

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

(DS562)

**INTEGRATED EXECUTIVE SUMMARY OF
THE UNITED STATES OF AMERICA**

February 5, 2021

EXECUTIVE SUMMARY OF THE U.S. FIRST WRITTEN SUBMISSION

I. INTRODUCTION

1. Between 2012 and 2016, the financial situation of the U.S. industry producing crystalline silicon photovoltaic (“CSPV”) products was dismal, particularly deteriorating between 2015 and 2016. This occurred in the face of explosive demand growth, as confirmed by information gathered by the U.S. International Trade Commission (“USITC” or “Commission”) in the global safeguard investigation China has challenged. During this time period, imports of CSPV products increased both absolutely and relative to domestic production, reaching record highs in 2016. The imports were lower priced than domestically produced CSPV products, leading to declining domestic prices and significant and worsening net and operating losses for the already unprofitable domestic industry producing like or directly competitive products. Dozens of domestic facilities shuttered and the U.S. industry producing CSPV products experienced significant idling of its production facilities and significant unemployment and underemployment. Moreover, a significant number of domestic producers were unable to generate capital to finance the modernization of their domestic plants and equipment or to maintain existing levels of expenditures for research and development. This decline occurred despite market conditions that were otherwise extremely favorable to the domestic producers, including strong and increasing domestic demand.

2. The domestic industry first sought to resolve the difficulties posed by increasing imports by seeking antidumping and countervailing duty measures. But the issuance of antidumping and countervailing duty orders on imports from China in December 2012 and additional antidumping and countervailing duty orders on certain other imports from China and Taiwan in February 2015 did not bring relief. The antidumping and countervailing duty measures prompted shifts in production to countries where CSPV products for export to the United States were not subject to such remedies.

3. In 2017, the domestic industry filed a petition with the USITC requesting imposition of a safeguard measure on imports of CSPV products from all sources. The USITC conducted an investigation and found that increased imports were causing serious injury to the domestic industry. On September 22, 2017, the Commission reached a unanimous affirmative determination that CSPV products were being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry. The investigation then proceeded to the remedy phase, so the Commission could provide remedy recommendations in its report to the President.

4. The Commission issued a report in November 2017, containing its affirmative serious injury determination and recommendations for action to take. On November 27, 2017, the United States Trade Representative requested the USITC to provide additional information in the form of a supplemental report identifying any unforeseen developments that led to the articles at issue being imported into the United States in such increased quantities as to be a substantial cause of serious injury. The Commission responded to this request by issuing a supplemental report on December 27, 2017, containing its finding that the increased imports were a result of unforeseen developments and the reasons for that finding. These reports taken together

constitute the report of the U.S. competent authorities for purposes of Articles 3.1 and 4.2(c) of the Safeguards Agreement.

5. Following receipt of the Commission’s reports, the President imposed a safeguard measure beginning on February 7, 2018, that he determined “will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.” The safeguard measure imposed a 2.5 GW tariff rate quota (“TRQ”) on imports of CSPV cells for a period of four years, with unchanging within-quota quantities and annual reductions in the rates of duty applicable to goods entering in excess of those quantities in the second, third, and fourth years. The measure also imposed *ad valorem* duties on imports of CSPV modules for a period of four years, with annual reductions in the rates of duty in the second, third, and fourth years.

II. STANDARD OF REVIEW AND BURDEN OF PROOF

6. The burden of proof rests with the complaining party alleging a breach of an obligation or the party who is asserting a fact. The evidence and arguments underlying a *prima facie* case must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision. Accordingly, China, as the complaining party, bears the burden of demonstrating that the safeguard measure within the Panel’s terms of reference is inconsistent with one of the enumerated provisions of the Safeguards Agreement or GATT 1994.

7. Under these standards, panels are charged with the mandate to determine the facts of the case and to interpret and apply the relevant text of the covered agreements to the challenged measures. In challenging action to impose a safeguard measure, a complaining party brings forward evidence and argument relating to the investigation carried out, the findings by the competent authority, and the remedy imposed. Therefore, past reports have examined whether the authorities have provided a reasoned and adequate explanation as to how the evidence on the record supported its factual findings and how those factual findings support the overall determination. In reviewing agency action, the Panel must not conduct a *de novo* evidentiary review, but instead should bear in mind its role as reviewer of agency action. Indeed, it would not reflect the function set out in Article 11 of the DSU for a panel to go beyond its role as reviewer and instead substitute its own assessment of the evidence and judgment for that of the competent authority.

III. THE USITC’S SERIOUS INJURY DETERMINATION IS CONSISTENT WITH ARTICLE XIX OF GATT 1994 AND SAFEGUARDS AGREEMENT ARTICLES 2, 3, AND 4

A. Overview of the USITC Serious Injury Determination

1. Conditions of Competition

8. The Commission addressed the question of whether CSPV products were being imported into the United States in such increased quantities as to be a substantial cause of serious injury to

the domestic industry. The Commission began by discussing several conditions of competition that informed its analysis. Generally, China does not challenge the Commission’s findings concerning conditions of competition.

9. **Demand.** The Commission found that demand for CSPV products, which derives from demand for solar electricity, increased in every year of the POI. It observed that, consistent with the data, the vast majority of firms reported that U.S. demand for CSPV products increased since 2012. According to most of these firms, the increase in demand resulted from the reduction in CSPV system prices and installation costs as well as the existence of Federal, state, and local incentive programs. Firms also tied the increase in demand to the public’s increased knowledge of and general interest in renewable energy, increased technology improvements, including module efficiency, and increased military use of solar energy.

10. The Commission further found that the vast majority of CSPV modules sold in the U.S. market were connected to the electricity grid and sold to three market segments – residential, commercial, and utility. Annual installations of on-grid photovoltaic systems increased from 3,373 MW in 2012 to 14,762 MW in 2016, an increase of 338 percent. All three on-grid segments experienced considerable growth in both the number of installations and the total wattage of installation projects during the POI, with residential and utility installations increasing by 423 percent and 488 percent, respectively, from 2012 to 2016. The domestic industry and importers each sold CSPV products in the U.S. market to distributors, residential and commercial installers, and utility customers.

11. **Supply.** The Commission found that during the POI, the U.S. market was supplied primarily by imports and to a continuously lesser degree by the domestic industry. Despite the demand increase, several U.S. firms closed their domestic production facilities during the POI. As import presence skyrocketed, the domestic industry’s share of the U.S. market declined from 2012 to 2016.

12. The Commission found that imports, as a whole, accounted for the vast majority of the market, and their share of apparent U.S. consumption increased dramatically from 2012 to 2016. Imports from China were consistently the largest or one of the largest sources of imports except in 2013, following the first antidumping and countervailing duty investigation on CSPV cells and modules from China. Other large sources included Taiwan (particularly from 2012 to 2014), Korea and Malaysia (2016), and Mexico (each year).

13. **Substitutability.** The Commission found a high degree of substitutability between imports and domestically produced CSPV products. The Commission observed that throughout the POI, U.S. producers and importers made commercial shipments of a wide variety of CSPV products, predominantly in the form of modules. Imported and domestically produced CSPV products were sold in a range of wattages and conversion efficiencies, and modules were sold in both 60-cell and 72-cell forms. Imported and domestically produced CSPV products were also sold to overlapping market segments through overlapping channels of distribution, and most responding domestic producers, importers, and purchasers reported that domestic and imported CSPV products were interchangeable.

