UNITED STATES – CRYSTALLINE SILICON PHOTOVOLTAIC CELLS SAFEGUARD MEASURE

(USA-CDA-2021-31-01)

U.S. COMMENTS ON CANADA'S RESPONSES TO QUESTIONS FROM THE PANEL TO THE PARTIES

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TABLE OF ABBREVIATIONS

Abbreviation	Definition
Agreement or CUSMA or USMCA	*United States-Mexico-Canada Agreement*
CSPV	Crystalline silicon photovoltaic
GATT 1994	General Agreement on Tariffs and Trade 1994
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
Safeguards Agreement	Agreement on Safeguards
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

I. INTRODUCTION

1. In its written responses to the Panel's questions, Canada addresses the three written questions to the Parties,[1] replicates the Panel's oral questions during the hearing, and supplements certain of its oral responses in writing.[2] The United States comments on Canada's response to the Panel's written questions in section II below. In section III, we comment on Canada's supplemented responses to certain of the Panel's oral questions presented during the hearing. Canada appears to replicate all the oral questions from the Panel, but it does not address all of them. Where Canada has not responded to a particular question, the United States omits the question in these comments. Where Canada elaborates on its response to an oral question, we rely on Canada's numbering of those questions below for ease of reference.

II. U.S. COMMENTS ON CANADA'S RESPONSES TO THE PANEL'S POST-HEARING WRITTEN QUESTIONS

Question 1

In its opening statement, Canada stated that the tariffs are the act "currently being applied through an amendment to the U.S. tariff schedule." The United States noted that they "do not dispute that those measures, those tariffs, are before {the Panel} and subject to the USMCA." Could the Parties comment on whether the Harmonized Tariff Schedule of the United States (HTUS) is the measure before the Panel in this dispute?[3]

Comments:

2. The United States disagrees with Canada that the Harmonized Tariff Schedule of the United States ("HTSUS") is "part of the measures before the Panel in this dispute."[4] We refer to our own response to this question.[5]

3. That being said, we add that Canada's USMCA Article 2.4.2 claim against the solar safeguard measure does not mean that the HTSUS is within the Panel's terms of reference, as Canada appears to suggest.[6] Canada's Article 2.4.2 claim is entirely dependent on its claims against the inclusion of imports from Canada in the safeguard measure under Articles 10.2.1, 10.2.5(b), or 10.3.[7] Canada has failed to establish that the United States acted inconsistently

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[1] Canada's Responses to the Panel's Questions, paras. 112-117.

[2] Canada's Responses to the Panel's Questions, paras. 2-111.

[3] Canada numbers this question as Question 88. Canada's Responses to the Panel's Questions, para. 112.

[4] Canada's Responses to the Panel's Questions, para. 112.

[5] U.S. Responses to the Panel's Questions, paras. 1-6.

[6] Canada's Responses to the Panel's Questions, para. 112.

[7] U.S. Initial Written Submission, paras. 158-160.

with these Articles, and for this reason Canada has also failed to establish that the United States acted inconsistently with Article 2.4.2 by including imports of CSPV[8] products from Canada when taking emergency action while the NAFTA was in force.[9]

Question 2

Could the Parties comment on the relationship between a measure based on the HTUS and the determinations made by the President in relation to Art. 10.2:1(a) and Art. 10.2:1(b)?[10]

Comments:

4. As we explained in our own response to this question, in challenging the President's decision to include imports of CSPV products from Canada in the solar safeguard measure, Canada treated two distinct measures as if they were one. The first measure is a determination that the President made in 2018, which provided the legal predicate for the decision to include imports from Canada in the solar safeguard measure. The second measure is the application of the safeguard measure through *Proclamation 9693*.[11]

5. Based on Canada's response to this question, Canada appears to agree that there are two different measures here: (1) "{t}he determinations made by President Trump on whether imports from Canada account for a substantial share of total imports and contribute importantly to the serious injury", and (2) "{t}he decision not to exclude Canada . . . led to the amendments to the {HTSUS} made by Proclamations 9693 and 10101 being applicable to Canada."[12] The United States and Canada also appear to agree that the first and second measures are related in the sense that the first measure determined the existence of conditions that gave the President the authority to take the second one.[13]

6. However, the United States disagrees with Canada's suggestion that the ongoing application of tariffs in the HTSUS is subject to the Panel's terms of reference. As we explained in our response to this question, the first measure is not subject to the USMCA because the relevant USMCA Articles to which Canada refers did not exist when the President made his

[8] Crystalline silicon photovoltaic.

[9] U.S. Initial Written Submission, paras. 158-160.

[10] Canada numbers this question as Question 89. Canada's Responses to the Panel's Questions, paras. 113-114.

[11] U.S. Responses to the Panel's Questions, para. 7.

[12] Canada's Responses to the Panel's Questions, paras. 113-114; U.S. Responses to the Panel's Questions, para. 7.

[13] Canada's Responses to the Panel's Questions, para. 114 ("The decision not to exclude Canada from the measure, contrary to the requirements of Article 10.2.1, led to the amendments to the HTUS made by Proclamations 9693 and 10101 being applicable to Canada"); U.S. Responses to the Panel's Questions, paras. 7-8.

January 2018 determination. Canada never challenged that determination under NAFTA Chapter 20 dispute settlement, let alone achieved a NAFTA panel finding that the determination was inconsistent with the relevant NAFTA obligations. For this reason, the United States is entitled to rely on that determination as the basis to impose safeguard duties on imports from Canada,[14] including through the application of duties through changes in the HTSUS that have continued since the USMCA entered into force.[15]

Question 3

Could the Parties comment on whether a likelihood of a surge in imports can be understood as falling within the scope of 10.2:1(a) and 10.2:1(b)?[16]

Comments:

7. The United States disagrees with Canada's assertion that a "likelihood of a surge" "does not fall within the scope of Articles 10.2.1(a) and 10.2.1(b)."[17] We refer to our own response to this question, in which we explain that a "likelihood of a surge" in imports could fall within the scope of Article 10.2.1(a), (b), or both subparagraphs, depending on the facts of a particular case. We also explain in our own response that in the specific circumstances of the solar safeguard, the likelihood of a surge in imports from Canada, if the President had excluded such imports from the safeguard measure, was relevant to both conditions in Article 10.2.1.[18]

8. Canada errs in arguing that reading Article 10.2.1 in this manner would render Article 10.2.3 inutile.[19] First, even if a Party considers the possibility of a surge under Article 10.2.2, which informs Article 10.2.1, this does not necessarily mean that it will ultimately decide to include imports from the other Party or Parties at the outset of a safeguard action. Second, the existence of a remedy for threat of serious injury shows that imminent harm is relevant to the evaluation. Article 10.2.3 is best understood as addressing unexpected surges where a Party does not include imports from another Party at the outset of a safeguard action, and it remains available where there is a "real, and not prospective, surge in imports, undermining the effectiveness of the action".[20]

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[14] U.S. Rebuttal Written Submission, para. 2.

[15] U.S. Responses to the Panel's Questions, paras. 1-9.

[16] Canada numbers this question as Question 90. Canada's Responses to the Panel's Questions, paras. 115-117.

[17] Canada's Responses to the Panel's Questions, para. 115; *see also id.* at paras. 91-92.

[18] U.S. Responses to the Panel's Questions, paras. 10-18.

[19] Canada's Responses to the Panel's Questions, para. 116.

[20] U.S. Rebuttal Written Submission, para. 98 (quoting Mexico's Third Party Submission, para. 23 (bullet point 4)).

III. U.S. COMMENTS ON CANADA'S SUPPLEMENTED RESPONSES TO THE PANEL'S ORAL QUESTIONS

Question 1

(Member McRae) And I wondered why Canada did not pursue a claim under NAFTA and I wondered if we could get some information on what the US response was to Canada's request for consultation. So perhaps we could find out generally why Canada didn't pursue a claim under NAFTA, if that's information you can give to us. I don't know if you can. But it's certainly something we were wondering when we started to look at this. And then what was the U.S. response? We know that there was a consultation request, but we have no more information of that. So you can decide which of you would like to go first.

Comments:

9. The United States refers to its oral response to this question during the hearing.[21] With respect to Canada's written response, the United States takes issue with Canada's assertion that it did not sit on its hands.[22] Canada's consultations request is dated July 23, 2018.[23] The USMCA entered into force on July 1, 2020. Within that roughly two-year time period, Canada could have requested a panel under NAFTA Chapter 20 to examine the President's determination to include imports from Canada under NAFTA Articles 802.1, 802.2, and 802.5(b). It did not and, therefore, Canada did not obtain a finding that the President's determination was inconsistent with the then-applicable NAFTA obligations. Consequently, the United States is entitled to rely upon the President's determination as the NAFTA-consistent basis for including Canadian imports in the solar safeguard measure, including after the USMCA entered into force.[24] We add that Canada could have sought a transition provision to ensure that its NAFTA Chapter 20 challenge could move forward once the USMCA entered into force, just as the Parties negotiated for NAFTA Chapter 19 binational panels to continue their work once the USMCA entered into force.[25]

[21] Transcript, 94-95. At the time of filing these written comments, the final hearing transcript has not yet been released. In preparing these comments, the United States relies on the version of the transcript provided by the U.S. Section of the Secretariat to the Parties on December 1, 2021. Consequently, the page numbering in the U.S. citations to the transcript in these comments could be different from the final version of the transcript.

[22] Canada's Responses to the Panel's Questions, para. 2.

[23] Canada's NAFTA consultations request (Exhibit CAN-74).

[24] *See* U.S. Rebuttal Written Submission, para. 2.

[25] USMCA, Articles 34.1.4, 34.1.5.

Question 2

(Member Hillman) I wondered if I could just follow up only on the point about Chapter 20 and the existence of or not of a Chapter 20 process. I mean, a number of places throughout the U.S.'s submissions is this argument that Canada slept on its rights under the NAFTA and that could have, should have pursued this as a Chapter 20 claim. I'm just trying to understand as a realistic, practical matter, could Canada have obtained a panel under Chapter 20 to hear this dispute in light of the fact that there had been no existing roster as of 2009? I'm just trying to understand how valid is the United States' point that Canada slept on its rights.

