

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

(DS562)

**COMMENTS OF THE UNITED STATES
ON CHINA’S RESPONSE
TO THE THIRD SET OF QUESTIONS FROM THE PANEL**

January 29, 2021

TABLE OF CONTENTS

1 Additional Information	5
Question 32 (US)	5
2 Whether the USITC failed to properly demonstrate that CSPV imports were a cause of serious injury to the domestic industry	5
Question 33 (both parties).....	5
Question 34 (both parties).....	6
Question 35 (both parties).....	7
Question 36 (China).....	10
Question 37 (both parties).....	12
Question 38 (China).....	13
Question 39 (China).....	16
Question 40 (China).....	17
Question 41 (US)	21
3 Whether the USITC failed to ensure that the injurious effects of other factors were not attributed to increased imports	21
Question 42 (both parties).....	21
Question 43 (China).....	22
Question 44 (US)	25
Question 45 (China).....	25
Question 46 (both parties).....	27
Question 47 (China).....	28
Question 48 (US)	30
Question 49 (both parties).....	31
Question 50 (US)	32
Question 51 (China).....	32
Question 52 (China).....	34
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.....	35
Question 53 (US)	35
Question 54 (China).....	35

Question 55 (US) 39

Question 56 (both parties)..... 39

Question 57 (both parties)..... 40

Question 58 (US) 42

5 Whether the USITC failed to provide a sufficient public summary of confidential data to allow
for interested parties to present a meaningful defence 42

 Question 59 (China)..... 42

TABLE OF REPORTS

SHORT FORM	FULL CITATION
<i>US – Lamb (AB)</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001
<i>US – Lamb (Panel)</i>	Panel Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/R, WT/DS178/R, adopted 16 May 2001, as modified by Appellate Body Report WT/DS177/AB/R, WT/DS178/AB/R
<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-24	U.S. Department of Commerce, Federal Register Notice, Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China, 77 Fed. Reg. 63788 (Oct. 17, 2012)
USA-25	Memorandum to Paul Piquado, Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China (Oct. 9, 2012)

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.

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.

1. China argues that “serious injury” and “causal link” are “distinct elements” under the Safeguards Agreement and, as such, the “serious injury” determination “is context for, but does not dictate, the ‘causal link’ determination[.]”¹ China seems to misunderstand this question, which asked “[t]o what extent does the serious injury determination in a safeguard investigation dictate the *parameters* of the causal link determination,”² and not the *outcome* of that determination. There is no dispute that a competent authority, having found the existence of serious injury, is not foreclosed from determining that increased imports are not the cause of that serious injury. The question, as the United States understands it, is about the extent to which the serious injury determination cabins the separate determination regarding the causal link between increased imports and serious injury and, in particular, how a panel should proceed when, as here, a complaining Member challenges the competent authorities’ causation finding but not the serious injury finding.

2. In that regard, China asserts that the “serious injury” finding “in no way prejudices or limits how the Panel should assess the authority’s finding of ‘causal link’” but China does not offer any legal support for this assertion, which is a *non sequitur*.³ The serious injury found to exist is at the center of the causation analysis because the “causal link” to be evaluated is between increased imports and serious injury. While the nature of the serious injury does not dictate a particular methodology or type of analysis, the analysis used must be one capable of evaluating how imports might (or might not) lead to the factual conditions found to be injurious. In any case, the authorities must holistically examine the relationship between the increasing imports and the interplay among the various indicia of the industry’s overall condition.

3. China asserts that where “the investigating authority’s finding of serious injury is ... not challenged in a dispute, a WTO panel should still examine the authority’s finding of the

¹ China’s Responses to Panel’s Third Set of Questions, paras. 3, 4.

² Panel Question 33 (emphasis added).

³ China’s Responses to Panel’s Third Set of Questions, para. 8.

existence of causal link as a separate and legally distinct question if the complaining Member has brought a claim regarding the existence of such causal link under Article 4.2(b)."⁴ It is true that even when the complaining Member has conceded the WTO-consistency of a competent authority's finding of serious injury (or chosen not to pursue a challenge to that finding), the complaining Member still may properly challenge, and the Panel should then examine, the authority's finding of a causal link for consistency with the Safeguards Agreement. But that does not mean, as China has asserted, that a Member may use a claim under Article 4.2(b) to make a collateral attack on a finding of serious injury that it has not challenged under Article 2.1 or 4.2(a).

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."⁵ 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.

4. China states that the “appropriate standard for the Panel’s assessment of a competent authority’s causal link determination in a general sense is whether the USITC provided a ‘reasoned and adequate’ explanation,” and that what is “reasoned and adequate” will vary in different circumstances.⁶ Specifically, China asserts that “in the absence of a coincidence in trends, an explanation is ‘reasoned and adequate’ only when it is ‘compelling.’”⁷

5. As the United States explained in response to this question, the Panel’s review should be grounded upon the words used in Article 3.1(a) – specifically, whether the report sets out the competent authorities’ “findings and reasoned conclusions.” But regardless of whether the Panel frames its analysis in the actual terms of Article 3.1(a) or China’s “reasoned and adequate” formulation, it would be erroneous to conclude that a “compelling” explanation is required when there is an absence of an overall coincidence in trends. Article 4 of the Safeguards Agreements requires the competent authorities to conduct a fact-based analysis of a number of factors. There is no basis to conclude in the abstract that the absence of one potential relationship (an “overall coincidence in trends”) means that other evidence must reach a particular (*i.e.*, “compelling”)

⁴ China’s Responses to Panel’s Third Set of Questions, para. 9.

⁵ China's second written submission, para. 29.

⁶ China Responses to Panel’s Third Set of Questions, para. 11.

⁷ China Responses to Panel’s Third Set of Questions, paras. 14, 16.

level. Article 4 calls for an evaluation of the evidence and argumentation *as a whole*, and not a segmented analysis of trends versus other considerations.

6. Depending on the specific facts and conditions of competition present in an investigation, an inverse relationship between imports and some injury factors may not be “utterly inconsistent with any inference of a causal link” as China asserts.⁸ In this investigation, certain of the domestic industry’s performance factors indicated overall improvement during the period of investigation despite an injurious increase in the volume of imports. As detailed in the U.S. written submissions, this improvement in some factors was not inconsistent with the finding of a causal link when considered within the context of U.S. market conditions. Specifically, the Commission examined the factors against the background of an unprecedented and sharp increase in demand and imposition of two sets of antidumping and countervailing duty orders on CSPV imports from China and Taiwan.⁹ The Commission discussed how in 2012, the domestic industry was first materially injured by CSPV imports from China, and then materially injured by imports from China and Taiwan that were not covered by the *CSPV I* investigations. And although the domestic industry’s condition improved after imposition of the antidumping and countervailing duty orders and initiation of the *CSPV II* investigations, low-priced imports from other third countries not covered by the orders proceeded to flood the market between 2015-2016, exerting downward pricing pressure on the domestic prices, which in turn resulted in the financial deterioration of the industry’s poor condition. Thus, the record of the investigation demonstrated a clear causal link between imports and the domestic industry’s serious injury.

7. Nothing in the Safeguards Agreement required that the Commission provide an additional “compelling” explanation. The Safeguards Agreement sets forth only one standard, whether the report sets out the competent authorities’ “findings and reasoned conclusions,” which the Panel applies in reviewing a complainant’s claims. China has not provided any textual basis – and there is none – for its asserted sliding scale approach or to elevate the degree of explanation required beyond the terms used in Article 3.1(a).

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.

8. China concedes that the Safeguards Agreement does not expressly address whether evidence from outside the period of investigation may be considered by competent authorities when analyzing causation.¹⁰ China nonetheless asserts that the Commission “should have

⁸ China Responses to Panel’s Third Set of Questions, para. 14.

⁹ See, e.g., U.S. Responses to Panel’s First Set of Questions paras. 16-21; U.S. Second Written Submission, paras. 22-30, 81-86.

¹⁰ China Responses to Panel’s Third Set of Questions, para. 17.

limited its examination of evidence to that evidence within the POI” because Article 4.2(b) requires an investigating authority to conduct the investigation on the basis of “objective evidence.”¹¹

9. As the United States explained in response to this question, 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.¹² Thus, although evidence falling within the period of investigation is certainly probative to the current situation of the domestic industry, evidence collected during the investigation pertaining to events or information outside the period of investigation could also constitute objective evidence and can be considered by the competent authority if such evidence is relevant and the parties had an opportunity to respond.

10. The previous panel reports cited by China do not suggest otherwise.¹³ The panels in *US – Steel Safeguards* and *US – Wheat Gluten* explained that competent authorities must consider information falling within the period of investigation, but did not find that the authority’s examination must be limited to a certain time period or that the authority was prohibited from considering relevant information falling outside the period of investigation.¹⁴ In fact, the panel in *US – Wheat Gluten* found that “any determination of serious injury must pertain to the *recent* past,”¹⁵ which supports the conclusion that competent authorities’ analysis may encompass consideration of information outside the period of investigation so long as it was temporally near the domestic industry’s current injury.

11. Indeed, the text of the Safeguards Agreement itself confirms this. It directs competent authorities to base their injury findings and overall conclusions on the evidence gathered during their investigations. Article 3.1, which is entitled “*Investigation*” 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.” The remainder of Article 3.1 elaborates upon the investigative steps that the competent authorities must include to seek out pertinent information and focuses upon “‘interested parties,’ who must be notified of the investigation, and who must be given an opportunity to submit ‘evidence,’ as well as their ‘views’, to the competent authorities.” Interested parties must also be given an opportunity to “respond to the

¹¹ China Responses to Panel’s Third Set of Questions, para. 19.

¹² U.S. Responses to Panel’s Third Set of Questions, paras. 9-11.

¹³ China Responses to Panel’s Third Set of Questions, para. 20.

¹⁴ *US – Steel Safeguard (Panel)*, para. 10.165; *US – Wheat Gluten (Panel)*, para. 8.81.

¹⁵ *US – Wheat Gluten (Panel)*, para. 8.81 (emphasis in original).

presentations of other parties.”¹⁶ Notably absent are any time limitations with respect to the information collected during the investigation.

