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

(DS562)

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

October 12, 2020

TABLE OF REPORTS

SHORT FORM	FULL CITATION
Korea – Dairy (AB)	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R
US – Steel Safeguards (Panel)	Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R / WT/DS249/R / WT/DS251/R / WT/DS252/R / WT/DS253/R / WT/DS254/R / WT/DS258/R / WT/DS259/R / and Corr.1, adopted 10 December 2003, as modified by Appellate Body Report WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R

1 Whether the USITC failed to properly demonstrate that CSPV imports were a cause of serious injury to the domestic industry

Question 1 (both parties)

> **As part of its serious injury determination, the USITC appears to have found that the domestic industry's inability to further improve certain aspects of its performance during a period of favourable market conditions was indicative of serious injury.[1] Given that China does not challenge the serious injury determination in these proceedings, please respond to the following:**
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> **a. Is the Panel required to accept the findings in the serious injury determination as undisputed facts in its assessment of China's claims concerning the causal link between increased imports and serious injury?**
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> **b. If not, how should the Panel treat the findings in the serious injury determination in its assessment of China's claims concerning the causal link between increased imports and serious injury?**

1. China's decision not to bring a claim contesting the U.S. International Trade Commission ("USITC" or "Commission") 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.

2. Pursuant to Articles 6.2 and 7.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), the Dispute Settlement Body ("DSB") establishes a panel to examine the matter referred to in the complainant's panel request. Consistent with Article 7.1, a panel's terms of reference are limited to the complainant's claims on the matter as referred to the DSB for resolution. In other words, a panel's terms of reference establish the bounds of the panel's authority and the limits of a particular dispute settlement proceeding beyond which a panel lacks jurisdiction.

3. China included in its request for consultations in this proceeding a claim that:

> Articles 2.1, 3.1, 4.1 and 4.2 of the Agreement on Safeguards as the United States *failed to make a proper determination*, including a reasoned and adequate explanation, of a significant overall impairment in the position of the domestic

[1] Footnote in text of question: See, *e.g.*, USITC Final Report (Exhibit CHN-2), pp. 31-33 (capacity and production), 37-38 (shipments).

> industry *to support its conclusion that the domestic industry was suffering from "serious injury or threat of serious injury"*.[2]

But China included no such claim in its request for panel establishment. Therefore, the DSB has not established terms of reference for the Panel encompassing a claim that the USITC's finding of serious injury was inconsistent with the Safeguards Agreement or GATT 1994.

4. The consequence of this failure is that China may not now assert that the USITC acted contrary to the Safeguards Agreement or GATT 1994 in finding that the domestic CSPV products industry was in a condition of serious injury. Nor may China assert that any subsidiary findings made by the USITC or evidence considered by the USITC, individually or collectively, is inconsistent with a finding of serious injury. Were the Panel to consider such arguments, it would in effect be assessing a claim with respect to that finding that is not within the Panel's terms of reference.

5. In its analysis of other legal issues, including whether increased imports caused the serious injury, the USITC referenced findings and evidence underlying its finding of serious injury. Where China argues that such findings and evidence are inconsistent with a finding that the industry is experiencing serious injury, the argument is not properly before the Panel, and should be disregarded. Where China argues that the finding or evidence does not support a further finding on a *different* legal issue, the Panel should exercise care to ensure that it uses that finding or evidence in a manner consistent with the unchallenged finding that the CSPV products industry is experiencing serious injury.

Question 2 (China)

> **Citing the presence of positive injury factors during the POI, China contends that the USITC was required to provide a "compelling" explanation concerning the existence of a causal link between increased imports and serious injury[3], and failed to do so in its report.[4] China further argues that the "positive factors in this case are so significant — such as increased production capacity, shipments, and employment — that they raise serious doubt about any overall coincidence between imports and injury in this case".[5] Please reconcile these positions with the USITC's determination that, notwithstanding the presence of certain positive injury factors, the domestic industry was still seriously injured during the POI.[6]**

Question 3 (China)

> **China's arguments concerning the conditions of competition between domestic and imported CSPV products focus on the lack of competition between domestic and**

[2] Request for Consultations by China, WT/DS562/1, para. II.c (16 August 2018) (italics added).

[3] Footnote in text of question: See China's oral statement, paras. 6-9.

[4] Footnote in text of question: Ibid., paras. 10-18.

[5] Footnote in text of question: Ibid., para. 11.

[6] Footnote in text of question: See, *e.g.*, USITC Final Report (Exhibit CHN-2), pp. 31-33, 37-38.

imported products in the utility segment[7], and do not appear to account for the competition between domestic and imported CSPV products in the residential and commercial segments. Please explain why.

Question 4 (both parties)

Does record evidence address the extent of competition between domestic and imported CSPV products in the residential and commercial market segments? Please explain.

6. Yes. The record is replete with evidence showing that imported and domestically produced CSPV products competed directly against each other in the residential and commercial market segments. As the Commission found, CSPV products from domestic and foreign sources were sold to overlapping market segments through overlapping channels of distribution, particularly to residential and commercial installers.[8] In their questionnaire responses, domestic producers confirmed selling a majority of their CSPV products to distributors (a majority of which were then sold to residential installers) and a substantial amount to commercial installers, and importers also reported selling a substantial amount of CSPV products to commercial and residential installers.[9]

7. The Commission further found that CSPV products shipped by U.S. producers and importers to these market segments were highly substitutable with each other and that price was an important factor in purchasing decisions.[10] Imported and domestic CSPV products were available in cell, laminate, and module forms, with most in the form of modules, and during the period of investigation, CSPV products were sold in a range of wattages and conversion efficiencies.[11] Consistent with this, the domestic industry and importers of CSPV products generally reported sales of CSPV products within similar efficiency and wattage ranges,[12] and most U.S. producers, importers, and purchasers reported that product from domestic and foreign sources were interchangeable.[13] Given the foregoing, the record evidenced that highly substitutable domestically produced and imported CSPV products competed for sales to the residential and commercial sectors.

[7] Footnote in text of question: *See*, *e.g.*, China's first written submission, paras. 134-137; China's Responses to the Panel's Questions to the Parties, para. 39.

[8] USITC November Report, p. 29-30 (Exhibit CHN-2).

[9] USITC November Report, p. I-28 (Exhibit CHN-3).

[10] USITC November Report, p. 30 (Exhibit CHN-2).

[11] USITC November Report, p. 51 (Exhibit CHN-2).

[12] USITC November Report, p. 54 (Exhibit CHN-2).

[13] USITC November Report, p. V-16 (Exhibit CHN-3).

Question 5 (both parties)

> **The USITC appears to have found that the domestic industry competed in the utility segment[14], but also that the domestic industry did not have the capacity to supply high-volume utility projects.[15] Did the USITC consider the injurious effects of the import competition associated with the portion of the utility segment that the domestic industry could supply, separate from the portion of the utility segment that the domestic industry could not supply due to its limited capacity? Was it required to do so to properly account for the prevailing conditions of the competition in the market? Please explain.**

8. The Commission analyzed the entirety of the utility segment. It considered the injurious effects of import competition associated with the portion of the utility segment that the domestic industry was equipped to supply. It also recognized the existence of projects that the domestic industry could not supply, and analyzed their implications for the causation analysis. The Commission found that increased imports prevented or undermined the industry's efforts to expand capacity, which prevented domestic producers from realizing economies of scale that would have enabled them to serve the largest utility projects. In finding a causal link between increased imports and the domestic industry's serious injury, the Commission accounted for the totality of the circumstances, including that imports put domestic producers in a position where they could not service the largest volume sales.

9. As an initial matter, it is worth noting that the definition of utility systems varies by source,[16] but that information submitted by the parties demonstrated that the utility segment encompassed utility projects with a capacity of 1 MW or above.[17] The record further indicated that the median size of utility projects during 2012-2016 was 4.9 MW.[18] During this period, the domestic industry had the capability of supplying utility projects that were several times larger than 1 MW, and in fact participated in utility projects that were almost three times as large as their median size.[19]

10. Notwithstanding this, the Commission observed that the domestic industry's capacity utilization levels were low and dropped at the end of the period of investigation as imports reached their summit.[20] The Commission found that, faced with overall low capacity utilization levels throughout the investigation period, the largest U.S. producers, SolarWorld and Suniva,

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[14] Footnote in text of question: *See* USITC Final Report (Exhibit CHN-2), pp. 51, 58-60.

