

***UNITED STATES – SAFEGUARD MEASURE ON IMPORTS OF CRYSTALLINE
SILICON PHOTOVOLTAIC PRODUCTS***

(DS562)

U.S. RESPONSES TO THE THIRD SET OF QUESTIONS FROM THE PANEL TO THE PARTIES

January 15, 2021

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<i>US – Steel Safeguards (Panel)</i>	Panel Reports, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , 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, as modified by Appellate Body Report WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R
<i>US – Wheat Gluten (AB)</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001
<i>US – Wheat Gluten (Panel)</i>	Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/R, adopted 19 January 2001, as modified by Appellate Body Report WT/DS166/AB/R

TABLE OF U.S. EXHIBITS

EXHIBIT NO.	DESCRIPTION
USA-14	SolarWorld Prehearing Injury Brief and Exhibits
USA-15	Suniva Prehearing Injury Brief and Exhibits
USA-16	SolarWorld Posthearing Injury Brief and Exhibits
USA-17	Suniva Posthearing Injury Brief and Exhibits
USA-18	SolarWorld Prehearing Remedy Brief and Exhibits
USA-19	Suniva Prehearing Remedy Brief and Exhibits
USA-20	SolarWorld Posthearing Remedy Brief and Exhibits
USA-21	Suniva Posthearing Remedy Brief and Exhibits
USA-22	WTO TAO Spreadsheet: U.S. Bound Duty Rate for Subheading 8541.40.60, Line 3, Columns N, Q, R, S
USA-23	WTO Data Portal Spreadsheet: U.S. Bindings for Heading 8541.40, Line 5690, Column G

1 ADDITIONAL INFORMATION

Question 32 (US)

Please provide public versions of the pre- and post-hearing briefs of Suniva and SolarWorld, as well as public versions of the exhibits attached to these briefs.

1. The United States has submitted these briefs and exhibits as attachments to this submission.

2 WHETHER THE USITC FAILED TO PROPERLY DEMONSTRATE THAT CSPV IMPORTS WERE A CAUSE OF SERIOUS INJURY TO THE DOMESTIC INDUSTRY

Question 33 (both parties)

To what extent does the serious injury determination in a safeguard investigation dictate the parameters of the causal link determination that must be made under Articles 2.1 and 4.2(b), first sentence, of the Agreement on Safeguards? When responding to this question, please address the relevance, if any, of China's decision not to challenge the USITC's serious injury determination in these proceedings.

2. Article 2 of the Safeguards Agreement sets out the “Conditions” for taking a safeguard measure. Among these are that the Member has determined that a product is being imported into its territory in such *increased quantities* and *under such conditions* as to *cause* or threaten to cause *serious injury* to the domestic industry that produces like or directly competitive products. As a logical matter, this text calls for an assessment on the one hand of the quantity and conditions in which the product is imported and, on the other hand, of whether the domestic industry is in a state of serious injury, which Article 4.1(a), defines as “a significant overall impairment in the position of a domestic industry.” The term “cause” calls for an assessment of the relationship between the imports and the serious injury. Article 4.2(a) of the Safeguards Agreement further calls for the competent authorities to “evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry” in performing this assessment.

3. The parameters of the causation inquiry will be framed on one end by the increased imports, and on the other end by the “significant overall impairment” that the competent authority has found to exist. An authority may make an affirmative determination only if it finds and demonstrates a causal path between the two, *i.e.*, that the quantities of increased imports and conditions under which they entered the market led to the impaired *overall* state of the domestic industry.

4. As the United States has explained, China’s decision not to bring a claim contesting the U.S. International Trade Commission (“USITC” or “Commission”) finding that the CSPV products industry in the United States was experiencing serious injury precludes review of that finding.¹ The consequence of this failure is that China may not at this point:

¹ U.S. Responses to the Second Set of Questions from the Panel to the Parties, para. 1.

- (1) assert that the USITC acted contrary to the Safeguards Agreement or GATT 1994 in finding that the domestic CSPV products industry was in a position that reflected a significant overall impairment;
- (2) argue that the factors the USITC found to indicate serious injury do not in fact indicate serious injury;
- (3) argue that a causal relationship between increased imports and the factors indicating serious injury does not support the finding of a causal link between imports and serious injury; and
- (4) assert that subsidiary findings made by the USITC or evidence considered by the USITC, individually or collectively, are inconsistent with a finding of serious injury.

Having foregone a challenge to the Commission’s finding of serious injury, China can prevail in its causation challenge only if it can demonstrate that there is an absence of causal relationship between the increased imports and the serious injury that the USITC determined to exist.

Question 34 (both parties)

In arguing that the USITC's explanation concerning the causal link between increased imports and serious injury must be "compelling", China clarifies that it is not "reading additional requirements into Article 3.1 of the Agreement on Safeguards, nor a 'heightened standard' under Article 3.1 as alleged by the United States. This is merely a reflection of the requirement that the explanation must be 'reasoned and adequate' in a context where there is an absence of a coincidence in trends, and how the requirement ought to be applied in such a scenario."² Does each party agree that that the appropriate standard for the Panel's assessment of the USITC's causal link determination is whether the USITC provided a "reasoned and adequate" explanation? If not, please explain.

5. The United States considers that the appropriate inquiry under Article 3.1(a) is whether the report sets out the competent authorities’ “findings and reasoned conclusions.” The ordinary meanings of these terms are as follows:

finding . . . 6 The result of a judicial order or other formal inquiry; a verdict

reason . . . 4 a. v.i. Think in a connected or logical manner; use one’s reason in forming conclusions. . . . **b. v.t.** Arrange the thought of in a logical manner, embody reason in; express in a logical manner.

² China's second written submission, para. 29.

conclusion . . . 4 A judgement or statement arrived at by reasoning; an inference, a deduction.³

Thus, the ordinary meaning of these terms calls for the report to provide the results of the competent authorities’ inquiries and its judgments arrived at in a connected or logical manner.

6. A number of WTO dispute settlement reports have described a panel’s evaluation of whether competent authorities meet this obligation as an inquiry into whether they have provided a “reasoned and adequate explanation.”⁴ The United States fails to see the utility of this reformulation of the terms used in Article 3.1(a). The repetition of the word “reasoned” does not add any clarity, while the substitution of “explanation” for “findings” and “conclusions” seems simply to duplicate one of the aspects that makes a finding or conclusion “reasoned.” The addition of “adequate” actually injects imprecision, as it begs the question of what the “explanation” is “adequate” to do.

7. Having said this, China has framed its arguments in terms of whether the USITC reports provide a reasoned and adequate explanation. The United States has demonstrated that China failed to meet its burden of proof with respect to this formulation, in that the USITC provided a reasoned and adequate explanation that satisfied the obligation under Article 3.1 to publish a report containing the competent authorities’ findings and reasoned conclusions. The United States considers that grounding the analysis in the precise words used in Article 3.1(a) would be the best approach. However, it might also be appropriate to test China’s arguments on an *arguendo* basis against the “reasoned and adequate explanation” formulation as long as the Panel used that as a tool for making a finding as to compliance with the actual terms used in the obligation.

8. In any event, China’s argument that Article 3.1(a) requires a different degree of explanation in the absence of a coincidence in trends has no basis in the Safeguard Agreement or DSU.⁵ China insists that it is not “reading additional requirements into Article 3.1 of the Agreement on Safeguards.”⁶ Yet, that is exactly what it is doing in continuing to assert that competent authorities must provide a “very compelling” explanation why increasing imports are causing serious injury in the absence of declines in some of the injury factors. China provides no textual basis – and there is none – to elevate the standard of review beyond the terms used in Article 3.1(a). Thus, the appropriate legal question on this issue is whether, in light of all of the facts, the Commission’s report sets out conclusions on the causal link that are “reasoned” in the sense of being “connected and logical”.