Comments:

10. The United States refers to its own oral response to this question.[26] We add that we are not engaging in "misdirection" by suggesting Canada is making a retroactive claim of NAFTA provisions.[27] Canada *is* making claims against a determination the President made under NAFTA obligations. USMCA Chapter 31 does not allow a Party to invoke claims under NAFTA, or to apply USMCA obligations retroactively, to a determination made pursuant to NAFTA obligations.[28] Irrespective of there not being an active roster under NAFTA Chapter 20, Canada could have still brought its claim under the NAFTA. The existence of a roster has nothing to do with the ability of another Member to bring a claim under the NAFTA.

Question 3

(Member McRae) Let me move on slightly but focus more on CUSMA itself and why it doesn't have anything dealing with this question of rights under NAFTA and rights under USMCA. And one can ask, but I expect I am putting you in the same position as I put you before, if I said did this come up in the negotiations, I expect I will have a similar answer to what we just heard. But there is a question when one looks at it as an outsider, one sees that Chapter 19 was dealt with as a matter that existed under NAFTA and would have to be continued under the USMCA but then silence on safeguard measures. Now, is there any light you can throw on why that had -- or we don't have any evidence of a proposal similar to the Chapter 19 provision being rejected or considered? Again, is there anything you can say, or have you already said everything you can say?

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[26] Transcript, 96.

[27] Canada's Responses to the Panel's Questions, para. 3.

[28] *See* U.S. Rebuttal Written Submission, para. 5.

Comments:

11. The United States refers to its own oral response to this question.[29] Our arguments during the hearing apply *mutatis mutandis* to Canada's points regarding CFTA Article 1104.[30]

12. We add that, while an analog to NAFTA Annex 805 is absent from USMCA Chapter 10, this difference does not support a conclusion that USMCA Chapter 10 must apply retroactively to prior actions taken with regard to safeguard measures in place at the time of entry into force. An exclusion determination under NAFTA Articles 802.1 and 802.2, or a restriction taken under Article 802.5(b), are not subject to some continuing obligation. USMCA Articles 10.2.1, 10.2.2, and 10.2.5(b) do not create continuing obligations either.[31]

Question 4

(Member McRae) Before we move off negotiations, and this perhaps will seem a more trivial, perhaps not because there were arguments made about it, and it's sort of interesting to understand how the words "smooth transition" got in in terms of the move from NAFTA to USMCA. Was that -- I mean, I don't think I've ever seen that term used in a treaty, and I don't know if anyone wants to claim ownership of it as the originator. But I'm just intrigued by the use of the word and whether you can again throw anymore light on it than you have already in your pleadings.

Comments:

13. We refer to our oral rebuttal to Canada's response to this question during the hearing.[32] We also responded to Canada's arguments regarding the "smooth transition" language in USMCA Article 34.1.1 in our rebuttal written submission.[33] In brief, we agree that facts, events, or conduct that occurred prior to the USMCA's entry into force can be considered in USMCA Chapter 31 dispute settlement. But this does not mean that facts, events, or conduct that occurred prior to the USMCA's entry into force necessarily constitute a breach of the USMCA. Article 34.1.1 does not supersede Article 34.5's entry into force language. The end of NAFTA obligations on June 30, 2020, and the commencement of USMCA obligations on July 1, 2020, was an integral part of the "smooth transition." Reading Article 34.1.1 as negating the clear provisions regarding the end of the NAFTA and the entry into force of the USMCA would directly obstruct the passage from the NAFTA to the USMCA as well as impeding and creating

[29] Transcript, 100-102.

[30] Canada's Responses to the Panel's Questions, para. 5.

[31] U.S. Rebuttal Written Submission, para. 21.

[32] Transcript, 108-110.

[33] U.S. Rebuttal Written Submission, paras. 32-34.

difficulty, too.[34] As such, Article 34.1.1 is best read as a bright-line rule signaling the end of the NAFTA and the beginning of the USMCA.

Question 5

(Member Hillman) Can I ask just to make sure I'm understanding exactly what you're saying. The fact that the United States had an obligation under the NAFTA to not -- to exclude Canada unless it found that it met the substantial share and contributing import, that there was an obligation under the NAFTA to do that, to exclude Canada from the safeguard unless it found that it met these two conditions, and that the exact same obligation under the USMCA. You are not saying that we are looking at that NAFTA obligation in order to in some way confer jurisdiction over this measure?

Comments:

14. Although Canada appears to correctly understand that USMCA Article 31.2 requires both an actual measure and a USMCA obligation to invoke Chapter 31 dispute settlement, the issue here is the second requirement.[35] Canada asserts that the solar safeguard measure "is inconsistent with the United States' CUSMA obligations,"[36] but USMCA Articles 10.2.1, 10.2.2, and 10.2.5(b) create obligations with respect to the *adoption* of a safeguard measure and certain *determinations preceding adoption* of a safeguard measure. They do not create obligations to evaluate on an ongoing basis whether subsequent conditions continue to support the original determinations made or the decision with respect to exclusion.[37] The scope of Chapter 31 dispute settlement is concerned with "an obligation of *this Agreement*" (*i.e.*, the USMCA), not the NAFTA.[38]

Questions 9-11

(Member Hillman) As I at least heard the argument from the government of Mexico, the argument was actually when the USMCA enters into effect, arguably, you do have a new obligation to ensure that this decision is consistent with the new treaty that has come into effect. And therefore, there is an affirmative obligation to ensure that the measure does meet the terms of the new treaty. That's as I'm hearing the argument from Mexico.

(Member Hillman) But is it a new obligation to ensure that you are acting in consistency with the USMCA?

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[34] U.S. Rebuttal Written Submission, paras. 32-34.

[35] Canada's Responses to the Panel's Questions, para. 9.

[36] Canada's Responses to the Panel's Questions, para. 9.

[37] U.S. Rebuttal Written Submission, para. 17.

[38] *See, e.g.,* USMCA, Article 31.2(b) (emphasis added); U.S. Rebuttal Written Submission, para. 17.

(Member Hillman) Meaning the exclusion requirement. Each party obtains its rights under Article 19 of the safeguards --

Comments:

15. Canada refers to its response to question 12 in addressing these questions. The United States refers to its comments on Canada's response to question 12 below.

Question 12

(Member Hillman) I'm not going to – I'm not sure I'm going to find it immediately, but the gist is clearly what Mexico is arguing, as I hear it, is that when a new treaty comes into effect, it is the obligation of all parties to a treaty to ensure that their domestic laws and regulations and actions are consistent with the new treaty obligation that they take on. Obviously, when the United States enacts their version of USMCA, they are saying with the enactment of this USMCA Implementing Act, the United States is now in compliance with its USMCA obligations. And therefore, there is read into this a requirement that the United States ensure that it is in compliance with 10.2 of the USMCA.

Comments:

16. We took note of Mexico's suggestion during the hearing that the Parties "were obligated to bring all their measures into compliance with the USMCA at the time it entered into force."[39] Upon further review, the United States is not aware of any USMCA provision that required the United States to revisit the President's NAFTA-era determination to include imports from Canada. Mexico has not specifically identified one either.[40] Nor has Canada in adopting Mexico's purported rule in addressing this question.[41] For Mexico's premise to be true, then the Parties would have sought and agreed to language similar to that in Article 11 of the Agreement on Safeguards ("Safeguards Agreement").

17. Canada's assertion that, once the USMCA entered into force, the United States was in violation of USMCA Article 10.2.1 because it did not exclude imports from Canada from the solar safeguard measure, reflects Canada's erroneous presumption that there is a "continuing breach."[42] There is not. We refer to our previous arguments on this point.[43] Canada also relies

[39] Mexico's Third Party Oral Statement, para. 14.

[40] U.S. Responses to the Panel's Questions, para. 9.

[41] Canada's Responses to the Panel's Questions, para. 13.

[42] Canada's Responses to the Panel's Questions, para. 13.

[43] U.S. Rebuttal Written Submission, paras. 12-20; *see also* U.S. Opening Statement, paras. 41-44.

again on NAFTA Annex 805 and the definition of "emergency action",[44] and we refer to our previous arguments regarding Annex 805.[45]

Question 13

(Member Hillman) And then it's solely because notwithstanding the fact that Canada had requested consultations and had raised this issue in writing in their request for consultation with the NAFTA, the fact that they did not invoke a Chapter 20 panel in and of itself means that the United States was free to assume that they were in full compliance with their obligations when USMCA came into effect?

Comments:

18. With regard to Canada's response to this question, we refer to our own response to this question during the hearing.[46] In addition, the President made the determination that Canada now challenges more than two years before the USMCA entered into force, while the NAFTA was in force. Canada filed a consultations request under NAFTA Chapter 20, but it never sought a panel, let alone achieved a ruling that the President's determination was inconsistent with NAFTA Chapter 8. Therefore, the United States is entitled to rely on that determination now.[47]

19. This argument is not "contrary to the text of CUSMA and principles of international law."[48] Notably, in its response, Canada does not actually point to anything in the USMCA text that precludes the United States' position on this point.[49] Canada cites to its rebuttal written submission, where it discusses the concept of a "continuing breach."[50] We refer to our prior arguments in response to Canada on this issue.[51]

20. As we also explained during the hearing, Canada's failure to establish a NAFTA Chapter 20 panel is not the "sole reason" that the United States was entitled to assume we were in full compliance when the USMCA entered into force. Substantively, the determination was also fully consistent with the NAFTA.[52] Therefore, Canada is precluded from arguing otherwise in this proceeding.

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[44] Canada's Responses to the Panel's Questions, para. 14.

[45] U.S. Rebuttal Written Submission, para. 21; Transcript, 100-102.

[46] Transcript, 116.

[47] U.S. Rebuttal Written Submission, para. 2.

[48] Canada's Responses to the Panel's Questions, para. 15.

[49] Canada's Responses to the Panel's Questions, para. 15.

[50] Canada's Responses to the Panel's Questions, para. 15.

[51] U.S. Rebuttal Written Submission, paras. 12-31.

[52] Transcript, 116.

Question 14

(Member McRae) I was going to ask questions about continuing breach and it struck me that you automatically went into the questions I was going to ask, in fact. But it does seem to me that two different things are being talked about. One is a decision to -- not to exclude Canada from the measure, and the other is a maintaining of a measure that has been established not in conformity with the agreement because there was no exclusion. And one clearly is something that happened once and something continues. So I wonder if you're both talking about different things here. Which is the continuing measure here that is involved? Because I think that the actual decision to exclude -- not to exclude Canada was an instantaneous decision, there's no question about that. But something else continued. And what is the something else, just to be precise about it?

