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UNITED STATES – CRYSTALLINE SILICON PHOTOVOLTAIC CELLS SAFEGUARD MEASURE

(USA-CDA-2021-31-01)

OPENING STATEMENT
OF THE UNITED STATES OF AMERICA

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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
Vienna Convention	*Vienna Convention on the Law of Treaties*
WTO	World Trade Organization

I. INTRODUCTION

1. Mr. Chairman, members of the Panel, Good Morning.

2. We would like to begin by thanking the Panel, your staff assisting you, and the U.S. Section of the Secretariat for helping to ensure this hearing could happen in person. We also thank our Canadian colleagues for their constructive engagement in addressing the many procedural issues raised by this second dispute under the USMCA.[1]

3. We are here today because Canada wants the United States to open a potentially significant loophole in the U.S. solar safeguard measure, which would imperil the limited recovery that U.S. producers of CSPV[2] solar products have enjoyed so far.

4. Here is the problem with that, from a factual perspective. As Canada well knows, under NAFTA[3] rules of origin, U.S. imports of CSPV modules assembled in a NAFTA country, even from CSPV cells originating in non-NAFTA countries, qualified as products from the NAFTA country.[4] This remains the case under the USMCA. Even before the President imposed the solar safeguard measure, foreign producers of CSPV products had a demonstrated, years-long track record of rapidly country-hopping to avoid other types of U.S. trade remedy measures.[5] It defies

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[1] *United States-Mexico-Canada Agreement*.

[2] Crystalline silicon photovoltaic.

[3] *North American Free Trade Agreement*.

[4] *Crystalline Silicon Photovoltaic Cells (Whether or not Partially or Fully Assembled into Other Products)*, Inv. No. TA-201-75, USITC Pub. 4739, Vol. 1, 20-21 n.84 (Nov. 2017) ("USITC Serious Injury Determination Report") (Exhibit CAN-07); Canada's Initial Written Submission, para. 34.

[5] Supplemental Report of the U.S. International Trade Commission Regarding Unforeseen Developments, 10 (Dec. 17, 2017) (Exhibit USA-53).

logic to believe that one of the largest producers in the world,[6] which itself has engaged in such production-shifting worldwide,[7] and which is headquartered in Ontario,[8] would not move significant production to Canada to take advantage of this loophole, to the detriment of an already extremely vulnerable U.S. industry.

5. This company is called Canadian Solar. According to its own website, Canadian Solar continues to maintain a global presence even today, with subsidiaries in 23 countries and 20 manufacturing facilities in Asia and the Americas.[9] According to one source, Canadian Solar was the fifth largest solar panel manufacturer in the world during 2020.[10] Excluding Canada from the safeguard measure would provide a huge incentive for any of the massive China-connected producers, and especially Canadian Solar, to ramp up imports or onshore production in Canada. And that would greatly undercut the remedial effect of the safeguard measure on U.S. producers.

6. In the context of implementing the solar safeguard measure through *Proclamation 9693*,

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[6] The Top Solar Panel Manufacturers in the USA, Energy Sage, https://news.energysage.com/best-solar-panel-manufacturers-usa/ (consulted Nov. 8, 2021) (Exhibit USA-72) (listing Canadian Solar as fifth largest solar panel manufacturer by global market share in 2020, based on sales in 2019).

[7] U.S. Rebuttal Written Submission, para. 97; Supplemental Report of the U.S. International Trade Commission Regarding Unforeseen Developments, 8 & n.28 (Dec. 27, 2017) (Exhibit USA-53).

[8] About Us – Canadian Solar (Exhibit USA-56).

[9] About Us – Canadian Solar, canadiansolar.com/aboutus/ (consulted Oct. 27, 2021) (Exhibit USA-56).

[10] The Top Solar Panel Manufacturers in the USA, Energy Sage, https://news.energysage.com/best-solar-panel-manufacturers-usa/ (consulted Nov. 8, 2021) (Exhibit USA-72) (listing Canadian Solar as fifth largest solar panel manufacturer by global market share in 2020, based on sales in 2019); *see also Crystalline Silicon Photovoltaic Cells, Whether or Not Partially or Fully Assembled into Other Products: Monitoring Developments in the Domestic Industry*, Inv. No. TA-201-75, I-22, USITC Pub. 5021 (Feb. 2020) ("USITC Monitoring Report") (Exhibit CAN-23) (explaining that Canadian Solar was the eighth largest cell producer and fifth largest module producer globally in 2018).

the President acted in preventing this from happening.[11] In doing so, the President followed the then-applicable NAFTA obligations in making the determination to include imports from Canada. Our presentation today will demonstrate that the determination, taken more than two years before the USMCA entered into force, was nonetheless consistent with Chapters 2 and 10 of the USMCA.