³ *New Shorter Oxford English Dictionary*, pp. 469, 951, and 2495-2496. (1993).

⁴ *E.g.*, *US – Lamb (AB)*, para. 103.

⁵ China Second Written Submission, paras. 25-29.

⁶ China Second Written Submission, para. 29.

Question 35 (both parties)

Does the Agreement on Safeguards prevent competent authorities from taking into account evidence from outside of the period of investigation when determining that increased imports caused serious injury to the domestic industry? Please explain.

9. No. The Safeguards Agreement does not prevent competent authorities from taking into account evidence from outside the period of investigation for their injury determination. The only limitation set forth in the Agreement is that the evidence considered by a competent authority be part of the record before the agency.

10. Article 3.1 states, in relevant part, that a safeguard measure may be applied only following an investigation, after which, “competent authorities must publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.” Article 4.2(c), which calls on competent authorities to provide “a detailed analysis of the case under investigation as well as a demonstration of the factors examined,” elaborates on the Article 3.1 obligation to provide “reasoned conclusions” in a published report.⁷ These provisions collectively establish that competent authorities should base their injury findings and overall conclusions on the evidence gathered during their investigations. Evidence collected during the investigation pertaining to time periods outside the period of investigation could thus be considered if the competent authority found that evidence to be relevant. To this end, the competent authorities have the discretion to consider the relevance and weight afforded to any such evidence related to the period of time before or after the period of investigation.

11. Here, the Commission issued questionnaires requesting data for the period spanning 2012 to 2016, which it defined as the “period of investigation.” In addition to the questionnaire responses submitted by market participants, the record contained considerable other evidence provided by the parties in their briefs, information collected by Commission staff, and testimony provided at the Commission’s hearings. This information addressed, among other things, imports, prices, and the domestic industry’s performance during the period of investigation, but some of the material fell outside the examined period. For instance, the record contained testimony regarding the failing operations of two of the largest domestic producers in the U.S. market. This testimony, which informed the Commission of Suniva’s April 2017 suspension of operations of its cell and module factories as part of its chapter 11 bankruptcy filing and SolarWorld’s June 2017 issuance of WARN Act notifications and layoff of 360 employees in mid-July 2017,⁸ was directly relevant to the Commission’s analysis as it reflected even further deterioration of the industry immediately following the conclusion of the investigation when imports had reached their peak levels. Although the Commission focused its analysis on the data falling within the period of investigation, it also properly considered and referenced post-period

⁷ *US – Wheat Gluten (AB)*, paras. 55-56.

⁸ USITC November Report, pp. 34, 49 (Exhibit CHN-2).

evidence regarding SolarWorld and Suniva in its analysis of the causal link between increasing imports and the domestic industry's serious injury.

Question 36 (China)

Please respond to the United States' argument that the Agreement on Safeguards does not obligate competent authorities to conduct separate causation analyses for different market segments when the product definition is singular.⁹

Question 37 (both parties)

Assuming that it was appropriate for the USITC to conduct a single causation assessment, to what extent was the USITC required to find that domestic and imported products competed across all market segments to arrive at a finding that the domestic industry was seriously injured by increased imports? Please explain.

12. As the United States has previously explained, given its single domestic like product definition, the Commission was not required to find that competition existed between domestic and imported CSPV products in all three market segments.¹⁰ Article 4.1(a) of the Safeguards Agreement defines "serious injury" as "a significant overall impairment in the position of a domestic industry." Competition across all segments of a segmented market might result in such an overall impairment. Additionally, competition in some, but not all segments, might also lead to an "overall impairment" if there were spillover effects in other segments, or if the effects in one segment were serious enough to result in an "overall impairment."

13. In this case, the Commission considered sector-specific evidence and found the competition between imports and domestic CSPV products across all market segments. The existence of such competition¹¹ reinforced the finding of a high degree of competition between imported and CSPV products from all sources in the U.S. market and supported the Commission's ultimate conclusion that imports caused serious injury to the domestic industry.

14. Indeed, the evidence showed a lack of significant differences in physical characteristics of CSPV products from foreign and domestic sources and a substantial overlap in shipments by U.S. importers and U.S. producers to the residential, commercial, and utility segments. As the United States detailed in its most recent written submission, domestic and imported CSPV products were highly substitutable.¹² CSPV products from both sources were generally sold within similar efficiency and wattage ranges during the period of investigation, and modules were sold in both 60-cell and 72-cell forms and to all three market segments through overlapping

⁹ United States' second written submission, para. 44.

¹⁰ U.S. Second Written Submission, paras. 41-47.

¹¹ USITC November Report, pp. 29-30, 58-61 (Exhibit CHN-2).

¹² U.S. Second Written Submission, paras. 51-65.

channels of distribution.¹³ In addition, most market participants reported that domestic and imported CSPV products were interchangeable.¹⁴ These facts demonstrated the meaningful competition between imports and the domestically produced product across the U.S. market, thus disproving respondents' assertions of attenuated competition, particularly in the utility segment.

15. Against this factual backdrop of direct competition across market segments, the Commission explained how imports at prices lower than the domestically produced products exerted pressure on domestic producers to reduce their prices for CSPV products to levels that resulted in their net sales values remaining near or below their costs throughout the period of investigation. As discussed in the United States' prior written submissions, the record showed that price played an important role in purchasers' purchasing decisions, and that the "majority of purchasers reported that they had increased their purchases of imported CSPV products, most often identifying lower price as the reason for increasing their purchases of imported CSPV products."¹⁵ Moreover, a substantial number of purchasers confirmed that domestic producers reduced prices and/or rolled back announced price increases to compete with imported CSPV products.¹⁶ This pricing pressure resulted in a collapse in domestic prices, which in turn, caused the domestic industry's poor financial condition to deteriorate even further. Through this demonstration of direct competition, pricing pressure, and the industry's deteriorating financial condition, the Commission was able to establish a clear causal link between increasing imports and the domestic industry's serious injury.

Question 38 (China)

Please refer the Panel to record evidence that directly supports China's position that: (1) only "limited" competition existed between domestic and imported CSPV products in the residential and commercial market segments;¹⁷ and (2) the domestic

¹³ USITC November Report, pp. 29-30, 54 (Exhibit CHN-2).

¹⁴ USITC November Report, pp. 29-30 (Exhibit CHN-2).

¹⁵ See, e.g., U.S. Comments on China Responses to Panel's First Set of Questions, paras. 15-21; U.S. Second Written Submission, paras. 66-80; see also USITC November Report, p. 49 (Exhibit CHN-2).

¹⁶ USITC November Report, pp. 45-46 (Exhibit CHN-2).

¹⁷ China's response to the Panel's questions to the parties following the first substantive meeting, para. 22.

industry was not even competitive in the portion of the utility segment that it could supply.¹⁸

Question 39 (China)

China contends that the domestic industry's higher costs, small scale, and inefficiency prevented it from capitalizing on the global decline in CSPV prices.¹⁹ Please explain, referring to record evidence that supports this contention.

Question 40 (China)

China appears to argue that the domestic industry lost market share only because of its limited capacity and inability to keep up with the growth in demand.²⁰ (1) Is this China's position? Please explain. (2) If so, please reconcile this position with the USITC's findings that the domestic industry lost sales to imports and had unused capacity during the POI.²¹

Question 41 (US)

Please explain how the USITC's assessment of the domestic industry's declining market share accounted for: (1) the significant growth in the domestic market during the period of investigation and (2) the fact that a significant amount of this growth was in the utility segment where the domestic industry had a relatively limited presence.

