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

FIRST WRITTEN SUBMISSION OF THE UNITED STATES

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Short Title	Full Citation
Argentina – Footwear (EC) (AB)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000
Argentina – Footwear (EC) (Panel)	Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R
China – Broiler Products (Panel)	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013
Dominican Republic – Safeguard Measures (Panel)	Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, and Add.1, adopted 22 February 2012
EC – Hormones (AB)	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
EC – Tube or Pipe Fittings (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
India – Iron and Steel Products (Panel)	Panel Report, *India – Certain Measures on Imports of Iron and Steel Products*, WT/DS518/R, circulated 6 November 2018
India – Patents (AB)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998
Japan – Alcoholic Beverages II (AB)	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996

Japan – Apples (AB)	Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003
Korea – Certain Paper (Panel)	Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 November 2005
Korea – Dairy (AB)	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R
Korea – Dairy (Panel)	Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R and Corr.1, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R
Turkey Textiles (Panel)	Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted 19 November 1999, as modified by Appellate Body Report WT/DS34/AB/R
Ukraine – Passenger Cars (Panel)	Panel Report, *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars*, WT/DS468/R, adopted 20 July 2015
US – Cotton Yarn (AB)	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001
US – Countervailing Duty Investigation on DRAMS (AB)	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005
US – Countervailing Duty Investigation on DRAMS (Panel)	Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, adopted 20 July 2005, as modified by Appellate Body Report WT/DS296/AB/R

US – Gambling (AB)	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
US – Hot Rolled Steel (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US – Lamb (AB)	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001
US – Lamb (Panel)	Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R, WT/DS178/R, adopted 16 May 20012001, as modified by Appellate Body Report WT/DS177/AB/R, WT/DS178/AB/R
US – Line Pipe (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002
US – Softwood Lumber VI (Article 21.5 – Canada) (AB)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006
US – Steel Safeguards (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003

US – Steel Safeguards (Panel)	Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R / WT/DS249/R / WT/DS251/R / WT/DS252/R / WT/DS253/R / WT/DS254/R / WT/DS258/R / WT/DS259/R / and Corr.1, adopted 10 December 2003, as modified by Appellate Body Report WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R
US – Tyres (AB)	Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 October 2011
US – Wheat Gluten (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001
US – Wheat Gluten (Panel)	Panel Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R, adopted 19 January 2001, as modified by Appellate Body Report WT/DS166/AB/R
US – Wool Shirts and Blouses (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1

TABLE OF U.S. EXHIBITS

EXHIBIT NO.	DESCRIPTION
USA-01	19 C.F.R. § 206.17
USA-02	19 C.F.R § 201.6
USA-03	WARN Act, 29 U.S.C. § 2102
USA-04	Trade Act of 1974, § 201(a)
USA-05	SolarWorld Posthearing Injury Brief (Excerpts)
USA-06	Suniva Posthearing Injury Brief (Excerpts)
USA-07	Application for Disclosure of Confidential Business Information Under Administrative Protective Order
USA-08	Administrative Protective Order Form
USA-09	Notification of Final Date for Compliance with Administrative Protective Order Confidential Business Information Requirements, *Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products)*, Inv. No. TA-201-75 (Nov. 14, 2017)
USA-10	Solar Energy Industries Association's Written Response to Comments Concerning the Administration's Action Following a Determination of Import Injury with Regard to Certain Crystalline Silicon Photovoltaic Cells, Doc. No. USTR-2017-0020 (Nov. 29, 2017)

INTRODUCTION AND EXECUTIVE SUMMARY

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

2. The domestic industry first sought to resolve the difficulties posed by increasing imports by seeking antidumping and countervailing duty measures. But the issuance of antidumping and countervailing duty orders on imports from China in December 2012[2] and additional antidumping and countervailing duty orders on certain other imports from China and Taiwan in February 2015[3] did not bring relief. The antidumping and countervailing duty measures prompted shifts in production to countries where CSPV products for export to the United States were not subject to such remedies.

3. In 2017, the domestic industry filed a petition with the USITC requesting imposition of a safeguard measure on imports of CSPV products from all sources. The USITC conducted an investigation and found that increased imports were causing serious injury to the domestic industry. The Commission issued a report in November 2017, containing its affirmative serious injury determination and recommendations for action to take.[4] In response to a request from the United States Trade Representative for further information, the Commission then issued a

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[1] For this submission, "CSPV products" means certain crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products subject to the USITC investigation, as defined on pages 10-16 of *Crystalline Silicon Photovoltaic Cells (Whether or not Partially or Fully Assembled into Other Products)*, Inv. No. TA-201-75, USITC Pub. 4739 (Exhibit CHN-2) ("USITC November Report").

[2] The 2012 orders covered CSPV cells produced in China and CSPV modules assembled in China and other third countries using CSPV cells made in China.

[3] The 2015 orders covered CSPV modules assembled in China using CSPV cells produced in Taiwan and other third countries and CSPV cells produced in Taiwan and CSPV modules assembled in Taiwan and third countries other than China using CSPV cells made in Taiwan.

[4] USITC November Report (Exhibit CHN-2).

supplemental report addressing unforeseen developments in December 2017.[5] (These reports taken together constitute the report of the U.S. competent authorities for purposes of SGA Articles 3.1 and 4.2(c).) Following receipt of the Commission's reports, the President imposed a safeguard measure beginning on February 7, 2018, that he determined "will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs."[6] The safeguard measure imposed a 2.5 GW tariff rate quota ("TRQ") on imports of CSPV cells for a period of four years, with unchanging within-quota quantities and annual reductions in the rates of duty applicable to goods entering in excess of those quantities in the second, third, and fourth years. The measure also imposed *ad valorem* duties on imports of CSPV modules for a period of four years, with annual reductions in the rates of duty in the second, third, and fourth years.

4. China argues that the safeguard measure and underlying investigation by the USITC were inconsistent with the GATT 1994[7] and the Safeguards Agreement ("SGA"). However, the arguments it advances in support of its claims are wrong. China relies on multiple misunderstandings of the relevant obligations, fails to take account of the totality of the evidence, and distorts the findings of the USITC.

5. Section I of this submission shows that the applicable standard of review for this Panel is one of "objective assessment" of the matter before it, with the burden of proof resting on China, as the complaining party, to demonstrate that the safeguard measure within the Panel's terms of reference is inconsistent with one of the enumerated provisions of the SGA or GATT 1994.

6. Section II of this submission shows that China's submission fails to demonstrate any way in which the ITC's affirmative serious injury determination is inconsistent with the provisions of the SGA or GATT 1994 that China cites. The USITC examined the conditions of competition, the injury factors, and alternate causes of injury put forward by the parties before it, and explained its conclusions at great length. China's arguments that the USITC did not adequately explain its findings that increased imports caused the domestic industry's serious injury are baseless. The Commission established a causal link between increased import volume and market share, on the one hand, and the industry's dismal and worsening financial performance, significant idling of productive facilities, and significant unemployment or underemployment, on the other, and also demonstrated that the seemingly positive trends in other factors did not detract from this finding. The Commission also demonstrated that the alternative causes of injury argued by respondents were not important causes of injury, and did not detract from the causal link between the increased imports and the serious injury experienced by the domestic industry.

[5] Supplemental Report of the U.S. International Trade Commission Regarding Unforeseen Developments (Exhibit CHN-6) ("USITC Supplemental Report").

[6] Proclamation 9693 of January 23, 2018, 83 Fed. Reg. 3541 (Jan. 25, 2018) (Exhibit CHN-1).

[7] The *General Agreement on Tariffs and Trade 1994*.

Despite China's assertions to the contrary, the ITC's serious injury determination was consistent with SGA Articles 2.1, 3.1, and 4.2(b).

7. Section III of this submission shows that China's submission fails to establish that imports did not increase as a result of unforeseen developments and obligations that the United States has incurred. Contrary to China's arguments, Article XIX of the GATT 1994 and the SGA do not require competent authorities to include findings regarding unforeseen developments or obligations incurred in their report, as such conclusions constitute "circumstances" under Article XIX:1(a) and not "conditions" for the application of a safeguard measure under SGA Article 2. Moreover, China fails to recognize that the USITC, although not required, provided detailed findings regarding these circumstances in its November Report, as supplemented by the Supplemental Report. Specifically, the USITC demonstrated that imports of CSPV products increased as a result of unforeseen developments (particularly due to China's policies, practices, and programs that resulted in vast overcapacity for such products and the targeting of the U.S. market) and of obligations incurred by the United States (including tariff concessions that prevented the United States from raising duties on such imports).

8. Section IV of this submission shows that the USITC more than complied with the obligations under SGA Article 3. Article 3.2 mandates that competent authorities prevent the disclosure of business confidential information submitted during an investigation. The USITC complied with this obligation by redacting the relevant information from the report it published with its findings. Beyond this obligation, the USITC provided a narrative description of the redacted information where possible. Despite these procedures, China argues that the USITC denied the parties an opportunity to present a meaningful defense. China's argument fails, however, because the USITC had no obligation to provide non-confidential summaries to the parties during its investigation, the USITC published its non-confidential report in a manner that gave the parties ample time to review it and present their views to the U.S. government, and because the USITC had no obligation to include non-confidential summaries in its published report.

ARGUMENT

I. STANDARD OF REVIEW AND BURDEN OF PROOF

9. Article 3.2 of the DSU directs a WTO adjudicator to resolve claims relating to provisions of the covered agreements by interpreting those provisions "in accordance with customary rules of interpretation of public international law." Those customary rules of interpretation are reflected in Articles 31 to 33 of the Vienna Convention on the Law of Treaties ("VCLT").[8]

10. Article 31 of the VCLT provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,"[9] and further defines what constitutes "context" and "object and purpose,"[10] as well as the relevance of certain instruments.[11] Article 32 of the VCLT provides for recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, to confirm a meaning resulting from the application of Article 31 or where application of Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.[12]

11. As Article 31 reflects, under customary rules of interpretation, it is the text of the treaty that is paramount.[13] The Appellate Body correctly elaborated in *India – Patents* that "principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or . . . concepts that were not intended. . . . Both panels and the Appellate Body must be guided by the rules of treaty interpretation set out in the Vienna Convention, and must not add to or diminish rights and obligations provided in the WTO Agreement."[14]

12. The DSU does not assign precedential value to panel or Appellate Body reports adopted by the DSB, or to interpretations contained in those reports.[15] The DSU states that it exists to

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[8] *See US – Gasoline (AB)*, p.17; *Japan – Alcoholic Beverages II (AB)*, p.10.

[9] VCLT art. 31.1.

[10] VCLT art. 31.2.

[11] VCLT art. 31.3.

[12] VCLT art. 32.

[13] *See Japan – Alcoholic Beverages II (AB)*, p. 11 ("Article 31 of the Vienna Convention provides that the words of the treaty form the foundation for the interpretative process: 'interpretation must be based above all upon the text of the treaty'").

[14] *India – Patents (AB)*, paras. 45-46.

[15] Instead, the DSU and the WTO Agreement reserve such weight to authoritative interpretations adopted by WTO Members in a different body, the Ministerial Conference or General Council, acting not by negative consensus but under different procedures. The DSU explicitly provides in Article 3.9 that the dispute settlement system operates without prejudice to this interpretative authority. In *Japan – Alcoholic Beverages II*, the Appellate Body explicitly found that adoption of reports under the WTO does not create "precedent" or assign a special status

resolve disputes arising under the covered agreements[16] – not disputes concerning panel or Appellate Body interpretations of those agreements. The DSU also provides that a panel or the Appellate Body is to apply customary rules of interpretation of public international law in assisting the DSB to determine whether a measure is inconsistent with a Member's commitments under the covered agreements.[17] Those customary rules of interpretation likewise do not assign a precedential value to interpretations given as part of dispute settlement for purposes of discerning the meaning of agreement text.

13. DSU Article 11 sets out the "function of panels" and reflects a standard of review of "objective assessment." It provides that:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

14. The burden of proof rests with the complaining party alleging a breach of an obligation or the party who is asserting a fact.[18] "The *evidence and arguments* underlying a *prima facie* case must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision."[19] Accordingly, China, as the complaining party, bears the burden of demonstrating that the safeguard measure within the Panel's terms of reference is inconsistent with one of the enumerated provisions of the SGA or GATT 1994.[20]

15. Under these standards, panels are charged with the mandate to determine the facts of the case and to interpret and apply the relevant text of the covered agreements to the challenged

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for interpretations reached in reports, as that status has been reserved for authoritative interpretations reached by the Ministerial Conference. *See Japan – Alcoholic Beverages II (AB)*, pp. 12-14.

[16] DSU art. 1.

[17] DSU arts. 3.2, 7.1.

[18] *Japan – Apples (AB)*, para. 157; *Turkey Textiles (Panel)*, para. 9.57.

[19] *US – Gambling (AB)*, paras. 140-41 (emphasis added).

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

measures.[21] In challenging action to impose a safeguard measure, a complaining party brings forward evidence and argument relating to the investigation carried out, the findings by the competent authority, and the remedy imposed. Therefore, past reports have examined whether the authorities have provided a reasoned and adequate explanation as to how the evidence on the record supported its factual findings and how those factual findings support the overall determination.[22] In reviewing agency action, the Panel must not conduct a *de novo* evidentiary review, but instead should bear in mind its role as *reviewer* of agency action.[23] 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.[24]

16. The *US – Lamb (AB)* report summarized the role of a panel under Article 11 in a dispute involving a determination of serious injury made by the competent authorities:

> [A]s with any claim under the provisions of a covered agreement, panels are required to examine, in accordance with Article 11 of the DSU, whether the Member has complied with the obligations imposed by the particular provisions identified in the claim.
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> * * * * *
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> [A]lthough panels are not entitled to conduct a *de novo* review of the evidence, nor to substitute their own conclusions for those of the competent authorities, this does not mean that panels must simply accept the conclusions of the competent authorities …. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some alternative explanation of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation.[25]

[21] *US – Wheat Gluten (AB)*, para. 150.

[22] *E.g.*, *US – Lamb (AB)*, para. 103.

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

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

[25] *US – Lamb (AB)*, paras. 105-06.

II. THE USITC'S SERIOUS INJURY DETERMINATION IS CONSISTENT WITH ARTICLE XIX OF GATT 1994 AND SGA ARTICLES 2, 3, AND 4.

A. Overview of the USITC Serious Injury Determination

17. To provide a complete understanding of the reasoning underlying the Commission's affirmative serious injury determination, we set out below a summary of the Commission's step-by-step analysis.

Background

18. The Commission instituted the safeguard investigation underlying this dispute on May 17, 2017, following receipt of an amended petition filed by Suniva, Inc. ("Suniva"), a domestic producer of CSPV products.[26] Shortly thereafter, on May 25, 2017, SolarWorld, another domestic producer of CSPV products, publicly stated its support for the petition as a co-petitioner.[27] The scope of the petition covered CSPV products, including the non-cell portion of a finished CSPV module (such as the aluminum frame).[28] It expressly excluded CSPV cells, whether or not partially or fully assembled into other products, if the CSPV cells were manufactured in the United States. Also excluded from the investigation were thin film photovoltaic products and CSPV cells, not exceeding 10,000 mm^2 in surface area, that are permanently integrated into a consumer good whose function was other than power generation and that consumed the electricity generated by the integrated CSPV cell.[29]

19. In addition to domestic producers Suniva and SolarWorld, there was extensive participation in the Commission investigation by a broad spectrum of interested parties representing foreign exporters, importers, purchasers and industry organizations. The respondents that appeared at the injury and remedy hearings with counsel and submitted prehearing and posthearing briefs on injury and remedy issues included the following: Canadian Solar Solutions, Inc., Silfab Solar Inc. ("Silfab Solar"), and Heliene Inc. ("Heliene") (collectively "Canadian respondents"); the Solar Energy and Photovoltaic Products Branch of the China Chamber of Commerce for Import and Export of Machinery and Electronic Products ("CCCME"); the Korea Photovoltaic Industry Association ("KOPIA"); REC Solar Pte. Ltd. and REC Americas, LLC ("REC Americas") (collectively "REC Solar"); and SunPower Corp., SunPower Corporation Systems, SunPower North America, LLC, SunPower Corp. Mexico, S. de R.L. de C.V., SunPower Philippines Manufacturing Ltd., and SunPower Solar Malaysia

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[26] *Crystalline Silicon Photovoltaic Cells (Whether or not Partially or Fully Assembled into other Products); Institution and Scheduling of Safeguard Investigation and Determination That the Investigation is Extraordinarily Complicated*, 82 Fed. Reg. 25331 (June 1, 2017) ("Institution Notice") (Exhibit CHN-12); USITC November Report, p. 6 (Exhibit CHN-2).

[27] USITC November Report, p. 6 (Exhibit CHN-2).

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

[29] USITC November Report, pp. 12-13 (Exhibit CHN-2).

Sdn. Bhd. (collectively "SunPower"). Vina Solar Technology Co. Ltd. ("Vina Solar"), Boviet Solar USA Ltd. ("Boviet USA"), and Boviet Solar Technology Co., Ltd. ("Boviet") (collectively "Vietnamese respondents") submitted joint prehearing briefs on injury and prehearing and posthearing briefs on remedy. Seven interested parties submitted prehearing and posthearing briefs on remedy (Auxin Solar, Changzhou Trina, Goal Zero LLC, Mission Solar, NextEra Energy Inc., Solatube International Inc., and the Taiwan Photovoltaic Industry Association ("TPVIA")), and two other interested parties (Sunrun and Tesla) submitted posthearing briefs on remedy.