7. Our two written submissions refute all of Canada's claims. We will focus today on how Canada misapplies the customary rules of interpretation in reaching its conclusions about what the text of the relevant USMCA provisions means, and we will hit on a few examples of this. We will also highlight how Canada's sole as such claim in this dispute raises a significant institutional concern.

8. But first, it's important to take a step back so that you can put the Presidential determination in its full context.

II. THE PRESIDENT'S DETERMINATION TO INCLUDE IMPORTS FROM CANADA IN THE SOLAR SAFEGUARD MEASURE

9. Approximately one month before it filed the solar safeguard petition with the USITC,[12] U.S. producer Suniva was in bankruptcy and had suspended its cell and module factory operations.[13] In mid-2017, its co-petitioner, SolarWorld laid off hundreds of employees.[14] Throughout the period covered by the original USITC findings, the domestic industry suffered

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[11] *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 (Jan. 25, 2018) ("*Proclamation 9693*") (Exhibit CAN-05).

[12] U.S. International Trade Commission.

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

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

hundreds of millions of dollars in losses.[15] A significant number of producers were unable to maintain existing levels of expenditures for research and development, despite what the USITC termed "explosive demand growth" during the period of investigation.[16] As a result, sales values declined and losses increased.[17] The USITC unanimously determined that increased imports were to blame for the domestic industry's serious injury.[18]

10. The USITC also made the following observation about the foreign solar products-producing industry:

> {B}ased on the substantial production capacity and available unused capacity in the foreign industries, their export orientation, their willingness to shift substantial volumes among export markets from one period to the next, and the demonstrated attractiveness of the U.S. market to the foreign industries, . . . the U.S. market is a focal point for the diversion of exports.[19]

11. Canadian Solar was,[20] and still is, headquartered in Ontario,[21] and had cell production around the world.[22] In 2016, the year before the USITC initiated its serious injury investigation, "Canadian Solar (China)" was identified as the eighth largest CSPV cell producer in the world.[23] That same year, Canadian Solar (China) was the third largest module supplier in the world.[24]

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

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

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

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

[19] USITC Serious Injury Determination Report, Vol. 1, 41 (Exhibit CAN-07); *see also id.* at 38-41.

[20] Crystalline Silicon Photovoltaic Cells Whether or Not Partially or Fully Assembled into Other Products: Post-Hearing Injury Brief of Canadian Industry, At Exhibit 3, para. 3 (Declaration of Vincent Ambrose, General Manager for North America, Canadian Solar Inc.) (Aug. 23, 2017) (Exhibit CAN-13) (PDF p. 50).

[21] About Us – Canadian Solar (Exhibit USA-56).

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

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

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

And, generally speaking, in Canada, "Canadian capacity, production, and total shipments for CSPV module operations generally increased from 2012 to 2016."[25]

12. It is in this context that the President needed to decide whether to include imports from Canada in the solar safeguard measure. In light of these facts, the decision to include Canada was both reasonable and prudent.

13. It is in this historical context that the President, under then-domestic law implementing NAFTA Article 802.1, and after taking account of the USITC's report, determined that "imports of CSPV products from . . . Canada, considered individually, account for a substantial share of total imports and contribute importantly to the serious injury or threat of serious injury found by the ITC."[26] The President adhered to the relevant NAFTA provisions in making this determination. Even if certain of the USMCA provisions were somehow retroactively applicable to this determination – which they are not[27] – the President's actions were consistent with them, too.

14. Canada previously argued to the President that he could have addressed these concerns by excluding Canada at the outset, and use the anti-surge mechanism in NAFTA Article 802.3 or USMCA Article 10.2.3 when foreign producers exploited the NAFTA rules-of-origin loophole.[28]

15. However, this wait-and-see approach was not pragmatic, and Canada does not

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

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

[27] *See*, *e.g.*, U.S. Rebuttal Written Submission, paras. 10-31.

[28] *See* Canada's Initial Written Submission, para. 47 (explaining that, in their submissions to the USTR, "the Canadian parties also indicated that U.S. law already provides the President with the ability to address potential future surges of imports from Canada if they were found to undermine the effectiveness of the global safeguard measure in the future").

demonstrate how this was realistic. The domestic industry was in an extremely vulnerable state at the time. The foreign industry had already exhibited an ability to rapidly shift production to other countries in response to U.S. antidumping and countervailing duty measures.[29] And there was an established record of these shifts undermining the effectiveness of trade remedies, resulting in plant closures and massive losses for U.S. producers.

III. THE PRINCIPLES OF INTERPRETATION GOVERNING THIS DISPUTE

16. With that factual backdrop, we turn to the questions raised by Canada's claims. There are several important questions of legal interpretation in this dispute. You are the second panel ever to be composed under USMCA Chapter 31. All of these issues are of first impression. Chapter 31 provides critical guidance in how to approach these questions.