14. The Commission also found that in the U.S. market for CSPV products, purchasers identified price as an important factor in their purchasing decisions, among other factors they also took into account. Price was the most often cited primary factor, followed by quality/performance and availability.
15. **Other Conditions of Competition.** The Commission found another important condition of competition to be raw material costs. Raw materials accounted for the largest component of the total cost of goods sold (“COGS”) for both CSPV cells and CSPV modules. Prices of polysilicon, the key raw material used in the production of wafers used to manufacture CSPV cells fluctuated but declined overall during the POI.
16. In addition, the Commission found that during the POI, domestic producers and importers reported selling CSPV products using transaction-by-transaction negotiations and also contracts. In 2016, domestic producers sold the majority of their CSPV products through short-term contracts and the remainder on a spot basis, whereas importers sold most of their CSPV products through a mix of short-term, annual, and long-term contracts.
17. The Commission also examined the domestic industry’s profitability and found that the domestic industry was unable to carry out domestic production operations at a reasonable level of profit during the POI. The value of the domestic industry’s net sales declined over the POI and its COGS to net sales ratio was high throughout the POI. Consistent with overall declines in its net sales value and high COGS to net sales ratio, the domestic industry experienced hundreds of millions of dollars in operating and net losses throughout the POI.
18. The Commission recognized that the domestic industry’s U.S. shipments increased overall between 2012 and 2016. The Commission found, however, that this overall increase was dwarfed by the growth in apparent U.S. consumption. Consequently, the domestic industry’s market share fell from a period high in 2012 to a period low in 2016. Both the domestic industry’s and importers’ end-of-period inventories increased overall, and U.S. importers reported that as of June 2017, they already had arranged for importation of an additional 10,200 MW in CSPV products for calendar year 2017.
19. As part of its serious injury analysis, the Commission also examined the extent to which the U.S. market was a focal point for diversion of exports. It found that foreign industries had substantial and increasing capacity to manufacture CSPV cells and CSPV modules and significant unused capacity. Foreign producers’ collective capacity consistently exceeded their combined production levels by large margins and their excess capacity exceeded the size of the entire U.S. market in each full year of the POI. In addition, their combined end-of-period inventories increased each year from 2012 to 2016.
20. The Commission found that foreign industries had not only the available capacity, but also the incentive to export significant volumes of CSPV products to the United States. Although the foreign industries collectively consumed the majority of the CSPV cells that they manufactured in their home market CSPV module assembly operations, their CSPV module operations were export oriented. Indeed, their combined exports of CSPV modules more than quintupled from 2,300 MW in 2012 to 11,800 MW in 2016.

21. The foreign industries also demonstrated an ability to redirect exports from one market to another and to increase exports substantially to individual markets from one year to the next. With several foreign industries facing antidumping and/or countervailing duty orders on their exports to one or more non-U.S. markets, including the European Union (CSPV cells and modules from China, Malaysia, and Taiwan), Canada (CSPV modules from China), and Turkey (CSPV modules from China), the Commission found the large and growing U.S. market was a target for the foreign industries' exports. This was corroborated by questionnaire data, which indicated that the foreign industries collectively increased their exports of CSPV modules to the United States throughout 2012 to 2016, and the U.S. market accounted for an increasing share of their total shipments of CSPV modules during this period.

22. Finally, the Commission examined prices of CSPV products during the POI. Specifically, the Commission examined the pricing data comparing import and domestic prices on the five pricing products agreed by the investigation participants to be representative of CSPV sales in the United States. These products included 60-cell modules as well as 72-cell modules. These comparisons demonstrated that imports of CSPV products were priced lower than domestically produced products in 33 of 52 instances involving approximately two-thirds of the total volume of products for which the Commission had pricing data, and were priced higher in only 19 instances. The Commission observed that domestic producers documented losing sales to low-priced imports of CSPV products, and the majority of purchasers reported that they had increased their purchases of imported CSPV products, most often identifying lower price as the reason for increasing their purchases of imported CSPV products. It found that the domestic industry experienced adverse price conditions as imports were lower priced than domestically produced CSPV products and domestic prices fell between 2012 and 2016 despite very strong demand growth. The domestic industry's COGS to net sales ratio was high throughout the POI with its costs remaining near or above its net sale values.

23. Upon its evaluation of all relevant information concerning the condition of the domestic industry, the Commission found that the domestic industry was seriously injured.

2. Increased Imports were a Substantial Cause of Serious Injury and an Important Cause not less than any Other Cause

24. The Commission found that imports were a substantial cause of serious injury to the domestic industry. As the Commission explained, consistent with the large and attractive nature of the U.S. market and the large and growing size of the export-oriented foreign industries, imports of CSPV products increased both absolutely and relative to domestic production in each year since 2012, reaching record highs in 2016. The increasing volume of imports also accounted for a growing and substantial share of the U.S. market.

25. The Commission noted the change in the composition of imports during the POI. It observed that in 2009, the beginning of the antidumping and countervailing duty investigations on imports from China ("CSPV I"), the domestic industry had held the largest share of apparent U.S. consumption followed by imports from China corresponding to the scope of those investigations, and imports from all other sources. Imports from China, however, overtook the

domestic industry's U.S. shipments in 2010 and by the end of 2011, imports from China had nearly doubled from their 2009 level.

26. After those imports became subject to antidumping and countervailing duty orders in December 2012, imports from China and Taiwan corresponding to the scope of subsequent antidumping and countervailing duty investigations on imports from China and Taiwan ("CSPV II") increased their presence in the U.S. market and replaced entirely the substantial market share previously held by the CSPV I imports from China and took additional market share from the domestic industry. The Commission further observed that before the CSPV II orders became effective in February 2015, imports from additional countries entered the U.S. market. By the end of 2015, imports had almost doubled their level from 2014, and imports continued to grow in 2016.

27. The Commission found that while the volume of imports that were highly substitutable with the domestically produced product and generally lower priced, grew, prices for all five pricing products declined between January 2012 and December 2016. Specifically, prices declined substantially in 2012. Prices stabilized somewhat after imports from China became subject to antidumping and countervailing duty orders in December 2012, additional investigations on imports from China and Taiwan were commenced at the end of 2013, and imports grew at a slower pace than apparent U.S. consumption between 2013 and 2014. As imports from additional sources entered the U.S. market and rapidly increased to higher volumes, however, the domestic industry's prices steadily fell throughout 2016. Several purchasers also reported steeper price reductions in 2016, as the domestic industry's share of the market fell to its lowest level.

28. The Commission found that consistent with the hundreds of millions of dollars in net and operating losses throughout the POI, a significant number of domestic producers were unable to generate adequate capital to finance the modernization of their domestic plants and equipment, and a significant number of them were unable to maintain existing research and development expenditure levels. This inability to generate adequate capital for investments and research and development impaired the domestic industry's ability to develop next-generation products in a highly capital-intensive and technologically sophisticated market.

29. Additionally, despite the need to increase capacity in order to achieve economies of scale, the domestic industry's capacity and production levels did not increase commensurately with demand growth, and its capacity utilization levels remained low and dropped at the end of the POI as imports reached their summit. Although many U.S. producers entered the U.S. market seeking to take advantage of this demand growth, the consistent inability of the domestic industry to compete with low-priced imports forced both new entrants and preexisting producers to shut down their facilities. The substantial number of facility closures during the POI resulted in numerous layoffs and the need for trade adjustment assistance for the highly trained, skilled workers affected by these closures.

30. Consistent with the declines in many of the domestic industry's trade and financial indicators between 2015 and 2016, as imports reached their POI pinnacle, the Commission found that available information suggested that the domestic industry's condition continued to

deteriorate into 2017, continuing beyond the end of the POI in December 2016. Two additional U.S. production facilities closed by July 2017. The domestic industry’s unemployment and underemployment also worsened in 2017, with Suniva’s bankruptcy filing and SolarWorld’s additional layoffs and issuance of worker training and readjustment (“WARN Act”) notices.

31. Based on these considerations, the Commission found “a clear causal link” between increased imports and serious injury to the domestic industry.

32. Finally, the Commission undertook to assure that it did not attribute to increased imports injury caused by other factors. Specifically, respondents identified two such causes: (1) alleged missteps by the domestic industry and (2) factors other than imports that led to declines in domestic prices. The Commission found that the facts did not support respondents’ contentions regarding these other alleged factors.

33. The Commission first addressed respondents’ claims concerning alleged missteps by the domestic industry, which respondents identified in terms of the types of products the domestic industry manufactured, the market segments they served, and the quality, delivery, and service the domestic producers provided. The Commission acknowledged that certain foreign producers may have produced CSPV products that were unique or unavailable from other sources, but explained that the record evidence indicated that these products accounted for only a small share of the U.S. market for CSPV products. Moreover, it found that there was more overlap between U.S. and imported specialized CSPV products than acknowledged by respondents.

34. The Commission also found that respondents’ assertions regarding participation in certain market segments did not break the causal link between imports and serious injury to the domestic industry. Specifically, respondents claimed that: (1) the domestic producers focused their business models on the higher-profit residential and commercial segments of the U.S. market and until recently did not seek to compete for lower-margin, higher-volume utility sales even though utilities were the fastest-growing segment that accounted for the largest share of the market; and (2) domestic producers were unable “to provide the required combination of product type and demonstrated product performance” demanded by utilities.

35. Although the great majority of the domestic industry’s shipments went to residential and commercial installers, the USITC found that the domestic industry also competed for and shipped to the utility segment of the market. The Commission found that the evidence showed that the domestic industry sold both 60-cell and 72-cell modules, and that the utility segment purchased both types of modules during the POI. Respondents even acknowledged that 60-cell modules predominated in all three segments of the market, including the utility segment, at the beginning of the POI. Although the utility segment later shifted to 72-cell modules, SolarWorld added a 72-cell module assembly line to its U.S. facilities due to increasing demand and Suniva devoted 45 percent of its cell production capacity to 72-cell modules.

