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Crystalline Silicon Photovoltaic Cells Safeguard Measure

(USA-CDA-2021-31-01)

FINAL REPORT

February 1, 2022

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Abbreviation	Description
CSPV	crystalline silicon photovoltaic
CUSMA	Canada-United States-Mexico Agreement
GATT 1994	General Agreement on Tariffs and Trade 1994
GW	Gigawatt
HTSUS	Harmonized Tariff Schedule of the United States
ILC	International Law Commission
KW	Kilowatt
NAFTA	North America Free Trade Agreement
NAFTA SAA	Statement of Administrative Action accompanying the NAFTA Implementation Act
SAA	Statement of Administrative Action accompanying the USMCA Implementation Act
T-MEC	Tratado entre México, Estados Unidos y Canadá
Trade Act	(United States) Trade Act of 1974
Transcript	Transcript of the Hearing in this dispute held in Washington, D.C. on November 10, 2021
TRQ	Tariff-rate quota
U.S.	United States of America
USITC	United States International Trade Commission
USMCA	United States-Mexico-Canada Agreement
USMCA Implementation Act	United States-Mexico-Canada Agreement Implementation Act, Pub. L. 116-113 (January 29, 2020)
USTR	United States Trade Representative
VCLT	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization

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I. INTRODUCTION

1. This dispute arises from the imposition by the United States of safeguard measures on imports from Canada of crystalline silicon photovoltaic cells (whether or not partially or fully assembled into other products) ("CSPV products") notwithstanding the provisions in the United States-Mexico-Canada Agreement (USMCA)[1] mandating an exclusion of imports from the USMCA Parties from safeguard measures, subject to certain specified conditions.

2. The safeguard measures that are the subject of Canada's claim consist of: (a) a tariff-rate quota (TRQ) on imports of CSPV cells not partially or fully assembled into other products, and (b) an increase in duties on imports of CSPV modules. The TRQ imposes additional tariffs of 30% ad valorem in the first year (February 7, 2018 through February 6, 2019) and 25% in the second year, 20% in the third year and 15% in the fourth year on imports of CSPV cells in excess of 2.5 gigawatts (GW) annually.[2] The additional tariffs on imports of CSPV modules were initially set at 30% ad valorem for the first year (February 7, 2018 through February 6, 2019) 25% ad valorem for the second year, 20% for the third year, and 15% for the fourth year. The rate in the fourth year was subsequently increased to 18% ad valorem for both the TRQ on cells and the duties on modules.[3]

II. PROCEDURAL HISTORY

3. On December 22, 2020, Canada requested consultations with the United States pursuant to USMCA Article 31.4, contending that the safeguard measures were imposed in violation of Articles 2 and 10 of the USMCA and that they nullify or impair benefits accruing to Canada directly or indirectly under the USMCA.[4]

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[1] The Panel recognizes that the agreement between the United States of America, the United Mexican States and Canada is referred to in the United States as United States-Mexico-Canada Agreement or "USMCA", is referred to in Canada as the Canada-United States-Mexico Agreement or "CUSMA" and is referred to in Mexico as Tratado entre México, Estados Unidos y Canadá "T-MEC." Because the United States is the responding party and therefore the United States' Secretariat is the "responsible Section of the Secretariat" under Article 2 of the Rules of Procedure for Chapter 31 (Dispute Settlement), the Panel will use the United States' reference "USMCA" when referring to the Agreement.

[2] Presidential Proclamation 9693 of January 23, 2018, To Facilitate Positive Adjustment to Competition From Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially to Fully Assembled into Other Products) and for Other Purposes – Federal Register/ Vol.83, № 17, Exhibit CAN-05.

[3] Presidential Proclamation 10101 of October 10, 2020, To Further facilitate Positive Adjustment to Competition From Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially to Fully Assembled Into Other Products) and for Other Purposes – Federal Register/ Vol.85, № 201, Exhibit CAN-29.

[4] Letter of request for consultations by Canada, page 2; Request for the Establishment of a Panel by Canada, para. 1.

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4. Consultations between the Parties took place on January 28, 2021, but the consultations failed to settle the dispute.[5]

5. On June 21, 2021,[6] Canada requested the establishment of a panel in accordance with USMCA Article 31.6, alleging that the proclamations establishing and modifying the safeguard measures (Proclamations 9693 and 10101) as well as Section 302 of the USMCA Implementation Act (19 U.S.C. 4552), are inconsistent with USMCA Articles 2.4.1, 2.4.2, 10.2.1, 10.2.2, 10.2.5, and 10.3.[7]

6. On August 4, 2021, in accordance with USMCA Article 31.9, Canada and the United States completed the panel composition process and established a panel of three members:

Chairman: Mario Matus Baeza

Members: Jennifer Hillman

Donald McRae.[8]

7. Canada filed its initial written submission on August 10, 2021; the United States responded with its initial written submission on September 15, 2021; and Mexico submitted its initial third-party submission on October 4, 2021. Canada's rebuttal submission was submitted on October 6, 2021, and the United States' rebuttal submission was filed on October 27, 2021.[9]

8. On November 10, in accordance with the *Rules of Procedure* in USMCA Article 31.11 and consistent with the timeline for the proceedings issued by the Panel, a hearing was held in Washington, DC with representatives of both parties and Mexico as a third party present.[10] All parties were permitted the opportunity to make opening and closing statements and all parties responded to questions from the Panel.

9. On November 12, 2021, the Panel issued a set of written questions to the parties, requesting elaboration on answers given during oral arguments as well as several additional questions.[11] Both parties responded to these questions on November 22, 2021.

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[5] Request for the establishment of a Panel by Canada, para. 2. The Panel refers to the parties to this dispute, Canada and the United States, as "parties" and to Mexico as a "third party" or "third-party participant." The Panel refers to the members of the USMCA as "Parties."
[6] While Canada's request for the establishment of a panel was received on June 18, 2021, June 18 was declared a federal holiday in the United States and the U.S. Section of the Secretariat was officially closed on that day. Therefore, pursuant to the *Rules of Procedure for Chapter 31 (Dispute Settlement),* the U.S. Section of the Secretariat informed the parties that June 21, 2021 is the effective date of the dispute.
[7] Request for the establishment of a Panel by Canada, para. 13.
[8] Notification of panel selection, joint letter from the parties, August 4, 2021.
[9] In accordance with USMCA Article 31.12, all submissions were filed electronically.
[10] Proceeding Timetable issued by the Panel on August 16, 2021.
[11] Panel Questions of 12 November 2021.

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10. On December 2, 2021, both parties submitted comments on the other parties' responses to questions from the Panel.

11. On January 3, 2022, the Panel presented its Initial Report to the parties in accordance with Article 31.17:1 of USMCA.

12. On January 18, 2022, both Canada and the United States submitted comments on the Initial Report.

13. On February 1, 2022, the Panel presented its Final Report.

III. FACTUAL BACKGROUND

14. The safeguard measures were imposed following an investigation by the United States International Trade Commission (USITC), the designated "competent investigating authority,"[12] which found that CSPV products were being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry producing an article like or directly competitive with the imported article.[13] The USITC also made the required findings with respect to the two conditions necessary for the application of safeguard measures to a USMCA Party: whether imports from Canada: 1) accounted for a substantial share of total imports and 2) contributed importantly to the serious injury caused by imports. The USITC made a negative finding with respect to both conditions.[14]

15. On January 23, 2018, the President of the United States issued Proclamation 9693 imposing the safeguard measures beginning on February 7, 2018. Notwithstanding the USITC's negative determination with respect to the two prerequisite conditions for imposition of a safeguard measure to a USMCA Party, the President proclaimed that the safeguard measures would be imposed on Canada. The Proclamation contained no explanation for not adopting the USITC's negative findings, stating simply that the President "determined after considering the USITC Report that imports of CSPV products from . . . Canada … account for a substantial share of total imports and contribute importantly to the serious injury or threat of serious injury found by the ITC."[15]

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[12] USMCA Article 10.1.

[13] USITC Report, Crystalline Silicon Photovoltaic Cells (Whether or not Partially or Fully Assembled into Other Products), Investigation No. TA-201-75, Publication 4739, November 2017 (USITC Publication 4739, November 2017), Exhibit CAN-07. There is no challenge in this dispute to the underlying finding that imports were causing serious injury to the domestic CSPV industry.

[14] USITC, Publication 4739, November 2017, p. 67, Exhibit CAN-07.

[15] Presidential Proclamation *9693*, January 23, 2018, para. 7, Exhibit CAN-05.

16. Canada objected to the imposition of the safeguard measures to its CSPV imports in light of the USITC's finding that imports from Canada did not account for a substantial share of total imports and did not contribute importantly to the serious injury.

17. On July 23, 2018, Canada requested consultations with the United States pursuant to Article 2006 of the NAFTA, contesting the application of the safeguard measures to Canada notwithstanding the obligation in NAFTA Chapter 8 to exclude Canadian imports unless they account for both a substantial share of total imports and contribute importantly to serious injury, with the USITC finding that neither condition had been met.[16] Canada's request for consultations also contended that the United States, in applying its safeguard measures to Canada, had failed to ensure that the safeguard measures would allow for reasonable growth in Canadian exports.[17] The United States did not respond to Canada's consultation request.[18] No request for the establishment of a panel under NAFTA Chapter 20 was made.

18. On July 1, 2020, the USMCA entered into force.

IV. ARGUMENTS OF THE PARTIES

19. Canada claims:[19]

a) The United States acted inconsistently with Article 10.3 of USMCA by modifying the competent investigating authority's negative injury determination with respect to CSPV products originating in Canada other than by review of a judicial or administrative tribunal.

b) The United States acted inconsistently with Article 10.2.1 of USMCA by failing to exclude imports from Canada from its safeguard measure on CSPV products.

c) The United States acted inconsistently with Article 10.2.5(b) of USMCA by imposing a safeguard measure that had the effect of reducing imports of Canadian CSPV products and not allowing for reasonable growth.

d) The United States acted inconsistently with Article 2.4.2 of USMCA by applying a customs duty on imports of CSPV products not in accordance with its Schedule; and

[16] Letter of request for consultations by Canada, July 23, 2018 (Exhibit CAN-74).
[17] Letter of request for consultations by Canada, July 23, 2018 (Exhibit CAN-74).
[18] Request for the establishment of a Panel by Canada, para. 10.
[19] Canada's Initial Written Submission, para. 134.

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e) Section 302 the *USMCA Implementation Act* (19 U.S.C. § 4552) is inconsistent, as such, with Article 10.3 of USMCA to the extent that it fails to entrust determinations of serious injury to the competent investigating authority, and it allows for negative injury determinations to be modified by the President.

