UNITED STATES – CRYSTALLINE SILICON PHOTOVOLTAIC CELLS SAFEGUARD MEASURE

(USA-CDA-2021-31-01)

INITIAL WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

PUBLIC VERSION

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TABLE OF ABBREVIATIONS

Abbreviation	Definition
Agreement or CUSMA or USMCA	*United States-Mexico-Canada Agreement*
CFTA	*United States–Canada Free Trade Agreement*
CSPV	Crystalline silicon photovoltaic
ITC or USITC	U.S. International Trade Commission
NAFTA	*North American Free Trade Agreement*
NAFTA Implementation Act	North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057 (Dec. 8, 1993)
Party	USMCA Party
Trade Act	Trade Act of 1974
TRQ	Tariff-rate quota
USMCA Implementation Act	United States-Mexico-Canada Agreement Implementation Act, Pub. L. 116-113 (Jan. 29, 2020)
USTR	United States Trade Representative
WTO	World Trade Organization

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TABLE OF EXHIBITS

Exhibit No.	Description
USA-01	19 U.S.C. § 1330
USA-02	*Exclusion of Particular Products From the Solar Safeguard Measure*, 84 Fed. Reg. 27,684 (USTR June 13, 2019)
USA-03	*Withdrawal of Bifacial Solar Panels Exclusion to the Solar Products Safeguard Measure*, 84 Fed. Reg. 54,244 (USTR Oct. 9, 2019)
USA-04	*Invenergy Renewables LLC v. United States*, 422 F. Supp. 3d 1255 (Ct. Int'l Trade 2019)
USA-05	*Determination on the Exclusion of Bifacial Solar Panels From the Safeguard Measure on Solar Products*, 85 Fed. Reg. 21,497 (USTR Apr. 17, 2020)
USA-06	*Crystalline Silicon Photovoltaic Cells, Whether or Not Partially or Fully Assembled Into Other Products: Advice on the Probable Economic Effect of Certain Modifications to the Safeguard Measure*, Inv. No. TA-201-75, USITC Pub. 5032 (Mar. 2020)
USA-07	*Crystalline Silicon Photovoltaic Cells, Whether or Not Partially or Fully Assembled Into Other Products: Extension of Action*, 86 Fed. Reg. 44,403 (USITC Aug. 12, 2021)
USA-08	*Proclamation 7529 of March 5, 2002: To Facilitate Positive Adjustment to Competition From Imports of Certain Steel Products*, 67 Fed. Reg. 10,553 (Mar. 7, 2002)
USA-09	United States–Canada Free Trade Agreement (entered into force Jan. 1, 1989) (excerpts)
USA-10	United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. 100-449, 102 Stat. 1851 (1988) (excerpts)
USA-11	Approving and Implementing the United States-Canada Free Trade Agreement, S. Rep. 100-509 (Sept. 15, 1988) (excerpts)
USA-12	North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057 (1993) (excerpts)
USA-13	Statement of Administrative Action accompanying the NAFTA Implementation Act (1993) (excerpts)
USA-14	S. Rep. 103-189 (Nov. 18, 1993) (excerpts)
USA-15	United States-Mexico-Canada Agreement Implementation Act, Pub. L. 116-113 (Jan. 29, 2020) (excerpts)
USA-16	Commodity Status Report: Sept. 13, 2021, U.S. Customs and Border Protection
USA-17	2020 Calendar Year End Commodity Status Report, U.S. Customs and Border Protection
USA-18	2019 Calendar Year End Commodity Status Report, U.S. Customs and Border Protection
USA-19	2018 Calendar Year End Commodity Status Report, U.S. Customs and Border Protection

Exhibit No.	Description
USA-20	Definition of "Important," *Oxford English Dictionary*, https://www.oed.com/view/Entry/92556?redirectedFrom=important#eid (consulted Sept. 15, 2021)
USA-21	Definition of "Extent," *Oxford English Dictionary*, https://www.oed.com/view/Entry/66951?rskey=xnqiyG&result=1&isAdvanced=false#eid (consulted Sept. 15, 2021)
USA-22	Definition of "Provide," *Oxford English Dictionary*, https://www.oed.com/view/Entry/153448?rskey=uAeeAl&result=2#eid (consulted Sept. 15, 2021)
USA-23	Definition of "Normally," *Oxford English Dictionary*, https://www.oed.com/view/Entry/128277?redirectedFrom=normally#eid (consulted Sept. 15, 2021)
USA-24	Definition of "Restriction," *Oxford English Dictionary*, https://www.oed.com/view/Entry/164022?redirectedFrom=restriction#eid (consulted Sept. 15, 2021)
USA-25	Definition of "Effect," *Oxford English Dictionary*, https://www.oed.com/view/Entry/59664?rskey=7OVv99&result=1#eid (consulted Sept. 15, 2021)
USA-26	Definition of "Will," *Oxford English Dictionary*, https://www.oed.com/view/Entry/229051?rskey=KwvVBB&result=1#eid (consulted Sept. 15, 2021)
USA-27	Definition of "Reduce," *Oxford English Dictionary*, https://www.oed.com/view/Entry/160503?rskey=A0UvaL&result=2#eid (consulted Sept. 15, 2021)
USA-28	Definition of "Below," *Oxford English Dictionary*, https://www.oed.com/view/Entry/17525?rskey=n3J3tm&result=2&isAdvanced=false#eid (consulted Sept. 15, 2021)
USA-29	Definition of "Trend," *Oxford English Dictionary*, https://www.oed.com/view/Entry/205544?rskey=nk7ZaI&result=1#eid (consulted Sept. 15, 2021)
USA-30	Definition of "Base," *Oxford English Dictionary*, https://www.oed.com/view/Entry/15848?rskey=VZNnP1&result=1#eid (consulted Sept. 15, 2021)
USA-31	Definition of "Period," *Oxford English Dictionary*, https://www.oed.com/view/Entry/140968?rskey=bBOZEe&result=1#eid (consulted Sept. 15, 2021)
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USA-33	Definition of "Representative," *Oxford English Dictionary*, https://www.oed.com/view/Entry/163003?redirectedFrom=representative#eid (consulted

Exhibit No.	Description
	Sept. 15, 2021)
USA-34	Definition of "Allowance," *Oxford English Dictionary*, https://www.oed.com/view/Entry/5464?rskey=zZC3ZB&result=1&isAdvanced=false#eid (consulted Sept. 15, 2021)
USA-35	Definition of "Reasonable," *Oxford English Dictionary*, https://www.oed.com/view/Entry/159072?redirectedFrom=reasonable#eid (consulted Sept. 15, 2021)
USA-36	Definition of "Growth," *Oxford English Dictionary*, https://www.oed.com/view/Entry/81924?rskey=pirq4C&result=1#eid (consulted Sept. 15, 2021)
USA-37	Definition of "Devoir," *LeRobert Dico En Ligne* (consulted Sept. 15, 2021)
USA-38	R.E. Batchelor & Miguel Angel San José, *A Reference Grammar of Spanish* (Cambridge University Press 2010) (excerpts)
USA-39	Peter T. Bradley and Ian Mackenzie, *Spanish: An Essential Grammar* (Routledge 2004) (excerpts)
USA-40	Mike Thacker & Casimir D'Angelo, *Essential French Grammar* (Routledge 2d ed 2019) (excerpts)
USA-41	Ryan Kennedy, "Silfab Doubles U.S. Solar Panel Manufacturing Capacity," *PV Magazine* (Aug. 31, 2021)
USA-42	Kelly Pickerel, "Silfab Opens Second Solar Panel Assembly Facility in Washington State," *Solar Power World* (Aug. 30, 2021)
USA-43	"Heliene Unveils New High Efficiency Modules and Expands US Solar Module Manufacturing Capabilities With New Florida Facility," *businesswire* (Aug. 10, 2021)
USA-44	Brittany Smith et al., *Solar Photovoltaic (PV) Manufacturing Expansions in the United States, 2017-2019: Motives, Challenges, Opportunities, and Policy Context* (National Renewable Energy Laboratory Apr. 2021) (excerpts)
USA-45	U.S. Solar Panel Manufacturers, *Solar Power World* (last updated Sept. 2021)
USA-46	WTO Dispute Settlement Understanding
USA-47	Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R / WT/DS249/R / WT/DS251/R / WT/DS252/R / WT/DS253/R / WT/DS254/R / WT/DS258/R / WT/DS259/R / and Corr.1, adopted 10 December 2003 (excerpts)
USA-48	Appellate Body Report, *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS345/AB/R, adopted Aug. 1, 2008 (excerpts)
USA-49	Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted Jan. 27, 2000 (excerpts)

Exhibit No.	Description
USA-50	Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, vol. II

PUBLIC VERSION

I. INTRODUCTION

1. Following a U.S. global safeguard investigation on crystalline silicon photovoltaic ("CSPV") products, the U.S. International Trade Commission ("USITC" or "ITC") unanimously determined in late 2017 that the U.S. solar products industry, which was on the verge of extinction, was seriously injured by increased imports. Based on the USITC's affirmative serious injury determination, a process of public input, and consultation with other U.S. Government agencies, the President of the United States imposed a safeguard measure in early 2018 to help the U.S. solar industry rebuild and expand after being ravaged by low-priced imports for years. At that time, and pursuant to *North American Free Trade Agreement* ("NAFTA") obligations, the President determined that imports of solar products from Canada constituted a substantial share of total imports and contributed importantly to the serious injury identified by the USITC. As a result, he included imports from Canada in the solar safeguard. Doing so has ensured that a potential loophole based on NAFTA country-of-origin rules for solar modules, which foreign producers could have exploited with devastating effect on an already fragile U.S. CSPV industry, would remain closed.

2. Canada argues that the United States acted inconsistently with the *United States-Mexico-Canada Agreement* ("USMCA") in authorizing the President to make determinations with respect to the exclusion of USMCA Parties from safeguard measures, and that the particular Presidential determination in this case was inconsistent with the USMCA. This submission will show that both the statute and the President's determination were fully consistent with the relevant USMCA provisions. But first, it is important to note that Canada's arguments fail on a more fundamental level because of their timing.

3. First of all, the President made the challenged determination *before the entry into force of the USMCA*. At the time of the determination, the NAFTA was in effect. Canada requested consultations pursuant to the NAFTA, but did not seek establishment of a panel with respect to the measures set out in the consultations request. There is no provision that extends USMCA safeguards commitments and dispute settlement procedures to measures that were subject to NAFTA commitments. Canada seeks to avoid this problem by observing that USMCA Articles 10.2.1, 10.2.2, and 10.2.5(b) are nearly identical to then-applicable NAFTA Articles. Be that as it may, USMCA Article 31.2 makes clear that the scope of Chapter 31 dispute settlement applies to actual or proposed measures of a Party that another Party considers inconsistent with USMCA obligations. The scope of Chapter 31 does not allow a panel to consider whether actual or proposed measures of a Party are inconsistent with NAFTA obligations. If Canada sought to challenge the President's actions under the then-applicable NAFTA provision, its proper remedy was to seek dispute settlement under the NAFTA, rather than to wait three years and seek a retroactive application of the USMCA. Antidumping and countervailing duty measures are subject to a transition provision in the USMCA that allows NAFTA Chapter 19 disputes to continue,[1] but there is no similar provision for safeguard actions. This evinces that the Parties did not intend to allow each other to raise NAFTA claims in USMCA Chapter 20 dispute

[1] USMCA, Articles 34.1.4, 34.1.5.

settlement.

4. Second, Canada is now challenging section 302 of the USMCA Implementation Act, which empowers the President to make determinations related to the exclusion of USMCA Parties from safeguard measures. Although Canada's panel request cites section 302 – and Canada's challenge to it under USMCA Article 10.3 – Canada's consultations request does not. Accordingly, this measure, and the claim asserted against it, cannot properly be part of "the matter" referred to the Panel under USMCA Article 31.6. That is, section 302 is not properly within the Panel's terms of reference.

5. It is also worth noting that the mechanism whereby the President makes exclusion determinations has been part of U.S. law for more than 30 years, and over the course of not one, but *three* different free trade agreements involving the United States and Canada. USMCA Article 10.3 obligates the United States to entrust determinations related to safeguard proceedings to the USITC only "to the extent provided by domestic law." Assuming that Article 10.3 even applies in this context, section 312 of the NAFTA Implementation Act, which provided the President with authority to make exclusion determinations, was clearly part of U.S. "domestic law" prior to entry into force of the USMCA. Furthermore, section 302 of the USMCA Implementation Act, which implemented USMCA commitments, was part of U.S. "domestic law" when the USMCA entered into force. Accordingly, this mechanism is explicitly exempt from the obligations in Article 10.3.

6. Finally, it is worth mentioning that Canada has benefitted from the President's authority to make exclusion determinations and has even endorsed it. Previously, Canada explicitly took the position in a WTO dispute that "the President, in making his determination under the NAFTA Implementation Act, was not required to follow the USITC or to explain his reasons for not doing so."[2] It is difficult to reconcile this statement with Canada's position before this Panel, and in particular its assertion that the only permissible conclusion is that USMCA Article 10.3 prohibits the United States from entrusting an exclusion determination to the President.

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

8. **Section II** presents the relevant factual background information, and **section III** sets forth the terms of reference, rules of interpretation, and standard of review applicable in USMCA Chapter 31 dispute settlement proceedings.

9. **Section IV** explains that 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

[2] Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, para. 8.5, WT/DS248/R / WT/DS249/R / WT/DS251/R / WT/DS252/R / WT/DS253/R / WT/DS254/R / WT/DS258/R / WT/DS259/R / and Corr.1, adopted 10 December 2003 (*US – Steel Safeguards (Panel)*) (Exhibit USA-47).

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.

10. **Section V** demonstrates that, even aside from the fact that these claims are not properly before the Panel, the United States did not act inconsistently with USMCA Articles 10.2.1, 10.2.2, and 10.2.5(b), nor with Articles 10.3 and 2.4.2 by including imports of CSPV products originating in Canada in the solar safeguard. Subsection A demonstrates that the United States did not violate Article 10.3 by including imports from Canada because that Article does not govern exclusion determinations, and, even if it did, the Article 10.3 preserves the U.S. right to entrust exclusion determinations to the President. Subsection B explains that the facts of the solar safeguard proceeding supported – and indeed warranted – a determination that imports from Canada should be included in the safeguard, pursuant to Articles 10.2.1 and 10.2.2. Subsection C highlights fundamental errors in Canada's understanding of Article 10.2.5(b), which calls for a determination of eligibility for the safeguard exclusion based on information available at the time of the determination, and not the *ex post* information on which Canada relies. Subsection D demonstrates the errors in Canada's residual Article 2.4.2 claim against the solar safeguard.

11. **Section VI** addresses Canada's as such challenge to section 302 of the USMCA Implementation Act. Subsection A explains that there is no basis to hear Canada's claim because Canada did not raise section 302 as a measure subject to challenge in its consultations request, and for this reason it cannot properly be part of "the matter" referred to the Panel under USMCA Article 31.6. Section 302 is therefore outside the Panel's terms of reference. Subsection B clarifies that, even aside from the fact that this claim is not within the Panel's terms of reference, Canada has failed to establish any inconsistency with the USCMA.

II. FACTUAL BACKGROUND

12. Between 2012 and 2016, the financial situation of the U.S. industry producing CSPV products[3] was dismal, particularly deteriorating between 2015 and 2016.[4] The USITC found that during this time period, imports of CSPV products increased both absolutely and relative to domestic production, reaching record highs in 2016.[5] The imports were lower priced than domestically produced CSPV products, leading to declining domestic prices and significant and worsening net and operating losses for the already unprofitable domestic industry producing like

[3] For this submission, "CSPV products" means certain crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products subject to the USITC investigation. *Crystalline Silicon Photovoltaic Cells (Whether or not Partially or Fully Assembled into Other Products)*, Inv. No. TA-201-75, USITC Pub. 4739, Vol. 1, 10-16 (Nov. 2017) (Exhibit CAN-07) ("USITC Serious Injury Determination Report").

[4] *See* USITC Serious Injury Determination Report, Vol. 1, 43, 46-49 (Exhibit CAN-07).

[5] USITC Serious Injury Determination Report, Vol. 1, 21-22, 44-45 (Exhibit CAN-07).

or directly competitive products.[6] Dozens of domestic facilities shuttered and the U.S. industry producing CSPV products experienced significant idling of its production facilities and significant unemployment and underemployment, and the domestic industry was unable to carry out domestic production operations at a reasonable level of profit.[7] Moreover, a significant number of domestic producers were unable to generate capital to finance the modernization of their domestic plants and equipment or to maintain existing levels of expenditures for research and development.[8] This decline occurred despite market conditions that were otherwise extremely favorable to the domestic producers, including strong and increasing domestic demand.[9]

13. The domestic industry first sought to resolve the difficulties posed by increasing imports by seeking antidumping and countervailing duty measures. But the issuance of antidumping and countervailing duty orders on imports from China in December 2012[10] and additional antidumping and countervailing duty orders on certain other imports from China and Taiwan in February 2015[11] did not bring durable relief. The antidumping and countervailing duty measures prompted shifts in production to countries where CSPV products for export to the United States were not subject to such remedies.[12]

14. In 2017, the domestic industry filed a petition with the USITC requesting that the President impose a safeguard measure on imports of CSPV products from all sources, pursuant to section 201 of the Trade Act of 1974 ("Trade Act").[13] The USITC instituted the investigation on May 23, 2017.[14] Following the collection of voluminous information and a public hearing, the USITC issued a report in November 2017, in which the four USITC Commissioners

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[6] USITC Serious Injury Determination Report, Vol. 1, 42-43, 45-47 (Exhibit CAN-07).

[7] USITC Serious Injury Determination Report, Vol. 1, 31-35, 43, 47-48 (Exhibit CAN-07).

[8] USITC Serious Injury Determination Report, Vol. 1, 35-37, 43, 47 (Exhibit CAN-07).

[9] USITC Serious Injury Determination Report, Vol. 1, 26-28, 37, 43, 45 (Exhibit CAN-07).

[10] The 2012 orders covered CSPV cells produced in China and CSPV modules assembled in China and other third countries using CSPV cells made in China.

[11] The 2015 orders covered CSPV modules assembled in China using CSPV cells produced in Taiwan and other third countries and CSPV cells produced in Taiwan and CSPV modules assembled in Taiwan and third countries other than China using CSPV cells made in Taiwan.