[15] Footnote in text of question: Ibid. pp. 60-61.

[16] USITC November Report, p. 57 (Exhibit CHN-2); USITC November Report, p. I-27 (Exhibit CHN-3).

[17] SolarWorld Posthearing Injury Brief, Exhibit 1 p. 23 (Exhibit USA-05); SEIA Prehearing Injury Brief, p. 19 n.49 (Exhibit CHN-20).

[18] USITC November Report, p. 57 (Exhibit CHN-2); USITC November Report, p. I-27 (Exhibit CHN-3).

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

[20] USITC November Report, p. 47 (Exhibit CHN-2).

had available capacity and tried to compete to a greater extent in the utility segment of the market, but were often unable to win bids in this segment.[21]

11. Respondents blamed this failure to win more bids on the domestic industry's alleged inability or lack of sufficient capacity to produce 72-cell modules. However, the Commission explained that the domestic industry produced modules that the utility segment desired. Indeed, as even as respondents acknowledged, the utility segment purchased 60-cell modules at the beginning of the period of investigation, including from domestic producers. As the utility segment shifted to the use of 72-cell modules, the domestic industry *added* capacity to increase production of 72-cell modules while continuing to produce 60-cell modules. However, the large volume of imports at low and declining prices adversely affected the domestic industry's ability to compete successfully in the price-sensitive utility segment.[22] The Commission found that the consistent inability of the domestic industry to compete with low-priced imports resulted in severe underutilization of assets, firm closures, and underemployment. By July 2017, Suniva ultimately suspended operations and filed for bankruptcy, and SolarWorld was forced to lay off 360 employees.[23]

12. Together with the low capacity utilization rates evidencing the ability of domestic producers' to supply a greater share of the market, the Commission also considered that imports directly affected the industry's ability to increase capacity, which would allow it to achieve economies of scale and supply even a greater share of the rapidly growing utility segment.[24] The Commission found that the unrelenting volumes of low-priced imports, which actually increased at a *greater* rate than apparent U.S. consumption in all but one year of the period of investigation, negatively affected 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.[25] Collectively, these facts and negative injury trends established that imports caused serious injury to the domestic industry, including in the utility segment.

13. The Commission did not formally divide the utility segment into standard-volume and high-volume subsegments for analytical purposes. No party suggested such a further segmentation of the market. Instead, the Commission considered the utility segment as a whole, analyzing the effect of imports on sales that domestic producers could supply and also on sales that they could not supply, including sales for high-volume projects. In so doing, it accounted for the prevailing conditions of competition in the market and fully explained how, in that context, increased imports caused serious injury throughout the utility segment.

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

[22] USITC November Report, p. 60 (Exhibit CHN-2).

[23] USITC November Report, p. 60-61 (Exhibit CHN-2).

[24] USITC November Report, pp. 47, 60-61 (Exhibit CHN-2).

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

Question 6 (China)

China appears to argue that it was unreasonable for the USITC to find that the domestic industry's product offerings significantly overlapped with imports.[26] However, in determining that domestic and imported products were highly substitutable, the USITC relied upon evidence demonstrating that: (1) domestic and imported CSPV products were sold in a range of wattages and conversion efficiencies, and modules were sold in both 60-cell and 72-cell forms[27]; (2) domestic and imported CSPV products were sold to overlapping market segments through overlapping channels of distribution, particularly to residential and commercial installers[28]; (3) price was an important factor in the purchase of CSPV products[29]; and (4) most US producers, importers, and purchasers reported that domestic and imported CSPV products were interchangeable.[30] Please reconcile China's position with this evidence.

Question 7 (China)

China claims that the presence of non-price factors in the competition between domestic and imported CSPV products undermines the USITC's finding that increased imports caused the domestic industry to experience adverse price conditions.[31] Please explain why this is the case when record evidence appears to show that price was an important factor in the competition between domestic and imported CSPV products.[32]

Question 8 (China)

China claims that it was unreasonable for the USITC to consider that the main driver of price trends over the POI was the interrelationship between the source and volume of CSPV imports and effectiveness of *CSPV I* and *CSPV II* orders.[33] However, Exhibit CHN-60, which was originally filed by the Solar Energy Industries Association in the safeguards investigation, states that: "In the past few years, U.S. module price trends were largely driven by antidumping and countervailing duties on Chinese suppliers. But recently the main driver has shifted; current module price

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[26] Footnote in text of question: See, *e.g.*, China's oral statement, para. 48.

[27] Footnote in text of question: USITC Final Report (Exhibit CHN-2), p. 29.

[28] Footnote in text of question: Ibid.

[29] Footnote in text of question: USITC Final Report (Exhibit CHN-2), pp. 29-30; USITC Staff Report (Exhibit CHN-3), p. V-14, Table V-4.

[30] Footnote in text of question: USITC Final Report (Exhibit CHN-2), p. 30; USITC Staff Report (Exhibit CHN-3), Table V-8.

[31] Footnote in text of question: China's Responses to the Panel's Questions to the Parties, paras. 35-37 and 61-64; China's Comments on the Responses of the United States and Third Parties to the Panel's Questions to the Parties, paras. 25-26.

[32] Footnote in text of question: See, *e.g.*, USITC Final Report (Exhibit CHN-2), pp. 29-30 (referring to USITC Staff Report (Exhibit CHN-3), Table V-4).

[33] Footnote in text of question: China's Responses to the Panel's Questions to the Parties, para. 65.

trends are largely a result of supply-demand imbalance".[34] As the USITC appears to have relied upon this report in its analysis of price trends[35], please explain why China considers that the USITC's characterization of price trends was not reasoned and adequate, particularly in light of this evidence.

Question 9 (China)

China appears to argue that the fact that the domestic industry increased its production and shipments during the POI means that the domestic industry did not lose sales to imports.[36] Is this China's argument? If so, please explain.

Question 10 (both parties)

China relies upon Table V-19 of the USITC Staff Report to argue that the domestic industry's market share increased consistently in the second half of the POI as imports reached their peak.[37] By contrast, the USITC referred to Tables IV-4 and C-1b of the USITC Staff Report in its finding that the domestic industry's market share, as a share of domestic US consumption, declined in 2012-2013, increased in 2013-2014 as imports slowed, and decline anew in 2015-2016 as imports peaked.[38]

a. *(To China):* Please explain why it was unreasonable for the USITC to rely upon this evidence to support its finding that the domestic industry lost market share as a result of increased imports.

b. *(To the United States)*: Does the data reported in Table V-19 of the USITC Staff Report undermine the USITC's finding that the domestic industry lost market share as a result of increased imports? Please explain.

14. No. Table V-19 contains data on purchases of CSPV products (by type) reported by purchasers in their questionnaire responses. It was not intended to depict, and does not accurately represent, the entirety of the market, or domestic industry's market shares. Therefore, it does nothing to undermine the ITC's finding that the domestic industry lost market share as a result of increased imports. Specifically, as the Commission explained, it had calculated apparent U.S. consumption and market shares in Tables IV-4 and C-1b based upon shipment data reported by U.S. producers and U.S. importers in their questionnaire responses, which showed total imports in 2016 of 12.8 GW.[39] In contrast, Table V-19 provides the volumes reported in in

[34] Footnote in text of question: SEIA, "U.S. Solar Market Insight: Executive Summary, 2016 Year in Review" (Exhibit CHN-60), p. 16.

[35] Footnote in text of question: *See* USITC Final Report (Exhibit CHN-2), p. 46, n. 252 (referring to USITC Staff Report (Exhibit CHN-3), p. V-27).

[36] Footnote in text of question: China's Responses to the Panel's Questions to the Parties, para. 14. See also China's oral statement, para. 22.