Comments:

21. With regard to Canada's response to this question, the United States refers to its statements during the hearing on this issue.[53] In addition, we refer to our response to the Panel's first and second written questions to the Parties regarding the measures at issue in this dispute.[54]

22. With regard to Canada's assertion that *Proclamation 10101* "constituted a new emergency action",[55] we refer to our comments on Canada's response to question 17 below.

Question 16

(Member Hillman) Could I ask, if this panel were to determine, you just said that the primary obligation under Article 10.2 is to make a determination. If this panel were to instead decide that the primary obligation under 10.2 was to exclude imports from the safeguard unless the conditions were met, would that change your assessment under the ILC articles, in terms of whether it fits under 14.1 or 14.2?

Comments:

23. Canada is correct that the "primary obligation" under USMCA Article 10.2.1 is to "exclude" imports of another Party.[56] However, integral to that primary obligation is a determination of whether or not imports from another Party "account for a substantial share of total imports" and "contribute importantly to the serious injury, or threat thereof, caused by

[53] Transcript, 122-124.

[54] U.S. Responses to Questions from the Panel, paras. 1-8.

[55] Canada's Responses to Questions from the Panel, para. 18.

[56] Canada's Responses to Questions from the Panel, para. 19.

imports."[57] That determination – and the obligations related to it – only apply when the Party is putting the safeguard measure into place.[58] For this reason, and to the extent the Panel finds the ILC Articles relevant in this dispute, the relevant one would be ILC Article 14(1), not Article 14(2).[59] We refer to our prior arguments on this point.[60]

Question 17

(Member Hillman) If I can then turn maybe to Proclamation 10101. Canada, in your opening statement today, you refer to this as a new, a new measure, a new action. And yet when I read the proclamation itself, the proclamation simply refers back to the prior proclamation, again makes no new determination with respect to Canada, with respect to the exclusion, with respect to serious injury, with respect to anything. It simply refers back to the old proclamation, and then does make the modifications that we've all discussed. I'm just trying to understand why we should then assume that this is now creating some kind of a new obligation such that it provides jurisdiction to this panel over hearing this dispute. That's sort of what I'm hearing Canada argue, is that this Proclamation 10101 is an independent source of jurisdiction.

Comments:

24. *Proclamation 10101* does not satisfy the definition of an "emergency action" under Article XIX of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). For this reason, *Proclamation 10101* does not give the Panel jurisdiction over the President's determination to include imports from Canada in *Proclamation 9693* under USMCA Articles 10.2.1, 10.2.2, or 10.2.5(b).[61]

25. *Proclamation 10101* made two modifications to the solar safeguard measure. The first withdrew an exclusion USTR previously granted for bifacial panels, and the second "adjust{ed} the duty rate of the safeguard tariff for the fourth year of the safeguard measure to 18 percent."[62] Neither of these modifications "increase{d} tariffs or expand{ed} the scope of the measure to

[57] USMCA, Article 10.2.1.

[58] *See, e.g.,* U.S. Rebuttal Written Submission, paras. 12-16.

[59] *See* Transcript, 123-124.

[60] U.S. Rebuttal Written Submission, paras. 22-26.

[61] Canada's Responses to Questions from the Panel, paras. 20-25.

[62] *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) (paras. 9(a)-(b)) ("*Proclamation 10101*") (Exhibit CAN-29); *see also* U.S. Initial Written Submission, para. 48; U.S. Rebuttal Written Submission, para. 37.

additional products".[63] With regard to the first modification, *Proclamation 9693* originally covered bifacial panels, and USTR excluded them from the safeguard measure through a subsequent procedure that Canada does not challenge in this dispute. *Proclamation 10101* revoked the exclusion, returning to the status quo reflected in the USITC[64] serious injury determination, which included bifacial panels.[65] The second modification changed the duty rate for the fourth year of the solar safeguard measure from 15 percent to 18 percent, but it did not change the applicable duty rate for the third year of the safeguard measure, which was applicable when the President issued *Proclamation 10101* and which was unchanged from *Proclamation 9693*.[66] Thus, "there was no upward {change} from the existing rate of duty. We still continued to progressively liberalize, just less than was anticipated."[67]

26. The two modifications in *Proclamation 10101* were not taking an emergency action, but rather were amending the emergency action already taken in 2018.[68] Article 7.4 of the Safeguards Agreement confirms this conclusion.[69] Nothing in the USMCA references the midterm review process specified in Article 7.4 of the Safeguards Agreement, and there is certainly nothing allowing or requiring a Party to revisit earlier exclusion findings as part of that process. Thus, the United States did not act inconsistently with the USMCA by not subsequently revisiting, in *Proclamation 10101*, the President's determination to include imports of CSPV products from Canada in the solar safeguard measure in *Proclamation 9693*.[70]

Question 24

(Member Hillman) I don't have any other questions on Proclamation 10101. Then if maybe we could move -- again, I'm just trying to close out some of our questions on the overall issue of jurisdiction, so just to be clear to you all where we are at least in our own heads sort of. I wanted to turn to the issue that the United States has raised about the failure to raise the as-such claim in the consultation request, and what that does in terms of the jurisdiction of the panel. So I'm trying, if I can, to not get to the substance of whether there was a violation and just stick with the jurisdictional issue. You know, Canada, I mean, I'm hearing what you said, that in essence as I hear your argument, you're contending that we should look only at the terms of reference in the formal request for the

[63] Canada's Responses to the Panel's Questions, para. 22.

[64] U.S. International Trade Commission.

[65] *Proclamation 10101*, 85 Fed. Reg. at 65,640 (para. 9(a)) (Exhibit CAN-29); U.S. Rebuttal Written Submission, para. 37; *see also* Transcript, 130-135.

[66] U.S. Rebuttal Written Submission, para. 38; Transcript, 130-135.

[67] Transcript, 134.

[68] U.S. Rebuttal Written Submission, para. 38; Canada's Responses to the Panel's Questions, paras. 22-23.

[69] U.S. Rebuttal Written Submission, para. 39.

[70] U.S. Rebuttal Written Submission, para. 42; Canada's Responses to the Panel's Questions, para. 24.

establishment of a panel, that our entire scope, if you will, is governed by Article 31.7. And my question is if so, what's the point or the goal of consultations? I mean, if they have nothing to do with, then what becomes the request for a panel, what's the point?

Comments:

27. The United States agrees with Canada that "{c}onsultations serve an important function in the settlement of disputes" under the USMCA.[71] However, Canada's reading of Chapter 31 renders consultations pointless. USMCA Articles 31.4 and 31.6 collectively evince that the purpose of consultations is to "arrive at a mutually satisfactory resolution of a matter"[72] or "to resolve the matter."[73] That is possible only if the responding Party has notice of the "specific measure{(s)}" in dispute. The fact that Article 31.4.2 requires a consultations request to be "in writing" exemplifies this notice requirement. Parties cannot seek to "resolve the matter" prior to requesting a panel if the defending Party is not on notice of what "specific measure" the complaining Party is challenging.[74] The United States had *no* notice from Canada's consultations request that Canada intended to bring a claim with respect to section 302 of the USMCA Implementation Act.[75]

28. The phrase "to this end" in Article 31.4.6 envisages that both Parties have obligations in the consultations process including "to provide sufficient information to enable a full examination of how the actual or proposed measure or other matter at issue might affect the operation or application of this Agreement",[76] as Canada suggests.[77] But the Parties' exchange of information during consultations does not mean that the complaining Party is free to ignore the explicit language of Article 31.4.2, which requires that Party to, *inter alia*, provide "identification of the specific measure" in its consultations request.[78]

29. Canada argues that, given the information exchange contemplated by Article 31.4.6, a complaining Party "cannot be expected to provide the same level of detail in its consultations

[71] Canada's Responses to the Panel's Questions, para. 26.

[72] USMCA, Article 31.4.6.

[73] USMCA, Article 31.6.1.

[74] U.S. Opening Statement, para. 52; U.S. Initial Written Submission, para. 169.

[75] U.S. Opening Statement, para. 53.

[76] USMCA, Article 31.4.6.

[77] Canada's Responses to the Panel's Questions, para. 26. The United States notes that this obligation applies to *both* parties, and that information from Canada as to the fact that it sought to challenge the statute was crucial to meaningful consultations.

[78] Canada's Responses to the Panel's Questions, para. 27.

request as is expected in its panel request".[79] The text of Article 31.4.2 already recognizes this, though, because it imposes a looser standard on the complaining Party in a consultations request to provide "an indication of the legal basis for the complaint", as compared to Article 31.6.3's "brief summary of the legal basis of the complaint sufficient to present the issue clearly."[80] But with regard to identifying the "measure", Article 31.4.2 requires the complaining Party to provide an "identification of the specific measure", or, in other words, to recognize the precise or particular measure or other matter in its consultations request, before it may request a panel under Article 31.6.1.[81] Finally, Article 31.7 does not permit a Party to sidestep Article 31.4.2.[82]

Question 25

(Member Hillman) So I'm just curious, because as I hear what the U.S. is arguing, the main sort of point of contention as I hear it is this issue of whether it is an as-such challenge to the statute on its face, as opposed to the issue of whether or not what the United States did in practice comported with the terms of Article 10 of the USMCA. And there a simple reference to domestic law to me is not the same as indicating that you intend to challenge the existence of the statute itself.

Comments:

30. Although the purpose of a panel request is to indicate what measures will be subject to dispute settlement, the consultations request, as envisaged by USMCA Article 31.4.2, *is* to indicate precisely what measures are at issue.[83] The text of Article 31.4.2 clearly requires a Party filing a consultations request to provide an "identification of the *specific* measure".[84] This is a precondition to requesting a panel.[85] One function during the consultations process is to "exchange information on the measure or other matter at issue",[86] but the responding Party cannot be expected to provide information on a measure that it does not know is being

[79] Canada's Responses to the Panel's Questions, para. 27.

[80] U.S. Rebuttal Written Submission, para. 128.

[81] U.S. Rebuttal Written Submission, para. 129 (citing Definition of "Identification," *Oxford English Dictionary*, https://www.oed.com/view/Entry/90995?redirectedFrom=identification& (consulted Oct. 27, 2021) (definition 2) (Exhibit USA-51); Definition of "Specific," *Oxford English Dictionary*, https://www.oed.com/view/Entry/185999?result=2&rskey=3w6Aty& (consulted Oct. 27, 2021) (definition A.4.b) (Exhibit USA-52)).