12. Here, the Commission defined the period of investigation as spanning 2012 to 2016, and issued questionnaires requesting data for this time period. Consequently, the Commission also focused its causation analysis on the increase in the volume of imports that occurred between 2012 to 2016¹⁷ and the declining prices and the domestic industry's dismal and deteriorating financial performance that occurred during this time period.¹⁸ It, however, also referred to corroborating post-POI information regarding 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. As the Commission observed, this evidence was consistent with the declines in many of the domestic industry's financial trade and financial indicators between 2015 and 2016, as imports reached their pinnacle.¹⁹

13. China criticizes the Commission for considering this information regarding Suniva and SolarWorld. But China's assertions that the Commission cannot consider events because they occurred outside the POI, and that the Commission “cherry picked” this evidence and failed to consider post-POI evidence in a “balanced way”²⁰ have no merit.

14. As demonstrated above, the Safeguards Agreement does not prohibit investigating authorities from considering information collected in an investigation that is outside the period of investigation. This most recent information about two primary domestic CSPV producers²¹ was relevant as it reflected even further deterioration of the industry immediately following the conclusion of the investigation when imports had reached their peak levels. The parties also had ample opportunity to respond to this information, which was provided as testimony during the Commission's injury hearing. In fact, respondent SEIA expressly “acknowledge{d} the poor performance of the industry after the POI” in its posthearing brief, and did not dispute that this information reflected the domestic industry's deteriorating performance.²²

¹⁶ *US – Wheat Gluten (AB)*, para. 54.

¹⁷ USITC November Report, p. 21 (Exhibit CHN-2).

¹⁸ USITC November Report, pp. 31-43 (Exhibit CHN-2).

¹⁹ USITC November Report, p. 49 (Exhibit CHN-2).

²⁰ China Response to Panel's Third Set of Questions, paras. 22-23.

²¹ Suniva and SolarWorld together accounted for the vast majority of U.S. CSPV cell production in 2016 and the large majority of module assembly during the period of investigation. USITC November Report, p. 6 n.82 (Exhibit CHN-2).

²² SEIA Posthearing Injury Brief, p. 5 (Exhibit CHN-22).

15. Contrary to China’s assertion, the Commission did not consider this post-POI information in an unbalanced manner. In fact, in Table III-3 of its November Report, the Commission listed all of the firms that closed facilities in 2017 (Navajo Universal, Silicon Energy, Suniva, and tenKsolar) as well as plant opening (SunPower) that year.²³ That the Commission did not explicitly reference SunPower’s plant opening within the text of its causation analysis does not mean that it did not consider it. As the Commission noted, the firm had not submitted a response to the Commission’s U.S. producer questionnaire in the first instance,²⁴ and in any event, SunPower’s plant opening does nothing to diminish the evidence regarding the failing operations of the two largest domestic producers in the U.S. market. Thus, there was nothing WTO-inconsistent about the Commission’s consideration of this post-POI information.

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.²⁵

16. China insists that it “has not argued that there is any need for separate causation analysis for each segment,”²⁶ but asserts that the Commission erred by “ignor{ing}” the existence and factual relevance of different market segments. China cites to the panel findings in *US – Lamb* as an example of “how an authority should deal with different segments.”²⁷ This panel report, however, is inapposite because it involved the issue of *industry* segments, and not *market* segments.

17. Specifically, in *US – Lamb*, the panel accepted *arguendo* the Commission’s domestic industry definition as including all industry segments, including growers and feeders of live lamb, on the one hand, and packers and breakers of lamb meat, on the other. The panel

²³ USITC November Report, Table III-3 (Exhibit CHN-3). In addition to SunPower’s reported plant opening in 2017, the Commission also considered other information falling outside the POI submitted by respondents. For instance, the Commission accounted for respondents’ arguments regarding the historical desire for CSPV generated electricity to meet grid parity prices. SEIA Posthearing Injury Brief, pp. 92-94 (Exhibit CHN-22). The Commission found that “while conventional energy prices may account for some of the decrease in the prices of CSPV product in some years, they do not explain the consistent observed price declines over the 2012-2016 period.” USITC November Report, p. 64 (Exhibit CHN-2).

²⁴ USITC November Report, Table III-3 notes (Exhibit CHN-3). SunPower reported that it had previously partnered with Flextronics to produce CSPV modules in Milipitas, CA, but that the facility was “not adequately scaled.” As a result, it stopped production. USITC November Report, p. 7 n.17 (Exhibit CHN-2). Because SunPower did not submit a U.S. producer questionnaire response, however, the Commission was unable to include the firm in its analysis of the domestic industry’s performance over the period of investigation.

²⁵ United States' second written submission, para. 44.

²⁶ China Responses to Panel’s Third Set of Questions, para. 24.

²⁷ China Responses to Panel’s Third Set of Questions, para. 25.

explained that to provide an adequate explanation, the Commission report should have contained a discussion regarding:

(i) why conclusive inferences from the data concerning *one* industry segment can be drawn for *another* industry segment, or (ii) why the factual constellation in particular industry segment in the given case does *not* permit data collection (i.e., *not* a “factor of a *objective* and *quantifiable* nature”), or (iii) renders a certain injury factor not probative in the circumstances of a particular industry segment (i.e., *not* a factor “*having a bearing* on the situation of that industry” within the meaning of SG Article 4.2(a).²⁸

Unlike in *US – Lamb*, the issue raised by China is not whether the Commission collected and analyzed trade and financial data separately for different types of producers along the production chain. (In fact, the Commission did just this sort of analysis by gathering and analyzing separate data on CSPV cell producers and CSPV module producers.) Rather, the question raised in this dispute is whether the Commission sufficiently analyzed the factual distinctions and degree of competition within the three sectors (residential, commercial, and utility) of the U.S. market.²⁹

18. As the United States has explained, the Commission gathered data on and examined the distinctions that existed in the different market segments to determine the degree of competition between imports and the domestic like product.³⁰ The Commission determined that all three segments experienced considerable growth,³¹ imports and domestically produced CSPV products competed against each other across all three sectors of the U.S. market,³² and that domestic producers lost market share in each of the market segments to imports that were lower priced than domestically produced products and that caused domestic prices to decline during the period of investigation.³³ Contrary to China’s view, this analysis “address{ed} specifically the nature of the interaction between the imported and domestic products.”³⁴ It provided a holistic analysis of the three segments that supported the ultimate conclusion with respect to injury to “the producers as a whole of the like or directly competitive products.” That is all that the Safeguard Agreement calls for.

²⁸ *US – Lamb (Panel)*, para. 7.141 (emphasis in original).

²⁹ China Responses to Panel’s Third Set of Questions, paras. 24-34.

³⁰ U.S. Responses to Panel’s Third Set of Questions, paras. 12-15.

³¹ USITC November Report, p. 27 (Exhibit CHN-2).

³² USITC November Report, pp. 29-30 (Exhibit CHN-2).

³³ USITC November Report, pp. 43-50 (Exhibit CHN-2).

³⁴ China Responses to Panel’s Third Set of Questions, para. 27.

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.

19. China concedes that the “Agreement on Safeguards does not clarify the ‘extent’ to which imported and domestically produced products need to compete,”³⁵ but that “for an analysis to demonstrate causation, it must address specifically the nature of the interaction between the imported and domestic products in the domestic market of the importing country.”³⁶ The United States does not disagree. The U.S. response to this question detailed how such an assessment informs the degree of competition between products from the different sources, and that the domestic industry’s serious injury could be demonstrated through competition across all segments, but could also result from the effects in one or some of those segments if serious enough to result in “overall impairment.”³⁷

20. In this investigation, the Commission analyzed the extent of competition between imports and the domestic like product, and set forth a detailed analysis in its November Report establishing that direct competition existed between imports and the domestic like product in each of the three segments of the U.S. market. China, ignoring the Commission’s analysis, criticizes the USITC’s November report as containing “no . . . analysis.”³⁸ Citing again to the panel report in *US – Lamb*, China argues that the Commission had “four options” to conduct a “proper causation analysis taking into account the different conditions of competition in various market segments,” but that the Commission failed to consider the lack of domestic industry participation in the utility segment.³⁹

21. China’s arguments fail for several reasons. First, Article 4.2(b) does not set forth any particular methodology, and the finding cited by China in no way suggests that the Commission must analyze market segments in any particular manner. Furthermore, as discussed in the U.S. comments to China’s response to question 36 above, *US – Lamb* pertained to *industry* segments, and not *market* segments, and is therefore irrelevant to China’s claims challenging the Commission’s causation analysis.⁴⁰

³⁵ China Responses to Panel’s Third Set of Questions, paras. 27-28.

³⁶ China Responses to Panel’s Third Set of Questions, para. 27.

³⁷ U.S. Responses to Panel’s Third Set of Questions, paras. 12-15.

³⁸ China Responses to Panel’s Third Set of Questions, para. 28.

³⁹ China Responses to Panel’s Third Set of Questions, paras. 29-34.

⁴⁰ *US – Lamb (Panel)*, para. 7.177.

22. Second, China’s assertion that “the domestic industry and imports were not in direct competition” in the utility sector⁴¹ is simply wrong. As the United States explained in its prior written submissions, the domestic producers had not made a business decision to serve only the residential and commercial segments as China asserts, but rather were active in all segments of the market, including the utility sector.⁴² The questionnaire response data confirmed that the domestic industry sold CSPV products to all sectors of the U.S. market including the utility segment,⁴³ that the domestic industry dedicated capacity and added specific assembly lines to serve this sector,⁴⁴ and that it had competed for and won bids for utility-scale sales.⁴⁵ Consequently, objective evidence supports the Commission’s finding of direct competition between the domestic like product and imports not only in the residential and commercial sectors, but also in the utility segment.

23. Third, any limitations in the domestic industry’s ability to supply the large-scale utility segment or the entirety of the increase in demand in that sector was not indicative of attenuated competition as China asserts, but rather demonstrated the serious injury caused by increased imports. As the Commission found, the unrelenting volumes of low-priced imports actually increased at a *greater* rate than apparent U.S. consumption in all but one year of the period of investigation.⁴⁶ In other words, imports not only captured the entirety of the explosive increase in demand, but also took existing sales volume from the domestic industry. These imports also exerted downward pricing pressure on domestic prices, negatively impacting the domestic industry’s financial performance and making it difficult for the domestic industry to increase capacity to a scale that made it more competitive in this segment.⁴⁷

24. Finally, China’s focus on the size of the utility sector does nothing to lessen the overlap and competition in the residential and commercial sectors, which were important to both domestic producers and importers. Nor does it diminish the injury caused by the low-priced imports in those other market segments.

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

⁴¹ China Responses to Panel’s Third Set of Questions, para. 30.