[37] Footnote in text of question: China's Responses to the Panel's Questions to the Parties, para. 33.

[38] Footnote in text of question: *See* USITC Final Report (Exhibit CHN-2), p. 49.

[39] USITC Report, p. C-3 (Exhibit CHN-3). These data are from Table C-1a. However, the source is the same as used for Tables IV-4 and C-1b. Table C-1a simply presents the data using a different way of determining origin.

the *purchaser* questionnaires. These did not cover the entirety of the market. The Commission sent purchaser questionnaires only to the 65 largest purchasers. It received voluntary responses from additional purchasers.[40] Table V-19 shows that this smaller base reflects 7.6 GW of purchased CSPV products imports in 2016, far fewer than the data on 12.8 GW covered by producer and importer shipment data. Therefore, the data in Table V-19 do not undermine the market share conclusions that the Commission drew from the broader data set covered in Tables IV-4 and C-1b.

15. Neither respondents in the proceedings below nor China in this dispute object to the data sources used by the Commission to calculate market shares. Consequently, there is no basis for China to disagree with the Commission's citation to Tables IV-4 and C-1b as being the correct tables to reference for the domestic industry's market shares over the period of investigation.[41]

2 Whether the USITC failed to ensure that the injurious effects of other factors were not attributed to increased imports

Question 11 (both parties)

> **The United States argues that "the domestic industry's lack of capacity was a *result* of serious injury caused by increased imports, not, as China argues, an independent cause of injury".[42] In this regard, does the second sentence of Article 4.2(b) of the Agreement on Safeguards require that an "other" factor of injury must be independent from increased imports? If so, to what extent?**

16. 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.[43] The USITC's report identified such factors as indicators of serious injury caused by increased imports and not as independent causes of injury.

17. 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

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[40] USITC Report, p. I-44 (Exhibit CHN-2).

[41] USITC November Report, pp. 9, 19-21 (Exhibit CHN-2); USITC November Report, Tables IV-4 & C-1b (Exhibit CHN-3). In any event, Table V-19 still corroborates the Commission findings that the domestic industry lost market share as a result of increased imports. Specifically, it shows that the industry's market share declined from 5.2 percent in 2012 to 4.6 percent in 2016. USITC November Report, Table V-19 (Exhibit CHN-3).

[42] Footnote in text of question: Comments of the United States on China's Responses to the First Set of Questions from the Panel, para. 101. See also United States' opening statement, para. 25 (arguing that the second sentence of Article 4.2(b) of the Agreement on Safeguards "does not call on competent authorities to treat the consequential effects of increased imports (in this case, stymied capacity) as constituting an independent causal factor").

[43] USITC November Report, pp. 35-38 (Exhibit CHN-2).

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."[44] "Causal" means "of or relating to a cause or causes."[45] 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.

18. 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.

19. The first sentence of Article 4.2(b) confirms this conclusion. As noted above, it explicitly describes the causal link in terms that include a chain of events initiated by increased imports that results in serious injury. Thus, the reference to "factors other than increased imports" in the second sentence cannot refer to the increased imports themselves or to factors that are the result of the increased imports.

20. The question asks whether this means that an alleged "factor other than increased imports" must be "independent" from increased imports to fall within the purview of the second sentence of Article 4.2(b) and, if so, to what extent. The United States considers that the Panel need not reach that question in this dispute, given that none of the other factors cited by China was causing any injury to the domestic industry during the period of investigation. In any event, the second sentence of Article 4.2(b) instructs competent authorities to evaluate whether an "other factor" is "causing injury . . . at the same time" as increased imports, which suggests that such "other factors" are not occurring in a temporal vacuum divorced from "increased imports." The important point is that Article 4.2(a) and (b) differentiate between cause and effect. To the extent that a "factor" is an injurious effect of increased imports, it is not a "factor other than imports" that is causing injury.

Question 12 (both parties)

> **Are the competent authorities required to explain in their published report (1) how they weighed competing evidence and arguments submitted by interested parties in**

[44] New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. I, p. 1598.

[45] New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. I, p. 355.

the safeguards investigation; and (2) why they considered the evidence of certain interested parties to be more compelling? Please explain.

21. Article 3.1 of the Safeguards Agreement instructs the competent authorities, as part of their investigation, to "publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." This report is the culmination of the competent authorities' investigation, which includes procedures such as "public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views" on the relevant conditions to apply a safeguard measure under Article 2 and other considerations. Article 4.2(c) further calls on the competent authorities to publish "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined." These obligations set the standards for evaluating the explanations provided in the report of the competent authorities. The "analysis" must be "detailed," and any conclusions "reasoned." But, if the competent authorities find that an issue is not "pertinent" or has no "relevance," they need not address that issue further.

22. The degree to which these obligations involve explanations of how the competent authorities weighed the evidence or evaluated the extent to which certain evidence is compelling will of necessity depend on the facts of the case. As the United States emphasized in its closing statement at the Panel's videoconference with the Parties, the role of the competent authorities under the Safeguards Agreement is to evaluate each party's assertions equally and reach a conclusion based on what the evidence in the record actually shows. The competent authorities' "conclusions" must be "reasoned," but the Agreement leaves them considerable latitude in how they reach their conclusions and lay out their reasoning. Where the interested parties offer conflicting views on an issue, the competent authorities must determine which evidence they find to be the most probative and may conclude that one body of evidence outweighs the other. They may also consider that one party to the investigation made assertions that were more credible, or presented better legal or economic arguments. They may even reconcile the competing views by concluding that areas of disagreement are irrelevant, insubstantial, or illusory. In any of these cases, the explanation they provide satisfies Articles 3.1 and 4.2(c) if it is sufficiently "reasoned" and "detailed" to support the analysis and conclusion.

23. To be clear, the obligations of Articles 3.1 and 4.2(c) do not establish an abstract level or nature of explanation that competent authorities provide for each finding. They require only that the analysis be "detailed" and the findings and conclusions be "reasoned". If a brief "explanation" provides sufficient analysis and detail to support the competent authorities' conclusion as to a pertinent issue, that is enough. There is no obligation to explain the weighing of evidence or argumentation beyond what is needed to meet that standard.

Question 13 (both parties)

Please explain whether the USITC provided a reasoned and adequate explanation demonstrating that the domestic industry did not have "widespread" service and delivery issues and, if so, whether that was sufficient to explain why the alleged service and delivery issues were not "other" factors of injury. In so doing, please refer to the following:

> **a. Domestic and imported CSPV products were highly substitutable. The degree of substitution between domestic and imported CSPV products depended upon such factors as relative prices, quality, and conditions of sale.[46]**
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> **b. Most purchasers reported that no domestic or foreign supplier had failed in its attempt to qualify product, or had lost its approved status, since 2012.[47]**
>
> **c. In 2015, there were several thousand residential solar installers in the United States most of which were relatively small firms, and over 1,000 non-residential installers.[48]**

24. The Commission provided a reasoned and adequate explanation, based on the totality of the evidence, that the domestic industry did not have "widespread" delivery and service problems. Citing to respondents' briefs, the Commission observed that respondents' allegations consisted of criticisms from only a handful of purchasers in the U.S. market.[49] (The Commission received questionnaire responses from 106 purchasers; respondents pointed to a small number of these purchasers that reported delivery and service problems.) SolarWorld and Suniva offered competing hearing testimony and posthearing submissions, in which the companies responded in detail to these allegations of quality, delivery, and service concerns. The Commission weighed the competing evidence provided by the parties as well as the other evidence on the record, including that cited by the Panel in Question 13(a)-(c), and provided a reasoned conclusion that "{t}he evidence simply does not support the sort of widespread problems alleged by respondents."