20. The United States rejects Canada's claims arguing:

a) Canada's Article 10.2.1, 10.2.2, and 10.2.5(b) claims are outside the scope of Chapter 31 dispute settlement because they address a determination made before entry into force of the USMCA. As this determination was subject to the NAFTA, USMCA Chapter 31 does not allow a panel established under it to consider whether actual or proposed measures of a Party are inconsistent with NAFTA obligations. Accordingly, Canada's Article 10.2.1, 10.2.2, and 10.2.5(b) claims in this dispute are not properly before the Panel.

b) The President's determination to include imports of CSPV products from Canada in the solar safeguard measure is not inconsistent with USMCA Articles 2.4.2, 10.2.1, 10.2.2, 10.2.5(b), or 10.3; and

c) Section 302 of the USMCA Implementation Act is not inconsistent as such with Article 10.3 of the USMCA.[20]

21. Mexico, as a third-party participant, contended:

a) USMCA Chapter 31 (Dispute Settlement) applies when a Party considers that an "actual measure" of another Party is inconsistent with an obligation of the Agreement. Because the safeguard tariffs were "actual measures" applied to Canadian imports, the Panel has jurisdiction over the present dispute.

b) Articles 10.2.1 and 10.2.2 require a factual and legal determination demonstrating the satisfaction of both of the conditions in Article 10.2.1 (a) and (b) before a safeguard measure can be applied to a USMCA Party.

c) Determinations under Article 10.2.1 cannot be based on the likelihood of a surge in imports.

d) Determinations under Article 10.2 are "serious injury determinations" covered by Article 10.3 and therefore only the competent investigating authority specified in Article 10.1 can make the determination of whether the two conditions for the imposition of a safeguard have been met.

[20] U.S. Initial Written Submission, paras. 9-11.

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22. The detailed arguments of the parties are addressed in the Panel's findings below.

V. TERMS OF REFERENCE, STANDARD OF REVIEW, AND BURDEN OF PROOF

23. Article 31.7: Terms of Reference provides:

> ***1.*** *Unless the disputing Parties decide otherwise no later than 20 days after the date of delivery of the request for the establishment of a panel, the terms of reference shall be to:*
>
> *a. examine, in the light of the relevant provisions of this Agreement, the matter referred to in the request for the establishment of a panel under Article 31.6 (Establishment of a Panel); and*
>
> *b. make findings and determinations, and any jointly requested recommendations, together with its reasons therefor, as provided for in Article 31.17 (Panel Report).*
>
> ***2.*** *If, in its request for the establishment of a panel, a complaining Party claims that a measure nullifies or impairs a benefit within the meaning of Article 31.2 (Scope), the terms of reference shall so indicate.*

24. The disputing parties did not otherwise decide on terms of reference for the Panel. Accordingly, the Panel finds that its terms of reference are the examination of the matter referred to in Canada's Request for the Establishment of a Panel.[21] In that request, Canada noted the measures at issue to be the safeguard measures on CSPV products as established under Proclamation 9693 and as modified and continued under Proclamation 10101. Canada stated that the safeguard measure was based on the initial USITC determination of serious injury, its subsequent identification of unforeseen developments leading to CSPV imports in such increased quantities as to cause serious injury, and its mid-term determination and report.[22]

25. The parties agree that the role and obligations for this Panel are set forth in Article 31.13 of USMCA:

[21] The Panel notes that in para. 14 of its Request for the Establishment of a Panel, Canada claimed that the safeguard measures nullify or impair benefits accruing to Canada directly or indirectly under the USMCA. The Panel understands that Canada is claiming nullification and impairment as a consequence of the alleged breach of the USMCA and not as a separate claim. Canada Request for the Establishment of a Panel, filed on June 21, 2021.
[22] Canada Request for the Establishment of a Panel, para. 5.

26. Article 31.13: Function of Panels

> ***1.*** *A panel's function is to make an objective assessment of the matter before it and to present a report that contains:*
>
> *a. Findings of fact;*
> *b. determinations as to whether:*
> *(i) the measure at issue is inconsistent with obligations in this Agreement,*
> *(ii) a Party has otherwise failed to carry out its obligations in this Agreement,*
> *(iii) the measure at issue is causing nullification or impairment within the meaning of Article 31.2 (Scope), or*
> *(iv) any other determination requested in the terms of reference;*
> *c. recommendations, if the disputing Parties have jointly requested them, for the resolution of the dispute; and*
> *d. the reasons for the findings and determinations.*[23]

27. The parties also agree that in making that objective assessment of the matter before it, the Panel must, pursuant to USMCA Article 31.13.4, interpret the relevant provisions of 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." The parties also acknowledge that Article 31.13.2 provides that the findings, determinations, and recommendations of a panel shall not add to or diminish the rights and obligations of the Parties under the USMCA.

28. The parties declined to set forth any additional standard by which the Panel might assess whether the determination of the United States to apply its safeguard measures to Canada was "reasonable" or "correct" or "arbitrary," with the United States asserting that the proper framing of the question was whether or not Canada had put forth a *prima facie* case that the President's determination not to exclude Canadian CSPV imports from the safeguard measures was inconsistent with the USMCA.[24]

29. As such, this Panel is tasked with making an objective assessment of Canada's claims that the U.S. safeguard measures imposed on imports of CSPV products from Canada violated the USMCA, particularly Articles 10.2.1 and 10.2.2, Article 10.2.5, Article 10.3, and, as a consequence Article 2.4.2. The Panel understands the burden is on Canada as the complaining party to make a *prima facie* case of violation for each of its

[23] Canada's Initial Written Submission, para. 16; U.S. Initial Written Submission, para. 31.
[24] Transcript, p. 207-208.

claims.[25] The Panel regards a *prima facie* case as one based on evidence and legal argument by the complaining party which, in the absence of effective refutation by the defending party, requires a panel to rule in favor of the complaining party presenting the *prima facie* case.

VI. PANEL FINDINGS

30. The Panel will first, address the question of its jurisdiction over Canada's claims; second, consider whether the United States acted consistently with Article 10.2 in applying its safeguard measure to imports of CSPV products from Canada; third, consider whether the United States acted consistently with Article 2.4.2 in increasing its tariffs applicable to imports of CSPV products from Canada; and fourth, address Canada's other claims.

A. Jurisdiction

1. Background

31. The United States argues that Chapter 31 precludes Canada's claim that there has been a violation of Articles 10.2.1, 10.2.2 and 10.2.5(b) because Chapter 31 applies to actual or proposed measures of a Party that another Party considers are inconsistent with an "obligation of this Agreement." The United States points out that the USMCA was not in force when the actions Canada complains of were taken. The determinations made under Article 10 were made in January 2018 when the NAFTA was in force. Canada had the opportunity to bring its claims under the NAFTA at the time the determinations were made but chose not to do so. It cannot now bring what was a NAFTA claim under the USMCA. There is no provision in the USMCA for bringing the NAFTA claims under Chapter 31.[26]

32. Canada argues that the provisions in Article 10 on which it bases its claim are substantially identical to the provisions of NAFTA and it was intended that there be continuity from the NAFTA to the USMCA. Canada also argues that the safeguard measure was in place when the USMCA came into force and it was continued and modified by the President as part of the mid-term review.[27] In its Rebuttal Written

[25] Article 14 of the Rules of Procedure for USMCA Chapter 31 (Dispute Settlement) provides: Article 14: Burden of Proof Regarding Inconsistent Measures and Exceptions 1. A complaining Party asserting that a measure of another Party is inconsistent with this Agreement, that another Party has failed to carry out its obligations under this Agreement, that a benefit the complaining Party could reasonably have expected to accrue to it is being nullified or impaired in the sense of Article 31.2(b) (Scope), or that there has been a denial of rights under Article 31-A.2 (Denial of Rights) or Article 31-B.2 (Denial of Rights), has the burden of establishing that inconsistency, failure, nullification or impairment, or denial of rights.
[26] U.S. Initial Written Submission, para. 34.
[27] Canada's Initial Written Submission, para. 21.

Submission, Canada argues that the continuation of the safeguard measure under the USMCA was a "continuing breach." Canada also argues that in the event the Panel finds there was no continuing breach, Proclamation 10101 which was made following the mid-term review and after the USMCA came into force is itself an emergency action which falls within the scope of the USMCA dispute settlement.[28]

33. Article 31.2 provides that the dispute settlement provisions of Chapter 31 apply, *inter alia:*

> *(b) when a Party considers that an actual or proposed measure of another Party is or would be inconsistent with an obligation of this Agreement or that another Party has otherwise failed to carry out an obligation of this Agreement;*

34. In its Initial Written Submission Canada stated,[29]

> *This dispute concerns the failure of the United States to abide by its obligations under the Canada–United States–Mexico Agreement (CUSMA) by imposing safeguard measures on imports of crystalline silicon photovoltaic products (CSPV products) originating in Canada.*

35. Canada argues that "the United States ignored its USMCA obligations by refusing to exclude Canadian CSPV products from the safeguard measures."[30] Specifically, it claimed that this amounted to a violation of USMCA Article 10.2.1 and a consequential violation of USMCA Article 2.4.2.[31]

36. USMCA Article 10.2.1 provides:

> *Each Party retains its rights and obligations under Article XIX of the GATT 1994 and the Safeguards Agreement except those regarding compensation or retaliation and exclusion from an action to the extent that such rights or obligations are inconsistent with this Article. Any Party taking an emergency action under Article XIX and the Safeguards Agreement shall exclude imports of a good from each other Party from the action unless:*
>
> *a. imports from a Party, considered individually, account for a substantial share of total imports; and*

[28] Canada's Rebuttal Submission, para. 12.
[29] Canada's Initial Written Submission, para. 1
[30] Canada's Initial Written Submission, para. 7.
[31] Article 2.4.2 provides: "Unless otherwise provided in this Agreement, each Party shall apply a customs duty on an originating good in accordance with its Schedule in Annex 2-B (Tariff Commitments)".

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b. *imports from a Party considered individually, or in exceptional circumstances imports from Parties considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports.*

37. In the view of Canada, Article 10.2.1 imposes an obligation on a Party to exclude imports from another Party in the application of a safeguard measure unless conditions (a) and (b) are met.

38. In its Initial Written Submission, the United States argued that the determinations made by the President, which resulted in the application of the safeguard measure to Canada under Article 10.2.1, were made in 2018 when the safeguard measure was imposed. That happened before the USMCA entered into force and thus it was too late to bring a claim under the USMCA.

2. Panel's Analysis

a. Whether there is continuity between the NAFTA and the USMCA

39. Canada's first argument, set out in its Initial Written Submission, is that the substantive obligations on the United States that existed under the NAFTA were continued into the USMCA. It argues that the continuity of obligations between the NAFTA and the USMCA was recognized in USMCA Article 34.1.1 which referred to "the importance of a smooth transition" from the NAFTA to the USMCA.[32] Canada argues that the substantive obligations of the NAFTA continued to exist under the USMCA in "identical or nearly identical form".[33] Canada argues that, as a consequence, Article 34.1.1 provides textual support for taking into account facts and events that took place prior to the USMCA's entry into force in assessing the United States' compliance with its USMCA obligations. [34]

40. The United States rejects Canada's argument of continuity between the NAFTA and the USMCA, pointing out that USMCA Article 31.2(b) refers to measures that a Party considers inconsistent with an obligation of "this Agreement".[35] There is no reference to disputes concerning obligations under the NAFTA. Indeed, in Article 34, which is titled "Transitional Provision from NAFTA 1994", the only reference to dispute settlement is a reference to panel review under NAFTA Chapter 19.[36] Thus, there is nothing in the USMCA that extends dispute settlement to measures that were subject to the NAFTA.

[32] Canada's Initial Written Submission, para. 19.
[33] Canada's Initial Written Submission, para. 20.
[34] Canada's Rebuttal Submission, paras. 33-44; Canada's Responses to Questions from the Panel, paras. 7-8.
[35] U.S. Initial Written Submission, para. 34.
[36] USMCA Article 34.4.

