United States – Safeguard Measure on Imports Of Crystalline Silicon Photovoltaic Products
(DS562)

COMMENTS OF THE UNITED STATES ON CHINA'S RESPONSES TO THE FIRST SET OF QUESTIONS FROM THE PANEL

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Argentina – Footwear (EC) (AB)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000
Argentina – Footwear (EC) (Panel)	Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R
EC – Hormones (AB)	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
EC – Tube or Pipe Fittings (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
Guatemala – Cement I (AB)	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998
India – Iron and Steel Products (Panel)	Panel Report, *India – Certain Measures on Imports of Iron and Steel Products*, WT/DS518/R, circulated 6 November 2018
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US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US – Lamb (AB)	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001
US – Line Pipe (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002

US – Softwood Lumber VI (Article 21.5 – Canada) (AB)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006
US – Line Pipe (Panel)	Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, adopted 8 March 2002, as modified by Appellate Body Report WT/DS202/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
US – Tuna II (Mexico) (Article 21.5) (AB)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/AB/RW, adopted 3 December 2015
US – Wheat Gluten (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001
US – Wool Shirts and Blouses (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1

TABLE OF U.S. EXHIBITS

EXHIBIT NO.	DESCRIPTION
USA-11	*Certain Crystalline Silicon Photovoltaic Cells and Modules from China*, Inv. Nos. 701-TA-481 and 731-TA-1190 (Final), USITC Pub. 4360 (Nov. 2012) ("*CSPV I*").
USA-12	*Certain Crystalline Silicon Photovoltaic Products from China and Taiwan*, Inv. Nos. 701-TA-511 and 731-TA-1246 to 1247 (Final), USITC Pub. 4519 (Feb. 2015) ("*CSPV II*").

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.

1. The United States notes at the outset that, in its response to this question, "China agrees that the standard of review does not require perfection."[1] This is the main point of the U.S. statement quoted in this question. However, China then asserts that "the United States' approach . . . stretches the standard of review to accommodate *any* error, omission or silence in the published report on the pretext that such flaw[s] are somehow not pertinent or do not cast doubt on the conclusions reached."[2] China provides no support for this assertion, and there is none. As is clear from the statement quoted in the question, the United States does not dispute that an error that casts doubt on a particular finding, or the omission of a pertinent factor, is relevant to a panel's review.

2. China devotes the remainder of its response to elaborating three points on how a panel should evaluate consistency with the Safeguards Agreement. However, China neglects the most important point – that in such a case, DSU Article 7.1 calls for a panel "to examine, in light of the relevant provisions in [the Safeguards Agreement] the matter referred to the DSB by [China] . . . and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that[] agreement[]." The "matter" consists of the underlying safeguard measure and the claims made by China with respect to that measure in its panel request.[3] DSU Article 7.2 clarifies that the "relevant provisions in any covered agreement" are those "cited by the parties to the disputes" in the arguments China raises in support of those

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[1] China Response to Written Questions, para. 1.

[2] China Response to Written Questions, para. 1 (emphasis added).

[3] *See Guatemala – Cement I (AB)*, para. 71 ("The word 'matter' has many ordinary meanings, the most appropriate of which in this context is 'substance' or 'subject-matter.' Although the ordinary meaning is rather broad, it indicates that the 'matter' is the substance or subject-matter of the dispute.").

claims, and the rebuttal advanced by the United States.[4] Under the DSU, therefore, China may prevail on such a claim only if it makes a *prima facie* case of inconsistency with a cited obligation in the Safeguards Agreement.[5]

3. Thus, China errs in asserting in the abstract that "a panel must examine whether the competent authority has considered all relevant facts" and "a panel must review and confirm that the authority completed and thoroughly explain[ed] its reasons."[6] Rather, a panel evaluating a claim under Article 3.1 is called on to examine whether the complaining party has established that the competent authorities failed to provide findings and reasoned conclusions on all pertinent issues of fact and law. As such, it is the complaining party that bears the burden of demonstrating that the issue in question is relevant, and that the competent authorities failed to provide findings and conclusions.

4. The United States has noted with respect to this evaluation that where "an error or omission does not cast doubt on a particular conclusion, that conclusion is still 'reasoned' and, thus, consistent with Article 3.1."[7] As a simple example, if the competent authorities identify four separate bases for their conclusion that imports increased during the period of investigation and made an error with respect to one of those bases, the finding that imports increased would still represent a reasoned conclusion if supported by the other three bases. Instead of being "difficult to reconcile" as China suggests, this approach confirms that, under the DSU and the Safeguards Agreement, a reasoned conclusion based on sufficient evidence does not require flawless evaluations with respect to every subsidiary finding leading to the ultimate conclusion.

5. China compounds its error by contending that "having collected information for its relevance, the authority cannot then dismiss that information on the basis that it is 'irrelevant' without at least providing some explanation."[8] However, China forgets that competent authorities collect information starting at the *beginning* of an investigation, and must rely on the parties to provide that information. Information gathered to address one issue may not be relevant for an evaluation of others, and parties' responses may not be sufficient to evaluate even the issue they were intended to address. And, finally, Article 3.1 calls for "findings and reasoned conclusions reached on all pertinent *issues* of fact and law." It does not require the competent authorities to address all *facts* presented, or to provide a conclusion as to the relevance (or

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[4] *See* DSU Article 7.2 ("Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.").

[5] *See US – Wool Shirts and Blouses (AB)*, p. 14 ("[I]t is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."); *see also EC – Hormones (AB)*, para. 98 ("The initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of [a covered agreement] on the part of the defending party, or more precisely, of its . . . measure or measures complained about.").

[6] China Response to Written Questions, para. 2.

[7] U.S. First Written Submission, para. 84.

[8] China Response to Written Questions, para. 3.

irrelevance) of each assertion presented by a party. As noted in the U.S. response to this question, the ordinary meaning of the word "report" is to provide a "summary" or "outline," and not to recite all information received during the investigation and a systematic ordering of that information into categories of "relevant" and "not relevant" with the reasons for each.

6. The Panel's task, in light of the above, is to assess whether China has established that the USITC report failed to set out necessary findings and reasoned conclusions on ***pertinent*** issues of fact and law. The Panel does not have the inverse responsibility, as China implies, to scrutinize all information the USITC did not consider in support of its determination. In other words, a panel reviews the sufficiency of the findings and reasons that the competent authority provided, not those that it did not.

7. Moreover, China confuses the requirement to provide a report, on the one hand, with the competent authorities' findings and what China refers to as "*post hoc* reasoning after the fact" on the other. The United States does not engage in a *post hoc* rationalization when it addresses China's framing of the claims and arguments in this dispute. Instead, such an exchange of positions and arguments represents an integral feature of WTO dispute settlement. A responding party is free to rebut the arguments a complaining party presents in support of its claims. The Appellate Body has recognized that the WTO rules envision this aspect of dispute settlement proceedings.[9] The United States' arguments in response to China's position in these proceedings are not an "after-the-fact" justification but an explanation as to why China has failed to make a *prima facie* case that the USITC's determination is inconsistent with the Safeguards Agreement.

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

General Comments Concerning China's Responses to Questions About the USITC's Determination

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

General Comment 1: U.S. producers did not "decide" to abandon sales into the fast-growing utility sector. Their expansion was blocked by increased volumes of low-priced imports.

9. In arguing that other factors caused injury to the domestic industry, China repeatedly relies upon respondents' unproven assertion in the USITC investigation that the domestic

[9] *US – Tuna II (Mexico) (Article 21.5) (AB)*, para. 7.177 ("While arguments may be progressively refined throughout the course of the proceedings, each party must be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party.").

industry made a business decision to focus on the residential and commercial segments of the U.S. market, and to abandon the fast-growing utility segment.[10] As the Commission explained, however, the totality of the evidence belied this assertion. Rather, as the Commission found upon thorough examination of the complete record, the "domestic industry clearly sought to compete in the large, concentrated, and price-sensitive utility market, but the large volume of imports at low and declining prices adversely impacted the domestic industry's financial performance, making it difficult for the domestic industry to increase capacity to a scale that made it more competitive in this segment, even if it managed to develop and even pioneer innovative products that utilities and others sought."[11] The Commission identified, with direct citations to the record evidence, the many ways in which domestic producers were active in and sought to expand their presence in the utility sector.

10. For example, as the evidence showed and the Commission explained, at the beginning of the period of investigation ("POI"), 60-cell modules predominated in the utility segment, but with time, the utility segment shifted more to 72-cell modules to reduce balance-of-system costs.[12] In responding to this shift, during the POI, the domestic industry added to its production 72-cell modules, in addition to continuing production of 60-cell modules. Indeed, the questionnaire response data confirmed that the domestic industry and importers each sold CSPV products – 60-cell modules and 72-cell modules – in the U.S. market to all three segments, including the utility segment.[13] In addition, the largest U.S. producers, SolarWorld and Suniva, submitted extensive data on their bids for sales to the utility segment, further demonstrating that the domestic industry competed in this segment of the market.[14] The bid information showed that both companies won bids on utility projects, although the underbidding by imports often preventing them from winning large bids in this segment.[15]

11. Other compelling evidence likewise demonstrated the industry's genuine efforts to compete in the utility segment. As the Commission observed, SolarWorld added a 72-cell module assembly line to its U.S. facilities specifically to serve the increasing demand in the utility market, and Suniva dedicated nearly half of its cell manufacturing capacity to 72-cell modules.[16] The domestic industry also pioneered certain other CSPV technologies, such as monocrystalline products, which converted sunlight more efficiently than multicrystalline products and were sold in all segments of the U.S. market.[17]

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[10] *See, e.g.*, China Response to Written Questions, paras. 19-21, 24, 57-58, 99-100.

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

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

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

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

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

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

[17] USITC November Report, pp. 51, 60 (Exhibit CHN-2).

12. As the Commission further noted, evidence presented by respondents themselves confirmed that domestic producers manufactured both 60-cell and 72-cell modules for sale to the utility industry. Specifically, as the Commission observed, respondents acknowledged that at the beginning of the POI, 60-cell modules predominated in all three segments of the U.S. market, including the utility segment. While emphasizing that the utility segment shifted to 72-cell modules, respondents further acknowledged that Suniva and SolarWorld both manufactured 72-cell modules.[18] Notably China itself concedes that the domestic industry won bids to supply 72-cell modules to the utility segment.[19]

13. It is also noteworthy that there is absolutely no credible evidence to support the respondent allegation that the domestic industry willingly disregarded the utility segment. China observes that domestic producers had their greatest success in the residential and commercial segments,[20] but these data are not evidence of a "decision" to "focus" on those segments. The only other evidence it cites is a statement by Suniva CEO Matt Card that "we're not a qualified player to go after a 200 megawatt (MW) project."[21] However, the entirety of his testimony made clear that Suniva "focused on all three markets: commercial, residential, and utility," and the company "had a long history of participating in all those markets."[22] Other evidence, showed that SolarWorld likewise competed for and shipped to this segment of the market during the POI.[23]

14. Also unavailing is China's attempt to blame the domestic industry's lack of ability to compete in the utility segment to its limited capacity in producing 72-cell modules for large scale utility projects.[24] As an initial matter, China's statement that the domestic industry "could have entered the market at the end of the POI" overlooks the evidence demonstrating that the domestic industry was already present in the utility market during the POI. Indeed, the domestic industry

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

[19] China Response to Written Questions, para. 20.

[20] China Response to Written Questions, para. 39.

[21] China Response to Written Questions, para. 20, note 37; para. 41, note 64; para. 99, note 100; para. 102, note 161.

[22] China seeks to minimize Suniva's efforts as serving "small utility market. China's Response to Written Questions, para. 106. However, the median size of the utility segment in 2012-2016 was 4.9 MW, with the definition of utility systems varying by source. USITC November Report, p. 57 (Exhibit CHN-2); USITC November Report, Vol. II, p. I-27 (Exhibit CHN-3). Information submitted by the parties demonstrated that the utility segment encompassed utility projects with a capacity of 1 MW or above. Solarworld Posthearing Injury Brief, Exhibit 1 p. 23 (Exhibit USA-05); SEIA Prehearing Injury Brief, p. 19 n.49 (Exhibit CHN-20). Suniva's projects plainly met these criteria, as evidenced by its participation in utility projects that were 13.5, 14.0, and 7.0 MW in size. Transcript of USITC Hearing on Injury, p. 164 (Exhibit CHN-9).

[23] USITC November Report, pp. 59-61 (Exhibit CHN-2). *See* U.S. First Written Submission, paras. 125, 179.

[24] China Response to Written Questions, para. 40.

and importers each sold CSPV products – 60-cell modules and 72-cell modules – in the U.S. market to all three segments, including the utility segment throughout the POI.[25]

General comment 2: The Commission correctly found that price was the factor reported most frequently as important to purchasing decisions, and China's alternative tabulations of the data do not detract from that finding.

15. China repeatedly, and wrongly, accuses the Commission of mischaracterizing the importance of price as reported in the purchaser questionnaire responses.[26] Specifically, China asserts that the Commission misleadingly "paints the picture" that price was the most important factor in purchasing decisions, and that price was the primary reason for purchasers' purchases of imported product over the domestically produced product.[27] It is China, however, that mischaracterizes the Commission's price findings, which are fully consistent with the purchaser questionnaire response data.

16. Contrary to China's claim, the Commission did not find that price was the most important factor in purchasing decisions. Rather, the Commission stated that in the U.S. market for CSPV products, "purchasers consider a variety of factors in their purchasing decisions, but price continues to be an important factor."[28] Moreover, the Commission did not find that price was purchasers' primary reason for purchasing imports over domestic product. Instead, the Commission stated that the "majority of purchasers reported that they had increased their purchases of imported CSPV products, most often identifying lower price as the reason for increasing their purchases of imported CSPV products."[29]

17. China misapprehends the Commission's findings, and thus also fails to demonstrate the Commission's actual findings are not supported by the purchaser questionnaire response data. To the extent that China disagrees with the manner in which the Commission tabulated the questionnaire response data, China's submission does nothing to undermine the reasonableness of the Commission's approach. As the Commission explained, in arriving at its finding that "purchasers consider a variety of factors in their purchasing decisions, but price continues to be an important factor," it considered that "the most-often cited top three factors that firms consider in their purchasing decision for CSPV products were price (81 firms), quality/performance (77 firms), and availability (42 firms)."[30]

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

[26] China Response to Written Questions, paras.17, 35-36, 61-62.

[27] China Response to Written Questions, paras.17, 61-62.

[28] USITC November Report, pp. 29-30 (Exhibit CHN-2).

[29] USITC November Report, p. 49 (Exhibit CHN-2).

[30] USITC November Report, p. 30 n.144 (Exhibit CHN-2).

18. Apparently, China would have preferred that the Commission focused exclusively on the purchasers' reported first most important factor.[31] Given the realities of the U.S. market, where purchasers considered various factors in their purchasing decisions, it was reasonable for the Commission to have looked at purchasers' most-often cited top three factors. In any event, even under China's approach of focusing only on purchasers' reported first most important factor, the purchaser questionnaire response data would still support the Commission's finding that price was an important factor in purchasing decisions. Indeed, more than quality/performance, purchasers most frequently cited price as their first most important factor in purchasing decisions.[32]

19. China's submission likewise fails to demonstrate anything WTO-inconsistent or unreasonable about the Commission's tabulation of the data in arriving at its finding that "the majority of purchasers reported that they had increased their purchases of imported CSPV products, most often identifying lower price as the reason for increasing their purchases of imported CSPV products." As the Commission explained:

> Of the 104 responding purchasers, 91 reported that since 2012 they had purchased imported CSPV products instead of U.S.-manufactured CSPV products. Seventy-three of these purchasers reported that import prices were lower than U.S.-manufactured CSPV products, and 33 reported that price was a primary reason for their decision to purchase imported CSPV over products manufactured in the United States.[33]

20. China argues that price was not a primary reason for purchasing imported product rather than domestic product because 53 of 86 purchasers cited factors other than price as their reason for purchasing imports.[34] Rather than demonstrating any Commission error or misrepresentation of the record, however, China merely cites to a manner by which the evidence in the record could have been weighed differently. Indeed, as the Commission explained, purchasers identified a variety of different non-price reasons for their purchasing imported product rather than domestically produced product.[35] Thus, the Commission reasonably compared the number of purchasers for each of the identified reasons in finding that purchasers had most often cited price as a primary reason. Ignoring this, China points to a different methodology that would yield the result it prefers, by instead comparing the total number of purchasers that cited price to the total number of purchasers that cited non-price reasons. Ultimately, however, China's

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[31] China Response to Written Questions, paras. 35, 61. According to China, doing so would have demonstrated that more purchasers ranked quality/performance as their first most important factor than they did price.