[12] *See* USITC Serious Injury Determination Report, Vol. 1, 40-41, 44-45 (Exhibit CAN-07).

[13] Codified at 19 U.S.C. § 2251 *et seq.* (Exhibit CAN-02).

[14] *Crystalline Silicon Photovoltaic Cells' (Whether or Not Partially or Fully Assembled Into Other Products); Institution and Scheduling of Safeguard Investigation and Determination That the Investigation Is Extraordinarily Complicated*, 82 Fed. Reg. 25,331 (USITC June 1, 2017) (Exhibit CAN-06).

presiding over the investigation[15] unanimously made the following determination:

> Based on the facts in this investigation, we determine pursuant to section 202(b) of the Trade Act of 1974 ("Trade Act") that crystalline silicon photovoltaic cells (whether or not partially or fully assembled into other products) ("CSPV products") are 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.[16]

15. The USITC also made findings called for under statutes dealing with various U.S. preferential trade arrangements, including the then-applicable NAFTA.[17] Section 311(a)-(b) of the NAFTA Implementation Act implemented Article 802 of NAFTA into U.S. law.[18] Section 311 required the following:

> (a) IN GENERAL.—If, in any investigation initiated under chapter 1 of title II of the Trade Act of 1974, 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 330(d) of the Tariff Act of 1930), 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) FACTORS.—

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[15] The USITC is normally composed of six Commissioners appointed by the President, by and with the advice and consent of the Senate. 19 U.S.C. § 1330(a) (Exhibit USA-01). However, there were two vacancies on the USITC as of July 1, 2017, and the USITC thereafter was composed of four Commissioners during the solar safeguard investigation.

[16] USITC Serious Injury Determination Report, Vol. 1, 5 (footnotes omitted) (Exhibit CAN-07); *see also id.* at 79.

[17] USITC Serious Injury Determination Report, Vol. 1, 1, 5, 65-71 (Exhibit CAN-07).

[18] USITC Serious Injury Determination Report, Vol. 1, 65-67 (Exhibit CAN-07); *see also* North American Free Trade Agreement Implementation Act, sec. 311, Pub. L. 103-182, 107 Stat. 2106 (1993) (Exhibit USA-12) ("NAFTA Implementation Act") (previously codified at 19 U.S.C. § 3371 (Exhibit CAN-04)); S. Rep. 103-189, 31 (Nov. 18, 1993) (Exhibit USA-14) ("Sections 311 and 312 implement Article 802, which requires the President to exclude imports from Mexico and Canada from global safeguard actions unless certain conditions are met").

> (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) DEFINITION.—For purposes of this section and section 312(a), the term "contribute importantly" refers to an important cause, but not necessarily the most important cause.[19]

16. Pursuant to section 311(a), the Commissioners expressed different views regarding whether imports of CSPV products from Canada should be excluded from any safeguard measure.[20] A three-Commissioner majority 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 imports."[21] The then-USITC Chairman dissented, and found instead that "imports of CSPV products from Canada account for a substantial share of total imports and contribute importantly to the serious injury caused by imports."[22]

17. But notwithstanding the USITC majority's negative section 311(a) finding with respect to Canada, all four Commissioners observed that:

> Given that imports from Canada started the {period of investigation} at a smaller baseline than other foreign suppliers and increased overall during the {period of investigation} at

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[19] Section 311 of the NAFTA Implementation Act (Exhibit USA-12) (previously codified at 19 U.S.C. § 3371 (Exhibit CAN-04)).

[20] USITC Serious Injury Determination Report, Vol. 1, 1, 5-6 & n.5, 67-70 & n.387 (Exhibit CAN-07).

[21] USITC Serious Injury Determination Report, Vol. 1, 5, 67-70 (Exhibit CAN-07).

[22] USITC Serious Injury Determination Report, Vol. 1, 5-6 n.5, 67 n.387, 79 n.452 (Exhibit CAN-07).

a rate that exceeded the growth rate for global imports, we recognize that if the President were to determine to exclude imports from Canada from any safeguard measure, unrestrained imports from Canada might increase to harmful levels.[23]

18. All four Commissioners observed that there were "{c}ertain factors increasing the likelihood of a surge of imports into the U.S. market from Canada":

- "the CSPV module industry in Canada increased capacity and production between 2012 and 2016;"
- "the Canadian industry shipped an irregularly increasing share of its total shipments to the United States (increasing nearly four-fold from *** percent of its total shipments in 2012 to *** percent by 2016);"
- "the Canadian industry had available capacity throughout the {period of investigation}, with its capacity utilization ranging from a low of *** percent in 2012 to a high of *** percent in 2015, and a near lowest level of *** percent at the end of the POI in 2016);"
- "producers in Canada (including the *** foreign producer (Canadian Solar)) maintain corporate and other arm's length supply chain relationships with firms in several other countries;"
- "Canadian producers and their related firms exported growing volumes of CSPV products to the United States over the {period of investigation};" and
- "if the CSPV products manufactured by Canadian producers' affiliates are subject to a global safeguard measure, the industry in Canada will have an incentive to supply the U.S. market from its Canadian operations instead."[24]

19. Given the USITC's affirmative serious injury determination, the Commissioners made recommendations as to what they believed would address the serious injury to the domestic industry and be most effective in facilitating the efforts of the domestic industry to make a positive adjustment to import competition.[25]

20. The USITC then transmitted its report to the President for consideration. Following receipt of the USITC report, the Trade Policy Staff Committee requested public comments on what remedies the President should take based on the USITC's serious injury determination, and

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[23] USITC Serious Injury Determination Report, Vol. 1, 67 n. 387, 69-70 (Exhibit CAN-07).

[24] USITC Serious Injury Determination Report, Vol. 1, 67 n. 387, 69-70 n.400 (Exhibit CAN-07).

[25] *See* USITC Serious Injury Determination Report, Vol. 1, 2-3, 81-133 (Exhibit CAN-07); Section 202(e) of the Trade Act (codified at 19 U.S.C. § 2252(e)) (Exhibit CAN-02).

convened a public hearing on this matter in December 2017.[26]

21. *Proclamation 9693 of January 23, 2018: To Facilitate Positive Adjustment to Competition From Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled Into Other Products) and for Other Purposes* ("*Proclamation 9693*") imposed a safeguard measure beginning on February 7, 2018, that the President determined "will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs."[27] Specifically, the President imposed a 2.5 GW tariff rate quota ("TRQ") on imports of CSPV cells for a period of four years, with unchanging within-quota quantities and annual reductions in the rate of duty applicable to goods entering in excess of those quantities in the second, third and fourth years.[28] The in-quota quantity of cells under the TRQ was "allocated among all countries except those countries the products of which are excluded from" the TRQ.[29] The measure also imposed *ad valorem* duties on all imports of CSPV modules for a period of four years, with annual reductions in the rates of duty in the second, third, and fourth years.[30]

22. At the time of the issuance of *Proclamation 9693*, section 312(a)-(b) of the NAFTA Implementation Act provided as follows:

> (a) IN GENERAL.—In determining whether to take action under chapter 1 of title II of the Trade Act of 1974 with respect to imports from a NAFTA country, the President shall determine whether—
>
> > (1) imports from such country, considered individually, account for a substantial share of total imports; or
> >
> > (2) imports 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, found by the International Trade Commission.

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[26] *Request for Comments and Public Hearing About the Administration's Action Following a Determination of Import Injury With Regard to Certain Crystalline Silicon Photovoltaic Cells*, 82 Fed. Reg. 49,469 (USTR Oct. 25, 2017) (Exhibit CAN-19).

[27] *Proclamation 9693 of January 23, 2018: To Facilitate Positive Adjustment to Competition From Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled Into Other Products) and for Other Purposes*, 83 Fed. Reg. 3541, 3542 (Jan. 25, 2018) (para. 12) (Exhibit CAN-05) ("*Proclamation 9693*"); *see also* section 203(a)(1)(A) of the Trade Act (codified at 19 U.S.C. § 2253(a)(1)(A) (Exhibit CAN-02)).

[28] *See Proclamation 9693*, 83 Fed. Reg. at 3542 (para. 8) (Exhibit CAN-05).

[29] *Proclamation 9693*, 83 Fed. Reg. at 3542 (para. 11) (Exhibit CAN-05).

[30] *See Proclamation 9693*, 83 Fed. Reg. at 3542 (para. 8) (Exhibit CAN-05).

> (b) EXCLUSION OF NAFTA IMPORTS.—In determining the nature and extent of action to be taken under chapter 1 of title II of the Trade Act of 1974, the President shall exclude from such action imports from a NAFTA country if the President makes a negative determination under subsection (a) (1) or (2) with respect to imports from such country.[31]

23. Pursuant to section 312(a), the President "determined after considering the ITC 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 ITC."[32]

24. In *Proclamation 9693*, the President delegated the authority to exclude specific products from the solar safeguard measure to USTR.[33] In June 2019, USTR determined to exclude, *inter alia*, "bifacial solar panels that absorb light and generate electricity on each side of the panel and that consist of only bifacial solar cells that absorb light and generate electricity on each side of the cells" ("bifacial exclusion").[34] In October 2019, USTR withdrew the bifacial exclusion because "maintaining the exclusion will undermine the objectives of the safeguard measure."[35] Following a U.S. domestic court holding that this initial bifacial exclusion withdrawal did not follow particular procedures under U.S. law,[36] USTR again withdrew the bifacial exclusion in April 2020.[37]

25. Pursuant to section 204(a) of the Trade Act, the USITC conducted a review to "monitor developments with respect to the domestic industry, including the progress and specific efforts made by workers and firms in the domestic industry to make a positive adjustment to import competition."[38] The USITC transmitted the report containing the results of this review to the

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[31] Section 312 of the NAFTA Implementation Act (Exhibit USA-12) (previously codified at 19 U.S.C. § 3372 (Exhibit CAN-04)).

[32] *Proclamation 9693*, 83 Fed. Reg. at 3542 (para. 7) (Exhibit CAN-05).

[33] *Proclamation 9693*, 83 Fed. Reg. at 3543-44 (Exhibit CAN-05).

[34] *Exclusion of Particular Products From the Solar Safeguard Measure*, 84 Fed. Reg. 27,684, 27,685 (USTR June 13, 2019) (Exhibit USA-02).

[35] *Withdrawal of Bifacial Solar Panels Exclusion to the Solar Products Safeguard Measure*, 84 Fed. Reg. 54,244, 54,245 (USTR Oct. 9, 2019) (Exhibit USA-03).

[36] *Invenergy Renewables LLC v. United States*, 422 F. Supp. 3d 1255 (Ct. Int'l Trade 2019) (Exhibit USA-04).

[37] *Determination on the Exclusion of Bifacial Solar Panels From the Safeguard Measure on Solar Products*, 85 Fed. Reg. 21,497 (USTR Apr. 17, 2020) (Exhibit USA-05). Domestic court litigation regarding USTR's withdrawal of the bifacial exclusion remains ongoing.

[38] Section 204(a) of the Trade Act (codified at 19 U.S.C. § 2254(a)) (Exhibit CAN-02).

President on February 7, 2020.[39] The President also received a petition from a majority of the representatives of the domestic solar industry requesting that the President modify the safeguard measure to: (1) withdraw the bifacial exclusion, and (2) increase the *ad valorem* tariff on CSPV modules during the fourth year of the safeguard measure. Based on this petition and the USITC's monitoring report, *Proclamation 10101* of October 10, 2020, included the following determinations:

> (a) that the exclusion of bifacial panels from application of the safeguard tariff has impaired and is likely to continue to impair the effectiveness of the action I proclaimed in Proclamation 9693 in light of the increased imports of competing products such exclusion entails, and that it is necessary to revoke that exclusion and to apply the safeguard tariff to bifacial panels;
>
> (b) that the exclusion of bifacial panels from application of the safeguard tariffs has impaired the effectiveness of the 4-year action I proclaimed in Proclamation 9693, and that to achieve the full remedial effect envisaged for that action, it is necessary to adjust the duty rate of the safeguard tariff for the fourth year of the safeguard measure to 18 percent.[40]

26. *Proclamation 10101* did not revisit any other determination made in *Proclamation 9693*, including the President's determination to include imports of CSPV products from Canada in the solar safeguard measure.

27. The solar safeguard measure is currently in its fourth year, and it is currently set to expire on February 6, 2022.

28. On August 6, 2021, at the request of members of the domestic CSPV products industry, the USITC instituted an investigation to determine, pursuant to section 204(c) of the Trade Act, whether the safeguard measure continues to be necessary to prevent or remedy serious injury and whether there is evidence that the domestic industry is making a positive adjustment to import

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[39] *Crystalline Silicon Photovoltaic Cells, Whether or Not Partially or Fully Assembled into Other Products: Monitoring Developments in the Domestic Industry*, Inv. No. TA-201-75, USITC Pub. 5021 (Feb. 2020) (Exhibit CAN-23) ("USITC Monitoring Report"); *see also id.* at 79. In March 2020, the USITC also transmitted a report to the President, in response to a request from USTR for advice on the probable effect of modifying the solar safeguard measure of increasing the TRQ on CSPV cells upward from 2.5 GW. *Crystalline Silicon Photovoltaic Cells, Whether or Not Partially or Fully Assembled Into Other Products: Advice on the Probable Economic Effect of Certain Modifications to the Safeguard Measure*, Inv. No. TA-201-75, USITC Pub. 5032 (Mar. 2020) (Exhibit USA-06).

[40] *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 or Fully Assembled Into Other Products)*, 85 Fed. Reg. 65,639, 65,640 (Oct. 10, 2020) (para. 9) (Exhibit CAN-29) ("*Proclamation 10101*").

competition.[41] This review is ongoing.

29. Subsequent to *Proclamation 9693*, the United States, Canada, and Mexico concluded the USMCA, which entered into force for the Parties on July 1, 2020.[42]

III. TERMS OF REFERENCE, RULES OF INTERPRETATION, STANDARD OF REVIEW, AND BURDEN OF PROOF

30. Canada and the United States have not decided on terms of reference for this dispute other than the terms of reference as set out in USMCA Article 31.7. Accordingly, pursuant to Article 31.7.1, the terms of reference are for the Panel 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).

31. Article 31.13 describes the "function of panels" and the standard of review to be applied by panels. A panel's function is to make an objective assessment of the matter before it. In making that objective assessment of whether a measure is inconsistent with the USMCA, Article 31.13.4 provides that a dispute settlement panel shall interpret the USMCA "in accordance with customary rules of interpretation of public international law, as reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*" ("*Vienna Convention*"). Article 31 of the *Vienna Convention* provides that "{a} treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Furthermore, 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.

32. Article 14 of the Rules of Procedure for Chapter 31 (Dispute Settlement) ("Rules of Procedure") states that "{a} complaining Party asserting that a measure of another Party is inconsistent with this Agreement . . . has the burden of establishing that inconsistency . . ." Accordingly, Canada as the complaining Party has the burden of proving that the aspects of the

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[41] *Crystalline Silicon Photovoltaic Cells, Whether or Not Partially or Fully Assembled Into Other Products: Extension of Action*, 86 Fed. Reg. 44,403 (USITC Aug. 12, 2021) (Exhibit USA-07); *see also* section 204(c) of the Trade Act (codified at 19 U.S.C. § 2254(c) (Exhibit CAN-02)).

[42] Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada, para. 2 ("This Protocol and its Annex shall enter into force on the first day of the third month following the last notification").

measure it challenges are inconsistent with the USMCA.

33. Article 14 of the Rules of Procedure further states that, "{i}n cases where the responding Party declines to participate in the panel proceeding, the panel shall only find that the complaining Party has satisfied its burden if the complaining Party establishes a *prima facie* case of such inconsistency . . ." Article 14 indicates that it is Canada's obligation to establish a *prima facie* case that the aspects of the United States' solar safeguard measure it challenges are inconsistent with the relevant USMCA provisions.

IV. USMCA ARTICLES 10.2.1, 10.2.2, AND 10.2.5(B) ARE NOT APPLICABLE TO THE PRESIDENT'S DETERMINATION TO INCLUDE IMPORTS FROM CANADA IN THE SOLAR SAFEGUARD MEASURE, WHICH OCCURRED BEFORE ENTRY INTO FORCE OF THE USMCA

34. USMCA Chapter 31 dispute settlement rules preclude Canada's claims under USMCA Articles 10.2.1, 10.2.2, and 10.2.5(b), as applied to the President's determination to include imports of CSPV products from Canada in the solar safeguard measure. Chapter 31 applies to actual or proposed measures of a Party that another Party considers inconsistent with "an obligation of this Agreement" (*i.e.*, the USMCA).[43] The United States made the determination that Canada challenges in January 2018, while the NAFTA was in force. Therefore, the USMCA provisions cited by Canada – Articles 10.2.1, 10.2.2, and 10.2.5(b) – did not apply at the time, and the determination cannot have been inconsistent with them. Moreover, there is no provision that extends USMCA safeguards commitments and dispute settlement procedures to measures that were subject to NAFTA commitments.

35. As an initial matter, the text of USMCA Articles 10.2.1, 10.2.2, and 10.2.5(b) only creates an obligation on a Party at the time it is making the determination whether to exclude imports from other Parties from a safeguard measure. These provisions do not create an obligation following such a determination to evaluate on an ongoing basis whether subsequent conditions continue to support the original determination.

36. Specifically, USMCA Article 10.2.1, which governs the question of excluding imports from another Party from a safeguard measure, applies to a Party "taking an emergency action under Article XIX and the Safeguards Agreement." Thus, by its terms Article 10.2.1 applies at the time a Party is putting a safeguard measure in place, which includes the decision whether to exclude or include imports from another Party. Article 10.2.2 confirms this conclusion, because it applies to a Party "determining" whether imports from a Party qualify for an exclusion when, as envisaged under Article 10.2.1, a Party is "taking an emergency action . . ." Nothing in these provisions creates additional obligations that extend beyond the process of making an exclusion determination.

37. USMCA Article 10.2.3 confirms that Articles 10.2.1 and 10.2.2 only apply at the time a

[43] USMCA, Article 31.2(b).

Party is considering whether to exclude another Party's imports. Article 10.2.3 clarifies that a Party may determine to include imports of the relevant good from a Party in two situations: (1) "initially" through Article 10.2.1, or (2) "subsequently" under Article 10.2.3 "in the event that the competent investigating authority determines that a surge in imports of such good from the other Party or Parties undermines the effectiveness of the action."