⁴² See, e.g., U.S. Responses to Panel’s First Set of Questions, paras. 26-30; U.S. Comments on China’s Responses to the Panel’s First Set of Questions, paras. 9-14.

⁴³ USITC November Report, p. 58 (Exhibit CHN-2).

⁴⁴ USITC November Report, p. 59 (Exhibit CHN-2).

⁴⁵ USITC November Report, pp. 58-59 (Exhibit CHN-2).

⁴⁶ USITC November Report, p. 48 (Exhibit CHN-2).

⁴⁷ USITC November Report, pp. 47-49 (Exhibit CHN-2).

products in the residential and commercial market segments;⁴⁸ and (2) the domestic industry was not even competitive in the portion of the utility segment that it could supply.⁴⁹

(1) Direct competition existed between domestic and imported CSPV products in the residential and commercial segments.

25. China’s response to this question fails to identify any record evidence detracting from the Commission’s finding that imported and domestically produced CSPV products competed directly against each other in the residential and commercial market segments. Specifically, the questionnaire response data demonstrated that domestic producers sold a majority of their CSPV products to distributors (a majority of which were then sold to residential installers) and a substantial amount to commercial installers. U.S. importers also reported selling a substantial volume of CSPV products to commercial and residential installers.⁵⁰ Moreover, CSPV products shipped by U.S. producers and importers were within similar efficiency and wattage ranges and were highly substitutable with each other, with price being an important factor in purchasing decisions.⁵¹ Thus, as the Commission found, CSPV products from domestic and foreign sources were sold to overlapping market segments through overlapping channels of distribution, *particularly* to residential and commercial installers.⁵²

26. Notwithstanding this evidence supporting the Commission’s findings, China contends that the record showed a “different presence by domestic and imported products in the residential and commercial segments.”⁵³ In an effort to support its own preferred view of the record, China cites to information in the USITC November Report indicating that the majority of the domestic industry’s shipments served the residential and commercial segments whereas the majority of imports were shipped to the utility segment. That the domestic producers’ and importers’ sales to these two segments did not account for the same percentage of overall shipments, however, does not alter the existence of a significant overlap in shipments of highly substitutable CSPV products made by domestic producers and importers to these market segments. Indeed, this overlap was not “limited” as China seeks to portray, but meaningful given that a “majority” of

⁴⁸ China’s response to the Panel’s questions to the parties following the first substantive meeting, para. 22.

⁴⁹ *Ibid.*, para. 49.

⁵⁰ USITC November Report, p. I-28 (Exhibit CHN-3).

⁵¹ USITC November Report, pp. 30, 54 (Exhibit CHN-2).

⁵² USITC November Report, p. 29-30 (Exhibit CHN-2).

⁵³ China Responses to Panel’s Third Set of Questions, para. 37. China also asserts that the domestic industry “had smaller penetration in the utility segment of the market,” but the extent of the domestic producers’ participation in the utility segment is not relevant to the Panel’s question regarding the competition between the domestic like product and imports in the residential and commercial segments. *See id.* at para. 38.

the domestic like product and a “substantial amount” of imported product that were highly substitutable with each other were sold to the residential and commercial segments.⁵⁴

(2) The domestic industry was competitive in the portion of the utility segment that it could supply.

27. Here again, China fails to defeat the Commission’s pertinent findings. Objective record evidence establishes that the domestic industry was competitive in the portion of the utility segment that it could supply. Indeed, the evidence shows that the domestic industry had the capability of supplying, and did in fact participate in, utility projects.⁵⁵ And as the utility segment shifted from 60-cell modules which predominated at the beginning of the period of investigation, to 72-cell modules,⁵⁶ the domestic industry added to its production of 72-cell modules in addition to continuing production of 60-cell modules.⁵⁷ The questionnaire response data confirmed that the domestic industry sold CSPV products – 60-cell modules and 72-cell modules – in the U.S. market to all three segments, including the utility segment.⁵⁸ Moreover, bid information submitted by SolarWorld and Suniva, showed that the domestic industry bid for and won sales for utility scale projects.⁵⁹ And even respondents, while emphasizing that the utility segment shifted to 72-cell modules, acknowledged that domestic producers manufactured 72-cell modules.⁶⁰

28. Notwithstanding this, China asserts that the domestic industry was not competitive in the small utility segment. China points to complaints made by five purchasers (out of 106 responding purchasers) that criticized the quality, service, or delivery of 72-cell modules supplied by SolarWorld or Suniva.⁶¹ As explained in the prior U.S. submissions, the Commission considered these allegations and found, based on the totality of the evidence that the domestic industry did not have “widespread” problems that would have affected the substitutability between their products and imported CSPV products.⁶² This evidence included competing and credible hearing testimony and submissions showing that the vast majority of market participants considered that domestic and imported products were interchangeable, and the small number of purchasers that reported the failure of a domestic producer in qualifying

⁵⁴ USITC November Report, p. I-28 (Exhibit CHN-3).

⁵⁵ Transcript of USITC Hearing on Injury, p. 164 (Exhibit CHN-9).

⁵⁶ USITC November Report, p. 59 (Exhibit CHN-2).

⁵⁷ USITC November Report, p. 59 (Exhibit CHN-2).

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

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

⁶⁰ USITC November Report, p. 60 n.346 (Exhibit CHN-2).

⁶¹ China Responses to Panel’s Third Set of Questions, paras. 40-43.

⁶² See, e.g., U.S. Responses to Panel’s Second Set of Questions, paras. 24-28; U.S. Comments to China Responses to Panel’s First Set of Questions, paras. 115-126.

product or losing its approved status. Consequently, the criticisms identified by China do not cast doubt on the reasonableness of the Commission's finding that the domestic industry was competitive in the portion of the utility segment it was able to supply.

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.⁶³ Please explain, referring to record evidence that supports this contention.

29. In its response to this question, China asserts that the "global decline in CSPV prices" and the domestic industry's failure to increase capacity to a larger scale and innovate explained the lower prices of imported CSPV products compared to the domestically produced product.⁶⁴ China's assertions are factually flawed because China ignores the record evidence demonstrating that the domestic industry did, in fact, innovate and supply CSPV products that were highly substitutable with imports. China also fails to account for the imports' role in hindering the domestic industry's ability to increase capacity to a larger scale in the first instance.

30. Specifically, the Commission found that domestic producers pioneered certain CSPV technologies, and that they continued to innovate, develop, and manufacture leading-edge products during the period of investigation. The record demonstrated that the domestic industry supplied a wide variety of monocrystalline and multicrystalline products that competed against imported CSPV products, including CSPV products with 2, 3, 4, and 5 busbars, PERC products, frameless modules, heterojunction cells, bifacial products, and hybrid CSPV products.⁶⁵ To the extent that certain CSPV products were only available from foreign suppliers, the Commission explained that available objective evidence indicated that CSPV products that were unique or unavailable from other sources accounted for only a small share of the U.S. market.⁶⁶ Indeed, most U.S. producers, importers, and purchasers confirmed that product from domestic and foreign sources were interchangeable.⁶⁷

31. Regarding the domestic industry's asserted inability to increase capacity to a larger scale, China ignores a critical finding made by the Commission – that increasing imports at declining prices adversely affected the industry's financial performance, making it difficult for the industry to increase capacity to a scale that made it more competitive.⁶⁸ Indeed, of the 33 CSPV cell or CSPV module facilities operating in the United States as of January 1, 2012, only 13 of those

⁶³ China's second written submission, paras. 105 and 109.

⁶⁴ China Responses to Panel's Third Set of Questions, para. 44.

⁶⁵ USITC November Report, pp. 52-54 (Exhibit CHN-2).

⁶⁶ USITC November Report, pp. 52-53 (Exhibit CHN-2).

⁶⁷ USITC November Report, p. V-16 (Exhibit CHN-3).

⁶⁸ USITC November Report, p. 61 (Exhibit CHN-2).

facilities remained open by December 31, 2016. And although 16 additional facilities opened seeking to take advantage of the demand growth, the consistent inability of the domestic industry to compete with low-priced imports, forced many of these firms to close.⁶⁹ The domestic producers remaining in the market continued to operate at below full capacity, particularly for CSPV module assembly operations.⁷⁰ China’s argument fails, in that it amounts to a circular attempt to attribute the domestic industry’s higher costs to its smaller scale, which itself was causally linked to the pricing pressure exerted by the flood of lower priced imports.

32. In any event, China still does not explain the overall relevance of its assertions regarding the alleged global decline in CSPV prices to its claim that the ITC’s price analysis was inconsistent with the Safeguards Agreement. In fact, this assertion serves only to disprove that other factors identified by China as causing the declines in domestic prices (*i.e.*, the domestic industry’s decreasing costs, increased efficiency, and technological innovation) were responsible for the domestic industry’s serious injury.⁷¹ Indeed, China contradictorily argues in response to this question that the “small scale of the domestic industry” and its “inefficiencies” resulted in “higher costs for the domestic industry,” explaining why “import prices were lower than domestic products.”⁷² The logical conclusion of China’s argument is that the lower-priced imports were the real culprit in the price declines of domestic products over the period of investigation.

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.⁷³ (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.⁷⁴

1. China’s argument regarding the domestic industry’s loss in market share does not withstand scrutiny.

33. In responding to this question, China relies upon respondents’ assertion that the domestic industry made a business decision to focus on serving the residential and commercial segments instead of the fast growing utility segment, a theory that was refuted by the record.⁷⁵ China,

⁶⁹ USITC November Report, pp. 48-49 (Exhibit CHN-2).

⁷⁰ USITC November Report, p. 33 (Exhibit CHN-2).

⁷¹ China Responses to Panel’s Third Set of Questions, paras. 104-118.

⁷² China Responses to Panel’s Third Set of Questions, para. 44.

⁷³ China’s second written submission, paras. 91-94.

⁷⁴ See, *e.g.*, USITC Final Report, Exhibit CHN-02, pp. 42 and 49 (lost sales); 47 and fn. 261 (unused capacity).

⁷⁵ China Responses to Panel’s Third Set of Questions, paras. 53-55.

therefore, fails to demonstrate that the domestic industry’s lost market share resulted from reasons other than the domestic industry’s limited capacity due to imports and its resulting financial inability to keep up with the growth in demand.

