any values of imports during the reference period used in the applicable model.[747] In the United States' view, this is especially so under Canada's approach to selecting a reference period, which, according to the United States, can lead to a reference period occurring years before a triggering event. Moreover, the United States notes that if the reference period is a pre-investigation reference period, then the new shipper would not have made exports during that time because, by definition, the new shipper could not have made exports during the original investigation's PoI.[748] The United States considers that the new shipper's shipments, if they are to be factored into the calculation of the level of NI, must have occurred during the reference period, or else they would be "unconnected with the market the new shipper is entering".[749]

8.217. The United States notes that Canada appeared to appreciate such problems and had originally attempted to remedy them by using the annualized value of imports of the new shipper from an unnamed year and essentially constructing fictionalized exports from the new shipper for the reference period "by applying the new shipper's estimated share of imports under the All Others rate in the unnamed year to the value of imports under the All Others rate" in the reference period.[750] The United States argued, however, that this method is flawed because it does not recognize that the composition of companies subject to the all-others rate differs between segments of a CVD proceeding.[751]

8.218. Moreover, the United States argues that Canada's originally proposed approach may likely inflate the estimate of the level of NI. This overestimation arises, according to the United States, because it is reasonable to assume that the value of imports from companies subject to the all-others rate will decrease with time (i.e. as the companies become subject to other kinds of CVD rates via administrative reviews). The United States also asserts that the value of imports coming from companies subject to the all-others rate could be further depressed over time due to the imposition of CVDs and ADDs not at issue in this proceeding. Thus, in the United States' view, Canada could be estimating the new shipper's value of imports based on an outdated and inflated value of imports, subject to the all-others rate, relative to what that value would be at the time of the new shipper review (which could occur years following the reference period under Canada's approach).[752]

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[743] United States' response to Arbitrator question No. 243 (referring to 19 U.S.C. § 1675 (Exhibit USA-15), ss. (a)(2)(B)(ii)).

[744] United States' response to Arbitrator question No. 243 (referring to, *inter alia*, 19 U.S.C. § 1675 (Exhibit USA-15), ss. (a)(2)(B)(iii)).

[745] United States' response to Arbitrator question No. 295, para. 48. Canada agrees with this observation (Canada's response to Arbitrator question No. 295, para. 66).

[746] United States' response to Arbitrator question No. 207, para. 97.

[747] United States' response to Arbitrator question No. 207, para. 97.

[748] United States' response to Arbitrator question No. 207, para. 103. Canada agrees with this observation (Canada's response to Arbitrator question No. 289, para. 38).

[749] United States' response to Arbitrator question No. 294, para. 39.

[750] United States' comments on Canada's response to Arbitrator question No. 207, para. 104.

[751] United States' comments on Canada's response to Arbitrator question No. 207, para. 104 (referring to the United States' response to Arbitrator question No. 207, para. 79 and fn 70 thereto; Canada's response to Arbitrator question No. 189, para. 49).

[752] United States' comments on Canada's response to Arbitrator question No. 207, para. 104.

8.219. The United States also considers that no annualization exercise should occur with respect to a new shipper's value of imports, which would, in the United States' view, artificially increase a new shipper's value of imports because it would be arbitrary and disconnected from factual reality.[753]

8.220. In response, Canada argues that the United States presents no compelling evidence supporting its claim that new shippers may cease shipping after their first shipment pending a conclusion of a new shipper review.[754] Canada also argues that the United States' position (that if the new shipper did not export in the reference period then a new shipper's imports must be zero) relies on the untenable notion that if a new shipper has no exports during the reference period then the OFA-AFA Measure would have no effect on its exports going forward from the triggering event.[755] Canada also asserts that annualization of a new shipper's exports is appropriate in order to capture the annual impact of the OFA-AFA Measure, which is what the model is geared to measuring.[756]

8.221. The Arbitrator notes that, in assessing the parties' arguments in this context, establishing certain background facts appears helpful. We therefore note that the parties agree, and the record indicates, that in order to qualify as a new shipper, a company cannot have exported the relevant product to the United States during the original PoI.[757] Thus, any new shipper would likely not have made any exports in any pre-investigation reference period that may be used. Moreover, the record reflects that a new shipper must request its new shipper review within one year of the time it first exported the relevant goods to the United States[758], so the new shipper may have up to roughly twelve months' worth of imports to the United States before even requesting a new shipper review. Moreover, the record reflects that the USDOC will only begin a new shipper review "in the calendar month immediately following the anniversary month or the semiannual anniversary month if the request for the review is made during the 6-month period ending with the end of the anniversary month or the semi-annual anniversary month (whichever is applicable)".[759] This means that there is a time lag of between one and six months between the request for a new shipper review and its initiation. The parties also agree, and the record reflects, that a new shipper review would usually take roughly nine months but could take up to 15 months to complete. This means that, from the date of the new shipper's first shipment, a new shipper review could take anywhere from approximately ten months to 21 months, and thus it could be expected that a new shipper's first shipment to the United States occurred at least ten months before the conclusion of its new shipper review. In sum, we therefore note that it is: (a) unclear whether the new shipper would have starting exporting before the beginning of the calendar year that forms the *reference period*; (b) also unclear whether the new shipper would have started exporting before the beginning of the *calendar year prior to the USDOC's issuance of the final results* of the new shipper review; but (c) likely that the new shipper would have starting exporting either before the beginning of the *twelve-month period immediately preceding* the issuance of the new shipper review or shortly after the beginning of that twelve-month period.

8.222. With such background established, and in light of the parties' arguments, five issues present themselves in this context. First is whether to include new shipper reviews as triggering events. Second is the time-period from which to take the new shipper's value of imports and, relatedly, whether to allow Canada to "annualize" the value of imports of the new shipper. Third is the source from which the new shipper's import data should be taken. Fourth is whether to further adjust the value of import data to adapt it to the reference period in the manner that Canada suggests, or in an alternative manner. Last is how to incorporate the value of imports from new shippers into the calculation of relevant value of affected imports. We address each in turn.

[753] United States' response to Arbitrator question No. 294, para. 40.
[754] Canada's comments on the United States' response to Arbitrator question No. 277, para. 3.
[755] Canada's comments on the United States' response to Arbitrator question No. 294, para. 41.
[756] Canada's comments on the United States' response to Arbitrator question No. 294, para. 42.
[757] See Exhibit CAN-53, subsection (a)(2)(B)(i); 19 CFR 351.214 (Exhibit CAN-142), subsections (a) and (b)(2). Because the end of the PoI necessarily precedes the final determination in the original investigation, the new shipper could have started shipping after the PoI ended but before the issuance of the final determination in the original investigation.
[758] Exhibit CAN-142, subsection (c) and (b)(2)(iv)(A). The United States has confirmed that this is the case as well (United States' response to Arbitrator question No. 277, para. 3 (referring to Exhibit CAN-55)).
[759] Exhibit CAN-142, subsection (d).

8.1.1.2.3.1 New shipper reviews as triggering events

8.223. Regarding whether to include new shipper reviews as triggering events, we note that we have already concluded that triggering events could arise in any CVD proceedings in which the OFA-AFA Measure is used.[760] Thus, we conclude that new shipper reviews can constitute triggering events.

8.1.1.2.3.2 Time period from which to take new shippers' values of imports

8.224. Regarding the time period from which to take the new shippers' value of imports, we recall that it is: (a) unclear whether the new shipper would have starting exporting before the beginning of the calendar year that forms the *reference period*; (b) also unclear whether the new shipper would have started exporting before the beginning of the *calendar year prior to the USDOC's issuance of the final results* of the new shipper review; but (c) likely that the new shipper would have starting exporting either before the beginning of the *twelve-month period immediately preceding* the issuance of the new shipper review or shortly after the beginning of that twelve-month period.[761]

8.225. In light of such circumstances, we recall the substance of Canada's advocated approach.[762] That is, if the new shipper's first shipment was before the beginning of the reference period, or occurred during the first month of the reference period, then the US Customs data from the reference period should be used to calculate the value of imports of the new shipper in the same way as it is calculated for any other company. However, if the new shipper's first shipment was made at least one month after the beginning of the reference period, then the new shipper's value of imports shall be taken from the twelve-month period preceding the issuance of the final results in the new shipper review. We consider that this approach will reasonably ensure that Canada takes the new shipper's export data from a twelve-month period the majority of which occurred after the company's first shipment.

8.226. In countenancing the above-described approach, we recognize, as does the United States, that other companies' export data will, in contrast, be taken from the reference period exclusively. We consider, however, that an alternate approach for new shippers is reasonable due to their nature as *new* shippers. This status means that the risks that such companies will not have exports during the reference period are higher than for other types of companies. In order to best capture the effect that the OFA-AFA Measure would have on new shippers' exports following a triggering event, therefore, allowing an alternate period from which to take the new shipper's data (i.e. the twelve months preceding the issuance of the final results of the new shipper review) is reasonable in our view.

8.227. If Canada ultimately uses the twelve-month period immediately preceding the USDOC's issuance of the final results of a new shipper review as the time period from which to take the new shippers value of imports, a further question arises as to whether to allow Canada to "annualize" the value of imports of the new shipper. That is, Canada proposes that if the new shipper made its first shipment after the beginning of the 12-month period from which the value of imports are taken, then the amount should be annualized to get a twelve-month value of imports. We consider such an annualization exercise reasonable. This is so because the selected model is geared towards calculating an *annual* level of NI. Thus, converting the value of a firm's export activity that occurred over fewer than 12 months to arrive at an annual value would appear consistent with the model's general implementation.

8.228. We note that the United States argues that such an annualization exercise may improperly inflate the level of NI because, in the United States' view, the resulting annualized value of imports would be arbitrary and disconnected from factual reality. The United States' criticism has some weight, as goods are, of course, not always exported at constant rates throughout a given twelve-month period. However, we also recall that it appears reasonable to assume that Canada would be working with at least the majority of a year's worth of export data from the new shipper in this context. This observation, in our view, materially diminishes the weight of the United States'

[760] See section 6.2.3, above.
[761] See para. 8.221, above.
[762] Canada's proposal had been first proposed by the Arbitrator in a question to the parties. See Canada's response to Arbitrator question No. 295, Revised Table 1, at p. 33 (cells for "New shippers")).

criticism, as any annualization exercise would likely be done with the benefit of a relatively large amount of actual export data.

8.229. We also note that, in order to perform an annualization exercise, Canada would need to know the date of the new shipper's first shipment. The sources from which Canada can obtain that information are discussed further in section 8.1.1.2.3.3, below. Suffice to say for now that as part of obtaining the new shipper's value of imports overall, Canada will obtain the date of the first shipment as part of that exercise.

8.230. Thus, and in sum, if the new shipper's first shipment occurred before the beginning of the reference period, or occurred during the first month of the reference period, then Canada shall take the new shipper's values of imports from the reference period the same as for any other company. However, if the new shipper's first shipment was made at least one month after the beginning of the reference period, then Canada shall take the new shipper's value of imports from the twelve-month period (using whole calendar months) immediately preceding the issuance of the final results in the new shipper review.[763] If Canada uses the twelve-month period immediately preceding the USDOC's issuance of the final results of a new shipper review as the time period from which to take the new shippers value of imports, and if the new shipper made its first shipment at least one month after the beginning of that period, then Canada shall annualize the value of imports by multiplying the observed import values with the inverse of their observation period.[764]

8.1.1.2.3.3 Data source for value of imports

8.231. Regarding the source from which the data on the value of imports should be taken, Canada proposes that the preference would be to obtain the information from US Customs. In the absence of US Customs data, according to Canada, the information could be obtained from the new shipper itself or from the record of the new shipper review, with no preference for either source in that context.[765] The United States provided no material reasons as to why Canada should not be able to rely on these sources.[766] The United States further confirmed that the new shipper's US sales data will appear on the public record of the new shipper review, and that such data could be used to obtain the value of imports.[767] The Arbitrator therefore discerns no reason to decline to allow Canada to rely on these data sources in the manner described by Canada.

8.232. Thus, to obtain data on the value of imports for a new shipper, we consider it reasonable that Canada shall request the following information from US Customs:

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[763] To illustrate, assume that the new shipper's first shipment occurred two months after the beginning of the reference period. Further assume that the final results of the new shipper review are published on 10 June of Year X. In this case, Canada would take the new shipper's values of imports from the period of 1 June of Year (X-1) through 31 May of Year X.

[764] For instance, if imports worth 120 have been observed over nine calendar months, the annualized value would be $120 * \frac{12}{9} = 160$. This method was proposed to the parties, accepted by Canada, and not specifically criticized by the United States as a technical matter (Canada's response to Arbitrator question No. 294(b), para. 55).

[765] Canada's response to Arbitrator question No. 295, Revised Table 1 at p. 33, cells for "New shippers" "value of imports".

[766] The United States did argue, however, that Canada should not be allowed to use data obtained directly from the new shipper unless it can be shared with the United States (United States' response to Arbitrator question No. 295, para. 48). We reject this argument for the same reasons as we rejected similar arguments from the United States in other contexts. (See, in particular, para. 8.205, above). Moreover, we note that it appears reasonable to believe that the confidential data obtained from a new shipper directly may be no less (if not more) reliable than the publicly ranged data on the record of a new shipper review.

[767] United States' response to Arbitrator question No. 295, para. 48. We note, however, that the new shipper's data on the public USDOC record may be publicly ranged (see Canada's response to Arbitrator question No. 295, para. 66; United States' response to Arbitrator question No. 195, para. 48. See also fn 184 to para. 6.71, above (describing publicly ranged data)). We further note that Canada may have to reach a definitive conclusion as to the date of the new shipper's first shipment in order to implement the Arbitrator's instructions in paragraph 8.230, above. Thus, Canada should always seek to obtain that specific date from the data source from which Canada obtains the new shipper's value of imports. If the source specifies the date of the first export to the United States, that date shall be used. If the source does not specify that date, then the first shipment that the information obtained from the relevant source reflects occurred shall be assumed to be the new shipper's first export to the United States.

a. information normally requested in an initial notification for the reference period, which will include shipments from the new shipper during the reference period;

b. the value of imports for the new shipper during the most recent twelve whole calendar months immediately preceding the issuance of the final results of the new shipper review that comprises the triggering event[768]; and

c. the date of the new shipper's first shipment to the United States of the relevant product.[769] All the information shall be provided by the United States under the same deadline as that specified in paragraph 8.106, above.

8.233. If the United States fails to provide US Customs data before the relevant deadline, Canada may, at its discretion:

a. obtain, directly from the new shipper:

i. data regarding the new shipper's value of imports for the reference period;

ii. the value of imports for the new shipper during the most recent twelve whole calendar months immediately preceding the issuance of the final results of the new shipper review that comprises the triggering event; and

iii. the date of the new shipper's first shipment to the United States of the relevant product; or

b. Canada may also use the new shipper's publicly ranged sales values from the public record of the new shipper review.

8.234. If both options (a) and (b) discussed in the preceding paragraph are unavailable, i.e. the new shipper's value of imports cannot be ascertained, then the new shipper review will not qualify as a triggering event and any previously calculated level of NI shall remain unchanged.[770]

8.1.1.2.3.4 Further adjustments to the value of imports

8.235. If Canada takes the value of imports for the new shipper from a period other than the reference period, we must consider whether to allow Canada to further adjust the value of imports in the manner proposed by Canada (i.e. with reference to the value of imports by companies subject to the all-others rate). Canada proposes that the ratio be taken from the annualized value of imports of the new shipper and the remaining value of the shipments of companies subject to the all-others rate during the same time period, and then apply[771] that ratio to the value of imports of companies subject to the all-others rate during the reference period, thus yielding a value of imports of the new shipper for the reference period.[772]

[768] To the extent that this time period does not overlap with the reference period, we consider that US Customs shall search for Canadian imports from the new shipper in the non-overlapping period of time outside the reference period by searching for the name of the new shipper in US Customs records, cross-checked against all the 10-digit HTS codes present in the CVD order. (See para. 8.92, above (specifying similar procedure for the special case of companies excluded from the scope of the CVD order in post-investigation reference periods)). This, in our minds, would reasonably limit the additional burden imposed on the United States in having to search for potentially two time-periods worth of Canadian import data in this context (i.e. the reference period and the twelve-month period preceding the issuance of the final results of the new shipper review).

[769] If Canada is already in possession of certain such information at the time of the triggering event (e.g. information contained under item (a) left over from a previous calculation of the level of NI), Canada shall only request from US Customs the information that it does not have.

[770] We note that materially similar procedures had been proposed to the parties for comment. See generally Arbitrator question No. 295.

[771] It appears the "apply" in this context means "multiply with". That is, if the new shipper had 50% worth of the all-others value of imports in the relevant twelve-month period, then the new shipper would be assumed to have a value of imports equal to 50% of the all-others value of imports during the reference period.

[772] Canada's response to Arbitrator question No. 207, para. 142.

8.236. While a possibility, the United States points out a problem with this approach. That is, if one assumes that the value of imports from companies subject to the all-others rate will decrease over time (because, *inter alia*, companies will drop out of this category as they become subject to their own administrative reviews over time, a proposition unchallenged by Canada) then Canada's method could overestimate the level of NI.