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41. In the view of the Panel, the NAFTA and the USMCA are separate treaties. Indeed, upon the entry into force of the USMCA, the NAFTA came to an end, "but without prejudice to those provisions set forth in USMCA that refer to the provisions of NAFTA."[37] It would have been possible for the Parties to have inserted a provision in the USMCA providing for the continuation of all obligations under the NAFTA as obligations under the USMCA. But they did not do so. The Parties created self-standing USMCA obligations even though such obligations were stated in "identical or nearly identical form" to obligations under NAFTA. Where the Parties wanted to carry over specific the NAFTA obligations, such as NAFTA Chapter Nineteen, they did so explicitly in Article 34.

42. Equally, the Panel does not consider that the reference in Article 34.1 to "the importance of a smooth transition from NAFTA to CUSMA" implies continuity in obligations. Regardless of the abstract meaning or dictionary definitions that might be attached to the words "smooth transition," the Panel has difficulty in seeing how they can imply the incorporation of the substantive NAFTA obligations into the USMCA. A "smooth transition" is facilitated by clarity in the obligations under the Agreement and clarity in how the Parties are to carry them out. But this is not achieved by treating the words "smooth transition" as an implicit carryover of the NAFTA obligations into the USMCA when there are no other words in the USMCA doing that.

43. Accordingly, the Panel takes the view that the question of whether it has jurisdiction over disputes about measures taken before the USMCA came into force cannot be resolved by an assumption of continuity of the NAFTA obligations into the USMCA.

b. Whether there was a continuation of the safeguard measure

44. Canada' second argument is that while the imposition of the safeguard measure took place when the NAFTA was in force, "[t]he safeguard measure was continued and modified by the President, as part of the mid-term review, after CUSMA entered into force."[38] In its Rebuttal Submission, Canada elaborates on this argument, stating that the United States is in continuing breach of Articles 10.2.1, 10.2.2 and 10.2.5(b) because it has "maintained safeguard measures in the form of tariffs on imports of CSPV products originating from Canada".[39] Canada argues in the alternative that Proclamation 10101, under which the tariffs in the safeguard measure were modified, and proclaimed after

[37] Protocol replacing the North American Free Trade Agreement with the agreement between Canada, the United States of America and the United Mexican States, para 1.
[38] Canada's Initial Written Submission, para.21.
[39] Canada's Rebuttal Submission, para. 12. At the Oral Hearing Canada stated, "each instance that the United States imposes these measures on imports from Canada constitutes a violation of CUSMA." Transcript p. 11, 12 -14

the USMCA came into force, was also an emergency action subject to the requirements of Article 10.2.

45. The United States argues that the determination to include imports from Canada in the safeguard measure, which is the basis of Canada's claim, took place in 2018. Articles 10.2.1, 10.2.2 and 10.2.5(b) place obligations on a Party "at the time it is making the determination."[40] The United States rejects the Canadian argument that the use of the phrase "taking an emergency action" in Article 10.2.1 implies a continuing act, claiming that such an interpretation would suggest an ongoing obligation to evaluate whether the conditions for the exclusion from the safeguard measure exist.[41] The United States does not deny that that the safeguard measure is an actual measure that is in effect but, it argues, the question is whether the measure is inconsistent with the Agreement.[42]

46. In the view of the Panel, the fundamental difference between the parties in this case is over the scope of what constitutes the challenged "measure." Canada identifies the measure as the continuing application of a safeguard measure in Proclamation 9693 to Canada when, in Canada's view, Article 10.2.1 requires the exclusion of Canadian imports from the application of the measure. The United States, by contrast, argues that the measure complained of is the determination by the President that Canada was not to be excluded from the application of the safeguard measure, which entailed determinations under Article 10.2.1 paragraphs (a) and (b). Those determinations were made prior to the adoption of the safeguard measure and prior to the entry into force of the USMCA. Thus, they are not determinations that can be the subject of the USMCA dispute settlement.

47. The Panel starts its analysis of the parties' arguments on this point with Article 10.2.1 which makes two things clear. First, Parties are entitled to take an emergency action in accordance with GATT Article XIX and the WTO Safeguards Agreement. Second, when taking an emergency action, a Party must exclude imports from another Party unless certain conditions are met.

48. The parties focus on the meaning of the word "taking" in the phrase "taking an emergency action" in the second sentence of Article 10.2.1 but, in the view of the Panel, what is more critical is the meaning of "an emergency action," since the obligation to exclude imports from another Party under Article 10.2.1 is in respect of "an emergency action" under GATT Article XIX and the WTO Safeguards Agreement. Indeed, the United

[40] U.S. Initial Written Submission, paras. 34-35.
[41] U.S. Rebuttal Written Submission, para. 15.
[42] U.S. Rebuttal Written Submission, para. 17.

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States recognizes this when it says, "[t]he proper question is not whether 'taking' is continuous, but whether the 'emergency action' is."[43]

49. The nature of an emergency action can be ascertained from GATT Article XIX, which is titled "Emergency Action on Imports of Particular Products." Paragraph 1 (a) describes emergency action as follows:

> *If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.*

50. Thus, an emergency action consists of the suspension of specific WTO obligations, including tariff concessions, to particular imports provided certain conditions are met. The reference, then, in Article 10.2.1 to "taking an emergency action under Article XIX of GATT 1994 and the Safeguards Agreement" is a reference to suspending tariff concessions in respect of particular products.

51. USMCA Article 10.2.1, thus, both recognizes that the Parties have the right to suspend obligations, including tariff concessions, and adds the qualification that a Party taking such an emergency action shall exclude other USMCA Parties from the measure unless the conditions specified in (a) and (b) of that Article are met.

52. This is precisely what happened here. The United States determined that it had to take emergency action in respect of CSPV products to protect its domestic industry and did so on January 23, 2018, in Presidential Proclamation 9693. That Proclamation modified the scheduled tariff commitments in the Harmonized Tariff Schedule of the United States (HTSUS) in respect of CSPV products, imposing a higher tariff on those products. Canada's claim is that the Proclamation applied to Canadian products whereas, in its view, the conditions for the inclusion of Canada as a USMCA Party set out in Article 10.2.1 had not been met.

53. The United States' argument is that Canada's claim is with the determinations that Canada met the conditions of paragraphs (a) and (b) of Article 10.2.1 and thus should not be excluded from the application of the emergency action. These are

[43] U.S. Rebuttal Written Submission, para. 14.

determinations, the United States says, made before the USMCA came into force and thus cannot be the subject of the USMCA dispute settlement.

54. The Panel notes that while the application of Proclamation 9693 to Canada was a consequence of the determinations of the President with respect to paragraphs (a) and (b) of Article 10.2.1, it is not the fact of the determinations themselves that is the basis of Canada's claim. It is rather that Proclamation 9693 included imported products from Canada are now subject to tariffs. Certainly, Canada objects to the determinations, but it is the fact that the United States included Canada in Proclamation 9693 and applied the safeguard tariffs to Canadian products that is the foundation of the complaint. If the determinations had been made that Canada in fact fell within the scope of paragraphs (a) and (b) but nonetheless Canada was not included in the countries to which Proclamation 9693 applied, Canada would have had no complaint. The violation of Article 10.2.1 occurs because the emergency action was applied to Canadian imports.

55. The fact that it is the inclusion of Canada within the countries to which Proclamation 9693 applies that is the basis of Canada's claim is made clear in Canada's response to the Panel's question regarding the HTSUS where it said, "the Harmonized Tariff Schedule is part of the measures before the Panel in this dispute."[44] Although the United States argued that the HTSUS was not a measure,[45] it did say in its response to the Panel's questions,

> *The relevant provisions of the HTSUS are word-for-word identical to the Annex to Proclamation 9693, with the modifications made by Proclamation 10101, and are the mechanism by which the safeguard measure that Canada explicitly challenges, as determined by the President in the body of Proclamation 9693, is given legal force.*[46]

56. The determinations of the President in respect of paragraphs (a) and (b) certainly took place before the USMCA entered into force. But Proclamation 9693 and the relevant provisions of the HTSUS continued after the USMCA came into effect. They continued as a suspension of the bound tariff (which in Canada's case was zero) and the application of a tariff to CSPV imported products. That is the very nature of a safeguard measure. It is not a measure that operates just at the time that it is taken. It operates every time that it is applied to imports that would otherwise attract a lower tariff.

57. In the absence of a justification under Article 10.2.1 for the safeguard measure, Proclamation 9693 would be contrary to USMCA Article 2.4.2, which provides "Unless

[44] Canada's Responses to Panel Questions, para. 112.
[45] U.S. Comments on Canada's Responses to Questions from the Panel to the Parties, para. 2.
[46] U.S. Responses to the Panel's Questions, para. 6.

otherwise provided in this Agreement, each Party shall apply a customs duty on an originating good in accordance with its Schedule in Annex 2-B (Tariff Commitments)."Compliance with Article 10.2.1 is the basis for asserting that Article 2.4.2 has been complied with.

58. Thus, to comply with USMCA Article 2.4.2, a safeguard measure must meet the requirements under which it is permissible to apply the measure to a USMCA Party. It does not matter when the United States decided to adopt the safeguard measure. That could happen before or after the USMCA comes into force. But if a safeguard measure is to be applied to Canadian imports while the USMCA is in effect, then it has to be shown that the measure meets the requirements of Article 10.2.1.

59. The difference between the parties over what is the challenged measure is at the foundation of their difference over whether the term "taking an emergency action" applies only to the decision to take an emergency action or whether it implies a continuous act resulting in a "continuing breach." The parties both made reference to Article 14 of the ILC Articles on State Responsibility. The United States focused on paragraph 1 of that article which provides,

> *[t]he breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.*

60. Canada by contrast based its argument on paragraph 2 which provides,

> *The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.*

61. If the determinations of the President in respect of Article 10.2.1 are seen as the measures at issue, they may well fall within Article 14(1) of the ILC Articles on State Responsibility. They are acts that were completed but had continuing effects. However, if Proclamation 9693 and the HTSUS are seen to be the measures at issue, they would fall within the scope of Article 14(2) as measures having a continuing character. Like "legislative provisions incompatible with the treaty obligations of enacting State" which the ILC Commentaries referred to as an example of a continuing act,[47] Proclamation 9693 and the HSTUS remain in effect and are applied to products from Canada when they are imported into the United States.

[47] International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 60, para. 3 (2001)

62. In its Third-Party Submission, Mexico argued that[48]

> *a measure that would be inconsistent with the USMCA obligations, whether enacted before or after the entry into force of the Agreement, should have been eliminated or modified by the Parties to ensure full compliance with the Agreement on the date of the entry into force of the Agreement.*

63. Mexico did not refer to any specific provision of the USMCA requiring Parties to eliminate measures that are inconsistent with the USMCA before the entry into force of the Agreement, and the United States pointed out that there is no such provision.[49] It saw Mexico's statement as a version of the obligation to revisit determinations, which the USMCA does not provide for, and that in any event the determinations were consistent with the United States' obligations.[50]

64. While the Panel makes no comment on whether there was a general obligation to ensure that safeguard measures that would be inconsistent with the USMCA were to be eliminated before the entry into force of the Agreement, it is clear that if a tariff is applied while the USMCA is in force, that tariff has to be consistent with the terms of the USMCA. If a tariff is applied by a Party that is not in accordance with its Schedule to Annex 2-B of the Agreement, then the tariff must be justified by some other provision of the Agreement. That is the requirement of Article 2.4.2.

