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

(DS562)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES AND COMMENTS ON CHINA'S RESPONSES TO THE SECOND SET OF QUESTIONS FROM THE PANEL TO THE PARTIES

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TABLE OF U.S. EXHIBITS

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USA-13	Office of the United States Trade Representative, Federal Register Notice, Request for Comments and Public Hearing About the Administration's Action Following a Determination of Import Injury With Regard to Certain Crystalline Silicon Photovoltaic Cells, 82 Fed. Reg. 49469 (Oct. 25, 2017)

I. OVERVIEW

1. The United States presents its second written submission to the Panel in the form of a short narrative section, followed by comments on China's responses to the Panel's second set of questions.

2. Under the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), as clarified and reinforced by the *WTO Agreement on Safeguards* ("Safeguards Agreement"), a Member may resort to safeguard measures when necessary to remedy serious injury caused by increased imports to a domestic industry. Safeguard measures are available to a Member when its competent authority establishes, in a published report, findings and reasoned conclusions on the pertinent issues with a detailed analysis and demonstration of the relevant factors.

3. The United States International Trade Commission ("USITC" or "Commission") ably discharged its responsibilities under GATT 1994 and the Safeguards Agreement and, as such, the United States was free to invoke Article XIX of the GATT 1994 and implement the safeguard measure at issue in this dispute. In its published report, the USITC found a clear overall coincidence between an almost six-fold increase in low-priced imports between 2012 to 2016 that surged by 492.4 percent during this time and a deterioration in the domestic industry's condition, especially between 2015 and 2016 when imports reached their highest levels. The USITC's analysis is fully consistent with all the applicable obligations under the Safeguards Agreement.

4. The USITC's published report includes subsidiary findings that the other causal factors alleged by respondents did not cause *any* injury to the domestic industry. The Commission started with an examination of those other factors, but found the respondents' arguments "are not supported by the facts."[1] The Commission further elaborated that "the record does not support respondents' contentions that the domestic industry was unable to provide quality products, failed to serve certain segments of the market, or suffered widespread delivery issues."[2] The Commission also found that changes in government incentive programs, declining raw material costs, and the need to meet grid parity with other sources of electricity failed to explain the price declines of CSPV products and the domestic industry's condition.[3] The Commission definitively concluded that none of the other factors individually or collectively caused injury to the domestic industry.[4] This analysis and the resulting findings establish that the USITC did not attribute to increased imports any injury caused by factors other than increased imports, thereby complying with the second sentence of Article 4.2(b) of the Safeguards Agreement.

5. Contrary to China's arguments, the USITC's findings do not suggest that the other causal factors addressed in the report caused *some* injury that the Commission disregarded due to the

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

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

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

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

test for serious injury under U.S. domestic law. Therefore, there was no need for further analysis to ensure that "such injury [is] not . . . attributed to increased imports."

6. China has also raised several arguments with regard to an analysis that the Safeguards Agreement does not charge to a Member's competent authorities – whether, in accordance with Article XIX:1(a) of GATT 1994, increased imports are a result of unforeseen developments and the effect of obligations incurred. The Appellate Body has described these as "circumstances" that must exist before taking a safeguard measure, rather than "conditions" that must be demonstrated in the report of a competent authority. Although the treaty text does not require such a demonstration in that report, the USITC established the existence of the first of these circumstances with detailed findings that show increased imports *as a whole* were a result of "unforeseen developments." China argues that Article XIX:1(a) required more –particularized evaluation of each import source. But nothing in GATT 1994 or the Safeguards Agreement requires adoption of a particular methodology to assess unforeseen developments, let alone a country-specific analysis.

7. As for "the effect of obligations incurred," this phrase only requires that a Member demonstrate, as a matter of fact when challenged in dispute settlement proceedings, that it has incurred obligations under the GATT 1994, such as tariff concessions, and that the obligations prevent the Member from taking action to address the increased imports causing serious injury to its domestic industry. There is no dispute that the U.S. tariff rate for the products in question is bound at zero, which precludes the United States from raising its tariffs to a level that would prevent the importation of CSPV cells and modules "in such increased quantities and under such conditions as to cause . . . serious injury."

II. THE COMMISSION PROPERLY WEIGHED THE EVIDENCE AND PROVIDED REASONED AND ADEQUATE EXPLANATIONS OF ITS FINDINGS AND CONCLUSIONS; CHINA'S IDENTIFICATION OF SPECIFIC PIECES OF EVIDENCE AND INDIVIDUAL ASSERTIONS MADE BY RESPONDENTS AND ITS ALTERNATIVE TABULATIONS OF THE DATA DO NOT DETRACT FROM THE COMMISSION'S ANALYSIS

8. China's arguments suffer from the same thematic difficulties that afflicted the arguments in each of its prior submissions. First, in challenging the reasonableness and adequacy of the Commission's findings, China ignores the detailed analyses actually undertaken by the Commission and points to specific pieces of evidence and individual assertions made by respondents that, in its view, the Commission did not consider.[5] Articles 3.1 and 4.2(c) call for the report of the competent authorities to provide "their findings and reasoned conclusions on all pertinent issues of fact and law," including a "detailed analysis of the case" and a "demonstration of the relevance of the factors considered." Thus, while an investigating authority must evaluate all relevant evidence and explain the basis for its conclusions, nowhere does the Safeguards

[5] *See, e.g.*, China Response to Panel's Second Set of Questions, paras. 60, 96, 146-149, 159.

Agreement mandate that the explanation discuss each piece of evidence and assertion put forward by the parties in its published report.

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

10. China's criticisms of the Commission's findings simply amount to a view that the Commission should have weighed the evidence differently. China repeatedly points to different methodologies with respect to tabulation of the data and provides different characterizations of the evidence to support its own preferred theory of the case.[6] However, none of China's claims demonstrate any inconsistency with U.S. obligations under the Safeguards Agreement.

11. On this last point, it is important to note that it is China, as the complaining party, that bears the burden of demonstrating that the safeguard measure within the Panel's terms of reference is inconsistent with the cited provisions of the Safeguards Agreement.[7] In challenging an action to impose a safeguard measure, a complaining party brings forward evidence and argument relating to the investigation carried out, the findings by the competent authority, and the remedy imposed. And in reviewing the competent authority's action, a panel must not conduct a *de novo* evidentiary review, but instead should bear in mind its role as *reviewer* of agency action.[8] Indeed, it would not reflect the function set out in Article 11 of the DSU for a panel to go beyond its role as reviewer and instead substitute its own assessment of the evidence and judgment for that of the competent authority.[9]

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[6] *See, e.g.*, China Responses to Panel's Second Set of Questions, paras. 27-28, 70-7579-88, 158, 165.

[7] *EC – Hormones (AB)*, para. 109 *(*citing *US – Wool Shirts and Blouses (AB)*, paras.14-16*); see also China – Broiler Products (Panel)*, para. 7.6.

[8] *See US – Lamb (AB)*, paras. 105-07; *Korea – Dairy (Panel)*, para. 7.30.

[9] *E.g., US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 188-90.

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

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

13. On the legal question, China repeatedly mischaracterizes the requirements in Article XIX:1(a), including the connection that must be established between the different elements. For example, China has described what it calls a "subsidiary obligation" to find a link between the unforeseen developments identified and the obligations that resulted in increased imports. While Article XIX:1 refers to a circumstance in which increased imports are a result of unforeseen developments and that the increased imports are the effect of obligations incurred, it contains no requirement to identify a link between the unforeseen developments and obligations incurred. China also argues, regarding another requirement, that a competent authority cannot focus on developments in a single country without being inconsistent with Article XIX. However, Article XIX:1(a) applies when "any product is being imported into the territory of [a] contracting party in such increased quantities," without regard as to the source or origin of that product. Thus, in evaluating whether this situation is "as a result of unforeseen developments," a Member is free to examine increased imports of the "product" as a class, and need not separately evaluate imports from individual sources.[10]

14. Furthermore, China argues that, for a Member to apply a safeguard measure, its competent authorities must address the question of increased imports that are as a result of unforeseen developments and the effect of obligations in its published report. While a Member may elect to have its competent authorities address this question in their report, there is no requirement to demonstrate the satisfaction of the first clause of GATT 1994 Article XIX:1(a) before the Member applies a safeguard measure. As explained, the references in Article XIX to unforeseen developments and the effect of obligations incurred are circumstances that must exist for application of a safeguard measure. They are not conditions under Article 2 of the Safeguards Agreement that must be demonstrated in the competent authorities' report.[11]

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[10] In fact, it is difficult to see the utility of a country-by-country analysis. If imports from one country increased as a result of unforeseen developments to a degree that exceed a decrease in imports from every other source, it would still be the case that imports of the product as a whole increased "as a result of unforeseen developments."

[11] *See* U.S. First Written Submission, paras. 229-241; U.S. Comments on China's Responses to Panel's First Set of Questions, paras. 159, 164; U.S. Responses to Panel's Second Set of Questions, paras. 60-64; U.S. Opening Statement, paras. 37-38.

15. The same point applies to China's specific argument about the identification of obligations incurred under Article XIX:1(a). China contends that satisfaction of this particular aspect of the obligation must be identified in the competent authorities' published report. However, the text in Article XIX is straightforward and only requires that increased imports are the "effect of obligations incurred by a Member under this Agreement, including tariff concessions" that requires it to allow entry of imports despite the existence of the conditions specified later in the sentence. As such, the text simply refers to the context that necessitates resort to "emergency action" to address the serious injury. It does not imply an additional causation test or impose a specific obligation on a Member's competent authorities.

16. Thus, China provides no legal basis to justify elevating Article XIX's references to the existence of unforeseen developments or the obligations incurred into onerous procedural and substantive barriers to the imposition of a safeguard measure. It also fails as a matter of fact because the USITC specifically addressed the unforeseen developments and obligations incurred in its published reports.

17. The USITC found, for example, in the Supplemental Report that "the six largest firms producing CSPV cells and CSPV modules in China increased their global CSPV cell and CSPV module manufacturing capacity by expanding investments in third countries without reducing their capacity in China. Imports from four countries where Chinese affiliates added both CSPV cell and CSPV module capacity – Korea, Malaysia, Thailand, and Vietnam – increased their share of apparent U.S. consumption from *** percent in 2012 to *** percent in 2016. Much of this increase occurred between 2015 and 2016, *as their collective share of the U.S. market more than doubled from *** percent in 2015 to *** percent in 2016, which occurred just after the CSPV II orders went into effect in February 2015*."[12] The USITC specifically noted that the imports from these countries, collectively, more than *doubled* their share of the U.S. market during the time just after the trade remedy orders in *CSPV II* took effect. China cannot reasonably argue that its producers' massive increase in production capacity in certain countries is unrelated to a significant increase in exports to the United States from those same countries at the same time.

18. Therefore, China cannot meet its burden, as a legal matter, because it has set out the wrong standard for addressing unforeseen development and obligations incurred under Article XIX:1(a). Likewise, it cannot meet its burden, as a factual matter, because the unrebutted evidence supports the USITC's conclusion that (i) China's rampant domestic overproduction in the solar industry, and its extension to foreign countries, was an unexpected development; (ii) that imports of solar products into the United States increased from China and the countries where Chinese manufacturers established production facilities; and (iii) the U.S. obligation in the form of tariff concessions for duty-free entry of such products prevented the United States from

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

taking action to address the influx. Accordingly, China has failed to establish its claim in this dispute under Article XIX:1(a).

COMMENTS ON CHINA'S RESPONSES TO THE SECOND SET OF QUESTIONS FROM THE PANEL TO THE PARTIES

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

Question 1 (both parties)

As part of its serious injury determination, the USITC appears to have found that the domestic industry's inability to further improve certain aspects of its performance during a period of favourable market conditions was indicative of serious injury.[13] Given that China does not challenge the serious injury determination in these proceedings, please respond to the following:

a. Is the Panel required to accept the findings in the serious injury determination as undisputed facts in its assessment of China's claims concerning the causal link between increased imports and serious injury?

19. China's decision not to challenge the Commission's determination on serious injury precludes the Panel's review of the findings underlying that determination. When China failed to assert a claim on serious injury under Article 4 of the Safeguards Agreement, it elected not to have the Dispute Settlement Body include this issue within the Panel's terms of reference. Accordingly, due to China's decision not to bring such a claim, the Panel in this dispute is not empowered to review the USITC's factual findings on serious injury.

20. China's response does not contradict any of this reasoning. Instead, China attempts to evade the Panel's question by asserting that China's choice "not to challenge the USITC's finding on serious injury does not mean that China accepts these conclusions as undisputed."[14] This is a non sequitur. China's failure to make a claim with respect to the USITC's serious injury finding means that the finding is literally and legally undisputed for purposes of the "dispute" subject to this proceeding. China's blanket assertion now that it does not "accept" the USITC finding is immaterial. Similarly, any specific assertion that the U.S. industry is not suffering serious injury or that the findings underlying the USITC determination of serious injury are inconsistent with the covered agreements is not properly before the Panel.

b. If not, how should the Panel treat the findings in the serious injury determination in its assessment of China's claims concerning the causal link between increased imports and serious injury?

21. China argues that, in a WTO dispute under the Safeguards Agreement, serious injury and causal link are "distinct legal issues" for the Panel's evaluation. The United States does not

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

[14] China's Response to Panel's Questions to Parties Following the First Substantive Meeting, para. 1.

disagree with the discrete nature of these elements, and notes that this view is more consistent with the approach the United States has advocated above. The point remains, however, that China cannot attack the relevant findings as to one of these "distinct legal issues" when it only brought a claim as to the other. Since China has not raised a claim of WTO inconsistency with respect to the USITC serious injury finding, the matter is not before the Panel and must be accepted as undisputed. To the extent that China argues that a particular finding or certain evidence does not support a finding concerning a different legal issue, the Panel must exercise care when evaluating the USITC's finding or evidence so as not to allow China impermissibly to obtain a finding with respect to an aspect of the safeguard measure that was not raised in its panel request.

Question 2 (China)

> **Citing the presence of positive injury factors during the POI, China contends that the USITC was required to provide a "compelling" explanation concerning the existence of a causal link between increased imports and serious injury[15], and failed to do so in its report.[16] China further argues that the "positive factors in this case are so significant — such as increased production capacity, shipments, and employment — that they raise serious doubt about any overall coincidence between imports and injury in this case".[17] Please reconcile these positions with the USITC's determination that, notwithstanding the presence of certain positive injury factors, the domestic industry was still seriously injured during the POI.[18]**

22. At the outset, it is important to note that China's response to this question reveals two general flaws with its approach. First, China misapprehends the role of the Panel. China acknowledges that "serious injury" and "causation" are two distinct legal issues, and that it has not challenged the Commission's finding of serious injury.[19] In light of this, the Panel's review of causal link starts with the given that the domestic industry suffered serious injury during the period of investigation. Notwithstanding this, China suggests that the Panel should conduct its own new assessment of the facts, including those related to serious injury.[20] However, this approach would be exactly the type of *de novo* review that panel and appellate reports have universally found to be improper for a panel. Thus, to the extent that China raises the state of the domestic industry as an issue in its challenge to the Commission's finding of a causal link, the Panel should reject such arguments. As the U.S. explained in response to question 1, China's

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

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

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

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

[19] China Responses to Panel's Second Set of Questions, para. 2.

[20] China Responses to Panel's Second Set of Questions, para. 3.

decision not to bring a claim contesting the Commission's serious injury finding, precludes Panel review of that finding.[21]

23. Second, China misapprehends the legal obligations applicable to the competent authorities' determination. It asserts that Article 4.2(b) requires competent authorities to follow the approach set forth in *Argentina – Footwear*.[22] In that report, the panel stated that its evaluation of whether the competent authorities' determination complied with the Safeguard Agreement would consist of three elements:

> we will consider whether Argentina's causation analysis meets these requirements on the basis of (i) whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether a reasoned explanation is provided as to why nevertheless the data show causation; (ii) whether the conditions of competition in the Argentine footwear market between imported and domestic footwear as analysed demonstrate, on the basis of objective evidence, a causal link of the imports to any injury; and (iii) whether other relevant factors have been analysed and whether it is established that injury caused by factors other than imports has not been attributed to imports.[23]

24. Contrary to China's position, Article 4, in fact, imposes no obligation as to *how* the competent authorities comply with its obligations. Article 4.2(b) states only:

> The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

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[21] U.S. Responses to Panel's Second Set of Questions, paras. 1-5.

[22] China Responses to Panel's Second Set of Questions, paras. 8-9.

[23] *Argentina – Footwear (EC) (Panel)*, para. 8.229. China asserts, in reference to paragraphs 8.237 and 8.238 of the *Argentina – Footwear* panel report, that if "there is an overall absence in overall trends, or where there are mixed trends" the competent authorities must provide "a *compelling* explanation" as to why a causal link exists. China Responses to Panel's Second Set of Questions, para. 9. The *Argentina – Footwear* panel report stated that if the competent authorities do not find an increase in imports to coincide with a decline in the relevant injury factors, "Article 3 . . . would require a very compelling analysis of why causation still is present." The panel provided no explanation for this statement, or why the "reasoned conclusion" required under SGA Article 3.1 would, in that situation, have to meet the heightened standard of being "very compelling." As such, this sentence does not provide useful guidance for the Panel's evaluation of China's arguments in this proceeding.

The Appellate Body in *US – Lamb* confirmed that "the method and approach WTO Members choose to carry out the process of separating the effects of increased imports and the effects of the other causal factors is not specified by the *Agreement on Safeguards*."[24]

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

26. The effort is unavailing. China's argument that trends in the domestic industry's performance were improving relies on upward movement in a subset of the performance factors.[25] The Commission recognized these upward movements in its analysis of serious injury, but found that when these factors were considered within the context of the relevant conditions of competition and in light of the downward trends in other significant factors, and the overall downward trends, particularly between 2015 and 2016 as imports reached their peak, there was a direct correlation between increasing imports and the industry's dismal and deteriorating financial performance. The Commission provided detailed analyses on how declining prices and the industry's dismal and deteriorating financial condition corresponded to import trends.[26] The Commission explained that the market otherwise was favorable to domestic producers, with explosive demand growth and trade measures in place against sources of dumped and subsidized imports that had previously caused material injury. However, instead of benefitting from this rapidly expanding demand, the domestic industry struggled and remained unprofitable, as low-priced, highly substitutable imports flooded the market. The industry incurred hundreds of millions of dollars in net and operating losses throughout the POI and was unable to generate adequate capital to finance modernization of their domestic plants and equipment and unable to maintain existing research and development expenditure levels.[27]

27. Ignoring the Commission's comprehensive and factually supported analysis demonstrating a clear "overall coincidence," China, instead, focuses on certain factors where the data viewed in isolation might appear to improve. In doing so, China disregards that the Commission addressed these factors in its serious injury analysis, and concluded they did not detract from the conclusion that the totality of the evidence demonstrated "a significant overall impairment in the position of the domestic industry." Thus, the positive trends identified by China cannot detract from the analysis conducted by the Commission of trends in the most

[24] *US – Lamb (AB)*, para. 181

[25] China Response to Panel's Second Set of Questions, para. 11.