38. USMCA Article 10.2.5(b) states that that "{n}o Party may impose restrictions on a good in an action under paragraph 1 or 3 . . . 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." As discussed in greater detail below in section V.C, the phrase "would have the effect of . . ." in Article 10.2.5(b) involves a prediction of the "effect" of the "restrictions" referenced in the chapeau at the time those restrictions were imposed. Thus, Article 10.2.5(b) envisages an *ex ante* approach, not an *ex post* one. If the USMCA Parties intended Article 10.2.5(b) to obligate a Party to evaluate on an ongoing basis whether inclusion of imports in a safeguard measure met the criteria, then there would have been no need to include the term "would."

39. Thus, the obligations in USMCA Articles 10.2.1, 10.2.2, and 10.2.5(b) apply at a particular moment in time, when the Party is initially deciding whether to include imports from another Party in a safeguard action. The obligations under USMCA Articles 10.2.1, 10.2.2, and 10.2.5(b) are essentially identical to those in NAFTA Articles 802.1, 802.2, and 802.5(b), respectively.[44] Therefore, these NAFTA provisions also only applied at the time a Party was initially determining whether to include imports from another Party in a safeguard action.

40. With regard to including imports from Canada in the solar safeguard, the President made this determination once, and only once, under U.S. implementing legislation and did so before the USMCA entered into force, and while the NAFTA was in force.[45] Consequently, the President's determination to include imports from Canada was not subject to Article 10.2.1, 10.2.2, or 10.2.5(b) of the USMCA, and cannot have been inconsistent with those provisions. Since that time, the United States has not revisited that determination, or made any other determination with respect to the inclusion of imports originating in Canada under the solar safeguard.

41. Canada seeks to avoid the conclusion that it is challenging a decision made while the NAFTA was in force by observing that "{t}he substantive obligations of the United States in {the USMCA} at issue in this dispute are essentially identical to the U.S. obligations in NAFTA."[46] It even provides a table purporting to show a concordance between certain NAFTA and USMCA provisions.[47] This changes nothing. The USMCA provisions were not in force at

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[44] Canada's Initial Written Submission, Annex 1.

[45] *Proclamation 9693*, 83 Fed. Reg. at 3542 (para. 7) (Exhibit CAN-05); *see also id.* at 3541 (para. 3).

[46] Canada's Initial Written Submission, para. 18.

[47] Canada's Initial Written Submission, Annex 1.

the time the determination was made, and alleged similarities to certain NAFTA provisions do not give the USMCA provisions retroactive effect. Indeed, if Canada considered that the January 2018 determination to include imports from Canada was contrary to the NAFTA provisions listed in its concordance, Canada's remedy was to seek establishment of a NAFTA panel to address those claims. Its failure to do so before the USMCA superseded the NAFTA in July 2020 means that the NAFTA dispute settlement system is no longer available to it.

42. Canada cannot properly invoke USMCA dispute settlement to belatedly address claims of NAFTA inconsistency that it could have, but did not, raise while NAFTA was in force. Chapter 31 applies to disputes arising under "this Agreement" (*i.e.*, the USMCA). USMCA Article 31.2, which concerns the "{s}cope" of Chapter 31, indicates that it covers, *inter alia*, "the interpretation or application of *this Agreement*" and questions of whether "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*."[48] Article 31.7 provides that the terms of reference of a panel are, *inter alia*, to "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)."[49] Article 31.13 provides that the function of a panel is to make an objective assessment of the matter before it and present a report that, *inter alia*, makes determinations of whether "the measure at issue is inconsistent with obligations in *this Agreement*," and whether "a Party has otherwise failed to carry out its obligations in *this Agreement*."[50]

43. Consequently, a Party may raise only claims under the USMCA in USMCA Chapter 31 dispute settlement. Thus, any claim that the determination to include imports originating in Canada in the solar safeguard measure was inconsistent with NAFTA is precluded by Chapter 31.

44. The only other provision that Canada relies on in suggesting it may raise its Article 10.2.1, 10.2.2, and 10.2.5(b) claims against the January 2018 decision is Article 34.1.1, which states: "The Parties recognize the importance of a smooth transition from NAFTA 1994 to this Agreement."[51] But Canada nowhere explains why the Panel should read the Parties' desire for a "smooth transition" as empowering a USMCA panel to address claims under the NAFTA. To the contrary, a bright line rule allowing NAFTA panels to address only claims under the NAFTA and USMCA panels to address only claims under the USMCA smooths the transition by ensuring that at any one time, a Party is subject to obligations under one, rather than both, agreements.

45. In fact, the USMCA contains such a bright line rule for challenges to antidumping and

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[48] USMCA, Article 31.2 (emphasis added).

[49] USMCA, Article 31.7 (emphasis added).

[50] USMCA, Article 31.13 (emphasis added).

[51] Canada's Initial Written Submission, paras. 19, 21.

countervailing duty determinations. Article 34.1.4 provides that "Chapter Nineteen of NAFTA 1994 shall continue to apply to binational panel reviews related to final determinations published by a Party before the entry into force of this Agreement." Article 34.1.5 provides that the USMCA Secretariat shall perform the functions assigned to the NAFTA 1994 Secretariat under Chapter 19 of the NAFTA "until the binational panel has rendered a decision and a Notice of Completion of Panel Review has been issued by the Secretariat pursuant to the Rules of Procedure for Article 1904 Binational Panel Reviews." USMCA Articles 34.1.4 and 34.1.5 evince that where the Parties sought to ensure that a Party could raise NAFTA claims once the USMCA entered into force, they did so explicitly. This is consistent with the Protocol, which explains that "the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA."[52] Unlike NAFTA Chapter 19 dispute settlement, there are no special transitional provisions in the USMCA that refer to NAFTA Chapter 8, which covered safeguards. This demonstrates that the Parties did not intend for safeguard actions taken pursuant to NAFTA obligations to be challengeable under USMCA Chapter 31.

46. Canada's references to the USITC's midterm review and to *Proclamation 10101* do not change this conclusion.[53] Canada appears to assert that either of these events "continued" the safeguard measure, including renewing the determination that imports from Canada should be included.[54] But Canada misunderstands both the purpose of the midterm review process under U.S. law, and what *Proclamation 10101* did.

47. Under section 204(a)(1) of the Trade Act, the USITC "shall monitor developments with respect to the domestic industry, including the progress and specific efforts made by workers and firms in the domestic industry to make a positive adjustment to import competition."[55] Under section 204(a)(2), if the initial period that a safeguard action is in effect exceeds three years, then the USITC "shall submit a report on the results of the monitoring" to the President and Congress no later than the mid-point of the initial period. Thus, the USITC's midterm review under section 204(a) does not seek to determine whether to "extend{ }" a safeguard measure. Under U.S. law, the determination of whether to extend a safeguard measure is governed by section 204(c).[56] The midterm review merely provides the results of monitoring developments in the industry after imposition of a safeguard measure, and does not require any formal determinations.

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[52] Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada, para. 1.

[53] Canada's Initial Written Submission, para. 21.

[54] Canada's Initial Written Submission, paras. 21, 56-57, 87, 95.

[55] Codified at 19 U.S.C. § 2254(a)(1) (Exhibit CAN-02).

[56] Codified at 19 U.S.C. § 2254(c) (Exhibit CAN-02).

48. *Proclamation 10101* was issued on October 10, 2020, after the USMCA entered into force, but it made only two specific modifications to the safeguard measure, neither of which were to extend it or renew the President's determination to include imports from Canada.[57] One modification was to withdraw an exclusion USTR previously granted for "bifacial panels," because the President determined that the exclusion "has impaired and is likely to continue to impair the effectiveness of the action . . ."[58] The second modification was to "adjust the duty rate of the safeguard tariff for the fourth year of the safeguard measure to 18 percent," given "that the exclusion of bifacial panels from application of the safeguard tariffs has impaired the effectiveness of the 4-year action I proclaimed in Proclamation 9693."[59] The President made this latter modification "to achieve the full remedial effect envisaged" by *Proclamation 9693*.[60] As neither of these modifications addressed imports of goods originating in Canada, they cannot be read as determinations with respect to the inclusion or exclusion of goods originating in Canada in the safeguard measure that are subject to the USMCA.

49. In sum, the obligations in NAFTA Articles 802.1, 802.2, and 802.5(b) applied at the time a Party was considering whether to include imports from another Party in a safeguard measure, and did not create ongoing obligations. If Canada considered that the 2018 determination to include imports originating in Canada in the safeguard measure was inconsistent with U.S. international obligations, it should have challenged the determination under the obligations then in effect, namely, those under the NAFTA. Having failed to do so, it may not now invoke USMCA Chapter 31 dispute settlement to challenge the determination under USMCA provisions that were not in effect at the time.

V. 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

50. In this dispute, Canada only challenges the U.S. determination to include imports of CSPV products from Canada in the solar safeguard measure. Canada does not challenge any other aspect of the safeguard measure or the underlying determination by the USITC.

51. Even aside from the fact that these claims are not properly before the Panel, Canada's multiple attacks on the determination to include imports from Canada all lack merit. Subsection A shows that Canada's Article 10.3 claim emanates from the faulty premise that the determination called for under Article 10.2.1 is a "serious injury determination." Article 10.2.1, in fact, takes the existence of serious injury and its causation by all imports as a given, and calls only for a determination as to the contribution of Canadian imports. Moreover, and even aside from the fact that the determination called for in Article 10.3 cannot legitimately be

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[57] *Proclamation 10101*, 85 Fed. Reg. at 65,639 (Exhibit CAN-29).

[58] *Proclamation 10101*, 85 Fed. Reg. at 65,640 (para. 9(a)) (Exhibit CAN-29).

[59] *Proclamation 10101*, 85 Fed. Reg. at 65,640 (para. 9(b)) (Exhibit CAN-29).

[60] *Proclamation 10101*, 85 Fed. Reg. at 65,640 (para. 9(b)) (Exhibit CAN-29).

characterized as a "serious injury determination," the text retains the President's role in exclusion determinations "to the extent provided by domestic law." Canada has understood for decades that the President has definitive authority to make exclusion determinations, given that this approach has been a part of U.S. law over the course of *three* free trade agreements involving the United States and Canada. Canada has even benefitted from – and publicly supported – the President's authority to make autonomous determinations in this regard.

52. Subsection B shows that the USITC's investigation record supported a determination to include imports of CSPV products from Canada. Therefore, Canada errs in asserting that there was no data supporting the inclusion of Canada in the safeguard.

53. Subsection C shows that Canada's Article 10.2.5(b) claim emanates from a faulty premise – that this provision requires a comparison between import levels before and after imposition of a restriction to discern whether the restriction would have the effect of reducing imports from Canada below a certain level. Article 10.2.5(b) calls for an *ex ante*, not *ex post* analysis.

54. Finally, in subsection D, we address Canada's claim under USMCA Article 2.4.2, which is entirely dependent on its Article 10.2.1, 10.2.2, 10.2.5(b), and 10.3 claims against the solar safeguard measure. Those claims lack merit, so Canada's Article 2.4.2 claim also lacks merit.

A. Canada Fails to Establish that Including Imports of CSPV Products from Canada in the Solar Safeguard Measure was Inconsistent with USMCA Article 10.3

55. Canada's USMCA Article 10.3 claim fails because it relies on the faulty premise that the President's determination to include imports originating in Canada in the solar safeguard measure was a "determination{ } of serious injury, or threat thereof" or a "negative injury determination{ }."[61] As we explain in subsections 1 and 2, it was neither. The only "serious injury determination" in the proceeding was the USITC's finding that imports from all sources were a substantial cause of serious injury to the domestic CSPV products industry. As that was an affirmative determination, Article 10.3's reference to a "negative injury determination" is not relevant. The only determinations that the USITC – and the President – made with respect to imports from Canada were as to whether they represented a "substantial share" of imports from all sources and "contribute{d} importantly" to the serious injury caused by imports from all sources. Neither of these was a "serious injury determination," as they did not revisit whether the domestic industry was injured, or whether that injury was serious. Nor was the USITC's finding a "negative injury determination," as it addressed only whether imports originating in Canada "contributed importantly" to the serious injury, and did not find – either implicitly or explicitly – that those imports made no contribution whatsoever to serious injury.

56. In any event, and as we explain in subsection 3, even if Article 10.3 governs exclusion determinations, that Article preserves the U.S. right to entrust exclusion determinations to the

[61] *See, e.g.,* Canada's Initial Written Submission, para. 68.

President. The Article expressly provides that a Party shall entrust determinations of serious injury, or threat thereof, to a competent investigating authority "to the extent provided by domestic law." This qualification allows the United States to charge the President with making exclusion determinations with respect to imports from Canada and Mexico in safeguard proceedings. Indeed, Canada has understood for more than 30 years that U.S. law provides the President with authority to make exclusion determinations, and Canada has explicitly endorsed that approach in the past.

1. Article 10.3 Does Not Apply to Determinations as to Whether Imports Originating in USMCA Parties Account for a Substantial Share of All Imports, or Contribute Importantly to Serious Injury Caused by All Imports

57. A determination regarding whether to exclude or include imports from a Party in a safeguard measure is not a "determination{ } of serious injury, or threat thereof" or "negative injury determination{ }."[62] Thus, Article 10.3 does not govern such determinations, and did not preclude the United States from giving the President the ultimate authority under the NAFTA to make the determinations related to inclusion of imports originating in Canada in the solar safeguard measure.

58. USMCA Article 10.3, entitled "Administration of Emergency Action Proceedings," provides that:

> Each Party shall entrust determinations of serious injury, or threat thereof, in emergency action proceedings to a competent investigating authority, subject to review by judicial or administrative tribunals, to the extent provided by domestic law. Negative injury determinations shall not be subject to modification, except by such review. The competent investigating authority empowered under domestic law to conduct such proceedings should be provided with the necessary resources to enable it to fulfill its duties.

59. The scope of the first sentence of Article 10.3 specifically covers "determinations of serious injury, or threat thereof," "in emergency action proceedings." The first sentence imposes two obligations on Parties making "determinations of serious injury, or threat thereof." First, it requires that "{e}ach Party shall entrust" such determinations "to a competent investigating authority." In this and every global safeguard investigation undertaken by the United States, it did just this—the United States entrusted the determination of serious injury to its competent investigating authority, the USITC. Second, it requires that such determinations be "subject to review by judicial or administrative tribunals." As discussed in subsection 3, the phrase "to the extent provided by domestic law" qualifies both of these obligations.

60. The second sentence refers to "negative injury determinations," and it imposes an obligation that they "not be subject to modification, except by such review." The second and

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[62] *See, e.g.,* Canada's Initial Written Submission, para. 68.

first sentences are integrally connected. The phrase "subject to review by judicial or administrative tribunals" in the first sentence informs "such review" in the second sentence. In other words, "such review" is shorthand for the review discussed in greater detail in the first sentence.

61. Given the integral connection between the first and second sentences, it is evident that "negative injury determinations" in the second sentence refers back to "determinations of serious injury, or threat thereof" in the first sentence, when those determinations are "negative." For this reason, the United States disagrees with Canada that the second sentence of Article 10.3 "must therefore refer to a broader category than the term 'determinations of serious injury' in the first sentence."[63] "Negative injury determinations" in the second sentence is shorthand for "determinations of serious injury, or threat thereof" in the first sentence (where they are negative), just as "such review" is shorthand for "review by judicial or administrative tribunals." This is the only "significance" of the difference between the references to determinations in the first and second sentences.[64] In sum, the second sentence of Article 10.3 does not establish another type of "injury" determination that is made in a safeguard proceeding, affirmative or negative.

62. The hortatory statement regarding resources in the third sentence of Article 10.3 refers to "such proceedings" of "{t}he competent investigating authority." Read in light of the first and second sentences, "such proceedings" in the third sentence refers back to "determinations of serious injury, or threat thereof, in emergency action proceedings." Put another way, the obligations in all three sentences of Article 10.3 cover a subset of the findings made in a safeguard proceeding, namely, a serious injury or threat of serious injury determination.[65]

63. As Canada observes, the chapeau to Article 10.2.1 specifically references Article XIX of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the *Agreement on Safeguards* ("Safeguards Agreement").[66] In fact, it refers to them as providing for "emergency action." Article 10.3 is entitled "Administration of Emergency Action Proceedings" and explicitly addresses "determinations of serious injury, or threat thereof, in emergency action proceedings." Thus, Article XIX of the GATT 1994 and the Safeguards Agreement provide important context for the interpretation of USMCA Articles 10.2 and 10.3. Canada appears to share this view, but fails to draw the correct conclusions.

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[63] Canada's Initial Written Submission, para. 77.

[64] Canada's Initial Written Submission, para. 77.

[65] The United States agrees in principle with Canada that Article 10.3 ensures serious injury determinations are made "by a competent investigating authority in a manner free from political interference." Canada's Initial Written Submission, para. 65. However, as discussed below, specific treaty provisions do not have an "object and purpose."

[66] Canada's Initial Written Submission, paras. 70-71.

64. Article XIX:1 of the GATT 1994 authorizes "emergency action on imports of particular products" when "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 . . . ."[67] On its face, this "serious injury" is with respect to "any product" without regard as to its origin. Article 2.2 of the Safeguards Agreement provides that any remedy imposed as an emergency action "shall be applied to a product being imported irrespective of its source."[68] The use of the phrase "product being imported irrespective of its source" clarifies that the "product" being imported and the determination of "serious injury" is irrespective of the source of the product, that is, that they are from all sources. Article XIX of the GATT 1994 and the Safeguards Agreement do not provide for any other determination of serious injury or determination of injury, negative or otherwise.

65. Thus, the reference in Article 10.3 to a "determination{ } of serious injury" in an "emergency action proceeding{ }" can only be understood as meaning the determination called for in Article 2.1 of the Safeguards Agreement, namely, a Member's determination that a "product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry. . . ."[69] That determination is with respect to all sources. Similarly, the "negative injury determination{ }" in the second sentence of Article 10.3 can only refer to a "determination" of "injury" that is "negative." As an "emergency action proceeding{ }" calls for only one "determination," which is with respect to imports from all sources, that "negative injury determination" is properly understood as referring to a determination that imports from all sources do not cause serious injury. Thus, the only "determination{ }" that must be "entrust{ed}" to a "competent investigating authority" under USMCA Article 10.3 is the determination whether imports from all sources cause or threaten to cause serious injury to the domestic industry.