36. The Commission also found that the record evidence did not support respondents’ allegations that the domestic industry had quality, delivery, and service issues. As an initial matter, most U.S. producers, importers, and purchasers reported that domestically produced CSPV products were interchangeable with imported CSPV products. Moreover, SolarWorld and

Suniva both reported low warranty claim rates, and independent firms recognized the quality of the domestic industry's products. That the domestic industry provided satisfactory quality, delivery, and service was further corroborated by the purchaser questionnaire responses, most of which reported that no domestic supplier had failed in its attempt to qualify product or had lost its approved status since 2012.

37. The Commission next addressed respondents' assertions concerning factors other than imports that allegedly led to declines in domestic prices. These alleged factors were declining government incentive programs, declining polysilicon raw material costs, and the need to meet grid parity with other sources of electricity. The Commission found that these proposed alternative causes could not individually or collectively explain the serious injury to the domestic industry, particularly the declining market share, low capacity utilization levels, facility closures, and abysmal financial performance.

38. Having found that factors other than imports could not individually or collectively explain the serious injury to the domestic industry, the Commission concluded that increased imports were a substantial cause of serious injury to the domestic industry manufacturing CSPV products that was not less than any other cause. In doing so, the Commission assured that it had not attributed any injury from any other factors to increased imports.

IV. CHINA HAS FAILED TO ESTABLISH THAT IMPORTS DID NOT INCREASE AS A RESULT OF UNFORESEEN DEVELOPMENTS AND OF THE EFFECT OF OBLIGATIONS INCURRED

39. The increase in imports observed by the USITC is both the result of unforeseen developments and of the effect of the tariff concessions made by the United States on CSPV products during the Uruguay Round. Specifically, the U.S. negotiators of these tariff concessions did not foresee that a WTO Member would undertake systematic excessive investment in production facilities for solar products so as to create vast overcapacity on a global scale. This effort not only enabled foreign producers to penetrate the U.S. market at unexpected speeds, but furthered the ability of those foreign producers to shift production facilities to multiple countries within accelerated and previously unknown timeframes. As a result, imports increased 492.4 percent between 2012 and 2016, with significant increases from one year to the next during the investigation period.

40. China argues that the USITC did not demonstrate unforeseen developments that are linked to a specific obligation incurred and connected to the increased imports of CSPV products. This argument errs in two ways.

41. First, as a legal matter, Article XIX:1 of the GATT 1994 and Articles 2.1, 3.1, and 4.2 of the Safeguards Agreement do not require a finding that unforeseen developments or a specific obligation are linked to each other, or that there is a causal link, in the sense of Safeguards Agreement Article 4.2(a), with the increased imports. Nor is there any obligation to include findings regarding unforeseen developments or obligations incurred in the report of the competent authorities.

42. Second, China’s argument errs as a factual matter because the USITC November Report, as supplemented by the Supplemental Report, includes findings that identify the tariff concessions and unforeseen developments that resulted in the increased imports.

43. China also argues that the findings on obligations incurred and unforeseen developments must appear in the report of the competent authorities. China’s argument fails on its own terms as the USITC November Report, as supplemented by the Supplemental Report, addresses both the relevant obligations incurred and unforeseen developments. Even aside from China’s erroneous argument, the United States notes that Articles 3.1 and 4.2(d) of the Safeguards Agreement require only that the report of the competent authorities address whether increased imports cause serious injury, and not the separate question whether those imports are a result of unforeseen developments and the effect of obligations incurred. The Appellate Body statements on which China relies reflect an incorrect understanding of the relevant obligations. They did not address all of the potentially relevant arguments and disregard the ordinary meaning of the terms in their context and in light of the object and purpose of the relevant arguments. Therefore, the statements in question are erroneous and should not be regarded by the Panel as persuasive.

**A. The Framework Under Article XIX and the Safeguards Agreement
Concerning Unforeseen Developments and Obligations Incurred**

44. There are important differences between the first and second clauses of Article XIX:1(a). While both contain clauses modifying the main verb “is being imported,” the first clause is triggered “as a result of” unforeseen developments, while the sub-clause in the second clause is triggered by “as to cause serious injury.” The Appellate Body has stated that “{a}lthough we do not view the first clause in Article XIX:1(a) as establishing independent conditions for the application of a safeguard measure, additional to the conditions set forth in the second clause of that paragraph, we do believe that the first clause describes certain circumstances which must be demonstrated as a matter of fact” Another significant point, which the Appellate Body did not note, is that the circumstances covered by the first clause occur before the main verb, while the situations covered by the second occur after and concurrently with the main verb.

45. These are the substantive obligations indicating the factual circumstances in which a Member may take a safeguard measure. The United States does not understand China to disagree with these observations. The parties do, however, disagree on where and how a Member may show that the factual circumstances for taking a safeguard measure exist.

46. China considers that findings to this effect must appear in the report of the competent authorities. The United States has demonstrated that China’s argument fails on its own terms because the USITC November Report, as supplemented by the Supplemental Report, establishes that the increased imports are as a result of unforeseen developments and obligations incurred by the United States under the GATT 1994.

B. The USITC’s Supplemental Report Identifies and Explains the Unforeseen Developments and Obligations Incurred Resulting in the Increased Imports that Caused Serious Injury to the U.S. Solar Industry

47. The Supplemental Report identified several factors that culminated in support of its finding regarding the unforeseen developments. The USITC ultimately concluded that these targeted practices of the Chinese government contributed significantly to the increased imports causing serious injury to the relevant industry in the United States. The USITC also found that such circumstances were not foreseen by the U.S. negotiators at the time of China’s WTO accession, at the time the United States joined the WTO in 1994, or at the time the United States undertook its GATT commitments in 1947.

48. Specifically, the USITC found that:

U.S. negotiators could not have foreseen at the time that the United States acceded to GATT 1947, at the time that the United States acceded to the WTO, or at the time that the United States agreed to China’s accession to the WTO that the government of China would implement the industrial policies, plans, and government support programs such as those described above that directly contradicted the obligations that China committed to undertake as part of its WTO accession. U.S. negotiators also could not have foreseen that such industrial policies, plans, and support programs would lead to the development and expansion of capacity to manufacture CSPV products in China to levels that substantially exceeded the level of internal consumption. They could not have foreseen that this capacity would largely be directed to export markets such as the United States. U.S. negotiators also could not have foreseen that the U.S. government’s use of authorized tools, such as antidumping and countervailing duty measures on imports from China, would have limited effectiveness and instead lead to rapid changes in the global supply chains and manufacturing processes in order to facilitate U.S. imports of non-covered products from China and Taiwan and later U.S. imports from Chinese producers’ affiliates in other countries.

49. China asserts that the Supplemental Report “does not actually identify any specific ‘obligation incurred’ as a result of the GATT or WTO negotiations,” and asserts that the only reference to an obligation in the Supplemental Report is the statement that “[t]he United States has been a GATT member since January 1, 1948, and has incurred the obligations of WTO membership since January 1, 1995.” However, as even China notes, the Supplemental Report says more than this.

50. The Supplemental Report makes clear that CSPV products covered by the safeguard measure “are provided for in subheading 8541.40.60 of the U.S. Harmonized Tariff Schedule [and] have been free of duty under the general duty rate since at least 1987.” This commitment represents a tariff concession that the United States undertook as part of its obligation to bind its Schedule under Article II of the GATT 1994.

51. China contends that “it is hardly ‘unforeseen’ that countries would seek economic development and energy security.” But that was not the USITC’s point. What was unforeseen was the scale of the effort, the speed with which it boosted Chinese production, the overcapacity that it created, and the degree to which these effects spilled into other countries where Chinese producers expanded their operations. It is telling that China essentially ignores the points about the speed of its industry’s growth and the overcapacity that resulted, which are central to the USITC’s conclusions.

52. China argues that negotiators would certainly have foreseen that trade remedies on China would result in increased shipments from other countries because “trade will naturally shift to the countries with lower duties.” However, the USITC did not erroneously treat a “natural” shift in sourcing as “unforeseen.” Rather, it found that China’s policies, plans, and programs “led to vast overcapacity in China and subsequently in other countries as Chinese producers built facilities elsewhere.” Thus, this was not a case of supply and demand “naturally” leading purchasers to source from the country with the lowest prices, but one of China’s practices allowing its producers to move their production from one place to another in ways that were completely unforeseen. Thus, China’s assertions do nothing to cast doubt on the USITC’s finding that Chinese producers’ ability to avoid trade remedies by shifting production to other countries was unforeseen.

