UNITED STATES – CRYSTALLINE SILICON PHOTOVOLTAIC CELLS SAFEGUARD MEASURE

(USA-CDA-2021-31-01)

REBUTTAL WRITTEN SUBMISSION 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
ITC or USITC	U.S. International Trade Commission
NAFTA	*North American Free Trade Agreement*
Party	USMCA Party
Trade Act	Trade Act of 1974
TRQ	Tariff-rate quota
NAFTA Implementation Act	North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057 (1993)
USMCA Implementation Act	United States-Mexico-Canada Agreement Implementation Act, Pub. L. 116-113 (Jan. 29, 2020)
USTR	United States Trade Representative
WTO	World Trade Organization

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TABLE OF EXHIBITS

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

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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)
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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

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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)

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USA-50	Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, vol. II
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 December 2003 (excerpt of paras. 10.553-10.729)

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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)

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I. INTRODUCTION

1. In this dispute, Canada endeavors to rewrite provisions in the *United States-Mexico-Canada Agreement* ("USMCA") on the exclusion of Canadian exports from U.S. safeguard measures to allow the President, with no articulated rationale whatsoever, to overrule U.S. International Trade Commission ("USITC") findings with which Canada disagrees, but to forbid any deviation, even one supported by compelling reasons, when the President disagrees with USITC findings that Canada supports. However, these provisions do not call for such a heads-I-win-tails-you-lose process. Instead, they provide for data-gathering and an initial determination by the U.S. competent investigating authority, with the President making the ultimate determination as to whether the facts meet the criteria for including or excluding a USMCA Party in a safeguard measure. As our initial written submission demonstrated, that is what the United States did when the President implemented the safeguard measure on crystalline silicon photovoltaic ("CSPV") products ("solar safeguard measure"). That submission showed further that, contrary to Canada's arguments, the existence in Canada of a producer with global reach capable of shifting its production and exports from country to country supported a determination that imports from Canada constituted a substantial share of total imports, and that Canadian imports contributed importantly to the serious injury found to exist by the USITC.

2. Canada also engages in an erroneous reading of Articles 10.2.1, 10.2.2, and 10.2.5(b), as well as of Chapter 31, to assert that these provisions of Chapter 10 apply to a determination made more than two years before those obligations entered into force. Canada's effort to apply the USMCA retroactively is not justified by arguing that the solar safeguard measure's application of tariffs to Canadian imports is a "continuing breach" of the USMCA. The United States applies those tariffs pursuant to a determination made while the *North American Free Trade Agreement* ("NAFTA") was in force. Canada never brought that determination before a NAFTA panel, and much less did it obtain a finding that the determination was inconsistent with the then-applicable international obligations. Therefore, the United States is entitled to rely upon that determination as the basis for including Canadian imports in the solar safeguard measure. And, while USMCA Article 34.1.1 calls for a "smooth transition" from the NAFTA to the USMCA, the existence of an entry-into-force date for USMCA obligations and a termination of NAFTA obligations as of that date is a critical element of that transition that Parties may not ignore when it suits them.

3. Finally, Canada attempts to rewrite USMCA Chapter 31 and the applicable Rules of Procedure for Chapter 31 (Dispute Settlement) ("Rules of Procedure") by contending it was not obligated to identify section 301 of the USMCA Implementation Act as a "specific measure" in its consultations request, before it could challenge that measure as such under Article 10.3 in its panel request. The applicable rules do not allow Canada to skip this requirement, thereby depriving the United States of notice that, in addition to the solar safeguard measure, the U.S. statute was subject to challenge.

4. In this submission, the United States will not reiterate all of the points we made in our initial written submission. Instead, we focus on refuting aspects of Canada's rebuttal written submission and Mexico's third party submission, which largely repeats Canada's arguments. Although Canada slightly switches the sequencing of its claims in its rebuttal written submission,

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the United States retains the sequencing in Canada's and our initial written submissions. The United States has organized this submission as follows.

5. **Section II** refutes Canada's argument, in section II of its rebuttal written submission, that USMCA Articles 10.2.1, 10.2.2, and 10.2.5(b) are applicable to the President's exclusion determination, made while the NAFTA was in force, and that the United States is in "continuing breach" of these provisions. We also explain that, while a panel may consider facts and circumstances predating the USMCA's entry into force in addressing USMCA claims, that does not permit a complaining Party to ignore the obligations as they are written. These provisions do not require a Party to revisit its determination on the applicability of the safeguard exclusion as new data become available, and Chapter 31 does not allow a Party to raise what are really NAFTA claims in USMCA dispute settlement. In addition, we point out that Canada errs in seeking to portray the USITC's midterm review and *Proclamation 10101*[1] as "emergency action{s}" taken after the USMCA entered into force, such that these events now allow Canada to challenge the USMCA consistency of the President's decision to include imports from Canada. The midterm review and *Proclamation 10101* were related to modifications of the emergency action taken well before the entry into force of the USMCA and, as such, were (and are) not subject to the obligations applicable to initial emergency actions.

6. **Section III** addresses the merits of Canada's Article 10.2.1, 10.2.2, 10.2.5(b), and 10.3 claims as applied to the solar safeguard measure. In subsection A below, we rebut Canada's arguments, which it makes in section V of its rebuttal written submission, that the United States acted inconsistently with Article 10.3. We highlight that Canada fundamentally misunderstands that an exclusion determination is not a "determination{ } of serious injury, or threat thereof," and that Article 10.3's reference to "injury determinations" does not suggest that its disciplines extend to a broader class of determinations "pertaining to" injury.

7. In subsection B, we rebut Canada's arguments that the United States acted inconsistently with Articles 10.2.1 and 10.2.2. Canada raises these arguments in section III of its rebuttal written submission. In particular, Canada points to nothing in Articles 10.2.1 or 10.2.2 that would require a Party to provide a "reasoned and adequate explanation" of how imports of the relevant good from another Party meet or do not meet the two conditions in Article 10.2.1. Moreover, we demonstrate that the evidence available at the time the President took the emergency action support the determination that imports of CSPV products from Canada constituted a substantial share of total imports and contributed importantly to the serious injury identified by the USITC.

8. In subsection C, we address Canada's Article 10.2.5(b) rebuttal arguments, which it makes in section IV of its rebuttal written submission. We explain that Article 10.2.5(b) calls for an analysis at the time a Party implements a restriction on imports pursuant to a safeguard

[1] *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).

measure, and that this Article does not require – or allow – another Party (or a panel) to second-guess the determination made at the time of taking the emergency action based on information available after that time. Furthermore, we demonstrate that the evidence does not support Canada's factual assertions, such that it continues to fail to make a *prima facie* case of Article 10.2.5(b) inconsistency.

9. Finally, **section IV** rebuts Canada's contention in section VI of its rebuttal written submission that its as such claim against section 302 of the USMCA Implementation Act is properly within the Panel's terms of reference. Canada concedes in its rebuttal written submission that it did not identify section 302 in its consultations request. Therefore, the Panel's analysis of this claim should end there. Nonetheless, we also highlight that, for example, Canada misreads key sections of Chapter 31, and it erroneously relies on WTO dispute settlement reports that are not germane to this dispute, given key differences between USMCA Chapter 31 and the WTO Dispute Settlement Understanding ("DSU"). We also explain that, even if section 302 were properly within the Panel's terms of reference, Canada's as such claim fails on the merits because the determinations it provides are is not "determinations of serious injury, or threat thereof" or "injury determinations" that a Party must entrust to the competent investigating authority under Article 10.3.

II. USMCA ARTICLES 10.2.1, 10.2.2, AND 10.2.5(B) DO NOT APPLY TO THE PRESIDENT'S DETERMINATION TO INCLUDE IMPORTS FROM CANADA IN THE SOLAR SAFEGUARD MEASURE, AS THAT DETERMINATION OCCURRED MORE THAN TWO YEARS BEFORE ENTRY INTO FORCE OF THE USMCA

10. USMCA Chapter 31 dispute settlement rules preclude Canada's claims under USMCA Articles 10.2.1, 10.2.2, and 10.2.5(b), as applied to the President's determination to include imports of CSPV products from Canada in the solar safeguard measure. Chapter 31 applies to actual or proposed measures of a Party that another Party considers inconsistent with "an obligation of this Agreement" (*i.e.*, the USMCA).[2] The United States made the determination that Canada challenges in January 2018, while the NAFTA was in force, and more than two years before the USMCA entered into force.[3] Therefore, the USMCA provisions cited by Canada – Articles 10.2.1, 10.2.2, and 10.2.5(b) – did not apply at the time, and the determination cannot have been inconsistent with them. Moreover, there is no provision that extends USMCA safeguards commitments and dispute settlement procedures to measures that were subject to NAFTA commitments.

11. The United States is not denying Canada a remedy regarding its Article 10.2.1, 10.2.2,

[2] USMCA, Article 31.2(b).

[3] *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).

and 10.2.5(b) claims.[4] Rather, Canada slept on its rights by waiting until after the USMCA superseded the NAFTA to bring this dispute. In subsection A below, we rebut Canada's suggestion that the United States is in "continuing breach" of these Articles. In subsection B, we explain that a panel may take into account "relevant facts and determinations that occurred prior to the entry into force" of the USMCA in evaluating whether actions after entry into force are consistent with USMCA obligations. But that does not mean that a Party may argue that those facts or determinations may themselves be found inconsistent with USMCA obligations that were not in force at the time. Finally, in subsection C, we demonstrate that Canada errs in seeking to portray the USITC's midterm review and *Proclamation 10101* as "emergency action{s} taken after CUSMA entered into force". They were related to modifications of the emergency action taken well before the entry into force of the USMCA and, as such, were not subject to the obligations applicable to initial emergency actions.

A. The United States is Not in "Continuing Breach" of USMCA Articles 10.2.1, 10.2.2, or 10.2.5(b)

12. Canada misreads USMCA Articles 10.2.1, 10.2.2, and 10.2.5(b) in suggesting that the United States is in "continuing breach" of them.

13. With regard to Article 10.2.1, Canada observes that one definition of "take" is "{t}o make, do, perform (an act, action, movement, etc.); to carry out" and that it appears in the Article in the present participle form "taking".[5] However, Canada errs in assuming that this usage "suggests a continuing action, meaning an act, or action that is being done, performed, or carried out continually."[6] A participle is a verbal adjective that can be used in a number of ways, including in the present tense to show that one action occurs at the same time as another.[7] This is the more natural reading of "taking" as it appears in Article 10.2.1 – that at the time a Party takes an emergency action, it must exclude imports of another Party unless certain conditions exist.[8]

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[4] Canada's Rebuttal Written Submission, para. 11.

[5] Canada's Rebuttal Written Submission (quoting Definition of "Take," *Oxford English Dictionary*, https://www.oed.com/view/Entry/197158?rskey=j3rPCc&result=3&isAdvanced=false#eid (consulted Oct. 4, 2021) (Exhibit CAN-68)).

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

[7] *See* Definition of "Participle," *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/participle (consulted Oct. 27, 2021) (Exhibit USA-70).

[8] Article 10.2.1 states, in relevant part:

> Any Party taking an emergency action under Article XIX and the Safeguards Agreement shall exclude imports of a good from each other Party from the action unless:
>
> (a) imports from a Party, considered individually, account for a substantial share of total imports; and

14. The proper question is thus not whether "taking" is continuous, but whether the "emergency action" is. The phrase itself is ambiguous – to take an emergency action may refer either to the act of adopting a legal measure putting a safeguard measure in place or to the day-to-day act of applying safeguard restrictions to imports. As a general matter, the WTO Agreement on Safeguards ("Safeguards Agreement"), to which Article 10.2.1 refers,[9] uses the verb "apply" to refer to the act of imposing restrictions on imports and the verb "take" to refer to the legal act of putting a safeguard measure in place.[10] In particular, Article 12.4 provides that "{c}onsultations shall be initiated immediately after the {provisional safeguard} measure is taken" – an obligation that would be meaningless if "taking" a measure were understood to occur throughout the life of a measure. The French text of USMCA Article 10.2.1 confirms this understanding, referring to "{t}oute Partie qui adopte une mesure d'urgence," making clear that the obligation applies at the time of adoption of an emergency action rather than throughout its

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

[9] The chapeau to Article 10.2.1 refers to both Article XIX of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Safeguards Agreement. Given this textual reference, relevant provisions of the Safeguards Agreement are informative to certain issues in this dispute.

[10] *Compare* Safeguards Agreement, Article 2.1 ("A Party may apply a safeguard measure to a product . . ."), n.1 ("A customs union may apply a safeguard measure as a single unit or on behalf of a member State."), Article 3 ("A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994."), Article 5.1 ("A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment."), Article 5.2(a) ("In cases in which a quota is allocated among supplying countries, the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned."); Article 7.1 ("A Member shall apply safeguard measures only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment."), Article 7.4 (". . . the Member applying the measure shall progressively liberalize it at regular intervals during the period of application."); *with* Safeguards Agreement Article 6 ("In critical circumstances where delay would cause damage which it would be difficult to repair, a Member may take a provisional safeguard measure pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury."), Article 8.3 ("The right of suspension referred to in paragraph 2 shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement."), Article 10 ("Members shall terminate all safeguard measures taken pursuant to Article XIX of GATT 1947 that were in existence on the date of entry into force of the WTO Agreement . . ."), Article 11.1(a) ("A Member shall not take or seek any emergency action on imports of particular products . . ."), Article 12.1(c) ("A Member shall immediately notify the Committee on Safeguards upon . . . taking a decision to apply or extend a safeguard measure."), Article 12.4 ("A Member shall make a notification to the Committee on Safeguards before taking a provisional safeguard measure") (Exhibit CAN-35).

life.[11]

15. It is also worth noting that to read "{a}ny Party taking an emergency action" to refer to application of import restrictions throughout the life of the emergency action would mean that the Party would have an ongoing obligation to evaluate whether the conditions for exclusion did or did not exist. If that were the case, then a Party that determined correctly that the conditions for exclusion did not exist at the time of adopting a safeguard measure could find itself in breach of the obligation at any subsequent point that the other Party could argue that conditions had changed – even momentarily. Conversely, a Party that correctly found that the conditions for exclusion existed could revoke the exclusion at any point. Thus, viewing "taking an emergency action" as a continuous act would render Article 10.2.3 inutile, as the Party would have ongoing authority to revoke the exclusion any time imports from another USMCA Party no longer met the conditions for exclusion or to reimpose it under Article 10.2.1, even if there was no surge and the exclusion was not undermining the effectiveness of action.

16. Article 10.2.2, which Canada agrees informs Article 10.2.1,[12] confirms that Article 10.2.1 only applies *at the time the Party is putting a safeguard measure into place*. Article 10.2.2 applies to a Party "{i}n determining" whether imports from another Party qualify for an exclusion.[13] These Articles must be read together. Nothing in them creates additional obligations that extend beyond the process of making an exclusion determination.[14] Article 10.2.5(b) does not create ongoing, prospective obligations either, which we discuss in further detail in section III.C.[15]

17. The United States does not dispute that the solar safeguard measure is an "actual measure" that is still in effect.[16] But in referencing USMCA Article 31.2, Canada downplays that an "actual measure", alone, is insufficient to invoke Chapter 31. Mexico correctly recognizes that there are two elements in Article 31.2(b): (1) a "measure" that exists in fact and is in force and being enforced by a Party, and (2) the measure would be considered "inconsistent with an obligation of this Agreement".[17] The second element is the issue here. USMCA Articles 10.2.1, 10.2.2, and 10.2.5(b) create obligations with respect to the *adoption* of a safeguard

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[11] The Spanish text of Article 10.2.1 applies to "Cualquier Parte que aplique una medida de emergencia," which is ambiguous as to whether it refers to the adoption of the legal instrument or the day-to-day application of import restrictions.