[82] U.S. Rebuttal Written Submission, para. 127; Canada's Responses to the Panel's Questions, para. 28.

[83] Canada's Responses to the Panel's Questions, para. 29.

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

[85] U.S. Rebuttal Written Submission, para. 127; U.S. Initial Written Submission, para. 167.

[86] Canada's Responses to the Panel's Questions, para. 29.

challenged.

31. Canada's written elaboration of its oral response seeks to blur the requirements in Article 31.4.2 to identify the specific measure or other matter at issue *and* to indicate the legal basis of the complaint. These are two separate requirements. The USMCA Article 10.3 discussion in Canada's consultations request indicates the "legal basis" for Canada's claim. Section 302 of the USMCA Implementation Act is a "measure."[87] But the *only* "measure" that Canada identified in its consultations request was the solar safeguard measure.[88]

32. The United States takes issue with Canada's accusation that "the United States suffered no harm or procedural unfairness because Canada did not refer specifically in its consultation request to section 302 of the *USMCA Implementation Act* (19 U.S.C. § 4552), which Canada later referenced in its panel request."[89] This is not true. Canada is attempting to challenge a U.S. statute. If Canada prevails, the United States might have to enact new legislation, which is a very burdensome step. Therefore, knowing that there is a statutory challenge would influence every step of USTR's consultations with other agencies and with Congress, as well as our engagement with stakeholders and the public. Canada's omission of the statutory challenge from its consultations request made all of that impossible.[90]

33. Moreover, the United States received Canada's consultations request on December 22, 2020. The United States had passed the USMCA Implementation Act in January 2020. The issue of section 302 being inconsistent with the USMCA had never been raised by anyone up to that point, including Canada.[91] Canada did not challenge the precursor provision, section 312 of the NAFTA Implementation Act, in its NAFTA consultations request either.[92]

34. Regardless of the harm to the United States, Canada's argument, followed to its end, would suggest that a Party has a license to disregard Chapter 31 as written. Canada's approach here raises institutional concerns for the USMCA Chapter 31 system, because it would render inutile both the consultations process and the obligation to identify specific measures subject to consultation.[93]

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[87] U.S. Rebuttal Written Submission, paras. 128-129.

[88] U.S. Initial Written Submission, para. 171 (citing Canada's Consultations Request, 1-2).

[89] Canada's Responses to the Panel's Questions, para. 32.

[90] U.S. Opening Statement, para. 53.

[91] Transcript, 142-143.

[92] U.S. Opening Statement, para. 49 (citing Letter from Canada to the United States requesting Consultations (July 23, 2018) (Exhibit CAN-74)).

[93] U.S. Opening Statement, para. 54.

Questions 26-27

(Member Hillman) On the U.S. side, two questions I guess I would ask of you. What did you mean by your assertion in paragraph 30 of your initial submission? You said that the U.S. and Canada have not decided on the terms of reference for the dispute. I'm well aware of the provision within Article 31.7 that says unless the disputing parties decide otherwise, no later than 20 days after the date of the delivery for the request, they establish the panel's terms of reference shall be, and again it says, you know, the matter referred to in the request for the establishment of the panel. So I'm just curious what you meant by that. I mean, 20 days had clearly passed. The request was in June, so by July 8 we would have passed that 20-day threshold. I'm just curious whether there's something I'm missing in that, that's one. And then the second question is again am I correct that the basic gist of your complaint is not that you did not know or did not find whatever was the domestic law at issue, what you're complaining about is that you did not understand that this was going to be an as-such challenge?

(Member Hillman) But there is a clear reference to the idea that the president did not have the authority to make the exclusion decision. I mean, that is clearly referenced in the request for the consultations. So I'm struggling with, what is it that you did not understand?

Comments:

35. Canada refers to its response to question 25 in addressing these questions. The United States refers to its comments on Canada's response to question 25 above.

Question 28

(Member McRae) To start with here, a few questions about the way in which Article 10, paragraph 3, was being interpreted by Canada. And this is really a question of whether or not negative determinations means the same thing as serious injury determinations, and how you get there. And I was struck by the fact that you tended to look at the meaning of the words, and you talked about the reference to serious -- determinations in relation to mentions of serious injury or threat thereof, and then stopped, and then talked about the meaning of negative injury determinations. And I just wondered whether you can stop if you try to understand this provision after serious injury or threat thereafter, and I'm wondering whether your ordinary meaning has allowed you to ignore the context. Because I read it as saying each party shall entrust determinations of serious injury or threat thereof in emergency action proceedings. And if that's so, I'm not quite sure how you get to the point that the competent authority on domestic law to conduct such proceedings refers to a broader concept of emergency proceedings than serious injury. It seems to me that the reference to emergency proceedings is a reference to determinations of serious injury, and therefore such proceedings, I'm not quite sure how you suddenly isolate the emergency action and say well, such proceedings means all kinds of emergency action

proceedings, and therefore this gives you the authority to interpret the exclusion provisions in Article 2, this is the basis for your interpretation. So I just – doesn't the context affect the way you interpret this? I wonder if you've taken it out of context in order to get where you're going.

Comments:

36. The United States shares the concerns identified in the question, as we explained during the hearing.[94] Canada's reading of "negative injury determinations" as meaning something broader than "determinations of serious injury, or threat thereof" ignores the context provided by the rest of Article 10.3. As we explained previously, the phrase "negative injury determinations" in the second sentence of Article 10.3 is best understood as a shorthand reference to "determinations of serious injury, or threat thereof" in the first sentence that are negative.[95] We also refer to our remarks on this issue during the hearing, including that Canada's interpretation of the second sentence of Article 10.3 would read out "serious" and "threat" in the first sentence.[96]

37. Canada's written expansion of its response to this question asserts that an exclusion determination under USMCA Article 10.2.1 is "part of the emergency action proceeding within the meaning of Article 10.3."[97] That is incorrect, and irrelevant. The Parties agree that "emergency action" refers to a safeguard measure under GATT 1994 Article XIX and the Safeguards Agreement.[98] The exclusion determination is not part of that proceeding, and USMCA Article 10.2.1 is silent as to whether the determinations it envisages are part of the emergency action proceeding or made through a separate proceeding.

38. Moreover, even if USMCA Chapter 10 could be read as requiring the Article 10.2.1 determinations to occur as part of the "emergency action" proceeding, Article 10.3 does not require a Party to entrust those determinations to the competent investigating authority. The fact that they occurred as part of an emergency action proceeding does not transform exclusion determinations into determinations of "serious injury, or threat thereof" or of "injury".

39. Canada's written response errs in arguing that the USMCA Article 10.2.4 reference to "emergency action under paragraph 1 or 3" signals that an exclusion determination under Article 10.2.1 or an exercise of the anti-surge mechanism under Article 10.2.3 is an "emergency action"

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[94] Transcript, 153.

[95] U.S. Rebuttal Written Submission, para. 71; U.S. Initial Written Submission, paras. 59-61.

[96] Transcript, 154-155.

[97] Canada's Responses to the Panel's Questions, para. 36.

[98] Canada's Rebuttal Written Submission, para. 27 ("As Article 10.2.1 states, the 'emergency action' in question is one taken under Article XIX of the GATT 1994 and the Agreement on Safeguards.").

in its own right.[99] Article 10.2.1 introduces its substantive obligation in the chapeau as "{a}ny Party taking an emergency action under Article XIX and the Safeguards Agreement shall . . . ." Thus, the Article 10.2.1 reference to an "emergency action under paragraph 1" can only be understood as the safeguard measure itself, and not to the separate act of excluding or including imports from a USMCA Party. Likewise, the references to "{a} Party taking such action" and "in the action" in Article 10.2.3 refer to the original safeguard measure, The text assumes that the "emergency action" has already been taken, particularly given that Article 10.2.3 only applies "subsequently" to the Party taking emergency action.[100] Thus, Canada errs in seeking to portray Article 10.2.4 as "direct textual support" for its position that an exclusion determination under Article 10.2.1 is a "determination{ } of serious injury, or threat thereof" for purposes of Article 10.3.[101] The fact that Article 10.3 is entitled "Administration of Emergency Action Proceedings" does not mean that a Party must entrust an exclusion determination to the competent investigating authority either.[102] The text of the Article speaks for itself.

40. Canada invokes NAFTA Article 803.3 and Annex 803.3 in arguing that the Parties understood an emergency action under NAFTA Article 802 as including determinations regarding exclusions, and by extension that adoption of some (but not all) of the NAFTA Article 802 language in USMCA Article 10.3 means that it, too, covers exclusion determinations.[103] Canada's argument fails from the outset because the Parties to the USMCA continued only some of the language in NAFTA Articles 802 and 803, omitting the text on which Canada relies. That suggests that they did not intend any of the excluded obligations to continue in the USMCA.

41. Canada is also mistaken in its interpretation of the NAFTA. Like USMCA Article 10.3, NAFTA Article 803.2 refers only to "determinations of serious injury" and "negative determinations of injury." It does not mention the separate determinations of "substantial share" and "contribute importantly." Canada points out that Article 803.3 obligates parties to "adopt or maintain equitable, timely, transparent and effective procedures for emergency action proceedings, in accordance with the requirements set out in Annex 803.3," and that paragraph 3(g) of the Annex requires any petition to provide information on

> (g) criteria for inclusion - quantitative and objective data indicating the share of imports accounted for by imports from the territory of each other Party and the petitioner's views on the extent to which such imports are contributing

[99] Canada's Responses to the Panel's Questions, para. 37.

[100] U.S. Initial Written Submission, para. 37.

[101] Canada's Responses to the Panel's Questions, para. 37.

[102] Canada's Responses to the Panel's Questions, para. 37.

[103] Canada's Responses to the Panel's Questions, paras. 38-40.

> importantly to the serious injury, or threat thereof, caused by imports of that good.[104]

However, Canada ignores that immediately preceding subparagraph separately requires petitioners to provide information on:

> (f) cause of injury - an enumeration and description of the alleged causes of the injury, or threat thereof, and a summary of the basis for the assertion that increased imports, either actual or relative to domestic production, of the imported good are causing or threatening to cause serious injury, supported by pertinent data.[105]

This juxtaposition recognizes that the "inclusion criteria" are separate and distinct from the question of the "cause of injury."

