

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

(DS562)

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

May 29, 2020

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<i>EC – Tube or Pipe Fittings (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003
<i>India – Iron and Steel Products (Panel)</i>	Panel Report, <i>India – Certain Measures on Imports of Iron and Steel Products</i> , WT/DS518/R, circulated 6 November 2018
<i>US – Hot-Rolled Steel (AB)</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001
<i>US – Lamb (AB)</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001
<i>US – Large Civil Aircraft (2nd complaint) (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R, adopted 23 March 2012
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<i>US – Softwood Lumber VI (Article 21.5 – Canada) (AB)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW, adopted 9 May 2006
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<i>US – Steel Safeguards (Panel)</i>	Panel Reports, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/R / WT/DS249/R / WT/DS251/R / WT/DS252/R / WT/DS253/R / WT/DS254/R / WT/DS258/R / WT/DS259/R / and Corr.1, adopted 10 December 2003, as modified by Appellate Body

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1 STANDARD OF REVIEW

Question 1 (both parties)

At paragraph 84 of its first written submission, the United States advances that "[Agreement on Safeguards ("SA")] Articles 3.1 and 4.2(c) do not impose a burden of investigative or explanatory perfection that no competent authority could meet. For example, if an error or omission does not cast doubt on a particular conclusion, that conclusion is still 'reasoned' and, thus, consistent with Article 3.1. Similarly, if the competent authorities are silent on a particular issue of fact or law that is not pertinent, they have still complied with Article 3.1."

- a. *(To China)*: Does China agree with the United States' characterization of the applicable standard of review in this paragraph? If not, please explain why.
- b. *(To the United States)*: Please reconcile the characterization of the applicable standard of review in this paragraph with the requirement that the competent authorities must evaluate all relevant evidence, which the United States appears to accept in its first written submission.¹

¹ United States first written submission, para. 90, quoting Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97 and *US – Hot-Rolled Steel*, para. 193.

Response:

1. The quoted passage from the U.S. first written submission comports fully with the requirements that a competent authority must satisfy in such an investigation. Articles 3 and 4 of the Safeguards Agreement contain obligations on the steps the competent authorities must take to reach a serious injury determination that would authorize a Member to take a safeguard measure. Publishing a report is one of those steps. Specifically, Article 3.1 requires that the competent authorities “publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.” Article 4.2(c) calls for them to publish in that report “a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.”

2. The *Oxford English Dictionary* defines “report” as:

An evaluative account or summary of the results of an investigation, or of any matter on which information is required (typically in the form of an official or formal document), given or prepared by a person or body appointed or required to do so.

* * * * *

A written account of a case heard in a court (esp. as prepared for publication), typically giving an outline of the proceedings and setting out (now often verbatim) the judgment.¹

Both of these definitions make clear that a “report” does not reproduce the entirety of an investigation or a case. It provides a “summary” or “outline,” which by its nature involves omitting information in the interest of attaining brevity. The terms of Articles 3.1 and 4.2(c) indicate some of what competent authorities may permissibly omit, namely, issues of fact and law that are not “pertinent” and factors that are not relevant to their determination.

3. Article 4.1(a) of the Safeguards Agreement obligates the competent authorities to “evaluate all relevant factors of an objective and quantifiable nature having a bearing of the situation of that industry.”² However, it does not require that they reproduce all of the *evidence* regarding relevant factors in their report. Rather, the report of the competent authorities satisfies Articles 3.1 and 4.2(c) as long as it provides a detailed analysis, including the relevance of the factors examined. The Appellate Body has explained that, under DSU Article 11,

an “objective assessment” of a claim under Article 4.2(a) of the *Agreement on Safeguards* has, in principle, two elements. First, a panel must review whether competent authorities have evaluated *all relevant factors*, and, second, a panel must review whether the authorities have provided a *reasoned and adequate explanation* of how the facts support their determination. Thus, the panel's objective assessment involves a *formal* aspect and a *substantive* aspect. The formal aspect is whether the competent authorities have evaluated “all relevant factors”. The substantive aspect is whether the competent authorities have given a reasoned and adequate explanation for their determination.³

The “summary” or “outline” provided in the competent authorities’ report need not refer specifically to a particular piece of evidence if the analysis otherwise provides findings and reasoned conclusions on the relevant issues.

¹ New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. II, p. 2551.

² The question refers to a requirement to “evaluate all relevant evidence” which is a phrase appearing in an Appellate Body finding that a panel’s evaluation of an investigating authority’s reasoning:

may also require a panel to consider whether, in analyzing the record before it, the investigating authority evaluated all of the relevant evidence in an objective and unbiased manner, so as to reach its findings without favouring the interests of any interested party, or group of interested parties, in the investigation.

US – Softwood Lumber VI (Article 21.5 – Canada) (AB), para. 97 (emphasis added).

³ See *US – Lamb (AB)*, para. 103 (emphasis in original) (footnote omitted).

4. By the same token, if a panel considered that the competent authorities had made a mistake, the panel would need to consider these in the context of the totality of the report. It might be the case that a factual error was minor or on a tangential issue, such that it did not detract from a conclusion based on other evidence. Similar considerations led the Appellate Body to reject a challenge to a panel’s erroneous analysis of one piece of evidence because “{e}ven if we were able to correct the Panel’s erroneous reading of the table in the Peisen Study, the United States has not explained why or how the Panel’s numerical error necessarily vitiates its finding that the aeronautics R&D subsidies facilitated an earlier launch of the 787 than would have otherwise been possible.”⁴ The Appellate Body explained that the panel had relied on its erroneous understanding to reach a generalized conclusion, which was supported by other evidence, and that, therefore, “we reject the argument of the United States that the Panel’s misreading of the table in the Peisen Study attenuates its finding that the aeronautics R&D subsidies contributed in a genuine and substantial way to the development of the 787.”⁵

5. The same reasoning is instructive in applying Articles 3.1 and 4.2(c) of the Safeguards Agreement. If a factual omission, miscalculation, or other error does not undermine the support otherwise provided by the record as a whole for a finding made by the competent authorities, the report complies with Articles 3.1 and 4.2(c).

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

Question 2 (China)

In its first written submission, China appears to take the position that a domestic industry cannot be seriously injured by imports if it lacks the capacity to supply the full extent of domestic demand.² In this respect, please explain: (i) whether this is in fact China’s position; and (ii) if so, whether it accounts for the possibility that a domestic industry could be suffering serious injury in respect of the portion of demand that it could supply (but for import competition), e.g. through losing sales or experiencing low capacity utilization.

² China’s first written submission, paras. 120-121 and 130.

⁴ *US – Large Civil Aircraft (AB)*, para. 980.

⁵ *US – Large Civil Aircraft (AB)*, para. 981.

Question 3 (China)

(To China): Please explain why it was unreasonable for the USITC to consider the fact that "domestic industry's capacity and production levels did not increase commensurately with demand growth"³ to be part of the injurious dynamic affecting the domestic industry?

³ USITC Final Report, Exhibit CHN-2, p. 47.

Question 4 (US)

(To the United States): At paragraph 120 of its first written submission, China claims that, during the POI, US excess capacity for CSPV modules averaged 400,000 kW per year. In the same paragraph, China also claims that apparent US consumption "increased substantially during the POI, so much so that demand exceeded available excess capacity by the domestic industry at the beginning of the POI by 2,981,806 kW, and by 14,185,282 kW by 2016. This meant that excess domestic industry capacity could meet only 13% of total demand in 2012 and only about 4% of total demand in 2016." Please explain whether, and if so how, the USITC reconciled these circumstances with its ultimate finding that the increased imports caused serious injury to the domestic industry.

Response:

6. 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 productive 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.

7. These imports were highly substitutable with and priced lower than the domestically produced like product.⁶ 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 2016.⁷ 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

⁶ USITC November Report, pp. 29-30, 41-42 (Exhibit CHN-2).

⁷ USITC November Report, p. 45 (Exhibit CHN-2).