65. Thus, when the United States applies Proclamation 9693 to imported products from Canada after the USMCA has come into effect, it must be able to establish that Proclamation 9693 complies with Article 10.2.1. This does not require any "ongoing monitoring" as the United States suggests. It is just a matter of showing, when challenged, that a tariff is being applied in accordance with the terms of the USMCA.

c. Conclusion

66. If Canada considers that the tariff being applied to its products after the USMCA has come into effect does not comply with the United States' obligations under that Agreement, specifically because it has applied a tariff that is inconsistent with its obligation under Article 2.4.2 that cannot be justified under Article 10.2.1 (because it has failed to exclude imports from Canada from the US safeguard measure), then in accordance with USMCA Article 31.2(b) Canada can invoke the dispute settlement provisions of the USMCA.

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[48] Mexico's Third-Party Submission, para. 9.
[49] U.S. Comments on Canada's Responses to Questions from the Panel to the Parties, para. 16.
[50] See Transcript of Hearing of November 10, 2021, p. 113 – 119.

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67. This is what Canada has done, and the Panel concludes, therefore, that it has jurisdiction over this dispute.

68. In light of this conclusion, the Panel has no need to address Canada's argument that Proclamation 10101 also constitutes an emergency action.

B. Whether the United States Acted Consistently with Article 10.2 in Applying Its Safeguard Measure to Imports of CSPV products from Canada

1. Background

69. When it made its initial determination that CSPV products were being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry producing an article like or directly competitive with the imported article, the USITC also made findings as required by NAFTA Article 802, as codified in U.S. law, with respect to imports from Canada.[51]

70. NAFTA Article 802.1 provided as follows:

> *Each Party retains its rights and obligations under Article XIX of the GATT or any safeguard agreement pursuant thereto except those regarding compensation or retaliation and exclusion from an action to the extent that such rights or obligations are inconsistent with this Article. Any Party taking an emergency action under Article XIX or any such agreement shall exclude imports of a good from each other Party from the action unless:*
>
> *a. imports from a Party, considered individually, account for a substantial share of total imports; and*

[51] The NAFTA Implementation Act [formerly 19 U.S.C. § 3331 et seq.] provides:
(*a) In general*
If, in any investigation initiated under chapter 1 of title II of the Trade Act of 1974 [19 U.S.C. 2251 et seq.], the International Trade Commission makes an affirmative determination (or a determination which the President may treat as an affirmative determination under such chapter by reason of section 1330(d) of this title), the International Trade Commission shall also find (and report to the President at the time such injury determination is submitted to the President) whether—

1. imports of the article from a NAFTA country, considered individually, account for a substantial share of total imports; and
2. imports of the article from a NAFTA country, considered individually or, in exceptional circumstances, imports from NAFTA countries considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports.

b. *imports from a Party, considered individually, or in exceptional circumstances imports from Parties considered collectively, contribute importantly to the serious injury, or threat thereof, caused by import*s.[52]

71. The USITC found that imports of CSPV products from Canada "do not account for a substantial share of total imports and do not contribute importantly to the serious injury caused by the imports."[53] The USITC then went on to state that it had "accordingly" made a "negative finding" with respect to imports from Canada.[54]

72. In reaching its negative finding, the USITC relied on the factors set forth in NAFTA Article 802.2, as codified in U.S. law, regarding "substantial share" and "contribute importantly."[55]

73. NAFTA Article 802.2 provided:

In determining whether:

a. *imports from a Party, considered individually, account for a substantial share of total imports, those imports normally shall not be considered to account for a substantial share of total imports if that Party is not among the top five*

[52] The text of NAFTA Article 802.1 is virtually identical to the text of USMCA Article 10.2.1. The only difference between the two is the explicit reference in USMCA to the WTO Agreement on Safeguards, which had not come into force at the time the NAFTA was completed.
[53] USITC Publication 4739, November 2017, p. 67, Exhibit CAN-07. The USITC did not find exceptional circumstances that would warrant considering whether imports from Canada and Mexico collectively contribute importantly to the serious injury. USITC Pub. No. 4739, fn. 399. The President's proclamation treated imports from Canada separately from Mexican imports. No party has challenged the USITC's determination to treat imports from the two USMCA Parties individually.
[54] USITC, Publication 4739, November 2017, p. 67, Exhibit CAN-07.
[55] U.S. statutory law (19 U.S.C. § 4551) provides:
(b) Factors
(1) Substantial import share
In determining whether imports from a NAFTA country, considered individually, account for a substantial share of total imports, such imports normally shall not be considered to account for a substantial share of total imports if that country is not among the top 5 suppliers of the article subject to the investigation, measured in terms of import share during the most recent 3-year period.
(2) Application of "contribute importantly" standard
In determining whether imports from a NAFTA country or countries contribute importantly to the serious injury, or threat thereof, the International Trade Commission shall consider such factors as the change in the import share of the NAFTA country or countries, and the level and change in the level of imports of such country or countries. In applying the preceding sentence, imports from a NAFTA country or countries normally shall not be considered to contribute importantly to serious injury, or the threat thereof, if the growth rate of imports from such country or countries during the period in which an injurious increase in imports occurred is appreciably lower than the growth rate of total imports from all sources over the same period.
c) "Contribute importantly" defined
For purposes of this section and section 4552(a) of this title, the term "contribute importantly" refers to an important cause, but not necessarily the most important cause.

suppliers of the good subject to the proceeding, measured in terms of import share during the most recent three-year period; and

b. *imports from a Party or Parties contribute importantly to the serious injury, or threat thereof, the competent investigating authority shall consider such factors as the change in the import share of each Party, and the level and change in the level of imports of each Party. In this regard, imports from a Party normally shall not be deemed to contribute importantly to serious injury, or the threat thereof, if the growth rate of imports from a Party during the period in which the injurious surge in imports occurred is appreciably lower than the growth rate of total imports from all sources over the same period.*[56]

74. In conducting its investigation, the USITC established its period of investigation to be the five-year period prior to the 2017 initiation of its investigation. Accordingly, the USITC collected data on imports and import market share for the years 2012 through 2016. In conducting its assessment of imports, the USITC examined the import data on both a volume and a value basis using different sets of data. The first data set examined imports from the world using as the country-of-origin the location of cell manufacturing.[57] The second set of data examined total imports using a country-of-origin for Canada and Mexico based on module manufacture location and a country-of-origin for all other sources based on cell manufacture location.[58] The USITC reported rankings for the top ten largest sources of imports under both data sets for each year of the five-year period and broke out data and import shares for 13 importing countries.[59]

75. With respect to "substantial share," the USITC noted that Canada was not among the top five suppliers of imports of CSPV products during the three most recent years, finding instead that imports from Canada, when examined on a volume basis, were the tenth largest source of imports in 2012 and 2013, the ninth largest source in 2014, the seventh largest source in 2015 and the tenth largest source in 2016.[60] When examined

[56] The Panel notes that the text of NAFTA Article 802.2 is identical to the text of USMCA Article 10.2.2 and that the U.S. statutory text is slightly different from the treaty texts. U.S. law uses the word "considered" in place of the word "deemed" and uses the word "increase" instead of the word "surge" found in NAFTA Article 802.2. NAFTA Article 805 contained a definition of "contribute importantly" but USMCA Chapter 10 does not contain a definition for the phrase "contribute importantly."
[57] The import data examined using cell manufacture location as the country-of-origin was summarized in the USITC's Table II-1, p. II-2 through II-5, USITC, Publication 4739, November 2017 (Exhibit CAN-07).
[58] The import data examined using country-of-origin for NAFTA countries based on module manufacture location and a country-of-origin for all other sources based on the cell manufacture location was summarized in Table II-2, p. II-7 through II-10, USITC, Publication 4739, November 2017, Exhibit CAN-07.
[59] USITC, Publication 4739, November 2017, Table II-1 and Table II-2 Exhibit CAN-07. The Panel notes that the country-specific data was redacted from the public version of the USITC Report for all countries except China and Taiwan in Table II-1 and was redacted for all countries in Table II-2, while the figures for total imports were included in both Tables. The country rankings for the 10 largest sources of imports were set forth in their entirety in Table II-2.
[60] USITC, Publication 4739, November 2017, pp. 67-68 and Table II-2, Exhibit CAN-07.

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on a value basis, the USTIC found that Canadian imports were even less substantial, ranking as the eleventh largest source of imports in 2014 and 2015 and the twelfth largest source in 2016, the final year of the period of investigation.[61] The USITC import data using module manufacture location as the country-of-origin for Canadian and Mexican imports showed that the five largest sources of imports during any of the five years between 2012 and 2016 were Taiwan, China, Malaysia, Mexico, the Philippines, Korea, and Singapore.[62] The data using cell manufacture as the country-of -origin for all imports showed that imports from Taiwan alone accounted for 49% of imports in 2012, 68.1% in 2013 and 45.6% in 2014 before Taiwan was displaced by China as the largest source of imports in 2015, with China alone accounting for 39.3% of total imports.[63]

76. The USITC also noted that neither of the two scenarios contemplated in the Statement of Administrative Action (NAFTA SAA) accompanying the NAFTA that would justify departing from the "normal" requirement that a country's imports need to be among the top five suppliers to be considered "substantial" were present with respect to imports from Canada.[64] The NAFTA SAA states:

> *As the use of the modifier "normally" makes clear, there will likely be instances when it is appropriate for the ITC to find that a NAFTA country accounts for a substantial share of total imports even though the country is not one of the top five suppliers. For example, when there is little difference between the share of a fifth-place supplier and those that fall below fifth place, or there are many suppliers, each accounting for a substantial share, the sixth- or seventh-place supplier may nevertheless account for a substantial share of total imports.*[65]

77. The USITC rejected the notion that there was little difference between Canada's imports and the share of the fifth-place supplier or that there were many suppliers accounting for a substantial share.

78. With respect to the determination of whether imports of CSPV from Canada "contribute importantly" to the serious injury, the USITC examined the actual volume and value of imports from Canada, the changes in those values over the five-year period investigated, and the Canadian share of total imports. Based on that examination, the USTIC found that imports from Canada did not "contribute importantly" to the serious injury.[66] The USITC's data on Canadian imports was redacted from the public version of

[61] USITC Publication 4739, November 2017, p.68 fn. 389, Exhibit CAN-07, drawn from official import statistics.
[62] Table II-2, p. II-9, USITC, Publication 4739, November 2017, Exhibit CAN-07.
[63] USITC, Publication 4739, November 2017, Table II-1, Exhibit CAN-07.
[64] USITC, Publication 4739, November 2017, fn. 388, Exhibit CAN-07.
[65] Statement of Administrative Action accompanying the NAFTA Implementation Act, 116 (1993), Exhibit USA-13.
[66] USITC, Publication 4739, November 2017, pp. 5, 68-69, Exhibit CAN-07.

