

UNITED STATES – AUTOMOTIVE RULES OF ORIGIN

(USA-MEX-CDA-2022-31-01)

**INITIAL WRITTEN SUBMISSION
OF THE UNITED STATES OF AMERICA**

PUBLIC VERSION

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TABLE OF ABBREVIATIONS

| Abbreviation | Definition |
|---------------------|--|
| Agreement or USMCA | <i>United States-Mexico-Canada Agreement</i> |
| ASP | Alternative Staging Program |
| Party | USMCA Party |
| ROO | Rules of Origin |
| RVC | Regional Value Content |
| VNC | Value of Non-originating Components |
| VNM | Value of Non-originating Materials |
| WTO | World Trade Organization |

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TABLE OF EXHIBITS

| Exhibit No. | Description |
|-------------|---|
| USA-1 | Trilateral Statement on the Conclusion of NAFTA Round One, August 16, 2017 |
| USA-2 | Estimated Impacts of Complainants’ Interpretation |
| USA-3 | Office of the United States Trade Representative, Executive Office of the President, Summary of Objectives for the NAFTA Renegotiation, November 17, 2017 |
| USA-4 | Office of the United States Trade Representative, Executive Office of the President, Summary of Objectives for the NAFTA Renegotiation, July 17, 2017 |
| USA-5 | O. Dörr and K. Schmalenbach, Vienna Convention on the Law of Treaties: A Commentary 2nd edn. (Springer, 2018) |
| USA-6 | June 11-12, 2020 email exchange between Canada and the United States, June 11 and June 12, 2020 |
| USA-7 | July 8, 2020 email correspondence between Kia and U.S. officials, July 8, 2020 (Confidential) |
| USA-8 | July 22, 2020 email correspondence between the Parties, July 22, 2020 |
| USA-9 | U.S. Trade Officials Sought Consulting Work on Rules They Wrote, Bloomberg News, June 14, 2020 |
| USA-10 | Inside U.S. Trade, Lighthizer ‘troubled’ by two USTR officials’ solicitation of consulting work on USMCA auto rules, dated June 17, 2020 |
| USA-11 | August 18, 2020 email correspondence between Mexican and USTR Officials, August 18, 2020 |
| USA-12 | September 2, 2020 email correspondence between Canadian and USTR officials, September 2, 2020 |
| USA-13 | September 9, 2020 email correspondence between Canadian and USTR officials, September 9, 2020 |
| USA-14 | Alternative Staging Plan Approval Letters from USTR to Automotive Producers, December 28, 2020 (Confidential) |
| USA-15 | Mexico’s ASR Approval Letter to [REDACTED], December 31, 2020 (Confidential) |
| USA-16 | Canada’s ASR Approval Letter to [REDACTED], January 12, 2021 (Confidential) |
| USA-17 | Articles on the Law of Treaties with commentaries (1966) (“ILC Commentaries”) |
| USA-18 | Sinclair, Sir Ian, The Vienna Convention on the Law of Treaties, 2nd edition. Manchester: Manchester University Press, 1984 |
| USA-19 | Auto producer chart of core parts methodology calculation |
| USA-20 | Foreign auto producer calculation (Confidential) |

| Exhibit No. | Description |
|-------------|--|
| USA-21 | O. Dörr and K. Schmalenbach, <i>Vienna Convention on the Law of Treaties: A Commentary</i> 2nd edn. (Springer, 2018) |

I. Introduction

1. The *United States-Mexico-Canada Agreement* (USMCA or Agreement) was negotiated and agreed in the context of heightened skepticism in the United States and elsewhere that certain trade agreements have succeeded in delivering their promised benefits. The North American Free Trade Agreement (NAFTA), the predecessor agreement to the USMCA, was frequently cited as contributing to a decline in manufacturing jobs in the United States.
2. The treatment of auto parts and automobiles under NAFTA was of particular concern. Over time, NAFTA's outdated rules of origin had allowed autos and auto parts with large amounts of non-North American content to receive preferential tariff treatment into the North American market – undermining the very benefits to U.S. and North American manufacturing the agreement was intended to create.
3. Therefore, on August 16, 2017, the United States, Canada and Mexico launched the renegotiation and modernization of NAFTA.¹ A key outcome of these negotiations was an overhaul of the rules governing rules of origin for autos and auto parts to incentivize investment and job creation in North America and rebuild support for trade between the parties.
4. First, the USMCA increased the overall regional value content (“RVC”) requirement for autos and auto parts. Under the NAFTA, the minimum North American content required for vehicles to enjoy preferential treatment was 62.5 percent. The USMCA raised the minimum North American content required for vehicles to enjoy preferential treatment from 62.5 percent to 75 percent for cars and light trucks, and to 70 percent for heavy trucks.
5. Second, the USMCA eliminated a NAFTA “deeming” rule whereby any auto part that was not specifically identified on a list created at the time the NAFTA was negotiated – in the early 1990s – was “deemed” to be originating in North America, regardless of where it was actually produced.² Under NAFTA, this rule had rendered the autos rules of origin increasingly obsolete as technological advances meant that newer, more valuable content from all over the world was automatically granted the preferential treatment originally intended to support Canadian, Mexican, and U.S. manufacturers and workers.³
6. Finally, in addition to the overall vehicle RVC, the USMCA added three additional content requirements for vehicles. The *first* of these requires that 70 percent of the steel and aluminum used by auto manufacturers in their North American production must be sourced in North America. The *second* requires that auto manufacturers must also satisfy a labor value content requirement (LVC), which requires that the LVC of a passenger vehicle must be 40 percent, including at least 25 percentage points of high-wage material and manufacturing expenditures, no more than 10 percentage points of technology expenditures, and no more than 5

¹ Trilateral Statement on the Conclusion of NAFTA Round One, August 16, 2017, Exhibit USA-1.

² North American Free Trade Agreement, Article 401, available at: <http://www.sice.oas.org/trade/nafta/naftatce.asp>.

³ See USTR, Estimated Impact of the United States-Mexico-Canada Agreement (USMCA) on the U.S. Automotive Sector, April 18, 2019, p. 3 (Exhibit MEX-9).

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percentage points of high-wage assembly expenditures. In part, producers meet this requirement by showing that the production wage rate is at least \$16/hour as a percentage of the net cost of the vehicle or the total vehicle plant assembly Annual Purchase Value.

7. The *third* additional content requirement – under Article 3(7) of the Autos Appendix – is at the heart of this dispute. This requirement establishes that certain “core parts” of the vehicle must themselves be originating by satisfying the separate regional value content thresholds set out for those parts (the “core parts origination requirement”).⁴ The seven defined core parts – the engine, transmission, body and chassis, axle, suspension system, steering system and where applicable, the advanced battery – represent some of the most valuable parts of a vehicle, constituting as much as [[REDACTED]] percent of the total value depending on the model.⁵

8. This new origination requirement means that, whereas other parts of a vehicle may be non-originating but still be present in an otherwise originating vehicle, the core parts of the vehicle must contain sufficient amounts of regional value content to satisfy an origination threshold (for each part separately, or taken together as a single part). If these core parts of a vehicle are not themselves originating, the vehicle cannot receive preferential access to the USMCA market.

9. In this dispute, Canada and Mexico challenge the U.S. interpretation of the USMCA automotive rules of origin, specifically with respect to the relationship between the core parts origination requirement and the calculation of the overall regional value content for vehicles. As the United States will explain in this submission, by the ordinary meaning of its terms in the context of Chapter 4 and the Autos Appendix, the core parts origination requirement is a separate requirement for a vehicle to receive preferential USMCA treatment. As such, this requirement applies independently of the overall vehicle RVC calculation and cannot be used in conjunction with the “roll-up” provision set out in Article 4.5.4 of the Agreement.

10. A close examination of the relevant provisions reveals three key aspects of the text and structure of the Agreement that confirm the U.S. interpretation.

11. **The bifurcated structure of Article 3 of the Autos Appendix** – the first six paragraphs expressly cross-reference and link to the standard RVC calculation, while the final three paragraphs, containing the core parts origination requirement, set out an independent calculation.

12. **The express limitation in the final paragraph of Article 3(9) of the Autos Appendix** – this provision specifies that core parts identified in Table A.2 that satisfy the relevant thresholds

⁴ Pursuant to Article 3(7) of the Autos Appendix to Annex 4-B, a core part “is originating only if it satisfies the regional value content requirement in paragraph 2, except for an advanced battery.” That is, the RVC for core parts must meet the staged thresholds in Article 3(2) of the Appendix. However, Articles 3(8)-(9) provide additional flexibilities for the calculation of RVC for “super core” parts.

⁵ United States Autos Rules of Origin Proposal to Canada and Mexico, NAFTA 2.0 Rules of Origin Autos and Autos Parts, March 13, 2018 (Exhibit MEX-25) (Confidential).

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using the 3(9) calculation satisfy the core parts origination requirement *in Article 3(7)*, but does not refer to other provisions or the RVC calculation.

13. **The existence of two separate, but co-extensive tables – Tables A.1 and A.2** – each is associated in the text with separate requirements and separate calculation methodologies, confirming the negotiators’ development of two separate requirements.

14. Under the generally applicable “roll-up” provision in Article 4.5.4 of the USMCA, 100% of the value of a part that is used in a final product is treated as originating, for purposes of calculating the RVC of the final product, if the part crosses a threshold of North American content. The provisions in Articles 3(7)-3(9) setting out core parts origination requirement do not cross-reference or amend this “roll-up” calculation. That calculations under the core parts origination requirement do not apply and are not relevant to the “roll-up” provision is also consistent with the object and purpose of the Agreement. This is important, because the core parts origination requirement provisions contain significant calculation flexibilities not permitted in the overall vehicle RVC calculations. If those flexibilities were “rolled-up” into the overall RVC calculation, they would significantly reduce – rather than enhance – the actual regional value content of the vehicle. This would turn what was clearly intended to be an additional, heightened content requirement into an effective loop hole.

15. And the facts bear this out: Estimates calculated by the U.S. International Trade Commission based on producer and trade data show a range of North American content *loss* between eight percent to *thirty-three percent* when applying Complainants’ interpretation.⁶ One vehicle manufacturer estimated that, on average, the core parts original requirement flexibilities would *reduce* the North American content by about *ten percent*⁷; another vehicle manufacturer reported an increase of [[REDACTED]] in its standard RVC when calculated according to complainants’ interpretation.⁸ Given current values of Mexican and Canadian imports to the United States, which exceeded \$70 billion USD in 2021, an interpretation allowing for a reduction in required North American value of even ten percent would amount to a loss of more than \$7 billion USD in North American manufacturing. These outcomes undermine the USMCA and cannot have been intended by the negotiators.

16. In fact, under Complainants’ interpretation, the negotiators would have better achieved their goal of increasing the RVC of vehicles had they *not* included the core parts origination requirement at all. This absurd result is contrary not only to the text and structure of Chapter 4 and the Autos Appendix. It is also contrary to the parties’ goals of attracting new investment, creating good, well-paying manufacturing jobs, and ensuring, to the extent possible, that only the

⁶ See Estimated Impacts of Complainants’ Interpretation, Exhibit USA-2.

⁷ See Auto producer chart of core parts methodology calculation, Exhibit USA-19, which indicates an artificial increase in regional content of 3% when “Accounting for VNM of key parts only” and another 7% relying on a “Roll-up of qualifying core parts”.

⁸ Foreign auto producer calculations, Exhibit USA-20 (Confidential).

Parties of the USMCA benefit from the duty-free treatment provided by the Agreement for meeting these new rules of origin.

17. For these and the additional reasons explained at length in this initial submission, Complainants have failed to demonstrate that the United States’ interpretation of the USMCA automotive rules of origin is inconsistent with the terms of the USMCA, and their claims must be rejected.

18. The United States has structured this submission as follows.

19. First, **Section II** presents factual background information relevant to this dispute, and in particular details the communications between the parties regarding the interpretation at issue in this dispute.

20. **Section III** next sets forth the legal argument of the United States, and explains how the text and structure of Article 4 of the USMCA and Article 3 of the Autos Appendix confirms that the core parts origination requirement set out in Articles 3(7)-(9) of the Appendix permits regional value calculations separate and independent from the calculations required for purposes of the standard vehicle RVC.