25. Specifically, the Commission first scrutinized the problems each specific purchaser had lodged against SolarWorld and Suniva. For example, the Commission noted and addressed the testimony of a purchaser, NextTracker, that complained of delivery and product specification problems with SolarWorld. Other concrete evidence in the record, however, showed that the cited instances were not of such a magnitude as to result in SolarWorld losing NextTracker as a customer. As the Commission found, NextTracker's website still listed SolarWorld as an approved vendor, and SolarWorld continued to supply CSPV products for NextTracker's projects.[50]

26. Regarding the other allegations, the Commission likewise found that compelling record evidence refuted respondents' allegations of "widespread" delivery and service issues. Specifically, SolarWorld provided credible documentation refuting respondents' allegations regarding transactions with DEPCOM, California Solar System, and Borrego, and that Suniva likewise provided credible information refuting allegations regarding its transactions with

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[46] Footnote in text of question: USITC Staff Report (Exhibit CHN-3), p. V-13.

[47] Footnote in text of question: USITC Staff Report (Exhibit CHN-3), p. V-15.

[48] Footnote in text of question: USITC Staff Report (Exhibit CHN-3), p. I-29.

[49] USITC November Report, p. 61 n.354 (Exhibit CHN-2).

[50] USITC November Report, p. 61 n.355 (Exhibit CHN-2).

DEPCOM, Borrego, NRG Energy, Silfab Solar, and SunPower.[51] As discussed in the U.S. Comments on China's Responses to Panel's First Set of Questions, many of the SolarWorld's and Suniva's responses contained confidential information, but the responses that were publicly available demonstrate that the explanations were specific, credible, and compelling.[52]

27. The Commission also considered the complaints against the backdrop of other evidence on the record, which also confirmed that "widespread" delivery and service problems did not exist so as to have caused injury to the domestic industry. The Commission found that CSPV products from domestic and foreign sources were highly substitutable. In reaching this finding, the Commission conducted a thorough analysis of aspects such as relative prices, quality (*e.g.*, standards, reliability of supply, defect rates, *etc.*), and conditions of sale (*e.g.*, price discounts/rebates, lead times between order and delivery dates, payment terms, product services, *etc.*).[53] To the extent that any delivery and service issues such as those alleged by respondents would have been expected to limit substitutability between domestic and imported CSPV products, the Commission found that this was not the case, as most market participants (including purchasers) viewed them as being interchangeable, with price being an important purchasing factor.[54]

28. Other record evidence, including that cited in parts (b) and (c) of the Panel's question, further corroborated the Commission's conclusion. In 2015, there were several thousand residential solar installers in the United States, most of which were relatively small firms, and more than 1,000 non-residential installers. The Commission received U.S. questionnaire responses from 106 of those purchasers, and found that the vast majority of purchasers reported that no domestic supplier had failed in its attempt to qualify product, or had lost its approved status in 2012.[55] In light of the totality of the evidence, including the sheer number of purchasers that did not report having delivery and/or service issues with domestic producers, China's reliance upon criticisms made by a *handful of purchasers* does nothing to detract from the Commission's reasoned conclusion that the evidence failed to support a finding that the domestic industry was injured by its own "missteps."

[51] USITC November Report, p. 61 n.355 (Exhibit CHN-2); SolarWorld Posthearing Injury Brief, Exhibit 1, section II pp. 14-20, Exhibits 17-25 (Exhibit USA-05); Suniva Posthearing Injury Brief, pp. 5-7, Exhibit 9 (Exhibit USA-06).

[52] U.S. Comments on China's Responses to Panel's First Set of Questions, paras. 121-126.

[53] USITC November Report, pp. 29-30 (Exhibit CHN-2); USITC November Report, p. V-13 (Exhibit CHN-3).

[54] USITC November Report, pp. 29-30 (Exhibit CHN-2); USITC November Report, pp. V-13-17 (Exhibit CHN-3).

[55] USITC November Report, p. 55 (Exhibit CHN-2); USITC November Report, p. V-15 (Exhibit CHN-3).

Question 14 (both parties)

Did the USITC find that (1) federal government incentive programs and (2) state and local government incentive programs increased, decreased, or remained neutral during the POI? Please explain.

29. As the Commission explained, some government incentive programs had expired while others emerged or continued.[56] The Commission did not make an overall characterization of changes in the level or availability of federal or state and local incentives as increased, decreased, or neutral. Rather, it observed that market participants had varied experiences. Most firms reported that the level or availability of federal incentives had not changed since 2012, and firms had varied experiences regarding changes to the availability of state and local incentives, with the largest number reported a decrease.[57] The Commission also considered reported views on how changes in the availability or level of incentives affected demand. In this regard, it noted that the largest number of producers, importers, and producers reported that changes in federal incentives did not result in a change in demand, while changes in state and local incentives increased demand.[58]

30. The Commission emphasized that more important than the changes in the actual *number* of incentive programs being offered was the fact that the overall availability of incentives during the period of investigation did not have any negative impact on demand for solar generated electricity. To the contrary, the Commission found that U.S. demand experienced explosive growth throughout the period of investigation. Most firms reported that changes to federal incentives had not changed demand for CSPV products, and the second largest number of firms reported that demand had increased; those that reported an increase in demand for CSPV products identified the level of federal incentives as the reason for the increase, noting the extension of the Federal Income Tax Credit.[59] Moreover, a plurality of U.S. producers, importers, and purchasers reported an increase in the demand for CSPV products due to the availability of state and local incentives.[60]

Question 15 (both parties)

With reference to the following record evidence, please explain whether it was reasonable for the USITC to find that, because demand for CSPV products increased, changes in government incentive programs did not contribute to price declines:

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[56] USITC November Report, pp. V-31-37 (Exhibit CHN-3).

[57] USITC November Report, Table V-22 (Exhibit CHN-3).

[58] USITC November Report, p. 63 (Exhibit CHN-2).

[59] USITC November Report, p. 63 (Exhibit CHN-2); USITC November Report, Table V-23 (Exhibit CHN-3).

[60] USITC November Report, p. 63 (Exhibit CHN-2); USITC November Report, Table V-23 (Exhibit CHN-3).

a. Demand for CSPV products is derived from the demand for solar electricity, which is influenced by factors such as cost competitiveness with traditional energy sources, environmental concerns, a desire for national energy independence, and the availability of federal, state, and local incentives.[61]

b. Several firms reported that the price of CSPV modules is a large factor in the price of solar electricity; therefore, declining CSPV module prices translate directly into less expensive solar generated electricity.[62]

c. US producers reported that the decrease in the price of solar electricity has been driven by CSPV market competition.[63]

d. Several firms attributed the decline in the price of solar electricity to the increase in supply of solar electricity in the marketplace.[64]

31. Yes, it was reasonable for the Commission to find that any change in the availability of government incentive programs did not contribute to price declines. In doing so, the Commission not only relied upon the explosive increase in demand for CSPV products noted in the question, but also evidence demonstrating that the availability of government incentive programs during the period of investigation had made solar generated electricity more cost-competitive with other sources of electricity and, thus, attractive to purchasers in the first instance.

32. It is important to reiterate that, as discussed above in the response to Question 14, market participants had varied experiences with respect to government incentive programs during the period of investigation as certain programs expired while others emerged or continued. In particular, the Federal Income Tax Credit, which played a vital role in stimulating U.S. CSPV demand, was extended during the period of investigation.[65]

33. Moreover, regardless of any change in government incentives, the overall level of incentives collectively had a positive impact and could not have been responsible for the price declines of CSPV products. As the Commission explained, incentive programs sought to increase and stimulate demand for solar energy by decreasing generators' costs, and it found that this goal had been achieved during the period of investigation.[66] Most questionnaire respondents confirmed that the availability of government incentives had led to a decrease in the price of solar-generated electricity, "making CSPV products more cost-competitive with other sources of

[61] Footnote in text of question: USITC Staff Report (Exhibit CHN-3), p. V-6.

[62] Footnote in text of question: USITC Staff Report (Exhibit CHN-3), p. V-37.

[63] Footnote in text of question: USITC Staff Report (Exhibit CHN-3), p. V-42.

[64] Footnote in text of question: USITC Staff Report (Exhibit CHN-3), p. V-37.