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the USITC's report.[67] In this dispute, Canada provided confidential data that shows Canadian imports during the first year of the USITC's period of investigation (2012) to be [****]kW compared to total 2012 imports of 2,163,073 ([****]% of total imports), rising the following year to [****]kW compared to total 2013 imports of 3,100,220 kW ([****]% of total imports), with Canadian imports [****] in 2015 at [****]kW before falling in 2016 to [****]kW out of total imports of 12,815,100 kW ([****]% of total imports).[68]

79. The USITC acknowledged that the rate of growth of Canadian imports exceeded the rate of growth for global imports between 2012 and 2015 but noted that the rate of increase was "a function of the very low level of imports from Canada in 2012."[69] In finding that imports from Canada did not contribute importantly to serious injury, the USITC also noted that imports from Canada declined between 2015 and 2016 while global imports continued to increase.[70] The USITC summed up its "contribute importantly" finding as follows:

> *Despite the larger growth rate for imports from Canada relative to global imports, given the relatively small share of total imports accounted for by imports from Canada, the relatively small change in the Canadian industry's import share over the POI, and the more modest level and change in the level of imports from Canada, particularly relative to total imports from all sources over the POI, we find that imports from Canada considered individually do not contribute importantly to the serious injury caused by imports.*[71]

80. The USITC's determination that imports from Canada did not account for a substantial share of imports and did not contribute importantly to the serious injury was reached by a majority of the USITC commissioners and was set forth as the determination of the USITC. Included in the report was a footnote containing a dissenting opinion by one commissioner, Chairman Rhonda Schmidtlein, finding that Canadian imports did constitute a substantial share and did contribute importantly to the serious injury.

81. The USITC's report, including its finding that CSPV imports from Canada do not account for a substantial share of total imports and do not contribute importantly to the serious injury caused by imports and the dissenting footnote was transmitted to the President on November 13, 2017.

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[67] USITC, Publication 4739, November 2017, Table II-2, Exhibit CAN-07 (noting total imports). The data for Canada specifically is confidential.
[68] Canadian import data from Exhibit CAN-85 (Confidential Information); Total import volumes from Table II-2, USITC, Publication 4739, November 2017, Exhibit CAN-07. Pursuant to Appendix 1.6 of the Chapter 31 Rules of Procedure preventing the disclosure of confidential information, all confidential information has been removed from this paragraph.
[69] USITC, Publication 4739, November 2017, p. 69, Exhibit CAN-07.
[70] USITC, Publication 4739, November 2017, p. 69, Exhibit CAN-07.
[71] USITC, Publication 4739, November 2017, p. 69, Exhibit CAN-07.

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82. On January 23, 2018, the President issued Proclamation 9693 imposing safeguard measures on CSPV imports entered after February 7, 2018. With respect to imports from Canada, the President noted that the USITC had made a negative finding as to whether imports from Canada account for a substantial share of total imports and contribute importantly to the serious injury caused by imports.[72] The President did not adopt the USITC's negative determination, stating without further explanation, "Pursuant to section 312(a) of the NAFTA Implementation Act (19 U.S.C. 3372(a)), I have determined after considering the USITC Report that imports of CSPV products from each of Mexico and Canada, considered individually, account for a substantial share of total imports and contribute importantly to the serious injury or threat of serious injury found by the USITC."[73]

83. The President's Proclamation modified subchapter III of chapter 99 of the HTSUS to increase the tariffs applicable to CSPV products and to establish a tariff-rate quota (TRQ) on CSPV imports in the amounts specified in Annex I to the Proclamation. The TRQ portion of the safeguard measure imposes additional tariffs of 30% in the first year, 25% in the second year, 20% in the third year and 15% in the fourth year on imports of CSPV cells in excess of 2.5 gigawatts (GW). The safeguard measure also imposes additional tariffs of 30% in the first year, 25% in the second year, 20% in the third year, and 15% in the fourth year on imports of CSPV modules. As a result of the President's determination that imports from Canada account for a substantial share of total imports and contribute importantly to the serious injury, the increased tariffs were applied to imports of CSPV modules from Canada as of the effective date of the Proclamation, February 7, 2018. The President's Proclamation applied the safeguard measures to Canadian imports in the same manner and amount as applied to imports from all other sources. However, because there was no production of CSPV cells in Canada, the TRQ did not impact Canadian exports.[74]

84. Under United States domestic law, the USITC is required to prepare a mid-term report to the President and the Congress on the results of its monitoring of developments with respect to the domestic industry since the imposition of the safeguard measure, including information concerning the progress and specific efforts made by workers and firms in the domestic industry to make a positive adjustment to import competition.[75] The USITC issued its mid-term monitoring report on February 7, 2020.[76]

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[72] Presidential Proclamation 9693, January 23, 2018, para. 3, Exhibit CAN-05.
[73] Presidential Proclamation 9693, January 23, 2018, para. 7, Exhibit CAN-05.
[74] USITC, Publication 4739, November 2017, p. I-3, fn. 15, Exhibit CAN-07; Canada's Initial Written Submission, para. 34.
[75] Section 204(a) of the Trade Act of 1974 (codified at 19 U.S.C. § 2254(a)), Exhibit CAN-02.
[76] USITC Publication 5021, February 2020, p. I-1, Exhibit CAN-23.

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85. After receiving the USITC mid-term report and an additional USITC report responding to a December 6, 2019 letter from the U.S. Trade Representative (USTR) for probable economic effects advice regarding an increase in the level of the TRQ, the President issued Proclamation 10101 on October 10, 2020. The Proclamation: a) removed the exclusion for certain CSPV modules known as bifacial panels that USTR had used the discretion provided in Proclamation 9693 to exclude from the coverage of the safeguard measures, and b) increased the tariff rate applicable to CSPV products in the fourth year of the safeguard from 15% to 18%.[77] As a result of Proclamation 10101, imports of Canadian bifacial panels were subject to the safeguard measures and all Canadian CSPV products became subject to the higher fourth year duties of 18%.

2. Panel's Analysis

86. Canada contends that the CSPV safeguard measures are inconsistent with the obligations of the United States under Articles 10.2.1 and 10.2.2 of the USMCA because the United States has failed to exclude imports from Canada from its safeguard measure despite Canada's contention and the USITC's finding that imports from Canada did not account for a substantial share of imports and did not contribute importantly to the serious injury caused by imports.

87. As noted above, USMCA Article 10.2.1 provides:

> *Each Party retains its rights and obligations under Article XIX of the GATT 1994 and the Safeguards Agreement except those regarding compensation or retaliation and exclusion from an action to the extent that such rights or obligations are inconsistent with this Article. Any Party taking an emergency action under Article XIX and the Safeguards Agreement shall exclude imports of a good from each other Party from the action unless:*
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> *a. imports from a Party, considered individually, account for a substantial share of total imports; and*
>
> *b. imports from a Party considered individually, or in exceptional circumstances imports from Parties considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports.*

88. The parties agree that the word "shall" in the second sentence of the chapeau conveys a mandatory obligation for a USMCA Party taking a safeguard action to exclude imported goods originating in another USMCA Party unless both of the two conditions of "substantial share of total imports" and "contribute importantly to the serious injury, or threat thereof" are satisfied.[78]

[77] Presidential Proclamation 10101, October 10, 2020, Exhibit CAN-29.
[78] Canada's Initial Submission, para. 89, and para. 91, U.S. Initial Written Submission, para. 99 and Canada's Rebuttal Written Submission para. 56.

89. Article 10.2.2 sets forth the factors to be used in making the "substantial share" and "contribute importantly" determinations. It provides:

> *In determining whether:*
>
> a. *imports from a Party, considered individually, account for a substantial share of total imports, those imports normally shall not be considered to account for a substantial share of total imports if that Party is not among the top five suppliers of the good subject to the proceeding, measured in terms of import share during the most recent three-year period; and*
>
> b. *imports from a Party or Parties contribute importantly to the serious injury, or threat thereof, the competent investigating authority shall consider such factors as the change in the import share of each Party, and the level and change in the level of imports of each Party. In this regard, imports from a Party normally shall not be deemed to contribute importantly to serious injury, or the threat thereof, if the growth rate of imports from a Party during the period in which the injurious surge in imports occurred is appreciably lower than the growth rate of total imports from all sources over the same period.*

90. There is some slight variance in the wording the parties use to describe the role that the factors set out in Article 10.2.2 play, with the United States claiming they provide "guidance in interpreting Article 10.2.1(a) - (b)," Canada stating that Article 10.2.2 "sets out how to determine whether the conditions of Article 10.2.1 (a) and (b) are met," and Mexico, finding a somewhat stronger obligation, stating that the conditions in Article 10.2.1 "must be examined based on the factors provided in Article 10.2.2(a) and (b)."

91. The United States argues that USMCA Articles 10.2.1 and 10.2.2 do not apply to the President's determination to include imports from Canada because the USMCA was not in force at the time of the President's initial determination.[79]

92. As noted above, the Panel considers that whether the United States is in violation of USMCA Article 2.4.2 by applying its safeguard measure to imports of CSPV products from Canada depends on whether the safeguard measure complies with the requirements for taking safeguard measures in USMCA Article 10. This requires an assessment of whether the United States acted consistently with Articles 10.2.1 and 10.2.2. It is no answer for the United States to claim that the USMCA was not in force at the time the decision to take the safeguard measures was made. If the safeguard

[79] U.S. Initial Written Submission, para. 96.

measure cannot be shown to be consistent with Article 10, then there is no right under the USMCA to apply that measure.

93. Moreover, the fact that the decision to impose the safeguard measure was taken when the NAFTA was in force poses no hardship or unfairness on the Parties. The actions of the United States authorities taken at that time can still be tested by reference to what is required under Article 10. This is not a case where the criteria that were being applied under the NAFTA were different from those applicable under the USMCA today. Indeed, as already pointed out, the provisions under the NAFTA relating to the taking of safeguard measures are identical to those under the USMCA. Thus, the data and analysis conducted by the USITC under the NAFTA for assessing "substantial share of total imports" required looking at the same data for the volume and value of imports from Canada compared to the imports from all sources and the same assessment of whether Canada ranked among the top five suppliers under the NAFTA as the USITC would have done under the USMCA. Similarly, because the factors for determining whether imports from Canada contribute importantly are the same under the NAFTA as under the USMCA, there is no additional or different data the USITC would need to have collected or any different analysis that would have been done had the USITC been making a determination under the USMCA.

94. Accordingly, the Panel will now address whether, in taking the safeguard measure set out in Proclamation 9693, the United States acted consistently with its obligations under USMCA Articles 10.2.1 and 10.2.2

a. Whether Canadian imports account for a substantial share of total imports

95. Canada contends that there is no data or evidence supporting a determination that its imports accounted for a substantial share of total imports. Canada emphasizes that the language of 10.2.2 (a) is clear—that imports "normally shall not be considered to account for a substantial share of total imports if that Party is not among the top five suppliers of the good subject to the proceeding, measured in terms of import share during the most recent three-year period." Canada claims that because its imports do not figure in the top five supplying countries, it does not meet the standard for "substantial share" set forth in Article 10.2.2(a).[80] Canada notes that its imports were never in the top five supplying countries and that its share of imports during the three-year period preceding the imposition of the safeguard measure was at most 2.3%.[81]

96. The United States does not dispute that Canada's imports were not among the top five suppliers.[82] As noted, the record indicates that during the period of investigation used by the USITC, 2012-2016, by volume, Canada's imports were the tenth largest

[80] Canada 's Initial Written Submission, para. 96.
[81] Canada's Rebuttal Written Submission, para. 65.
[82] U.S. Initial Written Submission, para. 106.