53. China also argues that the specific focus on China’s policies, plans, and programs in the USITC Supplemental Report does not explain the connection between these unforeseen developments and the increase in imports from other countries, particularly towards the end of the investigation period in 2016. China’s argument is incorrect because both the USITC November Report and the Supplemental Report explain how China’s policies, plans, and programs resulted in Chinese producers shifting production facilities to other countries and that U.S. imports from these other countries increased massively following this shift.

54. Specifically, the USITC Supplemental Report found that:

the six largest firms producing CSPV cells and CSPV modules in China increased their global CSPV cell and CSPV module manufacturing capacity by expanding investments in third countries without reducing their capacity in China. Imports from four countries where Chinese affiliates added both CSPV cell and CSPV module capacity – Korea, Malaysia, Thailand, and Vietnam – increased their share of apparent U.S. consumption from *** percent in 2012 to *** percent in 2016. Much of this increase occurred between 2015 and 2016, as their collective share of the U.S. market more than doubled from *** percent in 2015 to *** percent in 2016, which occurred just after the CSPV II orders went into effect in February 2015.

V. THE USITC PROPERLY PUBLISHED ITS FINDINGS AND REASONED CONCLUSIONS UNDER SAFEGUARDS AGREEMENT ARTICLE 3.1 AND PROTECTED BCI UNDER ARTICLE 3.2

55. Article 3.1 of the Safeguards Agreement provides that a Member may take a safeguard measure only after its competent authorities have conducted an investigation, provided appropriate means for interested parties to present evidence and their views, allowed them to respond to each others' arguments, and published a report setting out their findings and reasoned conclusions on all pertinent issues of fact and law. Article 3.2 requires that the competent authorities not disclose any confidential information they receive in this process without permission of the party submitting it. Both articles are mandatory, and the USITC complied with both. At the outset of the proceeding, it published a non-BCI version of the petition. It gave parties multiple opportunities to present their views and evidence in writing, and required that they serve each other with copies of the submissions. It conducted two public hearings.

56. China asserts that the USITC acted inconsistently with Article 3 of the Safeguards Agreement because it allegedly failed to provide a sufficient public summary of confidential data to allow for a meaningful defense. China presents this argument as having a procedural dimension with respect to the timing of the ITC's release of certain documents, and a substantive dimension with respect to the adequacy of public summaries of BCI.

57. An examination of Articles 3.1 and 3.2 and the evidence before the Panel shows these arguments to be meritless. First, the USITC had no obligation under Articles 3.1 and 3.2 to provide non-confidential summaries of BCI to the parties during its investigation. Therefore, the timing of release of documents during the investigation is irrelevant. Second, the USITC published its non-BCI report in a manner that gave parties ample time to review it and present their views to the U.S. government. Third, the USITC had no obligation to include non-confidential summaries of submitted BCI in its published report. The relevant obligation is for the competent authorities' report to "set[] forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." China's examples of redactions provide no basis to conclude that the USITC report failed to comply with this obligation.

EXECUTIVE SUMMARY OF U.S. RESPONSES TO THE PANEL'S FIRST SET OF QUESTIONS

U.S. RESPONSE TO PANEL QUESTION 4

58. The USITC considered the domestic industry's excess capacity and inability to meet the entirety of apparent U.S. consumption, and provided a reasoned and adequate explanation linking these circumstances to the serious injury caused by increased imports. Pages 43 to 50 of the USITC November Report provide a detailed analysis explaining how the increased imports caused firms to incur hundreds of millions of dollars in losses throughout the POI, resulting in significant idling of production facilities and hindering the industry's ability to increase capacity commensurate with demand growth. To summarize, the domestic industry's inability to expand capacity in parallel with the growth in domestic demand was one element of the serious injury caused by increased imports and not, as China seems to argue, an independent cause of injury.

59. These imports were highly substitutable with and priced lower than the domestically produced like product. Given that price was an important consideration in purchasing decisions, prices declined as the volume of lower priced imports grew between January 2012 and December 2016. The data demonstrated that prices declined substantially in 2012. Prices stabilized somewhat after imports from China became subject to antidumping and countervailing duty orders in December 2012, additional investigations on imports from China and Taiwan were commenced at the end of 2013, and imports grew at a slower pace than apparent U.S. consumption between 2013 and 2014. As imports from additional sources entered the U.S. market and rapidly increased to higher volumes, however, the domestic industry's prices steadily fell throughout 2016. Several purchasers also reported steeper price reductions in 2016, as the domestic industry's share of the market fell to its lowest level.

60. The Commission found that as prices declined over the POI, the domestic industry's net sales values fell overall and its COGS to net sales ratio was high and exceeded 100 percent at the end of the POI, leading to further deterioration of the industry's condition. Consistent with overall declines in its net sales value and high COGS to net sales ratio, the domestic industry experienced hundreds of millions of dollars in operating and net losses throughout the POI.

61. Thus, despite extremely favorable demand conditions, the domestic industry's performance was "dismal and declining" during the POI. The Commission found that consistent with the hundreds of millions of dollars in net and operating losses throughout the POI, a significant number of domestic producers were unable to generate adequate capital to finance the modernization of their domestic plants and equipment, and a significant number of them were unable to maintain existing research and development expenditure levels. This inability to generate adequate capital for investments and research and development impaired the domestic industry's ability to develop next-generation products in a highly capital intensive and technologically sophisticated market.

62. The Commission also found that, although the remaining firms were capable of supplying additional demand, they were unable to do so due to the increasing volume of lower priced imports. Domestic producers reported and documented losing bids and sales to low-priced imports of CSPV products during the POI. Thus, the remaining firms experienced low capacity utilization even with increasing demand throughout the POI, with excess capacity for module producers increasing from 391,194kW in 2012 to 576,718kW in 2016.

63. Thus, compelling evidence supported the Commission's findings that the increasing volumes of low-priced subject imports resulted in underutilization of the domestic industry's production assets, underinvestment, and closures, which in turn, affected the industry's ability to capitalize on the strong and increasing domestic demand. These findings are consistent with and support the Commission's ultimate finding that increased imports caused serious injury to the domestic industry.

U.S. RESPONSE TO PANEL QUESTION 20

64. The Commission based its finding of a causal link between increased imports and the declining prices on a detailed evaluation of the evidence and consideration of the parties'

arguments. The Commission also evaluated whether other factors might explain the declining prices and attenuate the causal link identified in the first stage of its analysis. It considered the other causes posited by respondents, including declining raw material costs and increased production efficiencies. The Commission found that the record did not support respondents' arguments. Notwithstanding this decline in raw material costs – which should have benefitted the domestic industry – the Commission observed that the domestic industry remained unprofitable as it continued to incur hundreds of millions of dollars in losses over the POI. Like declining raw material costs, any achievement in higher levels of production efficiencies should have been a favorable factor that benefitted the domestic industry by lowering its overall costs. As explained, however, the domestic industry's COGS to net sales ratio was consistently high, and exceeded 100 percent in 2016. Thus, rather than being able to take advantage of lower overall costs resulting from gains in production efficiencies, prices declined at a level that kept pace with their declines in costs.

65. In sum, China's allegation that other factors were responsible for falling prices does nothing to cast doubt on the link the Commission found between increasing low-priced imports and decreased prices for domestic CSPV products.

EXECUTIVE SUMMARY OF U.S. COMMENTS ON CHINA'S RESPONSES TO THE PANEL'S FIRST SET OF QUESTIONS

U.S. GENERAL COMMENTS ON CHINA'S RESPONSES TO PANEL QUESTIONS ABOUT THE USITC'S DETERMINATION

66. Many of China's responses to the Panel's questions concerning the Commission's causation and non-attribution analysis suffer from the same overarching factual inaccuracies and misapprehension of the Panel's role. Rather than make the same points repeatedly each time China's response commits one of the errors, the United States provided consolidated comments with respect to each issue.

67. **General Comment 1.** In arguing that other factors caused injury to the domestic industry, China repeatedly relies upon respondents' unproven assertion in the USITC investigation that the domestic industry made a business decision to focus on the residential and commercial segments of the U.S. market, and to abandon the fast-growing utility segment. As the Commission explained, however, the totality of the evidence belied this assertion. Rather, as the Commission found upon thorough examination of the complete record, 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 others sought." The Commission identified, with direct citations to the record evidence, the many ways in which domestic producers were active in and sought to expand their presence in the utility sector.