21. **Section IV** then addresses the Complainants’ arguments under Article 32 of the Vienna Convention on the Law of Treaties, and demonstrates why most of the communications submitted by Complainants do not constitute “supplementary means of interpretation” that may be relied on by the Panel. We also show how the negotiation history of the USMCA fails to support Complainants’ position, and in fact supports the U.S. interpretation of the relevant provisions.

22. Next, **Section V** addresses Complainants’ consequential claims under Article 4.2 of the Agreement, Article 4.11 of the Agreement, Article 8 of the Autos Appendix, and Article 5.16.6 of the Agreement, and explains why these claims should be rejected for the same reasons Complainants’ principal interpretive claim fails.

23. Finally, **Section VI** addresses Complainants’ claims the U.S. interpretation has nullified or impaired benefits that Canada or Mexico could have reasonably expected to accrue to it. Simply put, Canada and Mexico could have had no reasonable expectation that the United States would impose measures *inconsistent* with the USMCA. Therefore, they have not demonstrated that the measures imposed by the United States nullify or impair benefits that Canada and Mexico could reasonably have expected to accrue to it, and Complainants cannot make out a claim under Article 31.2(c) of the USMCA.

II. Factual Background

24. On May 18, 2017, the Trump administration notified the United States' Congress of the intent to renegotiate the North American Free Trade Agreement (NAFTA).⁹ On July 17, 2017, the United States released the Renegotiating Objectives of the United States.¹⁰ And on November 17, 2017, the United States released the Revised Renegotiating Objectives of the United States.¹¹ The United States' position was that NAFTA had not been a good deal for many American workers and businesses. The general U.S. objectives sought to update NAFTA's "provisions to the best 21st century standards and rebalance the benefits of the deal so that each country succeeds. U.S. proposals reflecting these objectives are supported by a diverse group of American interests" in order to "obtain more open, equitable, secure, and reciprocal market access".¹² On automotive rules of origin, the United States sought to increase the North American value content of vehicles, increase the North American steel and aluminum content of vehicles, increase the labor value content in vehicles and vehicle parts produced in North America, and accordingly, to incentivize investment, production and employment in the U.S. automotive sector.¹³

25. Following seven rounds of negotiations, USMCA negotiations concluded on September 30, 2018¹⁴, and the Agreement was signed one month later, on November 30, 2018. On July 1, 2020, the USMCA entered into force. Thereafter, the U.S., Canadian and Mexican governments worked with interested autos companies to develop and get approval for their ASPs. Under paragraph 8 of the Autos Appendix, Alternative Staging Plans (ASPs) are permitted to allow producers certain flexibilities during the phase-in of the autos ROOs requirements of the USMCA. For example, until July 1, 2025, exporters may apply for certain passenger vehicles to be originating if the regional value content for such vehicles is not lower than 62.5 percent under the net cost method.¹⁵ This effectively permits exporters to avoid the implementation of the 75 percent regional value content requirement for 5 years after entry into force of the USMCA.

⁹ Office of the United States Trade Representative, Executive Office of the President, Summary of Objectives for the NAFTA Renegotiation, November 17, p. 2 ("United States Revised Renegotiation Objectives") (Exhibit USA-3). On November 17, 2017, USTR submitted the Revised Renegotiation Objectives to Congress, which reflect "updates to the original objectives". See United States Revised Renegotiation Objectives, p. 2.

¹⁰ Office of the United States Trade Representative, Executive Office of the President, Summary of Objectives for the NAFTA Renegotiation, July 17 ("United States Renegotiating Objectives") (Exhibit USA-4).

¹¹ United States Revised Renegotiation Objectives (Exhibit USA-3).

¹² United States Revised Renegotiation Objectives (Exhibit USA-3).

¹³ USTR, Estimated Impact of the United States-Mexico-Canada Agreement (USMCA) on the U.S. Automotive Sector, April 18, 2019, pp. 1-2 (Exhibit MEX-9).

¹⁴ Joint Statement from United States Trade Representative Robert Lighthizer and Canadian Foreign Affairs Minister Chrystia Freeland, September 30, 2018, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/september/joint-statement-united-states>, (Exhibit USA-5).

¹⁵ Autos Appendix, Article 8(2)(a).

26. Just before entry into force, on June 11, 2020, Canadian officials reached out to certain U.S. officials, regarding the core parts origination requirement, and the alternative calculation methodologies prescribed under Article 3(8) and 3(9) of the Autos Appendix.¹⁶ Despite the importance of these issues, Canada did not reach out at the Ministerial, Vice-Ministerial, or Chief Negotiator level, all of whom were in frequent contact. In this staff-level exchange, Canadian officials “wanted to confirm that [they had] the same understanding of how the flexibilities provided for core parts can be used.”¹⁷ The Canadian officials outlined their understanding about the core parts calculations, but mentioned nothing about using the results of those calculations for purposes of calculating the vehicle’s RVC.¹⁸ The U.S. officials responded with their understanding, stating “our understanding is...”, and noting where it differed from the Canadian understanding. On June 12, 2020, Canadian officials responded, indicating that they would like to discuss the U.S. official’s response “early next week”. This discussion did not occur, however, due to the abrupt resignation of the U.S. officials involved in that email exchange, as explained further below.

27. As early as July 8, 2020, U.S. Customs and Border Protection (CBP), the agency responsible for administering the autos rules of origin provisions, began responding to questions from auto producers regarding implementation. In these communications, CBP communicated the U.S. interpretation that producers must undertake two separate calculations – one to meet the core parts origination requirement, and one to meet the vehicle RVC requirement – and that the core parts origination requirement calculations cannot be rolled-up under Article 4.5.4.¹⁹

28. On July 22, 2020, the Parties held a trilateral call during which the United States presented its interpretation of the core parts provision. In addition to USTR officials, this call included officials from CBP. In that call, and in a follow-up email to that call on the same day, a USTR official explained the interpretation that would be applied by CBP: “[o]ur position is that the special flexibilities in calculating the VNM of core parts under paragraphs 8 and 9 of Article 3 of the Auto Appendix are limited to meeting the core parts origination requirement and cannot be used in calculating the vehicle’s overall regional value content.”²⁰

29. Therefore, two apparently contrary interpretations were provided by U.S. officials to the Parties within 27 days. The reason for this apparent contradiction is important.

30. The first interpretation was provided by a U.S. official, who, together with a second U.S. official had started a private consulting firm called Autovisory, through which they offered advice to “light vehicle producers, heavy truck producers, equipment producers, parts suppliers,

¹⁶ June 11-12, 2020 email correspondence between Canada and United States, June 11-12, 2020 (Exhibit USA-6).

¹⁷ June 11-12, 2020 email correspondence between Canada and United States, June 11-12, 2020 (Exhibit USA-6).

¹⁸ June 11-12, 2020 email correspondence between Canada and United States, June 11-12, 2020 (Exhibit USA-6).

¹⁹ July 8, 2020 email correspondence between Kia and U.S. officials, July 8, 2020 (Exhibit USA-7) (Confidential).

²⁰ July 22, 2020 email correspondence between the Parties, July 22, 2020 (Exhibit USA-8).

other manufacturers, and associated service providers ” on compliance with USMCA autos rules of origin, among other things.²¹ Therefore, at the very time the interpretation of the core parts provision was provided, these individuals were actively soliciting clients, including – apparently – among those companies with whom they had worked during and after the course of USMCA negotiations.²² In fact, the U.S. officials had recused themselves in March 2020 from matters involving autos rules of origin, and were no longer communicating with automotive companies in their capacity as USTR staff on autos-related matters.²³

31. It would appear from these facts, then, that Canada contacted individuals with whom it had previously worked on the negotiations of the autos ROOs, but whom Canada knew or should have known – and the auto companies surely would have known – were publicly offering expert advisory work to autos companies exporting to the United States. It is reasonable to consider that Canada could have believed that these U.S. officials might relay, in their present official capacity, an interpretation of use to their potential future clients.

32. If Canada did not then know of the new consulting firm, they surely did four days later when it was reported in the press on June 15, 2020,²⁴ or when, on June 17, 2020, then-U.S. Trade Representative Robert Lighthizer was questioned about it at a hearing of the Senate Finance Committee.²⁵

33. In response to the July 22 communication, Canada replied that “Canada’s approach to the new rules of origin for automotive goods has at all time’s [sic] been informed by our desire to minimize the compliance burden associated with these requirements” and that “once a good is originating it retains that status if subsequently used in the production of another good.”²⁶ The United States does not have a record of Mexico’s response.

34. On August 18, 2020, despite the direct communications from U.S. officials, Mexican officials sent an email to then-Deputy USTR C.J. Mahoney, noting that they had heard that USTR had been “informing certain companies on an *informal* basis that USMCA requires two

²¹ See Autovisory | Automotive Trade Advisors: Autos, Auto Parts, International, Trade, FTA, USMCA, Certification, Compliance, Rules of Origin (archive.org), available at: <https://web.archive.org/web/20200612140612/https://autovisory.com/>.

²² U.S. Trade Officials Sought Consulting Work on Rules They Wrote, Bloomberg News, June 14, 2020, Exhibit USA-9.

²³ Lighthizer ‘troubled’ by two USTR officials’ solicitation of consulting work on USMCA auto rules, Inside U.S. Trade, June 17, 2020, available at <https://insidetrade.com/trade/lighthizer-troubled-two-ustr-officials-solicitation-consulting-work-usmca-auto-rules>. Exhibit USA-10.

²⁴ U.S. Trade Officials Sought Consulting Work on Rules They Wrote, Bloomberg News, June 14, 2020, Exhibit USA-9.

²⁵ Lighthizer ‘troubled’ by two USTR officials’ solicitation of consulting work on USMCA auto rules, Inside U.S. Trade, June 17, 2020, available at <https://insidetrade.com/trade/lighthizer-troubled-two-ustr-officials-solicitation-consulting-work-usmca-auto-rules>. Exhibit USA-10.

²⁶ July 22, 2020 email correspondence between the Parties, July 22, 2020 (Exhibit USA-8).

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independent RVC calculations be conducted: (1) for vehicles and (2) for their “core parts”; and that the RVC calculation for “core parts” is not taken into account in the overall vehicle RVC.”²⁷ The email also noted that “the lack of transparency in the manner in which the communication of the U.S. interpretation has been handled raises independent concerns about U.S. compliance with Chapters 5 and 7 of the USMCA.” U.S. officials then held a call with Mexican Officials on August 18th, regarding the U.S. position.²⁸ On September 2, 2020, Canada forwarded the prior June 11, 2020, email from the ex-U.S. official, communicating the conflicting, and incorrect interpretation, to a USTR official. In this email, Canada noted that that during a call that would be happening that day, the Canadian official may quote the some of the email, and that the email had been shared with the Canadian official’s superiors.²⁹ On September 9, 2020, USTR reiterated the correct interpretation of the autos ROOs with Canadian officials, who responded that the explanation was “helpful”.³⁰

35. Thereafter, the U.S., Canadian, and Mexican governments worked with interested autos companies to develop and approve their ASPs. On December 28, 2020, USTR sent out ASP approval letters to auto manufacturers that had applied for ASPs. Consistent with the interpretation set out in July and September 2020 by U.S. officials, these approval letters conditioned approval on calculating the respective regional value content of vehicles consistent with the text of the USMCA, in that the calculation for a vehicle's RVC pursuant to 3(1) and the calculation for the core parts origination requirement in Article 3(7) of the Autos Appendix are calculated separately and independently of one another.³¹ Mexico issued its ASR letters on December 31, 2020, and [[REDACTED]].³²

36. Canada issued its ASR letters on January 12, 2021, noting that [REDACTED]

[REDACTED]

²⁷ August 18, 2020 email correspondence between Mexican and USTR Officials, August 18, 2020 (emphasis added) (Exhibit USA-11).

²⁸ August 18, 2020 email correspondence between Mexican and USTR Officials, August 18, 2020 (emphasis added) (Exhibit USA-11).

²⁹ September 2, 2020 email correspondence between Canadian and USTR officials, September 2, 2020 (Exhibit USA-12).

³⁰ September 9, 2020 email correspondence between Canadian and USTR officials, September 9, 2020 (Exhibit USA-13).

³¹ Alternative Staging Plan Approval Letters from USTR to Automotive Producers, December 28, 2020 (Exhibit USA-14) (Confidential).