66. As further context, the United States notes that USMCA Article 10.2.1 calls for two additional "determinations" with respect to imports from another USMCA Party. Neither of these is a "serious injury determination" or "injury determination." The first additional determination – whether imports from a USMCA Party "account for a substantial share of total imports" does not even reference serious injury. The second additional determination is whether imports from a USMCA Party "contribute importantly to the serious injury, or threat thereof, caused by imports." It takes as a given that "the serious injury . . . caused by imports" has already been determined, and calls for the Party contemplating a safeguard measure to make a *different* determination as to the contribution of imports from each USMCA Party. This is a critical point, as the determination with respect to imports from all sources (the "total imports" referenced in Article 10.2.1(a)) *includes* imports from USMCA Parties. Thus, the Party's competent investigating authority will already have determined that any imports from USMCA

[67] GATT 1994, Article XIX:1 (Exhibit CAN-34).

[68] Safeguards Agreement, Article 2.2 (Exhibit CAN-35).

[69] Safeguards Agreement, Article 2.1 (Exhibit CAN-35).

Parties are among those that have caused serious injury, or the threat thereof. Article 10.2.1(b) calls for the Party to additionally determine whether the extent to which imports from USMCA Parties have "contribute{d}" to the serious injury is "important{ }." It does not require the Party to revisit the competent investigating authority's findings that the domestic industry is injured, that the injury is serious, or that imports from all sources caused the injury. Thus, it is not a determination of serious injury.

67. Canada seeks to portray these determinations as "serious injury determinations" by arguing that "substantial share" and "contribute importantly" are "counterparts" or "parallels" to findings of increased imports or that imports cause or threaten to cause serious injury under Article XIX of the GATT 1994 and the Safeguards Agreement.[70] Canada's efforts are unavailing. The question of "substantial share" addresses whether imports of a good from a Party rank among other sources of such imports, without regard to whether imports from that Party are increasing or decreasing. As noted above, the "contribute importantly" prong is not analogous to a determination of serious injury as it relates only to one element – causation – of the serious injury analysis. And, it relates only tangentially to that element, as the question regarding whether imports from one source contribute importantly to serious injury is independent of whether all imports cause serious injury, and does not preclude that imports from that one source contribute to the serious injury, albeit in a less-than-important way.[71]

68. Canada erroneously argues that the "object and purpose of Section A of Chapter 10" is "ensuring that trade between CUSMA Parties is not unnecessarily disrupted by a global safeguard measure."[72] Specific treaty provisions, or sections of treaties, do not have a so-called "object and purpose." Article 31.1 of the *Vienna Convention* requires 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." That is, the object and purpose relates to the treaty *as a whole*, not to specific provisions or chapters.

69. The USMCA's object and purpose, as evidenced by its preamble, does not support Canada's interpretation of Article 10.3. On the one hand, it seeks to "ELIMINATE obstacles to international trade which are more trade-restrictive than necessary." On the other hand, it also seeks to "PRESERVE AND EXPAND regional trade and production by further incentivizing the

[70] Canada's Initial Written Submission, paras. 68-72.

[71] The United States notes that "important" may be a very high threshold. The dictionary definition is: "That is of great consequence or significance; having a serious or significant effect or influence; consequential, weighty, momentous." Definition of "Important," *Oxford English Dictionary*, https://www.oed.com/view/Entry/92556?redirectedFrom=important#eid (consulted Sept. 15, 2021) (definition A.I.1.a) (Exhibit USA-20). Thus, imports from Canada might meet this standard even if they were "of consequence" or had a material (rather than "serious or significant") effect or influence.

[72] Canada's Initial Written Submission, para. 75.

production and sourcing of goods and materials in the region."[73] When a Party's competent investigating authority has found that imports from all sources, including other USMCA Parties, are causing serious injury to a domestic industry, those objectives may come into conflict. Articles 10.2 and 10.3 are best understood as defining the balance between the objectives of eliminating obstacles and incentivizing the production and sourcing of goods and materials in the region, setting out conditions for allowing a temporary restriction on imports from a Party. Nothing in the preamble supports tilting that balance in one direction or another.

70. As indicated above, Canada's Article 10.3 claim is erroneously premised on an understanding that this Article requires that a Party entrust the "substantial share" and "contribute importantly" determinations in Article 10.2.1 to the competent investigating authority. As additional context, Article 10.2.1 does not mention the "competent investigating authority," but refers only to the "Party."[74] The "competent investigating authority" does not appear in Article 10.2.2(a) either. Article 10.2.2(b) calls for the competent investigating authority to consider certain factors in "determining" whether imports from a Party contribute importantly to the serious injury. But this does not mean that only the competent investigating authority may make that determination, or that a Party must "entrust" that determination exclusively to the authority. The fact that Articles 10.2.1 and 10.2.2 do not refer to "entrust" confirms that the competent investigating authority need not have the final say in whether imports from a Party must be excluded. A Party could choose to entrust this determination to the competent investigating authority, but Articles 10.2.1 and 10.2.2 do not require this. For the same reason, Article 10.3's prohibition on negative injury determinations being subject to modification, except by judicial or administrative tribunal review, is inapplicable in the Article 10.2.1 context.

71. In sum, USMCA Article 10.3 does not govern USMCA exclusions. They need not be entrusted to the competent investigating authority, and they are susceptible to modification or reversal outside the context of judicial or administrative tribunal review.

2. The United States Complied with Article 10.3 in the Solar Safeguard Proceeding

72. Even aside from the fact USMCA Article 10.3 did not apply to the President's pre-USMCA determination to include imports from Canada in the solar safeguard measure, the United States has not breached that Article.

73. Consistent with the first sentence of Article 10.3, the USITC is the competent investigating authority entrusted to make serious injury determinations in safeguard proceedings,

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[73] USMCA, preamble.

[74] *See, e.g.,* Canada's Initial Written Submission, paras. 78, 92.

under both U.S. law[75] and the USMCA.[76] The USITC Commissioners unanimously made an affirmative serious injury determination in the solar safeguard proceeding.[77]

74. Consistent with the second sentence of Article 10.3, U.S. law does not permit the President to modify or reverse a USITC serious injury determination, affirmative or negative.[78] Instead, the President, in response to a USITC affirmative determination of serious injury, or threat thereof, is charged with determining what action to take to facilitate efforts by the domestic industry to make a positive adjustment to import competition. In implementing the solar safeguard measure, the President acknowledged the USITC's affirmative serious injury determination, and no part of *Proclamation 9693* can be read as modifying or reversing the serious injury determination.[79]

75. Thus, the United States complied with Article 10.3 because it entrusted the USITC to make the determination of serious injury in the safeguard investigation, and the serious injury determination has never been modified or reversed by the President or by any other entity.

76. As discussed in subsection 1, a USMCA exclusion is not a serious injury determination, and need not be entrusted to the competent investigating authority. Similarly, the President's definitive exclusion or inclusion determination, even if it contradicts the USITC's findings on that issue, is not a "modification" of a negative serious injury determination. The USITC made a determination of serious injury caused by imports from all sources, *including from Canada* in the

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[75] *See, e.g.,* section 201(a) of the Trade Act (codified at 19 U.S.C. § 2251(a)) (Exhibit CAN-02) ("*If the United States International Trade Commission (hereinafter referred to in this chapter {19 USC §§ 2251 et seq.} as the 'Commission') determines under section 2252(b) of this title {section 202(b)}} that an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article*, the President, in accordance with this part, shall take all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs") (emphasis added); section 202(b)-(c) of the Trade Act (codified at 19 U.S.C. § 2252(b)-(c) (Exhibit CAN-02)) (governing how USITC makes serious injury determinations).

[76] USMCA, Article 10.1(c).

[77] USITC Serious Injury Determination Report, Vol. 1, 5 (Exhibit CAN-07); *see also id.* at 79.

[78] *See* sections 201(a), 203(a)(1)(A) of the Trade Act (codified at 19 U.S.C. §§ 2251(a), 2253(a)(1)(A), respectively (Exhibit CAN-02)). Section 19 U.S.C. § 1330(d) provides that if the USITC Commissioners are equally divided with respect to a determination of serious injury, then "the determination agreed upon by either group of commissioners may be considered by the President as the determination of the Commission." 19 U.S.C. § 1330(d) (Exhibit USA-01). In other words, if the Commissioners are tied in their vote, the President may treat the USITC's determination as either affirmative or negative. However, all that he does is choose which of two views to treat as the institutional determination of the Commission. The statute does not authorize him to add to, subtract from, or otherwise modify the conclusions of the Commissioners that he selects. In any event, in the solar safeguard investigation, the USITC unanimously determined that the domestic industry was seriously injured.

[79] *See Proclamation 9693*, 83 Fed. Reg. at 3541 (para. 2) (Exhibit CAN-05).

solar safeguard investigation, and the President made the definitive determination to include imports from Canada in promulgating the safeguard measure while the NAFTA was in force. The USITC serious injury determination is subject to Article 10.3; the President's USMCA exclusion is not.

77. The fact that the USITC report's "Views on Injury" included findings of whether imports from Canada met the criteria for exclusion, or that analogous sections of past USITC safeguard reports have included such findings, did not transform the question of whether Canada should be excluded into a determination of serious injury, or threat thereof.[80] In fact, the USITC majority, in making findings under U.S. law implementing NAFTA Articles 802.1 and 802.2, recognized that their making findings regarding imports from Canada was not equivalent to a serious injury determination.[81]

78. In sum, Article 10.3 governs "determinations of serious injury, or threat thereof." The USITC made an affirmative serious injury determination in the solar safeguard investigation, and the United States has not modified it. The President's pre-USMCA determination to include imports from Canada constituted a different determination, separate and apart from the USITC's determination of serious injury. The United States was not required to entrust that separate NAFTA-based determination to the USITC, and the USITC's findings regarding exclusion of imports from Canada were not off limits from modification, review, or change by the President.

3. Article 10.3 Requires Entrustment of Serious Injury Determinations to the Competent Investigating Authority only "to the Extent Provided by Domestic Law," Which in the United States Authorizes the President to Make a Separate and Definitive Determination on these Questions

79. Finally, and even if Article 10.3 applied to the President's determination, Canada has misinterpreted Article 10.3 and failed to identify any way in which the Presidential exclusion determination was inconsistent with that Article. Article 10.3 does not, as Canada contends, impose an unqualified obligation to entrust such determinations to the competent investigating authority. As discussed in subsection a below, the phrase "to the extent provided by domestic

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[80] Canada's Initial Written Submission, para. 78.

[81] In its November 2017 report, the USITC majority stated that:

> The statute refers to "the serious injury, or threat thereof, caused by imports." 19 U.S.C. § 3371(a)(2)). Having found under section 202 of the Trade Act (19 U.S.C. § 2252(b)) that crystalline silicon photovoltaic cells (whether or not partially or fully assembled into other products) are being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry producing crystalline silicon photovoltaic cells (whether or not partially or fully assembled into other products), we limit our findings for NAFTA countries to whether imports of the article from each NAFTA country contribute importantly to the serious injury caused by imports consistent with the Commission's approach in prior investigations.

USITC Serious Injury Determination Report, Vol. 1, 68 n.390 (Exhibit CAN-07).

law" qualifies Article 10.3's requirements. Subsection b highlights that the President has had definitive authority to make exclusion determinations involving Canada over the course of three free trade agreements involving the two countries, and subsection c briefly describes that Canada has benefitted from the Presidential exercise of this authority in a prior safeguard proceeding and has even supported the U.S. approach in the past. Therefore, nothing in the Article precluded the President from making the exclusion determinations with respect to Canada.

a. The Phrase "to the Extent Provided by Domestic Law" Qualifies the Obligations in Article 10.3

80. As discussed in subsection 1 above, the first sentence of Article 10.3 imposes two obligations. First, it requires that "{e}ach Party shall entrust determinations of serious injury, or threat thereof, in emergency action proceedings to a competent investigating authority." Second, it requires that "determinations of serious injury, or threat thereof, in emergency action proceedings" be "subject to review by judicial or administrative tribunals." Significantly, the first sentence of Article 10.3 also contains the qualifier "to the extent provided by domestic law." This language modifies both obligations in the first sentence.

81. The second sentence of Article 10.3 provides that "{n}egative injury determinations shall not be subject to modification, except by such review." As discussed in subsection 1, the first and second sentences are connected and must be read together, including the phrase "to the extent provided by domestic law" in the first sentence.

82. To understand the meaning of the modifier "to the extent provided by domestic law" in the first sentence, Article 31.13.4 provides that a panel shall interpret the USMCA in accordance with customary rules of public international law, as reflected in Articles 31 and 32 of the *Vienna Convention*. Thus, we start with dictionary definitions to discern the ordinary meaning of these terms. In *US – Section 301 Trade Act*, the WTO dispute settlement panel commented that "{f}or pragmatic reasons the normal usage . . . is to start the interpretation from the ordinary meaning of the 'raw' text of the relevant treaty provisions and then seek to construe it in its context and in light of the treaty's object and purpose."[82] The United States considers this reasoning to be compelling, and notes that Canada appears to consider that dictionary definitions may provide useful guidance in interpreting terms in the USMCA.[83]

83. The ordinary meaning of the phrase "*to a certain, great, etc., extent, to the (full) extent*

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[82] *See* Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, para. 7.22, WT/DS152/R, adopted Jan. 27, 2000 (Exhibit USA-49). *See also* Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, vol. II, at 219 (Exhibit USA-50) (noting that the International Court of Justice "emphasized that to adopt an interpretation which ran counter to the clear meaning of the terms would not be to interpret but to revise the treaty").

[83] *See, e.g.*, Canada's Initial Written Submission, para. 104 n.119.

of" is "the limit to which anything extends; e.g. in *to reach the extent*."[84] "Provide" means "{t}o stipulate in a will, statute, etc.; to lay down as a provision or arrangement."[85] Thus, the first sentence of Article 10.3 provides, in relevant part, that "{e}ach Party shall entrust determinations of serious injury, or threat thereof, in emergency action proceedings to a competent investigating authority" to the limits of what is laid down in U.S. statutes. Even aside from the fact that Article 10.3 does not apply to a USMCA exclusion, the relevant statute would be section 302 of the USMCA Implementation Act (19 U.S.C. § 4552), which entrusts to the President the final opportunity to make a USMCA exclusion in implementing a U.S. safeguard measure. Given the relationship between the first and second sentences of Article 10.3, the phrase "to the extent provided by domestic law" also informs the requirement in the second sentence that negative determinations are not subject to modification except through review by judicial or administrative tribunals.

84. Consequently, if Canada's argument that a USMCA exclusion is a determination of serious injury, or threat thereof, has merit,[86] then this necessarily means that the qualifier "to the extent provided by domestic law" applies to exclusion determinations. That is, this language in Article 10.3 necessarily qualifies Canada's claimed rule that a USMCA exclusion must be made solely by the competent investigating authority, and negative findings cannot be modified except by judicial or administrative tribunal review. That language allows a Party, including the United States, to deviate from the obligations of Article 10.3 to the extent provided in its domestic law, which is what the United States did.

b. The President's Authority to Make Definitive Exclusion Determinations Has Been "Provided by Domestic Law" Over the Course of Three Free Trade Agreements Involving the United States and Canada, Supporting the Conclusion that Article 10.3 Protected the U.S. Discretion to Organize Safeguard Determinations in this Way

85. If the premise of Canada's claim that a USMCA exclusion is governed by Article 10.3 holds true, then "to the extent provided by domestic law" obviates Canada's Article 10.3 claim against the solar safeguard measure. Canada has been well aware of the President's role in the exclusion process in safeguard proceedings for decades, given that U.S. domestic law has "stipulate{d}"[87] this role for more than 30 years, over the course of *three* different free trade

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[84] Definition of "Extent," *Oxford English Dictionary*, https://www.oed.com/view/Entry/66951?rskey=xnqiyG&result=1&isAdvanced=false#eid (consulted Sept. 15, 2021) (definition II.4.c) (emphasis in original) (Exhibit USA-21).

[85] Definition of "Provide," *Oxford English Dictionary*, https://www.oed.com/view/Entry/153448?rskey=uAeeAl&result=2#eid (consulted Sept. 15, 2021) (definition I.1.a) (Exhibit USA-22).

[86] *See, e.g.,* Canada's Initial Written Submission, para. 68.

[87] Definition of "Provide," *Oxford English Dictionary*, https://www.oed.com/view/Entry/153448?rskey=uAeeAl&result=2#eid (consulted Sept. 15, 2021) (definition I.1.a) (Exhibit USA-22).

agreements involving the United States and Canada: the United States–Canada Free Trade Agreement (CFTA), the NAFTA, and the USMCA.

86. We begin with the CFTA, which entered into force on January 1, 1989. CFTA Article 1102 provided a mechanism for excluding imports from a Party in a global safeguard proceeding:

> With respect to an emergency action taken by a Party on a global basis, the Parties retain their respective rights and obligations under Article XIX of the *General Agreement on Tariffs and Trade* subject to the requirement that *a Party taking such action shall exclude the other Party from such global action unless imports from that Party are substantial and are contributing importantly to the serious injury or threat thereof caused by imports*. For purposes of this paragraph, imports in the range of five percent to ten percent or less of total imports would normally not be considered substantial.[88]

While this language is not identical to USMCA Article 10.2.1, the similarities are striking.

87. The United States implemented CFTA Article 1102 through section 302(b) of the relevant implementing legislation.[89] Section 302(b)(1)(A) provided that, if the USITC makes an affirmative determination of serious injury or threat thereof in a global safeguard proceeding, then it "shall also find (and report to the President at the time such injury determination is submitted to the President), whether imports from Canada of the article that is the subject of such investigation are substantial and are contributing importantly to such injury or threat thereof."[90] Section 302(b)(2)(A) then tasked the President with ultimately "determin{ing} whether imports from Canada of such article are substantial and contributing importantly to the serious injury or threat of serious injury found by the Commission."[91] Subsection (b)(2)(B) mandated that "the President shall exclude from such {safeguard} action imports from Canada" if the President makes a negative determination under subsection (b)(2)(A).[92]

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[88] United States–Canada Free Trade Agreement, Article 1102(1) (Exhibit USA-09) (emphasis added).