[12] Canada's Rebuttal Written Submission, para. 57; *see also* Mexico's Third Party Submission, paras. 12, 18, 23 (bullet point 2).

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

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

[15] *See also* U.S. Initial Written Submission, para. 38.

[16] Canada's Rebuttal Written Submission, paras. 22-23; Mexico's Third Party Submission, para. 6.

[17] Mexico's Third Party Submission, paras. 6-7; *see also* USMCA, Article 31.2(b).

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.[18] For this reason, the fact that the President signed *Proclamation 9693* in early 2018 is certainly "relevant"[19] to whether the Panel can consider these claims by Canada, given that the President made the determination to include imports from Canada while the NAFTA was in force and the USMCA was not. The scope of Chapter 31 dispute settlement is concerned with "an obligation of *this Agreement*" (*i.e.*, the USMCA), not the NAFTA.[20]

18. The text of Articles 10.2 and 31.2 thus establish that Canada may not assert USMCA claims relating to determinations when those determinations were taken prior to entry into force of the USMCA and pursuant to another international agreement, the NAFTA. The other materials cited by Canada do not support its legal position, and if anything, lend further support to this conclusion.

19. The NAFTA Chapter 20 panel report in *The U.S. Safeguard Action Taken on Broom Corn Brooms from Mexico* ("*Corn Brooms*") is irrelevant to Canada's arguments regarding Article 10.2.1.[21] As an initial matter, the issue in *Corn Brooms* was not whether a pre-NAFTA determination pertaining to serious injury or adoption of a safeguard measure could give rise to a breach of NAFTA obligations. The domestic industry filed the safeguard petition in 1996, the USITC made its serious injury determination in 1996, and the President implemented the safeguard action in 1996 – all after entry into force of the NAFTA.[22]

20. Canada makes much of the fact that the *Corn Brooms* panel framed its ultimate conclusion as: "The safeguard measures currently in force pursuant to Proclamation 6961, having been based on an ITC determination that fails to provide 'reasoned conclusions on all pertinent issues of law and fact,' constitutes a continuing violation of United States obligations under NAFTA."[23] Canada fails to recognize that the only NAFTA inconsistency found by the panel was that the USITC failed to provide "reasoned conclusions" for excluding producers of plastic brooms from the domestic industry.[24] The panel found the safeguard measure inconsistent with the NAFTA because it was "based on" the USITC's determination that was inconsistent with the NAFTA. The panel's description of this as a "continuing violation" is

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[18] U.S. Initial Written Submission, paras. 35-39.

[19] Mexico's Third Party Submission, para. 8.

[20] *See, e.g.,* USMCA, Article 31.2(b) (emphasis added); *see also* U.S. Initial Written Submission, para. 42.

[21] Canada's Rebuttal Written Submission, para. 30.

[22] Final Panel Report, *U.S. Safeguard Action Taken on Broom Corn Brooms from Mexico*, paras. 8-13, USA-97-2008-01 (Jan. 30, 1998) (Exhibit CAN-69) ("*Corn Brooms*").

[23] *Corn Brooms*, para. 78 (Exhibit CAN-69) (citation omitted).

[24] *Corn Brooms*, paras. 63, 71 (Exhibit CAN-69).

perhaps best understood as framing for the remainder of the paragraph, which states that: "This measure has already been in force for two years. The Panel therefore recommends that the United States bring its conduct into compliance with the NAFTA at the earliest possible time."[25] To the extent that Canada seeks to ascribe legal significance to the use of this phrase, it would be *obiter dictum*, as neither NAFTA Party argued that the safeguard measure would be valid because the underlying determination had occurred in the past. (Indeed, the only relevant use of any form of the verb "continue" is in the panel's conclusion.)

21. Canada also seeks to ascribe significance to the fact that the USMCA does not contain an analog to NAFTA Article 805's "bright line" rule that "emergency action" did not include "'any emergency action pursuant to a proceeding instituted prior to January 1, 1994'".[26] That is why, as noted above, the United States agrees that the day-to-day application of safeguard tariffs remains subject to the USMCA's ongoing obligations. However, this does not mean that an exclusion determination under NAFTA Articles 802.1 and 802.2, or a restriction taken under Article 802.5(b), are subject to some continuing obligation. These Articles created no such obligations, just as USMCA Articles 10.2.1, 10.2.2, and 10.2.5 do not.

22. Canada's extensive "continuing breach" discussion does not further its case. First, Canada relies on Article 14(2) of the ILC Articles on State Responsibility to suggest that the United States is in "continuing breach" of USMCA Articles 10.2.1, 10.2.2, and 10.2.5(b).[27] At the outset, these Articles do not set forth customary rules of interpretation of public international law, nor do the ILC's Commentaries to which Canada refers. In fact, the ILC Articles themselves do not purport merely to set out customary international law, but rather "to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of states for their internationally wrongful acts."[28] Thus, the rules and their commentary often leave unclear whether they are attempting to *state* customary law, to *create* (in the sense of "formulating" or "developing") new law or, in the case of the commentary, to "comment on" the law. To the extent they create law or merely comment on it, they do not reflect customary international law.

23. In any event, and to the extent the Panel finds them relevant, Canada ignores ILC Article 14(1). Article 14 states:

> 1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

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[25] *Corn Brooms*, para. 78 (Exhibit CAN-69) (emphasis omitted).

[26] Canada's Rebuttal Written Submission, para. 31 (quoting NAFTA, Article 805 (Exhibit CAN-01)).

[27] Canada's Rebuttal Written Submission, para. 13.

[28] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 31, para. 1 (2001) (Exhibit CAN-59).

> 2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.
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> 3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.[29]

24. To the extent the Panel finds these Articles relevant, Article 14(1), not Article 14(2), is relevant here. The ILC Commentaries explain that Article 14 "develops the distinction between breaches not extending in time and continuing wrongful acts (see paragraphs (1) and (2) respectively)."[30] The ILC Commentaries further state that:

> The critical distinction for the purpose of article 14 is between a breach which is continuing and one which has already been completed. In accordance with *paragraph 1*, *a completed act occurs "at the moment when the act is performed", even though its effects or consequences may continue*. The words "at the moment" are intended to provide a more precise description of the time frame when a completed wrongful act is performed, without requiring that the act necessarily be completed in a single instant.
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> . . .
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> In accordance with *paragraph 2*, a continuing wrongful act, on the other hand, occupies the entire period during which the act continues and remains not in conformity with the international obligation, provided that the State is bound by the international obligation during that period. Examples of continuing wrongful acts include the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State, unlawful detention of a foreign official or unlawful occupation of embassy premises, maintenance by force of colonial domination, unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent.
> . . .
>
> Whether a wrongful act is completed or has a continuing character will depend both on the primary obligation and the circumstances of the given case. For example, the Inter-American Court of Human Rights has interpreted forced or involuntary disappearance as a continuing wrongful act, one which continues for as long as the person concerned is unaccounted for. *The question whether a wrongful taking of property is a completed or*

[29] International Law Commission, Responsibility of States for Internationally Wrongful Acts, Article 14 (2001) (Exhibit CAN-58).

[30] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 59, para. 1 (2001) (Exhibit CAN-59).

> *continuing act likewise depends to some extent on the content of the primary rule said to have been violated.*[31]

25. The two emphasized parts of this quotation are critical to understanding the difference between Article 14(1) and Article 14(2). The emphasized portion of the first paragraph envisages that, under Article 14(1) a breach that constitutes a "completed act" may have continuing effects, but that does not mean the breach itself is "ongoing". The President's determinations regarding the exclusion criteria did not breach NAFTA Article 802.1 (nor could this USMCA proceeding adjudicate that issue). However, even if they had breached the NAFTA, the fact that "tariffs are being applied and duties collected on a continuing basis against imports of CSPV products from Canada",[32] as an "effect" or "consequence" of the inclusion determinations, does not mean that the determinations regarding the exclusion criteria constitute an "ongoing breach" of USMCA Article 10.2.1. In other words, that the inclusion determinations may have ongoing effects does not transform them into "a permanent course of action with a continuing character until such time that they are removed."[33]

26. As to the second emphasized portion of this ILC Commentaries excerpt, the content of the "primary rule{s}" (*i.e.*, USMCA Articles 10.2.1, 10.2.2, and 10.2.5(b)) "said to have been violated" do not create an obligation following such a determination to evaluate, on an ongoing basis, whether subsequent conditions continue to support the original determination. NAFTA Articles 802.1, 802.2, and 802.5(b) did not either.[34] Therefore, the fact that the President did not make new determinations with respect to the exclusion criteria at the time of entry into force of the USMCA is not inconsistent with any of those provisions. Canada suggests that Article 28 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*") "provides that a State can be held responsible for breach of a treaty obligation if the obligation is in force for that State at the time of the alleged breach."[35] Article 28, entitled "{n}on-retroactivity of treaties," provides:

> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.[36]

Canada is correct that the ILC Commentaries on the *Vienna Convention* state that, with regard to

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[31] International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 59-60, paras. 2-4 (2001) (Exhibit CAN-59) (emphasis added).

[32] Canada's Rebuttal Written Submission, paras. 21, 32.

[33] Canada's Rebuttal Written Submission, para. 21.

[34] U.S. Initial Written Submission, paras. 35-40.

[35] Canada's Rebuttal Written Submission, para. 14.

[36] *Vienna Convention on the Law of Treaties*, Article 28.

what ultimately became Article 28, "'if {. . .} an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into force, it will be caught by the provisions of the treaty.'"[37] However, Canada reads this statement far too loosely. The ILC Commentaries on the *Vienna Convention* also state:

> The article accordingly states that unless it otherwise appears from the treaty, its provisions do not apply to a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party. In other words, the treaty will not apply to acts or facts which are *completed* or to situations which have ceased to exist before the treaty comes into force. The general phrase "unless a different intention appears from the treaty or is otherwise established" is used in preference to "unless the treaty otherwise provides" in order to allow for cases where the very nature of the treaty rather than its specific provisions indicates that it is intended to have certain retroactive effects.[38]

As we discussed above, the text of USMCA Articles 10.2.1, 10.2.2, and 10.2.5(b) – and NAFTA Articles 802.1, 802.2, and 802.5(b) – demonstrate that they only apply at the time the particular determination is made. They do not establish ongoing obligations after the Party makes the determination.

27. Canada's citations to "consistent jurisprudence" "affirming that international tribunals have jurisdiction over measures existing at the date of the entry into force of the treaty in question, unless specifically provided to the contrary by that treaty" are not pertinent as Canada cites to no USMCA provision that would make such considerations part of the USMCA commitments and procedures to be applied by the Panel. And, furthermore, Canada's assertions are simply inapt.[39]

28. In particular, Canada cites to the award in *Mondev Intl Ltd v. United States*, but again, the arbitral tribunal's remarks actually support the U.S. position in this dispute.[40] In *Mondev*, the tribunal found that it lacked jurisdiction over an investor's NAFTA Article 1110 expropriation claim because any expropriation was completed before the NAFTA entered into force, and the

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[37] Canada's Rebuttal Written Submission, para. 14 (quoting International Law Commission, Draft Articles on the Law of Treaties with commentaries 1966, Commentary to Article 24 {subsequently renumbered to Article 28 in the *Vienna Convention*}, 212, para. 3 (Exhibit CAN-60)).

[38] International Law Commission, Draft Articles on the Law of Treaties with commentaries 1966, Commentary to Article 24 {subsequently renumbered to Article 28 in the *Vienna Convention*}, 212-213, para. 4 (Exhibit CAN-60) (emphasis in original).

[39] Canada's Rebuttal Written Submission, paras. 15-20.

[40] Canada's Rebuttal Written Submission, paras. 16-17.

NAFTA did not have retroactive effect.[41] With regard to Mondev's Article 1105 minimum standard of treatment claim, the tribunal found that conduct before the NAFTA's entry into force could not constitute the basis for a claim.[42] Specifically, Mondev had an unremedied claim in U.S. courts at the end of 1993, and the tribunal found that "{t}he subsequent failure of the United States courts to provide any remedy for that continuing situation was itself, in the circumstances, a breach of Article 1105 (1), which matured only with the definitive rejection of Mondev's claims."[43] In this context, the tribunal explained that:

> {E}vents or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach.[44]

29. Likewise, *Marvin Roy Feldman Karpa v. United Mexican States* supports the U.S. position here.[45] In considering claims pre-dating the NAFTA's entry into force, the tribunal concluded that:

> Given that NAFTA came into force on January 1, 1994, no obligations adopted under NAFTA existed, and the Tribunal's jurisdiction does not extend, before that date. NAFTA itself did not purport to have any retroactive effect. Accordingly, this Tribunal may not deal with acts or omissions that occurred before January 1, 1994. However, this also means that if there has been a permanent course of action by Respondent which started before January 1, 1994 and went on after that date and which, therefore, "became breaches" of NAFTA Chapter Eleven Section A on that date (January 1, 1994), that post-January 1, 1994 part of Respondent's alleged activity *is* subject to the Tribunal's jurisdiction, as the Government of Canada points out (paras. 18, 19) and also the Respondent concedes (Counter-Memorial, para. 232). Any activity prior to that date, even if otherwise identical to its post-NAFTA continuation, is not subject to the Tribunal's jurisdiction in terms of time.[46]

30. Both of these awards support the U.S. position. Canada cannot appropriately point to U.S. conduct after the date the President determined to include imports from Canada in the solar

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[41] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award, paras. 73, 75 (Oct. 11, 2002) (Exhibit CAN-64) ("*Mondev*").

[42] *Mondev*, paras. 70, 75 (Exhibit CAN-64).

[43] *Mondev*, para. 66 (Exhibit CAN-64).

[44] *Mondev*, para. 70 (Exhibit CAN-64).

[45] Canada's Rebuttal Written Submission, para. 17.

[46] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, para. 62 (Dec. 6, 2000) (Exhibit CAN-65) ("*Feldman*") (emphasis in original).

safeguard, "which is itself a breach" of USMCA Articles 10.2.1, 10.2.2, or 10.2.5(b).[47] The President determined to include imports of CSPV products from Canada in the solar safeguard measure through *Proclamation 9693*, which pre-dated the USMCA, and the United States has not revisited this determination. There is no "permanent course of action"[48] under USMCA Articles 10.2.1, 10.2.2, and 10.2.5(b) because those Articles create no obligation following such a determination to evaluate on an ongoing basis whether subsequent conditions continue to support the original determination. NAFTA Articles 802.1, 802.2, and 802.5(b) did not either.[49] And although Canada points to the fact that certain tribunals have recognized the concept of a "continuing breach" in other contexts, that means only that a "continuing breach" may give rise to breach of a treaty.[50] It does not mean that there is a "continuing breach" in the circumstances here.[51]

31. Finally, the fact that NAFTA Articles 802.1, 802.2, and 802.5(b) are largely identical to USMCA Articles 10.2.1, 10.2.2, and 10.2.5(b) does not mean that there is a "continuing breach" of the latter provisions.[52] The USMCA provisions were not in force at the time the determination was made, and alleged similarities to certain NAFTA provisions do not give the USMCA provisions retroactive effect. Indeed, if Canada considered that *Proclamation 9693* was problematic, Canada's remedy was to seek establishment of a NAFTA panel to address those claims. Its failure to do so before the USMCA superseded the NAFTA in July 2020 does not mean that the USMCA should be misread to permit a claim that belonged under the NAFTA dispute settlement system.[53]

B. The Panel May Consider Facts and Circumstances Prior to the USMCA's Entry into Force, but Only as Relevant to the Particular USMCA Obligations

32. The United States agrees that facts, events, or conduct that occurred prior to entry into force of an agreement may be relevant in determining whether a state has breached obligations

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[47] *Mondev*, para. 70 (Exhibit CAN-64).