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.⁸

8. The Commission found that as prices declined over the POI, the domestic industry’s net sales values fell overall and its cost of goods sold (“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.⁹ 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.¹⁰

9. Thus, despite extremely favorable demand conditions, the domestic industry’s performance was “dismal and declining” during the POI.¹¹ 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.¹²

10. 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 commensurate 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 companies sought to open or add production in the U.S. market 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.¹³

11. The Commission found that available information suggested that, 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 domestic industry’s condition continued to deteriorate into 2017. Two additional U.S. production facilities closed by July 2017. The domestic industry’s unemployment and underemployment also worsened in 2017, with Suniva’s

⁸ USITC November Report, pp. 45-46 (Exhibit CHN-2).

⁹ USITC November Report, p. 38 (Exhibit CHN-2).

¹⁰ USITC November Report, pp. 34-35 (Exhibit CHN-2).

¹¹ USITC November Report, p. 35 (Exhibit CHN-2).

¹² USITC November Report, p. 47 (Exhibit CHN-2).

¹³ USITC November Report, pp. 47-48 (Exhibit CHN-2).

bankruptcy filing and SolarWorld’s additional layoffs and issuance of worker training and readjustment (“WARN Act”) notices.¹⁴

12. Thus, contrary to China’s suggestion, the inability of the domestic industry to fully supply all of demand did not mean that the domestic industry was not seriously injured by increased imports. To the contrary, the Commission demonstrated that the presence of increased imports prevented the domestic industry from increasing productive capacity to a greater extent and meeting a larger share of the apparent U.S. consumption in the first instance.

13. The Commission also found that, although the remaining firms were capable of supplying additional demand and the consumption of CSPV products, 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 2016.¹⁵

14. The Commission further observed that the domestic producers suffered other negative effects on their investments directly due to imports. These included: tabling, postponing, and deferring projects; rejection of investment proposals; reduction in the size of capital investments; negative returns on investments; inability to generate adequate capital to finance modernization of domestic plants and equipment; increased costs for debt financing; inability to maintain existing levels of research and development expenditures; rejection of bank loans; lowering of credit ratings; inability to issue stock or bonds; inability to service debt; lowered bankability; and other such difficulties.¹⁶

15. Thus, compelling evidence supported the Commission’s findings that the increasing volumes of low-prices 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.¹⁷ These findings are consistent with and support the Commission’s ultimate finding that increased imports caused serious injury to the domestic industry.

¹⁴ USITC November Report, p. 49 (Exhibit CHN-2). Under the WARN Act, 29 U.S.C. § 2102 (Exhibit USA-03), most employers with 100 or more employees are required to provide written notification 60 calendar days in advance of plant closings or mass layoffs.

¹⁵ USITC November Report, p. 32 (Exhibit CHN-2).

¹⁶ USITC November Report, p. 36 (Exhibit CHN-2).

¹⁷ USITC November Report, p. 48 (Exhibit CHN-2).

Question 5 (China)

In section III.A.2.c.i of its first written submission, China recognizes that there may have been a coincidence between increased imports and lost market share, but contends that the USITC failed to analyse the domestic industry's lost market share in the context of the conditions of competition in the domestic market. Please reconcile this argument with the USITC's findings referred to at paragraphs 118-120 and 122-124 of the United States' first written submission concerning: (i) the domestic industry losing sales to imports; (ii) competition between domestic and imported products in residential, commercial, and utility market segments; and (iii) imports impeding the domestic industry's ability to compete with imports in the first instance.

Question 6 (China)

The United States advances that the USITC adequately analysed the impact of the CSPV I and CSPV II orders on the financial condition of the domestic industry in its finding that the orders ultimately "had limited effectiveness due to rapid changes in the global supply chains and manufacturing processes", despite having an initial favourable impact.⁴ Please respond to this argument.

⁴ See United States' first written submission, paras. 144-146 and 148-149.

Question 7 (US)

(To the United States): Does the United States agree with China's characterization at paragraph 145 of its first written submission that "the domestic industry was better off in 2016 after the import increase than in 2012 before the import increase"? If so, did the USITC reconcile these circumstances with its conclusion that increased imports caused the domestic industry's financial condition to deteriorate? Please explain.

Response:

16. As an initial matter, the United States notes that, notwithstanding this characterization of the domestic industry's condition, China has not raised a claim challenging the Commission's conclusion that the domestic industry suffered serious injury. Underlying this unchallenged conclusion was the Commission's finding that the domestic industry's financial performance was "dismal and declining."¹⁸

17. In any event, the United States does not agree with China's assertion that "the domestic industry was better off in 2016 after the import increase than in 2012."¹⁹ China ignores important conditions of competition – in particular, the explosive growth in demand and the

¹⁸ USITC November Report, p. 35 (Exhibit CHN-2).

¹⁹ China First Written Submission, para. 145.

early, but ineffective, imposition of trade remedy orders – that informed the Commission’s injury analysis and “provided insights into the issue of the causal relationship between increased imports and serious injury.”²⁰

18. As the Commission explained, the *CSPV I* orders were imposed on imports from China in December 2012 and the *CSPV II* orders were imposed on imports from China and Taiwan in February 2015.²¹ The antidumping and countervailing duty measures had an initial favorable impact, but ultimately had limited effectiveness due to rapid changes in the global supply chains and manufacturing processes.²² The Commission discussed how each imposition of the trade remedies led to shifts in manufacturing and global supply chains. Specifically, immediately after imports from China became subject to orders in December 2012 and additional investigations on imports from China and Taiwan commenced at the end of 2013, imports grew at a slower pace than apparent U.S. consumption between 2013 and 2014. However, as imports from additional sources subsequently entered the U.S. market, imports rapidly increased to higher volumes throughout 2016, for an overall increase of 492.4 percent between 2012 and 2016.²³

19. The Commission explained that during this time, 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 not covered by the orders, without reducing their capacity in China. Indeed, 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, particularly between 2015 and 2016, and their collective share of the U.S. market more than doubled.²⁴

20. Price movements correlated with import trends, stabilizing between 2013 and 2014, and then steadily falling throughout 2016, as did the domestic industry’s financial condition.²⁵ Thus, the Commission 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.²⁶ By demonstrating how global capacity and supply chains shifted to provide an immense source of CSPV imports into the United States and how they harmed the domestic industry’s condition

²⁰ *US – Steel Safeguards (Panel)*, para. 10.314.

²¹ USITC November Report, p. 40 (Exhibit CHN-2).

²² USITC November Report, p. 44 (Exhibit CHN-2).

²³ USITC November Report, pp. 44, 46 (Exhibit CHN-2).

²⁴ USITC November Report, pp. 44-45 (Exhibit CHN-2).

²⁵ USITC November Report, p. 46 (Exhibit CHN-2).

²⁶ USITC November Report, p. 47 (Exhibit CHN-2).

after imposition of the *CSPV I* and *CSPV II* orders, the Commission established that the domestic industry was not “better off” in 2016 than in 2012.

21. Additionally, when the domestic industry’s hundreds of millions of dollars in net and operating losses throughout the POI are viewed in the context of booming demand, the Commission’s observations that the industry’s performance improved only “marginally” through 2015, and then “deteriorated further” in 2016, do not indicate good performance or a “better off” domestic industry,²⁷ as China suggests. Rather, the USITC properly viewed these developments in the context of the conditions of competition. It conducted a searching analysis of the trends and other data before concluding that increased imports were the most important cause of the domestic industry’s dismal overall financial performance.²⁸

Question 8 (China)

At paragraphs 149-150 of its first written submission, China takes the position that the USITC's analysis of price trends "did not actually link the relationship between the increased imports, and declining prices". In response, in section II.D.2.a.ii of its first written submission, the United States refers to a variety of evidence that purportedly established such a link.⁵ Please explain why, in China's view, this evidence does not support the USITC's finding that increased imports caused prices of CSPV products to decline.