[89] Approving and Implementing the United States-Canada Free Trade Agreement, S. Rep. 100-509, 21-22 (Sept. 15, 1988) (Exhibit USA-11) ("Section 302(b) implements the obligations assumed by the United States under Article 1102 of the Agreement to give special treatment to imports from Canada in import relief proceedings under Chapter 1 of Title II of the Trade Act of 1974").

[90] United States-Canada Free-Trade Agreement Implementation Act of 1988, sec. 302(b)(1)(A), Pub. L. 100-449, 102 Stat. 1872 (1988) (Exhibit USA-10).

[91] United States-Canada Free-Trade Agreement Implementation Act of 1988, sec. 302(b)(2)(A), Pub. L. 100-449, 102 Stat. 1872 (1988) (Exhibit USA-10).

[92] United States-Canada Free-Trade Agreement Implementation Act of 1988, sec. 302(b)(2)(B), Pub. L. 100-449, 102 Stat. 1872 (1988) (Exhibit USA-10); *see also* Approving and Implementing the United States-Canada Free Trade Agreement, S. Rep. 100-509, 22 (Sept. 15, 1988) (Exhibit USA-11) ("Under subsection (b)(2), the President is required, in determining whether to provide import relief, to make essentially the same determination

88. Thus, U.S. law implementing the CFTA conferred on the President, and not the USITC, authority to make definitive determinations regarding exclusions of imports from Canada in global safeguard proceedings.

89. Subsequent to the CFTA, the United States, Canada, and Mexico concluded the NAFTA, which entered into force on January 1, 1994. NAFTA Articles 802.1 and 802.2 provided for exclusion determinations regarding imports from other Parties in global safeguard actions. As indicated elsewhere in this submission, these provisions were essentially identical to USMCA Articles 10.2.1 and 10.2.2. NAFTA Article 803.2 contained language identical to that in USMCA Article 10.3, including for the first time the "to the extent provided by domestic law" language.[93]

90. As indicated above, the United States implemented NAFTA Articles 802.1 and 802.2 through sections 311 and 312 of the NAFTA Implementation Act.[94] Similar to the predecessor U.S. statutory provisions implementing the CFTA, section 311(a) of the NAFTA Implementation Act required the USITC, at the time it made an affirmative serious injury determination, to report to the President whether imports from a NAFTA country accounted for a substantial share of total imports of the article under investigation and whether such imports contribute importantly to the serious injury or threat thereof.[95] Notably, similar to the CFTA implementing provisions, section 312(a) required the President to make "essentially the same determination as the ITC as to whether imports from NAFTA countries represent a substantial share of total imports and whether they contribute importantly to the injury or threat of injury," and that, "{i}f the President finds in the affirmative, he is required, under subsection (b), to exclude imports from NAFTA countries from any global relief imposed."[96]

91. Thus, when Canada agreed to incorporate Article 803.2 into the NAFTA, it understood how the United States implemented the predecessor exclusion process under the CFTA, and specifically that the President had authority to make definitive exclusion determinations. If Canada is correct that an exclusion determination is a determination of serious injury, or threat thereof, Canada understood at the time that, "to the extent provided by domestic law,"[97] the President retained definitive authority to make NAFTA exclusions under NAFTA Articles 802.1 and 802.2.

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that is required of the ITC under subsection (b)(1), i.e., whether imports from Canada are substantial and contributing importantly to the serious injury or threat thereof found by the ITC.").

[93] NAFTA, Article 803.2 (Exhibit CAN-01).

[94] S. Rep. 103-189, 31 (Nov. 18, 1993) (Exhibit USA-14).

[95] S. Rep. 103-189, 31 (Nov. 18, 1993) (Exhibit USA-14).

[96] S. Rep. 103-189, 31-32 (Nov. 18, 1993) (Exhibit USA-14).

[97] NAFTA, Article 803.2 (Exhibit CAN-01).

92. Turning to the USMCA, with regard to the exclusion process for imports from other Parties, its provisions and U.S. implementing legislation are essentially identical to the predecessor structure under NAFTA.[98] Indeed, sections 311 and 312 of the NAFTA Implementation Act, which implemented Articles 802.1 and 802.2 of the NAFTA, were merely "transferred" over to the USMCA Implementation Act to implement USMCA Articles 10.2.1 and 10.2.2, with some editorial changes.[99] USMCA Article 10.3 is identical to NAFTA Article 803(2).[100]

93. Therefore, Canada can have been in no doubt about how the United States understood the operation of the exclusion determinations. Even aside from the fact that USMCA Article 10.3 does not apply to USMCA exclusions, the phrase "to the extent provided by domestic law" qualifies the obligation to allow the President to make exclusion determinations with respect to imports from Canada and Mexico in safeguard proceedings.

c. Canada Has Benefitted from the President's Exercise of the Authority to Make Exclusion Determinations Contrary to Those Made by the USITC

94. Past practice provides further evidence that has Canada understood (and accepted) for 20 years that the President may properly reach an exclusion determination contrary to the USITC's. Indeed, Canada has benefitted from the President's exercise of this authority in the past.

95. In the U.S. safeguard investigation of steel products, conducted in 2001 while NAFTA was in force, the USITC found that imports of three distinct steel products from Canada (steel hot bar, cold bar, and stainless steel bar and fittings) accounted for a substantial share of the total imports and contributed importantly to the serious injury or threat thereof caused by imports to the corresponding U.S. domestic industries.[101] The President nonetheless determined that these products did not account for a substantial share of total imports and did not contribute importantly to the serious injury. The President excluded these three products from Canada from the steel safeguard measures otherwise applied to imports from all sources.[102] In the subsequent WTO challenge to the steel safeguard measures, Canada argued explicitly that "the President, in making his determination under the NAFTA Implementation Act, was not required to follow the USITC or to explain his reasons for not doing so."[103] It is difficult to reconcile this statement with Canada's position before this Panel, and in particular its assertion that the only permissible

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[98] *Compare* sections 311, 312 of the NAFTA Implementation Act (Exhibit USA-12), *with* 19 U.S.C. §§ 4551-4552 (Exhibit CAN-03).

[99] USMCA Implementation Act, sec. 502, Pub. L. 116-113, 134 Stat. 70 (2020) (Exhibit USA-15).

[100] Canada's Initial Written Submission, Annex 1.

[101] *Steel*, Inv. No. TA-201-73, USITC Pub. 3479, Vol. 1, 1 (Dec. 2001) (Exhibit CAN-41).

[102] *Proclamation 7529 of March 5, 2002: To Facilitate Positive Adjustment to Competition From Imports of Certain Steel Products*, 67 Fed. Reg. 10,553, 10,555 (Mar. 7, 2002) (paras. 8, 11) (Exhibit USA-08).

[103] *US – Steel Safeguards (Panel)*, para. 8.5 (Exhibit USA-47).

conclusion is that USMCA Article 10.3 prohibits the United States from entrusting this determination to the President.

B. The United States Did Not Act Inconsistently with USMCA Articles 10.2.1 or 10.2.2 By Including Imports of CSPV Products from Canada in the Solar Safeguard Measure

96. As explained in subsection A above, USMCA Articles 10.2.1 and 10.2.2 do not apply to the President's determination to include imports from Canada in the solar safeguard measure because the USMCA was not in force at the time. Canada's arguments that these USMCA provisions duplicate obligations under then-applicable NAFTA Articles 802.1 and 802.2 are inapposite, as the USMCA does not allow a Party to raise NAFTA claims under Chapter 31 dispute settlement.

97. Even aside from the fact that Canada's USMCA Article 10.2.1 and 10.2.2 claims are not properly before the Panel, the United States did not act inconsistently with those Articles simply because the President disagreed with the USITC's findings on imports from Canada.[104] We provide the appropriate interpretation of these provisions in subsection 1, below. As discussed in subsection 2, the information available at the time, including as reflected in the USITC's report, supported the President's determination, made while NAFTA was in force, to include imports from Canada.

1. Article 10.2.2 Provides Guidance on Making the "Contribute Importantly" Determination, but Allows Flexibility in Circumstances that are Not "Normal"

98. USMCA Article 10.2.1 states, in relevant part:

> 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
>
> (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.

99. The word "shall" in the second sentence of the chapeau connotes a mandatory obligation to exclude imports of the good from another Party unless both conditions enumerated in subparagraphs (a) and (b) are satisfied. However, as explained above in section A, the competent investigating authority is not entrusted to decide on USMCA exclusions.

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[104] Canada's Initial Written Submission, para. 89.

100. Article 10.2.2 provides guidance to interpreting Article 10.2.1(a)-(b). It states:

> In determining whether:
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> (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.

101. "Normally" means "under normal or ordinary conditions; as a rule, ordinarily."[105] "Normally" 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. Article 10.2.2(a) does not enumerate what these circumstances are.

102. Article 10.2.1(b) informs the interpretation of Article 10.2.1(b), and calls for an examination of certain factors. It introduces these with the phrase "such factors as," indicating that the two factors listed there are non-exhaustive. The second sentence explains that, "normally," imports from a Party 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. That is, there will be instances in which the growth rate of imports from a Party during the surge period is appreciably lower than the surge rate from imports from all sources over that period, but other considerations may warrant a determination that imports from that Party nonetheless contribute importantly to the serious injury, or threat thereof. Article 10.2.2(b)'s second sentence references the "period in which the injurious surge in imports occurred," but, unlike Article 10.2.2(a)'s reference to "the most recent three-year period," Article 10.2.2(b) does not reference a specific duration of time that must be analyzed.

103. Finally, Articles 10.2.1 and 10.2.2 call only for a "determination" regarding each of the

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[105] Definition of "Normally," *Oxford English Dictionary*, https://www.oed.com/view/Entry/128277?redirectedFrom=normally#eid (consulted Sept. 15, 2021) (definition 2) (Exhibit USA-23).

exclusion criteria. They do not require a Party to articulate a factual or legal basis in the relevant determination as to whether imports from another Party satisfy the conditions in those provisions.[106]

2. Evidence from the USITC's Serious Injury Investigation Supported the President's Determination to Include Imports from Canada in the Solar Safeguard Measure

104. The President did not "ignore{ } the findings of the USITC and the factual evidence submitted during the investigation" in determining to include imports from Canada while NAFTA was in force.[107] Rather, the President "determined *after considering the ITC Report* that imports of CSPV products from . . . 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 ITC."[108] Like Chairman Schmidtlein, he reached a conclusion different from the USITC majority based on the facts before him.

a. The USITC's Record Supported a Determination that Imports from Canada Accounted for a Substantial Share of Total Imports

105. As identified in the USITC's serious injury determination report, U.S. imports of CSPV modules from Canada increased between 2012 and 2016.[109] During the period of investigation, imports of CSPV products from Canada ranked as the tenth largest source of imports by quantity during 2012 and 2013, ninth by quantity during 2014, seventh by quantity during 2015, and tenth by quantity during 2016.[110] As indicated in USMCA Article 10.2.2(a), the focus of the question under Article 10.2.1(a) is import share by the Party "during the most recent three-year period." Thus, during 2014 through 2016, the three full years prior to initiation of the investigation, imports from Canada were among the top 10 import sources, and were even higher than tenth place during 2014 and 2015.

106. Although Canada was not "among the top five suppliers of the good subject to the

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[106] *See* Canada's Initial Written Submission, para. 95 ("President Trump offered no factual or legal basis to determine 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 USITC").

[107] Canada's Initial Written Submission, para. 95.

[108] *Proclamation 9693*, 83 Fed. Reg. at 3542 (para. 7) (Exhibit CAN-05) (emphasis added).

[109] USITC Serious Injury Determination Report, Vol. 2, II-11 (Exhibit CAN-07).

[110] USITC Serious Injury Determination Report, Vol. 2, II-9 (table II-2), II-11 (Exhibit CAN-07); *see also id.* at Vol. 1, 67-68 & n.387.

proceeding"[111] during this period, it was consistently among the top 10.[112] In addition, USITC Chairman Schmidtlein observed that:

> Moreover, the absolute volume of U.S. imports from Canada increased in all but one period of the {period of investigation} and increased at very large rates of growth (U.S. imports from Canada increased from ***). CR/PR at Table II-2. These rates of growth exceed the corresponding rates for global U.S. imports between 2012 and 2015. Therefore, . . . because these very large rates of increase warrant the use of the flexibility envisioned in the {Statement of Administrative Action}, U.S. imports from Canada do account for a substantial share of total U.S. imports.[113]

107. The Chairman's reference to the "flexibility" envisioned in the Statement of Administrative Action,[114] related to the use of the term "normally" in U.S. law implementing NAFTA Article 802.2(a). "Normally" also appeared in NAFTA Article 802.2(a), and is present in USMCA Article 10.2.2(a). Thus, the facts from the USITC's record supported a conclusion that Canada: (1) was consistently among the top 10 sources of imports of CSPV products during the three years preceding initiation of the investigation, (2) the absolute U.S. import volume from Canada increased in all but one year of the period of investigation, and (3) the rates of growth in CSPV imports from Canada exceeded the corresponding global growth rate for imports between 2012 and 2015. The culmination of these facts and circumstances, in combination with Canadian Solar's place among the ranks of the world's top producers of CSPV modules (as discussed in subsection b below), supported a determination that imports of CSPV products from Canada, "considered individually, account{ed} for a substantial share of total imports."[115]

b. Information Before the President, Including Information and Findings in the USITC Report, Supported a Determination that Imports from Canada Contributed Importantly to the Serious Injury

108. The facts gathered during the USITC's investigation also supported a determination that imports from Canada contributed importantly to the serious injury found by the USITC. The facts demonstrated a "large increase in the absolute volume of U.S. imports from Canada," an "increasing U.S. market share from virtually zero at the beginning" of the period of investigation to a certain percentage in 2015, and a "larger rate of growth of these U.S. imports relative to

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[111] USMCA, Article 10.2.2(a); Canada's Initial Written Submission, para. 94.

[112] USITC Serious Injury Determination Report, Vol. 1, 67 n.387 (Exhibit CAN-07).

[113] USITC Serious Injury Determination Report, Vol. 1, 67 n.387 (Exhibit CAN-07).

[114] *See* Statement of Administrative Action accompanying the NAFTA Implementation Act, 116 (1993) (Exhibit USA-13).

[115] *Proclamation 9693*, 83 Fed. Reg. at 3542 (para. 7) (Exhibit CAN-05).

global U.S. imports."[116]

109. The USITC Commissioners expressed the uniform view that:

> Given that imports from Canada started the {period of investigation} at a smaller baseline than other foreign suppliers and increased overall during the {period of investigation} at a rate that exceeded the rate for global imports, we recognize that if the President were to determine to exclude imports from Canada from any safeguard measure, unrestrained imports from Canada might increase to harmful levels.[117]

110. The Commissioners – again unanimously – found that "{f}actors increasing the likelihood of a surge of imports into the U.S. market from Canada include the following:"

- "the CSPV module industry in Canada increased capacity and production between 2012 and 2016;"
- "the Canadian industry shipped an irregularly increasing share of its total shipments to the United States (increasing nearly four-fold from *** percent of its total shipments in 2012 to *** percent by 2016);"
- "the Canadian industry had available capacity throughout the POI, with its capacity utilization ranging from a low of *** percent in 2012 to a high of *** percent in 2015, and a near lowest level of *** percent at the end of the {period of investigation} in 2016);"
- "producers in Canada (including the *** foreign producer (Canadian Solar)) maintain corporate and other arm's length supply chain relationships with firms in several other countries;"
- "Canadian producers and their related firms exported growing volumes of CSPV products to the United States over the {period of investigation};" and
- "if the CSPV products manufactured by Canadian producers' affiliates are subject to a global safeguard measure, the industry in Canada will have an incentive to supply the U.S. market from its Canadian operations instead."[118]

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[116] USITC Serious Injury Determination Report, Vol. 1, 67 n.387 (Exhibit CAN-07) (citing USITC Serious Injury Determination Report, Vol. 2, C-4 (table C-1b) (Exhibit CAN-07)).

[117] USITC Serious Injury Determination Report, Vol. 1, 67 n.387, 69 (Exhibit CAN-07).

[118] USITC Serious Injury Determination Report, Vol. 1, 69-70 n.400 (Exhibit CAN-07) (citing USITC Serious Injury Determination Report, Vol. 2, tables IV-10, IV-11, IV-17, IV-18 (Exhibit CAN-07)).

111. The USITC majority opined that if unrestrained imports from Canada increased to harmful levels, "the domestic industry would have other options to consider, including the import-surge mechanism of 19 U.S.C. § 3372(c) and the antidumping and/or countervailing duty laws (19 U.S.C. § 1671, 19 U.S.C. § 1673)."[119] However, this statement, and the factors referenced above, must be considered in light of additional circumstances.

112. In particular, Canadian Solar was one of the four CSPV module producers in Canada that responded to the USITC's questionnaires.[120] Meanwhile, Canadian Solar was identified as one of "the six largest firms producing CSPV cells and modules in China."[121] In 2016, the year before the solar safeguard investigation was initiated, "Canadian Solar (China)" was identified as the eighth largest CSPV cell producer in the world.[122] The USITC report listed Canadian Solar as having cell production capacity in various countries.[123] The USITC identified "Canadian Solar (China)" as the third largest CSPV module supplier in the world in 2016.[124] (In other words, Canadian Solar dramatically increased its shipments relative to other producers operating in China and other countries outside North America.) And, generally speaking, in Canada, "Canadian capacity, production, and total shipments for CSPV module operations generally increased from 2012 to 2016."[125]

113. Moreover, as Canada observes,[126] and as the USITC recognized:

> under NAFTA rules of origin and marking rules, U.S. imports of finished CSPV modules assembled in a NAFTA country, even from CSPV cells originating in non-NAFTA countries, qualify as products from the NAFTA country, where the goods originate under General Note 12(b) and are accompanied by a signed and completed NAFTA certificate of origin, because the final assembly operations in the NAFTA country involve more than minor processing and require substantial investment and value added.[127]

114. Meanwhile, the U.S. solar industry was in a very fragile state at the time of the USITC

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[119] USITC Serious Injury Determination Report, Vol. 1, 69-70 (Exhibit CAN-07).

[120] USITC Serious Injury Determination Report, Vol. 2, IV-12-IV-13 (Exhibit CAN-07).

[121] USITC Serious Injury Determination Report, Vol. 2, IV-26 & n.38 (Exhibit CAN-07).