20. In addition, representatives from the Embassies of Korea, Indonesia, Brazil, Mexico, and Canada, as well as a representative from the EU and another from the Taipei Economic and Cultural Representative office all provided statements at the beginning of the Commission's injury hearing.[30]

21. As it typically does in its safeguard investigations, the Commission defined the period of investigation ("POI") as the five most recent full years, from 2012-2016.[31] To collect the information necessary for its analysis, the Commission issued detailed questionnaires, developed with input from petitioners and respondents, to known industry participants in all aspects of the CSPV market. The Commission received questionnaire responses from: 16 firms, estimated to have accounted for all known domestic production of CSPV cells and 63.9 percent of domestic production of CSPV modules in 2015; 56 importers, estimated to have accounted for 82.6 percent of subject imports in 2016; and 100 foreign producers/exporters of CSPV products.[32]

22. In addition, the Commission received 106 usable purchaser questionnaire responses, including from the industry's largest purchasers to whom it originally sent questionnaires as well as additional firms who self-identified as purchasers and volunteered to participate in the investigation.[33] These 106 purchasers covered the range of uses, mainly including commercial or residential installers; utility companies, developers, and contractors; and module distributors and assemblers.[34]

23. On September 22, 2017, the Commission reached a unanimous affirmative determination that CSPV products were being imported into the United States in such increased quantities as to

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[30] Under the Commission's regulations the Government of China could have participated in the investigation in any capacity including as a full interested party. Specifically, under USITC Rule 206.17 an interested party whose counsel is authorized access to the confidential record includes, among others, "[t]he government of a country in which {an article which is the subject of a safeguard investigation} is produced or manufactured." 19 C.F.R § 206.17 (Exhibit USA-01).

[31] USITC November Report, p. 6 n.10 (Exhibit CHN-2).

[32] USITC November Report, p. 9 (Exhibit CHN-2).

[33] USITC November Report, p. I-44 & n.153 (Exhibit CHN-2).

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

be a substantial cause of serious injury to the domestic industry.[35] The investigation then proceeded to the remedy phase, so the Commission could provide remedy recommendations in its report to the President.

24. The Commissioners announced their remedy recommendations to the President. Three Commissioners recommended a TRQ on imports of CSPV cells (with annual increases to within quota quantities and annual reductions in applicable duty rates) and an additional tariff on imports of CSPV modules (with annual reductions in duty rates) for a period of four years.[36] One Commissioner recommended a quantitative restriction on imports of CSPV products for a four-year period, administered on a global basis.[37] The USITC submitted its November report (including relevant business confidential information ("BCI")),[38] to the President on November

[35] USITC November Report, p. 7 (Exhibit CHN-2). As the Commission explained in its supplemental report, based on the data and other information it evaluated at the time that it reached its affirmative injury determination in this case, it found and confirmed the existence of unforeseen developments that led to the articles at issue being imported into the United States in such increased quantities as to be a substantial cause of serious injury. Supplemental Report of the USITC Regarding Unforeseen Developments, p. 4 (Exhibit CHN-6).

[36] Specifically, Chairman Schmidtlein recommended a TRQ on imports of CSPV cells as follows: (a) Year 1: a tariff of 10 percent *ad valorem* on imports of up to 0.5 GW and a tariff of 30 percent *ad valorem* on imports in excess of 0.5 GW; (b) Year 2: a tariff of 9.5 percent *ad valorem* on imports of up to 0.6 GW and a tariff of 29percent *ad valorem* on imports in excess of 0.6 GW; (c) Year 3: a tariff of 9 percent *ad valorem* on imports of up to 0.7 GW and a tariff of 28 percent *ad valorem* on imports in excess of 0.7 GW; and (d) Year 4: a tariff of 8.5 percent *ad valorem* on imports of up to 0.8 GW and a tariff of 27 percent *ad valorem* on imports in excess of 0.8 GW. She also recommended the imposition of a tariff on imports of CSPV modules at the rate of 35 percent *ad valorem* in the first year of relief, declining by one percent increments each following year to 34 percent *ad valorem* in the second year, 33 percent *ad valorem* in the third year, and 32 percent *ad valorem* in the fourth year. USITC November Report, p. 81 (Exhibit CHN-2).

Vice Chairman Johanson and Commissioner Williamson recommended a TRQ on imports of CSPV cells as follows: (a) Year 1: a tariff of 30 percent *ad valorem* on imports in excess of 1.0 GW; (b) Year 2: a tariff of 30 percent *ad valorem* on imports in excess of 1.0 GW; (c) Year 3: a tariff of 20 percent *ad valorem* on imports in excess of 1.4 GW; (d) Year 4: a tariff of 15 percent *ad valorem* on imports in excess of 1.6 GW. They also recommended the imposition of a tariff on imports of CSPV modules at the rate of 30 percent *ad valorem* in the first year of relief, declining by five percent increments each following year to 25 percent *ad valorem* in the second year, 20 percent *ad valorem* in the third year, and 15.0 percent *ad valorem* in the fourth year. USITC November Report, p. 89 (Exhibit CHN-2).

[37] Commissioner Broadbent recommended a quantitative restriction on imports of CSPV products at 8.9 GW in the first year, increasing by 1.4 GW each subsequent year, administered on a global basis. She further recommended that the quantitative restrictions be administered by selling import licenses at public auction at a minimum price of $0.01 per watt, and to the extent permitted by law, authorize the use of funds equal to the amount generated by import license auction to provide development assistance to the domestic industry for the duration of the remedy period. USITC November Report, pp. 105-06 (Exhibit CHN-2).

[38] The USITC's regulations define confidential business information ("CBI") as "information which concerns or relates to the trade secrets, processes, operations, style of works, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, or amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, or other information of commercial value, the disclosure of which is likely to have the effect of either impairing the

13, 2017. This report consisted of the Commission's views in support of its determination of serious injury, the Commissioners' views in support of their recommendations for action to take to prevent or remedy the serious injury and facilitate adjustment, and the final staff report, compiling information gathered over the course of the investigation. The Commission published the non-BCI USITC November Report on November 20, 2017.

25. On November 27, 2017, the USTR requested the USITC to provide additional information in the form of a supplemental report identifying any unforeseen developments that led to the articles at issue being imported into the United States in such increased quantities as to be a substantial cause of serious injury.[39] The Commission responded to this request by issuing a supplemental report on December 27, 2017, containing its finding that the increased imports were a result of unforeseen developments and the reasons for that finding. (The USITC November Report and USITC Supplemental report taken together constitute the report of the U.S. competent authorities for purposes of SGA Articles 3.1 and 4.2(c)).[40]

Like or directly competitive domestic product and domestic industry

26. The Commission began its analysis by defining the like or directly competitive domestic product as all domestically produced CSPV cells and CSPV modules corresponding to the imported products within the scope of the investigation.[41] Consistent with its definition of the like product, the Commission defined the domestic industry as all U.S. producers of CSPV cells, whether or not partially or fully assembled into other products, including integrated producers of

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Commission's ability obtain such information as is necessary to perform its statutory functions, or causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained, unless the Commission is required by law to disclose such information." 19 C.F.R. § 201.6 (Exhibit USA-02). The United States considers that this information qualifies as "confidential information" for purposes of SGA Article 3.1, and is encompassed within the business confidential information ("BCI") covered by the Panel's "Additional Working Procedures of the Panel Concerning Business Confidential Information." For avoidance of confusion, the United States uses the term "BCI" to refer to information designated as CBI during the USITC investigation and "confidential information" within the meaning of SGA Article 3.1.

[39] Letter from Ambassador Robert E. Lighthizer to Chairman Rhonda K. Schmidtlein (Nov. 27, 2017) (Exhibit CHN-5).

[40] *See, e.g.*, Notification Under Article 12.1(B) of the Agreement on Safeguards on Finding a Serious Injury or Threat Thereof Caused by Increased Imports; G/SG/N/8/USA/9/Suppl.3 (January 8, 2018) ("{p}ursuant to Article 12.1(b) of the WTO Agreement on Safeguards (Safeguards Agreement), the United States is supplementing its earlier notifications regarding the determination of the U.S. International Trade Commission (ITC) with respect to serious injury, or threat thereof, to the domestic industry caused by increased imports.")

Notification Under Article 12.1(B) of the Agreement on Safeguards on Finding a Serious Injury or Threat Thereof Caused by Imports; Notification Under Article 12.1(C) upon taking a Decision to Apply or Extend a Safeguard Measure; Notification Pursuant to Article 9, n. 2 of the Agreement on Safeguards, G/SG/N/8USA/9/Suppl.1; G/SG/N/10/USA/7; G/SG/N11/USA/6 (January 26, 2018)

[41] USITC November Report, pp. 10-16 (Exhibit CHN-2).

CSPV cells and modules and independent module producers.[42] China does not challenge the Commission's like product and domestic industry definitions.

Increased imports

27. Having defined the domestic industry, the Commission found that imports increased during the period of investigation, both in absolute terms and relative to domestic production.[43] Subject import volume increased in each year of the POI, from 2,100 MW in 2012 to 3,100 MW in 2013, 4,600 MW in 2014, 8,400 MW in 2015, and 12,800 MW in 2016.[44] This represented an overall increase of 492.4 percent between 2012 to 2016, and a fifty percent increase just from 2015 to 2016.[45] Imports as a ratio to domestic production also increased in each year of the POI, from 733.9 percent in 2012 to 948.4 percent in 2013, 1,140 percent in 2014, 1,539 percent in 2015, and 2,276.2 percent in 2016.[46] China does not challenge these findings.

Conditions of competition and the business cycle

28. The Commission next turned to the question of whether CSPV products were being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry. The Commission began by discussing several conditions of competition that informed its analysis. Generally, China does not challenge the Commission's findings concerning conditions of competition.

29. ***Demand***. The Commission found that demand for CSPV products, which derives from demand for solar electricity, increased in every year of the POI.[47] It observed that, consistent with the data, the vast majority of firms reported that U.S. demand for CSPV products increased since 2012. According to most of these firms, the increase in demand resulted from the reduction in CSPV system prices and installation costs as well as the existence of Federal, state, and local incentive programs. Firms also tied the increase in demand to the public's increased knowledge of and general interest in renewable energy, increased technology improvements, including module efficiency, and increased military use of solar energy.[48]

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[42] USITC November Report, p. 18 (Exhibit CHN-2).

[43] USITC November Report, pp. 19-22 (Exhibit CHN-2).

[44] As the Commission explained, it collected data in terms of wattage, which measures the output of CSPV cells and modules. A kilowatt ("kW") equals 1,000 watts, one megawatt ("MW") equals 1,000 kW, and a gigawatt ("GW") equals 1,000 MW. USITC November Report, p. 20 & n.81. (Exhibit CHN-2).

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

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

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

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

30. The Commission further found that the vast majority of CSPV modules sold in the U.S. market were connected to the electricity grid and sold to three market segments – residential, commercial, and utility.[49] Annual installations of on-grid photovoltaic systems increased from 3,373 MW in 2012 to 14,762 MW in 2016, an increase of 338 percent. All three on-grid segments experienced considerable growth in both the number of installations and the total wattage of installation projects during the POI, with residential and utility installations increasing by 423 percent and 488 percent, respectively, from 2012 to 2016.[50] The domestic industry and importers each sold CSPV products in the U.S. market to distributors, residential and commercial installers, and utility customers.[51]

31. ***Supply.*** The Commission found that during the POI, the U.S. market was supplied primarily by imports and to a continuously lesser degree by the domestic industry.[52] Despite the demand increase, several U.S. firms closed their domestic production facilities during the POI. As import presence skyrocketed, the domestic industry's share of the U.S. market declined from 2012 to 2016.[53]

32. The Commission found that imports, as a whole, accounted for the vast majority of the market, and their share of apparent U.S. consumption increased dramatically from 2012 to 2016. Imports from China were consistently the largest or one of the largest sources of imports except in 2013, following the first antidumping and countervailing duty investigation on CSPV cells and modules from China. Other large sources included Taiwan (particularly from 2012 to 2014), Korea and Malaysia (2016), and Mexico (each year).[54]

33. ***Substitutability.*** The Commission found a high degree of substitutability between imports and domestically produced CSPV products.[55] The Commission observed that throughout the POI, U.S. producers and importers made commercial shipments of a wide variety of CSPV products, predominantly in the form of modules. Imported and domestically produced CSPV products were sold in a range of wattages and conversion efficiencies, and modules were sold in both 60-cell and 72-cell forms. Imported and domestically produced CSPV products were also sold to overlapping market segments through overlapping channels of distribution, and

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

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

[51] USITC November Report, p. 28 (Exhibit CHN-2). Distributors typically sold CSPV products to the residential and commercial market segments, including to installers. Suniva also reported that some of its sales to distributors served the utility segment. *See* USITC November Report at 28 n.128 (Exhibit CHN-2).

[52] USITC November Report, p. 28 (Exhibit CHN-2).

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

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

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

most responding domestic producers, importers, and purchasers reported that domestic and imported CSPV products were interchangeable.[56]

34. The Commission also found that in the U.S. market for CSPV products, purchasers identified price as an important factor in their purchasing decisions, among other factors they also took into account.[57] Price was the most often cited primary factor, followed by quality/performance and availability.[58]

35. ***Other Conditions of Competition.*** The Commission found another important condition of competition to be raw material costs.[59] Raw materials accounted for the largest component of the total cost of goods sold ("COGS") for both CSPV cells and CSPV modules. Prices of polysilicon, the key raw material used in the production of wafers used to manufacture CSPV cells fluctuated but declined overall during the POI.[60]

36. In addition, the Commission found that during the POI, domestic producers and importers reported selling CSPV products using transaction-by-transaction negotiations and also contracts. In 2016, domestic producers sold the majority of their CSPV products through short-term contracts and the remainder on a spot basis, whereas importers sold most of their CSPV products through a mix of short-term, annual, and long-term contracts.[61]

Serious injury to the domestic industry

37. Having discussed the conditions of competition relevant to its analysis, the Commission found that the domestic industry was seriously injured.[62] China does not challenge this finding.

38. The Commission first examined the domestic industry's production facilities and employment, finding significant idling of domestic production facilities for CSPV products between 2012 and 2016, as well as significant unemployment and underemployment within the domestic industry.[63]

39. The Commission took note of the domestic industry's increase in CSPV cell and CSPV module capacity and production, but found that neither of the increases approached the

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

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

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

[59] USITC November Report, pp. 30-31 (Exhibit CHN-2).

[60] USITC November Report, pp. 30-31 (Exhibit CHN-2).

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

[62] USITC November Report, pp. 31-43 (Exhibit CHN-2).

[63] USITC November Report, pp. 31-34 (Exhibit CHN-2).

magnitude of the explosive growth in apparent U.S. consumption during this period. Instead, dozens of U.S. facilities closed their operations during this period as imports captured most of the growth in demand.[64] Indeed, 33 CSPV cell or CSPV module facilities operated in the United States as of January 1, 2012, but only 13 of those facilities remained open by December 31, 2016. Of the 16 additional facilities that opened during the POI, five closed. And although two firms announced plans for new facilities, those facilities were not commercially operational by July 2017.[65] Moreover, the domestic producers remaining in the market continued to operate at below full capacity, particularly for CSPV module assembly operations.[66]

40. The substantial number of facility closures resulted in extensive layoffs and the award of U.S. Trade Adjustment Assistance Act benefits to many workers during the POI. In addition, workers at some facilities experienced temporary shutdowns or productive slowdowns, which led to layoffs and underemployment.[67]

41. The Commission also examined the domestic industry's profitability and found that the domestic industry was unable to carry out domestic production operations at a reasonable level of profit during the POI.[68] The value of the domestic industry's net sales declined over the POI and its COGS to net sales ratio was high throughout the POI. Consistent with overall declines in its net sales value and high COGS to net sales ratio, the domestic industry experienced hundreds of millions of dollars in operating and net losses throughout the POI.[69]

42. The Commission also found a significant number of domestic producers were unable to generate adequate capital to finance the modernization of their domestic plants and equipment or maintain existing levels of expenditures for research and development, despite explosive demand growth during the POI.[70] The Commission acknowledged that the domestic industry's capital expenditures increased overall between 2012 and 2016, reaching their highest level in 2015, but found the largest share of those expenditures was related to expenditures by one firm on new CSPV cell operations that had not yet become commercially operational.[71] The domestic industry's research and development expenses generally declined between 2012 and 2015, but increased in 2016, and the value of the domestic industry's production assets increased overall,

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

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

[66] USITC November Report, p. 33 (Exhibit CHN-2).

[67] USITC November Report, p. 33 (Exhibit CHN-2).

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

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

[70] USITC November Report, pp. 35-37 (Exhibit CHN-2).