16. The Commission, in assessing the domestic industry's declining market share, accounted for the significant growth in U.S. demand during the period of investigation, including in the utility segment. At the outset, it is important to note that, in doing so, the Commission considered this factor in conjunction with the other relevant factors, including those demonstrating the domestic industry's dismal and deteriorating financial condition. Based upon the totality of the evidence, the Commission concluded that there was a clear causal link between the imports' increased volume and market share and the domestic industry's serious injury.

17. The analysis undertaken by the Commission is consistent with the holistic analysis suggested by Articles 2.1, 4.2(a), and 4.2(b). For example, the report in *US – Wheat Gluten (AB)* explained:

As for the second element under Article 2.1, we see it as a complement to the first. While the first element refers to increased imports specifically, the second relates more generally to the prevailing 'conditions' in the marketplace for the

¹⁸ Ibid., para. 49.

¹⁹ China's second written submission, paras. 105 and 109.

²⁰ China's second written submission, paras. 91-94.

²¹ See, e.g., USITC Final Report, Exhibit CHN-02, pp. 42 and 49 (lost sales); 47 and fn. 261 (unused capacity).

product concerned that may influence the domestic industry. . . . Interpreted in this way, the phrase ‘under such conditions’ is a shorthand reference to the remaining factors listed in Article 4.2(a), which relate to the overall state of the domestic industry and the domestic market, as well as the other factors ‘having a bearing on the situation of {the} industry’. The phrase ‘under such conditions’, therefore, supports the view that, under Articles 4.2(a) and 4.2(b) of the Agreement on Safeguards, the competent authorities should determine whether the increase in imports, not alone, but in conjunction with the other relevant factors, cause serious injury.²²

Thus, the manner in which increased imports cause serious injury to a domestic industry will vary depending upon the interplay of “conditions of competition” and “relevant factors” in a given investigation.

18. Here, the Commission demonstrated within the relevant conditions of competition how increased imports caused serious injury by not only directly taking sales from the domestic industry, but also through adverse effects on the industry’s sales prices. These price declines, in turn, negatively affected the domestic industry’s profitability and financial performance, and consequently, the industry’s ability to increase capacity to meet a larger share of the exploding demand.²³ Specifically, the Commission found that while annual U.S. installations of on-grid photovoltaic systems increased by 338 percent between 2012 and 2016, imports surged at an even greater rate, by 492.4 percent during this time period.²⁴ As imports increased at a greater rate than apparent U.S. consumption in each full year of the period of investigation except one (2013/2014), they took market share directly at the expense of the domestic industry.²⁵ The domestic industry not only was unable to take advantage of this demand growth, but it also lost sales to the increasing imports.²⁶ Indeed, seven domestic producers reported that they had lost sales to imports since 2012,²⁷ with four of those producers estimating that their lost sales totaled 950,000 kW. Another domestic producer, which did not provide a quantity estimate, reported lost sales totaling \$148.7 million.²⁸ Consistent with this, purchasers confirmed the domestic industry’s lost sales, with 91 of 104 responding purchasers reporting that they had purchased imports CSPV products instead of domestically produced CSPV products, and 73 of those

²² *US – Wheat Gluten (AB)*, para. 78.

²³ See *US – Steel Safeguards (Panel)*, para. 10.320; see also *US – Wheat Gluten (Panel)*, paras. 8.109-8.110.

²⁴ USITC November Report, pp. 21, 46 (Exhibit CHN-2).

²⁵ USITC November Report, p. 48.

²⁶ USITC November Report, p. 49 (Exhibit CHN-2); USITC November Report, p. V-28 (Exhibit CHN-3).

²⁷ USITC November Report, p. 49 (Exhibit CHN-2).

²⁸ USITC November Report, p. V-28 (Exhibit CHN-3).

purchasers reporting that import prices were lower than those of the domestic products, and 33 purchasers reporting that lower price was a primary reason of those purchases.²⁹

19. Consequently, notwithstanding favorable demand conditions and two sets of trade measures that were imposed during the period of investigation, the domestic industry suffered from dozens of plant closures and low capacity utilization rates, with excess capacity for modules producers increasing from 391,194 kW in 2012 to 576,718 kW in 2016.³⁰

20. At the same time, the domestic prices on sales of all five pricing products declined overall and the industry's ratio of COGS to net sales, which had been high throughout the period of investigation, soared to over 100 percent by the end of the period of investigation.³¹ The Commission explained that imports that were highly substitutable with the domestic like product were generally lower priced. These low-priced imports exerted downward pricing pressure on the domestic producers, which reported the need to reduce prices due to the low-priced imports.³² A substantial number of purchasers (38 of 104 purchasers) also confirmed that producers had to reduce prices of their CSPV products to compete with these lower-priced imports, with several of them also reporting steeper price reductions in 2016 as the domestic industry's market share fell to its lowest levels.³³ As prices declined, the domestic producers were unable to cover their costs and incurred hundreds of millions of dollars in losses.³⁴ In addition, although many firms sought to open or add production in the United States to take advantage of the demand growth, low import-driven prices foreclosed profits, forcing new entrants and existing producers to shut down facilities.³⁵

21. Thus, the Commission demonstrated that, to the extent that domestic producers had a "limited presence" in the utility segment, this was not only the result of the dramatically increasing imports that took sales from the domestic industry, but also was due to the surging imports that flooded the U.S. market at low and declining prices, which adversely affected the domestic industry's financial performance and made it difficult for the domestic industry to utilize existing capacity or add additional capacity to scale that made it more competitive in the utility segment.³⁶

²⁹ USITC November Report, p. 49 n.272 (Exhibit CHN-2).

³⁰ USITC November Report, p. 32 (Exhibit CHN-2).

³¹ USITC November Report, pp. 38, 43 (Exhibit CHN-2).

³² USITC November Report, p. 41 (Exhibit CHN-2).

³³ USITC November Report, pp. 42, 45-46 (Exhibit CHN-2).

³⁴ USITC November Report, p. 48 (Exhibit CHN-2).

³⁵ USITC November Report, pp. 48-49 (Exhibit CHN-2).

³⁶ USITC November Report, pp. 60-61 (Exhibit CHN-2).

22. In sum, the Commission provided a thorough explanation demonstrating that the domestic industry's decline in market share during a time of explosive growth in domestic demand was a factor indicative of the serious injury caused by increased imports.

3 WHETHER THE USITC FAILED TO ENSURE THAT THE INJURIOUS EFFECTS OF OTHER FACTORS WERE NOT ATTRIBUTED TO INCREASED IMPORTS

Question 42 (both parties)

Does the strength of the determination concerning the causal link between increased imports and the serious injury experienced by the domestic industry impact the obligation under Article 4.2(b), second sentence, of the Agreement on Safeguards to ensure that injury caused by other factors is not attributed to increased imports? Please explain.

23. The strength of the causal link does not change the *legal* obligation under Article 4.2(b) to assure that injury caused by other factors is not attributed to increased imports. From a factual perspective, the strength of the link could affect the *factual* non-attribution analysis undertaken in any particular investigation. It is not unreasonable to expect that if the causal link between imports and injury is particularly strong, it will be relatively more straightforward to conclude that other factors are not causing serious injury.

24. In this case, however, it is not even necessary for the Panel to resolve this question because the Commission found that the other factors at issue did not cause injury to the domestic industry.

Question 43 (China)

With respect to the USITC's analysis of the impact of changes in government incentive programs on the domestic industry, China appears to argue that the USITC's focus on the growing demand was unreasonable in part because: (1) "[t]he USITC also provided no insight as to the beneficial effects of [Federal Tax Income Credit] for domestic producers"³⁷ and (2) "[renewable portfolio standards] particularly encouraged the development of utilities, where the domestic industry had a limited representation and competitiveness".³⁸ Please explain whether record evidence establishes that the domestic industry did not benefit from these measures.