34. As discussed in the prior U.S. written submissions, the Commission objectively evaluated all the record evidence concerning the domestic industry’s role in the utility segment and determined that the

domestic industry clearly sought to compete in the large, concentrated, and price-sensitive utility market, but the large volume of imports at low and declining prices adversely impacted the domestic industry’s financial performance, making it difficult for the domestic industry to increase capacity to a scale that made it more competitive in this segment, even if it managed to develop and even pioneer innovative products that utilities and other sought.”⁷⁶

Indeed, petitioners provided information demonstrating that they actively sold modules to the utility sector and, as SolarWorld detailed, it planned to use the adjustment period following imposition of safeguard remedies to expand its presence in this sector even more.⁷⁷ The Commission provided a detailed explanation of its rejection of respondents’ assertions that the domestic industry decided to focus its business models on the residential and commercial segment of the U.S. market, and China’s submission fails to demonstrate anything unreasonable about the Commission’s findings on this point.

2. *China fails to reconcile its position with the USITC’s findings that the domestic industry lost sales to imports and had unused capacity during the POI.*

a. The domestic industry lost sales to lower-priced imports.

35. China insists that because imports were sold into the utility sector where the domestic producers did not participate, that “the domestic industry did not lose any sales of CSPV products.”⁷⁸ China’s response to this question highlights the fallacy of its arguments.

36. As discussed above, the domestic industry participated in all segments of the market, including the utility segment. Moreover, as the record showed, seven domestic producers

⁷⁶ USITC November Report, pp. 60-61 (Exhibit CHN-2); U.S. First Written Submission, paras. 177-182; U.S. Comments on China Responses to Panel’s First Set of Questions, paras. 9-14; U.S. Responses to Panel’s Second Set of Questions, paras. 8-13; U.S. Second Written Submission, paras. 41-50.

⁷⁷ Suniva Posthearing Remedy Brief, Exhibit 1 p.11 (Exhibit USA-21) (informing of its plan to “expand its marketing and sales in the large commercial-utility segment of the market”).

⁷⁸ China Responses to Panel’s Third Set of Questions, para. 58.

reported that they had lost sales to imports since 2012,⁷⁹ 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.⁸⁰

37. The Commission examined the reasons behind the lost sales, and found that price played a primary role for these lost sales to a substantial number of purchasers. As the Commission explained, imports that were highly substitutable with the domestic like product sold for lower prices in 33 of 52 instances involving approximately two-thirds of the total volume of comparisons, and a substantial number of purchasers confirmed that domestic producers lost sales to low-priced imports.⁸¹ Specifically, of the 104 responding purchasers, 91 reported that they had purchased imported CSPV products instead of the domestic like product. Seventy-three of these purchasers reported that import prices were lower than those of the domestically produced products, and 33 reported that price was a primary reason for their decision to purchase imported products over products manufactured in the United States.⁸²

38. China stresses that “{f}ifty-three of 86 purchasers indicated that price was not a primary reason for purchasing imported product rather than domestic product.”⁸³ However, China’s alternative tabulation of the purchaser responses does nothing to detract from the fact that a substantial number of purchasers confirmed price to be the primary reason for the domestic industry’s lost sales.

39. It is also worth mentioning that China’s criticism of the Commission’s analysis fails to recognize that the Commission did not base its injury determination solely on the domestic industry’s lost sales. As the Commission demonstrated, the increased volume of 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 imports were highly substitutable with the domestic like product and generally lower priced, and they exerted downward pricing pressure on the domestic producers. The questionnaire responses corroborated the imports’ role in causing declines in domestic prices, with 8 of 12 responding domestic producers reporting the need to reduce prices, and three reporting a roll back in announced price increases to avoid losing sales to competitors selling imported CSPV products during the period of investigation. Moreover, of the 103 responding purchasers, 38 reported that U.S. producers had to reduce prices of their CSPV products to compete with lower-priced imports, and 44 of them reported that they did not know whether domestic producers had reduced their prices to compete with

⁷⁹ USITC November Report, p. 49 (Exhibit CHN-2).

⁸⁰ USITC November Report, p. V-28 (Exhibit CHN-3).

⁸¹ USITC November Report p. 42 (Exhibit CHN-2).

⁸² USITC November Report, p. V-30 (Exhibit CHN-3).

⁸³ China Responses to Panel’s Third Set of Questions, paras. 61-62.

lower-priced imports. Several purchasers also reported steeper price reductions in 2016, as the domestic industry’s market share fell to its lowest level.⁸⁴

b. *The domestic industry had underutilized capacity caused by imports during the POI.*

40. It is, in fact, impossible to reconcile China’s argument that a shortfall in domestic capacity was the real cause of the domestic industry’s woes with the observable fact that the industry could not fill the capacity that it had. China’s efforts to evade this conclusion are accordingly weak.

41. It begins with invective, asserting that the Commission “mischaracterized the facts.”⁸⁵ This assertion fails because the subsequent argument shows no error in the facts – simply disagreement with the conclusions the Commission reached. China then identifies four “points” that, in fact, have no bearing on the question.

42. It first notes that the capacity utilization for domestic cell production decreased and that domestic purchasers reported purchasing fewer cells and more modules. But China fails to note that the two largest U.S. producers were *integrated* – they produced cells and made modules from those cells.⁸⁶ Thus, reduced utilization of cell capacity was a direct result of their inability to fill their module capacity.

43. China then notes that utilization of domestic module capacity decreased by five percentage points, and seeks to blame this on the “limiting factor” that “production of U.S.-origin CSPV cells was insufficient to satisfy the domestic industry’s capacity for producing CSPV modules.”⁸⁷ Given that China itself had just admitted that utilization of cell production capacity *decreased*, it is hard to credit the assertion that this served as a “limiting factor.”

44. China’s third point (which it labels as the “most important”) is that domestic capacity for cells and modules increased over the investigation period, and that this explains why they did not reach full capacity utilization.⁸⁸ This is indeed important, in that it contradicts China’s earlier argument that the industry’s alleged failure to increase its capacity resulted in higher costs and inefficiencies, and forced purchasers to rely on imports.⁸⁹ This is exactly the internal contradiction that the Panel asked China to “reconcile,” and highlights its failure to do so.

⁸⁴ USITC November Report, pp. 42, 45-46 (Exhibit CHN-2).

⁸⁵ China Responses to Panel’s Third Set of Questions, para. 63.

⁸⁶ USITC November Report, pp. 15-16 Exhibit (CHN-2).

⁸⁷ China Responses to Panel’s Third Set of Questions, para. 64.

⁸⁸ China Responses to Panel’s Third Set of Questions, para. 65.

⁸⁹ China Responses to Panel’s Third Set of Questions, para. 44.

45. China’s last point is to repeat its baseless contention that “the domestic producers made a deliberate choice not to focus on the utilities segment of the market.”⁹⁰ The United States has shown the fallacy of this assertion elsewhere and at length.⁹¹

46. China closes by asserting that the Commission never properly analyzed the four “points” it presents. However, as these “points” were inherently self-contradictory, incorrect, or otherwise irrelevant, they are baseless and cannot support China’s argumentation in this dispute.

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.

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.

47. China and the United States are in agreement that the strength of the causal link between increased imports and the domestic industry’s serious injury does not change or extinguish the legal obligation under Article 4.2(b) to assure that injury caused by other factors is not attributed to increased imports.⁹²

48. In response to this question, however, China makes assertions concerning the non-attribution requirement that are not supported by the Safeguards Agreement. Specifically, China maintains that an “other” factor does not need to be completely independent and separate from the effects of increased imports.⁹³ China’s assertion is illogical because Article 4.2(b)’s non-

⁹⁰ China Responses to Panel’s Third Set of Questions, para. 67.

⁹¹ See U.S. First Written Submission, paras. 177-182; U.S. Responses to Panel’s First Set of Questions paras. 26-30; U.S. Comments to China Responses to Panel’s First Set of Questions, paras. 9-14; U.S. Second Written Submission, paras. 41-50.

⁹² U.S. Responses to Panel’s Third Set of Questions, paras. 23-24; China Responses to Panel’s Third Set of Questions, paras. 70-71.

⁹³ China Responses to Panel’s Third Set of Questions, para. 83.

attribution requirement is triggered only when a relevant “other factor” is “causing injury to the domestic industry at the same time.”

49. Specifically, the second sentence of Article 4.2(b) begins with a condition: “When factors other than increased imports are causing injury to the domestic industry at the same time” In this context, “when” means “[a]t the time that; on the occasion that; in the circumstances which.”⁹⁴ “Factor” means “[a] circumstance, fact, or influence which tends to produce a result.”⁹⁵ “Other than” means “besides”; “{d}ifferent in kind or quality.”⁹⁶ “At the same time” means “during the same period, at the same moment, simultaneously.”⁹⁷ Thus, the ordinary meaning of these terms demonstrate that an “other factor” can only be understood as those that are different from or additional to increased imports, and not those that are derived from increased imports. None of the other “factors” cited by China, and considered by the Commission, were causing injury to the domestic industry – let alone causing injury at the same time. This analysis and its conclusions for purposes of the first clause of the second sentence of Article 4.2(b) established that there was no “such injury” that might improperly “be attributed to increased imports.” Therefore, it complied with the second clause of that sentence. There was no need for the Commission to perform a second (and superfluous) inquiry into whether the nonexistent injury caused by other factors was erroneously attributed to increased imports.⁹⁸

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

⁹⁴ *New Shorter Oxford English Dictionary*, p. 3665.

⁹⁵ *New Shorter Oxford English Dictionary*, p. 904.

⁹⁶ *New Shorter Oxford English Dictionary*, pp. 2031-32.

⁹⁷ *New Shorter Oxford English Dictionary*, p. 3313.

⁹⁸ China continues to over rely on prior reports that have cited a requirement for competent authorities to “separate and distinguish” the effects of other factors to ensure that injury caused by these other factors are not attributed to increased imports. China Responses to Panel’s Third Set of Questions, para. 72. As the United States has explained in its previous written submissions, Article 4.2(b) does not actually contain such language; but, in any event, the Commission’s determination was consistent with the non-attribution obligations even if these other factors are seen as contributing to the domestic industry’s injury. The only parameters imposed by the second sentence of Article 4.2(b) are for competent authorities to evaluate whether factors other than increased imports are causing injury to the domestic industry at the same time, and *if such other factors exist*, to ensure that such injury is not attributed to increased imports. *See* U.S. First Written Submission, paras. 97-108; U.S. Comments to China Responses to Panel’s First Set of Questions, para. 85. However, the Article does not specify how competent authorities may comply with the obligations. Thus, competent authorities retain methodological discretion in evaluating other factors causing injury to the domestic industry. Indeed, in *US – Lamb*, the Appellate Body confirmed that “the method and approach WTO Members choose to carry out the process of separating the effects of increased imports and the effects of the other causal factors is not specified by the Agreement on Safeguards.” *US – Lamb (AB)*, para. 181.