17. In particular, USMCA Article 31.13.4 states that the Panel's role is to "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* . . . ."[30] In turn, Article 31.1 of the *Vienna Convention* states that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

18. At this juncture, we make two key observations about Article 31.1. First, it assigns particular roles to the elements of this analysis. Interpretation is "in accordance with" the ordinary meaning of the terms, "in" the context of those terms, and "in light of" the object and

[29] Supplemental Report of the U.S. International Trade Commission Regarding Unforeseen Developments, 10 (Dec. 17, 2017) (Exhibit USA-53).

[30] USMCA, Article 31.13.4.

purpose of the treaty. Thus, the "terms of the treaty" are at the center of the analysis, and the object and purpose are consulted to inform the understanding of those terms. Second, the use of "its" before "object and purpose" in Article 31.1 signifies that the "object and purpose" is of the *treaty* itself, and not of particular chapters, sections, or specific provisions.[31]

19. We highlight these points because, in making certain arguments, Canada appears to be trying to elevate the object and purpose of the USMCA (and the purported "object and purpose" of Chapter 10) over the text of the Articles themselves.[32] Canada has suggested that the "object and purpose of Section A of Chapter 10" is "ensuring that trade between CUSMA Parties is not unnecessarily disrupted by a global safeguard measure."[33] The logical outgrowth of Canada's position seems to be that, because the USMCA is a *free* trade agreement, you must interpret each provision at issue to allow the *freest* possible trade in each instance.

20. The USMCA's object and purpose, as evidenced by its preamble, is to "ELIMINATE obstacles to international trade which are more trade-restrictive than necessary."[34] On the other hand, it also seeks "PRESERVE AND EXPAND regional trade and production by further incentivizing the production and sourcing of goods and materials in the region."[35] To be sure, the USMCA is a *free* trade agreement. However, it is important to recall that the Agreement is also a sophisticated balance of rights and obligations. Parties reserved rights to maintain separate regulatory systems, and created several mechanisms specifically designed to place limits

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[31] U.S. Initial Written Submission, para. 68.

[32] Canada's Rebuttal Written Submission, para. 86 (discussing object and purpose of Agreement and USMCA Article 10.2.5(b)).

[33] Canada's Initial Written Submission, para. 75; Canada's Rebuttal Written Submission, para. 86.

[34] USMCA, preamble, recital 12.

[35] USMCA, preamble, recital 4; U.S. Initial Written Submission, para. 69.

on trade in appropriate circumstances. An appropriate balance must be struck between promoting free trade within the region and the rights and obligations to which the Parties agreed.

21. This is particularly the case with global safeguards. Where a Party's competent investigating authority has determined that imports from all sources – which would include imports from other USMCA Parties – are causing serious injury to a particular industry, the overall objectives of the USMCA may come into conflict.[36] The rights and obligations in Chapter 10, Section A, are an explicit recognition that there are times that the enactment of restrictions on other Parties as part of a global safeguard measure is entirely appropriate. As we will show, the President's decision to include Canada in the solar safeguard measure was appropriate.

22. As we mentioned, the preamble to the USMCA states that the Parties are to "ELIMINATE obstacles to international trade which are more trade-restrictive than necessary."[37] But that should not be overemphasized to mean that, for example, there are additional obligations, absent from the text, governing a Party's ability to take or maintain a restriction.[38]

23. We focus on the preamble because that is where treaties normally state their object and purpose. Chapter 10 does not have a preamble, or any other provision that states a particular objective independent of the obligations themselves. Canada nonetheless seeks to ascribe an independent object and purpose to Chapter 10, and use that to dictate the interpretation of individual obligations. This is an effort completely at odds with the USMCA rule of

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[36] U.S. Initial Written Submission, para. 69.

[37] USMCA, preamble, recital 4.

[38] Canada's Rebuttal Written Submission, paras. 83-88 (ongoing monitoring obligation under USMCA Article 10.2.5(b)); U.S. Rebuttal Written Submission, paras. 102-103.

interpretation. Inviting the interpreter to divine an object and purpose from a set of obligations, and then use that to inform the understanding of those same obligations, is to inject the interpreter's subjective understanding into what is fundamentally an objective analysis. It elevates the interpreter's sense of the meaning over the actual meaning.