68. Other compelling evidence likewise demonstrated the industry's genuine efforts to compete in the utility segment. As the Commission observed, SolarWorld added a 72-cell

module assembly line to its U.S. facilities specifically to serve the increasing demand in the utility market, and Suniva dedicated nearly half of its cell manufacturing capacity to 72-cell modules. The domestic industry also pioneered certain other CSPV technologies, such as monocrystalline products, which converted sunlight more efficiently than multicrystalline products and were sold in all segments of the U.S. market.

69. **General Comment 2.** China repeatedly, and wrongly, accuses the Commission of mischaracterizing the importance of price as reported in the purchaser questionnaire responses. Specifically, China asserts that the Commission misleadingly “paints the picture” that price was the most important factor in purchasing decisions, and that price was the primary reason for purchasers’ purchases of imported product over the domestically produced product. It is China, however, that mischaracterizes the Commission’s price findings, which are fully consistent with the purchaser questionnaire response data.

70. Contrary to China’s claim, the Commission did not find that price was the most important factor in purchasing decisions. Rather, the Commission stated that in the U.S. market for CSPV products, “purchasers consider a variety of factors in their purchasing decisions, but price continues to be an important factor.” Moreover, the Commission did not find that price was purchasers’ primary reason for purchasing imports over domestic product. Instead, the Commission stated that the “majority of purchasers reported that they had increased their purchases of imported CSPV products, most often identifying lower price as the reason for increasing their purchases of imported CSPV products.”

71. **General Comment 3.** In its efforts to attack the reasonableness and adequacy of the Commission’s analysis, China repeatedly cites to individual assertions and statements made by respondents during the course of the administrative proceedings, while ignoring the substantial and contradictory evidence and arguments on the record. Articles 3.1 and 4.2(c) call for the report of the competent authorities to provide “their findings and reasoned conclusions on all pertinent issues of fact and law,” including a “detailed analysis of the case” and a “demonstration of the relevance of the factors considered.” Nowhere does the Agreement require that the competent authorities touch on every single point put forth by the parties, as China seems to suggest. Given the voluminous amount of information on the record in this case – literally thousands of pages – such a requirement would be onerous and unfeasible.

U.S. COMMENT ON CHINA’S RESPONSE TO PANEL QUESTION 24

72. Article XIX:1 of the GATT 1994 provides for a safeguard measure when increased imports are “as a result of” unforeseen developments. China errs in asserting that, to establish that this circumstance exists, a Member must demonstrate a “clear linkage” between unforeseen developments and increased imports. “Link” is a term of art that appears only in the Safeguards Agreement Article 4.2(b) obligation to demonstrate the existence of a “causal link” between increased imports and serious injury. As neither GATT 1994 nor the Safeguards Agreement requires such a showing with respect to unforeseen developments, the term “link” has no place in the evaluation of a claim that a Member has failed to demonstrate that increased imports are “as a result of” unforeseen developments.

73. Indeed, the interpretation advanced by China imposes a double causation requirement that unforeseen developments cause the increased imports that caused serious injury. China nowhere provides a basis in GATT 1994 or the Safeguards Agreement to set the same causal standard for unforeseen developments and serious injury. China’s approach, however, is even more problematic because it would require not only that the competent authority show that unforeseen developments caused the increased imports that caused serious injury but that the unforeseen developments caused the increased imports during a particular year.

74. China’s response to the Panel’s question argues that “[t]he question before this Panel is: does the USITC’s identification of the unforeseen developments adequately explain the increased imports during the most recent time period, that is, from 2015 to 2016?” According to China, not only does a competent authority have to establish a link between increased imports and unforeseen developments, but the link needs to account for increases from one year to the next during the period of investigation. This particularized conception of unforeseen developments under the WTO safeguards disciplines is completely unfounded.

EXECUTIVE SUMMARY OF THE U.S. OPENING STATEMENT AT FIRST VIDEOCONFERENCE WITH THE PANEL

75. The U.S. written submissions have demonstrated that, by any reasonable standard, the USITC met the obligations of the Safeguards Agreement. It conducted an exhaustive investigation of the U.S. market for solar cells and modules, including the relevant tariff concessions, the conditions of competition, and the roles played by imported and domestically produced product. It evaluated the effects of increased imports and of other factors affecting the industry and determined as a result that increased imports themselves caused serious injury to that industry. And finally, the USITC issued a massive report explaining its conclusions in detail. At the request of the U.S. Trade Representative, it also issued a supplemental report explaining how these increased imports were the result of unforeseen developments.

76. The U.S. submissions demonstrated that China failed in its efforts to impugn the USITC’s findings. We will not repeat all of those observations, but will focus on three broad points. First, the USITC established a causal link between increased imports and the domestic industry’s serious injury. Second, the USITC evaluated whether factors other than imports were causing injury to the domestic industry and did not attribute any such injury to increased imports. Third, the United States has identified that the increased imports were the result of unforeseen developments and obligations incurred, consistent with Article XIX.

77. Therefore, China has not carried its burden to show that the safeguard measure on solar products is inconsistent with the United States’ obligations under the WTO Agreement. Instead, China has simply repeated the same or similar arguments that various parties raised during the underlying investigation and that the USITC found unpersuasive or contrary to the voluminous evidence as a whole collected in the investigation. Given China’s failure, we respectfully request that the Panel find that China has not established that the United States has acted inconsistently with respect to the solar safeguard measure.

EXECUTIVE SUMMARY OF THE U.S. CLOSING STATEMENT AT FIRST VIDEOCONFERENCE WITH THE PANEL

78. Two overarching problems arise again and again with respect to China’s opening statement. The first of these is China’s approach to the USITC’s weighing of the evidence. China repeatedly portrays the importers and customers who appeared as respondents in the USITC investigation as neutral observers whose assertions the Panel should accept as “compelling,” and the domestic producers who appeared as petitioners as partisans whose assertions are invariably “self-serving” and inherently unreliable. China provides no justification for these characterizations, and there is none.

79. In its role as competent authority, the USITC was not permitted to, and did not, presume that one side was impartial and the other unreliable. Instead, the USITC treated each party’s assertions equally, and relied on what the evidence in the record actually showed in reaching its factual findings. Where there was conflict between the views advocated by the interested parties, the USITC analyzed and weighed the submitted evidence as a competent authority must to arrive at a reasoned conclusion. This approach fully comports with the obligations under Article 3.1 of the Safeguards Agreement to provide interested parties and the public opportunities to present evidence and their views, to respond to each others’ presentations, and to provide findings and reasoned conclusions. In a WTO proceeding, it is not sufficient for a Member to observe that one set of parties to the investigation presented views and evidence that conflict with the competent authorities’ determination, or that the Member challenging the determination considers the conflicting views and evidence to be more “compelling.” That would call for a re-weighing of the evidence, which is not the job of a panel.

80. A second overarching problem with China’s opening statement lies in its repeated assertions that U.S. rebuttals of China’s arguments constitute “post hoc” reasoning whenever they do not duplicate the text used in the Commission’s determination. This represents a fundamental misunderstanding of the role of a party responding to WTO challenges to the determinations of its competent authorities. China, as the complaining party, bears the burden of proof with respect to its arguments that the USITC failed to comply with U.S. WTO obligations. In rebutting those arguments, the United States has the right both to point out legal misinterpretations by China and to provide the Panel with further detail and explanation of the Commission’s analysis. Where China has misunderstood, misrepresented, or omitted aspects of the findings, the United States is free to identify the errors and point to portions of the record that support the Commission’s conclusions. In doing so, the United States has demonstrated why China has failed to make a prima facie case that the Commission’s determination is inconsistent with the Safeguards Agreement. Such illumination of the Commission’s analysis and exchange of positions and arguments between the parties are integral features of the WTO dispute settlement process.

EXECUTIVE SUMMARY OF U.S. RESPONSES TO THE PANEL’S SECOND SET OF QUESTIONS

U.S. RESPONSE TO PANEL QUESTION 1

81. China’s decision not to bring a claim contesting the USITC finding that the U.S. CSPV products industry was experiencing serious injury precludes review of that finding. Therefore, the Panel must accept that finding as an undisputed fact when assessing the causal link between increased imports and that serious injury. Specifically, given that China did not raise a claim with respect to the USITC’s determination of serious injury, it may not contest that the state of the domestic industry at the time of the determination was one of serious injury. Nor may it assert that individual pieces of evidence or certain aspects of the industry’s condition, individually or collectively, are inconsistent with serious injury. Such arguments would in effect require assessment of a claim that China has not brought under the Safeguards Agreement or GATT 1994.