[26] USITC November Report, pp. 43-46 (Exhibit CHN-2).

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

relevant factors that led to its finding of serious injury. Nor do they undermine the Commission's finding of a causal link based upon its finding of an "overall coincidence."

28. In this analysis, the Commission properly considered the 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."[28] As the Commission explained, at the beginning of the period of investigation, the domestic industry was already in an injured state due to significant CSPV imports from China that had adversely affected the domestic industry. After the *CSPV I* orders were imposed on imports from China in December 2012 and new *CSPV II* investigations on imports from China and Taiwan were commenced at the end of 2013, imports grew at a slower pace than apparent U.S. consumption in 2013 and 2014.[29] The Commission found that during this time, the antidumping and countervailing duty measures had an initial favorable impact as evidenced by the stabilization of prices and increase in the domestic industry's share of apparent U.S. consumption. Likewise, the domestic industry's financial condition improved marginally.[30]

29. The *CSPV I* and *II* orders ultimately had limited effectiveness, however, due to rapid changes in the global supply chains and manufacturing processes.[31] The Commission discussed how each imposition of the trade remedies led to shifts in manufacturing and global supply chains, and as imports from additional sources subsequently entered the U.S. market, they rapidly increased to higher volumes throughout 2016.[32] The Commission found that as imports reached their highest levels that year, CSPV prices collapsed, the domestic industry's capacity utilization levels dropped, its market share declined anew, and its financial performance, which had been dismal, deteriorated even further.[33]

30. Thus, the Commission objectively found that the domestic industry's financial condition, which was at its worst at the beginning of the POI, improved marginally after imposition of the orders and the filing of new antidumping and countervailing duty cases, but remained poor, and then deteriorated further in 2016, as imports peaked in terms of volume and market share and prices dropped anew.[34] By demonstrating how global capacity and supply chains shifted and how imports harmed the domestic industry's condition after imposition of the *CSPV I* and *CSPV II* orders, the Commission not only established an overall coincidence between increased import

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

[29] USITC November Report, p. 44, 46 (Exhibit CHN-2).

[30] USITC November Report, pp. 46-49 (Exhibit CHN-2).

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

[32] USITC November Report, pp. 44, 46 (Exhibit CHN-2).

[33] USTIC November Report, pp. 46-49 (Exhibit CHN-2).

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

volume and market share, on the one hand, and the domestic industry's dismal and deteriorating financial condition, on the other, but the Commission also demonstrated that the seemingly positive trends in other factors did not detract from this conclusion. China has accordingly failed to establish that the Commission's analysis was inconsistent with Article 4.2(b).

Question 3 (China)

> **China's arguments concerning the conditions of competition between domestic and imported CSPV products focus on the lack of competition between domestic and imported products in the utility segment[35], and do not appear to account for the competition between domestic and imported CSPV products in the residential and commercial segments. Please explain why.**

31. China concedes that "the domestic industry was able to participate in the commercial and residential segments,"[36] but contends that imports did not adversely impact the domestic industry in these sectors in light of "(1) the small size of the domestic industry throughout the period, and (2) the explosive growth in demand over the period."[37] Here again, China is simply attempting to impose its own hypotheses and preferred analysis.

32. At the outset, China's argument goes back to its failed attempt to litigate the USITC finding of serious injury that China omitted from its request for panel establishment. As the United States explained, the Panel's analysis starts with the fact that the domestic industry was seriously injured during the POI, even if the industry was unable to meet the entirety of demand. Further, as the Commission explained, the very inability to meet a larger share of demand itself was a result of the massive increase in imports that led to facility closures and less capital for the industry to invest in more capacity.

33. In this case, CSPV imports increased dramatically, by 492.4 percent during the POI and 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.[38] The Commission found that these imports not only increased absolutely and relative to apparent U.S. production, but that they also surged at a *greater* rate than apparent U.S. consumption in all but one year of the POI, taking sales volumes directly from the domestic industry.[39] Moreover, the evidence

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

[36] China Responses to Panel's Second Set of Questions, para. 16.

[37] China Responses to Panel's Second Set of Questions, paras. 14-21.

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

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

showed that substantial amounts of these imports were sold to commercial and residential installers, where the domestic industry shipped the majority of its products.[40]

34. The Commission detailed how the surging imports created conditions that impacted the domestic industry's ability to compete, including in the residential and commercial segments, notwithstanding the industry's undisputed participation in these particular sectors.[41] As the Commission explained, these imports were highly substitutable with and priced lower than the domestically produced product.[42] As a result, the growth in the volume of lower priced imports between January 2012 and December 2016 placed pricing pressure on the domestic industry and caused prices to decline for domestic CSPV products.[43] As prices declined over the POI, the domestic industry's net sales values fell overall. Its 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]

35. The Commission found that as a result of these massive losses and despite the need to increase capacity 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.[46] The domestic industry's condition continued to deteriorate into 2017, and two additional U.S. production facilities closed by July 2017.[47]

36. Thus, as the Commission explained, the presence of increased imports prevented the domestic industry from fully utilizing its productive capacity or increasing capacity to a greater extent to meet a larger share of the growing apparent U.S. consumption. This type of scenario falls squarely within the meaning of serious injury caused by increasing imports under Article

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

[41] Indeed, China has repeatedly asserted that domestic producers have "focused their business models on serving the smaller commercial and residential segments" to the exclusion of the utility segment. China First Written Submission, para. 136

[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, pp. 47-48 (Exhibit CHN-2).

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

4.2 of the Safeguards Agreement, and demonstrates the fallacy of China's premise that a domestic industry's small size and inability to meet increasing demand negates any finding of serious injury caused by imports.

Question 4 (both parties)

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

37. China contends that the record demonstrates only "limited" competition between imports and domestically produced CSPV products in the residential and commercial market segments. Yet, China provides no support for this assertion other than to declare that these sectors have "different characteristics and requirements"[48] Nor does China elaborate on how any such purported differences and requirements translate into "limited" competition between domestic and foreign sources of supply *within the sectors*.

38. In fact, the record shows just the opposite. As detailed in the U.S. response to this question, the record evidence showed that imported and domestically produced CSPV products competed directly against each other in the residential and commercial market segments. As the Commission found, CSPV products from domestic and foreign sources were sold to overlapping market segments through overlapping channels of distribution, *particularly* to residential and commercial installers.[49] Indeed, in their questionnaire responses, domestic producers confirmed selling a majority of their CSPV products to distributors (a majority of which were then sold to residential installers) and a substantial amount to commercial installers, and importers also reported selling a substantial amount of CSPV products to commercial and residential installers.[50] Moreover, the Commission found that the CSPV products shipped by U.S. producers and importers were within similarly efficiency and wattage ranges and were highly substitutable with each other, with price being an important factor in purchasing decisions.[51]

39. In challenging the Commission's analysis, China makes two unavailing criticisms. First, it contends that information on the percentage of sales made to each distribution channel were redacted, and that the Commission's presentation of the data was "vague."[52] But as explained above, there was nothing vague about the Commission's findings. It used clear characterizations – that domestic producers sold the "majority" of their product and importers

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[48] China Responses to Panel's Second Set of Questions, para. 22. In fact, the record evidence shows that residential and commercial segments both typically use 60-cell modules. USITC November Report, p. V-2 (Exhibit CHN-3).

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

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

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

[52] China Responses to Panel's Second Set of Questions, paras. 27-28.

sold "substantial" amounts to the residential and commercial installers – supporting a finding that competition in these channels and segments was meaningful.[53]

40. Second, China asserts that the Commission "largely ignored" non-price factors such as quality, performance, and availability, which it asserts limited the extent of competition between domestic and imported CSPV products.[54] That purchasers considered non-price factors in its purchasing decisions, however, does nothing to undermine the Commission's finding that imports and the domestic like product were highly substitutable and that non-price factors did not attenuate competition between product from foreign and domestic sources. Indeed, the Commission thoroughly examined parties' assertions of competition between imported and domestic CSPV products, and explicitly observed that most U.S. producers, importers, and purchasers confirmed that product from domestic and foreign sources were interchangeable.[55]

Question 5 (both parties)

> **The USITC appears to have found that the domestic industry competed in the utility segment[56], but also that the domestic industry did not have the capacity to supply high-volume utility projects.[57] Did the USITC consider the injurious effects of the import competition associated with the portion of the utility segment that the domestic industry could supply, separate from the portion of the utility segment that the domestic industry could not supply due to its limited capacity? Was it required to do so to properly account for the prevailing conditions of the competition in the market? Please explain.**

41. In responding to this question, China attacks the Commission's assessment of the injury caused by the increased imports on the CSPV industry as a whole, notwithstanding the incontrovertible consistency of such an analysis with the Safeguards Agreement. All of the parties advocated for, and the Commission defined, a single domestic like product, corresponding to the imported products within the scope of the investigation that included CSPV cells and modules, and consistent with this, it defined a single domestic industry.[58] Given these findings, which China does not dispute, the Safeguards Agreement *required* the Commission to base its injury analysis upon the impact of imports on producers as a whole, rather than consider

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[53] China does not dispute that the information in question was properly identified as BCI. It simply asserts that the Commission "should have made a greater effort in characterizing or presenting the data in its non-confidential summary." China Responses to Panel's Second Set of Questions, para. 27. Given the obligation under Article 3.2 to protect BCI from public disclosure, China does not meet its burden of proof with this simple assertion. It would need to provide some basis to conclude that it was possible to provide greater granularity without impermissibly revealing BCI.

[54] China Responses to Panel's Second Set of Questions, para. 29.

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

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

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

[58] USITC November Report, pp. 10-18 (Exhibit CHN-2).

injurious effects in each market segment, let alone, the purported different parts of a particular segment (*i.e.*, "small" utility segment and "large" utility segment).

42. Indeed, SGA Article 4.1(c) states that:

> (c) in determining injury or threat thereof, a "domestic industry" shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.

43. Moreover, Article 2.1, which establishes the "conditions" for the imposition of a safeguard measure, provides:

> A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provision set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

44. As the Appellate Body in *US – Lamb* explained, "a safeguard measure is imposed on a specific 'product,' namely, the imported product," and can only be imposed if that specific product ('such product') is having the stated effects upon the 'domestic industry that produces like or directly competitive products.'"[59] Thus, the Commission's analysis properly focused on whether imported CSPV products adversely impacted the domestic industry as a whole. Nothing in the Safeguards Agreement required the Commission to conduct the segmented market injury analysis China describes.

45. Nonetheless, the Commission recognized the existence of these segments, and took them into account in its analysis. It considered that competition existed in each of the market segments. It also addressed the impact of the increased imports in the utility segment in its non-attribution analysis. In so doing, the Commission considered and addressed relevant arguments made by the parties concerning the relationship between the increased imports in this sector and serious injury that resulted to the industry. Now, China insists that the Commission should have performed an additional micro-analysis, breaking the utility segment down into artificial subsegments defined by volume. Nothing in the Safeguards Agreement creates such an obligation.

46. Moreover, China is wrong as a factual matter in asserting that the Commission's analysis of the utility segment was flawed because it "did not assess the competition in the utility market

[59] *US – Lamb (AB)*, para. 86.

segment as a whole."[60] Aside from the absence of any requirement in the Agreement to analyze separate market segments, China's argument is factually incorrect. As the United States explained in its response to this question, the Commission analyzed the entirety of the utility segment in its non-attribution analysis. Although the Commission did not, and was not required to, formally divide the utility segment into standard-volume and high-volume subsegments for analytical purposes, it examined the effect of imports on sales that domestic producers could supply and also on sales that they could not supply, including sales for high-volume projects. In so doing, it accounted for the prevailing conditions of competition in the market and fully explained how, in that context, increased imports caused serious injury throughout the utility segment.[61]

47. Ignoring the Commission's thorough analysis on the entirety of the utility segment, China contends that the Commission's analysis was "absolutely insufficient."[62] China specifically complains that the "small utility" segment where the domestic industry competed "presented characteristics that made it look closer to the commercial than the actual utility segment."[63] But China provides no factual basis for this statement. In fact, information submitted by the parties, including respondent SEIA, demonstrates that the utility segment encompassed utility projects with a capacity of 1 MW or above.[64] The record further indicates that the median size of utility projects during 2012-2016 was 4.9 MW,[65] and that during this period, the domestic industry had the capability of supplying, and did in fact participate in, utility projects that were several times larger than 1 MW.[66] Thus, the record supports that some projects supplied by the domestic industry clearly qualified as utility scale projects. China's attempt to impose its own factual characterization of domestic producers' participation in these projects should be rejected.

48. China also alleges that the Commission ignored evidence indicating that the domestic producers were not even competitive in the small utility segment due to quality and service issues.[67] As explained in the United States' prior submissions, however, the Commission did not "ignore" the purchaser service and delivery complaints identified by respondents, but thoroughly considered the allegations. It reasonably found, based on the totality of the evidence – including competing and credible hearing testimony and submissions, reports from most market participants regarding the interchangeability of CSPV products from domestic and foreign

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[60] China Responses to Panel's Second Set of Questions, para. 46.

[61] U.S. Responses to Panel's Second Set of Questions, paras. 8-13.

[62] China Responses to Panel's Second Set of Questions, paras. 47-49.

[63] China Responses to Panel's Second Set of Questions, paras. 47-48.

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

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

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

[67] China Responses to Panel's Second Set of Questions, paras. 47-48.

sources, and the small number of purchasers' that had reported the failure of a domestic producer in qualifying product or losing its approved status – that the domestic industry did not have "widespread" delivery and service problems.[68]

49. Likewise unavailing is China's attempt to discredit the Commission's reliance upon the domestic industry's list of winning bids, which contained confidential information, as evidence of its participation in the small utility segment.[69] The mere fact that the domestic industry's winning list of bids contained confidential information does not serve as a legitimate basis to simply disregard this information, as China believes. There was no reason in the record for the Commission to have doubted the credibility of the bid information submitted by SolarWorld and Suniva, and China's response provides no basis for questioning the Commission's weighing of the evidence on this point. Indeed, the questionnaire responses confirmed that that the domestic industry had capacity, produced, and sold 60-cell and 72-cell modules to the utility segment. Respondents themselves even acknowledged this fact.[70]

50. In sum, the Commission found that the unrelenting volumes of low-priced imports, which actually increased at a *greater* rate than apparent U.S. consumption in all but one year of the period of investigation, negatively affected the domestic industry's financial performance, making it difficult for the domestic industry to increase capacity to a scale that made it more competitive in this segment.[71] Collectively, these facts and negative injury trends established that imports caused serious injury to the domestic industry, including in the utility segment.

Question 6 (China)

> **China appears to argue that it was unreasonable for the USITC to find that the domestic industry's product offerings significantly overlapped with imports.[72] However, in determining that domestic and imported products were highly substitutable, the USITC relied upon evidence demonstrating that: (1) domestic and imported CSPV products were sold in a range of wattages and conversion efficiencies, and modules were sold in both 60-cell and 72-cell forms[73]; (2) domestic and imported CSPV products were sold to overlapping market segments through overlapping channels of distribution, particularly to residential and commercial**

[68] *See, e.g.*, U.S. Responses to Panel's Second Set of Questions, paras. 24-28.

[69] China Responses to Panel's Second Set of Questions, para. 49.

[70] USITC November Report, p. 58, 60 (Exhibit CHN-2). China also has recognized that "the domestic industry did have some limited production of 72 cell modules, and won some bids supplying 72 cell modules." China Responses to Panel's First Set of Questions, para. 20.

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

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

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

installers[74]; (3) price was an important factor in the purchase of CSPV products[75]; and (4) most US producers, importers, and purchasers reported that domestic and imported CSPV products were interchangeable.[76] Please reconcile China's position with this evidence.

51. As explained below, the Commission thoroughly considered the relevant evidence in arriving at its conclusion of high substitutability between domestic and imported products.

(i) Domestic and imported CSPV products were sold in a range of wattages and conversion efficiencies, and modules were sold in both 60-cell and 72-cell forms.

52. China does not dispute that domestic producers and importers sold CSPV products in a range of wattages and conversion efficiencies, and modules were sold in both 60-cell and 72-cell forms. Rather, its sole critique is that the Commission did not consider the domestic industry's inability to meet demand in the utility segment.[77] It contends that the Commission should have analyzed whether and to what extent the domestic industry's production could be "used at scale in different market segments," and whether "their late {72-cell module} introduction in the market made this potential {to supply such modules} irrelevant for most of the POI."[78]

53. China's arguments fail because the evidence noted in this question pertained to *similarities* in CSPV products offered by domestic producers and importers rather than the extent of *availability* of such products. Far from making an "overbroad" finding as China argues, the Commission reached a reasoned conclusion based upon evidence provided by U.S. producers and U.S. importers in their questionnaire responses. It found that these market participants "generally reported sales of CSPV cell and modules within similar efficiency and wattage ranges.[79]

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[74] Footnote in text of question: Ibid.

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

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

[77] China Responses to Panel's Second Set of Questions, paras. 52-61.

[78] China Responses to Panel's Second Set of Questions, para. 61.

[79] USITC November Report, pp. 29-30 (Exhibit CHN-2); USITC November Report, p. V-22 (Exhibit CHN-3). The statements of one purchaser, NRG Energy, to assert that the domestic industry only supplied monocrystalline 72-cell modules (as opposed to multicrystalline 72-cell modules) and that its modules fell behind the conventional 72-cell modules of 360 watts do not undermine the Commission's finding. China Responses to Panel's Second Set of Questions, paras. 59-60. The evidence showed that the domestic industry supplied a wide variety of monocrystalline and multicrystalline products that overlapped with imported CSPV products, including CSPV products with 2,3,4, and 5 busbars, PERC products, farmless modules, heterojunction cells, bifacial products, and hybrid CSPV products. USITC November Report, pp. 53-54 (Exhibit CHN-3). The record further showed that modules had a power output of up to 340 watts during the POI, and U.S. importers reported sales in CSPV products

54. China's assertion that domestic producers had limited capacity to produce 72-cell modules to serve the utility segment[80] does not detract from this finding. In any event, the Commission adequately addressed this separate point in its non-attribution analysis, explaining 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.[81] That Suniva, (which had dedicated 45 percent of its cell manufacturing capacity to 72-cell modules) had to suspend operations and file for bankruptcy and SolarWorld (which had added a 72-cell module assembly line to its U.S. facilities) was forced to lay off 360 employees by July 2017 are illustrative of the adverse impact of imports on the domestic industry's capacity.[82]

55. China's other assertion that the domestic industry was "late {in its} introduction" of 72-cell modules in the U.S. market simply has no merit. The pricing data show 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, *throughout* the POI.[83]

(ii) Domestic and imported CSPV products were sold to overlapping market segments through overlapping channels of distribution, particularly to residential and commercial installers.