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source of imports in 2012 and 2013, the ninth largest source in 2014, the seventh largest source in 2015 and the tenth largest source in 2016.[83]

97. Because the record is clear and there is no dispute between the parties, the Panel finds that Canada was not among the top five suppliers of CSPV imports during the entire period of investigation or during the most recent three-year period of the investigation. Therefore, the threshold question before the Panel is whether the United States has demonstrated that imports of CSPV products from Canada fall outside of the "norm" contemplated in Article 10.2.2(a). If they do not, then the language of 10.2.2(a) that imports "normally *shall not* be considered to account for a substantial share" dictates a negative finding with respect to imports from Canada and obligates the United States to exclude Canadian CSPV imports from its safeguard measures.[84]

98. In examining the use of the word "normally" in Article 10.2.2(a), the United States notes the definition as meaning "under normal or ordinary conditions; as a rule, ordinarily" and claims that "'[N]ormally' in Article 10.2.2(a) clarifies that there may be instances in which a USMCA Party accounts for a 'substantial share of imports' even though it is not one of the top five suppliers."[85] The United States adds that "Article 10.2.2(a) does not enumerate what these circumstances are."[86]

99. The Panel agrees with the United States on the assessment of the word "normally" but notes that while Article 10.2.2(a) does not spell out what circumstances might justify a departure from the norm of including only those suppliers in the top five, the United States' Statement of Administrative Action (SAA) accompanying the NAFTA and the USMCA does provide guidance on when a departure from the "norm" was contemplated.[87] The introduction to the USMCA SAA makes clear the role that Statements of Administrative Action play: "As is the case with Statements of Administrative Action submitted to the Congress in connection with implementing bills for other free trade agreements approved under trade promotion authority procedures, this Statement represents an authoritative expression by the Administration concerning

[83] USITC, Publication 4739, November 2017, p. 68, Exhibit CAN-07.
[84] USMCA Art. 10.2.2(a) (emphasis added).
[85] U.S. Initial Written Submission, para. 101. The other parties appear to agree with the United States' interpretation of the word "normally" as well. See Mexico's Third Party Submission, para. 13; Canada's Rebuttal Written Submission, para. 58
[86] U.S. Initial Written Submission, para. 101.
[87] Statement of Administrative Action accompanying the NAFTA Implementation Act, 116 (1993), Exhibit USA-13. The United States recognized the relationship between the SAA language and the word "normally" appearing in Article 10.2, noting USITC Chairman Schmidtlein's statement that the very large rates of increase [in imports from Canada] "warrant the use of the flexibility envisioned in the SAA." The United States added that "the Chairman's reference to the 'flexibility' envisioned in the Statement of Administrative Action related to the use of the term 'normally' in U.S. law implementing NAFTA Article 802.2(2)." U.S. Initial Written Submission, paras. 106-107.

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its views regarding the interpretation and application of the Agreement, both for purposes of U.S. international obligations and domestic law."[88]

100. The SAA states:

> *As the use of the modifier "normally" makes clear, there will likely be instances when it is appropriate for the ITC to find that a NAFTA country accounts for a substantial share of total imports even though the country is not one of the top five suppliers. For example, when there is little difference between the share of a fifth-place supplier and those that fall below fifth place, or there are many suppliers, each accounting for a substantial share, the sixth- or seventh-place supplier may nevertheless account for a substantial share of total imports.*[89]

101. The Panel reads the SAA as suggesting that the circumstances under which the United States can consider non-top five imports to constitute a "substantial share" are when the volume of imports from a sixth or seventh place supplier is very close to the volume of the fifth place supplier or when there are many suppliers with roughly comparable shares such that there is little distinction between the role played by the fourth or fifth place suppliers compared to the sixth or seventh place suppliers.

102. The Panel finds no evidence on the record to suggest that either of these scenarios were present in this case, or that there were any other circumstances justifying a departure from the USMCA's clear reliance on the top five suppliers as the defining criteria for "substantial share." As was noted, for three out of the five years under investigation, Canada was only the tenth largest supplier out of the top thirteen countries whose data was individually reported by the USITC.[90] Reaching a level of tenth largest out of those top 13 suppliers does not bring imports from Canada into the top five or even particularly close to the top five. In only one year, 2015, did Canada reach seventh place, but it dropped back down to tenth place in the final year of the investigation (2016). Canada's average place over the three most recent years was ninth on a volume basis and eleventh on a value basis.

103. Nor is there any evidence on the record demonstrating that there were many suppliers accounting for substantial shares close to that of the fifth-place suppliers. While much of the specific data for import shares is confidential, what is known when

[88] The Implementation Act For the Agreement Between the United States of American, the United Mexican States, and Canada (USMCA), Statement of Administrative Action 1, Exhibit CAN-81.
[89] Statement of Administrative Action accompanying the NAFTA Implementation Act, 116 (1993), Exhibit USA-13. Virtually identical language appears in the Statement of Administrative Action accompanying the USMCA. The Implementation Act For the Agreement Between the United States of American, the United Mexican States, and Canada (USMCA), Statement of Administrative Action 24, Exhibit CAN-81. The Panel observes that the use of the term "for example" suggests that the two scenarios set forth in the SAA are non-exhaustive.
[90] USITC, Publication 4739, November 2017, Table II-2, Exhibit CAN-07.

looking at imports based on cell manufacture as the country of origin is that the top suppliers commanded substantial shares of total imports, with Taiwan as the number one supplier in 2012 with 49.3% of total imports, 2013 with 68.1% of total imports and 2014 with 45.6% of total imports.[91] China started as the number two supplier before becoming the top supplier in 2015, capturing a substantial share of total imports in the process. In the most recent three-year period, China's imports accounted for 27.6%, 39.3% and 21.2% of total imports, respectively.[92] Canada's import share, albeit based on a different rule of origin, still averaged less than 2% over the period of investigation.[93] The President's proclamation contained no explanation of why that less than 2% figure and average ninth-place supplier position demonstrates that Canada had achieved a "substantial share" of total imports, nor why a departure from the top-five supplier norm was justified.

104. In reaching its finding that Canadian CSPV imports do not account for a "substantial share" of total imports, the USITC came to the same conclusion regarding the lack of a basis for departing from the norm, stating "[N]either of the scenarios contemplated by the NAFTA SAA as possible reasons why the Commission might find that imports from a NAFTA country account for a substantial share of total imports even though the NAFTA country is not one of the top five suppliers is present in this case."[94]

105. The United States cumulatively makes four claims to support both the departure from the top-five supplier norm and its underlying assertion that Canadian imports accounted for a substantial share of total imports: (1) that Canada was consistently among the top 10 sources of imports during the three-year period preceding the initiation of the investigation; (2) the absolute U.S. import volume from Canada increased in all but one year of the period of investigation, (3) the rates of growth in CSPV imports from Canada exceeded the corresponding global growth rate for imports between 2012 and 2015 and (4) the fact that one of the Canadian producers, Canadian Solar, ranks among the world's top producers of CSPV modules, with substantial production of CSPV cells and modules in China.[95]

106. The Panel does not find persuasive the claim that because Canada was among the top 10 suppliers, it should somehow be considered "close enough" to being in the top five to justify a departure from the norm or a finding that, despite the explicit reference to "top five suppliers" in Article 10.2.2(a), the text can be stretched so far as to cover suppliers that are twice as far from the top as the text itself provides for.

107. Regarding the reference to the increase in the absolute volume in imports, the Panel does not see the relevance in increases in absolute volumes in and of themselves.

[91] USITC, Publication 4739, November 2017, Table II-1, Exhibit CAN-07.
[92] USITC, Publication 4739, November 2017, Table II-1, Exhibit CAN-07.
[93] Canada's Rebuttal Written Submission, para. 65.
[94] USITC, Publication 4739, November 2017, fn. 388, Exhibit CAN-07.
[95] U.S. Initial Written Submission, paras. 106, 107 and 112.

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The criteria set forth in Article 10.2.1(a) is a relative one—what is the volume of imports from Canada relative to the volume of imports from all other suppliers. The test is whether Canadian imports account for a substantial share of total imports.[96] The fact that the absolute volume of Canadian imports rose from their very small base in 2012 is not relevant unless that increase vaulted Canada into the top five group of suppliers. It did not and so cannot provide a basis to depart from the norm or to reach a determination that imports from Canada accounted for a substantial share of total imports.

108. The claim that because the rate of growth in CSPV imports from Canada exceeded the rate of growth for global imports, the top-five norm can be departed from is also unavailing. [97] The Panel understands the "substantial share of total imports" test to require that imports have *already reached* the level of "substantial" at the time the determination is made as to whether imports meet the two conditions set forth in Article 10.2.1. The fact that "substantial share" must be judged by what has already happened is underscored by the explicit temporal reference in Article 10.2.2(a): "those imports normally shall not be considered to account for a substantial share of total imports if that Party is not among the top five suppliers of the good subject to the proceeding, measured in terms of *import share during the most recent three-year perio*d." Therefore, the fact that imports from Canada were growing at a faster pace than global imports might result in imports from Canada becoming substantial in the future, but it would not impact the share that Canadian imports had already attained during the requisite most recent three-year period.

109. The contention that because Canadian Solar was a very large global producer, the United States could depart from the top-five norm and deem Canadian imports to be "substantial" fails for similar reasons. While it is possible that Canadian Solar could *in the future* increase its shipment of CSPV modules made with imported CSPV cells, such later-in-time imports would not change the fact that Canadian imports were not among the top five suppliers during the period of investigation.

110. Moreover, Canada noted that many of the United States' claims about the size and potential of Canadian Solar were based on global production numbers, not CSPV products made in Canada.[98] In acknowledging the truth in Canada's assertion, the United States also explicitly noted that the concern with respect to Canadian Solar was their "potential and incentive to use the NAFTA rules-of-origin to gain duty-free access

[96] USMCA Art. 10.2.1(a).
[97] The United States appears to justify its departure from the top-five norm largely in reliance on the dissenting opinion of USITC Chairman Schmidtlein, which in turn relies on the large rates of increase in Canadian imports as the justification for departing from the normal requirement ("these very large rates of increase warrant the use of the flexibility envisioned in the SAA . . ."). U.S. Initial Written Submission, paras. 106-107. For the reasons stated above, the Panel does not find that large rates of growth in import volume can form the basis for a determination that imports account for a substantial share of total imports.
[98] Canada's Rebuttal Submission, para. 68.

to the U.S. market for CSPV modules. . ."[99] The United States asserted that this "fact . . . supported a finding that imports from Canada constituted a substantial share of imports." The Panel does not consider that "potential and incentive" for imports in the future can form a basis for a finding that Canadian imports constituted a substantial share of imports during the most recent three-year period of the investigation. As noted below, the USMCA Parties included a separate mechanism in Article 10.2.3 under which future surges in imports could be addressed.

b. Whether Canadian imports contributed importantly to the serious injury

111. The Panel notes at the outset that the parties agree that, in applying its CSPV safeguard measures to imports from Canada, the United States was required to demonstrate both that imports from Canada accounted for a substantial share of total imports *and* that Canadian imports "contribute importantly" to the serious injury.