42. The remainder of Annex 803.3 supports this conclusion. Paragraph 5 calls for publication of a notice identifying "the nature and timing of the determination" (in the singular) "to be made," and not determinations (which would potentially encompass exclusion determinations). Paragraph 7 calls for a hearing "to present evidence and to be heard on the questions of serious injury, or threat thereof, and the appropriate remedy" – but not the questions of "substantial share" and "contribute importantly." Paragraphs 9 and 10 covering "Evidence of Injury and Causation" call for the competent investigating authority to consider factors relating to all imports – but not the Mexico- and Canada-specific data referenced in Annex 803.3.3(g). Paragraph 10 provides that the competent investigating authority "shall not make an affirmative injury determination unless its investigation demonstrates, on the basis of objective evidence, the existence of a clear causal link between increased imports of the good concerned and serious injury, or threat thereof."[106] Thus, insofar as Annex 803.3 is relevant, it demonstrates that any determinations of whether imports from Canada and Mexico represent a "substantial share" or "contribute importantly" are separate from the competent investigating authority's determination of serious injury.

Questions 29-31

(Member McRae) But why do you take the -- you state as a fact that the emergency action reference is a broader reference. But how do you get there? Whereas I'm saying that the reference is -- determination of serious injury in emergency action proceedings seems to

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[104] Canada's Responses to the Panel's Questions, paras. 39-40.

[105] NAFTA, Annex 803.3.3(f) (Exhibit CAN-01).

[106] To the extent that Annex 803.3 has any relevance to the interpretation of USMCA Articles 10.2 and 10.3, the equation of "affirmative injury determination" with "the existence of a clear causal link between increased imports of the good concerned and serious injury, or threat thereof" indicates that a "negative injury determination" is a determination that there is no causal link between increased imports and serious injury and not – as Canada asserts – any negative finding related to injury.

me, or at least you can argue, that that narrows what you're talking about in Article 3. And yet you're saying that emergency action has a lot more than determination of serious injury. That's true, but in the context of Article 3, how do you get to that broader concept of emergency proceedings?

(Member McRae) So if I understand that interpretation, you're saying that if you take out the words in the first line, "serious injury" – "of serious injury or threat thereof," you get really what is meant here, that is each party shall entrust determinations in emergency action proceedings to a competent investigating authority. That's where you end up, isn't it?

(Member McRae) Aren't you taking those words out? You can make things in utile, effectiveness and so on. But I just wonder if your interpretation means that you don't need serious injury or threat thereof, it's actually got nothing to do with it, because it's really about emergency action – you'd have to put all of these to at least a competent authority, you still have your negative injury determination point. So haven't you effectively taken those words out?

Comments:

43. Canada refers to its response to question 28 in addressing these questions. The United States refers to its comments on Canada's response to question 28 above.

Question 32

(Member McRae) But how do you square that with the fact that Article 10.2.2 in paragraph b refers to the involvement of the competent investigating authority but no reference in a? Now, have we suddenly under your -- under your theory it seems to me, you don't need to have a reference to competent investigating authority in b because everyone knows that a and b would have to be determinations made by the competent investigating authority.

Comments:

44. The United States refers to its own response to this question during the hearing[107] and our arguments in our rebuttal written submission on this issue.[108]

[107] Transcript, 153-154.

[108] U.S. Rebuttal Written Submission, para. 61.

Question 33 and 34

(Member McRae) We can go back and forth on this, and that's not the point. I'm trying to get clear the arguments you're making. But I would like to ask the United States, clearly paragraph b of Article 10.2.2 contemplates the involvement of a competent investigating authority. Doesn't that imply that these decisions, these determinations, should be made at least with respect to the serious injury part of that determination in respect of the exclusion? Shouldn't that be made by a competent investigating authority and not by someone else?

(Member Hillman) So a couple of follow-ups. I mean first, maybe to either side, I'm going to follow up a little bit on what Mexico was just arguing. Because, to me, if you look at the structure of 10.2, in the United States, you're in essence discarding this singular determination to exclude or not exclude. When I'm looking at it I'm seeing actually two determinations, one on -- again, one on whether or not imports in this instance from Canada account for a substantial share of total imports, and a second determination on whether or not imports from Canada contribute importantly to the serious injury. So two, if you will, separate determinations. And then 10.2.2 goes on to say what are the criteria that should be used with respect to each one of those determinations, and they are also set out separately. And in one of them, we clearly have the investigating authority being referred to, and in the other one we have nothing said about the investigating authority. So I guess my question to the United States is if this panel were to decide that it was not appropriate for the president to make the ruling of the import -- contribute importantly, in other words the president did not have the authority under 2(b) because it says imports contribute importantly, the competent authority shall. Okay. If that were the determination, where does that leave the overall determination with respect to exclusion? And can the panel do that? I mean, in other words, read there's a clear reference in one of these two determinations to investigating authority and not in the other. You clearly heard Canada suggest that we should be reading investigating authority into a. If the panel were to decide no, we're not going to do that, we're not going to read the notion that the a determination has to be made by an investigating authority, but there's no question it's there in b, and we're not going to read that out, where does that leave us?

Comments:

45. Canada refers to its response to question 32 in addressing these questions. The United States refers to its comments on Canada's response to question 32 above and its own response to these questions during the hearing.[109]

[109] Transcript, 161-162.

Question 35

(Member Hillman) Maybe if I could turn to Canada, because -- and again, you're hearing the fact that I happened to have sat for nine years at the ITC making all these decisions. For me when you think about a serious injury determination, you are under U.S. domestic law and under the safeguards agreement focused on the significant idling of productive facilities, the inability of a significant number of firms to carry out operations at a reasonable level of profit, the significant unemployment. You are focused on the domestic industry and its conditions. And then when I come over here and look at 10.2, I'm reading imports account for a substantial share. I mean, argue that has nothing to do with the condition of the domestic industry. You know, imports contribute importantly to the serious injury. All right, maybe there's some connection there to the domestic industry. But fundamentally, these feel as though the focus and the thrust of what – the determination of serious injury is all about the domestic industry and its condition, and these decisions over here, whether we're going to call them exclusion decisions or whatever we're going to call them, 10.2, are not focused on serious injury factors. Am I wrong? And what comes of that? I mean, let's just say that this panel were to take my logic and say that serious injury determinations are those that are doing this, looking at the status of a domestic industry to figure out whether or not it has been seriously injured, and these others are about exclusion, determination, something else. If we come to that view, that these are different decisions, where does that leave your argument about the authority of the president to make the determination that he did?

Comments:

46. The United States agrees with Canada that injury to the relevant domestic industry is one component of a serious injury determination.[110] Article 2.1 of the Safeguards Agreement, to which the chapeau of USMCA Article 10.2.1 refers, contemplates that a serious injury determination comprises a determination that "such 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 that produces like or directly competitive products."[111] But Canada's reference to "additional elements" of a serious injury determination, and Canada's reference to the WTO Appellate Body's idea of "parallelism", does not render an exclusion determination under USMCA Article 10.2.1 as an "emergency action" or "determination of serious injury in relation to that Party."[112] With regard to Canada's arguments that Article 10.2.4 supports that an exclusion determination is an "emergency action" in its own right, we refer to our comments on Canada's response to question

[110] Canada's Responses to the Panel's Questions, para. 49.

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

[112] Canada's Responses to the Panel's Questions, para. 50.

28 above.

47. Canada continues to erroneously assert that "negative injury determinations" in the second sentence of USMCA Article 10.3 covers a broader category of injury determinations than the phrase "determinations of serious injury, or threat thereof" in the first sentence of that Article, and that this broader category covers exclusion determinations under Article 10.2.1.[113] We refer to our prior arguments on this point.[114] Canada also erroneously asserts that no evidence supported the President's determination that imports of CSPV products from Canada satisfied the "substantial share" and "contribute importantly" conditions in Article 10.2.1.[115] We refer to our prior arguments on this point as well.[116]

48. Finally, although we made the point during the hearing that the President's analysis is subject to executive privilege, this is *not* "precisely the reason why Article 10.3 requires that determination{ } in relation to CUSMA Party exclusions must be entrusted to the competent investigating authority, so that those determinations are not shrouded in a veil of secrecy."[117] Again, and put simply, Article 10.3 does not require a Party to entrust exclusion determinations to the competent investigating authority.[118]

Question 36

(Member Hillman) I'm going to just pick up on that, and again because you see it throughout your written submissions, you're using this word "relating to serious injury" or that it's again relevant or part of. And I'm just trying to understand whether that's good enough, if you will, to get these viewed as sort of the equivalent such that 10.3 applies to 10.2. I mean, that's really the gist of your argument, is that you have to read the first sentence of entrustment as applying to 10.2. And I'm just trying to understand, is there any other hook than this notion of serious injury, or again, is it good enough to get that hook if it is only relating to serious injury or sort of tangential to or somehow in the same room as serious injury but not really at the heart of what a serious injury determination is?

Comments:

49. Canada refers to its response to question 35 in addressing this question. The United

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[113] Canada's Responses to the Panel's Questions, para. 51.

[114] U.S. Rebuttal Written Submission, paras. 71-75; U.S. Opening Statement, paras. 45-48; U.S. Initial Written Submission, para. 61.

[115] Canada's Responses to the Panel's Questions, para. 52.

[116] U.S. Rebuttal Written Submission, paras. 92-100; U.S. Initial Written Submission, paras. 104-117.

[117] Canada's Responses to the Panel's Questions, para. 53.

[118] U.S. Initial Written Submission, paras. 57-71; U.S. Rebuttal Written Submission, paras. 48-67.

States refers to its comments on Canada's response to question 35 above and our remarks on this particular issue during the hearing.[119]

Question 45

(Member Hillman) But why does it work the same either way? Because it still requires this threshold finding that Canada has contributed significantly to the injury and still requires a threshold finding that Canada has a substantial share. That still is a requirement whether it's the President making the decision or the ITC making the determination. Those threshold two criteria still have to be met. And if the ITC has said they are not met, it is a different decision for the President to say oh, yes, they have, because then presumably he has to substitute something in place of what the ITC decided. Whereas if the ITC has decided that Canada contributes importantly and Canada is a substantial share, his decision to exclude Canada doesn't necessarily have to have anything to do with those conditions, it could be for political reasons, we want a peace treaty, we want something else, you know, whatever, the Prime Minister of Canada is visiting. Anything. There is no criteria in there. But there is no affirmative requirement that there be some kind of a finding, whereas in 2(a) and (b), there is.