24. Finally, we make a note about "context", as Article 31.1 of the *Vienna Convention* refers to it. There is some context that you will need to consider in interpreting aspects of Chapter 10, Section A of the USMCA. Notably, Article 10.2.1, which governs the process for determining whether to exclude imports from another Party in a safeguard action, states, in its chapeau, that "{e}ach Party retains its rights and obligations under Article XIX of the GATT 1994 and the Safeguards Agreement . . ." Because the chapeau explicitly references Article XIX of the GATT and the WTO Safeguards Agreement, this signals that they serve as context for certain of the interpretive issues before you.[39] It is also important that Section A of Chapter 10 does not incorporate Article XIX or the Safeguards Agreement. Thus, the reference cannot be read as importing obligations into the USMCA that are absent from the text.[40]

25. Now that we have established your framework for evaluating the President's action, we want to highlight certain instances of where Canada's proposed interpretations of the USMCA Articles at issue run afoul of these rules of interpretation.

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[39] U.S. Rebuttal Written Submission, para. 14 n. 9.

[40] *See* U.S. Rebuttal Written Submission, paras. 77-88 ("reasoned and adequate explanation" in Article 10.2.1).

IV. CANADA EXCISES "WOULD" FROM THE USMCA ARTICLE 10.2.5(B) ENGLISH TEXT, AND THE CONDITIONAL TENSE FROM THE OTHER TEXTS

26. We turn first to Canada's USMCA Article 10.2.5(b) claim. Canada argues that the United States acted inconsistently with this Article because, in Canada's view, data from after imposition of the measure show that it actually had a "devastating" effect on the Canadian CSPV solar products industry.[41] We take issue with this characterization. Two Canadian producers have actually expanded production in the United States,[42] and the Canadian industry stated during the USITC investigation that a third producer "ha{d} reduced substantially its own production capabilities" in a Canadian facility, purportedly to shift that facility to research and development".[43] However, the more important point is that evidence from after the President made his determination is irrelevant to an evaluation of whether the decision complied with USMCA.

27. As we described previously, Article 31.1 of the *Vienna Convention* dictates that you start with the text of the Article at issue. Article 10.2.5(b) states:

> No Party may impose restrictions on a good in an action under paragraph 1 or 3:
>
> . . .
>
> (b) that would have the effect of reducing imports of such good from a Party below the trend of imports of the good from that Party over a recent representative base period with allowance for reasonable growth.

28. The obligation on its face situates the decision of whether to impose a restriction at a moment in time. It instructs the Party to look at trends, which are necessarily in the past, and to

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[41] *See, e.g.,* Canada's Rebuttal Written Submission, para. 95.

[42] U.S. Rebuttal Written Submission, para. 119; U.S. Initial Written Submission, paras. 155-156.

[43] Canadian Solar, Silfab Solar Inc., and Heliene Inc., Post-Hearing Brief for Injury Phase, 10-11 (Exhibit CAN-13); *see also* U.S. Rebuttal Written Submission, para. 120.

identify what the "effect" of a safeguard measure "would" be in relation to those trends. This is necessarily an exercise in projection.

29. Canada gives short shrift to the actual text of this Article. It relies heavily on the "more trade-restrictive than necessary" language in the USMCA preamble to assert that "{t}his obligation to mitigate the impact of a safeguard measure on imports from another Party inevitably implies a *subsequent obligation* to observe the effect of the measure."[44] It is difficult to see how this assertion comports with a rule of interpreting the meaning of Chapter 10's terms "in light of" the object and purpose. To the contrary, in relying on "object and purpose" to "impl{y} a subsequent obligation," Canada illustrates how its approach adds an "obligation" that does not exist in the terms of the Agreement.

30. Article 10.2.5(b) imposes an obligation on a Party "imposing" a safeguard measure to evaluate what the effect "would" be. We have shown you through our written submissions that this conclusion is inescapable from the English, French, and Spanish texts. Specifically, we confirmed this reading by examining the definition of the word "would" in the English text and the significance of the use of the conditional tenses in the French and Spanish texts.[45]

31. Canada never addressed this aspect of the interpretation in its written submissions or in its opening statement today. It simply dismissed our point by acknowledging that these are so-called "grammatical elements" of the text.[46]

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[44] Canada's Rebuttal Written Submission, paras. 85-86 (emphasis added).

[45] U.S. Initial Written Submission, paras. 125-131.

[46] Canada's Rebuttal Written Submission, para. 88.

32. But the words, or "the ordinary meaning to be given to the terms of the treaty" as Article 31.1 of the *Vienna Convention* refers to them, are crucial to interpreting Article 10.2.5(b). What Canada dismisses as "grammatical elements" – the number, tense, and position of the terms – are both part of their "ordinary meaning" of the terms and their context. Indeed, Canada's proposed interpretation completely excises the word "would" in subparagraph (b) of the English text. This is contrary to the principle of effectiveness. Canada's reading of Article 10.2.5(b) would only work if an interpreter were to put redaction tape over, or cross out, "would" in subparagraph (b). Of course, an interpreter cannot do that. The customary rules of interpretation do not allow interpreters to dismiss the grammar used in expressing an obligation.