⁵ In particular, the United States advances that the USITC analysed evidence demonstrating that: domestic and imported CSPV products were generally interchangeable, and that a wide variety of CSPV products was sold during the POI; price played a predominant role in purchasing decisions; imported CSPV products were priced lower than domestic products; and domestic producers lost sales to imported CSPV products and lowered their prices to compete with imported CSPV products.

Question 9 (China)

The USITC appears to have found that price trends in the US market were linked to the interrelationship between the source and volume of CSPV imports and effectiveness of *CSPV I* and *CSPV II* orders.⁶ Was this finding unreasonable? Please explain.

⁶ See, e.g., USITC Final Report, Exhibit CHN-2, p. 46 and footnote 252.

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

²⁷ USITC November Report, p. 47 (Exhibit CHN-2).

²⁸ USITC November Report, p. 35 (Exhibit CHN-2).

Question 10 (both parties)

The parties appear to agree that the USITC report does not contain a "non-attribution" analysis demonstrating that the injurious effects of other factors raised in the CSPV investigation were not attributed to the injurious effects of imports.⁷ Is this understanding correct?

⁷ See China's first written submission, paras. 175 and 197-198; United States' first written submission, para. 107.

Response:

22. No. Pages 50 to 65 of the USITC November Report provide a thorough and detailed non-attribution analysis, in which it provided reasoned and record-based explanations for finding that none of the other factors cited by respondents caused injury to the domestic industry.²⁹

23. Article 4.2(b) provides the parameters for a competent authority to evaluate other factors allegedly causing injury to the domestic industry. Specifically, the second sentence of Article 4.2(b) states that “When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.” The first clause signals that it introduces an obligation that applies only if the competent authorities have found that a factor different from increased imports is causing some impairment to the domestic industry, and this is happening simultaneously with the serious injury caused by increased imports. The second clause sets out an obligation that applies when the conditions in the first clause are met: “such injury shall not be attributed to increased imports.” Therefore, if the competent authorities conclude that other factors are *not* causing injury, or that they did not cause injury at the same time as increased imports, the obligation in Article 4.2(b), second sentence, does not apply.

24. The Commission’s analysis conformed precisely to the obligations in the second sentence of Article 4.2(b). Specifically, the Commission carefully examined the record evidence, identified the two alternative causes of injury proposed by respondents – (1) alleged missteps by the domestic industry and (2) factors other than imports that led to declines in domestic prices – and evaluated whether they were causes of serious injury. It determined that the record evidence demonstrated that neither was a cause of the serious injury to the domestic industry. On that

²⁹ The United States also takes issue with the premise of the question, which cites paragraph 107 of the U.S. first written submission as indicating our agreement that the USITC Report does not contain a “non-attribution analysis.” That paragraph states explicitly that that “the USITC correctly found that the *other factors* at issue did *not* cause serious injury at all.” (emphasis original). That finding satisfied the obligation that injury caused by other factors “shall not be attributed to increased imports.” As such, it was the only “non-attribution” analysis necessary under these facts.

basis, the Commission found that neither was an “important cause” of serious injury for purposes of the U.S. safeguard statute.³⁰

25. By determining that each of the alleged other factors causing injury did not in fact cause injury to the domestic industry, the Commission demonstrated that it did not attribute the effects of any of these other factors, individually or collectively, to the increased imports. In doing so, the Commission conducted a non-attribution analysis that fully satisfied the obligation under SGA Article 4.2(b) to evaluate whether factors other than imports are causing injury to the domestic industry, and the admonition not to attribute any such injury to increased imports.

Question 11 (China)

Does SA Article 4.2(b), second sentence, require that a non-attribution analysis be conducted in respect of an other factor that the competent authorities find does not cause injury to the domestic industry? Please explain.

Question 12 (US)

At paragraph 184 of its first written submission, China argues that "the *USITC* did not explain the effect of the domestic industry's decision to focus on the higher-*profit* residential and commercial segments of the U.S. market". Did the *USITC* address the respondents' argument that the domestic industry *decided* to focus on the residential and commercial market segments in lieu of the utility segment? If so, where is this explanation contained in the *USITC* report?

Response:

26. The *USITC* addressed on pages 56 to 60 of its November Report respondents’ argument that the domestic industry decided to focus on the residential and commercial segments in lieu of the utility segment. The Commission considered this possibility and found that to the contrary, compelling record evidence demonstrated that domestic producers affirmatively sought to sell to the utility segment. Thus, respondents erred in asserting that domestic producers made a “decision to focus on the . . . residential and commercial segments of the U.S. market.”

27. As the Commission explained, the domestic industry served all segments of the U.S. market, including the utility segment, during the POI. Specifically, the record evidence showed that the domestic industry sold CSPV products in the U.S. market to distributors, residential and commercial installers, and the utility segment.³¹ The Commission also took into account the extensive information submitted by the largest U.S. producers of CSPV products, SolarWorld

³⁰ *USITC* November Report, pp. 50-65 (Exhibit CHN-2).

³¹ *USITC* November Report, p. 58 (Exhibit CHN-2). Although distributors typically sold CSPV products into the residential and commercial market, including to installers, Suniva reported that some of its sales to distributors served the utility segment. *USITC* November Report, p. 58 n.331.

and Suniva, demonstrating that they bid for sales to the utility segment and won bids to this segment. The Commission found that this evidence corroborated that the domestic industry sought to compete in and shipped products to the utility segment of the market.³²

28. The Commission also considered other probative evidence demonstrating the domestic industry's desire to sell CSPV products to the utility segment. As the Commission observed, the record showed that domestic producers produced both 60-cell and 72-cell modules during the POI and that they added and/or dedicated manufacturing capacity specifically to produce modules to serve the utility segment.³³ The Commission explained that, as respondents acknowledged, 60-cell modules predominated in the utility segment at the beginning of the POI.³⁴ Although the utility segment shifted towards 72-cell modules during the POI, the evidence showed that the domestic producers evolved their manufacturing capabilities accordingly. Specifically, 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 45 percent of its cell manufacturing capacity to 72-cell modules.³⁵ As the Commission noted, some of the evidence presented by respondents themselves corroborated that domestic producers manufactured both 60-cell and 72-cell modules for sale to the utility industry.³⁶

29. The Commission also considered how domestic producers pioneered certain CSPV technologies, and continued to innovate, develop, and manufacture leading-edge products such as monocrystalline products, which converted sunlight more efficiently than multicrystalline products. Utilities sought such innovative products, which, as the Commission found, were sold in all segments of the U.S. market.³⁷

30. Based on the abundant evidence, the Commission demonstrated that the domestic industry did *not* decide to focus on the residential and commercial segments of the market as respondents asserted, but rather sought to compete in all segments, including the utility segment.

Question 13 (China)

At pages 60-61 of its Final Report, the USITC found *that* "the domestic industry clearly sought to compete in the large, concentrated, and price-sensitive utility market, but the large volume of imports at low and declining prices adversely impacted the domestic industry's financial performance, making it difficult for the domestic industry to increase capacity to a

³² USITC November Report, p. 59 (Exhibit CHN-2). SolarWorld and Suniva together accounted for the vast majority of U.S. CSPV cell production in 2016 and the large majority of module assembly during the POI. *See* USITC November Report, p. 6 n.10.

³³ USITC November Report, p. 60 (Exhibit CHN-2).

³⁴ USITC November Report, p. 60 n.348 (Exhibit CHN-2).

³⁵ USITC November Report, p. 59 (Exhibit CHN-2).

³⁶ USITC November Report, p. 60 n.346 (Exhibit CHN-2).

³⁷ USITC November Report, pp. 60-61 (Exhibit CHN-2).

scale that made it more competitive in this segment". Was this finding unreasonable? Please explain.

Question 14 (US)

At paragraph 188 of its first written submission, the United States argues that the USITC weighed information submitted by respondents and domestic producers regarding the alleged service and delivery issues of the domestic industry. Please explain how the USITC demonstrated that it did so.