[122] USITC Serious Injury Determination Report, Vol. 2, IV-9 (Exhibit CAN-07).

[123] USITC Serious Injury Determination Report, Vol. 2, IV-27 (table IV-17) (Exhibit CAN-07).

[124] USITC Serious Injury Determination Report, Vol. 2, IV-12 (Exhibit CAN-07).

[125] USITC Serious Injury Determination Report, Vol. 2, IV-14-IV-15 (Exhibit CAN-07).

[126] Canada's Initial Written Submission, para. 34.

[127] USITC Serious Injury Determination Report, Vol. 1, 20-21 n.84 (Exhibit CAN-07).

investigation, and at the point the USITC made its determination of serious injury. Approximately one month before it filed the petition to institute the solar safeguard investigation, co-petitioner Suniva had suspended its cell and module factory operations in April 2017, as part of its chapter 11 bankruptcy filing.[128] The other co-petitioner, SolarWorld, issued WARN Act notifications in June 2017, and laid off 360 employees in mid-July 2017.[129] The domestic industry had "hundreds of millions of dollars in losses throughout the {period of investigation}."[130] In addition, "{a} significant number of domestic producers were unable to maintain existing levels of expenditures for research and development, despite explosive demand growth during the {period of investigation}."[131] Moreover, "at the end of the {period of investigation}, the domestic industry's net sales value declined and its COGS to net sales ratio increased to above 100 percent, leading to deterioration in its operating and net losses . . . These financial difficulties persisted into 2017, as additional firms shut down their operations and/or declared bankruptcy."[132]

115. In addition, the facts of the USITC's investigation indicated that:

- "{T}he foreign industries have substantial and increasing capacity to manufacture CSPV cells and CSPV modules."
- "Their collective capacity consistently exceeded their combined production levels."
- "The foreign industries' excess capacity, which grew between 2014 and 2016, consistently exceeded the size of the entire U.S. market."
- "{T}he foreign industries collectively have the ability to export significant volumes of CSPV products to the United States."
- "The foreign industries also possess the incentive to export significant volumes to the United States."
- "The foreign industries have demonstrated an ability to redirect exports from one market to another and to increase exports substantially to individual markets from one year to the next."
- "The large U.S. market has been and will remain a likely target for their exports."
- "As further evidence of the attractiveness of the U.S. market, after the imposition of the

[128] USITC Serious Injury Determination Report, Vol. 1, 33-34 (Exhibit CAN-07).

[129] USITC Serious Injury Determination Report, Vol. 1, 34 (Exhibit CAN-07).

[130] USITC Serious Injury Determination Report, Vol. 1, 35 (Exhibit CAN-07).

[131] USITC Serious Injury Determination Report, Vol. 1, 36-37 (Exhibit CAN-07).

[132] USITC Serious Injury Determination Report, Vol. 1, 38 (Exhibit CAN-07).

antidumping and countervailing duty orders on imports from China in December 2012 and on imports from China and Taiwan in February 2015, imports from other countries substantially increased their presence in the U.S. market."

- "{B}ased on the substantial production capacity and available unused capacity in the foreign industries, their export orientation, their willingness to shift substantial volumes among export markets from one period to the next, and the demonstrated attractiveness of the U.S. market to the foreign industries, . . . the U.S. market is a focal point for the diversion of exports."[133]

116. These additional facts, which represent consensus findings of the USITC, demonstrate that, had CSPV imports from Canada been excluded from the safeguard measure, Canadian Solar and additional Canadian producers would have been left with a significant potential and incentive to use the NAFTA rule-of-origin to gain duty-free access to the U.S. market for CSPV modules comprised of third-country cells that would have otherwise been subject to the measure. In conjunction with the domestic industry's fragile state, and the fact that CSPV imports from Canada exceeded the growth rate for global U.S. imports between 2012 and 2015, permitting this loophole for Canadian Solar and other producers would seriously threaten the effectiveness of any remedial measure. Although three of the Commissioners found comfort in the anti-surge mechanism under NAFTA Article 802.3,[134] that provision would require a new and additional determination as to whether a surge in Canadian imports "undermines the effectiveness of the action." Given the fragility of the U.S. industry and the documented ability of certain foreign producers to shift imports rapidly to evade imposition of trade remedies, it is reasonable to conclude that the anti-surge mechanism would likely provide only belated relief.

117. Accordingly, the USITC's investigation record supported a determination that imports from Canada contributed importantly to the serious injury or threat thereof. Thus, the President was within his authority to determine that "imports of CSPV products from Canada . . . contribute{d} importantly to the serious injury or threat of serious injury found by the ITC."[135]

C. Canada has Failed to Establish that Inclusion of Imports from Canada in the Solar Safeguard Measure Was Inconsistent with USMCA Article 10.2.5(b)

118. Canada contends that the United States acted inconsistently with USMCA Article 10.2.5(b) "by imposing a safeguard measure resulting in a decrease in imports of CSPV products originating in Canada into the United States and limiting the subsequent growth."[136] As indicated in section IV, Canada's Article 10.2.5(b) claim is not properly within the scope of

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[133] USITC Serious Injury Determination Report, Vol. 1, 38-41 (footnotes omitted) (Exhibit CAN-07).

[134] NAFTA, Article 802.3 (Exhibit CAN-01).

[135] *Proclamation 9693*, 83 Fed. Reg. at 3542 (para. 7) (Exhibit CAN-05).

[136] Canada's Initial Written Submission, para. 99.

USMCA Chapter 31 dispute settlement. Putting this point aside, though, and before responding to Canada's claim, it is crucial to highlight that the President imposed different measures on CSPV cells and CSPV modules in *Proclamation 9693*, as modified by *Proclamation 10101*. The President imposed a TRQ on cells that are not partially or fully assembled into other products, and an increase in duty on modules. Canada has no basis to complain about the TRQ on cells in this dispute. In its report, USITC staff observed that "{t}here was no reported Canadian production of CSPV cells during the period of investigation."[137] Canada concedes in its initial written submission that it "does not produce or export CSPV cells, but produces CSPV modules integrating imported CSPV cells."[138] The Canadian industry's decision not to produce or export cells, for whatever reason, means that the President's imposition of a TRQ on imported cells cannot be causing any concerns for Canada under Article 10.2.5(b), or indeed any other provision of the USMCA. In addition, cell imports have not exceeded the 2.5 GW TRQ on cells in any full year since the safeguard was imposed, or so far in 2021.[139]

119. For this reason, the United States understands that Canada's Article 10.2.5(b) claim *only* involves the increase in duty on imported modules.

120. Without prejudice to the fact that USMCA Article 10.2.5(b) did not apply to the President's determination while NAFTA was in force, Canada nonetheless fails to demonstrate any way in which inclusion of Canadian imports in the safeguard measure is inconsistent with that Article. Its arguments rely on the faulty premise that import trends *after* imposition of the safeguard measure are relevant to compliance with Article 10.2.5(b).[140] However, an evaluation of whether the United States complied with Article 10.2.5(b) calls for an *ex ante* analysis, not an *ex post* analysis. As Canada bases its arguments principally on data unavailable to the President (or the USITC) at the time of taking the solar safeguard measure, it fails entirely to address the relevant question – whether, as of the time it was imposed, the measure "*would* have the effect of reducing imports of such good from a Party below the trend of imports of the good from that

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[137] USITC Serious Injury Determination Report, Vol. 2, IV-12 n.16, IV-13, IV-16 (Exhibit CAN-07); *see also id.* at I-3 n.15 ("There is no known cell production in Canada").

[138] Canada's Initial Written Submission, para. 34.

[139] *See* 2020 Calendar Year End Commodity Status Report, U.S. Customs and Border Protection (Exhibit USA-17) (PDF p. 9 shows 72.62% filled); 2019 Calendar Year End Commodity Status Report, U.S. Customs and Border Protection (Exhibit USA-18) (PDF p. 7 shows 82.30% filled); 2018 Calendar Year End Commodity Status Report, U.S. Customs and Border Protection (Exhibit USA-19) (PDF p. 7 shows 28.28% filled); Commodity Status Report: Sept. 13, 2021, U.S. Customs and Border Protection (Exhibit USA-16) (PDF p. 9 shows 64.95% filled as of September 13, 2021).

[140] *See, e.g.,* Canada's Initial Written Submission, paras. 61 (discussing what happened "{f}ollowing the imposition of the safeguard measure"), 100 ("Article 10.2.5(b) requires that any restriction imposed under Article 10.2.1 of CUSMA does not reduce import{s} of a CUSMA Party below their historical levels"), 101 ("The U.S. safeguard measures have had an adverse impact on imports of CSPV products originating in Canada"), 108 ("after imposition of the U.S. safeguard measures, imports of CSPV products originating in Canada were unable to maintain their level of participation in the U.S. market").

Party over a *recent* representative base period with allowance for reasonable growth."

121. In subsection 1 below, we provide the proper interpretation of Article 10.2.5(b). In subsection 2, we turn to certain problems with Canada's analysis, which are fatal to its claim. Finally, in subsection 3, we explain that the information that Canada provided in its initial written submission, properly considered, undercuts its claim.

1. USMCA Article 10.2.5 Calls for an Evaluation of a USMCA Party's Imports at the Time of Taking a Safeguard Measure, Such that Compliance Cannot Be Evaluated Based on Information Unavailable at the Time of that Decision

122. USMCA Article 10.2.5 states in pertinent part:

> No Party may impose restrictions on a good in an action under paragraph 1 or 3:
>
> . . .
>
> (b) 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.

123. USMCA Article 31.13.4 provides that a panel shall interpret the Agreement in accordance with customary rules of public international law, as reflected in Articles 31 and 32 of the *Vienna Convention*. As we have done previously in this submission, we turn first to dictionary definitions to interpret Article 10.2.5.

124. The chapeau to Article 10.2.5 begins with the proposition that a Party may not impose "restrictions on a good in an action under paragraph 1 or 3" if the conditions described in either subparagraph (a) or (b) exist. The most relevant dictionary definition of "restriction" is "something that restricts a person or thing; a limitation on action; a limiting condition or regulation."[141] The reference to paragraphs 1 and 3 connects Article 10.2.5 back to Articles 10.2.1 and 10.2.3, respectively. Thus, the "limiting condition or regulation" contemplated under the chapeau is one that is taken against imports from a Party pursuant to a safeguard measure.

125. Subparagraphs (a) and (b) set out two conditions that negate the permission to impose restrictions on a good.[142] With specific regard to subparagraph (b), "effect" means "{s}omething

[141] Definition of "Restriction," *Oxford English Dictionary*, https://www.oed.com/view/Entry/164022?redirectedFrom=restriction#eid (consulted Sept. 15, 2021) (definition 2.a) (Exhibit USA-24).

[142] Canada makes no claim under subparagraph (a).

accomplished, caused or produced; a result, consequence."[143] The noun "effect" is prefaced by the phrase "that would have the". Canada appears to suggest that Article 10.2.5(b) is a conditional prohibition,[144] and the United States agrees in principle. However, the United States disagrees that Article 10.2.5(b) involves an *ex post* obligation to discern whether a restriction "does" actually "reduce import{s} of a {USMCA} Party below their historical levels."[145] Instead, the particular use of "would" in subparagraph (b) signals that the remainder of the provision contemplates a forecasting of whether the restriction referenced in the chapeau will bring about the hypothetical event or result envisaged in the remainder of subparagraph (b). As the obligation exists as of the time of imposing the safeguard measure, evaluating whether the United States complied with that obligation requires an *ex ante* analysis based on information as of the time of the decision. Otherwise, the Panel would be evaluating the U.S. action based on information the United States could not possibly have known at the time of imposing the safeguard measure, and which could be the result of factors unrelated to the safeguard measure.

126. The text of Article 10.2.5 confirms this reading. The Article sets out a prohibition ("{a} Party may not impose restrictions on a good . . .") in two independent situations set out in subparagraphs (a) and (b). Canada's claim relies on the second of these[146] – "that would have the effect of reducing imports . . . ." In this clause, "that" refers back to the "restrictions" that a Party may not impose.

127. "Would" has two possible meanings in this clause. The first is that it is the past tense of "will,"[147] "expressing potentiality, capacity, or sufficiency: was capable of ——ing; could."[148] In this case, the predicate of the verb "would" is "have the effect of . . . ." Thus, the "restrictions" subject to the obligation are not those that have the actual "effect" of reducing imports but those that have the "potential, capacity, or sufficiency" to bring about the "effect." The second possible meaning of "would" is that it is a modal (or auxiliary) of the base verb "have," used "{i}n the main clause (apodosis) of a hypothetical proposition (expressed or

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[143] Definition of "Effect," *Oxford English Dictionary*, https://www.oed.com/view/Entry/59664?rskey=7OVv99&result=1#eid (consulted Sept. 15, 2021) (definition 2.b) (Exhibit USA-25).

[144] *See* Canada's Initial Written Submission, para. 100 ("Article 10.2.5(b) requires that any restriction imposed under Article 10.2.1 of CUSMA does not reduce import{s} of a CUSMA Party below their historical levels").

[145] Canada's Initial Written Submission, para. 100.

[146] The condition in subparagraph (a) is not implicated by Canada's claim.

[147] Definition of "Will," *Oxford English Dictionary*, https://www.oed.com/view/Entry/229051?rskey=KwvVBB&result=1#eid (consulted Sept. 15, 2021) (definition I) (Exhibit USA-26).

[148] Definition of "Will," *Oxford English Dictionary*, https://www.oed.com/view/Entry/229051?rskey=KwvVBB&result=1#eid (consulted Sept. 15, 2021) (definition I.23) (Exhibit USA-26).

implied), indicating that the supposition is a possibility or contingent or conditional upon something."[149] Understood in this sense, the obligation in the chapeau applies if a reduction in imports is a possibility or contingent or conditional on imposition of the restrictions.

128. Although these meanings differ in some respects, they lead to the same conclusion. It is not the actual effects of the restrictions that trigger the obligation under Article 10.2.5, as Canada assumes. Rather, it is the *likely* effects of the restrictions. Read in light of the present tense "may not impose" in the chapeau, "would" calls on a Party to make a forecast, at the time of imposing restrictions, of whether the condition in subparagraph (b) is satisfied. This makes sense because at the time of imposition, the Party considering whether to impose the restrictions cannot know with certainty what effect they will have in the future.

129. The Spanish text of Article 10.2.5(b) confirms this interpretation. It provides that:

> Ninguna de las Partes podrá aplicar una medida prevista en los párrafos 1 o 3 que imponga restricciones a una mercancía . . . que pudiera tener el efecto de reducir las importaciones de la mercancía provenientes de otra Parte por debajo de su propia tendencia durante un periodo base representativo reciente, considerando un margen razonable de crecimiento.

"Podrá in the first clause is the future tense of "poder," used to convey a command or obligation.[150] The verb "pudiera" is the imperfect subjunctive of the verb "poder." The imperfect subjunctive of "poder" is commonly used in the "formal, literary, official, language of scholars" as a replacement for the conditional form, conveying "conjecture or hypothesis within the perspective of the past."[151] Thus, the Spanish text also calls on the Party considering

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[149] Definition of "Will," *Oxford English Dictionary*, https://www.oed.com/view/Entry/229051?rskey=KwvVBB&result=1#eid (consulted Sept. 15, 2021) (definition I.27) (Exhibit USA-26).

[150] R.E. Batchelor & Miguel Angel San José, *A Reference Grammar of Spanish*, 147 (Cambridge University Press 2010) (Exhibit USA-38) ("In official language, the future may be understood as a command or obligation.").

[151] R.E. Batchelor & Miguel Angel San José, *A Reference Grammar of Spanish* (Cambridge University Press 2010) (Exhibit USA-38):

> Just as the future can express possibility or probability within the perspective of the past tense, so the conditional can express conjecture or hypothesis within the perspective of the past.
>
> * * * * *
>
> In {formal, literary, official, language of scholars and purists}, the conditional tense may be replaced by the -ra form . . . of the imperfect subjunctive.
>
> * * * * *
>
> However, in certain verbs, this usage is very common, particularly querer, deber, poder and the auxiliary haber.

imposition of a safeguard measure to make a conjecture as to its effects on imports from another Party.

130. The French text supports the same conclusion. It reads:

> Une Partie n'impose pas, dans le cadre d'une mesure adoptée en vertudes paragraphes 1 ou 3, des restrictions à l'égard d'un produit . . . si la mesure doit avoir pour effet de ramener les importations de ce produit depuis une autre Partie à un niveau inférieur à la tendance enregistrée pour les importations du produit depuis cette autre Partie pendant une période de base représentative récente, compte tenu d'une marge de croissance raisonnable.

The text takes the form of a simple condition, with the result first and the condition second: if "la mesure doit avoir pour effet de ramener les importations . . . à un niveau inférieur" then "{u}ne Partie n'impose pas . . . des restrictions à l'égard d'un produit." "Doit" is the present indicative third person singular of "devoir," which when followed by an infinitive (here "avoir"), expresses "la vraisemblance, la probabilité, l'hypothèse."[152] A grammar textbook states with respect to the present tense indicative of devoir that "when followed by an infinitive it can express strong probability."[153] Thus, it is the effect that the restriction would likely have that triggers the obligation, and not the effects that it actually has.

131. If, as Canada suggests, the intent of Article 10.2.5(b) was to create an ongoing monitoring obligation on the Party imposing the restriction to ensure that imports from another Party do not fall below historical levels, then there would have been no need to include the term "would" in the provision. As Canada observes, "{o}ne of the corollaries of the 'general rule of interpretation' in Articles 31 and 32 of the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty."[154] The inclusion of "would" must be given meaning, and the inclusion of this term calls on a Party to structure a safeguard measure in light of effects on future imports that it considers likely at the time of taking a safeguard measure.

Id. at 150-151; *see also id.* at 3; *accord* Peter T. Bradley and Ian Mackenzie, *Spanish: An Essential Grammar*, 186 (Routledge 2004) (Exhibit USA-39) ("The conditional form of poder can also indicate possibility, with the meaning 'might', 'could': No hagas eso, podrias caer. Don't do that, you might fall.").

The imperfect subjunctive may also be used in subordinate clauses where the main verb is in the past tense or after "si" when the condition is improbable or impossible. R.E. Batchelor & Miguel Angel San José, *A Reference Grammar of Spanish*, 291, 293 (Cambridge University Press 2010) (Exhibit USA-38). Neither situation applies to "pudiera" as it appears in Article 10.3.