Question 44 (US)

With respect to the USITC's analysis of the impact of changes in government incentive programs on the domestic industry, China argues that the USITC "never explored the effects of the termination or reduction of incentives directly linked with the residential and commercial segments of the market (i.e. Section 1603 Treasury Cash Grant Program, net metering), or which directly targeted domestic producers

³⁷ China's second written submission, para. 183.

³⁸ China's second written submission, para. 185.

(i.e. Advanced Energy Manufacturing Tax credit and the U.S. Department of Energy's section 1705 Loan Guarantee)."³⁹ Please respond to this argument.

25. The Commission examined changes in the federal and state programs and considered their overall impact on the domestic industry. Regarding the federal incentive programs identified by China (*i.e.*, Section 1603 Treasury Cash Grant Program, Advanced Energy Manufacturing Tax credit and the U.S. Loan Guarantee), these programs terminated or were relevant only to projects commissioned *before* 2012, the first full year of the period of investigation.⁴⁰ Specifically, the Section 1603 Treasury Grant Program required solar projects to have commenced construction by December 31, 2011 and completed by 2016, the end of the period of investigation. In addition, the Advanced Energy Manufacturing Tax credit reached its funding cap in 2010, and the U.S. Loan Guarantee Program expired in 2011.⁴¹ Although China acknowledges these facts in its opening statement, it asserts that “the effects of their terminations were felt during the POI.”⁴² But this is pure speculation on China’s part, as it cites to nothing in the record to support this presumption. In fact, as the Commission observed, most questionnaire respondents reported that the level or availability of federal incentives had not changed since 2012, and that any terminations had not led to an increase in the price of solar-generated electricity. Consequently, it was reasonable for the Commission to have concluded that these programs’ expirations did not have any adverse effects on prices of CSPV products or the domestic industry’s performance during the period of investigation.

26. Regarding net metering programs at the state level, the Commission explained that these programs allow residential and commercial customers that generate their own electricity from solar to receive credit for excess electricity fed into the grid.⁴³ The Commission found that in 2013, there were more than 43 states, the District of Columbia, and four territories with some form of net energy metering legislation or regulation in process. By July 2017, the vast majority – 38 states, the District of Columbia, and three territories – still had mandatory net metering rules in place.⁴⁴ To the extent that a handful of states had phased out their net metering or made changes to other state programs, the Commission found that there was a “wide array” of incentives designed to lower the cost of solar project development and that each state implemented a number of programs at varying levels to encourage solar installation.⁴⁵ For

³⁹ China's second written submission, para. 182.

⁴⁰ SEIA Prehearing Injury Brief, Exhibit 39 (Exhibit CHN-63); USITC November Report, V-32 (Exhibit CHN-3).

⁴¹ SEIA Prehearing Injury Brief, Exhibit 39 (Exhibit CHN-63); USITC November Report, pp. 62-63 (Exhibit CHN-2); USITC November Report, V-32 (Exhibit CHN-3).

⁴² China Opening Statement, Second Panel Meeting, para. 52.

⁴³ USITC November Report, p. V-35 (Exhibit CHN-3).

⁴⁴ USITC November Report, p. V-35 n.70 (Exhibit CHN-3).

⁴⁵ USITC November Report, p. 62 (Exhibit CHN-2).

instance, states and utilities encouraged the installation of solar projects through other programs such as renewable energy rebates, which refunded a portion of the system installation costs to customers that installed photovoltaic systems, and feed-in-tariffs, which paid solar electric generators a known rate for electricity fed into the grid.⁴⁶ In light of each state's unique mix of programs, the Commission observed that firms' responses varied regarding how the level or availability of state and local incentives had changed since 2012.⁴⁷

27. In any event, as discussed in the U.S. prior written submissions,⁴⁸ the Commission found that the overall level of incentives being offered during the period of investigation had not caused an increase in the net cost to the solar electricity generator as China appears to believe.⁴⁹ As we noted, questionnaire respondents reported that the availability of government incentives had led to a *decline* in the price of solar-generated electricity since 2012, "making CSPV products more cost-competitive with other sources of electricity."⁵⁰ Thus, due to the availability of such programs, domestic producers did not need to reduce their prices to make solar energy more competitive with other sources of energy, the demand for which continued to soar throughout the period of investigation. Confirming this, most questionnaire respondents informed that changes in the price of solar generated electricity had not at all affected the prices of CSPV products since 2012.

28. Thus, contrary to China's assertion, the evidence does not indicate that changes in incentives placed pressure on domestic producers "to reduce their final prices to stay competitive."⁵¹ The Commission's analysis of changes in government incentive programs demonstrated otherwise and that any such changes had not caused injury to the domestic industry at all.

Question 45 (China)

In the context of its analysis concerning the impact of changes in government incentive programs on the domestic industry, the USITC found that "[m]ost questionnaire respondents reported that the availability of these incentives has led to a decrease in the price of solar-generated electricity".⁵² China submits that "the fact that prices of solar energy did not 'increase' is an indication that prices of CSPV products actually declined, to make up lost incentives previously enjoyed by both

⁴⁶ USITC November Report, p. V-34 (Exhibit CHN-3).

⁴⁷ USITC November Report, Table V-22 (Exhibit CHN-3).

⁴⁸ See, e.g., U.S. Comments on China Responses to Panel's First Set of Questions, paras. 141-146; U.S. Second Written Submission, paras. 134-146.

⁴⁹ China Second Written Submission, para. 187.

⁵⁰ USITC November Report, p. 63 (Exhibit CHN-2).

⁵¹ China Second Written submission, para. 187.

⁵² USITC Final Report, Exhibit CHN-02, p. 63 (referring to USITC Final Staff Report, Exhibit CHN-03, p. V-37).

the domestic industry and by the purchasers".⁵³ Please explain how record evidence supports this argument.

Question 46 (both parties)

Did the domestic industry's costs decline along the same trend and at the same magnitude as the declines in prices of CSPV products? Please explain.

29. No. First, the domestic industry's costs did not decline along the same trend as the declines in prices of CSPV products. The record demonstrates that while costs per kilowatt for U.S. producers of CSPV modules declined from \$1,476 in 2012 to \$1,174 in 2013, \$895 in 2014, \$820 in 2015, and \$783 in 2016,⁵⁴ the U.S. producers' prices experienced different year to year trends. As the Commission explained:

Prices declined substantially in 2012, but stabilized somewhat after imports from China became subject to antidumping and countervailing duty orders in December 2012, additional investigations on imports from China and Taiwan were commenced at the end of 2013, and imports grew at a slower pace than apparent U.S. consumption between 2013 and 2014. As imports from additional sources entered the U.S. market and rapidly increased to higher volumes, however, the domestic industry's prices steadily fell throughout 2016.⁵⁵

30. Industry publications also recognized the stabilization of CSPV module prices that occurred during the period of investigation, informing that although installed photovoltaic systems prices declined steadily in all three market segments, "{f}or most of the period, declining system prices largely reflect falling non-module costs, as module prices remained relatively stable from 2013 to 2015."⁵⁶ In fact, respondent SEIA's own publications reported that prices for both cells and modules declined steeply in 2012, but then began to *increase* and *stabilize* through the fourth quarter of 2013 and 2014, driven primarily by the *CSPV I* and *II* orders imposed on Chinese and Taiwanese cells and modules. SEIA's industry reports further indicated, however, that by the first quarter of 2016, prices of both cells and modules began to fall, blaming the decline on an imbalance between supply and demand.⁵⁷

⁵³ China's second written submission, para. 192.

⁵⁴ USITC November Report, Table III-21 (Exhibit CHN-3). Most production of CSPV cells and CSPV modules during the period of investigation was performed in the United States by integrated producers that manufacture and internally consume CSPV cells for their CSPV module operations. USITC November Report, p. 16 (Exhibit CHN-2).