Response:

31. The Commission demonstrated on page 61 of its November Report that it weighed the information regarding the alleged service and delivery issues of the domestic industry submitted by respondents and domestic producers.³⁸ Specifically, the Commission explained that it considered hearing testimony and allegations on behalf of respondent Solar Energy Industries Association (“SEIA”), a trade association of solar installers, project developers, contractors, and financiers, in its prehearing and posthearing injury briefs. As the Commission observed, these allegations consisted of certain purchasers’ specific criticisms regarding SolarWorld and Suniva.³⁹ The Commission also considered competing hearing testimony and the posthearing injury submissions of SolarWorld and Suniva, in which the companies responded in detail to the specific allegations of quality, delivery, and service concerns.⁴⁰

32. For example, the Commission explained, noted and addressed the testimony of a purchaser, NextTracker, that it had experienced delivery and product specification problems with SolarWorld. Upon examination of all of the relevant evidence, the Commission found that the purchaser’s website still listed SolarWorld as an approved vendor and that SolarWorld continued to supply CSPV products for NextTracker’s projects.⁴¹

33. Likewise, the USITC’s determination shows that it evaluated another specific allegation made by purchaser Sunrun that SolarWorld and Suniva refused to participate in its Vendor Quality Management Program. Submissions by SolarWorld and Suniva, however, demonstrated that their refusals were not due to quality, delivery, or service concerns. SolarWorld showed that the real obstacle was its refusal to release intellectual property demanded by Sunrun. Suniva explained that it had participated in the preliminary stages of negotiation with Sunrun but that the

³⁸ China First Written Submission, paras. 190-95.

³⁹ USITC November Report, p. 61 n.354 (Exhibit CHN-2).

⁴⁰ USITC November Report, p. 61 n.355 & n.356 (Exhibit CHN-2).

⁴¹ USITC November Report, p. 61 n.355 (Exhibit CHN-2).

two firms were so far apart on price that it had not made sense for Suniva to spend money on the qualification process.⁴²

34. Regarding the other allegations, the Commission found that SolarWorld provided credible documentation refuting respondents' allegations regarding transactions with DEPCOM, California Solar System, and Borrego. Likewise, Suniva provided credible information refuting allegations regarding its transactions with DEPCOM, Borrego, NRG Energy, Silfab Solar, and SunPower.⁴³

35. Based upon its evaluation of the competing evidence on the specific allegations and its assessment that the domestic producers' responses were credible and compelling, the Commission concluded that the record "simply d[id] not support the sort of widespread problems alleged by respondents."⁴⁴

36. The Commission also considered the views of producers, importers, and purchasers as set forth in their responses to questionnaires. As the Commission observed, most responding firms reported that domestically produced products were interchangeable with imported CSPV products.⁴⁵ Additionally, it found that most purchasers reported that no domestic supplier had failed in its attempt to qualify product or lost its approved status since 2012, and that the independent research firm EuPD Research ranked SolarWorld's CSPV products as the most purchased brand by U.S. installers.⁴⁶ Moreover, SolarWorld and Suniva each reported that their warranty claim rates were low. Specifically, SolarWorld stated that its claim rate was far lower than many other producers while Suniva reported that its claim rate was 0.05 percent – compelling evidence of the excellent quality of their products.⁴⁷

37. Thus, the Commission demonstrated that it took account of conflicting evidence and reasonably evaluated all of the relevant evidence in an objective and unbiased manner.⁴⁸

⁴² USITC November Report, p. 61 n.356 (Exhibit CHN-2).

⁴³ USITC November Report, p. 61 n.355 (Exhibit CHN-2); SolarWorld Posthearing Injury Brief, Exhibit 1, section II at 14-20, Exhibits 17-25 (Exhibit USA-05); Suniva Posthearing Injury Brief at 5-6, Exhibit 9 (Exhibit USA-06).

⁴⁴ USITC November Report, p. 61 (Exhibit CHN-2).

⁴⁵ USITC November Report, p. 55 (Exhibit CHN-2).

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

⁴⁷ USITC November Report, p. 55 n.308 (Exhibit CHN-2).

⁴⁸ Appellate Body reports have explained that a panel should examine whether the conclusions reached by the authority are reasoned and adequate in the light of the evidence on the record and other plausible alternative explanations:

[I]t is in the nature of such investigations that an authority will gather a variety of information and data from different sources, and that these may suggest different trends and outcomes. The investigating authority will inevitably be called upon to reconcile this divergent information and

Question 15 (China)

Please explain why it was unreasonable for the USITC to conclude that the domestic industry was able to supply quality products based on its analysis at pages 50-56 of the USITC Final Report.

Question 16 (US)

Please reconcile the USITC's statement that "[w]e do not find that changes in incentive programs explain the domestic industry's condition" (page 61 of the USITC Final Report) with its statement that "changes in the availability and scope of Federal, state, and local government incentives and regulations continue to affect the price of and demand for CSPV products" (pages 61-62 of the USITC Final Report).

Response:

38. The USITC's statements that the Commission did "not find that changes in incentive programs explain the domestic industry's condition" and that "changes in availability and scope of Federal, state, and local government incentives and regulations continue to affect the price of and demand for CSPV products" address two different points regarding changes in incentive programs.

39. The USITC's statement that "changes in availability and scope of Federal, state, and local government incentives and regulations continue to affect the price of and demand for CSPV products" addresses, generally, the effect of changes of such programs on the U.S. CSPV market. As the Commission explained, the existence of these programs incentivizes the purchase of CSPV products by offsetting the cost of generating solar or other renewable energy, mandating its use, or otherwise influencing its price. In doing so, these programs stimulate demand for renewable energy-generated electricity and assist developers of solar power and other renewable energy sources to achieve sufficient economies of scale.⁴⁹ Thus, as the Commission recognized,

data. However, the evidentiary path that led to the inferences and overall conclusions of the investigating authority must be clearly discernible in the reasoning and explanations found in its report. When those inferences and conclusions are challenged, it is the task of a panel to assess whether the explanations provided by the authority are "reasoned and adequate" by testing the relationship between the evidence on which the authority relied in drawing specific inferences, and the coherence of its reasoning. In particular, the panel must also examine whether the investigating authority's reasoning takes sufficient account of conflicting evidence and responds to competing plausible explanations of that evidence. This task may also require a panel to consider whether, in analyzing the record before it, the investigating authority evaluated all of the relevant evidence in an objective and unbiased manner, so as to reach its findings without favouring the interests of any interested party, or group of interested parties, in the investigation.

US – Softwood Lumber VI (Article 21.5 – Canada) (AB), para. 97; *US – Hot-Rolled Steel (AB)*, para. 193.

⁴⁹ USITC November Report, p. 62 (Exhibit CHN-2).

as a general matter, changes in the incentives and their level of availability “continue to affect the price of and demand for CSPV products.”⁵⁰ The Commission made these findings with respect to CSPV products generally, and did not identify differential effects for domestic as opposed to foreign products.

40. The USITC’s statement that “{w}e do not find that changes in incentive programs explain the domestic industry’s condition,” addresses the Commission’s separate analysis of the extent to which changes in these programs affected the condition of the domestic industry during the POI.⁵¹ In this portion of its analysis, the Commission determined, based upon its evaluation of the record evidence, that the overall mix of incentive programs available during the POI did not have any *negative* effects on the domestic industry.

41. As the Commission observed, the largest shares of responding producers, importers, and purchasers, reported “no change” in how the availability of Federal government incentives affected demand for CSPV products, with the next largest share reporting that the availability of Federal government incentives “increased” demand for CSPV products since 2012.⁵² Moreover, a plurality of questionnaire respondents reported an increase in the demand for CSPV products due to the availability of state and local incentives.⁵³ In addition, the record data established that although some programs expired while others continued, any change in the overall mix of government incentives had not led to any decrease in apparent U.S. consumption. In fact, the exact opposite occurred. Demand continued to experience robust growth throughout the POI, including in states most affected by changes in incentive programs, such as California.⁵⁴ The USITC therefore properly concluded that changes in incentive programs did not have negative effects. Therefore, the record evidence did not support the assertion that this factor was an alternative cause of injury that could explain the serious injury caused to the domestic industry by increased imports.⁵⁵

Question 17 (US)

Please respond to China's argument at paragraph 202 of its first written submission that the USITC failed to explain the nature and extent of the impact that changes in the availability of government incentive programs had on the prices of CSPV products.