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

largely due to the same firm's planned new CSPV cell operations.[72] Other domestic producers recognized asset impairments, reserved or wrote off production equipment, and otherwise slowed or shut down production.[73]

43. Domestic producers also identified a series of actual negative effects on their investment, growth, and development due to imports. These included tabling, postponing, and deferring projects; rejection of investment proposals; reduction in the size of capital investments; negative returns on investments; inability to generate adequate capital to finance modernization of domestic plants and equipment; increased costs for debt financing; inability to maintain existing levels of research and development expenditures; rejection of bank loans; lowering of credit ratings; inability to issue stocks or bonds; inability to service debt; lowered bankability;[74] and other such difficulties.[75]

44. The Commission recognized that the domestic industry's U.S. shipments increased overall between 2012 and 2016. The Commission found, however, that this overall increase was dwarfed by the growth in apparent U.S. consumption. Consequently, the domestic industry's market share fell from a period high in 2012 to a period low in 2016.[76] Both the domestic industry's and importers' end-of-period inventories increased overall, and U.S. importers reported that as of June 2017, they already had arranged for importation of an additional 10,200 MW in CSPV products for calendar year 2017.[77]

45. As part of its serious injury analysis, the Commission also examined the extent to which the U.S. market was a focal point for diversion of exports.[78] It found that foreign industries had substantial and increasing capacity to manufacture CSPV cells and CSPV modules and significant unused capacity. Foreign producers' collective capacity consistently exceeded their combined production levels by large margins and their excess capacity exceeded the size of the

[72] USITC November Report, pp. 35-36 (Exhibit CHN-2).

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

[74] As respondents acknowledged, the industry does not have a standard definition of "bankability." Respondents claimed that "bankability" included factors such as "creditworthiness" and performance of the product over time and that it could vary from project to project or customer to customer. The Commission found that at a minimum, "bankability" encompassed both the financial viability of a supplier and the product's performance reliability. USITC November Report, p. 55 (Exhibit CHN-2).

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

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

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

[78] USITC November Report, pp. 38-41 (Exhibit CHN-2).

entire U.S. market in each full year of the POI. In addition, their combined end-of-period inventories increased each year from 2012 to 2016.[79]

46. The Commission found that foreign industries had not only the available capacity, but also the incentive to export significant volumes of CSPV products to the United States.[80] Although the foreign industries collectively consumed the majority of the CSPV cells that they manufactured in their home market CSPV module assembly operations, their CSPV module operations were export oriented. Indeed, their combined exports of CSPV modules more than quintupled from 2,300 MW in 2012 to 11,800 MW in 2016.[81]

47. The foreign industries also demonstrated an ability to redirect exports from one market to another and to increase exports substantially to individual markets from one year to the next. With several foreign industries facing antidumping and/or countervailing duty orders on their exports to one or more non-U.S. markets, including the European Union (CSPV cells and modules from China, Malaysia, and Taiwan), Canada (CSPV modules from China), and Turkey (CSPV modules from China), the Commission found the large and growing U.S. market was a target for the foreign industries' exports. This was corroborated by questionnaire data, which indicated that the foreign industries collectively increased their exports of CSPV modules to the United States throughout 2012 to 2016, and the U.S. market accounted for an increasing share of their total shipments of CSPV modules during this period.[82]

48. As further evidence of the attractiveness of the U.S. market, the Commission found that after the imposition of the antidumping and countervailing duty orders on imports from China in December 2012 and on imports from China and Taiwan in February 2015, imports from other countries substantially increased their presence in the U.S. market.[83] Without closing any of their existing capacity in China, the six largest firms producing CSPV cells and CSPV modules in China increased their global capacity to produce CSPV cells between 2012 and 2016, with four of the six firms adding CSPV cell manufacturing capacity in one or more of the following five countries: Korea, Malaysia, the Netherlands, Thailand, and Vietnam.[84] These same six firms also increased their global capacity to produce CSPV modules between 2012 and 2016, without closing any of their existing capacity in China, with four of the six firms adding CSPV module capacity in one or more of the following six countries: Canada, Indonesia, Korea, Malaysia, Thailand, and Vietnam. Notably, imports from the four countries where Chinese

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

[80] USITC November Report, pp. 39-41 (Exhibit CHN-2).

[81] USITC November Report, p. 39 n.205 (Exhibit CHN-2).

[82] USITC November Report, pp. 39-40 (Exhibit CHN-2).

[83] USITC November Report, p. 40 (Exhibit CHN-2).

[84] These six firms were: Canadian Solar (China), Hanwha Qidong (China), Shanghai JA solar, Jinko Solar (China), Changzhou Trina (China), and Yingli Green. USITC November Report, p. 40 n.215 (Exhibit CHN-2).

affiliates added both CSPV cell and CSPV module capacity (Korea, Malaysia, Thailand, and Vietnam) increased their share of apparent U.S. consumption between 2012 and 2016, and much of this increase occurred between 2015 and 2016 after the second round of antidumping and countervailing duty orders went into effect in February 2015. Consistent with these shifts, a substantial number of U.S. importers and purchasers reported that the origin of their purchases had shifted, as they purchased CSPV products imported from other countries.[85]

49. Finally, the Commission examined prices of CSPV products during the POI.[86] It found that the domestic industry experienced adverse price conditions as imports were lower priced than domestically produced CSPV products and domestic prices fell between 2012 and 2016 despite very strong demand growth. The domestic industry's COGS to net sales ratio was high throughout the POI with its costs remaining near or above its net sale values.[87]

50. Specifically, the Commission examined the pricing data comparing import and domestic prices on the five pricing products agreed by the investigation participants to be representative of CSPV sales in the United States. These products included 60-cell modules as well as 72-cell modules. These comparisons demonstrated that imports of CSPV products were priced lower than domestically produced products in 33 of 52 instances involving approximately two-thirds of the total volume of products for which the Commission had pricing data, and were priced higher in only 19 instances.[88]

51. Seven domestic producers reported that they had lost sales to imported CSPV products since 2012. Confirming this, the great majority of purchasers reported that they had increased their purchases of imported CSPV products, and they identified lower price most often as the reason for increasing their purchases of imported CSPV products.[89] Purchasers also reported that imported CSPV modules as a share of their total purchases of CSPV products increased from 75.6 percent of total CSPV purchases in 2012 to 91.2 percent of total CSPV purchases in 2016, a change of 15.6 percentage points.[90]

52. The Commission also considered price trends.[91] As reported in the questionnaires, quarterly prices for all five pricing products declined between January 2012 and December 2016, with prices of domestically produced products declining between 48.5 and 73.2 percent and imported CSPV products declining between 45.7 and 51.0 percent during this period. Published

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

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

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

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

[89] USITC November Report, p. 42 & n.224 (Exhibit CHN-2).

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

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

industry reports likewise showed price declines, with CSPV cell and CSPV module prices falling by 60.4 percent and 58.5 percent, respectively, from 2012 to 2016.

53. Eight of 12 responding domestic producers reported that they had to reduce prices, and three reported having to roll back announced price increases in order to avoid losing sales to competitors selling imported CSPV products during the POI. These three producers suffered an estimated $140 million in total lost revenues since 2012.[92] Purchaser questionnaire responses also indicated declining prices. Of the 104 purchasers who responded to this question, 38 reported that U.S. producers had reduced prices of their CSPV products in order to compete with lower-priced imports, and 44 of them reported that they did not know whether U.S. producers had reduced their prices to compete with lower-priced imports.[93] Several purchasers also reported steeper price reductions in 2016.[94]

54. The Commission took note that although the domestic industry's COGS declined by a greater amount than the industry's net sales values between 2012 and 2016, the industry's COGS to net sales ratio consistently remained high throughout this period and exceeded 100 percent at the end of the POI.[95]

55. Upon its evaluation of all relevant information concerning the condition of the domestic industry, the Commission found that the domestic industry was seriously injured.[96]

Increased imports were a substantial cause of serious injury to the domestic industry

56. The Commission found that imports were a substantial cause of serious injury to the domestic industry.[97] As the Commission explained, consistent with the large and attractive nature of the U.S. market and the large and growing size of the export-oriented foreign industries, imports of CSPV products increased both absolutely and relative to domestic production in each year since 2012, reaching record highs in 2016.[98] The increasing volume of imports also accounted for a growing and substantial share of the U.S. market.[99]

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[92] USITC November Report, p. 42 & n.228 (Exhibit CHN-2).

[93] The percentage of purchasers who admitted to purchasing an increased volume of imported CSPV products instead of domestic CSPV products on a price basis is particularly notable, given that a number of purchasers appeared in the Commission's investigation to oppose the imposition of measures.

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

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

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

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

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

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

57. The Commission noted the change in the composition of imports during the POI. It observed that in 2009, the beginning of the antidumping and countervailing duty investigations on imports from China ("*CSPV I*"), the domestic industry had held the largest share of apparent U.S. consumption followed by imports from China corresponding to the scope of those investigations, and imports from all other sources. Imports from China, however, overtook the domestic industry's U.S. shipments in 2010 and by the end of 2011, imports from China had nearly doubled from their 2009 level.

58. After those imports became subject to antidumping and countervailing duty orders in December 2012, imports from China and Taiwan corresponding to the scope of subsequent antidumping and countervailing duty investigations on imports from China and Taiwan ("*CSPV II*") increased their presence in the U.S. market and replaced entirely the substantial market share previously held by the *CSPV I* imports from China and took additional market share from the domestic industry. The Commission further observed that before the *CSPV II* orders became effective in February 2015, imports from additional countries entered the U.S. market. By the end of 2015, imports had almost doubled their level from 2014, and imports continued to grow in 2016.[100]

59. The Commission found that while the volume of imports that were highly substitutable with the domestically produced product and generally lower priced, grew, prices for all five pricing products declined between January 2012 and December 2016.[101] Specifically, prices declined substantially in 2012. Prices stabilized somewhat after imports from China became subject to antidumping and countervailing duty orders in December 2012, additional investigations on imports from China and Taiwan were commenced at the end of 2013, and imports grew at a slower pace than apparent U.S. consumption between 2013 and 2014. As imports from additional sources entered the U.S. market and rapidly increased to higher volumes, however, the domestic industry's prices steadily fell throughout 2016. Several purchasers also reported steeper price reductions in 2016, as the domestic industry's share of the market fell to its lowest level.[102]

60. As the Commission further found, the domestic industry's financial condition correlated with import and price trends. Specifically, the domestic industry's condition, which had been at its worst at the beginning of the POI before the antidumping and countervailing duty orders were imposed on imports from China in December 2012, improved marginally after imposition of the orders and the filing of new antidumping and countervailing duty cases, but remained poor and

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

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

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

deteriorated further in 2016, as imports peaked in terms of volume and market share and prices dropped anew.[103]

61. The Commission found that consistent with the hundreds of millions of dollars in net and operating losses throughout the POI, a significant number of domestic producers were unable to generate adequate capital to finance the modernization of their domestic plants and equipment, and a significant number of them were unable to maintain existing research and development expenditure levels. This inability to generate adequate capital for investments and research and development impaired the domestic industry's ability to develop next-generation products in a highly capital-intensive and technologically sophisticated market.[104]

62. Additionally, despite the need to increase capacity in order to achieve economies of scale, the domestic industry's capacity and production levels did not increase commensurately with demand growth, and its capacity utilization levels remained low and dropped at the end of the POI as imports reached their summit. Although many U.S. producers entered the U.S. market seeking to take advantage of this demand growth, the consistent inability of the domestic industry to compete with low-priced imports forced both new entrants and preexisting producers to shut down their facilities. The substantial number of facility closures during the POI resulted in numerous layoffs and the need for trade adjustment assistance for the highly trained, skilled workers affected by these closures.[105]

63. The Commission took note that the domestic industry's U.S. shipments increased over the POI, but found that this overall increase was dwarfed by the growth in apparent U.S. consumption during this period. The increase in production also paled in comparison to the explosion in demand, as the domestic industry lost market share to the consistently growing low-priced imports. Domestic producers documented that they had lost sales to low-priced imports of CSPV products. The purchaser questionnaires corroborated this, with a majority of purchasers reporting 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.[106]

64. Consistent with the declines in many of the domestic industry's trade and financial indicators between 2015 and 2016, as imports reached their POI pinnacle, the Commission found that available information suggested that the domestic industry's condition continued to deteriorate into 2017, continuing beyond the end of the POI in December 2016. Two additional U.S. production facilities closed by July 2017. The domestic industry's unemployment and

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[103] USITC November Report, pp. 38, 47 (Exhibit CHN-2).

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

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

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

underemployment also worsened in 2017, with Suniva's bankruptcy filing and SolarWorld's additional layoffs and issuance of worker training and readjustment ("WARN Act") notices.[107]

65. Based on these considerations, the Commission found "a clear causal link" between increased imports and serious injury to the domestic industry.[108]

Imports were an important cause not less than any other cause

66. Finally, the Commission undertook to assure that it did not attribute to increased imports injury caused by other factors. Specifically, respondents identified two such causes: (1) alleged missteps by the domestic industry and (2) factors other than imports that led to declines in domestic prices. The Commission found that the facts did not support respondents' contentions regarding these other alleged factors.[109]

67. The Commission first addressed respondents' claims concerning alleged missteps by the domestic industry, which respondents identified in terms of the types of products the domestic industry manufactured, the market segments they served, and the quality, delivery, and service the domestic producers provided.

68. Regarding respondents' arguments that the domestic industry was unable to provide innovative CSPV products, the Commission found that domestic producers pioneered certain CSPV technologies, and that they continued to innovate, develop, and manufacture leading-edge products. Like imports, domestically produced CSPV products were sold across a range of wattages and conversion efficiencies, and modules were sold in 60- and 72-cell forms.[110]

69. The Commission acknowledged that certain foreign producers may have produced CSPV products that were unique or unavailable from other sources, but explained that the record evidence indicated that these products accounted for only a small share of the U.S. market for CSPV products.[111] Moreover, it found that there was more overlap between U.S. and imported specialized CSPV products than acknowledged by respondents. Despite the closures of numerous domestic producers and the inability of a number of domestic producers to generate adequate capital to finance facility expansions or upgrades or research and development efforts discussed earlier, the domestic industry supplied a wide variety of monocrystalline and multicrystalline products that overlapped with imported CSPV products, including CSPV

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

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

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

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

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

products with 2, 3, 4, and 5 busbars, PERC products, frameless (glass-glass) modules, heterojunction cells, bifacial products, and hybrid CSPV products. This overlap was further corroborated by the pricing data, which reflected that the domestic industry and importers sold CSPV products within similar efficiency and wattage ranges.[112]

70. The Commission further found that in any event, despite the existence of some variations in product offerings between imports and U.S.-manufactured CSPV products, 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.[113] In fact, most U.S. producers, importers, and purchasers reported that U.S.-produced CSPV products were interchangeable with imported CSPV products.

71. The Commission also rejected respondents' argument that domestic producers were not "bankable" for large-scale commercial and utility purchases and lacked "Tier 1" status on the Bloomberg BNEF Tier 1 list. In this regard, the Commission observed that in their questionnaire responses, purchasers did not identify "bankability" as one of their "top three" purchasing factors, and only three of 56 responding importers indicated that developers, installers, and project owners chose Tier I module suppliers. The Commission also observed that SolarWorld qualified as a Bloomberg Tier 1 supplier in 2014, 2015, all of 2016, and through February 2017. The Commission found that the company's subsequent loss of bankability resulted from the serious injury substantially caused by increased imports.[114]

72. The Commission also found that respondents' assertions regarding participation in certain market segments did not break the causal link between imports and serious injury to the domestic industry.[115] Specifically, respondents claimed that: (1) the domestic producers focused their business models on the higher-profit residential and commercial segments of the U.S. market and until recently did not seek to compete for lower-margin, higher-volume utility sales even though utilities were the fastest-growing segment that accounted for the largest share of the market; and (2) domestic producers were unable "to provide the required combination of product type and demonstrated product performance" demanded by utilities.[116]

73. As an initial matter, the Commission noted that all three grid-connected market segments – residential, commercial, and utility – experienced considerable growth in both the number of installations and the total wattage of installation projects during the POI.[117] During the POI, the

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

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

[114] USITC November Report, pp. 55-56 (Exhibit CHN-2).

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

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

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

domestic industry and importers each sold CSPV products in the U.S. market to distributors (who, in turn, typically sold product to the residential and commercial segments), residential and commercial installers, and the utility segment.[118]

74. Although the great majority of the domestic industry's shipments went to residential and commercial installers, the USITC found that the domestic industry also competed for and shipped to the utility segment of the market.[119] The Commission found that the evidence showed that the domestic industry sold both 60-cell and 72-cell modules, and that the utility segment purchased both types of modules during the POI. Respondents even acknowledged that 60-cell modules predominated in all three segments of the market, including the utility segment, at the beginning of the POI.[120] Although the utility segment later shifted to 72-cell modules, SolarWorld added a 72-cell module assembly line to its U.S. facilities due to increasing demand and Suniva devoted 45 percent of its cell production capacity to 72-cell modules.[121] Extensive bid information submitted by SolarWorld and Suniva further demonstrated that the domestic industry sold or tried to sell products to utilities throughout the POI. Notwithstanding this, the domestic industry lost market share to imports for both 60-cell and 72-cell modules. The Commission found that although the domestic industry clearly sought to compete in the large, concentrated, and price-sensitive utility market, the large volume of imports at low and declining prices adversely 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, even if it managed to develop and even pioneer innovative products that utilities and others sought.[122]

75. The Commission also found that the record evidence did not support respondents' allegations that the domestic industry had quality, delivery, and service issues.[123] As an initial matter, most U.S. producers, importers, and purchasers reported that domestically produced CSPV products were interchangeable with imported CSPV products. Moreover, SolarWorld and Suniva both reported low warranty claim rates, and independent firms recognized the quality of the domestic industry's products. That the domestic industry provided satisfactory quality, delivery, and service was further corroborated by the purchaser questionnaire responses, most of which reported that no domestic supplier had failed in its attempt to qualify product or had lost its approved status since 2012.[124] The Commission also considered petitioners' detailed explanations responding to respondents' specific allegations of unsatisfactory delivery and

[118] USITC November Report, p. 28 n.128, 59 (Exhibit CHN-2).