[48] *Feldman*, para. 62 (Exhibit CAN-65).

[49] U.S. Initial Written Submission, paras. 35-40.

[50] Canada's Rebuttal Written Submission, para. 18 (citing *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, para. 85 (July 25, 2007) (Exhibit CAN-66)).

[51] Similarly, the fact that counsel for a particular U.S. investor previously recognized the concept of a "continuing breach" of a treaty obligation in arguing a particular dispute does not mean that there is a "continuing breach" in the circumstances here. Canada's Rebuttal Written Submission, para. 19 (citing *Mobil Investments Canada Inc. v. Government of Canada*, ICSID Case No. ARB/15/6, Transcript, Volume 1, Hearing on Jurisdiction, Merits and Quantum, 109-110 (July 24, 2017) (Exhibit CAN-67)).

[52] Canada's Rebuttal Written Submission, para. 20.

[53] U.S. Initial Written Submission, para. 41.

after entry into force.[54] For example, the United States agrees that the USITC report and determination and the President's determination in *Proclamation 9693*, all of which predate entry into force of the USMCA, are relevant to the analysis of Canada's claims. But this is correct only with respect to evaluating whether facts, events, or conduct subject to a USMCA obligation are consistent with that obligation. It does not mean that the pre-existing facts, events, or conduct are themselves subject to obligations that were not in force at the time they took place. As Judge Gerald Fitzmaurice explained in his separate opinion in the International Court of Justice *Northern Cameroons* case: "An act which did not, in relation to a party complaining of it, constitute a wrong at the time it took place, obviously cannot *ex post facto* become one."[55]

33. Canada seeks to avoid this important distinction by citing to USMCA Article 34.1, the "Transitional Provision from NAFTA 1994."[56] As Canada notes, the first paragraph of the Article states "the Parties recognize the importance of a smooth transition from NAFTA 1994 to this Agreement." The subsequent paragraphs of the Article then detail how the USMCA institutions will continue certain specifically identified activities commenced under the NAFTA, none of them relevant to this proceeding. In particular, they do not purport to supersede the following Article 34.5, which provides that: "This Agreement enters into force in accordance with paragraph 2 of the Protocol Replacing the North American Free Trade Agreement with the Agreement between the United States of America, the United Mexican States, and Canada." That Protocol, in turn, specifies only that entry into force would occur "on the first day of the third month following the last notification" that each Party had completed its internal procedures for entry into force, which occurred on July 1, 2020. None of the relevant documents provided what Canada now seeks – a gray zone in which both NAFTA and USMCA commitments applied to their actions. Thus, the end of NAFTA obligations on June 30, 2020, and commencement of USMCA obligations on July 1, 2020, was an integral part of the "smooth transition."

34. Paragraphs 36 through 44 of Canada's rebuttal written submission discourse at length on the ordinary meanings of certain terms in Article 34.1.1, and how they evidence the Parties' view that it was important for the passage from the NAFTA to the USMCA to be "without obstruction, interruption, impediment, or difficulty." The United States fails to see how this supports Canada's position. 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 difficulty, too.

35. Finally, Articles 34.1.4 and 34.1.5 are relevant. Canada is correct that these provisions "deal with the very practical matter of ensuring that NAFTA Chapter 19 binational panels already established prior to entry into force of CUSMA would continue to their conclusion with

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[54] Canada's Rebuttal Written Submission, para. 33.

[55] Separate Opinion of Judge Gerald Fitzmaurice in *Northern Cameroons (Cameroon v. U.K.)*, 1963 I.C.J. 15, 129 (Dec. 2) (Exhibit USA-67).

[56] Canada's Rebuttal Written Submission, paras. 34-40.

administrative support from the CUSMA Secretariat, as the NAFTA Secretariat would cease to exist", and that there were ongoing Chapter 19 disputes that warranted these provisions' inclusion in the USMCA.[57] Although there were no outstanding Chapter 20 disputes during the negotiations, Articles 34.1.4 and 34.1.5 evince that where the Parties sought to ensure that a Party could raise NAFTA claims once the USMCA entered into force, they did so explicitly. This is consistent with the Protocol, which explains that "the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA."[58] Unlike NAFTA Chapter 19 dispute settlement, there are no special transitional provisions in the USMCA that refer to NAFTA Chapter 8, which covered safeguards. This demonstrates that the Parties did not intend for safeguard actions taken pursuant to NAFTA obligations to be challengeable under USMCA Chapter 31.[59]

C. The USITC's Midterm Review and *Proclamation 10101* Are Not "Emergency Actions" Taken After Entry Into Force of the USMCA

36. The USITC issued its midterm report regarding the solar safeguard measure, and the President issued *Proclamation 10101*, after the USMCA entered into force. However, neither of these was an "emergency action" that would allow Canada to invoke USMCA Articles 10.2.1, 10.2.2, and 10.2.5(b).[60]

37. *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."[61] With regard to the first modification, *Proclamation 10101* did not "expand the scope of the original safeguard measures by applying tariffs to additional products imported from Canada and other countries, namely bifacial panels".[62] *Proclamation 9693* originally covered bifacial panels, and USTR excluded them from the safeguard measure through a subsequent procedure that Canada does not challenge. *Proclamation 10101* revoked that exclusion for reasons not relevant to this proceeding, returning to the status quo reflected in the USITC serious injury

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[57] Canada's Rebuttal Written Submission, paras. 41-43.

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

[59] U.S. Initial Written Submission, para. 45.

[60] Canada's Rebuttal Written Submission, paras. 45-49.

[61] *Proclamation 10101*, 85 Fed. Reg. at 65,640 (paras. 9(a)-(b)) (Exhibit CAN-29); *see also* U.S. Initial Written Submission, para. 48.

[62] Canada's Rebuttal Written Submission, para. 47.

determination, which included bifacial panels.[63]

38. Canada errs in asserting that *Proclamation 10101* applied a 20 percent duty to imports from Canada for the third year of the measure.[64] It was, in fact, *Proclamation 9693* that put the 20 percent duty on imports of modules from all countries, including Canada, during the February 7, 2020, through February 6, 2021 period.[65] The only duty rate that *Proclamation 10101* changed was for the fourth year (February 7, 2021, through February 6, 2022), which it increased from 15 percent to 18 percent.[66] In making this change, the United States was not "taking an emergency action." It was merely amending the emergency action already taken in 2018.

39. Article 7.4 of the WTO Agreement on Safeguards ("Safeguards Agreement") confirms this conclusion. It provides, in part, that "{i}f the duration of the {safeguard} measure exceeds three years, the Member applying such a measure shall review the situation not later than the mid-term of the measure and, if appropriate, withdraw it or increase the pace of liberalization."[67] The only requirement for a Member to "withdraw", or "increase the pace of liberalization" of, the measure is that it "review the situation" and conclude that the modification is "appropriate." The provision does not reference the requirements for taking an emergency action, either implicitly or explicitly. Thus, such a modification cannot be understood as taking an emergency action.

40. The United States implements this obligation through section 204(a) of the Trade Act, which states in relevant part that:

> **(a) Monitoring**
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> (1) So long as any action taken under section 203 remains in effect, the Commission shall monitor developments with respect to the domestic industry, including the progress and specific efforts made by workers and firms in the domestic industry to make a positive adjustment to import competition.
>
> (2) If the initial period during which the action taken under section 203 is in effect exceeds 3 years, or if an extension of such action exceeds 3 years, the Commission shall submit a report on the results of the monitoring under paragraph (1) to the President and to the Congress not later than the date that is

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

[64] Canada's Rebuttal Written Submission, para. 47.

[65] *Proclamation 9693*, 83 Fed. Reg. at 3548 (Annex at paras. 18(f) and (h)) (Exhibit CAN-05). The United States excluded most developing country WTO Members from these duties in accordance with Article 9.1 of the Safeguards Agreement.

[66] *Proclamation 10101*, 85 Fed. Reg. at 65,642 (Annex at paras. 18(f) and (h)) (Exhibit CAN-29).

[67] Safeguards Agreement, Article 7.4 (Exhibit CAN-35).

> the mid-point of the initial period, and of each such extension, during which the action is in effect.[68]

Section 204(b) then provides that the action may be "reduced, modified, or terminated" by the President after receipt of the USITC report. As in Article 7.4 of the Safeguards Agreement, this takes the form not of a new "action," but as a modification to the existing action. It is not subject to the procedural requirements applicable to the original taking of a safeguard measure, such as a determination by the USITC, a deadline for the President to take action, or a report to the U.S. Congress.

41. Canada concludes from these provisions that "President Trump had the authority to exclude Canada from the emergency action taken when he issued Proclamation 10101."[69] However, it points to no instance of a U.S. President using the section 204(b) authority in this way, and provides no basis for asserting that the U.S. statute provides this authority. In particular, Canada has not addressed the various limitations on the President's actions, including those in section 203(e) of the Trade Act.

42. In any event, even if Canada could establish that the President possessed such authority, it would not be relevant to interpretation of the USMCA obligation. Nothing in the USMCA references the midterm review process specified under 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 absence from *Proclamation 10101* of a modification to the earlier exclusion determinations cannot have been inconsistent with the USMCA.

III. THE PRESIDENT'S DETERMINATION TO INCLUDE IMPORTS OF CSPV PRODUCTS FROM CANADA IN THE SOLAR SAFEGUARD MEASURE IS NOT INCONSISTENT WITH USMCA ARTICLES 2.4.2, 10.2.1, 10.2.2, 10.2.5(B), OR 10.3

43. Putting aside our position that USMCA Articles 10.2.1, 10.2.2, and 10.2.5 were not applicable to the President's determination to include imports of CSPV products from Canada, all of Canada's claims against the solar safeguard still fail. The United States will not reiterate all of its arguments in this section, but instead will address Canada's rebuttal arguments and points made by Mexico in favor of Canada's arguments.[70]

44. In subsection A below, we explain how Canada fails to establish that the United States acted inconsistently with Article 10.3. Canada fundamentally misunderstands that an exclusion determination is not a "determination{ } of serious injury, or threat thereof," and that Article 10.3's reference to "injury determinations" does not suggest that its disciplines extend to a

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

[69] Canada's Rebuttal Written Submission, para. 49.

[70] For example, Canada does not rebut our interpretation and understanding of Canada's Article 2.4.2 claim. Therefore, the United States refers the Panel to its prior views on this claim. U.S. Initial Written Submission, paras. 158-160.

broader class of determinations "pertaining to" injury.

45. In subsection B, we rebut Canada's arguments that the United States acted inconsistently with Articles 10.2.1 and 10.2.2. In particular, while Canada and the United States agree on many key interpretative issues, Canada points to nothing in those Articles that would require a Party to provide a "reasoned and adequate explanation" of how imports of the relevant good from another Party meet or do not meet the two conditions in Article 10.2.1. Moreover, we demonstrate that the evidence available at the time the President took the emergency action support the determination that imports of CSPV products from Canada constituted a substantial share of total imports and contributed importantly to the serious injury identified by the USITC.

46. Finally, in subsection C, we address Canada's Article 10.2.5(b) rebuttal arguments. Specifically, we explain that Article 10.2.5(b) calls for an *ex ante* analysis at the time it implements a restriction on imports pursuant to a safeguard measure. It does not require – or allow – a Party (or a panel) to second-guess the determination made at the time of taking the emergency action based on information available after that time. Furthermore, we highlight various problems with Canada's factual analysis, which illustrate that Canada continues to fail to make a *prima facie* case of Article 10.2.5(b) inconsistency.

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

47. Canada's Article 10.3 claim fails because it relies on the faulty premise that the President's determination to include imports originating in Canada in the solar safeguard measure was a "determination{ } of serious injury, or threat thereof" or a "negative injury determination{ }." As we explained in our initial written submission, and as we explain in subsections 1 and 2 below, it was neither. The only "serious injury determination" was the USITC's finding that imports from all sources were a substantial cause of serious injury to the domestic CSPV products industry. As that was an affirmative determination, Article 10.3's reference to a "negative injury determination" is not relevant. We explain in subsection 3 that Article 10.3 does not create an additional, broader category of "injury determinations" subject to additional obligations.

1. Exclusion Determinations Covered by USMCA Article 10.2.1 Are Not "Determinations of Serious Injury" For Purposes of USMCA Article 10.3

48. Canada's rebuttal written submission correctly recognizes that that the determination described in Article 2.1 of the Safeguards Agreement is a "determination of serious injury" for purposes of USMCA Article 10.3 even though Article 2.1 does not use that precise phrase. However, Canada errs in arguing that a "textual interpretation" of Article 10.2.1 requires treating exclusion determinations as "determinations of serious injury" despite the fact that they

manifestly are not.[71]

49. Of course, an analysis of compliance with Article 10.3 must begin with an understanding of the relevant obligation, in this case to entrust "determinations of serious injury" to a Party's competent investigating authority. The meaning is straightforward – a determination of serious injury is a determination that "serious injury" exists. The reference in Article 10.2.1 to the Parties' "rights and obligations under Article XIX of the GATT 1994 and the Safeguards Agreement" makes clear that "serious injury" in USMCA Chapter 10 has the same meaning as under those agreements.

50. As a Party must apply a safeguard measure "to a product being imported irrespective of its source," this "serious injury" is without regard to the source of the product, that is, imports causing injury are from all sources.[72] Article XIX of the General Agreement on Tariffs and Trade, 1994 ("GATT 1994") and the Safeguards Agreement do not provide for any other determination of serious injury or determination of injury, negative or otherwise. Thus, the reference in Article 10.3 to a "determination{ } of serious injury" in an "emergency action proceeding{ }" can only be understood as meaning the determination called for in Article 2.1 of the Safeguards Agreement, namely, a Member's determination that a "product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry. . . ."[73]

51. The French text confirms this understanding, as it renders the obligation as "chacune des Parties confiera à un organisme d'enquête compétent la détermination *de l'existence d'un préjudice grave, ou d'une menace de préjudice grave*." The Spanish text supports the same conclusion. While it renders the first sentence of Article 10.3 as covering "las resoluciones relativas a daño grave o amenaza del mismo," it subsequently refers to "{l}as resoluciones negativas sobre la existencia de daño."

52. The "determinations" called for in USMCA Article 10.2.1 are not determinations of the existence of serious injury. Article 10.2.1(b) is premised on the competent authorities having already determined "the serious injury . . . caused by imports" from all sources – including Canada and Mexico – and calls for a *different* determination as to the *contribution* of imports from each USMCA Party to the serious injury already determined to exist. Article 10.2.1(b) calls for the Party to further determine whether the extent to which imports from USMCA Parties have "contribute{d}" to the serious injury is "important{ }." It does not require the Party to revisit the competent investigating authority's findings that the domestic industry is injured, that the injury is serious, or that imports from all sources (including USMCA Parties) caused the

[71] Canada's Rebuttal Written Submission, paras. 106-107.

[72] *See* Safeguards Agreement, Articles 2.1, 2.2 (Exhibit CAN-35).