Response:

⁵⁰ USITC November Report, pp. 61-62 (Exhibit CHN-2).

⁵¹ USITC November Report, p. 61 (Exhibit CHN-2).

⁵² USITC November Report, p. 63 n.363 (Exhibit CHN-2).

⁵³ USITC November Report, p. 63 (Exhibit CHN-2).

⁵⁴ USITC November Report, pp. 61-63 (Exhibit CHN-2).

⁵⁵ USITC November Report, p. 65 (Exhibit CHN-2).

42. China’s argument is based on its assertion that “any decline in incentives would affect the cost-sensitiveness of system users, and result in CSPV producers having to offer lower prices to remain competitive.”⁵⁶ This assertion is mere speculation, as China provides neither evidence nor detailed reasoning in support. In fact, the Commission’s thorough examination of the relevant evidence refutes China’s argument. As the Commission observed, the incentive programs “benefit systems owners, and typically are not directed at any particular domestic or foreign manufacturer of CSPV products.” The Commission further explained that the purpose of these incentives is to stimulate demand for CSPV products. It found that notwithstanding any changes in the incentive programs, demand continued to experience robust growth through the POI.⁵⁷

43. Thus, irrespective of changes in the incentive programs, demand continued to grow. As a basic economic matter, a considerable increase in demand for a certain product would be expected to result in coincident rises in prices for that product. The facts in this record show that this did not occur here. Even as changes in the incentive programs were accompanied by continued growth in demand, prices declined without relationship to the incentive program changes. Thus, the record belies China’s assertion that the changes in incentive programs caused prices to decline.

44. Consequently, nor did the changes in incentive programs result in injury to the domestic industry. As the Commission found, the changes in the incentive programs do not explain the domestic industry’s declining market share, low capacity utilization levels, facility closures, and abysmal financial performance.⁵⁸ Thus, they were not an alternative cause of the serious injury that the Commission found to be caused by increased imports.

Question 18 (China)

At paragraph 202 of its first written submission, China argues that it was "sorely inadequate" for the USITC to find that "the impact of declining incentive programs was insignificant because demand continued". Please explain.

Question 19 (China)

Please respond to the United States' argument at paragraphs 138 and 206 of its first written submission that China fails to substantiate its presumption that, as a rule, prices decline whenever raw material prices decline.

⁵⁶ China First Written Submission, para. 202.

⁵⁷ USITC November Report, p. 62 (Exhibit CHN-2).

⁵⁸ USITC November Report, p. 65 (Exhibit CHN-2).

Question 20 (US)

Please explain how the USITC ensured that it was increased imports, and not declining raw material costs or increased production efficiencies, that caused prices of CSPV products to decline during the POI.

Response:

45. To ensure that it was not attributing to the increased imports any injury caused by declining raw material costs or increased production efficiencies – alternative factors alleged by respondents to have caused prices of CSPV products to decline during the POI – the Commission: (1) determined that the record evidence demonstrated a clear causal link between increased imports and declining prices; and (2) found that the decline in raw material costs and increased production efficiencies could not explain the price declines during the POI.

46. 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. It began by scrutinizing quarterly pricing data on domestic producer and importer sales of five CSPV products that the parties before it considered to be representative of sales in the U.S. market and comparable to each other.⁵⁹ These data showed that subject imports were priced lower than comparable domestically produced CSPV products in 33 of 52 quarterly comparisons involving approximately two-thirds of the total volume in the pricing data.⁶⁰

47. The Commission next examined the trends in price comparison data, noting that prices for all five surveyed products declined overall during the POI.⁶¹ It compared the price trends with import volumes and found a clear correlation between the increasing volume of lower priced imports and declining prices.⁶² It explained that prices declined substantially in 2012, but stabilized somewhat in 2013 and 2014 after the *CSPV I* antidumping and countervailing duty orders were issued in December 2012 and trade remedy proceedings began against the primary import sources in 2013, which occasioned a slowing of the pace at which imports grew in relation to apparent U.S. consumption. 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 2016.⁶³

48. In addition, the Commission observed that 8 of 12 responding domestic producers reported having to reduce prices, and three reported having to roll back announced price increases to avoid losing sales to competitors selling imported CSPV products during the POI.

⁵⁹ USITC November Report, pp. 41, 45 (Exhibit CHN-2).

⁶⁰ USITC November Report, pp. 42, 45 (Exhibit CHN-2).

⁶¹ USITC November Report, pp. 42, 45 (Exhibit CHN-2).

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

⁶³ USITC November Report, p. 46 (Exhibit CHN-2).

Of the 103 responding purchasers, 38 reported that U.S. producers had to reduce prices of their CSPV products to compete with lower-priced imports, and 44 of them reported that they did not know whether domestic producers had reduced their prices to compete with lower-priced imports. Moreover, several purchasers also reported steeper price reductions in 2016, as the domestic industry's market share fell to its lowest level.⁶⁴

49. Against this factual background, and in light of the high degree of substitutability between imported and domestic CSPV products and the importance of price to purchasers, the Commission found a causal link between increased imports and declining domestic prices.

50. The Commission next 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.⁶⁵ The Commission found that the record did not support respondents' arguments.⁶⁶

51. The Commission carefully considered all the relevant evidence. It recognized that raw materials accounted for the largest components of the total COGS for both CSPV cells and modules and that polysilicon was a key raw material used in the production of the wafers that are used to manufacture CSPV cells. It observed that although polysilicon costs fluctuated during the POI, they declined overall by 52.6 percent for ingots and 54.5 percent for wafers.⁶⁷ 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. As the Commission explained, declines in the domestic industry's net sales values kept pace with declines in its costs, with the industry's COGS to net sales ratio exceeding 100 percent in 2016, leading to further deterioration of the industry's financial condition.⁶⁸

52. 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 2016.⁶⁹ 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.⁷⁰ China's argument on these alternative causes fails to consider the context of the domestic industry's dismal financial

⁶⁴ USITC November Report, pp. 42, 45-46 (Exhibit CHN-2).

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

⁶⁶ USITC November Report, p. 50 (Exhibit CHN-2).

⁶⁷ USITC November Report, p. 64 (Exhibit CHN-2).

⁶⁸ USITC November Report, p. 64 (Exhibit CHN-2).

⁶⁹ USITC November Report, pp. 34, 64 (Exhibit CHN-2).

⁷⁰ USITC November Report, p. 64 (Exhibit CHN-2).

condition and reconcile why domestic producers would purposefully sell their CSPV products at declining prices that kept pace with their decreasing costs, incurring substantial losses during the POI.

53. Thus, contrary to China’s suggestion that the lower prices were a result of decreasing raw material costs and increased production efficiencies, the evidence in fact showed that the surging imports led to lower domestic prices, which in turn led to a high COGS to net sales ratio despite declining raw material costs and achievement in any production efficiencies.⁷¹

54. As further indication that imports, and not any other factors, were responsible for the declining prices, the Commission observed that questionnaire respondents consistently pointed to the large volumes of low-priced imports as the reason for price declines. Even foreign producers’ own financial disclosures attributed the decline in prices of CSPV products to global excess capacity rather than to changes in the availability of incentive programs or changes in raw material costs.⁷²

55. 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.

Question 21 (US)

Did the USITC analyse how price trends of conventional energy generation may impact prices of CSPV products beyond observing the absence of a correlation between price trends of CSPV products and price trends of conventional energy generation? If so, please indicate where such analysis is contained in the USITC report.