³² See e.g., Mexico’s ASR Approval Letter to [[REDACTED]], December 31, 2020 (Exhibit USA-15) (Confidential).

[REDACTED]

III. The Text, Read in Context, and in Light of the Object and Purpose of the Agreement, Supports the Interpretation that the Overall RVC Calculation and the Core Parts Origination Requirement Require Two Separate Calculations

37. Complainants are challenging the interpretation of the United States set forth in the Alternative Staging Plans approval letters, sent to auto producers on December 28, 2020. Specifically, Complainants claim that this interpretation is inconsistent with Articles 4.2(b), 4.5.4, 4.11, and 5.16 of the USMCA, and Articles 3(7)-(9) and Article 8 of the Autos Appendix. These claims all fail because they stem from a flawed understanding that the special methodologies provided for purposes of the core parts origination requirement may also be applied for purposes of calculating the standard vehicle RVC. As we detail below, this fundamentally misunderstands these provisions of the USMCA and would dramatically undermine the North American content the renegotiated USMCA was intended to promote.

38. In order for a passenger vehicle to be considered originating and receive preferential treatment, among other things, Article 3 of the Autos Appendix sets forth two distinct requirements that a vehicle must meet: the overall vehicle RVC requirement³⁴ and the core parts origination requirement.³⁵ As the United States will explain in the sections below, by the ordinary meaning of its terms, in the context of Chapter 4 and the Autos Appendix, and in light of the object and purpose of the Agreement, the core parts origination requirement is a separate obligation that applies independently of the vehicle RVC requirement. Further, these two separate obligations require two separate calculations, and are subject to different calculation methodologies. As such, producers cannot apply the “roll-up” provision set out in Article 4.5.4 of the Agreement to core parts on the basis of the special calculation methodologies set out for purposes of the core parts origination requirement.

39. To elaborate these points, in this Section the United States first, in section A, will explain the overall vehicle RVC calculation under Article 4.5 of the Agreement. Second, in section B, we will explain the separate core parts origination requirement, which can be calculated by one of four special calculation methodologies in Articles 3(8) and 3(9) of the Autos Appendix. Third, we will explain how the text, in the context of Chapter 4, and in light of the object and purpose of the Agreement, supports the interpretation that these two requirements are separate, and require separate calculations.

³³ See e.g., Canada’s ASR Approval Letter to [REDACTED], January 12, 2021 (Exhibit USA-16) (Confidential).

³⁴ Autos Appendix, Article 3(2).

³⁵ Autos Appendix, Article 3(7).

40. As we detail in subsection C below, there are three aspects of the Agreement in particular that support the interpretation that these requirements are separate and require separate calculations:

(1) **The bifurcated structure of Article 3 of the Autos Appendix** – the first six paragraphs expressly link to and specify the calculation methodologies for the standard RVC calculation, while the final three paragraphs, containing the core parts origination requirement, set out a special, independent calculation;

(2) **The express limitation in the final paragraph of Article 3(9) of the Autos Appendix** – this provision specifies that core parts identified in Table A.2 that satisfy the relevant thresholds using the 3(9) calculation satisfy the core parts origination requirement in Article 3(7), but does not refer to other provisions or the RVC calculation; and

(3) **The existence of two separate, but co-extensive tables – Tables A.1 and A.2** – each is associated in the text with separate requirements and separate calculation methodologies, confirming the negotiators’ development of two separate requirements.

41. The U.S. interpretation is consistent with the object and purpose of the Agreement. This is important, because the core parts origination requirement provisions contain significant calculation flexibilities not permitted in the overall vehicle RVC calculations. If those flexibilities were “rolled-up” into the overall RVC calculation, they could significantly reduce – rather than enhance – the actual regional value content of the vehicle.

42. The data demonstrates that Complainants’ interpretation results in a significant decrease in the North American content required under the vehicle RVC calculation. Estimates calculated by the U.S. International Trade Commission based on producer and trade data show a range of North American content *loss* between eight percent to *thirty-three percent* when applying Complainants’ interpretation.³⁶ One vehicle manufacturer estimated that, on average, the core parts original requirement flexibilities would *reduce* the North American content by about *ten percent*³⁷; another vehicle manufacturer reported an increase of [[REDACTED]] in its standard RVC when calculated according to complainants’ interpretation.³⁸

43. These outcomes undermine the USMCA and cannot have been intended by the negotiators. Under Complainants’ interpretation, what looks like an additional, heightened requirement—the core parts origination obligation—actually acts as loophole *reducing* the required North American content. This absurd result is contrary not only to the text and structure

³⁶ See Estimated Impacts of Complainants’ Interpretation, Exhibit USA-2.

³⁷ See Auto producer chart of core parts methodology calculation, Exhibit USA-19, which indicates an artificial increase in regional content of 3% when “Accounting for VNM of key parts only” and another 7% relying on a “Roll-up of qualifying core parts”.

³⁸ Foreign auto producer calculations. Exhibit USA-20 (Confidential).

of Chapter 4 and the Autos Appendix, but to the goals of attracting new investment, creating good, well-paying manufacturing jobs, and ensuring, to the extent possible, that only the Parties of the USMCA benefit from the duty-free treatment provided by the Agreement for meeting these new rules of origin.

A. The Overall Vehicle RVC Calculation

44. Article 3(1) of the Autos Appendix sets forth one of the two product-specific regional value content requirements that an importer, exporter, or producer needs to show the vehicle satisfies, in order to qualify as originating under Article 4.2(b) of the Agreement.³⁹ Specifically, Article 3(1) of the Autos Appendix sets forth the regional value content requirement that passenger vehicles or light trucks must meet, which are phased in over three years after entry into force of the USMCA. Article 3(1) provides:

Notwithstanding Article 2 (Product-Specific Rules of Origin for Vehicles), each Party shall provide that the regional value content requirement for a passenger vehicle or a light truck is:

(a) 66 percent under the net cost method, beginning on January 1, 2020, or the date of entry into force of this Agreement, whichever is later;

(b) 69 percent under the net cost method, beginning on January 1, 2021, or one year after the date of entry into force of this Agreement, whichever is later;

(c) 72 percent under the net cost method, beginning on January 1, 2022, or two years after the date of entry into force of this Agreement, whichever is later; and

(d) 75 percent under the net cost method, beginning on January 1, 2023, or three years after the date of entry into force of this Agreement, whichever is later, and thereafter.

³⁹ Chapter 4 of the Agreement sets forth the rules in order for goods to enjoy preferential treatment under the USMCA. In order for a good to enjoy preferential treatment, it must be “originating” under Chapter 4 of the USMCA. Article 4.2 of the Agreement defines the rules for determining whether a good is originating. Depending on the factual circumstances of a good, for example, whether it contains non-originating materials, there are four different ways in which a good can be considered originating. However, in each instance, the material or good must be produced entirely in the territory of one or more of the Parties.

Because autos are goods that contain non-originating materials, the rule under Article 4.2(b) applies. Article 4.2(b) requires a Party to provide that a good that is made using non-originating materials is originating if the following conditions are met: (1) The good is produced entirely in the territory of one or more of the Parties; (2) the good satisfies all applicable product-specific requirements of Annex 4-B; and (3) the good satisfies all other requirements of Chapter 4 that apply to it. For autos, this would include those product-specific requirements for autos and autos parts set out in the Autos Appendix in Annex 4-B of Chapter 4 of the Agreement.

45. Following Article 3(1) are Articles 3(2) through 3(5). These Articles set forth the regional value content thresholds for core parts listed at Table A.1, principal parts listed in Table B, and complementary parts listed in Table C. These regional value content requirements are relevant for two distinct purposes: first, when these parts are imported or exported independently (not assembled in a vehicle) within the USMCA territories; second, when these parts are assembled into a vehicle, for determining whether these parts are originating and thus are subject to the roll-up rule when calculating the vehicle's overall RVC.

46. Article 3(6) of the Autos Appendix then lists the provisions applicable for calculating the regional value content for the goods listed in Articles 3(1)-3(5) of the Autos Appendix.⁴⁰ Article 3(6) provides:

For the purposes of calculating the regional value content under paragraphs 1 through 5, Article 4.5 (Regional Value Content), Article 4.6 (Value of Materials Used in Production), Article 4.7 (Further Adjustments to the Value of Materials), and Article 4.8 (Intermediate Materials) and Article 5 (Averaging) apply.

47. Accordingly, when calculating the RVC of the vehicle, the importer, exporter or producer would apply the rules and calculations provided for under those provisions listed in Article 3(6). This includes the rules and calculations for RVC contained in Article 4.5 of the Agreement. Notably, the provision does not reference the use of the special core parts calculation methodologies at Articles 3(8) and 3(9).

48. According to Article 3(6) of the Appendix, a producer would utilize Article 4.5 of the Agreement to calculate the vehicle's RVC. Article 4.5 of the Agreement sets forth the general rules and methodologies for calculating the regional value content of any good subject to a regional value content requirement. Paragraph 1 sets forth the rule that unless the product specific rules in Annex 4-B do not provide a rule based on the transaction value method⁴¹, that the producer must calculate the regional content value content of a good based on either the transaction value method, or net cost method.⁴² Article 4.5.2 sets forth the regional value content calculation based on the transaction value method, and Article 4.5.3 sets forth the regional value content calculation based on the net cost method. And, Article 4.5.4 of the

⁴⁰ That is, passenger vehicles and light trucks; core parts listed at Table A.1 for use in passenger vehicles and light trucks; principal parts listed in Table B; and complementary parts listed in Table C.

⁴¹ See USMCA, Article 4.5.6. Article 4.6 provides:

Each Party shall provide that an importer, exporter, or producer shall calculate the regional value content of a good solely on the basis of the net cost method set out in paragraph 3 if the rule under the Annex 4-B (Product-Specific Rules of Origin) does not provide a rule based on the transaction value method.

⁴² USMCA, Article 4.1. Paragraph 1 of Article 4.5 provides:

Except as provided in paragraph 6, each Party shall provide that the regional value content of a good shall be calculated, at the choice of the importer, exporter, or producer of the good, on the basis of either the transaction value method set out in paragraph 2 or the net cost method set out in paragraph 3.

establishes the “roll-up” rule, meaning that if a material (i.e. auto part) that is being used in the production of auto parts is considered originating, that for purposes of undertaking the regional value content calculations at paragraphs 2 or 3, any non-originating materials of that material (i.e., auto part) are disregarded (rolled-up) into the material (i.e., auto part). Accordingly, the vehicle producer can count the value of the part as 100 percent regional value content when calculating the RVC of the finished product (i.e., a passenger vehicle).

49. For a passenger vehicle, the regional value content must be calculated on the basis of the net cost method set out at paragraph 3. This is because the Autos Appendix (Product-Specific Rules of Origin for Autos under Annex 4-B) does not provide a rule based on the transaction value for calculating the regional value content of a passenger vehicle.⁴³ Accordingly, paragraph 6 of Article 4.5 of the Agreement applies, and the regional value content of a passenger vehicle can only be calculated on the basis of the net cost method set out in paragraph 3 of Article 4.5 of the Agreement.

50. Pursuant to the calculation methodology at Article 4.5.3 of the Agreement, in order to calculate the RVC of a passenger vehicle, an importer, exporter, or producer would need to calculate the net cost of the good, and the VNM of the good. When calculating the VNM of the good, the roll-up rule of Article 4.5.4 applies. Article 4.5.4 provides:

Each Party shall provide that the value of non-originating materials used by the producer in the production of a good shall not, for the purposes of calculating the regional value content of the good under paragraph 2 or 3, include the value of non-originating materials used to produce originating materials that are subsequently used in the production of the good.

51. The plain language of Article 4.5.4 requires the Parties to permit producers to disregard the VNM of a material that is used in a good that individually qualifies as originating, when calculating the regional value content of a good under either paragraphs 2 or 3 of Article 4.5.

52. In order to determine whether a material⁴⁴ used in the production of a good is considered originating, and so the VNM of that material could be disregarded when calculating the RVC of a good that the material is used in, the producer would again start with Article 4.2 of the Agreement. Since this dispute is about core parts, we will describe how a producer would determine whether the core part (material) used in the production of a passenger vehicle, qualifies as originating, and thus whether the VNM of that core part can be disregarded pursuant to the roll-up rule of Article 4.5.4, when calculating the regional value content of the vehicle.