33. The word "would" must be given meaning. The U.S. reading of this Article as requiring an *ex ante* analysis gives effect to all the words in the text, including "would" in the English text and the conditional tenses in the French and Spanish texts.

34. Thus, properly interpreted, Article 10.2.5(b) prohibits a Party from establishing a limiting condition or regulation on a good if the forecasted result will be the lowering of the number or quantity of imports of that good from another Party below the general tendency of imports from that Party.[47] Our concerns with Canada's reading of Article 10.2.5(b) are not just limited to this issue, though, and we refer you to our written submissions for our additional points.

V. CANADA ERRONEOUSLY ATTEMPTS TO READ A REQUIREMENT OF A "REASONED AND ADEQUATE EXPLANATION" INTO USMCA ARTICLE 10.2.1

35. We turn next to Canada's proposed readings of Articles 10.2.1 and 10.2.2. We have

[47] U.S. Initial Written Submission, para. 139.

serious systemic concerns about Canada's attempt – joined by Mexico – to inject a requirement for a "reasoned and adequate explanation" into Article 10.2.1, based on WTO Appellate Body reports interpreting other agreements.[48]

36. We will not reiterate all of the lengthy text of Articles 10.2.1 and 10.2.2 in this opening statement. But put simply, they collectively establish conditions and guidelines for excluding or including imports from other Parties in a global safeguard action. But nothing in these two Articles requires a Party to explain the determination it makes based on these requirements.

37. *Nothing* in the text supports carrying the concept of a "reasoned and adequate explanation" over from WTO Appellate Body reports into USMCA Article 10.2.1, as Canada and Mexico encourage you to do. We mentioned that the Safeguards Agreement is relevant to better understanding the meaning behind some of the terms of art the Parties used in drafting USMCA Chapter 10, Section A. In this sense, it is useful "context" for understanding the USMCA safeguards provisions. However, this should not be taken as an invitation to import wholesale principles that the Appellate Body has read into the Safeguards Agreement into USMCA Article 10.2.1. It is also not an invitation to import obligations from the Safeguards Agreement into a USMCA Party's process for evaluating exclusions under USMCA Article 10.2.1.

38. Where the USMCA Parties intended to require some sort of written explanation in Chapter 10, they used explicit language, as in the Annex 10-A, paragraph 6(c) obligation for an authority in an antidumping and countervailing duty proceeding to "prepare a written report" of

[48] Canada's Rebuttal Written Submission, paras. 52-55; Mexico's Third Party Submission, paras. 17-22.

the results of its verification.[49] But the Parties did not do so in Section A of that Chapter with respect to determinations in a safeguard proceeding. Canada provides no valid basis to conclude that the meaning of this silence is "insert Safeguards Agreement here." To the contrary, the absence of an obligation to provide written findings indicates that there is no obligation to do so.

39. Therefore, the USMCA imposes no obligation for the United States to publish the reasons for a determination to include or exclude imports from USMCA Party in a safeguard measure.[50]

40. To be clear, Canada itself has explicitly endorsed this view with regard to NAFTA Article 802.1, which read almost identically to USMCA Article 10.2.1. Back in 2003, Canada opined that "the President, in making his determination under the NAFTA Implementation Act, was not required to follow the USITC *or to explain his reasons for not doing so*."[51] This is flatly contrary to its current position that the determinations referenced in Article 10.2 must be supported by a reasoned and adequate explanation in the report of the competent investigating authority (or a determination by the Executive Branch). Its attempt to import this requirement into the USMCA for USITC determinations that Canada dislikes, but ignore it for USITC determinations that Canada likes, has no principled basis.

VI. CANADA ERRONEOUSLY ATTEMPTS TO READ A REQUIREMENT OF AN ONGOING MONITORING OBLIGATION INTO USMCA ARTICLE 10.2.1

41. We want to make another point about Canada's Article 10.2.1 claim. Canada suggests

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[49] *See also* USMCA, Annex 10-A, para. 7; U.S. Rebuttal Written Submission, para. 87.

[50] U.S. Rebuttal Written Submission, paras. 77-78.

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

that Article 10.2.1 applies on an ongoing basis, after the Party makes an exclusion or inclusion determination.[52] It does not.[53] NAFTA Article 802.1 did not either.