Comments:

50. Canada refers to its response to question 46 in addressing this question. The United States refers to its comments on Canada's response to question 46 below.

Question 46

(Member Hillman) What you have on the table -- so again let's review this. What you have on the table when the ITC has made the decision that they have made is Canada is not contributing substantially and Canada is not a substantial share. That's what's on the record. I know. And the President nonetheless says I'm going to apply the safeguard to Canada, which means he has to be replacing those two decisions with something else in order to come to this decision. Whereas if it's the other way around, you can leave the ITC finding exactly as it is, he doesn't have to touch it, he doesn't have to say anything about it, he typically says I agree with it, but he doesn't have to. He can put in any criteria or no criteria for choosing to exclude Canada because there's no criteria in 10.2.

Comments:

51. In addition to our own remarks during the hearing on this question,[120] we make the

[119] Transcript, 169-171.

[120] Transcript, 189-190.

following comments on Canada's response to this question. Articles 10.2.1 and 10.3 do not require a Party to entrust exclusion determinations to the competent investigating authority.[121] Article 10.2.1 does not require a Party to give the competent investigating authority the final say in including or excluding imports from another Party in a safeguard measure.[122]

52. We agree with Canada that Article 10.2.1 is set up in such a way that, even if the competent investigating authority affirmatively finds that imports from another Party constitute a "substantial share" and "contribute importantly," a Party *may* include such imports in a safeguard measure but that it is not required to do so.[123] But this discretion built into Article 10.2.1 does not mean that a different entity may not modify or reverse the competent investigating authority's *negative* findings on these conditions under Article 10.2.1, such as the President. As we explained, there is a textual difference between Article 10.2.1 and 10.3. The latter requires a Party to "entrust" certain determinations to the competent investigating authority, namely, "determinations of serious injury, or threat thereof". The former does not contain "entrust", which means that, although a Party could choose to give the competent investigating authority the final say on an exclusion determination under Article 10.2.1, that Article does not require this.[124]

Question 48

(Member McRae) I think we are now going to move on to wrongfully applied measures, subject 10.2.1. And I have kind of a preliminary question about this. And again based on the assumption, and it's purely an assumption, hasn't got to do with anything -- but if we conclude the President does have an appropriate role here, is there a standard review issue in trying to determine whether the law was properly applied to the facts? In other words, do we simply say this is our interpretation of the law and we don't think the facts meet the law, or do we have to provide deference, or is there some kind of question of whether what was done was reasonable rather than trying to make individual decisions on each point? Is there some kind -- if we use this European term, which maybe is not relevant on this continent, of marginal appreciation that we have to -- in other words, that's the question I want put to both parties? If there is a standard review issue, what is the standard review for this?

Comments:

53. As the United States observed at the hearing, and Canada apparently accepts, USMCA

[121] Canada's Responses to the Panel's Questions, para. 56.

[122] U.S. Rebuttal Written Submission, para. 61; U.S. Initial Written Submission, para. 70; Transcript, 153-154.

[123] Canada's Responses to the Panel's Questions, para. 57.

[124] Transcript, 153-154; U.S. Initial Written Submission, para. 70.

Article 31.13.1 provides the starting point for the Panel's analysis of this question.[125] Article 31.13.1 states:

> A panel's function is to make an objective assessment of the matter before it and to present a report that contains:
>
> (a) findings of fact;
>
> (b) determinations as to whether:
>
> (i) the measure at issue is inconsistent with obligations in this Agreement,
>
> (ii) a Party has otherwise failed to carry out its obligations in this Agreement,
>
> (iii) the measure at issue is causing nullification or impairment within the meaning of Article 31.2 (Scope), or
>
> (iv) any other determination requested in the terms of reference;
>
> (c) recommendations, if the disputing Parties have jointly requested them, for the resolution of the dispute; and
>
> (d) the reasons for the findings and determinations.[126]

54. The parties also appear to be in also agreement that Article 31.13.4 is relevant to the Panel's assessment, because it provides that a panel "shall interpret this Agreement 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* . . ."[127] Thus, a fair reading of Article 31.13.1, based on dictionary terms of "objective" and "assessment", requires a panel to "conduct an objective assessment through an impartial evaluation or judgement of the object of consideration, or subject of dispute."[128] In principle, the United States agrees with Canada that this is neither *de novo* review nor total deference.[129] Ultimately, the Panel must evaluate

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[125] Canada's Responses to the Panel's Questions, para. 58; Transcript, 193.

[126] USMCA, Article 31.13.1.

[127] Canada's Responses to the Panel's Questions, para. 59.

[128] Canada's Responses to the Panel's Questions, paras. 60-61.

[129] Canada's Responses to the Panel's Questions, para. 62; Transcript, 195-196 ("{T}he review that you apply to the determination of the President would be the same review that you would apply to the determination of the ITC. And that is does the evidence cited and the reasoning provided support that the determination is consistent with the international obligation, in this case"); *see also id.* at 204 ("But certainly panels in WTO have been extremely reluctant to do a de novo review, and we would say that is a reluctance that a panel established under the USMCA should also share").

whether the President's determination was consistent with the relevant obligation, which here is USMCA Article 10.2.1.[130] Although part of the Panel's role is to make "findings of fact",[131] the Panel must keep in mind that the determinations of "substantial share" and "contribute importantly" under USMCA Article 10.2.1 are *legal* determinations (that is, an application of law to facts) because they require an evaluation whether evidence satisfies a legal condition.[132] And given that the Panel must also make a "determination{ }" as to whether "the measure at issue is inconsistent with obligations in this Agreement", the Panel is ultimately looking at whether the Party's determination complied with the relevant USMCA obligations.

55. The United States takes issue, however, with Canada's reliance on findings of the WTO Appellate Body in supporting these conclusions or in adding additional elements to the analysis. In particular, the WTO understands "objective assessment" in the context of Article 11 of the DSU, which differs in many respects from USMCA Article 31.13.4.[133] Canada's reliance on paragraph 103 of *US – Lamb* is additionally problematic because the Appellate Body relied in part on Article 4.2(a) (and implicitly Article 4.2(c)) of the Safeguards Agreement, which have no analog in the USMCA.[134]

56. Thus, in a dispute under Chapter 31 of the USMCA evaluating consistency with USMCA Chapter 10, Section A, the Panel is not limited to assessing the information within the four corners of *Proclamation 9693*.[135] Thus, the Panel may – and must – consider the analysis proffered by the United States in this dispute that demonstrates that the President's determinations that "imports of CSPV products from . . . Canada . . . account for a substantial share of total imports and contribute importantly to the serious injury or threat of serious injury found by the ITC" was consistent with the USMCA.[136]

Question 49

(Member McRae) Thank you. But what I was also trying to get at was the discussion you were having with my copanelist earlier on. You're talking about the discretion that was exercised. And so if you're talking about a burden of proof to prove a discretion was

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[130] Transcript, 199.

[131] USMCA, Article 31.13.1(a); Canada's Responses to the Panel's Questions, para. 61.

[132] Transcript, 204.

[133] Canada's Responses to the Panel's Questions, paras. 62-63.

[134] U.S. Rebuttal Written Submission, para. 84 (quoting Safeguards Agreement, Article 4.2(c) (Exhibit CAN-35)).

[135] U.S. Rebuttal Written Submission, paras. 77-79; Transcript, 215-216.

[136] U.S. Rebuttal Written Submission, paras. 92-100 (quoting *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. 7) ("*Proclamation 9693*") (Exhibit CAN-05)).

wrong, that certainly does involve a matter of how do you look at discretion? It's certainly not a straight factual matter, A doesn't meet A. If there's a discretionary element involved, it does involve the panel trying to assess the level at which one would intervene with the exercise of discretion.

Comments:

57. Canada refers to its response to question 48 in addressing this question. The United States refers to its comments on Canada's response to question 48 above and our remarks on this issue during the hearing.[137]

Question 50

(Member Hillman) And was there any evidence cited by the President to meet either A or B, in your view?

Comments:

58. Canada's response to this question presupposes that USMCA Article 10.2.1 requires a Party to provide what Canada has referred to as a "reasoned and adequate explanation", and that the Panel may only consider the four corners of *Proclamation 9693* in assessing whether the President's determination complied with that Article.[138] Both of these suggested rules are absent from the text of Article 10.2.1 and Chapter 31.[139] We also refer to our own remarks on this question during the hearing.[140]

Questions 51-52

(Member Hillman) I'm going to come back to that. I think we should come back to that issue of whether you can look backwards. I'm sorry, we'll go back to Canada, I'm sorry.

(Member Hillman) And why would it be the same in this instance, where you do have a complete factual record that comes to conclusion A and the President is making a decision that comes to conclusion B, presumably according to the President based on looking at the exact same factual record? I mean, what the original proclamation said is I've looked at the ITC record and I've come to the complete opposite decision that the ITC did, when in compiling that record. Why is that the same panelists evaluate compliance all the time with measures -- without adequate evidence of what was available at the time the decision was made?

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[137] Transcript, 195-196.

[138] Canada's Responses to the Panel's Questions, paras. 69-70.

[139] U.S. Rebuttal Written Submission, paras. 77-88; U.S. Opening Statements, paras. 35-40.

[140] Transcript, 196.

Comments:

59. Canada refers to its response to question 50 in addressing these questions. The United States refers to its comments on Canada's response to question 50 above.

Question 53

(Member Hillman) Again, I guess again to the extent that you want to think about it and whatever, we are at some level looking for by what standard of review do we judge whether the determination of the President to apply safeguards to Canada was reasonable, was arbitrary and capricious, was subject to a complete de novo review by us. I mean, that's a little bit I think what we're looking for. But my second question goes to the panel. Are we permitted – here's the question to you. Are we permitted, that's one option, are we required or are we precluded from coming to our own conclusion about whether Canadian imports were a substantial share of or that Canada contributed importantly to the serious injury? In other words, can this panel, is this panel, option A required to, option B permitted to, option C precluded from, coming to our own view about whether or not 1.10.2(a) and (b), we can go through them if you need, where do we get a ride, if any, to make any determinations on the record that we have before us about that? Is that a proper role for the panel?