8.237. The Arbitrator considers that the United States' criticism has merit. As a result of changes in composition of the all-others rate over time, it appears unduly speculative as to whether the value of imports assigned to the all-others category meaningfully reflects relevant changes in market conditions as between the reference period and the period from which the new shipper's import data were taken, which would appear to be the assumption underlying Canada's approach. Moreover, Canada's approach would presumably mean that significantly more data must be gathered from US Customs, with significant attendant burdens on the United States, since the values of imports from companies subject to the all-others rate during the twelve-month period preceding the issuance of the final results of the new shipper review (in addition to the reference period) would further have to be determined. Canada offers no proposals for addressing these issues. As such, we decline Canada's proposal in this context.

8.238. The Arbitrator does, however, consider that a further adjustment to the new shipper's value of imports would be appropriate in a particular scenario, i.e. when no sales used to calculate the value of imports for a new shipper occurred during the reference period. This means that *all* values of imports being used would have occurred at a likely different price level than sales during the reference period. The Arbitrator thus proposed to the parties that, in this case, and in order for all values of imports to be at the same price level, the values of imports for the new shipper would be price-adjusted to the reference period using an industry-specific PPI. The price-adjusted $vimp_{RP}$ would be calculated as follows:

$$vimp_{RP} = vimp_t \left(\frac{PPI_{RP}^{DEC}}{PPI_t^{DEC}} \right),$$

where $vimp_t$ denotes the annualized import values as observed, PPI_t^{DEC} denotes the industry-specific price level for this period, and PPI_{RP}^{DEC} denotes the industry-specific price level for the month of December in the reference period.[773] Canada accepted this proposal by the Arbitrator, and the United States has made no specific technical objection to it.[774] The Arbitrator therefore considers this price-level adjustment to be reasonable in this special case. As such, when no sales used to calculate the value of imports for a new shipper occurred during a reference period, Canada shall price-level adjust the value of imports of the new shipper to the reference period in the manner described in this paragraph.

8.1.1.2.3.5 Incorporation of new shippers' values of imports in the model

8.239. Regarding how to incorporate the value of imports from a new shipper into relevant market shares in the selected model, the Arbitrator proposed a method to the parties, which was agreed to by Canada. The United States raised no specific technical objections to it. Hence, the Arbitrator instructs Canada to apply the following method: Canada shall add the value of imports of new shipper to the reference-period values of imports to the other affected (if the new shipper is affected) or unaffected (if the new shipper is unaffected) Canadian companies *and* to the overall market size insofar as the new shipper's value of imports are not taken from the reference period.[775] All other market shares then would have to be recalculated with the methodologies and data sources as described in the other sections of 8.1.1, above and below.

[773] The instructions outlined in section 9.4 below on the data sources for industry-specific PPIs and on the matching of CVD order-specific product codes to industries shall equally apply here.

[774] Canada's response to Arbitrator question No. 294, para. 55; United States' response to Arbitrator question No. 294, para. 41.

[775] Of course, we note that, insofar as the new shipper's value of imports was already taken from the reference period, that amount will already be accounted for in the reference period value of imports and the overall market size.

8.1.1.2.3.6 Conclusion: new shippers

8.240. As the above discussions indicate, new shippers pose a somewhat special case requiring a tailored approach. Thus, if and when a new shipper review arises as a triggering event, Canada shall apply the specific guidance above, in conjunction with other relevant guidance in other sections further above, to calculate a value of imports for the new shipper.

8.1.1.3 Value of RoW imports

8.241. In Canada's originally proposed methodology, imports from the RoW not subject to any change-in-duty rate are an input in determining Canada's market share in the US market. Canada suggests using 2019 US Census data to calculate Canada's share in total imports (i.e. from Canadian and non-Canadian sources), and multiplying this share with the share of imports in total US absorption to derive the Canadian market share.[776]

8.242. The United States proposes to source import values from the RoW from US Census data. These imports would be calculated by subtracting imports from Canada (the sum of affected and unaffected imports) from total US imports.[777]

8.243. For the sake of clarity, the Arbitrator notes that US Census provides US trade statistics via its database (USA Trade Online). We further note that both parties suggest using US Census trade statistics in this context to determine the value of imports from the RoW. Therefore, the Arbitrator suggested in its own proposal outlined in Annex A to Arbitrator question No. 246 (i.e. when proposing its own approach to calculating market shares) to rely on these data to determine the value of total US imports. The Arbitrator notes that neither party expressed concerns with respect to this data source. Both parties consider US Census data preferable over trade statistics accessed via USITC DataWeb.[778] We see no reason to deviate from the parties' shared opinion.

8.244. The Arbitrator thus concludes that Canada shall use the following procedure for determining the value of imports from the RoW. First, Canada shall determine the total value of US imports for the reference period for all the 10-digit HTS codes in the relevant CVD order using USA Trade Online. If such data are unavailable, Canada shall source this data from USITC DataWeb as an alternative.[779] Next, Canada shall subtract from that total amount the value of imports of the relevant product from Canada, computed as outlined in section 8.1.1.2, above. The resulting value shall be the value of imports from the RoW.

8.1.2 Duty rates

8.245. The selected model uses as inputs all Canadian companies' reference period CVD rates and factual CVD rates, and, for affected companies only, counterfactual CVD rates. We must therefore specify how such rates are assigned to various types of companies' values of imports. This section addresses that issue in four parts. First, it discusses whether to include duties other than CVDs in Canadian companies' relevant duty rates. Second, it addresses the role of provisional duties. Third, it prescribes how Canada should assign CVD rates to Canadian companies' values of imports. Finally, it discusses how to assign single relevant duty rates to aggregated values of imports for affected and unaffected Canadian companies.

8.1.2.1 Duties other than CVDs

8.246. The United States argues that "the calculation of the change in duties will need to take into account the associated [AD] rates".[780] More specifically, in the United States' view, "if … dumping rates [are] applied to the product in the proceeding, they should be taken into account in the overall duty calculation since both the AD and CVD rates will affect the relative competitiveness of the

[776] Report Appending Canada's Methodology Paper (BCI) (Canada's methodology report), paras. 29-30.
[777] United States' written submission, Appendix 2, Table 1.
[778] United States' response to Arbitrator question No. 178, fn 85 to para. 100; Canada's response to Arbitrator question No. 222, fn 132 to para. 192; United States' comments on Canada's response to Arbitrator question No. 222, para. 132; Canada's response to Arbitrator question No. 276, para. 6.
[779] In doing so, Canada shall use the same search criteria outlined in Tables 1-2, above, adapted appropriately to this context.
[780] United States' written submission, para. 133.

Canadian product that is representative of the realities of the market."[781] If the AD rates are not taken into account in the selected model, the United States argues that the counterfactual would "reflect an inappropriately high level of nullification or impairment for Canada".[782] In sum, the United States argues that "if a Canadian company affected by the challenged measure was subject to both AD and CVD duties, the correct calculation for that company's change in duty should be the difference between all duties (CVD and AD) applied to the specific company with the challenged measure in effect, compared to all duties excluding the challenged measure applied to the specific company."[783] The United States provides examples illustrating how ADDs, if not taken into account in the overall duty rates to which relevant Canadian companies would be subject at relevant times, would affect the calculated level of NI.[784] The United States clarifies, however, that although it is possible for the United States to impose ADDs and CVDs on overlapping but non-identical products, the model should only account for ADDs if the ADDs and CVDs affected by the OFA-AFA Measure are placed on identical products ("when the product description in the AD and CVD orders is the same"[785]) during "the same time period".[786] Overall, therefore, according to the United States, in the selected model, all duty rates (i.e. the reference period duty rate, the factual duty rate, and the counterfactual duty rate) should include the ADD rate.[787] The United States asserts that this is necessary "to correctly estimate the level of nullification or impairment by isolating the effect of the challenged measure on U.S. imports from Canada while controlling for all other duties during the relevant time period".[788]

8.247. Canada rejects the United States' argument that ADDs should be considered when calculating the change-in-duty rate. Canada asserts that the US proposal is overly speculative because: (a) it is unclear whether ADDs will be imposed in future proceedings in which the OFA-AFA Measure is used; (b) the United States never explained why including ADDs in the proposed manner is reasonable; and (c) "it is also speculative whether any hypothetical anti-dumping duties would have a measurable effect on the market conditions for the Canadian product".[789] Canada also argues that the United States' proposal "inappropriately broadens its own proposed counterfactual beyond a compliance scenario that eliminates the duty resulting from the OFA-AFA measure", because ADDs are unrelated to the operation of the OFA-AFA Measure.[790] Finally, Canada claims that the arbitrator in *US – Washing Machines (Article 22.6 – US)* did not "consider[] … countervailing duties that could have been imposed on goods exported to the United States relevant to the calculation of nullification or impairment."[791]

8.248. Canada also argues that taking ADDs into account would be inappropriate because US ADDs would likely be calculated in a WTO-inconsistent manner. Thus, "[i]f anti-dumping duties had to be taken into account, the counterfactuals may also need to consider a reasonable and plausible compliance scenario not only for the removal of the OFA-AFA measure, but likely also the removal of the U.S. anti-dumping duties that are currently WTO-inconsistent, or that are found to be WTO-inconsistent in the future".[792] Canada asserts in this context that the *US – Washing Machines (Article 22.6 – US)* arbitrator stressed that a chosen counterfactual should not be

[781] United States' written submission, para. 133.

[782] United States' written submission, para. 133; response to Arbitrator question No. 81, paras. 208 and 238. This is so, mathematically, because, according to the United States, "it is the percent change in the total duty rate" related to the use of the OFA-AFA Measure that is relevant to the calculation of NI. Thus, the initial duty rate is the sum of relevant CVD and ADDs on the product in question, and the counterfactual duty rate is the counterfactual CVD rate and the ADD rate applied to the product in question. (United States' response to Arbitrator question No. 81, para. 209 (emphasis original)).

[783] United States' written submission, para. 133. The United States asserts that changes in ADDs would not independently trigger the need to run the model (United States' response to Arbitrator question No. 77, para. 206).

[784] See United States' response to Arbitrator question No. 81, paras. 208-212, No. 83, paras. 214-227, and No. 84, paras. 228-239.

[785] United States' response to Arbitrator question No. 78, para. 207.

[786] United States' response to Arbitrator question No. 82, para. 213.

[787] United States' response to Arbitrator question No. 84, para. 238, and No. 151, para. 71 and fn 56 thereto.

[788] United States' response to Arbitrator question No. 151, para. 71.

[789] Canada's written submission, para. 168.

[790] Canada's written submission, para. 163.

[791] Canada's written submission, para. 164.

[792] Canada's response to Arbitrator question No. 78, para. 165. (fn omitted)

WTO-inconsistent.[793] In Canada's view, taking ADDs into account in the manner suggested by the United States is unreasonable because it would be impracticable to implement in a situation where the USDOC imposes ADDs and CVDs on overlapping but different product groups. This is because it would be likely impossible under the US model to ascertain relevant parameters and appropriate counterfactuals for all the "varieties" of imports. Consequentially, in Canada's view, the interaction of such considerations with the more complicated counterfactual means that it would be extremely difficult to calculate a level of NI.[794]

8.249. The United States responds to Canada's arguments about ADDs, noting that the United States is, contrary to Canada's assertions, not asking the Arbitrator to speculate as to whether ADDs and relevant CVDs will be imposed on relevant products in the future.[795] Moreover, the United States asserts that, in arguing that ADDs should be taken into account, the United States is not inappropriately broadening the scope of any relevant counterfactual because the United States is arguing that ADDs are simply among the many circumstances that are held fixed as between reality and the counterfactual world.[796] The United States further asserts that if there are ordinary tariffs, or any other kinds of duties, placed on the relevant product subject to the CVDs affected by the OFA-AFA Measure during the year in which the market shares or the value of imports is calculated, those duties should also be taken into account in any model.[797]

8.250. The United States rejects Canada's argument that the WTO-consistency of US ADDs is relevant for purposes of this proceeding, for the simple reason that the presence of ADDs is part of the *factual* rather than the *counterfactual* analysis. Thus, according to the United States, the presence of ADDs is a constant, rather than something that requires adjustment in the counterfactual.[798] The United States also asserts that Canada's assumption that future US ADDs will be WTO-inconsistent is without basis and unreasonable given that, by definition, no such *future* ADDs have been subject to WTO dispute settlement.[799] Moreover, the United States confirms that it could provide all such information to Canada pursuant to the parties' jointly proposed BCI Understanding.[800]

8.251. The Arbitrator notes that, in this context, the United States argues that the chosen model should include tariffs and duties other than CVDs that are imposed on the relevant product during the reference period. In its proffered form, we consider the United States' argument difficult to accept. This is so because we discern no material attempt by the United States to demonstrate that taking other tariffs and duties into account in the manner suggested is a workable strategy for Canada. The United States provides no list of the forms that such other tariffs or duties could take, does not explain their relevant modes of implementation *vis-à-vis* a particular product that may be subject to relevant CVDs, and does not describe how Canada could practically take such a universe of tariffs and duties into account.[801] Moreover, we note that the United States never specifically argues that any particular subset of duties or tariffs should be taken into account to the exclusion

[793] Canada's response to Arbitrator question No. 77. Specifically, Canada asserts that US ADDs imposed on Canadian companies would likely use the "Differential Pricing Methodology" found to WTO-inconsistent in *US – Washing Machines*.

[794] Canada's response to Arbitrator question No. 78, paras. 162-166, and No. 80, paras. 173-174.

[795] United States' response to Arbitrator question No. 83, paras. 208 and 210-212.

[796] United States' response to Arbitrator question No. 81, para. 210.

[797] United States' response to Arbitrator question No. 85, para. 240 ("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)", and No. 151, para. 71 ("[t]he purpose is to correctly estimate the level of nullification or impairment by isolating the effect of the challenged measure on U.S. imports from Canada while controlling *for all other duties* during the relevant time period"). (emphasis added)

[798] United States' response to Arbitrator question No. 149, paras. 64-65.

[799] United States' response to Arbitrator question No. 149, paras. 66-67.

[800] United States' response to Arbitrator question No. 150, para. 70.

[801] Potential problems may pertain to the following subjects, such as: (i) identifying relevant measures; (ii) measures affecting products that overlap incompletely with the relevant product subject to CVDs; (iii) discerning what the applicable rates associated with other measures are; (iv) identifying the periods of time any particular rate was in effect; (v) additional burdens on Canada to account for such measures in the model; (vi) verification of any additional data received by Canada from the United States in this context; and (vii) resolving disagreements that may arise as between the parties concerning the inclusion of such duties.

of others.[802] We also discern no principled or practical reason as to why only a subset of tariffs or duties should be taken into account, while others should not.[803]

8.252. The Arbitrator therefore considers that it must ultimately decline to accept the United States' argument on the basis of the facts and arguments presented in this proceeding. As a result, the Arbitrator considers Canada's remaining arguments as to why the model should not take other tariffs and duties into account are moot.

8.1.2.2 Provisional CVDs

8.253. In response to a question from the Arbitrator, Canada noted that, in original investigations, provisional CVD rates may be imposed on companies before the imposition of a final CVD order. Canada originally asserted that, if such provisional duties are imposed on Canadian companies during a relevant reference period, the reference period duty rates should include those provisional rates.[804] Canada subsequently clarified, however, that if provisional duties are in place during a pre-investigation reference period, then it would not be unreasonable to exclude them from the relevant companies' reference-period CVD rates because the USDOC has not verified those rates and they are subject to change.[805]

8.254. The United States asserts that provisional measures may be imposed during the course of an original investigation. In the United States' view, however, provisional duties need not be taken into consideration in the reference period duty rates because such measures are imposed pursuant to preliminary determinations that are not final. The United States also observes that the provisional rates would not be affected by the OFA-AFA Measure because verification occurs after preliminary determinations in CVD investigations. The United States thus argues that, in pre-investigation reference periods the CVD rates of both individually investigated companies and companies subject to the all-others rate will always be zero.[806]

8.255. The Arbitrator notes that provisional duties can be imposed during the course of an original investigation, which means they would only be relevant for calculating reference-period CVD rates when the parties use a pre-investigation reference period.[807] Such duties are, by nature, provisional and subject to change pending the investigation's outcome. Both parties agree that provisional duties can be disregarded given that the provisional duties are not verified and subject to change. Moreover, we note that provisional duties, under WTO disciplines, may only be imposed for a maximum of four months[808] (i.e. a maximum of only one-third of a year-long reference period) and that inclusion of such rates would further complicate an already complex model. In light of such circumstances, the Arbitrator finds that the parties shall disregard provisional CVD rates in the construction of any relevant CVD rate for purposes of calculating a level of NI.

8.1.2.3 Assignment of CVD rates to specific Canadian companies' values of imports

8.256. In the previous two sections, the Arbitrator has eliminated from consideration any duties other than CVDs assigned as a result of the imposition of a CVD order following an original investigation. That being the case, the Arbitrator recalls that the selected model uses as inputs all

[802] Canada does indicate that "ordinary tariffs" may be included in duty rates, although both parties note that nearly all imports from Canada enter the United States' tariff free (Canada's response to Arbitrator question No. 148, fn 78 to para. 100; United States' response to Arbitrator question No. 85, para. 240). Thus, the parties agree that ordinary tariffs are almost always irrelevant in any event, and neither party offers any specifics on their relevant administration or modes of implementation when they do exist in some form.