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

[120] USITC November Report, p. 60 n.348 (Exhibit CHN-2).

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

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

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

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

service, and found petitioners' responses to provide a compelling and credible rebuttal of those allegations. It concluded that the evidence did not support the widespread delivery and service issues alleged by respondents.[125]

76. The Commission next addressed respondents' assertions concerning factors other than imports that allegedly led to declines in domestic prices. These alleged factors were declining government incentive programs, declining polysilicon raw material costs, and the need to meet grid parity with other sources of electricity. The Commission found that these proposed alternative causes could not individually or collectively explain the serious injury to the domestic industry, particularly the declining market share, low capacity utilization levels, facility closures, and abysmal financial performance.[126]

77. First, the Commission found that changes in incentive programs failed to explain the domestic industry's condition.[127] As the Commission explained, these incentives offset the cost of generating solar or other renewable energy, mandated its use, or otherwise influenced its price, thereby stimulating demand for renewable energy-generated electricity and assisting developers of solar power and other renewable energy sources to achieve sufficient economies of scale to become more competitive with conventional sources of electricity.[128]

78. The Commission found that some incentive programs had expired while others were continued, but that despite any decrease in incentives, apparent U.S. consumption had not been negatively affected. Instead, demand continued to experience robust growth throughout the POI, including in states most affected by changes in incentive programs, such as California. Indeed, in 2016, solar power was the largest source of new electric generating capacity, accounting for 39 percent of all new electric generating capacity installed in the United States.[129]

79. The Commission also found that raw material costs, which accounted for the largest component of the total cost of goods sold for both CSPV cells and CSPV modules, failed to explain the domestic industry's condition.[130] During the POI, prices of polysilicon, the key raw material used in the production of the wafers that were used to manufacture CSPV cells and other high-tech products, fluctuated but declined overall by 52.6 percent for ingots and by 54.5 percent for wafers. However, the industry was unable to increase its profit margins despite declining polysilicon costs, because of the pressure to reduce prices. Thus, as prices continued to

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

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

[127] USITC November Report, pp. 61-62 (Exhibit CHN-2).

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

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

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

decline in pace with input costs, so too did the domestic industry's net sales values, leading to the domestic industry's substantial losses throughout the POI.[131]

80. Finally, the Commission found that the need for CSPV products to attain grid parity to compete with electricity generated from other sources such as natural gas did not explain the consistent price declines in the price of CSPV products over the POI and the domestic industry's condition.[132] The Commission recognized that lower conventional energy prices may have accounted for some of the decrease in the prices of CSPV products in some years. It observed, however, that during the POI, prices of natural gas, which set the levelized cost of energy, had not correlated with domestic prices of CSPV products. Although domestic CSPV prices declined throughout the POI, the price of natural gas for electricity generation increased in the latter half of 2012 and 2013, peaked in February 2014, and declined to its lowest level in March 2016 after which it rose and was projected to increase.[133] The Commission also observed that questionnaire respondents most often pointed to large volumes of low-priced imports and did not mention gas prices as the reason for price declines. Indeed, even foreign producers' own financial statements attributed the decline in prices of CSPV products to global excess capacity.[134]

81. Having found that factors other than imports could not individually or collectively explain the serious injury to the domestic industry, the Commission concluded that increased imports were a substantial cause of serious injury to the domestic industry manufacturing CSPV products that was not less than any other cause. In doing so, the Commission assured that it had not attributed any injury from any other factors to increased imports.[135]

B. Standard of Review for Panel's Examination of the Commission's Serious Injury Determination

1. Articles 3.1 and 4.2(c) call for the competent authorities to publish a report setting forth their findings based on their investigation.

82. Article 3.1, third sentence, and Article 4.2(c) describe the obligation of the competent authorities to publish a report on the investigation. Together, they require that the competent authorities provide "their findings and reasoned conclusions reached on all pertinent issues of fact and law," along with "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined."

83. These obligations focus on the competent authorities and their investigation. The competent authorities must publish "*their*" findings and reasoned conclusions – not those that the

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

[132] USITC November Report, pp. 64-65 (Exhibit CHN-2).

[133] USITC November Report, pp. 64-65 (Exhibit CHN-2).

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

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

panel or one of the complainants might have made. The competent authorities must demonstrate the relevance of the factors *they* examined – not those that the Panel or the Complainants would have examined. And this analysis must appear in the report. If the report, as in the case of the USITC November report, contains narrative views and separate data tables, both must be considered in evaluating whether the report has satisfied the obligations.

84. Articles 3.1 and 4.2(c) do not impose a burden of investigative or explanatory perfection that no competent authority could meet. For example, if an error or omission does not cast doubt on a particular conclusion, that conclusion is still "reasoned" and, thus, consistent with Article 3.1. Similarly, if the competent authorities are silent on a particular issue of fact or law that is not pertinent, they have still complied with Article 3.1.

85. Pursuant to Article 3.1, the competent authorities "shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." Based on the ordinary meanings of those terms, competent authorities are required "to 'give an account of' a 'judgement or statement which is reached in a connected or logical manner or expressed in a logical form', 'distinctly, or in detail.'"[136] On all "pertinent issues of fact and law," competent authorities must "provide a conclusion that is supported by facts and reasoning."[137] We note in this regard past Appellate Body reports finding that Article 3.1 calls for a "reasoned and *adequate* explanation."[138]

86. In conducting a safeguard investigation pursuant to Article 3.1, competent authorities "should carry out a 'systematic inquiry' or a 'careful study' into the matter before them" and must also "actively seek out pertinent information."[139] Article 3.1 also requires competent authorities to take certain steps to facilitate the participation of interested parties in safeguard investigations. Specifically, Article 3.1 requires competent authorities to provide notice of the investigation to interested parties, an opportunity for interested parties to submit evidence and their views to the competent authorities, and an opportunity for interested parties to respond to the presentations of other parties.[140] Although competent authorities may not "remain passive in the face of possible short-comings in the evidence submitted" by interested parties, they do not have "an open-ended and unlimited duty to investigate all available facts that might possibly be relevant."[141]

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[136] *US – Steel Safeguards (AB)*, para. 287.

[137] *US – Steel Safeguards (AB)*, para. 329.

[138] *US – Line Pipe (AB)*, para. 216 (emphasis added).

[139] *US – Wheat Gluten (AB)*, para. 53.

[140] *US – Wheat Gluten (AB)*, para. 54.

[141] *US – Wheat Gluten (AB)*, paras. 55-56.

87. Article 4.2(c) states: "The 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." This article does not impose any additional publication requirements, but rather is merely "an elaboration of the requirement set out in Article 3.1, last sentence, to provide a 'reasoned conclusion' in a published report."[142] Panels will look to the explanation given by the competent authorities in their published report to determine whether those authorities have acted consistently with the obligations imposed by Article 4.2 of the Agreement on Safeguards.

88. As the *US – Steel Safeguards* Appellate Body report observed:

> It is by "setting forth findings and reasoned conclusions on all pertinent issues of fact and law", under Article 3.1, and by providing "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined", under Article 4.2(c), that competent authorities provide panels with the basis to "make an objective assessment."[143]

2. A panel reviewing the determination of the competent authorities should make an objective assessment of the matter, and not conduct a de novo review.

89. In *US – Steel Safeguards*, the Appellate Body stated:

> the precise nature of the examination to be conducted by a panel, in reviewing a claim under Article 4.2 of the Agreement on Safeguards, stems … in part from the panel's obligation to make an 'objective assessment of the matter' under Article 11 of the DSU and, in part, from the obligations imposed by Article 4.2, to the extent that those obligations are part of the claim. Thus, as with any claim under the provisions of a covered agreement, panels are required to examine, in accordance with Article 11 of the DSU, whether the Member has complied with the obligations imposed by the particular provisions identified in the claim.[144]

90. A panel may not conduct a *de novo* review of the evidence or substitute its judgment for that of the competent authorities. The reasoned conclusions, detailed analysis, and demonstration of the relevance of the factors examined that are contained in the report of a competent authority, are the only bases on which a panel may assess whether a competent authority has complied with its obligations under the SGA or Article XIX of GATT 1994.[145] A

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[142] *US – Steel Safeguards (AB)*, para. 289.

[143] *US – Steel Safeguards (AB)*, para. 299.

[144] *US – Steel Safeguards (AB)*, paras. 298-99.

[145] *US – Steel Safeguards (AB)*, para. 299.

panel should examine whether the conclusions reached by the authority are reasoned and adequate in the light of the evidence on the record and other plausible alternative explanations.[146]

> [I]t is in the nature of such investigations that an authority will gather a variety of information and data from different sources, and that these may suggest different trends and outcomes. The investigating authority will inevitably be called upon to reconcile this divergent information and data. However, the evidentiary path that led to the inferences and overall conclusions of the investigating authority must be clearly discernible in the reasoning and explanations found in its report. When those inferences and conclusions are challenged, it is the task of a panel to assess whether the explanations provided by the authority are "reasoned and adequate" by testing the relationship between the evidence on which the authority relied in drawing specific inferences, and the coherence of its reasoning. In particular, the panel must also examine whether the investigating authority's reasoning takes sufficient account of conflicting evidence and responds to competing plausible explanations of that evidence. This task may also require a panel to consider whether, in analyzing the record before it, the investigating authority evaluated all of the relevant evidence in an objective and unbiased manner, so as to reach its findings without favouring the interests of any interested party, or group of interested parties, in the investigation.[147]

91. Thus, a panel's examination of the competent authorities' conclusions should be critical and must be based on the information contained in their record and the explanations given by the authority in its published report.[148] Conversely, a panel may not base its review on information that was *not* on the competent authorities' record or arguments regarding that evidence that the parties did not make. Evidence or argumentation presented for the first time in a WTO panel proceeding cannot establish an inconsistency with the obligations for the competent authorities to publish a report "setting forth *their* findings and reasoned conclusions" (Article 3.1) and containing "a detailed analysis of *the case under investigation* as well as a demonstration of the relevance of *the factors examined*." (Article 4.2(c)).

C. Obligations for the Competent Authorities' Evaluation of Whether Increased Imports Have Caused or are Threatening to Cause Serious Injury

[146] *US – Tyres (AB)*, para. 123; *Argentina – Footwear (AB)*, paras. 119-121; *US – Cotton Yarn (AB)*, paras. 74-78; *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 183, 186-188; *US – Hot-Rolled Steel (AB)*, para. 55; *US – Lamb (AB)*, paras. 101, 105-108; *US – Steel Safeguards (AB)*, para. 299; *US – Wheat Gluten (AB)*, paras. 160-161.

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

[148] *US – Tyres (AB)*, para. 123 (citing *US – Lamb (AB)*, para. 106). *See also US – Tyres (AB)*, para. 329; *US – Wheat Gluten*, para. 162; *Korea – Dairy (Panel)*, para. 7.30.

92. As noted above, China does not challenge the USITC determinations that imports of CSPV products increased, or that the U.S. industry producing like or directly competitive products is experiencing serious injury. It does, however, challenge the determination that increased imports caused serious injury to domestic producers of CSPV products. China divides its arguments into two sections, corresponding to the two sentences of SGA Article 4.2(b):

> 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.

China's submission presents the discussion of the legal obligations governing the competent authorities' analysis of causation into two parts, one covering demonstration of the causal link (section III.A.1), and the other instructing competent authorities not to attribute injury caused by other factors to the increased imports (section III.B.1). For purposes of this submission, the United States provides an integrated response to China's arguments on these two issues.

93. The Appellate Body report in *US – Wheat Gluten* provides a useful analysis of the ordinary meaning of the relevant terms in the first sentence of Article 4.2(b):

> That sentence provides that a determination "shall not be made unless [the] investigation demonstrates . . . the existence of the causal link between increased imports . . . and serious injury or threat thereof." (emphasis added) Thus, the requirement for a determination, under Article 4.2(a), is that "the causal link" exists. The word "causal" means "relating to a cause or causes", while the word "cause", in turn, denotes a relationship between, at least, two elements, whereby the first element has, in some way, "brought about", "produced" or "induced" the existence of the second element. The word "link" indicates simply that increased imports have played a part in, or contributed to, bringing about serious injury so that there is a causal "connection" or "nexus" between these two elements. Taking these words together, the term "the causal link" denotes, in our view, a relationship of cause and effect such that increased imports contribute to "bringing about", "producing" or "inducing" the serious injury.[149]

Thus, the competent authorities satisfy the obligation in the first sentence of Article 4.2(b) if they demonstrate a relationship of cause and effect between the increased imports and the serious injury experienced by the domestic industry.

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[149] *US – Wheat Gluten (AB)*, para. 67, *citing New Shorter Oxford English Dictionary*, pp. 145, 355, 356, and 1598.

94. The second sentence of Article 4.2(b) is framed somewhat differently. It begins with a condition: "When factors other than increased imports are causing injury to the domestic industry at the same time . . . ." In this context, "when" means "[a]t the time that; on the occasion that; in the circumstances which."[150] "Factor" means "[a] circumstance, fact, or influence which tends to produce a result."[151] "Other than" means "besides"; "{d}ifferent in kind or quality."[152] "At the same time" means "during the same period, at the same moment, simultaneously."[153] "Injury," in this clause creates a link to "serious injury," which Article 4.2(a) defines as "a significant overall impairment in the position of a domestic industry." Thus, "injury" here refers to impairments to the domestic industry that are not necessarily "serious."

95. In sum, this first clause signals that it introduces an obligation that applies only if the competent authorities have found that a factor different from increased imports is causing some impairment to the domestic industry, and this is happening simultaneously with the serious injury caused by increased imports. Conversely, if the competent authorities conclude that other factors are *not* causing injury, or that they did not cause injury at the same time as increased imports, the obligation in Article 4.2(b), second sentence, does not apply.

96. The second clause sets out an obligation that applies when the conditions in the first clause are met: "such injury shall not be attributed to increased imports." The key term in this clause is "attribute," which means "[a]scribe to as an effect or consequence."[154] The Appellate Body has similarly observed that "[s]ynonyms for the word 'attribute' include 'assign' or 'ascribe'."[155] Thus, the second clause of the second sentence of Article 4.2(b) means that, if the competent authorities find that factors other than increased imports cause injury to domestic producers, their evaluation of the causal link under the first sentence of Article 4.2(b) shall not ascribe that injury to imports.

97. Article 4 imposes no obligation as to *how* the competent authorities comply with its obligations. Thus, they retain a large margin of discretion. In *US – Wheat Gluten*, the Appellate Body envisaged Article 4.2 as "presupposing" a series of "steps" of first distinguishing the

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[150] *New Shorter Oxford English Dictionary*, p. 3665.

[151] *New Shorter Oxford English Dictionary*, p. 904. The Appellate Body in *US – Wheat Gluten* linked "factors" in Article 4.2(b) to the "factors . . . having a bearing on the situation of that industry" that Article 4.2(a) requires the competent authorities to consider in their investigation whether increased imports cause serious injury. *US – Wheat Gluten (AB)*, para. 72. The United States considers this observation inapt. The exemplary "factors" enumerated in Article 4.2(a) are all conditions measuring the performance of the domestic industry, while the "other factors" that cause injury for purposes of Article 4.2(b) are circumstances that bring about an impairment to the industry *as measured by* the "factors" covered by Article 4.2(a).

[152] *New Shorter Oxford English Dictionary*, pp. 2031-32.

[153] *New Shorter Oxford English Dictionary*, p. 3313.

[154] *New Shorter Oxford English Dictionary*, p. 145.

[155] *US – Wheat Gluten (AB)*, para. 69.

effects of increased imports from the effects of other factors, then attributing to each factor its distinct effects, and finally determining whether the causal link between increased imports and serious injury "involves a genuine and substantial relationship of cause and effect between these two elements."[156] In *US – Lamb*, the Appellate Body qualified this finding, stating that;

> [T]hese three steps simply describe a logical process for complying with the obligations relating to causation set forth in Article 4.2(b). These steps are not legal "tests" mandated by the text of the *Agreement on Safeguards*, nor is it imperative that each step be the subject of a separate finding or a reasoned conclusion by the competent authorities.[157]

China concurs that "[t]he Agreement on Safeguards does not prescribe any particular method or analytical tool for making a determination of causal link."[158]

98. The panel in *Argentina – Footwear* 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.[159]

[156] *US – Wheat Gluten* (AB), para. 69

[157] *US – Lamb (AB)*, para. 178.

[158] China First Written Submission, para. 91.

[159] *Argentina – Footwear (EC) (Panel)*, para. 8.229.

The Appellate Body endorsed this approach, and subsequent panels followed it.[160] China's first written submission also adopts this approach.[161] The United States agrees that this statement provides a useful framework for addressing the findings of competent authorities.