⁵⁵ USITC November Report, p. 46 (Exhibit CHN-2).

⁵⁶ USITC November Report, p. 46 (Exhibit CHN-2); USITC November Report, pp. V-8-9 (Exhibit CHN-3).

⁵⁷ USITC November Report, p. 46 n.253 (Exhibit CHN-2); USITC November Report, pp. V-9, V-27 (Exhibit CHN-3); SEIA's Prehearing Brief, Exhibit 36-B at 16 (Exhibit CHN-60).

31. In addition to the disparate trends that occurred after the imposition of the *CSPV I* orders and initiation of the *CSPV II* investigations, the magnitude of the declines in costs and prices in 2016 were also dissimilar. Specifically, while costs per kilowatt for U.S. producers of CSPV modules declined by \$37 from \$820 in 2015 to \$783 in 2016 (or by 4.5 percent), the domestic producers' reported prices fell more sharply, by 18.3 percent for 60 cell modules and 31.7 percent for 72 cell modules.⁵⁸ There was also a difference in the magnitude of overall price and cost declines that occurred over the entire period of investigation. The costs per kilowatt for U.S. producers of CSPV modules declined by \$693 from \$1,476 in 2012 to \$783 in 2016 (or by 46.9 percent), but the domestic producers' reported prices declined by 48.5 percent to as much as 73.2 percent.⁵⁹ Industry publications reported that module prices fell by 58.5 percent between 2012 and 2016.⁶⁰

32. The price stabilization that occurred during the period of investigation and differences in the magnitude of cost and price declines belie China's assertions that the continuous declines in costs and increased efficiencies were responsible for the declining prices during the period of investigation. Rather than correlating to declining costs, prices declined as imports that were from sources not covered by the *CSPV I* and *CSPV II* orders flooded the U.S. market, forcing domestic producers to reduce their prices to levels that fell below their costs, resulting in the domestic industry's downward financial spiral.

Question 47 (China)

Is it China's position that declining raw material costs and increased production efficiencies was an "other" factor of injury?⁶¹ If so, please explain:

- a. Why China believes this to be the case considering that the declining raw material costs and increased production efficiencies would normally allow for a firm to increase its profit margin or decrease its prices while maintaining the same level of profit margin; and**
- b. Whether record evidence directly demonstrates that the domestic industry was injured as a result of declining raw material costs and increased production efficiencies.**

Question 48 (US)

China submits that the record evidence demonstrates that "the whole market worked under the assumption that declines in raw material costs and enhanced efficiencies would allow for greater price competitiveness of solar energy. And this

⁵⁸ USITC November Report, p. 46 n.252 (Exhibit CHN-2).

⁵⁹ USITC November Report, p.42 (Exhibit CHN-2).

⁶⁰ USITC November Report, p. V-27 (Exhibit CHN-3).

⁶¹ China's second written submission, para. 176; China's response to the Panel's questions to the parties following the first substantive meeting, para. 208.

was admitted by the USITC Final Report.”⁶² Please comment, explaining whether the USITC’s analysis accounts for such evidence.

33. The information cited by China addresses *solar generated electricity*, specifically, the historical decline in costs of solar electricity generation or market participant expectations for such costs to fall to meet costs of conventional energy sources.⁶³ None of this cited evidence, however, supports a finding that declining costs and enhanced efficiencies, as a rule, must result in a decrease in prices of *CSPV products*. This is particularly true in light of the hundreds of millions of dollars in losses that were already being incurred by the domestic producers during the period of investigation.

34. Moreover, a simple examination of the price data on the record demonstrates the fallacy in China’s assumption. The price data submitted by U.S. producers and U.S. importers show that prices for CSPV products, in fact, had stabilized after the *CSPV I* orders were imposed and new investigations were initiated in *CSPV II*.⁶⁴ Industry reports similarly reported that although installed photovoltaic systems prices declined steadily in all three market segments,⁶⁵ prices for CSPV products had increased in 2013 through 2015.⁶⁶ As the Commission explained, “{f}or most of the period, declining system prices largely reflect falling non-module costs, as module prices remained relatively stable from 2013 to 2015.”⁶⁷ This price stabilization that occurred under the protective effect of the orders confirms that the prices of CSPV products do not necessarily follow declining costs and increased efficiencies.

35. Although prices for CSPV products dropped in 2016, the Commission explained how this was caused by surging imports from countries not covered by the *CSPV I* and *CSPV II* antidumping and countervailing duty orders. Following imposition of the orders, the Chinese industry had rapidly expanded its production facilities into other countries, exacerbating the oversupply conditions.⁶⁸ The foreign industries’ collective capacity, which consistently exceeded their production levels, and their excess capacity grew between 2014 and 2016 as the largest firms in China increased their global capacity by offshoring their production operations

⁶² China’s second written submission, para. 197, footnotes 363-366.

⁶³ SEIA Prehearing Injury Brief, Appendix A & Exhibits 10, 20, 93 (Exhibits CHN-19, CHN-40, CHN-44, CHN-49 and CHN-109); SEIA Posthearing Injury Brief at Exhibit 53 (Exhibit CHN-157); Injury Hearing Transcript, p. 401 (Exhibit CHN-9); USITC November Report, p. 61 (Exhibit CHN-2).

⁶⁴ USITC November Report, p. 46 (Exhibit CHN-2).

⁶⁵ USITC November Report, p. V-9 (Exhibit CHN-3).

⁶⁶ USITC November Report, p. V-27 (Exhibit CHN-3).

⁶⁷ USITC November Report, p. 46 (Exhibit CHN-2); USITC November Report, pp. V-8-9 (Exhibit CHN-3).

⁶⁸ USITC November Report, p. 44 (Exhibit CHN-2).

without closing any of their existing capacity in China.⁶⁹ And as imports from additional sources entered the U.S. market and rapidly increased to higher volumes,⁷⁰ domestic prices for CSPV products fell to levels that exceeded producers' costs, demonstrating a direct correlation between prices and low-priced imports.⁷¹ Respondent SEIA's own publications confirmed the direct connection between prices and import volumes, informing that the price declines of CSPV products that occurred after prices had stabilized after imposition of the *CSPV I* and *II* orders were due to an imbalance between supply and demand.⁷² Thus, rather than declining costs and increased efficiencies, the evidence clearly showed that declining prices were the result of surging imports.

Question 49 (both parties)

The United States argues that "[a]s the Commission discussed, the domestic CSPV products industry was unprofitable and its COGS to net sales ratio remained high and accelerated over 100 percent by the end of the POI. The objective of grid parity would not explain producers' acceptance of such continual losses."⁷³

a. (To the United States): Is it the United States' position that the need to attain grid parity did not have downward price pressure on the domestic industry because of its deteriorating financial performance? Please explain.

36. The domestic industry's unprofitable financial state was one of the compelling pieces of evidence supporting the Commission's conclusion that the need for *solar generators* to attain grid parity was not the reason for the domestic industry producing *CSPV products* to reduce prices for its cells and modules during the period of investigation.

37. Other record evidence supporting the Commission's conclusion demonstrated the complexities of grid parity. Far from being a uniform concept, the data showed that the leveled cost of energy of photovoltaic systems varied by region, time of day, and availability of other electricity sources, and even could vary widely for a given energy source.⁷⁴ Indeed, as the Commission observed, installed photovoltaic system prices differed greatly from state to state and project to project, with a considerable spread among the prices in each market segment.⁷⁵

⁶⁹ USITC November Report, pp. 40-41 (Exhibit CHN-2).

⁷⁰ USITC November Report, pp. 44, 46 (Exhibit CHN-2).