[152] Definition of "Devoir," *LeRobert Dico En Ligne* (consulted Sept. 15, 2021) (Exhibit USA-37).

[153] Mike Thacker & Casimir D'Angelo, *Essential French Grammar*, 195 (Routledge 2d ed 2019) (Exhibit USA-40).

[154] Canada's Initial Written Submission, para. 77 n.93 (citing, *e.g.*, Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, 23, WT/DS2/AB/R, adopted May 20, 1996 (Exhibit CAN-40)).

Therefore, to establish an inconsistency with this obligation, a complaining Party would need to provide an *ex ante* analysis showing, based on information available at that time, that the measure was likely to have the effects indicated in Article 10.2.5(b).

132. Turning to the remainder of subparagraph (b), the most relevant meaning of "reduce" is "to lower, diminish, lessen; to make smaller; (also) to limit."[155] "Below" means "{e}xpressing position in or movement to a lower place."[156] "Trend" means "{t}he general course, tendency, or drift (of action, thought, etc.) . . ."[157] Thus, Article 10.2.5(b) contemplates a forecast of whether the restriction will bring about the event or result of changing the number or quantity of imports from another Party to a lower position relative to the general course or tendency of such imports. Put another way, Article 10.2.5(b) requires that the restriction is not projected to result in imports from another Party falling under a particular floor, as indicated by the general course or tendency of such imports prior to imposing the measure. Article 10.2.5(b) does not presuppose that this trend is upward, downward, flat, or fluctuating.

133. This general course or tendency is framed "over a recent representative base period with allowance for reasonable growth." The United States agrees that the phrase "over a recent representative base period" is undefined.[158] However, Canada errs in skipping directly to "contextual elements" to inform the meaning of this phrase, without first considering the ordinary meaning of these terms.[159]

134. The pertinent definition of "base" is "{a} fundamental principle, an underlying basis, a foundation."[160] The most relevant definition of "period" here is "{a} length of time, esp. one marked by the occurrence of a phenomenon," or "{a} definite portion or division of time; a fixed

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[155] Definition of "Reduce," *Oxford English Dictionary*, https://www.oed.com/view/Entry/160503?rskey=A0UvaL&result=2#eid (consulted Sept. 15, 2021) (definition I.2.b) (Exhibit USA-27).

[156] Definition of "Below," *Oxford English Dictionary*, https://www.oed.com/view/Entry/17525?rskey=n3J3tm&result=2&isAdvanced=false#eid (consulted Sept. 15, 2021) (definitions A.1 and B.1) (Exhibit USA-28).

[157] Definition of "Trend," *Oxford English Dictionary*, https://www.oed.com/view/Entry/205544?rskey=nk7ZaI&result=1#eid (consulted Sept. 15, 2021) (definition 4.b) (Exhibit USA-29).

[158] Canada's Initial Written Submission, para. 102.

[159] Canada's Initial Written Submission, paras. 102-103.

[160] Definition of "Base," *Oxford English Dictionary*, https://www.oed.com/view/Entry/15848?rskey=VZNnP1&result=1#eid (consulted Sept. 15, 2021) (definition I.12.a) (Exhibit USA-30).

number of years, etc."[161] Thus, the "foundation" for identifying the "trend of imports" must be an extent of time.

135. "{B}ase period" is modified by two adjectives: "recent" and "representative." "Recent" means "{o}f or belonging to a past period of time comparatively near to the present," or "{o}f a point or period of time: not much earlier than the present; not long past."[162] The "present" to which this past period of time is "comparatively near" would be the time at which a Party is imposing the restriction on imports of the good. This reading is supported by the chapeau to Article 10.2.5, which is focused on the imposition of a restriction. It is further supported by subparagraph (a), which requires written notice to the Commission and the opportunity for consultation with a Party or Parties "against whose good the action is proposed to be taken, as far in advance of taking the action as practicable."

136. This past course of time must also be "representative," or "{t}hat exemplifies a wider group, class, or kind; (of an individual) typical; (of a sample or selection) balanced."[163] Thus, the base period must be capable of exemplifying the general course or tendency of imports of the good from the Party in question.

137. There is no further guidance in subparagraph (b) regarding how long this base period of time should or must be. The use of "representative" indicates that it should be long enough to be capable of exemplifying the general course or tendency of imports. To this end, the United States agrees with Canada that context from Article 10.2.2(a), which relies on data from the most recent three-year period, could in principle inform the length of the base period to be used under Article 10.2.5(b).[164] However, a different length of time could be used if three years would not be "representative."

138. Finally, the permitted effect of a safeguard measure must also reflect an "allowance for reasonable growth." The "growth" is of "imports of the good from that Party." "Allowance" means "{t}o take into account mitigating or extenuating circumstances regarding (a person, their behaviour, etc.); to excuse or treat leniently" or "{t}he action of allowing something to occur;

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[161] Definition of "Period," *Oxford English Dictionary*, https://www.oed.com/view/Entry/140968?rskey=bBOZEe&result=1#eid (consulted Sept. 15, 2021) (definitions A.I and A.I.5.a) (Exhibit USA-31).

[162] Definition of "Recent," *Oxford English Dictionary*, https://www.oed.com/view/Entry/159425?redirectedFrom=recent#eid (consulted Sept. 15, 2021) (definitions A.3 and A.4) (Exhibit USA-32).

[163] Definition of "Representative," *Oxford English Dictionary*, https://www.oed.com/view/Entry/163003?redirectedFrom=representative#eid (consulted Sept. 15, 2021) (definition A.I.3) (Exhibit USA-33); *see also* Canada's Initial Written Submission, para. 104.

[164] Canada's Initial Written Submission, para. 103.

toleration, permission."[165] Relevant definitions of "reasonable" are "{w}ithin the limits of what it would be rational or sensible to expect; not extravagant or excessive; moderate," or "{s}ufficient, adequate, or appropriate for the circumstances or purpose; fair or acceptable in amount, size, number, level, quality, or condition."[166] ("Reasonable" does not mean "substantial," as Canada appears to suggest.[167]) "Growth" means "{t}he action, process or manner of growing . . ."[168] The term "growth" indicates that the allowance would represent an addition, within the limits of what it would be rational or sensible to expect, to the previously identified trend. "Reasonable" would take the trend into account, and could also account for any conditions in the market of the Party imposing the restriction that would affect sales of the imported article or domestic like product, including demand conditions for the product at issue and expectations of producers in the export market. However, this does not mean that "allowance for reasonable growth" is relative to market share trends of the exporting Party in the importing Party or trends in the size of the market in the importing Party for the good following imposition of the restrictions, as Canada suggests.[169]

139. The culmination of this analysis demonstrates that, properly interpreted, Article 10.2.5(b) prohibits a Party from establishing a limiting condition or regulation on a good if the forecasted result will be the lowering of the number or quantity of imports of that good from another Party below the general tendency of imports from that Party. The general tendency of such imports is determined over a past length of time that is not much earlier than when the Party is establishing the restriction. There is no specific length of time established in Article 10.2.5(b), but it must be one that is capable of exemplifying the general course or tendency of such imports. That restriction must also allow for growth, within the limits of what it would be rational or sensible to expect, in the size or value of imports of the good from that Party.

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[165] Definition of "Allowance," *Oxford English Dictionary*, https://www.oed.com/view/Entry/5464?rskey=zZC3ZB&result=1&isAdvanced=false#eid (consulted Sept. 15, 2021) (phrase P1.b and definition II.8) (Exhibit USA-34).

[166] Definition of "Reasonable," *Oxford English Dictionary*, https://www.oed.com/view/Entry/159072?redirectedFrom=reasonable#eid (consulted Sept. 15, 2021) (definitions A.1 and A.7.a) (Exhibit USA-35).

[167] Canada's Initial Written Submission, para. 107 ("the U.S. safeguard measure should have been calibrated to allow for a *substantial* increase of Canadian imports") (emphasis added).

[168] Definition of "Growth," *Oxford English Dictionary*, https://www.oed.com/view/Entry/81924?rskey=pirq4C&result=1#eid (consulted Sept. 15, 2021) (definition 1.a) (Exhibit USA-36).

[169] Canada's Initial Written Submission, paras. 106-107.

2. Canada's Ex Post Analysis Suffers from Various Flaws, and, Accordingly, Canada Has Failed to Make a Prima Facie Case that the Solar Safeguard Measure is Inconsistent with USMCA Article 10.2.5(b)

140. In support of its claim under USMCA Article 10.2.5(b), Canada:

(1) relies on a three-year base period comprising 2015 through 2017 to discern the trend of imports of CSPV products from Canada, purportedly based on "numbers reported in the USITC U.S. Importers' Questionnaire Table II-27" as contained in Exhibit CAN-30 (CONFIDENTIAL INFORMATION), which Canada contends reflected "an increase of [[***]]" over this period;[170]

(2) relies on trends in U.S. CSPV installations from 2017 through 2020 to contend that imports from Canada "should have been allowed to increase by as much as [[***]] over an equivalent period, or around [[***]] annually;"[171] and

(3) relies on import figures from 2017 through 2020, again purportedly based on "USITC U.S. Importers' Questionnaire Table II-27" in Exhibit CAN-30 (CONFIDENTIAL INFORMATION), to assert that "imports of CSPV products originating in Canada did not follow the growth trend set by the U.S. market," and that "imports of CSPV products originating in Canada represented a declining share of the U.S. installations over the same period."[172]

141. Canada's demonstration suffers from two critical flaws, either of which are fatal to Canada's Article 10.2.5(b) claim.

a. Canada's Analysis Contravenes the Rules of Procedure Because the Confidential Exhibits Upon Which Canada Relies Cannot be Used to Verify the Accuracy of the Representations Made in its Initial Written Submission

142. First, Canada claims it acquired import data from Canadian industry to establish the trends in imports of CSPV products, both in terms of absolute figures and in terms of growth rates. However, the United States – and more importantly the Panel – cannot verify the accuracy of the representations made in Canada's initial written submission. Exhibit CAN-30

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[170] Canada's Initial Written Submission, para. 105 & n.120 (citing Exhibit CAN-30 (CONFIDENTIAL INFORMATION)).

[171] Canada's Initial Written Submission, paras. 106-107 (citing Exhibits CAN-23, CAN-30 (CONFIDENTIAL INFORMATION), CAN-32, CAN-33, CAN-50, CAN-52, CAN-56).

[172] Canada's Initial Written Submission, paras. 108-110 (citing Exhibits CAN-30 (CONFIDENTIAL INFORMATION), CAN-32, CAN-33, CAN-47 (CONFIDENTIAL INFORMATION), CAN-48 (CONFIDENTIAL INFORMATION), CAN-51 (CONFIDENTIAL INFORMATION), CAN-52, CAN-56).

(CONFIDENTIAL INFORMATION) is so heavily redacted that the aggregate figures and growth rates included in paragraph 105 of Canada's initial written submission cannot be confirmed against the very limited information in this exhibit.

143. For example, [[***]]. Put simply, the information contained in Exhibit CAN-30 cannot be traced to the sum totals or alleged growth rates in CSPV product imports from Canada during the time periods on which Canada relies in its analysis.[173]

144. Similarly, the other exhibits upon which Canada relies cannot be used to verify the accuracy of its assertions. For example, Exhibit CAN-51 (CONFIDENTIAL INFORMATION) [[***]]. Assuming here that [[***]].

145. Pursuant to Article 10.3 of the Rules of Procedure, "{t}he other disputing Party shall have the opportunity to rebut or test the veracity of testimony or evidence," and "{t}he Panel has the right to test the veracity of testimony or evidence." In light of the preceding discussion, the United States cannot rebut or test the veracity of Canada's Article 10.2.5(b) analysis, and the Panel cannot either. Moreover, under Article 18.3 of the Rules of Procedure, Canada "shall submit with its written submissions all evidence upon which it intends to rely in support of the factual and legal arguments it advances." As this issue pertains to its initial written submission, Canada has failed to discharge this obligation. Finally, under Article 14.1, Canada "has the burden of establishing" an inconsistency by "establish{ing} a *prima facie* case of such inconsistency." In light of the preceding discussion, Canada has failed to discharge this obligation with regard to its Article 10.2.5(b) claim.

b. By Relying on Information that Would Not Have been Available to the President (or the USITC) at the Time the Safeguard Measure was Imposed, Canada Misunderstands the Ex Ante Analysis Required by Article 10.2.5(b)

146. Second, in its Article 10.2.5(b) analysis, Canada relies on certain data that would not have been available to the President (or the USITC) at the time the safeguard measure was imposed. Article 10.2.5(b) requires an *ex ante* analysis based on information *as of the time of the decision*. Canada's analytical misstep in its Article 10.2.5(b) analysis constitutes an independent basis to reject Canada's challenge under this Article.

147. Canada suggests using a base period of 2015 through 2017, which was the three-year

[173] The United States notes further that Canada cites its data as coming from various USITC questionnaire responses [[***]]. It nonetheless reports data for [[***]]. Canada explains that "it requested that participating producers and importers update the relevant forms found in the original USITC investigation questionnaires. Canada relies on this data, accepted by the USITC, throughout this submission." Canada's Initial Written Submission, para. 59. In fact, the USITC never even saw the "updates" [[***]] prepared at the request of the Government of Canada, and certainly did not "accept" them.

period preceding the safeguard measure.[174] However, data for this full period was not available to the United States when it made the decision not to exclude Canada from imposition of the safeguard measure. The USITC's period of investigation covered 2012 through 2016.[175] Canada suggests that information submitted to the USITC is appropriate to rely on in this dispute,[176] and the United States agrees in principle. However, as the USITC initiated the investigation in May 2017 and issued its report to the President in November 2017, the USITC did not collect import data for full-year 2017, or include those data in its report. The President would not have known the information provided by Canada covering 2017 at the time of imposition of the solar safeguard measure.[177] Consequently, 2017 cannot be part of the "recent representative base period" for purposes of Article 10.2.5(b).

148. Similarly, the text of Article 10.2.5(b) does not support Canada's comparison between imports and absolute growth rates in imports from 2015 and 2017, and imports and growth rates from 2017 through 2020. Again, Article 10.2.5(b) does not call for an analysis of movements in imports after the imposition of the restriction, with the assumption that the restriction is entirely responsible for the movements. Thus, import data post-dating the restriction's implementation is irrelevant. Similarly, information from the USITC's midterm report, which post-dates the original investigation, and information from other sources regarding growth rates in U.S. CSPV installations between 2018 and 2020, are irrelevant.[178] Data from 2017 onwards was not available when the measure was imposed.

3. Canada's Analysis Otherwise Does Not Demonstrate that the United States Acted Inconsistently with Article 10.2.5(b)

149. Even aside from the fact that 2017 was not properly part of the base period, and was not and could not have been taken into account by the United States when the safeguard action was taken, the data in any event [[***]] regarding the base period trend. This flaw provides yet another independent reason to reject Canada's Article 10.2.5(b) challenge. Canada [[***]] to discern the trend of imports.[179] But a [[***]]. The United States considers that [[***]]. This

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[174] Canada's Initial Written Submission, para. 105.

[175] *See, e.g.,* USITC Serious Injury Determination Report, Vol. 1, 6 n.10 (Exhibit CAN-07) (referencing January 1, 2012 to December 31, 2016 period of investigation).

[176] *See, e.g.,* Canada's Initial Written Submission, para. 59.

[177] *See Proclamation 9693*, 83 Fed. Reg. at 3542 (para. 7) (Exhibit CAN-05) ("Pursuant to section 312(a) of the NAFTA Implementation Act (19 U.S.C. 3372(a)), *I have determined after considering the ITC 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 ITC") (emphasis added).

[178] *See* Canada's Initial Written Submission, paras. 106-109.

[179] Canada's Initial Written Submission, para. 105.

accords with the ordinary definition of "trend," which is {t}he general course, tendency, or drift (of action, thought, etc.) . . ."[180]

150. The [[***]] the 2015-2017 data presented by Canada, as illustrated in Table 1 of Canada's initial written submission, show that imports [[***]]. If [[***]], Canada's data [[***]].[181]

151. In addition, information from the USITC's record explained that "{f}irm projections indicate that capacity, production, and capacity utilization in Canada are expected to decline from 2016 to 2018," and "exports to the United States in 2017 and 2018 will decline."[182] This information, which was available to the President at the time the safeguard measure was imposed, belies Canada's assertion that the safeguard measure should have allowed for a "substantial increase" in imports from Canada.[183] This information is pertinent to discerning an allowance for reasonable growth based on the trend.

152. With regard to "an allowance for reasonable growth," the text does not state that this allowance must take a particular form. That being said, nothing in Article 10.2.5(b) precludes an analysis regarding an allowance for reasonable growth based on the nature of the particular action taken under the safeguard measure. The tariff on module imports applies across the board to all sources, other than to imports from certain developing countries.[184] The USITC observed that there was "explosive demand growth" during the period of investigation for CSPV products.[185] It cannot be seriously disputed that Canada has a geographic advantage over many other sources of CSPV imports into the United States given the two countries' proximities and shared border. Coupled with the USITC's observation that Heliène produced modules in the United States during 2017,[186] Canada has an obvious advantage over other producers from other countries around the world. The allowance for reasonable growth is not a *guarantee* of growth. But the application of a tariff on module imports that applies essentially to all sources does give Canada an advantage that producers in other countries do not have based on its geographic proximity, and in this sense the tariff would have provided Canada with an allowance for

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[180] Definition of "Trend," *Oxford English Dictionary*, https://www.oed.com/view/Entry/205544?rskey=nk7ZaI&result=1#eid (consulted Sept. 15, 2021) (definition 4.b) (Exhibit USA-29).

[181] Canada contends that data "immediately preceding this period would not be representative of the recent trend since the imports volumes accounted for were [[***]] low." Canada's Initial Written Submission, para. 105.

[182] USITC Serious Injury Determination Report, Vol. 2, IV-14 (Exhibit CAN-07).

[183] Canada's Initial Written Submission, para. 107.

[184] *Proclamation 9693*, 83 Fed. Reg. at 3542, 3545 (paras. 9, 10 and Annex I) (Exhibit CAN-05).

[185] USITC Serious Injury Determination Report, Vol. 1, 36-37, 43 (Exhibit CAN-07).

[186] USITC Serious Injury Determination Report, Vol. 2, III-4 (Exhibit CAN-07).

reasonable growth.