112. Canada claimed that, as the USITC found, its very low level of imports and its small and relatively constant share of total imports over the period of investigation demonstrates that CSPV products originating in Canada do not contribute importantly to the serious injury.[100] For Canada, the President's inclusion of Canada in the safeguard measures in the absence of evidence supporting a positive finding of "contribute importantly" is contrary to Article 10.2.1 of USMCA.[101]

113. The United States made four claims in support of its contention that imports of CSPV products from Canada contributed importantly to the serious injury: 1) that there had been a large increase in the absolute volume of imports from Canada; 2) that imports from Canada had increased their U.S. market share from "virtually zero" at the beginning of the period to a "certain percentage" in 2015; 3) that Canadian imports had a larger rate of growth relative to global imports; and 4) there was a significant likelihood of a surge of imports into the U.S. market from Canada at a time when the U.S. industry was in a very fragile state.[102]

114. The Panel begins by noting that the word "normally" also appears in the factor for determining "contribute importantly" but in a different context from its use in determining "substantial share." First, while "normally" applies to the single criterion set forth in the "substantial share" factor of being among the top-five suppliers, the criteria for determining "contribute importantly" consist of specific factors introduced by the phase "such factors as. . ." The Panel agrees with the United States that the list of factors for determining "contribute importantly" is a non-exhaustive one[103] that permits the United States to bring in other factors while requiring that at least the

[99] U.S. Rebuttal Written Submission, para. 95.
[100] Canada's Initial Written Submission, para. 96.
[101] Canada's Initial Written Submission, para. 96.
[102] U.S. Initial Written Submission, paras. 108, 109, 110, 114.
[103] U.S. Initial Written Submission, para. 102.

factors specifically included in Article 10.2.2(b) (the change in the import share and the level and change in the level of imports) must be considered.

115. The word "normally" appears only in the second sentence of Article 10.2.2(b), is connected to the first sentence by the phrase "in this regard," and sets forth the norm that if the growth rate of imports from Canada was appreciably lower than the growth rate of imports from all sources, then Canada would "normally" not be considered to be contributing significantly to the serious injury. The Panel views the word "normally" in this context as suggesting that in certain instances, countries with an appreciably lower rate of import growth than the rate for global imports can nonetheless be found to be contributing importantly to serious injury. This reading is consistent with the SAA that notes that imports from a Party will normally not be considered to contribute importantly if the growth rate of imports from such country during the period in which the injurious increase in imports occurred is appreciably lower than the growth rate of total imports from all sources. The SAA adds that the word "normally" means that an appreciably lower growth rate is "not necessarily determinative."[104] Unlike the SAA language with respect to "substantial share," the SAA provides no guidance on when or under what conditions a departure from the norm is contemplated.

116. With respect to this factor, there is no dispute that Canada does not fall within the lower-growth rate norm for the first four years of the five-year period of investigation.[105] The growth rate of Canadian imports was far greater than the rate of growth for global imports during those first four years and was only appreciably lower in the final year of the investigation, when imports from Canada fell while those from all sources rose significantly.

117. However, as contended by Canada and as found by the USITC, Canada's rate of growth is highly distorted by the fact that it began the period of investigation with imports at a very low ("virtually zero") level.[106] Therefore, any increase, even if relatively small, would nonetheless translate into a large *rate of growth* even if the actual increase in imports is not significant. In this case, total imports grew by 43% between 2012 and 2013, 48% in the next year, 84% in the third year (2014-2015) and 52% over the final year period (2015-2016).[107] Those rates of growth were the result of increases in imports from a base of 2.16 million kW in 2012 to a final year total of 12.8 million kW.[108] Canada's rates of growth for the first four years, on the other hand, were much higher,

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[104] The Implementation Act For the Agreement Between the United States of American, the United Mexican States, and Canada (USMCA), Statement of Administrative Action 24, Exhibit CAN-81.

[105] Canada's Rebuttal Submission, para. 72 ("Hence, despite a larger relative growth rate, an examination of the overall factors led the USITC to the conclusion that imports of CSPV products originating in Canada do not contribute importantly to the serious injury caused by imports and thus do not meet the condition set in Article 10.2.1(b).").

[106] Canada's Rebuttal Submission, para. 71; USITC, Publication 4739, November 2017, p. 68-69, and 67, fn. 387, Exhibit CAN-07.

[107] USITC, Publication 4739, November 2017, Table II-2, Exhibit CAN-07.

[108] USITC, Publication 4739, November 2017, Table II-2 and fn. 396, Exhibit CAN-07.

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more than [****]% between 2012 and 2013, more than [****]% between 2013 and 2014, more than [****]% between 2014 and 2015, before falling by [****]% between 2015 and 2016.[109] Yet, despite these large rates of growth, the actual growth in Canadian imports over the period was less than [****]kW, which pales in comparison to the 10.6 million kW increase in total imports.[110]

118. The numbers noted above are consistent with the United States' first claim—that the fact that there was a "large increase in the absolute volume of U.S. imports from Canada" supports a determination that imports from Canada contributed importantly to the serious injury.[111] The Panel agrees that the facts show a large increase in the absolute volume of imports of CSPV products from Canada for the first four years of the period. The Panel also notes that Article 10.2.2 requires consideration of the level and change in the level of imports as one of the factors to be considered in rendering a "contribute importantly" determination. However, the Panel does not agree that a large increase in the absolute volume of imports in and of itself supports a finding of "contribute importantly." If the absolute level of imports is very low, as Canada's was in 2012 ("virtually zero"), a large increase in the absolute volume, particularly if it occurs at a time when domestic demand is also increasing, as was the case here, does not mean that imports from Canada were contributing significantly more to the serious injury than they were at the start of the period of investigation when the volume of their imports was extremely low.[112]

119. The United States' second claim and one of the factors required to be considered under Article 10.2.2(b) is the change in import share, with the United States contending that the fact that Canada had an "increasing U.S. market share from virtually zero at the beginning" of the period of investigation to a specific (but confidential) percent in 2015 supports a "contribute importantly" finding. Because of the lack of any additional evidence from the United States, either in the President's proclamation or in the United States' submission, the Panel finds that the United States has not met its burden of refuting the claim by Canada or the finding by the USITC that Canada's increase in market share was a function of the very low level of imports in 2012 and was ameliorated by the decline in imports between 2015 and 2016 when global imports and domestic consumption increased. This pattern of change in import share does not rise to the level of "contribute importantly" to the serious injury caused by imports.

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[109] The growth in Canadian imports is based on the import data provided by Canada in this dispute. Exhibit CAN-85 (CONFIDENTIAL INFORMATION). Pursuant to Appendix 1.6 of the Chapter 31 Rules of Procedure preventing the disclosure of confidential information, all confidential information has been removed from this paragraph.
[110] Pursuant to Appendix 1.6 of the Chapter 31 Rules of Procedure preventing the disclosure of confidential information, all confidential information has been removed from this paragraph.
[111] U.S. Initial Written Submission, para. 108.
[112] USITC, Publication 4739, November 2017, p. 68, Exhibit CAN-07 (noting that "imports from Canada generally were even smaller as a share of apparent U.S. consumption").

120. Another argument made by the United States for a finding of "contribute importantly" is that there is a likelihood of a surge in imports from Canada.[113] The United States notes the USITC findings of increased capacity and production in Canada; the increase in Canadian shipments to the United States; the availability of additional capacity for production of CSPV products; the relationship of Canadian producers, particularly Canadian Solar, to foreign producers; and the incentives created by the NAFTA rule of origin that permits CSPV modules made in Canada from foreign CSPV cells to be considered NAFTA-originating goods as indicators of a likely surge.[114]

121. Canada and Mexico both contend that the potential for a surge cannot be taken into account when making a "contribute importantly" determination. Mexico notes that the present tense of the verb "contribute to" indicates that the determination must be based on a current satisfaction of the condition.[115] Canada notes that the possibility of a surge is not a condition identified in Article 10.2.1(b) or a factor identified in Article 10.2.2(b).[116] Canada also agrees that the present tense in Article 10.2.1 means that the anticipation of a possible future surge is immaterial to the assessment of any contribution to the present serious injury by imports from Canada.[117]

122. The United States responds by contending that the non-exhaustive list of factors in Article 10.2.2(b) does not preclude a Party from considering the likelihood of a surge in imports as part of an Article 10.2.2(b) analysis.[118] While accepting that Article 10.2.1(b) is written in the present tense, the U.S. insists that the concepts of current and imminent injury are "closely related" and that the immediate prospects of the domestic industry are critical for understating its condition in the present.[119]

123. Both Canada and Mexico also contend that basing a "contribute importantly" determination on the likelihood of a surge in imports in the future renders *inutile* the surge mechanism provided in Article 10.2.3:

> 3. *A Party taking such action, from which a good from another Party or Parties is initially excluded pursuant to paragraph 1, shall have the right subsequently to include that good from the other Party or Parties in the action in the event that the competent investigating authority*

[113] U.S. Initial Written Submission, paras. 109-116; U.S. Rebuttal Submission, paras. 97-99.
[114] U.S. Initial Written Submission, paras. 110-111 noting also the recognition by the USITC that excluding Canadian imports from the safeguard measures could result in Canadian imports increasing to harmful levels and dismissing the USITC's finding that should such a surge occur, the domestic industry could invoke the import-surge mechanism found in NAFTA and USMCA, or antidumping or countervailing duty actions.
[115] Mexico's Third Party Submission, para. 23.
[116] Canada's Rebuttal Submission, para. 73.
[117] Canada's Rebuttal Submission, para. 73.
[118] U.S. Rebuttal Written Submission, para. 97.
[119] U.S. Rebuttal Written Submission, para. 97.

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determines that a surge in imports of such good from the other Party or Parties undermines the effectiveness of the action.

124. Canada notes that this surge mechanism presupposes that a safeguard mechanism is already in place and provides a means to address a subsequent surge in imports from a country that was initially excluded from the safeguard measure.[120] Both Canada and Mexico add that allowing concerns over a future surge in imports to be considered as part of the present determination of "contribute importantly" would undermine the requirement in Article 10.2.3 for a finding that an actual surge has happened.[121] Mexico adds that allowing consideration of a potential surge in the "contribute importantly" determination would render *inutile* the requirement to find actual impairment of an action's effectiveness before including a Party's goods in the safeguard mechanism.[122]

125. The United States contended that the fact that the Article 10.2.3 anti-surge mechanism would require a "new and additional determination as to whether a surge in Canadian imports 'undermines the effectiveness of the action,'" along with the fragility of the U.S. industry, meant that the anti-surge mechanism "would likely provide only belated relief."[123] The United States further contended that, because serious injury determinations can be made on the basis of a threat of serious injury (not the case here), "imminent harm is relevant to the evaluation" and therefore, Article 10.2.3. is "best understood as addressing *unexpected* surges."[124]

126. The Panel agrees with the United States that the "such as" clause in Article 10.2.2(b) means that additional factors beyond those explicitly stated can be taken into account by the investigating authority. However, the Panel does not find that those additional factors can include events that have not happened and may not ever happen. As Mexico and Canada have stated, the determination is framed in the present tense—whether imports that have already come into a market contribute importantly to the serious injury that has already been found by the investigating authority. Moreover, the more specific criteria that imports normally shall not be deemed to "contribute importantly" if the growth rate of imports is appreciably lower than the growth rate of total imports includes the phrase "*during the period in which the injurious surge in imports occurred.*"[125] This explicit temporal reference indicates that the analysis of whether imports "contribute importantly" is a time-bound one that does not include assessment of potential future events beyond the period examined by the investigating authorities.