42. This is easy to see. In addition to the arguments we already made through our written submissions on this interpretive question, we note the following. All three USMCA Parties agree that Article 10.2.2 informs Article 10.2.1.[54] Article 10.2.2, through its chapeau, introduces the guidance in subparagraphs (a) and (b) using the phrase "{i}n determining". This word choice makes clear that Article 10.2.1 does not create additional obligations once the Party makes the determination that Article calls for.[55]

43. Canada appears to agree that dictionary definitions can inform the ordinary meaning of the terms of a treaty, consistent with Article 31.1 of the *Vienna Convention*.[56] "In determining" is an action that happens at a particular moment. The dictionary definition of "determining" confirms this. The most relevant definition is "{t}o bring to an end a dispute, controversy, or doubtful matter; to conclude, settle, decide, fix."[57]

44. In light of this definition, the Party is not "determining" in perpetuity whether imports from a Party constitute a substantial share of total imports or contribute importantly to the serious injury found by the competent investigating authority. A Party is "bring{ing}" that

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[52] Canada's Rebuttal Written Submission, para. 26.

[53] U.S. Rebuttal Written Submission, paras. 13-16.

[54] Canada's Rebuttal Written Submission, para. 57; Mexico's Third Party Submission, paras. 12, 18, 23 (bullet point 2); U.S. Rebuttal Written Submission, para. 16.

[55] U.S. Rebuttal Written Submission, para. 16.

[56] Canada's Initial Written Submission, para. 104 n.119.

[57] Definition of "Determining," *Oxford English Dictionary*, https://www.oed.com/view/Entry/51244?rskey=TSB3hG&result=1#eid (consulted Nov. 8, 2021) (definition II) (Exhibit USA-71).

question "to an end".[58] NAFTA Article 802.2, which applied to the President's determination, used the same language, which informed Article 802.1. This definition of "determining" helps confirm that Article 10.2.1 does not obligate a Party, on an ongoing basis, to ensure that the two conditions in subparagraphs (a) and (b) continue to, or no longer, exist during the life of a safeguard measure.

VII. ARTICLE 10.3 DOES NOT ESTABLISH A BROADER CATEGORY OF "INJURY DETERMINATIONS"

45. We now briefly address Canada's USMCA Article 10.3 claim. Canada suggests that the second sentence of Article 10.3 contemplates a broader category of "injury determinations" than the "determinations of serious injury" that under the first sentence of Article 10.3 must be entrusted to the competent investigating authority.[59] Canada contends that a Party's decision to include or exclude imports from another Party fits into this broader category, which is subject to an additional obligation. But there is no such broader category.

46. We start with the text. Article 10.3 provides:

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

47. We note that the first sentence uses the phrase "determinations of serious injury, or threat

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[58] Definition of "Determining," *Oxford English Dictionary*, https://www.oed.com/view/Entry/51244?rskey=TSB3hG&result=1#eid (consulted Nov. 8, 2021) (definition II) (Exhibit USA-71).

[59] Canada's Rebuttal Written Submission, paras. 118-125.

thereof." This is a term of art, referring back to the rights under Article XIX of the GATT 1994 and the Safeguards Agreement that each Party "retains" pursuant to Article 10.2.1.[60] And for the reasons we have already explained, we do not think an exclusion determination fits into that definition.[61] Thus, a Party does not need to entrust an exclusion determination to the competent investigating authority.

48. Here, we want to focus on the second sentence. The second sentence refers to "negative injury determinations." The phrase "negative injury determinations" in the second sentence is a short-hand reference back to "determinations of serious injury, or threat thereof" in the first sentence that are "negative". This reading is buttressed by the fact that "such review" in the second sentence refers back to "review by judicial or administrative tribunals" in the first sentence. Article 10.3 does not contemplate an additional category of "review", just as it does not contemplate an additional type of "injury determination{ }".[62] This is the case for all three authentic USMCA texts, and our reading gives meaning to all terms of Article 10.3.[63] Therefore, the obligations in Article 10.3 do not apply to determinations of whether imports from a USMCA Party account for a substantial share and contribute importantly to serious injury.

49. Before we leave the discussion of Article 10.3, we want to flag one more point. Canada does not deny that it has understood for 20 years, accepted, and benefitted from the fact that U.S. law allows the President to reach an exclusion determination contrary to the USITC's. Canada

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[60] U.S. Initial Written Submission, paras. 64-65; U.S. Rebuttal Written Submission, para. 50.

[61] *See, e.g.,* U.S. Rebuttal Written Submission, para. 52.

[62] U.S. Initial Written Submission, paras. 60-61; *see also* U.S. Rebuttal Written Submission, para. 71.