[32] USITC November Report, Vol. II, p. V-14 Table V-4 (Exhibit CHN-3).

[33] USITC November Report, p. 49 n. 272 (Exhibit CHN-2).

[34] China Response to Written Questions, paras. 17, 36, 62.

[35] USITC November Report, Vol. II, p. V-30 (Exhibit CHN-3) (listing financial strength/bankability, customer service, product range (technology and efficiencies), quality, product availability, warranty backstop protection, and delivery time).

assertion of an alternative characterization of the data does not cast doubt on the reasonableness of the Commission's finding that for a substantial number of purchasers, price was a primary reason for purchasing low imports rather than the domestically produced product.[36]

21. The United States also notes that the Commission conducted an extensive analysis of respondents' assertions that U.S. cells and modules suffered from quality and reliability issues, and found that the evidence did not support that assertion.[37] Thus, there is no basis to assert that the Commission disregarded or mischaracterized the role of price vis à vis quality/performance.

General comment 3: As the USITC report could not possibly reference every single assertion on its voluminous record, China does not demonstrate any infirmity in the report when it identifies discrete assertions that the report does not explicitly cite.

22. In its efforts to attack the reasonableness and adequacy of the Commission's analysis, China repeatedly cites to individual assertions and statements made by respondents during the course of the administrative proceedings, while ignoring the substantial and contradictory evidence and arguments on the record.[38] Articles 3.1 and 4.2(c) call for the report of the competent authorities to provide "their findings and reasoned conclusions on all pertinent issues of fact and law," including a "detailed analysis of the case" and a "demonstration of the relevance of the factors considered." Nowhere does the Agreement require that the competent authorities touch on every single point put forth by the parties, as China seems to suggest. Given the voluminous amount of information on the record in this case – literally thousands of pages – such a requirement would be onerous and unfeasible.

23. Moreover, DSU Article 11 does not call for a panel to apply such a standard in evaluating claims under the Safeguard Agreement. The Appellate Body has explained that:

> 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.[39]

24. Thus, a panel's evaluation of the competent authorities' report need not inquire specifically after every particular piece of evidence or every argument made by the parties.

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[36] *See, e.g.*, *United States – DRAMS (Panel)*, paras. 6.66-6.69.

[37] USITC November Report, pp. 50-56, 61 (Exhibit CHN-2).

[38] *See, e.g.*, China Response to Written Questions, paras. 19, 108-109, 120, 122, 134, 136, 151.

[39] *US – Lamb (AB)*, para. 103 (emphasis in original) (footnote omitted).

Rather, it should examine whether they have evaluated all relevant factors, and provided a reasoned and adequate explanation for their determination. The USITC's November Report contained all the elements called for under the Safeguards Agreement. It explicitly included an evaluation of all relevant factors. Moreover, it contained a detailed analysis of the case, explaining how the facts supported the Commission's ultimate conclusion that CSPV producers were being imported into the United States in such increased quantities as to be a substantial cause of injury to the domestic industry. China's citations to isolated statements and assertions does nothing to detract from the force of the Commission's conclusion.

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.

(i) Whether this is in fact China's position

25. China states that it "does not make a blanket statement that no domestic industry can ever be seriously injured by increased imports if it lacks the capacity to supply the full extent of domestic demand."[40] This, however, is the logical extension of China's contentions that the Commission failed to account for: (1) the small size of the domestic industry throughout the POI and (2) the explosive growth in demand, particularly in the utility segment, which, in China's view, the domestic industry did not have the capacity to supply.[41] In other words, China is indeed faulting the Commission for finding serious injury caused by imports where, in China's view, the domestic industry lacked current capacity to meet the explosive demand. China's argument fails both as a factual and a legal matter.

26. Factually, China overlooks the role that the surging imports played in creating the conditions under which the domestic industry was unable to expand capacity to meet the increasing demand. Contrary to China's assertion, the USITC considered all relevant evidence, including the circumstances China focuses upon. The Commission provided a thorough explanation demonstrating that the domestic industry's inability to expand capacity during a time of explosive 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.

[40] China Response to Written Questions, para. 9.

[41] China Response to Written Questions, para. 10. Contrary to China's suggestion, the utility segment was not the only segment to have experienced significant growth. As the Commission explained, all three on-grid segments – residential, commercial, and utility – experienced considerable growth in both the number of installations and the total wattage of installation projects during the POI. USITC November Report, p. 58 (Exhibit CHN-2).

27. Specifically, the Commission conducted a detailed analysis of 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. As the Commission explained, these imports were highly substitutable with and priced lower than the domestically produced like product.[42] As a result, the growth in the volume of lower priced imports between January 2012 and December 2016 occasioned a drop in prices for domestic CSPV products.[43] As prices declined over the POI, the domestic industry's net sales values fell overall. Its cost of goods sold ("COGS") to net sales ratio, which consistently remained near or exceeded 100 percent throughout the POI, climbed to over 100 percent in 2016.[44] Consistent with overall declines in its net sales value and consistently high COGS to net sales ratio, the domestic industry experienced hundreds of millions of dollars in operating and net losses throughout the POI.[45]

28. Thus, despite extremely favorable demand conditions, the domestic industry's performance was "dismal and declining" during the POI.[46] 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.[47]

29. Additionally, despite the need to increase capacity in order to achieve economies of scale, the domestic industry's capacity and production levels did not increase markedly, 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 pre-existing 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

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

[43] USITC November Report, p. 45 (Exhibit CHN-2).

[44] USITC November Report, pp. 34, 38 (Exhibit CHN-2).

[45] USITC November Report, pp. 34-35 (Exhibit CHN-2).

[46] USITC November Report, p. 35 (Exhibit CHN-2).

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

workers affected by these closures.[48] The domestic industry's condition continued to deteriorate into 2017, and two additional U.S. production facilities closed by July 2017.[49]

30. Thus, as the Commission explained, the presence of increased imports prevented the domestic industry from increasing productive capacity to a greater extent and meeting a larger share of the growing apparent U.S. consumption in the first instance. This type of scenario falls squarely within the meaning of serious injury caused by increasing imports under SGA Article 4.2, and demonstrates the legal fallacy of the premise that a domestic industry's inability to meet increasing demand automatically negates any finding of serious injury caused by imports.

(ii) whether China 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).

31. China asserts that it affirmatively accounted for the possibility that the domestic industry could be suffering serious injury with respect to the portion of demand that it could have supplied.[50] But rather than explaining how it did so, China instead makes a flawed critique of the Commission's analysis.[51]

32. China first asserts that the Commission focused on negative trends and did not objectively consider that the domestic industry's CSPV cell and module capacity and capacity utilization actually increased during the POI. According to China, these factors were not reflective of an injured industry.[52] The United States notes, however, that notwithstanding this characterization of the domestic industry's condition, China has not made a claim challenging the Commission's conclusion that the domestic industry suffered serious injury.

33. Moreover, the Commission did not focus exclusively on negative trends as China contends. Rather, the Commission expressly acknowledged that the domestic industry's cell and module capacity and cell capacity utilization increased overall during the POI. Rather than view these positive trends in isolation, the Commission objectively considered these data in light of the explosive demand growth that occurred during the POI.[53] As China itself acknowledged in

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

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

[50] China Response to Written Questions, para. 11.

[51] China Response to Written Questions, para. 11-21.

[52] China Response to Written Questions, paras. 12-13.

[53] USITC November Report, pp. 31-33, 47-49 (Exhibit CHN-2). Unlike the domestic industry's cell capacity utilization, the industry's module capacity utilization declined over the POI. *See ibid.* at 32. China blames the decline in the domestic industry's module capacity utilization to the addition of module capacity in 2016. China Response to Written Questions, para. 13. This, however, does nothing to diminish the force of the Commission's reasoning that the fact that domestic industry module industry had excess capacity during a period of explosive demand was indicative of injury caused by the increasing import volumes. (It also exposes the fallacy of China's argument that domestic producers' failure to expand capacity in tandem with demand was an alternative cause of serious injury.)

its First Written Submission, "it is also critical that those trends be analyzed in light of the conditions of competition for that specific industry. The trends might have different significance depending on the conditions of competition."[54] In the CSPV products investigation, it was crucial and appropriate for the Commission to evaluate the significance of the trends in the U.S. CSPV products market. The seemingly "positive" development in trends had different significance when viewed in light of the magnitude of growth in U.S. demand, most of which accrued to the benefit of imports and not domestic products.

34. The Commission provided a thorough analysis explaining that the domestic industry's cell and module capacity and U.S. cell capacity utilization, while increasing, did not approach the magnitude of the explosive growth in apparent U.S. consumption during this period; rather, dozens of U.S. facilities closed their operations.[55] Moreover, the firms that did not exit the industry experienced low capacity utilization even with increasing demand throughout the POI, with excess capacity for module producers increasing from 391 MW in 2012 to 577 MW in 2016.[56]

35. 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.[57]

36. This compelling evidence supported the Commission's finding that despite market conditions that were otherwise extremely favorable to the domestic producers, increasing volumes of low-priced subject imports resulted in severe underutilization of the domestic industry's production assets and closures. These in turn adversely affected the industry's ability to capitalize on the strong and increasing domestic demand.[58] These findings were consistent with and supported the Commission's ultimate finding that increased imports caused serious injury to the domestic industry.

37. China also attempts to refute the Commission's finding that the domestic industry lost sales to imports during the POI.[59] The Commission reached this finding by first showing that there was a high degree of substitutability between the domestically produced product and

[54] China First Written Submission, para. 101.

[55] USITC November Report, pp. 33, 47-49 (Exhibit CHN-2).

[56] USITC November Report, p. 32 (Exhibit CHN-2).

[57] USITC November Report, p. 36 (Exhibit CHN-2).

[58] USITC November Report, p. 48 (Exhibit CHN-2).

[59] China Response to Written Questions, para. 14.

imports. Domestic and imported CSPV products were generally sold within similar efficiency and wattage ranges during the POI, and modules were sold in both 60-cell and 72-cell forms[60] and to overlapping market segments through overlapping channels of distribution. Moreover, most responding domestic producers, importers, and purchasers reported that domestic and imported CSPV products were interchangeable.[61]

38. Against this high degree of substitutability, purchasers in their questionnaire responses confirmed that domestic producers lost sales to low-priced imports of CSPV products. Specifically, of the 104 purchasers, 91 reported that since 2012, they had purchased imported CSPV products instead of the domestically produced CSPV products. Seventy-three of these purchasers reported that imports prices were lower than the domestic product, and 33 reported that price was a primary reason for their decision to purchase imported CSPV products over products manufactured in the United States.[62]

39. Rather than address this compelling evidence that the domestic industry lost sales, China first criticizes the Commission's observation that price was the factor purchasers cited most frequently as being important to purchasing decisions.[63] As explained in General Comment 2, the Commission correctly found that price was an important factor in purchasing decisions and that for a substantial number of purchasers, lower price was a primary reason for purchasing imports. China's alternative tabulations of the data do not detract from that finding. These findings support the Commission's conclusion that the domestic industry lost sales to imports and China fails to demonstrate otherwise.

40. In another effort to downplay the importance of price in purchaser's purchasing decisions, China contends that the domestic industry did not offer products that were demanded by the U.S. CSPV market.[64] China, however, provides no support for this assertion. The evidence indicates otherwise. As the Commission observed, U.S. producers and importers generally sold the same type of products to overlapping market segments during the POI.[65] Moreover, most responding domestic producers, importers, and purchasers reported that domestic and imported CSPV products were interchangeable.[66]

41. China also attempts to rely on respondents' unsupported assertion that the domestic industry chose not to sell to the utility segment. As the United States explained in General Comment 1, U.S. producers did not "decide" to abandon sales into the fast-growing utility sector.

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[60] USITC November Report, pp. 29-30, 54 (Exhibit CHN-2).

[61] USITC November Report, pp. 29-30 (Exhibit CHN-2).

[62] USITC November Report, p. 49 n.272 (Exhibit CHN-2).

[63] China Response to Written Questions, para. 17.

[64] China Response to Written Questions, para. 17.

[65] USITC November Report, pp. 29-30, 54 (Exhibit CHN-2).

[66] USITC November Report, pp. 29-30 (Exhibit CHN-2).

Their expansion was blocked by increased volumes of low-priced imports. On this point, China seeks to use the price-sensitive nature of the utility segment to argue that domestic producers could not effectively compete in the utility market.[67] Rather than support China's argument, however, this fact reinforces the Commission's finding that the effects of the significant volume of low-priced imports that were highly substitutable with the domestically produced product was particularly felt in the utility segment where the domestic industry sought to compete.[68]

42. In any event, the Panel's question asks about injury suffered by the domestic industry for the "portion of demand that it could supply." China's argument, which focuses on the shift in market share in the utility segment, does not even address the Commission's finding that the domestic industry also lost market share in the residential and commercial segments, which, in China's view, the domestic industry made a business choice to serve.[69] Nor does China's argument explain the domestic industry's low capacity utilization levels, facility closures, and abysmal financial performance.

Question 3 (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.

43. China concedes that it is reasonable for competent authorities to *consider* whether the growth of the domestic industry's capacity and production increased commensurately with demand growth.[70] But crafting a theory to fit its preferred view of the facts of this case, China insists that this relationship is only ever relevant if the imports directly displace domestic product and if domestic shipments do not increase. Positing that its narrow factual scenario did not exist in this particular investigation, China contends that "an increase in domestic shipments slower than overall market growth . . . certainly does not reflect a dynamic that warrants the extraordinary relief provided by safeguard measure."[71]

44. At the most basic level, this overarching pronouncement has no basis in the Safeguards Agreement. Article 2.1 recognizes the importance of the relative relationship between imports and domestic product, expressly authorizing a Member to take a safeguard measure when "a product is being imported into its territory in such increased quantities, absolute or relative to domestic production." One instance of imports increasing "relative to domestic production" is when domestic shipments grow slower than the market and imports fill the gap. As illustrated by

[67] China Response to Written Questions, para. 19.

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

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

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

[71] China Response to Written Questions, para. 22.

this case, when imports seize the largest share of an increase in demand, modest increases in domestic production (and shipments) can leave the domestic industry in poor financial position, with difficulty competing in important segments of the market. The Commission found, and China does not contest, that CSPV imports not only increased absolutely during the POI, but also increased relative to domestic production, from 733.9 percent in 2012 to 948.4 percent in 2013, 1,140 percent in 2014, 1,593.5 percent in 2015, and 2,276.2 percent in 2016.[72]

45. China asserts that the Commission based its injury analysis on the "premise" that the domestic industry "had a *right* to increase capacity *commensurately* with demand growth."[73] This is not the case. The Commission cited a variety of evidence demonstrating that the market conditions favored an improvement in the domestic industry's performance. As the Commission explained, demand experienced explosive growth and the United States imposed trade remedies during the POI. Notwithstanding this, the industry faced an influx of low-priced imports from new sources that took advantage of the exploding demand. The Commission evaluated the industry's poor performance against this background. Without a meaningful increase in sales volume or prices, domestic facilities continued to operate at below full capacity as domestic producers and dozens of facilities actually shuttered their operations, including many of those that entered the U.S. market seeking to take advantage of the demand growth.[74] The Commission did not presume any particular level of or capacity for growth. Rather it focused on the dozens of facility closures and low capacity utilization rates during the POI that occurred despite extremely favorable market conditions.