153. Given Canadian Solar's presence in Canada at the time and the company's large size relative to most other global producers, as discussed above in subsection B, coupled with the then-NAFTA rule-of-origin requirements for modules, there must be a distinction between an allowance for *reasonable growth* under Article 10.2.5(b) and an allowance for *circumvention*. That is, a careful balance would have been necessary, especially given the U.S. industry's fragile state. The tariff that applied to essentially all import sources struck that balance.

154. In this light, and even though post-investigation data would not be relevant here, Canada contends that between 2017 and 2020, "imports of CSPV products grew by a [[***]]."[187] In light of the solar safeguard measure's aim of remedying injury from imports, this allowance for growth would have been [[***]].

155. Finally, and assuming once again that post-investigation data is relevant here, there are additional reasons why imports of modules from Canada into the United States may have changed since the safeguard measure was imposed. The USITC observed in its midterm report that module imports from all sources declined between 2017 and 2018, but were higher in the first half of 2019 compared with the first half of 2018, while multiple producers opened up U.S. module production facilities, particularly in the first half of 2019, "leading to increases in domestic module production capacity, production, and market share from 2017 to 2018 and from the first half of 2018 to the first half of 2019."[188] Both Heliène and Silfab have opened up or expanded manufacturing facilities in the United States since February 7, 2018. The USITC monitoring report indicated that Heliène "reported expanding their existing U.S. module operations or increasing capacity."[189] Silfab began module assembly in Washington State in 2018,[190] and Silfab was cited as reporting that "it was already considering U.S. locations when the Section 201 tariffs were announced."[191] As of April 2019, Silfab was operating at around 0.2 GW/year of capacity in its Bellingham, WA factory.[192] In August 2021, Silfab was reported to have announced that it was now shipping panel products from its "new Burlington, Washington,

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[187] Canada's Initial Written Submission, para. 109.

[188] USITC Monitoring Report, 1 (Exhibit CAN-23).

[189] USITC Monitoring Report, 3 n.1, 6-7, I-45, III-19-III-20, VII-24 (Exhibit CAN-23).

[190] USITC Monitoring Report, 3 n.1, I-40, I-45, III-19-III-20, VII-24 (Exhibit CAN-23).

[191] Brittany Smith et al., *Solar Photovoltaic (PV) Manufacturing Expansions in the United States, 2017-2019: Motives, Challenges, Opportunities, and Policy Context*, 36-37 (National Renewable Energy Laboratory Apr. 2021) (Exhibit USA-44).

[192] Brittany Smith et al., *Solar Photovoltaic (PV) Manufacturing Expansions in the United States, 2017-2019: Motives, Challenges, Opportunities, and Policy Context*, 35 (National Renewable Energy Laboratory Apr. 2021) (Exhibit USA-44).

production facility."[193] Heliène reportedly is also opening a new production facility in Florida in September 2021 "to produce super high-efficiency heterojunction solar cell modules for residential and commercial applications," adding 100 MW of additional capacity in the United States.[194] Public information from September 2021 indicates that Silfab has 800 MW of combined current production capacity in its Bellingham, WA and Burlington, WA facilities, and Heliène has 140 MW of production capacity at its Mountain Iron, MN factory and another 100 MW of production capacity in Riviera Beach, FL.[195]

156. Canada's analysis does not effectively grapple with other reasons that may have affected its module imports into the United States, such as possible production-shifting from Canada to the United States.

157. In sum, Canada does not demonstrate that the United States acted inconsistently with Article 10.2.5(b).

D. The Solar Safeguard Measure is Not Inconsistent with USMCA Article 2.4.2

158. Canada's claim that the United States acted inconsistently with Article 2.4.2 of the USMCA is entirely dependent on the success of its claims against the inclusion of imports from Canada in the solar safeguard measure under Articles 10.2.1, 10.2.2, 10.2.5, or 10.3.[196] As discussed above, these claims are without merit. Consequently, if Canada's claims under Chapter 10 of the USMCA lack merit, then Canada's claim under Article 2.4.2 lacks merit as well.[197]

159. Article 2.4.2 provides that, "{u}nless otherwise provided in this Agreement, each Party shall apply a customs duty on an originating good in accordance with its Schedule to Annex 2-B (Tariff Commitments)."

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[193] Ryan Kennedy, "Silfab Doubles U.S. Solar Panel Manufacturing Capacity," *PV Magazine* (Aug. 31, 2021) (Exhibit USA-41); *see also* Kelly Pickerel, "Silfab Opens Second Solar Panel Assembly Facility in Washington State," *Solar Power World* (Aug. 30, 2021) (Exhibit USA-42).

[194] "Heliene Unveils New High Efficiency Modules and Expands US Solar Module Manufacturing Capabilities With New Florida Facility," *businesswire* (Aug. 10, 2021) (Exhibit USA-43).

[195] U.S. Solar Panel Manufacturers, *Solar Power World* (last updated Sept. 2021) (Exhibit USA-45).

[196] *See* Canada's Initial Written Submission, paras. 111-116 ("Considering that nothing in CUSMA otherwise allows for the increased tariffs applied by the United States on CSPV products, as demonstrated above, the U.S. safeguard measure violates the terms of Article 2.4.2 by applying a customs duty on CSPV imports at a rate that exceeds the rate listed in its Schedule").

[197] In its panel request, Canada also claimed that the United States acted inconsistently with Article 2.4.1 of the USMCA in applying the safeguard measure to Canada. *See* Canada's Panel Request, para. 13(a). However, Canada has not briefed this claim in its initial written submission. Accordingly, the United States understands that Canada has abandoned this claim.

160. One such part of the Agreement that "otherwise provide{s}" is the trade remedies chapter – Chapter 10 – which contains rules allowing a Party to take safeguard measures under Article XIX of GATT 1994 and the Safeguards Agreement, subject to certain conditions. As shown elsewhere in this submission, Canada has failed to establish that the United States acted inconsistently with those conditions, as set out in Articles 10.2.1, 10.2.2, 10.2.5(b), and 10.3 of the USMCA. Accordingly, Canada has also failed to establish that the United States acted inconsistently with Article 2.4.2 by including imports of CSPV products from Canada when taking emergency action while the NAFTA was in force.

VI. SECTION 302 OF THE USMCA IMPLEMENTATION ACT IS NOT INCONSISTENT AS SUCH WITH ARTICLE 10.3 OF THE USMCA

161. In addition to its claims against the solar safeguard measure, Canada argues that section 302 of the USMCA Implementation Act (codified at 19 U.S.C. § 4552) is inconsistent as such with USMCA Article 10.3. It relies on the flawed premise that an Article 10.2.1 determination in a global safeguard proceeding is a "determination{ } of serious injury" under Article 10.3 that must be entrusted to the competent authority.[198] Stemming from this faulty premise, Canada further contends that this statutory provision allows the President to "overturn" negative USITC findings under Article 10.2.1, and the President "does not constitute a judicial or administrative tribunal under Article 10.3."[199]

162. As we explain below in subsection A, Canada's Article 10.3 as such challenge to section 302 must fail because section 302 is outside the Panel's terms of reference. As we explain in subsection B, even if section 302 is within the Panel's terms of reference, section 302 is not inconsistent as such with Article 10.3. An exclusion determination under Article 10.2.1 is not a "serious injury determination{ }" or "negative injury determination{ }," as Canada suggests. Even aside from the fact that an exclusion determination is not an injury determination, the Presidential role in the exclusion process has been part of U.S. domestic law for more than 30 years and, as such is excluded from the application of Article 10.3.

A. Canada's Challenge to Section 302 of the USMCA Implementation Act Is Not Properly Within the Panel's Terms of Reference

163. Canada's Article 10.3 claim against section 302 of the USMCA Implementation Act as such is not properly within the Panel's terms of reference because section 302 was not included as a measure subject to challenge in Canada's consultations request.

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[198] Canada's Initial Written Submission, paras. 117, 123-130, 132-133.

[199] Canada's Initial Written Submission, paras. 5, 117, 131-133.

1. USMCA Chapter 31 Does Not Permit a Complaining Party's Panel Request to Expand the Scope of "the Matter" that Was Subject to a Consultations Request by Raising Separate and Distinct Measures

164. USMCA Article 31.4 governs consultations under Chapter 31 dispute settlement. Article 31.4.1 states that "{a} Party may request consultations with another Party with respect to a matter described in Article 31.2 (Scope)." Article 31.4.2 mandates that "{t}he Party making the request for consultations shall do so in writing, and shall set out the reasons for the request, including identification of the specific measure or other matter at issue and an indication of the legal basis for the complaint." In addition, Article 31.4.6 requires that, in "mak{ing} every attempt to arrive at a mutually satisfactory resolution of a matter through consultations under this Article or other consultative provisions of this Agreement . . . each consulting Party shall provide sufficient information to enable a full examination of how the actual or proposed measure or other matter at issue might affect the overall operation or application of this Agreement." Thus, a request for consultations regards "a matter,"[200] and the Party must provide an "identification of the specific measure or other matter at issue" in its written consultations request.[201] Article 31.4.6 explains further that the purpose of consultations is to permit the Parties "to arrive at a mutually satisfactory resolution of the matter."

165. Article 31.6.1 states:

> If the consulting Parties fail to resolve the matter within:
>
> (a) 30 days after a Party has delivered a request for consultations under Article 31.4 (Consultations) in a matter regarding perishable goods;
>
> (b) 75 days after a Party has delivered a request for consultations under Article 31.4 (Consultations); or
>
> (c) another period as the consulting Parties may decide,
>
> a consulting Party may request the establishment of a panel by means of a written notice delivered to the responding Party through its Section of the Secretariat.

166. A Party requesting the establishment of a panel must do so through a "written notice."[202] Article 31.6.3 establishes what a panel request must include: "an identification of the measure or other matter at issue and a brief summary of the legal basis of the complaint sufficient to present

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[200] USMCA, Article 31.4.1.

[201] *See* USMCA, Article 31.4.2; *see also* USMCA, Articles 31.4.6, 31.2(b)-(c).

[202] USMCA, Articles 31.6.1, 31.6.2.

the issue clearly."[203]

167. Read together, Articles 31.4 and 31.6 establish a process under which a Party may first request consultations with another Party regarding "a matter,"[204] and, to that end, must file a written consultations request that "include{es} identification of the specific measure or other matter at issue."[205] Following the delivery of that consultations request and an allotted period of time to "resolve the matter," a Party may then request the establishment of a panel to examine the "measure or other matter at issue" if "the consulting Parties fail to resolve the matter" through consultations.[206] Therefore, delivery of a consultations request meeting the requirements of Article 31.4 is a precondition for requesting establishment of a panel.

168. The consultations and panel requests must identify in writing the "measure or other matter at issue." Although a Party may request consultations on "a matter" pursuant to Article 31.4.1, a panel request may only be filed under Article 31.6.1 if the Parties cannot resolve "the matter." "{T}he matter" in Article 31.6.1 refers back to "a matter" that was subject to consultations under Article 31.4.1.

169. Therefore, the "matter" in a request for establishment of a panel must be the same as the matter subject to the request for consultations. A Party may not expand the scope of "the matter" in the consultations request by raising a different and additional measure for the first time in a panel request.[207] To permit a Party to do so would render inutile the Article 31.4 consultations process, the purpose of which is to "arrive at a mutually satisfactory resolution of a matter"[208] or "to resolve the matter."[209] Parties cannot seek to resolve the matter prior to requesting the establishment of a panel if the measure was not previously the subject of a consultations request.

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[203] USMCA, Article 31.6.3.

[204] USMCA, Article 31.4.1.

[205] USMCA, Article 31.4.2.

[206] USMCA, Articles 31.6.1, 31.6.3.

[207] The WTO Dispute Settlement Understanding ("DSU") is worded differently from USMCA Chapter 31. Nonetheless, generally speaking, these provisions are structured similarly, and the consultations requirement in Article 4 of the DSU is a precondition to the ability of a WTO Member to request the establishment of a panel under Article 6 of the DSU. *Compare* DSU, Article 4, *with* DSU, Article 6 (Exhibit USA-46).

For example, in *US – Customs Bond Directive*, the panel and the Appellate Body found that the focus of a party's consultations request "was on the instruments constituting the Amended {Customs Bond Directive}, and not on the legal provisions that provide the general authority for them," and accordingly that claims against those "legal provisions" were outside the panel's terms of reference. Appellate Body Report, *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, paras. 294-296, WT/DS345/AB/R, adopted Aug. 1, 2008 (*US – Customs Bond Directive (AB)*) (Exhibit USA-48).

[208] USMCA, Article 31.4.6.

[209] USMCA, Article 31.6.1.

2. Canada's As Such Challenge to Section 302 is Not Properly Within the Panel's Terms of Reference

170. Although section 302 – and Canada's as such challenge to it under USMCA Article 10.3 – is referenced in Canada's panel request,[210] section 302 was not included in Canada's consultations request.[211] Accordingly, this measure, and the claim asserted against it, cannot be part of "the matter" referred to the Panel under Article 31.6. Consequently, section 302 is not properly within the Panel's terms of reference.

171. The *only* "measure or other matter at issue"[212] identified and discussed in Canada's consultations request is "the imposition and ongoing application of an emergency action (or safeguard measure) by the United States on crystalline silicon photovoltaic cells (whether or not partially or fully assembled into other products) (CSPV products), including from Canada."[213] Canada's particular focus in the consultations request is on the safeguard measure's application "to imports from Canada."[214] Following references to the contents of *Proclamation 9693* and *Proclamation 10101* and a recitation of various USMCA and NAFTA articles, Canada's consultations request states that "{t}he Government of Canada considers that the above measure is inconsistent with the obligations of the United States under" Articles 2.4, 10.2, and 10.3 of the USMCA.[215] Section 302 of the USMCA Implementation Act is not mentioned in Canada's consultations request. It is evident from Canada's consultations request that the focus of its claims pertained to the U.S. determination to include imports of CSPV products from Canada in the solar safeguard measure, and not the legal provisions that provided the general authority to make that determination under U.S. law.

172. However, in its panel request, Canada included the following additional "measure":

> Under U.S. law, the USITC was required to make findings in respect of NAFTA countries, including Canada, as to whether imports from a NAFTA country account for a substantial share of total imports and whether those imports contribute importantly to serious injury. At the time of the original investigation, this requirement was set out in Section 311 of the NAFTA Implementation Act, 19 U.S.C. § 3371. This provision was subsequently replaced by Section 301 of the USMCA Implementation Act, 19 U.S.C. § 4551, following the entry into force of CUSMA. U.S. law sets out that, following the USITC's determinations, the President shall also determine whether imports from Canada

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[210] Canada's Panel Request, paras. 6, 13(d).

[211] *See generally* Canada's Consultations Request.

[212] USMCA, Article 31.4.2.

[213] Canada's Consultations Request, 1.

[214] Canada's Consultations Request, 1-2.

[215] Canada's Consultations Request, 1-2.

> account for a substantial share of imports and contribute importantly to serious injury, as originally set out in Section 312 of the NAFTA Implementation Act, 19 U.S.C. § 3372, and subsequently replaced by Section 302 of the USMCA Implementation Act, 19.U.S.C. § 4552.[216]

173. Canada identified the "legal basis" for its "complaint" regarding section 302 (19 U.S.C. § 4552) as being that:

> . . . the designation of the President under 19.U.S.C. § 4552 to make determinations (which may contradict the USITC's final determinations) on whether imports of a CUSMA country account for a substantial share of imports and contribute importantly to serious injury is as such inconsistent with CUSMA{.}"[217]

174. With specific regard to section 302, Canada did not request consultations with the United States before filing its panel request that did identify that measure. Therefore, Canada did not meet the procedural requirements for including section 302 in its panel request, and section 302 is not properly before the Panel.

175. Finally, Canada includes the following statement in its consultations request: "The Government of Canada reserves the right to address additional measures, factual and legal claims in the course of consultations and in any future request for panel proceedings."[218] This vague, blanket reservation is insufficient to save Canada's as such challenge here. Canada was obligated in its consultations request to "set out the reasons for the request, including identification of *the specific measure* or other matter at issue and an indication of the legal basis for the complaint."[219] A consultations request that purports to identify "additional measures" has not identified "the specific measure" of concern. Such generic and vague language thus does not establish that section 302 was subject to Canada's request for consultations. Accordingly, that measure cannot be identified as "the measure" at issue for purposes of Canada's panel request under Article 31.6.

176. Therefore, Canada's as such claim regarding section 302 of the USMCA Implementation Act is not properly within the Panel's terms of reference.

B. In Any Event, Section 302 is Not Inconsistent as Such with USMCA Article 10.3

177. Even if Canada's challenge to section 302 is properly within the Panel's terms of reference, this provision is not inconsistent as such with USMCA Article 10.3. As discussed in

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[216] Canada's Panel Request, para. 6.

[217] Canada's Panel Request, para. 13(d).

[218] Canada's Consultations Request, 2.

[219] USMCA, Article 31.4.2 (emphasis added).

section V.A.1, the President's definitive authority to make exclusion determinations for imports from a Party is not inconsistent with Article 10.3. Again, the determinations specified in Article 10.2.1 are not "determinations of serious injury, or threat thereof, in emergency action proceedings" and, therefore, are not subject to the obligations in Article 10.3. This point applies equally to Canada's as such challenge to section 302, which is the implementing legislation that authorizes the President to make exclusion determinations regarding imports from a USMCA Party.

178. Furthermore, as discussed in section V.A.3, if the Panel accepts Canada's argument that USMCA exclusions described in Article 10.2.1 are "serious injury determinations," then Article 10.3 requires that they be entrusted to the competent investigating authorities only "to the extent provided by domestic law." Canada has been aware for more than 30 years, and through multiple free trade agreement negotiations with the United States, that U.S. law tasks the President with making exclusion determinations for imports from USMCA Parties in safeguard proceedings, and has even benefitted from (and endorsed) the President's exercise of this authority in this context. Accordingly, if Article 10.3 applies to exclusion determinations, then "to the extent provided by domestic law" retains the President's definitive authority to make exclusion determinations. This analysis applies equally to the legislation that provides general authority for the President to make USMCA exclusions in safeguard proceedings, section 302 of the USMCA Implementation Act.

VII. CONCLUSION

179. For the reasons set out above, Canada has failed to establish any inconsistency with the USMCA in this dispute.