[65] USITC November Report, pp. 62-63 (Exhibit CHN-2); *see also* SEIA Prehearing Injury Brief, p. 105 (Exhibit CHN-20) (describing the Federal Investment Tax Credit as the "single most influential federal government incentive for solar deployment today).

[66] USITC November Report, pp. 62-63 (Exhibit CHN-2).

electricity."[67] In turn, demand for these cost-competitive CSPV products increased significantly throughout the period of investigation with U.S. installations of on-grid photovoltaic systems increased by 338 percent from 2012 to 2016.[68]

34. As the question indicates, several firms reported that the price of CSPV modules is a large factor in the price of solar electricity and that declining CSPV module prices translated directly into less expensive solar generated electricity. However, during the period of investigation, incentive rates and program availability already reduced generators' costs. System owners (*i.e.*, the purchasers of CSPV products) continued to financially benefit – and to an increasing degree – from the availability of such programs, which would tend to obviate the need for domestic producers to reduce prices of their CSPV products in order for solar to successfully compete against other sources of energy. Thus, as most questionnaire respondents confirmed, changes in the price of solar generated electricity had not at all affected the prices of CSPV products since 2012.[69]

35. With respect to parts "c" and "d" of this question, that CSPV market competition and increase in supply of *solar generated electricity on the grid* may have resulted in price declines of *solar electricity* does not show that government incentive programs created declines in prices of *CSPV products*. As discussed above, the record evidence demonstrated otherwise. Government incentive programs created declines in prices for *solar generated electricity*, and not for *CSPV products*.[70]

36. Yet, while solar generators' costs declined and demand for both solar electricity and CSPV products increased significantly throughout the period, the domestic CSPV industry – which sold the "hardware" to the system owners – was unable to reap the benefits of increasing demand. Rather, the industry experienced financial deterioration, which provided further confirmation that the surge in low-priced imports exerted pressure on the domestic industry to reduce prices during the period of investigation. The availability of government incentive programs did not cause any injury to the domestic industry during the period of investigation. Rather, the industry was unable to benefit from the positive impact of these programs due to imports and suffered injury *despite* these programs, and not *because* of these programs.[71]

Question 16 (United States)

Please explain how the USITC's analysis concerning the impact of changes in government incentive programs on prices of CSPV products accounted for the fact

[67] USITC November Report, p. 63 (Exhibit CHN-2).

[68] USITC November Report, p. 27 (Exhibit CHN-2).

[69] USITC November Report, p. V-37 (Exhibit CHN-3).

[70] Indeed, there is no evidence on the record that any change in incentive levels caused an *increase* in the price of solar generated electricity, which would have reduced its cost competitiveness with other sources of electricity.

[71] USITC November Report, p. 63 (Exhibit CHN-2).

that domestic producers reported that changes in government incentive programs were a factor of injury, with some ranking this factor as "being an extremely important cause of injury".[72]

37. Notwithstanding that some producers reported that changes in government incentive programs were a factor of injury, the majority of U.S. producers did not even rank government incentive programs as an injury causing factor. And only two U.S. producers (out of the 16 U.S. producers that submitted a questionnaire response) ranked this factor as "being an extremely important cause of injury."[73] Moreover, the specific data in the record, as discussed in the United States' responses to the Panel's questions 14 and 15, indicated that government incentive programs successfully stimulated demand and were not responsible for the price declines of CSPV products during the period of investigation. In light of the totality of the evidence, the Commission reasonably concluded that the government incentive programs were not an injury causing factor. The mere existence of some evidence contrary to the ultimate conclusion does not invalidate the conclusion. Indeed, in the context of the large and comprehensive record assembled by the USITC, divergent views are to be expected. What matters is that the weight of the evidence supported the Commission's conclusion.

Question 17 (United States)

Please explain how the USITC's analysis concerning the impact of declining raw material costs on prices of CSPV products accounted for: (1) the fact that domestic producers reported that changes in raw material costs were a factor of injury, with some ranking this factor as "being an extremely important cause of injury";[74] and (2) the evidence purporting to show a high degree of correlation between the cost of raw materials and the price of CSPV products.[75]

38. The Commission considered and weighed all the relevant evidence on the record, including the evidence referenced in this question, to reach its reasoned conclusion that declining raw material costs did not cause any injury to the domestic industry.

39. As with their view of government incentive programs, the majority of U.S. producers did not consider raw material costs to be an injury causing factor, and only two U.S. producers (out of the 16 U.S. producers that submitted questionnaire responses) ranked this factor as "being an extremely important cause of injury."[76]

40. With respect to correlation between decreases in input costs and CSPV product prices, the Commission properly examined this in light of the totality of the evidence. It concluded that,

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[72] Footnote in text of question: USITC Staff Report (Exhibit CHN-3), Table F-2.

[73] USITC November Report, Table F-2 (Exhibit CHN-3).

[74] Footnote in text of question: USITC Staff Report (Exhibit CHN-3), Table F-2.

[75] Footnote in text of question: Answer to the Question 32 in Appendix A of the SEIA Post Hearing Injury Brief (Exhibit CHN-22), pp. 78-80.

[76] USITC November Report, Table F-2 (Exhibit CHN-3).

regardless of the fact that both decreased, declining raw material costs could not explain the domestic industry's injury. As the Commission explained, "declining polysilicon prices . . . would help make CSPV products more cost-competitive with other sources of electricity" but declining prices meant that producers' losses continued and worsened.[77] In other words, where the domestic industry's costs consumed all or nearly all of the sales value and left little to no margin for profits, there is no basis to conclude that the industry would have purposefully cut prices for CSPV products in step with declining raw material costs, incurring continued and *increasing* substantial losses during the period of investigation. Indeed, by the end of the period of investigation, the industry's COGS to net sales ratio soared above 100 percent, leading to further deterioration in the domestic industry's operating and net losses.[78]

41. Thus, the Commission established that declining polysilicon costs were in no way causing injury. Rather, the inability of the domestic industry to improve its financial condition despite declining costs was emblematic of the negative effects of low-priced imports. As the Commission further observed, foreign producers' own financial disclosures attributed the decline in prices of CSPV products to global excess capacity rather than to changes in raw material costs.[79] The Panel should not reweigh the evidence before the Commission nor should it disturb the Commission's reasoned conclusion.

Question 18 (both parties)

> **Does the characterization of declining raw material costs as a positive factor suffice as a reasoned and adequate explanation demonstrating that it was not an "other" factor causing injury to the domestic industry? Please explain.**

42. Depending on the unique facts and circumstances of each investigation, the characterization of declining raw material costs as a positive factor may suffice as a reasoned and adequate explanation that it is not an injury causing factor. And, although this consideration played a part in the Commission's reasoning, it was not the sole consideration. As discussed in the U.S. response to question 17, the Commission evaluated this "positive" factor in light of the other evidence on the record in determining that it was not an injury causing factor. Specifically, the Commission considered this factor relative to domestic prices of CSPV products and within the context of the domestic industry's struggling financial condition. It found that although declining costs would have been expected to benefit the industry by allowing for greater profit margins or by allowing the industry to lower prices and sell more product, the domestic industry in this case did not benefit in either respect due to the pressure caused by the constant influx of low-priced imports. As discussed, the Commission found that the domestic industry's financial

[77] USITC November Report, p. 64 (Exhibit CHN-2).

[78] USITC November Report, p. 38 (Exhibit CHN-2). The domestic industry's net sales values actually fell by a greater amount that did its cost of goods sold. *See id.* at 43.

[79] USITC November Report, p. 65 (Exhibit CHN-2).

losses continued, its capacity utilization levels remained low, and dozens of production facilities closed.

43. China has yet to point to any probative evidence that detracts from the force of the Commission's reasoning. Instead, China continues to rely upon its blanket presumption that declining raw material prices must result in corresponding declines in the price of the finished product. As explained in the previous submissions, this concept fails to account for other business imperatives, an important one of which was for the domestic industry to curtail the hundreds of millions of dollars in losses it was incurring during the period of investigation.[80] China's submissions do nothing to demonstrate or reconcile why domestic producers would have chosen to forego this imperative by pricing their products at levels near or below their costs so that their losses continued. Consequently, China has failed to demonstrate that the Commission acted inconsistently with Article 4.2(b) by impermissibly attributing any injury from that factor to increased imports.