46. China asserts that this understanding of developments in the market "ignores three key features of this market."[75] First, it asserts that the Commission ignore an alleged "mismatch" between imported and domestic CSPV products.[76] As explained in General Comment 1, the Commission found that the domestic industry sought to compete in all segments of the market, not just the residential and commercial segments. Moreover, the Commission found that contrary to any existence of a "product mismatch," a significant and direct overlap existed in the types of CSPV products offered by both domestic and foreign suppliers. The Commission's detailed analysis demonstrated how both imported and domestic CSPV products were available in cell, laminate, and module forms, with most in the form of modules.[77] The pricing data also confirmed that domestic industry and importer sales of CSPV products were made within similar efficiency and wattage ranges. The Commission explained that despite the existence of some variations in product offerings between imports and domestically manufactured products, all CSPV products served the same function in converting sunlight into electricity and that CSPV

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

[73] *See* China Response to Written Questions, para. 23.

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

[75] China Response to Written Questions, para. 23.

[76] China Response to Written Questions, para. 24.

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

products essentially competed against each other on the basis of electrical output and cost.[78] Indeed, as the Commission found, most responding domestic producers, importers, and purchasers reported that domestic and imported CSPV products were interchangeable.[79]

47. Second, China asserts that the Commission failed to take account of the "explosive growth in demand of over 300 {percent}" and the domestic industry's "small scale and market share at the beginning of the POI."[80] To the contrary, the Commission discussed that in 2009, at the beginning of the *CSPV I* investigations on imports from China, the domestic industry had, in fact, held the *largest* share of apparent U.S. consumption, followed by imports from China corresponding to the scope of those investigations, and imports from all other sources. Imports from China, however, overtook the domestic industry's U.S. shipments in 2010 and by the end of 2011, imports from China had nearly doubled from their 2009 level.[81]

48. After those imports became subject to antidumping and countervailing duty orders in December 2012, imports from China and Taiwan corresponding to the scope of subsequent *CSPV II* investigations on imports from China and Taiwan increased their presence in the U.S. market and replaced entirely the substantial market share previously held by the *CSPV I* imports from China and took additional market share from the domestic industry. The Commission further observed that before the *CSPV II* orders became effective in February 2015, imports from additional countries entered the U.S. market. By the end of 2015, imports had almost doubled their level from 2014, and imports continued to grow in 2016.[82]

49. Thus, the Commission demonstrated that in 2012, the beginning of the POI, the domestic industry was already in an injured state due to CSPV imports from China. But rather than having the time and ability to recover after imposition of trade remedies, the industry faced low-priced imports from new sources that took advantage of the exploding growth and adversely impacted the domestic industry's capacity and production levels. The Commission's detailed analysis and demonstration of this injurious dynamic caused by increased imports fully satisfied its obligations under SGA Articles 3.1 and 4.2(b).

Question 4 (US)

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

[78] USITC November Report, pp. 54-55 Exhibit CHN-2).

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

[80] China Response to Written Questions, paras. 25-29.

[81] USITC November Report, p. 44 (Exhibit CHN-2).

[82] USITC November Report, pp. 44-45 (Exhibit CHN-2).

circumstances with its ultimate finding that the increased imports caused serious injury to the domestic industry.

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.

50. As noted in the question, China acknowledges "a coincidence between increased imports and lost market share." Nonetheless, China asserts that the Commission failed to analyze this correlation within the context of the conditions of competition, specifically "the rapidly increasing demand and the domestic industry's inability to compete in the utility market segment."[83] As explained above in the United States' comments on China's response to the Panel's questions 2 and 3, the Commission thoroughly considered the relevant evidence within the conditions of competition in arriving at its findings that the domestic industry lost sales to imports, domestic and imported products competed in all segments of the U.S. market, and the significant volume of low-priced imports affected the domestic industry's ability to compete.

(i) The domestic industry losing sales to imports

51. The Commission found that seven domestic producers reported losing sales to imported CSPV products during the investigation period, for an estimated total of 950 MW.[84] It explained that imports sold for lower prices in 33 of 52 instances, involving two-thirds of the total volume of comparisons, noted the importance of price in purchasing decisions, and that a substantial number of purchasers even *confirmed* that domestic producers lost sales to low-priced imports of CSPV products.[85]

52. China, however, asserts that given that the domestic industry's market share, which began to increase in the second half of the POI as imports reached their peak and the increase in domestic industry's market share for CSPV modules, it was illogical for the Commission to have assigned blame to imports for lost sales.[86] Putting aside that it is certainly possible for the

[83] China Response to Written Questions, para. 31.

[84] USITC November Report, p. 42 (Exhibit CHN-2).

[85] USITC November Report, p. 49 n.272 (Exhibit CHN-2).

[86] China Response to Written Questions, para. 33.

domestic industry to still lose sales while gaining market share,[87] the record showed that there was, in fact, a direct correlation between increasing import volumes and the domestic industry's overall decline in market share. As the Commission explained, the domestic industry's market share declined from 2012 to 2013, but then increased in 2014 after imposition of the *CSPV I* orders and initiation of the *CSPV II* investigations and imports temporarily grew at a slower pace than apparent U.S. consumption. The domestic industry's market share, however, declined anew in 2015 and 2016 as imports from additional sources entered the U.S. market and rapidly increased to their highest volumes.[88]

53. China also again asserts that the Commission misrepresented the purchaser questionnaire response data in arriving at its lost sales finding.[89] As explained in General Comment 2, the Commission correctly found that price was an important factor in purchasing decisions, and indeed a primary reason for several purchasers' purchases of imports, and China's alternative tabulations of the data do not detract from that finding. China's critique accordingly identifies no flaw in the Commission's conclusion that the domestic industry lost sales to low-priced imports.

(ii) Competition between domestic and imported products in residential, commercial, and utility market segments

54. As explained in General Comment 1, the central premise of China's response – that "key domestic producers chose to focus on the residential and commercial segment, and not the utility segment"[90] – is wrong. The evidence demonstrated otherwise. Based upon this evidence, the Commission determined that the "domestic industry clearly sought to compete in the large, concentrated, and price-sensitive utility market, but the large volume of imports at low and declining prices adversely impacted the domestic industry's financial performance, making it difficult for the domestic industry to increase capacity to a scale that made it more competitive in this segment, even if it managed to develop and even pioneer innovative products that utilities and other sought."[91]

55. China's argument also misses the point that the domestic industry's limited capacity was a *result* of serious injury caused by increased imports, not, as China argues, an independent cause of injury. China's argument simply amounts to a circular attempt to attribute the domestic industry's lack of competitiveness to the industry's limited capacity – which, as the Commission

[87] China relies on an inapposite table (Table V-19) for its assertions and its depiction of the domestic industry's market shares. China Response to Written Questions, para. 33. As cited by the Commission in its determination, the Table C-1b of the USITC November Report contains the data regarding market shares.

[88] USITC November Report, p. 49 (Exhibit CHN-2).

[89] China Response to Written Questions, paras. 34-37.

[90] China Response to Written Questions, para. 39.

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

demonstrated, was causally linked to the financial woes exacerbated by the influx of lower priced imports.

56. In any event, China's argument, which focuses on the shift in market share in the utility segment, does not even address the competition that existed between the domestically produced product and imports in the residential and commercial segments. As previously discussed, all three on-grid segments – residential, commercial, and utility – experienced considerable growth in both the number of installations and the total wattage of installation projects during the POI, but the domestic industry lost market share to imports regardless of segment.[92] China's silence upon the domestic industry's loss of market share in the residential and commercial segments is telling, particularly in light of China's repeated assertions that the domestic industry focused on these particular segments.

(iii) Imports impeding the domestic industry's ability to compete with imports in the first instance

57. China disputes the Commission's finding that imports impeded the domestic industry's ability to compete with imports, but none of China's challenges withstands scrutiny.

58. First, China argues that the Commission erroneously blamed imports for price declines that were caused by the industry's increased efficiencies and declining costs of raw materials.[93] Contrary to China's argument, the record evidence demonstrated a clear causal link between increased imports and declining prices and did not support respondents' allegations that the decline in raw material costs and increased production efficiencies explained the price declines during the POI.

59. As detailed in both the U.S. first written submission and answers to the Panel's questions, 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.[94] The Commission found 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.[95] Additionally, noting that prices for all five surveyed products declined overall during the POI, the Commission found a clear correlation between the increasing volume of lower priced imports and declining prices.[96]

60. The Commission further observed that information provided in the questionnaire responses corroborated the imports' causal role in declining domestic prices with 8 of 12 responding domestic producers reporting the need to reduce prices, and three reporting a roll

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[92] USITC November Report, pp. 58-59 (Exhibit CHN-2).

[93] China Response to Written Questions, para. 99.

[94] U.S. First Written Submission, paras. 129-142; U.S. Response to Written Questions, paras. 45-55.

[95] USITC November Report, pp. 42, 45 (Exhibit CHN-2).

[96] USITC November Report, p. 45 (Exhibit CHN-2).

back in announced price increases to avoid losing sales to competitors selling imported CSPV products during the POI. Moreover, of the 103 responding purchasers, 38 reported that U.S. producers had to reduce prices of their CSPV products to compete with lower-priced imports, and 44 of them reported that they did not know whether domestic producers had reduced their prices to compete with lower-priced imports. Several purchasers also reported steeper price reductions in 2016, as the domestic industry's market share fell to its lowest level.[97]

61. 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. The United States, in its prior submissions, also discussed how the Commission thoroughly considered the other causes of the price declines posited by respondents, including declining raw material costs and increased production efficiencies, and that it reasonably concluded that the record did not support respondents' arguments.[98] Indeed, 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 an already poorly performing domestic industry.[99] China's argument on these alternative causes evidently fails to consider the context of the domestic industry's dismal financial condition and reconcile why domestic producers would purposefully sell their CSPV products at declining prices that kept pace with their decreasing costs, incurring hundreds of millions of dollars in net and operating losses during the POI.

62. Thus, contrary to China's argument 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.[100] 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 increased production efficiencies or changes in raw material costs.[101]

63. China also contends that the Commission focused "simplistically on the fact of financial losses in general,"[102] when, in fact, the "industry did better as imports increased."[103] This

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[97] USITC November Report, pp. 42, 45-46 (Exhibit CHN-2).

[98] U.S. First Written Submission, paras. 205-207; U.S. Response to Written Questions, paras. 45-55.

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

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

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

[102] China Response to Written Questions, para. 44.

[103] China Response to Written Questions, para. 44.

argument ignores important conditions of competition– in particular, the explosive growth in demand and the 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."[104]

64. As the Commission discussed, favorable conditions existed in the U.S. market. U.S. demand was strong and experienced explosive growth.[105] Moreover, the United States imposed trade measures against imports of CSPV products from China and Taiwan.[106] Within this context, the Commission explained that 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.[107] 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.[108]

65. Moreover, 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,[109] 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 caused the domestic industry's dismal and deteriorating condition.[110]

66. China further argues that the Commission provided an "incomplete and misleading summary of the facts" because it did not address year-to-year trends regarding firm closures and openings that occurred during the POI.[111] China overlooks that, as the Commission found, the domestic industry's financial performance during the entire POI was dismal and declining. Given this and the favorable market conditions that existed during this time, including the explosive growth in apparent U.S. consumption and imposition of trade remedies, it was reasonable for the Commission to make an overall observation that dozens of U.S. facilities closed their operations during the POI as imports captured most of the growth in demand and

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[104] *US – Steel Safeguards (Panel)*, para. 10.314.

[105] USITC November Report, pp. 26-27 (Exhibit CHN-2).

[106] USITC November Report, p. 44 (Exhibit CHN-2).

[107] USITC November Report, p. 46 (Exhibit CHN-2).

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

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

[110] USITC November Report, p. 43-50 (Exhibit CHN-2).

[111] China Response to Written Questions, para. 46-47.

linking this to the domestic industry's injury.[112] China also asserts that the Commission did not account for new firms that opened during the POI. To the contrary, the Commission expressly explained that its general observation was based upon the fact that 33 CSPV cell or CSPV module facilities operated in the United States as of January 1, 2012, but only 13 of those facilities remained open by December 31, 2016. It further found that of the 16 additional facilities that opened during the POI, five closed. And although two firms announced plans for new facilities, those facilities were not commercially operational by July 2017.[113] There is nothing inaccurate or misleading about the Commission's findings, and it did not fail to consider facility openings.

67. China also errs in its accusation that the Commission provided "no analysis" as to how imports caused "negative effects on investments."[114] The Commission provided a detailed analysis relating how imports of CSPV products increased and reached record highs in 2016, how their low prices depressed domestic prices, and how these developments led to significant and worsening net and operating losses for the already unprofitable domestic industry. As the Commission explained, the hundreds of millions of dollars in net and operating losses throughout the POI resulted in negative effects on investments as the domestic industry faced underutilization of its production assets, underinvestment, and closures.[115]

68. Similarly unavailing is China's claim that SolarWorld's investment in a new 72-cell module factory, another firm's investment in expanded CSPV cell production, and the opening of a $25 million R&D facility are at odds with claims of adverse effects on investments.[116] Regarding the firm that had invested in new CSPV cell operations, the Commission noted that the company had not yet become commercially operational during the POI.[117] Moreover, SolarWorld, despite having invested in a new 72-cell module factory in 2016, was forced to issue "WARN Act" notices in 2017 due to its dire financial condition.[118] As the Commission further observed, other domestic producers also recognized asset impairments, reserved or wrote off production equipment, and otherwise slowed or shut down production.[119] Although the Commission noted that SunPower, which had manufactured CSPV cells in Malaysia and the Philippines and assembled CSPV cells into modules in Mexico and the Philippines, invested in a

[112] USITC November Report, p. 32 (Exhibit CHN-2).

[113] USITC November Report, pp. 31-32 (Exhibit CHN-2).

[114] China Response to Written Questions, para. 49.

[115] USITC November Report, pp. 43-50 (Exhibit CHN-2).

[116] China Response to Written Questions, para. 49.

[117] USITC November Report, p. 35 (Exhibit CHN-2).

[118] 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.

[119] USITC November Report, p. 36 (Exhibit CHN-2).

$25 million facility in California during the POI,[120] this does not diminish from the totality of the circumstances demonstrating that increased imports resulted in the domestic industry's negative effects on investments.

69. Finally, China points to the alleged increase in the industry's utilization rates as imports increased over the POI to argue that the Commission failed to explain how imports were the cause of the domestic industry's low capacity utilization. The U.S. comments on China's response to Panel Question 2 address how the seemingly "positive" development in the domestic industry's CSPV *cell* capacity utilization rate had different significance when viewed in light of the magnitude of growth in U.S. demand, most of which accrued to the benefit of imports and not domestic products. As the Commission explained, notwithstanding an increase in cell capacity utilization rates, utilization still remained below full capacity. Moreover, contrary to China's assertion, the domestic industry's *module* capacity utilization rate, in fact, declined from 57.9 percent in 2012 to 53.7 percent in 2016.[121]

70. In sum, China's submission fails to demonstrate any way that the Commission's analysis regarding increased imports and the domestic industry's serious injury was not reasonable or adequate.

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.

71. In its response China does not dispute the Commission's observation that the trade remedy orders caused covered imports from China and Taiwan to decrease, or that imports from other sources subsequently increased, often because the companies covered by the orders opened new facilities in other countries. It does not dispute that the domestic industry's financial condition improved marginally after imposition of the orders and the filing of new trade remedy cases, or that the condition deteriorated further in 2016, as those shifts led total imports to peak in terms of volume and market share and prices to drop anew.[122] Its sole critique is that these observations should have led the Commission to conclude that industry trends were being driven by other factors – specifically, falling prices due to improved technology, falling costs, and the imperative of grid parity.[123] The Commission, however, thoroughly considered, and rejected, assertions that each of these other factors explained the domestic industry's dismal and

[120] USITC November Report, p. 7 n.17 (Exhibit CHN-2).

[121] USITC November Report, p. 32 (Exhibit CHN-2).

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

[123] China Response to Written Questions, para. 51.

deteriorating condition.[124] Although China claims that these shifts in supply chains were due to the domestic industry's inability to supply demand, this was not the case of the natural ebb and flow directed by supply and demand considerations.[125] Rather, as the Commission demonstrated, these shifts in global supply were due to producers in China purposefully expanding their CSPV cell and module operations into other countries in 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. As the Commission observed, 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, as their collective share of the U.S. market more than doubled.[126]

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.

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.**

a. Domestic and imported CSPV products were generally interchangeable, and a wide variety of CSPV products was sold during the POI.