Response:

56. Yes, the Commission analyzed how price trends of conventional energy may impact prices of CSPV products beyond observing the absence of correlation between price trends of CSPV products and price trends of conventional energy generation. The Commission’s complete analysis is contained on pages 25 to 26 (conditions of competition), 41 to 43 (price effects), and pages 64 to 65 (factors other than imports that allegedly led to price declines) of the USITC November Report.

57. As demonstrated in the USITC November Report, the Commission undertook a thorough examination of the relevant evidence and explained that the record did not support respondents’ claims that the need for CSPV products to attain grid parity to compete with electricity generated from other sources explained declines in the prices of CSPV products and the domestic industry’s deteriorating condition. In the first instance, the Commission recognized that

⁷¹ USITC November Report, p. 64 (Exhibit CHN-2).

⁷² USITC November Report, p. 65 (Exhibit CHN-2).

electricity providers using renewable energy sources such as CSPV products seek to achieve “grid parity,” the point at which the levelized cost of energy (“LCOE”) generated from renewable sources equals the cost from the grid. The Commission found, however, that because the United States does not have a national electricity market, but rather state/regional markets, grid parity is a complex and elastic concept with grid parity prices varying by region, time of the day, and availability of other electricity sources. The Commission further found that prices even could vary widely for a given energy source.⁷³

58. Thus, it is not the case that other energy sources determine an absolute target price at which domestic producers strive to sell their CSPV products. As the Commission observed, “{d}uring periods of non-peak electricity demand in the United States, only lowest-cost ‘baseload’ generators (traditionally coal and nuclear plants) would be able to sell electricity to the grid,” and that “during periods of peak electricity demand, even generators with somewhat higher costs may be able to sell electricity into the transmission or distribution grid.”⁷⁴

59. In any event, the Commission found a lack of correlation between natural-gas generated electricity, which generally sets the LCOE that CSPV and other renewable energy systems seek to meet during peak periods of electricity demand, and domestic prices of CSPV products.⁷⁵ Although domestic CSPV prices declined throughout the POI, the price of natural gas for electricity generation increased in the latter half of 2012 and 2013, peaked in February 2014, and declined to its lowest level in March 2016 after which it rose and was projected to increase.⁷⁶

60. In addition to the high variability in grid parity prices and a lack of correlation between natural gas prices and domestic CSPV prices, the Commission also observed that questionnaire respondents pointed to the large volumes of low-priced imports, and did not identify gas prices or the need to attain grid parity, as the reason for price declines. Even foreign producers’ own financial statements attributed the decline in prices of CSPV products to global excess capacity.⁷⁷ Indeed, the objective of attaining grid parity would not explain producers’ acceptance of the continual losses experienced during the POI. To the contrary, as the Commission observed, most U.S. producers reported that changes in conventional energy had not affected the price of solar-generated electricity since 2012.⁷⁸

⁷³ USITC November Report, pp. 25-26 (Exhibit CHN-2).

⁷⁴ USITC November Report, p. 26 (Exhibit CHN-2).

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

⁷⁶ USITC November Report, pp. 64-65 (Exhibit CHN-2).

⁷⁷ USITC November Report, p. 65 (Exhibit CHN-2).

⁷⁸ USITC November Report, p. 64 n.376 (Exhibit CHN-2).

61. In light of all the foregoing compelling evidence, the Commission reasonably concluded that this alleged alternative cause of injury did not explain the consistent observed price declines during the POI.⁷⁹

Question 22 (US)

Please respond to China's argument at paragraphs 218 and 219 of its first written submission that the facts of the CSPV investigation required the USITC to examine collective impact of the other factors allegedly causing injury.

Response:

62. Contrary to China's argument, the facts of the CSPV investigation did not require the Commission to examine the *collective* impact of the other factors allegedly causing injury. The Commission clearly established that the record evidence did not support the existence of the alleged other causes or indicate that they caused any injury to the domestic industry. In doing so, the Commission fully satisfied its obligations under Article 4.2(b).⁸⁰

63. In the first instance, Article 4.2(b) does not specify how competent authorities may comply with the non-attribution obligation. The second sentence of Article 4.2(b) requires only that "When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports."

64. As discussed above in the U.S. response to Question 10, the first clause of the second sentence in Article 4.2(b) signals that it introduces an obligation that applies only if the competent authorities have found that a factor different from increased imports is causing some impairment to the domestic industry, and this is happening simultaneously with the serious injury caused by increased imports. Conversely, if the competent authorities conclude that other factors are *not* causing injury, or that they did not cause injury at the same time as increased imports, the obligation in Article 4.2(b), second sentence, does not apply. The second clause sets out an obligation that applies when the conditions in the first clause are met: "such injury shall not be attributed to increased imports."⁸¹

⁷⁹ USITC November Report, p. 64 (Exhibit CHN-2).

⁸⁰ USITC November Report, pp. 50-65 (Exhibit CHN-2).

⁸¹ In *US – Lamb*, the Appellate Body found that "the method and approach WTO Members choose to carry out the process of separating the effects of increased imports and the effects of the other causal factors is not specified by the Agreement on Safeguards." *US – Lamb (AB)*, para. 181. Thus, as China even recognized, "an assessment of the collective effects of other causal factors 'is *not always* necessary to conclude that injuries ascribed to dumped imports are actually caused by those imports and not by other factors.'" China First Written Submission, para. 218, n.279 (quoting *U.S. – Steel Safeguards (AB)*, para. 490). The Appellate Body in *US – Steel Safeguards* acknowledged that, as explained in *EC – Tube or Pipe Fittings (AB)*, "there may be cases where, because of the specific factual circumstances therein, the failure to undertake an examination of the collective impact of other causal factors would result in the investigating authority improperly attributing the effects of other causal factors to

65. For its non-attribution analysis, the Commission undertook to assure that it did not attribute to increased imports injury caused by other factors. 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. On pages 50 to 65 of the USITC November Report, the Commission provided comprehensive explanations, with citations to record evidence, that the facts did not support respondents' contentions regarding each of these other alleged factors.⁸²

66. Having found that there was a causal link between increased imports and serious injury to the domestic industry, and that neither of the alleged "other factors" could individually explain that serious injury, the Commission concluded that increased imports caused serious injury to the domestic industry manufacturing CSPV products. In doing so, the Commission fully satisfied the obligation under SGA Article 4.2(b) to evaluate whether factors other than imports are causing injury to the domestic industry, and the admonition not to attribute any such injury to increased imports.⁸³

4 WHETHER THE USITC FAILED TO ESTABLISH THAT THE INCREASED IMPORTS WERE THE RESULT OF "UNFORESEEN DEVELOPMENTS" AND "OBLIGATIONS INCURRED"

Question 23 (US)

Please indicate where the following arguments in the United States' first written submission are contained in the USITC report:

- a. **"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";**

Response:

67. The USITC's Supplemental Report reaches the overarching conclusion that

the government of China implemented a series of industrial policies, five-year plans, and other government support programs favoring renewable energy product manufacturing, including CSPV products These industrial policies, plans, and government support took a variety of forms and led to vast overcapacity in China and subsequently in other countries as Chinese producers built facilities

dumped imports," but that "an investigating authority is not required to examine the collective impact of other causal factors, *provided that*, under the specific factual circumstances of the case, it fulfills its obligation not to attribute to dumped imports the injuries caused by other causal factors." *US – Steel Safeguards (AB)*, para. 490.

⁸² USITC November Report, pp. 50-65 (Exhibit CHN-2).

⁸³ USITC November Report, p. 65 (Exhibit CHN-2).

elsewhere, which in turn ultimately resulted in the increased imports of CSPV products causing serious injury to the domestic industry in the United States.⁸⁴

The USITC based this conclusion “on the data and other information we evaluated at the time that we reached our affirmative injury determination in this case.”⁸⁵ Thus, the detailed findings throughout the USITC’s reports provide critical context for understanding, and reviewing, the USITC’s conclusion as to the extent of China’s practices and their full impact on the solar industry. This backdrop brings into focus the scale and speed of China’s efforts, the overcapacity that they produced, and how they expanded into and targeted markets beyond China’s borders.