Question 19 (United States)

> **Please respond to China's argument that the USITC did not account for the constant gap between the prices of the CSPV products and natural gas, when finding a lack of correlation between price trends of CSPV products and natural gas over the POI.[81]**

44. China is mistaken in its assertion that the Commission "did not account for the constant gap between the prices of CSPV products and natural gas, when finding a lack of correlation between price trends of CSPV products and natural gas over the period of investigation." The Commission closely examined the prices of CSPV products and natural gas, but found that any disparity between them did not demonstrate that the need to attain grid parity was responsible for the price declines or a cause of injury to the domestic industry.

45. The purported "gap" between price trends of CSPV products and natural gas relied upon by China is based upon the faulty premise that there is one single levelized cost of energy that solar generators seek to meet. As the Commission explained, grid parity prices varied by region, time of day, and availability of other electricity sources, and even could vary widely for a given energy source.[82] Indeed, installed photovoltaic system prices varied greatly from state to state and project to project, with a considerable spread among the prices in each market segment.[83]

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[80] U.S. First Written Submission, paras. 205-207; U.S. Comments on China's Responses to Panel's Questions, paras. 150-152.

[81] Footnote in text of question: China's Comments on the Responses of the United States and Third Parties to the Panel's Questions to the Parties, para. 152.

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

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

Moreover, "during periods of peak electricity demand, even generators with somewhat higher costs may be able to sell electricity into the transmission or distribution grid."[84]

46. Thus, despite China's assertion that the *average* levelized cost of energy for solar generated electricity was higher than that for natural gas,[85] demand for CSPV products still experienced unprecedented growth during the period of investigation. China's focus on the gap between average solar and gas prices only serves to disprove the notion that CSPV producers must sell at certain prices in order for purchasers to choose solar over other energy sources or that the impetus of attaining grid parity overcame other business imperatives of the domestic industry. Clearly that was not the case. Most U.S. producers reported that changes in conventional energy had not affected the price of solar-generated electricity since 2012.[86]

Question 20 (United States)

> **In arguing that the USITC was required to analyze in its report the econometric study filed by respondents during the safeguards investigation, China claims that "[t]he United States also tries to justify the USITC's decision to disregard the econometric study arguing it as 'too theoretical' or only presents 'estimates', without any explanation of what these vague criticisms mean. In fact, these criticisms were never raised by the USITC during the investigation and represent *ex-post* rationalizations".[87] Please respond to this argument.**

47. China's assertions do not withstand scrutiny. First, its characterization of the U.S. rebuttal as being "vague" because it was based on the study being "too theoretical" and presenting "estimates" is in fact a direct reflection of the "theoretical" nature of the econometric study, which supports the Commission's decision not to assign weight to it. In addressing how the study presented "estimates" as opposed to "facts," the United States recited the study's own statements, which affirmed that it was based on an "estimation approach" with many of the variables being treated as "theoretically" inter-related.[88] For instance, as the United States observed, the study discussed state incentive programs as a general matter, hypothesizing that "the size of the subsidy needed at time 'a' is larger than the size of the subsidy needed at time 'b'".[89] Notably, China does not dispute that an estimation approach was used by the study. Nor has China provided any compelling reason why the Commission should have accepted this

[84] USITC November Report, p. 26 (Exhibit CHN-2).

[85] USITC November Report, pp. V-38-40 (Exhibit CHN-3).

[86] USITC November Report, p. 64 n.376 (Exhibit CHN-2).

[87] Footnote in text of question: China's oral statement, para. 40.

[88] U.S. Comments on China's Response to Panel's Questions, para. 145; *see also* SEIA Prehearing Injury Brief, Appendix A, Table of Contents (using headings such as "Estimating the Impact of Imports for the Residential CSPV Market," "Estimating the Impact of Imports for the Utility-Scale CSPV Market," and "Complete Estimation Results"), p. 22 (Exhibit CHN-19).

[89] SEIA Prehearing Injury Brief, Appendix A p. 22 (Exhibit CHN-19).

estimation approach over the extensive qualitative evidence on the record demonstrating a contrary conclusion.[90]

48. Second, China's argument that the United States' rebuttals represented "ex-post rationalizations" represents a fundamental misunderstanding of the role of a party responding to WTO challenges to the determinations of its competent authorities. China misunderstands that the exchange of positions and arguments between parties are integral features of the WTO dispute settlement process. China, as the complaining party, bears the burden of proof with respect to its arguments that the USITC failed to comply with the U.S. WTO obligations. In rebutting these arguments, the United States has every right to identify errors and provide the Panel with further detail and explanation of the Commission's analysis, which is what it did here. The United States is also free to identify factual and conceptual errors demonstrating that China has not met its burden of proof.

49. The Safeguards Agreement requires 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 mandate that they reproduce every single piece of evidence or every argument made by the parties.[91] Indeed, given the thousands of pages of information and argument on the record in this case, doing so would have been overly burdensome and unfeasible. Thus, if a responding party considers that the competent authorities' treatment of a piece of evidence demonstrates an inconsistency with Articles 3.1 or 4.2(c), it bears the burden of establishing a *prima facie* case that, considered in light of the weight of evidence cited by the authorities, that evidence shows that their conclusions were not reasoned or their analysis was not detailed. China's citation to the Prusa study, the theoretical conclusions of which were disproved by the concrete and qualitative evidence on the record, does not meet this burden.

3 Whether the USITC acted inconsistently with gatt 1994 article xix:1(a) by failing to demonstrate that imports increased "as a result of unforeseen developments and of the effect of the obligations incurred" by the united states

Question 21 (China)

China claims that the USITC's finding concerning "unforeseen developments" is not reasoned and adequate because it focuses on developments from within China when the import surge occurring in 2015-2016 largely emanated from outside China.[92] In response, the United States argues that China "completely ignores the critical finding in the USITC's Supplemental Report that imports decreased from China due to duties under U.S. trade remedy laws against China's unfair trade practices, and

[90] The panel in *US – Steel Safeguards* recognized that the Safeguards Agreement does not require quantification or an econometric study to analyze causation. *US – Steel Safeguards (Panel)*, paras. 10.336. In particular, the panel explained that quantification is less than perfect, while an "overall qualitative assessment that takes into account all relevant information must always be performed." *Id*. at paras. 10.340-10.341.

[91] *See* U.S. Responses to Panel's First Set of Questions, paras. 1-3, 22-24.

[92] Footnote in text of question: China's Responses to the Panel's Questions to the Parties, paras. 164-165.

imports increased from other countries because Chinese producers relocated their production to circumvent those same antidumping and countervailing duty orders."[93] Please respond to this argument.

Question 22 (United States)

In claiming that the USITC failed to demonstrate a "clear linkage" between the "unforeseen developments" and increased imports, China argues that the USITC failed to adequately demonstrate that the increased imports from Korea, Malaysia, Thailand, and Vietnam primarily came from Chinese companies which had increased their production capacity in those countries.[94] Please respond to this argument.

50. China does not meaningfully dispute the USITC's findings that Chinese firms expanded production capacity in the four countries listed above or that this offshoring coincided with the trade remedy orders the United States imposed on unfairly traded CSPV products from China and Taiwan. Instead, China argues that the USITC's Supplemental Report does not contain information showing the increase in exports came directly from the Chinese affiliates operating within those countries.

51. China is mistaken – the USITC's November Report and Supplemental Report address this point. The November Report states:

> {T}he 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. These same six 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, as their collective share of the U.S. market more than *** from *** percent in 2015 to *** percent in 2016 just after the second round of antidumping and countervailing duty orders went into effect in February 2015. *Consistent with these shifts, a substantial number of U.S. importers and purchasers reported that the origin of*

[93] Footnote in text of question: *See* Comments of the United States on China's Responses to the First Set of Questions from the Panel, para. 158.

[94] Footnote in text of question: China's oral statement, para. 89.