72. China concedes that domestic and imported products were "generally interchangeable" and that both the domestic industry and foreign producers supplied a variety of products during the POI.[127] Notwithstanding this, China claims that the Commission's finding of

[124] USITC November Report, pp. 61-65 (Exhibit CHN-2).

[125] China Response to Written Questions, para. 52.

[126] USITC November Report, pp. 44-45 (Exhibit CHN-2).

[127] China Response to Written Questions, para. 56.

interchangeability "glossed over" the "important differences in the degree of availability of different products" in the utility segment.[128] China's arguments fail for several reasons.

73. First, China fails to recognize that interchangeability addresses the extent to which products can be used in the same application. As the Commission explained, the record demonstrated that throughout the POI, U.S. producers and importers made commercial shipments of CSPV products within the same range of wattages and conversion efficiencies, and modules were sold in both 60-cell and 72-cell forms. The Commission further found that products from both sources were sold to overlapping market segments through overlapping channels of distribution, particularly to residential and commercial installers. Moreover, most U.S. producers, importers, and purchasers reported that domestically produced product were interchangeable with imported CSPV products.[129] Far from making "sweeping generalizations" regarding interchangeability as China argues, the Commission reached a reasoned conclusion based upon substantial evidence in the record. China's assertion that domestic producers had limited *capacity* to produce 72-cell modules[130] does not detract from this conclusion, as it relates to a different issue – the volume of 72-cell modules that domestic producers could sell. The U.S. first written submission and answers to the Panel's questions explain why the USITC concluded that any such limitations were among the injurious effects of increased imports, and not an alternative cause of injury.[131]

74. China's argument also fails because it relies upon the false premise that the "domestic industry focused its production on the smaller scale commercial and residential segments, and only attempted to enter into the utility segment toward the end of the POI."[132] General Comment 1 explains that domestic producers affirmatively sought, and in fact did sell, product to the utility segment during the POI, and not just at the end of the POI as China claims.

75. In any event, China's argument does not provide any logic explaining how the domestic industry's limited availability of 72-cell modules affected the Commission's finding of interchangeability or its ultimate conclusion that increased imports caused prices to decline. China accordingly establishes no valid basis for concern that the Commission did not conduct an adequate analysis on this issue.

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[128] China Response to Written Questions, paras. 56-60.

[129] USITC November Report, pp. 29-30 (Exhibit CHN-2); USITC November Report, p. V-22 (Exhibit CHN-3).

[130] China Response to Written Questions, para. 58

[131] U.S. First Written Submission, paras. 117-125, 180-182; U.S. Response to Written Questions, paras. 6-15.

[132] China Response to Written Questions, paras. 57-58.

b. Price was *an* important factor in purchasing decisions, and for a substantial number of purchasers, price was *a primary* reason for purchasing low imports rather than the domestically produced product.

76. As General Comment 2 explains, the Commission correctly found that price was an important factor in purchasing decisions, and indeed a primary reason for several purchasers' purchases of imports, and China's alternative tabulations of the data do not detract from that finding. In its response to Panel Question 8, China further asserts that evidence that "only 3 of 8 U.S. producers had to roll back planned price increases" suggests that factors other than price were important factors in making purchasing decisions.[133] China, however, again misapprehends that the Commission did not find that price was the most important factor in purchasing decisions. Rather, the Commission recognized that "purchasers consider a variety of factors in their purchasing decisions, but price continues to be an important factor."[134] In any event, eight of 12 responding domestic producers reported having to reduce prices, and 38 of the 103 responding purchasers 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. Several purchasers also reported steeper price reductions in 2016, as the domestic industry's market share fell to its lowest level.[135] Such evidence further demonstrated the link between increased imports and declining prices.

77. China takes issue with the statement in the U.S. first written submission that "the 38 purchasers that blamed low import prices represent two thirds of the 59 purchasers expressing a view."[136] It asserts that this statement was "not objective" because it "ignored the other 44 [of 103] purchasers, who do not know."[137] However, the U.S. submission explicitly noted the existence of the non-response. In essence, China is arguing that purchasers' non-answers to a question must be treated as an answer that supports China's preferred view of the case because "{n}ot knowing is in fact itself meaningful."[138] China provides no factual support for its assertion. Nor does it provide any basis to question the Commission's reliance upon the responses of those purchasers that actually had knowledge of the domestic producers' pricing behavior. Indeed, given the totality of the evidence, including the high degree of substitutability and the importance of price to purchasers, the underselling of the domestically produced product by imports, and the declining prices despite strong demand growth, China's citation to

[133] China Response to Written Questions, para. 63.

[134] USITC November Report, pp. 29-30 (Exhibit CHN-2).

[135] USITC November Report, pp. 42, 45-46 (Exhibit CHN-2).

[136] U.S. first written submission, para. 136. China refers to the statement as being that this was "59% of purchasers expressing an opinion." China Response to Written Questions, para. 64. However, the number 59 in the paragraph refers to the total number of purchasers expressing a view.

[137] China Response to Written Questions, para. 64.

[138] China Response to Written Questions, para. 64.

unanswered questions in purchaser responses provides no basis to question the Commission finding linking increased imports to declining prices.[139]

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.

78. In arguing that it was unreasonable for the Commission to have linked domestic prices to the interrelationship between volume of CSPV imports and the limited effectiveness of the *CSPV I* and *CSPV II* orders, China returns again to its disproven claims that the Commission did not "provide any analysis regarding how imports caused the price declines" and that it failed to account for other factors affecting prices during the POI.[140] The United States' comments on China's response to the Panel's question number 5 address these arguments in detail. As discussed, the Commission thoroughly examined the role and relationship of import and domestic prices, and found a correlation between increasing import volumes and declining prices. Moreover, the Commission considered the effects of increased production efficiencies and declining raw material costs, and found that the record did not support respondents' allegations that these factors explained the price declines during the POI.[141]

79. China's reliance on the Commission's 2014 determination in *CSPV II* is unavailing.[142] First, China misstates the findings the Commission made in this prior determination concerning antidumping and countervailing duties. In *CSPV II*, the Commission did not find that "imports were not the cause of price suppression or depression," as China states. Rather, the Commission expressly stated that it was making *no* finding as to whether there was significant price suppression of depression.[143] Moreover, China overlooks that *CSPV II* covered a different time period (January 2011 through June 2014) than the period covered in the safeguard investigation (January 2012 through December 2016). Because each of the investigations involved a unique combination and interaction of many economic variables, the Commission's finding in *CSPV II*

[139] USITC November Report, p. 43 (Exhibit CHN-2).

[140] China Response to Written Questions, paras. 65-68.

[141] USITC November Report, pp. 44-47, 61-65 (Exhibit CHN-2).

[142] China Response to Written Questions, para. 67 (citing *Certain Crystalline Silicon Photovoltaic Products*, Inv. Nos. 701-TA-511 and 731-TA-1246-1247 (Final), USITC Pub. 4519, (Feb. 2015) (Exhibit USA-12)). China also claims that the "U.S. industry simply could not keep up with the broader industry trends due to its higher costs caused by its smaller scale, and its efficiency issues due to weaker technology." *Ibid.*, para. 66. China, however, provides no support for these assertions. Nor does China explain the overall relevance of these unsupported assertions to its point that declining costs and increased production efficiencies explained the declining prices for CSPV products.

[143] *Certain Crystalline Silicon Photovoltaic Products*, Inv. Nos. 701-TA-511 and 731-TA-1246-1247 (Final), USITC Pub. 4519, pp. 40-43 (Feb. 2015) (Exhibit USA-12).

that declining raw material costs contributed to price declines cannot be regarded as dispositive for purposes of this later safeguard investigation.

80. China also argues that the "U.S. industry simply could not keep up with the broader industry trends due to its higher costs caused by its smaller scale, and its efficiency issues due to weaker technology."[144] China, however, provides no support for these assertions. Nor does China explain the overall relevance of these unsupported assertions to its point that declining costs and increased production efficiencies explained the declining prices for CSPV products.

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

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; Unites States' first written submission, para. 107.**

81. The U.S. response to this question detailed the non-attribution analysis conducted by the USITC, which found that the potential "other factors" identified by its investigation were not, in fact, causing serious injury. While China concedes that the Commission assessed other factors, it contends that this analysis erred as a matter of law in finding that these factors did *not* cause injury and not continuing on to "separate and distinguish" the injurious effects of these other factors (of which there were none) from the injurious effects of increased imports.[145] China also argues that the USITC actually found that "other factors at issue in this case had adverse effects on the performance of the domestic industry," which were not relevant under the statutory "substantial cause" standard, but are relevant to the causation analysis under the Safeguards Agreement.[146] Neither of China's arguments, however, withstand scrutiny.

82. The second sentence of Article 4.2(b) states that "{w}hen 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." As the United States explained, although Article 4.2(b) requires competent authorities to conduct a non-attribution analysis, it does not impose any obligation as to *how* the competent authorities comply with its obligations. Thus, the Safeguards Agreement assigns a large margin of discretion to a competent authority to conduct its non-attribution

[144] China Response to Written Questions, para. 66.

[145] China Response to Written Questions, paras. 71-74.

[146] China Response to Written Questions, para. 75.

analysis.[147] China concurs,[148] but asserts that such discretion does not allow competent authorities "to skip the analysis entirely" or to "lightly assume that other factors do not have any effect."[149] These assertions are essentially rhetorical devices. The United States never asserted that competent authorities may "skip" the obligation set out in the second sentence of Article 4.2(b), or "assume" that other factors have no effect. And, our submissions have demonstrated that the USITC November Report provides an analysis consistent with the second sentence of Article 4.2(b), based on a detailed analysis of the evidence.

83. The USITC considered the alternative causes of injury argued by respondents – (1) alleged missteps by the domestic industry and (2) factors other than imports that led to declines in domestic prices. It evaluated the arguments and evidence on the record and provided a detailed analysis explaining its findings that none of these other factors were causes of injury.[150] Therefore, the Commission fully satisfied its obligation under Article 4.2(b), which, as a first step, requires competent authorities to determine whether factors different from increased imports are causing some impairment to the domestic industry, and if this is happening simultaneously with the serious injury is caused by increased imports.[151]

84. Because the Commission concluded that no other factors were in fact causing injury, Article 4.2(b) did not call for any further analysis as to whether injury *that other factors did not cause* was somehow attributed to increased imports. To read Article 4.2(b) as requiring such a pointless analytical step would elevate formality over substance. China's response to this question emphasizes past reports framing the non-attribution analysis as one in which the competent authorities must "separate and distinguish the nature" of the injury caused by other factors from the injury caused by increased imports.[152] To be clear, if the competent authorities correctly determine that a factor is not "causing injury to the domestic industry at the same time" for purposes of Article 4.2(b), there is nothing to "separate" or "distinguish" from the injury caused by increased imports. None of the findings cited by China suggest that Article 4.2(b) requires a "separate and distinguish" analysis of factors that do not cause injury.

85. China errs in citing *US – Wheat Gluten (AB)*, *US – Line Pipe (AB)*, and *US – Lamb (AB)* as dictating a particular methodology.[153] "Separate and distinguish" does not appear in Article 4.2(b), or anywhere else in the Safeguards Agreement. Article 4.2(b) requires only that any injury from other factors not be attributed to increased imports and does not set forth a specific

[147] U.S. First Written Submission, para. 97.

[148] China Response to Written Questions, para. 72.

[149] China Response to Written Questions, paras. 72, 74.

[150] USITC November Report, p. 50 (Exhibit CHN-2).

[151] U.S. First Written Submission, paras. 94-96.

[152] *See* China First Written Submission, paras. 164-165; China Response to Written Questions, para. 72 (quoting *US – Wheat Gluten (AB)*, para. 68; *US – Line Pipe (AB)*, para. 215; *US – Lamb (AB)*, para. 183).

[153] U.S. First Written Submission, paras. 101-104.

approach for competent authorities to take. The Appellate Body has recognized this, emphasizing in *US – Lamb*, "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."[154] In any event, it is not even necessary for the Panel to address the question of whether the Appellate Body statements upon which China relies represent a correct reading of Article 4.2(b) because, as discussed, the Commission found that the other factors at issue did not cause injury to the domestic industry.

86. There is no merit to China's assertion that the United States mischaracterized the Commission's conclusion regarding these other factors and engaged in *post hoc* rationalization. China simply cites to the Commission's determination for purposes of U.S. law that "increased imports were a substantial cause not less than any other cause," and argues that this implies a finding that there existed "other causes." China then argues that the United States is seeking *ex post* to "re-package" this finding into one of no injury.[155] This is not the case.

87. Section 202(b)(1)(A) of the Trade Act of 1974 requires the Commission to determine "whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." Section 202(b)(1)(B) defines "substantial cause" as "a cause which is important and not less than any other cause." As China notes, the November Report sets out this determination, along with an explanation based upon a number of intermediate findings. These include findings that none of the other factors individually or collectively explained the serious injury.[156]

88. In reaching that finding, the Commission conducted a thorough and detailed analysis on each other factor and explained how none of the alleged missteps (domestic producer's failure to serve the utility segment, inability to provide innovative products, and widespread unreliability in quality, delivery, and service) actually occurred and that the expiration of government incentive programs, declining raw material costs, and need to meet grid parity could not explain the declines in domestic prices.[157] As the Commission concluded, "{w}e have examined these factors but find that respondents' arguments are not supported by the facts."[158] Section 202 may frame the ultimate conclusion differently than Article 4.2(b), but in reaching that conclusion, the USITC made findings that satisfied the substantive obligations of the Article. That is all that matters for purposes of the Safeguards Agreement.

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[154] *US – Lamb (AB)*, para. 181.

[155] China Response to Written Questions, paras. 75-76.

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

[157] USITC November Report, pp. 50-65 (Exhibit CHN-2).

[158] USITC November Report, p. 50 (Exhibit CHN-2).

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.

89. At the outset, it is worthwhile to note that over the course of its 18-paragraph response, China never explicitly answers the yes/no question posed by the Panel. It appears that China's view is that, yes, Article 4.2(b), second sentence, requires a non-attribution analysis of an other factor that the competent authorities find does not cause injury to the domestic industry – specifically that there must be a "collective" assessment of all factors determined not to cause injury.[159] However, China response only serves to disprove this assertion.

a. Article 4.2(b) does not require competent authorities to collectively assess factors that are determined not to cause injury.

90. China's legal analysis begins with a lengthy recitation of findings by panels and the Appellate Body regarding the causation analysis. It then ends with a paragraph stating simply:

> Finally, even where the investigating authority considers that an individual other factor did not cause injury, after having separated and distinguished all other factors, the competent authority still must assess under the specific facts of the case whether the individual factor caused injury collectively with other factors.[131] The USITC in this case, however, refused to engage in such an analysis.[132]

[131] Appellate Body, *EC – Tube or Pipe Fittings*, para. 192 ("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 dumped imports.").

[132] [footnote omitted][160]

China provides no analysis or explanation for reaching this conclusion, either with regard to the terms of the Safeguards Agreement or to evaluations of the Safeguards Agreement in adopted panel or Appellate Body reports.

91. China does provide a citation and quotation to *EC– Pipe Fittings*, but this citation does not support China's position. The full sentence from the report states:

> At the same time, we recognize that *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

[159] China Response to Written Questions, para. 85.

[160] China Response to Written Questions, para. 85.

> authority improperly attributing the effects of other causal factors to dumped imports.[161]

This statement by the panel does not, and cannot, create an obligation to conduct a collective assessment of factors that do not individually cause injury where such obligation is not set out in Article 4.2(b). The sentence immediately following the sentence that China quotes in non-pertinent part confirms that "[w]e are therefore of the view 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 fulfils its obligation not to attribute to dumped imports the injuries caused by other causal factors."[162]

92. China has not demonstrated any "specific factual circumstances" that would warrant a collective assessment of other factors in this case. Given that the Commission properly found that none of the claimed other factors caused injury at all, a collective assessment would be meaningless. Here, the Commission determined that none of the other factors alleged by respondents individually caused injury, and in doing so, fulfilled its obligation not to attribute to imports any injury caused by other factors.