[73] U.S. Initial Written Submission, paras. 64-65.

injury. Thus, it is not a determination of serious injury.[74] Canada suggests several times that the conditions in Article 10.2.1 "pertain to 'serious injury'",[75] but that is irrelevant because a "determination{ } of" serious injury is not equivalent to a "determination pertaining to" serious injury. The latter would encompass any number of analyses related to a safeguard proceeding, such as findings by customs authorities of whether particular importations fall within the scope of the products covered by a safeguard measure, that are manifestly not within the purview of the competent investigating authority.

53. Canada errs in suggesting that the United States is reading the words "serious injury, or threat thereof" out of Article 10.2.1(b).[76] They are integral to a proper understanding of the provision, as they make clear that a Party must make the determination with respect to a serious injury or threat thereof that the competent investigating authority has determined to exist *prior to* considering whether conditions mandate exclusion of USMCA Parties under Article 10.2.1. (Indeed, an evaluation of whether to exclude USMCA Parties would be pointless if the competent investigating authorities found that serious injury did not exist.) The "contribute importantly" prong is not a determination of serious injury because it takes as a given that "total imports" cause serious injury, and asks merely whether imports from one source contribute importantly to that serious injury. Moreover, it does not preclude that imports from the USMCA Party contribute to the serious injury, albeit in a less-than-important way.[77]

54. Canada gives short shrift to subparagraph (a),[78] which does not even reference "serious injury." It does not need to do so, as "substantial share" addresses whether imports of a good from a Party rank among other sources of such imports, without regard to whether imports from that Party are increasing or decreasing, whether the domestic industry is seriously injured, or whether increased imports cause that serious injury.[79] Canada appears to concede elsewhere that subparagraph (a) is not an injury determination when it states "{t}he statutory 'substantial share' requirement is entirely separate from any analysis of injury, causation, or threat."[80]

55. In the solar safeguard proceeding, the USITC majority recognized that their findings regarding imports from Canada were not equivalent to a serious injury determination.[81] Nothing

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[74] U.S. Initial Written Submission, para. 66.

[75] Canada's Rebuttal Written Submission, paras. 108-109.

[76] Canada's Rebuttal Written Submission, para. 108.

[77] U.S. Initial Written Submission, para. 67.

[78] Canada's Rebuttal Written Submission, para. 109.

[79] U.S. Initial Written Submission, paras. 66-67.

[80] Canada's Rebuttal Written Submission, para. 67.

[81] U.S. Initial Written Submission, para. 77 (citing USITC Serious Injury Determination Report, Vol. 1, 68 n.390 (Exhibit CAN-07)).

in their report contradicts this.[82] Canada argues that the USITC treated them as being essentially the same because a footnote in the report refers in a single sentence to both the determination of serious injury and the "findings for NAFTA countries."[83] On its face, such an isolated reference does not warrant the prominence that Canada seeks to give it. Moreover, Canada fails to recognize that the sentence *differentiates* the two findings, stating because the USITC already determined that increased imports from all sources are a substantial cause of serious injury, it would "limit" its findings for NAFTA imports to the "contribute importantly" test under section 311 of the NAFTA Implementation Act. The majority did not say that they were making another determination of serious injury regarding imports from Canada.[84] Finally, the fact that the USITC report's "Views on Injury" included findings of whether imports from Canada met the criteria for exclusion did not transform the question of whether Canada should be excluded into a determination of serious injury, or threat thereof.[85]

2. Determinations Related to Exclusions Are Not Determinations of Serious Injury and, Therefore, Are Not Subject to the USMCA Article 10.3 Obligation to Entrust "Determinations of Serious Injury, or Threat Thereof" to a Competent Investigating Authority

56. Canada errs in arguing that the fact that the determinations related to exclusions occur in the context of an "emergency action proceeding," makes them into "determinations of serious injury, or threat thereof." The first sentence of Article 10.3 requires a Party to entrust "determinations of serious injury, or threat thereof" – and nothing more – in "emergency action proceedings" to the competent investigating authority.[86] As we demonstrated above and in our initial written submission, that refers exclusively to determinations that increased imports from all sources caused serious injury, or the threat thereof, to a domestic industry.[87] The Article 10.2.1 determinations do not do that. Indeed, they are entirely irrelevant to the determination of the existence of serious injury.

57. Canada suggests that the last sentence of Article 10.3, and particularly the French and Spanish texts, confirms that Article 10.3 is concerned with "emergency action proceedings" as a whole and not merely the "determinations of serious injury, or threat thereof" within those proceedings.[88] Canada is mistaken. Its English text argument argues that "such proceedings" in

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[82] Canada's Rebuttal Written Submission, para. 127.

[83] Canada's Rebuttal Written Submission, para. 127 (quoting USITC Serious Injury Determination Report, Vol. 1, 68 n.390 (Exhibit CAN-07) (emphasis added by Canada)).

[84] Canada's Rebuttal Written Submission, paras. 127-128.

[85] Canada's Rebuttal Written Submission, para. 128; U.S. Initial Written Submission, para. 77.

[86] *See* Canada's Rebuttal Written Submission, para. 110.

[87] U.S. Initial Written Submission, paras. 57-65.

[88] Canada's Rebuttal Written Submission, paras. 112-113; Mexico's Third Party Submission, para. 37 (bullet point 3).

the final sentence of Article 10.3 refers back to "emergency action proceedings" in the first sentence. Thus, the statement that "{t}he 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" refers to "the proceedings as a whole under Article XIX of the GATT 1994 and the Safeguards Agreement."

58. This view is demonstrably wrong. "Emergency action proceedings" as a whole would include the selection of what action to take. That is not the province of the competent investigating authority under the USMCA, or of the competent authorities under the Safeguards Agreement. The hortatory statement regarding resources in Article 10.3's final sentence applies only to the extent of the competent investigating authority's *own functions* (*i.e.*, "its duties"), and not to the elements of an emergency action entrusted to other entities, such as the President's authority to determine what measure to apply, or the decision by the Governor in Council as to what measure to apply in a Canadian safeguard proceeding,[89] or to the decision of the Federal Executive as to what measure to apply in a Mexican safeguard proceeding.[90] The final clause of the sentence – calling for funding for the competent investigating authority "to fulfill *its* duties" drives home that "such proceedings" covers only those elements of the proceeding entrusted to the competent investigating authority "under domestic law." Thus, "such proceedings" logically refers only to the proceedings *of the competent authorities* described in the preceding sentences of Article 10.3, namely the "determinations of serious injury," and not to other, arguably related, proceedings.

59. This conclusion is even more apparent in the French and Spanish texts. The French text provides:

> S'agissant de l'adoption d'une mesure d'urgence, chacune des Parties confiera à un organisme d'enquête compétent la détermination de l'existence d'un préjudice grave, ou d'une menace de préjudice grave. Les décisions de cet organisme pourront être soumises à l'examen de tribunaux judiciaires ou administratifs, dans la mesure prévue par la législation interne. Les déterminations négatives de préjudice ne pourront être modifiées,

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[89] *See* Customs Tariff, Division 4, Section 55(1), https://laws-lois.justice.gc.ca/PDF/C-54.011.pdf (consulted Oct. 27, 2021) (Exhibit USA-68) ("Subject to sections 56, 57, 59 and 61, if at any time it appears to the satisfaction of the Governor in Council, on the basis of a report of the Minister or of an inquiry made by the Canadian International Trade Tribunal under section 20 or 26 of the Canadian International Trade Tribunal Act, that goods are being imported under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive goods, the Governor in Council may, on the recommendation of the Minister, by order, make any such goods imported from a country specified in the order, when imported into Canada or a region or part of Canada specified in the order during the period that the order is in effect, subject to a surtax . . .").

[90] *See* La Ley de Comercio Exterior, Título II, Capítulo I, Artículo 4o, *reported in* Notification of Laws, Regulations and Administrative Procedures Relating to Safeguard Measures: Mexico, G/SG/N/1/MEX/1 (May 12, 1995) (Exhibit USA-69) ("El Ejecutivo Federal tendrá las siguientes facultades: . . . II. Regular, restringir o prohibir la exportación, importación, circulación o tránsito de mercancías, cuando lo estime urgente,mediante decretos publicados en el DiarioOficial de la Federación, de conformidad con el artículo 131 de la Constitución Política de los Estados Unidos Mexicanos.").

> si ce n'est à la suite d'un tel examen. Les organismes d'enquête compétents habilités par la législation interne à mener les procédures relatives à l'adoption d'une mesure d'urgence devront disposer des ressources nécessaires pour leur permettre de s'acquitter de leurs fonctions.

Considered in isolation, "les procédures relatives à l'adoption d'une mesure d'urgence" in the last sentence could be read as referring to everything done between initiation of an investigation through the issuance of the instrument putting a safeguard measure in place. But, as noted above, it does not occur in isolation. The sentence itself limits the scope to those "procédures" that the "organismes d'enquête" are "habilités par la législation interne à mener." Given that the previous sentences specify exactly what "procédures" a Party "confiera" to its competent investigating authority, the final sentence refers to those procedures, and only those procedures.

60. The Spanish text of Article 10.3 provides:

> En los procedimientos para la adopción de medidas de emergencia, cada una de las Partes encomendará las resoluciones relativas a daño grave o amenaza del mismo a una autoridad investigadora competente. Estas determinaciones serán objeto de revisión por parte de tribunales judiciales o administrativos en la medida que lo disponga la legislación interna. Las resoluciones negativas sobre la existencia de daño no podrán modificarse salvo por este procedimiento de revisión. A la autoridad investigadora competente que esté facultada por la legislación interna para llevar a cabo estos procedimientos se le proporcionarán todos los recursos necesarios para el cumplimiento de sus funciones.

Mexico contends that "estos procedimientos" in the last sentence refers back to "procedimientos para la adopción de medidas de emergencia" in the first sentence.[91] But again, this view disregards the context of "estos procedimientos." In the final sentence, they are explicitly the subset of "procedimientos" with which the competent investigating authority "esté facultada por la legislación interna." As in the French and English texts, the preceding sentences require that specific steps be entrusted to those authorities, indicating that the reference to "estos procedimientos" in the final sentence refers exclusively to those proceedings.

61. Canada also seeks to find support for its reasoning in Article 10.2.2(b)'s provision that in "determining" whether imports from a USMCA Party contribute importantly to the serious injury the "competent investigating authority" shall consider certain factors.[92] Although this provision envisages a determination by those authorities, that does not require the Party to give the authority the final say.[93] The U.S. system, in which the USITC makes an initial

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[91] Mexico's Third Party Submission, para. 37 (bullet point 4).

[92] Canada's Rebuttal Written Submission, para. 115.

[93] U.S. Initial Written Submission, para. 70.

determination with respect to "contribute importantly" and the President makes a final determination based on the report of the authority, comports fully with this obligation. Mexico seeks to support Canada's position by noting that Articles 10.2.1 and 10.2.2 do not refer to a different authority,[94] but its argument is misplaced. Article 10.2.1 refers to a "Party," indicating that action with respect to the exclusion rests with the Party as a whole, and not with a specific governmental organ.

62. Mexico also seeks to find support for Canada's views in Article 10.2.3's charging the "competent investigating authority" with determining that "a surge in imports of such good from the other Party or Parties undermines the effectiveness of the action" as the first step in an anti-surge mechanism.[95] However, Article 10.2.3 next provides that "in the event" that the competent investigating authority makes this determination, the "*Party* . . . shall have the right subsequently to include that good from the other Party or Parties in the action." This latter phrase indicates that the competent investigating authority need not be the entity that subsequently decides whether to include that good. Indeed, Canadian law charges the Governor in Council with ultimately deciding whether to subsequently include imports from a Party in a Canadian safeguard action, where the Canadian International Trade Tribunal determines that there has been a surge of imports that undermines the effectiveness of the safeguard action.[96] Thus, a Party could entrust this decision to the competent investigating authority, but Article 10.2.3 does not require this.

63. The United States also disagrees with Canada's suggestions that Article 10.2.3 "implies a re-determination of the satisfaction of both conditions in Article 10.2.1,"[97] and with Canada's suggestion that Article 10.2.3 is another type of "injury determination" that parallels a serious injury determination under Article 2.1 of the Safeguards Agreement.[98] First, the imposition of an independent standard that there is "a surge in imports of such good from the other Party or Parties" which "undermines the effectiveness of the action," creates a strong negative implication that the competent investigating authority need not consider the Article 10.2.1 factors.

64. Second, Article 10.2.3 does not parallel Safeguards Agreement Article 2.1. The Safeguards Agreement requires only *one* injury determination, which covers imports from all sources (including from USMCA Parties).[99] The Safeguards Agreement does not require any

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[94] Mexico's Third Party Submission, para. 28.

[95] Mexico's Third Party Submission, paras. 30-32.

[96] Customs Tariff, Division 4, Section 60, https://laws-lois.justice.gc.ca/PDF/C-54.011.pdf (consulted Oct. 27, 2021) (Exhibit USA-68).

[97] Canada's Rebuttal Written Submission, para. 123; *see also* Mexico's Third Party Submission, para. 32.

[98] Canada's Rebuttal Written Submission, para. 123.

[99] The Appellate Body has found that a Member may exclude imports of an FTA partner from a safeguard measure only if it determines that imports from the remaining Members by themselves cause serious injury. *See*

other type of injury determination. Like Article 10.2.1, Article 10.2.3 presupposes that the competent investigating authority has already made the determination of serious injury because it only applies "subsequent{ }" to a Party imposing a safeguard measure. Article 10.2.3 does not even contain the word "injury."

65. Canada's "object and purpose" argument misses the mark.[100] The "object and purpose" in *Vienna Convention* Article 31(1) relates to "the treaty" as a whole, not to individual provisions or sections.[101] To allow interpreters to devise an "object and purpose" of an Article, paragraph, or sentence, and use that to change the interpretation indicated by the ordinary meaning of the terms in their context, is to risk the interpreters' views as to a higher purpose of the obligation superseding the balance struck by the Parties. Canada's argument illustrates this risk. To the extent any "object and purpose" for Articles 10.2.1 and 10.2.2 can legitimately be discerned, it is to strike a balance between reducing restraints on inter-Party commerce and protecting domestic industries from serious injury caused by increased imports. The provisions delineate that balance with a series of detailed conditions and considerations. To use some perceived "objective" or "purpose" to tilt that balance in one direction, as Canada and Mexico[102] do, is to ignore the careful compromise that the negotiators reached, in defiance of the customary rules of interpretation of public international law, as reflected in Articles 31 and 32 of the *Vienna Convention*.

66. Thus, the United States disagrees with Canada's assertion that the "object and purpose" of Section A of Chapter 10 is to "ensure that trade between CUSMA Parties is not unnecessarily disrupted by a global safeguard measure."[103] While reducing limitations of trade among the Parties is one part of the balance, the other side is equally important – ensuring that Parties retain the right to limit imports from USMCA Parties when they are a substantial share of imports and contribute importantly to serious injury to a domestic industry. Canada's effort to inject a "necessity" element into this evaluation is misplaced – the terms of the provision describe when Parties may exercise this right, and none of them suggest an added consideration of

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Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, para. 181, WT/DS202/AB/R, adopted Mar. 8, 2002 (*US – Line Pipe (AB)*) (Exhibit USA-63) ("a gap between imports covered under the investigation and imports falling within the scope of the measure can be justified only if the competent authorities 'establish explicitly' that imports from sources covered by the measure 'satisf{y} the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards.'") (quoting 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 (*US – Wheat Gluten (AB)*) (Exhibit USA-64). Under this reasoning, the "parallelism" determination would be the only determination of serious injury needed to justify taking a safeguard measure.