Comments:

60. We agree with Canada that the Panel is entitled to make findings of fact, pursuant to USMCA Article 31.13.1(a), and that it is charged with determining whether a Party has complied with its USMCA obligations.[141] But the Panel's first task is to evaluate each part of the Parties' respective arguments, and if the Parties' arguments take the Panel to a place where a finding of fact is necessary, then the Panel should make the findings of fact that are needed and the determinations of law.[142] We refer to the remainder of our own response to this question during the hearing, and we reiterate, as we did above in our comments to Canada's response to question 48, that a determination of "substantial share" under USMCA Article 10.2.1 is a legal concept, not just a factual one.[143]

Question 54-55

(Member Hillman) We do have to? In other words, you are in the required camp. We are required to come to our own view as to whether or not imports from Canada meet A and B?

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[141] Canada's Responses to the Panel's Questions, para. 73-75; Transcript, 203.

[142] Transcript, 203.

[143] Transcript, 203-206.

(Member Hillman) And would you regard a finding that imports from Canada account for a substantial share of total imports to be a finding of fact?

Comments:

61. Canada refers to its response to question 53 in addressing these questions. The United States refers to its comments on Canada's response to question 53 above.

Question 56

(Member Hillman) Okay. Well, then let me pose perhaps this question to the United States. I am looking at Canada's exhibit, all right, and I am seeing the red line down here that shows Canada's share of total imports. So this is on page 24 of what was handed out, but it's drawn from Canada and Canada, all right. And I'm seeing a red line way down here at the bottom and obviously a much larger bar for imports from the world. I understand the arguments the United States made on potential for growth, et cetera. But I understand at the time the President decided under Proclamation 9637, were Canadian imports a substantial share of total imports. Yes or no?

Comments:

62. We refer to our answers to questions 56-59 during the hearing on this issue,[144] and we provide the following comments on Canada's response to this question. Canada provides certain figures that purport to show that imports of CSPV products from Canada were not a substantial share of total imports between 2014 and 2017.[145] Canada is correct that imports were not among the top five sources during the USITC's period of investigation.[146] Nonetheless, as we have previously explained, the situation was not "normal" within the meaning of USMCA Article 10.2.2(a) because relying solely on relative ranking would not have provided a true picture of import share from Canada. Additional factors, including the likelihood of a surge of imports from Canada, in tandem with Canada's ranking among other import sources, demonstrated that they constituted a "substantial share" of total imports.[147] We refer to our response to the Panel's third written question to the Parties.[148] This factual basis supported a legal determination by the President that imports from Canada constituted a substantial share of total imports under Article 10.2.1.

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[144] Transcript, 205-208.

[145] Canada's Responses to the Panel's Questions, para. 78.

[146] Canada's Responses to the Panel's Questions, para. 78.

[147] U.S. Responses to the Panel's Questions, paras. 11-15 (citing, *e.g.*, U.S. Initial Written Submission, paras. 105-107, 116; U.S. Rebuttal Written Submission, paras. 95, 97).

[148] U.S. Responses to the Panel's Questions, paras. 11-15.

Questions 57-59

(Member Hillman) Yes. a substantial share, okay. And again under what standard of review do we review that decision, whether that was an objective, reasonable or arbitrary or capricious decision?

Okay. And so again, I'm just trying to understand it. Say I look at this and I say, just me as a panelist, no way, no how is [[***]] or [[***]], no rational human being could decide that that was substantial. Just say that happens hypothetically to be my view. What does that tell me about then what I need to say about what you just said, that the President says that that's substantial, and I say no rational person can decide that that's substantial? Is that the proper way that this panel should be thinking about this question?

(Member Hillman) Is it a rational standard, a reasonable standard, rational standard, arbitrary standard, a de novo standard. Again, you say the President says that is substantial. Again, by what measure am I supposed to be judging whether I think that's true or not, that's objectively correct?

Comments:

63. Canada refers to its response to question 48 in addressing these questions. The United States refers to its comments on Canada's response to question 48 above.

Question 60

(Member Hillman) I'm not going to refer to anything. Again, it was not my intent in any way to suggest anything that was -- to reveal any confidential information to anyone. So I will not refer to any numbers. I will simply just ask the question. I just want to make sure I'm getting it on the record. At the time that the President made his decision and issued Proclamation 9693, did imports from Canada contribute importantly to the serious injury of the United States solar industry?

Comments:

64. The United States refers to its comments on Canada's response to question 56 above.[149]

Question 61

(Member Hillman) If I can come back to the United States, because the United States, you've made the argument and I've heard it very clearly that there is no obligation anywhere in Article 10 for there to be an explanation for a decision. It simply is not there. But two questions. One is – we've had some discussion earlier about the reference to the

[149] Canada's Responses to the Panel's Questions, paras. 82-83.

fact that Article 10 starts by a reference to Article XIX of the GATT and to the Safeguards Agreement. And clearly within Article 10 of the GATT -- Article XIX, excuse me, Article XIX of the GATT and the Safeguards Agreement, there is an absolute requirement for investigating authorities to explain the reasons that they have come to their serious injury determinations, and that's part of what is required under the Safeguards Agreement. Is there anything about the fact that the beginning of Article 10.2 starts with reference to the Safeguards Agreement that would suggest anything about a requirement to disclose facts, the result of an investigation, a reasoned explanation? Can any of what is in the Safeguards Agreement directly referenced in Article 10.2 be read in any way into the exclusion decisions?

Comments:

65. The United States refers to its response to this question during the hearing[150] and its prior remarks on this issue.[151] The United States also provides the following comments on Canada's written elaboration of its response to this question.[152] The chapeau to USMCA Article 10.2.1 refers to the Safeguards Agreement, but Canada makes too much of this reference. The statement in the chapeau to Article 10.2.1 that "{e}ach Party retains its rights and *obligations* under Article XIX of the GATT 1994 and the Safeguards Agreement" is not an invitation to read in rules from the Safeguards Agreement that are absent from USMCA Chapter 10, Section A.[153]

66. This includes not reading in the obligation on the competent authorities to publish a report setting forth their findings and conclusions reached on all pertinent issues of fact and law, pursuant to Article 3.1 of the Safeguards Agreement.[154] Indeed, the WTO Dispute Settlement Body has understood the obligation in Article 3.1 of the Safeguards Agreement as meaning issues related to WTO obligations.[155] For example, in *US – Line Pipe*, the Appellate Body stated that "the fulfilment of the basic conditions set out in Article 2.1 {of the Safeguards Agreement} is a 'pertinent issue{ } of law' for which 'finding{s}' or 'reasoned conclusion{s}' must be included in the published report by the competent authorities, as required by Article 3.1."[156] Compliance with USMCA Article 10.2.1 is not a "pertinent issue{ } of fact and law"[157] in the

[150] Transcript, 213-214.

[151] U.S. Rebuttal Written Submission, paras. 77-88; U.S. Opening Statement, paras. 35-40.

[152] Canada's Responses to the Panel's Questions, paras. 84-88.

[153] Canada's Responses to the Panel's Questions, para. 85 (quoting USMCA, Article 10.2.1 (emphasis added by Canada)); *see also* U.S. Opening Statement, paras. 24, 35-40.

[154] Canada's Responses to the Panel's Questions, para. 85.

[155] Transcript, 213-214.

[156] *US – Line Pipe (AB)*, para. 160 (Exhibit USA-63).

[157] Safeguards Agreement, Article 3.1 (Exhibit CAN-35).

WTO context. Consequently, a discussion of whether imports from a USMCA Party satisfy USMCA Article 10.2.1 would not fall within the purview of the obligation under Article 3.1 of the Safeguards Agreement.[158]

67. Put simply, USMCA Article 10.2.1 does not obligate a Party to cite to particular evidence supporting a determination to include – or exclude – imports from another Party, or to indicate what was taken into account in making that determination.[159] A Party must make the determination required by Article 10.2.1, but nothing in the Article creates an obligation to explain it.[160] Where the Parties intended to require a Party to provide an "explanation" in Chapter 10, they did so explicitly, but they did not do so in Chapter 10, Section A.[161] Nothing precludes a Party from explaining the basis for including imports from another Party for the first time in USMCA Chapter 31 dispute settlement.[162]

68. Canada asserts that "for the matter of adjudicating whether a Party has complied with its obligation under Article 10.2.1, a responding Party will carry a significant burden in demonstrating compliance without any evidence of contemporaneous, positive evidence of its reasons."[163] In this dispute, the United States has demonstrated that it complied with Article 10.2.1.

Question 62

(Member Hillman) But it does beg the question how do we know if they have been satisfied if there is no explanation. That's where I'm trying to get back to, what is our role here as a panel. How do we know this if there's no explanation? How am I supposed to know that the President did any of this if there's no explanation?

Comments:

69. The United States refers to its comments on Canada's response to question 61 above.[164] In brief, nothing precludes the Panel from making an objective assessment of whether the United States complied with USMCA Article 10.2.1 based on the explanation the United States has

[158] Transcript, 213-214.

[159] Canada's Responses to the Panel's Questions, para. 87.

[160] U.S. Rebuttal Written Submission, paras. 77-88.

[161] U.S. Rebuttal Written Submission, para. 87 (citing USMCA, Annex 10-A, Articles 6(c), 7).

[162] U.S. Rebuttal Written Submission, para. 77.

[163] Canada's Responses to the Panel's Questions, para. 88.

[164] Canada's Responses to the Panel's Questions, para. 89.

given for the first time in Chapter 31 dispute settlement.[165]

Question 63

(Member Hillman) But as I hear Mexico's point, the issue is how is it effective if -- again, if you're putting out criteria and someone just says trust me, I met the criteria, with no evidence, no explanation, no anything, how effective is the criteria if there's never an obligation to prove that the basics of the criteria have been met?

Comments:

70. Canada refers to its response to questions 61 and 62 in addressing this question. The United States refers to its comments on Canada's responses to questions 61 and 62 above. The United States also refers to its own response to this question during the hearing.[166]

Question 64

(Member Hillman) Can I ask the United States, I mean, does the existence of the separate surge mechanism mean that concerns over a potential surge in imports cannot be used as a basis not to exclude Canadian imports from a safeguard? Because clearly, the notion of a surge in imports is not in either a or b. I mean, neither a or b speak to the issue of a surge. Both of those speak to, as you put it, a snapshot, I mean a decision right now, is Canada today a substantial share of the imports. That's a. Is Canada contributing significantly to the serious injury as of today, that's b. Neither of those have anywhere in there, you know, sort of the notion of a potential surge. So again my question to the United States is does the existence of the separate surge mechanism mean that you cannot use a potential surge as a basis for either a or b?