⁴³ Autos Appendix, Article 3(1).

⁴⁴ Chapter 4 defines “material” as a “a good that is used in the production of another good, and includes a part or an ingredient.” See USMCA, Article 4.1. Accordingly, a core “part” such as an engine, would be considered a material that is used in the production of another good, i.e. a passenger vehicle.

53. The relevant requirements for core parts used in a passenger vehicle appear at Articles 3(2) and 3(3) of the Autos Appendix. As we described above, once fully implemented, the regional value content requirement for a core part (i.e., an engine), as listed under Table A.1 (except for an advanced battery) is 75 percent under the net cost method, or 85 percent under the transaction value method.⁴⁵ Article 3(3) sets forth the rule that a core part (i.e., an engine) listed in Table A.1 for use in a passenger vehicle or light truck, only qualifies as originating if it satisfies the regional value content requirement in paragraph 2.⁴⁶ Article 3(6) of the Appendix then provides that in order to determine whether a core part listed in Table A.1 meets the RVC threshold at Article 3(2), and thus can be considered originating consistent with Article 3(3), the producer applies “Article 4.5 (Regional Value Content), Article 4.6 (Value of Materials Used in Production), Article 4.7 (Further Adjustments to the Value of Materials), and Article 4.8 (Intermediate Materials) and Article 5 (Averaging).”

54. Accordingly, in order to determine whether a core part listed in Table A.1 (i.e., an engine) is originating, a producer would run through the calculation methodologies and rules prescribed under those provisions of the Agreement (as they would for the passenger vehicle, described above). If pursuant to these calculation methodologies a core part (i.e., an engine) had a regional value content of 75 percent under the net cost method, or 85 percent under the transaction value method, the part would qualify as originating consistent with Article 3(3) of the Autos Appendix, and assuming it met the other two requirements of Article 4.2(b) of the Agreement (produced entirely in the territory of one or more Parties and meets all other rules under Chapter 4), it would be considered to be originating for purposes of Chapter 4. Therefore, any non-originating materials used in the production of that core part could be disregarded when calculating the RVC of the vehicle for purposes of meeting the vehicle RVC the requirement at paragraph 3(1) of the Appendix.

B. The Core Parts Origination Requirement Calculation

55. Article 3(7) sets forth the second product-specific regional value content requirement for passenger vehicles that an importer, exporter, or producer must show the vehicle satisfies, in order to be considered to be originating for purposes of Article 4.2(b) of the Agreement. Properly interpreted, Articles 3(8)-(9) of the Autos Appendix only apply for purposes of meeting

⁴⁵ Autos Appendix, Article 3(2)(d). As noted in Article 3(2)(a)-(d), Full implementation will occur on July 1, 2023 (“three years after the date of entry into force of the Agreement”).

⁴⁶ Article 3(3) of the Autos Appendix provides:

Notwithstanding Article 2 (Product-Specific Rules of Origin for Vehicles) and the Product-Specific Rules of Origin in Annex 4-B, each Party shall provide that a part listed in Table A.1 of this Appendix that is for use in a passenger vehicle or light truck is originating only if it satisfies the regional value content requirement in paragraph 2, except for batteries of subheading 8507.60 that are used as the primary source of electrical power for the propulsion of an electric passenger vehicle or light truck.

(underline added).

the core parts origination requirement at Article 3(7) of the Autos Appendix. There is no textual support for permitting the producer to disregard, for purposes of calculating the overall vehicle RVC, the value of non-originating materials of core parts that were determined originating for the core parts origination requirement under the calculation flexibilities prescribed at Articles 3(8)-(9) of the Appendix.

56. Article 3(7) states:

Each Party shall provide that a passenger vehicle or light truck is originating only if the parts under Column 1 of Table A.2 of this Appendix used in the production of a passenger vehicle or light truck are originating. Such a part is originating only if it satisfies the regional value content requirement in paragraph 2, except for an advanced battery. The Parties, as appropriate, shall provide in the Uniform Regulations additional description or other clarification to the list of the parts and components under Table A.2 of this Appendix, such as by tariff provision or product description, to facilitate implementation of this requirement.

57. Article 3(7) logically contains two requirements. The first obligation is at the core of this dispute, and the focus of this analysis. This obligation prescribes that a Party can only consider a vehicle originating if the parts under Column 1 of Table 2 (core parts) are originating. In order for these parts to be originating, they must meet the RVC requirement in paragraph 2 of Article 3 (RVC requirements for core parts).

58. The first sentence of the provision sets forth an obligation “shall provide that a passenger vehicle or light truck is originating”, which is conditioned on “the parts under Column 1 of Table A.2 of the Appendix” being originating. The phrase “only if” indicates a necessary condition on the first clause of the first sentence, meaning that a passenger vehicle can only be originating when the condition in the second clause (that the parts under Column 1 of Table A.2 are originating), is met. Accordingly, a passenger vehicle or light truck is originating pursuant to Chapter 4 only if the parts under Column 1 of Table A.2 of the Appendix are originating. The second sentence places a further necessary condition on the obligation in the first sentence. Specifically, it clarifies that a part under Column 1 of Table A.2 of the Appendix is only originating under Chapter 4 if it satisfies the RVC requirement in paragraph 2 of Article 3 of the Appendix.

59. In order to understand the meaning of the first sentence of Article 3(7), it is necessary to understand the meaning of the terms “originating” and “the parts under Column 1 of Table A.2”. USMCA Article 1.5 defines “originating” as “qualifying as originating under the rules of origin set out in Chapter 4 (Rules of Origin) or Chapter 6 (Textile and Apparel Goods)”. The parts under Column 1 of Table A.2 are specific core parts. Table A.2 is titled “parts and components for determining the origin of passenger vehicles and light trucks under Article 3 of this Appendix”. Column 1 lists seven core parts (engine, transmission, body and chassis, axel, steering system, suspension system, and advanced battery). Taken together, this means that each Party shall provide that a passenger vehicle or light truck “qualif[ies] as originating under the

rules of origin set out in Chapter 4” only if the “engine, transmission, body and chassis, axel, steering system, suspension system, and advanced battery” are originating.

60. To understand the meaning of the second sentence, we must understand the terms “originating” and “[RVC] in paragraph 2 [of Article 3 of the Appendix]”. As noted, Article 1.5 of the USMCA defines “originating”. Paragraph 2 of Article 3 of the Appendix sets forth the RVC requirements for the core parts listed at Table A.1 of the Appendix.

61. Accordingly, Article 3(7) sets forth an additional product-specific requirement for vehicles that an importer, exporter, or producer must show the vehicle satisfies in order for the vehicle to qualify as originating pursuant to Article 4.2(b) of the Agreement. Specifically, that a vehicle is only originating under Chapter 4 if the “engine, transmission, body and chassis, axel, steering system, suspension system, and advanced battery” “satisf[y] the regional value content requirement in paragraph 2, except for an advanced battery.” The text sets a condition on when a Party may consider a vehicle originating – the core parts origination requirement – but the text does not set out that meeting that condition satisfies the RVC calculation for the vehicle, which is calculated under Article 4.5.

62. Unlike meeting the vehicle RVC requirement under Article 3(1) of the Autos Appendix, where the RVC can only be calculated consistent with the methodologies set forth in Article 4.5 of the Agreement, an importer, exporter, or producer have four different ways they can calculate the regional value content of the core parts at Table A.2, for purposes of meeting the requirement at Article 3(7) of the Appendix. These methodologies come directly after Article 3(7), and are set out in Articles 3(8) and 3(9) of the Autos Appendix.

63. Article 3(8) provides that the VNM for the RVC calculation can be calculated in one of two ways. First, through using the value of all non-originating materials used in the production of the part, which is the same as the standard method provided at paragraphs 2 and 3 of the Agreement. Second, the producer could use the “focused value” method, which permits the producer to count only the value of the non-originating components listed in column 2 of Table A.2, that are used in the production of the core part. This means that a non-originating value for components other than those listed under Column 2 of Table A.2, are not included in the value of non-originating materials. For reference, Article 3(8) provides:

Each Party shall provide that for the purposes of calculating the regional value content under Article 4.5 (Regional Value Content) for a part under Column 1 of Table A.2 of this Appendix, the value of non-originating materials (VNM) is, at the vehicle producer’s option:

- (a) the value of all non-originating materials used in the production of the part; or
- (b) the value of any non-originating components used in the production of the part that are listed under Column 2 of Table A.2 of this Appendix.

64. Properly interpreted, this provision requires the Parties provide two options for how the producer can calculate the VNM of the parts at Table A.2 in order to determine whether the

vehicle meets the core parts origination requirement. The calculation at Article 3(8)(b) differs from what is provided for under the standard calculations at Articles 4.5.2 and 4.5.3 of the Agreement, which both provide that the “VNM is the value of non-originating materials including materials of undetermined origin used by the producer in the production of the good”. The flexibility provided at paragraph 8(b) allows the producer to disregard the non-originating materials of certain components, but requires them to account for the non-originating materials in the components at Column 2 of Table A.2. The calculation methodology at paragraph 8(a) is similar to that of the standard VNM calculation.

65. In addition to the alternative methodologies for calculation VNM provided at Article 3(8) of the Autos Appendix, Article 3(9) provides two additional options for how a producer can calculate the RVC of the parts in Table A.2 to meet the core parts origination requirement. The alternative methodologies at Article 3(9) both provide the ability to treat all core parts in Table A.2 as a “single part (sometimes referred to as a “super-core” part). Article 3(9) of the Appendix provides:

Further to paragraph 8, each Party shall provide that the regional value content may also be calculated, at the producer’s option, for all parts under Column 1 of the Table A.2 of this Appendix as a single part, using the sum of the net cost of each part listed under Column 1 of Table A.2 of this Appendix”.

- (a) the sum of the value of all non-originating materials used in the production of the parts listed under Column 1; or
- (b) the sum of the value of only those non-originating components under Column 2 of Table A.2 of this Appendix, used in the production of the parts listed under Column 1.

If this regional value content meets the required threshold under paragraph 2, then each Party shall provide that all parts under Table A.2 of this Appendix are originating and the passenger vehicle or light truck will be considered to have met the requirement under paragraph 7.

66. Article 3(9) contains two obligations. First, that each Party is required to permit the producer to treat all of the parts under Column 1 of Table A.2 as a “single part”, when calculating the RVC to meet the core parts origination requirement. Second, that each Party is required to permit the producer to choose how to calculate the VNM of the “single part”, through either Article 3(9)(a) or 3(9)(b). The methods for calculating the VNM of the “single part” at subparagraphs (a) and (b) are parallel to those at Article 3(8)(a) and 3(8)(b), only rather than calculating the VNM of each part individually, the VNM is calculated by using the sum of the value of the non-originating materials for all parts or components listed at Table A.2.

C. The Text, Read in Context, Requires that the Core Parts Origination Requirement and the Overall Vehicle RVC Requirement Are Separate and Require Two Separate Calculations

1. The Bifurcated Structure of Article 3 of the Autos Appendix Indicates that the Core Parts Origination Requirement and the Overall Vehicle RVC Requirement Are Separate and Require Two Separate Calculations

67. The structure of Article 3 of the Autos Appendix confirms the plain meaning of the text, which provides that the vehicle RVC requirement and core parts originating requirement are two separate requirements, requiring two independent calculations.

68. Specifically, the RVC requirements for the vehicle appear first in Article 3 of the Autos Appendix (Article 3(1)), and are separated from the core parts origination requirement by Article 3(6) of the Autos Appendix. Article 3(6) sets forth the applicable Articles in Chapter 4 and the Autos Appendix that apply when calculating the regional value content for purposes of determining whether the vehicle meets the RVC thresholds at Article 3(1) of the Autos Appendix. Notably, the special calculation methodologies at Articles 3(8) and 3(9) of the Autos Appendix, for use in determining the core parts origination requirement, are *not* included in this list.

69. Article 3(6) of the Autos Appendix provides that for purposes of calculating the RVC of the vehicles and parts under the preceding paragraphs 1-5, the standard provisions under Article 4.5 of the Agreement used for calculating RVC apply. This means that a producer would apply the standard RVC rules in Article 4.5 for purposes of calculating whether the vehicle, or part, meets the relevant RVC thresholds prescribed under Article 3(1) through 3(5). In this way, Article 3(6) and its location within Article 3 of the Appendix serves to differentiate the standard methods used for passenger vehicle RVC calculations in Articles 3(1)-(5) from the separate core parts origination requirement and its calculations contained in the subsequent paragraphs.