Credit] for domestic producers”⁹⁹ and (2) “[renewable portfolio standards] particularly encouraged the development of utilities, where the domestic industry had a limited representation and competitiveness”.¹⁰⁰ Please explain whether record evidence establishes that the domestic industry did not benefit from these measures.

50. China clarifies that it “has not argued that the domestic industry did not benefit at all” from the Federal Income Tax Credit and renewable portfolio standards.¹⁰¹ The argument it is now disavowing, however, is the logical extension of China’s contentions that these incentives “either primarily or exclusively benefitted the utility segments, generating increased demand in a market where the domestic industry did not focus.”¹⁰²

51. China’s continued reliance upon the disproven notion that the domestic industry did not serve the utility segment is unavailing. As discussed in the U.S. comments regarding China’s response to question 40 above, the domestic industry was active in and sold CSPV products to all sectors of the market, including the utility segment. Thus, even assuming that the Federal Investment Tax Credit and renewable portfolio standards incentivized the use of solar generated electricity only in the utility sector, U.S. producers and importers alike benefitted from such measures.

52. In any event, China is wrong in its assertion that the Federal Investment Tax Credit, which all parties recognized played a vital role in stimulating demand, “particularly” benefitted the utility sector.¹⁰³ The Commission explained that this program “provided a 30 percent tax credit on capital expenditures for new solar photovoltaic systems for the residential, commercial and utility segments.”¹⁰⁴

53. Respondent SEIA even acknowledged the Federal Investment Tax Incentive’s favorable impact in all three sectors, explaining how it allowed for a dollar-for-dollar reduction in income

⁹⁹ China’s second written submission, para. 183.

¹⁰⁰ China’s second written submission, para. 185.

¹⁰¹ China Responses to Panel’s Third Set of Questions, para. 76.

¹⁰² China Responses to Panel’s Third Set of Questions, para. 78.

¹⁰³ Respondent SEIA even described the Federal Investment Tax Credit as the “single most influential federal government incentive for solar deployment today.” SEIA Prehearing Injury Brief, p. 105 (Exhibit CHN-20).

¹⁰⁴ USITC November Report, pp. 62-63, n.361 (Exhibit CHN-2). China’s reliance upon SEIA’s market report is also unavailing. Like the Commission report, this report merely discusses the increase in installations in the utility segment in 2016 due to the anticipated expiration of the Federal Income Tax Credit, and does not support China’s assertion that this incentive primarily benefitted the utility sector. China Responses to Panel’s Third Set of Questions, paras. 81-83.

taxes “applied against the tax liability of residential (Section 25D) and commercial and utility (Section 48) investors in solar energy property.”¹⁰⁵ SEIA explained:

Section 25D residential ITC allows the homeowner to apply the credit to his/her personal income taxes. This credit is used when homeowners purchase solar systems outright and then have them installed on their homes. In the case of the Section 48 credit, the business that installs, develops and/or finances the project claims the credit.¹⁰⁶

54. China now seeks to rely on specific statements in the USITC November Report, which do nothing to support the proposition that the tax credit “particularly” benefitted the utility sector.¹⁰⁷ But those statements simply discussed the growth in U.S. demand in the utility segment between 2015-2016, and then explained how that growth was driven by the anticipated expiration of the Federal Investment Tax Credit:

- “U.S. installations of PV solar grew 97 percent from 2015 to 2016. This growth, particularly in the utility segment, was driven by the anticipated expiration of the 30 percent Federal Income Tax Credit, which had been scheduled to step down at the end of 2016.”¹⁰⁸
- “This growth, primarily in the utility segment, was driven by the anticipated December 2016 expiration of the 30 percent Federal Investment Tax Credit.”¹⁰⁹

The words “particularly” and “primarily” were used to modify the growth in demand. Consequently, that the Commission found the growth in U.S. demand between 2015 and 2016 was “particularly” or “primarily” in the utility segment, did not mean that the Federal Investment Tax Credit “particularly” or “primarily” benefitted the utility segment as China asserts. As noted above, it benefitted *all* sectors. Nor is China’s argument advanced by its assertion that even if the continuation of the Federal Investment Tax Credit “could have benefited all the three market segment,” the impact on the utility segment was greater because it was the largest segment.¹¹⁰ China’s argument misses the point that the extension of the incentive had a favorable, not negative, impact on demand in all three market sectors and supported the Commission’s ultimate

¹⁰⁵ SolarWorld Posthearing Remedy Brief, Exhibit 46 (Exhibit USA-20).

¹⁰⁶ SolarWorld Posthearing Remedy Brief, Exhibit 46 (Exhibit USA-20).

¹⁰⁷ China Responses to Panel’s Third Set of Questions, paras. 79-80.

¹⁰⁸ USITC November Report, p. V-2 (Exhibit CHN-3).

¹⁰⁹ USITC November Report, p. 62 (Exhibit CHN-2).

¹¹⁰ China Responses to Panel’s Third Set of Questions, para. 84.

conclusion that any changes in the overall availability in government incentive programs had not resulted in injury to the domestic industry.

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 (i.e. Advanced Energy Manufacturing Tax credit and the U.S. Department of Energy's section 1705 Loan Guarantee)." ¹¹¹ Please respond to this argument.

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". ¹¹² 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 the domestic industry and by the purchasers". ¹¹³ Please explain how record evidence supports this argument.

55. As discussed in the U.S. second written submission, the Commission found that any changes in the overall availability of incentives had not resulted in an increase in the net cost to solar electricity generators. This meant that domestic producers did not need to reduce their prices to make solar energy more competitive with other sources of energy. Most questionnaire respondents confirmed that the availability in incentives led to a decrease in the price of solar generated electricity and that changes in the price of solar generated electricity had not at all affected the prices of CSPV products since 2012. ¹¹⁴ Based upon the totality of the evidence concerning these incentives and in light of the continued robust demand for CSPV products, the Commission reasonably concluded that the availability of government incentive programs had not caused injury to the domestic industry.

56. China cites to isolated statements to support its assertion 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 the domestic industry and by the purchasers.” ¹¹⁵ These cherry-picked statements do nothing to detract from the force of the Commission’s

¹¹¹ China's second written submission, para. 182.

¹¹² USITC Final Report, Exhibit CHN-02, p. 63 (referring to USITC Final Staff Report, Exhibit CHN-03, p. V-37).

¹¹³ China's second written submission, para. 192.

¹¹⁴ U.S. Second Written Submission, paras. 134-146.

¹¹⁵ China Responses to Panel’s Third Set of Questions, paras. 91-93.

conclusion. As an initial matter, in light of this immense record, which consisted in part of the submissions of interested parties opposed to the imposition of safeguard measures, it is not surprising that China can point to a handful of market participant statements to support its opposing theory. These isolated statements, however, do not render the Commission’s analysis, which was based upon its consideration of the totality of the evidence, inconsistent with the Safeguards Agreement.

57. In any event, the statements relied upon by China fail to validate its assertion. The cited statements generally fit into three categories: (1) expectations for government incentives to decline as costs for solar generated electricity fall to meet costs of conventional energy sources; (2) the relationship between incentives and demand; and (3) the domestic industry’s asserted failure to innovate and inability to achieve economies of scale.¹¹⁶ Regarding the first category, statements regarding anticipated declines in incentives do not conclusively establish that government incentive programs had actually declined during the period of investigation or that any changes in the availability of incentive programs had resulted in either higher costs of solar electricity generation or declining prices of CSPV products. In fact, as detailed in the U.S. prior written submissions, the record indicated that this did not occur.¹¹⁷

58. The second category of cited statements merely demonstrates the close interplay between incentives and demand, a relationship that China seeks to downplay.¹¹⁸ For instance, one of the cited publications discusses how the potential expiration of the Federal Investment Tax Credit in 2015, which would have affected demand for solar energy, resulted in solar companies’ shift in business plans to provide “broad solutions that include energy storage systems and energy management tools in addition to solar panels,” but that Congress extended the tax credit, which gave the “solar industry a new boom.”¹¹⁹ Another cited publication, SolarWorld’s annual report, discussed the relationship between declining incentives and slower market growth, but confirmed that in light of the extension of the Federal Investment Tax Credit in 2015, the probability that incentives would decline was “low.”¹²⁰ These statements disprove China’s assertion that incentives declined during the period of investigation and show the fallacy of its criticism of the Commission’s analysis, which included an examination of the growth in U.S. demand.

59. The United States has already addressed the third category of statements in the comments on China’s response to question 39 above. As discussed, China ignores the extensive record evidence demonstrating that the domestic industry did, in fact, innovate and supply CSPV products that were highly substitutable with imports. China also fails to account for the imports’

¹¹⁶ China Responses to Panel’s Third Set of Questions, paras. 91-93.

¹¹⁷ U.S. Responses to Panel’s Second Set of Questions, paras. 29-36; U.S. Second Written Submission, paras. 127-146.

¹¹⁸ China Responses to Panel’s Third Set of Questions, para. 89.

¹¹⁹ See, e.g., SEIA Prehearing Injury Brief, Exhibit 30 (Exhibit CHN-55).

¹²⁰ SEIA Posthearing Injury Brief, Exhibit 9 (Exhibit CHN-134).

effect on the domestic industry’s ability to increase capacity to a larger scale in the first instance. In any event, these statements do nothing to support China’s assertions regarding government incentive programs, in particular, that their overall levels declined or that they adversely affected prices of CSPV products.

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.

60. China did not respond to the questions asked. Rather than address the relationship between the *domestic industry’s costs* and CSPV prices, China responded with a discussion of the trends and magnitude of *raw material costs*.¹²¹ As the record showed, the domestic industry’s unit costs (which declined from \$1,476 in 2012 to \$1,174 in 2013, \$895 in 2014, \$820 in 2015, and \$783 in 2016) did not decline along the same trend as the declines in prices of CSPV products (which declined in 2012, but stabilized between 2013 and 2015, before declining in 2016). Moreover, the magnitude of the declines in prices and costs were different. Specifically, 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. Industry publications reported that module prices fell by 58.5 percent between 2012 and 2016.¹²²

61. In any event, China’s response demonstrates that, despite its assertions that the trends and magnitude of the domestic industry’s raw material costs and prices were similar, this was not the case. Indeed, the graphics inserted in China’s response show a greater degree of fluctuation in raw material costs than the price trends of CSPV products.¹²³ Moreover, cell and module prices fell overall by “60.4 percent and 58.5 percent.” This was greater than the overall price declines in polysilicon ingots and wafers, which “declined overall by 52.6 percent for ingots and by 54.5 percent for wafers.”¹²⁴

62. This lack of correlation supports the Commission’s finding that the continuous declines in costs and increased efficiencies could not explain the declines in prices of CSPV products and the domestic industry’s serious injury. Other record evidence corroborates this finding. As the Commission observed, questionnaire respondents most often pointed to large volumes of low-priced imports and did not mention raw material costs and increased efficiencies as the reason for price declines, and foreign producers’ own financial statements attributed the decline in

¹²¹ China Responses to Panel’s Third Set of Questions, paras. 98-103.