68. The USITC started from its finding that foreign industries “possess the incentive to export significant volumes to the United States. Although the foreign industries collectively consume the majority of the CSPV cells that they manufacture in their home market CSPV module assembly operations, *their CSPV module operations are export oriented.*”⁸⁶ China was the main producer of CSPV products imported into the United States before the United States applied antidumping and countervailing duties aimed at remedying its unfairly traded imports.⁸⁷

69. The USITC further noted that after *CSPV I* orders on imports from China were imposed and before those imports began to recede from the U.S. market:

imports from China and Taiwan corresponding to the scope of the *CSPV II* antidumping and countervailing duty investigations *increased their presence in the U.S. market. Those imports from China and Taiwan almost completely replaced the substantial market share previously held by the CSPV I imports from China and took additional market share from the domestic industry.*”⁸⁸

This statement highlights the speed and efficiency in China’s coordinated effort to switch the products shipped for export to the United States in light of the U.S. antidumping and countervailing duty orders.

⁸⁴ USITC Supplemental Report, p. 5 (Exhibit CHN-6).

⁸⁵ USITC Supplemental Report, p. 4 (Exhibit CHN-6).

⁸⁶ USITC November Report, p. 39 (Exhibit CHN-2) (emphasis added).

⁸⁷ USITC November Report, p. 44 (Exhibit CHN-2) (“In 2009, the beginning of the period of investigation in the *CSPV I* investigations, the domestic industry held the largest share of apparent U.S. consumption (***) percent), followed by imports from China corresponding to the scope of those investigations (***) percent), and imports from all other sources (***) percent). *Imports from China overtook the domestic industry’s U.S. shipments by 2010, and by the end of 2011, imports from China had nearly doubled from their 2009 level.*”) (emphasis added).

⁸⁸ USITC November Report, p. 44 (Exhibit CHN-2) (emphasis added).

70. Also, the USITC found the Chinese practice of targeting the U.S. market continued, despite the antidumping and/or countervailing duty orders on its exports, by shifting production to other countries not subject to these orders. The USITC specifically pointed out that

[a]s further evidence of the attractiveness of the U.S. market, after the imposition of the antidumping and countervailing duty orders on imports from China in December 2012 and on imports from China and Taiwan in February 2015, *imports from other countries substantially increased their presence in the U.S. market.*⁸⁹

71. The USITC did not see this development as a coincidence, flowing from market-based principles of supply and demand. Instead, it juxtaposed this situation with the correlative finding that,

without closing any of their existing capacity in China, the six largest firms producing CSPV cells and CSPV modules in China increased their global capacity to produce CSPV cells by *** percent between 2012 and 2016, with four of the six firms adding CSPV cell manufacturing capacity in one or more of the following five countries during that time: Korea, Malaysia, the Netherlands, Thailand, and Vietnam.⁹⁰

72. The same six Chinese firms

also increased their global capacity to produce CSPV modules by *** percent between 2012 and 2016, without closing any of their existing capacity in China, with four of the six firms adding CSPV module capacity in one or more of the following six countries: Canada, Indonesia, Korea, Malaysia, Thailand, and Vietnam. *Notably, imports from the 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, and much of this increase occurred between 2015 and 2016[.]*⁹¹

73. Moreover, the offshoring of production by Chinese firms to avoid the U.S. antidumping and countervailing duties coincided with significant overcapacity within China. As the USITC noted, “[a]lthough a greater share of this production was consumed in China more recently, production capacity in China continued to greatly exceed consumption of CSPV products in China.”⁹² Indeed, the data indicated that, by 2016, China’s CSPV module capacity of 46,399.8

⁸⁹ USITC November Report, p. 40 (Exhibit CHN-2) (emphasis added).

⁹⁰ USITC November Report, p. 40 (Exhibit CHN-2).

⁹¹ USITC November Report, p. 40 (Exhibit CHN-2) (emphasis added).

⁹² USITC Supplemental Report, p. 8, n.25 (Exhibit CHN-6).

MW greatly exceeded its home market shipments of 20,686.4 MW and projected further disparity in future years.⁹³

- b. **"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"; and**

Response:

74. As emphasized above, the USITC November Report specifically found that, without closing any of their existing capacity in China, the six largest firms producing CSPV cells and CSPV modules in China increased their global capacity, with four of the six firms at the same time adding CSPV cell manufacturing capacity in one or more of five countries.⁹⁴ Likewise, these same six firms increased their global capacity to produce CSPV modules, also without closing any of their existing capacity in China, and that four of the six added CSPV module capacity in one or more of six countries.⁹⁵

75. The timing of these efforts by Chinese firms to offshore production correspond to the antidumping and countervailing duty orders the United States imposed on the unfairly traded imports from China. Instead of the natural ebb and flow directed by supply and demand considerations, China's approach represents a concerted effort to circumvent trade remedies the United States lawfully imposed and, thereby, continue supplying the demand in the United States for low-priced imports, all to the detriment of the U.S. domestic industry. The quotation highlighted by the question accurately summarizes these findings.

- c. **"negotiators did not expect – and should not have expected – such a determined, systematic, and coordinated effort by a WTO Member to bolster its domestic industry to the point of massive overcapacity, with ripple effects throughout the world".**

⁸ United States' first written submission, para. 278 (emphasis original).

⁹ United States' first written submission, para. 281.

¹⁰ United States' first written submission, para. 279.

Response:

76. 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

⁹³ USITC November Report, Vol. II, p. IV-33, Table IV-22 (Exhibit CHN-3).

⁹⁴ USITC November Report, p. 40 (Exhibit CHN-2).

⁹⁵ USITC November Report, p. 40 (Exhibit CHN-2).

Uruguay Round Agreements and Decisions.”⁹⁶ When undertaking negotiations in good faith to establish their respective commitments, WTO Members did not envision that an individual Member would disavow the market-based principles at the heart of the WTO Agreement to pursue industrial policies and government programs that would distort the market and manipulate the behavior of individual firms. Despite this expectation, the USITC found that China has done precisely this with respect to the solar industry since its accession to the WTO.

77. Specifically, the USITC found that the 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, which in turn 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.”⁹⁷ The USITC further found that negotiators “could not have foreseen that this capacity would largely be directed to export markets such as the United States[;]” 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 that this would “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.”⁹⁸ The quotation highlighted by the question accurately summarizes these findings.

Question 24 (China)

At paragraph 275 of its first written submission, China argues that the USITC found imports to be a substantial cause of serious injury based on the dramatic increase in imports in 2016, when imports from China decreased. Please explain the implications of this argument on the Panel's analysis of whether the USITC provided a reasoned and adequate explanation that linked increased imports to the "unforeseen developments".

Question 25 (China)

Is it China's position that the USITC was required to identify "unforeseen developments" that resulted in the imports increase from Mexico and Korea? If so, on what basis?

Question 26 (China)

At paragraph 283 of its first written submission, China cites paragraph 106 of the Appellate Body Report in *US – Lamb* for the proposition that the competent authorities may only demonstrate that the import increase is "a result of" the "unforeseen developments" if they

⁹⁶ Marrakesh Declaration of 15 April 1994.

⁹⁷ USITC Supplemental Report, pp. 5, 10 (Exhibit CHN-6).

⁹⁸ USITC Supplemental Report, p. 10 (Exhibit CHN-6).

consider alternative explanations for why the increased imports occurred. Please explain how this position is supported by the cited paragraph in US – Lamb.

Question 27 (US)

In *India – Iron and Steel Products*, the panel indicated that GATT Article XIX:1(a) requires demonstration that the relevant "obligations incurred" constrained the Member's ability to react to the increased imports causing serious injury to its domestic industry.¹¹ Please explain whether the United States agrees.

¹¹ Panel Report, *India – Iron and Steel Products*, paras. 7.87 and 7.89.