93. At one point in its discussion of "the substantive obligation," China raises again the assertions it made in response to Panel's Question 10.[163] As the United States explains in its comment on that question, China misunderstands that although nothing precludes competent authorities to "separate and distinguish" the adverse effects of other factors, competent authorities may also adopt other approaches as long as they result in demonstrating the causal link between increased imports and serious injury and do not attribute to increased imports the injury caused by other factors.[164] In any event, as the United States further explained, *even under* China's erroneous legal argument the USITC found, firmly based on the evidence, that the *other claimed factors* at issue did *not* cause injury at all.

b. The Commission provide a reasoned and adequate explanation concerning its non-attribution finding.

94. In addition to misapprehending the Commission's substantive obligations under Article 4.2(b), China makes unavailing arguments regarding the adequacy of the Commission's non-

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[161] *EC – Pipe Fittings (AB)*, para. 192, *quoted in* China Response to Written Questions, para. 85.

[162] *EC – Pipe Fittings (AB)*, para. 192. In fact, in that dispute, the panel and Appellate Body rejected Brazil's claim that the investigating authority was obligated to examine the collective impact of other factors. *Ibid* at para. 196 (g)(ii).

[163] China Response to Written Questions, paras. 81-83.

[164] *U.S. – Lamb (AB)*, para. 181; *see also US – Hot-Rolled Steel (AB)*, para. 223-24 ("{T}he particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the injurious effects of dumped imports from the injurious effects of the other known causal factors are not prescribed by the *Anti-Dumping Agreement*."); *EC – Tube or Pipe Fittings (AB)*, para. 188 ("{P}rovided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the 'causal relationship' between dumped imports and injury.").

attribution analysis.[165] In support, China relies upon the Appellate Body findings in *Argentina – Footwear* and *US – Line Pipe*.[166]

95. These reports are inapposite because they involved different factual circumstances, and the competent authorities' analysis was found to be deficient in ways that are not present in the USITC's November Report in this investigation.

96. Specifically, in *Argentina – Footwear*, the Appellate Body found that the Argentine competent authorities had not adequately explained how they ensured that the injury caused by the recession, resulting from the collapse of the Mexican peso, was not attributed to imports.[167] And in *US – Line Pipe*, the Appellate Body found that the USITC acknowledged that the decline in oil and gas industry was having injurious effects on the domestic line pipe industry, but that it provided "no insight" into the nature and extent of injury, and had instead "effectively assumed that the decline in the oil and gas industry did not cause the injury attributed to increased imports."[168] As the Appellate Body explained, the

> USITC Report highlighted by the United States is but a mere assertion that injury caused by other factors is not attributed to increased imports. A mere assertion such as this does not *establish explicitly*, with a *reasoned and adequate explanation*, that injury caused by factors other than the increased imports was not attributed to increased imports.[169]

Unlike the facts and findings in the investigations at issue in *Argentina – Footwear* and *US – Line Pipe*, the Commission here provided a thorough explanation, with references to the record evidence, regarding its finding that the other factors alleged by respondents did not cause any injury to the domestic industry.[170]

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[165] China Response to Written Questions, para. 92.

[166] China Response to Written questions, paras. 89-93.

[167] *Argentina – Footwear (AB)*, paras. 145-147; *see also Argentina – Footwear (Panel)*, paras. 8.268-8.269. Specifically, the Appellate Body found that Argentina's comparison of the macroeconomic indicators for footwear and for the economy as a whole, and its conclusion that imports were responsible for the sharper declines in footwear, was not a sufficient consideration of the potential injury caused by the recession resulting from the collapse of the Mexican peso. *Argentina – Footwear (Panel)*, paras. 8.268-8.269.

[168] *US – Line Pipe (AB)*, para. 220; *see also US – Line Pipe* (Panel), paras. 7.287-7.288.

[169] *US – Line Pipe (AB)*, para. 220 (emphasis original).

[170] USITC November Report, pp. 50-65 (Exhibit CHN-2). To the extent that China cites *Argentina – Footwear* and *US – Line Pipe* for the proposition that the Commission's "substantial cause" test is inconsistent with Article 4.2(b), it is incorrect. As an initial matter, *Argentina – Footwear* had nothing to do with U.S. law or the Commission's substantial cause test, but rather was a matter challenging a determination issued by the Argentine competent authority. Moreover, the Appellate Body in *Argentina – Footwear* and *US – Line Pipe* predicated its findings regarding the analysis of the alternative causes of injury as being inconsistent with Article 4.2(b) on the lack of adequate explanation provided rather than any "as such" consistency between the substantial cause test and

97. The Commission's determination was clear and did not make contradictory statements as China claims. According to China, the "USITC Final Report asserts that there are no other factors causing injury" while at the same time acknowledging that other factors had an adverse impact on the domestic industry.[171] As in its response to Question 10, the only support China provides for this assertion is to point to U.S. statutory requirement that increased imports be an important cause not less than any other cause.[172] Although China wrongly contends that the statutory standard results in the Commission's "tendency to dismiss other causes or their adverse effects," that is not the case. The Commission does not simply "dismiss" other alternative causes of injury, but rather, conducts a thorough analysis to identify the effects of those causes (if any) and thereby ensure that it does not attribute injury from these other causes to imports.

98. In sum, China fails to demonstrate any way in which the ITC's non-attribution analysis was inconsistent with the provisions of the Safeguards Agreement.

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?

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

99. China asserts that the Commission's finding was unreasonable because the USITC: (1) "confused limited attempts with a genuine effort by the domestic industry to compete for the utility segment;" (2) "confused attempts to compete with actual competitiveness;" and (3) ignored the domestic industry's "early business choice to focus its limited capacity on the more profitable commercial and residential segments of the market."[173] China is mistaken. The Commission objectively evaluated all the record evidence concerning the domestic industry's role in the utility segment of the U.S. market and provided a reasoned and adequate explanation regarding its finding.

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the Safeguards Agreement. *Argentina – Footwear (AB)*, paras. 145-147; *see also Argentina – Footwear (Panel)*, paras. 8.268-8.269.

[171] China Response to Written Questions, para. 92.

[172] China Response to Written Questions, para. 93.

[173] China Response to Written Questions, paras. 97-110.

100. China's first and third points are essentially different versions of a single argument – that domestic producers made a decision not to participate in a meaningfully way in the utility segment. As General Comment 1 explains, U.S. producers did not "decide" to abandon sales into the fast-growing utility sector. Their expansion was blocked by increased volumes of low-priced imports. In its response to this question, China again provides no evidence supporting this assertion.[174]

101. Also unavailing is China's second argument, that the Commission "confused the domestic industry's attempts to compete with actual competitiveness."[175] Yet again, China asserts that the domestic industry lacked the scale to supply modules necessary to compete in the utility segment. And again, in making this argument, China ignores the critical fact-based finding 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.

102. Moreover, contrary to China's assertions that the USITC "ignored the domestic industry's past experience" in reaching its finding, the Commission thoroughly considered the relevant information.[176] China points to evidence indicating that in 2009, the domestic industry shipped 30 MW of CSPV product to the utility sector while shipping larger volumes to the residential and commercial sectors, as support for its claim that the domestic industry was never competitive in the utility segment, even prior to the beginning of the POI.[177] China overlooks that, as the Commission observed, in 2009, "the commercial segment accounted for the largest share of the market, followed by the residential and utilities segments."[178] That the domestic industry shipped larger volumes to the larger residential and commercial segments of the U.S. market, thus, does not support an inference that the domestic industry historically was never competitive in the utility segment as China asserts.

103. Similarly baseless is China's effort to diminish SolarWorld's competitiveness because that producer added a 72-module assembly line to its U.S. facilities in 2016.[179] As an initial matter, China's assertion improperly equates the utility segment with 72-cell modules. As the Commission found, and China does not dispute, 60-cell modules predominated in the utility

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[174] China Response to Written Questions, para. 102. China also relies upon certain findings of the Commission that the utility segment was price sensitive and that utility bids involved price renegotiations to inaccurately assert that "the USITC Final Report confirms why the domestic producers generally decided not to compete in the more competitive utility segment." China Response to Written Questions, para. 108. The USITC's November Report never made such a confirmation, but rather linked the price sensitivity of the utility market to its conclusion that increasing volume of low-priced imports made it difficult for the domestic industry to increase capacity to a scale that made it more competitive in the "acutely price sensitive" utility segment. USITC November Report, p. 59 (Exhibit CHN-2).

[175] China Response to Written Questions, para. 100.

[176] China Response to Written Questions, paras. 100-101.

[177] China Response to Written Questions, para. 101.

[178] USITC November Report, p. 57 (Exhibit CHN-2).

[179] China Response to Written Questions, para. 109.

segment at the beginning of the POI. Moreover, throughout the POI, SolarWorld developed and pioneered innovative products that utilities sought. For example, SolarWorld was one of the earliest producers of monocrystalline products and the first producer of monocrystalline PERC products. It also developed the p-type PERC bifacial cell in 2015, the next level of innovation that increased energy yield at the system level and had a greater impact on the cost of the delivered energy. SolarWorld also increased the power of its 60-cell modules by approximately 10 watts per year from 250 watts in 2011 to 300 watts. It developed or patented several cell innovations to increase modules power and was among the first manufacturers to implement statistical process control to ensure higher product quality and improve production yields.[180] Clearly, SolarWorld made technology changes during the POI to remain competitive in all segments of the U.S. market.

104. China also claims that the USITC's analysis was inadequate because it did not explore whether the domestic industry had supplied realistic bids to the utility segment. In suggesting that it was impossible for domestic producers to have seriously competed for utility projects,[181] China again overlooks the evidence demonstrating that the domestic industry did, in fact, compete in the utility segment during the POI.[182] The questionnaire response data confirmed that the domestic industry and importers each sold CSPV products – 60-cell modules and 72-cell modules – in the U.S. market to all three segments, including the utility segment, and SolarWorld and Suniva each provided information regarding its winning bids in the utility segment as well as bids it lost.[183] There was simply no reason for the Commission to doubt the legitimacy of the bid information submitted by SolarWorld and Suniva, and China's submission provides no basis for questioning the Commission's weighing of the evidence on this point.

105. China also tries to sidestep the Panel's question by alleging that respondents' arguments were not focused on whether the domestic industry "sought" to participate in the utility sector, but rather "whether the industry's insufficient participation affected and distorted the USITC's assessment of the industry's economic indicators."[184] In the first place, it is hard to reconcile this position with China's repeated assertions that the domestic industry "decided" to focus on the residential and commercial segments at the expense of the utility segment. But irrespective of what respondents intended to argue, China misses the point that the Commission found low-priced imports to have adversely affected the domestic industry's ability to compete in the utility sector in the first instance. Thus, whether the domestic industry "sought" to participate in this

[180] USITC November Report, pp. 51-52 n.291 (Exhibit CHN-2).

[181] China Response to Written Questions, para. 100.

[182] USITC November Report, p. 58 n.334 (Exhibit CHN-2); *see also* SEIA Prehearing Injury Brief, p. 19 (Exhibit CHN-20).

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

[184] China Response to Written Questions, para. 103. It is unclear how respondents could have been complaining about distortion in the USITC's assessment before the Commission even made its determination.

sector was directly pertinent in the Commission's analysis of the domestic industry's performance during the POI.

106. Moreover, regardless of any "insufficient participation" in the utility segment during the POI, compelling evidence demonstrated that domestic producers were also seriously injured by imports in the residential and commercial segments. As the Commission found, each of the three market segments, including the utility segment, was important to both domestic producers and importers but that the domestic industry lost market share to imports regardless of market segment.[185]

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.

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.

107. Although this question asks only about the reasonableness of the Commission's analysis concerning the domestic industry's ability to supply quality products, China's response also addresses the analyses on product availability, alleged delivery and service problems, and bankability.[186] Contrary to China's argument that the Commission simply "dismissed" arguments on these issues, the Commission thoroughly evaluated the totality of the evidence. It acknowledged the evidence submitted in support of respondents' concerns, but also considered "detailed explanations" submitted by domestic producers in response to the allegations, including documentation related to specific transactions. Its weighing of this information led it to conclude that the record "simply d[id] not support the sort of widespread problems alleged by respondents."[187]

a. The Commission conducted a detailed analysis of the availability of domestic CSPV products that competed against imported CSPV products.

108. China asserts that the Commission's analysis of product availability "does not specify which products are unavailable {from the domestic producers} and downplays this factor noting that the market share of these products is small."[188] In fact, the Commission provided a thorough

[185] USITC November Report, pp. 58-59 (Exhibit CHN-2).

[186] China Response to Written Questions, paras. 112-127.

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

[188] China Response to Written Questions, para. 116.

explanation regarding the differences in product offerings and adequately assessed that this factor did not negatively impact the domestic industry.[189]

109. In the first instance, the Commission cited extensive evidence in support of its finding a significant and direct overlap in the types of CSPV products offered by both domestic and foreign suppliers. The Commission demonstrated that both imported and domestic CSPV products were available in cell, laminate, and modules forms, with most in the form of modules.[190] The pricing data reflected domestic industry and importer sales of CSPV products within similar efficiency and wattage ranges. Moreover, despite the existence of some variations in product offerings between imports and domestically manufactured products, the Commission found that all CSPV products served the same function in converting sunlight into electricity and that CSPV products essentially competed against each other on the basis of electrical output and cost.[191] Indeed, most responding domestic producers, importers, and purchasers reported that domestic and imported CSPV products were interchangeable.[192]

110. The only flaw that China asserts with respect to this analysis is the Commission's statement that "most of U.S. producers, importers, and purchasers consider imported and domestically-produced product to be 'interchangeable.'"[193] China complains that the Commission's analysis of the questionnaire response data was "incomplete and simplistic" and asserts that the data actually demonstrated a "mixed view of interchangeability."[194] China, however, provides no basis to consider the data inconsistent with the Commission's ultimate conclusion. As an initial matter, China miscalculates the percentage of importers and purchasers that did not consider those products to be interchangeable. Only 24 percent of importers (and not 30 percent as China asserts) and 11 percent of purchasers (and not 25 percent as China asserts) reported that the domestically produced product was not interchangeable with imported products.[195] Moreover, China fails entirely to address the other compelling evidence cited by the USITC. Given this, China's citation to questionnaire responses provides no basis to question the Commission's findings regarding the overlap and interchangeability in the types of products being offered by domestic and foreign sources.

111. In addition to demonstrating direct overlap between CSPV product types offered by domestic and foreign sources, the Commission also considered respondents' allegations that

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[189] USITC November Report, pp. 50-55 (Exhibit CHN-2).

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

[191] USITC November Report, pp. 54-55 (Exhibit CHN-2).

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

[193] China Response to Written Questions, para. 121.

[194] China Response to Written Questions, para. 121.

[195] USITC November Report, Vol. II, p. V-16 Table V-8 (Exhibit CHN-3). The exact figures are 1 of 11 U.S. producers, 11 of 45 U.S. importers, and 11 of 101 purchasers reporting domestically produced product not to be interchangeable with imported product, with the vast majority (65 percent) indicating interchangeability between the products.

certain CSPV products were only available from foreign suppliers. In this regard, the Commission identified such products to be monocrystalline n-type interdigitated back contact ("IBC") products, n-type technology with back-contact solar cells with double-side cell structure, and commercial-scale multicrystalline modules with rear-side passivated cells.[196] As the Commission explained, available objective evidence indicated that CSPV products that were unique or unavailable from other sources accounted for only a small share of the U.S. market and that, in any event, there was more overlap between domestically produced products and imported specialized CSPV products than acknowledged by respondents.[197]

112. The Commission's detailed analysis refutes China's claim that the Commission was "dismissive" of the "small volume" of products supplied only by foreign sources.[198] As the Commission discussed, despite certain differences in specialized CSPV products supplied by domestic and foreign sources, competition existed between such products. The record evidence showed that the domestic industry supplied a wide variety of monocrystalline and multicrystalline products that competed against imported CSPV products, including CSPV products with 2, 3, 4, and 5 busbars, PERC products, frameless modules, heterojunction cells, bifacial products, and hybrid CSPV products.[199] The Commission took note that even respondent Hanwha Q-CELLS conceded that its multicrystalline modules with rear-side passivated cells were similar to PERC technology.[200] Moreover, the record evidence belied respondents' assertion that n-type monocrystalline CSPV were available only from non-U.S. sources.[201] The pricing data corroborated the overlap in sales, in that both domestic producers and importers of CSPV products reported sales of CSPV products within similar efficiency and wattage ranges.[202]

113. Also unavailing is China's suggestion that the Commission did not assess whether CSPV products were available at the scale required in the utility segment.[203] China's argument fails to recognize a critical point made by the Commission – that although the domestic industry sought to compete in the utility segment, the large volume of imports at low and declining prices adversely affected the industry's financial performance, making it difficult to increase capacity to a scale that made it more competitive in this segment.[204] China's argument amounts to a circular attempt to attribute the domestic industry's inability to make inroads in the utility

[196] USITC November Report, pp. 50, 52 (Exhibit CHN-2).