¹²² U.S. Response to Panel’s Third Set of Questions, paras. 29-32.

¹²³ China Responses to Panel’s Third Set of Questions, para. 101.

¹²⁴ China Responses to Panel’s Third Set of Questions, paras. 99, 101. It is worth noting that, as percentage changes in cell and module prices were off a larger base than changes in polysilicon prices, the difference in the absolute changes was much greater.

prices of CSPV products to global excess capacity.¹²⁵ In addition, respondent SEIA's market publications also linked prices to import volumes, reporting that the increase of prices between 2013 and 2015 were driven by these *CSPV I* and *CSPV II* orders, and that the subsequent decline in prices in 2016 was due to an imbalance between supply and demand.¹²⁶ (Needless to say, that imbalance occurred in large part because the massive increase in imports drove up the supply of CSPV products in the U.S. market.)

Question 47 (China)

Is it China's position that declining raw material costs and increased production efficiencies was an "other" factor of injury?¹²⁷ 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

63. As discussed in the prior U.S. submissions, the Commission carefully considered respondents' arguments that declining costs (resulting from declining raw material costs, increasing efficiency, and technological innovation) negatively affected prices during the POI.¹²⁸ It found declining costs to be a positive factor that should have benefitted the domestic industry, but that as costs declined, the domestic industry's net sales values also declined, with the industry's COGS to net sales ratio exceeding 100 percent by the end of the period of investigation.¹²⁹ Thus, rather than being able to take advantage of lower overall costs, the domestic industry was forced to reduce prices at a pace that canceled out and fell below decreasing costs, evidencing that rather than declining costs, surging imports were responsible for the lower domestic prices.¹³⁰

64. Rather than consider declining raw material costs and increased production efficiencies as positive factors, however, China asserts that they are an "other" factor causing injury to the domestic industry. In support, China continues to rely on a flawed econometric study submitted

¹²⁵ USITC November Report, p. 65 (Exhibit CHN-2).

¹²⁶ 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).

¹²⁷ 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.

¹²⁸ U.S. First Written Submission, paras. 205-207; U.S. Responses to Panel's First Set of Questions, paras. 45-55; U.S. Comments to China Responses to Panel's First Set of Questions, paras. 147-153.

¹²⁹ USITC November Report, p. 64 (Exhibit CHN-2).

¹³⁰ USITC November Report, p. 64 (Exhibit CHN-2).

by respondents on the record, which allegedly “provided a quantification of the impact of such declines on prices of CSPV products.”¹³¹

65. The “quantification” set forth in this econometric study, however, does nothing to detract from the facts in the record, as laid out in detail by the Commission. Indeed, the study was based solely upon an “estimation approach,” with many of the variables being treated as “theoretically” inter-related.¹³² Consequently, the study could not have possibly captured the unique market dynamics or the realities of the domestic industry’s condition, including the unprofitability of the domestic producers throughout the period of investigation. The facts in the record showed that the estimation approach used by the econometric model bore no relationship to the domestic industry’s real injury.

66. Moreover, the econometric study also did not even accurately apply the research upon which it was based. As China explains, the econometric study relied upon the data contained in the “famous 2006 paper” published by Richard Swanson.¹³³ In this paper, Swanson had documented the historical reductions in costs and in prices of CSPV products, but also had questioned whether such cost declines resulting from increased technological efficiencies would even continue beyond 2012. As Swanson stated, “[s]ometime after 2012, wafered silicon will probably begin running out of steam,” and that it was “unlikely” that the technological capabilities could proceed on the same path after 2012.¹³⁴ The respondents’ econometric study nonetheless extended the historical trends discussed by Swanson by inserting prices at which CSPV modules were sold after Swanson’s paper was published.¹³⁵ In doing so, the econometric study failed to account for the fact that module prices at the beginning of the period of investigation had been significantly affected by CSPV imports from China,¹³⁶ resulting in price declines at a greater rate than even Swanson had envisioned.¹³⁷ Indeed, in the paper, Swanson predicted that module prices would decline to \$1.56 per watt (in 2002 dollars) in 2012. In reality, however, domestic producers were already selling their products at much lower prices.¹³⁸

¹³¹ China Responses to Panel’s Third Set of Questions para. 111.

¹³² See SEIA Prehearing Injury Brief, Appendix A p. 22 (Exhibit CHN-19).

¹³³ China Responses to Panel’s Third Set of Questions, para. 105.

¹³⁴ SEIA Prehearing Injury Brief, Appendix A at Annex E p.449 (Exhibit CHN-19).

¹³⁵ SEIA Prehearing Injury Brief, Appendix A p. 8 (Exhibit CHN-19)

¹³⁶ *Certain Crystalline Silicon Photovoltaic Cells and Modules from China*, Inv. Nos. 701-TA-481 and 731-TA-1190 (Final), USITC Pub. 4360 (Nov. 2012) (Exhibit USA-11).

¹³⁷ SEIA Prehearing Injury Brief, Appendix A at Annex E p.449 (Exhibit CHN-19).

¹³⁸ USITC November Report, Table C-3a (Exhibit CHN-3). In 2012, the domestic industry’s average unit net sales value was \$1.04 per watt.

67. This flawed econometric study, therefore, fails to provide probative evidence that CSPV module costs and prices must decline at a certain rate year over year as China presumes, particularly in light of the substantial contradictory data on the record.

b. Whether record evidence directly demonstrates that the domestic industry was injured as a result of declining raw material costs and increased production efficiencies.

68. Also unavailing is China’s argument that the domestic industry was injured as a result of declining raw material costs and increased production efficiencies. China attributes the domestic industry’s high COGS to net sales ratio to the domestic industry’s “inefficiencies” and “business missteps.”¹³⁹ The Commission, however, considered these alleged “missteps” and found that they were not supported by the facts.¹⁴⁰ Moreover, China itself acknowledges that the domestic industry achieved cost reductions and improving efficiencies that resulted in a 50 percent decline in the industry’s total COGS.¹⁴¹

69. In any event, China’s assertion fails to establish or support its assumption that domestic producers were injured by these factors. China contends that “{i}n this context of financial results attributable to other factors than increased imports, the decline of raw material costs (transparent for customers and enjoyed by all producers) only put additional pressure to reduce final prices.”¹⁴² China provides no logic explaining the relationship among these assertions, or how they support its ultimate conclusion. Moreover, as discussed above, the record belies China’s assertion that domestic producers were responsible for their unprofitable conditions. Nor is there any evidence establishing that in this industry, U.S. producers, as a rule, must reduce prices when raw material costs decline and their production efficiencies increase. The absence of any such rationale is particularly striking in this scenario where declining raw material costs and increased efficiencies in a booming market should have allowed producers to recoup some of their losses and reverse their downward financial spiral.

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 was admitted by the USITC Final Report.”¹⁴³ Please comment, explaining whether the USITC’s analysis accounts for such evidence.

¹³⁹ China Responses to Panel’s Third Set of Questions, paras. 110-118.

¹⁴⁰ USITC November Report, pp. 50-61 (Exhibit CHN-2).

¹⁴¹ China Responses to Panel’s Third Set of Questions, para. 111.

¹⁴² China Responses to Panel’s Third Set of Questions, para. 112.

¹⁴³ China’s second written submission, para. 197, footnotes 363-366.

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."¹⁴⁴

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.

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

70. China asserts that the U.S. argument cited in this question does not actually itself explain the influence that grid parity could have as “another factor” causing injury.¹⁴⁵ China misunderstands that the domestic industry’s unprofitable financial condition was only one of the 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. The U.S. response to this question detailed the other evidence on the record supporting the Commission’s conclusion.¹⁴⁶

71. Importantly, as the record demonstrates, any desire for solar generators to attain grid parity did not translate into consistently declining prices for *CSPV products* during the POI. CSPV modules are but one part of the costs of solar-generated electricity, the other costs being soft costs (installation labor, land, sales tax, overhead, etc.) and other hardware costs (structural and electrical components).¹⁴⁷ During the period of investigation, installed photovoltaic systems prices paid by purchasers declined steadily in all three market segments.¹⁴⁸ This steady decrease was due primarily to falling non-module costs, as prices for CSPV products, in fact, stabilized after the *CSPV I* orders were imposed and new investigations were initiated in *CSPV II*.¹⁴⁹ It was only after imports from additional sources entered the U.S. market and rapidly increased to

¹⁴⁴ United States' first written submission, para. 212.

¹⁴⁵ China Responses to Panel’s Third Set of Questions, para. 121.

¹⁴⁶ U.S. Responses to Panel’s Third Set of Questions, paras. 36-38

¹⁴⁷ USITC November Report, pp. I-24-25 (Exhibit CHN-3); Suniva Prehearing Remedy Brief, p. 22 (Exhibit USA-19); SolarWorld Prehearing Remedy Brief, p. 42 (Exhibit USA-18) (stating that according to GTM research, CSPV modules represent a small and decreasing share of the overall system price). Respondent SEIA has noted, non-module soft costs, including labor, supply chain and overhead considerations constituted the “biggest cost-decline opportunity in the solar industry.” SEIA Prehearing Injury Brief, Exhibit 1 (Exhibit CHN-1).

¹⁴⁸ USITC November Report, p. V-9 (Exhibit CHN-3).

¹⁴⁹ USITC November Report, p. 46 (Exhibit CHN-2); USITC November Report, pp. V-8-9 (Exhibit CHN-3).

higher volumes in 2016 that U.S. module prices collapsed.¹⁵⁰ This price stabilization that occurred under the protective effects of the orders, which in turn improved the domestic industry's financial condition, provides clear indication that the impetus of solar generators to reach grid parity did not overcome the domestic industry's business imperatives of attaining profitability and staying in operation.