⁷¹ USITC November Report, pp. 46-47 (Exhibit CHN-2); USITC November Report, pp. V-8-9 (Exhibit CHN-3).

⁷² USITC November Report, p. 46 n.253 (Exhibit CHN-2); USITC November Report, pp. V-9, V-27 (Exhibit CHN-3); SEIA's Prehearing Brief, Exhibit 36-B at 16 (Exhibit CHN-60).

⁷³ United States' first written submission, para. 212.

⁷⁴ USITC November Report, pp. 25-26 (Exhibit CHN-2); USITC November Report, p. V-38 (Exhibit CHN-3).

⁷⁵ USITC November Report, p. 26 n.111 (Exhibit CHN-2).

Respondent SEIA’s own expert confirmed that “[i]t is possible that, within a particular state, the residential solar segment might have achieved grid parity but the utility-scale segment has not, or vice versa.”⁷⁶ And China itself stated that the cost for solar-generated electricity systems in the utility segment was already at grid parity, which “made them cost-competitive with other energy sources.”⁷⁷ Given this great variability, there could not have been one absolute target price that all domestic producers strove to meet in selling their CSPV products.

38. In addition, the record evidence further demonstrated that the need to attain grid parity had not even translated into continuously declining prices for CSPV products as China asserts. Rather, the price data showed that prices for CSPV products, in fact, had stabilized after the *CSPV I* orders were imposed and new investigations were initiated in *CSPV II*.⁷⁸ The Commission observed that although installed photovoltaic system prices declined steadily in all three market segments,⁷⁹ this was due to falling non-module costs rather than to any price changes in CSPV products between 2013 and 2015.⁸⁰ Although U.S. module prices declined in 2016, this was, as the Commission explained, a direct result of low-priced imports from additional sources that entered the U.S. market. Moreover, as those imports rapidly increased to higher volumes in 2016, U.S. module prices rapidly declined.⁸¹ This correspondence demonstrates that, rather than the need for solar generators to attain grid parity, low-priced imports were the real factor in the overall price declines of CSPV products during the period of investigation.

b. (To China): Please respond to the United States’ argument.

Question 50 (US)

The United States submits that “[t]he Commission closely examined the prices of CSPV products and natural gas, but found that any disparity between them did not demonstrate that the need to attain grid parity was responsible for the price declines or a cause of injury to the domestic industry.”⁸² Please explain why the absence of a correlation between the price trends of natural gas and CSPV products

⁷⁶ See SEIA Prehearing Injury Brief, Appendix A p. 13 (Exhibit CHN-19).

⁷⁷ China Comments on U.S. Responses to Panel’s First Set of Questions, para. 144.

⁷⁸ USITC November Report, p. 46 (Exhibit CHN-2); USITC November Report, pp. V-8-9 (Exhibit CHN-3).

⁷⁹ USITC November Report, p. V-9 (Exhibit CHN-3).

⁸⁰ USITC November Report, p. 46 (Exhibit CHN-2); USITC November Report, pp. V-8-9 (Exhibit CHN-3).

⁸¹ USITC November Report, p. 46 (Exhibit CHN-2); USITC November Report, pp. V-8-9 (Exhibit CHN-3).

⁸² U.S. responses to the second set of questions from the Panel to the parties, para. 44.

would necessarily suggest that the need to achieve grid parity did not have any downward price pressure on CSPV products.

39. The lack of correlation between the price of natural gas and CSPV products, when considered together with other objective evidence on the record, provided support for the Commission’s conclusion that any need for *solar generators* to achieve grid parity did not place any downward pressure on domestic producers to decrease prices of *CSPV products* during the period of investigation.

40. Specifically, objective evidence demonstrates a high variability in the levelized cost of energy, which differed by region, time of day, and availability of other electricity sources.⁸³ No party has disputed this fact. This uncontested evidence means that there was no single “grid price,” and thus no single target for solar generators to achieve parity. In a given location, solar power might at any time be at, above, or below, the price for other sources. The Commission observed that, consistent with this conclusion, most U.S. producers reported that changes in conventional energy had not affected the price of solar-generated electricity since 2012.⁸⁴ In addition, most questionnaire respondents most often pointed to large volumes of low-priced imports and did not mention gas prices as the reason for price declines. And even foreign producers’ own financial statements attributed the decline in prices of CSPV products to global excess capacity.⁸⁵

41. Moreover, if China were correct that prices for solar power were determined primarily by prices for natural gas, and that this factor determined prices for CSPV products, one would expect prices for CSPV products to correlate with prices for this traditional energy source. The Commission’s observation that no such correlation existed is one indicator that China’s assertion is incorrect.

42. Further, as respondent SEIA’s expert explained, the intent of reaching grid parity was to become competitive with other sources of electricity in order to create demand.⁸⁶ Here, notwithstanding China’s asserted “constant gap” in prices, demand for CSPV products experienced unprecedented growth during the period of investigation. In fact, in 2016, solar power accounted for the largest share of new U.S. electricity generation, surpassing natural gas, coal, and wind with 39 percent of total added capacity, a fact that invalidates China’s theory that costs of generating solar electricity needed to be at “grid parity” in order to be competitive.

⁸³ USITC November Report, pp. 25-26 (Exhibit CHN-2); USITC November Report, p. V-38 (Exhibit CHN-3).

⁸⁴ USITC November Report, p. 64 n.376 (Exhibit CHN-2).

⁸⁵ USITC November Report, p. 65 (Exhibit CHN-2).

⁸⁶ See SEIA Prehearing Injury Brief, Appendix A p. 18 (Exhibit CHN-19).

Question 51 (China)

The USITC appears to have focused its analysis regarding grid parity on natural gas price trends because natural gas-generated electricity set the levelized cost of energy during peak periods of demand.⁸⁷ Please explain whether it was appropriate for the USITC to do so.

Question 52 (China)

The United States argues that "as China itself observes, the cost for solar-generated electricity systems in the utility segment was already at grid parity, which 'made them cost-competitive with other energy sources'."⁸⁸ Please respond to this argument.

4 WHETHER THE USITC ACTED INCONSISTENTLY WITH GATT 1994 ARTICLE XIX:1(A) BY FAILING TO DEMONSTRATE THAT IMPORTS INCREASED "AS A RESULT OF UNFORESEEN DEVELOPMENTS AND OF THE EFFECT OF THE OBLIGATIONS INCURRED" BY THE UNITED STATES

Question 53 (US)

Please respond to China's argument that the USITC failed to demonstrate that it was "completely unforeseen" that, in a situation where US demand for CSPV products significantly exceeded domestic production capability, the imposition of anti-dumping and countervailing duties would have led to increased imports from other countries.⁸⁹

43. As a preliminary matter, a development does not have to be *completely* unforeseen to qualify as an "unforeseen development" for purposes of Article XIX of the GATT 1994. China's second written submission appears to suggest that the origin of this invented phrase is the USITC's report since, when discussing the imposition of antidumping and countervailing duties, China writes that "[t]he USITC Supplemental Report maintains that it was *completely unforeseen* that [such] duties against China would lead to increased imports from other count[r]ies."⁹⁰

44. The USITC Supplemental Report uses no such phrase. Instead, the USITC applied the correct standard and examined whether developments that resulted in increased imports were "unexpected."⁹¹ China's attempt to heighten the standard is contrary to the meaning of the terms used in GATT 1994 Article XIX:1(a). This is similar to the point we made in our opening statement with regard to China's argument that the United States was "completely surprised" that

⁸⁷ USITC Final Report, Exhibit CHN-02, footnote 378.

⁸⁸ Opening statement of the United States of America at the Panel's second videoconference with the parties, para. 24 (referring to China's comments on the responses of the United States to the Panel's questions to the parties, para. 144).