[803] We note that, in its earlier submissions, the United States had focussed on ADDs as duties that should be taken into account. However, even with respect to ADDs, specifically, the United States has offered no explanations to the effect that AD and CVD orders would in all relevant cases be administered and/or implemented in manners that would raise no material complications for Canada in calculating a level of NI. Indeed, we take special note in this context that the United States had to revise its argument in this context in response to an Arbitrator question that raised related concerns (see United States' response to Arbitrator question No. 78, para. 207 (explaining that, in response to an Arbitrator question, potential differences in product scope as between AD and CVD orders could cause significant problems in calculating a level of NI, and thus arguing that ADDs should only be considered when ADDs and CVDs are applied to an identical product)).

[804] Canada's response to Arbitrator question No. 283, paras. 14-20.

[805] Canada's comments on the United States' response to Arbitrator question No. 283, para. 14.

[806] United States' response to Arbitrator question No. 283, para. 14.

[807] Article 17 of the SCM Agreement.

[808] Article 17 of the SCM Agreement.

Canadian companies' reference period CVD rates and factual CVD rates, and, for affected companies only, counterfactual CVD rates. We must therefore specify how such rates are assigned to various types of companies, and, ultimately, to the two Canadian varieties (i.e. affected and unaffected imports). For ease of analysis, and in light of how the parties have structured their arguments on this score, we do so in the following five parts. First, we prescribe certain common rules that generally apply to all companies. Second, third, fourth, and fifth we prescribe additional guidance pertaining, as needed, to: (i) companies subject to a factual individual CVD rate; (ii) companies subject to a factual non-selected CVD rate; (iii) companies subject to a factual all-others rate; and (iv) to new shippers.

8.257. This guidance is further organized into Table 4 in section 8.1.3, below. We note that the guidance offered in that table is offered mainly for convenient reference and is necessarily summary in form. Thus, insofar as the summary guidance in that table differs from the more detailed guidance offered in these sections, the guidance in these sections shall prevail.

8.1.2.3.1 Procedures common to all companies

8.258. We note that Canada, in particular, and in response to proposals by the Arbitrator on these subjects, offered its own proposals regarding how to assign relevant CVD rates to relevant types of companies. Certain of these procedures, which we consider reasonable, apply to different types of companies. Therefore, in an effort to avoid duplicative guidance, we prescribe here certain procedures for assigning certain types of CVD rates which will apply across all companies, both affected and unaffected.

8.259. First, counterfactual CVD rates for all types of companies shall be determined with reference to the discussions in section 6.3, above. We therefore do not further discuss counterfactual duty rates here.

8.260. Second, for a pre-investigation reference period, the reference-period CVD rates for all companies shall be zero.[809]

8.261. Third, we note that when Canada receives US Customs data with which to calculate values of imports, US Customs will relay to Canada the reference-period CVD rates and factual CVD rates for all relevant companies.[810] Canada proposes that Canada use this information to calculate reference-period duty rates for all relevant companies.[811] The United States does not contest this approach and we see no particular reason why Canada should not also rely on the information regarding factual CVD rates contained in the US Customs dataset for assigning factual CVD rates to companies. Therefore, when US Customs data is relayed to Canada, these data may be used to assign reference-period and factual CVD rates to Canadian companies. We note, however, with respect to the reference-period and factual CVD rates contained in the US Customs data spreadsheet (see section 8.1.1.2.1.3(c), above) if it is discovered that they conflict with the rates established by the USDOC in public USDOC record documents (i.e. if an error is revealed in the US Customs dataset with respect to CVD rates), the authoritative USDOC record documents shall prevail.

8.262. Fourth, we note that, in the absence of US Customs data, both parties agree that all companies' relevant reference-period and factual CVD rates are available by consulting public USDOC record documents, including Federal Register notices.[812] Thus, in the absence of US Customs

[809] This is so because the only CVD rates that would be in effect during that time are provisional CVD rates, which we have decided to exclude from consideration (see section 8.1.2.2, above). Moreover, we have excluded the consideration of other types of duties other than CVDs (see section 8.1.2.1, above. See also Canada's response to Arbitrator question No. 283, para. 15 ("Both parties have confirmed the Arbitrator's understanding that for pre-investigation reference periods, the CVD rate will be zero.") (referring to Canada's response to Arbitrator question No. 209, para. 151; United States' response to Arbitrator question No. 209, para. 99)).

[810] See Annex C-3.

[811] See Exhibit USA-53, column K; Exhibit CAN-147, column Q. See also Canada's response to Arbitrator question No. 295, Revised Table 1; United States' comments on Canada's response to Arbitrator question No. 295, paras. 33-38.

[812] See e.g. Canada's response to Arbitrator question No. 295, Revised Table 1, last column; United States' response to Arbitrator question No. 30, para. 89 (noting that published CVD rates are not confidential), No. 189, para. 33, No. 286, para. 18, and No. 295, para. 55; Canada's comments on the United States' response to Arbitrator question No. 295, para. 52.

data, Canada shall determine relevant companies' reference-period and factual CVD rates by examining USDOC public record documents, including Federal Register notices.

8.263. Fifth, we note that reference-period CVD rates may change during the course of a reference period for a company. Both parties have recognized that a reasonable solution to this issue is to weight the reference-period duty rates by the number of months in which they were in effect.[813] We consider this proposal reasonable as well, and adopt it as such. Thus, if a company's reference-period CVD rate changes over the reference period, each applicable CVD rate shall be weighted for that company by the number of months during which it was in effect, rounding up or down to a whole number of months (rounding up if the CVD rate was in effect for at least half of the month).

8.264. With these general rules established, we turn to prescribe guidance as to how to assign relevant CVD rates for types of companies. Here, we follow the same structural approach as we followed in discussing how to determine values of imports for certain types of companies.[814] We therefore discuss, in turn, how to assign CVD rates to: (i) companies subject to a factual individual CVD rate; (ii) companies subject to a factual non-selected CVD rate; (iii) companies subject to a factual all-others rate; and (iv) new shippers.

8.1.2.3.2 Companies subject to a factual individual CVD rate

8.265. Canada proposed no procedures for individually investigated or reviewed companies that differ from the guidance in the preceding section. Thus, the guidance in the above section shall apply for individually investigated companies both in the presence and absence of US Customs data. We also note that, although neither party recognizes it as a possibility, in the interest of completeness we further specify that if neither US Customs data nor the USDOC public record data for some reason do not contain the relevant reference period or factual CVD rate(s) for an individually investigated or reviewed company, then Canada shall assume that the company's value of imports is part of the value of imports assigned to the companies subject to the factual all-others rate.[815]

8.1.2.3.3 Companies subject to a factual non-selected rate

8.266. Canada offered one relevant additional special piece of guidance for determining the reference-period CVD rates of companies subject to a factual non-selected rate. That is, Canada proposed that, if, in the absence of US Customs data, Canada cannot calculate a company-specific value of imports for a company subject to a non-selected rate, and thus must calculate an aggregate value of imports for a *group* of such companies, then the group of companies would be assigned the non-selected rates in effect during the reference period.[816]

8.267. The United States, for its part, notes that, when Canada calculates a weighted average for a group of companies (e.g. those subject to a factual non-selected rate), then performing a simple average of the companies' relevant CVD rates during the reference period would be reasonable. Only in the instance where the number of companies used to calculate an aggregate value of imports, and hence their CVD rates, cannot be determined, should Canada be able to resort to another and assumed CVD rate (e.g. the all-others rate).[817]

8.268. Canada responds that it does not object "in principle" to assigning a simple average of reference period CVD rates of companies used to calculate an aggregate value of imports, as suggested by the United States, but does indicate that such a process could be very burdensome on Canada when the number of relevant companies is high and when such companies CVD rates are

[813] Canada's response to Arbitrator question No. 209, paras. 154-156; United States' response to Arbitrator question No. 209, paras. 99-101.
[814] See generally section 8.1.1.2, above.
[815] We recall that the value of imports for the all-others rate is the "residual" category of the value of imports both in the presence and absence of US Customs data (see fn 547 to para. 8.92 and section 8.1.1.2.2.1, above).
[816] Canada's response to Arbitrator question No. 295, Revised Table 1 (cell for "Companies subject to a non-selected rate" in last column for "Without US Customs data").
[817] United States' response to Arbitrator question No. 295, para 55-56.

changing over time. Canada thus ultimately considers its own approach, discussed two paragraphs above, to be more appropriate.[818]

8.269. The Arbitrator recognizes that, in the absence of company-specific US Customs data, data from companies subject to a non-selected rate may pose challenges for Canada. This is so because, first, there may be multiple non-selected rates active at the time of a triggering event. Also, the group of companies subject to any single non-selected rate could be large and such companies also could have different reference-period CVD rates.[819] Thus, the process of determining reference-period and factual CVD rates for this group of companies could well be complex and burdensome on Canada in the absence of US Customs data. Moreover, Canada's options for calculating a company-specific value of imports are more limited for companies subject to a non-selected rate than they are for individually investigated companies.[820] This means that Canada may have to calculate values of imports for *groups* of companies subject to a given non-selected rate, and thus need to assign that aggregated value of imports from multiple companies a single reference-period CVD rate.

8.270. In light of such circumstances, we consider that providing Canada additional flexibility in assigning reference-period and factual CVD rates in this context is reasonable. We further consider that, because examinations of public records could be burdensome in this context, any additional option that Canada has in this context to calculate such rates should be simple to apply. This is particularly so given that the only reason Canada would have to engage in this process is because the United States failed to supply US Customs data.

8.271. Thus, we consider that, in this specific context, for a reference period CVD rate[821], although Canada is encouraged to calculate individual values of imports and associated individual CVD rates for companies subject to factual non-selected CVD rates, Canada may assign to any company or group of companies subject to factual non-selected CVD rates at the time of the triggering event a simple average of the non-selected CVD rates in effect during the reference period.

8.272. Moreover, if: (a) the USDOC records do not contain the relevant reference period CVD rate(s) and/or factual CVD rate(s) of a company or group of companies; or (b) Canada considers it too burdensome to calculate the reference period and/or factual rates for a company or group of companies, then Canada may assume that the value of imports of the company or companies is part of the value of imports assigned to the all-others rate (see below). If Canada does so assume, Canada shall inform the United States in writing the reasons for doing so at the time Canada relays its calculations of values of imports to the United States for consultations purposes.

8.1.2.3.4 Companies subject to a factual all-others rate

8.273. We recall that the all-others rate is established at the conclusion of the original investigation, and that it stays constant over the duration of the CVD order's life. Thus, we note that assigning CVD rates to companies subject to a factual all-others rate is a straightforward proposition. That is, unless the reference period is a pre-investigation reference period (in which case the all-others rate will be zero), the reference period CVD rate will be the all-others rate in effect during the reference period. The factual rate shall also be the single factual all-others rate in effect following the triggering event.

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[818] Canada's comments on the United States' response to Arbitrator question No. 295, para. 52.

[819] Canada notes that in the *Softwood Lumber* CVD proceedings, "25 separate countervailing duty rates have been generated over the course of the proceeding" (Canada's response to Arbitrator question No. 189, para. 50) and "[t]here were 243 named companies that requested participation in the first administrative review, that number increased to 260 in the second administrative review, and 264 companies are now subject to the third administrative review." (Canada's response to Arbitrator question No. 189, fn 38 to para. 50).

[820] For individually investigated companies, company-specific values can be obtained either from the company itself or by using USDOC record data in conjunction with an aggregate data source. For a company subject to a non-selected rate, only the former can be used (see sections 8.1.1.2.2.2 and 8.1.1.2.2.3, above).

[821] We consider that reference-period CVD rates will generally be more difficult to obtain than factual CVD rates, as only the most recently assigned CVD rates to a company are needed to obtain the latter. Although further examination of USDOC public records may have to be performed to obtain additional CVD rates from companies if reference period CVD rates changed over time.

8.1.2.3.5 New shippers

8.274. We recall that new shippers were addressed separately in the section addressing calculating a value of imports since new shippers presented a somewhat special case in that context.[822] This is so because the period of time from which a new shipper's values of imports are taken may be different than the reference period. We further recall, however, that a new shipper will be subject to the all-others rate before receiving a new duty rate from the new shipper review.[823] Thus, we clarify here that the new shippers' reference period CVD rate shall be the factual all-others rate to which the new shipper was in fact subject during the time from which its value of imports is taken. A new shipper's factual CVD rate will be the CVD rate actually assigned to the new shipper as a result of the new shipper review. If the new shipper received an affected rate in the new shipper review, then its counterfactual CVD rate will be determined in accordance with the guidance in section 6.3.3, above.

8.1.2.4 Assigning single duty rates to the affected and unaffected Canadian varieties

8.275. At this point, we consider it helpful to recall that two of the four varieties to be used in the selected model are affected Canadian imports and unaffected Canadian imports. In section 8.1.1.2, above, we described how Canada shall determine the aggregate values of affected and unaffected Canadian companies. We further recall that the selected model requires that a *single* reference period duty rate and a *single* factual duty rate be assigned to each variety of Canadian companies, i.e. affected and unaffected companies. The affected variety will also require a *single* counterfactual duty rate to be assigned to it. We therefore recall that each of the two Canadian varieties may have been based on the values of imports from many different companies, which may have different duty rates. Thus, different firms' reference period, factual, and/or counterfactual duty rates would have to be averaged in order to arrive at a single relevant duty rate. Such average duty rates across firms shall be calculated, for each of the two groups of affected and unaffected companies, as trade-weighted averages based on the following formula:

$$\tau = \sum_{j} \tau_j \frac{M_j}{\sum_j M_j},$$

where τ_j and $M_j$denote the duty rate and shipment value of company j, respectively, and the totality of all imports across all companies withing the group of affected or unaffected companies is described by $\sum_j M_j$.

8.1.3 Summary of guidance for values of imports and duty rates

8.276. In sections 8.1.1.2 and 8.1.2, above, we have provided guidance for calculating values of imports for affected and unaffected Canadian companies and the assignment of duty rates thereto. Below, for convenient reference, appears a table summarizing such guidance. We underline that this table is summary in nature and therefore the more detailed guidance in the sections above shall be authoritative. We also include a table summarizing relevant deadlines with respect to the processes for calculating values of imports.

[822] See section 8.1.1.2.3, above.

[823] See United States' comments on Canada's response to Arbitrator question No. 277, para. 3; Canada's comments on the United States' response to Arbitrator question No. 277, para. 5.

Table 4: Summary of guidance for calculating values of imports and duty rates

Type of factual CVD rate to which company is subject immediately following the triggering event	Value of Imports	Reference Period and Factual Duty Rates[824]
Individual CVD rate (i.e. as a result of being an individually investigated/reviewed company)[825]	**With US Customs data** Identify and determine the import values for the company based on disaggregated US Customs data provided by the United States.	**With US Customs data** The reference period CVD rate will be the CVD rate (if any) applied to the company's shipments as reported by US Customs. US Customs will also provide the factual CVD rate. If the company's reference period CVD rate changes over the reference period, each applicable CVD rate shall be weighted for that company by the number of months during which it was in effect, rounding up or down to a whole number of months (rounding up if the CVD rate was in effect for at least half of the month).
	Without US Customs data Canada will identify each company based on USDOC records and, at Canada's discretion: (1) Obtains import values for the reference period directly from the company; or (2) Use publicly ranged US sales data of the company from the USDOC CVD proceeding record with a PoI/PoR that is closest to the reference period[826] to determine the company's share of total US imports from Canada in conjunction with data from an aggregate data source, and adapting it to the total value of US imports from Canada during the reference period. (3) If both options (1) and (2), immediately above, are unavailable, then the company's value of imports shall be assumed to be part of the value of imports subject to the all-others rate (see below).	**Without US Customs data** Reference period CVD rates and factual CVD rates for individually investigated or reviewed company shall normally be available from public USDOC records. If a relevant reference period CVD rate changed over the reference period, each applicable CVD rate shall be weighted by the number of months during which it was in effect, rounding up or down to a whole number of months (rounding up if the CVD rate was in effect for at least half of the month). If the USDOC records do not contain the relevant reference period CVD rate(s) and/or factual CVD rate of a company, then Canada may assume that the company's value of imports is part of the value of imports assigned to the all-others rate (see below).
Factual non-selected rate	**With US Customs data** Identify and determine the import values for this category of companies based on disaggregated US Customs data provided by the United States.	**With US Customs data** The reference period CVD rate will be the CVD rate (if any) applied to the company's shipments as reported by the US Customs data. US Customs will also provide the factual CVD rate. If the company's reference period CVD rate changes over the reference period, each applicable CVD rate shall be weighted for that company by the number of months during which it was in effect, rounding up or down to a whole number of months (rounding up if the CVD rate was in effect for at least half of the month).

[824] Instructions for calculating counterfactual duty rates are contained in section 6.3, above.
[825] This category includes companies that were excluded from the scope of the CVD order.
[826] The chosen USDOC record need not relate to the segment of the USDOC proceeding that qualifies as the relevant triggering event.