56. China criticizes the Commission's finding that domestic and imported CSPV products were sold to overlapping market segments through overlapping channels of distribution, particularly to residential and commercial installers, as being "quite ambiguous."[84] There is, however, nothing unclear about the Commission's finding.

57. The first part of the Commission's finding – that "{i}mported and U.S.-manufactured CSPV products were sold to overlapping market segments" – is explicit and unchallenged by China.[85] It is also supported by objective evidence in the record. Indeed, U.S. producers and U.S. importers reported commercial U.S. shipments to all three market segments – residential, commercial, and utility.[86] China attempts to downplay this reality by arguing that "domestic producers directed the majority of their output to residential market segment while importers

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within the same wattage ranges as those sold by domestic producers. USITC November Report, p. V-1 (Exhibit CHN-3).

[80] China Responses to Panel's Second Set of Questions, paras. 55-58.

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

[82] USITC November Report, pp. 34, 58, 60 (Exhibit CHN-2).

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

[84] China Responses to Panel's Second Set of Questions, para. 62.

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

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

directed their output to the utility segment."[87] Contrary to China's assertion, however, U.S. producers sold substantial amounts of CSPV products to the residential *and* commercial sectors, and they also sold products to the utility sector. Moreover, U.S. importers did not only direct their sales to the utility segment as China asserts, but they also shipped substantial amounts to the commercial and residential segment.[88] Thus, the Commission had an ample evidentiary basis for its finding of overlap of domestic and foreign products in the market segments.

58. The second part of the Commission's finding – that imported and domestically produced CSPV products were sold "through overlapping channels of distribution, particularly to residential and commercial installers" – is equally clear and also based on objective data.[89] Specifically, the Commission observed that CSPV products, whether imported or domestically produced, were generally sold in the United States to distributors, residential installers, commercial installers, and utility/developers. Based on the information reported in the questionnaire responses, the Commission found that U.S. producers sold a majority of their products to distributors (a majority of which were then sold to residential installers), a substantial amount was sold to commercial installers, and some product was sold to utilities or developers during 2012-2016. Importers also shipped their CSPV products through all three distribution channels with a substantial amount going to commercial installers and residential installers, although they sold the majority of their products to utility/developers.[90] Thus, while the distribution of sales differed, the record unequivocally showed the CSPV products product from domestic and foreign sources overlapped in all three market segments.

59. China takes issue with the Commission's particular emphasis on the overlap of sales to residential and commercial installers. It was reasonable, however, for the Commission to highlight the large segments of the market where the domestic industry and low-priced imports competed head to head. Moreover, China is wrong in its allegation that the Commission said "nothing" "about the stakeholders participating in the utility segment and whether they also participate via similar channels of distribution."[91] When this phrase is placed within the context of the complete cited sentence, it is clear that the Commission found an overlap in shipments of domestic and imported CSPV products in all the channels of distribution to the three segments,

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[87] China Responses to Panel's Second Set of Questions, para. 62.

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

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

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

[91] China Responses to Panel's Second Set of Questions, para. 63. China also provides a lengthy recitation of the differences between the channels of distribution, which does nothing to advance its assertions. *See id.* at paras. 64-67. Indeed, the Commission never stated that the channels of distribution in the residential/commercial segments versus the utility segment were the same. Rather, in reaching its finding, the Commission recognized such differences, and tabulated the amounts of commercial shipments made to each of these separate distribution channels as reported by U.S. producers and U.S. importers. *See* USITC November Report, p. 58 (Exhibit CHN-2); USITC November Report, I-28 (Exhibit CHN-3).

including to utility/developers.[92] This is confirmed by the Commission later in its determination, where it reiterates that "{d}uring the POI, the domestic industry and importers each sold CSPV products in the U.S. market to distributors, residential and commercial installers, and the utility segment."[93]

(iii) Price was an important factor in the purchase of CSPV products.

60. In challenging the Commission's finding regarding the importance of price in purchasing decisions, China simply points to a different manner of tabulating the data that would yield the result it prefers.[94] As we explain below in our comments on China's response to question 7, China's assertion of an alternative characterization does not demonstrate anything WTO-inconsistent about the Commission's analysis and findings regarding price.

(iv) Most US producers, importers, and purchasers reported that domestic and imported CSPV products were interchangeable.

61. Finally, China asserts that the questionnaire responses were "divided" with regard to the interchangeability of products.[95] China's preference to characterize findings that lean one way as being "divided" does not detract from the Commission's accurate finding that "most U.S. producers, importers, and purchasers reported that U.S.-produced CSPV products were interchangeable with imported CSPV products." Indeed, when asked about the interchangeability between product produced in the United States and other countries, 10 out of 11 U.S. producers, 33 out of 47 U.S. importers, and 78 out of 102 U.S. purchasers answered affirmatively. These numbers clearly represent "most U.S. producers, importers, and purchasers" as described by the Commission because they consisted of more than half of the total responses for each responding group.[96]

62. China also accuses the Commission of undertaking an "ambiguous" analysis.[97] Specifically, China asserts that it is unclear whether the Commission considered evidence indicating that the domestic industry's 72-cell modules were "not fit for certain market segments (i.e. utility), either because of product characteristics (i.e. monocrystalline) or volume demands" and that the industry "lagged behind the innovation curve."[98] China's arguments fail because the Commission, in fact, considered such evidence. The Commission found that purchasers did not

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

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

[94] China Responses to Panel's Second Set of Questions, paras. 68-72.

[95] China Responses to Panel's Second Set of Questions, para. 74.

[96] USITC November Report, Table V-8 (Exhibit CHN-3).

[97] China Responses to Panel's Second Set of Questions, para. 76.

[98] China Responses to Panel's Second Set of Questions, paras. 76-77.

generally specify whether they wanted monocrystalline or multicrystalline CSPV products, and that because both technologies were sold in all segments of the U.S. market, prices of multicrystalline CSPV products affected pries of monocrystalline products and *vice versa*.[99] Thus, interchangeability of products remained unaffected by the differences in crystals used.

63. Regarding China's arguments that the domestic industry did not provide innovative CSPV products that were interchangeable with imports, the Commission found that domestic producers pioneered certain CSPV technologies, and that they continued to innovate, develop, and manufacture leading-edge products.[100] The Commission acknowledged that certain foreign producers may have produced CSPV products that were unique or unavailable from other sources, but it explained that the record evidence indicated that these products accounted for only a small share of the U.S. market for CSPV products.[101] As the Commission found, imports and domestically produced CSPV products were sold within similar efficiency and wattage ranges, and CSPV modules were sold in 60-cell and 72-cell forms.[102] Moreover, despite the existence of some variations in product offerings between imports and U.S.-manufactured CSPV products, the Commission found that all CSPV products served the same function of converting sunlight into electricity, and CSPV products made from different technologies competed with each other on the basis of electrical output and cost.[103]

64. Moreover, the Commission's interchangeability finding addressed the ease in which products could be used in the same application, rather than an analysis regarding the ability to meet volume demands as China appears to believe. In any event, the Commission carefully considered the domestic industry's ability to supply the utility segment in its causation analysis, and found that any limitations of the types enumerated by respondents (and China in this dispute) were among the injurious effects of increased imports, and not an alternative cause of injury.[104]

65. In sum, none of China's assertions served to detract from the Commission's reasonable finding that most U.S. producers, importers, and purchasers reported that domestic and imported CSPV products were interchangeable.

Question 7 (China)

> **China claims that the presence of non-price factors in the competition between domestic and imported CSPV products undermines the USITC's finding that increased imports caused the domestic industry to experience adverse price**

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

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

[101] USITC November Report, p. 52 (Exhibit CHN-2).

[102] USITC November Report, pp. 53-54 (Exhibit CHN-2).

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

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

conditions.[105] Please explain why this is the case when record evidence appears to show that price was an important factor in the competition between domestic and imported CSPV products.[106]

66. In responding to this question, China wrongly accuses the Commission of: (1) "exaggerat{ing} the importance of price as the dominant explanatory factor" for purchasers' purchasing decisions; and (2) not "objectively analy{zing} the non-price factors that were also important and better explained the declining market prices for CSPV products."[107] China, however, mischaracterizes the Commission's price analysis, which properly reflected the evidence before it. Moreover, contrary to China's assertion, the Commission objectively considered and disproved that other factors alleged by respondents were responsible for declining CSPV prices.

(i) The Commission correctly found that price was important to purchasing decisions.

67. As an initial matter, the Commission did not find that price was the most important, or "dominant" or "only" factor in purchasing decisions, as China asserts.[108] Rather, the Commission explicitly 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."[109]

68. Due to this misapprehension of the Commission's findings, China's efforts to insist that other factors (performance and quality) were "the most important"[110] have no bearing on the accuracy of the Commission finding that price was "an" important factor. China simply disagrees with the manner in which the Commission tabulated or weighed the purchaser questionnaire response data in the following five categories: (1) U.S. purchasers' ranking of factors used in purchasing decisions; (2) U.S. purchasers' frequency of purchase decisions based on price; (3) U.S. purchasers' cited reasons for purchasing higher price products over lower priced products; (4) U.S. purchasers' primary reason for purchasing imported rather than domestic products; and (5) U.S. producers' responses indicating the need to reduce prices and/or

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

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

[107] China Responses to Panel's Second Set of Questions, paras. 79-94.

[108] *See* China Responses to Panel's Second Set of Questions, para. 79. China elsewhere contradicts its own argument by itself recognizing earlier in its submission that "although the USITC concluded that price was an important factor in the purchase of CSPV products, it never concluded that it was the 'most important factor.'" China Responses to Panel's Second Set of Questions, para. 69.

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

[110] China Responses to Panel's Second Set of Questions para. 81.

roll back announced price increases to compete with imported CSPV products.[111] China's alternative characterizations of the data, however, do nothing to demonstrate any way that the Commission's analysis and finding that price was an important purchasing factor was not objective or adequate.

69. 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)."[112] Although China argues that the Commission should have focused exclusively on the purchasers' reported first and second most important factor (quality/performance), China acknowledges that purchasers considered various factors in their purchasing decisions.[113] Given this, it was entirely reasonable for the Commission to have considered the three factors most often considered by purchasers, which included price. Moreover, as the Commission found, most U.S. producers, importers, and purchasers reported that U.S.-produced CSPV products were interchangeable with imported CSPV products.[114] Price, which was the most frequently cited next most important factor in purchasing decisions, would have served as the differentiating factor between imports and domestically produced CSPV products. As the Commission noted, even respondent SEIA acknowledged, "We are competing on price and price alone. If you change the underpinnings of that, it undermines what we're doing."[115]

70. The Commission's finding of price as an important purchasing factor finds further support in U.S. purchasers' reporting of the frequency with which they based purchasing decisions on price. As demonstrated in Table V-5, of the 105 responding purchasers, only 23 purchasers reported that they never purchased the lowest-priced product. On the other hand, the vast majority – 79 purchasers – reported that they sometimes or usually purchased the lowest-priced product.[116] China, however, asserts that such "evidence suggests that non-price factors were more often the reason why purchasers purchased a product," and "serves to highlight the fact that quality/performance was most frequently cited as the first and most important factor in purchasing decisions."[117] China's depiction of the data in a manner that supports its own position does not render the Commission's finding that price was an important factor in

[111] China Responses to Panel's Second Set of Questions paras. 82-88.

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

[113] China Responses to Panel's Second Set of Questions, para. 83.

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

[115] USITC November Report, p. 30 n.146 (Exhibit CHN-2).

[116] USITC November Report, Table V-5 (Exhibit CHN-3).

[117] China Responses to Panel's Second Set of Questions, para. 84.

purchasing decisions, unreasonable, particularly in light of the substantial number of purchasers that sometimes or usually purchased the lowest-priced product.

71. Nor is the Commission's finding on the importance of price invalidated by the fact that 64 of the 105 responding purchasers reported an instance of buying a product from a source despite the availability of a comparable product at a lower price from another source.[118] China asserts that these data "show[] that a majority of purchasers chose higher-priced products over lower-priced products due to other non-price factors."[119] China overgeneralizes the data and overlooks that this question did not elicit answers as to the frequency that purchasers would forego purchasing comparable, but lower-priced CSPV product. Rather, it simply asked that "if" purchasers *ever* purchased CSPV product from one source although a comparable product was available at a lower price from another source, to report that reason.[120] Thus, the data cited by the Commission on whether purchasers always/usually/sometimes/never purchased the lowest priced product provides better evidence of the overall situation.

72. China's response 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.[121]

73. In its efforts to undermine the Commission's finding about the importance of price, China accuses the Commission of misrepresenting the facts on the record.[122] But China's use of this accusatory language does not change the theme of its grievance – that it would have preferred that the Commission had weighed or characterized the facts in a different manner so as to reach the result China desires. And, it provides *no* evidence to support its allegation of

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[118] USITC November Report, p. V-14 (Exhibit CHN-3). What also appears to be established by these responses is the fact that 41 U.S. purchasers had not provided any reason at all, suggesting that they had *always* purchased the lower priced CSPV product when faced with comparable product from different sources.

[119] China Responses to Panel's Second Set of Questions, para. 85.

[120] USITC November Report, p. V-14 (Exhibit CHN-3) (emphasis added).

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

[122] China Responses to Panel's Second Set of Questions, para. 81.

misrepresentation. The Commission presented the relevant data clearly and accurately. China's disagreement with the conclusions that the Commission drew does not justify such an accusation.

74. According to China, 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.[123] As the Commission explained, however, purchasers identified a variety of different non-price reasons for their purchasing imported product rather than domestically produced product.[124] 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, comparing the total number of purchasers that cited price to the total number of purchasers that cited non-price reasons (despite that there were an array of non-price reasons). That the evidence could be weighed or presented differently, however, does not undermine 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.[125]

75. Finally, as the Commission observed, the "domestic industry reported having to reduce prices and/or roll back announced price increases to compete with imported CSPV products."[126] Again accusing the Commission of misrepresenting the facts, China asserts that the "evidence actually shows that the majority of the domestic producers did not report having to reduce prices or roll back announced price increases with imported CSPV products."[127] China is simply wrong. In support of its assertion, China argues that "only 3 of 8 domestic producers had to roll back planned price increases,"[128] but China omits the part of the same sentence from the Commission's report that addresses producers' *price reductions* due to import competition. The complete sentence states that "{o}f the 12 responding U.S. producers, eight reported that they had to reduce prices and three reported that they had to roll back announced price increases in order to avoid losing sales to competitors selling imported CSPV products since 2012."[129] Thus, not only does this evidence support the Commission's finding about price reductions and roll backs, but it also directly contradicts China's characterization of what was reported by the majority of domestic producers. In fact, opposite to China's assertion, the majority of domestic

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[123] China Responses to Panel's Second Set of Questions, para. 86.

[124] 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).

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

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

[127] China Responses to Panel's Second Set of Questions, para. 87.

[128] China Responses to Panel's Second Set of Questions, para. 87.

[129] USITC November Report, p. V-28 (Exhibit CHN-3).

producers (at least eight of twelve) reported either price reductions or roll backs of planned price increases

76. In light of the totality of the evidence, the Commission reasonably found that price was an important factor.

(ii) The Commission reasonably determined that other factors alleged by respondents were not responsible for the price declines.

77. The Commission did not "largely ignore{}" respondents' arguments that declining costs (resulting from declining raw material costs, increasing efficiency, and technological innovation) affected prices during the POI.[130] As discussed in detail in the United States' prior submissions, the Commission carefully considered all the relevant evidence.[131] The Commission observed that notwithstanding the declining costs – which should have benefitted the domestic industry – the domestic industry remained unprofitable as it continued to incur hundreds of millions of dollars in losses over the POI. The Commission explained that even as costs declined, the domestic industry's net sales values also declined, with the industry's COGS to net sales ratio exceeding 100 percent in 2016, leading to further deterioration of the industry's financial condition.[132] Thus, rather than being able to take advantage of lower overall costs, the domestic industry was forced to reduce prices at a pace that canceled out and even surpassed decreasing costs.[133] China's argument on this alternative cause fails to consider the context of the domestic industry's dismal financial condition and reconcile why domestic producers would purposefully refuse to take advantage of the opportunity to improve profitability as costs declined. Thus, contrary to China's assertion that the lower prices were a result of decreasing costs, 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 costs.[134]

78. China's reliance on the Commission's *CSPV II* determination is unavailing.[135] First, China's assertion that the Commission's analysis of price in this investigation should have relied on the same price factors that it relied upon in the antidumping and countervailing duty

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[130] China Responses to Panel's Second Set of Questions, paras. 89-94.

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

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

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

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

[135] China Responses to Panel's Second Set of Questions, paras. 89-94 (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.

investigations ignores that the requirements of the Safeguards Agreement differ from those of the Antidumping Agreement and SCM Agreement. Whereas the Antidumping and SCM Agreements require investigating authorities to consider, among other things, whether the subject imports have had significant price depressing or suppressing effects,[136] the Safeguards Agreement contains no such requirement. Thus, China's citation to the Commission's finding of no price depression by reason of the imports in the antidumping and countervailing duty investigations has no bearing on whether the Commission complied with the requirements of the Safeguards Agreement.[137]

79. Furthermore, although the two sets of investigations cover somewhat overlapping periods, the *CSPV II* POI began and ended (January 2011 through June 2014) earlier than the period covered in the safeguard investigation (January 2012 through December 2016), and contained different data. Indeed, whereas in *CSPV II*, the Commission found that between January 2011 and June 2014, prices declined overall for both the imports and the domestic like product, the Commission in this safeguard investigation found that the prices declined in 2012, stabilized after imposition of the *CSPV I* order and initiation of the *CSPV II* investigations, and then experienced steep declines in 2016 as Chinese producers moved their production facilities offshore to circumvent the orders and CSPV imports surged into the U.S. market. The stabilization of prices that occurred between 2013-2015 in the face of declining raw material costs, and "continuous technological innovation" and increasing efficiencies, served to disprove any link between prices and declining costs, unlike in the *CSPV II* investigations.