70. Article 3(7) of the Appendix then introduces a second set of provisions setting out the core parts origination requirement. Under this requirement, the core parts listed at Table A.2 of the Appendix must meet the RVC thresholds listed in Article 3(2) of the Appendix. Special calculation methodologies are then provided in Articles 3(8) and 3(9) for purposes of the core parts origination requirement. Article 3(8) gives the producer the option to adjust the calculation for the VNM of these parts, for example, by counting only the VNM of “key parts” of those core parts. Article 3(9) gives the producer the option to treat all core parts as a “single part” when calculating the VNM, which would permit a core part to fall short of its RVC threshold if, taken together, all core parts meet the threshold.

71. Based on this language and structure, paragraph 6 serves to bifurcate Article 3 in two, and explicitly provides that Article 4.5 (Regional Value Content) and certain specific methods

apply when calculating the vehicle’s RVC.⁴⁷ Paragraphs 8 and 9 then provide special calculation methodologies only for purposes of meeting the core parts origination requirement set out in paragraph 7.

72. This bifurcated structure imposed by Article 3(6) demonstrates that the special calculation methodologies under paragraphs 8 or 9, under which a core part may be originating for purposes of meeting the core parts origination requirement, do not apply when calculating the vehicle RVC under Article 3(6) of the Appendix and Article 4.5. If a producer were to use the calculation methodologies set out in Articles 3(8) or 3(9) for purposes of calculating its overall vehicle RVC, the producer would in fact fail to comply with the calculation methodologies set forth in Article 4.5.

73. As noted by Complainants, the Uniform Regulations also provide context for the interpretation of these provisions. However, contrary to Complainants’ arguments, these Regulations do not provide contextual support for Complainants’ position that Article 4.5.4 can apply to parts considered originating pursuant to the special calculation methodologies of Articles 3(8) and 3(9) of the Appendix.

74. Section 14 of the Uniform Regulations is titled “Further Requirements Related to the Regional Value Content for Passenger Vehicles, Light Trucks, and Parts Thereof”. Paragraph (1) of Section 14 details the “roll-up” rule, provided for at Article 4.5.4 of the USMCA. Section 14(1), is titled “Roll-Up of Originating Materials”, and provides:

The value of non-originating materials used by the producer in the production of a passenger vehicle, light truck and parts thereof must not, for the purpose of calculating the regional value content of the good, include the value of non-originating materials used to produce originating materials that are subsequently used in the production of the good. For greater certainty, if the production undertaken on non-originating materials results in the production of a good that qualifies as originating, no account is to be taken of the non-originating material contained therein if that good is used in the subsequent production of another good.

75. This provision does not address whether the VNM of core parts satisfying the core parts origination requirement under the special calculation methodologies at Articles 3(8) and 3(9) of the Appendix can be “rolled up” pursuant to Article 4.5.4 of the USMCA, for purposes of meeting the RVC threshold for the vehicle at Article 3(1) of the Appendix. But this provision is followed by several additional provisions – under four separate headings, and detailed in nine

⁴⁷ Article 3(6) states:

For the purposes of calculating the regional value content under paragraphs 1 through 5 , Article 4.5 (Regional Value Content), Article 4.6 (Value of Materials Used in Production), Article 4.7 (Further Adjustments to the Value of Materials), and Article 4.8 (Intermediate Materials) and Article 5 (Averaging) apply.

different paragraphs – that *do* expressly address the separate core parts origination requirement, and the alternative calculation methodologies provided to satisfy that requirement. This structure mirrors the bifurcated structure seen in the Agreement itself, by first describing the calculation of the overall vehicle RVC calculation and then describing the core parts origination requirement.

76. Therefore, the structure of Article 3 indicates that the vehicle must meet two distinct requirements to receive duty free treatment: (1) that the vehicle and certain parts meet, among others, certain regional value content requirements; and (2) that the core parts listed in Column 1 of Table 2 are originating. The results of the separate calculation methodologies for meeting the core parts origination requirement, and thus the methodologies themselves, cannot be carried over when calculating the vehicle’s RVC.

2. *The text of Article 3(9) makes clear that the special calculation methodologies therein apply only for purposes of meeting the core parts origination requirement at Article 3(7).*

77. As detailed in section III.B above, Articles 3(7), 3(8), and 3(9) set out the core parts origination requirement and the special methodologies permitted to calculate that content. Article 3(9) then expressly limits the applicability of the super-core calculation to the core parts origination requirement under Article 3(7). Neither the text of Article 3(7), nor the text at Articles 3(8) and (9), includes language making these special core parts calculation methodologies applicable for purposes of calculating the vehicle RVC.

78. In fact, the text of Article 3(9) makes clear that the special calculation methodologies apply only for purposes of meeting the core parts origination requirement. In relevant part, Article 3(9) states:

If this regional value content meets the required threshold under paragraph 2, then each Party shall provide that all parts under Table A.2 of this Appendix are originating and the passenger vehicle or light truck will be considered to have met the requirement under paragraph 7.

79. The phrase “*this* regional value content” logically refers back to the regional value content of the “single part” as described in Article 3(9). Meeting the regional value content requirement under paragraph 2 by the “single part” means that all core parts are originating and the passenger vehicle or light truck will be considered to have met the core parts origination requirement. There is no language that refers to the vehicle RVC requirement at Article 3(1) or makes this special calculation methodology applicable to it. Nor does Article 3(9) operate to supersede the requirement that the core parts under Table A.1, are only considered originating if they each meet the RVC requirement at Article 3(2).

80. These calculation methodologies give the producer greater flexibility in meeting the core parts origination requirement, by not requiring that each part individually meet the RVC requirement. If the North American value of the “single part” meets the required threshold, then all core parts in column 1 of Table A.2 are considered to meet the core parts origination

requirement at Article 3(7). This flexibility allows importers, exporters, or producers to meet the rule set out in Article 3(7), even if some of the core parts would not meet the RVC for a part on their own.

81. Therefore, contrary to Complainants’ arguments, Articles 3(8) and 3(9) of the Autos Appendix do not set out methodologies that are applicable for purposes of calculating the RVC of the vehicle, or parts used in producing the vehicle, pursuant to the RVC thresholds under Articles 3(1) and 3(2).⁴⁸ In fact, Article 3(6) omits paragraphs 7-9 from its list of provisions that “apply” “[f]or the purposes of calculating the regional value content under paragraphs 1 through 5”.

82. Nor does the U.S. interpretation breach Articles 3(8)-(9) of the Autos Appendix by limiting the choice of vehicle producers’ calculation of VNM for core parts.⁴⁹ Rather, the United States permits the vehicle producers to use those alternative methods for purposes of calculating the VNM of core parts for purposes of meeting the requirement under Article 3(7) of the Appendix, but not for purposes of calculating the VNM for core parts for purposes of calculating the RVC of the vehicle.

83. Complainants are also wrong that the term “originating” must mean the same thing when used in different contexts.⁵⁰ As the United States has explained, the text of Article 3 itself limits the scope of the term “originating” in Articles 3(7), 3(8) and 3(9) to the core parts origination requirement. And nothing in the remaining paragraphs of Article 3 suggest otherwise.

84. Thus, Complainants fail to demonstrate that the other paragraphs of Article 3 confirm that a core part considered originating under Articles 3(7)-(9) is originating material subject to roll-up under Article 3(6) of the Autos Appendix and Article 4.5.4.⁵¹

3. The existence of two core parts tables in the Autos Appendix confirms that there are two separate requirements, with different calculation methodologies applicable to each

85. It is important to note that the core parts listed in Table A.1, are the same core parts listed in Table A.2 of the Appendix, albeit organized differently. When viewed in context, the existence of these two separate but overlapping tables, evidences fact that two separate requirements were developed and included in the Appendix for two separate purposes.

86. Table A.2 of the Autos Appendix is referenced in the Autos Appendix at Articles 3(7), 3(8), 3(9), and 3(10) only for purposes of determining whether a vehicle meets the core parts origination requirement. Table A.2 is also referenced in the definition of “super-core” in the

⁴⁸ Canada’s First Written Submission, para. 110; Mexico’s First Written Submission, paras. 157-167.

⁴⁹ Canada’s First Written Submission, para. 117.

⁵⁰ Canada’s First Written Submission, para. 112.

⁵¹ Canada’s First Written Submission, para. 116.

Autos Appendix which provides that super-core “means the parts listed in the left column of Table A.2 of this Appendix, which are considered as a single part for the purposes of performing a Regional Value Content calculation in accordance with Article 5.2 (Averaging).”

87. Table A.1 is referenced when determining whether a core part meets the RVC threshold to be considered originating, and is referenced at Article 3(2) of the Appendix. It is also referenced at Article 5.2, for purposes of averaging when calculating the RVC, and Article 8.2(b), for purposes of Alternative Staging Plans.

88. A producer would reference Table A.1 when it is determining whether a core part listed in Table A.1 is originating pursuant to the RVC threshold at Article 3(2) in two circumstances: (1) when a core part is being shipped individually, not assembled into a vehicle, and thus an importer, exporter, or producer is seeking preferential treatment for that part alone, or (2) for purposes of determining whether the roll-up requirement would apply to a core part listed in Table A.1 (because it is originating pursuant to the RVC threshold at Article 3(2) of the Autos Appendix), when calculating the vehicle RVC pursuant to Article 4.5 of the Agreement, as prescribed under Article 3(6).

89. The second circumstance is relevant to this dispute. As discussed above, pursuant to the text of Article 3(6), the only regional value content calculation methodologies applicable to calculating the vehicle RVC are those in Article 4.5 of the Agreement. Accordingly, in order to determine whether a core part is originating for purposes of applying the roll-up provision to the vehicle RVC, the producer would need to calculate the core part pursuant to the calculation methodologies in Article 4.5 of the Agreement. Article 3(6) of the Autos Appendix dictates which RVC requirements are calculated pursuant to Article 4.5 of the Agreement. Among them, are the core parts listed at Table A.1. Specifically, Article 3(2) sets forth the regional value content threshold for core parts listed at Table A.1, Article 3(3) clarifies that a core part in Table A.1 is only originating if it meets the regional value content requirement at Article 3(2), and Article 3(6) states that for purposes of calculating the RVC of paragraphs 1 through 5, Article 4.5 applies. Therefore, for purposes of determining whether a core part is originating when undertaking the vehicle RVC calculation, a core part is only originating when it individually meets the RVC requirement at Article 3(2) of the Appendix.

90. The special calculation methodologies for purposes of the separate core parts origination requirement for core parts listed at Table A.2 are not listed in Article 3(6). In Article 3 of the Autos Appendix, Table A.2 is only referenced in Articles 3(7), 3(8), and 3(9). In Article 3(7), Table A.2 is referenced to establish the separate core parts origination requirement. It is again referenced in paragraphs 8 and 9 of Article 3, for purposes of describing how a producer can calculate the VNM of the parts at Table A.2, for purposes of meeting the core parts origination requirement.

91. That there are two separate tables, containing the same core parts, reflects that the Parties developed two separate requirements, which each require separate calculations, and separate calculation methodologies.

D. The Object and Purpose of the Agreement Supports a Finding that the Core Parts Origination Requirement and the Overall Vehicle RVC Calculation Are Separate Requirements Requiring Independent Calculations

92. The object and purpose of the USMCA, as set forth in the Preamble to the USMCA, support the application of a two-prong approach to determine whether a vehicle is originating, and will receive duty free treatment under the USMCA. In relevant part, the Preamble of the USMCA provides that the Parties resolve to:

PRESERVE AND EXPAND regional trade and production by further incentivizing the production and sourcing of goods and materials in the region;

ENHANCE AND PROMOTE the competitiveness of regional exports and firms in global markets, and conditions of fair competition in the region;

[. . .]

ESTABLISH a clear, transparent, and predictable legal and commercial framework for business planning, that supports further expansion of trade and investment [. . .]