99. In applying this framework in *US – Steel Safeguards*, the panel stated that while coincidence is central to a causation analysis, other tools, such as an analysis of the conditions of competition, could also be used to establish a causal link under Article 4.2(b).[162] The panel recognized that "consideration of the conditions of competition of the market in which the relevant imported and domestic products are being sold may generally provide insights into the issue of the causal relationship between increased imports and serious injury."[163]

100. The competent authorities' methodological discretion extends also to their approach to evaluating other factors causing injury to the domestic industry. In *US – Lamb*, the Appellate Body found that "the method and approach WTO Members choose to carry out the process of separating the effects of increased imports and the effects of the other causal factors is not specified by the Agreement on Safeguards."[164] That said, Article 4.2(b) provides certain parameters. In particular, the competent authorities must evaluate whether factors other than increased imports are causing injury to the domestic industry at the same time, thereby triggering the prohibition on attributing that injury to increased imports. However, the Article does not specify how they may comply with the obligations.

101. Despite acknowledging the discretion accorded to competent authorities,[165] China argues that certain findings of the Appellate Body in fact dictate particular approaches. It focuses on

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[160] China asserts, in apparent reference to paragraph 8.238 of the *Argentina – Footwear* panel report, that if "there is an absence of coincidence of trends," the competent authorities must provide "a 'compelling' explanation" as to why a causal link exists. China first written submission, para. 91, item (1). The *Argentina – Footwear* panel report stated in that paragraph 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.

[161] China First Written Submission, para. 91. China asserts, in apparent reference to paragraph 8.238 of the *Argentina – Footwear* panel report, that in the competent authorities' analysis of the causal link, "if not there is an absence of coincidence of trends, whether a 'compelling' explanation is provided." China first written submission, para. 91, item (1). That panel provides no reason for considering that the explanation in this situation would have to be more compelling. Thus, the description in this paragraph, which reflects the SGA Article 3.1 requirement to provide "reasoned conclusions," is clearly correct.

[162] *US – Steel Safeguards (Panel)*, para. 10.296.

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

[164] *US – Lamb (AB)*, para. 181

[165] China First Written Submission, para. 163.

language first articulated by the Appellate Body in *US – Wheat Gluten*, and then repeated in subsequent reports, reasoning that:

> Under the last sentence of Article 4.2(b), we are concerned with the proper "attribution", in this sense, of "injury" caused to the domestic industry by "factors other than increased imports". Clearly, the process of attributing "injury", envisaged by this sentence, can only be made following a separation of the "injury" that must then be properly "attributed". What is important in this process is separating or distinguishing the effects caused by the different factors in bringing about the "injury".[166]

102. China then notes that in *US – Line Pipe*, the Appellate Body elaborated on this reasoning when stating that competent authorities are required to identify factors other than increased imports responsible for "injurious effects" and distinguish the nature and extent of those effects from the injury caused by increased imports.[167] China further notes that the Appellate Body commented on the process of "separating and distinguishing" in *US – Lamb* when discussing the non-attribution language in Article 4.2(b).[168]

103. "Separating and distinguishing" is not text found in Article 4.2(b). As laid out in *US – Wheat Gluten*, this phrase is an effort to explain the process laid out in Article 4.2(b), in which the competent authorities evaluate whether increased imports caused serious injury, and separately consider whether other factors cause injury at the same time. If that were the case, the competent authorities would need to evaluate whether they had attributed to increased imports the injury caused by other factors and, if so, adjust their analysis so as to avoid such attribution. However, to the extent that China reads these words to dictate a particular precision or methodology – such as econometric modeling[169] – it errs. Article 4.2(b) requires only that, if other factors are causing injury, the competent authorities not attribute that injury to increased imports. This silence leaves competent authorities the flexibility to base their conclusions on a qualitative assessment, a quantitative assessment, or another type of assessment that they consider appropriate.

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[166] *US – Wheat Gluten (AB)*, para. 68, *cited in* China First Written Submission, para. 164.

[167] *US – Line Pipe (AB)*, para. 215 ("As we ruled in *US – Hot-Rolled Steel* with respect to the similar requirement in Article 3.5 of the *Anti-Dumping Agreement*, so, too, we are of the view that, with respect to Article 4.2(b), last sentence, competent authorities are required to identify the nature and extent of the injurious effects of the known factors other than increased imports, as well as explain satisfactorily the nature and extent of the injurious effects of those other factors as distinguished from the injurious effects of the increased imports."), *quoted in* China First Written Submission, para. 165.

[168] *US – Lamb (AB)*, para. 179 ("The non-attribution language in Article 4.2(b) . . . requires that the competent authorities assess appropriately the injurious effects of the other factors, so that those effects may be disentangled from the injurious effects of the increased imports."), *quoted in* China First Written Submission, para. 166.

[169] *E.g.*, China First Written Submission, para. 215.

104. The Appellate Body statements that China quotes from *US – Line Pipe* and *US – Lamb* requiring the competent authorities "identify the nature and extent of the injurious effects" of other factors and "disentangle" those effects from the effects of increased imports are at odds with the obligation they purport to explain. Article 4.2(b) requires only an evaluation of whether other factors cause "injury." It does not require an atomized inquiry identifying the separate "effects" of each individual other factor. Nor does it require a finding as to the extent and nature of each "effect" of each other factor, or that these effects be "disentangled" from the effects of increased imports.

105. To be clear, nothing precludes competent authorities from taking any of these approaches. But, by the same token, nothing precludes them from adopting other approaches as long as they result in a demonstration of the causal link between increased imports and serious injury that does not attribute to increased imports the injury caused by other factors. As the Appellate Body emphasized in *US – Lamb*, "the method and approach WTO Members choose to carry out the process of separating the effects of increased imports and the effects of the other causal factors is not specified by the Agreement on Safeguards."[170]

106. The panel report in *US – DRAMs CVDs* illustrates one such approach.[171] First, the panel recognized "that the ITC was not required to quantify the injury caused by other factors in order to separate and distinguish it from the injurious effects of the alleged subsidized imports."[172] The panel then noted that "[t]he US asserts that its analysis demonstrated that subsidized imports had their own injurious effects, independent from the injurious effects of other factors".[173] Approving of the ITC's non-attribution methodology, the panel found with respect to the alleged other factor of non-subject imports:

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

[171] This report addressed a claim under Article 15.5 of the SCM Agreement, which provides that "{t}he authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports." The Appellate Body found in *US – Line Pipe* that, in light of "considerable similarities between the two Agreements as regards the non-attribution language," its "statements in *US – Hot-Rolled Steel* on Article 3.5 of the *Anti-Dumping Agreement* likewise provide guidance in interpreting the similar language in Article 4.2(b) of the *Agreement on Safeguards*." *US – Line Pipe (AB)*, para. 214. The same logic applies with equal force to findings under Article 15.5 of the SCM Agreement.

[172] *US – Countervailing Duty Investigation on DRAMS (Panel)*, para. 7.353.

[173] *US – Countervailing Duty Investigation on DRAMS (Panel)*, para. 7.354 (noting also that the responding party did not challenge the propriety of that approach).

> By ascertaining that the price underselling frequency by non-subject imports was lower than, and increased less than, the underselling frequency of alleged subsidized imports between 2000 and 2002, and that the injurious price effects of non-subject imports were less pronounced than their absolute and relative volumes might otherwise indicate, the ITC effectively separated and distinguished the injurious price effects of alleged subsidized imports from the injurious price effects of the larger volume of non-subject imports.[174]

These findings show that authorities may demonstrate a causal link, and not improperly attribute to imports injury caused by other factors, without determining the "extent" of injury caused by other factors, or "disentangling" that injury from the injury caused by imports. It was enough to engage in a qualitative and comparative analysis demonstrating that subject imports had injurious effects independent of the effects of other factors.

107. China therefore errs in its understanding of the conditional non-attribution requirement in Article 4.2(b) (second sentence, second clause). The United States also notes that it is not necessary for purposes of this dispute for the Panel to address the question of whether the Appellate Body statements that China pulls from *US – Lamb* and *US – Line Pipe* represent a valid reading of the second sentence of Article 4.2(b). The U.S. analysis below demonstrates that, *even under* China's erroneous legal argument the USITC correctly found that the *other factors* at issue did *not* cause serious injury at all. Therefore, the obligation under Article 4.2(b) with regard to attribution of injury caused by other factors *never came into play*.

108. It is necessary to make one more point. China ends its legal argument regarding the second sentence of Article 4.2(b) with the erroneous assertion that the Appellate Body in *US – Lamb* found the "'substantial cause' test" under U.S. law to be insufficient to satisfy the "reasoned and adequate explanation" requirement under the SGA.[175] The Appellate Body made no such finding. Rather, the Appellate Body found that the Commission's analysis of alternative causes of injury was inconsistent with Article 4.2(b) *under the facts of that particular case*:

> The USITC concluded only that each of four of the six "other factors" was, relatively, a less important cause of injury than increased imports . . . . in so doing, the USITC acknowledged implicitly that these factors were actually causing injury to the domestic industry at the same time. But, to be certain that the injury caused by these other factors, whatever its magnitude, was not attributed to increased imports, the USITC *should also have assessed, to some extent*, the injurious effects of these other factors. It did not do so . . . . In short, without knowing anything about the nature and extent of the injury caused by the six other factors, we cannot satisfy ourselves that the injury deemed by the USITC

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[174] *US – Countervailing Duty Investigation on DRAMS (Panel)*, para. 7.360.

[175] China First Written Submission, paras. 172-173, 177-178.

> to have been caused by increased imports does not include injury which, in reality, was caused by these factors.[176]

The Appellate Body predicated these findings on "the explanation given by the USITC for its conclusions on the relative causal importance of the increased imports, as distinguished from the injurious effects of the other causal factors," not on any "as such" inconsistency between the U.S. law and the SGA.[177] Indeed, the Appellate Body emphasized 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."[178] Thus, the application of the "substantial cause" standard is not, in and of itself, inconsistent with SGA Article 4.2(b).

D. The USITC complied with SGA Articles 2.1, 3.1, and 4.2(b) in Finding a Causal Link between Increased Imports and the Domestic Industry's Serious Injury

1. The USITC's causation analysis took as its foundation the unchallenged findings that imports increased and that the domestic industry was experiencing serious injury.

109. As Article 4.2(b) calls for an inquiry into whether there is a link between increased imports and injury to the domestic industry, any analysis must begin with the situation of imports and the condition of the domestic industry. China's First Written Submission does not dispute that imports increased within the meaning of Articles 2.1, or that the domestic industry suffered serious injury within the meaning of Article 4.1(a) and 4.2(a). Nor does it take issue with any of the USITC's findings in this regard. As these findings apparently represent an area of agreement between the parties, they provide a useful starting point for an analysis of the issues in dispute.

110. With regard to increased imports, the USITC found that subject imports increased in each year of the POI in absolute terms, increasing overall by 492.4 percent between 2012 and 2016, and that imports as a ratio to domestic production also increased overall and in each year.[179]

111. For its serious injury determination, the Commission thoroughly examined the data on the financial condition of the domestic industry and found the domestic industry's financial performance was dismal and in a state of deterioration. Even though there was explosive demand growth during the POI, there nevertheless was significant idling of productive facilities for CSPV products between 2012 and 2016 with dozens of firm closures and temporary shutdowns or production slowdowns, which, in turn, led to significant layoffs and

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[176] *US – Lamb (AB)*, paras. 185-86 (emphasis added).

[177] *US – Lamb (AB)*, para. 184.

[178] *US – Lamb (AB)*, para. 181.

[179] USITC November Report, pp. 19-21 (Exhibit CHN-2).

underemployment.[180] The industry was unprofitable, experiencing hundreds of millions of dollars in operating and net losses throughout the POI, and was unable to generate adequate capital to finance the modernization of their domestic plants and equipment. [181] The Commission found that at the end of the POI, the domestic industry's market share declined to a period low, its net sales value declined, and its COGS to net sales ratio increased to above 100 percent, leading to further deterioration in operating and net losses. The Commission also found that these financial difficulties persisted into 2017, as additional firms shut down their operations and/or declared bankruptcy.[182] As China has not challenged the Commission's increased imports and serious injury determinations, the Commission's findings on these issues are undisputed.

2. China fails to establish any inconsistency with SGA Articles 2.1, 3.1, and 4.2(b) in the USITC finding that there is a causal link between increased imports and the domestic industry's serious injury.

112. In the first instance, the Commission established a coincidence between the increased imports and the industry's worsening financial losses and inability to generate adequate capital to finance the modernization of their domestic plants and equipment and maintain research and development expenditures. In examining this issue, it considered all relevant evidence, including seemingly positive trends in other factors. The Commission provided a reasoned and adequate explanation of the coincidence of trends between the increase in imports and the dismal and deteriorating performance of the domestic industry, thus satisfying its obligations under the first step of the Article 4.2(b) causation analysis.

113. None of China's challenges to the Commission's analysis of the causal link between increased imports and serious injury to the domestic industry withstands scrutiny. China argues that the Commission failed to explain how certain negative trends established the required causal link. However, the Commission discussed in detail how increased imports of CSPV products that were lower priced than the domestically produced product caused domestic prices to decline and the domestic industry's financial condition to deteriorate. China also contends that the USITC downplayed and disregarded the domestic industry's positive trends. This is not the case. The Commission expressly acknowledged that certain factors increased overall during the POI. But the Commission explained that these seemingly "positive" factors were inadequate to protect the domestic industry from the injurious effects of the increasing volume of low-priced imports. Finally, China contends that the USITC failed to explain why the required causal link existed in spite of the lack of overall coincidence.[183] Contrary to China's argument, the Commission provided detailed analyses on the overall coincidence between increased imports and the

[180] USITC November Report, pp. 31-34 (Exhibit CHN-2).

[181] USITC November Report, pp. 34-37 (Exhibit CHN-2).

[182] USITC November Report, pp. 37-38 (Exhibit CHN-2).

[183] China First Written Submission, paras. 106-59.

negative trends in injury. Thus, China has failed to meet its burden of proof with respect to the first sentence of Article 4.2(b).

a. The USITC demonstrated an overall coincidence between increased imports and negative injury trends

114. In analyzing causation, the USITC demonstrated an overall coincidence between increased imports and the domestic industry's negative injury trends. It focused on declining prices and the industry's dismal and deteriorating financial condition, which corresponded to import trends.[184] The Commission also took into consideration the dozens of firm closures, significant unemployment and underemployment, and low capacity utilization that pervaded the POI.[185] The USITC 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. Instead of benefitting from this 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.[186]

115. Such an analysis is consistent with the Commission's obligations under Article 4.2(b) in demonstrating an overall coincidence between increased imports and negative injury trends. In *US – Steel Safeguards*, the panel explained:

> . . . relative price trends as between imports and domestic products will often be a good indicator of whether injury is being transmitted to the domestic industry (provided that the market context for such trends are borne in mind) given that price changes have an immediate effect on profitability, all other things being equal. In turn, profitability is a useful measure of the state of the domestic industry.[187]

In fact, profitability is in many ways the *result* of the levels and values of sales, production, productivity, capacity utilization, and employment factors referenced in Article 4.2(a), and may allow the competent authorities to track an industry's overall situation with respect to those factors.[188]

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

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

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

[187] *US – Steel Safeguards (Panel)*, para. 10.320 (emphasis in original).

[188] *US – Steel Safeguards (Panel)*, para. 10.320.

116. In rebuttal, China asserts that the Commission did not provide a reasoned and adequate explanation of how decreases in market share, domestic prices, financial performance, and plant closures were caused by increased imports. China's criticisms of the Commission's discussion on these injury factors amount to a preference that the Commission have weighed the evidence differently, and do not demonstrate any inconsistency with U.S. obligations under the SGA.

i. The Commission provided a reasoned and adequate explanation demonstrating that increased imports caused decreases in the domestic industry's market share.

117. China argues that the USITC's analysis of the domestic industry's declining market share "ignored the key condition of competition that overall consumption was increasing rapidly."[189] In its view, the fact that demand increased over the POI negates a finding of a causal link based on declining market share because the domestic industry allegedly did not have the ability to meet the rapidly increasing demand.[190] Contrary to China's argument, the Commission considered these issues in explaining how the domestic industry's declining market share was caused by increased imports.

118. The USITC November Report explained that although the domestic industry increased its U.S. shipments over the POI, this overall increase was dwarfed by the explosive growth in demand during the POI. In other words, the domestic industry lost market share to the consistently growing low-priced imports, which increased by 492.4 percent between 2012 and 2016.[191] Domestic producers also reported and documented losing bids and sales to low-priced imports of CSPV products. Consistent with this evidence, 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.[192]

119. China's argument that the domestic industry did not have the ability to meet increasing demand fails because it misses the point that increased imports themselves directly impeded the domestic industry's ability to compete with low-priced imports in the first instance. As the USITC explained, imports of highly substitutable lower priced imports flooded the market in increased quantities, causing domestic prices to decline despite explosive demand growth.[193] The domestic industry's net sales values fell overall between 2012 and 2016 and its COGS to net sales ratio consistently remained high and increased to above 100 percent at the end of the POI.

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[189] China First Written Submission, paras. 129-33.

[190] China First Written Submission, para. 130.

[191] USITC November Report, pp. 21, 49 (Exhibit CHN-2).

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

[193] USITC November Report, pp. 43, 49 (Exhibit CHN-2).