U.S. RESPONSE TO PANEL QUESTION 11

82. The domestic solar industry’s limited production capacity is a symptom of the serious injury suffered during the period of investigation, not a cause thereof. In this way, lack of capacity is no different from the domestic industry’s inability to capture market share or invest in research and development as it increasingly lost sales and had to lower prices in response to competition from the growing imports into the United States. The USITC’s report identified such factors as indicators of serious injury caused by increased imports and not as independent causes of injury.

83. This approach comports with the language of Article 4.2(b). The first sentence of that provision states that a determination that increased imports have caused serious injury “shall not be made unless this investigation demonstrates . . . the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof.” The relevant meaning of link is “{a} connecting part; esp. a thing or a person serving to establish or maintain a connection; a member of a series; a means of connection or communication.” “Causal” means “of or relating to a cause or causes.” Thus, a “causal link” exists if increased imports result in conditions that lead to serious injury, or if those imports start a causal chain connecting them to the development of conditions indicative of serious injury.

84. The second sentence of Article 4.2(b) calls on the competent authorities to evaluate whether “factors other than increased imports are causing injury to the domestic industry.” “When” that is the case, the sentence states that “such injury shall not be attributed to increased imports.” On its face, this provision distinguishes between factors that “are causing” injury and the injury itself. To treat “the injury” itself as also being a factor that is “causing” injury would reverse the analysis envisaged in Article 4.2(b). The second clause of the sentence confirms this conclusion – it would be absurd to instruct competent authorities not to “attribute” to increased imports an injury that they have found to be the result of increased imports.

U.S. RESPONSE TO PANEL QUESTION 23

85. There is no dispute that the USITC identified in its report that the U.S. tariff schedule provided for duty-free treatment of CSPV products from 1987 forward, or that these rates are bound under GATT 1994. Neither of these facts constitutes a post hoc rationalization and are

sufficient to establish U.S. conformity with Article XIX:1(a). Indeed, as a previous report has noted:

With respect to the phrase “of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions,” we believe that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions. Here, we note that the Schedules annexed to the GATT 1994 are made an integral part of Part I of that Agreement, pursuant to paragraph 7 of Article II of the GATT 1994. Therefore, any concession or commitment in a Member’s Schedule is subject to the obligations contained in Article II of the GATT 1994.

86. The USITC report did what was necessary to comply with the “obligations incurred” language of Article XIX:1(a) when it identified the relevant tariff concession. It is not post hoc rationalization for the United States, in response to China’s claim in this proceeding, to point to the relevant USITC finding, or to observe that this finding was sufficient to satisfy the Article XIX:1(a) “obligations incurred” language.

U.S. RESPONSE TO PANEL QUESTION 26

87. A tariff rate bound at zero percent has significant implications for demonstrating that increased imports are the result “of the effect of obligations incurred.” When a Member undertakes an obligation in the form of a tariff concession pursuant to Article II of the GATT 1994, it represents a commitment that, per se, prevents that Member from raising its tariffs to ameliorate any harm caused by increased imports.

88. Accordingly, a Member may establish that increased imports are the “effect of obligations incurred” simply by identifying a commitment, such as a tariff concession, that prevents it from raising duties on the imports in question. A tariff rate bound at zero percent, while not necessary, is more than sufficient to constitute a restraint on a Member’s freedom to raise its duties and thereby qualify as a per se commitment that satisfies the requirement in Article XIX:1(a) concerning the “effect of obligations incurred.”

EXECUTIVE SUMMARY OF THE U.S. SECOND WRITTEN SUBMISSION AND U.S. COMMENTS ON CHINA’S RESPONSES TO THE PANEL’S SECOND SET OF QUESTIONS

I. THE COMMISSION PROPERLY WEIGHED THE EVIDENCE AND PROVIDED REASONED AND ADEQUATE EXPLANATIONS OF ITS FINDINGS AND CONCLUSIONS

89. China’s arguments suffer from the same thematic difficulties that afflicted the arguments in each of its prior submissions. First, in challenging the reasonableness and adequacy of the Commission’s findings, China ignores the detailed analyses actually undertaken by the Commission and points to specific pieces of evidence and individual assertions made by respondents that, in its view, the Commission did not consider. Articles 3.1 and 4.2(c) call for

the report of the competent authorities to provide “their findings and reasoned conclusions on all pertinent issues of fact and law,” including a “detailed analysis of the case” and a “demonstration of the relevance of the factors considered.” Thus, while an investigating authority must evaluate all relevant evidence and explain the basis for its conclusions, nowhere does the Safeguards Agreement mandate that the explanation discuss each piece of evidence and assertion put forward by the parties in its published report.

90. In fact, the Commission considered the evidence or assertions identified by China, but found them to be outweighed by other evidence which the Commission found to be more compelling. The Commission provided reasoned and adequate explanations regarding its findings. That the analysis did not descend to the granular level of minute detail suggested by China does not render the determination WTO-inconsistent. As explained in the U.S. submissions, the USITC’s November Report contained all the elements called for under the Safeguards Agreement. It explicitly included an evaluation of all relevant factors. Moreover, it contained a detailed analysis of the case, explaining how the facts supported the Commission’s ultimate conclusion that CSPV producers were being imported into the United States in such increased quantities as to be a substantial cause of injury to the domestic industry. In doing so, the Commission fully complied with the obligations required of competent authorities under the Safeguards Agreement.

91. China’s criticisms of the Commission’s findings simply amount to a view that the Commission should have weighed the evidence differently. China repeatedly points to different methodologies with respect to tabulation of the data and provides different characterizations of the evidence to support its own preferred theory of the case. However, none of China’s claims demonstrate any inconsistency with U.S. obligations under the Safeguards Agreement.

92. On this last point, it is important to note that it is China, as the complaining party, that bears the burden of demonstrating that the safeguard measure within the Panel’s terms of reference is inconsistent with the cited provisions of the Safeguards Agreement. In challenging an action to impose a safeguard measure, a complaining party brings forward evidence and argument relating to the investigation carried out, the findings by the competent authority, and the remedy imposed. And in reviewing the competent authority’s action, a panel must not conduct a *de novo* evidentiary review, but instead should bear in mind its role as reviewer of agency action. Indeed, it would not reflect the function set out in Article 11 of the DSU for a panel to go beyond its role as reviewer and instead substitute its own assessment of the evidence and judgment for that of the competent authority.

II. CHINA HAS FAILED TO CARRY ITS BURDEN ON UNFORESEEN DEVELOPMENTS AND OBLIGATIONS INCURRED UNDER ARTICLE XIX

93. China has erred, as a legal matter, when describing the requirements under Article XIX of the GATT 1994 and has failed, as a factual matter, to rebut the findings in the USITC’s November Report and Supplemental Report on these issues. Accordingly, China cannot carry its burden because it identifies the wrong framework for the Panel’s evaluation and has not submitted arguments or evidence that establish any way in which the USITC’s detailed findings and reasoned conclusions are inconsistent with the relevant WTO obligations.

94. On the legal question, China repeatedly mischaracterizes the requirements in Article XIX:1(a), including the connection that must be established between the different elements. Article XIX:1(a) applies when “any product is being imported into the territory of [a] contracting party in such increased quantities,” without regard as to the source or origin of that product. Thus, in evaluating whether this situation is “as a result of unforeseen developments,” a Member is free to examine increased imports of the “product” as a class, and need not separately evaluate imports from individual sources.

95. Furthermore, China argues that, for a Member to apply a safeguard measure, its competent authorities must address the question of increased imports that are as a result of unforeseen developments and the effect of obligations in its published report. While a Member may elect to have its competent authorities address this question in their report, there is no requirement to demonstrate the satisfaction of the first clause of GATT 1994 Article XIX:1(a) before the Member applies a safeguard measure. As explained, the references in Article XIX to unforeseen developments and the effect of obligations incurred are circumstances that must exist for application of a safeguard measure. They are not conditions under Article 2 of the Safeguards Agreement that must be demonstrated in the competent authorities’ report.

96. The USITC found, for example, in the Supplemental Report that “the six largest firms producing CSPV cells and CSPV modules in China increased their global CSPV cell and CSPV module manufacturing capacity by expanding investments in third countries without reducing their capacity in China. Imports from four countries where Chinese affiliates added both CSPV cell and CSPV module capacity – Korea, Malaysia, Thailand, and Vietnam – increased their share of apparent U.S. consumption from *** percent in 2012 to *** percent in 2016. Much of this increase occurred between 2015 and 2016, as their collective share of the U.S. market more than doubled from *** percent in 2015 to *** percent in 2016, which occurred just after the CSPV II orders went into effect in February 2015.” The USITC specifically noted that the imports from these countries, collectively, more than doubled their share of the U.S. market during the time just after the trade remedy orders in CSPV II took effect. China cannot reasonably argue that its producers’ massive increase in production capacity in certain countries is unrelated to a significant increase in exports to the United States from those same countries at the same time.