[100] Canada's Rebuttal Written Submission, paras. 116-117.

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

[102] Mexico's Third Party Submission, para. 16.

[103] Canada's Rebuttal Written Submission, para. 117.

"necessity."[104]

67. Similarly, Canada overreaches in its efforts to ascribe to Article 10.3 an "object and purpose" of "ensur{ing} the independence of safeguard proceedings, such that investigations and injury determinations are made by a competent investigating authority in an objective manner."[105] The provision is much more mechanical. It identifies particular governmental entities in each of the Parties, and requires each Party to "entrust" specifically identified "determinations" to those entities. It conspicuously does not separately require that they be "objective" or "independent." The omission from the USMCA of the NAFTA's Annex on "Administration of Emergency Action Procedures" (Annex 803.3) drives home the point that the USMCA does not impose further obligations on *how* the competent investigating authorities do their work.

68. The United States has noted Canada's observation that in the French and Spanish texts, the analogs to the qualifier "to the extent provided by domestic law" apply only with respect to the provision of judicial review, and not to the entrustment of determinations of serious injury to the competent authorities.[106] The point is valid, but does not affect the broader conclusion that the U.S. system, which assigns an initial determination regarding the exclusion criteria to the USITC and the ultimate determination to the President, is consistent with Article 10.3.

69. In particular, Canada does not deny that it has understood for 20 years, accepted, and benefitted from the fact that the President may properly reach an exclusion determination contrary to the USITC's, but simply brushes these points aside as "immaterial" or "irrelevant".[107] Again, Canada underwent three rounds of free trade agreement negotiations with the United States. It has been well aware of the President's role in the exclusion process in safeguard proceedings since the *United States–Canada Free Trade Agreement*, including the 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.[108] Far from being immaterial,[109] Canada's acquiescence in this authority, including its emphatic defense of Presidential deviations from USITC negative conclusions on the injury factors, shows at least its view that these are not "arbitrary" or lacking in "objectivity," and do not require some sort of "reasoned and adequate explanation."

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[104] Canada's Rebuttal Written Submission, para. 117.

[105] Canada's Rebuttal Written Submission, para. 117.

[106] Canada's Rebuttal Written Submission, paras. 132-135; *see also* Mexico's Third Party Submission, paras. 39-41.

[107] Canada's Rebuttal Written Submission, paras. 136-137.

[108] U.S. Initial Written Submission, paras. 86-90, 92.

[109] Canada's Rebuttal Written Submission, para. 136.

70. Finally, Canada cherry-picks aspects of the U.S. initial written submission when it "asks the Panel to note that the U.S. admitted that 'section 302 of the USMCA Implementation Act (19 U.S.C. § 4552), which entrusts the President the final opportunity to make a USMCA exclusion in implementing a U.S. safeguard measure' deviates from (i.e. is inconsistent with) the obligations of Article 10.3."[110] The United States did no such thing. Section V.A.3.a of the U.S. initial written submission clearly illustrates that the United States made the entire argument regarding "to the extent provided by domestic law" *in the alternative* to its main argument that an exclusion determination is not a serious injury determination or "injury determination" under Article 10.3 to begin with.[111] In sum, there is nothing for the Panel to "note" here.

3. USMCA Article 10.3's Reference to "Injury Determinations" Does Not Signal that Something Other Than "Determinations of Serious Injury" Must Be Entrusted to the Competent Authorities

71. As the United States has explained, Article 10.3 applies only to the "determinations of serious injury, or threat thereof" referenced in its first sentence, namely, the determination of the existence of serious injury, or threat thereof, caused by increased imports from all sources.[112] Canada seeks to rely on the principle of effectiveness in treaty interpretation to argue that "injury determinations" in the second sentence of the English text must be read to mean something different from the different term ("determinations of serious injury, or threat thereof") in the first sentence of the English text.[113] The United States agrees that an interpreter must take differences of this sort into account in its evaluation of the text, but they do not end the inquiry. Maxims of interpretation, such as the principle of effectiveness, are tools to us in the central inquiry as to the ordinary meaning of terms in their context and in light of the object and purpose of the agreement. In this instance, as outlined above, "injury determinations" in the second sentence is best understood as a shorthand reference to "determinations of serious injury, or threat thereof" in the first sentence that are negative.[114] This reading gives full effect to all terms in Article 10.3, and is therefore consistent with the principle of effectiveness.[115]

72. The Spanish and French Article 10.3 texts do not support Canada's view that the Article can be read as operating at two levels, with the first sentence applying to "determinations of serious injury" and the remainder applying to a broader category of "injury determinations" that

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[110] Canada's Rebuttal Written Submission, para. 129 (quoting U.S. Initial Written Submission, paras. 83-84).

[111] U.S. Initial Written Submission, paras. 79-85.

[112] U.S. Initial Written Submission, paras. 59-65.

[113] Canada's Rebuttal Written Submission, paras. 118-125; *see also* Mexico's Third Party Submission, para. 38.

[114] U.S. Initial Written Submission, paras. 59-61.

[115] Canada's Rebuttal Written Submission, paras. 119-121.

encompasses any finding "pertaining to" injury.[116] At the broadest level, they make clear that Canada's efforts to reach substantive conclusions based on minute terminological differences are futile. Article 10.3 contains three obligations with respect to "determinations":

	Action subject to the obligation		
Obligation	English	Spanish	French
"entrust"	"determinations of serious injury, or threat thereof"	"resoluciones relativas a daño grave o amenaza del mismo"	"détermination de l'existence d'un préjudice grave, ou d'une menace de préjudice grave"
"subject to review"	"determinations of serious injury, or threat thereof"	"Estas determinaciones"	"Les décisions"
"not subject to modification"	"injury determinations"	"resoluciones sobre la existencia de daño"	"déterminations . . . de préjudice"

73. If Canada's approach to effectiveness were correct, the English text would be read as applying the first and second obligations to the same acts, and the third obligation to a different act. The Spanish text would be read as applying the first obligation to "resoluciones," the second obligations to "determinaciones," and the third obligation to yet another set of acts, "resoluciones sobre la existencia de daño" but not "resoluciones sobre . . . la amenaza de daño." The French text would produce the same jumble as the Spanish text. This is obviously a nonsensical result. As explained above in section II.A.2, the way to harmonize these three texts is to read the obligations as referring to the same determinations – of the existence of serious injury (including threat thereof) caused by increased imports from all sources.

74. Mexico seeks to justify differentiating between the first and second obligations by noting the absence of a "demonstrative pronoun or direct textual reference, such as 'estas determinaciones'" in the third sentence as suggesting that this sentence covers a broader scope of "injury determinations."[117] The point fails under the broader logic outlined above. In any case, lawyers' after-the-fact assertions that text would have been clearer if drafted differently are hazardous. The U.S. reading of the text might indeed have been more clearly correct if the various texts referred to each of the three obligations as applying to "determinations of serious injury or threat thereof," "resoluciones relativas a daño grave o amenaza del mismo," and "déterminations de l'existence d'un préjudice grave, ou d'une menace de préjudice grave." By the same token, if the negotiators intended for Canada's interpretation, they would have needed to adopt different language. None of these counterfactual texts is relevant to determining what

[116] Canada's Rebuttal Written Submission, para. 122; *see also* Mexico's Third Party Submission, paras. 36-38.

[117] *See* Mexico's Third Party Submission, paras. 37-38.

the actual text means.

75. The foregoing analysis confirms the connection between the third and second sentences of the Spanish and French Article 10.3 texts, and the second sentences' connection with the first. This reading is consistent with the U.S. reading of the English text, which is that "negative injury determinations" in the second sentence is shorthand for "determinations of serious injury, or threat thereof" in the first sentence (where they are negative), just as "such review" is shorthand for "review by judicial or administrative tribunals".[118] Consequently, the third sentences of the Spanish and French Article 10.3 texts do not establish an "injury determination{ }" that is broader than a "determination{ } of serious injury, or threat thereof". This sentence does not cover exclusion determinations.[119]

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

76. Canada and Mexico misinterpret Articles 10.2.1 and 10.2.2. We explain in subsection 1 that these Articles do not require a Party to provide a "reasoned and adequate explanation" of how imports from another Party meet or do not meet the two conditions. In subsection 2, we highlight where the Parties appear to agree on interpretative questions regarding these Articles, but we also highlight our disagreement with Canada's attempt to too narrowly read "normally" in Article 10.2.2(a) and (b). In subsection 3, we address Canada's arguments concerning the factual basis for including imports from Canada in the safeguard.

1. USMCA Articles 10.2.1 and 10.2.2 do Not Require a Party to Provide a "Reasoned and Adequate Explanation" of How the Two Conditions Are Satisfied in Its Determination to Include or Exclude Another Party's Imports

77. Canada suggests that the President acted inconsistently with USMCA Article 10.2.1 in failing to provide a "reasoned and adequate explanation" of how imports of CSPV products from Canada failed to meet the criteria for exclusion from the safeguard measure.[120] However, Article 10.2.1 does not require a Party to provide a "reasoned and adequate explanation" or indeed to provide any explanation at all. Canada points to prior WTO panel and Appellate Body reports in suggesting that a Party must provide such an explanation under USMCA Article 10.2.1, but Canada points to nothing in the USMCA that requires this. Nor does Canada point to anything that precludes a Party from explaining the basis for including imports from another Party for the

[118] U.S. Initial Written Submission, para. 61.

[119] Canada's Rebuttal Written Submission, para. 122; *see also* Mexico's Third Party Submission, para. 38.

[120] Canada's Rebuttal Written Submission, paras. 51-55; *see also* Mexico's Third Party Submission, paras. 17-22.

first time in Chapter 31 dispute settlement.[121] In fact, Canada has previously endorsed the right of the President to negate an affirmative USITC inclusion finding *with no explanation whatsoever*.[122]

78. All USMCA Parties appear to agree that Article 10.2.1 requires a Party to exclude imports from another Party unless such imports satisfy both conditions in subparagraphs (a) and (b).[123] This is a "fact-based determination".[124] However, while a Party must make such a determination before including imports from another Party in a safeguard measure, nothing in Chapter 10 requires an explicit announcement of the determination, or an explanation of the basis for reaching the determination. Nothing in USMCA Chapter 31 or the Rules of Procedure require this either.

79. There is nothing in the text of Articles 10.2.1 and 10.2.2 that creates the obligation asserted by Canada, and the Panel has no mandate under Chapter 31 to create such a new obligation. Essentially, the sole basis for Canada's argument is to seek to import into the USMCA a WTO dispute settlement standard based on obligations that do not exist in the text of Articles 10.2.1 or 10.2.2. The United States urges the Panel to reject incorporating the WTO Appellate Body's requirement of a "reasoned and adequate explanation" into these USMCA Articles.[125]

80. Setting this aside, at least it is the case that the Safeguards Agreement, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement"), and Agreement on Subsidies and Countervailing Measures each contain provisions that require the competent authorities or investigating authority to publish reports in safeguard, antidumping, and countervailing duty proceedings.[126] Annex 803.3.12 of the NAFTA contained an obligation that "{t}he competent investigating authority shall publish promptly a report, including a summary thereof in the official journal of the Party, setting out its findings

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[121] Canada's Rebuttal Written Submission, para. 54; *see also* Mexico's Third Party Submission, paras. 17-20.

[122] 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) ("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*.") (emphasis added).

[123] U.S. Initial Written Submission, para. 99; Mexico's Third Party Submission, paras. 11, 20; Canada's Rebuttal Written Submission, para. 50.

[124] Mexico's Third Party Submission, para. 20.

[125] Canada's Rebuttal Written Submission, para. 54; Mexico's Third Party Submission, paras. 17-20.

[126] Safeguards Agreement, Articles 3.1, 4.2(c) (Exhibit CAN-35); WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Article 12 ("Anti-Dumping Agreement") (Exhibit USA-60); Agreement on Subsidies and Countervailing Measures, Article 22 (Exhibit USA-61).

and reasoned conclusions on all pertinent issues of law and fact."[127] However, USMCA Chapter 10, Section A, contains no comparable requirements. Therefore, text analogous to that cited in WTO Appellate Body reports to find an obligation to provide a "reasoned and adequate explanation" does not exist or apply here.

81. For example, in *US – Steel Safeguards*,[128] the WTO panel explained that the competent authorities must establish explicitly that imports covered by the safeguard measure satisfy the conditions for its application," which implies that the authorities "must provide a reasoned and adequate explanation of how the facts support their determination."[129]

82. In making this assertion, the panel cited to the Appellate Body report in *US – Line Pipe*, which stated:

> a gap between imports covered under the investigation and imports falling within the scope of the measure can be justified only if the competent authorities "establish explicitly" that imports from sources covered by the measure "satisfy{y} the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards." And, as we explained further in *US – Lamb*, in the context of a claim under Article 4.2(a) of the Agreement on Safeguards, "establish{ing} explicitly" implies that the competent authorities must provide a "reasoned and adequate explanation of how the facts support their determination".[130]

83. In paragraph 103 of *US – Lamb*, which the Appellate Body also relied on in support of its statement in *US – Line Pipe*, the Appellate Body stated that:

> {A}n "objective assessment" of a claim *under Article 4.2(a) of the Agreement on Safeguards* has, in principle, two elements. First, a panel must review whether competent authorities have evaluated all relevant factors, and, second, a panel must review whether the authorities have provided a reasoned and adequate explanation of how the facts support their determination. Thus, the panel's objective assessment involves a formal aspect and a substantive aspect. The formal aspect is whether the competent authorities have evaluated "all relevant factors". The substantive aspect is whether the competent

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[127] NAFTA, Annex 803.3.12 (Exhibit CAN-01).

[128] Mexico's Third Party Submission, para. 19.

[129] Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, para. 10.595, 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-66)) (citing *US – Line Pipe (AB)*, para. 181 (Exhibit USA-63).

[130] *US – Line Pipe (AB)*, para. 181 (Exhibit USA-63) (quoting *US – Wheat Gluten (AB)*, paras. 96, 98 (Exhibit USA-64); Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, para. 103 n.38, WT/DS177/AB/R, WT/DS178/AB/R, adopted May 16, 2001 (*US – Lamb (AB)*) (Exhibit USA-65)).

authorities have given a reasoned and adequate explanation for their determination.[131]

84. The emphasized reference in the quotation from *US – Lamb* illustrates how the requirement of a "reasoned and adequate explanation" in *US – Steel Safeguards* ultimately was asserted to follow from "Article 4.2(a) of the Agreement on Safeguards." Significantly, another part of Article 4.2, namely, subsection (c), requires that "{t}he competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined."[132] This would include an analysis of "the rate and amount of the increase in imports of the product concerned in absolute and relative terms" under Article 4.2(a) of the Safeguards Agreement. With no comparable provisions in the USMCA, that logic simply does not apply.