80. China also argues that any price differences between the domestic like product and lower-priced imports were due to "the domestic industry's higher costs and efficiency issues that resulted in the domestic industry's inability to keep up with and capitalize on these industry-wide trends."[138] China, however fails to cite any evidentiary support in the record of this investigation for this point. Nor does China explain the overall relevance of these unsupported assertions to its contradictory point that declining (*i.e.*, lower) costs and increased production efficiencies explained the declining prices for CSPV products.

Question 8 (China)

> **China claims that it was unreasonable for the USITC to consider that the main driver of price trends over the POI was the interrelationship between the source and volume of CSPV imports and effectiveness of *CSPV I* and *CSPV II* orders.[139] However, Exhibit CHN-60, which was originally filed by the Solar Energy Industries Association in the safeguards investigation, states that: "In the past few years, U.S. module price trends were largely driven by antidumping and countervailing duties on Chinese suppliers. But recently the main driver has shifted; current module price**

[136] Antidumping Agreement, Article 3.2; SCM Agreement, Article 15.2.

[137] China Responses to Panel's Second Set of Questions, paras. 91-92.

[138] China Responses to Panel's Second Set of Questions, para. 89.

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

trends are largely a result of supply-demand imbalance".[140] As the USITC appears to have relied upon this report in its analysis of price trends[141], please explain why China considers that the USITC's characterization of price trends was not reasoned and adequate, particularly in light of this evidence.

81. China asserts that the Commission's characterization of price trends was not reasoned and adequate because it "selectively focused on particular isolated pieces of evidence to make its point, without objectively considering the evidence as a whole."[142] This is not the case. In fact, the Commission examined the entirety of the relevant evidence. Specifically, it carefully scrutinized the pricing data submitted by U.S. producers and U.S. importers and analyzed the pricing trends within the context of the *CSPV I* and *II* orders, the changing composition of imports as Chinese producers shifted their production facilities offshore to other third countries not covered by orders, and the resulting volume of imports that increased 491.4 percent between 2012 and 2016 (and fifty percent just from 2015 to 2016).

82. Based upon its consideration of the entirety of the evidence, the Commission found:

> Prices declined substantially in 2012, but stabilized somewhat after imports from China became subject to antidumping and countervailing duty orders in December 2012, additional investigation on imports from China and Taiwan were commenced at the end of 2013, and imports grew at a slower pace than apparent U.S. consumption between 2013 and 2014. As imports from additional sources entered the U.S. market and rapidly increased to higher volumes, however, the domestic industry's prices steadily fell throughout 2016. Several purchasers also reported steeper reductions in 2016, as the domestic industry's share of the market fell to its lowest level.[143]

83. The Commission's analysis of the pricing data further revealed that the decline in prices between the fourth quarter of 2015 and the fourth quarter of 2016 (ranging between 18.3 percent to 31.7 percent for all pricing products) were twice as large as the price declines between the first quarter of 2015 and the first quarter of 2016 (ranging between 9.2 percent to 14.7 percent for all five pricing products).[144]

84. Other relevant evidence provided further corroboration of the Commission's findings. As the Commission observed, respondent SEIA's own publications, including the SEIA "U.S. Solar

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

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

[142] China Responses to Panel's Second Set of Questions, paras. 95-100.

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

[144] USITC November Report, p. 46 n.252 (Exhibit CHN-2).

Market Insight: Executive Summary, 2016 Year in Review" referenced in this question, confirmed that prices for both cells and modules declined steeply in 2012, but then began to increase and stabilize through the fourth quarter of 2013 and 2014, driven primarily by the *CSPV I* and *II* orders imposed on Chinese and Taiwanese cells and modules. SEIA's industry reports further indicated that by the first quarter of 2016, prices of both cells and modules began to fall, which was due to an imbalance between supply and demand.[145]

85. Notwithstanding the Commission's comprehensive analysis, China argues that the Commission ignored "evidence of broader price trends," specifically, that "between the 1976-2016 time period, prices have fallen (on average) by 11.9 percent per year," but that during the POI, "the annual average price decline was actually 9.3 percent which was slower than the industry's longer-term historical norm."[146] China contends that "{w}hat this data suggests is that whatever effect the AD/CVD orders may have had during part of the POI, more generally, compared to earlier time periods such orders were actually having little effect over the full POI."[147] The Commission, however, did examine broader price trends, finding that during this period of substantial and growing volumes of low-priced imports, prices for all five pricing products declined overall between January 2012 and December 2016, with prices of imported CSPV products declining 45.7 percent to 51.0 percent and prices of U.S.-manufactured products declining 48.5 percent to 73.2 percent.[148] In any event, China's assertion, rather than undermine the Commission's analysis, in fact fully supports the Commission's finding that the antidumping and countervailing duty measures, despite having an initial favorable impact on prices, had limited effectiveness due to rapid changes in the global supply chains and manufacturing processes.[149]

86. In sum, the Commission demonstrated that it reasonably evaluated all of the relevant evidence, fully satisfying its obligations under the Safeguards Agreement.

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[145] USITC November Report, p. 46 n.253 (Exhibit CHN-2); USITC November Report, pp. V-9, V-27 (Exhibit CHN-3); SEIA's Prehearing Brief, Exhibit 36-B at 16 (Exhibit CHN-60).

[146] China Responses to Panel's Second Set of Questions, para. 96.

[147] China Responses to Panel's Second Set of Questions, para. 96.

[148] USITC November Report, p. 45 (Exhibit CHN-2). To the extent that China argues that the Commission should have considered price trends beginning from 1976, the Commission collected pricing data for the period examined – 2012 to 2016.

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

Question 9 (China)

> **China appears to argue that the fact that the domestic industry increased its production and shipments during the POI means that the domestic industry did not lose sales to imports.[150] Is this China's argument? If so, please explain.**

87. China's response to this question confirms its position that "the fact that the domestic industry increased its production and shipments during the POI means that the domestic industry did not lose sales to imports,[151] which highlights the fallacy of its arguments. As occurred in this investigation, producers can increase production and increase the volume of their shipments, but still lose sales to other sellers (such as importers). This is especially so where, as here, demand is exploding

88. In fact, as the record in this investigation shows, and the Commission found, seven domestic producers reported that they had lost sales to imports since 2012,[152] with four of those producers estimating that their lost sales totaled 950,000 kW. Another domestic producer, which did not provide a quantity estimate, reported lost sales totaling $148.7 million.[153]

89. The Commission also found that price was a primary reason for these lost sales to a substantial number of purchasers. As the Commission explained, imports that were highly substitutable with the domestic like product sold for lower prices in 33 of 52 instances involving approximately two-thirds of the total volume of comparisons, and a substantial number of purchasers confirmed that domestic producers lost sales to low-priced imports.[154] Specifically, of the 104 responding purchasers, 91 reported that they had purchased imported CSPV products instead of the domestic like product. Seventy-three of these purchasers reported that import prices were lower than that of the domestically produced product, and 33 reported that price was a primary reason for their decision to purchase imported products over products manufactured in the United States.[155]

90. The data reflecting the volumes of domestic shipment further demonstrates that, even as the domestic CSPV industry increased its production and shipments, it lost sales to the surging

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

[151] China Responses to the Panel's Second Set of Questions, para. 101.

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

[153] USITC November Report, p. V-28 (Exhibit CHN-3). Moreover, domestic producers reported that they were forced to reduce prices to avoid losing sales to imports. *See id.*

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

[155] USITC November Report, p. V-30 (Exhibit CHN-3).

imports, which increased by 492.4 percent from 2012 to 2016.[156] Indeed, in all but one year of the period of investigation (2013/2014), imports increased at a greater rate than apparent U.S. consumption.[157] In other words, imports not only captured the entirety of the explosive increase in demand, but also took existing sales volume from the domestic industry, ensuring their dominant position in the U.S. market directly at the expense of the domestic industry.

Question 10 (both parties)

> **China relies upon Table V-19 of the USITC Staff Report to argue that the domestic industry's market share increased consistently in the second half of the POI as imports reached their peak.[158] By contrast, the USITC referred to Tables IV-4 and C-1b of the USITC Staff Report in its finding that the domestic industry's market share, as a share of domestic US consumption, declined in 2012-2013, increased in 2013-2014 as imports slowed, and decline anew in 2015-2016 as imports peaked.[159]**
>
> **a.** ***(To China):*** **Please explain why it was unreasonable for the USITC to rely upon this evidence to support its finding that the domestic industry lost market share as a result of increased imports.**

91. In its response, China does not dispute that Tables IV-4 and C-1b, which were based upon shipment data reported by U.S. producers and U.S. importers in their questionnaire responses, accurately depict the domestic industry's market shares over the period of investigation. Rather, China's criticisms of Tables IV-4 and C-1b simply stem from the fact that these tables contain redacted information. In this regard, China justifies its reference to Table V-19 for information regarding the domestic industry's market shares.[160]

92. As an initial matter, that the information contained in Tables IV-4 and C-1b was confidential does not, as China asserts, make it reasonable to use an inapposite table – Table V-19 – for market share information. As China even acknowledges, Table V-19 provides only a "summary of how responding purchasers allocated their volume between domestic and foreign supply sources."[161] The United States also explained in its response to this question that Table V-19, which was based upon information reported in U.S. purchasers questionnaire responses, did not cover the entirety of the market and, thus, was not intended to depict and did not

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[156] USITC November Report, p. 21 (Exhibit CHN-2). Imports as a ration to domestic production also increased overall and, in each year, from 733.9 percent in 2012, 948.4 percent in 2013, 1,140 percent in 2014, 1,593.5 percent in 015, and 2,276 percent in 2016.

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

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

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

[160] China Responses to Panel's Second Set of Questions, paras. 109-113.

[161] China Responses to Panel's Second Set of Questions, para. 114.

accurately represent, the entirety of the market or the domestic industry's market shares.[162] China's reliance upon Table V-19 is therefore misplaced.[163]

93. Even though the public version of the USITC November Report did not reveal the BCI data concerning market shares, the Commission was able to provide a detailed analysis of how the domestic industry's market shares correlated with import volumes over the course of the period of investigation, which supported its finding of a direct causal link between increased imports and the domestic industry's serious injury. Specifically, the Commission explained that in 2009, the beginning of the period of investigation in the *CSPV I* investigations, the domestic industry held the *largest* share of apparent U.S. consumption, followed by imports from China. However, imports from China overtook the domestic industry's U.S. shipments by 2010, and by 2011, imports from China had nearly doubled from their 2009 level.[164]

94. The *CSPV I* orders were issued in December 2012, but as the Commission found, before the imports covered by the scope of those orders receded from the U.S. market, imports from China and Taiwan corresponding to the scope of the *CSPV II* investigations increased their presence, almost completely replaced the substantial market share previously held by the *CSPV I* imports from China, and then took additional market share.[165] And 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 and reach their pinnacle in 2016.[166]

95. The Commission linked the increasing import volumes to the declines in the domestic industry's market shares, finding that the domestic industry's share of apparent U.S. consumption fell from 2012 to 2013, increased somewhat in 2014 as prices stabilized while imports grew at a slower pace than apparent U.S. consumption due to the *CSPV I* and *II* orders, but then declined anew in 2015 and to a period low in 2016 as imports peaked.[167] In doing so, the Commission properly explained how the overall increasing imports trends coincided with trends in serious injury factors pertaining to the overall poor and deteriorating situation of the domestic industry. The Commission's detailed analysis, which referenced and summarized that

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[162] U.S. Reponses to Panel's Second Set of Questions, paras. 14-15.

[163] In any event, Table V-19, which shows that the industry's market share declined from 5.2 percent in 2012 to 4.6 percent in 2016, does not support China's assertion that "domestic suppliers were able to maintain and even expand somewhat their share of total purchaser volume." China Responses to Panel's Second Set of Questions, para. 116.

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

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

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

[167] USITC November Report, p. 37 (Exhibit CHN-2).

data contained in Tables IV-4 and C-1b, fully satisfied the obligations under SGA Article 3.1 and 4.2(b).

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

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

Question 11 (both parties)

The United States argues that "the domestic industry's lack of capacity was a *result* of serious injury caused by increased imports, not, as China argues, an independent cause of injury".[168] In this regard, does the second sentence of Article 4.2(b) of the Agreement on Safeguards require that an "other" factor of injury must be independent from increased imports? If so, to what extent?

96. China's response to this question concedes that the phrase "factors other than imports" in Article 4.2(b) "cannot plausibly be read in any other way"[169] than confirming that such factors must be "different" from increased imports. The U.S. response to this question pointed to numerous other elements of the text indicating that the injurious effects of increased imports are not "other factors" causing injury for purposes of Article 4.2(b), and that the nonattribution language in that provision does not apply to such effects. China nevertheless tries to blur the necessary distinction between causes and effects in support of its illogical argument that capacity constraints caused by increased imports were themselves a cause of serious injury. China's argument, however, does not counter the fundamental understanding that the second sentence in Article 4.2(b) must refer to causes of injury that are not themselves the effects of increased imports.

97. China starts by offering a dictionary definition of the term "other" as "(1)'that is different or distinct from one already mentioned or known about, but also (2) further, additional.'"[170] China argues that "neither of these meanings goes so far as to require an 'other factor' to be completely independent and separate from imports."[171] This is incorrect, as "different or distinct" means exactly that. To the extent that China is relying on "further, additional" as supporting its assertion, it is inserting words into the question that are not there. The Panel did

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

[169] China's Response to Panel's Questions to Parties Following the First Substantive Meeting, para. 118.

[170] China's Response to Panel's Questions to Parties Following the First Substantive Meeting, para. 119.

[171] China's Response to Panel's Questions to Parties Following the First Substantive Meeting, para. 119.

not ask whether an "other factor" must be "*completely* independent and separate." Such a reading of the question is illogical, as Article 4.2(b) presupposes that a relevant "other factor" is "causing injury to the domestic industry at the same time." In light of the dictionary definitions cited by China, "other factors" can only be understood as those that are different from or additional to increased imports, and not those that are derived from increased imports.

98. China's citations to past appellate and panel reports confirm this conclusion. In *US – Wheat Gluten*, the Appellate Body found that "The USITC . . . makes an explicit link between the profitability of the domestic industry and the rate of capacity utilization."[172] The Appellate Body analyzed the interplay between the increase in imports, the growth in the domestic industry's capacity, and the decrease in the capacity utilization rate, and concluded that the USITC determination was inconsistent with Article 4.2(b) because it failed to adequately evaluate "whether the increases in average capacity, during the investigative period, were causing injury to the domestic industry at the same time as increased imports."[173] Unlike in this case, the growth in capacity was independent of the increased imports. The United States argued, and the Appellate Body did not dispute, that the growth in domestic capacity began before the surge in imports, and slowed afterwards.[174] The relevant "effect" was the low capacity utilization rate, which depressed the industry's profitability, and which the Appellate Body did not find to be an "other cause."[175] Thus, *US – Wheat Gluten* supports the conclusion that the effects of increased imports are not properly treated as "other factors," for purposes of Article 4.2(b).

99. Paragraphs 126 to 128 repeats China's arguments from previous submissions that the evidence does not support the ITC's finding that increased imports are responsible for the domestic industry's low levels of capacity.[176] These assertions are not relevant to the Panel's question, which addresses the interpretation of "factors other than increased imports" as a legal matter. The United States has rebutted China's assertions in the U.S. First Written Submission, paras. 121-125; the U.S. Responses to the Panel's First Set of Questions, paras. 11-13; and the U.S. Comments on China's Responses to Panel's First Set of Questions, paras. 11-12.

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[172] *US – Wheat Gluten (AB)*, para. 84.

[173] *US – Wheat Gluten (AB)*, para. 91.

[174] *US – Wheat Gluten (AB)*, paras. 87-99.

[175] *US – Wheat Gluten (AB)*, para. 85.

[176] China also contradictorily asserts that the domestic industry's increase in capacity, which it identified as a positive factor, was also an "other factor" causing injury to the domestic industry. China Responses to Panel's Second Set of Questions, paras. 127-128. Of note, no respondent party identified this as an "other factor" during the proceedings before the USITC, which is not surprising since increasing capacity during a time of unprecedented growth in demand makes perfect economic sense, and could hardly be viewed as a factor causing injury.

Question 12 (both parties)

> **Are the competent authorities required to explain in their published report (1) how they weighed competing evidence and arguments submitted by interested parties in the safeguards investigation; and (2) why they considered the evidence of certain interested parties to be more compelling? Please explain.**

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

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

102. That is exactly what China seeks to do. It seeks to frame the task as one where a competent authority must "explain its reasoning in a manner that makes sense and is supported by objective evidence on the record," which "needs to be satisfactory in light of all relevant fact and more reasonable than other plausible explanations."[177] However, its critique of the USITC applies these principles in an unreasonably extreme way.

103. For example, it accuses the USITC of failing to address "all the evidence" because it summarized parties' positions ("the USITC set up many issues as 'petitioner argued on the one hand' and 'respondents replied on the other hand'") and did not reference every point made by every respondent ("complaints against Suniva by DEPPCOM, Borrego, NRG Energy, Silfab Solar, and SunPower are not even mentioned.").[178] But the Safeguards Agreement does not

[177] China's Response to Panel's Questions to Parties Following the First Substantive Meeting, para.137.

[178] China's Response to Panel's Questions to Parties Following the First Substantive Meeting, para. 138.

require the competent authorities to address every single assertion made by every party. The USITC cited relevant assertions by petitioners and respondents, provided specific allegations as examples, and explained why petitioners' rebuttals led them to discredit the allegations – generally because other statements by the respondents showed the allegations to be insubstantial.[179] The Commission also considered these allegations within the context of other relevant evidence, including questionnaire responses from 104 purchasers and found that, in any event, these specific allegations failed to demonstrate any "widespread" delivery and service problems. This approach of references and examples provides a "reasoned explanation" for the USITC's conclusion, and China provides no basis to believe that the examples were unrepresentative or that other evidence would have led to a different conclusion.

104. A discussion of this one issue demonstrates the flaw with China's approach. It is always possible to find something in a large administrative record – a piece of evidence or an argument – that the competent authorities did not explicitly address. To treat such omissions as a failure to provide "findings and reasoned conclusions" would foreordain a finding of WTO inconsistency in every case.

105. China does not dispute that Article 3.2 requires competent authorities to protect BCI from disclosure to the public, but nonetheless criticizes the USITC for redacting BCI from its public report, arguing that "a mere reference to confidential information is not sufficient for the purposes of providing a 'detailed analysis' as requirement by Article 4.2(c)."[180] Article 3.2's explicit provisions for collection and protection of BCI recognize that BCI may be critical for making the determination called for in Article 4.2(a), and that parties will not provide such information absent assurances that it will be protected. Thus, to argue – as China does – that the mere fact of redactions evidences a failure to provide findings and reasoned conclusions would make it impossible for competent authorities to comply with the Safeguards Agreement.