[197] USITC November Report, pp. 52-53 (Exhibit CHN-2).

[198] China Response to Written Questions, para. 118.

[199] USITC November Report, pp. 52-54 (Exhibit CHN-2).

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

[201] USITC November Report, p. 53 (Exhibit CHN-2).

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

[203] China Response to Written Questions, paras. 118-119.

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

segment to the industry's underutilization of capacity – which itself was causally linked to the financial woes exacerbated by the influx of lower priced imports.

114. Based on a thorough evaluation of all relevant evidence, the Commission reasonably concluded that the evidence submitted by respondents did not overcome the extensive objective and compelling evidence on the record that the domestic industry supplied CSPV products that directly overlapped with imported product and that it also supplied innovative CSPV products that competed with imported specialized CSPV products. China's submission provides no basis for questioning the Commission's weighing of the evidence on these points. These assertions accordingly establish no valid support for China's claim that the USITC impermissibly attributed to imports the injury caused by the alleged lack of availability of CSPV products.

b. The Commission provided a reasoned and adequate explanation demonstrating that the domestic industry supplied quality CSPV products.

115. China asserts that the Commission did not provide an "adequate" discussion concerning its dismissal of evidence that the domestic industry suffered from product quality issues.[205] But, the Commission did not "dismiss" these assertions. It thoroughly considered the totality of the evidence, and concluded that the record did not support the contention that purchasers had "widespread problems" with domestic producers.[206]

116. Specifically, the USITC considered the views of the questionnaire respondents, including producers, importers, and purchasers. Most of them reported that domestically produced products were interchangeable with imported CSPV products.[207] Additionally, most purchasers reported that no domestic supplier had failed in its attempt to qualify product or lost its approved status since 2012.[208]

117. Other relevant evidence further corroborated the domestic industry's ability to provide quality products and excellent customer service. The USITC noted that the independent research firm EuPD Research ranked SolarWorld's CSPV products as the most purchased brand by U.S. installers and the Better Business Bureau gave the company a top rating for its customer service.[209] Moreover, SolarWorld and Suniva reported that their warranty claim rates were low. Specifically, SolarWorld reported that it was the first to offer a 25-year warranty, a 30-year warranty, and a 20-year workmanship warranty, which it was able to do given that its warranty

[205] China Response to Written Questions, paras. 112, 122-123.

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

[207] USITC November Report, p. 55 (Exhibit CHN-2).

[208] USITC November Report, p. 55 (Exhibit CHN-2).

[209] USITC November Report, p. 55 (Exhibit CHN-2); Hearing Tr., p. 107 (Exhibit CHN-9).

rate was far lower than many other producers.[210] Suniva reported that its claim rate was 0.05 percent – compelling evidence of the excellent quality of their products.[211]

118. China asserts that a footnote in the November Report contradicts a statement in the text regarding failed attempts to qualify product and loss of approved status.[212] Specifically, the text states that "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."[213] Footnote 311 provided further detail, noting that 19 out of 95 responding purchasers reported a domestic or foreign supplier had failed in its attempt to qualify for a product or had lost its approved status since 2012 for reasons including "customer service, financial strength, broken commitments, cell cracks, use of thinner frame, quality control, bankability, failed audit, efficiency, delivery rates, and prefer local manufacturer."[214] The statements, despite being framed differently, are fully consistent. The text says that "most" purchasers reported no failed attempts or loss of approved status; the footnote indicates the number of purchasers that *did* report such failed attempts or loss of approved status. By China's own calculation, 80 percent of responding purchasers – meeting the Commission's characterization of "most" purchasers – did *not* report such events. Thus, most, and indeed the vast majority of purchasers who responded to the question (the remaining 76 of the 95 responding purchasers) did not report having any issues with domestic producers' qualification of their products.

119. Also unavailing is China's reliance on SolarWorld's and Suniva's refusal to participate in Sunrun's Vendor Quality Management Program and their alleged failure in Vivint Solar's quality assurance program.[215] As the Commission explained, this was not due to any quality 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 two firms were so far apart on price that it had not made sense for Suniva to spend money on the qualification process.[216] Regarding the companies' lack of participation in Vivint Solar's quality assurance program, respondents' own evidence demonstrates that this was not due to product quality concerns. Rather, SolarWorld refused to commit to a 60-day lead time for delivery and Suniva had not provided the information and documentation necessary for Vivint Solar to consider Suniva for its qualification process.[217]

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[210] USITC November Report, p. 55 (Exhibit CHN-2).

[211] USITC November Report, p. 55 n.308 (Exhibit CHN-2).

[212] China Response to Written Questions, para. 122.

[213] USITC November Report, p. 55 (Exhibit CHN-2).

[214] USITC November Report, p. 55 n.311 (Exhibit CHN-2).

[215] China Response to Written Questions, para. 122.

[216] USITC November Report, p. 61 n.356 (Exhibit CHN-2).

[217] SEIA Prehearing Injury Brief, pp. 77-78 (Exhibit CHN-20).

120. In sum, the Commission did not, as China argues, disregard evidence advanced by the respondents. It considered the record evidence in its totality. With respect to the particular issues highlighted by China, the Commission reasonably found that evidence contrary to the conclusion preferred by China was more credible or otherwise entitled to greater weight.

c. The Commission adequately and objectively weighed the information regarding the alleged service and delivery issues of the domestic industry.

121. China also criticizes an alleged "lack of attention by the USITC to addressing the purchasers' complaints about delivery and service issues with domestic suppliers.[218] In actuality, rather than dismissing these allegations through "sweeping assertions" as China claims, the Commission weighed the information regarding the alleged service and delivery issues of the domestic industry submitted by respondents and domestic producers.[219]

122. Specifically, the Commission considered hearing testimony and allegations respondent SEIA's prehearing and posthearing injury briefs. As the Commission observed, these allegations consisted of certain purchasers' specific criticisms regarding SolarWorld and Suniva.[220] The Commission also considered competing hearing testimony and the posthearing submissions of SolarWorld and Suniva, in which the companies responded in detail to the specific allegations of quality, delivery, and service concerns.[221]

123. For example, the Commission explained, noted, and addressed the testimony of a purchaser, NextTracker, that complained of 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.[222]

124. 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.[223]

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[218] China Response to Written Questions, para. 124.

[219] China First Written Submission, paras. 190-95.

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

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

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

[223] 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).

125. Many of the SolarWorld's and Suniva's responses contained confidential information. However, as an illustration, some of the responses that were available to the public included the following:

- Although DEPCOM testified that SolarWorld's modules underperformed and that it would never use SolarWorld's modules on any future projects, DEPCOM continued to use SolarWorld's modules. For instance, according to DEPCOM's own website, it used SolarWorld modules for its NC22 project in North Carolina.[224]

- DEPCOM made disparaging comments about Suniva's products, but DEPCOM had never bought a Suniva product nor had it ever performed due diligence on or an inspection of Suniva's factories.[225]

- Contrary to NRG Energy's statements that Suniva did not offer a product that met its specifications at the scale or quality required, and that NRG was unable to purchase products from Suniva during the POI, NRG in fact purchased solar panels from Suniva for its flagship-named stadium, NRG Stadium in Houston, Texas.[226]

- Although California Solar Systems described delays it experienced with Suniva's modules due to a power outage at Suniva's Georgia manufacturing facility, California Solar Systems actually purchased Suniva modules through a distributor during the POI. While the selling distributor could not be specifically identified, there was no record of any of any Suniva distributors in Southern California issuing a warranty claim or comment regarding California Solar Systems.[227]

126. 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."[228] In doing so, the Commission demonstrated that it took account of conflicting evidence and reasonably evaluated all of the relevant evidence in an objective and unbiased manner.[229]

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[224] SolarWorld Posthearing Injury Brief, Exhibit 1, section II pp. 16-17 (Exhibit USA-05).

[225] Suniva Posthearing Injury Brief, pp. 5-6 (Exhibit USA-06).

[226] Suniva Posthearing Injury Brief, p. 6 (Exhibit USA-06).

[227] Suniva Posthearing Injury Brief, pp. 6-7 (Exhibit USA-06).

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

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

d. The Commission adequately evaluated the issue of "bankability" as part of its non-attribution analysis regarding alleged missteps by the domestic industry.

127. China asserts that the Commission erroneously "did not attach much importance" to bankability despite evidence indicating that many purchasers considered it an important factor in purchasing decisions.[230] China also contends that the Commission provided "little explanation about the actual meaning of bankability."[231]

128. China's critique regarding the "actual meaning of bankability" is hard to square with the evidence. China does not dispute the Commission's finding that respondents "acknowledge that the industry has no standard definition of bankability," or the Commission's recognition of their assertion that "it includes factors such a 'creditworthiness' and performance of the product over time and may vary from project to project or customer to customer."[232] The Commission continued on to consider references to bankability in the *CSPV I* investigations, and found that, at a minimum, bankability encompassed "both the financial viability of a supplier and the product's performance reliability, especially in the CSPV industry where manufacturers provide warranties of 25 years or longer on their products; bankability also allows installing firms to apply for non-recourse loans for their solar projects."[233] Again, China does not dispute this finding.

129. China's critique of the Commission's analysis of the importance of bankability simply asks the Panel to conduct a *de novo* review based on a one-sided recitation of the evidence. As the Commission explained, purchasers did not identify "bankability" as one of their "top three" purchasing factors. And although China notes that this factor was the fourth most important factor in purchasing decisions, the Commission found that bankability was a "distant" fourth.[234] The evidence supports this characterization. While 81 purchasers reported price, 77 reported quality/performance, and 42 firms reported availability as their top three purchasing factors, only 15 purchasers reported bankability to be an important purchasing factor.[235]

130. Given this evidence, China's evidence that a relatively small number of purchasers and importers placed some emphasis on domestic producers' bankability fails to undermine the Commission's findings, based on the totality of the evidence, regarding the importance of various factors cited as important in purchasing decisions.[236]

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[230] China Response to Written Questions, para. 125.

[231] China Response to Written Questions, para. 126.

[232] USITC November Report, p. 55 (Exhibit CHN-2).

[233] USITC November Report, p. 55 n.313 (Exhibit CHN-2).

[234] USITC November Report, p. 56 n.315 (Exhibit CHN-2).

[235] USITC November Report, p. 56 n.315; USITC November Report, Table V-4 (Exhibit CHN-3).

[236] China Response to Written Questions, para. 125 (stating that the evidence showed that "{s}even purchasers stopped buying domestic products because they 'failed bankability requirements, did not meet quality

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).

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.

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.

131. The Commission evaluated assertions regarding changes in solar incentive programs, and found that irrespective of those changes, U.S. demand for CSPV products experienced explosive growth, which as a basic economic matter, would have been expected to result in coincident rises in prices for that product. China makes two criticisms of this aspect of the analysis: first, that "the USITC analysis of the relationship between the availability of incentive programs and demand is overly simplistic given the multiple incentives and government-levels concerned;"[237] and, second, that the Commission did not determine the possible effect of incentive programs on other injury indicators such as price.[238] China's critiques identify no flaw in the Commission's

requirements, had limited availability, and did not sell stand-alone CSPV products," "{t}hree importers stated that performance data and bankability of the CSPV products can limit the degree of interchangeability," and "{t}three importers stated that developers, installers, and project owners chose module suppliers with high bankability that are listed as Tier 1 by Bloomberg"). With respect to the Bloomberg list, which tiered firms based on bankability, the Commission explained that Bloomberg itself cautioned banks and module producers against relying heavily on its list. USITC November Report, p. 56 (Exhibit CHN-2). The Commission observed that during the *CSPV I* investigations, respondents acknowledged that the major U.S. producers were bankable. *See id.*, p. 56 n.318. Moreover, SolarWorld qualified as a Bloomberg Tier 1 supplier in 2014, 2015, 2016, and through February 2017, but subsequently lost its bankability status. *See id.* As the Commission found, SolarWorld's loss of its Tier 1 bankability status further demonstrated the serious injury to the domestic industry caused by increased imports. *See ibid.*

[237] China Response to Written Questions, para. 138. The introduction to China's response frames its critique as being that "the Commission did not assess what consumption would have been in a scenario where government incentive programs were maintained." *Ibid.*, para. 130. However, the remainder of its analysis consists of a series of criticisms of the individual steps in the USITC's reasoning, and nowhere lays out what the scope of the "scenario" referenced in the introduction.

[238] China Response to Written Questions, paras. 141.

analysis and conclusion that changes in incentive programs did not explain the domestic industry's condition.[239]

132. Before addressing China's individual arguments, it is important to keep in mind that the complaining party bears the burden of proof with respect to any claim of inconsistency with the Safeguards Agreement. In the case of China's claim that the USITC's analysis of incentive programs failed to comply with the second sentence of Article 4.2(b), it is China that bears the burden of establishing: (1) that changes in incentive programs caused injury to the domestic industry, (2) that this injury was at the same time as serious injury caused by increased imports, and (3) that the USITC attributed to increased imports the injury caused by changes in incentive programs. Its argument fails in each of these respects.

a. The Commission provided a detailed analysis in support of its conclusions regarding the effect on demand of changes in government incentive.

133. The Commission both described in detail the government incentives that were in place during the POI, and analyzed their aggregate impact on the market for CSPV products. China essentially disregards the aggregate findings, but they are crucial to an understanding of the ultimate conclusion. Most importantly, the Commission found that "[t]hese mechanisms benefit systems owners, and typically are not directed at any particular domestic or foreign manufacturer of CSPV products."[240] The Commission also found that the purpose of the incentive programs was to stimulate demand, and the record showed that they achieved this objective, as the domestic CSPV market continued to experience robust growth throughout the POI.[241]

134. The Commission also evaluated the magnitude of the incentives, and how that changed over the POI. It noted that most firms reported that Federal incentives changed during the POI, and that this either had no effect on the level of demand for CSPV products or increased demand. In other words, the effect of the change was *positive* or *neutral*, rather than injurious. Questionnaire respondents were divided as to whether the level or availability of state and local incentives changed during the POI, but a plurality considered that the existing incentives increased demand.[242] The Commission concluded that notwithstanding any change in the overall mix of government incentives, apparent U.S. consumption had not decreased. 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.[243]

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

[240] USITC November Report, p. 62 (Exhibit CHN-2).

[241] USITC November Report, p. 62 (Exhibit CHN-2); USITC November Report, Vol. II, p. V-31 (Exhibit CHN-3).

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

[243] USITC November Report, pp. 61-63 (Exhibit CHN-2).