Comments:

71. The United States refers to its previous remarks on this issue,[167] including its response to the third written question posed by the Panel to the Parties[168] and its comments on Canada's response to that question in section II above.

[165] U.S. Rebuttal Written Submission, para. 77.

[166] Transcript, 216-217.

[167] U.S. Rebuttal Written Submission, paras. 96-99; Transcript, 219-224.

[168] U.S. Responses to the Panel's Questions, paras. 10-18.

Questions 65 and 67-68

(Member Hillman) Then why have it? Why have a surge mechanism in there if what you really mean is you should take surges or potential surges into account in making exclusion decision in the first place?

(Member Hillman) And why is that permitted to be taken into account in either a or b? I mean, again, it's imports today or whatever, at the time of the decision, account for a substantial share of total imports. I guess I'm just trying to make sure I understand whether the United States thinks that you can do anything about what may happen in the future when you are deciding whether imports account for a substantial share of total imports. Is the panel or the ITC or the President allowed to do anything about future when it makes its determination about whether imports account for a substantial share?

(Member Hillman) That's not in a, and I was just reading you a, a alone. Focus on a. Imports account for a substantial share of total imports. Is anyone, the panel if we decide this, the ITC, the President, allowed to consider future imports or the trend or something in making that basic decision, are imports accounting for a substantial share of -- are imports from Canada accounting for a substantial share?

Comments:

72. Canada refers to its response to question 64 in addressing these questions. The United States refers to its comments on Canada's response to question 64 above.

Question 74

(Member Hillman) I think we may if it's all right move to then the issue of the Article 10.2.5(b) and the arguments there. Let me just start by asking the United States, do you view the United States as required to provide any form of accommodation to Mexico or Canada as a result of the existence of Article 10 10.2.5(b)?

Comments:

73. The United States refers to its own response to this question during the hearing[169] and offers the following comments on Canada's written elaboration of its oral response.[170] The only "accommodation" a Party is required to provide to another Party, if the circumstances exist for imposing a restriction under USMCA Article 10.2.5(b), is an "allowance for reasonable

[169] Transcript, 229-230.

[170] Canada's Responses to the Panel's Questions, para. 96.

growth."[171] But an allowance is not a *guarantee* of growth. Rather, it is "permission."[172] In the context of the solar safeguard measure, the application of a tariff to module imports from essentially all sources does give Canada an advantage with respect to other countries that do not have Canada's geographic proximity to the United States, and in this sense the measure provides an "allowance for reasonable growth".[173] And, although post-investigation data is not relevant under Article 10.2.5(b), the fact that imports of CSPV products from Canada grew evidences that Canadian producers took advantage of the opportunity for growth.[174]

Question 76

(Member Hillman) In theory, that competitive advantage would be there for every product. So why have a requirement that Canada and Mexico have to be provided some kind of an accommodation if -- in other words, aren't you not reading out this provision if you simply say because Canada and Mexico are close to us, they are automatically accommodated by proximity?

Comments:

74. With regard to Canada's response to this question, the United States refers to its own response to this question and questions 77 and 78 during the hearing.[175]

Questions 77 and 78

(Member Hillman) I'm just trying to make sure I'm understanding it. You are agreeing that you are required under 1052 to provide some kind of an accommodation to both Mexico and Canada.

(Member Hillman) In this instance you did nothing affirmative to provide an accommodation other than acknowledge that Canada and Mexico are close to the United States? I'm just trying to make sure I understand the argument.

Comments:

75. Canada refers to its response to question 76 in addressing these questions. The United

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[171] U.S. Rebuttal Written Submission, para. 104; Transcript, 229-230.

[172] U.S. Rebuttal Written Submission, para. 104; 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) (Exhibit USA-34).

[173] U.S. Rebuttal Written Submission, para. 118.

[174] U.S. Rebuttal Written Submission, para. 118 (citing Canada's Rebuttal Written Submission, para. 98; Canada's Initial Written Submission, para. 109); U.S. Initial Written Submission, para. 154.

[175] Transcript, 231-232; *see also* U.S. Rebuttal Written Submission, para. 118.

States refers to its comments on Canada's response to question 76 above.

Question 79

(Member Hillman) Now, on both sides, the provision goes on to say that you have to provide for reasonable growth over a recent representative base period. My question to both Canada and the United States is what is the reasonable representative base periods in this investigation? Canada?

Comments:

76. Canada continues to erroneously rely on a three-year base period comprising 2015 through 2017.[176] As we explained previously, USMCA Article 10.2.5(b) requires an *ex ante* analysis based on information as of the time of the decision.[177] Year 2017 is not part of the "recent representative base period" because the USITC's period of investigation was 2012 through 2016. For this reason, the President did not have 2017 data available at the time he imposed the safeguard measure.[178] Even aside from the fact that 2017 was not properly part of the base period, we reiterate our prior observations regarding Canada's proposed base period.[179] Canada still has not addressed these particular issues we previously identified with its proposed base period in this dispute.

Question 80

(Member Hillman) Was there full data available for 2017?

Comments:

77. Canada refers to its response to question 81 in addressing this question. The United States refers to its comments on Canada's response to question 81 below.

Question 81

(Member Hillman) By using data after the time period that the ITC's investigation closed strikes me that what you're trying to show is evidence that Canada didn't have some kind of a growth rate. Is that really how you read the test here, where it is that they would have the effect of reducing imports? So in other words, the decision has to be made at the same

[176] Canada's Responses to the Panel's Questions, paras. 101-102.

[177] U.S. Rebuttal Written Submission, para. 111.

[178] U.S. Rebuttal Written Submission, para. 113; U.S. Initial Written Submission, para. 147.

[179] U.S. Rebuttal Written Submission, paras. 114-116; *see also* U.S. Initial Written Submission, paras. 149-150.

time that the safeguard is imposed about whether this safeguard is going to have the effect of reducing imports. So why would it be appropriate to look at data that was not available at the time that that basic decision was made?

Comments:

78. Canada argues that "{t}here is a distinction between the period of investigation used in the safeguard investigation and the assessment of whether trade data can support the conclusion that the measure is non-compliant with Article 10.2.5(b)."[180] Canada further argues that "{n}othing in the text of Article 10.2.5(b) suggests that the recent representative base period for assessing whether a Party's measure has allowed for reasonable growth must be the same as the competent investigating authority's period of investigation."[181] Both of these arguments emanate from the faulty premise that information post-dating the investigation is relevant under Article 10.2.5(b). It is not.

79. Indeed, the United States has argued that "would" in the English Article 10.2.5(b) text, and the use of conditional tense in the Spanish and French texts, support the *ex ante* nature of the obligation in that Article.[182] Canada *still* has not responded to – and cannot respond to – these arguments. The *ex ante* nature of the obligation undercuts Canada's contention that data post-dating the investigation are relevant under Article 10.2.5(b).[183] In its response to question 80 from the Panel, during the hearing Canada conceded that information from 2017 was not available to the President.[184]

Question 82

(Member Hillman) I understand there are ITC questionnaire data. I am very familiar with ITC questionnaire data and why companies might put certain numbers in our questionnaires, but we don't go there. You know, on page 18 of Canada's statement, this issue to me goes to whether or not there is any obligation on the United States to present any kind of a projection or an analysis of if you impose a percent tariff on Canadian imports, what will it do to Canada's growth, Canada's participation in the market. Is there an obligation on the United States to try to do that analytical work? Again, I'm just looking at 10.5.2(b), and it clearly says no party may impose a restriction that would have

[180] Canada's Responses to the Panel's Questions, para. 104.

[181] Canada's Responses to the Panel's Questions, para. 104.

[182] U.S. Rebuttal Written Submission, paras. 102-103; U.S. Initial Written Submission, paras. 125-131; U.S. Opening Statement, paras. 27-34.

[183] Canada's Responses to the Panel's Questions, paras. 105-106.

[184] Transcript, 233 ("There wasn't at the time of -- there was not at the time of the USITC investigation.").

the effect of reducing imports. Does that create an affirmative obligation on the United States to form some kind of a modeling, a test, an analysis, a projection of any kind?

Comments:

80. With regard to Canada's response to this question, the United States refers to its own response to this question and questions 83 through 85 during the hearing.[185]

Question 85

(Member Hillman) I know it would have been possible. The question is was it done. And presumably this obligation extends to Mexico as well. So presumably, if you're saying you accept that the United States has an obligation, and I just want to make sure this is correct, you accept that the United States has an obligation to do something to accommodate Canada and Mexico whenever it imposes a safeguard, secondly, that you have an obligation to do some kind of a projection or an analysis so that you know how much, if you will, you have to accommodate Canada and Mexico because of it, and yet I'm not sure I know whether either of those were done and what the result was. I think I heard you say no accommodation was done for Mexico or Canada, other than to acknowledge their proximity. And I don't know whether any projection or analysis was done of the impact of this on either Mexico or Canada.

Comments:

81. Canada refers to its response to question 82 in addressing this question. The United States refers to its comments on Canada's response to question 82 above.

Question 86

(Chair Matus) One last question from my side. In the case or if this measure at issue, the one that we're discussing, we found that it's not in conformity with the USMCA, the implication would be that this imposed to Canada would be consistent with Article 2.4.2, which is the commitment in the USMCA tariff.

Comments:

82. Canada refers to its response to question 87 in addressing this question. The United States refers to its comments on Canada's response to question 87 below.

[185] Transcript, 238-241.

Question 87

(Chair Matus) Yeah. But in regarding on that commitment that you have in the USMCA Article 2.4.2, which is the annex where you made the commitments on the schedule.

Comments:

83. The United States agrees with Canada that its USMCA Article 2.4.2 claim against the solar safeguard measure is consequential to its USMCA Article 10.2.1, 10.2.2, 10.2.5(b), or 10.3 claims.[186] 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.[187]

[186] Canada's Responses to the Panel's Questions, paras. 110-111; U.S. Initial Written Submission, para. 158.

[187] U.S. Initial Written Submission, para. 158.