[120] Canada's Rebuttal Submission, para. 76.
[121] Canada's Rebuttal Submission, para. 76.
[122] Mexico's Third-Party Submission, para. 24.
[123] U.S. Initial Written Submission, para. 116.
[124] U.S. Rebuttal Written Submission, para. 98 (emphasis added).
[125] USMCA Article 10.2.2(b).

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127. The Panel notes that the USITC's analyses—both the majority determination that imports from Canada did not contribute importantly and the dissenting opinion that Canadian imports did contribute importantly—did not include a potential surge in imports as part of their analyses. It was only after completing its "contribute importantly" analyses that the USITC turned to the separate question of a potential surge in imports. There the USITC unanimously recognized that if the President were to determine to exclude imports from Canada that "unrestrained imports from Canada might increase to harmful levels," but stated that "if any such increase were to occur, the domestic industry would have other options to consider, including the import-surge mechanism [Article 10.2.3] and the antidumping and/or countervailing duty laws."[126]

128. The Panel finds that the availability of the anti-surge mechanism is the method provided by the USMCA negotiators to address a surge in imports that occurs following the imposition of a safeguard measure. It requires a finding by the investigating authority (here the USITC) that a surge has actually occurred and that the surge has undermined the effectiveness of the safeguard measure. It permits the application of safeguard measures to a Party that had been previously excluded from them.

129. The United States appears to circumvent the process, including the time required to wait to see if a surge in imports has in fact occurred and the time (limited by U.S. law to 30 days) required for the USITC determination of an undermining of the relief.[127] The Panel finds that the United States is not entitled to forego the procedural requirements of the anti-surge mechanism by a post-hoc rationalization that the entire process would provide "belated relief."[128] Nor is the United States entitled to achieve the results of the application of the anti-surge mechanism—the inclusion of Canada in the safeguard measures—without meeting the required pre-requisites. Permitting the United States to base a determination that imports from Canada currently "contribute importantly" to serious injury and can therefore be included in the safeguard measures on a potential future surge in imports would do just that. If the United States' concerns that the combination of the fragile state of the domestic industry, the incentives provided by the NAFTA rules of origin for CSPV production in Canada, and the capacity of the Canadian CSPV industry to ramp up its exports to the U.S. market prove valid, then relief is available to the United States through the anti-surge mechanism and the process for its application that was agreed upon by all USMCA Parties.

c. Whether the United States Acted Consistently with Article 10.2.5 in Applying Its Safeguard Measure to Imports of CSPV products from Canada

130. Canada also claims that the United States acted inconsistently with Article 10.2.5(b) by imposing a safeguard measure that reduced imports from Canada and did

[126] USITC, Publication 4739, November 2017, 69-70, fn. 400, Exhibit CAN-07.
[127] 19 U.S.C. Section 4552(c)(2).
[128] U.S. Initial Written Submission, para. 116.

not allow for reasonable growth.[129] Canada contended that the imposition of a 30% tariff to its CSPV products during the first year resulted in a significant reduction in Canadian exports to the United States and that no provision was made to ensure that Canadian exports were provided with an allowance for reasonable growth.[130]

131. Article 10.2.5(b) prohibits a Party from imposing a safeguard measure on a good that "would have the effect of reducing imports of such good from a Party below the trend of imports of the good from that Party over a recent representative base period with allowance for reasonable growth."[131]

132. The safeguard measure applied to Canada did not contain any special provisions unique to Canada or any accounting system to monitor whether imports from Canada were reduced or permitted growth in the future. The United States contended that the combination of the NAFTA rule of origin that permitted Canadian CSPV modules to use imported CSPV cells, the opening of Canadian-based module producers in the United States, and the proximity of Canada to the United States were sufficient to ensure a reasonable growth in Canadian exports of CSPV products to the United States.[132]

133. Considering the Panel views noted in this report regarding the inconsistency of the United States' safeguard measures with Article 2.4.2 and Article 10.2.1 and given the subsidiary nature of the claim under Article 10.2.5(b),[133] the Panel finds it unnecessary to rule on whether the United States' safeguard measure was imposed inconsistently with Article 10.2.5(b).

134. Nevertheless, the Panel notes that Article 10.2.5(b) is clear in establishing an obligation for the Party imposing a safeguard measure to ensure that there is no reduction in imports and to allow for reasonable growth, that is, to provide an accommodation ensuring the continued presence and reasonable growth of the imports subject to the emergency measure.

135. The Panel doubts that the United States' claim that the applied measure was structured to ensure no reduction in imports from Canada despite the substantial increase in tariffs or that the measure allowed for reasonable growth in Canadian imports by means of geographical proximity would satisfy the test under Article 10.2.5(b). Such argument is inconsistent with the reading of the clear prohibition in Article 10.2.5 ("No Party may impose restrictions that . . ."), requiring some action to ensure that the conditions of 10.2.5(b) are met. The Panel doubts that a passive acknowledgement of the geographical proximity of Canada (and Mexico) to the U.S.

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[129] Canada's Initial Written Submission, paras. 99-110.
[130] Canada's Initial Written Submission of Canada, para. 110.
[131] USMCA Article 10.2.5(b), which begins with "No Party may impose restrictions on goods that . . . "
[132] U.S. Initial Written Submission, para. 152 and 155.
[133] Canada's Initial Written Submission, para. 99. Canada's Rebuttal Submission, para. 80.

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market would constitute an "allowance for reasonable growth" within the meaning of Article 10.2.5 (b).

d. Conclusion

136. As the complaining party in this dispute, Canada bears the initial burden of proving that the United States' imposition of safeguard measures on imports of CSPV products was inconsistent with the requirement in Article 10.2.1 that the United States must exclude CSPV imports from Canada unless the United States has demonstrated that CSPV imports from Canada both: 1) accounted for a substantial share of imports and 2) contributed importantly to the serious injury caused by imports from all sources.

137. The Panel finds Canada has met its burden and presented a *prima facie* case that imports of CSPV products from Canada: 1) did not constitute a substantial share of total imports because they were never among the top five suppliers and did not fall within the parameters of the flexibilities to consider imports outside of the top five; and 2) did not contribute importantly to the serious injury because of their low level, their relatively small share of total imports and their decline in volume in the final year of the period of investigation.

138. The Panel finds that the President's single-sentence determination with respect to imports from Canada and the United States' submissions before this Panel did not rebut Canada's *prima facie* case. The United States presented no evidence that Canada was among the top five suppliers or that imports from Canada fit within any contemplated departure from the top-five supplier norm such that Canada could properly be considered to account for a "substantial share" of total imports. The United States' claim that Canada's imports "contributed importantly" to the serious injury rested primarily on an impermissible inclusion of a potential for a surge in imports as part of its assessment of the contribution of current imports to the serious injury.

139. In order to lawfully include imports from Canada in its safeguard measures, the United States was required to demonstrate that imports of CSPV products from Canada both: 1) accounted for a substantial share of imports and 2) contributed importantly to the serious injury caused by imports from all sources. The Panel finds that the United States failed to do so.

C. Whether the United States Acted Consistently with Articles 2.4.2. in Increasing the Tariffs Applicable to Imports of CSPV products from Canada

140. Canada claims that the United States is under an obligation under USMCA Article 2.4.2 to assess customs duties in accordance with its tariff schedule as specified in Annex 2-B (Tariff Commitments) to the USMCA, yet the United States increased its tariffs on

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Canadian CSPV imports without a valid justification.[134] Canada claims that the imposition of such tariffs in the absence of a valid justification constitutes a violation of Article 2.4.2 of USMCA.[135]

141. The United States' tariff schedule provides that Canadian CSPV products are entitled to enter the United States free of customs duties.[136] Notwithstanding that commitment to impose a duty rate of zero, the United States assessed customs duties of 30% ad valorem on Canadian CSPV products entered for consumption into the United States between February 7, 2018, and February 6, 2019, 25% on Canadian CSPV imports entered between February 7 2019 and February 6 2020, 20% on Canadian imports entered between February 7, 2020 and February 6 2021, and 18% on Canadian imports entered after February 7, 2021.[137]

142. Article 2.4.2 of USMCA specifies:

> *Unless otherwise provided in this Agreement, each Party shall apply a custom duty on an originating good in accordance with its schedule to Annex 2-B (Tariff Commitments).*

143. In other words, Article 2.4.2 of USMCA authorizes a Party to deviate from assessing the customs duties set forth in its tariff schedule only when the Agreement so specifies.

144. The only provisions authorizing a Party to deviate from the application of its Tariff Schedule in the form of a safeguard measure are specified under Chapter 10, Section A of USMCA. Article 10.2.1 does not authorize the imposition of additional tariffs (or other safeguard actions) unless the two conditions of accounting for a substantial share and contribute importantly to serious injury have been met. Indeed, Article 10.2.1 expressly precludes the application of safeguard measure to a USMCA Party in the absence of a demonstration that the two conditions in Article 10.2.1 (a) and (b) have been met.

145. As provided earlier, the Panel has already found that the United States had failed to demonstrate that either of the two conditions had been met. Therefore, the emergency safeguard measure imposed by the United States was imposed inconsistently with Article 10.2 of USMCA and thus the United States has not complied with USMCA Article 2.4.2.

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[134] Canada's Request for the Establishment of a Panel, para 13(a), Canada's Initial Written Submission, para. 113.
[135] Canada's Initial Written Submission, para. 114.
[136] Tariff Schedule of the United States (Schedule to Annex 2-B of USMCA), Line 8541.40.60, Exhibit CAN-53.
[137] Presidential Proclamation 9693, January 23, 2018, Exhibit CAN-05, raising the duty rate for CSPV products from 0% to 30%, effective on February 7, 2018, with annual reductions in the rate of duty in the second, third and fourth years to, respectively, 25, 20 and 15%; and Presidential Proclamation 10101, October 10, 2020, Exhibit CAN-29, increasing the tariff rate in the fourth year from 15% to 18% ad valorem.

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D. Canada's Other Claims

146. In light of the Panel's conclusions with respect to USMCA Articles 10.2 and 2.4.2, that the United States has applied to imports from Canada a safeguard measure that is not in conformity with its obligations under Article 10.2.1, and hence is in violation of Article 2.4.2, the substantive issues raised by Canada of the wrongful inclusion of its imports of CSPV products in the safeguard measure has been resolved. Thus, the Panel has no need to address the remaining claims made by Canada under Articles 10.2.5(b) and 10.3.

VII. CONCLUSION AND RECOMMENDATION

147. The Panel concludes that the United States has applied a safeguard measure to imports of CSPV products originating in Canada that is not in conformity with the United States' obligation under USCMA Articles 10.2.1 to exclude Canada from such safeguard measure. Consequently, the United States has violated its obligations under USCMA Article 2.4.2.

148. Accordingly, the Panel recommends that the United States bring its safeguard measure and consequently its tariff schedule into conformity with its USMCA obligations.