The growing demand was for the most part filled by the surging imports, while, the domestic industry continued to incur operating and net losses throughout the POI.[194]

120. The USITC observed that in addition to dozens of firm closures and low capacity utilization of remaining firms throughout the POI, domestic producers identified a series of negative effects on their investments directly due to imports. These included: tabling, postponing, and deferring projects; rejection of investment proposals; reduction in the size of capital investments; negative returns on investments; inability to generate adequate capital to finance modernization of domestic plants and equipment; increased costs for debt financing; inability to maintain existing levels of research and development expenditures; rejection of bank loans; lowering of credit ratings; inability to issue stock or bonds; inability to service debt; lowered bankability; and other such difficulties.[195] Thus, as the Commission explained, the domestic industry was unable to capitalize on increased consumption because increasing volumes of low-prices subject imports caused the industry to suffer worsening operating and net losses during this period, resulting in significant idling of productive facilities.

121. Likewise flawed is China's claim that the domestic industry lacked the capacity, product type, and skills to supply the utility segment, the largest and fastest growing segment of the U.S. market.[196] The USITC provided a thorough explanation for its rejection of party arguments on this issue.[197]

122. As an initial matter, as the Commission explained, all three on-grid segments – residential, commercial, and utility – experienced considerable growth in both the number of installations and the total wattage of installation projects during the POI. The USITC found, however, that the domestic industry lost market share to imports regardless of segment.[198] China's argument, which focuses on the shift in market share in the utility segment, does not even address the domestic industry's loss of market share in the residential and commercial segments.

123. In addition, the USITC considered and explained in detail how increased imports affected the industry's capability to supply the utility market. It explained that during the POI, imported and domestically produced products were sold across a range of wattages and conversion efficiencies, and that modules were sold in 60- and 72-cell forms.[199] Moreover, the domestic industry pioneered certain CSPV technologies, such as monocrystalline products, which

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

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

[196] China First Written Submission, paras. 134-37.

[197] USITC November Report, pp. 55-61 (Exhibit CHN-2).

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

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

converted sunlight more efficiently than multicrystalline products and were sold in all segments of the U.S. market.[200] The Commission identified many ways in which domestic producers were active in the utility sector, and sought to expand their presence. At the beginning of the POI, 60-cell modules predominated in the utility segment, but with time, the utility segment shifted more to 72-cell modules to reduce balance of system costs. SolarWorld added a 72-cell module assembly line to its U.S. facilities due to increasing demand in the utility market and Suniva reported that 45 percent of its cell manufacturing capacity was devoted to 72-cell modules during the POI.[201]

124. The USITC found that notwithstanding the domestic industry's demonstrated capability and efforts to compete with imports in the utility sector – as well as in the residential and commercial sectors – domestic producers lost market share to the flood of low-priced imports into the U.S. market. Indeed, despite the fact that the domestic industry sold both 60-cell and 72-cell modules throughout the POI, the record showed that the domestic industry lost market share to imports for both types of modules.[202]

125. The record further belies China's contention that the domestic industry made a business decision to focus on 60-cell modules and the residential and small utility segment. The Commission found that the domestic industry and importers each sold CSPV products in the U.S. market to the utility segment.[203] SolarWorld and Suniva provided extensive bid information indicating that they had competed for and shipped to the utility segment of the market during the POI.[204] Thus, it was reasonable for the Commission to conclude that the totality of the evidence showed that the domestic industry sought to compete in the utility market.[205]

126. China also mistakenly claims that the Commission's analysis failed to address that purchasers made purchasing decisions on CSPV products based on quality, performance, and availability, as well as efficiency, long-term performance, warranty, and bankability.[206] In fact, the Commission noted this evidence, but found that despite purchasers' consideration of a variety of factors in their purchasing decisions, the evidence indicated that price remained an important factor.[207] Indeed, as the Commission observed, domestic producers reported losing sales to low-

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

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

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

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

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

[205] USITC November Report, pp. 58-61 (Exhibit CHN-2).

[206] China First Written Submission, paras. 138-139.

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

priced imports during the POI, and the majority of purchasers most often identified lower price as the reason for increasing their purchases of imported CSPV products.[208]

127. China seeks to undermine this conclusion by asserting that a footnote in the Commission's determination and a page from the USITC November Report show that the Commission "largely dismissed" allegations that domestic producers were not always able to deliver on quality, service, delivery, certain technical developments, consumer tastes, and bankability requirements.[209] But, the Commission did not "dismiss" these assertions. It considered the totality of the evidence, and concluded that the record did not support the contention that purchasers had "widespread problems" with domestic producers.[210] Furthermore, the cited portions of the USITC November Report do nothing to undermine the Commission's ultimate conclusion that any problems were not widespread. First, footnote 311 of the Commission's determination observes that 19 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. In fact, three purchasers specifically stated that both SolarWorld and foreign producer Yingli had lost their approved status due to financial distress.[211] Thus, the problems noted in the footnote implicated both domestic and foreign producers, and consequently failed to explain the domestic industry's loss of market share to imports. In any event, the vast majority of purchasers who responded to the question cited in footnote 311 (the remaining 76 of the 95 responding purchasers) did not report having any issues with domestic producers' qualification of their products.

128. Second, the page of the November Report cited by China observes that certain purchasers cited factors other than price as their *primary* reason for purchasing imports. This means only that these purchasers chose the imported product because they found it better in some way, and not that domestic producers were "not always able to deliver" in the large number of areas listed by China. Moreover, these purchasers identified a variety of *different* non-price reasons for their purchasing decisions,[212] indicating that domestic producers were not systematically lacking in any one area. Indeed, the other evidence in the record indicates that domestic products were competitive in all of these areas.[213]

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

[209] China First Written Submission, para. 139, *citing* USITC November Report, p. 55 n.311 and p. V-30.

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

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

[212] USITC November Report, 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).

[213] USITC November Report, pp. 51-61 (Exhibit CHN-2).

ii. The Commission provided a reasoned and adequate explanation demonstrating that increased imports caused declines in domestic prices.

129. China makes two primary criticisms of the USITC's analysis of price trends: first, that it "did not actually link the relationship between the increased imports, and declining prices;"[214] and, second, that it did not take into account other factors that caused prices to decline.[215] China is mistaken. The Commission demonstrated the link by showing how pervasively domestic 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.[216] The USITC also considered, and rejected, assertions that other factors fully explained the observed fall in prices. China's critique accordingly identifies no flaw in the Commission's conclusion that low-priced imports forced decreases in domestic prices that were responsible for the domestic industry's dire financial performance.

130. China's argument makes almost no reference to the reasoning that led to the USITC's conclusion. The Commission began by examining the competitive relationship between domestic and imported products. It observed that most responding domestic producers, importers, and purchasers reported that domestic and imported CSPV products were interchangeable.[217] The Commission also observed that throughout the POI, domestic producers and importers made commercial shipments of a wide variety of CSPV products, predominantly in the form of modules, and that imported and domestically produced CSPV products were sold in a range of wattages and conversion efficiencies, and modules were sold in both 60-cell and 72-cell forms.[218]

131. The Commission also examined the role that pricing played in purchasing decisions, finding that in the U.S. market for CSPV products, purchasers considered a variety of factors in their purchasing decisions, but that price was an important factor.[219] Indeed, as the Commission observed, the most-often cited top three factors that firms considered in their purchasing decisions for CSPV products were price (81 firms), quality/performance (77 firms), and availability (42 firms).[220] These facts, which China does not dispute, support the USITC's

[214] China First Written Submission, para. 150.

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

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

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

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

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

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

conclusions that price was an important factor in purchasing decisions and that there was high substitutability between domestic and imported CSPV products.[221]

132. The price comparison data corroborated this conclusion. As discussed above in Section II.A., the Commission gathered data on prices for discrete groups of products that the parties before it considered to be representative of sales in the U.S. market and comparable to each other.[222] These data showed that subject imports were priced lower than comparable domestically produced CSPV products in 33 of 52 quarterly comparisons involving approximately two-thirds of the total volume in the pricing data.[223] The Commission also examined the trends in price comparison data, noting that prices for all five surveyed products declined overall during the POI.[224] Published industry reports corroborated an overall decline in prices of CSPV cells (by 60.4 percent) and CSPV modules (by 58.5 percent) from 2012 to 2016.[225]

133. The USITC noted that seven domestic producers reported losing sales to imported CSPV products since 2012. These accounts were consistent with the purchaser questionnaire responses, in which the majority of responding purchasers reported that they had increased their purchases of imported CSPV products, identifying lower price most often as the reason for increasing their purchases of imported CSPV products.[226]

134. The Commission also found a relationship between the shifts in prices and import volumes. In particular, prices declined substantially in 2012, but stabilized somewhat after trade remedy proceedings began against the primary import sources in 2013, which occasioned a slowing of the pace at which imports grew in relation to apparent U.S. consumption 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.[227]

135. Further indicating a correlation between increased imports and declining prices, the Commission found that eight of 12 responding domestic producers reported having to reduce prices, and three reported having to roll back announced price increases to avoid losing sales to competitors selling imported CSPV products during the POI. Of the 103 responding purchasers, 38 reported that U.S. producers had to reduce prices of their CSPV products to compete with

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

[222] USITC November Report, pp. 41, 45 (Exhibit CHN-2).

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

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

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

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

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

lower-priced imports, and 44 of them reported that they did not know whether domestic producers had reduced their prices to compete with lower-priced imports. Moreover, several purchasers also reported steeper price reductions in 2016, as the domestic industry's market share fell to its lowest level.[228]

136. The only flaw that China asserts with respect to this reasoning is that "only 38 of 103 U.S. purchasers reported that U.S. producers had reduced prices of their CSPV products in order to compete with lower priced imports."[229] China provides no basis to consider this figure inconsistent with the Commission's ultimate conclusion. In fact, given that 44 of the 103 responding purchasers did not know why domestic producers decreased prices, the 38 purchasers that blamed low import prices represent two thirds of the 59 purchasers expressing a view. Moreover, China fails entirely to address the totality of the evidence cited by the USITC. Given the high degree of substitutability and the importance of price to purchasers, the underselling of the domestically produced product by imports, and the declining prices despite strong demand growth, China's citation to purchaser responses provides no basis to question the Commission findings linking increased imports to declining prices.[230]

137. Also unavailing is China's contention that the USITC's analysis of price trends failed to take into account various other factors, including the decreasing raw material costs (and COGS), the domestic industry's "increased efficiency," and changes in government incentive programs.[231] The Commission considered and addressed why these factors did not explain the price declines during the POI.[232]

138. As an initial matter, there is no basis for China's apparent presumption that, as a rule, price declines occur whenever raw material costs decline.[233] In this case, where the domestic industry's COGS to net sales ratio was already extremely high, exceeding 100 percent at the end of the POI, the fall in input costs could have allowed producers to realize better profit margins, were it not for the pressure to compete with declining import prices. As the Appellate Body has explained:

> [W]e note that the COGS/sales ratio expresses the portion of total sales value this accounted for by costs directly associated with making a particular good. A higher COGS/sale ratio therefore indicates that such costs make up a higher portion of sales value, leaving a smaller margin for selling, general and administrative

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

[229] China First Written Submission, para. 150.

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

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

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

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

> expenses, and profits. The COGS/sales ratio therefore provides an indication of whether the sales value is sufficient to cover the production costs of the goods that are sold.[234]

139. In this case, given the industry's already high COGS to net sales ratio and unprofitability due to imports throughout the POI, declining raw material costs should have been a favorable factor, benefitting the domestic industry. However, as the Commission explained, the domestic industry was unable to climb out of its dismal financial state because prices continued to decline, resulting in net sales values that merely kept pace with decreasing costs. Indeed, contrary to China's suggestion that the lower prices were a result of decreasing raw material costs, the evidence in fact showed that the surging imports led to lower domestic prices, which in turn led to a high COGS to net sales ratio despite declining raw material costs.[235]

140. China's assertions regarding "increased efficiency" are similarly unpersuasive in explaining the decreasing prices for CSPV products during the POI.[236] Like declining raw material costs, achieving higher levels of efficiency should have benefitted the domestic industry and helped the industry achieve profitability. As discussed, however, as the industry's net sales values declined, the industry's COGS to net sales ratio consistently remained high and rose to more than 100 percent at the end of the POI. This in turn led to further deterioration of the industry's condition.[237]

141. The USITC also addressed in detail why any reduction in government incentive programs did not explain the decline in prices. It observed that these programs stimulated demand for renewable energy-generated electricity.[238] The Commission found, while some programs expired, others continued, and demand continued to grow robustly throughout the POI, including in states most affected by changes in incentive programs, such as California.[239] Consequently, contrary to China's argument, changes in incentive programs were not responsible for the price declines of CSPV products during the POI because they did not reduce demand.

142. As further indication that imports, and not any other factors, were responsible for the declining prices, questionnaire respondents pointed to the large volumes of low-priced imports as the reason for price declines. Even foreign producers' own financial disclosures attributed the decline in prices of CSPV products to global excess capacity rather than to changes in the

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[234] *China – Tyres (AB)*, para. 243.

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

[236] There is some degree of artificiality in China's treatment of "increased efficiency" as an explanatory factor separate from declining COGS, as increased efficiency would normally result in lower COGS.

[237] USITC November Report, pp. 38, 47 (Exhibit CHN-2).

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

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

availability of incentive programs or changes in raw material costs.[240] Thus, China's citation of other factors allegedly responsible for falling prices does nothing to cast doubt on the link the Commission found between low-priced imports and decreased prices for domestic CSPV products.

iii. The Commission provided a reasoned and adequate explanation demonstrating that increased imports caused the domestic industry's poor and deteriorating financial performance and plant closures.

143. China asserts that the USITC's discussion of the domestic industry's financial performance "glosses over the key disconnects that undercut its analysis of causal link" [241] In fact, the Commission provided a thorough explanation regarding the correspondence between the growing volume of imports and the domestic industry's deteriorating financial performance in each year of the POI. The Commission conducted its analysis within the context of the conditions of competition in the U.S. CSPV market, and properly dismissed the significance of the "disconnects" alleged by the respondents in its investigation.[242]

144. As the Commission discussed, favorable conditions existed in the U.S. market. U.S. demand was strong and experienced explosive growth.[243] Yet, throughout the POI, the domestic industry suffered. At the outset, the industry was adversely affected by unfairly traded imports from China and then from unfairly traded imports from China and Taiwan. But the imposition of measures to address these unfairly traded imports were not given a chance to curb the injury to the industry, as global imports, from China as well as other countries, continued or began to enter the U.S. market in ever increasing volumes and declining prices.

145. The first antidumping and countervailing duty orders covering U.S. imports of CSPV cells and modules produced in China took effect in December 2012 and the second set of orders on U.S. imports of CSPV cells and modules produced in China and Taiwan took effect in February 2015.[244] Within this context, the Commission explained that imports, particularly from China, had been increasing rapidly before the POI. After imports from China became subject to orders in December 2012 and additional 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 between 2013 and 2014. However, as imports from additional sources subsequently entered the

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

[241] China First Written Submission, para. 140.

[242] USITC November Report, pp. 34-35, 38-43, 44-49 (Exhibit CHN-2).

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

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

U.S. market, imports rapidly increased to higher volumes throughout 2016, for an overall increase of 492.4 percent between 2012 and 2016.[245]

146. Prices followed suit, stabilizing between 2013 and 2014, and then steadily falling throughout 2016, as did the domestic industry's financial condition.[246] 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 deteriorated further in 2016, as imports peaked in terms of volume and market share and prices dropped anew.[247] Thus, the Commission demonstrated a coincidence of trends, including how the upward trend in imports towards the end of the POI explained the downward trend in the domestic industry's financial performance. Moreover, given the obvious relationship between a manufacturer's prices and revenue, the relationship between continuously decreasing prices and continuously poor financial performance is indisputable.

147. China asserts that "the domestic industry was better off in 2016 after the import increase than in 2012," and that the USITC "tried to side-step" this flaw in its reasoning by referring to the antidumping and countervailing duty orders. In the first place, when viewed in the context of booming demand, the Commission's observations that the industry's performance improved only "marginally" through 2015, and then "deteriorated further" in 2016, do not indicate good performance,[248] as China seems to believe. Rather, the USITC properly viewed these developments in the context of the conditions of competition. It did not "side-step" this evidence, but conducted a searching analysis of the trends and other data before concluding that increased imports were the most important cause of the financial performance that it had previously characterized as "dismal and declining."[249] (It bears repeating that China does not dispute this characterization, or the finding that the domestic industry was suffering from serious injury.)

148. As the Commission explained, the antidumping and countervailing duty measures, despite having an initial favorable impact, had limited effectiveness due to rapid changes in the global supply chains and manufacturing processes.[250] The Commission discussed how each imposition of the remedial orders was followed by shifts in manufacturing and global supply chains. Before imports from China began to recede from the U.S. market after the *CSPV I* orders were imposed in December 2012, imports from China and Taiwan corresponding to the scope of the subsequent investigations increased their presence in the U.S. market, replacing the

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

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

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

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

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

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

substantial market share held by *CSPV I* imports from China and taking additional market share from the domestic industry. This phenomenon of shifting global supply chains occurred again before the *CSPV II* orders became effective in February 2015 when imports increased, almost doubling their level from 2015 and reaching record highs in 2016.[251]

149. During this time, the six largest firms producing CSPV cells and CSPV modules in China increased their global CSPV cell and CSPV module manufacturing capacity by expanding investments in third countries not covered by the orders, without reducing their capacity in China. Indeed, imports from four countries where Chinese affiliates added both CSPV cell and CSPV module capacity – Korea, Malaysia, Thailand, and Vietnam – increased their share of apparent U.S. consumption, particularly between 2015 and 2016, as their collective share of the U.S. market more than doubled.[252] By demonstrating how global capacity and supply chains shifted to provide an essentially limitless source of CSPV imports into the United States, the Commission further demonstrated the causal link between the increased imports and the domestic industry's financial performance within the context of the relevant conditions of competition.