⁸⁹ China's second written submission, paras. 269-277.

⁹⁰ China Second Written Submission, para. 269.

⁹¹ USITC Supplemental Report, pp. 2-3 (Exhibit CHN-6).

antidumping and countervailing duties led to increased exports from other countries.⁹² The relevant standard is not whether circumstances were a “complete surprise” as that would mean they were “unforeseeable” in the sense of “unpredictable” or “incapable of being foreseen, foretold or anticipated” instead of “unexpected.”

45. With respect to the specific argument referenced in this question, China misses the point the United States has made. “Unforeseen developments” are those that a Member did not foresee at the time of undertaking a commitment. A showing that a Member might have predicted particular developments in response to facts that did not exist at that time or based on economic argumentation goes to the separate question of whether that development was *foreseeable*. As we have explained, such arguments are not relevant to the identification of unforeseen developments.⁹³

46. In its Supplemental Report, the USITC correctly focused on whether U.S. negotiators foresaw the market-distorting effects of excess capacity and the export-oriented nature of Chinese manufacturers’ production of modules when the United States undertook bound duties at zero percent. It correctly found that they did not, and China provides no evidence to the contrary.

47. China tries to argue that the operation of its companies is merely a “natural shift” or “well-documented phenomenon” according to market-based principles and economic concepts that the USITC comprehends.⁹⁴ China even attempts to liken these developments to the “international trade version of professing *complete surprise* that a store would lose customers to competitor stores after raising prices higher than the competitor stores.”⁹⁵ Not only does this further reveal China’s proclivity for applying the wrong standard, the analogy is not an apt one. As the United States has countered, China’s “store” analogy “only applies if one store was able to undercut the other on price by misappropriating its trade secrets or engaging in some other form of unfair trade practices.”⁹⁶

Question 54 (China)

China's arguments concerning whether the USITC appropriately demonstrated that imports increased as a result of "unforeseen developments" focus on the alleged lack of explanation and evidence demonstrating how the government policies

⁹² U.S. Opening Statement, para. 45.

⁹³ U.S. Opening Statement, para. 45.

⁹⁴ China’s Response to Panel’s Questions to Parties Following the First Substantive Meeting, para. 219-221.

⁹⁵ China’s Response to Panel’s Questions to Parties Following the First Substantive Meeting, para. 219 (emphasis added).

⁹⁶ U.S. Second Written Submission, para. 157.

adopted by China resulted in increased exports from countries other than China.⁹⁷ However, the USITC appears to have found that the imports increased as a result of a broader confluence of unforeseen circumstances under which: (1) global production capacity of CSPV products increased, particularly in China; (2) much of this capacity was directed to the US market; and (3) the United States' use of anti-dumping and countervailing duty measures had limited effectiveness due to rapid changes in the global supply chains and manufacturing processes which aimed at facilitating imports of CSPV products first from China and Chinese Taipei and later from Chinese producers' affiliates in other countries.⁹⁸ Please reconcile China's critique with this broader confluence of circumstances established by the USITC.

Question 55 (United States)

Please respond to China's argument that the USITC failed to demonstrate that: (1) there were government policies by China to encourage production both inside and outside of China; (2) Chinese producers took advantage of such government policies to build production facilities in countries outside of China; and (3) the increase in US imports from these other countries came from those Chinese producers that had built facilities in countries outside of China.⁹⁹

48. China's argument does not take into account the full record before the USITC during the safeguard investigation or the evidence before the Panel in this dispute, including exhibits the United States has submitted. As for (1), the USITC noted the findings of the U.S. Department of Commerce when, in 2011, it issued an affirmative antidumping duty determination and identified 12 programs that "provided countervailable subsidies to *producers/exporters* in China."¹⁰⁰ These countervailable subsidies "included programs involving preferential policy lending; provision of polysilicon, land, and electricity for less than adequate remuneration; preferential taxes; import tariff and value added tax exemptions for use of imported equipment; value added tax rebates on foreign-invested enterprises' purchase of Chinese-made equipment; and export credit subsidies."¹⁰¹ Additional details regarding these programs are found in Exhibit USA-11 that contains the complete ITC report for this AD/CVD investigation.

49. As the USITC noted in the Supplemental Report, during this "period of favorable government industrial policies, plans, and support, {the} capacity and production of CSPV products in China increased significantly" and "{a} substantial share of the CSPV modules manufactured in China was directed to markets outside of China."¹⁰² This is supported by the data showing that China's 46 GW production capacity greatly exceeded home market shipments

⁹⁷ See China's second written submission, paras. 281-291.

⁹⁸ See, e.g., USITC Supplemental Report, Exhibit CHN-06, p. 10.

⁹⁹ China's second written submission, paras. 284-285.

¹⁰⁰ USITC Supplemental Report, pp. 5-6 (emphasis added) (Exhibit CHN-6).

¹⁰¹ USITC Supplemental Report, p. 6 (Exhibit CHN-6).

¹⁰² USITC Supplemental Report, p. 7 (Exhibit CHN-6).

of 21 GW in 2016, and that the absolute volume of Chinese exports increased from 9.6 GW in 2012 to 13.9 GW in 2016.¹⁰³

50. Moreover, the USITC credited petitioner SolarWorld’s observation “that an explicit goal of the government of China’s programs, plans, and support was to expand capacity and production and to target export markets where governments offered support for solar installations (i.e., solar consumption).”¹⁰⁴ And while the USITC noted that China’s internal consumption of solar products grew during the period of investigation, the export-oriented module production capacity in China *more than doubled* its home market shipments in 2016.¹⁰⁵

51. As for (2), in response to the initial U.S. antidumping and countervailing duty orders in 2011, Chinese producers took advantage of the favorable programs already in place and the overcapacity those programs facilitated to shift their operations as different combinations of cells and modules assembled or manufactured in China and Chinese Taipei increased their presence in the U.S. market. After an additional U.S. antidumping and countervailing duty order (*CSPV II*) issued to address these new import patterns that avoided the initial orders, Chinese companies once again modified their operation, this time to offshore production facilities in countries not subject to any of the earlier trade remedy measures. The USITC Supplemental Report found that “the six largest firms producing CSPV cells and CSPV modules in China increased their global CSPV cell and CSPV module manufacturing capacity by expanding investments in third countries without reducing their capacity in China.”¹⁰⁶

52. As for (3), the United States has made two points. First, the USITC specifically noted that the imports from the countries where Chinese firms added capacity, collectively, more than *doubled* their share of the U.S. market during the time just after the trade remedy orders in *CSPV II* took effect. China cannot reasonably argue that its producers’ massive increase in production capacity in those countries is no way related to a significant increase in contemporaneous exports to the United States from those same countries. Second, Article XIX does not require arguments or evidence on unforeseen developments at a more granular level than what the USITC provided or examined during the safeguard investigation. In other words, the United States does not need to show import-specific information on a transaction-by-transaction (or company-by-company or country-by-country) basis.

Question 56 (both parties)

China argues that the USITC failed to establish the requisite connection between increased imports and unforeseen developments because a significant share of the increased imports in the US market originated from Korea where "there was no

¹⁰³ USITC Supplemental Report, p. 8, fn 25 (Exhibit CHN-6).

¹⁰⁴ USITC Supplemental Report, p. 8, fn 25 (Exhibit CHN-6).

¹⁰⁵ USITC Supplemental Report, p. 8, fn 25 (Exhibit CHN-6).

¹⁰⁶ USITC Supplemental Report, p. 8 (Exhibit CHN-6).

Chinese producer that had substantial CSPV production factories"¹⁰⁷ and where no Chinese CSPV producers "controlled" the market.¹⁰⁸

a. (To the United States): Please respond to China's argument.