93. The U.S. interpretation “preserve[s] and expand[s] regional trade and production by further incentivizing the production and sourcing of goods and materials in the region”, while at the same time “enhance[ing] and promot[ing] the competitiveness of regional exports and firms in global markets, and conditions for fair competition in the region.”⁵² And by ensuring that the actual RVC of a vehicle is fully reflected in the overall vehicle calculation for purposes of receiving preferential treatment, this interpretation also supports the “establish[ment of] a clear, transparent, and predictable legal and commercial framework for business planning, that supports further expansion of trade and investment” in the North American market.

94. The core parts represent some of the most valuable parts of a vehicle, constituting as much as [[REDACTED]] percent of the total value depending on the model.⁵³ The stricter rules of origin in the USMCA were specifically designed to address concerns of the U.S. steel industry and organized labor about the low and decreasing amount of North American content in the North American auto industry under the NAFTA, and to promote greater production in the United States and North America. If Complainants’ interpretation were adopted, it would allow producers to treat all of the individual core parts of the “single part” as originating for purposes of calculating the vehicle’s RVC, even if certain core parts were not originating – and in turn, to disregard for purposes of the vehicle RVC calculation *all of* the non-originating material in those core parts. For example, even if only 70 percent of the value of the core parts were originating, auto producers would then apply 100 percent of the value of those core parts as originating

⁵² Mexico’s First Written Submission, para. 98 (citing the USMCA Preamble).

⁵³ United States Autos Rules of Origin Proposal to Canada and Mexico, NAFTA 2.0 Rules of Origin Autos and Autos Parts, March 13, 2018 (Exhibit MEX-25) (Confidential).

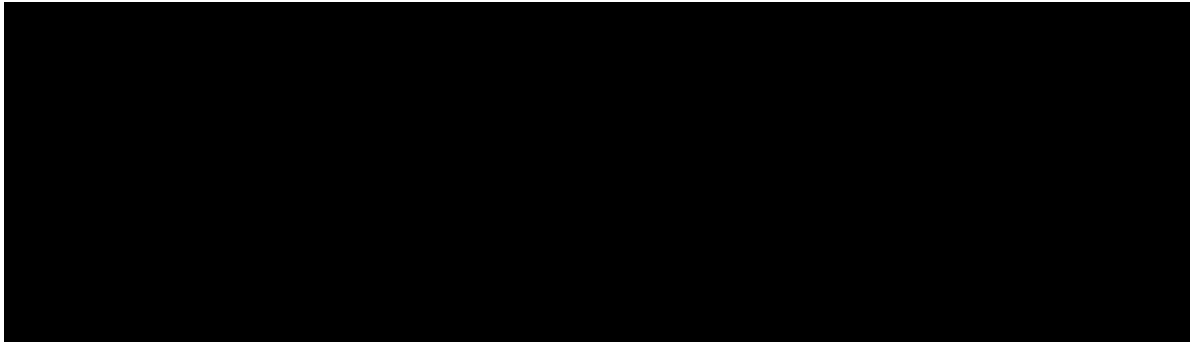
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content in calculating the vehicle’s RVC, whereas under the U.S. interpretation, the auto producer would use the 70 percent figure in calculating the overall RVC.

95. As the United States highlighted in the introduction to this submission, Complainants’ interpretation would undermine the object and purpose of the USMCA, and turn a requirement clearly intended to increase the amount and value of North American-originating content into a loophole that instead reduces the amount of required regional content by as much as thirty-three percent.

96. For example, an auto manufacturer provided calculations to the U.S. Government of regional value content for one vehicle model, both using Complainants’ interpretation, and the U.S. interpretation.⁵⁴ The results of these calculations, as partially reproduced in the table below, confirm that the Complainants’ interpretation artificially inflates the RVC of the vehicle.

[[

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97. In Exhibit USA-2, the United States also provides five sample calculations comparing the application of the two interpretations based on producer and trade data obtained by the U.S. International Trade Commission. These calculations show that the Complainants’ interpretation inflates the RVC of the vehicle in every case, reducing the required regional content by 8 percent, 11 percent, 14 percent, 20 percent, and 33 percent, respectively. Accordingly, based on these actual and sample calculations, it is Complainants’ interpretation that runs counter to the object and purpose of the USMCA.

98. Mexico asserts that the U.S. interpretation threatens “future investments, purchases, and jobs in all three Parties”, and suggests that planned investments in the region were made pursuant

⁵⁴ Foreign auto producer calculations, Exhibit USA-19.

to the Complainants’ interpretation.⁵⁵ But this is just assertion – Mexico does not provide any information that demonstrates these assertions are true.⁵⁶ To the contrary, the USTR Report cited by Mexico highlighting the \$13.5 billion in planned investments in the region, as a “response” to the text as written and as explained to the industry “throughout the negotiations” until June 2020, shows no threat to future investments, purchases, and jobs.⁵⁷ First, there is nothing in this report to suggest that the producers that publicly announced these investments relied on the Complainants interpretation in doing so. And second, Mexico fails to explain why such investments would not have been made based on the correct interpretation of the United States, the purpose of which is precisely to attract such investment.

99. Mexico insists that it would not have accepted a result that only applied the special methodologies set forth in Article 3(8) and 3(9) for purposes of the core parts origination requirement,⁵⁸ but Mexico provides no evidence to support its assertion that it understood these provisions to operate otherwise. To the contrary, Mexico has submitted communications between a private Mexican auto producer, VW Mexico, and U.S. officials, all of which occurred after September 30, 2018, when the negotiations closed.

100. Therefore, the object and purpose of the USMCA also supports an interpretation that the core parts origination requirement and the overall vehicle RVC calculation are two separate requirements requiring two separate calculations.

E. Review of Supplementary Means of Interpretation Is Not Necessary, And In Any Event Supports the U.S. Interpretation

101. Complainants’ arguments rely in large part on various documents communications that occurred during the negotiation of the USMCA or thereafter, including communications between U.S. and Canadian officials, U.S. officials and the auto industry, and affidavits from Mexican negotiators recalling aspects of the negotiations. However, the Panel need not review any of these materials in making its assessment of this matter because the proper interpretation of the relevant USMCA provisions is clear based on the ordinary meaning of the terms of the Agreement, when read in context and in light of the object and purpose of the Agreement. Therefore, no recourse need be had to supplementary means of interpretation either to confirm or to determine (in exceptional circumstances) the meaning of the Agreement. Moreover, when documents properly constituting supplementary means of interpretation are taken into consideration, they fail to support Complainants’ arguments and, to the contrary, confirm the interpretation set out by the United States.

⁵⁵ Mexico’s First Written Submission, para. 101.

⁵⁶ Mexico’s First Written Submission, paras. 100-101.

⁵⁷ Mexico’s First Written Submission, para. 99; USTR, *Estimated Impact of the United States-Mexico-Canada Agreement (USMCA) on the U.S. Automotive Sector*, Apr. 18, 2019 (Exhibit MEX-09).

⁵⁸ Mexico’s First Written Submission, para. 100.

1. *The Panel need not resort to “supplementary means of interpretation”*

102. Article 31.13 of the USMCA describes the “function of panels” and the standard of review to be applied by panels. A panel’s function is to make an objective assessment of the matter before it. In making that objective assessment whether a measure is inconsistent with the USMCA, Article 31.13.4 establishes that a dispute settlement panel shall interpret the USMCA “in accordance with customary rules of interpretation of public international law, as reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*” (“Vienna Convention”). Article 31 of the Vienna Convention provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Under Article 32, “Supplementary means of interpretation” may be applied under certain conditions. Article 32 specifies that:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.⁵⁹

103. It is plain from the text of Articles 31 and 32 of the Vienna Convention that Article 31, the “general rule”, is applied first. Article 32, the “Supplementary means of interpretation”, may then be applied, but only to “confirm” the meaning resulting from the application of the general rule, or to “determine the meaning” if application of the general rule fails to reveal the meaning. If a treaty interpreter applies the general rule of interpretation and is able to discern the meaning of the terms of the treaty, then the interpretive analysis is effectively concluded. There is no reason to continue on and apply the rule relating to supplementary means of interpretation that is set forth in Article 32 of the Vienna Convention unless to confirm the meaning that results from application of Article 31.

104. This understanding is also confirmed by the commentaries of the International Law Commission (“ILC”), which were produced at the time that the Vienna Convention rules were drafted. The ILC commentaries explain that “the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation ab initio into the

⁵⁹ Vienna Convention on the Law of Treaties, 1969,
https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

intentions of the parties.”⁶⁰ Application of the customary rules of interpretation is the means by which the treaty interpreter discerns the common intention of the parties.

105. The treaty interpreter may not simply accept a party’s post hoc representations of its intentions as evidence, and such representations cannot alter the meaning of the terms of the treaty. As Sinclair notes, when a treaty interpreter “can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning.”⁶¹ Indeed, as noted in the ILC commentaries, “to adopt an interpretation which ran counter to the clear meaning of the terms would not be to interpret but to revise the treaty.”⁶² Logically, taking into account post hoc representations of a party’s intent – with the near certainty of opposing representations by the disputing parties – could not possibly permit resolution of the interpretive dispute.

106. The terms of the treaty are the first and best evidence of the common intention of the parties. Accordingly, Articles 31 and 32 reflect that recourse to “supplementary” means of interpretation may only be had after application of the general rule of interpretation under Article 31.

107. Determining the meaning of a treaty by recourse to supplementary means of interpretation is only possible where application of the general rule in Article 31 leaves the meaning “ambiguous or obscure”, or gives a meaning which is “manifestly absurd or unreasonable”. This, however, is the “exception”.⁶³ Recourse to supplementary means of interpretation “must be strictly limited, if it is not to weaken unduly the authority of the ordinary meaning of the terms.”⁶⁴

108. As demonstrated in Section III above, the meaning of the provisions in question are clear on their face, and the terms are not ambiguous. Accordingly, there is no basis for the Panel to resort to supplementary means of interpretation. Complainants ask the Panel to resort to the various communications they have put on the record to reach a meaning of the Agreement that is contrary to the ordinary meaning given to the terms, in context and in light of the object and purpose of the treaty. That is not the appropriate outcome of the application of Article 32, and the Panel should therefore reject Complainants’ request.

⁶⁰ Draft Articles on the Law of Treaties with commentaries (1966) (“ILC Commentaries”) (Exhibit USA-17), p. 220 para. 11.

⁶¹ Sinclair, Sir Ian, *The Vienna Convention on the Law of Treaties*, 2nd edition. Manchester: Manchester University Press, 1984 (Exhibit USA-18), p. 127 (footnote omitted).

⁶² ILC Commentaries (Exhibit USA-17), p. 219 para. 6 (underline added).

⁶³ ILC Commentaries (Exhibit USA-17), p. 223 para. 19.

⁶⁴ ILC Commentaries (Exhibit USA-17), p. 223 para. 19.

2. *Supplementary means support the U.S. interpretation, and most of the evidence submitted by Complainants does not constitute supplementary means of interpretation*

109. While not necessary, if the Panel determines that review of supplementary means of interpretation is appropriate to confirm the meaning of the Agreement, both the negotiating history and the circumstances of the USMCA’s conclusion support the U.S. interpretation of the relevant provisions.

110. Although Article 32 permits recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, the scope of materials on which a treaty interpreter might rely as supplementary means is not at all unbounded.

111. Concerning negotiating history, as observed in the International Law Commission’s commentary to Article 32, “several conditions must be fulfilled before the material in question can be considered travaux préparatoires.”⁶⁵ Among these conditions is that “only material and processes that can be objectively assessed by an interpreter can qualify as preparatory work. They must be part of the outside world, so that people can take cognizance of them. Thus, individual thoughts, plans, recollections and memoirs in principle do not qualify; also, oral statements are difficult to evaluate, as long as they are not written down or cannot be corroborated by other evidence.”⁶⁶ The material considered also “must be apt to illuminate a common understanding of the negotiating parties”. Any “documents from a unilateral source, such as statements of individual governments or State representatives outside the treaty negotiations” can only be taken into account “if they were at some point introduced into the negotiation process ... and did not remain unilateral hopes, inclinations or opinions.”⁶⁷

112. On circumstances of conclusion, the documents concern the context surrounding negotiations but must speak to the common intentions of the Parties. Commentaries provide that circumstances of conclusion are meant to cover both the circumstances at the time the treaty was concluded, as well as the historical context of the treaty.⁶⁸ Specifically, “reference is made to factual circumstances present at the time of conclusion and the historical background of the treaty, which is supposed to have been present in the minds of those who concluded it.”⁶⁹

⁶⁵ O. Dörr and K. Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* 2nd edn. (Springer, 2018) (Exhibit USA-21), p. 621.