150. China's table showing alleged "improvements" in the domestic industry's performance based on percentage changes obfuscates the overall situation of the domestic industry. 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.[253]

151. As the panel explained in *US – Wheat Gluten*, whether a coincidence in the movements in imports and the movements in injury factors exists involves consideration of "*overall* trends in imports and the *overall* imports trends in serious injury factors pertaining to the *overall* situation of the industry over the period of investigation" and a determination of whether there is a "*general* coincidence between the trends in injury factors and the trends in imports."[254] Here, the Commission properly explained how the *overall* increasing imports trends coincided with the trends in serious injury factors pertaining to the *overall* poor and deteriorating situation of the industry. The information cited by China does nothing to detract from that ultimate conclusion.

152. China inaccurately claims that the USITC did not provide an explanation as to how the domestic industry's plant closures were linked to increased imports.[255] The Commission

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

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

[253] China First Written Submission, para. 142; USITC November Report, p. 47 (Exhibit CHN-2).

[254] *US – Wheat Gluten (Panel)*, para. 8.97 (emphasis in original).

[255] China First Written Submission, para. 154.

provided an extensive analysis of how increasing import trends directly corresponded with the domestic industry's inability to carry out domestic production operations at a reasonable level of profit, which in turn led to firm closures and bankruptcies. China nevertheless argues that plant closures were due in large part to factors other than imports, including the domestic industry's missteps.[256] The United States discusses this assertion in addressing China's non-attribution claims below in section II.D. As we will show in that discussion, the Commission explained why the factors identified by respondents in the underlying investigation were not factors that caused plant closures or other serious injury to the domestic industry.

b. In examining the coincidence of trends between the increase in imports and the declining prices and financial performance of the domestic industry, the Commission also addressed seemingly positive trends.

153. The Commission predicated its finding of a clear causal link between increased imports and serious injury to the domestic industry upon an evaluation of the movements in imports (volume and market share) and the movement in injury factors. China nonetheless argues that the Commission disregarded allegedly positive developments in the industry, specifically the increases in U.S. cell and module production, production capacity, cell capacity utilization, U.S. shipments, employment for cell production, and capital expenditures and research and development expenses during the POI. In light of these allegedly positive developments, China maintains that there was not an overall coincidence of negative trends to justify the Commission's determination.[257]

154. China errs in that: (1) overall coincidence can be demonstrated even when certain injury factors have positive trends; and (2) the Commission did, in fact, consider the allegedly positive developments highlighted by China.

155. Article 4.2(a) instructs competent authorities to examine all relevant factors, "in particular," the rate and amount of increase in imports, the imported product's market share, changes in levels of sales, production, productivity, capacity utilization, profits and losses, and employment. Article 4.2(c) calls on them to provide in their report "a demonstration of the relevance of the factors examined," indicating that the "relevance" of individual factors may vary, and allowing for the possibility that the analysis may indicate that some factors are not relevant at all.

156. Thus, negative developments in any one, or any combination, of the relevant factors may indicate that imports have increased under such conditions as to cause serious injury; conversely, positive developments in one or more factors may not be "relevant." As the panel explained in

[256] China First Written Submission, para. 154.

[257] China First Written Submission, paras. 111-15.

US – Steel Safeguards, "*overall* coincidence is what matters and not whether coincidence or lack thereof can be shown in relation to a few select factors which the competent authority has considered."[258] The panel referred to the panel's decision in *US – Wheat Gluten*, where it stated that:

> [I]n light of the overall coincidence of the upward trend in increased imports and the negative trend in injury factors over the period of investigation, the existence of slight absences of coincidence in the movement of individual injury factors in relation to imports, would not preclude a finding by the USITC of a causal link between increased imports and serious injury.[259]

It is the very nature of multiple-year trends to encompass individual years with deviations. Thus, it is to be expected that a respondent in an investigation covered by SGA Articles 2, 3, and 4 can identify data points at odds with an overall development. Such deviations indicate an inconsistency with SGA Articles 2.1, 3.1, and 4.2(b) only if they are sufficient to establish that the reasons provided by the competent authorities are inadequate.

157. Here, as discussed above, the Commission focused on the industry's overall dismal and deteriorating financial condition, which corresponded to increases in lower-priced imports. The Commission did not "downplay" the allegedly positive trends China identifies, but rather expressly acknowledged that the domestic industry's production and capacity, cell capacity utilization, U.S. shipments, employment for cell production, and capital expenditures and research development expenses increased overall during the POI.[260] The Commission explained, however, that even the seemingly "positive" factors were inadequate to protect the domestic industry from the injurious effects of the increasing volumes of low-priced imports.[261]

158. Specifically, the Commission analyzed the trends for all relevant factors in light of the explosive demand growth that occurred during the POI.[262] Such an analysis was not only appropriate, but critical. Indeed, as China itself acknowledges, "[b]eyond the coincidence in trends, it is also critical that those trends be analysed in light of the conditions of competition for that specific industry. The trends might have different significance depending on the conditions of competition."[263] That was the case in the USITC investigation at issue in this proceeding. The seemingly "positive" development in trends had different significance when viewed in light

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[258] *US – Steel Safeguards (Panel)*, para. 10.302 (emphasis in original).

[259] *US – Steel Safeguards (Panel)*, para. 10.302; *US – Wheat Gluten (Panel)*, para. 8.101.

[260] USITC November Report, pp. 32-33, 35, 37-38 (Exhibit CHN-2).

[261] *See Dominican Republic – Safeguard Measures (Panel)*, para. 7.313.

[262] USITC November Report, pp. 31-33, 47-49 (Exhibit CHN-2).

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

of the magnitude of growth in U.S. demand, most of which accrued to the benefit of imports and not domestic products.

159. As the Commission explained, the domestic industry's production, capacity, U.S. shipments, cell capacity utilization and employment did not approach the magnitude of the explosive growth in apparent U.S. consumption during this period; rather, dozens of U.S. facilities closed their operations.[264] The dozens of facility closures resulted in extensive layoffs and the award of U.S. Trade Adjustment Assistance Act benefits to many workers; in addition, workers at some facilities experienced temporary shutdown or production slowdown, which led to layoffs and underemployment.[265] Thus, as imports increased, the domestic industry was generally unable to take part in the explosive demand growth. Instead, in the face of the flood of imports and declining prices, the industry experienced a downward financial spiral and was unable to fully utilize its production assets.[266]

c. The Commission explained that the seemingly positive trends observed in certain injury factors did not detract from its conclusion of an overall coincidence in increased imports and negative injury trends.

160. Contrary to China's claim, the Commission provided a compelling explanation as to why there was an overall causal link notwithstanding positive trends in some injury factors.[267] The Commission provided detailed analyses on these allegedly positive developments in the industry in light of the relevant conditions of competition, particularly the explosive increase in demand that occurred throughout the POI. SGA Articles 3.1 and 4.2(b) do not require anything more.

161. As a general matter, the USITC devoted several pages – not "a single sentence each" as China claims – to discussing the increases in capacity, production, and capacity utilization.[268] It provided a detailed explanation that neither the increase in capacity for nor the production of CSPV cells or modules approached the magnitude of the substantial growth in apparent U.S. consumption of these products during this period. Just the opposite, dozens of U.S. facilities closed their operations during this period as imports captured most of the growth in demand. Moreover, those producers remaining in the market continued to operate at below full capacity, particularly for CSPV module assembly operations.[269] As the Commission observed, 33 CSPV

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

[265] USITC November Report, pp. 33, 48 (Exhibit CHN-2).

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

[267] China First Written Submission, paras. 116-25.

[268] China First Written Submission, para. 118. China misstates that during the POI, "capacity utilization for modules overall did not change." *See* China First Written Submission, para. 118. As the Commission stated, capacity utilization for CSPV modules declined from 57.9 percent in 2012 to 53.7 percent in 2016. USITC November Report, p. 32 (Exhibit CHN-2).

[269] USITC November Report, pp. 32-33, (Exhibit CHN-2).

cell or CSPV module facilities operated in the United States as of January 1, 2012, but only 13 of those facilities remained opened by December 31, 2016. And of the 16 additional facilities that opened during the POI, five closed.[270]

162. The Commission further explained in detail how the overall increase in U.S. shipments was also dwarfed by the explosive growth in U.S. demand. The domestic industry lost market share from 2012 to 2013, but then gained market share in 2014 as prices stabilized and imports temporarily grew at a slower pace than apparent U.S. consumption. However, the domestic industry's market share declined anew in 2015 and 2016, as imports peaked. The Commission observed that domestic producers documented losing sales to low-priced imports of CSPV products. 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.[271] Thus, the Commission demonstrated how the domestic industry, rather than being able to participate in the booming market, was unable to compete with the large volumes of low-priced imports, resulting in severe underutilization of production assets and plant closures.[272]

163. The USITC did not, as China asserts, base its analysis on an "implicit false premise" that "the domestic industry somehow had a right to increase as fast as the overall market, regardless of how fast the market was growing."[273] Rather, the Commission cited a variety of evidence suggesting that the domestic industry's performance would have been expected to improve, and evaluated the industry's poor performance in light of those expectations. It did not presume a particular level or capacity for growth. The USITC analysis focused on the dozens of facility closures and low capacity utilization rates during the POI that contradictorily occurred simultaneously with the explosive demand. Rather than having time and ability to recover after imposition of trade remedies, the industry faced low-priced imports from new sources that took advantage of the exploding growth. Without a meaningful increase in sales volume or prices, domestic facilities continued to operate at below full capacity as domestic producers and dozens of facilities actually shuttered their operations, including many of those that entered the U.S. market seeking to take advantage of the demand growth.[274]

164. China also argues, incorrectly, that the USITC failed to address the domestic industry's increasing employment and capital expenditures, research and development expenses, and production assets and how they coincided with increased imports.[275] The Commission did so.

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

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

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

[273] China First Written Submission, paras. 120-21.

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

[275] China First Written Submission, paras. 122-24.

Having found imports to have increased over the POI, the Commission also found that dozens of domestic CSPV cell and CSPV module facilities closed, resulting in numerous layoffs and the need for trade adjustment assistance for the highly trained, skilled workers affected by these closures. The Commission further noted that the domestic industry's unemployment and underemployment worsened in 2017, with Suniva filing for bankruptcy and SolarWorld announcing additional layoffs and issuing WARN Act notices.[276]

165. Contrary to China's characterization, the USITC did not "mystically" arrive at a finding of significant underemployment based exclusively on "minor layoffs outside of the POI."[277] China does not deny the Commission's observation that dozens of domestic facilities closed over the POI, which logically resulted in layoffs.[278] China belittles the evidence of SolarWorld issuing WARN Act notices and Suniva's bankruptcy for occurring after the end of the POI. However, this information was highly relevant, as it reflected the actualities of the industry at the conclusion of the investigation. Moreover, such evidence was on the record of the investigation and the parties had the opportunity to address it. There was no basis for the Commission to ignore this evidence or treat it as irrelevant to findings on the domestic industry's underemployment and unemployment.

166. Regarding capital expenditures, research and development expenses, and production assets, the Commission explained that the largest share of these expenditures was related to expenditures by one firm on new CSPV cell operations that had not yet become operational by the end of the POI.[279] In fact, the Commission found that as imports increased and prices declined, the domestic industry incurred hundreds of millions of dollars in net and operating losses throughout the POI. Consequently, a significant number of domestic producers were unable to generate adequate capital to finance the modernization of their domestic plants and equipment or maintain existing research and development expenditure levels. This, in turn, impaired the industry's ability to develop next-generation products in a market that was highly capital-intensive and technologically sophisticated.[280]

167. In sum, the Commission established an overall coincidence between increased imports and the increasingly dire condition of the domestic industry. Although not all industry factors declined, the stability or uptick in some factors did not arrest the industry's financial deterioration as lower-priced imports flooded the market to take full advantage of exploding demand. China has accordingly failed to establish that the Commission's causal link analysis

[276] USITC November Report, pp. 48-49 (Exhibit CHN-2).

[277] China First Written Submission, para. 122.

[278] China First Written Submission, para. 122.

[279] USITC November Report, pp. 35-36 (Exhibit CHN-2).

[280] USITC November Report, pp. 36, 47 (Exhibit CHN-2).

was inconsistent with Articles 2.1 or 4.2(b), or that its report failed to provide reasoned conclusions for purposes of Articles 3.1.

E. China Does Not Provide Any Basis to Conclude that, Contrary to SGA Article 4.2(b), the USITC Attributed Injury Caused by Other Factors to Increased Imports

168. In establishing a causal link between increased imports and serious injury, the Commission first demonstrated that increased imports of CSPV products were a "substantial cause" of serious injury to the domestic industry.[281] The Commission then established that the two alternative causes of injury argued by respondents – (1) alleged missteps by the domestic industry and (2) factors other than imports that led to declines in domestic prices – were not important causes of injury because neither was supported by the record evidence.[282] The Commission's legal conclusions and findings of fact fully satisfied the obligation under SGA Article 4.2(b) to evaluate whether factors other than imports are causing injury to the domestic industry, and the admonition not to attribute any such injury to increased imports.

169. China challenges the USITC analysis of alternative causes of injury on three grounds. First, China argues that the "substantial cause" test, as applied by the Commission in the underlying proceeding, fails to "'separate and distinguish' the injurious effects of all factors" in a manner consistent with SGA Article 4.2(b).[283] Even setting aside China's erroneous understanding of Article 4.2(b),[284] China's argument fails because the Commission looked individually at each of the alleged "other factors," and determined that it did not cause injury to the domestic industry. SGA Article 4.2(b) does not require anything more.

170. Second, China recognizes that the USITC explicitly addressed three asserted "other factors," but asserts that the examinations of market segments, alleged missteps by the domestic industry, and domestic products' alleged quality shortcomings "simply dismissed [those factors] with a perfunctory analysis that essentially ignored the impact they were having on the domestic CSPV industry."[285] China again errs because the Commission provided detailed analyses showing that each of the purported other factors did not have injurious effects.

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[281] USITC November Report, pp. 43-50 (Exhibit CHN-2). The "substantial cause" standard derives from section 201 of the Trade Act of 1974, which provides that the President may take action under the Act if the Commission "determines under section 202(b) that an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry . . . ." Trade Act of 1974, § 201(a) (Exhibit USA-04). The law defines "substantial cause" as "a cause which is important and not less than any other cause." Trade Act of 1974, § 202(b)(1)(B) (Exhibit CHN-32).

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

[283] China First Written Submission, paras. 177-78.

[284] *See* U.S. First Written Submission, section II.C above.

[285] China First Written Submission, paras. 181-95. The Commission considered respondents' arguments on these three issues to fall under the category, "alleged missteps by the domestic industry," whereas China

171. Third, China asserts that the Commission, despite acknowledging that three other factors – declining government incentive programs, declining raw material costs, and need to meet grid parity with other sources of electricity – negatively impacted prices or demand, failed to separate and distinguish injury these factors caused from injury caused by increased imports.[286] China once again errs. As the Commission found, these other factors did not either individually or collectively cause injury. Therefore, the Commission could not have impermissibly attributed injury to increased imports.

1. The USITC applied the statutory "substantial cause" standard in a manner consistent with SGA Article 4.2(b).

172. China's argument that the Commission was somehow incapable of complying with SGA Article 4.2(b) is based upon the erroneous premise that the Appellate Body found the "'substantial cause' test" under U.S. law inconsistent with the SGA in *US – Lamb*. However, the Appellate Body made no such finding. Rather, the Appellate Body found that the Commission's analysis of alternative causes of injury to be inconsistent with Article 4.2(b) *under the facts of that particular case.*[287]

173. The analysis here is readily distinguishable from its analysis of alternative causes of injury in the investigation covered by *US – Lamb*. In that proceeding, the Commission "acknowledged implicitly" that four of six other "factors were actually causing injury to the domestic industry." In contrast, in the CSPV products investigation, the USITC found that the record evidence did not support any of the respondents' assertions that "other factors" caused injury to the domestic industry.[288]

174. With respect to respondents' allegations of missteps by the domestic industry, the Commission found that "the record does not support respondents' contention that the domestic industry was unable to provide quality products, failed to serve certain segments of the market, or suffered widespread delivery and service issues."[289] With respect to expiration of government incentive programs, declining raw material costs, and the need to meet grid parity with other sources of electricity, the Commission found that the proposed alternative causes could not explain the injury to the domestic industry, particularly the declining market share, low capacity

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characterizes only one of these issues, the domestic industry's inability to provide innovative products, as such. USITC November Report, pp. 50-61 (Exhibit CHN-2). The difference in the Commission's and China's characterization of the issues is of no consequence as the Commission provided a reasoned and adequate analysis for its finding that each of these factors was not a cause of serious injury.

[286] China First Written Submission, paras. 196-98.

[287] *US – Lamb (AB)*, paras. 185-86.

[288] *US – Lamb (AB)*, para. 185.

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

utilization levels, facility closures, and abysmal financial performance.[290] On this issue, far from finding that these factors negatively impacted the domestic industry's condition as China mistakenly argues,[291] the Commission definitively found that "respondents' arguments are not supported by the facts."[292]

175. The Commission couched its rejection of respondents' proposed causal factors in the language of the U.S. statute, finding none of them to be "an important cause of injury." That is, in its analysis, none of them individually or collectively explained the serious injury.[293] These findings signify that there was no injury that the Commission might have erroneously attributed to increased imports. Thus, they comply with the admonition in the second sentence of Article 4.2(b).