[63] *See* U.S. Rebuttal Written Submission, paras. 71-75.

simply brushes these points aside as "immaterial" or "irrelevant".[64] Canada also does not dispute that it did not cite the U.S. statute as a measure inconsistent with the NAFTA in its request for consultations under the NAFTA.[65]

50. Far from being "immaterial" or "irrelevant", Canada was a Party in three separate free trade agreement negotiations with the United States: the CFTA,[66] the NAFTA, and most recently the USMCA. It has been well aware of the President's role in the exclusion process in safeguard proceedings since the 1980s under the CFTA. It has understood the President's authority to deviate from USITC findings that Canadian imports were not a substantial share of total imports and did not contribute importantly to the serious injury. Canada's acquiescence in this authority, including its emphatic defense of Presidential deviations from USITC conclusions on the injury factors, *with no explanation whatsoever*, shows that it has clearly understood and accepted the U.S. interpretation of the exclusion process for decades.[67]

VIII. CANADA'S READING OF USMCA CHAPTER 31 IN CONNECTION WITH ITS AS SUCH CLAIM HAS ADVERSE INSTITUTIONAL IMPLICATIONS FOR THE USMCA DISPUTE SETTLEMENT SYSTEM

51. Before we conclude, we highlight a very important institutional concern for the Panel in this dispute. USMCA Chapter 31, and particularly Article 31.4.2, is clear on what a request for consultations must include. It is also clear that a consultations request that follows those

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[64] U.S. Rebuttal Written Submission, para. 69 (quoting Canada's Rebuttal Written Submission, paras. 136-137).

[65] Letter from Canada to the United States requesting Consultations (July 23, 2018) (Exhibit CAN-74).

[66] *United States–Canada Free Trade Agreement.*

[67] U.S. Rebuttal Written Submission, para. 69; *see also* U.S. Initial Written Submission, paras. 85-90, 94-95.

obligations is a precondition for establishing a panel under Article 31.6. Canada has already conceded that it did not raise section 302 of the USMCA Implementation Act, which provides the President with the definitive authority to make exclusion determinations for USMCA Parties, in its consultations request.[68] However, Canada brushes this off and suggests that a complaining Party can sidestep the requirement to identify the "specific measure" at issue before requesting a panel under Article 31.6, by just giving an "indication" of the "legal basis" for the complaint.[69] This is a highly problematic assertion.

52. Allowing a complaining Party to circumvent the requirements in Article 31.4.2 does not just ignore the text. It also has very real, adverse implications for the Chapter 31 dispute settlement process. Articles 31.4 and 31.6 collectively evince that the purpose of consultations is to "arrive at a mutually satisfactory resolution of a matter"[70] or "to resolve the matter."[71] 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.[72]

53. The United States certainly had no notice from Canada's consultations request that it intended to challenge section 302 of the USMCA Implementation Act. This is very important

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[68] Canada's Rebuttal Written Submission, para. 148 ("Although Canada did not specifically identify Section 302 of the USMCA Implementation Act in making this claim . . .").

[69] Canada's Rebuttal Written Submission, paras. 140-150.

[70] USMCA, Article 31.4.6.

[71] USMCA, Article 31.6.1.

[72] *See* U.S. Initial Written Submission, para. 169.

here because Canada is challenging 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.

54. 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. Therefore, we urge you not to reach Canada's as such claim as the measure to which it pertains is not validly part of this dispute.

IX. CONCLUSION

55. In sum, we have laid out certain examples of where Canada fails to follow the customary rules of interpretation in taking positions in this dispute. The Panel should reject these unfounded attempts, and in turn reject all of Canada's claims in this dispute. Moreover, we have highlighted how Canada's misinterpretation of Chapter 31 has negative implications for the consultations process and for the functionality of all disputes going forward.

56. Mr. Chairman, members of the Panel, this concludes our opening statement. We look forward to addressing your questions. Thank you.