85. As another example, Canada refers to the WTO panel report in *Brazil – Poultry Anti-Dumping Duties* to support its contention that this Chapter 31 Panel "cannot take into consideration any arguments and reasons that have not been demonstrated to form part of the original decision."[133] In *Brazil – Poultry Anti-Dumping Duties*, the panel quoted the following from the panel report in *Argentina – Ceramic Tiles*:

> "Under Article 17.6 of the AD Agreement we are to determine whether the DCD established the facts properly and whether the evaluation performed by the DCD was unbiased and objective. In other words, we are asked to review the evaluation of the DCD made at the time of the determination *as set forth in a public notice or in any other document of a public or confidential nature*. We do not believe that, as a panel reviewing the evaluation of the investigating authority, we are to take into consideration any arguments and reasons that did not form part of the evaluation process of the investigating authority, but instead are *ex post facto* justifications which were not provided at the time the determination was made."[134]

Implicit in the italicized language above is a reference to Article 12 of the Anti-Dumping Agreement, which is entitled {p}ublic {n}otice and {e}xplanation of {d}eterminations". Article 12.2 obligates the investigating authority in antidumping investigations to give "{p}ublic notice" of preliminary and final determinations, and to provide "sufficient detail" in that public notice or

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[131] *US – Lamb (AB)*, para. 103 (Exhibit USA-65) (emphasis added by the United States; emphasis by the Appellate Body omitted).

[132] Safeguards Agreement, Article 4.2(c) (Exhibit CAN-35).

[133] Canada's Rebuttal Written Submission, para. 54 & n.46.

[134] *Brazil – Poultry Anti-Dumping Duties*, para. 7.48 (Exhibit CAN-79) (quoting *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, para. 6.27, WT/DS189/R, adopted Nov. 5, 2001) (*Argentina – Ceramic Tiles*) (Exhibit CAN-78)) (emphasis added by the United States; emphasis by the panel omitted).

a separate report regarding "the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities."[135] Thus, these reports demonstrate that the text used to assert that the Anti-Dumping Agreement imposes an obligation to provide a "reasoned and adequate explanation" does not exist in the USMCA in connection with safeguards.

86. The foregoing analysis of *US – Steel Safeguards* and *Brazil – Poultry Anti-Dumping Duties* illustrates how the "reasoned and adequate explanation" in the WTO context for safeguard, antidumping, and countervailing duty proceedings has been asserted to follow from particular transparency-related provisions governing investigating authorities. USMCA Chapter 10, Section A does not impose such requirements for determinations of serious injury. The U.S. reading of Article 10.2.1 does not render inutile "the contingent character of the mandatory obligation of exclusion", because, put simply, there is no obligation to explain.[136]

87. Indeed, where the Parties intended to require a Party to provide an "explanation" in USMCA Chapter 10, they signaled this intention explicitly. As a counterpoint, Annex 10-A to Chapter 10 contains certain rules governing antidumping and countervailing duty proceedings, and some of these rules require disclosure and written explanations. For example, Article 7 in Annex 10-A includes the requirement to "disclose . . . the calculations used to determine the rate of dumping or countervailable subsidization," and "{t}he disclosure and explanation shall be in sufficient detail so as to permit the interested party to reproduce the calculations without undue difficulty." As another example, Article 6(c) in Annex 10-A requires a written report following an in-person verification in an antidumping or countervailing duty proceeding "describing the methods and procedures that {the investigating authority} followed in carrying out the verification and the results of the verification{.}" Section A of USMCA Chapter 10 imposes no similar requirements.

88. Mexico complains that this reading of Articles 10.2.1 and 10.2.2 prevents another Party from assessing the legality of the inclusion determination.[137] This is incorrect because Parties have many sources of information regarding trade volumes and commercial conditions outside of reports by competent investigating authorities. Indeed, the argument proves too much. *Any* USMCA claim would be easier if a Party published an explanation of its actions. However, that does not translate into a generalized obligation for a Party to provide reasoned and adequate explanations for every action it takes. Therefore, it cannot create a particularized obligation in the context of Section A of Chapter 10.

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[135] Anti-Dumping Agreement, Article 12.2 (Exhibit USA-60).

[136] Mexico's Third Party Submission, para. 18.

[137] Mexico's Third Party Submission, para. 18.

2. The Parties Otherwise Appear to Agree on Most Questions Regarding the Interpretation of Articles 10.2.1 and 10.2.2

89. All Parties agree that Article 10.2.1 requires a Party to exclude imports of the relevant good of another Party from a safeguard action unless both conditions in subparagraphs (a) and (b) are satisfied.[138] The United States and Mexico appear to agree that the term "normally", as it appears in Article 10.2.2(a) – which provides guidance to interpreting Article 10.2.1(a) – signals that there may be instances in which a USMCA Party accounts for a "substantial share of imports" even though it is not one of the top five suppliers.[139] The United States and Mexico also appear to agree that "normally," as it appears in Article 10.2.2(b) – which provides guidance to interpreting Article 10.2.1(b) – signals that there will be instances in which the growth rate of imports from a Party during the surge period is appreciably lower than the surge rate from imports from all sources over that period, but other considerations may warrant a determination that imports from that Party nonetheless contribute importantly to the serious injury, or threat thereof.[140] The United States agrees with Mexico that the word "shall" in Article 10.2.2(a) and (b) provides mandatory effect to the analyses in those provisions, and that the particular use of "shall" in the first sentence of Article 10.2.2(b) is not affected by "normally".[141]

90. Canada appears to agree with the United States regarding the definition of "normally" and that this term in Article 10.2.2(a) and (b) "suggests that a certain flexibility is to be given in applying these criteria."[142] The United States disagrees, however, with Canada's argument that the flexibility of "normally" only "applies when the top five condition is not an appropriate measure of the suppliers' *share of total imports* or when the relative growth rate is not an appropriate measure of the *contribution to the serious injury*."[143] This is wrong. To frame the question in the abstract, the statement that Condition X "normally" results in Conclusion Y means that it is possible in some cases Condition X exists but does not result in Conclusion Y, and that in other cases Condition X does not exist, but Conclusion Y is nonetheless the result. Article 10.2.2 is completely silent on what these non-"normal" situations may be, indicating that they will depend on the facts of each particular case. Thus, there is no basis to limit what constitutes a non-"normal" situation to any particular set of hypothetical facts.

91. Canada is correct that the flexibility could apply in the two situations that Canada highlights in the U.S. Statements of Administrative Action accompanying the NAFTA and the

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[138] U.S. Initial Written Submission, para. 99; Canada's Rebuttal Written Submission, para. 56; Mexico's Third Party Submission, para. 11.

[139] U.S. Initial Written Submission, para. 101; Mexico's Third Party Submission, para. 13 (bullet point 1).

[140] U.S. Initial Written Submission, para. 102; Mexico's Third Party Submission, para. 13 (bullet point 2).

[141] Mexico's Third Party Submission, paras. 14-15.

[142] Canada's Rebuttal Written Submission, para. 58.

[143] Canada's Rebuttal Written Submission, para. 59 (emphasis in original).

USMCA on "substantial share."[144] However, it could also be the case that these conditions are appropriate measures of the conditions, but additional information nonetheless supports a finding, or buttresses a finding, that a Party's imports satisfy the condition at issue. For example, imports from a Party may not be among the top 10 sources under Article 10.2.2(a), but additional information such as growth trends in imports from that Party, or other characteristics about its producers, may ultimately support a determination that imports constitute a "substantial share."

3. Factual Evidence Supported the President's Determination to Include Imports From Canada in the Solar Safeguard Measure

92. The information available at the time the President imposed the safeguard measure on CSPV products, including as reflected in the USITC's report, supported a determination by the President to include imports from Canada in the safeguard measure.[145]

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

93. The United States does not dispute that imports of CSPV products from Canada were not among the top five sources during the three-year period preceding the safeguard measure.[146] They were tenth by quantity during 2012 and 2013, ninth during 2014, seventh during 2015, and tenth in 2016.[147] But additional evidence supported a finding that Canada nonetheless accounted for a substantial share of imports.[148] The United States also pointed out that (1) the absolute U.S. import volume from Canada increased in all but one year of the period of investigation, (2) these rates of growth exceeded the corresponding global growth rate for imports between 2012 and 2015, and (3) Canadian Solar, a company headquartered in Canada that exported from there to the United States, ranked among the world's top producers of CSPV modules.[149] These factors are not specifically enumerated in Articles 10.2.1(a) or 10.2.2(a), but "normally" in Article 10.2.2(a) permits flexibility in analyzing the question in Article 10.2.1(a). These factors together supported a finding that imports from Canada constituted a substantial share of total imports, even though Canada was not among the top five sources.

94. The United States recognizes that Article 10.2.2(b) explicitly requires consideration of trends in the volume of USMCA imports as a factor for considering whether those imports

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[144] Canada's Rebuttal Written Submission, paras. 60-61.

[145] U.S. Initial Written Submission, paras. 97, 104-117.

[146] Canada's Rebuttal Written Submission, para. 65; U.S. Initial Written Submission, paras. 105-106.

[147] U.S. Initial Written Submission, para. 105 (citing 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)).

[148] Canada's Rebuttal Written Submission, para. 65.

[149] U.S. Initial Written Submission, paras. 106-107.

contribute importantly to the serious injury. However, nothing in Article 10.2.2 precludes the possibility that a single data set may be relevant to both analyses. Thus, the U.S. explanation does not conflate Articles 10.2.1(a) and 10.2.1(b).[150] Nothing in Articles 10.2.1(a) and 10.2.2(a) precludes a Party from *also* considering growth rates in determining substantial share.

95. It is true that the United States relied on Canadian Solar's global production of modules in our initial written submission.[151] Nonetheless, elsewhere, we also pointed out that "'Canadian Solar (China)' was identified as the eighth largest CSPV *cell* producer in the world" in 2016.[152] Furthermore, under NAFTA rules-of-origin, "'U.S. imports of finished CSPV modules assembled in a NAFTA country, even from CSPV cells originating in non-NAFTA countries, qualify as products from the NAFTA country'".[153] Thus, had the President excluded CSPV imports from Canada from the safeguard measure, "Canadian Solar and additional Canadian producers would have been left with a significant potential and incentive to use the NAFTA rule-of-origin to gain duty-free access to the U.S. market for CSPV modules comprised of third-country cells that would have otherwise been subject to the measure."[154] This fact, coupled with the other factors discussed above, supported a finding that imports from Canada constituted a substantial share of imports.

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

96. 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."[155] Indeed, CSPV imports from Canada exceeded the growth rate for total U.S. imports between 2012 and 2015.[156] Although the USITC majority also observed that Canada's growth rate was "'a function of the

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[150] Canada's Rebuttal Written Submission, para. 67.

[151] Canada's Rebuttal Written Submission, para. 68 (citing U.S. Initial Written Submission, para. 107).

[152] U.S. Initial Written Submission, para. 112 (quoting USITC Serious Injury Determination Report, Vol. 2, IV-9 (Exhibit CAN-07) (emphasis added)).

[153] U.S. Initial Written Submission, para. 113 (quoting USITC Serious Injury Determination Report, Vol. 1, 20-21 n.84 (Exhibit CAN-07)).

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

[155] 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.

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

very low level of imports from Canada in 2012,'"[157] this observation did not undermine that Canada's growth rate nonetheless exceeded the growth rate for global U.S. imports during this time period. The first and second sentences of Articles 10.2.1(b) and 10.2.2(b) contemplate this particular situation. Thus, this analysis may stand on its own to show that Canada satisfied Article 10.2.1(b).[158]

97. That being said, Canada erroneously suggests that the United States is arguing that the "likelihood of a surge" in imports is an additional condition under Article 10.2.1.[159] To the contrary, the likelihood that excluding Canada would create an opportunity for a rapid influx of imports is a highly relevant factor in evaluating whether the conditions explicitly identified in Article 10.2.2 existed. In any event, however, Article 10.2.2(b), which informs the interpretation of Article 10.2.1(b), calls for an examination of "factors such as" two specific considerations, which signals that these factors are illustrative rather than exhaustive.[160] Nothing precludes a Party from considering the likelihood of a surge in imports from another Party *as part of* an Article 10.2.2(b) analysis. "{S}uch factors as" may well include, where relevant, whether (1) there will be a likelihood of a surge of imports from the other Party in question, (2) a NAFTA (or USMCA) rule of origin creates a risk of circumvention of the safeguard, and (3) the fragility of the domestic industry if something is not done to eliminate the risk of circumvention as early as possible.[161] Canada is correct that Article 10.2.1(b) is written in the present tense,[162] but the concepts of current and imminent injury, while different, are closely related.[163] Moreover, the

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[157] Canada's Rebuttal Written Submission, para. 71 (quoting USITC Serious Injury Determination Report, Vol. 1, 69 (Exhibit CAN-07)).

[158] Canada's Rebuttal Written Submission, para. 73 (arguing that Article 10.2.1 uses the present tense, which signals it is not a prospective exercise); Mexico's Third Party Submission, para. 23 (bullet point 3) (arguing that "{t}he use of present tense in the verbs of Articles 10.2.1 and 10.2.2 ('account for', 'contribute to') indicates that the determination must be based on a current satisfaction of the conditions").

[159] Canada's Rebuttal Written Submission, para. 73; *see also* Mexico's Third Party Submission, para. 23 (bullet point 1).

[160] U.S. Initial Written Submission, para. 102.

[161] Mexico's Third Party Submission, para. 23 & n.16 (bullet points 1 and 2 in para. 23).

[162] Canada's Rebuttal Written Submission, para. 73; *see also* Mexico's Third Party Submission, para. 23 (bullet point 3).

[163] *See, e.g.,* The Appellate Body correctly explained in *US – Line Pipe* that:

> these two definitions reflect the reality of how injury occurs to a domestic industry. In the sequence of events facing a domestic industry, it is fair to assume that, often, there is a continuous progression of injurious effects eventually rising and culminating in what can be determined to be "serious injury". Serious injury does not generally occur suddenly. Present serious injury is often preceded in time by an injury that threatens clearly and imminently to become serious injury, as we indicated in *US – Lamb*. Serious injury is, in other words, often the realization of a threat of serious injury.

US – Line Pipe (AB), para. 168 (Exhibit USA-63).

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.[164]

98. Canada errs in contending that the United States ignored Article 10.2.3.[165] A Party's ability to examine the "likelihood of a surge" under Article 10.2.2(b) does not "render{ } *inutile*"[166] or "ignore{ }" Article 10.2.3.[167] To invoke Article 10.2.3, the competent investigating authority must determine "that a surge in imports of such good from the other Party or Parties undermines the effectiveness of the action."[168] This Article contemplates a "real, and not prospective, surge in imports, undermining the effectiveness of the action".[169] A Party's ability to consider factors that could lead to a surge in imports from another Party under Article 10.2.2(b) does not render Article 10.2.3 inutile. First, even if a Party considers such factors under Article 10.2.2(b), 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. Therefore, 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

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[164] In its supplemental report on unforeseen developments in the solar safeguard proceeding, the USITC explained that, *inter alia*:

> U.S. negotiators also could not have foreseen that the U.S. government's use of authorized tools, such as antidumping and countervailing duty measures on imports from China, would have limited effectiveness and instead lead to rapid changes in the global supply chains and manufacturing processes in order to facilitate U.S. imports of non-covered products from China and Taiwan and later U.S. imports from Chinese producers' affiliates in other countries. These unforeseen developments led to CSPV products being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry producing an article like or directly competitive with the imported article.

Supplemental Report of the U.S. International Trade Commission Regarding Unforeseen Developments, 4-10 (Dec. 27, 2017) (Exhibit USA-53) (citations omitted). In the subsequent WTO dispute brought by China against the U.S. solar safeguard measure, the panel found that the USITC appropriately identified the existence of "unforeseen developments" and that imports increased as a result of these unforeseen developments, and that the USITC's findings were consistent with Article XIX:1(a) of the GATT 1994. Panel Report, *United States – Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products*, paras. 7.28, 7.45, WT/DS562/R, circulated Sept. 2, 2021 (currently on appeal) (Exhibit USA-62).