U.S. COMMENT ON CHINA’S RESPONSE TO PANEL QUESTION 2

97. It is important to note that China’s response to this question reveals two general flaws with its approach. First, China misapprehends the role of the Panel. China acknowledges that “serious injury” and “causation” are two distinct legal issues, and that it has not challenged the Commission’s finding of serious injury. In light of this, the Panel’s review of causal link starts with the given that the domestic industry suffered serious injury during the period of investigation. Notwithstanding this, China suggests that the Panel should conduct its own new assessment of the facts, including those related to serious injury. However, this approach would be exactly the type of de novo review that panel and appellate reports have universally found to be improper for a panel. Thus, to the extent that China raises the state of the domestic industry as an issue in its challenge to the Commission’s finding of a causal link, the Panel should reject

such arguments. China’s decision not to bring a claim contesting the Commission’s serious injury finding, precludes Panel review of that finding.

98. Second, China misapprehends the legal obligations applicable to the competent authorities’ determination. The Appellate Body in *US – Lamb* 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.”

99. In addition to misapprehending the relevant legal obligations, China fails to resolve the contradiction at the heart of the Panel’s question – that China’s assertions that trends in the relevant factors were moving upward is inconsistent with the USITC’s unchallenged finding that the domestic industry was experiencing serious injury. China seeks to reconcile its position by arguing that there was not causation because, while the industry was injured, its condition was improving at the same time that imports were increasing.

100. The effort is unavailing. China’s argument that trends in the domestic industry’s performance were improving relies on upward movement in a subset of the performance factors. The Commission recognized these upward movements in its analysis of serious injury, but found that when these factors were considered within the context of the relevant conditions of competition and in light of the downward trends in other significant factors, and the overall downward trends, particularly between 2015 and 2016 as imports reached their peak, there was a direct correlation between increasing imports and the industry’s dismal and deteriorating financial performance. The Commission provided detailed analyses on how declining prices and the industry’s dismal and deteriorating financial condition corresponded to import trends. The Commission explained that the market otherwise was favorable to domestic producers, with explosive demand growth and trade measures in place against sources of dumped and subsidized imports that had previously caused material injury. However, instead of benefitting from this rapidly expanding demand, the domestic industry struggled and remained unprofitable, as low-priced, highly substitutable imports flooded the market. The industry incurred hundreds of millions of dollars in net and operating losses throughout the POI and was unable to generate adequate capital to finance modernization of their domestic plants and equipment and unable to maintain existing research and development expenditure levels.

101. Thus, the Commission objectively found that the domestic industry’s financial condition, which was at its worst at the beginning of the POI, improved marginally after imposition of the orders and the filing of new antidumping and countervailing duty cases, but remained poor, and then deteriorated further in 2016, as imports peaked in terms of volume and market share and prices dropped anew. By demonstrating how global capacity and supply chains shifted and how imports harmed the domestic industry’s condition after imposition of the CSPV I and CSPV II orders, the Commission not only established an overall coincidence between increased import volume and market share, on the one hand, and the domestic industry’s dismal and deteriorating financial condition, on the other, but the Commission also demonstrated that the seemingly positive trends in other factors did not detract from this conclusion. China has accordingly failed to establish that the Commission’s analysis was inconsistent with Article 4.2(b).

U.S. COMMENT ON CHINA’S RESPONSE TO PANEL QUESTION 12

102. As the United States pointed out in its answer to this question, where interested parties to a safeguards investigation offer conflicting views on a specific issue, a competent authority must determine which evidence it finds to be the most probative. During the course of an investigation, a competent authority may conclude that certain evidence outweighs other evidence or is more credible. This is consistent with the obligations of Articles 3.1 and 4.2(c), which do not establish an abstract level or nature of explanation that competent authorities must provide for each finding. Instead, these provisions require only that the analysis be “detailed” and the findings and conclusions be “reasoned”. There is no obligation to explain how the competent authority weighed the evidence or argumentation beyond what is needed to meet these standards as set out in the Safeguards Agreement.

103. It is important to interpret these obligations in their broader context. The Safeguards Agreement requires the competent authorities to provide importers, exporters, and other interested parties to present evidence and their views, and to respond to presentations of other parties. They must conduct an investigation of and evaluate “all relevant factors of an objective and quantifiable nature having a bearing on the situation of the industry.” If they perform these tasks diligently – as the USITC did in the CSPV Products investigation – they will have before them a huge mass of evidence and argumentation, which may run (as it did in this case) to many thousands of pages. And, any public discussion must avoid any disclosure of business confidential information. By necessity, any “findings and reasoned conclusions” consistent with these principles will involve summarization of evidence and parties’ views. To conclude otherwise would present the competent authorities with an impossible task.

104. That is exactly what China seeks to do. It seeks to frame the task as one where a competent authority must “explain its reasoning in a manner that makes sense and is supported by objective evidence on the record,” which “needs to be satisfactory in light of all relevant fact and more reasonable than other plausible explanations.” However, its critique of the USITC applies these principles in an unreasonably extreme way.

105. For example, it accuses the USITC of failing to address “all the evidence” because it summarized parties’ positions (“the USITC set up many issues as ‘petitioner argued on the one hand’ and ‘respondents replied on the other hand’”) and did not reference every point made by every respondent (“complaints against Suniva by DEPPCOM, Borrego, NRG Energy, Silfab Solar, and SunPower are not even mentioned.”). But the Safeguards Agreement does not require the competent authorities to address every single assertion made by every party. The USITC cited relevant assertions by petitioners and respondents, provided specific allegations as examples, and explained why petitioners’ rebuttals led them to discredit the allegations – generally because other statements by the respondents showed the allegations to be insubstantial. The Commission also considered these allegations within the context of other relevant evidence, including questionnaire responses from 104 purchasers and found that, in any event, these specific allegations failed to demonstrate any “widespread” delivery and service problems. This approach of references and examples provides a “reasoned explanation” for the USITC’s conclusion, and China provides no basis to believe that the examples were unrepresentative or that other evidence would have led to a different conclusion.

106. China does not dispute that Article 3.2 requires competent authorities to protect BCI from disclosure to the public, but nonetheless criticizes the USITC for redacting BCI from its public report, arguing that “a mere reference to confidential information is not sufficient for the purposes of providing a ‘detailed analysis’ as requirement by Article 4.2(c).” Article 3.2’s explicit provisions for collection and protection of BCI recognize that BCI may be critical for making the determination called for in Article 4.2(a), and that parties will not provide such information absent assurances that it will be protected. Thus, to argue – as China does – that the mere fact of redactions evidences a failure to provide findings and reasoned conclusions would make it impossible for competent authorities to comply with the Safeguards Agreement.

U.S. COMMENT ON CHINA’S RESPONSE TO PANEL QUESTION 21

107. As the United States noted in its answer to the Panel’s question, China cannot reasonably argue that its producers’ massive increases in production capacity in certain countries have no effect on the significant increase in exports to the United States from those same countries at the same time. And since Article XIX does not require arguments or evidence on unforeseen developments with more particularity than this, the United States does not need to show import-specific information on a transaction-by-transaction (or company-by-company or country-by-country) basis.

108. As for China’s second response that such developments were not “unforeseen,” China argues that the Chinese producers’ expansion into other countries represents a “natural shift” or “well-documented phenomenon” according to market-based principles and economic concepts that the USITC comprehends. Notably, China does not respond to the United States’ point that, under the Marrakesh Declaration, WTO Members have declared that their economies will participate in the international trading system based on “open, market-oriented policies and the commitments set out in the Uruguay Round Agreements and Decisions.” Nor does it have any reply to the USITC’s findings in the Supplemental Report regarding China’s pervasive and unexpected practices to pursue industrial policies and government programs to distort the market and manipulate the behavior of individual firms. As such, China’s “store” analogy in its response to the Panel’s question only applies if one store was able to undercut the other on price by misappropriating its trade secrets or engaging in some other form of unfair trade practices.