> *their purchases had shifted, as they purchased CSPV products imported from other countries.*[95]

52. The USITC repeated this finding in the Supplemental Report when noting 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*."[96]

53. China has focused its argument on the four countries (Korea, Malaysia, Thailand, and Vietnam) where Chinese affiliates added *both* CSPV cell and CSPV module capacity. Despite that focus, it is important to note that the USITC's November Report found that four of the six largest Chinese firms added CSPV module capacity in two additional countries (Canada and Indonesia). This, coupled with the USITC's findings concerning the "large and attractive nature of the U.S. market and the large and growing size of the export-oriented foreign industries{,}"[97] reveals that increased imports resulting from China's efforts to target the United States are not limited to the four countries identified in Question 22. The only reasonable inference to draw is that increased imports from export-oriented module producers also entered the United States from Canada and Indonesia as a result of the production capacity that Chinese companies added there.

54. Furthermore, the USITC's reports support its conclusion that increased imports into the United States were "as a result" of the unforeseen development that Chinese producers massively increased their production in Korea, Malaysia, Thailand, and Vietnam. 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*. Nothing in Article XIX:1(a) requires such willful blindness to the natural conclusion that increased imports from a Member are a result of increased production capacity in that same Member. And Article XIX does not require arguments or evidence on unforeseen developments at a more granular level than this. In other words, the United States does not need to show import-specific information on a transaction-by-transaction (or company-by-company or country-by-country) basis.

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[95] USITC November Report, pp. 40-41 (Exhibit CHN-2) (italics added).

[96] USITC Supplemental Report, pp. 8-9 (Exhibit CHN-6) (italics added).

[97] USITC Supplemental Report, p. 9 (Exhibit CHN-6).

Question 23 (both parties)

Referring to the United States' duty-free treatment of CSPV products since at least 1987, the United States contends that "[t]here 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".[98]

a. *(To China)*: Does China agree with this characterization? Please explain.

b. *(To the United States)*: Please respond to China's argument that this statement amounts to an impermissible *post hoc* rationalization in the present dispute.[99]

55. As it has done repeatedly throughout these proceedings, China fundamentally misunderstands the difference between the USITC's responsibilities as the competent authority in the underlying investigation and the U.S. right in this dispute to defend its measure, including by rebutting the erroneous arguments China has asserted. Such rebuttals do not constitute a "*post hoc* rationalization." As with any dispute, where a complaining party has misconstrued or omitted aspects of a competent authority's report, the responding party is free to highlight those errors and identify portions of the record that support the competent authority's conclusions. In exercising this right, the United States has played not only an active but proper role in this proceeding when demonstrating that China has failed to make a *prima facie* case that the USITC's determination is inconsistent with the Safeguards Agreement.

56. 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.[100]

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[98] Footnote in text of question: U.S. Responses to Questions from the Panel to the Parties, para. 82.

[99] Footnote in text of question: China's Comments on the Responses of the United States and Third Parties to the Panel's Questions to the Parties, para. 209.

[100] *Korea – Dairy (AB)*, para. 84.

57. 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.

Question 24 (China)

> **China claims that GATT Article XIX:1(a) requires demonstrating a "clear linkage" between increased imports, on the one hand, and "unforeseen developments" and relevant "obligations incurred", on the other hand.[101] In China's view, does the "clear linkage" standard differ from the "causal link" standard under Article 4.2(b) of the Agreement on Safeguards? Please explain.**

Question 25 (China)

> **Please respond to the United States' argument that China is incorrect to rely upon *US – Lamb* and *India – Iron and Steel Products* for the proposition that the competent authorities are required to consider alternative explanations for increased imports, as those reports described the standard for a panel's evaluation of claims raised in a WTO dispute, and not the standard that must be followed by the competent authorities in a safeguards investigation.[102]**

Question 26 (both parties)

> **Would the fact that a tariff rate is bound at zero percent have any implications for demonstrating compliance with the requirement emanating from the phrase "of the effect of the obligations incurred" under GATT Article XIX:1(a)? Please explain.**

58. 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.

59. 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."

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[101] Footnote in text of question: China's first written submission, para. 251; China's Responses to the Panel's Questions to the Parties, paras. 159 and 169.

[102] Footnote in text of question: Comments of the United States on China's Responses to the First Set of Questions from the Panel, paras. 161-164.

Question 27 (both parties)

With reference to the text of the Agreement on Safeguards, please explain whether the competent authorities are required to demonstrate compliance with the first clause of GATT Article XIX:1(a) before applying a safeguard measure. In so doing, please refer to the ordinary meaning of the relevant treaty provisions, as well as their context and object and purpose. In addition, please address the following:

60. A Member's competent authorities may elect, but are not required, to demonstrate the satisfaction of the first clause of GATT Article XIX:1(a) before that Member applies a safeguard measure. The United States explained in its first written submission and in response to the Panel's questions that 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. However, they are not conditions under Article 2 of the Safeguards Agreement that must be demonstrated in a competent authority's report. The text of the Safeguards Agreement confirms this understanding.

61. In Article XIX, there are important differences between the first and second clauses of Article XIX:1(a). While both clauses modify 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." This difference has interpretive significance that must be considered with respect to the Safeguards Agreement's explicit obligations on analysis of serious injury and causation, and contrasted with the absence of such obligations in regard to unforeseen developments and obligations incurred. The Appellate Body recognized a similar point in stating 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."[103]

62. Accordingly, Article XIX:1 differentiates between the factual circumstances in which a Member may take a safeguard measure (set out in the first clause of Article XIX:1) and the conditions that must be established before applying the safeguard measure (set out in the second clause of Article XIX:1). The Safeguards Agreement provides additional confirmation of this interpretation.

63. Article 1 of the Safeguards Agreement provides that "{t}his Agreement establishes rules for the application of safeguard measures, which shall be understood to mean those measures provided for in Article XIX of GATT 1994." Article 11.1(a) states that a Member shall not take action under Article XIX "unless such action conforms with the provisions of that Article applied in accordance with this Agreement." Thus, Article XIX applies "in accordance with" the Safeguards Agreement, which provides "rules" for application of a measure.

[103] *Korea – Dairy (AB)*, para. 85.

64. Article 2 further solidifies the point by embodying only the *conditions* as referenced in Article 2.1, which consist exclusively of those contained in the second clause of Article XIX. It requires the Member to *determine* only that the product is imported in such quantities and under such conditions as to cause serious injury. The omission of any reference to unforeseen developments or obligations incurred is pivotal, and signifies that the published report with the competent authority's findings need not include determinations on other issues, such as unforeseen developments. This conclusion finds confirmation from the requirement that the determination be made "pursuant to the provisions set out below."

a. Are "pertinent issues of fact and law" under Article 3.1 of the Agreement on Safeguards exclusively those factual and legal issues that pertain to the "investigation" conducted under Article 3 of the Agreement on Safeguards? Please explain.

b. Are the parameters of the "investigation" referred to in Article 3.1 of the Agreement on Safeguards the same as the "investigation" referred to in Article 4.2 of the Agreement on Safeguards? Please explain.

65. Both provisions use the same term – "investigation." Article 3.1 lays out formal requirements – that the procedures be established and made public, that there be reasonable public notice, etc. Article 4 addresses the substantive requirements – that the competent authorities determine whether increased imports have caused or are threatening to cause serious injury based on a consideration of certain issues subject to certain legal standards. There is no basis to consider that these Articles refer to different "investigations," or to legal considerations other than those specified in other provisions. Thus, the parameters of the "investigation" identified in Article 3.1 are the same as those referred to in Article 4.2.