[165] Canada's Rebuttal Written Submission, paras. 74-75 (citing U.S. Initial Written Submission, para. 68).

[166] Mexico's Third Party Submission, para. 24 (emphasis in original).

[167] Canada's Rebuttal Written Submission, paras. 74-77.

[168] USMCA, Article 10.2.3.

[169] Mexico's Third Party Submission, para. 23 (bullet point 4); *see also* Canada's Rebuttal Written Submission, para. 76.

available in that situation.

99. Canada seeks to dismiss U.S. concerns about Canada becoming a conduit for injurious imports diverted from countries covered by the safeguard measure as "speculative."[170] As a legal matter, Canada disregards that a determination of present serious injury inevitably requires the authority to project conclusions about the present based on data from an investigation period closed many months prior to the date of the determination stretching years into the past. That is especially the case with the threat of serious injury, which necessitates projections. U.S. concerns about the likelihood of Canadian producers quickly becoming a focus for injurious imports are no different. As a factual matter, such diversions are *not* speculative. The USITC record showed that major Chinese producers, including Canadian Solar, routinely and quickly shifted imports from countries subject to U.S. trade remedies to countries not subject to such restrictions.[171]

100. Accordingly, the USITC's investigation record supported a determination that imports from Canada constituted a substantial share of total imports and they contributed importantly to the serious injury or threat thereof. Thus, the President was within his authority to determine that "imports of CSPV products from . . . Canada . . . account for a substantial share of total imports and contribute importantly to the serious injury or threat of serious injury found by the ITC."[172]

C. Canada Fails to Establish that the United States Acted Inconsistently with USMCA Article 10.2.5(b) by Including Imports from Canada in the Solar Safeguard Measure

101. Canada's USMCA Article 10.2.5(b) claim lacks merit. In subsection 1, we highlight that, in advancing its strained reading of Article 10.2.5(b) as calling for an *ex post* analysis, Canada reads "would" out of this Article. Properly interpreted, Article 10.2.5(b) requires a Party to examine, before it takes a restriction, whether such restriction would have the effect contemplated in that Article, based on information available at the time of that decision. In subsection 2, we explain that Canada's factual analysis is erroneously premised on information that would not have been available to the President at the time of the decision. This is fatal to Canada's *prima facie* case. In addition, we demonstrate that, even if Article 10.2.5(b) contemplates an *ex post* analysis, Canada's factual analysis still suffers from certain key flaws.

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[170] Canada's Rebuttal Written Submission, para. 78.

[171] Supplemental Report of the U.S. International Trade Commission Regarding Unforeseen Developments, 4-10 (Dec. 27, 2017) (Exhibit USA-53).

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

1. Canada Misunderstands that USMCA Article 10.2.5(b) Calls for an Ex Ante Analysis, Not an Ex Post Analysis

102. Article 10.2.5(b) applies at the point that a Party "impose{s}" restrictions on a good imported from a USMCA Party. At that point, the Party does not know the actual effect of the measure. It has no choice but to make inferences based on available information as to the effect the measure "would have". Thus, the evaluation of whether a Party complied with that obligation requires an *ex ante* analysis, based on information as of the time of the decision, of whether taking a restriction would have the effect contemplated in that Article.[173] Allowing an affected Party to impugn that decision based on an *ex post* analysis of subsequent data would make it impossible for a Party to comply because it would be held responsible for facts that it had no way of knowing. Similarly, Article 10.2.5(b) does not require a Party to "ensure" that a restriction does not actually have the effect contemplated in subparagraph (b).[174] The United States refers to its previous analysis of this Article.[175]

103. Canada's rebuttal of the U.S. argument overemphasizes the word "effect" in subparagraph (b), and excises essentially all the words preceding it in that subparagraph, especially "would."[176] Indeed, Canada's only response to the United States' *Vienna Convention* analysis of "would" is that the United States "fails to take into consideration the ordinary meaning of this provision as a whole and runs counter to the object and purpose of CUSMA."[177] Canada does not even engage with our textual analysis of "would" across all three authentic USMCA texts, but merely acknowledges our focus on "grammatical elements."[178] By simply ignoring the critical "would," it is Canada that fails to consider the ordinary meaning of this provision as a whole.[179]

104. The provision for an "allowance" for reasonable growth underscores that Article 10.2.5(b) does not require "a subsequent obligation to observe the effect of the measure."[180] "Allowance" means "{t}o take into account mitigating or extenuating circumstances regarding (a person, their behaviour, etc.); to excuse or treat leniently" or "{t}he action of allowing something

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

[174] Canada's Rebuttal Written Submission, para. 81.

[175] U.S. Initial Written Submission, paras. 123-139.

[176] Canada's Rebuttal Written Submission, paras. 83-88.

[177] Canada's Rebuttal Written Submission, para. 88 & n.77.

[178] Canada's Rebuttal Written Submission, para. 88 & n.77.

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

[180] Canada's Rebuttal Written Submission, para. 85.

to occur; toleration, permission."[181] An "allowance for reasonable growth" is not a *guarantee* of growth in general.[182] Article 10.2.5(b) does not require a Party imposing a restriction to ensure that another Party's exporters take advantage of that "toleration" or "permission".[183]

105. This reading is consistent with the USMCA's object and purpose. On the one hand, the preamble seeks to "ELIMINATE obstacles to international trade which are more trade-restrictive than necessary." On the other hand, it also seeks to "PRESERVE AND EXPAND regional trade and production by further incentivizing the production and sourcing of goods and materials in the region."[184] When a Party's competent investigating authority has found that imports from all sources, including other USMCA Parties, are causing serious injury to a domestic industry, those objectives may come into conflict. Articles 10.2 and 10.3 are best understood as defining the balance between the objectives of eliminating obstacles and incentivizing the production and sourcing of goods and materials in the region, setting out conditions for allowing a temporary restriction on imports from a Party. Nothing in the preamble supports tilting that balance in one direction or another.[185]

106. This reading is also consistent with the context provided by Article 5.1 of the Safeguards Agreement, which requires that a safeguard measure be applied "'only to the extent necessary to remedy serious injury and facilitate adjustment.'"[186] So long as the data available at the time the Party imposed the restriction demonstrates that imposing it would not have the anticipated effect contemplated in Article 10.2.5(b), the Party may impose the restriction.

107. Canada explains that in 2019 it took the step of providing exclusive TRQs to Mexican imports of steel as part of provisional safeguards it imposed.[187] However, Canada's own decision does not mean the U.S. Article 10.2.5(b) interpretation is wrong.[188] Article 10.2.5(b)

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[181] Definition of "Allowance," *Oxford English Dictionary*, https://www.oed.com/view/Entry/5464?rskey=zZC3ZB&result=1&isAdvanced=false#eid (consulted Sept. 15, 2021) (phrase P1.b and definition II.8) (Exhibit USA-34); U.S. Initial Written Submission, para. 138.

[182] U.S. Initial Written Submission, para. 152.

[183] 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).

[184] USMCA, preamble.

[185] U.S. Initial Written Submission, para. 69; Canada's Rebuttal Written Submission, para. 86.

[186] Canada's Rebuttal Written Submission, para. 86 (quoting Safeguards Agreement, Article 5.1 (Exhibit CAN-35)).

[187] Canada's Rebuttal Written Submission, para. 87 & n.76 (citing Memorandum of Understanding between Canada and Mexico, January 16, 2019, SOR/2018-206, Safeguard Measures Imposed on the Importation of Certain Steel Goods (Exhibit CAN-82)).

[188] The United States notes further that the "effect" that a "restrictions . . . would have" on imports from a USMCA product is highly specific to the product and the conditions of competition in the relevant markets. The

does not require a mechanism to "prevent{ } the safeguard measures from reducing imports from Canada below their historical level and ensuring allowance for a reasonable growth."[189] The United States was not obligated to include any such mechanism in *Proclamation 10101* either.[190] Put simply, Article 10.2.5(b) does not create an ongoing monitoring obligation.

108. Given that Article 10.2.5(b) involves an *ex ante* analysis, data post-dating the Party's imposition of a restriction are irrelevant to the Panel's analysis of whether the Party complied with this Article.[191] Nonetheless, Canada suggests that:

> While the Party may proceed to an *ex ante* analysis to determine how to design the measure, the analysis conducted by the Panel is targeted at determining whether the imports were in fact reduced by the measure below historical levels and whether there was allowance for a reasonable growth.[192]

This is a strained interpretation of Article 10.2.5(b) and a fundamental misunderstanding of the Panel's role. Chapter 31 charges a panel with assessing whether the defending Party complied with the obligation as written.[193] The *ex ante* nature of Article 10.2.5(b) does not change depending on whether it is a panel or a Party that is assessing compliance with that obligation.

2. Canada's Arguments Regarding the Factual Evidence Fail to Make a Prima Facie Case that the Solar Safeguard Measure is Inconsistent with USMCA Article 10.2.5(b)

109. The previous section shows that an evaluation of compliance with Article 10.2.5(b) requires an *ex ante* analysis in which data post-dating the application of the safeguard measure has no place. Subsection a below shows that Canada fails to provide such an analysis, as it relies on information not available at the time the United States took the safeguard measure. For purposes of completeness, subsection b addresses Canada's *ex post* analysis and demonstrates that it does not make a *prima facie* case of Article 10.2.5(b) inconsistency.

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fact that Canada considered TRQs to be appropriate for Mexican steel products is in no way indicative of whether they would be necessary or appropriate for Canadian CSPV products.

[189] Canada's Rebuttal Written Submission, para. 92.

[190] Canada's Rebuttal Written Submission, para. 92.

[191] Canada's Rebuttal Written Submission, para. 90.

[192] Canada's Rebuttal Written Submission, para. 91.

[193] *See, e.g.*, USMCA, Article 31.13.1(b)(i) (explaining that a panel's function is to present a report that contains determinations of whether "the measure at issue is inconsistent with obligations in this Agreement"); USMCA, Article 31.13.4 (explaining that a panel "shall interpret this Agreement in accordance with the customary rules of interpretation of public international law, as reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*, done at Vienna on May 23, 1969").

110. In its initial written submission, the United States noted that redactions from certain Canadian exhibits prevented a complete analysis of Canada's factual assertions. Canada has explained that what appeared to be redactions were in fact inadvertent deletions introduced by the TAS e-filing system, and Canada provided complete copies of the relevant exhibits.[194] Based on these developments, the United States withdraws the argument that we cannot verify the accuracy of Canada's factual representations regarding its Article 10.2.5(b) claim.[195] The analysis in the remainder of this section presents limited additional observations based on the complete versions of Exhibits CAN-30 and CAN-51, and on Exhibit CAN-85, which the United States understands is an updated version of Exhibit CAN-30.[196]

a. Canada Continues to Erroneously Rely on Information that Would Not Have been Available to the President (or the USITC) at the Time the United States Imposed the Safeguard Measure

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

112. Canada erroneously relies on a 2015 through 2017 base period.[197] The USITC's period of investigation covered 2012 through 2016,[198] which means that 2017 was not part of the "recent representative base period."[199] The President did not have 2017 data available at the time he imposed the safeguard measure. The United States is not obligated to suggest an alternative base period.[200] It is Canada's obligation to make a *prima facie* case here.[201]

113. In addition, the text does not support Canada's continued comparison between a base period of 2015 through 2017 and any time period following imposition of the safeguard measure.[202] Article 10.2.5(b) does not call for an analysis of movements in imports after a Party

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[194] Canada's Letter to the Panel (Sept. 21, 2021) (Exhibit CAN-83); Canada's Rebuttal Written Submission, para. 103.

[195] U.S. Initial Written Submission, paras. 142-145.

[196] Canada's Rebuttal Written Submission, para. 101 n.99.

[197] Canada's Rebuttal Written Submission, para. 96.

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

[199] U.S. Initial Written Submission, para. 147.

[200] Canada's Rebuttal Written Submission, para. 96.

[201] Rules of Procedure, Article 14; U.S. Initial Written Submission, para. 33.

[202] Canada's Rebuttal Written Submission, para. 97.

imposes a restriction, with the assumption that the restriction is entirely responsible for the movements. Thus, import data post-dating the restriction's implementation is irrelevant. Similarly, information from the USITC's midterm report, which post-dates the original investigation, and information from other sources regarding growth rates in U.S. CSPV installations between 2018 and 2020, are irrelevant.[203]

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

114. As we previously explained,[204] even aside from the fact that 2017 was not properly part of the base period, and was not and could not have been taken into account by the United States when the safeguard action was taken, the data in any event [[]] regarding the base period trend. This flaw provides yet another independent reason to reject Canada's Article 10.2.5(b) challenge. Canada [[]] to discern the trend of imports.[205] But a [[]]. The United States considers that [[]]. This accords with the ordinary definition of "trend," which is {t}he general course, tendency, or drift (of action, thought, etc.) . . ."[206]

115. The [[]] the 2015-2017 data presented by Canada, as illustrated in Table 1 of Canada's initial written submission – and now by the complete versions of Exhibits CAN-30 and CAN-51, and CAN-85 as well – show that imports [[]]. If [[]], Canada's data [[]].

116. Canada does not address this issue in its rebuttal written submission. However, the base period trend is crucial to the remainder of the analysis under Article 10.2.5(b). 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 (*i.e.*, the trend[207]) of imports from that Party.[208] If the [[]], then this fact is highly relevant to what type of anticipatory impact a restriction could have.

117. In addition, information from the USITC's record supporting that "capacity, production, and capacity utilization in Canada are expected to decline from 2016 to 2018," and "exports to the United States in 2017 and 2018 will decline," are relevant to discerning an allowance for

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[203] U.S. Initial Written Submission, para. 148.

[204] U.S. Initial Written Submission, para. 149.

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

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

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

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

reasonable growth based on the trend.[209] Canada does not address this evidence in its rebuttal written submission either.

118. 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 geographical proximity to the United States. In this sense, the measure allows for reasonable growth.[210] Canada argues that this cannot be a relevant feature in examining the opportunity for reasonable growth because Canada's location always gives it that advantage.[211] This is incorrect, as location is less relevant for high-value, low-volume products for which freight costs are not a significant cost factor. It would also not be a factor for products produced in regions closer to coastal ports than to the Canadian border. Heliène's Canadian factory is in Saulte Ste. Marie, Ontario.[212] Silfab is located in Mississauga, Ontario.[213] Canadian Solar's global headquarters are in Guelph, Ontario.[214] All of these Canadian locations share close proximity to the U.S. border, and would be closer to major U.S. purchasers than the ports of entry for solar products delivered by ocean-going vessels.[215] The fact that imports from Canada grew by [[]] evidences that Canadian producers took advantage of the opportunity for growth.[216] Canada suggests that this is insufficient, because "Article 10.2.5(b) requires allowance for reasonable growth despite the imposition of the safeguard measure, the aim and effect of which is generally to limit global imports."[217] But [[]] growth is [[]],[218] particularly given the aforementioned evidence from the USITC's record, which suggested that exports of CSPV products from Canada would decline.

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[209] USITC Serious Injury Determination Report, Vol. 2, IV-14 (Exhibit CAN-07); U.S. Initial Written Submission, para. 151.

[210] U.S. Initial Written Submission, para. 152.

[211] Canada's Rebuttal Written Submission, para. 94.

[212] Contact – Heliène, https://heliene.com/contact/ (consulted Oct. 27, 2021) (Exhibit USA-54).

[213] Contact – Silfab, https://silfabsolar.com/contact-silfab-page/ (consulted Oct. 27, 2021) (Exhibit USA-55).