⁶⁶ O. Dörr and K. Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* 2nd edn. (Springer, 2018) (Exhibit USA-21), p. 621.

⁶⁷ O. Dörr and K. Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* 2nd edn. (Springer, 2018) (Exhibit USA-21), p. 621.

⁶⁸ O. Dörr and K. Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* 2nd edn. (Springer, 2018) (Exhibit USA-21), p. 624.

⁶⁹ O. Dörr and K. Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* 2nd edn. (Springer, 2018) (Exhibit USA-21), p. 624.

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113. Most of the supplementary material submitted by Complainants does not qualify as either negotiating history, or circumstance of conclusion because there is no indication that these materials “were at some point introduced into the negotiation process,” and all but one of these materials occurred after negotiations concluded. Further, these materials cannot speak to the context of the negotiations since they occurred after negotiations concluded, and some were even between certain U.S. officials and automotive companies who were not present at the negotiations. Accordingly, these materials cannot speak to the “factual circumstances present at the time of conclusion and the historical background of the treaty, which is supposed to have been present in the minds of those who concluded it.”

114. There are only a handful of negotiating documents submitted by Complainants that can be considered supplementary materials. However, as we explain in subsection 4 below, these negotiating documents do not support Complainants’ interpretation, but rather support the U.S. interpretation.

3. The communications, presentations, and affidavits submitted by Complainants are not supplementary means of interpretation

115. The communications, both between certain U.S. officials and private companies, and certain U.S. officials and Canada, the presentations, and the affidavits submitted by Complainants are not supplementary means of interpretation.

116. First, there are the communications between U.S. officials and private companies.⁷⁰ All but one (which does not speak to the interpretation question at issue) of these communications occurred before the conclusion of negotiations.⁷¹ The communications in question all took place between U.S. officials and a foreign vehicle producer –VW, and took place after the conclusion of negotiations. Therefore, these communications cannot be considered supplementary materials for purposes of Article 32 of the Vienna Convention, and are therefore not relevant to the Panel’s interpretative analysis.

⁷⁰ Email from Volkswagen Mexico, forwarded on April 8, 2019 to USTR lead Rules of Origin negotiators by [REDACTED], Volkswagen Group of America Inc. (Exhibit CAN-15) (Confidential); Email exchange between USTR officials and [REDACTED] Volkswagen Group of America Inc., dated November 2018 (Exhibit CAN-16) (Confidential); Email from Volkswagen Mexico, forwarded on April 8, 2019 to USTR lead Rules of Origin negotiators by [REDACTED], Volkswagen Group of America Inc. (Exhibit CAN-17) (Confidential); Email from USTR official, to [REDACTED], Volkswagen Group of America Inc. dated, January 24, 2019 and earlier email from Volkswagen Mexico to USTR officials, dated, December 6, 2018 (Exhibit CAN-25) (Confidential); Sample Correspondence between Automakers and USTR Officials, 2018-2019 (Exhibit MEX-28) (Confidential); Email from J. Bernstein (USTR) to M. Thornell (Global Affairs Canada), re: core parts, Jun. 11, 2020 (Exhibit MEX-60) (Confidential).

⁷¹ See Sample Correspondence, September 11, 2018 exchange between VW and USTR officials, pp. 27 (Exhibit MEX-28) (Confidential).

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117. Second, there are the June 11-12, 2020, communications between Canadian and certain U.S. officials.⁷² These communications occurred long after the conclusion of negotiations and only confirm the interpretation that certain U.S. officials shared with one Mexican auto producer – VW Mexico, while they were simultaneously seeking business from auto producers for purposes of giving advice on USMCA autos rules of origin, for their own business outside of their capacity as USTR officials. Nonetheless, these communications occurred long after the conclusion of the negotiation, and therefore there is no indication that this interpretation was shared with Canada or Mexico during the negotiations. Accordingly, these communications cannot be considered supplementary materials for purposes of Article 32 of the Vienna Convention, and are therefore not relevant to the Panel’s interpretative analysis.

118. Third, there are the presentations from USTR staff in spring and summer of 2019, again, long after the conclusion of the negotiations.⁷³ These presentations cannot shed light on the meaning of the relevant provisions of USMCA. Specifically, these presentations took place after the conclusion of negotiations (September 30, 2018), and the signature of the USMCA (November 30, 2018), and there is no indication that this information was ever introduced into the negotiation process. Accordingly, these presentations cannot be considered supplementary materials for purposes of Article 32 of the Vienna Convention, and are therefore not relevant to the Panel’s interpretative analysis.

119. And fourth, the affidavits cited throughout Mexico’s submission, detailing recollections of certain Mexican negotiators that were present during the negotiations cannot be considered supplementary materials.⁷⁴ Specifically, these materials are not “material and processes that can be objectively assessed by an interpreter can qualify as preparatory work”, are not a “part of the outside world, so that people can take cognizance of them.” Rather, they are “individual thoughts” and “recollections” and “in principle do not qualify” as supplementary materials. Further, they were created long after the conclusion of negotiations for purposes of this dispute, and therefore cannot be confirmed to have been “factual circumstances present at the time of conclusion and the historical background of the treaty, which is supposed to have been present in the minds of those who concluded it.” Accordingly, these affidavits cannot be considered

⁷² Email from USTR lead negotiator to Canadian lead negotiator, dated June 11, 2020 (Exhibit CAN-14); see also June 11-12, 2020 communications between USTR and Canadian official, dated June 11-12, 2020 (Exhibit USA-6).

⁷³ See Supplier Briefing United States-Mexico-Canada Agreement, April 19, 2019, p. 14 and 18 of PDF (Exhibit CAN-18) (Confidential); MEMA South Carolina Regional Supplier Briefing on USMCA, June 24, 2019 (Exhibit CAN-19) (Confidential).

USTR officials presented to vehicle parts producers in April and June of 2019, providing an overview of the USMCA autos ROO provisions. These presentations did not speak to whether core parts that were determined to meet the core parts originating requirement through the special calculations at Articles 3(8) and 3(9) could be considered originating for purposes of calculating the standard vehicle RVC.⁷³

⁷⁴ Affidavit by [REDACTED], March 10, 2022 (Exhibit MEX-19) (Confidential); Affidavit by [REDACTED], March 15, 2022 (Exhibit MEX-23) (Confidential); Affidavit by [REDACTED], March 21, 2022 (Exhibit MEX-77) (Confidential).

supplementary materials for purposes of Article 32 of the Vienna Convention, and are therefore not relevant to the Panel’s interpretative analysis.

4. Those documents properly considered negotiating history support the U.S. interpretation

120. Certain of the materials submitted by Complainants properly constitute negotiating history. This negotiating history confirms the U.S. interpretation that the core parts origination requirement and the standard vehicle RVC calculation are separate requirements requiring independent calculation.

121. Specifically, these documents are: [[

[REDACTED]

]]⁸⁰

122. As noted, the negotiations for the Rules of Origin chapter began in the fall of 2017. On

[[[REDACTED]]].

⁷⁵ Exhibit CAN-10 (Confidential); Exhibit MEX-78 (Confidential).

⁷⁶ Exhibit MEX-81 (Confidential).

⁷⁷ Exhibit MEX-25 (Confidential).

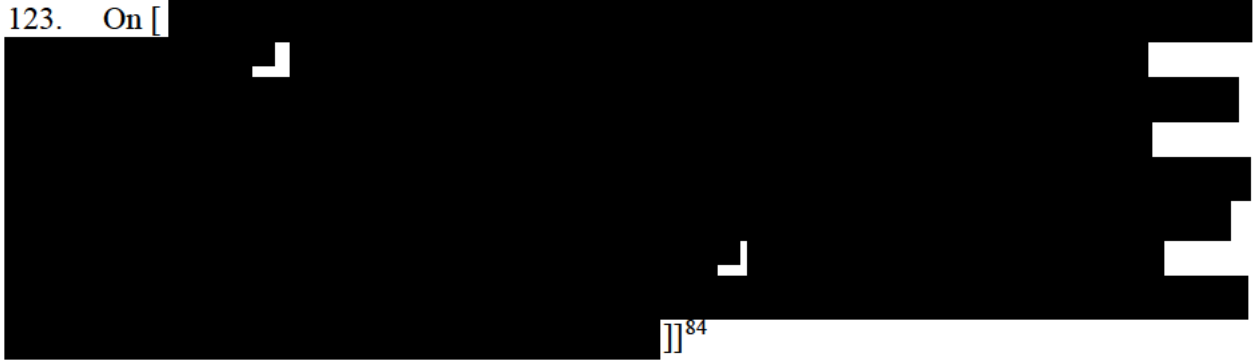
⁷⁸ Exhibit MEX-80 (Confidential).

⁷⁹ Exhibit CAN-11 (Confidential); Exhibit MEX-26 (Confidential).

⁸⁰ Exhibit CAN-12 (Confidential); Exhibit MEX-27 (Confidential).

⁸¹ Canada’s First Written Submission, para. 61 and Exhibit CAN-10 (Confidential); Mexico’s First Written Submission, para. 37; see also Exhibit MEX-78 (Confidential).

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123. On []]]⁸⁴

124. On [[]].

⁸² Mexico’s First Written Submission, para. 42 and Exhibit MEX-81 (Confidential).

⁸³ Trilateral Report of the Rules of Origin Group to the Chief Negotiators on the Sixth Round (Exhibit MEX-81), para. 2.

⁸⁴ Trilateral Report of the Rules of Origin Group to the Chief Negotiators on the Sixth Round (Exhibit MEX-81), paras. 3-4.

⁸⁵ United States, *NAFTA 2.0 Rules of Origin Autos and Auto Parts*, March 13, 2018 (Exhibit MEX-25) (Confidential).

⁸⁶ NAFTA 2.0 Rules of Origin Auto Parts, p. 5 (Exhibit MEX-25) (Confidential).

⁸⁷ NAFTA 2.0 Rules of Origin Auto Parts, p. 5 (Exhibit MEX-25) (Confidential).

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125. In [REDACTED]

[REDACTED]

[REDACTED]

126. [REDACTED]

[REDACTED]]].

127. [REDACTED]

[REDACTED]

⁸⁸ Mexico’s First Written Submission, para. 46 and Exhibit MEX-80 (Confidential).

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[REDACTED]]]

128. [[REDACTED]]].

129. On [[REDACTED]]

130. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁸⁹ Canada’s First Written Submission, Exhibit CAN-11 (Confidential); Mexico’s First Written Submission, Exhibit MEX-26 (Confidential).

⁹⁰ Canada’s First Written Submission, para. 63 and Exhibit CAN-11, (Confidential); Mexico’s First Written Submission, paras. 47-116 and Exhibit MEX-26 (Confidential).

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[REDACTED]]⁹¹

131. [[REDACTED]]]. For reference, in relevant part, Article 3(7) of the Appendix provides:

Each Party shall provide that a passenger vehicle or light truck is originating only if the parts under Column 1 of Table A.2 of this Appendix used in the production of a passenger vehicle or light truck are originating. Such a part is originating only if it satisfies the regional value content requirement in paragraph 2, except for an advanced battery.

132. [[REDACTED]]]

133. This text does not support Complainants' interpretation. Rather, this text shows that the United States proposed the concept that there be a separate core parts origination requirement as a condition for a vehicle to be originating, and that in order to meet that requirement, a party could calculate the RVC of core parts using special methodologies. These draft provisions do not speak to the relationship between the separate core parts calculations and their applicability to calculating the vehicle's RVC.

134. However, [[REDACTED]]

⁹¹ Rules of Origin for Automotive Goods, Concept Paper (Exhibit CAN-11) (Confidential) (underline added).

⁹² Mexico's First Written Submission, para. 42.

⁹³ Canada's First Written Submission, Exhibit CAN-12 (Confidential); Mexico's First Written Submission, para. 117, Exhibit MEX-27. See also Canada's First Written Submission, para. 65 (noting that [[REDACTED]]].

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[REDACTED]

[REDACTED]

[REDACTED]

135. [REDACTED]

⁹⁴ Canada’s First Written Submission, para. 66.

⁹⁵ Canada’s First Written Submission, para. 69.