Type of factual CVD rate to which company is subject immediately following the triggering event	Value of Imports	Reference Period and Factual Duty Rates[824]
	Without US Customs data Canada will identify each company based on USDOC records, and may, at Canada's discretion: (1) Obtain import values for the reference period directly from the relevant companies; or (2) Obtain import values for the reference period from Statistics Canada (i.e. the aggregate import values for the relevant 8-digit categories for companies subject to factual non-selected rate). (3) If both options (1) and (2), immediately above, are unavailable, or if Canada considers it too burdensome to use such options to calculate the value of imports for a company or group of companies, then the company's/companies' value of imports shall be assumed to be part of the value of imports subject to the all-others rate (see further below in this table).	**Without US Customs data** Reference period CVD rates and factual CVD rates shall normally be available from public USDOC records. If a company's reference period CVD rate changed over the reference period, each applicable CVD rate shall be weighted for that company by the number of months during which it was in effect, rounding up or down to a whole number of months (rounding up if the CVD rate was in effect for at least half of the month). Alternatively, for a reference period CVD rate, Canada may assign to any company or group of companies (even if such companies are subject to different factual non-selected CVD rates immediately following the triggering event) a simple average of the non-selected CVD rates in effect during the reference period. If: (a) the USDOC records do not contain the relevant reference period CVD rate(s) and/or factual CVD rate(s) of a company or group of companies; or (b) Canada considers it too burdensome to calculate the reference period and/or factual rates for a company or group of companies, then Canada may assume that the company's/companies' value of imports is part of the value of imports assigned to the all-others rate (see below).
Factual all-others rate	**With US Customs data** Identify and determine the import values for this category of companies based on disaggregated US Customs data provided by the United States. In the data set received from US Customs, the values of imports of companies subject to the all-others rate will be determined based on the total value of US imports from Canada (for all relevant HTS codes, or the CVD case number, whichever the case is) excluding the import values attributable to the individually investigated or reviewed companies, (where applicable) new shippers, and/or (where applicable) companies subject to factual non-selected rates. That total residual import value shall be attributed to companies subject to a factual all-others rate at the time of the triggering event.	**With US Customs data** The reference period CVD rate will be the CVD rate (if any) applied to the company's shipments as reported by the US Customs data. US Customs will also provide the factual CVD rate.

Type of factual CVD rate to which company is subject immediately following the triggering event	Value of Imports	Reference Period and Factual Duty Rates[824]
	Without US Customs data Canada may, at its discretion: (1) Obtain import values for the reference period directly from the relevant companies[827]; or (2) Obtain import values for the reference period from Statistics Canada (i.e. the aggregate import values for the relevant 8-digit categories, excluding values from companies for which Canada was able to calculate values of imports via other means); or (3) First, determine the total value of Canadian imports of the relevant product using all relevant HTS codes from the CVD order and USA Trade Online/USITC DataWeb, and then subtract from that total value the values of imports during the reference period calculated for companies for which Canada was able to calculate values of imports via other means. Insofar as Canada uses method (1), above, Canada must still use either method (2) or (3) to identify any additional and remaining values of imports that should also be attributed to (potentially unknown) companies subject to a factual all-others rate.	**Without US Customs data** Reference period CVD rates and factual CVD rates for companies subject to the all-others rate shall be obtained from public USDOC records.
New Shippers	**With US Customs data** Canada shall request the following information from US Customs: a) information normally requested in an initial notification for the reference period, which will include shipments from the new shipper during the reference period; b) the value of imports for the new shipper during the most recent twelve whole calendar months immediately preceding the issuance of the final results of the new shipper review that comprises the triggering event; and c) the date of the new shipper's first shipment to the United States of the relevant product. All the information shall be provided by the United States under the same deadline as that specified in paragraph 8.106, above. If the new shipper's first shipment was before the beginning of the reference period, or during the first month of the reference period, then	**With US Customs data** The new shipper's reference period CVD rate shall be the factual all-others rate to which the new shipper was in fact subject during the time from which its value of imports is taken (whether the all-others rate is affected or unaffected by the OFA-AFA Measure). The new shipper's factual CVD rate shall be the CVD rate assigned to the new shipper in the new shipper review.

[827] If Canada uses this option, see further below in this cell for additional instructions.

Type of factual CVD rate to which company is subject immediately following the triggering event	Value of Imports	Reference Period and Factual Duty Rates[824]
	the US Customs data from the reference period shall be used to calculate the value of imports of the new shipper the same as for any other company. If the new shipper's first shipment was made at least one month after the beginning of the reference period, then the new shipper's value of imports shall be taken from the twelve-month period preceding the issuance of the final results in the new shipper review. If the date of the new shipper's first shipment to the United States occurred after the beginning of that twelve-month period, then Canada shall annualize the new shipper's value of imports. Canada shall treat the value (or annualized value) of imports during the twelve-month period preceding the issuance of the final results as the new shipper's value of imports during the reference period.	
	Without US Customs data Canada may, at its discretion: (1) obtain, directly from the new shipper, the same information as requested from US Customs under (a), (b) and (c) (see cell immediately above) and use those values in the same manner as described in the cell immediately above; or (2) Canada may also use the new shipper's publicly ranged sales values from the new shipper's PoI in the public USDOC record. and use those values in the same manner as described in the cell immediately above. If both options (1) and (2), immediately above in this cell, are unavailable, i.e. the new shipper's value of imports cannot be ascertained, the new shipper review will not qualify as a triggering event and any previously calculated level of NI shall remain unchanged.	**Without US Customs data** The reference period CVD rate and factual CVD rate for the new shipper shall be determined in the same manner as described in the cell immediately above.

Table 5: Deadlines for calculations of values of imports

Event	Time allowed
No deadline for Canada to send the initial notification to the US following a triggering event, but following initial notification by Canada, US Customs gathers data and sends data to Canada in the time that appears to the right.	45 calendar days
After Canada receives US Customs data, time allotted to Canada to verify and inform United States if any alleged errors exist therein.	30 calendar days
Time for consultations to conclude following Canada notification to the United States of alleged errors in US Customs data.	Two weeks (14 calendar days)
If US Customs data is not provided to Canada, then Canada has no deadline for calculation of the value of imports. But once Canada is done determining the value of imports, Canada shall relay its determined values to the United States. The time allotted to the United States to comment on such data and consult with Canada regarding such data appears to the right.	Two weeks (14 calendar days)
All deadlines listed above can be extended by mutual consent of the parties.	

8.1.4 Armington substitution elasticity (σ)

8.277. In Armington models, products are treated as imperfect substitutes. The elasticity of substitution is the parameter governing the degree of substitutability across varieties. We consider it helpful to note two things about substitution elasticities at the outset for background purposes. First, the higher the substitution elasticity, the more consumers consider products as substitutes. Second, in both parties' proposed methodologies, the level of NI increases as the elasticity of substitution becomes larger.

8.278. Canada claims that the elasticity of substitution is a highly important input in the model, and can vary substantially across products.[828] Canada initially submitted estimates of the substitution elasticity from a study by Caliendo and Parro (published in 2015).[829] Using bilateral tariff rates, Caliendo and Parro estimate substitution elasticities for 20 ISIC Rev.3 "tradeable good sectors".[830] Canada claims that 98.5% of Canadian imports that are generally subject to CVD investigations, i.e. other than those in HS chapters 98 and 99, are directly covered by Caliendo and Parro sector elasticities, which, in Canada's view, are reliable because they proved generally consistent with NAFTA outcomes.[831]

8.279. The United States disagrees with Canada's proposal to use Caliendo and Parro elasticity estimates in this context for four main reasons. First, the United States asserts that the Caliendo and Parro study "uses tariffs and trade data from 1993", i.e. the data are outdated.[832] Second, the United States notes that the same study warned that in their model, "the elasticity of trade with respect to trade costs is the dispersion of productivity, and is not the elasticity of substitution as in Armington models".[833] Third, the United States contends that, "[l]ike the demand elasticities in the [Global Trade Analysis Project (GTAP)] database, these elasticities are not intended for use in product-specific, partial equilibrium analysis".[834] Fourth, the United States notes that the Caliendo and Parro sectors are highly aggregated and thus could likely lead to inaccurate results if applied in a model relating only to specific products, as this model will likely do.[835] The United States also notes that the arbitrator in *US – Washing Machines (Article 22.6 – US)* used more granular estimates for the elasticity of substitution from a different source (i.e. Soderbery 2015, who estimates elasticities at the HS 8- and 10-digit levels), and "Canada does not explain its choice to rely on a different source".[836]

8.280. Canada responds that its proposed elasticities "are objective and statistically derived by a third-party suitable for use in an Armington model", "have been peer-reviewed and have been subsequently used by a number of empirical trade studies", and "are widely recognized as providing reliable, independent, and objective measures of substitution elasticities".[837] Moreover, Canada asserts that the substitution elasticities from Caliendo and Parro were "particularly suitable for the

[828] Canada's methodology report, para. 22.

[829] Caliendo and Parro, "Estimates of the Trade and Welfare Effects of NAFTA", *The Review of Economic Studies*, Vol. 82, No. 1 (January 2015), pp. 1-44 (Caliendo and Parro) (Exhibit CAN-6).

[830] Canada's methodology report, para. 22 and fn 11 thereto. ISIC Rev.3 stands for Revision 3 of the International Standard Industrial Classification of All Economic Activities (ISIC).

[831] Canada's methodology report, paras. 22-23. As a technical matter, it should be noted that Canada matches Caliendo and Parro elasticities to HS-6 sub-headings (HS 2007 classification), and then concords them to the HS 2017 classification. Then Canada computes a weighted average within each of the 98 HS chapters, with weights given by each HS 6-digit product's share in total Canadian imports of the United States in 2019.

[832] United States' written submission, para. 115.

[833] United States' written submission, fn 125 to para. 115 (quoting Caliendo and Parro (Exhibit CAN-6), p. 16).

[834] United States' written submission, para. 115.

[835] United States' written submission, para. 115. The United States provides data that purportedly "demonstrates a wide divergence between the substitution elasticity selected by the arbitrators in *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)* and *US – Washing Machines (Article 22.6 – US)*, as well as the Commission's estimates in the *Supercalendered Paper* investigation, and the substitution elasticities from Caliendo and Parro that Canada proposes to use". (United States' written submission, para. 117, quoting Table 2 of Appendix 3).

[836] United States' written submission, fn. 127 to para. 117. The arbitrator in *US – Washing Machines (Article 22.6 – US)*, when fashioning its prospective model with respect to the measure found to be "as such" WTO-inconsistent, relied on elasticities of substitution estimated by A. Soderbery, "Estimating Import Supply and Demand Elasticities: Analysis and Implications", Journal of International Economics, 96(1), May 2015 at the HS chapter level (see Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, para. 4.72).

[837] Canada's written submission, para. 146 (quoting D. Riker, "A Trade Cost Approach to Estimating the Elasticity of Substitution", USITC Economics Working Paper Series (2020) (Exhibit CAN-31), fn 2).

task of calculating the level of nullification or impairment based on the trade effects of a change in duties for Canadian imports into the United States".[838] This is because they are "derived from differences in trade costs", and therefore directly capture "the response to import demand resulting from changes in tariff levels".[839] Finally, Canada dismisses the United States' criticism that Canada's proposed elasticities are derived from a Ricardian rather than an Armington model, claiming that "this is a distinction without a difference".[840]

8.281. The United States, as an alternative to using Caliendo and Parro elasticities, initially suggested to "rely on the [USITC] report in the investigation of the specific future product as the source for the substitution elasticity".[841] The United States points out 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".[842]

8.282. Canada argues that using substitution elasticities estimated by the USITC is inappropriate because "the USITC's methodologies are incapable of producing consistent and verifiable results".[843]

8.283. The Arbitrator notes that both parties' proposed sources for the substitution elasticity could be employed in principle, although both appear to display key weaknesses in this context.

8.284. The Arbitrator considers the main drawback of Caliendo and Parro substitution elasticities as proposed by Canada to be that they are estimated based on highly aggregated sector-level trade data. More aggregated substitution elasticities are typically lower than product-level substitution elasticities.[844] Because the estimated level of NI increases with the value for substitution elasticities, and because the products on which CVDs are placed would very likely not be at such a sectoral level, the use of Caliendo and Parro elasticities hence would tend to underestimate the level of NI. The Arbitrator therefore rejects the use of Caliendo and Parro substitution elasticities.

8.285. Concerning the United States' preferred approach of relying on substitution elasticities estimated by the USITC, the United States explains that the USITC determines a range of possible substitution elasticities specifically for a product under investigation using information gleaned from questionnaires, hearings, and from the expert judgment of USITC staff.[845] The Arbitrator notes that the estimated substitution elasticities generated by the USITC appear to be based on methods that are somewhat untransparent and non-replicable. Also, given the prospective nature of this arbitration proceeding, future USITC determinations are not and cannot be on the record before the Arbitrator yet, and thus the Arbitrator cannot evaluate them.[846] The Arbitrator therefore rejects the use of USITC substitution elasticities.

8.286. In light of the above-described weaknesses associated with the Canadian and US proposals in this context, the Arbitrator considered an alternative data source, i.e. the publicly-available trade

[838] Canada's written submission, para. 147.
[839] Canada's written submission, para. 147.
[840] Canada's written submission, para. 148 (responding to claim made in the United States' written submission, para. 115). More technically, Canada restates Caliendo and Parro's claim that after mapping the dispersion of productivity to the elasticity of substitution and the technology parameter to the home bias parameter, "the gravity equation implied from the [Ricardian] model […] is identical to the Armington model" (Caliendo and Parro (Exhibit CAN-6), fn 20).
[841] United States' written submission, para. 118.
[842] United States' written submission, para. 104.
[843] Canada's comments on the United States' response to Arbitrator question No. 198, para. 26.
[844] For example, substitution elasticities estimated by Fontagné, Guimbard and Orefice (2018) become smaller the more aggregate their underlying trade data is: the median substitution elasticity is 9.0 for HS 6-digit products, 7.2 for HS 4-digit products, and 6.0 for GTAP sectors.
[845] United States' response to Arbitrator question No. 57, paras. 155-156.
[846] However, the Arbitrator considers that if this were the case, USITC estimates would likely be stronger candidates for use in an economic model. See, e.g. Decision by the Arbitrator, *US – Anti Dumping Methodologies (China) (Article 22.6 – US)*, para. 7.36 (using pre-existing USITC elasticity estimates for a retrospective, rather than prospective, Armington model).

elasticities calculated by Fontagné, Guimbard and Orefice (2021) (Exhibit CAN-139) ("FGO")[847] at the relatively disaggregated level of HS sub-headings (6-digit). FGO estimates are based on a structural gravity model, which is based on sound economic theory.[848] Thus, FGO calculations are widely recognized as a reliable method for estimating trade elasticities. The Arbitrator proposed to the parties that, for each HS 6-digit sub-heading, Canada would calculate the substitution elasticity σ as $1-\varepsilon$, where ε is the FGO trade elasticity. The Arbitrator further proposed to match substitution elasticities to the HTS 10-digit codes referenced in the product scope description in the relevant CVD order pertaining to the relevant product, to produce a CVD order-specific substitution elasticity to be used as model input.

8.287. Canada repeatedly indicated that the trade elasticities estimated by FGO at the 6-digit level of the HS classification are "a suitable and reliable source for substitution elasticities".[849] Canada further: (a) suggested to align FGO elasticities – which are in the HS 2007 classification – "to the current HS-6 categorization"; and (b) offered "alternative proposals on how to account for missing values and statistical outliers".[850]

8.288. In response to several questions asked by the Arbitrator to seek clarifications on the issue, the United States revised its views regarding the appropriate data sources for the substitution elasticity. The United States eventually proposed a three-tiered approach to determine the elasticity of substitution.[851] According to the United States, the first option would be to rely on USITC estimates. The second option would be, in the "unlikely event that future product-specific substitution elasticities are not available from the Commission report" to "instruct the parties to consult and use some future source, including considering updated academic literature".[852] The third option, should the first and second options be non-viable, would be to compute the CVD order-specific elasticity of substitution as the median value of the CVD order-specific elasticity of substitution calculated "from each of the three academic studies: Soderbery (2015), Ahmad and Riker (2019), and the most recent version of [FGO]".[853] The United States discusses in detail how to compute CVD order-specific elasticities of substitution from each of these three data sources, taking into account the possibility of missing values and statistical outliers. The United States illustrates that, in the case of Softwood Lumber, the CVD order-specific substitution elasticity would be 2.24 if computed using Soderbery (2015), 3.82 if computed using Ahmad and Ricker (2019), and 18.98 if computed using FGO; the median value is therefore the 3.82 estimate of Ahmad and Ricker (2019).[854] Finally, the United States indicates that, in the calculations of the elasticity of substitution, only the primary reference HTS 10-digit codes referenced in the product scope description in the relevant CVD order should be utilized, "to avoid an overinclusion of imports".[855]

8.289. In response to the United States' revised proposals, Canada reiterates its objection to the use of USITC elasticities[856], rejects the United States' proposed tiered approach as "untenable,

[847] L. Fontagné, H. Guimbard and G. Orefice (2021), "Tariff-Based Product-Level Trade Elasticities", available at https://drive.google.com/file/d/1vHjbSdGA4nh0Jy1HsKHG7RAnyLzTWL7_/view. The data are accessible via: https://sites.google.com/view/product-level-trade-elasticity. Canada has submitted six-digit FGO trade elasticities, concorded from the original HS 2007 classification to the HS 2017 classification ("FGO Dataset B" (Exhibit CAN-139)).

[848] See generally World Trade Organization and United Nations Conference on Trade and Development, *A Practical Guide to Trade Policy Analysis* (Published 2012) (Exhibit CAN-3); Head and Mayer, "Gravity Equations: Workhorse, Toolkit, and Cookbook", in Gopinath et al., *Handbook of International Economics*, Vol. 4 (2014) (Exhibit CAN-5).

