UNITED STATES – CRYSTALLINE SILICON PHOTOVOLTAIC CELLS SAFEGUARD MEASURE

(USA-CDA-2021-31-01)

U.S. RESPONSES TO QUESTIONS FROM THE PANEL TO THE PARTIES

TABLE OF ABBREVIATIONS

Abbreviation	Definition
Agreement or CUSMA or USMCA	*United States-Mexico-Canada Agreement*
CSPV	Crystalline silicon photovoltaic
ITC or USITC	U.S. International Trade Commission
NAFTA	*North American Free Trade Agreement*
Party	USMCA Party

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?

Response:

1. The Panel's terms of reference are established by Article 31.7 of the USMCA,[1] which states, in relevant part, that:

> the terms of reference shall be to . . . examine, in the light of the relevant provisions of this Agreement, the matter referred to in the request for the establishment of a panel under Article 31.6 (Establishment of a Panel).[2]

Thus, Article 31.7(a) makes clear that it is the "matter" in Canada's panel request that dictates the Panel's terms of reference in this dispute and, therefore, which measures are before the Panel.

2. Canada's panel request identifies the "{m}easures at {i}ssue" as including the U.S. "safeguard measure on CSPV products" and two Presidential proclamations[3]: *Proclamation 9693* of January 23, 2018,[4] and *Proclamation 10101* of October 13, 2020.[5]

3. Canada's panel request describes the solar safeguard measure as being a change in duty treatment, but does not specifically refer to the Harmonized Tariff Schedule of the United States ("HTSUS") as "a measure at issue."[6] This change in duty treatment is reflected in *Proclamation*

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

[2] USMCA, Article 31.7(a).

[3] Canada's Panel Request, para. 4.

[4] *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).

[5] *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 (Oct. 10, 2020) ("*Proclamation 10101*") (Exhibit CAN-29).

[6] *See, e.g.,* Canada's Panel Request, para. 7 ("The safeguard measure imposed by the United States consisted of a 30 percent additional import tariff on certain CSPV products. Pursuant to Proclamation 9693, the duty rate declined to 25 percent in 2019 and 20 percent in 2020. The measure also included a zero-percent tariff-rate quota for imported CSPV cells, up to 2.5 GW per year, quantities above which CSPV cells would be subject to the additional import tariff.").

9693 itself, which explains that:

> In order to establish increases in duty and a tariff-rate quota on imports of the CSPV products described in paragraph 6 of this proclamation (other than excluded products), subchapter III of chapter 99 of the HTS is modified as provided in Annex I to this proclamation.[7]

4. Annex I to *Proclamation 9693* provides further detail on the modifications the President determined were necessary to implement the proclamation. Annex I makes two changes to subchapter III of chapter 99 of the HTSUS, adding note 18 and inserting new subheadings 9903.45.21 through 9903.45.25.[8]

5. *Proclamation 10101*, which made two modifications to the solar safeguard measure, effectuated them through certain modifications to note 18 to subchapter III of Chapter 99 of the HTSUS to implement those two modifications. It refers to specific changes to subheadings 9903.45.22 and 9903.45.25 in that discussion.[9]

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

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)?

Response:

7. During the hearing, the United States explained that, in challenging the President's decision to include imports of CSPV[10] products from Canada in the solar safeguard measure, Canada treats two distinct measures as if they were one. The first measure is a determination that the President made in 2018, which was 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*.

8. The first and second measures are related in the sense that the first measure determined

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

[8] *Proclamation 9693*, 83 Fed. Reg. at 3545-3550 (Exhibit CAN-05).

[9] *Proclamation 10101*, 85 Fed. Reg. at 65,642 (Exhibit CAN-29).

[10] Crystalline silicon photovoltaic.

the existence of conditions that gave the President the authority to take the second one. However, the first measure is not subject to the USMCA, despite Canada's suggestions to the contrary. The President made that determination more than two years before the USMCA entered into force. It could not possibly have been inconsistent with USMCA Articles 10.2.1, 10.2.2, or 10.2.5(b), because those Articles did not exist in January 2018. NAFTA[11] Articles 802.1, 802.2, and 802.5(b) applied at that time. 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,[12] including through the application of duties through changes in the HTSUS that have continued since the USMCA entered into force.

9. We also add that nothing in USMCA Chapter 10, Section A requires the Party applying a safeguard measure to revisit the determination to include or exclude imports from another Party once it makes that determination. During the hearing, the United States took note of Mexico's suggestion that the Parties "were obligated to bring all their measures into compliance with the USMCA at the time it entered into force."[13] But, 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.

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)?

Response:

10. A "likelihood of a surge" in imports could fall within the scope of USMCA Article 10.2.1(a), (b), or both subparagraphs, depending on the facts of a particular case. In the specific circumstances of the solar safeguard measure, 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.[14]

11. First, under Article 10.2.1(a), the question is whether imports from a Party "account for a substantial share of total imports". Article 10.2.2(a), which informs Article 10.2.1(a), states that imports from a Party "normally shall not be considered to account for a substantial share of total

[11] *North American Free Trade Agreement*.