106. Similarly, China extrapolates the obligation to publish "reasoned conclusions" into a requirement that competent authorities "specifically explain the reasoning followed to reach a conclusion on the basis of all information considered."[181] The disconnect is obvious – a "reasoned conclusion" need not address "all information considered." It need only demonstrate why the authorities reached the conclusion they did. China's specific critique demonstrates the error of this China's approach. It asserts that the analysis on page 61 of the USITC November Report merely "referred to petitioners' allegations" and did not explain why it considered them "more compelling."[182] But the USITC's analysis does more. It summarizes both sides' arguments, and provides specific examples of the evidence cited. It then explains that other public statements by NEXTracker contradicted the assertions it made to the Commission. The

[179] USITC November Report, p. 61, notes 354-356 (Exhibit CHN-2).

[180] China's Response to Panel's Questions to Parties Following the First Substantive Meeting, para. 139.

[181] China's Response to Panel's Questions to Parties Following the First Substantive Meeting, para. 143.

[182] China's Response to Panel's Questions to Parties Following the First Substantive Meeting, para. 144.

analysis then cites other instances in which the petitioners provided "documentation responding to allegations regarding transactions with DEPCOM, California Sola System, Borrego, and Sunrun."[183] The reasoning is obvious – petitioners provided documentation disproving allegations that they "had delivery and service issues or failed to compete for certain sales."[184] No further explanation is necessary. When one party makes a claim that the other successfully refutes, it has failed to meet its burden of proof.

107. Article 3 broadly provides that a competent authority must "publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." Article 4.2(c) adds that "competent authorities shall publish promptly, in accordance with the provisions of Article 3, a *detailed analysis* of the case under investigation as well as a *demonstration of the relevance of the factors examined*." (emphasis added). Therefore, a competent authority must publish a report that contains a "detailed analysis" of the case that explains the conclusions reached on the relevant issues. A competent authority carries out its responsibilities even if the published report does not include a detailed refutation to each argument, or subcomponent of an argument, that an interested party may raise to challenge arguments and evidence that the competent authority ultimately finds more convincing.

Question 13 (both parties)

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

108. In responding to this question, the United States detailed how the Commission provided a reasoned and adequate explanation, based on the totality of the evidence, that the domestic industry did not have "widespread" delivery and service problems.[185] China's criticisms of the Commission's discussion on this issue simply reflects China's preference for a different weighing of the evidence, and do not demonstrate any inconsistency with U.S. obligations under the Safeguards Agreement.

> **a. Domestic and imported CSPV products were highly substitutable. The degree of substitution between domestic and imported CSPV products depended upon such factors as relative prices, quality, and conditions of sale.[186]**

109. China acknowledges that "substitutability accounts for multiple factors in addition to physical characteristics, including relative prices, quality (e.g., standards, reliability of supply,

[183] USITC November Report, p. 61, notes 354-356 (Exhibit CHN-2).

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

[185] U.S. Responses to Panel's Second Set of Questions, paras. 24-28.

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

defect rates, etc.), and conditions of sale (e.g., price discounts/rebates, lead times between order and delivery dates, payment terms, product services, etc.)."[187] However, it asserts that the Commission "disregarded" conflicting evidence indicating lack of substitutability.[188] China's argument fails because the Commission examined all the relevant evidence in reaching its substitutability finding.

110. The Commission found that, throughout the period of investigation, U.S. producers and importers made commercial shipments of a wide variety of CSPV products, predominantly in the form of modules. It further found that imported and domestically produced products were sold in a range of wattages and conversion efficiencies, and modules were sold in both 60-cell and 72-cell forms. Moreover, CSPV products from both domestic and foreign sources were sold to overlapping channels of distribution, particularly to residential and commercial installers. Although purchasers considered a variety of factors in their purchasing decisions, price continued throughout the period of investigation to be an important factor, and most U.S. producers, importers, and purchasers reported that U.S.-produced CSPV were interchangeable with imported CSPV products.[189]

111. To the extent that any delivery and service issues such as those alleged by respondents would have been expected to limit substitutability between domestic and imported CSPV products, the Commission found that this was not the case, as most market participants (including purchasers) viewed them as being interchangeable, with price being an important purchasing factor.[190] As the Commission noted, even respondent SEIA acknowledged that "{w}e are competing on price and price alone. If you change the underpinnings of that, it undermines what we're doing."[191]

112. Notwithstanding this thorough analysis, China contends that the Commission did not consider certain pieces of evidence. Its argument repeats many of the same arguments made in response to Panel questions 6 and 7. The U.S. comments on China's responses to those questions demonstrate that the Commission reasonably considered the entirety of the evidence, including questionnaire responses, alleged differences in technological differentiation, and availability between domestic and foreign product. China's efforts to reweigh the evidence in a manner that supports its theory of a lack of interchangeability does nothing to detract from the reasonableness of the Commission's finding.

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[187] China Responses to Panel's Second Set of Questions, paras. 151-155; *see also* USITC November Report, p. V-13 (Exhibit CHN-3).

[188] China Responses to Panel's Second Set of Questions, paras. 151-153.

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

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

[191] USITC November Report, p. 30 n.146 (Exhibit CHN-2).

113. In addition to repeating assertions made in its responses to questions 6 and 7, China notes the existence of "different certification requirements and standards among the many different countries providing CSPV products."[192] China, however, fails to provide any meaningful explanation of how such differences indicate a lack of substitutability between domestic and imported CSPV products *that are sold in the U.S. market*. Indeed, the only certification requirements that were relevant to the Commission's finding on interchangeability were those demanded by U.S. purchasers, most of whom considered domestic and imported products to be interchangeable.

114. China's reliance upon purchasers' reported reasons for not purchasing domestic product, which included "limited availability and no possibility to send stand-alone CSPV products," and reasons for decreasing purchases of domestically produced product, which included "lack of availability as well as longer-lead times," is equally unavailing.[193] Only seven out of the 104 responding purchasers provided such reasons for not purchasing domestic product. And although seventeen purchasers reported decreasing purchases of domestically produced product, the reasons for doing so included "lower import prices." Consistent with this, the most often cited reason for increasing purchases of imports was lower prices.[194] Such evidence of lower import prices as a frequent reason in purchasers' decisions to purchase more imports supports the Commission's finding and serves to disprove China's contentions of limited substitutability.

b. Most purchasers reported that no domestic or foreign supplier had failed in its attempt to qualify product, or had lost its approved status, since 2012.[195]

115. In responding to the evidence noted in part (b), China asserts that the Commission "overstated the responses of the majority of the purchasers while ignoring the conflicting evidence on the experience of other purchasers."[196] To the contrary, the Commission carefully considered the totality of the evidence and did not make any overstatement regarding the purchasers' questionnaire responses.

116. The purchasers' questionnaire responses showed that 19 out of 95 responding purchasers reported that a domestic or foreign supplier had failed in its attempt to qualify 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."[197] Thus, as the Commission found, most, and indeed the vast majority of purchasers who responded to the question (the remaining

[192] China Responses to Panel's Second Set of Questions, para. 152.

[193] China Responses to Panel's Second Set of Questions, para. 155.

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

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

[196] China Responses to Panel's Second Set of Questions, para. 157.

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

76 of the 95 responding purchasers) did not report having any issues with domestic producers' qualification of their products.

117. Other relevant evidence further corroborated the domestic industry's ability to provide quality products. The USITC noted that the independent research firm EuPD Research ranked SolarWorld's CSPV products as the most purchased brand by U.S. installers.[198] And SolarWorld and Suniva reported that their warranty claim rates were low. Specifically, SolarWorld informed 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 rate was far lower than many other producers.[199] Suniva also reported that its claim rate was 0.05 percent – compelling evidence of the excellent quality of their products.[200]

118. China asserts that certain purchasers' quality and service concerns detracted from this finding. The Commission, however, considered and found that the specific criticisms from a small number of purchasers lacked merit and, in any event, did not demonstrate the existence of "widespread problems."[201] Indeed, China itself points to only four purchasers – NEXTracker, Depcom, Sunrun, and Vivint – as either having disqualified or never granted approved status to SolarWorld and/or Suniva.[202] But, as the Commission found, the evidence did not even support these four purchasers' criticisms of the quality of the domestic industry's CSPV products. Indeed, NEXTracker's website still listed SolarWorld as an approved vendor and SolarWorld continued to supply CSPV products for NextTracker's projects.[203] DEPCOM also continued to use SolarWorld's modules.[204]

119. Moreover, 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 had nothing to do with quality concerns. The evidence shows that the real obstacle for SolarWorld was its refusal to release intellectual property demanded by Sunrun, and for Suniva, the fact that the two firms were too far apart on price.[205] Regarding the companies' lack of participation in Vivint Solar's quality assurance program, respondents' own evidence demonstrates that this also was not due to product quality concerns. Rather, SolarWorld refused to commit to a 60-day lead

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

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

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

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

[202] China Responses to Panel's Second Set of Questions, paras. 158-159.

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

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

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

time for delivery and Suniva had not provided the information and documentation necessary for Vivint Solar to consider Suniva for its qualification process.[206]

c. In 2015, there were several thousand residential solar installers in the United States most of which were relatively small firms, and over 1,000 non-residential installers.[207]

120. China does not dispute that there were several thousand residential solar installers in the United States, most of which were relatively small firms, and more than 1,000 non-residential installers. It instead attempts to discount this evidence as failing to provide proper context for the small number of purchasers that had complained about service and delivery problems. Specifically, China asserts that domestic producers "fundamentally sold their product to distributors" and not installers.[208] China's assertion fails because it does not accurately represent or account for all of the evidence.

121. U.S producers reported that they sold a "substantial amount" of CSPV products to commercial installers as well as to distributors.[209] U.S. producers also sold to residential installers. China itself references a complaint regarding Suniva's modules made by purchaser California Solar System, a residential installer.[210] Moreover, distributors, which sold product to residential installers would have direct knowledge regarding any quality issues.[211] Consequently, that there were thousands of residential and non-residential installers in the U.S. CSPV market is certainly information that is relevant to the Commission's analysis of the alleged service and delivery issues.

122. Moreover, the Commission received U.S. questionnaire responses from 106 purchasers, and found that the vast majority reported that no domestic supplier had failed in its attempt to qualify product, or had lost its approved status in 2012.[212] That the sheer number of purchasers did not report having delivery and/or service issues with domestic producers provides compelling evidence for the Commission's reasoned conclusion that the evidence failed to support a finding that the domestic industry was injured by its own "missteps."

123. Notwithstanding the small number of purchasers that reported service and delivery issues, China asserts that these purchasers' complaints were "significant" because the purchasers were

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

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

[208] China Responses to Panel's Second Set of Questions para. 164.

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

[210] China Responses to Panel's Second Set of questions, para. 146.

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

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

"some of the largest" and they "presented not one, but multiple complaints."[213] China's identification of seven purportedly large purchasers that made multiple complaints, however, does not provide any basis for questioning the Commission's weighing of the evidence on this point.[214] Of the 106 purchasers submitting a questionnaire response, the Commission identified 65 purchasers as being the industry's "largest purchasers," and the vast majority of these "largest purchasers" did not report *any* problems or issues regarding the domestic industry's performance.[215] Moreover, the Commission conducted a thorough evaluation of all relevant evidence and reasonably concluded that SolarWorld's and Suniva's hearing testimony and posthearing submissions rebutting these isolated allegations of quality, delivery, and service concerns, were credible.[216]

124. China speculates that "the fact that 7 purchasers explicitly complained during the course of the public hearing or in an affidavit serving as evidence to a written submission, does not mean that other purchasers did not have similar concerns regarding quality and service issues."[217] This is pure conjecture, however, as China offers no evidence of any other purchasers having such concerns. Particularly given the large number of purchasers who responded to the Commission's questionnaires without identifying any such issues, the Commission reasonably relied on what was and was not reported in the questionnaires. Competent authorities must provide a reasoned and adequate explanation as to how the evidence *on the record* support their factual findings, and the Commission properly followed this obligation and based its non-attribution analysis of this other factor on the actual information in the record.

125. China also mischaracterizes the purchaser questionnaire responses as evidencing that "42 of the 106 responding purchasers reported availability concerns, 9 cited delivery times, 6 cited relationship with supplier/contract, and 5 cited customer supports" and insisting that this "was representative that over half of the purchasers from different market segments expressed concerns on service and delivery issues."[218] China did not provide any support for this assertion, but it appears to be referring to Table V-4 of the USITC's November Report.[219] This table, however, represents only purchasers' ranking of factors used in their purchasing decisions, and had nothing to do with purchasers' service and delivery concerns. Even if purchasers ranked

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[213] China Responses to Panel's Second Set of Questions, paras. 145-148.

[214] China Responses to Panel's Second Set of Questions, para. 148. China also points to four purchaser affidavits criticizing Suniva's performance that were submitted with respondent SEIA's injury brief. *See id.* at para. 149. These additional critiques still do not detract from the totality of the record evidence supporting the Commission's finding that the domestic industry did not have "widespread" problems.

[215] USITC November Report, p. I-44 (Exhibit CHN-3).

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

[217] China Responses to Panel's Second Set of Questions, para. 148.

[218] China Responses to Panel's Second Set of Questions, para. 165.

[219] USITC November Report, Table V-4 (Exhibit CHN-3).

factors such as delivery, availability and customer support as having some degree of importance to their purchasing decision, such ranking does not in any way mean that a supplier has failed to meet their service and delivery preferences, or that any such failure was on the part of a *domestic* supplier. Moreover, this table ranks the importance of the factors for both domestic and imported products, so any concerns that China by innuendo reads into this table would apply as well to the imports.

126. In sum, China's submission fails to demonstrate any way that the Commission's conclusion that the domestic industry did not suffer from widespread service and delivery issues was not reasoned or adequate.

Question 14 (both parties)

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

127. The U.S. response to this question discussed how the Commission found that some government incentive programs had expired while others emerged or continued.[220] The Commission did not make an overall characterization of changes in the level or availability of incentives as increased, decreased, or neutral, but rather observed that market participants reported varied experiences. The Commission emphasized that more important than the changes in the actual *number* of incentive programs being offered was the fact that the overall availability of incentives during the period of investigation achieved their purpose of stimulating demand for solar generated electricity, and thus, was in no way causing injury.[221]

128. China makes two primary criticisms of the USITC's analysis of incentive programs: first, that "{t}here were multiple pieces of evidence on the record showing both a decline in incentives and how the industry perceived the negative consequences of their reduction;"[222] and second, that the Commission's analysis was "superficial" and "particularly glaring" in light of the econometric study showing the economic impact of the declining incentives that respondents submitted on the record.[223]

129. The evidence cited by China does not support its assertions on either account. To the contrary, the evidence shows that the federal incentive programs that had expired (*i.e.*, Manufacturing Tax Credit, Treasury 1603 Program, and Loan Guarantee Program), had

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[220] U.S. Responses to Panel's Second Set of questions, paras. 29-30.

[221] USITC November Report, pp. 61-63 (Exhibit CHN-2). Indeed, even respondent SEIA acknowledged the positive role that incentives played in the industry's stability and growth. SEIA Prehearing Injury Brief, Exhibit 1 (Exhibit CHN-39).

[222] China Responses to Panel's Second Set of Questions, paras. 168-169.

[223] China Responses to Panel's Second Set of Questions, para. 181.

terminated or were relevant only to projects commissioned *before* 2012, the first full year of the POI.[224] Thus, those programs' expirations do not support a finding of a decline in federal incentive programs during the period of investigation.

130. Moreover, Congress extended the Federal Investment Tax Credit, which offered a 30 percent tax credit on capital expenditures for new solar photovoltaic systems for the residential, commercial, and utility segments.[225] As respondent SEIA acknowledged, this program was the "single most influential federal government incentive for solar deployment today."[226] Indeed, between 2015 and 2016, U.S. installations of CSPV systems increased by 97 percent driven by the anticipated December 2016 expiration of this program.[227] Instead of allowing it to expire, Congress extended it for several more years. Firms themselves reported that the level or availability of federal incentive programs had not changed since 2012.[228]

131. Regarding state and local government incentive programs, China points only to Commissioner Broadbent's individual statement made in her remedy recommendation that "{s}tate and local government incentives have also declined over the 2012 to 2016 period, particularly for net metering programs" as support for its assertion that their levels declined.[229] Commissioner Broadbent's statement, however, does not reflect the Commission's views concerning its injury determination. In fact, the Commission found that there were a "wide array" of incentives designed to lower the cost of solar project development and that each state implemented a number of programs at varying levels to encourage solar installation. Given each state's unique mix of programs, firms' responses varied regarding how the level or availability of state and local incentives had changed since 2012.[230]

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[224] SEA Prehearing Injury Brief, Exhibit 39 (Exhibit CHN-63); USITC November Report, V-32 (Exhibit CHN-3). The advanced energy manufacturing tax credit reached its funding cap in 2010. The Section 1705 Loan Guarantee Program expired in 2011. The Section 1603 Treasury Cash Grant Program expired at the end of 2011.

[225] USITC November Report, pp. 62-63 n.361 (Exhibit CHN-2).

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

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

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

[229] China Responses to Panel's Second Set of Questions, para. 172; *see also* USITC November Report, p. 111, n.35 (citing to Table V-22, which show that firms' responses were varied regarding how the level of availability of state and local incentives changed since 2012 and SEIA Posthearing Remedy Brief, Appendix A at 27-29, which focused only on the declining net metering programs without acknowledging the increase in programs that occurred in other states).

[230] USITC November Report, Table V-22 (Exhibit CHN-3). China claims that 67 firms reported a decline in the level or availability of state and local government incentives since 2012. China Responses to Panel's Second Set of Questions, para. 179. However, 40 firms reported an increase in state and local government incentives, 17 firms reported no change, and 35 firms reported fluctuations. USITC November Report, Table V-22 (Exhibit CHN-3).

132. In any event, regardless of any changes in the level of incentives being offered, the evidence does not support China's assertion that the industry harbored negative perceptions on the consequences of the level or availability of federal, state, and local incentives being offered. To the contrary, as the Commission found, most firms reported that changes to federal incentives had not changed demand for CSPV products, and the second largest number of firms reported that demand had increased; those that reported an increase in demand for CSPV products identified the level of federal incentives as the reason for the increase, noting the extension of the Federal Income Tax Credit.[231] In addition, a plurality of U.S. producers, importers, and purchasers reported an increase in the demand for CSPV products due to the availability of state and local incentives.[232]

133. China's reliance on an econometric study commissioned by respondents is unavailing.[233] That study, which did not even identify any incentive programs let alone provide any analysis whether federal and state/local program levels increased or decreased during the period of investigation,[234] does nothing to detract from the facts in the record, as laid out in detail by the Commission. The study relied on theoretical assumptions, including the assumption of declining incentives, which was then assigned a "variable" in a mathematical estimation equation.[235] The abstract methodology used by the study exemplifies precisely why it was reasonable for the Commission to base its determination on the actual facts gathered in the extensive record rather than accept the conclusions set forth in the hypothetical-fact study.