109. Despite China’s protestations, the USITC specifically found that U.S. negotiators could not have foreseen that China would contradict its commitments by implementing a series of industrial policies and government programs favoring renewable energy product manufacturing, and that this would “lead to the development and expansion of capacity to manufacture CSPV products in China at levels that substantially exceeded the level of internal consumption.” The intentional development of overcapacity in China and, following the U.S. trade remedy orders, in other countries, belies China’s argument that the findings identified in the Supplemental Report merely represent a natural ebb and flow according to market dictates rather than purposeful and export-oriented manipulation of the CSPV market.

EXECUTIVE SUMMARY OF THE U.S. OPENING STATEMENT AT SECOND VIDEOCONFERENCE WITH THE PANEL

110. The USITC’s November Report fully satisfies the legal requirements set forth under the Safeguards Agreement. In this report, the Commission provided a detailed analysis of the case, explaining how objective and compelling evidence supported its ultimate conclusion that increased imports of CSPV products caused serious injury to the domestic industry. The USITC complied with Safeguards Agreement Article 4.2(b) in finding a causal link between increased imports and the domestic industry’s serious injury. In particular, the USITC (1) adequately addressed upward movements in certain of the injury trends; (2) adequately considered the negative injury trends within the relevant conditions of competition; and conducted a non-attribution analysis that fully satisfied its obligations under the Safeguards Agreement.

111. In particular, China is confusing the substantive obligations regarding the existence of unforeseen developments and obligations incurred with a procedural obligation that the competent authorities demonstrate the existence of these circumstances in their report. The United States does not dispute the existence or applicability of these obligations to the safeguard measure on CSPV products. What the United States disputes is China’s non-textual assumption that, because the Safeguards Agreement charges the competent authorities with a determination as to serious injury, those same competent authorities must also address unforeseen developments and obligations incurred. China’s second written submission does nothing to counter the U.S. showing that there is no such obligation on the competent authorities.

112. To be clear, this is a moot point, as the USITC provided the necessary findings in the November Report and the Supplemental Report. Nonetheless, if the Panel finds a shortcoming in the USITC analysis, the question of how a Member may demonstrate compliance with the unforeseen developments and obligations incurred becomes relevant. The United States has shown that, in that case, the Panel is free to rely on additional argumentation presented in this proceeding, and China has not shown otherwise.

113. China also challenges the USITC’s Supplemental Report by questioning a supposed finding by the USITC that “the United States was completely surprised – it was ‘unforeseen’ – that other CSPV product exporting countries would increase their exports to the United States given the decrease in exports from China because of the AD-CVD duties.” Of course, the relevant standard is not whether circumstances were a “complete surprise.” That would mean that they were “unforeseeable” in the sense of “unpredictable” or “incapable of being foreseen, foretold or anticipated.” This is contrary to the ordinary meaning of “unforeseen,” namely, that “unforeseen developments” are those that were simply “unexpected.” The USITC’s findings establish that this was the case with respect to the developments identified in the USITC November Report and Supplemental Report.

114. Accordingly, these developments were not a simple product of supply and demand considerations. Instead, they represent the market distorting effects of excess capacity and the export-oriented nature of Chinese producers’ production of modules that U.S. negotiators would not have foreseen at the time that the United States undertook commitments to bind its rate of duty for such products at zero percent. In particular, the magnitude of these market distortions and the speed by which the largest Chinese solar producers were able to set up new production facilities in other countries, without decreasing their domestic operations, is contrary to market-

based firm behavior. U.S. negotiators would not have foreseen such behavior, as the USITC found in its Supplemental Report.

EXECUTIVE SUMMARY OF THE U.S. CLOSING STATEMENT AT SECOND VIDEOCONFERENCE WITH THE PANEL

115. This dispute has called upon the Panel to scrutinize the USITC's reports. The Panel has seen that the data show an industry that had every chance for success – booming domestic demand, products that its customers rated as competitive over all other sources, and numerous plans to expand existing facilities and build new ones. The Panel has also seen that throughout the period of investigation, imports entered at increasingly lower prices. Domestic products lost sales and market share in every sector in the market. Ambitions for expansion became impossible in light of consistent large losses, start-ups failed, and existing producers exited the market. The Commission thoroughly documented each of its findings based on a record thousands of pages long, derived from the Commission's own detailed questionnaires, written submissions by interested parties, and testimony at two day-long public hearings. If this exhaustive review of the evidentiary record is not enough to comply with Article XIX and the Safeguards Agreement, it is difficult to imagine what competent authority could comply. In other words, China's view of these disciplines would effectively nullify the right to take a safeguard measure. That might be an outcome satisfactory to China, but it would not be consistent with the terms of Article XIX and the Safeguards Agreement.

EXECUTIVE SUMMARY OF U.S. RESPONSES TO THE PANEL'S THIRD SET OF QUESTIONS

U.S. RESPONSE TO PANEL QUESTION 45

116. 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. 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.

U.S. RESPONSE TO PANEL QUESTION 49

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

118. Other record evidence supporting the Commission's conclusion demonstrated the complexities of grid parity. Far from being a uniform concept, the data showed that the leveled

cost of energy of photovoltaic systems varied by region, time of day, and availability of other electricity sources, and even could vary widely for a given energy source. Indeed, as the Commission observed, installed photovoltaic system prices differed greatly from state to state and project to project, with a considerable spread among the prices in each market segment. Respondent SEIA’s own expert confirmed that “[i]t is possible that, within a particular state, the residential solar segment might have achieved grid parity but the utility-scale segment has not, or vice versa.” And China itself stated that the cost for solar-generated electricity systems in the utility segment was already at grid parity, which “made them cost-competitive with other energy sources.” Given this great variability, there could not have been one absolute target price that all domestic producers strove to meet in selling their CSPV products.

119. In addition, the record evidence further demonstrated that the need to attain grid parity had not even translated into continuously declining prices for CSPV products as China asserts. Rather, the price data showed that prices for CSPV products, in fact, had stabilized after the CSPV I orders were imposed and new investigations were initiated in CSPV II. The Commission observed that although installed photovoltaic system prices declined steadily in all three market segments, this was due to falling non-module costs rather than to any price changes in CSPV products between 2013 and 2015. Although U.S. module prices declined in 2016, this was, as the Commission explained, a direct result of low-priced imports from additional sources that entered the U.S. market. Moreover, as those imports rapidly increased to higher volumes in 2016, U.S. module prices rapidly declined. This correspondence demonstrates that, rather than the need for solar generators to attain grid parity, low-priced imports were the real factor in the overall price declines of CSPV products during the period of investigation.

U.S. RESPONSE TO PANEL QUESTION 56

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

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

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

questionnaire responses limited to covered products. Thus, the data on which China relies is not relevant to the USITC’s unforeseen developments analysis.

123. In any event, Table C-7 indicates that Korea accounted for one-third of the increase in imports by value. Malaysia, Thailand, and Vietnam (the three other countries where Chinese firms had added both cell and modules capacity) accounted for almost two-thirds of the total increase shown in that table. The USITC’s findings regarding increased imports from all of these countries where Chinese companies had added both CSPV cell and module capacity were sufficient to establish that increased imports were “as a result of unforeseen developments” for purposes of Article XIX:1(a).

EXECUTIVE SUMMARY OF U.S. COMMENTS ON CHINA’S RESPONSES TO THE PANEL’S THIRD SET OF QUESTIONS

U.S. COMMENT ON CHINA’S RESPONSE TO PANEL QUESTION 36

124. China insists that it “has not argued that there is any need for separate causation analysis for each segment,” 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.” This panel report, however, is inapposite because it involved the issue of industry segments, and not market segments.

125. 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 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).

126. 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.

127. 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. The Commission determined that all three segments experienced considerable growth, imports and domestically produced CSPV products competed against each other across all three sectors of the U.S. market, 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. Contrary to China’s view, this analysis “address[ed] specifically the nature of the interaction between the imported and domestic products.” 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.

U.S. COMMENT ON CHINA’S RESPONSE TO PANEL QUESTION 39

128. 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. 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.

129. 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. 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. Indeed, most U.S. producers, importers, and purchasers confirmed that product from domestic and foreign sources were interchangeable.

130. 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. Indeed, of the 33 CSPV cell or CSPV module facilities operating in the United States as of January 1, 2012, only 13 of those 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. The domestic producers remaining in the market continued to operate at below full capacity, particularly for CSPV module assembly operations. 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.

131. 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. 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.” 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.

U.S. COMMENT ON CHINA’S RESPONSE TO PANEL QUESTION 57

132. 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. 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. 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.

133. 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.

CONCLUSION

134. For the foregoing reasons, the United States respectfully requests that the Panel find the safeguard measures at issue consistent with the United States’ obligations under Article XIX of the GATT 1994 and the Safeguards Agreement.