[849] Canada's response to Arbitrator question No. 246, para. 226. See also Canada's response to Arbitrator questions Nos. 50, 133, and 194.

[850] Canada's response to Arbitrator question No. 246, para. 226.

[851] United States' response to Arbitrator question No. 198, paras. 35-39.

[852] United States' response to Arbitrator question No. 246, comments on Annex A, section IV, para. 1.2.

[853] United States' response to Arbitrator question No. 246, comments on Annex A, section IV, para. 1.2. (fns omitted) See also Anson Soderbery, "Estimating Import Supply and Demand Elasticities: Analysis and Implications", Journal of International Economics, Vol. 96, Issue 1, May 2015 (Exhibit USA-24); and 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 and Riker (2019)" (Exhibit USA-27).

[854] United States' response to Arbitrator question No. 246, comments on Annex A, Table A at para. 233.

[855] United States' response to Arbitrator question No. 246, comments on Annex A, para. 213 (referring to United States' response to Arbitrator question No. 178, para. 103; United States' response to Arbitrator question No. 265, paras. 199-200).

[856] Canada's comments on the United States' response to the third set of Arbitrator questions, comments on Annex A, section II, para. 160.

impractical, and unnecessary"[857], and provides detailed comments only on the United States' proposed third option. According to Canada, Soderbery (2015) is an inappropriate and unreliable source for elasticities of substitution because Soderbery "does not utilize information on differences in tariffs and duties"[858] and because "Soderbery's methodology results in a large percentage of HS categories where no estimate is possible, or results in infeasible outcomes."[859] Canada further rejects the use of Ahmad and Riker (2019), because the results rely on "heroic assumptions regarding the nature of competition", and the United States "has not attempted to determine whether the assumptions underlying Ahmad and Riker are appropriate for the products to which the model may be applied, nor is there reason to believe it does."[860] Moreover, according to Canada, neither Soderbery (2015) nor Ahmad and Riker (2019) "permit the determination of the statistical reliability of the resulting values".[861] Therefore, according to Canada, "the Arbitrator should reject the U.S. proposal to use a median substitution elasticity value between [FGO], Soderbery (2015), and Ahmad and Riker (2019)."[862]

8.290. Having decided to reject Canada's initial suggestion of relying on Caliendo and Parro elasticities as well as the United States' preferred approach of relying on USITC estimates, the Arbitrator identifies three further issues for discussion and decision. The first is which HTS 10-digit codes appearing in a given CVD order to use in the calculations of the substitution elasticity. The second is whether to accept or to reject the United States' tiered approach. Finally, we consider whether to accept or to reject the United States' suggestion to rely on various data sources under the United States' third option.

8.291. First, the Arbitrator considers whether, as the United States suggests, to use only the "primary" HTS 10-digit codes referenced in the product scope description in the relevant CVD order in the calculations for the elasticity of substitution. We recall that, in section 8.1.1.2.1.2(a), above, the Arbitrator decided to include all HTS codes, rather than only the primary HTS codes, referenced in the product scope description in the relevant CVD order when ascertaining the values of imports. The same approach here is, in our view, the most reasonable to ensure as much consistency as possible as between the goods that are captured in the values-of-imports calculations and the goods captured in the elasticity-of-substitution calculation. The Arbitrator, therefore, instructs Canada to include all HTS codes referenced in the product scope description in the relevant CVD order in the calculation of the CVD order-specific elasticity of substitution.

8.292. Second, the Arbitrator considers that the second option put forward by the United States under its tiered approach (i.e. to rely on future, unspecified sources in case USITC substitution elasticities are unavailable) would likely create future disagreements between the parties, a possibility acknowledged by the United States itself.[863] In this context, we note that even if the parties were to agree on a particular data source in the future, the technical implementation of that data source may be complex and subject to interpretation. The Arbitrator therefore rejects this suggestion made by the United States.

8.293. Third, the Arbitrator considers whether the third option put forward by the United States under its tiered approach (i.e. to rely on three different data sources to compute the elasticity of substitution) is reasonable. We therefore note that computing a CVD order-specific elasticity of substitution from each of the three data sources identified by the United States (FGO; Soderbery (2015); and Ahmad and Riker (2019)) is likely to impose a significant burden on Canada, because

[857] Canada's comments on the United States' response to Arbitrator question No. 198, para. 25.
[858] Canada's comments on the United States' response to the third set of Arbitrator questions, comments on Annex A, section II, para. 163.
[859] Canada's comments on the United States' response to the third set of Arbitrator questions, comments on Annex A, section II, para. 164.
[860] Canada's comments on the United States' response to the third set of Arbitrator questions, comments on Annex A, section II, para. 167.
[861] Canada's comments on the United States' response to the third set of Arbitrator questions, comments on Annex A, section II, para. 168.
[862] Canada's comments on the United States' response to the third set of Arbitrator questions, comments on Annex A, section II, para. 172.
[863] "If the parties cannot come to an agreement on an alternative, future source" (United States' response to Arbitrator question No. 246, comments on Annex A, section IV, para. 1.2). See also Canada's comments on the United States' response to Arbitrator question No. 198, para. 27.

Canada would have to follow detailed instructions (in particular missing values and statistical outliers) that would be specific to each of the three data sources.[864]

8.294. Moreover, the Arbitrator considers that FGO offer reasonably accurate and reliable estimates for the substitution elasticities. As already noted, FGO estimates are widely considered to be reliable, and exist at the relatively disaggregated HS 6-digit level. Further, neither party has brought forward significant objections to the use of FGO estimates, and Canada expressly considers them to be reliable.[865] We note that the United States has shown that, in the specific case of the Softwood Lumber CVD order, the FGO substitution elasticity is approximately four times larger than the substitution elasticity of Ahmad and Riker (2019), which happens to be the median value among FGO, Soderbery (2015), and Ahmad and Riker (2019) in that particular circumstance. However, we consider that the mere fact that certain substitution elasticity estimates may vary in some particular instances does not call into question the general reliability of FGO estimates. This is particularly so given that the United States offers no demonstration that FGO estimates are somehow less reliable than the other two sources in the context of the Softwood Lumber example (or *vis-à-vis* any other potential product). Hence, the Arbitrator rejects the United States' proposal to use a median substitution elasticity value between FGO, Soderbery (2015), and Ahmad and Riker (2019), because it appears unnecessarily burdensome for Canada. At the same time, the Arbitrator concludes that Canada should source elasticities of substitution exclusively from FGO.

8.295. Having decided that a CVD order-specific elasticity of substitution shall be calculated based on FGO's HS 6-digit trade elasticities, the Arbitrator notes that the Arbitrator submitted a draft procedure for doing so to the parties in a question.[866] The parties provided technical suggestions to adjust the proposed procedure, and in particular regarding how to account for missing values and statistical outliers. Thus, before providing detailed instructions on how to compute a CVD order-specific elasticity of substitution, the Arbitrator first discusses the parties' suggestions regarding how to adjust the Arbitrator's proposed procedure.

8.296. The Arbitrator proposed to replace FGO trade elasticities that have a missing value in the FGO dataset or that qualify as statistical outliers (trade elasticities exceeding the median plus two standard deviations across all HS 6-digit trade elasticities in the FGO data set) with the median within the HS 4-digit headings, or within the HS 2-digit chapters in the event that a median cannot be calculated within the HS 4-digit headings. The United States broadly agrees with these suggestions, with the following qualifications: (a) the same procedure should also be applied to trade elasticities that are "missing from the dataset entirely, [or] statistically insignificant as defined by FGO"; (b) the two types of values noted in previous item (a) and outliers should be replaced with the median value within the HS 4-digit heading calculated "over all statistically significant, non-outlier estimates"; and (c) to obtain elasticities within HS Chapter 45, the median should be calculated "over all statistically significant, non-outlier […] HS 6-digit point estimates", because neither the median within the HS4 heading nor the median within this HS2 chapter would be available.[867]

8.297. Canada offers the following alternative proposals. First, in Canada's view, for statistical outliers, the value should be set equal to the median value plus two standard deviations (rather than to the median value) across all HS 6-digit codes in the FGO dataset, as this would be "consistent with the principle that the HS-6 outliers are more likely to be more substitutable than the median HS-6 category".[868] Second, Canada asserts that for elasticities that are missing (either because they are simply absent in the FGO dataset or because they have "been assigned a substitute value in the Fontagné data"), Canada suggests that the "weighted average of other HS-6 elasticities within the HS-4 heading, weighted by Canadian imports to the U.S." should be used "rather than the median

[864] The United States provided proposed detailed instructions (United States' response to Arbitrator question No. 246, comments on Annex A, section IV, paras. 1.3-1.5). Following these instructions, however, would still be significantly more burdensome than computing the CVD order-specific substitution elasticity from a single data source.

[865] Canada's response to Arbitrator question No. 246, para. 226. See also Canada's response to Arbitrator question Nos. 50, 133, and 194.

[866] Arbitrator question No. 246.

[867] United States' response to Arbitrator question No. 246, comments on Annex A, section I, para. 1.2. As correctly noted by the United States, the "FGO dataset […] includes a variable labelled 'zero' which is equal to one if a point estimate is statistically insignificant." (United States' response to Arbitrator question No. 246, comments on Annex A, section I, fn 142 to para. 1.2).

[868] Canada's response to Arbitrator question No. 246, para. 229.

value within the HS-4 heading".[869] According to Canada, "[w]eighting by the value of Canadian imports to the U.S. will be more representative of Canadian imports than the use of the median value for the HS-4 heading."[870]

8.298. The Arbitrator notes that the parties agree on the definition of outliers, i.e. as trade elasticities exceeding the median plus two standard deviations across all HS 6-digit trade elasticities in the FGO data set. The Arbitrator thus adopts this definition, which appears reasonable, to identify outliers. Regarding the treatment of outliers, the Arbitrator views Canada's suggestion to cap them at a given value (i.e. the overall median plus twice the overall standard deviation) as reasonable, because it recognizes that outlier values may well signal that the relevant HS 6-digit codes have trade elasticities that are generally higher than the median among the HS 6-digit codes. We note that the United States has not provided material reasoning as to why its approach to replacing outliers (i.e. assigning aggregated median values, computed by excluding other outliers within the same HS 4-digit or HS 2-digit categories), might be more logical or accurate. The Arbitrator, therefore, accepts Canada's proposal on how to treat outliers in the FGO dataset.

8.299. Regarding the treatment of missing values, Canada justifies its proposal to use trade-weighted averages based on such averages being more representative than the median within the HS 4-digit heading or within the HS 2-digit chapter. The Arbitrator notes that we initially proposed to the parties that missing values be assigned the median within the HS 4-digit headings, or within the HS 2-digit chapters in the event that a median cannot be calculated within the HS 4-digit headings. The Arbitrator did so due to the fact that no party proposals had yet been made on that specific score. We therefore note that we discern no particular reason why trade-weighted averages, as Canada proposes, would be less reliable than medians in this context. Furthermore, the United States has offered no material criticism of the Canadian approach, and has not provided material reasoning as to why its proposed approach of using the median within the HS 4-digit heading, or the HS 2-digit chapter, or the overall median for chapter 45, only over non-outlier values, might be more logical or accurate. We further discern no reason why the United States' approach would be more logical or accurate. The Arbitrator, therefore, rejects the United States' proposals regarding the treatment of missing values in favour of Canada's, which we consider reasonable under the circumstances. The Arbitrator, therefore, accepts Canada's proposal on how to treat missing values in and from the FGO dataset, with one qualification that will always allow Canada to compute a substitution elasticity for each HS 6-digit code, which is discussed in paragraph 8.300, below.

8.300. The Arbitrator now provides detailed instructions for the calculation of a CVD order-specific substitution elasticity based on FGO's HS 6-digit trade elasticities. To compute the CVD order-specific substitution elasticity, the Arbitrator instructs Canada to use the most recent version of FGO trade elasticities at the HS 6-digit level.[871] The Arbitrator notes that the current version of FGO trade elasticities at the HS 6-digit level follows the HS 2007 classification, and that both parties recognize that it will be necessary to match the data to a more recent HS classification.[872] When periodic revisions to the HS make it necessary to concord the reference HTS codes in the CVD order to the 6-digit FGO elasticities (the first 6-digit HTS codes are identical to the HS 6-digit code), Canada shall use official correspondence tables from the United Nations.[873] Canada shall calculate the substitution elasticity using the following linear transformation:

$$\sigma = 1 - \varepsilon$$

[869] Canada's response to Arbitrator question No. 246, para. 230.

[870] Canada's response to Arbitrator question No. 246, para. 230.

[871] The current version of HS 6-digit FGO trade elasticities, downloaded from https://sites.google.com/view/product-level-trade-elasticity, is available to Canada as STATA dataset "elasticity_for_publication_2019_11_28.dta", which is provided by Canada in Exhibit CAN-140. If a more recent version of such elasticities becomes available but, for some reason such as a change in their format, is unusable, Canada will revert to "elasticity_for_publication_2019_11_28.dta".

[872] See United States' response to Arbitrator question No. 246, comments on Annex A, section I, para. 1.2; Canada's response to Arbitrator question No. 133, para. 78.

[873] Correspondence tables from the United Nations are currently available at: https://unstats.un.org/unsd/trade/classifications/correspondence-tables.asp. Canada submits the correspondence table between HS 2017 and HS 2007 ("HS2017toHS2007ConversionAndCorrelationTables.xlsx") in Exhibit CAN-140. The resulting dataset, with FGO trade elasticities concorded to the HS 2017 classification, is in Exhibit CAN-139. In the future, the reference HTS codes in the CVD order will correspond to the HS Nomenclature 2022 Edition. Canada will then match the original FGO data to the HS 2022 classification, using the appropriate correspondence table that will be published by the United Nations. Further revisions to HS will require a similar procedure.

where ε is the point estimate of the FGO trade elasticity.[874] Canada shall then assign to statistical outliers, defined as values of σ exceeding the overall median plus two standard deviations across all observations, the value corresponding to the median plus two standard deviations across all observations in the FGO dataset.[875] Next, if the substitution elasticity σ is missing from the dataset entirely, or is statistically non-significant as defined by FGO[876], Canada shall compute it as the trade-weighted average of the HS-6 digit elasticity estimates within the HS 4-digit heading to which the HS 6-digit sub-heading belongs. If, for some reason, this is also missing or cannot be computed, the trade-weighted average within the HS 2-digit chapter to which the HS 6-digit sub-heading belongs shall be used. If, for some reason, this is also missing or cannot be computed, Canada shall use the overall median across all observations in the FGO dataset.[877] Trade weights used for the trade-weighted averages should be reference-year US imports from Canada at the level of HS 6-digit sub-headings, sourced from USA Trade Online or, if these data are not available, from USITC DataWeb. Canada shall then assign the same substitution elasticity σ to all HTS 10-digit codes in a CVD order with identical first six digits.

8.301. Once each HTS 10-digit code in a CVD order is assigned a substitution elasticity, in case all HTS 10-digit codes in a CVD order have the same substitution elasticity, this common substitution elasticity will also be the CVD order-specific substitution elasticity.[878] In case two or more HTS 10-digit codes are assigned different substitution elasticities, the CVD order-specific substitution elasticity shall be computed as a weighted average of each HTS 10-digit level's substitution elasticity, using, as weights, HTS 10-digit US imports from Canada sourced from USA Trade Online or, if these data are not available, from USITC DataWeb for the reference year, according to the following formula:

$$\sigma = \sum_j \sigma_j \frac{M_j}{\sum_j M_j}$$

where σ_j is the elasticity of substitution for HTS 10-digit code j (common to all 10-digit codes within each HS 6-digit sub-heading), M_j is the corresponding import value (US imports from Canada) and $\sum_j M_j$ is the total of all US imports from Canada subject to a CVD order.[879]

8.1.5 Price elasticity of demand (ε)

8.302. The price elasticity of demand is a measure of the sensitivity of consumers with respect to price changes. For ordinary goods, its values are negative. This means that demand for these goods reduces when their prices increase. For instance, a demand elasticity of $\varepsilon = -0.5$ can be interpreted as follows: if the price of a given product increases by 1%, demand for this product decreases by 0.5%. It may be noted that, assuming the price elasticity of demand is a negative value, the level of NI decreases as the value of the demand elasticity approaches zero in both parties' methodologies, as well as in the methodology adopted by the Arbitrator. This reflects the fact that, when demand reacts insensitively to price changes, even large tariff rate increases would lead to small changes in the quantities traded.

[874] This point estimate corresponds to the variable labelled "epsilon_pt" in "elasticity_for_publication_2019_11_28.dta", submitted by Canada in Exhibit CAN-140.

[875] In the current FGO dataset ("elasticity_for_publication_2019_11_28.dta", provided by Canada in Exhibit CAN-140), the threshold for outliers, equal to the median plus two standard deviations across all observations, is equal to 23.97.

[876] The current FGO dataset includes a variable labelled "zero" which is equal to one if a point estimate is statistically insignificant.

[877] This ensures that Canada will always be able to compute a substitution elasticity for each HS 6-digit code, and therefore for each HTS 10-digit code in a CVD order.

[878] As noted in the final sentence in the paragraph above, all HTS 10-digit codes with the same first six digits will necessarily be assigned the same substitution elasticity.