Question 15 (both parties)

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

134. China is mistaken in its assertion that the Commission "did not conduct any analysis on whether the evolution of incentives had any impact on prices."[236] The Commission conducted a

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

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

[233] China Responses to Panel's Second Set of Questions, para. 181.

[234] SEIA Prehearing Injury Brief, Annex A p. 14 (Exhibit CHN-19). The extent of the study's examination was to state that "public incentive programs are often 'volume capped,'" and that "the size of the subsidy needed to make a consumer opt for solar (during pre-grid parity period) changes over time.'" The study then presented a hypothetical depiction of "the size of the subsidy needed at time 'a' is larger than the size of the subsidy needed at time 'b.'" *Id*.

[235] SEIA Prehearing Injury Brief, Annex A (Exhibit CHN-19). Notably, the data sources cited in the study did not include any that addressed federal incentive programs. *See id.*, p. 70.

[236] China Responses to Panel's Second Set of Questions, para. 182

detailed analysis in which it examined all facets of this issue, including the effect on prices. The Commission began by considering the purpose of the incentive programs, which it found was to stimulate demand for renewable energy-generated electricity by offsetting the cost of generating solar or other renewable energy, mandating its use, or otherwise influencing its price.[237] The Commission then closely examined the various individual types of programs being offered and how they stimulated demand. 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.[238]

135. The Commission further noted that 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.[239]

136. The Commission then analyzed the levels of incentive programs being offered, and found 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.[240] The Commission also accounted for market participants' observations regarding the change, if any, of the level or availability of incentive programs since 2012.[241]

137. As the last step, the Commission analyzed the impact that the level or availability of incentives being offered had on: (1) the price of solar generated electricity; and (2) demand. It found that, as most questionnaire respondents reported, the availability of incentive programs made CSPV products more cost-competitive with other sources of electricity and that any decline in incentives had not led to declines in apparent U.S. consumption. Instead, demand

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

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

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

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

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

continued to experience robust growth throughout the period of investigation, including in states most affected by changes in incentive programs, such as California. Indeed, as the Commission observed, in 2016, solar power was the largest source of new electric generating capacity, accounting for 39 percent of all new electric generating capacity in the United States.[242] Through this critical assessment of the record evidence, the Commission reasonably concluded that any changes in government incentive programs did not cause prices of CSPV products to decline and was not an other injury causing factor.

a. Demand for CSPV products is derived from the demand for solar electricity, which is influenced by factors such as cost competitiveness with traditional energy sources, environmental concerns, a desire for national energy independence, and the availability of federal, state, and local incentives.[243]

138. In addressing the evidence noted in part "a" of this question, China agrees that government incentive programs stimulated demand by making solar energy more cost-competitive with other sources of electricity.[244] China next asserts that as "subsidy rates fall, the subsidized price of solar energy is no longer competitive unless it is accompanied by reduction in the CSPV price to substitute the effect of the falling subsidy rate," and that as a result, "declining subsidies mean that cost-conscious consumers do not adopt solar energy."[245] The scenario described by China, however, did not occur here. The record did not evidence an *overall* decline in the level of incentives being offered in the U.S. market.[246] Rather, as explained above, market participants had varied experiences with respect to government incentive programs during the period of investigation as certain programs expired while others emerged or continued. In particular, the Federal Income Tax Credit, which played a vital role in stimulating U.S. CSPV demand, was extended during the period of investigation.[247]

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

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

[244] China Responses to Panel's Second Set of Questions, paras. 184-186.

[245] China Responses to Panel's Second Set of Questions, para. 186.

[246] China's additional assertion that the "{e}vidence showed that even with subsidies, solar energy will remain behind in the race for grid parity in the near future" only serves to disprove the notion that solar must sell at natural gas prices in order for consumers to choose solar generated electricity. Even with this disparity, annual U.S. installations of on-grid photovoltaic systems increased by 338 percent from 2012 to 2016. USITC November Report, p. 7 (Exhibit CHN-2).

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

139. Moreover, regardless of any changes in the level of incentive programs, demand for solar generated electricity exploded to unprecedented levels during the period of investigation.[248] China fails to reconcile this positive fact with its arguments that incentives were an injury causing factor. Instead, it attempts to sidestep this flaw by making the unavailing assertion that the Commission did not determine "what parts of demand were caused by environmental concerns, the policy goal of energy independence, and their interrelationship."[249] In fact, the Commission did analyze these aspects and found that according to most firms, the increased demand resulted from a reduction in CSPV system prices and installation costs as well as the existence of federal, state, and local programs.[250] In any event, China's criticism misses the point that although these other elements may also have influenced demand, the relevant question, which the Commission reasonably and adequately answered in the negative, is whether any changes in the level of government incentive programs caused injury to the domestic industry. As the Commission found, the availability of incentives lowered generators' costs in implementing solar, which, in turn, stimulated demand for this renewable energy product. This effect cannot have resulted in injury to the domestic industry.

b. Several firms reported that the price of CSPV modules is a large factor in the price of solar electricity; therefore, declining CSPV module prices translate directly into less expensive solar generated electricity.[251]

140. China states its agreement with the evidence noted in part "b" of this question and speculates that "as subsidies declined, domestic producers had to incrementally introduce price reductions to offset the loss of the incentives over time."[252] China's assumptions, however, are not borne out by the record evidence.

141. First, it is important to reiterate that the record does not demonstrate an overall decline in government incentives. In addition, the evidence shows that any change in the availability of incentives had not caused an increase in the net cost to the solar electricity generator as China seems to believe. To the contrary, questionnaire respondents reported that the availability of government incentives had led to a decline in the price of solar-generated electricity since 2012, "making CSPV products more cost-competitive with other sources of electricity."[253] Thus, system owners (the purchasers of CSPV products) continued to financially benefit – and to an increasing degree – from the availability of such programs. This meant that domestic producers

[248] Respondent SEIA even acknowledged that the solar industry was "growing at a record pace," and that the Investment Tax Credit "has provided stability and growth since it initial passage in 2006." SEIA Prehearing Injury Brief, Exhibit 1 (Exhibit CHN-39).

[249] China Responses to Panel's Second Set of Questions, paras. 187-190.

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

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

[252] China's Responses to Panel's Second Set of Questions, paras. 191-193.

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

did not need to reduce their prices to make solar energy more competitive with other sources of energy. China itself acknowledged this dynamic, stating that "{s}ince the incentives lowered the cost to the customer of buying the CSPV product, they also reduced the need for the supplier to lower it prices to make their product competitive vis-à-vis other sources of energy."[254] Indeed, most questionnaire respondents confirmed that changes in the price of solar generated electricity had not at all affected the prices of CSPV products since 2012.[255]

c. US producers reported that the decrease in the price of solar electricity has been driven by CSPV market competition.[256]

142. China observes that the evidence noted in part "c" consisted of statements made by U.S. producers in response to a question from the Commission regarding how changes in the price of conventional energy impacted the price of solar generated electricity since 2012. In challenging this evidence, China asserts that the majority of U.S. importers and purchasers responded to the same question with reports that prices of natural gas exerted a downward pressure on the price of solar generated electricity.[257]

143. The Commission, however, addressed and disproved the notion of grid parity causing price declines of CSPV products over the 2012-2016 period. As the Commission found, the evidence demonstrated that there was not one absolute target price that domestic producers strove to sell their CSPV products. In fact, there was a complete lack of correlation between solar and natural gas prices. Moreover, notwithstanding any disparity between average levelized cost of solar and natural gas during the POI, demand for CSPV products still experienced unprecedented growth, invalidating China's theory that CSPV products must sell at a certain price in order for purchasers to choose solar over other energy sources.[258]

144. In any event, China's assertions regarding the purported downward pressure to meet natural gas prices does nothing to address the main point of the question, which is whether, in light of the U.S. producers' attribution of the decline in prices of solar generated electricity to CSPV market competition, it was reasonable for the Commission to find that government incentive programs did not cause injury. As discussed above, the record evidence demonstrated the government incentives created declines in prices for *solar generated electricity*, and not for *CSPV products*, which supported the Commission's conclusion. Alternatively, CSPV market competition caused downward pricing pressure on the domestic industry to reduce its prices for *CSPV products*. The Commission demonstrated the link by showing how pervasively domestic

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[254] China Responses to Panel's Second Set of Questions, para.

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

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

[257] China Responses to Panel's Second Set of Questions, paras. 196-202.

[258] U.S. First Written Submission, paras. 208-215; U.S. Responses to Panel's First Set of Questions, paras. 56-61; U.S. Responses to Panel's Second Set of Questions, paras. 44-46.

and imported CSPV products competed in the U.S. market, noting purchasers' statements that domestic producers decreased prices in response to import prices, and conducting a detailed analysis of trends illustrating that relationship.[259] As the Commission explained, imports that were highly substitutable with and priced lower than the domestically produced like product surged into the U.S. market.[260] As a result, the growth in the volume of lower priced imports between 2012 and 2016 causing a drop in prices for domestic CSPV products.[261]

145. Thus, to the extent that CSPV modules accounted for a meaningful share of the cost of the end-use solar energy systems in which they were used, the decline in module prices caused by import competition naturally resulted in a reduction in the overall cost to the solar generator. To be clear, however, this relationship does nothing to show that government incentive programs created declines in prices of *CSPV products*. To the contrary, as demonstrated, this was not the case.

d. Several firms attributed the decline in the price of solar electricity to the increase in supply of solar electricity in the marketplace.[262]

146. China asserts that the statements referenced in part "d" of this question do not "undermine the basic point that changes in incentives mattered."[263] The U.S. agrees with the general point that a finding that one factor (increase in supply) affected the price of solar energy does not preclude a finding that another factor (government incentive programs) also affected prices of solar generated electricity. Although market dynamics, including increasing supply of solar generated electricity on the grid, may have resulted in its price declines, the evidence still also demonstrates that government incentive programs also increasingly contributed to such price declines in solar generated electricity.[264] Yet, while solar generators' costs declined and demand for both solar electricity and CSPV products increased significantly throughout the period, the domestic CSPV industry's financial performance was abysmal and deteriorated as low-priced imports that generally undersold the domestic like product surged into the U.S. market. As the Commission found, the change in the incentive programs, which were not generally directed at any particular domestic or foreign manufacturer of CSPV products, failed to

[259] USITC November Report, pp. 41-43 (Exhibit CHN-2).

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

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

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

[263] China Responses to Panel's Second Set of Questions, para. 203.

[264] Even China acknowledges that, "the majority of the questionnaire respondents reported that the evolution of market incentive over the POI led to the decrease in prices of solar electricity in the marketplace." China Responses to Panel's Second Set of Questions, para. 203.

explain the domestic industry's declining market share, low capacity utilization levels, facility closures, and abysmal financial performance.[265]

Question 16 (United States)

> **Please explain how the USITC's analysis concerning the impact of changes in government incentive programs on prices of CSPV products accounted for the fact that domestic producers reported that changes in government incentive programs were a factor of injury, with some ranking this factor as "being an extremely important cause of injury".[266]**

Question 17 (United States)

> **Please explain how the USITC's analysis concerning the impact of declining raw material costs on prices of CSPV products accounted for: (1) the fact that domestic producers reported that changes in raw material costs were a factor of injury, with some ranking this factor as "being an extremely important cause of injury";[267] and (2) the evidence purporting to show a high degree of correlation between the cost of raw materials and the price of CSPV products.[268]**

Question 18 (both parties)

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

147. China asserts that a characterization of raw material costs as a positive factor cannot suffice as a reasoned and adequate explanation, and that the Commission's "assumption that decreased raw material prices should have operated as a 'positive' factor," was, therefore, "far too simplistic."[269] China's arguments do not withstand scrutiny.

148. First, as discussed above, in our comments on China's response to the Panel's question 2 and 11, 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. The second sentence of Article 4.2(b) states only 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." The Safeguards Agreement thus assigns significant flexibility to a competent authority to conduct its non-attribution analysis.[270] Accordingly, as the

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[265] USITC November Report, p. 62-63 (Exhibit CHN-2).

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

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

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

[269] China Responses to Panel's Second Set of Questions, paras. 206-213.

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

U.S. response to this question explained, depending on the unique facts and circumstances of each investigation, the characterization of declining raw material costs as a positive factor may suffice as a reasoned and adequate explanation that it is not an injury causing factor.[271]

149. In its response to this question, China cites to the panel's report in *Ukraine – Passenger Cars* as somehow illustrating that a finding of a factor to be "positive" cannot serve as a sufficient basis to conclude that it is not an other factor causing injury for purposes of Article 4.2(b).[272] That report is inapposite because it addressed different factual circumstances, and the competent authority's non-attribution analysis was found to be deficient in ways that did not involve factors found to be "positive."

150. Specifically, in *Ukraine – Passenger Cars*, the panel found that the Ukraine competent authority had failed to identify and analyze in its published report the injurious effects of any factors other than increased imports.[273] The panel noted, however, that in the Key Findings, which the Ukraine competent authority had circulated to exporting countries prior to issuance of its decision, three factors were identified as possibly having a negative impact on the domestic industry (*i.e.*, the global financial and economic crisis, non-competitiveness of the domestic products, and the lifting of government industry support, and the removal of a 13 percent duty beginning in 2009). As the panel explained:

> {I}t is not entirely clear, even after considering the Key Findings, whether the competent authorities found that there were other factors causing injury at the same time as increased imports, although in our view, that is the most reasonable interpretation of the Notice of 14 March 2013. But even assuming that our understanding of the Notice of 14 March 2013 was incorrect, this would not detract from our ultimate conclusion that Ukraine has acted inconsistently with Article 4.2(b). When the competent authorities determine that there are no other factors causing injury at the same time as increased imports, or that factors argued to be causing injury are not, in fact, doing so, this too, must be stated explicitly in the published report. Otherwise, it would be impossible to determine whether the imposing Member has properly considered whether factors other than imports are causing injury to the domestic industry, and if so, whether that Member has ensured that such injury is not attributed to the increased imports.[274]

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[271] U.S. Responses to Panel's Second Set of Questions, paras. 42-43.

[272] China Responses to Panel's Second Set of Questions, para. 207.

[273] *Ukraine – Passenger Cars (Panel)*, paras. 7.325-7.334.

[274] *Ukraine – Passenger Cars (Panel)*, para. 7.334.

Unlike the facts and findings in the investigation at issue in *Ukraine – Passenger Cars*, the Commission clearly identified, addressed, and rejected – through detailed explanations and clear conclusions – the assertion that the declining raw material costs caused injury.

151. Moreover, the characterization of declining raw material costs as a "positive" factor was not the sole consideration for the Commission's determination.[275] Rather, the Commission evaluated this factor in light of the other evidence on the record in determining that it was not an injury causing factor. Specifically, the Commission considered declining raw material costs relative to domestic prices of CSPV products and within the context of the domestic industry's struggling financial condition. It found that declining raw material costs to be a "positive" factor, which would have been expected to benefit the industry by allowing for greater profit margins or by allowing the industry to lower prices and sell more product, the domestic industry in this case did not benefit in either respect due to the pressure caused by the constant influx of low-priced imports. As the Commission explained, "declining polysilicon prices . . . would help make CSPV products more cost-competitive with other sources of electricity" but declining prices meant that producers' losses continued and worsened.[276] In other words, where the domestic industry's costs consumed all or nearly all of the sales value and left little to no margin for profits, there was no basis to conclude that the industry would have purposefully cut prices for CSPV products in step with declining raw material costs, incurring continued and *increasing* substantial losses during the period of investigation. Indeed, by the end of the period of investigation, the industry's COGS to net sales ratio soared above 100 percent, leading to further deterioration in the domestic industry's operating and net losses.[277]

152. China essentially ignores these findings and instead focuses its critique on the unproven assumption that because "lower costs were widely known in the market," that "the manufacturer can expect its customers to demand that some or all of the cost savings being passed on to them in the form of lower prices."[278] China's assertion fails to reconcile or demonstrate why domestic producers would choose to price their products at levels near or below their costs so that their losses continued or that this, in fact, occurred.

153. Moreover, China's continued reliance on respondents' econometric study as "showing how raw material costs caused a decline in final prices" is unavailing. As discussed, 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.[279] Thus, the conclusions of this study, which was based upon a variable for each "other" factor and then

[275] U.S. Responses to Panel's Second Set of Questions, paras. 42-43.

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

[277] USITC November Report, p. 38 (Exhibit CHN-2).

[278] China Responses to Panel's Second Set of Questions, para. 212.