66. The final formal obligation in Article 3.1 is that the competent authorities "publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." The relevant meaning of "pertinent" is "{a}ppropriate, suitable in nature or character; relating to the matter in hand, relevant; to the point; apposite."[104] In its context at the end of Article 3.1, the "pertinent issues of fact and law" are those "referring or relating to" the 'investigation" described in the precedent sentences of the paragraph. As noted above, this "investigation" is the one described in Article 4.2. Thus, the "pertinent issues of fact and law" are those set out in Article 4.2, namely, whether the industry is seriously injured, whether increased imports cause or threaten to cause that injury, and whether other factors are causing injury at the same. As Article 3.1 does not refer to any other provision of the covered agreements, there is no basis to consider that the report of the competent authorities need address issues presented in other provisions of the covered agreements, including Article XIX of the GATT 1994.

c. Does the reference to GATT Article XIX in the preamble and in Articles 1 and 11.1(a) of the Agreement on Safeguards modify the parameters of the

[104] New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. II, p. 2173.

competent authorities' "investigation" under the Agreement on Safeguards? Please explain.

67. No. The reference in the preamble is best understood as signifying that part of the object and purpose of the Safeguards Agreement is "to clarify and reinforce the disciplines of GATT 1994, specifically those of its Article XIX." The customary rules of interpretation of public international law, as reflected in Articles 31-33 of the Vienna Convention, call for interpretation of the terms of a covered agreement in light of its object and purpose. Thus, the preambular reference to Article XIX does not "modify" the parameters of the investigation described in Article 4. It instead provides guidance for interpreting those parameters.

68. It is significant in this regard that Article 4.2 addresses exclusively the competent authorities' determination whether increased imports cause or threaten to cause serious injury, and makes no reference to unforeseen developments or obligations incurred. In light of the preambular reference to GATT 1994 Article XIX, these obligations signify that the evaluation of serious injury and causation required further clarity and reinforcement, but that the evaluation of unforeseen developments and obligations incurred did not. Thus, it would go beyond the object and purpose of the Safeguards Agreement to read Articles 3.1 or 4.2 of the Safeguards Agreement as imposing additional obligations with respect to unforeseen developments or obligations incurred.

69. Similarly, Article 1 provides that the Safeguards Agreement "establishes rules for the application of . . . those measures provided for in Article XIX of GATT 1994. Thus, when Articles 3.1 and 4.2 call for an investigation and determination whether increased imports cause or threaten to cause serious injury, those are the relevant "rules." Nothing in Article 1 would justify reading those provisions (or any other provisions) to impose *additional* unwritten rules with regard to the GATT 1994 Article XIX references to unforeseen developments and obligations incurred.

70. Article 11.1(a) of the Safeguards Agreement provides that

> A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.

71. This provision reflects the principle announced in the preamble of the Safeguards Agreement and embodied in Article 1 – that the Agreement provides additional rules for taking a safeguard measure. It is undisputed that, taken alone, Article XIX does not require a Member to provide *ex ante* justification that it complied with *any* of the provisions for taking a safeguard measure. Thus, a Member "conforms with" the provisions of Article XIX if, as a matter of fact, increased imports are "as a result of unforeseen developments and of the effect of the obligations incurred" even if it has not established that fact at the time of taking the measure. And, a Member applies Article XIX "in accordance with this Agreement" if its competent authorities determine that increased imports cause or threaten to cause serious injury. As the Agreement does not require the competent authorities to do anything with respect to unforeseen

developments or the obligations incurred, applying Article XIX "in accordance with this Agreement" does not require the competent authorities to make findings as to those circumstances.

d. Should procedural or logistical considerations with respect to how a Member demonstrates compliance with the first clause of GATT Article XIX:1(a) impact the substantive obligations under the Agreement on Safeguards? If so, on what basis?

72. As a general matter, substantive obligations under the covered agreements should not be shaped by procedural or logistical considerations outside of those set out in the relevant agreement. This proposition applies with equal force to the first clause of Article XIX:1(a) of the GATT 1994. As recommendations and rulings of the DSB, under DSU Article 3.2, cannot add to or diminish the rights and obligations provided in the covered agreements, neither may procedural or logistical considerations have an effect on the substantive obligations of WTO Members set out in the text of the Agreement.

e. If the competent authorities are not required to demonstrate compliance with the first clause of GATT Article XIX:1(a) in their report, would parties in WTO dispute settlement be permitted to file new evidence in respect of the requirements in the first clause of GATT Article XIX:1(a), or would they be limited to evidence on the competent authorities' record? Please explain.

73. As a competent authority is not required under Article XIX of the GATT 1944 or the Safeguards Agreement to demonstrate the circumstances in the first clause of Article XIX:1(a) in its published report, there is nothing in any covered agreement preventing a Member from submitting new evidence on this particular question in a safeguards-related dispute settlement proceeding. In reviewing a Member's compliance with Articles 3 and 4 of the Safeguards Agreement, a WTO panel must ascertain whether the competent authorities objectively evaluated the record developed in the authorities' investigation and explained the basis for their findings and conclusions with respect to the substantive obligations set out in Article 4, based on the record of the investigation. In contrast, most other obligations in the covered agreements, including the first clause of Article XIX:1(a), do not call for investigations or published reports by a Member's competent authorities. In those instances, a Member is free to adduce evidence after the fact to establish that it complied with its obligations under the relevant covered agreement. Thus, a Member submitting evidence to a WTO panel concerning the circumstances in the first clause of Article XIX:1(a) would not differ in any respect from the normal function of a panel under DSU Article 11 to make an objective assessment of the matter before it, including an objective assessment of the facts of the case based on the evidence submitted.

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

Question 28 (China)

China appears to argue that Article 3.1 of the Agreement on Safeguards requires that the competent authorities prepare a preliminary report and "promptly" publish

a non-confidential version thereof.[105] Please reconcile this understanding of the obligations under Article 3.1 with the following statements of the panel in *Ukraine – Passenger Cars*:

> [N]othing in the text of the second sentence of Article 3.1 […], indicates that the importing Member must provide substantive information in advance of any public hearings to the interested parties. While Article 3.1 refers to an opportunity to "respond" to presentations of other parties, this is in the context of the public hearings or other appropriate means which must be provided for all interested parties to present evidence and their views.[106]
>
> Article 3.1 does not explicitly require the competent authorities to publish their report "promptly".[107]

Question 29 (China)

China submits that the timing of publication of the non-confidential version of the USITC Final Report rendered meaningless the right of interested parties under Article 3.1 of the Agreement on Safeguards to "present evidence and their views".[108] Please reconcile this understanding with the following statement of the panel in *Ukraine – Passenger Cars*:

> [T]he second sentence of Article 3.1 requires that the competent authorities hold public hearings "or" provide other appropriate means for interested parties to present evidence and views, including responses to presentations of other parties. The word "or" makes clear that when public hearings are held, there is no obligation to provide, in addition, any "other appropriate means" of giving input.[109]

Question 30 (China)

China appears to argue that the right of interested parties to "present evidence and their views" under the second sentence of Article 3.1 of the Agreement on Safeguards also includes the right to comment on the competent authorities' final report.[110] The United States disagrees and argues that the right of interested parties to "present evidence and their views" under Article 3.1 concerns the evidence and argument provided by the *parties* (rather that the competent authorities) *prior* to the publication of the final report.[111] Please respond to this argument.

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[105] Footnote in text of question: China's Responses to the Panel's Questions to the Parties, paras. 183-184, 188.

[106] Footnote in text of question: Panel Report, *Ukraine – Passenger Cars*, para. 7.423.

[107] Footnote in text of question: Panel Report, *Ukraine – Passenger Cars*, para. 7.440.

[108] Footnote in text of question: China's Responses to the Panel's Questions to the Parties, para. 185.

[109] Footnote in text of question: Panel Report, *Ukraine – Passengers Cars*, para. 7.422.

[110] Footnote in text of question: China's Responses to the Panel's Questions to the Parties, para. 192.

[111] Footnote in text of question: Comments of the United States on China's Responses to the First Set of Questions from the Panel, paras. 182-183.

Question 31 (China)

Is it China's position that Article 3.2 of the Agreement on Safeguards must be interpreted to require that the competent authorities provide non-confidential summaries of their final report in order to give the meaning to interested parties' rights under the second sentence of Article 3.1 of the Agreement on Safeguards? If so, please explain which specific obligation under Article 3.2 of the Agreement on Safeguards necessitates such an interpretation.