135. The Commission also discussed the individual types of incentives. It discussed that certain incentives were designed to lower the cost of solar project development, which included various tax credits, revenues from the sale of solar renewable energy certificates, cash grants in lieu of credit, accelerated depreciation, and loan guarantees.[244] The Commission further noted other incentives mandated the use of solar energy. It observed that in some states, the Public Utility Regulatory Policies Act of 1978 required utilities to purchase electricity from qualifying facilities (renewable projects that meet size requirements) at the utility's avoided cost, which led to the development of more solar projects for the utility segment. In addition, renewable portfolio standards, which were widespread state regulatory measures, mandated that entities supplying electricity, such as utilities, generate or purchase a portion of their retail electricity sales from renewable energy sources, including solar electricity, thereby increasing demand for CSPV products. States and utilities also encouraged the installation of solar projects through renewable energy rebates, feed-in-tariffs, or net metering incentives.[245]

136. The Commission recognized that although some of these incentive programs expired during the POI, others continued. In particular, the Commission noted that anticipated expiration of the Federal Investment Tax Credit in December 2016 drove installations of on-grid photovoltaic systems to increase 97 percent between 2015 and 2016, and that Congress extended that incentive for several more years.[246] Based upon its evaluation of the entirety of the evidence, the Commission concluded that "the existence of these incentive programs has made CSPV products more cost-competitive with other sources of electricity," and that "any decline in incentives has not led to declines in apparent U.S. consumption." Rather, demand continued to experience robust growth throughout the POI, thus meeting the precise purpose of the incentive programs.[247]

137. Other than criticizing them as "simplistic," China essentially ignores these findings and instead focuses its critique on allegations that the Commission should have conducted a more atomized analysis. It first expresses concern that "{n}ot all incentives targeted the three market segment (residential, commercial and utility) as a whole" and that the Commission therefore should have differentiated how incentives benefited each market segment or domestic producers.[248] This argument fails because the Commission not only found that annual installations of on-grid photovoltaic systems increased from 3,373 MW in 2012 to 14,762 MW in 2016, an increase of 338 percent, but also that "{a}ll three on-grid segments experienced *considerable* growth in both the number of installations and the total wattage of installation projects during the POI, with residential and utility installations increasing by 423 percent and

[244] USITC November Report, p. 62 n.357 (Exhibit CHN-2); USITC November Report, Vol. II, pp.V-31-35 (Exhibit CHN-3).

[245] USITC November Report, p. 62 n.357 (Exhibit CHN-2); USITC November Report, Vol. II, pp.V-31-35 (Exhibit CHN-3).

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

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

[248] China Response to Written Questions, para. 133.

488 percent, respectively from 2012 to 2016."[249] Thus, any changes in incentive programs did not have any negative effects on the domestic industry in any of the three market segments.

138. China also errs in contending that the USITC's Final Report did not "contain a detailed analysis on which other incentives expired, and what was their impact on the domestic industry."[250] The USITC's Final Report, at pages 62-63 and V-31-35 provided a comprehensive discussion of the government incentives that were in place and those that expired during the POI. China acknowledges that the Commission individually assessed the Federal Income Tax Credit and its extension during the POI, but downplays it significance, asserting that the program "seemingly made some contribution to market demand."[251] Contrary to China's characterization, the Federal Investment Tax Credit played a vital role in stimulating U.S. demand. The Commission found, and China does not dispute, that the Federal Investment Tax Credit drove installations of on-grid photovoltaic systems to increase 97 percent between 2015 and 2016.[252] Respondent SEIA even described the Federal Investment Tax Credit as the "single most influential federal government incentive for solar deployment today."[253] Thus, the continuation of this program was a significant factor.

139. Thus, substantial record evidence belies China's contention that termination of certain incentive programs had a negative effect on the domestic industry. Relying on questionnaire responses, China highlights that some purchasers noted declines in Federal and state incentive programs and that 21 purchasers reported a decline in demand due to changes in state programs.[254] But, as noted above, 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. The next largest share reported that the availability of Federal government incentives "increased" demand for CSPV products since 2012 and that those that reported an increase in demand identified the level of Federal incentives as the reason for the increase, noting the extension of the Federal Investment Tax Credit.[255] Moreover, the Commission found that a plurality of questionnaire respondents reported an increase in the demand for CSPV products due to the availability of state and local incentives.[256]

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[249] USITC November Report, p. 27 (Exhibit CHN-2) (emphasis added).

[250] China Response to Written Questions, para. 134.

[251] China Response to Written Questions, para. 135. China also inaccurately states that the Federal Investment Tax Credit benefited demand in only the utility sector. *See id.* To the contrary, as the Commission explained, the Federal Investment Tax Credit "provided a 30 percent tax credit on capital expenditures for new solar photovoltaic systems for the residential, commercial and utility segment." USITC November Report, pp. 62-63, n.361 (Exhibit CHN-2).

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

[253] SEIA Prehearing Injury Brief, p. 105 (Exhibit CHN-20).

[254] China Response to Written Questions, paras. 137-138.

[255] USITC November Report, p. 63 n.363 (Exhibit CHN-2).

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

140. In sum, the Commission critically assessed whether changes in incentive programs had a negative impact on the domestic industry during the POI, and reasonably concluded that it had none.

b. The Commission provided a reasoned explanation why changes in government incentive programs did not cause prices to decline.

141. As demonstrated in the U.S. first written submission, China's argument that the termination of certain government incentive programs caused prices of CSPV products to decline was based on its inference 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."[257] This assertion was mere speculation, as China provided neither evidence nor detailed reasoning in support.

142. In fact, the evidence adduced during the Commission's thorough examination of the incentive programs refuted 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."[258] The Commission further explained that the purpose of these incentives is to stimulate demand for CSPV products. It found that irrespective of changes in the incentive programs, demand continued to grow, and that prices should have increased as well. Even respondent SEIA acknowledged that there is normally a direct relationship between demand and prices, stating that "it is only logical that these incentives drive demand, and therefore prices, to such a significant degree."[259] The record evidence, however, shows 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.

143. China's errs in citing Table V-24 of the ITC's November Report as evidence confirming the effect of terminated incentives on prices of CSPV products.[260] Rather than demonstrate a link between terminated incentives and declining prices of CSPV products, Table V-24 supports the Commission's reasoning that incentive programs stimulated demand during the POI, in part by offsetting the cost of generating solar energy. Specifically, it shows that most questionnaire respondents reported that the changes in availability of government incentives cause prices of *solar generated electricity* to decrease since 2012.[261] This development did not translate automatically into declining prices of CSPV products. To the contrary, as the Commission

[257] U.S. First Written Submission, para. 204.

[258] USITC November Report, p. 62 (Exhibit CHN-2).

[259] SEIA Prehearing Injury Brief, p. 107 (Exhibit CHN-20).

[260] China Response to Written Questions, paras. 142-143.

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

observed, most U.S. producers, importers, and purchasers reported that changes in the price of solar generated electricity did not affect the prices of CSPV products.[262]

144. Also unavailing is China's reliance on respondents' econometric analysis, which it claims "captured subsidies at state-level showing their impact in the domestic industry and prices."[263] Citing to the panel's decision in *US – Steel Safeguards*, China asserts that prior panels have considered the relevance of conducting quantitative analysis when the complexities and the circumstances so require.[264]

145. However, as the panel in *US – Steel Safeguards* also recognized, the SGA does not require quantification or an econometric study to analyze causation.[265] 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."[266] This statement holds true with respect to respondents' modelling exercise. The study purported only to provide "estimates" of the impact of imports on prices of domestically produced CSPV products, based on a set of "theoretical" assumptions, rather than the actual data collected by the Commission.[267] Indeed, the authors of the study themselves explicitly acknowledged that the study was based on an "estimation approach" with many of the variables being treated as "theoretically" inter-related.[268] For instance, the study discusses 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'".[269] China provides no explanation as to why, having identified these concerns, the Commission erred in relying on the evidence it cited, rather than the study.

146. The Commission thus reasonably relied on the extensive data on the record to determine that changes in the availability of incentive programs did not cause prices to decline. 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.[270] Thus, they were not an alternative cause of the serious injury that the Commission found to be caused by increased imports.

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[262] USITC November Report, Vol. II, p. V-24 (Exhibit CHN-3).

[263] China Response to Written Questions, paras. 143-144.

[264] China Response to Written Questions, para. 144.

[265] *US – Steel Safeguards (Panel)*, paras. 10.336.

[266] *US – Steel Safeguards (Panel)*, paras. 10.340-10.341.

[267] *See* SEIA Prehearing Injury Brief, Appendix A (Exhibit CHN-19).

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

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

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

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.

147. China asserts that it "never stated a presumption that 'as a rule' prices decline whenever raw materials prices decline."[271] China's denial, however, cannot be reconciled with its statement that "prices in the solar industry are constantly falling due to decreasing raw material costs, incentive programs, and increased efficiency."[272] And, despite China's denial, its response to this question relies on the same presumption, embodied in its statement that the ITC "made no effort to quantitatively or qualitatively address and distinguish price changes associated with raw material costs and changes caused by other reasons."[273]

148. But the response to this question provides no valid support for its proposition that declining raw material costs caused prices of CSPV products to decrease during the POI in the first instance. Rather, China simply refers to the following findings in the USITC November Report regarding the share of raw material costs in the total cost of goods sold and the overall decline in raw material costs:

- "Raw materials account for the largest component of the total cost of goods sold for both CSPV cells and CSPV modules. Raw material costs for CSPV modules, much of which is the cost of the CSPV cell, accounted for 84.9 percent of U.S. CSPV module producers' total cost of goods sold in 2016, up from 58.2 percent in 2012."

- "Polysilicon is a key raw material used in the production of the wafers that are used to manufacture CSPV cells and other high-tech products . . . . During the POI, the price of polysilicon ingots and wafers fluctuated but declined overall by 52.6 percent for ingots and by 54.5 percent for wafers."

- "The majority of domestic producers (9 of 11) and importers (32 of 44) reported that prices of raw materials for CSPV products have declined since 2012."[274]

149. China also refers to the following Commission findings concerning the decline in U.S. photovoltaic systems prices:

- "According to several industry sources, average installed prices for photovoltaic system installations declined steadily in all three on-grid market segments during the POI. According to one industry report, the median installed price of a

[271] China Response to Written Questions, para. 146.

[272] China First Written Submission, para. 151.

[273] China Response to Written Questions, para. 146.

[274] China Response to Written Questions, para. 149.

photovoltaic system (including thin film) fell between 24.1 percent (residential system) and 43.6 percent (non-residential system greater than 500 kW) from 2012 to 2015."

- "According to another industry report, U.S. photovoltaic system pricing fell by almost 20 percent from the fourth quarter of 2015 to the fourth quarter of 2016. This report attributed the steep decline in photovoltaic system prices during 2016 to large decreases in module prices combined with substantial declines in hardware costs."[275]

150. China then manufactures a link between declining raw material costs and prices by citing to what it claims is the "most basic ideas of economics," that the price of the product will depend (at least in part) on the cost of those raw materials used to produce the product.[276] This concept, however, fails to establish that a decline in raw material costs must result in a decline in prices of the finished product. Nor does it account for other factors that may be in play either on micro or macro level. For example, demand often drives prices irrespective of raw material costs; and conversely oversupply can drive prices down.

151. In this case, the most prominent features of the domestic market for CSPV products during the POI were booming demand, surges in supply due to increased imports, and the domestic industry's unprofitability. With respect to the last point, China overlooks the important and basic economic principle that to earn a profit, firms must price their products above their cost of raw materials. And more importantly, in a market economy, firms must be profitable to remain in business.

152. As the Commission explained, the industry's COGS to net sales ratio "was high, near or exceeding, 100 percent" throughout the POI and the industry experienced operating losses throughout the POI.[277] In this case, where the domestic industry's costs made up all or nearly all of the portion of sales value and left little to no margin for profits, the industry would not have purposefully sold their CSPV products at declining prices that kept pace with their decreasing costs, incurring continued substantial losses during the POI. As the Commission found, "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.[278] Thus, contrary to China's assertion that the lower prices were a result of decreasing raw material costs, the evidence in fact showed that the surging imports led to lower domestic

[275] China Response to Written Questions, para. 149.

[276] China Response to Written Questions, paras. 146-147.

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

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

prices, which in turn led to the industry's consistently high COGS to net sales ratio despite declining raw material costs.[279]

153. China makes no reference to the reasoning that led to the USITC's conclusion. Instead, as it did in its response to the Panel's Question 18, China cites to respondents' own econometric model allegedly demonstrating that several factors, including declining raw material costs, operated together to affect price levels and had a greater impact on the industry than did imports.[280] As discussed above, the study, however, was based upon assumptions that these factors were "at least theoretically, inter-related" and used an "estimation approach" to examine their purported simultaneous effects.[281] Rather than rely on respondents' theoretical approach, the Commission based its determination on the facts gathered in the extensive record, consisting of thousands of pages of questionnaire responses, party briefs, information collected by Commission Staff, and approximately ten hours of hearing testimony. The facts in the record, as laid out in detail by the Commission, showed that the factors written into respondents' model bore no relationship to the domestic industry's injury. The Commission, in providing a comprehensive analysis on this issue, addressed the relevant points made by the econometric analysis.

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.

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.

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.

4 Whether the USITC failed to establish that the increased imports were the result of "unforeseen developments" and "obligations incurred"

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

[280] China First Written Submission, para. 220. The study discusses technological advancements such as development and widespread adoption of PERC and the move from cells with three bus bars to cells featuring five bus bars. *See* SEIA Prehearing Injury Brief, Appendix A p. 32 (Exhibit CHN-20).

[281] *See* SEIA Prehearing Injury Brief, Appendix A p. 22 (Exhibit CHN-19). Annex A of the study provides the "system of mathematical equations" used for its analysis. These mathematical equations confirm the study's theoretical nature and estimation approach.

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";

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

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.

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".

154. Article XIX:1 of the GATT 1994 provides for a safeguard measure when increased imports are "as a result of" unforeseen developments. China errs in asserting that, to establish that this circumstance exists, a Member must demonstrate a "clear linkage"[282] between unforeseen developments and increased imports. "Link" is a term of art that appears only in the SGA Article 4.2(b) obligation to demonstrate the existence of a "causal link" between increased imports and serious injury. As neither GATT 1994 nor the Safeguards Agreement requires such a showing with respect to unforeseen developments, the term "link" has no place in the evaluation of a claim that a Member has failed to demonstrate that increased imports are "as a result of" unforeseen developments.

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

[282] China Response to Written Questions, para. 167.

unforeseen developments caused the increased imports that caused serious injury but that the unforeseen developments caused the increased imports *during a particular year*.

156. China's response to the Panel's question argues that "[t]he question before this Panel is: does the USITC's identification of the unforeseen developments adequately explain the increased imports during the most recent time period, that is, from 2015 to 2016?"[283] According to China, not only does a competent authority have to establish a link between increased imports and unforeseen developments, but the link needs to account for increases from one year to the next during the period of investigation. This particularized conception of unforeseen developments under the WTO safeguards disciplines is completely unfounded.

157. The only support China provides for its assertion is a citation to the Appellate Body's finding in *US – Lamb*, and quoted in the *India – Iron and Steel Products* panel report, that "evidence from the recent past will provide the strongest indication of the likely future state of the domestic industry."[284] On its face, this finding relates to the analysis of *threat* of serious injury. Both the Appellate Body and the panel drew the conclusion from Articles 2 and 4 of the Safeguards Agreement, which have nothing to do with unforeseen developments. Nonetheless, China argues that, under this logic, "[t]he importance of the most recent time period (from 2015 to 2016) must also influence the assessment of the USITC's compliance with the unforeseen developments obligation."[285] China provides no explanation for this assertion. To the contrary, the use of the past participle in the first clause of Article XIX:1 ("If, as a result of unforeseen developments and of the effect of obligations incurr*ed* by a contracting party under this Agreement, including tariff concessions . . .") indicates that these circumstances may *precede* the increased imports. (For many Members, the relevant tariff concessions may have occurred decades in the past.)

158. China compounds its error by arguing that it "has highlighted the fact that, during the all-important last full year of the investigation period (2016), imports from China decreased, whereas imports from other countries increased."[286] This assertion 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 imports increased from other countries because Chinese producers relocated their production to circumvent those same antidumping and countervailing duty orders. As the USITC concluded, China's "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 elsewhere, which in turn ultimately resulted in the increased imports of CSPV products causing serious injury to*

[283] China Response to Written Questions, para. 164.

[284] China Response to Written Questions, para. 162 (quoting *India – Iron and Steel (Panel)*, para. 7.133 that quotes *US – Lamb (AB)*, para. 137).

[285] China Response to Written Questions, para. 164.

[286] China Response to Written Questions, para. 165.

the domestic industry in the United States."[287] Thus, although there was no legal obligation to do so, the USITC did explain how the unforeseen developments related to import levels in the most recent period, including specifically with respect to imports due to unforeseen developments concerning Chinese companies.

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?