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

inputted into a mathematical equation, could not possibly capture the unique market dynamics in play and serve as dispositive evidence, particularly in light of the substantial contradictory data on the record. Indeed, as the panel in *US – Steel Safeguards* explained, quantification is less than perfect, while an "overall qualitative assessment that takes into account all relevant information must always be performed."[280]

Question 19 (United States)

> **Please respond to China's argument that the USITC did not account for the constant gap between the prices of the CSPV products and natural gas, when finding a lack of correlation between price trends of CSPV products and natural gas over the POI.[281]**

Question 20 (United States)

> **In arguing that the USITC was required to analyze in its report the econometric study filed by respondents during the safeguards investigation, China claims that "[t]he United States also tries to justify the USITC's decision to disregard the econometric study arguing it as 'too theoretical' or only presents 'estimates', without any explanation of what these vague criticisms mean. In fact, these criticisms were never raised by the USITC during the investigation and represent *ex-post* rationalizations".[282] Please respond to this argument.**

3 Whether the USITC acted inconsistently with GATT 1994 Article XIX:1(a) by failing to demonstrate that imports increased "as a result of unforeseen developments and of the effect of the obligations incurred" by the United States

Question 21 (China)

> **China claims that the USITC's finding concerning "unforeseen developments" is not reasoned and adequate because it focuses on developments from within China when the import surge occurring in 2015-2016 largely emanated from outside China.[283] In response, the United States argues that China "completely ignores the critical finding in the USITC's Supplemental Report that imports decreased from China due to duties under U.S. trade remedy laws against China's unfair trade practices, and imports increased from other countries because Chinese producers relocated their production to circumvent those same antidumping and countervailing duty orders."[284] Please respond to this argument.**

154. China's response to this question fails to identify any flaw in the USITC's findings in the November Report or Supplemental Report. It begins by arguing that the United States made a

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

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

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

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

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

factual assertion that "increases in imports from other countries "came from Chinese producers that had relocated," and that the Commission did not "provide[] adequate and reasonable explanation for this finding."[285] Both statements are incorrect. The USITC's Supplemental Report did not seek to tie specific entries to specific producers. Rather, it cited an analysis in the October Report finding that China's six largest producers increased their global capacity. Four of them reported "adding CSPV cell manufacturing capacity" in six countries, and four of those countries increased their share of apparent domestic consumption. It noted that "much of this increase occurred between 2015 and 2016,"[286] a period that the USITC identified as demonstrating the most marked deterioration in the domestic industry's condition.[287]The USITC also noted that "imports from China maintained a substantial presence in the U.S. market."[288] These observations, which China does not dispute, fully support the USITC's conclusion that "increased imports were largely attributable to increased CSPV cell and CSPV module capacity by Chinese producers both within China and globally."[289]

155. Instead of disputing any of these points, China asserts that the "Supplemental Report provides no solid and compelling evidence that the increases came from the Chinese owned CSPV producer as opposed to other non-Chinese owned producers in those countries."[290] China ignores that these countries were already selling CSPV products into the United States before Chinese producers "add[ed] CSPV manufacturing capacity," after which, the significant increases in exports occurred. There was no need to link specific import shipments to specific Chinese producers. Demonstrating that increased imports into the United States were a result of increased production in particular countries, which resulted in turn from Chinese producers' increased capacity, the USITC demonstrated that the increased imports were a result of the unexpected development of Chinese producers expanding their production in other countries while maintaining excess capacity in China.

156. As the United States noted in its answer to the Panel's question, China cannot reasonably argue that its producers' massive increases in production capacity in certain countries have no effect on the significant increase in exports to the United States from those same countries *at the same time*. And since Article XIX does not require arguments or evidence on unforeseen developments with more particularity than this, the United States does not need to show import-

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[285] China's Response to Panel's Questions to Parties Following the First Substantive Meeting, para. 216.

[286] USITC November Report, pp. 40-41 and 44-45 (Exhibit CHN-2), *cited in* USITC Supplemental Report, p. 4 (Exhibit CHN-6).

[287] USITC November Report, pp. 38, 47 (Exhibit CHN-2); U.S. First Written Submission, para. 150 ("As discussed, the industry's condition was poor throughout the POI as it first sought to offset the effects of unfairly traded imports and then the effects of continued global imports. Its condition was particularly abysmal in 2016, deteriorating as the volume and market share of imports peaked and prices dropped.").

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

[289] USITC Supplemental Report, p. 4 (Exhibit CHN-6).

[290] China's Response to Panel's Questions to Parties Following the First Substantive Meeting, para. 217.

specific information on a transaction-by-transaction (or company-by-company or country-by-country) basis.

157. As for China's second response that such developments were not "unforeseen," China argues that the Chinese producers' expansion into other countries represents a "natural shift" or "well-documented phenomenon" according to market-based principles and economic concepts that the USITC comprehends.[291] Notably, China does not respond to the United States' point that, under the Marrakesh Declaration, WTO Members have declared that their economies will participate in the international trading system based on "open, market-oriented policies and the commitments set out in the Uruguay Round Agreements and Decisions."[292] Nor does it have any reply to the USITC's findings in the Supplemental Report regarding China's pervasive and unexpected practices to pursue industrial policies and government programs to distort the market and manipulate the behavior of individual firms. As such, China's "store" analogy in its response to the Panel's question only applies if one store was able to undercut the other on price by misappropriating its trade secrets or engaging in some other form of unfair trade practices.

158. Despite China's protestations, the USITC specifically found that U.S. negotiators could not have foreseen that China would contradict its commitments by implementing a series of industrial policies and government programs favoring renewable energy product manufacturing, and that this would "lead to the development and expansion of capacity to manufacture CSPV products in China at levels that substantially exceeded the level of internal consumption."[293] The intentional development of overcapacity in China and, following the U.S. trade remedy orders, in other countries, belies China's argument that the findings identified in the Supplemental Report merely represent a natural ebb and flow according to market dictates rather than purposeful and export-oriented manipulation of the CSPV market.

Question 22 (United States)

> **In claiming that the USITC failed to demonstrate a "clear linkage" between the "unforeseen developments" and increased imports, China argues that the USITC failed to adequately demonstrate that the increased imports from Korea, Malaysia, Thailand, and Vietnam primarily came from Chinese companies which had increased their production capacity in those countries.[294] Please respond to this argument.**

Question 23 (both parties)

> **Referring to the United States' duty-free treatment of CSPV products since at least 1987, the United States contends that "[t]here is no dispute that, because of these**

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[291] China's Response to Panel's Questions to Parties Following the First Substantive Meeting, para. 219-221.

[292] U.S. Responses to Panel's First Set of Questions, para. 76.

[293] USITC Supplemental Report, pp. 10 (Exhibit CHN-6).

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

concessions, it would be inconsistent with Article II of GATT 1994 for the United States to increase its tariffs above the bound levels to remedy the serious injury caused by increased imports".[295]

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

159. China's answer to the Panel's question is in parts irrelevant, and in parts erroneous. It begins by arguing that the USITC did not explicitly identify the bound duty-free tariff rate for CSPV products as the "obligation incurred" for purposes of Article XIX:1(a) of GATT 1994. This assertion is irrelevant because the question addresses a different issue – the U.S. "characterization" that there is no dispute in this proceeding that due to the U.S. tariff concessions, it would be inconsistent with GATT Article II for the United States to increase its tariffs above the duty-free bound level on imports of CSPV products.

160. China next asserts that the U.S. tariff binding is not an "obligation incurred" with respect to China because the United States has applied a zero tariff with respect to all imports since 1987.[296] This is incorrect. The United States had incurred no "obligation" to apply the zero duty rate to *China* until China acceded to the WTO. Thus, that rate was a relevant "concession" for purposes of Article XIX:1(a).

161. China's final argument appears to confirm the U.S. view. It notes that a Member is free to increase duties above its bound rates in the event that it meets the conditions for applying a countervailing duty, antidumping duty, or safeguard measure. But that is simply the reverse of the point made by the United States– that Article II precludes an increase in tariffs above the bound rate unless a Member meets the conditions for application of a safeguard measure. The fact that countervailing duties and antidumping duties allow tariffs above the bound rate *in other circumstances* does not detract from this conclusion. Thus, for purposes of Article XIX:1(a), the increase in imports of CSPV products is "the result . . . of the effect of the obligations incurred" under GATT 1994.

b. *(To the United States)*: Please respond to China's argument that this statement amounts to an impermissible *post hoc* rationalization in the present dispute.[297]

Question 24 (China)

China claims that GATT Article XIX:1(a) requires demonstrating a "clear linkage" between increased imports, on the one hand, and "unforeseen developments" and

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

[296] China's Response to Panel's Questions to Parties Following the First Substantive Meeting, para. 222

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

relevant "obligations incurred", on the other hand.[298] In China's view, does the "clear linkage" standard differ from the "causal link" standard under Article 4.2(b) of the Agreement on Safeguards? Please explain.

162. Although China asserts that the "concept of 'clear linkage' is fundamentally rooted in the phrase 'as a result of' in Article XIX:1(a),"[299] the United States does not see a need to substitute an invented phrase for the actual terms of GATT 1994. The renaming can only serve to obscure what China concedes to be true – that the establishment of a "causal link" between increased imports and serious injury is legally distinct from the fact that increased imports are as "a result of" unforeseen developments and the relevant obligations incurred.

163. And, in fact, China devotes the remainder of its response to efforts to portray "a result of" and "causal link" as essentially identical. As the United States has noted repeatedly, China's approach would be tantamount to a double causation requirement contrary to both GATT 1994 Article XIX and the Safeguards Agreement. Such an approach would ignore that Article XIX:1 itself separates these inquiries, and uses different terms to describe them.

164. These differences led the Appellate Body to conclude that 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. In other words, the substantive obligations at issue are factual circumstances in order to apply a safeguard measure. Article XIX:1 of the GATT 1994 and the Safeguards Agreement are silent as to when and how a Member may address assertions that the factual "circumstances" for applying a safeguard measure do not exist. Accordingly, when challenged in WTO dispute settlement, a Member remains free to amplify or modify the explanation as to why it considers that the relevant factual circumstances exist.

165. Also, as the United States previously explained, China errs by asserting that, to establish these circumstances, a Member must demonstrate a "clear linkage" between unforeseen developments and increased imports.[300] "Link" is a term of art for purposes of the Safeguards Agreement, particularly Article 4.2(b), which requires demonstration of a "causal link" between increased imports and serious injury. Since neither GATT 1994 nor the Safeguards Agreement requires such a showing for unforeseen developments, the term "link" is not appropriate to the evaluation of a claim that a Member has failed to show increased imports are "as a result of" unforeseen developments. For these reasons, the "clear linkage" test devised by China for this

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

[299] China's Response to Panel's Questions to Parties Following the First Substantive Meeting, para. 232.

[300] U.S. Comments on China's Responses to Panel's First Set of Questions, para. 154.

proceeding is not a useful way to approach the evaluation whether a safeguard measure complies with the first clause of Article XIX:1(a).

Question 25 (China)

> **Please respond to the United States' argument that China is incorrect to rely upon *US – Lamb* and *India – Iron and Steel Products* for the proposition that the competent authorities are required to consider alternative explanations for increased imports, as those reports described the standard for a panel's evaluation of claims raised in a WTO dispute, and not the standard that must be followed by the competent authorities in a safeguards investigation.[301]**

166. China's response to this question is at odds with customary rules of interpretation of public international law, the reasoning in the appellate report that it cites. Furthermore, China misunderstands the United States' argument.

167. China's response begins by asserting (without citation) that "[t]he United States appears not to dispute that a Member's safeguard measure does not comply with the unforeseen development requirement if the Member's safeguard report does not . . . address[] the existence of other possible explanations for increased imports."[302] This does not represent the United States' view, and in fact misses that the disagreement about this question is *precisely the point of the argument that the Panel cites*. Indeed, as the United States has previously noted, outside of the reference to "unforeseen developments" and "obligations incurred," Article XIX and the Safeguards Agreement call only for an examination of whether increased imports cause serious injury. They do not require any further analysis of why imports increased.

168. China also mistakenly conflates the obligations of the competent authorities under the Safeguards Agreement with the role of a panel in reviewing the competent authorities' injury determination under the DSU. As the United States observed in the argument cited by the Panel, a panel conducts its review of a Member's claims pursuant to the DSU, to carry out the function assigned to it by the DSB in Article 7.1 and further reflected in Article 11. In a safeguards investigation, the competent authorities conduct a different evaluation, into whether increased imports cause or threaten to cause serious injury – under a different covered agreement, subject to different substantive and procedural requirements. Thus, the Safeguards Agreement provides more relevant context than the DSU for evaluating the obligations of the competent authorities.

169. Indeed, panels and the Appellate Body have repeatedly emphasized that these are different inquiries. And, at the most basic level, the respective inquires must each be viewed in the context and in light of the object and purpose of the respective covered agreement. In particular, consistent with the Safeguards Agreement, the competent authorities conduct a *de*

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

[302] China's Response to Panel's Questions to Parties Following the First Substantive Meeting, para. 238.

novo review of the evidence and arguments, while a panel operating under the auspices of the DSU does not. Thus, China errs in arguing that what the Appellate Body has stated with regard to a panel's evaluation of the competent authorities' findings may be simply transposed to the competent authorities' *de novo* review of evidence and argumentation in their investigation.[303]

170. In the argumentation cited by the Panel, the United States observed that the Appellate Body's reasoning in *US – Lamb* was grounded in a panel's function under DSU Article 11 and, accordingly, did not apply to the competent authorities' determination under the Safeguards Agreement. Indeed, the Appellate Body took pains to "emphasize" in that report that it was inappropriate for a panel to perform a *de novo* analysis, which was the proper function of the competent authorities.[304] China does not disagree with any of these conclusions or observations. Instead, it argues that the panel in *India – Iron and Steel* announced a rule that "the same analytic approach was also applicable to *all aspects* of a panel's review of a challenged Member's safeguard determination, including the unforeseen developments obligation."[305] If China were correct, the logical conclusion would be that the panel misunderstood the Appellate Body's reasoning, as it did not explain why this principle, which the Appellate Body related explicitly to a panel's review of claims under SGA Article 4.2(a), would apply in other contexts. And, in any event, the panel's observation applied to its own analysis. It does not assert that the competent authorities, in their *de novo* review, must hypothesize and address every possible alternative explanation of the fact at each stage of their analysis.

171. In any event, the "alternative explanation" championed by China is not plausible. Although the record shows that production costs for CSPV products declined over the course of the period of investigation, China provides no support for asserting that this factor "contributed to global excess capacity."[306] As a matter of economics, changes in cost may affect the supply curve, but they will not necessarily lead to an equilibrium where there is excess capacity. Moreover, if this were the case "globally," the most likely result would be increased capacity in the United States, too, and not the observed capacity constraints that resulted from increased imports at low and decreasing prices.

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[303] *E.g.*, China's Response to Panel's Questions to Parties Following the First Substantive Meeting, para. 241 ("[W]hat the panel said in *India – Iron and Steel* [regarding a panel's analysis] is relevant for this Panel's analysis of whether the USITC Supplemental Report provides an adequate and reasoned explanation of how the United States complied with the unforeseen developments requirement.").

[304] *US – Lamb (AB)*, para. 106.

[305] China's Response to Panel's Questions to Parties Following the First Substantive Meeting, para. 244.

[306] China's Response to Panel's Questions to Parties Following the First Substantive Meeting, para. 246.

Question 26 (both parties)

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

172. China's answer, like that of the United States, is yes. Despite a long and convoluted response, China's answer remains unchanged that a tariff rate bound at zero percent has implications to demonstrate "the effect of obligations incurred" under Article XIX:1(a) of the GATT 1994.

173. The United States must, however, correct an error in China's answer. At the start, China states that "a tariff rate [] bound at zero percent *long before the Member's 'obligations incurred'* definitely has implications."[307] Its efforts to distinguish between the bound rate and the incurring of a Member's obligations ignores that the tariff bound at zero percent ***is*** the obligation incurred in this dispute. China's suggestion to the contrary appears to represent a return to China's previous argument that, because the United States lowered its tariffs before the entry into force of the WTO Agreement, tariff bindings under the GATT 1994 cannot be "obligations incurred" for purposes of Article XIX. As the United States showed in its first written submission, there is no basis for this argument.[308] Article XIX:1 refers explicitly to "obligations incurred by a contracting party *under this Agreement*, including tariff concessions" (emphasis added) – which clearly includes U.S. tariff bindings with regard to CSPV products. Accordingly, the relevant U.S. tariff concession is that incurred by the United States when it entered into the WTO and that is set out in the U.S. Schedule annexed to the GATT 1994.

174. It is also worth noting that the "bound" tariff rate applies only with respect to WTO Members. Thus, the zero duty on CSPV products was a "tariff concession" with respect to China only upon China's accession to the WTO in 2001.

175. And, as indicated in the United States' response to this question, a tariff rate bound at zero percent is more than sufficient to constitute a restraint on a Member's freedom to raise its ordinary customs duties and thereby qualify as a *per se* commitment that satisfies the requirement in Article XIX:1(a) concerning the "effect of obligations incurred."

Question 27 (both parties)

> **With reference to the text of the Agreement on Safeguards, please explain whether the competent authorities are required to demonstrate compliance with the first clause of GATT Article XIX:1(a) before applying a safeguard measure. In so doing,**

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[307] China's Response to Panel's Questions to Parties Following the First Substantive Meeting, para. 247 (emphasis added).

[308] U.S. First Written Submission, para. 273.

please refer to the ordinary meaning of the relevant treaty provisions, as well as their context and object and purpose. In addition, please address the following:

176. At the outset, the United States notes that the USITC November Report and Supplemental Report demonstrated compliance with both the unforeseen developments and obligations incurred elements of the first clause of GATT Article XIX:1(a). Therefore, the legal issue addressed by this question is not necessary to a resolution of the claims raised by China in this regard.

177. Competent authorities need to establish only those "conditions" found in Article 2 of the Safeguards Agreement before a Member applies a safeguard measure. Specifically, a Member may apply a safeguard measure if its competent authority *determines* that a product is being imported into its territory "in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products." No mention of unforeseen developments or the effect of obligations incurred is included among the conditions in Article 2 and, therefore, competent authorities do not have to address either in their published report.

178. China's analysis of the treaty text in the Safeguards Agreement and Article XIX:1(a) conflates the elements a Member must identify, without regard to when or how the timing, with those requirements that a competent authority must establish during its investigation and *before* application of a safeguard measure because they are necessary to the serious injury determination. For instance, China points out that "the provisions of Article XIX are among the obligations for Members to impose safeguard measures."[309] While this narrow statement is accurate, it does not establish that Members must publicly announce any unforeseen developments or effects of obligations incurred *before* applying a safeguard measure. Article XIX refers to the existence in fact of two circumstances (as a result of unforeseen developments and the effect of obligations incurred). A Member may therefore identify during WTO dispute settlement proceedings those circumstances that in fact existed.

179. China further argues "[n]othing in this language suggests that the Agreement on Safeguards somehow eliminates the requirements of Article XIX."[310] Of course, elimination of a requirement is different from identifying its temporal nature for determining when a Member must satisfy the requirement, or whether it is the competent authorities that must do so. The closest China comes to citing a provision in support of its view is Article 11.1(a) of the Safeguards Agreement, which provides that a Member shall not "take or seek" a safeguard measure "unless [it] conforms to the provisions of [Article XIX] applied in accordance with this Agreement." Again, this does not impose a requirement on a Member's *competent authority* to identify and analyze unforeseen developments and the effect of obligations incurred. Article

[309] China's Response to Panel's Questions to Parties Following the First Substantive Meeting, para. 261.

[310] China's Response to Panel's Questions to Parties Following the First Substantive Meeting, para. 262.

XIX:1(a) states that a Member "shall be free" to apply a safeguard measure "[i]f, as a result of unforeseen developments and of the effect of the obligations[,]" the conditions of Article 2 of the Safeguards Agreement are satisfied. These conditions are the only requirements the text imposes on the determinations of the competent authorities. Other than that, a Member is free to defend its measure against a challenge, including a claim that unforeseen developments and obligations incurred do not exist for application of a safeguard measure.