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."¹⁵¹ Please explain why the absence of a correlation between the price trends of natural gas and CSPV products would necessarily suggest that the need to achieve grid parity did not have any downward price pressure on CSPV products.

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.¹⁵² Please explain whether it was appropriate for the USITC to do so.

72. China does not dispute the Commission's decision to focus its analysis of grid parity on natural gas prices. As China recognizes, "it is natural-gas generated electricity that sets the levelized cost of electricity."¹⁵³ China nonetheless makes two criticisms of the Commission's analysis, both of which lack merit.

73. First, China asserts that "having identified that CSPV produced energy sought to achieve the same level as natural gas prices, the USITC did not address the effect of such pressure on CSPV produced energy prices by analyzing the historic price gap between natural gas and CSPV produced energy, a difference that still existed during the POI."¹⁵⁴ China's argument fails because the Commission, in fact, closely examined the prices of CSPV products and natural gas, but found that any disparity between them did not demonstrate that the need for solar generators

¹⁵⁰ USITC November Report, p. 46 (Exhibit CHN-2); USITC November Report, pp. V-8-9 (Exhibit CHN-3).

¹⁵¹ U.S. responses to the second set of questions from the Panel to the parties, para. 44.

¹⁵² USITC Final Report, Exhibit CHN-02, footnote 378.

¹⁵³ China Responses to Panel's Third Set of Questions, para. 129.

¹⁵⁴ China Responses to Panel's Third Set of Questions, para. 130.

to attain grid parity was responsible for the price declines of CSPV products or the domestic industry’s injury.¹⁵⁵

74. As the Commission found, there was not one single levelized cost of energy that solar generators seek to meet. Grid parity prices varied by region, time of day, and availability of other electricity sources, and even could vary widely for a given energy source.¹⁵⁶ Indeed, 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.¹⁵⁷ Consistent with this, most U.S. producers reported that changes in the price of U.S. conventional energy had not affected the price of solar generated electricity since 2012. Several importers and purchasers also reported no correlation between the two.¹⁵⁸

75. The record also demonstrates that notwithstanding the alleged “historic price gap” between natural gas and prices for solar generated electricity, demand for solar installations rose 338 percent between 2012 and 2016.¹⁵⁹ And in 2016, solar was the largest source of new electric generating capacity, accounting for 39 percent of all new electric generating capacity installed in the United States.¹⁶⁰ This is particularly telling, given that the whole point of reaching grid parity is to generate demand for the renewable energy source.¹⁶¹ In fact, demand was exploding during the period of investigation, contradicting China’s theory that CSPV producers had to sell CSPV products at declining prices or that solar generators had to meet a certain grid parity price in order for purchasers to choose solar over other energy sources.

76. Moreover, as discussed in the U.S. comments to China’s response to question 49 above, the price data on the record disproved the proposition that the *solar generators’* desire to attain grid parity had resulted in consistently declining prices for *CSPV products*. Rather, prices correlated with import volumes.¹⁶²

¹⁵⁵ USITC November Report, pp. 64-65 (Exhibit CHN-2).

¹⁵⁶ USITC November Report, pp. 25-26 (Exhibit CHN-2); USITC November Report, p. V-38 (Exhibit CHN-3).

¹⁵⁷ USITC November Report, p. 26 n.111 (Exhibit CHN-2). Even China acknowledges that the levelized cost of energy for solar energy varied between the utility, residential, and commercial sectors. China Comments on U.S. Responses to Panel’s First Set of Questions, paras. 144-145.

¹⁵⁸ USITC November Report, p. V-42 (Exhibit CHN-3).

¹⁵⁹ USITC November Report, p. V-2 (Exhibit CHN-3).

¹⁶⁰ USITC November Report, pp. V-6-7 (Exhibit CHN-3). Natural gas accounted for the next largest source of new U.S. electricity generating capacity (29 percent) in 2016, followed by wind (26 percent).

¹⁶¹ Respondents SEIA’s expert even acknowledged that the intent of reaching grid parity was to become competitive with other sources of electricity in order to create demand. See SEIA Prehearing Injury Brief, Appendix A p. 18 (Exhibit CHN-19).

¹⁶² USITC November Report, p. 65 (Exhibit CHN-2).

77. Second, China argues that “the USITC also failed to acknowledge that, were it to consider a scenario of supplying solar electricity during low demand periods, other traditional energy sources priced even lower than natural gas including coal electricity could also come into play.”¹⁶³ The United States fails to see the relevance of this hypothetical to the Commission’s analysis regarding the role grid parity played during the 2012-2016 period of investigation. Indeed, the Commission examined the estimated costs of generating natural gas, wind, and coal, and found that in 2016, natural gas generated electricity had the lowest levelized cost of energy, followed by onshore wind and coal. The Commission found that natural-gas generated electricity generally set the levelized cost of energy that CSPV and other renewable energy systems sought to meet,¹⁶⁴ and China concedes that it “does not dispute the finding of using gas natural prices to assess the grid parity factor.”¹⁶⁵

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'." ¹⁶⁶ Please respond to this argument.

78. China asserts that the fact that “utility produced CSPV energy was closer and in some cases even achieved the same level of LCOE as new installations of natural gas,” “reinforces” its argument that grid parity was an “other” injury causing factor.¹⁶⁷ But rather than support China’s theory, this fact corroborates the Commission’s finding that grid parity was not a monolithic concept whereby all solar generators sought to meet one levelized cost of energy.¹⁶⁸ China’s response to this question fails to demonstrate otherwise.

79. China simply repeats the same arguments that it made in response to question 51 above. Specifically, it argues that although the solar generated electricity in the utility sector achieved

¹⁶³ China Responses to Panel’s Third Set of Questions, paras. 132-133.

¹⁶⁴ USITC November Report, p. 26 (Exhibit CHN-2); USITC November Report, pp. V-37-40 (Exhibit CHN-3).

¹⁶⁵ China Responses to Panel’s Third Set of Questions, para. 129. Notably, even respondent SEIA, recognizing that natural gas set power prices throughout the country, urged that “the Commission must take into account the decline in price of natural gas during this POI.” SEIA Posthearing Injury Brief, Appendix A pp. 92-94 (Exhibit CHN-22). Respondents’ commissioned econometric study also used natural gas prices for its estimation of the impact caused by the alleged need to meet grid parity. SEIA Prehearing Injury Brief, Annex A (Exhibit CHN-19).

¹⁶⁶ 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).

¹⁶⁷ China Responses to Panel’s Third Set of Questions, para. 133.

¹⁶⁸ USITC November Report, p. 26 n.111 (Exhibit CHN-2). Even China acknowledges that the levelized cost of energy for solar energy varied between the utility, residential, and commercial sectors. China Comments on U.S. Responses to Panel’s First Set of Questions, paras. 144-145.

the same levelized cost of energy as natural gas, the instances in which this occurred were “extraordinary” and “limited to new installation,” and that solar energy electricity generally has not reached grid parity with natural gas in any of the three segments.¹⁶⁹ As discussed in the U.S. comments to China’s response to question 51, it was clearly not the case that CSPV products had to sell at declining prices in order for solar generated electricity to be competitive with other sources of electricity.¹⁷⁰

80. Indeed, notwithstanding any price gap that existed between prices of solar- and gas-generated electricity, prices for CSPV products stabilized and increased under the protective effects of the *CSPV I* and *CSPV II* orders. Moreover, despite this price stabilization of CSPV products that occurred between 2013 and 2015, demand for CSPV products continued to experience unprecedented growth year after year during the period of investigation.

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.¹⁷¹

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 adopted by China resulted in increased exports from countries other than China.¹⁷² 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.¹⁷³ Please reconcile China's critique with this broader confluence of circumstances established by the USITC.

¹⁶⁹ China Responses to Panel’s Third Set of Questions, paras. 134-137.

¹⁷⁰ USITC November Report, pp. 25-26 (Exhibit CHN-2).

¹⁷¹ China's second written submission, paras. 269-277.

¹⁷² See China's second written submission, paras. 281-291.

¹⁷³ See, e.g., USITC Supplemental Report, Exhibit CHN-06, p. 10.

81. China’s response alleges that the USITC reports failed to show that the government of China implemented industrial policies, particularly those involving subsidies, with an aim to develop vast capacity in its CSPV cell and module production and that the reports failed to demonstrate that such policies in China led to increased imports from other countries in addition to the increased imports directly from China during the period of investigation. China is wrong on all points.

82. First, the USITC’s Supplemental Report identified obligations that China was required to undertake as part of its WTO accession. For example, China “agreed to implement market-oriented economic reforms and to abide by WTO rules and principles, including to allow prices for traded goods and services in every sector to be determined by market forces, to eliminate all subsid{ies} contingent on export performance or the use of domestic goods, and to not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises.”¹⁷⁴ Having identified these commitments, the Supplemental Report grounded its findings that China adopted industrial policies, plans, and support programs that the United States did not expect by relying on conclusions that the U.S. Department of Commerce (“USDOC”) already reached in trade remedy investigations regarding CSPV products from certain countries.

83. Specifically, regarding China’s industrial policies, plans, and government support that led to overcapacity in China and eventually leading to capacity increases in other countries, the USITC cited the multitude of countervailable subsidies listed below that the USDOC found.¹⁷⁵

(1) Golden Sun Demonstration Program;¹⁷⁶

(2) Preferential Policy Lending;¹⁷⁷

¹⁷⁴ USITC Supplemental Report, pp. 4-5 (internal quotation marks omitted) (Exhibit CHN-6).

¹⁷⁵ USITC Supplemental Report, p. 6 (Exhibit CHN-6); U.S. Department of Commerce, Federal Register Notice, Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China, 77 Fed. Reg. 63788 (Oct. 17, 2012) (Exhibit USA-24); Memorandum to Paul Piquado, Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China (Oct. 9, 2012) (Exhibit USA-25).

¹⁷⁶ Memorandum to Paul Piquado, Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China (Oct. 9, 2012), pp. 11-12, 65 (Exhibit USA-25).