[REDACTED]

136. These documents show that the Parties successfully negotiated text that increased the regional value content of vehicles, including through adding a separate core parts origination requirement. These documents do not support Complainants’ interpretation, but rather support the U.S. interpretation that the core parts origination requirement and the standard vehicle RVC calculation are separate requirements requiring independent calculations.

F. Conclusion

137. As shown above, Complainants’ claims misinterpret the provisions of the USMCA and lead to an absurd result. Based on a proper examination of the text, read in context and in light of the object and purpose of the USMCA, the interpretation set forth by the United States in the ASP approval letters is fully consistent with the USMCA. While not necessary to the Panel’s interpretive task in this dispute, a review of the negotiating history of the USMCA confirms this interpretation. Therefore, the Panel should reject the Complainants’ claims under Articles 4.5.4 and Articles 3(7)-(9) of the Autos Appendix.

IV. Canada and Mexico’s Consequential Claims Under Article 4.2(b), paragraphs 1 and 2 of Article 4.11, paragraphs 1, 2, and 3 of Article 8 of the Appendix to Annex 4-B and sections 19(2) and 19(4) of the Uniform Regulations Also Should be Rejected

138. Complainants’ claims under Article 4.2(b), paragraphs 1 and 2 of Article 4.11, and paragraphs 1, 2, and 3 of Article 8 of the Appendix to Annex 4-B, and sections 19(2) and 19(4) of the Uniform Regulations are wholly consequential to their claims under Article 4.5.4, and Articles 3(7), 3(8) and 3(9) of the Autos Appendix. Therefore, each of these claims should be rejected for the same reasons its principal interpretive claims fail: because, as the United States explains in Section III above, Complainants have failed to demonstrate that the core parts origination requirement is not a separate and distinct requirement, or that the value of core parts calculated under the flexibilities provided under Articles 3(8) and 3(9) of the Autos Appendix can be rolled-up for purposes of calculating the overall vehicle RVC.

A. Article 4.2(b) of the USMCA

139. Article 4.2(b) provides:

Except as otherwise provided in this Chapter, each Party shall provide that a good is originating if it is: ...

(b) produced entirely in the territory of one or more of the Parties using non-originating materials provided the good satisfies all applicable requirements of Annex 4-B (Product-Specific Rules of Origin);

140. As the United States has established in section III above, the U.S. interpretation of the calculation of the RVC of passenger vehicles is consistent with the USMCA, and thus the United States has not acted inconsistently with Article 4.2(b).

B. Article 4.11 of the USMCA

141. Article 4.11.1 provides:

Each Party shall provide that a good is originating if the good is produced in the territory of one or more of the Parties by one or more producers, provided that the good satisfies the requirements of Article 4.2 (Originating Goods) and all other applicable requirements in this Chapter.

142. Complainants' claims under Article 4.11 are consequential to their claims under Article 4.2(b). As noted above, their claims under Article 4.2(b), in turn, are consequential to their claims under Article 4.5.4, and Articles 3(7), 3(8) and 3(9) of the Autos Appendix. The panel should therefore reject Complainants claims under Article 4.11⁹⁶ because Complainants have failed to demonstrate that the United States' interpretation for the calculation of the RVC of passenger vehicles and light trucks is inconsistent with the USMCA, and thus inconsistent with Article 4.2(b).

C. Article 8 of the Autos Appendix

143. Article 8(1) and 8(2) of the Autos Appendix set out a list of requirements that a vehicle covered by an ASR must meet in order to be originating. Contrary to Complainants' assertion, the United States does not condition the originating status of eligible vehicles on an additional requirement that is not prescribed in the USMCA. Rather, the USMCA prescribes that producers must meet this additional core parts origination requirement, and that is precisely what the ARS require. The panel should therefore reject Complainants claims under Article 8⁹⁷ because Complainants have failed to demonstrate that the United States' interpretation for the calculation of the RVC of passenger vehicles and light trucks is inconsistent with the USMCA.

D. Article 5.16.6 of the USMCA

144. Article 5.16.6 states: "Each Party shall apply the Uniform Regulations in addition to the obligations in the Chapter."

145. As explained above, the Uniform Regulations are consistent with Article 3 of the Autos Appendix. Complainants' claims under Article 5.16⁹⁸ are consequential to under Article 4.5.4,

⁹⁶ Canada's First Written Submission, paras. 141-146; Mexico's First Written Submission, paras. 174-178.

⁹⁷ Canada's First Written Submission, paras. 147-163; Mexico's First Written Submission, paras. 182-187.

⁹⁸ Canada's First Written Submission, paras. 164-173; Mexico's First Written Submission, paras. 179-181.

and Articles 3(7), 3(8) and 3(9) of the Autos Appendix. The panel should therefore reject Canada’s claims under Article 5.16.6 because Complainants have failed to demonstrate that the United States does not apply the Uniform Regulations, which are consistent with the obligations in Chapter 4.

V. Recourse Under Article 31.2(c) of the USMCA is Not Available to Complainants Because Complainants Have Not Demonstrated that the Measures Imposed by the United States Nullify or Impair the Benefits Canada and Mexico Could Reasonably Have Expected to Accrue to It

146. Complainants spend pages asserting that the U.S. interpretation has nullified or impaired benefits that Canada or Mexico could have reasonably expected to accrue.⁹⁹ However, Complainants have not demonstrated that the measures imposed by the United States nullify or impair benefits that Canada and Mexico could reasonably have expected to accrue to them. Therefore, Complainants cannot make out a claim under Article 31.2(c).

147. In relevant part, Article 31.2(c) of the Agreement provides that:

Unless otherwise provided for in this Agreement, the dispute settlement provisions of this Chapter apply: [. . .] when a Party considers that a benefit it could reasonably have expected to accrue to it under [. . .] Chapter 4 (Rules of Origin) [. . .] is being nullified or impaired as a result of the application of a measure of another Party that is not inconsistent with this Agreement.

148. Accordingly, in order for the Complainants to make out a claim under Article 31.2(c) of the USMCA, Complainants must demonstrate (1) the application of a measure by a Party of the USMCA, (2) a benefit accruing under the USMCA, and (3) the nullification or impairment of the benefit as a result of the application of the measure.

149. The elements of an Article 31.2(c) USMCA are parallel to a nullification or impairment claim under Article XXIII:1(b) of the GATT 1994. The existence of a cause of action in relation to a measure that is not itself inconsistent with an agreement is extraordinary. The claim potentially permits countermeasures to be taken in a situation in which a party to the agreement is performing its commitments under that agreement. As WTO adjudicators have reasoned, such an exceptional claim “should be approached with caution” because “Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules.”¹⁰⁰

150. The requirements in USMCA in relation to a non-violation nullification or impairment claim are not extensively elaborated, but in light of the extraordinary nature of the claim, it is reasonable to require more than a mere statement that they enjoy a benefit and that the United

⁹⁹ Canada’s First Written Submission, paras. 174-217; Mexico’s First Written Submission, paras. 192-205.

¹⁰⁰ *Japan – Measures Affecting Consumer Photographic Film and Paper (Panel) (Japan – Film)*, para. 10.36; see *EC – Asbestos (AB)*, para. 186.

States has adopted a measure that allegedly affects that benefit. For example, under Article 31.2(c), a party must consider “that a benefit it could reasonably have expected to accrue” is being nullified or impaired, and under Article 31.6.3, this forms part of the “legal basis of the complaint”. Canada and Mexico therefore must prove that it was reasonable to expect a benefit to accrue. Such a circumstance could conceivably arise if the challenged measure could not have been reasonably anticipated at the time the relevant benefit was negotiated.

151. Canada and Mexico have failed to demonstrate that the U.S. interpretation as expressed in its ASR approval letters have nullified or impaired any benefits – because they cannot reasonably argue that they could not have anticipated the United States would apply an interpretation of the core parts origination requirements and calculations consistent with the plain meaning of the text in the context of Chapter 4.

A. Complainants Have Failed to Prove That They Could Not Have Reasonably Anticipated the United States Would Apply an Interpretation Consistent with the USMCA Text

152. Complainants are seeking to demonstrate that they had a legitimate expectation for certain market access – namely, that it was reasonable for them to expect that the United States would provide market access for their passenger vehicles and light trucks based on an interpretation of the core parts calculations that was inconsistent with the Agreement. Put differently, Complainants must demonstrate that they could not have reasonably anticipated during the negotiation that the U.S. would implement the core parts origination requirement consistent with the correct interpretation of the Agreement.

153. Canada states that communications from the United States *during the negotiations* that were sent to Canada and vehicle producers directly contract the U.S. interpretation. As we detail in section III.D above, this is not true. As an initial matter, negotiations for the USMCA concluded on September 30, 2018, and the USMCA was signed on November 30, 2018. None of the communications submitted by Canada or Mexico, which provide a conflicting and incorrect interpretation, took place before the conclusion of the negotiations on September 30, 2018, or prior to the signature of the Agreement on November 30, 2018. In fact, we have no record of any communications between U.S. officials and any foreign government officials or vehicle producers before negotiations concluded, which provide this conflicting and incorrect interpretation. As explained in section III.D.4 above, the unilateral communications from certain U.S. officials to Canadian officials and to industry representatives that communicated the apparently conflicting and inconsistent interpretation, took place after negotiations concluded. Therefore, due to the timing of these communications, Complainants could not have reasonably anticipated that the United States would have implemented Canada’s and Mexico’s interpretation because this interpretation was not communicated with Canada and Mexico at the time the rules of origin provisions were negotiated.

154. Second, as discussed in section III.E.4 above, the negotiating documents submitted by the Complainants support the U.S. interpretation, and do not support the Complainants’

interpretation. Mexico asserts that it was “reasonable to expect that the United States would apply the automotive ROO as negotiated, written, and agreed to by the Parties.”¹⁰¹ As demonstrated in this submission, including support from negotiating history, the U.S. interpretation does just that. Complainants do not demonstrate otherwise, and accordingly, the materials submitted by Complainants are not evidence that Complainants could have reasonably relied on in support of their interpretation.

155. And third, as we detail in section III.D above, the U.S. interpretation does not run counter to the object and purpose of the Agreement – rather, it is Complainants’ interpretation that runs counter to the object and purpose of the Agreement. Complainants do not demonstrate otherwise.

156. Finally, the U.S. interpretation is not, as Mexico asserts, “designed to restrict duty-free access for vehicles to the U.S. market for domestic political purposes and to provide a useless and contradictory interpretation of Chapter 4 and the Automotive Appendix”.¹⁰² Rather, the U.S. interpretation, which is consistent with the terms of the USMCA, strives to increase the RVC of vehicles, investment, and jobs in the North American market. Mexico offers no factual support to the contrary.

157. Accordingly, Canada and Mexico have not demonstrated they could not have reasonably anticipated that the United States would apply interpretations of the vehicle RVC requirement and of the core parts origination requirement that are consistent with the Agreement. Consequently, Complainants’ Article 31.2(c) claim must fail.

B. Conclusion

158. Complainants have not met their burden of proof to demonstrate that they could not have reasonably anticipated during the negotiation that the United States would implement the core parts origination requirement consistent with the correct interpretation of the Agreement. For this reason alone, the Panel should reject the Complainants’ non-violation claim. In addition, the United States encourages the Panel to review this claim with caution. As noted, a claim that a party is entitled to withdraw commitments from another party that has acted consistently with an agreement is an extraordinary claim. One circumstance in which certain adjudicators have found a non-violation claim to be valid in the GATT/WTO is when a commitment is undertaken with respect to one type of measure, the value of which is undermined by subsequent application of a different type of measure – for example, a tariff commitment that is nullified by application of a subsidy.¹⁰³ However, the situation in this dispute is very different – namely, the application of a measure (autos content requirements) that is consistent with the agreement provisions that are

¹⁰¹ Mexico’s First Written Submission, para. 202.

¹⁰² Mexico’s First Written Submission, para. 202.

¹⁰³ See GATT Working Party, Report on the Australian Subsidy on Ammonium Sulphate, GATT/CP.4/39 (Report adopted on April 3, 1950).

addressed expressly to that type of measure. The United States does not consider that this is a circumstance in which a non-violation claim would be appropriate.

VI. CONCLUSION

159. For the reasons set out above, Complainants have failed to establish that any U.S. measure is inconsistent with the USMCA in this dispute and have failed to establish any non-violation nullification or impairment of benefits.