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

180. To recall, the United States has shown that the "pertinent issues of fact and law" are those set out in Article 4.2 of the Safeguards Agreement, which refers to whether the industry is seriously injured, whether increased imports cause or threaten to cause that injury, and whether other factors are causing injury at the same. China agrees.[311] The United States also established that Article 3.1 of the Safeguards Agreement does not refer to any other provision of the covered agreements. China does not dispute this observation, either.

181. The United States considers that there is accordingly no basis to read Article 3.1 as requiring that the published report of the competent address issues presented in other provisions of the covered agreements, including Article XIX of the GATT 1994. China, however, asserts that the "'investigation' in Article 3.1 remains an open-ended concept and covers any issues of fact and law as long as they are 'pertinent'," which it says are "determined by what substantive requirements a Member will need to satisfy before imposing a safeguard measure."[312] It provides no textual basis for this extension of the concept of "pertinent" beyond the confines of the substantive issues laid out in Article 4, and there is none.

182. China instead seeks to rely on the Appellate Body's reasoning in *US – Lamb* that, "[t]he logical connection between the "conditions" identified in the second clause of Article XIX:1(a) and the "circumstances" outlined in the first clause of that provision dictates that the demonstration of the existence of these circumstances must also feature in the same report of the competent authorities."[313] However, the existence of that connection does not reveal additional details of that connection or its legal consequences when considering whether one side of the connection (unforeseen developments) must appear in a report that, under the terms of the Safeguards Agreement, addresses only the "conditions" set out in the second clause of Article XIX:1(a). The Appellate Body explicitly recognized as much when it found – correctly – in *US*

[311] China's Response to Panel's Questions to Parties Following the First Substantive Meeting, paras. 268 and 273.

[312] China's Response to Panel's Questions to Parties Following the First Substantive Meeting, para. 269.

[313] *US – Lamb (AB)*, para. 72, *quoted in* China's Response to Panel's Questions to Parties Following the First Substantive Meeting, para. 271.

– *Line Pipe* that the report of the competent authorities need not address whether the planned safeguard measure is "to the extent and for such time as may be necessary to prevent or remedy such injury," a phrase that is equally present in Article XIX:1(a) and equally "connected" to the finding of serious injury.[314]

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

183. As the United States noted in its response to this question, there is no basis to consider that these articles refer to different "investigations" or to legal considerations specified in other provisions. The parameters of the "investigation" identified in Article 3.1 are the same as those referred to in Article 4.2. China does not argue otherwise, and the list of the occurrence of the word "investigation" in Articles 3 and 4 drives this point home forcefully. However, China errs in simply asserting that because this investigation takes place before imposition of a safeguard measure, the resulting report must "demonstrat[e] that all of the criteria for imposition of a safeguard measure ha[ve] been satisfied."[315] The Safeguards Agreement charges the competent authorities with a particular task – the determination of serious injury – and assigns other tasks, including choice of an appropriate measure and duration, more broadly to the Member itself. China provides no basis to superimpose obligations required of Members, including those related to unforeseen developments and obligations incurred, onto those required of competent authorities.

c. Does the reference to GATT Article XIX in the preamble and in Articles 1 and 11.1(a) of the Agreement on Safeguards modify the parameters of the competent authorities' "investigation" under the Agreement on Safeguards? Please explain.

184. The U.S. response to this part of the question explains that the cited references to GATT Article XIX do not expand the parameters of the competent authorities' investigation beyond those laid out in Article 4.1. They instead establish a framework in which the obligations under GATT 1947 Article XIX continue to apply to safeguard measures, with the obligations of the Safeguards Agreement applying additionally and additively. Thus the obligations under Article XIX:1(a) remain. A Member may apply a safeguard measure:

> If, as a result of **unforeseen developments** and of the effect of the **obligations incurred** by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting

[314] *US – Line Pipe (AB)*, para. 234 ("Article 5.1 imposes a general substantive obligation, namely, to apply safeguard measures only to the permissible extent, and also a particular procedural obligation, namely, to provide a clear justification in the specific case of quantitative restrictions reducing the volume of imports below the average of imports in the last three representative years. Article 5.1 does not establish a general procedural obligation to demonstrate compliance with Article 5.1, first sentence, at the time a measure is applied.").

[315] China's Response to Panel's Questions to Parties Following the First Substantive Meeting, para. 275.

> party **in such increased quantities and under such conditions** as to **cause or threaten serious injury** to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and **to the extent and for such time as may be necessary to prevent or remedy such injury**, to suspend the obligation in whole or in part or to withdraw or modify the concession.

Articles 3 and 4 require only that the competent authorities determine whether increased imports cause or threaten to cause serious injury. Therefore, a Member fully follows the "rules for the application of safeguard measures" for purposes of Article 1 and "conforms with the provisions of . . . Article [XIX] applied in accordance with this Agreement" for purposes of Article 11.1 if the competent authorities limit themselves to the determination of serious injury or threat thereof, leaving "unforeseen developments," "obligations incurred," and "to the extent and for such time as may be necessary" to the Member itself, as was the case before adoption of the Safeguards Agreement.

185. These observations fully rebut China's assertions in response to this question. The only point that requires additional comment is China's mischaracterization of the U.S. submissions to the Panel as "post-hoc rationalizations." The United States reiterates that China's argument represents a fundamental misunderstanding of the role of a party responding to WTO challenges to the determinations of its competent authorities. China, as the complaining party, bears the burden of proof with respect to its arguments that the USITC failed to comply with U.S. WTO obligations.

186. In rebutting those arguments, the United States has the right both to point out legal misinterpretations by China and to provide the Panel with further detail and explanation of the Commission's analysis. Where China has misunderstood, misrepresented, or omitted aspects of the findings, the United States is free to identify the errors and point to portions of the record that support the Commission's conclusions. In doing so, the United States has demonstrated why China has failed to make a *prima facie* case that the Commission's determination is inconsistent with the Safeguards Agreement. Such illumination of the Commission's analysis and exchange of positions and arguments between the parties are integral features of the WTO dispute settlement process.

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

187. China's response to this point repeats, yet again, the same point evidencing its misunderstanding between the obligations on a Member, under Article XIX:1(a) of the GATT 1994 and the obligations on a competent authority under Article 2 of the Safeguards Agreement. The United States has already shown why this argument is erroneous as a legal matter. China does not, however, address the actual question from the Panel, and provides no basis to conclude that logistical considerations, such as the putative utility of having the competent authorities

address issues not explicitly assigned to them, can properly influence the interpretation of Article XIX:1(a).

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

188. WTO Members have certain requirements that their competent authorities carry out before invoking Article XIX of the GATT 1994 to apply a safeguard measure. However, as with any implemented measure, the question whether the measure is consistent with a Member's obligations under a particular discipline (safeguard or otherwise) is tested through WTO dispute settlement proceedings. In these proceedings, a WTO Member implementing the measure is able to raise arguments and provide evidence to show compliance with its obligations, even if the arguments or evidence was not before the Member's competent authority during the underlying investigation. The only requirements on competent authorities are those imposed on them by a covered agreement. Where no such requirements exist, a Member is not limited in the defensive arguments it may raise in WTO dispute settlement proceeding to rebut a challenge to its measure, and this principle under the DSU extends to safeguard measures as with any other measure.

189. China asserts that if a Member may demonstrate compliance with the first clause of Article XIX:1(a) during a dispute settlement proceeding, it may only rely on "the evidence on which the Member based its decision at the time it made the decision to impose safeguard measures."[316] This assertion confuses two issues – the conditions actually in existence at the time and the evidence on the record of the competent authorities at the time. If, as posited in the question, the competent authorities are not required to demonstrate compliance with the first clause of GATT Article XIX:1(a) in their report, the record of their investigation may not contain all of the information relevant to that issue. In that case, the Member would be free to reference information outside the record in its response to a WTO claim of inconsistency with the first clause of Article XIX:1(a).

190. However, as China observes, Article XIX:1(a) is framed in the present tense. Thus, any information cited by the Member would have to relate to the situation in existence at the time of the safeguard measure. A Member could not defend its safeguard measure on the basis of evidence that was not in existence at the time it took the safeguard measure.

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

[316] China's Response to Panel's Questions to Parties Following the First Substantive Meeting, para. 287.

Question 28 (China)

> **China appears to argue that Article 3.1 of the Agreement on Safeguards requires that the competent authorities prepare a preliminary report and "promptly" publish a non-confidential version thereof.[317] Please reconcile this understanding of the obligations under Article 3.1 with the following statements of the panel in *Ukraine – Passenger Cars*:**
>
> [N]othing in the text of the second sentence of Article 3.1 […], indicates that the importing Member must provide substantive information in advance of any public hearings to the interested parties. While Article 3.1 refers to an opportunity to "respond" to presentations of other parties, this is in the context of the public hearings or other appropriate means which must be provided for all interested parties to present evidence and their views.[318]
>
> Article 3.1 does not explicitly require the competent authorities to publish their report "promptly".[319]

191. China is mistaken that the Safeguard Agreement obligates the United States to publish a "preliminary report,"[320] promptly or otherwise. As the United States explained,[321] Article 3 places certain obligations on the competent authorities' conduct of a safeguards investigation. Article 3.1 provides that a Member may take a safeguard measure only after its competent authorities have: (1) conducted an investigation; (2) provided appropriate means for interested parties to present evidence and their views; (3) allowed interested parties to respond to each others' arguments, and (4) published a report setting out their findings and reasoned conclusions on all pertinent issues of fact and law. In contrast, nothing in the Safeguards Agreement obligates the publication of preliminary reports before publication of the final version of the staff report along with the Commissioners' explanations of their findings, which serves as the report of the U.S. competent authorities for purposes of Articles 3.1 and 4.2(c).[322]

192. China also contends that "the competent authorities [must] publish a non-confidential summary of the confidential portions of any such report, as per Article 3.2."[323] There is no such

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

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

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

[320] China Response to the Panel's Questions to the Parties Following the First Substantive Meeting, paras. 291-92.

[321] U.S. Responses to Questions from the Panel to the Parties, paras. 83-5; U.S. First Written Submission, para. 294.

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

[323] China Response to the Panel's Questions to the Parties Following the First Substantive Meeting, para. 293.

obligation under the Safeguards Agreement, as explained more fully in the U.S. Response to Panel Question 31 below.

193. Finally, China makes a factual error in asserting that "the USITC is required by US law and practice to publish two reports."[324] The relevant statutory provision is section 202(f)(1) of the Trade Act of 1974, which states "The Commission shall submit to the President *a report* on each investigation undertaken under subsection (b)." (emphasis) added. Section 202(f)(2) provides further that:

> (2) The Commission shall include in *the report* required under paragraph (1) the following:
>
> (A) The determination made under subsection (b) and an explanation of the basis for the determination.
>
> (B) If the determination under subsection (b) is affirmative, the recommendations for action made under subsection (e) and an explanation of the basis for each recommendation.

(emphasis added). In keeping with this statutory mandate, the Commission published a single report in the CSPV Solar Products proceeding, containing its determination of serious injury and the remedy recommendations of the Commissioners. It subsequently published a supplemental report addressing additional issues at the request of the President.

Question 29 (China)

> **China submits that the timing of publication of the non-confidential version of the USITC Final Report rendered meaningless the right of interested parties under Article 3.1 of the Agreement on Safeguards to "present evidence and their views".[325] Please reconcile this understanding with the following statement of the panel in *Ukraine – Passenger Cars*:**
>
> [T]he second sentence of Article 3.1 requires that the competent authorities hold public hearings "or" provide other appropriate means for interested parties to present evidence and views, including responses to presentations of other parties. The word "or" makes clear that when public hearings are held, there is no obligation to provide, in addition, any "other appropriate means" of giving input.[326]

194. China does not assert that the USITC denied it the right to participate in public hearings as outlined in Article 3.1 of the Safeguards Agreement. Instead, China complains that the

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[324] China Response to the Panel's Questions to the Parties Following the First Substantive Meeting, para. 292.

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

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

USITC investigative process denied China the right to "present evidence and their views" because of the timing of publication of "non-confidential summaries of the USITC reports."[327] As the United States explained in the Response to Panel Question 31, there is no obligation under the Safeguards Agreement for a competent authority to provide non-confidential summaries of its final report.[328]

195. China also appears to contend that its rights were negated by the allegedly short time frame between the publication of the non-confidential summary and "the publication of the USITC Final Report and the deadline for presenting its views to the President."[329] As the United States explained in the Response to Panel Question 30, the publication of the final USITC report marks the end of the Investigation under Article 3.1, and China had no right under the Safeguards Agreement to comment on that report or thereafter.[330]

196. Finally, assuming for the sake of argument that China had the right to receive non-confidential summaries or comment on the final report, the United States notes that China does not articulate, beyond conclusory statements, why and how the timing of the USITC's report and nonconfidential summaries of information interfered with its ability to "properly present evidence and [its] views."[331] Rather, the record demonstrates that through the opportunity to review evidence, including BCI, to present briefing, and to participate in public hearings, China had ample opportunity "to present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views" consistent with Article 3.1.[332] That is all that the Safeguards Agreement requires.

Question 30 (China)

> **China appears to argue that the right of interested parties to "present evidence and their views" under the second sentence of Article 3.1 of the Agreement on Safeguards also includes the right to comment on the competent authorities' final report.[333] The United States disagrees and argues that the right of interested parties to "present evidence and their views" under Article 3.1 concerns the evidence and**

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[327] China Response to the Panel's Questions to the Parties Following the First Substantive Meeting, para. 297.

[328] U.S. Responses to Questions from the Panel to the Parties, paras. 83-5; U.S. First Written Submission paras. 311-13.

[329] China Response to the Panel's Questions to the Parties Following the First Substantive Meeting, para. 298.

[330] *See* U.S. Responses to Questions from the Panel to the Parties, paras. 86-7; U.S. First Written Submission paras. 314-15.

[331] China Response to the Panel's Questions to the Parties Following the First Substantive Meeting, para. 297.

[332] U.S. First Written Submission, paras. 304-09, 313, 317-18.

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

argument provided by the *parties* (rather that the competent authorities) *prior* to the publication of the final report.[334] Please respond to this argument.

197. According to China, it had a right to comment on the final USITC report under the Safeguards Agreement.[335] Nothing in the terms of the agreement supports China's argument. Article 3 does not require that an investigating authority provide interested parties an opportunity to comment on the final report at all.[336]

198. China now suggests that the USITC Report is not the final report because of the "additional briefing and hearing stage before the TPSC" after publication of the final USITC report.[337] China's analysis is wrong.

199. Article 3 addresses the "Investigation" of the competent authorities. The publication of the USITC Report marked the end of that investigation. The TPSC evaluation was a separate process to consider the findings and recommendation of the USITC in order to make a recommendation to the President. As the TPSC did not investigate or render a determination as to whether increased imports caused serious injury, its proceedings were not subject to the disciplines of Article 3.1.[338] Therefore, the USITC Report represented the publication of the final "report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law."

Question 31 (China)

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

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

[335] China Response to the Panel's Questions to the Parties Following the First Substantive Meeting, paras. 300-01.

[336] U.S. Responses to Questions from the Panel to the Parties, para. 86-7.

[337] China Response to the Panel's Questions to the Parties Following the First Substantive Meeting, paras. 300-03.

[338] U.S. First Written Submission, para. 315. The United States notes that it nonetheless went beyond the obligations of the safeguards agreement and provided means for interested persons, including China, to present information and argumentation for consideration by the TPSC. *See* Office of the United States Trade Representative, Federal Register Notice, Request for Comments and Public Hearing About the Administration's Action Following a Determination of Import Injury With Regard to Certain Crystalline Silicon Photovoltaic Cells, 82 Fed. Reg. 49469 (Oct. 25, 2017) (Exhibit USA-13).

200. China argues that "competent authorities are required to provide non-confidential summaries of their final report under Articles 3.1 and 3.2," because otherwise interested parties could not "consider or examine confidential evidence" or know what information to rely on in preparing their views for the public hearing under Article 3.1.[339]

201. Article 3.2 nowhere requires competent authorities to provide non-confidential summaries of confidential information relied upon in the final report.[340] In fact, Article 3.2 obligates the competent authorities not to disclose any confidential information they receive in the investigative process without permission of the party submitting it and gives discretion to the competent authorities to request non-confidential summaries from parties providing confidential information.

202. Here, the United States went beyond its obligations under Article 3. The United States permitted cleared counsel to review all of the submitted BCI, subject to the requirements of an administrative protective order, rather than merely a non-confidential summary of that information.[341]

203. While nothing in the Safeguards Agreement obligated the United States to permit access to this BCI in the first place,[342] China now complains that not all interested parties have U.S. counsel authorized under the APO.[343] This assertion does not establish any inconsistency with the Safeguards Agreement. While Article 3.1 contains an obligation to provide "public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views," it does not require that they have access to confidential information. Rather, Article 3.2 requires a Member to protect such information from public disclosure. And consistent with the ability of the USITC to assure such protections, it requires that parties' access to such information be through an attorney under a professional and legal obligation to protect the information. Nothing in the Safeguards Agreement prevents the competent authorities from requiring that parties in an investigation comply with such reasonable formalities.

204. In addition, China argues that its "US counsel would be hard-pressed in determining which particular piece of evidence may be discussed at length with a client or be publicly

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[339] China Response to the Panel's Questions to the Parties Following the First Substantive Meeting, para. 304-05.

[340] U.S. Responses to Questions from the Panel to the Parties, para. 88.

[341] U.S. Reponses to Questions from the Panel to the Parties, para. 89; U.S. First Written Submission, paras. 304, 318-19.

[342] U.S. First Written Submission, paras. 304, 316.

[343] China Response to the Panel's Questions to the Parties Following the First Substantive Meeting, para. 306.

discussed before the competent authorities."[344] This argument fails because the United States went beyond its WTO obligations in allowing counsel (including China's counsel) access to BCI. It was not obliged to also instruct counsel on how to use that BCI in presenting views on the proposed safeguard measure.

205. Finally, China asserts that Articles 3.1, 3.2, and 4.2(c) have been "read in conjunction" by "other panels" who have found that "the competent authorities are required to publish non-confidential summaries of their report."[345] But China omits that the "non-confidential summary" is solely a function of the obligation under the *third sentence* of Article 3.1, for the competent authorities to publish their findings and reasoned conclusions at the end of the investigation. No panel has asserted that this report, or any nonconfidential discussion of the competent authorities' conclusions, must be available to parties *during the investigation* in relation to second sentence of Article 3.1.

[344] China Response to the Panel's Questions to the Parties Following the First Substantive Meeting, para. 306.

[345] China Response to the Panel's Questions to the Parties Following the First Substantive Meeting, para. 307.