53. There are several problems with this argument. First, China asserts that the USITC based its unforeseen developments analysis only on “Chinese producers” who “did not control any significant CSPV production in Korea.”¹⁰⁹ That is not the case. The ITC based its analysis on “the six largest firms producing CSPV cells and CSPV modules in China.” The USITC November Report lists Hanwha Qidong as one of these six companies. Hanwha Qidong’s corporate parent (Hanwha) produces cells and modules in Korea.

54. Second, regardless of whether Chinese producers controlled significant production in Korea, this country was one of four specifically targeted by Chinese firms to offshore their production operations in efforts to circumvent the *CSPV I* and *CSPV II* orders.¹¹⁰ The increase in imports from Korea therefore provided direct support for the Commission’s finding of unforeseen developments.

55. Third, China does not even cite to the most accurate table for its assertions regarding the increase in imports from Korea. Table C-7 of the Annex to the November Report,¹¹¹ upon which China relies, was sourced from U.S. customs statistics for headings 8541.40.6020 and 8541.40.6030. These headings covered *all* solar cells and modules, including out of scope thin film photovoltaic products.¹¹² In addition, those headings were *underinclusive*, as they did not account for some of the covered imported products.¹¹³ Consequently, the USITC did not rely on these data in its unforeseen developments analysis, citing instead to tables derived from questionnaire responses limited to covered products.¹¹⁴ Thus, the data on which China relies is not relevant to the USITC’s unforeseen developments analysis.

56. In any event, Table C-7 indicates that Korea accounted for one-third of the increase in imports by value. Malaysia, Thailand, and Vietnam (the three other countries where Chinese firms had added both cell and modules capacity) accounted for almost two-thirds of the total increase shown in that table. The USITC’s findings regarding increased imports from all of

¹⁰⁷ China's second written submission, para. 294.

¹⁰⁸ China's second written submission, para. 297-302.

¹⁰⁹ China second written submission, para. 299.

¹¹⁰ USITC November Report, pp. 44-45 (Exhibit CHN-2).

¹¹¹ China second written submission, para. 301, note 492.

¹¹² USITC November Report, p. I-8 (Exhibit CHN-3).

¹¹³ USITC November Report, p. I-8 (Exhibit CHN-3).

¹¹⁴ *E.g.*, USITC Supplemental Report, pp.7, fn 24; 8, fn 26-28; 9, fn 29-31 (Exhibit CHN-6).

these countries where Chinese companies had added both CSPV cell and module capacity were sufficient to establish that increased imports were “as a result of unforeseen developments” for purposes of Article XIX:1(a).

b. (To China): Please reconcile this argument with the apparent affiliation between Hanwha in Korea and Hanwha Quidong in China and the USITC’s broader finding that, following the imposition of the CSPV II orders, the largest firms producing CSPV products in China increased their global manufacturing capacity by expanding investments in affiliated companies in third countries without reducing their capacity in China.¹¹⁵

Question 57 (both parties)

In its Final Staff Report and the Supplemental Report, the USITC notes that imports of CSPV products fall under subheading 8541.40.60 of the Harmonized Tariff Schedule of the United States, and have been free of duty under the general duty rate since at least 1987.¹¹⁶

a. Does this treatment establish that the United States was prevented from raising tariffs on CSPV products? Please explain.

57. Yes, the information the USITC included in its report is directly related to the tariff concession that the United States undertook to bind its rate of duty at zero percent. The USITC specifically referenced the tariff treatment for CSPV products under the relevant tariff schedule. That tariff schedule reflects the rates in the Schedule of the United States annexed to the GATT 1994 as an integral part of Part I of the WTO Agreement, as provided for in paragraph 7 of Article II of the GATT 1994. For this reason, by identifying the tariff treatment under the relevant tariff schedule, the USITC identified the commitment that the United States has taken in the form of a rate of duty bound at zero percent. This, in turn, shows that the United States was prevented from raising its tariffs on CSPV products and needed to exercise its right under Article XIX of the GATT 1994 to temporarily suspend its tariff concession obligating the duty-free entry of CSPV products into its territory.

b. Does each party agree that, pursuant to subheading 8541.40.60 of the United States’ Schedule of concessions (Goods Schedule) annexed to the GATT 1994, the bound duty rate for CSPV products is zero percent? Please explain.

58. Yes, the United States confirms – and China has not contested, let alone rebutted – that pursuant to subheading 8541.40.60 of the United States’ Schedule of concessions annexed to the GATT 1994, the duty rate for CSPV products imported into the United States is bound at zero percent. Public sources available through the WTO confirm that this is the case. The WTO Tariff Analysis Online (TAO) provides access to the WTO’s Integrated Data Base (IDB) and

¹¹⁵ USITC Supplemental Report, Exhibit CHN-06, pp. 8-10.

¹¹⁶ USITC Final Staff Report, Exhibit CHN-03, p. I-38; USITC Supplemental Report, Exhibit CHN-06, fn.

Consolidated Tariff Schedules (CTS), which reports the tariff commitments WTO Members have made. The TAO system establishes that the duty rate for CSPV products, when entered under subheading 8541.40.60 of the United States' Schedule of concessions, is bound at zero percent.¹¹⁷

59. A second system, the WTO Data Portal, confirms that, for the United States, a maximum binding of zero percent applies to all five tariff lines under the six-digit heading for 8541.40, including the tariff line 8541.40.60 for the CSPV products at issue in this dispute.¹¹⁸

60. With reference to these systems and the publicly available information they contain, the United States has conclusively established that it has undertaken obligations in the form of tariff concessions that bind its rate of duty for CSPV products at zero percent. The United States could not, consistent with these commitments, raise tariffs to remedy the serious injury to its domestic solar manufacturing industry caused by increased imports. Thus, it needed to invoke Article XIX of the GATT 1994 to justify a temporary deviation from the commitments.

Question 58 (US)

Please explain what it means for US tariff treatment of a product to fall under the "general duty rate". Is the United States obligated to apply the "general duty rate", or does the "general duty rate" also cover situations where the bound duty rate is higher and a lower rate is being applied on a most-favoured nation (MFN) basis?

61. Under the Harmonized Tariff Schedule of the United States (HTSUS), all goods imported into the customs territory of the United States are subject to duties according to the General Notes and General Rules of Interpretation of the HTSUS and other legal authority. The specific rates of duty for imported merchandise are identified in the HTSUS columns 1 ("general" and "special") and 2.

62. In the normal course, the United States applies the general duty rate from column 1 to imported merchandise. Although it would be consistent with WTO obligations to set the general rate at a level below the WTO bound rate, the United States does not do this. In nearly all cases, the United States sets the general duty rate equal to the WTO bound rate. In any event, this theoretical possibility is meaningless when the bound rate is set at zero pursuant to a GATT 1994 tariff concession. In such a case, zero would be the only general rate consistent with U.S. WTO obligations.

¹¹⁷ WTO TAO Spreadsheet: U.S. Bound Duty Rate for Subheading 8541.40.60, Line 3, Columns N, Q, R, S (Exhibit USA-22).

¹¹⁸ WTO Data Portal Spreadsheet: U.S. Bindings for Heading 8541.40, Line 5690, Column G (Exhibit USA-23).

**5 WHETHER THE USITC FAILED TO PROVIDE A SUFFICIENT PUBLIC SUMMARY OF
CONFIDENTIAL DATA TO ALLOW FOR INTERESTED PARTIES TO PRESENT A MEANINGFUL
DEFENCE**

Question 59 (China)

China appears to argue that the USITC failed to "set forth adequate and reasoned explanation for its findings" because it did not characterize certain confidential information on the record.¹¹⁹ With reference to specific findings in the USITC's report, please explain why this was the case.

¹¹⁹ China's second written submission, para. 318.