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

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

[14] *See* U.S. Rebuttal Written Submission, paras. 95, 97.

imports if that Party is not among the top five suppliers of the good subject to the proceeding, measured in terms of import share during the most recent three-year period".

12. The USITC[15] found that, during the period of investigation, imports of CSPV products from Canada ranked as the tenth largest source of imports by quantity during 2012 and 2013, ninth by quantity during 2014, seventh by quantity during 2015, and tenth by quantity during 2016.[16] Thus, during 2014 through 2016, the three full years prior to initiation of the investigation, imports from Canada were among the top 10 import sources, and were even higher than tenth place during 2014 and 2015.[17]

13. Although imports from Canada were not among the top five import sources during 2014 through 2016, the particular facts supported a determination to invoke the flexibility of "normally" as it appears in Article 10.2.2(a). The situation was not "normal" 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.

14. First, as we previously explained, the facts from the USITC's record also supported a conclusion that the absolute U.S. import volume from Canada increased in all but one year of the period of investigation, and the rates of growth in CSPV imports from Canada exceeded the corresponding global growth rate for imports between 2012 and 2015.[18]

15. Second, imports from Canada were likely to surge given that Canadian Solar and additional Canadian producers would have bene left with a significant potential and incentive to use the NAFTA rule-of-origin to gain duty-free access to the U.S. market for CSPV modules comprised of third-country cells that would have otherwise been subject to the measure.[19] This additional factor, coupled with the information identified above, and the fact that imports from Canada in part consisted of shipments[20] by a multinational corporation that was one of the world's largest producers of cells and modules and that had production facilities in multiple countries – Canadian Solar[21] – supported a determination that imports from Canada constituted a

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[15] U.S. International Trade Commission.

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

[17] U.S. Initial Written Submission, para. 105.

[18] U.S. Initial Written Submission, para. 107; USITC Serious Injury Determination Report, Vol. 1, 67 n.387 (Exhibit CAN-07).

[19] U.S. Initial Written Submission, para. 116.

[20] USITC Serious Injury Determination Report, Vol. II, IV-12-IV-16 (Exhibit CAN-07).

[21] *See* U.S. Rebuttal Written Submission, para. 95; U.S. Initial Written Submission, para. 107.

"substantial share" of total imports.

16. Turning to Article 10.2.1(b), the question is whether imports from a Party "contribute importantly" to the serious injury identified by the competent investigating authority. Article 10.2.2(b) informs the analysis under Article 10.2.1(b), and it calls for an examination of "such factors as" the two explicit factors in the first sentence, which indicates that these factors are not exhaustive. The second sentence of Article 10.2.2(b) explains, in relevant part, that: "imports from a Party normally shall not be deemed to contribute importantly to serious injury, or the threat thereof, if the growth rate of imports from a Party during the period in which the injurious surge in imports occurred is appreciably lower than the growth rate of total imports from all sources over the same period."

17. As we previously explained, the facts gathered during the USITC's investigation demonstrated a "large increase in the absolute volume of U.S. imports from Canada," an "increasing U.S. market share from virtually zero at the beginning" of the period of investigation to a certain percentage in 2015, and a "larger rate of growth of these U.S. imports relative to global U.S. imports."[22] The fact that CSPV imports from Canada exceeded the growth rate for total U.S. imports between 2012 and 2015 was, in and of itself, sufficient to satisfy Articles 10.2.1(b) and 10.2.2(b).[23]

18. But the "likelihood of a surge" is also a highly relevant factor in the assessment of whether imports from Canada "contribute importantly" to the serious injury.[24] The immediate prospects of the domestic industry are critical for understanding its condition in the present and the degree to which imports cause any serious injury that the industry faces. That is especially true in this case, where the USITC explicitly found that increased imports were the result of the ability of the largest Chinese producers, including Canadian Solar, to switch their sourcing of imports into the United States from one country to another in response to country-specific trade remedies.[25]

[22] USITC Serious Injury Determination Report, Vol. 1, 67 n.387 (Exhibit CAN-07) (citing USITC Serious Injury Determination Report, Vol. 2, C-4 (table C-1b) (Exhibit CAN-07)); U.S. Initial Written Submission, para. 108; U.S. Rebuttal Written Submission, para. 96.

[23] U.S. Rebuttal Written Submission, para. 96.

[24] U.S. Rebuttal Written Submission, para. 97.

[25] U.S. Rebuttal Written Submission, para. 97 (citing Supplemental Report of the U.S. International Trade Commission Regarding Unforeseen Developments, 4-10 (Dec. 27, 2017) (Exhibit USA-53)).