Response:

78. The United States does not agree. The panel's interpretation of GATT Article XIX:1(a) in *India – Iron and Steel Products* suffers from the same error as the Appellate Body report upon which the panel relied. Citing *US – Lamb*, the panel concluded that a WTO Member "imposing a safeguard measure must demonstrate the existence of unforeseen developments and the effect of GATT 1994 obligations *through reasoned and adequate explanations contained in its published report*."⁹⁹ The panel erred further in extending this logic to conclude that "*the competent authority's published report must demonstrate that a WTO Member imposing a safeguard measure is subject to an obligation (or obligations) under the GATT 1994 and explain how that obligation constrains its ability to react to the import surge causing injury to its domestic industry.*"¹⁰⁰

79. As a legal matter, Article XIX:1 of the GATT 1994 and the Safeguards Agreement do not require a finding that unforeseen developments or a specific obligation are linked to each other or that such developments or obligations must be causally linked with the increased imports at issue. Moreover, there is no requirement in either for a competent authority to include findings in its report regarding unforeseen developments or obligations incurred.

80. As indicated in the U.S. first written submission, Article 2.1 of the Safeguards Agreement does not mention unforeseen developments or obligations incurred. Instead, the only requirement it describes is for a Member applying a safeguard measure to determine that a product is being imported in such quantities and under such conditions as to cause or threaten to cause serious injury.¹⁰¹ Additionally, Article 4.2(a) states that "competent authorities" conducting an investigation must determine "whether increased imports have caused or are threatening to cause serious injury." And under the heading of "investigation," Article 3.1 provides that the competent authorities "shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of law or fact." None of these provisions

⁹⁹ *India – Iron and Steel Products (Panel)*, para. 7.87 (emphasis added).

¹⁰⁰ *India – Iron and Steel Products (Panel)*, para. 7.89 (emphasis added).

¹⁰¹ U.S. First Written Submission, para. 248.

require a competent authority to demonstrate the existence of unforeseen developments or obligations incurred in the report that contains its findings pursuant to the investigation.

81. Irrespective of this interpretation of the relevant provisions in Article XIX:1 of the GATT 1994 and the Safeguards Agreement, the United States reiterates that the USITC's reports include explicit findings on the unforeseen developments and obligations incurred that resulted in the increased imports which caused serious injury to the domestic industry.

Question 28 (US)

At paragraphs 218, 269 and 287 of its first written submission, the United States advances that its tariff concessions prevented it from increasing applied tariffs on CSPV products so as to modulate the increase in imports. Please indicate where this finding is contained in the USITC report.

Response:

82. The USITC Supplemental Report noted that the tariff concessions relevant to this dispute created a circumstance where “[i]mported articles that are provided for in subheading 8541.40.60 of the U.S. Harmonized Tariff Schedule have been free of duty under the general duty rate since at least 1987.”¹⁰² The USITC also made the same finding in its November Report.¹⁰³ There is no dispute that, because of these concessions, it would be inconsistent with Article II of GATT 1994 for the United States to increase its tariffs above the bound levels to remedy the serious injury caused by increased imports.

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

Question 29 (China)

Please explain which precise obligation(s) under SA Article 3 the USITC allegedly violated with respect to the procedure it followed in providing the non-confidential versions of its preliminary and final reports to the interested parties.

Question 30 (both parties)

Does SA Article 3 require the competent authorities to publish non-confidential versions of intermediate decisional documents during the investigation, e.g. preliminary pre-hearing reports? If so, on what basis?

¹⁰² USITC Supplemental Report, p. 4, n.10 (Exhibit CHN-6).

¹⁰³ USITC November Report, Vol. II, p. I-38 (Exhibit CHN-3).

Response:

83. Article 3 does not compel a competent authority to publish non-confidential versions of intermediate decisional documents. As discussed in the U.S. first written submission,¹⁰⁴ SGA Article 3 places certain obligations on the competent authorities' conduct of a safeguards investigation. SGA Article 3.1 provides that a Member may take a safeguard measure only after its competent authorities have: (1) conducted an investigation; (2) provided appropriate means for interested parties to present evidence and their views; (3) allowed interested parties to respond to each others' arguments, and (4) published a report setting out their findings and reasoned conclusions on all pertinent issues of fact and law. SGA 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.

84. The Appellate Body has noted that the Safeguards Agreement is

not concerned with how the competent authorities of WTO Members reach their determinations in applying safeguard measures. The Agreement on Safeguards does not prescribe the internal decision-making process for making such a determination. That is entirely up to WTO Members in the exercise of their sovereignty. We are concerned only with *the determination itself*, which is a singular act for which a WTO Member may be accountable in WTO dispute settlement.¹⁰⁵

85. Nevertheless, the United States went beyond the requirements prescribed in Article 3 of the SGA.¹⁰⁶ First, although Article 3.1 does not require competent authorities to disclose intermediate decisional documents to the parties, the USITC provided them a public version of its prehearing report prior to the hearing. Moreover, prior to the public hearing, the USITC also provided the *confidential* version of the ITC's intermediate staff report (the prehearing report) to interested parties' counsel who signed an administrative protective order. Through their counsel, interested parties had ample opportunity to review this report and to "present evidence and their views" on all issues and facts in record, consistent with SGA Article 3.1. Thus, the United States went well beyond its Article 3.1 obligations in several manners.

Question 31 (both parties)

Does SA Article 3 require the competent authorities to provide sufficient time for interested parties to comment on the final report? If so, on what basis?

¹⁰⁴ U.S. First Written Submission, para. 294.

¹⁰⁵ *US – Line Pipe (AB)*, para. 158 (emphasis added).

¹⁰⁶ See U.S. First Written Submission paras. 305-09.

Response:

86. SGA Article 3 does not require competent authorities to provide “sufficient time” for interested parties to comment on the final report. Indeed, SGA Article 3 does not require that an investigating authority provide interested parties an opportunity to comment on the final report at all. The publication of the final report “setting forth [the] findings and reasoned conclusions reached on all pertinent issues of fact and law” marks the end of the competent authorities’ role in the safeguards investigation. SGA Article 3 does not contain any requirement to provide post-publication opportunities for interested parties to comment.

87. The text of SGA Article 3.1 confirms this understanding. It provides for “reasonable public notice to all interested parties and public hearings or other appropriate means” to present evidence and their views and respond to each others’ arguments *prior* to the publication of the final report. Nothing in the Safeguards Agreement even suggests that competent authorities allow for such comments after publication of the final report, let alone that they provide “sufficient time” for such comments.

Question 32 (China)

Please explain which precise obligation(s) under SA Article 3.2 the USITC allegedly violated by failing to provide non-confidential summaries of the confidential information relied upon in the USITC Final Report and the USITC Staff Report.

Question 33 (both parties)

Does SA Article 3.2 affirmatively require the competent authorities to provide meaningful non-confidential summaries of confidential information relied upon in the report so that interested parties can exercise their right to present a defence? If so, on what basis?

Response:

88. SGA Article 3.2 does not affirmatively require competent authorities to provide “meaningful” non-confidential summaries of confidential information relied upon in the final report. SGA Article 3.2 obligates the competent authorities not to disclose any confidential information they receive in the investigative process without permission of the party submitting it. Under SGA Article 3.2’s discretionary element, parties submitting confidential information “*may* be requested to furnish non-confidential summaries thereof or, if such parties indicate that such information cannot be summarized, the reasons why a summary cannot be provided.”¹⁰⁷ This permissive provision signifies that the competent authorities need not request non-confidential summaries. The decision is in their discretion. (The Article contains no language requiring the competent authorities to prepare confidential summaries on their own initiative.)

¹⁰⁷ U.S. First Written Submission, para. 300.

89. In any event, yet again the United States went beyond what was required in SGA Article 3.2. The United States permitted cleared counsel to review the submitted BCI itself, subject to the requirements of an administrative protective order, rather than merely a non-confidential summary of that information.¹⁰⁸

¹⁰⁸ U.S. First Written Submission, paras. 304, 318-19.