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TABLE OF EXHIBITS

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

Exhibit No.	Description
USA-20	Definition of "Important," *Oxford English Dictionary*, https://www.oed.com/view/Entry/92556?redirectedFrom=important#eid (consulted Sept. 15, 2021)
USA-21	Definition of "Extent," *Oxford English Dictionary*, https://www.oed.com/view/Entry/66951?rskey=xnqiyG&result=1&isAdvanced=false#eid (consulted Sept. 15, 2021)
USA-22	Definition of "Provide," *Oxford English Dictionary*, https://www.oed.com/view/Entry/153448?rskey=uAeeAl&result=2#eid (consulted Sept. 15, 2021)
USA-23	Definition of "Normally," *Oxford English Dictionary*, https://www.oed.com/view/Entry/128277?redirectedFrom=normally#eid (consulted Sept. 15, 2021)
USA-24	Definition of "Restriction," *Oxford English Dictionary*, https://www.oed.com/view/Entry/164022?redirectedFrom=restriction#eid (consulted Sept. 15, 2021)
USA-25	Definition of "Effect," *Oxford English Dictionary*, https://www.oed.com/view/Entry/59664?rskey=7OVv99&result=1#eid (consulted Sept. 15, 2021)
USA-26	Definition of "Will," *Oxford English Dictionary*, https://www.oed.com/view/Entry/229051?rskey=KwvVBB&result=1#eid (consulted Sept. 15, 2021)
USA-27	Definition of "Reduce," *Oxford English Dictionary*, https://www.oed.com/view/Entry/160503?rskey=A0UvaL&result=2#eid (consulted Sept. 15, 2021)
USA-28	Definition of "Below," *Oxford English Dictionary*, https://www.oed.com/view/Entry/17525?rskey=n3J3tm&result=2&isAdvanced=false#eid (consulted Sept. 15, 2021)
USA-29	Definition of "Trend," *Oxford English Dictionary*, https://www.oed.com/view/Entry/205544?rskey=nk7ZaI&result=1#eid (consulted Sept. 15, 2021)
USA-30	Definition of "Base," *Oxford English Dictionary*, https://www.oed.com/view/Entry/15848?rskey=VZNnP1&result=1#eid (consulted Sept. 15, 2021)
USA-31	Definition of "Period," *Oxford English Dictionary*, https://www.oed.com/view/Entry/140968?rskey=bBOZEe&result=1#eid (consulted Sept. 15, 2021)
USA-32	Definition of "Recent," *Oxford English Dictionary*, https://www.oed.com/view/Entry/159425?redirectedFrom=recent#eid (consulted Sept. 15, 2021)
USA-33	Definition of "Representative," *Oxford English Dictionary*, https://www.oed.com/view/Entry/163003?redirectedFrom=representative#eid (consulted

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

Exhibit No.	Description
USA-50	Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, vol. II
U.S. Rebuttal Written Submission	
USA-51	Definition of "Identification," *Oxford English Dictionary*, https://www.oed.com/view/Entry/90995?redirectedFrom=identification& (consulted Oct. 27, 2021)
USA-52	Definition of "Specific," *Oxford English Dictionary*, https://www.oed.com/view/Entry/185999?result=2&rskey=3w6Aty& (consulted Oct. 27, 2021)
USA-53	Supplemental Report of the U.S. International Trade Commission Regarding Unforeseen Developments (Dec. 27, 2017)
USA-54	Contact – Heliène, https://heliene.com/contact/ (consulted Oct. 27, 2021)
USA-55	Contact – Silfab, https://silfabsolar.com/contact-silfab-page/ (consulted Oct. 27, 2021)
USA-56	About Us – Canadian Solar, canadiansolar.com/aboutus/ (consulted Oct. 27, 2021)
USA-57	Driving Directions – Canadian Solar, Guelph, ON to Lewiston, NY, Google Maps (consulted Oct. 27, 2021)
USA-58	Driving Directions – Heliène, Sault Ste. Marie, ON to Sault Ste. Marie, MI, Google Maps (consulted Oct. 27, 2021)
USA-59	Driving Directions – Silfab, Mississauga, ON to Lewiston, NY, Google Maps (consulted Oct. 27, 2021)
USA-60	WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
USA-61	WTO Agreement on Subsidies and Countervailing Measures
USA-62	Panel Report, *United States – Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products*, WT/DS562/R, circulated Sept. 2, 2021
USA-63	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted Mar. 8, 2002
USA-64	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, para. 98, WT/DS166/AB/R, adopted Jan. 19, 2001
USA-65	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted May 16, 2001
USA-66	Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R / WT/DS249/R / WT/DS251/R / WT/DS252/R / WT/DS253/R / WT/DS254/R / WT/DS258/R / WT/DS259/R / and Corr.1, adopted 10

Exhibit No.	Description
	December 2003 (excerpt of paras. 10.553-10.729)
USA-67	Separate Opinion of Judge Gerald Fitzmaurice in *Northern Cameroons (Cameroon v. U.K.)*, 1963 I.C.J. 15, 129 (Dec. 2)
USA-68	Customs Tariff, S.C. 1997, C. 36, https://laws-lois.justice.gc.ca/PDF/C-54.011.pdf (consulted Oct. 27, 2021)
USA-69	La Ley de Comercio Exterior, *reported in* Notification of Laws, Regulations and Administrative Procedures Relating to Safeguard Measures: Mexico, G/SG/N/1/MEX/1 (May 12, 1995)
USA-70	Definition of "Participle," *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/participle (consulted Oct. 27, 2021)
U.S. Opening Statement at the Oral Hearing	
USA-71	Definition of "Determining," *Oxford English Dictionary*, https://www.oed.com/view/Entry/51244?rskey=TSB3hG&result=1#eid (consulted Nov. 8, 2021)
USA-72	The Top Solar Panel Manufacturers in the USA, Energy Sage, https://news.energysage.com/best-solar-panel-manufacturers-usa/ (consulted Nov. 8, 2021)