[879] The Arbitrator notes that Canada finds this trade-weighted averaging procedure appropriate (Canada's response to Arbitrator question No. 246, para. 231), and the United States does not object to it (United States' response to Arbitrator question No. 246, comments on Annex A, section I, para. 1.2).

8.303. Canada proposes to source demand elasticities from version 11 of the GTAP.[880] Canada provides a table of such GTAP demand elasticities for 65 industry sectors.[881] Canada matches the 65 GTAP demand elasticities to products at the HS 6-digit level, and computes a weighted average within each of the 98 HS chapters, or alternatively within the 20 Caliendo and Parro sectors, with weights given by each HS 6-digit product's share in total Canadian imports of the United States in 2019.

8.304. The United States disagrees with Canada's approach of using GTAP demand elasticities, arguing that they "are not developed for use in product-specific, partial equilibrium analysis".[882] The United States contends further that: (a) "the demand elasticities in the GTAP 11 database are estimated on very broad sectors […]. Such an aggregation assumes that the demand elasticity for many types of products [is] identical"[883]; (b) there is a very wide variation in the number of 6-digit HTS categories within each of these GTAP sectors[884]; (c) some products subject to CVD or AD orders may fall in multiple GTAP sectors, and Canada fails to explain which elasticity will be used in the event of such a scenario[885]; and (d) Canada's approach of collapsing GTAP elasticities into the 20 tradeable sectors of Caliendo and Parro "further aggregates many different products that may have different elasticity estimates".[886] Moreover, the United States further argues that GTAP elasticities would be inappropriate because they "are only consumer demand elasticities", rather than "elasticit[ies] of total industry demand (that is, the demand response of all buyers – consumers, government, and firms – of the product as final or intermediate good)"[887], and GTAP elasticities "are not representative of contemporaneous market conditions".[888] The United States proposes instead to use "the demand elasticity estimate reported by the [USITC] that concerns the specific product at issue".[889] The United States argues that "[p]redictability will be assured by definitively determining the source of the data input, while also ensuring better accuracy and precision".[890]

8.305. Canada responds that it is preferable to source demand elasticity data from the most updated GTAP database, which is "based on analysis of the U.S. economy and account for the use of products as intermediate goods in production activities".[891] Canada asserts that "GTAP demand elasticities are widely used by the United States, Canada, the WTO, and other national and international entities for the purposes of modelling trade effects", and that the arbitrator in *US – Washing Machines (Article 22.6 – US)* used GTAP data "for modelling counterfactual trade outcomes".[892] Canada dismisses the United States' argument that GTAP demand elasticities are developed for general equilibrium analyses, rather than for partial equilibrium analyses, by noting that the demand elasticity in a given sector is the same independently of whether that sector is analysed in isolation (as in partial equilibrium analyses) or jointly with other sectors (as in general equilibrium analyses).[893] Finally, Canada dismisses the United States' argument that Canada's elasticities are too uniform, "with '85 percent of all products being price inelastic'"[894], arguing that Canada's elasticities "are in fact similar to those presented by the United States in its comparison of

[880] Canada's methodology report, para. 25.

[881] Canada's methodology report, Table A4. Only 45 sectors out of 65 are "tradeable" (see United States' written submission, para. 110).

[882] United States' written submission, para. 109.

[883] United States' written submission, para. 108. See also the United States' written submission, para. 110 (arguing that "[t]he problem with the GTAP parameter estimates is evident upon review" of Table A4 of Canada's methodology report).

[884] United States' written submission, para. 108.

[885] United States' written submission, para. 108.

[886] United States' written submission, para. 111. According to the United States, "17 of the 20 sector demand elasticities have a modestly inelastic demand elasticity of either -0.90 or -0.91" (United States' written submission, para. 111). Moreover, according to the United States, the share of sectors with "inelastic" demand (i.e. with demand elasticities that are less than one in absolute value) is equal to 85% (17 in 20), while it is equal to 47% (21 in 45) in the original GTAP data (United States' written submission, para. 111).

[887] United States' response to Arbitrator question No. 62, para. 164.

[888] United States' response to Arbitrator question No. 62, para. 168.

[889] United States' written submission, para. 113.

[890] United States' written submission, para. 113. (emphasis omitted)

[891] Canada's written submission, para. 149.

[892] Canada's written submission, para. 149 (quoting Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, para. 4.80).

[893] Canada's response to Arbitrator question No. 60, para. 129 (quoting Global Trade Analysis Project, "GTAP Resources: Frequently Asked Question Details", accessed March 8, 2021, https://www.gtap.agecon.purdue.edu/resources/faqs/faqs_display.asp?F_ID=151 (Exhibit CAN-88)).

[894] Canada's written submission, para. 150 (quoting United States' written submission, para. 111).

elasticity estimates".[895] Canada further addresses the issue of several sectors having inelastic demand, arguing that "in Appendix 3 of the United States' submission, […] more than 75% of the products (21 products out of 27) that the United States examines have even more inelastic demand according to its USITC estimates than those proposed by Canada".[896] According to Canada, "using the demand elasticities from GTAP would generally understate the magnitude of NI relative to using the United States' proposed source".[897]

8.306. As in the case of the substitution elasticity, the United States revised its views regarding the appropriate data sources for the price elasticity of demand, and eventually proposed a three-tiered approach.[898] It might be recalled that, according to the United States, the first option would be to rely on USITC estimates. The second option would be, in the "unlikely event that future product-specific substitution elasticities are not available from the Commission report" to "instruct the parties to consult and use some future source, including considering updated academic literature."[899] The third option for the demand elasticity, should the first and second options be non-viable, would be to compute the CVD order-specific demand elasticity using "the most recently available GTAP consumer final demand elasticities."[900]

8.307. In response to the United States' revised proposals, Canada reiterates its objection to the use of USITC elasticities[901], and it rejects the United States' proposed tiered approach as "untenable, impractical, and unnecessary."[902] With respect to GTAP demand elasticities, Canada does not object "to the use of updated versions [relative to GTAP 11], if available and usable in the context of the model."[903]

8.308. The Arbitrator notes that, concerning the United States' preferred approach of relying on demand elasticities estimated by the USITC, the United States explains that the USITC determines a range of possible demand elasticities specifically for a product under investigation using information gleaned from questionnaires, hearings, briefs from the interested parties, and estimates from the literature.[904] Consistent with the Arbitrator's observations concerning USITC substitution elasticities[905], the Arbitrator observes that the estimated demand elasticities generated by the USITC appear to be based on methods that are untransparent and non-replicable. Also, given the prospective nature of this arbitration proceeding, future USITC determinations are not and cannot be on the record before the Arbitrator yet, and thus the Arbitrator cannot evaluate them.[906] The Arbitrator therefore rejects the use of USITC demand elasticities.

8.309. The Arbitrator also rejects the second option put forward by the United States under its tiered approach (i.e. to rely on future, unspecified sources in case USITC demand elasticities are unavailable), as it would likely result in future disagreements between the parties. In this context, we note that even if the parties were to agree on a particular data source in the future, the technical implementation of that data source may be complex and subject to interpretation.

8.310. Having decided to reject the first and second tiers (respectively, using UISTC demand elasticities, or relying on future, unspecified sources in case USITC demand elasticities are unavailable), and noting that no other possible data sources have been proposed by the parties (even when explicitly asked by the Arbitrator) or appear readily available, the only viable option in front of the Arbitrator is to rely on GTAP demand elasticities.

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[895] Canada's written submission, para. 150 (referring to United States' written submission, para. 111).
[896] Canada's response to Arbitrator question No. 60, para. 130 (referring to the United States' written submission, Appendix 3).
[897] Canada's response to Arbitrator question No. 60, para. 131.
[898] United States' response to Arbitrator question No. 198, paras. 35-40.
[899] United States' response to Arbitrator question No. 246, comments on Annex A, section IV, para. 1.2.
[900] United States' response to Arbitrator question No. 198, para. 40.
[901] Canada's comments on the United States' responses to comments on Annex A, section II, para. 160.
[902] Canada's comments on the United States' response to Arbitrator question No. 198, para. 25.
[903] Canada's comments on the United States' responses to comments on Annex A, section II, para. 173.
[904] United States' response to Arbitrator question No. 61, para. 161.
[905] See para. 8.285, above.
[906] However, the Arbitrator considers that if this were the case, USITC estimates would likely be stronger candidates for use in an economic model. See, e.g. Decision by the Arbitrator, *US – Anti Dumping Methodologies (China) (Article 22.6 – US)*, para. 7.36 (using pre-existing USITC elasticity estimates for a retrospective, rather than prospective, Armington model).

8.311. The Arbitrator notes that multiple US arguments raised against using GTAP data in this context concentrate on the notion that GTAP demand elasticities are calculated at a relatively high level of aggregation. The Arbitrator notes, however, that the United States does not provide theoretical or empirical evidence that the estimation of demand elasticities depends on the level of sectoral aggregation, neither in general nor with respect to GTAP elasticities specifically. Therefore, it appears unclear that calculating the level of NI on the basis of relatively aggregated GTAP demand elasticities would yield systematically inaccurate or biased results. Moreover, there readily appears no source of alternate, more granular, and useable demand elasticities on this record. These observations, in our view, significantly dilute the United States' arguments addressing the level of aggregation of GTAP elasticities in a model geared to address more narrowly defined products.

8.312. We also note that the United States is correct that GTAP demand elasticities are derived from figures associated with final consumer demand, instead of relating to total industry demand. The United States, however, does not substantiate its apparent and implicit assumption that demand for intermediate goods is systematically differently shaped than demand for final goods.

8.313. The Arbitrator further considers that the United States' argument that GTAP demand elasticities are developed for general equilibrium analysis, as opposed to partial equilibrium analysis, is insufficiently supported. This is so because the United States does not substantiate its apparent and implicit assumption that GTAP demand elasticities are only reasonably functional in a general equilibrium model (such as GTAP) and not in a partial equilibrium model (such as the Armington model).[907]

8.314. The Arbitrator finally recognizes that the US argument that GTAP elasticities are not representative of contemporaneous market conditions might carry a certain weight, since GTAP estimates are, by construction, based on historical data (at times several years old).[908] However, the only alternative data source that might, in principle, better represent "contemporaneous" market conditions are USITC reports, which the Arbitrator has decided not to rely upon for reasons specified in above in this section.

8.315. The Arbitrator submitted a draft procedure for estimating CVD order-specific demand elasticities based on GTAP data to the parties in a question.[909] This procedure, which we adopt here, is virtually unaffected by the parties' comments thereon[910], and is as follows. Canada shall assign the most recent GTAP demand elasticities available[911] to HS 6-digit level product codes, and then assign the HS 6-digit demand elasticity to each of the HTS 10-digit codes listed in the respective CVD order belonging to the respective HS 6-digit product category.[912] In the event that an HTS 10-digit code referenced in a relevant CVD order cannot be concorded with a GTAP sector, Canada shall calculate the simple average of all GTAP demand elasticities and assign this value to that HTS 10-digit code. Once each HTS 10-digit code in a CVD order is assigned a demand elasticity, in case all HTS 10-digit codes in a CVD order have the same demand elasticity, this common demand elasticity will also be the CVD order-specific demand elasticity.[913] In case two or more HTS 10-digit codes have different demand elasticities, the CVD order-specific demand elasticity shall be computed

[907] We further note that the United States has not specifically contested Canada's statement that the "demarcation between demand elasticities in 'large, multi-sector general equilibrium models' […] and those in 'in product-specific, partial equilibrium analysis' […] is a distinction without a difference." (Canada's response to Arbitrator question No. 60, para. 129, quoting the United States' written submission, para. 109).

[908] United States' response to Arbitrator question No. 61, paras. 161-162.

[909] Arbitrator question No. 246.

[910] The United States argues that only "primary" HTS codes should be used. The Arbitrator dismisses this suggestion for the reasons explained in sections 8.1.1.2.1.2(a) and 8.1.4, above.

[911] If the most recent version of such elasticities is unavailable, or, for some reason, due to a change in their format, the GTAP demand elasticities become unusable, Canada could revert to the most recently available version of these elasticities in a useable format. We note that the current GTAP demand elasticities are on the record in Source Data 2 (Exhibit CAN-8), and thus a useable format of these elasticities would always be available to Canada via the record of this proceeding.

[912] The assignment of GTAP demand elasticities to HS 6-digit sub-headings shall be done using the correspondence in sheet "HS2017 to GTAP11" of Exhibit CAN-8. If future GTAP or HS classifications will be used, the assignment shall be done using correspondence tables from the World Bank or GTAP, presently available at the following URLs, respectively: https://wits.worldbank.org/product_concordance.html, and https://www.gtap.agecon.purdue.edu/databases/contribute/concord.asp.

[913] It might also occur that one HTS 10-digit code will correspond to more than one HS 6-digit sub-heading. In this case, Canada shall assign the median across the corresponding HS 6-digit elasticities to the HTS 10-digit code.

as a weighted average of each HTS 10-digit code's demand elasticity using, as weights, HTS 10-digit US imports from Canada sourced from USA Trade Online or, if these data are not available, from USITC DataWeb for the reference year, according to the following formula:

$$\varepsilon = \sum_j \varepsilon_j \frac{M_j}{\sum_j M_j},$$

where ε_j is the elasticity of demand for a HTS 10-digit product j, M_j is the corresponding import value (US imports from Canada) in HTS 10-digit code j and $\sum_j^J M_j$ is the total of all imports subject to a CVD order.

8.1.6 Price elasticity of supply (η)

8.316. The price elasticity of supply is a measure of the sensitivity of producers with respect to price changes. Its values are typically positive. For instance, a supply elasticity of $\eta = 5$ can be interpreted as follows: a 1% price increase accompanies an increase in supply of 5%. It may be noted that, assuming the price elasticity of supply is a positive value, the level of NI increases with the price elasticity of supply under the selected model.

8.317. Canada asserts that "there is limited information on import supply elasticities".[914] Canada proposes to use an import supply elasticity of 10, justifying this choice based on the *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)* arbitrator's selection of 10 for the import supply elasticity in its own Armington model and on a study by Hallren and Riker.[915] Canada proposes to apply the same elasticity of supply for domestic shipments, which Canada asserts was also done in the *US – Washing Machines (Article 22.6 – US)* arbitration decision.[916]

8.318. The United States agrees with Canada on a value of 10 for the *import* supply elasticity[917], but draws a distinction between this elasticity and the *domestic* supply elasticity. The United States argues 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".[918] The United States claims that the arbitrator in *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)* applied an identical approach, agreeing that "import supply elasticities are generally more elastic than domestic supply elasticities".[919] The United States also refers to multiple studies in support of its argument that import and domestic supply elasticities should be different.[920] The United States builds its case for using domestic supply elasticities that are lower than import supply elasticities based on four studies: (a) a study from November 2020 by an USITC economist, arguing that import supply elasticities generally exceed domestic supply elasticities[921]; (b) a study from March 2020 by a group of USITC economists, arguing that "[t]ypically, both subject and non-subject import sources have higher price elasticities of supply than the domestic source"[922];

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[914] Canada's methodology report, para. 27.

[915] Canada's methodology report, para. 27 (referring to Decision by the Arbitrator, *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 7.37; Hallren and Riker, "An Introduction to Partial Equilibrium Modeling of Trade Policy", USITC Office of Economics Working Paper Series (July 2017) (Exhibit CAN-4)).

[916] Canada's response to Arbitrator question No. 63, para. 134.

[917] United States' written submission, para. 120 (referring to Decision by the Arbitrator, *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 7.37).

[918] United States' written submission, para. 121.

[919] United States' response to Arbitrator question No. 64, para. 177 (quoting Decision by the Arbitrator, *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 7.37).

[920] United States' response to Arbitrator question No. 64, paras. 176-177 (referring to Exhibit CAN-4; 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)") (Exhibit USA-22); 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); Jennifer Leith et al., "Indonesia Rice Tariff", Poverty and Social Impact Analysis, March 2003 ("Leith et al. (2003)") (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)") (Exhibit USA-33)).

[921] Riker (November 2020) (Exhibit USA-31). See also United States' response to Arbitrator question No. 64, para. 176.

[922] Bethmann et al. (2020) (Exhibit USA-22), p. 5. See also United States' response to Arbitrator question No. 64, para 177.