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

[215] According to Google Maps, Heliène's Sault Ste. Marie factory is approximately 7.1 miles driving distance to International Bridge, Sault Ste. Marie, MI. Driving Directions - Heliène to United States (consulted Oct. 27, 2021) (Exhibit USA-58). Silfab's Mississagua, ON headquarters are approximately 75.4 miles driving distance to Lewiston, NY, just over the border. Driving Directions – Silfab to United States (consulted Oct. 27, 2021) (Exhibit USA-59). Canadian Solar's Guelph, Ontario headquarters are approximately 81 miles driving distance to Lewiston, NY, just over the border. Driving Directions – Canadian Solar to United States (consulted Oct. 27, 2021) (Exhibit USA-57).

[216] Canada's Rebuttal Written Submission, para. 98; Canada's Initial Written Submission, para. 109.

[217] Canada's Rebuttal Written Submission, para. 98.

[218] U.S. Initial Written Submission, para. 154.

119. Finally, Canada does not effectively grapple with other factors that may have affected imports of its modules into the United States. Canadian investment in U.S. production facilities is highly relevant here and not a "distract{ion}."[219] Both Heliène and Silfab have opened up or expanded manufacturing facilities in the United States since February 7, 2018.[220] For example, Silfab began module assembly in Washington State in 2018,[221] and Silfab was cited as reporting that "it was already considering U.S. locations when the Section 201 tariffs were announced."[222] Canada does not dispute that Canadian firms have shifted production to the United States and that these decisions were in course before the United States announced the solar safeguard measure.[223] The whole point of a company locating production in a foreign country is to source supply to that market from the transplant facility. To the extent [[]], this is not necessarily one of the "effects" that restrictions on imports "would have", and is not evidence of an inconsistency with Article 10.2.5(b).

120. Elsewhere in its rebuttal written submission, Canada states that "the Canadian CSPV products' industry has been reduced by the departure of a number of firms and the remaining suppliers cannot expand rapidly without large and risky investments."[224] Canada relies on Canadian industry's post-hearing rebuttal brief from the USITC investigation in making this assertion.[225] In their August 23, 2017, post-hearing brief, Canadian industry reported that "several firms have entered bankruptcy or otherwise exiting the solar module manufacturing business."[226] Canadian industry representatives also reported that "Canadian Solar Solutions, has reduced substantially its solar module production capabilities at the Guelph facility," purportedly because "the focus of the Guelph plant is shifting to research and development, seeking to bring new technologies to market."[227] Consequently, before the President imposed the safeguard, [[]].

121. Exhibit CAN-85 (CONFIDENTIAL INFORMATION) shows [[]]. This exhibit [[]].

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[219] Canada's Rebuttal Written Submission, para. 101.

[220] U.S. Initial Written Submission, para. 155 (citations omitted).

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

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

[223] Canada's Rebuttal Written Submission, para. 101.

[224] Canada's Rebuttal Written Submission, para. 78.

[225] Canada's Rebuttal Written Submission, para. 72 (citing Canadian Solar, Silfab Solar Inc., and Heliene Inc., Post-Hearing Brief for Injury Phase, 9-12 (Exhibit CAN-13)).

[226] Canadian Solar, Silfab Solar Inc., and Heliene Inc., Post-Hearing Brief for Injury Phase, 9-10 (Exhibit CAN-13).

[227] Canadian Solar, Silfab Solar Inc., and Heliene Inc., Post-Hearing Brief for Injury Phase, 10-11 (Exhibit CAN-13).

According to [[]]. This is all [[]]. This took place before the President announced the solar safeguard measure, meaning that the safeguard measure [[]].

122. Canada's point that [[]] following the safeguard measure but went unused is unavailing.[228] According to page 3 of Exhibit CAN-85 (CONFIDENTIAL INFORMATION), [[]]. This [[]].

123. Moreover, Exhibit CAN-85 [[]].[229] Although [[]]. Thus, [[]] do not fully explain [[]]. For similar reasons, the declarations from Canadian CSPV products suppliers[230] [[]] do not fully explain [[]], given the discussion above.

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

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

125. In subsection A below, we rebut Canada's argument that section 302 of the USMCA Implementation Act (codified at 19 U.S.C. § 4552) is properly within the Panel's terms of reference. Canada concedes that it did not identify section 302 in its consultations request. Under the applicable Rules of Procedure, the Panel's analysis should end there. Nonetheless, in subsection A, we also highlight Canada's strained reading of the applicable Rules of Procedure, including, for example, that Canada obfuscates the distinction between the "legal basis" for a claim and the "measure at issue" under USMCA Article 31.4.2. In addition, we explain that Canada erroneously relies on a NAFTA Chapter 20 report that is not germane to the procedural issue here and WTO panel and Appellate Body reports that rely on key differences between USMCA Chapter 31 and the WTO DSU. In subsection B, we explain that, even if the Panel finds that section 302 is properly within its terms of reference, this provision is not inconsistent with Article 10.3 because an exclusion determination is not a "determination{ } of serious injury, or threat thereof" or an "injury determination{ }" under that Article. For this reason, a Party need not entrust an exclusion determination to the competent investigating authority.

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[228] Canada's Rebuttal Written Submission, para. 101 (citing Exhibit CAN-30 (Sept. 21, 2021) (CONFIDENTIAL INFORMATION), Exhibit CAN-85 (CONFIDENTIAL INFORMATION)).

[229] The United States derived [[]].

[230] Canada's Rebuttal Written Submission, para. 100.

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

126. Canada concedes that it did not identify section 302 in its consultations request.[231] The Panel's analysis of Canada's as such claim should end here.

127. Article 31.4.2 requires a Party to identify the "specific measure or other matter at issue" in its consultations request before requesting a panel under Article 31.6.1.[232] The Parties' failure to resolve the matter at issue through consultations is not "the only precondition for requesting the establishment of a panel."[233] Canada's as such claim in its panel request is not properly within the Panel's terms of reference because it failed to satisfy this precondition. Article 31.7 does not permit a Party to sidestep Article 31.4.2.[234]

128. Canada appears to agree that Articles 31.4.2 and 31.6.1 are connected and related,[235] but obfuscates the difference between the requirement to "identify … the specific measure or other matter at issue" and the requirement to provide "an indication of the legal basis for the complaint" under Article 31.4.2.[236] These are two separate requirements. The United States agrees that Article 31.4.2 imposes a looser standard in requiring an "*indication* of the legal basis," as opposed to Article 31.6.3's "*brief summary of* the legal basis of the complaint sufficient to present the issue clearly."[237] But the somewhat looser standard regarding the *legal basis* for a claim does not excuse a Party from Article 31.4.2's more stringent requirement to "*identif{y}* . . . the *specific* measure or other matter at issue" in its consultations request.[238] Section 302 is the "specific measure" at issue in Canada's as such claim. Canada recognized this fact when it stated that that "U.S. law" constitutes a "measure" that is "subject to dispute settlement under CUSMA."[239] Indeed, USMCA Article 1.5 defines "measure" to include "any

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

[232] U.S. Initial Written Submission, paras. 164-167.

[233] Canada's Rebuttal Written Submission, para. 146.

[234] Canada's Rebuttal Written Submission, paras. 141-142.

[235] Canada's Rebuttal Written Submission, para. 146 ("The word 'matter' repeats from Article 31.4.2, where the Party must identify the specific measure or other matter at issue.").

[236] Canada's Rebuttal Written Submission, paras. 144-145.

[237] Canada's Rebuttal Written Submission, para. 144 (emphasis added).

[238] USMCA, Article 31.4.2.

[239] Canada's Initial Written Submission, paras. 118-120.

law, regulation, procedure, requirement, or practice."[240] Accordingly, Article 10.3 is the "legal basis" for Canada's claim, not section 302.

129. Therefore, it is insufficient for a Party to provide an "indication" – or "a hint, suggestion, or piece of information"[241] – in its consultations request as to the "specific measure or other matter at issue." The noun "identification," not "indication," governs the phrase "the specific measure or other matter at issue" in Article 31.4.2. "Identification" means "{t}he determination of identity; the action or process of determining what a thing is or who a person is; discovery and recognition."[242] The most relevant definition of "specific" is "{e}xactly named or indicated, or capable of being so; precise, particular."[243] Article 31.4.2 requires a Party to "recogni{ze}" the "precise" or "particular" "measure or other matter" in its consultations request, before it may request a panel under Article 31.6.1. Canada failed to do so with regard to section 302. The fact that Canada "generally described the matter of the emergency action taken by the United States on CSPV products" does not mean it identified section 302 as a "specific measure" in its consultations request.[244] The differences between challenging the one-time application of a trade remedy and challenging the legislation upon which that trade remedy was taken are not "negligible."[245] The latter is an entirely different measure adopted by an entirely different authority.

130. Canada also fails in justifying its consultations request in terms of adequately describing the "other matter" at issue. Even under Canada's proposed definition of the term, the vague and generalized of the issue in its consultation failed to identify the "object of consideration or concern, a subject, or an affair" as being the U.S. statute.[246] To the contrary, Canada's consultations request focuses on the U.S. decision to include imports of CSPV products from Canada in the solar safeguard measure, and not on the statutory provisions invoked as authorizing that decision. Canada's interest in consulting on section 302 is simply not evident in its consultations request.

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[240] USMCA, Article 1.5; Canada's Initial Written Submission, para. 119.

[241] Definition of "Indication," *Oxford English Dictionary* (Exhibit CAN-91); Canada's Rebuttal Written Submission, para. 145.

[242] Definition of "Identification," *Oxford English Dictionary*, https://www.oed.com/view/Entry/90995?redirectedFrom=identification& (consulted Oct. 27, 2021) (definition 2) (Exhibit USA-51).

[243] 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).

[244] Canada's Rebuttal Written Submission, para. 147.

[245] Canada's Rebuttal Written Submission, para. 149; USMCA, Article 31.4.2.

[246] Canada's Rebuttal Written Submission, para. 146 (citing Definition of "Matter," *Oxford English Dictionary*, https://www.oed.com/view/Entry/115083 (Exhibit CAN-92)).

131. The Canadian consultations request's vague, blanket reservation of the right to expand consultations and its panel request does not excuse its procedural misstep.[247] Canada had an obligation under Article 31.4.2 to "set out the reasons for the request, including identification of *the specific measure* or other matter at issue and an indication of the legal basis for the complaint."[248] The assertion in a consultations request that a Party may consider "additional measures" to be relevant at some future time has not identified "the specific measure" of concern. Such generic and vague language thus does not establish that section 302 was subject to Canada's request for consultations. Accordingly, that measure cannot be identified as "the measure" at issue for purposes of Canada's panel request under Article 31.6.[249]

132. Canada's discussions of prior NAFTA and WTO reports do not excuse its failure to follow Article 31.4.2.[250] *Corn Brooms* is irrelevant. As Canada correctly observes,[251] the issue there was whether Mexico could make additional *claims* regarding a safeguard measure in its panel request that it did not identify in its consultations request.[252] The issue was not whether Mexico impermissibly added additional *measures* in its panel request, separate and apart from the underlying safeguard measure at issue, that it did not include in its consultations request.

133. The United States agrees that WTO DSU Articles 4 and 6 are structured similarly to USMCA Articles 31.4 and 31.6.[253] Nonetheless, Canada fails to observe a crucial difference between these DSU and USMCA provisions. While DSU Article 4.4 requires a Party in its consultations request to identify the "measures at issue", Article 6.2 requires that a panel request identify the "specific measures at issue."[254] The appellate report in *Argentina – Import Measures* stated that, given this difference between DSU Articles 4.4 and 6.2, "in identifying the measure at issue, greater specificity is required in a panel request than in a consultations request."[255] Thus, it is in the context of observing "the difference in the language" between DSU Articles 4.4. and 6.2 that the report made the statement that a "'precise and exact identity between the specific {*sic*} measures that were the subject of consultations and the specific

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[247] Canada's Rebuttal Written Submission, para. 150 (quoting Canada's Consultations Request).

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

[249] U.S. Initial Written Submission, para. 175.

[250] Canada's Rebuttal Written Submission, paras. 151-154.

[251] Canada's Rebuttal Written Submission, para. 151.

[252] *Corn Brooms*, paras. 51-56 (Exhibit CAN-69).

[253] Canada's Rebuttal Written Submission, para. 153; U.S. Initial Written Submission, para. 169 n.207.

[254] *Compare* DSU, Article 4.4, *with* DSU, Article 6.2 (Exhibit USA-46); Appellate Body Report, *Argentina – Import Measures*, para. 5.9 (Exhibit CAN-93).

[255] *Argentina – Import Measures (AB)*, para. 5.9 (Exhibit CAN-93).

measures identified in the request for the establishment of a panel'" is not required.[256]

134. The USMCA drafters took a different approach in Chapter 31. Article 31.4.2 requires a Party to identify "the specific measure or other matter at issue" in a consultations request, while Article 31.6.3 requires a Party to identify "the measure or other matter at issue" in a panel request. The use of "specific" in the consultations request provision suggests that, as with a WTO panel request, a USMCA consultation request must identify the measure specifically. Compared to the WTO DSU,[257] the USMCA requires a Party to provide greater specificity regarding identified measures in a *consultations request*. By requiring that greater specificity in the consultation request, it is logical then that the USMCA refers simply to "the measure" for purposes of the panel request. The definite article "the" refers back to "the specific measure" that has already been identified in the consultations request. This is what Canada failed to do with respect to section 302.

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

135. Even if Canada's as such claim is properly within the Panel's terms of reference, we explained above in section II.A that a USMCA Party's ultimate determination with respect to "substantial share" and "contribute importantly" is not a "determination{ } of serious injury, or threat thereof" or "injury determination{ }" under Article 10.3. For this reason, Article 10.3 does not require a Party to entrust that determination to the competent investigating authority.[258] Similarly, we explained above in section II.A that Article 10.3's prohibition on negative injury determinations being subject to modification, except by judicial or administrative tribunal review, is inapplicable to the "substantial share" and "contribute importantly" determination.[259]

136. Contrary to Canada's assertion,[260] the United States also argued that "negative injury determinations" in the second sentence of Article 10.3 refers back to "determinations of serious injury, or threat thereof" in the first sentence of that Article. The second sentence does not establish another type of "injury" determination in a safeguard proceeding, affirmative or negative.[261] This argument applied, and continues to apply, equally to Canada's as applied and as such claims.

137. Finally, the United States did not "acknowledge{ } that its law deviates from the

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[256] *Argentina – Import Measures (AB)*, para. 5.13 (Exhibit CAN-93) (quoting *Brazil – Aircraft (AB)*, para. 132 (Exhibit CAN-94)).

[257] *Argentina – Import Measures (AB)*, para. 5.16 (Exhibit CAN-93).

[258] U.S. Initial Written Submission, paras. 57-71.

[259] U.S. Initial Written Submission, paras. 57-71.

[260] Canada's Rebuttal Written Submission, para. 157.

[261] U.S. Initial Written Submission, para. 61.

obligation in Article 10.3."[262] We explained in section II.A that Canada made a similar remark about the U.S. defense to Canada's as applied challenge under Article 10.3. Canada inappropriately cherry-picks aspects of the U.S. initial written submission. The United States clearly framed its argument about "to the extent provided by domestic law" in the alternative to its main argument that an exclusion determination is not a serious injury determination or "injury determination" under Article 10.3 to begin with. For even further clarity, our remarks in section II.A above apply *mutatis mutandis* to Canada's as such claim against section 302.

V. CONCLUSION

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

[262] Canada's Rebuttal Written Submission, paras. 159-160.