¹⁷⁷ Memorandum to Paul Piquado, Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China (Oct. 9, 2012), pp. 12, 45 (Exhibit USA-25)

- (3) Provision of Polysilicon for Less Than Adequate Remuneration (“LTAR”);¹⁷⁸
- (4) Provision of Land for LTAR;¹⁷⁹
- (5) Provision of Electricity for LTAR;¹⁸⁰
- (6) “Two Free, Three Half” Program for Foreign-Invested Enterprises (“FIEs”);¹⁸¹
- (7) Preferential Tax Program for High or New Technology Enterprises (“HNTEs”);¹⁸²
- (8) Enterprise Income Tax Law, Research and Development (“R&D”) Program;¹⁸³
- (9) Import Tariff and Value Added Tax (“VAT”) Exemptions for Use of Imported Equipment;¹⁸⁴

¹⁷⁸ Memorandum to Paul Piquado, Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China (Oct. 9, 2012), pp. 12-13, 29-34 (Exhibit USA-25)

¹⁷⁹ Memorandum to Paul Piquado, Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China (Oct. 9, 2012), pp. 13-14, 39-43 (Exhibit USA-25)

¹⁸⁰ Memorandum to Paul Piquado, Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China (Oct. 9, 2012), pp. 14-15, 43-44 (Exhibit USA-25)

¹⁸¹ Memorandum to Paul Piquado, Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China (Oct. 9, 2012), pp. 15-16, 69-70 (Exhibit USA-25)

¹⁸² Memorandum to Paul Piquado, Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China (Oct. 9, 2012), pp. 16-17, 69-72 (Exhibit USA-25)

¹⁸³ Memorandum to Paul Piquado, Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China (Oct. 9, 2012), pp. 17, 69-70 (Exhibit USA-25)

¹⁸⁴ Memorandum to Paul Piquado, Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China (Oct. 9, 2012), pp. 18, 69-70 (Exhibit USA-25)

(10) VAT Rebates on FIE Purchases of Chinese-Made Equipment,¹⁸⁵

(11) Discovered Grants;¹⁸⁶ and

(12) Export Credit Subsidy Programs.¹⁸⁷

84. Accordingly, China is wrong that “nowhere in the Supplemental Report or anywhere else does the United States provide evidentiary support” for the position that China adopted industrial policies, plans, and support programs to develop excess capacity for the production of CSPV products. Rather than representing “unfounded allegations,” the USITC cited this evidence in the Supplemental Report with reference to the USDOC import injury investigations. China has failed to confront or rebut the conclusions found in those investigations and relied on by the USITC.

85. Second, China’s responses in this and other instances have noted the USITC’s findings on unforeseen developments in a vacuum instead of as a progression of events during the period of investigation that were precipitated by policies, plans, and support programs that set those events in motion. In doing so, China’s defense has focused almost exclusively on the increased imports from *other countries* rather than the significant volume of increased imports from China during the period of investigation. China’s continual refrain is that “imports from China were *decreasing* at the end of the POI, and much of the increased imports were coming from other countries (particularly from Korea) for which there was no evidence that Chinese companies controlled CSPV production.”¹⁸⁸ However, this ignores that, “[w]ith the exception of 2013, following the first antidumping and countervailing duty investigation on CSPV cells and modules, *imports from China have consistently been the largest or one of the largest sources of imports*”¹⁸⁹ into the United States.

¹⁸⁵ Memorandum to Paul Piquado, Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China (Oct. 9, 2012), pp. 18-19 (Exhibit USA-25)

¹⁸⁶ Memorandum to Paul Piquado, Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China (Oct. 9, 2012), pp. 19-20, 66-69 (Exhibit USA-25)

¹⁸⁷ Memorandum to Paul Piquado, Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China (Oct. 9, 2012), pp. 20-21, 58-64 (Exhibit USA-25)

¹⁸⁸ China’s Responses to the Panel’s Questions to the Parties Following the Second Substantive Meeting, para. 144 (emphasis in original).

¹⁸⁹ USITC November Report, p. 29 (emphasis added) (Exhibit CHN-2).

86. The U.S. import data confirms the view that Chinese exports to the United States increased dramatically throughout the period of investigation, as imports started at 327 MW in 2012, dropped (as noted above) to 82 MW in 2013, but jumped to 1263 MW in 2014, followed by another massive increase to 3312 MW in 2015 and then a slight decline to 2720 MW in 2016.¹⁹⁰ While China has touted the decline during the final year of the period of investigation, it has failed to acknowledge that the total imports from China for that year ranked second highest during the five-year period of investigation. China's focus on increased imports from *other countries* cannot obscure the fact that imports from China increased significantly during the period of investigation as a result of the unforeseen developments occurring in China.

87. Lastly, on the issue of U.S. imports from countries other than China towards the end of the period of investigation, there is no dispute that, even under China's flawed approach, the majority of exports came from countries where Chinese affiliates added both CSPV cell and module capacity and that this increase mainly occurred between 2015 and 2016, which was just after the second round of U.S. trade remedy orders took effect.¹⁹¹ Accordingly, during the period of investigation, U.S. CSPV imports increased from China, as well as from efforts by Chinese producers to offshore their operations, and that the increased imports are largely attributable to unforeseen developments occurring in China based on its industrial policies, plans, and support programs (including the numerous subsidies referenced above). Those policies, in turn, facilitated China's efforts to develop massive overcapacity in its export-oriented module production industry and to direct those exports to the United States, despite the existence of trade remedy orders, which was aided by its circumvention efforts when adding production capacity in countries not covered by those orders.

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.¹⁹²

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

¹⁹⁰ USITC November Report, p. IV-2, Table IV-1 (Exhibit CHN-3).

¹⁹¹ USITC Supplemental Report, pp. 8-9 (internal quotation marks omitted) (Exhibit CHN-6).

¹⁹² China's second written submission, paras. 284-285.

Chinese producer that had substantial CSPV production factories"¹⁹³ and where no Chinese CSPV producers "controlled" the market.¹⁹⁴

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

b. (To China): Please reconcile this argument with the apparent affiliation between Hanwha in Korea and Hanwha Qidong 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.¹⁹⁵

88. China has again focused its response on Korean exports while ignoring the other component of the Panel's question regarding "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."¹⁹⁶ Although excluded from China's analysis, the United States previously noted that the USITC reports confirm that while Korea only 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 nearly two-thirds of the total increase.¹⁹⁷

89. The USITC's findings concerning increased imports from these other countries where Chinese companies added both CSPV cell and module capacity, combined with the significant exports from China that increased rather than subsided during the period of investigation, are sufficient to establish that increased imports were "as a result of unforeseen developments" for purposes of Article XIX:1(a) based on China's policies to foster excess module production capacity domestically and abroad. In particular, these policies contributed to the more than twofold increase in module assembly capacity for the largest Chinese producers during the period of investigation that started at 25,220 MW in 2012 and ended at 66,612 MW in 2016.¹⁹⁸

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

¹⁹³ China's second written submission, para. 294.

¹⁹⁴ China's second written submission, para. 297-302.

¹⁹⁵ USITC Supplemental Report, Exhibit CHN-06, pp. 8-10.

¹⁹⁶ Panel Question 56 (emphasis added).

¹⁹⁷ U.S. Responses to the Third Set of Questions from the Panel, para. 56.

¹⁹⁸ USITC November Report, p. IV-29, Table IV-18 (Exhibit CHN-3).

Schedule of the United States, and have been free of duty under the general duty rate since at least 1987.¹⁹⁹

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

90. China’s response attempts to undermine the U.S. position by arguing that the United States is now asserting for the first time that the zero general duty rate is the actual bound rate established during the GATT negotiations and that this position constitutes a *post hoc* rationalization.²⁰⁰ However, instead of a mere assertion, it is an *incontrovertible fact* that the U.S. duty rate for imports of CSPV products is bound at zero percent. Referring to this fact during WTO dispute settlement proceedings cannot constitute *post hoc* rationalization, as China continues to argue, because its self-evident nature is apparent to any user of the WTO’s publicly available systems that contain a Member’s tariff bindings.²⁰¹ The only thing necessary to carry out this task is an identification of the tariff lines in question for a cross reference within the WTO systems.

91. The USITC’s identification of the relevant tariff lines in the November and Supplemental Reports, along with the reference to their duty-free treatment, is directly related to the tariff concession that the United States undertook to bind its rate of duty at zero percent. Accordingly, 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. Moreover, as in this dispute, where a Member has undertaken an obligation to bind its rate of duty at zero, there can be no legitimate question that the Member is prevented from raising its tariffs on the imported products causing serious injury and that such a concession *per se* qualifies as an “obligation incurred” necessary for exercising the right under Article XIX of the GATT 1994 to apply a safeguard measure and temporarily depart from the WTO obligation preventing such action.

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.

¹⁹⁹ USITC Final Staff Report, Exhibit CHN-03, p. I-38; USITC Supplemental Report, Exhibit CHN-06, fn. 10.

²⁰⁰ China’s Responses to the Panel’s Questions to the Parties Following the Second Substantive Meeting, para. 163.

²⁰¹ See WTO TAO Spreadsheet: U.S. Bound Duty Rate for Subheading 8541.40.60, Line 3, Columns N, Q, R, S (Exhibit USA-22); WTO Data Portal Spreadsheet: U.S. Bindings for Heading 8541.40, Line 5690, Column G (Exhibit USA-23).

92. China has recognized 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[.]”²⁰² This conforms to the position of the United States.

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?

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.²⁰³ With reference to specific findings in the USITC's report, please explain why this was the case.

93. China argues that the United States failed to set forth an adequate and reasoned explanation for its findings consistent with Article 3.1 of the Safeguards Agreement because it “failed to characterize confidential information.”²⁰⁴ This argument is without merit and has no basis in the Safeguards Agreement.

94. First, as explained in detail in the U.S. submissions, Article 3.1 of the Safeguards Agreement does not obligate the competent authorities to include non-confidential summaries of submitted business confidential information in its published report.²⁰⁵

95. Second, there is no obligation under Article 3.2 to “characterize the confidential information” or provide “useful characterization” of the data.²⁰⁶ Rather, the relevant obligation under Article 3.2 is for competent authorities to not disclose submitted confidential information without permission.²⁰⁷

²⁰² China’s Responses to the Panel’s Questions to the Parties Following the Second Substantive Meeting, para. 164.

²⁰³ China's second written submission, para. 318.

²⁰⁴ China’s Response to Panel Questions after the Second Panel Meeting, para. 167.

²⁰⁵ See, e.g., U.S. First Written Submission, paras. 297-302; U.S. Second Written Submission and Comments on China’s Responses to the Second Set of the Panel’s Questions, paras. 192, 194, 205; U.S. Response to the Questions from the Panel to the Parties, paras. 88-90.

²⁰⁶ China’s Response to Panel Questions after the Second Panel Meeting, para. 168.

²⁰⁷ U.S. First Written Submission, para. 320.