(c) a PSIA[923] report where it is assumed that the domestic supply elasticity (0.3) is more than thirty times smaller than the import supply elasticity (10)[924]; and (d) a published paper using a value for the domestic supply elasticity (6) less than half the value of the import supply elasticity (15).[925] The United States, therefore, argues that Canada's proposal to use 10 (i.e. the same value as the foreign supply elasticity) for the US domestic supply elasticity lacks evidentiary support, and suggests using "the domestic supply elasticity estimate reported by the [USITC] in its investigation of the specified future product".[926]

8.319. Canada responds that "separating domestic supply and imports from the rest of the world is of secondary significance" in calculating the NI because "the focus is on imports from Canada".[927] Moreover, according to Canada, "the U.S. stated assumption has not been adopted by prior arbitrators facing similar circumstances to the present case", noting that the arbitrator in *US – Washing Machines (Article 22.6 – US)* used the same supply elasticity for both domestic sources and imports from the RoW.[928] Canada does not, however, provide evidence directly supporting the proposition that domestic and imported supply are equally shaped, although Canada notes that its approach has the advantage of being simpler than the United States' approach.[929]

8.320. As Canada has done in the case of discussing other elasticities, Canada rejects the United States' proposal to use USITC estimates in this context. In Canada's view, "the United States' suggestion of using [domestic] supply elasticity estimates from presently unverifiable USITC reports [is] untenable."[930] When asked to provide appropriate values of the domestic and foreign elasticity of supply should the Arbitrator decide "to set the value of the domestic supply elasticity lower than the value of the foreign supply elasticity"[931], Canada initially did so in the context of Canada's proposed two-variety model (see section 7.1, above), which distinguishes between Canadian and non-Canadian supply, rather than between US and non-US supply. In that context, Canada proposed the values of 15 for the elasticity of Canadian supply, and of 7.7 for the elasticity of non-Canadian supply.[932] To justify the choice of 15 for the elasticity of Canadian supply, Canada relies on Gasiorek et al. (2019) (Exhibit USA-33), who use this value.[933] To justify the choice of 7.7 for the elasticity of non-Canadian supply, Canada noted that this value – which is the value of the supply elasticity covering both domestic supply and imports in *US – Washing Machines (Article 22.6 – US)* – "should reflect a blend of supply elasticities from all non-Canadian sources, both U.S. domestic supply and the rest-of-world imports."[934] According to Canada, this implies that it should be "higher than an elasticity for a purely domestic source of supply", which, in Gasiorek et al. (2019) (Exhibit USA-33), was estimated to be 6.[935]

8.321. The Arbitrator further asked the parties to suggest pre-determined supply elasticities to be implemented under the four-varieties model framework proposed by the Arbitrator. Canada replied, with reference to Gasiorek et al. (2019) (Exhibit USA-33), that the most reasonable options would be to adopt a value of 6 for the US domestic supply elasticity and a value of 15 for the import supply elasticity.[936] Canada, however, considers "using 10 for import (i.e. non-US) supply elasticity would

[923] Poverty and Social Impact Analysis (PSIA), a multilateral economic policy evaluation programme in the early 2000s.
[924] Leith et al. (2003) (Exhibit USA-32). See also United States' response to Arbitrator question No. 64, para 177.
[925] Gasiorek et al. (2019) (Exhibit USA-33). See also United States' response to Arbitrator question No. 64, para 177.
[926] United States' written submission, para. 122. See also Appendix Table 1 of the United States' written submission.
[927] Canada's written submission, para. 152.
[928] Canada's written submission, para. 152 (referring to Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, para. 4.78).
[929] Canada's written submission, para. 152.
[930] Canada's response to Arbitrator question No. 63, para. 134 (referring to Canada's written submission, paras. 108 and 141-142).
[931] Arbitrator question No. 139.
[932] Canada's response to Arbitrator question No. 139, para. 89.
[933] Canada's response to Arbitrator question No. 139, para. 88 (referring to Michael Gasiorek *et al.*, "Which manufacturing industries and sectors are most vulnerable to Brexit?", The World Economy (2019) ("Gasiorek et al. (2019)") (Exhibit USA-33), p. 29).
[934] Canada's response to Arbitrator question No. 139, para. 89.
[935] Canada's response to Arbitrator question No. 139, para. 89.
[936] Canada's response to Arbitrator question No. 280, para. 8.

not be unreasonable" either.[937] The United States maintained its position to rely on USITC report estimates for the domestic supply elasticity and to employ a value of 10 for the import supply elasticity.[938]

8.322. The Arbitrator notes that, before determining values or data sources for the supply elasticity, the Arbitrator must first determine whether a single supply elasticity should be used for all sources of supply of the relevant product or whether different supply elasticities should govern different sources of supply. We thus note that the arguments made by the United States in favour of lower supply elasticities for domestic than for imported supply are supported by empirical studies and appear consistent with conventional economic thinking. Moreover, Canada itself recognizes that "the elasticity of supply for imports is sometimes treated as higher than for domestic sources".[939] Therefore, the Arbitrator considers that it is most reasonable to have import supply and US domestic supply subject to different price elasticities, and in particular using a US domestic supply elasticity that is lower than the foreign supply elasticity.

8.323. That being the case, we recall that Canada has suggested that different price elasticities could be assigned to Canadian imports and to other sources of supply (i.e. US domestic supply and RoW imports). This Canadian proposal, however, appeared tailored to apply specifically to Canada's formula derived by Canada's proposed two-variety model (see section 7.1, above), which is structured around a Canadian variety and a non-Canadian variety. In the framework of the selected four-varieties model, however, we discern no particular reason to treat imports from Canada differently than RoW imports, and Canada provides none. The Arbitrator, therefore, considers that this Canadian proposal should not be implemented in the context of the selected model. Rather, and as consistent with the discussion in the preceding paragraph, the Arbitrator considers that it is most reasonable to assign different values to the US domestic supply elasticity and to the foreign (i.e. non-US) supply elasticity.

8.324. The question therefore becomes what values to assign to domestic and import supply elasticities. The Arbitrator notes that both parties have suggested the use of a pre-determined value for the import supply elasticity. We see no reason to deviate from this shared suggestion. The Arbitrator also notes that the only alternative to pre-determine a value also for the domestic supply elasticity would be to rely on information from USITC reports, which is the United States' preferred approach. The United States explains that the USITC determines a range of possible supply elasticities specifically for a product under investigation using information gleaned from questionnaires, hearings, briefs from the interested parties, and estimates from the literature.[940] Consistent with the Arbitrator's observations concerning USITC substitution elasticities and demand elasticities[941], the Arbitrator observes that the estimated supply elasticities generated by the USITC appear to be based on methods that are untransparent and non-replicable. Also, given the prospective nature of this arbitration proceeding, future USITC determinations are not and cannot be on the record before the Arbitrator yet, and thus the Arbitrator cannot evaluate them.[942] The Arbitrator therefore rejects the use of USITC supply elasticities and decides to pre-determine values for both the import supply elasticity and the domestic supply elasticity.

8.325. With respect to the domestic supply elasticity, the Arbitrator notes that the United States failed to provide a proposal for a pre-determined value even when explicitly asked by the Arbitrator. The Arbitrator recalls, however, that Canada proposed a value of 6 for the domestic supply elasticity. The Arbitrator discerns nothing unreasonable about this value, which is taken from the empirical study by Gasiorek et al. (2019) (Exhibit USA-33), which we note is found in an exhibit initially submitted by the United States. Therefore, the Arbitrator decides to adopt Canada's proposed value of 6 for the domestic supply elasticity.

8.326. With respect to the import supply elasticity, the Arbitrator notes that neither Canada's suggestion of 15, nor the United States' suggestion of 10 appear unreasonable, and that neither

[937] Canada's response to Arbitrator question No. 280, fn 14 to para. 8.
[938] United States' response to Arbitrator question No. 280, paras. 8-9.
[939] Canada's response to Arbitrator question No. 250, para. 251.
[940] United States' response to Arbitrator question No. 66, paras. 181-182.
[941] See paras. 8.285 and 8.308, above.
[942] However, the Arbitrator considers that if this were the case, USITC estimates would likely be stronger candidates for use in an economic model. See, e.g. Decision by the Arbitrator, *US – Anti Dumping Methodologies (China) (Article 22.6 – US)*, para. 7.36 (using pre-existing USITC elasticity estimates for a retrospective, rather than prospective, Armington model).

party has brought forward substantiated arguments against the other's party suggestion. We further discern nothing from the discussions surrounding these values in the sources from which they are taken (i.e. the study by Gasiorek et al. (2019) (Exhibit USA-33), using a value of 15, and the arbitrator's decision in *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, using a value of 10) that materially demonstrates either value's superiority. Since Canada considers that the value of 10 as proposed by the United States is not unreasonable, the Arbitrator thus adopts a value of 10 for the import supply elasticity.

8.2 Implementation of the Armington model under the two steps

8.327. We note that the structural form of the Armington model (see section 7.3, above) and the determination of parameter values (see section 8.1, above) alone are insufficient to calculate a level of NI. Rather, to employ the selected model such that its outcome properly accounts for the difference between the factual and counterfactual situations (the difference being the level of NI), the sequencing of model applications, or "runs", is also necessary.

8.328. The United States proposes, for the implementation of the US methodology, that the model must be run twice:

> 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.[943]

8.329. Canada agrees, noting that, in the circumstances that would require two runs of Canada's formula, i.e. when the counterfactual WTO-consistent duty differs from the reference period's duty (see section 7.1.2.5, above), "the U.S. model would also need to be run twice".[944]

8.330. The Arbitrator notes that there is agreement between the parties that any Armington model would have to be run twice in order to account for the two distinct duty rate changes, i.e. the change from the reference period level to the factual, WTO-inconsistent one, and from the reference period level to the counterfactual, WTO-consistent one. The Arbitrator considers this approach valid to isolate the trade effects caused by the OFA-AFA Measure.

8.331. The Arbitrator further notes that, technically, a second model run is only required if the counterfactual duty rate differs from the reference period duty rate as no trade effects occur as a consequence of a zero duty rate change.[945] However, for the sake of transparency and the ease of application, the model proposed by the Arbitrator is run twice under any circumstances. The first model run changes the duty rate for affected imports from the reference level to the factual, WTO-inconsistent duty rate level, and the second model run changes the duty rate for affected imports from the reference level to the counterfactual, WTO-consistent duty rate level.[946] The final level of NI is the difference of the runs.

$$NI = NI(First\ Run) - NI(Second\ Run)$$

8.332. The input file (see Annex C-2 of the Addendum to this Decision, WT/DS505/ARB/Add.1) and the STATA code (see Annex C-1 of the Addendum to this Decision, WT/DS505/ARB/Add.1) provided by the Arbitrator runs the model twice by default, calculating, at the same time, $NI(First\ Run)$, $NI(Second\ Run)$, and the final level of $NI = NI(First\ Run) - NI(Second\ Run)$.

[943] United States' response to Arbitrator question No. 83, para. 223.
[944] Canada's response to Arbitrator question No. 79, fn 199 to para. 170.
[945] United States' response to Arbitrator question No. 131, paras. 21-22 (making this point).
[946] The Arbitrator further notes that, as confirmed by both parties, the factual, WTO-inconsistent duty rates for unaffected Canadian exporters can differ from the reference period duty rates for unaffected Canadian exporters (Canada's response to Arbitrator question No. 295, fn 64 to para. 62; United States' response to Arbitrator question No. 295, para. 54) The input file and the STATA code provided by the Arbitrator allow for this possibility.

9 PRICE-LEVEL ADJUSTMENT

9.1. In its Methodology Paper, Canada stated that "[t]he precise data inputs for the *Value of Imports* (inflated to the appropriate period) and the level and change of the WTO-inconsistent duty ($\Delta Duty$) remain to be determined in the future".[947] Moreover, Canada's methodology report stated that "the value of imports from Canada … is to be drawn from the calendar year prior to the imposition of the WTO-inconsistent duty and inflated from the reference period to the period subject to the WTO-inconsistent duty".[948] Further, in the context of discussing an example of how the formula was to be run, Canada stated that "[t]he nullification or impairment in this example is then the value of imports from the reference period (properly inflated) times 0.10 times the scaling factor for the sector associated with the product".[949] The submissions did not discuss, however, what the nature of this inflationary adjustment was or how it was to be performed.

9.2. The United States, noting the above-referenced statements in Canada's Methodology Paper and accompanying Report, explained that "[t]o the extent Canada seeks to apply an inflation rate, the United States strongly disagrees with such an application to the value of imports".[950] This is so because, in the United States' view, "[a]ll inputs should be based on the same calendar year and Canada has not suggested to inflate any of the other inputs. Therefore, to avoid unnecessarily overstating the estimate of the trade effect, the value of imports should be based solely on the calendar year prior to the imposition by Commerce of duties resulting from the application of the challenged measure in a future CVD proceeding, without any adjustment for inflation".[951]

9.3. Canada responded to the United States' assertions, explaining that "[w]ith respect to the inflation adjustment that Canada proposed in the Methodology for Calculating Canada's Losses, Canada slightly amends this proposal"[952], and that "Canada is not seeking to use an adjusted value of imports in its formula to calculate the level of nullification or impairment", because Canada is "seeking that the level of suspension calculated can be adjusted for inflation on an annual basis".[953] Canada argues that its request in this context "is consistent with the award in *US – Washing Machines (Article 22.6 - US)*, where the arbitrator allowed for an annual adjustment of the level of suspension or concession based on the rate of inflation".[954] In response to specific questions from the Arbitrator, Canada further clarified that, from its perspective, the purpose of the inflationary adjustment is to reflect changes in prices in the affected market and thus preserve the real value of suspension.[955] More specifically, Canada asserted that the inflationary adjustment is meant to adjust the level of NI. In light of that purpose, Canada considers that a PPI specific to the industry that relates to the relevant product is the most appropriate inflation index.[956]

9.4. In response to such clarifications by Canada, the United States asserts it "does not object to the concept of applying an adjustment for inflation to the initial nullification or impairment level on an annual basis" but that Canada has to provide an appropriate source for such an adjustment, which, according to the United States, could be "a U.S. producer price index for the relevant industry" but no "GDP growth rate, deflator, or other aggregate rate".[957] The United States has stated that the purpose of the adjustment is to preserve the real value (i.e. the economic impact) of the suspension.[958] However, in a later submission, the United States did not object to Canada's explanation that the purpose of the inflation adjustment is to adjust the level of NI, rather than the

[947] Canada's methodology report, para. 7. (emphasis original)
[948] Canada's methodology report, para. 35.
[949] Canada's methodology report, para. 36.
[950] United States' written submission, para. 142.
[951] United States' written submission, para. 142.
[952] Canada's written submission, para. 181. (fn omitted)
[953] Canada's written submission, para. 181.
[954] Canada's written submission, para. 181 (referring to Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, paras. 3.132-3.134 and 4.122-4.123).
[955] Canada's response to Arbitrator question No. 236, para. 210.
[956] Canada's response to Arbitrator question No. 292, paras. 51-53.
[957] United States' response to Arbitrator question No. 111, para. 278.
[958] United States' response to Arbitrator question No. 236, para. 159, and No. 292, para. 35.

level of suspension *per se*.[959] Further, the United States agrees with Canada that an industry-specific PPI would be the most appropriate inflation index in this context.[960]

9.5. Subsequently, in response to a question from the Arbitrator, Canada asserts that "[the] various options [for an inflationary index] reflect trade-offs between specificity, applicability, and administrability".[961] Canada suggests using PPIs provided by the United States' Bureau of Labor Statistics (BLS), which are available at "different levels of aggregation, categorization, and stage of production on a frequent basis with a relatively short time lag"[962]. Canada emphasizes that applying the "final demand goods" PPI is the simplest approach, albeit more disaggregated PPIs based on the NAICS classification can be used in combination with HTS to NAICS correspondences.[963] Canada suggests that the final demand goods PPI should be used in any cases where no such matching can be performed.[964]

9.6. The United States argues that an appropriate inflationary index could be derived from PPIs published by the BLS. The United States indicates that these PPIs are published monthly and an annual change could be derived from comparing PPIs from December to December, and that the BLS calculates PPIs on a monthly basis for approximately 535 industries and more than 4,000 product lines. The United States further asserts that the relevant indices follow the NAICS classification system which can be concorded to HTS.[965]

9.7. In addition, the United States mentions that the "BLS also publishes more than 3,700 commodity price indexes for goods. The commodity classification structure of the PPI organizes products and services by similarity or material composition, regardless of the industry classification of the producing establishment."[966] This data is structured in a unique classification system whose matching to other common classifications systems such as HS or NAICS is not straightforward.[967]

9.8. The Arbitrator notes at the outset that the parties' request for an "inflation" adjustment is more accurately described as a "price-level adjustment", as it would capture both inflationary and deflationary trends. We shall therefore use the latter term to describe this adjustment moving forward. That being said, this section proceeds in four parts. First, we address the reasonableness and purpose of a price-level adjustment, and, relatedly, the relevant price index to be used in such an adjustment. Second, we discuss the appropriate measurement of changes in the price-level. Third, we address the availability of the underlying price index data. Fourth, we provide detailed instructions on how to implement the price-level adjustment.

9.1 Reasonableness, purpose, and relevant price index

9.9. In this section, we address three somewhat related issues: (a) the reasonableness of a price-level adjustment; (b) its purpose; and (c) the relevant price-level index that would be used in such an adjustment. Both parties agree that a price-level adjustment is reasonable in principle. We discern no reason to disagree. A given level of suspension would remain in place for an unknown period of time, over which inflation could erode the utility of a given level of suspension in a manner that would inhibit the purpose of such a level of suspension, i.e. to induce compliance. We therefore find the adoption of such an adjustment reasonable in principle.

[959] United States' comments on Canada's response to Arbitrator question No. 292, para. 30.
[960] United States' comments on Canada's response to Arbitrator question No. 292, para. 30. The United States further considers that if, in deciding which inflationary index to use, the Arbitrator were to consider the range of products against which Canada might retaliate, this would exceed the Arbitrator's mandate (United States' response to Arbitrator question No. 292, para. 35).
[961] Canada's response to Arbitrator question No. 179, para. 169.
[962] Canada's response to Arbitrator question No. 179, para. 169.
[963] Canada's response to Arbitrator question No. 179, para. 170.
[964] Canada's response to Arbitrator question No. 179, paras. 169-170.
[965] United States' response to Arbitrator question No. 180.
[966] United States' response to Arbitrator question No. 180, para. 114.
[967] See Canada's response to Arbitrator question No. 179, fn 141 to para. 170, asserting that: "BLS uses a unique categorization of goods and services that does not match any other standard coding structure, such as NAICS or the U.N. Standard International Trade Classification. Canada is unaware of a correspondence that would permit matching to HS categories."