159. China's response to this question concedes that neither GATT 1994 Article XIX nor the Safeguards Agreement require a Member "to identify specific 'unforeseen developments' that resulted in the increased imports for each *individual* exporting country."[288] However, China errs in asserting, based on its arguments in response to Panel Question 24, that the competent authorities must demonstrate how unforeseen developments caused the increased imports that caused the serious injury to the domestic solar industry. As noted in the U.S. comment on Question 24, China's approach would be tantamount to a double causation requirement contrary to both GATT 1994 Article XIX and the Safeguards Agreement. Moreover, as the United States showed in its first written submission, the first clause of Article XIX:1(a) does not create "prerequisites" coequal with the conditions of the second clause. Rather, "as a result of unforeseen developments and of the effect of the obligations concurred" are circumstances that must be shown to exist, whereas "any product is being imported . . . in such increased quantities and under such conditions as to cause or threaten serious injury" are "conditions" that must be met.[289] Thus, the underlying premise of China's response to this question is invalid as a matter of law.

160. China also fails to engage with the analysis in the USITC Supplemental Report, which found that:

> Notably, 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

[287] USITC Supplemental Report, p. 5 (Exhibit CHN-6) (emphasis added).

[288] China Response to Written Questions, para. 166 (emphasis in original).

[289] U.S. First Written Submission, para. 240.

> to *** percent in 2016, which occurred just after the *CSPV II* orders went into effect in February 2015.[290]

Thus, the USITC explained how unforeseen developments related to China and Chinese producers resulted in increased imports, and the reference to increases in import levels in 2015 and 2016 followed the outcomes of those developments into the most recent period.

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

161. China's response is lengthy, but misses the key point. It recognizes that "the Appellate Body's discussion in *US – Lamb* was in the context of analyzing the USITC's findings concerning 'threat of serious injury'" and not unforeseen developments.[291] However, it fails to recognize that the Appellate Body (and the panel in *India – Iron and Steel Products*) were addressing a panel's evaluation of claims raised in a WTO dispute. They were not addressing how the competent authorities reach conclusions as to whether increased imports are causing serious injury.

162. As the Appellate Body stated:

> We wish to emphasize that, although panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the competent authorities, this does not mean that panels must simply accept the conclusions of the competent authorities. To the contrary, in our view, in examining a claim under Article 4.2(a), a panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate *only* if the panel critically examines that explanation, in depth, and in the light of the facts before the panel.[292]

Thus, the Appellate Body recognized that panels and competent authorities perform distinct tasks. The competent authorities conduct a *de novo* evaluation and reach findings and conclusions based on the evidence and arguments before them. Panels are explicitly barred from conducting a *de novo* review, and a panel may not substitute its conclusions for those of the competent authorities. Instead, a panel reviews the findings and conclusions of the competent authorities, based on the arguments presented by the complaining and responding parties.

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

[291] China Response to Written Questions, para. 179.

[292] *US – Lamb (AB)*, para. 106 (emphasis original).

163. The Appellate Body based its conclusions regarding the role of a panel from its reading of DSU Article 11 and SGA Article 4.2(a). It then stated that

> it follows that the precise nature of the examination to be conducted by a panel, in reviewing a claim under Article 4.2 of the *Agreement on Safeguards*, stems, in part, from the panel's obligation to make an "objective assessment of the matter" under Article 11 of the DSU and, in part, from the obligations imposed by Article 4.2, to the extent that those obligations are part of the claim.[293]

DSU Article 11 applies exclusively to the role of a panel in a WTO dispute. It does not apply to the competent authorities' conduct of their investigation or the explanation of their findings and conclusions, including any evaluation of unforeseen developments.

164. China focuses in particular on the Appellate Body's statement that "[a] panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some alternative explanation of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation."[294] However, in line with the reasoning outlined above, the Appellate Body directed this statement to what a *panel* does. It nowhere suggests that this reasoning applies to the *de novo* evaluation conducted by the Panel. Nowhere does the Appellate Body suggest that a competent authority must hypothesize alternative explanations for each element of the determination of serious injury or the circumstances set out in the first clause of GATT 1994 Article XIX:1. China's response to this question provides no reason to conclude otherwise.

165. Instead of recognizing that the role of a panel in a WTO dispute is *different* from the role of the competent authorities in a safeguard investigation, China focuses on a panel's standard of review under the DSU and the Safeguards Agreement. Thus, it fails to answer the question as to why the Appellate Body's conclusion applies to the competent authorities' evaluation of unforeseen developments. Thus, the Appellate Body statements referenced in this question simply do not apply to any aspect of the competent authorities' analysis, including any evaluation they perform with respect to unforeseen developments.

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.

[293] *US – Lamb (AB)*, para. 105.

[294] China Response to Written Questions, para. 177, *quoting US – Lamb (AB)*, para. 106.

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.

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.

166. **First**, as the United States explained in its First Written Submission[295] and in its response to Panel Question 33,[296] Article 3.2 *mandates* that competent authorities not disclose confidential information without permission from the submitting party and provides them *discretion* to seek non-confidential summaries from the submitting party. This permissive provision signifies that the competent authorities need not request non-confidential summaries or prepare confidential summaries on their own initiative.

167. China begins its response by asserting that Article 3.2 "requires the competent authorities to provide non-confidential summaries of any confidential data relied upon in such report."[297] This is a blatant mischaracterization. Article 3.2 states that "Parties providing confidential information *may* be requested to furnish non confidential summaries thereof."[298] The "may" signals that the provision is permissive – competent authorities may request summaries, but also may not. Nothing in Article 3.2 obligates competent authorities to summarize confidential information themselves.

168. **Second**, China argues that the USITC violated an alleged "procedural obligation," not found in the text of the SGA, in the timing of its publication of the non-confidential versions of the USITC injury and remedy reports before the deadline for the submission of the pre-hearing briefs on injury and on remedy.[299] China errs.

169. As a matter of law, as explained in the U.S. First Written Submission, nothing in Article 3.1 requires the competent authorities even to compile a report before the end of their proceedings and release it to the parties. Thus, the timing of the release of the reports (whether BCI or non-BCI) that the USITC staff nevertheless generated and released to the parties in the

[295] U.S. First Written Submission, paras. 297-302, 320.

[296] U.S. Response to Written Questions, para. 88.

[297] China Response to Written Questions, para. 183.

[298] Emphasis added.

[299] China Response to Written Questions, para. 184.

CSPV products proceeding cannot give rise to a breach of Article 3.1.[300] Moreover, as the United States explained in its First Written Submission, Article 3 does not give the parties to an investigation a "right" to request and review non-confidential summaries of confidential information.[301] Instead, under Article 3.2, it is the competent authorities that may request non-confidential summaries of the confidential information from the submitting party.[302]

170. **Third**, China argues that the timing of the publication of the USITC November Report and the mandatory destruction or return of BCI, pursuant to the terms spelled out in the Administrative Protective Order (APO), which they signed, hindered the opportunity to "present evidence and their views" before the TPSC.[303] China's argument fails both legally and factually.

171. As described in the U.S. First Written Submission, as a matter of law, Article 3 addresses the "Investigation" of the competent authorities. The publication of the USITC November Report marked the end of the investigation covered under Article 3. Any subsequent processes were directed at the decision whether and to what extent to apply a safeguard measure, which is a separate step covered by SGA Articles 5 and 7, and not subject to the disciplines of Article 3.1. Therefore, interested parties' ability to rely on the BCI or non-BCI version of the USITC November Report during the TPSC evaluation process is not relevant to the question of U.S. compliance with Article 3.1.[304]

172. Separately and independently, as a matter of law, nothing in Article 3 obligates the competent authorities to provide BCI to the parties to their investigation. Similarly, nothing dictates when competent authorities that allow access to BCI must do so, or when they can terminate access. Thus, nothing in Article 3 prevented the USITC from terminating access to BCI at the time it did, or in the manner than it did, namely, by requiring at the end of its investigation the return or destruction of all material containing BCI obtained pursuant to the APO.[305]

173. Finally, as a matter of fact, while the USITC published the non-BCI version of the November Report on the date for initial submissions to the TPSC, interested persons also had an opportunity to make rebuttal submissions and raise issues at the TPSC hearing. Interested persons also had the option of referring to the non-BCI version of the USITC November Report to support views raised during consultations under SGA Article 12.3.[306]

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[300] U.S. First Written Submission, para. 311.

[301] U.S. First Written Submission, para. 312.

[302] U.S. First Written Submission, para. 312.

[303] China Response to Written Questions, paras. 185-87.

[304] U.S. First Written Submission, para. 315.

[305] U.S. First Written Submission, para. 316.

[306] U.S. First Written Submission, para. 317.

174. The USITC released the BCI version of the November report to the parties' representatives one week before comments to the TPSC were due. The next day it informed them that, pursuant to the agency's rules addressing disclosure of BCI under APOs, they would have to return or destroy the information no later than "14 days after the completion of this investigation." Thus, interested parties who received BCI under the APO had an opportunity to review the report, note segments that contained information that they considered relevant, and direct the TPSC to those pages.[307] Some interested parties did just that.[308]

175. For these reasons, the United States not only met but exceeded the obligations under Article 3.

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?

176. The only thing that Article 3 requires the competent authorities to publish is "a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." The terms used to describe the contents of the report are telling – "findings" and "conclusions" would typically come at the end of a proceeding, not in the middle. Article 4.2(c) confirms this understanding in calling for the report contain a "demonstration of the relevance of the factors examined" (in the past tense).

177. The question recognizes that over the course of their investigation, the competent authorities may reach intermediate decisions, and document those decisions for internal purposes. Article 3 does not address these types of materials, let alone require their publication. Indeed, by its very nature, an intermediate decision is potentially subject to modification or reversal. If that occurs, the intermediate decision would not be part of the "findings and reasoned conclusions *reached* on all pertinent issues of fact and law," and would not properly be part of the competent authorities' report. Conversely, if an intermediate decision remains unchanged at the end of the investigation, the competent authorities comply fully with the obligations of Article 3 if they include that decision in their final report. Article 3 contains no

[307] U.S. First Written Submission, para. 318.

[308] *See, e.g.*, Solar Energy Industries Association (SEIA) Written Response to Comments Concerning the Administration's Action Following a Determination of Import Injury with Regard to Certain Crystalline Silicon Photovoltaic Cells, Doc. No. USTR-2017-0020 (Nov. 29, 2017) p. 2 ("[i]n response to petitioners' submissions, however, SEIA wishes to highlight certain key issues for the attention of the TPSC, with the understanding that the TPSC has full access to all of the supporting materials presented to the USITC, including SEIA's extensive presentations on injury and remedy."). SEIA further noted that "[d]ue to the confidential nature of the data, we refer the TPSC to SEIA's posthearing remedy brief for more detail. *See* SEIA's Posthearing Remedy Brief, Appendix A at 47-55 (Answers to Questions Posed at the Hearing and Written Questions from the Commission)" at p. 17, n.14 (Exhibit USA-10).

obligation to publish findings and conclusions as they are made, rather than at the end of a proceeding.

178. As there is no obligation to publish intermediate decisional documents, there can be no obligation to publish non-confidential versions of such documents.

179. China bases its argument to the contrary on the assertion that the obligation to publish a public report "logically entails that the competent authorities are also required to publish non-confidential versions of intermediate decisional documents to the extent that such documents form part of the report published under this obligation."[309] This is a *non sequitur*. If findings and reasoned conclusions on an issue "form part" of the competent authorities' report and appear in that report, the competent authorities have complied fully with Article 3. There is no further obligation to publish other, earlier documents related to the issue.[310]

180. Next, according to China, without publication of non-confidential versions of intermediate decisional documents, competent authorities would "simply mak[e] any findings and conclusions which relied on confidential information on intermediate decisional documents."[311] China's concern is unwarranted. Most importantly, as a legal matter, Article 3.2 makes clear that competent authorities may accept, and rely on, confidential information that "cannot be summarized." Thus, it is not *per se* inappropriate that an intermediate document contain or reflect confidential information.

181. Finally, China argues that certain USITC's injury and remedy decisions in a safeguard case should be considered part of the "final" report because they are the final decisions on those topics and should have been followed by non-confidential summaries.[312] As an initial matter, the remedy recommendation is not a "final" decision. It is simply a recommendation that the President may, or may not, accept in deciding what action to take to prevent or remedy serious injury to a domestic industry. In any event, the ITC's *final* findings and conclusions regarding serious injury and the rational underlying its remedy recommendation are in its published report. Earlier iterations of the findings, conclusions, and rationale are not relevant to the obligation under Article 3.1.

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?

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[309] China's Response to Written Questions, para. 188.

[310] The United States notes that Article 3.1 does not dictate how competent authorities construct their reports, and that they are free if they choose to publish intermediate decisions and incorporate those documents by reference in their final reports.

[311] China Response to Written Questions, para. 188.

[312] China Response to Written Questions, paras. 190-91.

182. As the United States explained in its response to this question, the publication of the final report marks the end of the competent authorities' role in the safeguards investigation. Article 3.1 does not require them to provide an opportunity to comment on the report. The obligation to provide "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" relates to the evidence and argument provided by *the parties*. It does not imply a right to respond to the findings and conclusions of *the competent authorities*. In fact, as explained in our response to Panel Question 29, the structure of Article 3.1 and context of Article 4.2(c) indicate that these processes *precede* the publication of the final report. Nothing in the SGA even suggests that competent authorities allow for such comments after publication of the final report.

183. Finally, China points to, but provides no argument about, the requirement in Article 4.2(c) to publish the final report "promptly."[313] This obligation applies solely with respect to the parties participating in the investigation to receive a detailed analysis and demonstration from the competent authorities.

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.

184. China cannot point to any obligation under SGA Article 3.2 the USITC allegedly breached. Instead, it cites the panel report in *US – Steel Safeguards* for the proposition that under a "harmonious interpretation" of Articles 3.1 and 3.2 "competent authorities are required to provide a reasoned and adequate explanation through means other than full disclosure of confidential data."[314] The United States does not disagree with this conclusion. However, China errs in asserting that this means that the competent authorities "are required to publish a non-confidential version."[315] Whether the competent authorities have complied with the obligations to provide "findings and reasoned conclusions," "a detailed analysis of the case," and "a demonstration of the relevance of the factors considered" is a substantive question. If they do so without summarizing underlying confidential information, they have complied. Conversely, if they summarize confidential information, but the findings are insufficiently detailed or do not demonstrate the relevance of the factors considered, the competent authorities have not complied. The presence or absence of summarized confidential information is not dispositive.

185. China's response to this question exposes the overarching flaw with its claims regarding summarization of confidential information – it assumes that it can prevail simply by identifying instances where the ITC redacted BCI. That is not enough to meet its burden of proof. Rather,

[313] China Response to Written Questions, para. 192.

[314] China Response to Written Questions, para. 194.

[315] China Response to Written Questions, para. 194.

China must make a *prima facie* case that specific findings fail to meet the obligations of Article 3.1 or 4.2(c).

186. Finally, the *US – Steel Safeguards* panel report's reasoning does not support China's argument. Elsewhere in the report, it explained with respect to the ITC's causation findings regarding stainless steel wire rod:

> the Panel is unable to assess the USITC's coincidence analysis given that essential information has been redacted. As stated above, the Panel agrees that, in some circumstances, Members have the obligation to confidentialize certain information, pursuant to Article 3.2 of the Agreement on Safeguards, although they can base their determination on such confidentialized information but this obligation should not reduce Members' rights to take safeguard actions. Also as mentioned above, in cases where information has been confidentialized, the Panel will examine whether the competent authority provided a reasoned and adequate explanation through means other than full disclosure of that data. In light of our approach, we reviewed the USITC's conditions of competition analysis and consider that it provided a compelling explanation, subject to fulfillment of the non-attribution requirement, that indicated the existence of a causal link between increased imports of stainless steel rod and serious injury to the relevant domestic producers.[316]

This provides one example of how a conclusion that redacts confidential information may nonetheless satisfy Article 3.1. It also underscores that it is not enough for a complaining party to simply identify redactions. The evaluation looks at the findings as a whole – something China has consistently failed to do.

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?

187. China's response to this question simply repeats arguments made in response to questions 30-33. Rather than repeat, the United States refers the panel to our comments on those same arguments made in response to those questions.

[316] *US – Steel Safeguards (Panel)*, para. 10.582.