9.10. We further note Canada's position that the core purpose of the price-level adjustment is to adjust the level of NI calculated under the model. The United States has less explicitly taken this position, instead more generally relying on a characterization of the adjustment as fulfilling the purpose of preserving the effectiveness of a level of suspension, but at the same time has not taken issue with Canada's explanation on this front. We consider that Canada's explanation that the purpose of the price-level adjustment is to adjust the level of NI calculated under the selected economic model is reasonable under the specific circumstances of this proceeding. We take special note that the United States has not contested Canada's position on this score. Furthermore, the United States' agreement that PPIs specific to the relevant product be used in this context appears to further suggest to us that an adjustment to the level of NI – which is calculated based on the values of imports of the relevant product – underlies the United States' position to some degree. We recognize, of course, that the proposed price-level adjustment is not a re-application of the economic model described in this Decision. However, we note that the selected model is meant to be applied only when triggering events occur, which may be rare, whereas the suspension of concessions that flow from such a triggering event will remain in place for an unknown length of time. Thus, adjusting a previously calculated level of NI to account for changes in at least one relevant market indicator, i.e. price levels of the relevant product, appears to us a rudimentary, albeit reasonable, exercise to adjust the level of NI. Such a strategy also appears generally consistent with the spirit of using of a prospective model.

9.11. We further note the parties' agreement that the index used in the price-level adjustment should be US PPIs that are specific to the product subject to the relevant CVD order. Having accepted the notion that the purpose of the price-level adjustment may, under the circumstances of this proceeding, be conceived of as an adjustment to the level of NI, we further agree with the parties' joint proposal that US PPIs are reasonably specific to the product subject to the relevant CVD order. This is so because this is the same product for which values of imports were used to determine the initial level of NI. We note that both parties suggested the United States BLS as data source for US PPIs. The Arbitrator sees no reason to question reliability of such PPIs released by the BLS. Moreover, the Arbitrator recognizes as an advantage of industry-level PPIs that these data are organized in NAICS codes and are, therefore, readily available for matching with HTS codes.

9.12. We underline at this point that our acceptance of the parties' proposed price-level adjustment, its purpose and the appropriate price-level index, should not be taken as a statement that such adjustments must be rigidly conceived or technically executed in the manner presented by the parties. Indeed, in our view, whether to adopt such an adjustment, the purpose of the adjustment, and the technical execution of the adjustment, must all be evaluated in light of the specific circumstances of the relevant proceeding.[968] We thus recall that in this proceeding, in particular, the parties generally agree on the adoption of, purpose of, and price index to be used in the proposed adjustment.

9.2 Measurement of change in the price level

9.13. This section addresses how the change in the PPIs should be measured. This includes both the calculation method as well as the period of time over which Canada shall take data for the relevant PPI. Canada suggests an adjustment every twelve months. Thereby, a twelve-month simple average of the seasonally unadjusted PPI should be calculated to derive a rate of inflation. Canada explains that if PPI data are unavailable for calculating the rate of inflation for ongoing periods, then "percent inflation adjustment would be based on the most recently available 12-month simple average of seasonally-unadjusted PPI index level relative to the previous 12-month period".[969]

9.14. The United States claims that the inflation adjustment should be based on annual data because the level of NI is also calculated on an annual basis. According to the United States, this

[968] We note that other arbitrators have accepted or declined to adopt similar such adjustments in manners specific to the circumstances of their proceedings. See Decisions by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, sections 3.5.2 and 4.6.2; *US – Large Civil Aircraft (2nd complaint) (Article 22.6 – US)*, section 6.5.1; and *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, sections 6.4.5.2 and 6.4.5.3.

[969] Canada's response to Arbitrator question No. 237, para. 213.

adjustment should be "based on the year-on-year change in the index from December to December".[970]

9.15. Canada responds that Canada "does not agree that a comparison of changes in the producer price index from one December monthly value to the next December monthly value is the best approach".[971] Canada does not further substantiate this claim.

9.16. The Arbitrator notes that Canada proposes to take an average inflation rate (which is the *change* in the PPI) based on monthly data, whereas the United States calculates annual inflation based on the annual change of the PPI from December to the next December. In this respect, the United States' approach appears simpler, as only two data points instead of 24 (each month in a two-year period) need to be sourced. Further, we discern no reason to believe that this approach would be statistically less reliable. Therefore, the Arbitrator concludes that the price changes should be calculated based on twelve-month year-on-year (i.e. December-to-December) changes of the respective PPI.

9.3 Data availability

9.17. Having decided that Canada shall take PPI data on a December-to-December annual basis, we note that the Arbitrator further raised the following two related issues with the parties: (a) that there may be a delay between the completion of a previous calendar month (e.g. December) and the release of PPI data pertaining to that month; and (b) even when data for such a month are released, they may be subject to statistical revision for some time.

9.18. According to Canada, relying on the most recently available PPI data at the time Canada performs the relevant price-level adjustment is reasonable despite the fact that this data might be subject to statistical revisions. Thereby, Canada argues that "Canada's ability to suspend concessions in a timely manner should not be unduly hindered by minor variations in the calculated NI that may result from potential revisions to the most current PPI values available for use at the time of application".[972]

9.19. The United States concurs that the most recently available PPI data appears reasonable to use in this context. The United States also provides an example showing how a price-level adjustment to the initial level of suspension would be calculated for each year. In the example provided by the United States, Canada calculates NI in year 1, and applies to this level of NI, at the end of year 2, an inflation rate computed as the percentage change in the PPI from December of year 1 to December of year 2.[973] The United States argues that statistical revisions will automatically be taken into account by comparing PPI index values relative to the base year, and applying the price-level adjustment each year "to the initial (i.e. year 1) level of suspension."[974]

9.20. The Arbitrator notes that both parties suggest using data for the price-level adjustment that might be subject to statistical revisions and that such statistical revisions do not cause a systematic bias in the determination of the adjusted level of NI. The Arbitrator further agrees with the United States that the United States' proposed method of calculating the change in price level based on December-to-December changes *relative to the base year* corrects for such revisions in the subsequent period. Hence, the Arbitrator concludes that the most recently available relevant PPI data at the time Canada performs the price-level adjustment should be used.

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[970] United States' response to Arbitrator question No. 237, para. 160.

[971] Canada's comments to United States' response to Arbitrator question No. 237, para. 109.

[972] Canada's response to Arbitrator question No. 293, para. 54.

[973] United States response to Arbitrator question No. 293, para. 37. In the United States' example, the PPI in December of year 1 is 100, and the PPI in December of year 2 is 103.5. Therefore, in year 2 NI is 103.5% of the initially-calculated NI.

[974] With the example in fn 973 to para. 9.19, above, given a PPI equal to 105.3 in December of year 3, the inflationary adjustment calculated by Canada at the end of year 3 uses the change in the price index between December of year 3 (105.3) and December of year 1 (100), and is applied to the level of NI calculated in year 1. That is, in year 3 NI is 5.3% of the initially-calculated NI. (United States' response to Arbitrator question No. 293, para. 37).

9.4 Technical implementation

9.21. With the issues in the three previous sections decided, we now turn to describe how Canada shall technically implement the price-level adjustment. Thus, the Arbitrator instructs Canada to implement the following procedure for a price-level adjustment of the level of NI. For the sake of clarity, this price-level adjustment shall be applied to any change in the relevant price level, whether it is inflationary (price-level increases) or deflationary (price level decreases).

9.22. Canada shall, first, access PPIs from the US BLS at the level of 6-digit NAICS codes.[975] Second, Canada shall match all the HTS 10-digit codes in the CVD order with the PPIs using an official correspondence table provided by the United States' Census Bureau.[976] In case a CVD order refers to only one 6-digit NAICS code, the price-level adjustment shall be based on that respective price-level change. In case only a subset of HTS 10-digit codes can be matched to 6-digit NAICS codes, the price-level adjustment shall be based on the PPI price-level change(s) corresponding to those NAICS code(s) that can be matched. In case the HTS 10-digit codes can be matched to two or more 6-digit NAICS codes, the price-level adjustment shall be based on a weighted average of PPIs corresponding to those NAICS codes, using, as weights, HTS 10-digit US imports from Canada sourced from USA Trade Online or, if these data are unavailable, from USITC DataWeb for the reference year, according to the following formula:

$$PPI = \sum_j PPI_j \frac{M_j}{\sum_j M_j},$$

where *PPI* is the CVD order-specific PPI, PPI_j is the NAICS 6-digit industry-specific PPI, and M_j are US imports from Canada belonging to industry j.

9.23. In case no HTS 10-digit code can be matched to a 6-digit NAICS codes or if the respective 6-digit PPIs are unavailable, Canada shall apply the same procedure as described in the paragraph immediately above using 3-digit NAICS codes. In case no HTS 10-digit code can be matched to a 3-digit NAICS code or if the respective 3-digit PPIs are unavailable, Canada shall use the PPI for the whole US economy.

9.24. Third, Canada shall use the PPIs calculated as in the two steps above to adjust the level of NI for price-level changes. The Arbitrator notes that Canada calculates a level of NI in year t (regardless of the month in year t in which suspension begins), while the reference period could be $t-1$ (i.e. the calendar year immediately preceding the year in which the level of NI is initially calculated) or a year prior to that ($t-2$, $t-3$,…).[977] In our view, price-level changes that occurred between the reference period and the year immediately before Canada's calculation of the level of NI – if the two years are not the same – should be taken into account in the initial calculation of the level of NI. To this end, Canada shall first apply the price-level adjustment to the calculated level of NI, denoted NI_t, determining the initial price-level adjusted NI, denoted $\widetilde{NI}_t$, as follows:

$$\widetilde{NI}_t = NI_t \times \left(\frac{PPI_{t-1}^{DEC}}{PPI_{RP}^{DEC}}\right),$$

and then, provided that the measure is still in place so that Canada is still entitled to suspend concessions, in each year $t+1, t+2, \ldots$, Canada shall use the following price-level adjustment to $\widetilde{NI}_t$:

$$NI_{t+j} = \widetilde{NI}_t \times \left(\frac{PPI_{t+j-1}^{DEC}}{PPI_{t-1}^{DEC}}\right), j = 1, \ldots, T.$$

9.25. The Arbitrator notes, first, that no adjustment to the initial determination of the level of NI will be necessary if the reference period is year $t-1$. In this case, in fact, the first equation in the paragraph immediately above implies that $\widetilde{NI}_t = NI_t$. Second, the Arbitrator notes that the formula

[975] An online data selection tool for industry-specific PPIs is currently available at: https://data.bls.gov/PDQWeb/pc.

[976] Correspondence tables can currently be accessed via: https://www.census.gov/foreign-trade/reference/codes/concordance/index.html.

[977] See para. 6.123, above (recognizing an outdated reference period as a possibility).

in the second equation in the paragraph immediately above, by calculating the change in price level based on December-to-December changes relative to base year ($t-1$), corrects for any revisions in PPIs (see paragraph 9.20). This formula is the same as the formula proposed by the United States.

9.26. To provide an example, t, the year in which Canada calculates NI_t (in any month), is 2025 in this example. Canada applies the Arbitrator's selected methodology and calculates NI_{2025}. If the reference period is not 2024, but a year preceding 2024, Canada will first calculate $\widetilde{NI}_{2025}$ using the first formula in paragraph 9.24: $\widetilde{NI}_{2025} = NI_{2025} \times \left(\frac{PPI_{2024}^{DEC}}{PPI_{RP}^{DEC}}\right)$. In 2026, when PPI_{2025}^{DEC} becomes available, provided that the measure is still in place, Canada applies the second formula in paragraph 9.24 and calculates $NI_{2026} = \widetilde{NI}_{2025} \times \left(\frac{PPI_{2025}^{DEC}}{PPI_{2024}^{DEC}}\right)$. Similarly, in 2027, provided that the measure is still in place, Canada calculates $NI_{2027} = \widetilde{NI}_{2025} \times \left(\frac{PPI_{2026}^{DEC}}{PPI_{2024}^{DEC}}\right)$, and so on in each successive year in which the measure is still in place.

10 NOTIFICATIONS TO THE DSB

10.1. The United States suggests that Canada "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".[978] Canada does not object to the kind of notification proposed by the United States. Canada underlines, however, that no legal obligation exists for such a notification, and that such notifications would be undertaken in a purely voluntary fashion and only for reasons of transparency. Regarding the language that the Arbitrator could include in its Decision, Canada proposes for the Arbitrator to suggest that Canada, "as of the starting point of suspension of concessions, 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".[979]

10.2. The Arbitrator considers that the United States' and Canada's proposal on this score appears reasonable and desirable, in particular because the described DSB notifications would promote transparency as to the calculated levels of suspension. We therefore suggest that, if Canada suspends concessions or other obligations, Canada notify the DSB of the level(s) of suspension that Canada calculates in a given calendar year in the first quarter of the following calendar year.[980]

11 CONCLUSION

11.1. This arbitration entailed special challenges mainly arising from the nature of the OFA-AFA Measure, which can apply in a wide variety of circumstances, coupled with Canada's request for a prospective model with which to determine levels of NI and equivalent levels of suspension. The Arbitrator expended significant efforts during the course of this proceeding ensuring that the chosen prospective model can reasonably function in a variety of future circumstances and against the background of the United States' retrospective duty assessment system which adds certain administrative complexities in this context. The selected model and methods for implementing that model were thus fashioned often as a result of a balancing of considerations, including selecting a methodology that will result in a reasoned estimate of a level of NI while not placing unreasonable burdens on Canada. That model and accompanying guidance on implementing it, described in detail in this Decision, is summarized below.

11.2. Following a triggering event (section 6.2.1), Canada is entitled to determine a level of NI and suspend concessions accordingly. This determination is based on the four-variety Armington model described in section 7.3, with instructions on data inputs and implementation of section 8. The selected model is able to quantify the trade decline Canada experiences due to the application of the OFA-AFA Measure in a CVD proceeding, taking into account that unaffected Canadian exporters may partially offset trade losses experienced by affected Canadian exporters. The value of this trade decline, which constitutes the level of NI, is derived from a comparative static exercise that compares trade levels occurring under factual, WTO-inconsistent CVD rates, with trade levels occurring under

[978] United States' response to Arbitrator question No. 35, para. 115. The United States notes that a similar procedure was suggested by the *US – Washing Machines (Article 22.6 – US)* arbitrator.

[979] Canada's response to Arbitrator question No. 126, paras. 62-63.

[980] We note that the *US – Washing Machines (Article 22.6 – US)* arbitrator included suggestions for such notifications with respect to its decisions regarding both LRWs and non-LRWs (*US – Washing Machines (Article 22.6 – US)*, paras. 5.1 and 5.3).

counterfactual, WTO-consistent CVD rates. Data inputs are generally taken from a reference period (section 6.4) that is, as a general principle, not distorted by the application of the OFA-AFA Measure. The Arbitrator provides a computer code to solve the Armington model in its non-linear form (Annex C-1 of the Addendum to this Decision, WT/DS505/ARB/Add.1), a solution method which minimizes potential approximation errors that would result from analytical, log-linearized solutions.

11.3. Canada shall collect all data inputs needed to calculate a level of NI and insert them in the "Parameter Input" sheet of the excel spreadsheet Annex C-2 of the Addendum to this Decision, WT/DS505/ARB/Add.1, provided by the Arbitrator. The data inputs, in the order in which they appear in the excel spreadsheet, are: (1) the import supply elasticity; (2) the domestic supply elasticity; (3) the elasticity of demand; (4) the Armington substitution elasticity; (5) the US domestic market share; (6) the value of affected Canadian imports; (7) the value of unaffected Canadian imports; (8) the value of RoW imports; (9) the reference period CVD rate associated with affected Canadian imports; (10) the reference period CVD rate associated with unaffected Canadian imports; (11) the factual, WTO-inconsistent CVD rate associated with affected Canadian imports; (12) the factual CVD rate associated with unaffected Canadian imports; and (13) the counterfactual, WTO-consistent CVD rate associated with affected Canadian imports.

11.4. Supply elasticities are fixed (section 8.1.6). CVD order-specific price elasticity of demand and Armington substitution elasticity will be calculated in a manner described in sections 8.1.5 and 8.1.4, respectively. Section 8.1.1 instructs Canada how to calculate the market shares of US domestic shipments, values of imports from Canada affected by the OFA-AFA Measure, values of imports from Canada unaffected by the OFA-AFA Measure, and values of imports from the rest of the world. In that section, in particular, significant efforts have been made to enable Canada to calculate these inputs under a variety of future circumstances. Section 8.1.2 includes the instructions regarding how to assign the relevant duty rates to both affected and unaffected Canadian imports.

11.5. Finally, using all relevant data inputs, the level of NI is determined by executing the computer code (Annex C-1), which automatically solves the model in two steps (section 8.2). Canada may suspend concessions for the duration specified in section 6.2.2 and perform price-level adjustments, if necessary, as described in section 9.

11.6. Canada may therefore request authorization from the DSB to suspend concessions or other obligations in the goods sector at a level not to exceed an annual amount to be determined by applying the methodology described in this Decision and as summarized above in this section.

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