2. The Commission provided a reasoned and adequate explanation for its finding that alleged missteps by the domestic industry were not causes of the serious injury identified by the Commission.

176. China argues that the USITC failed to provide reasoned and adequate explanations of why certain alleged "missteps" by the domestic industry were responsible for the serious injury to the domestic industry. The parties to the investigation identified three of these: domestic producers' alleged failure to serve certain segments of the market; inability to provide innovative products; and widespread unreliability in quality, delivery, and service.[294] The Commission examined the record evidence on each of these issues and provided a thorough explanation why none of the alleged missteps actually occurred. China provides no basis to question the Commission's weighing of the evidence on these issues.

a. The evidence did not support assertions that domestic producers focused on residential and commercial segments to the exclusion of the utility segment.

177. The USITC objectively evaluated all the record evidence concerning the domestic industry's role in the utility segment of the U.S. market. It noted the extensive bid information submitted by SolarWorld and Suniva, indicating that they had indeed competed for and made sales in the utility segment, and actually made shipments to utilities.[295] The Commission also examined questionnaire response data, and found that during the POI, the domestic industry and

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

[291] China First Written Submission, paras. 196-217.

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

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

[294] China First Written Submission, paras. 181-95.

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

importers each sold CSPV products in the U.S. market to all three segments, including the utility segment.[296] Parties attempted to bolster this argument by noting that 72-cell modules became the standard for utility installations over the course of the POI, and asserting that domestic producers lacked the capacity to produce these products. As the Commission explained, the record showed that this was not the case, as the domestic industry sold both 60-cell and 72-cell modules in overlapping segments throughout the POI and lost market share to imports for both types of modules.[297] The Commission further found that the record evidence showed that the domestic industry sought to compete in the utility segment, but that the large volume of imports at low and declining prices adversely impacted the domestic industry's financial performance, making it difficult to increase capacity to a scale that made it more competitive in this segment.[298]

178. China accuses the USITC of merely regurgitating evidence without providing the requisite explanation of the relative importance of each market segment and how the domestic industry's alleged decision not to focus on the fastest-growing utility segment impacted the domestic industry.[299] These arguments do not withstand scrutiny. First, China's argument fails because it is based on the incorrect factual premise that the domestic industry actually made a decision not to compete in the utility segment. The Commission considered this possibility, but found otherwise – that domestic producers affirmatively sought to sell to the utility segment. The record actually showed that the domestic industry sold both 60-cell and 72-cell modules throughout the POI, and sold them through channels of distribution similar to those used by imports, and into the same market segments.[300]

179. Furthermore, the evidence showed that the largest U.S. producers, SolarWorld and Suniva, tried to compete in the utility segment of the market, but were often unable to win large bids.[301] Both companies submitted extensive data on their bids for sales to the utility segment. The Commission also noted that SolarWorld added a 72-cell module assembly line to its U.S. facilities specifically to serve the increasing demand in the utility market, and that Suniva dedicated 45 percent of its cell manufacturing capacity to 72-cell modules.[302] Moreover, some of the evidence presented by respondents themselves confirmed that domestic producers manufactured both 60-cell and 72-cell modules for sale to the utility industry. Specifically, as the Commission found, respondents acknowledged that at the beginning of the POI, 60-cell

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

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

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

[299] China First Written Submission, para. 185.

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

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

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

modules predominated in all three segments of the U.S. market, including the utility segment. And, although the utility segment shifted to 72-cell modules, respondents further acknowledged that Suniva and SolarWorld both manufactured 72-cell modules.[303]

180. Second, contrary to China's assertion, the Commission thoroughly examined and discussed how each of the three market segments, including the utility segment, was important to both domestic producers and importers. The Commission took note that in the CSPV products investigation, the utility segment was the largest segment of the U.S. market, followed by the residential and commercial segments, but that all three segments experienced considerable growth in both the number of installations and the total wattage of installation projects during the POI.[304] As the Commission explained, the domestic industry and importers competed in each of the three market segments. Indeed, both domestic producers and importers sold CSPV products to all three segments, with the domestic industry losing market share to imports regardless of market segment.[305]

181. China also argues that the USITC did not address how its factual finding that the domestic industry sought to compete in the utility segment squared with the fact that "most of the utility-scale projects greatly exceeded the size that any of the domestic producers could supply."[306] As discussed above in section II.C.3.a, China's argument fails to recognize a critical point made by the Commission – that although the domestic industry sought to compete in the utility segment, the large volume of imports at low and declining prices adversely impacted the industry's financial performance, making it difficult to increase capacity to a scale that made it more competitive in this segment.[307] China's argument amounts to a circular attempt to attribute the domestic industry's inability to make inroads in the utility segment to the industry's underutilization of capacity – which itself was causally linked to the financial woes exacerbated by the influx of lower priced imports.

182. Thus, China has failed to establish any inconsistency with Article 4.2(b). As the domestic industry did in fact sell into the utility segment, its alleged failure to do so cannot be an "other factor" causing injury to the domestic industry. China has accordingly established no valid basis for concern that the USITC impermissibly attributed injury caused by this factor to increased imports.

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

[304] USITC November Report, pp. 57-58 (Exhibit CHN-2).

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

[306] China First Written Submission, para. 186.

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

b. The evidence did not support assertions that domestic producers allegedly failed to make technological innovations to their CSPV products.

183. The USITC also undertook a thorough examination of the relevant evidence and explained that the record did not support assertions that the domestic industry failed to adopt technological improvements and innovations. As the Commission explained, the domestic producers pioneered CSPV technologies and continued to innovate, develop, and manufacture leading-edge products during the POI.[308] The USITC further explained that although certain foreign producers may have produced CSPV products that were unique or unavailable from domestic sources, evidence indicated that these products accounted for only a small share of the U.S. market for CSPV products and that there was more overlap between U.S. and imported specialized CSPV products than acknowledged by respondents. As the Commission observed, 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, frameless modules, heterojunction cells, bifacial products, and hybrid CSPV products.[309]

184. China asserts that the USITC "cited to domestic producers' provided examples" and failed "to evaluate the competing information" provided by the respondents allegedly showing that the domestic industry could not provide "certain high-efficient products."[310] In fact, the Commission closely evaluated respondents' arguments on this issue, but found that compelling and objective evidence supported a conclusion that the domestic industry supplied a wide variety of innovative CSPV products that competed with imported CSPV products.[311]

185. For example, the Commission explicitly took note of respondents' arguments that technological change was a key characteristic of the solar industry and that certain types of products, such as monocrystalline n-type interdigitated back contact ("IBC") products, n-type technology with back-contact solar cells with double-side cell structure, or commercial-scale multicrystalline modules with rear-side passivated cells, were only or primarily available from non-U.S. sources.[312] As the Commission explained, available objective evidence indicated, however, that CSPV products that were unique or unavailable from other sources accounted for only a small share of the U.S. market and that, in any event, there was more overlap between

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

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

[310] China First Written Submission, paras. 188-90.

[311] USITC November Report, pp. 51-55 (Exhibit CHN-2).

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

domestically produced products and imported specialized CSPV products than acknowledged by respondents.[313]

186. Demonstrating overlap between domestic and imported specialized CSPV products was evidence showing that the domestic industry supplied a wide variety of monocrystalline and multicrystalline products that competed against imported CSPV products, including CSPV products with 2, 3, 4, and 5 busbars, PERC products, frameless modules, heterojunction cells, bifacial products, and hybrid CSPV products.[314] The Commission took note that even respondent Hawha Q conceded that its multicrystalline modules with rear-side passivated cells were similar to PERC technology.[315] Moreover, the record evidence belied respondents' assertion that n-type monocrystalline CSPV were available only from non-U.S. sources.[316] The pricing data further corroborated the overlap in sales, in that both domestic producers and importers of CSPV products reported sales of CSPV products within similar efficiency and wattage ranges.[317]

187. Based on a thorough evaluation of all relevant evidence, the Commission reasonably concluded that the evidence submitted by respondents did not overcome the extensive objective and compelling evidence on the record that the domestic industry supplied innovative CSPV products that competed with imported CSPV products. China's submission provides no basis for questioning the Commission's weighing of the evidence on this point. Therefore, since the domestic industry did in fact innovate, its alleged failure to do so cannot be an "other factor" causing injury to the domestic industry. China has accordingly established no valid basis for concern that the USITC impermissibly attributed injury caused by this factor to increased imports.

c. The evidence did not support assertions that domestic products suffered consistent problems with quality, delivery, and service.

188. Contrary to China's argument in this proceeding, the USITC thoroughly evaluated arguments that domestic CSPV products suffered from quality, delivery, and service issues.[318] It noted evidence submitted in support of those concerns, but also considered "detailed explanations" submitted by domestic producers in response to the allegations, including documentation related to specific transactions. Its weighing of this information led it to conclude

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

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

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

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

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

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

that the record "simply d[id] not support the sort of widespread problems alleged by respondents."[319]

189. For instance, while domestic purchaser NextTracker testified that it had experienced delivery and product specification problems with SolarWorld, the domestic producer's response showed that the purchaser's website still listed SolarWorld as an approved vendor and the firm continued to supply CSPV products for NextTracker's projects.[320]

190. Although Sunrun reported that SolarWorld and Suniva refused to participate in its Vendor Quality Management Program, their submissions demonstrated that their refusals were not due to quality, delivery, or service concerns. SolarWorld showed that the real obstacle was its refusal to release intellectual property demanded by Sunrun. Suniva explained that it had participated in the preliminary stages of negotiation with Sunrun but that the two firms were so far apart on price that it had not made sense for Suniva to spend money on the qualification process.[321]

191. SolarWorld also provided documentation refuting respondents' allegations regarding transactions with DEPCOM, California Solar System, and Borrego. Likewise, Suniva provided information responding to allegations regarding transactions with DEPCOM, Borrego, NRG Energy, Silfab Solar, and SunPower.[322]

192. In further support of its conclusion that the domestic industry provided quality products and satisfactory delivery and service, the USITC also considered the views of the questionnaire respondents, including producers, importers, and purchasers. Most of them reported that domestically produced products were interchangeable with imported CSPV products.[323] Additionally, most purchasers reported that no domestic supplier had failed in its attempt to qualify product or lost its approved status since 2012.[324]

193. Other relevant evidence further corroborated the domestic industry's ability to provide quality products and excellent customer service. The USITC noted that the independent research firm EuPD Research ranked SolarWorld's CSPV products as the most purchased brand by U.S. installers and the Better Business Bureau gave the company a top rating for its customer

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

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

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

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

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

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

service.[325] Moreover, SolarWorld and Suniva reported that their warranty claim rates were low. Specifically, SolarWorld stated that its claim rate was far lower than many other producers while Suniva reported that its claim rate was 0.05 percent – compelling evidence of the excellent quality of their products.[326]

194. Thus, the Commission did not, as China argues, disregard evidence advanced by the respondents. It considered that evidence, and found that contrary evidence was entitled to greater weight.

195. China further inaccurately paraphrases the Commission as having recognizing that "19 U.S. purchasers reported that a domestic supplier had failed in its attempt to provide a quality product or had lost its approved status for reasons such as customer service, financial strength, quality control, efficiency rates, delivery rates, etc."[327] In fact, the actual finding was that "[n]ineteen 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."[328] The same discussion emphasized that three purchasers reported that both SolarWorld and Chinese producer Yingli had lost their approved status due to financial distress.[329] As the findings apply to U.S. and domestic producers, they provide no support for China's assertion that domestic products were inferior.

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196. In sum, the USITC provided reasoned explanations why the totality of the evidence showed that the domestic industry did not make any of the alleged "missteps" during the USITC's investigation. Therefore, it could not have acted inconsistently with Article 4.2(b) by impermissibly attributing to increased imports the injury caused by these factors.

3. The USITC provided a reasoned and adequate explanation for its finding that "other factors" that allegedly led to decreases in prices did not cause the serious injury identified by the Commission.

197. Parties to the USITC investigation also alleged that three factors other than imports – expiration of government incentive programs, declining raw material costs, and need to meet grid parity with other sources of electricity – were responsible for price decreases or suppressed demand for CSPV products during the POI.[330] However, the USITC evaluated these assertions

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

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

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

[328] USITC November Report, p. 55, n.311.

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

[330] China First Written Submission, paras. 196-98.

and found that "the alternative causes cannot individually or collectively explain the serious injury to the domestic industry. . . ."[331] As the USITC properly found that these factors did not cause serious injury, it could not have impermissibly attributed that injury to the increased imports in contravention of Article 4.2(b).

a. The expiration or modification of government incentive programs did not cause injury to the domestic industry.

198. The USITC recognized the existence of federal, state, and local programs that incentivized the purchase of CSPV products by offsetting the cost of generating solar or other renewable energy, mandating its use, or otherwise influencing its price. It further recognized that these programs stimulated demand for renewable energy-generated electricity and assisted developers of solar power and other renewable energy sources to achieve sufficient economies of scale.[332]

199. The Commission considered the argument that the alleged "decline" in such programs explained price declines of CSPV products and the serious injury experienced by the domestic industry. It first noted that some programs expired while others continued. Nonetheless, the Commission found that any change in the overall mix of government incentives did not lead to any decrease in apparent U.S. consumption. In fact, the opposite occurred. Demand continued to experience robust growth throughout the POI, including in states most affected by changes in incentive programs, such as California.[333]

200. China contends that the "USITC acknowledged the importance of government incentive programs on demand for CSPV products in the US market, the price for CSPV products, and for the profitability of the domestic industry."[334] This is an exaggeration, as the Commission did not ascribe any particular "importance" to these programs. It did note that incentives generally benefitted systems owners (*i.e.*, the end user), rather than any domestic producers, without regard as to whether they bought domestic or imported products.[335] Moreover, as the Commission found, some government incentive programs had expired while others emerged or continued. However, the most important point was that any changes to the programs during the POI did not dampen U.S. demand, which experienced explosive growth throughout the POI.[336]

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

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

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

[334] China First Written Submission, para. 199.

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

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

201. In challenging the Commission's detailed analysis of the role and effects of incentive programs as a whole, China claims that the Commission focused on the continuation of one particular incentive – the Federal Income Tax Credit, which Congress extended during the POI.[337] China argues incorrectly that the Commission relied on the continuation of this one program as evidence that "any decline in incentives has not led to declines in apparent U.S. consumption."[338] As an initial matter, the Commission examined several additional programs in reaching its conclusion that certain programs continued while others expired. In any event, the exact identities of the programs are far less significant than the observation that, regardless of whatever happened to incentive programs, apparent domestic consumption of CSPV products increased substantially throughout the POI.

202. China nevertheless argues that the USITC analysis was inadequate because it failed to distinguish how much of the growth in demand was for in-scope CSPV products as compared to out-of-scope thin film.[339] This argument – which no party raised before the USITC – fails because China provides no basis to believe that fluctuations in demand for the products move independently, or that the incentive programs affected demand for them differently. In any event, the USITC did in fact prepare separate data on in-scope CSPV products, which revealed that apparent domestic consumption of, as reflected in the questionnaire response data, grew substantially during the POI.[340]

203. China also returns once more to its disproven argument that the domestic industry, largely by choice, did not service the utility segment. It then speculates that because the domestic producers were unlikely to have benefitted from any demand growth in the utility sector, that "it is unclear how this example adequately rebuts the observed negative impact that declining government incentives had on domestic producers."[341] China provides no logic explaining the relationship among these assertions, or how they support its ultimate conclusion. It is also incorrect. As the Commission found, the domestic industry clearly sought to compete in the utility market, but the large volume of imports at low and declining prices made it difficult for the domestic industry to increase capacity to a scale that made it more competitive in this segment.[342]

204. China also argues that the USITC gave too much weight to the robust growth in demand throughout the POI in dismissing the injurious effect of the reduction in government incentive programs. In particular, China contends that "one can infer that any decline in incentives would

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[337] China First Written Submission, para. 201.

[338] China First Written Submission, para. 201.

[339] China First Written Submission, para. 201.

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

[341] China First Written Submission, para. 201.

[342] USITC November Report, pp. 58-61 (Exhibit CHN-2).

affect the cost-sensitiveness of system users, and result in CSPV producers having to offer lower prices to remain competitive."[343] This "inference" is, in fact, mere speculation, as China provides neither evidence nor detailed reasoning in support. China's submission thus provides no basis for questioning the Commission's weighing of the evidence on this point.

b. The decrease in raw material costs did not cause injury to the domestic industry.

205. In its challenge to the USITC's finding of a causal link between imports and declining prices for domestic CSPV products, China argued that declining costs were the real cause of declining prices. In section II.C.2.a.ii of this submission, the United States showed that this argument erroneously assumed that prices would normally fall to the same extent as declining costs. In its analysis under SGA Article 4.2(b), China seeks to repurpose this failed argument as an "other cause" of injury, asserting that the Commission erroneously treated price decreases attributable to decreasing raw material as the effect of increased imports. However, the argument fares no better the second time.

206. The central problem remains the same – China provides no support for its presumption that declining raw material prices *cause* the price of a finished product to decrease. Nor does China point to anything to detract from the force of the Commission's reasoning that "declining polysilicon prices . . . would help make CSPV products more cost-competitive with other sources of electricity," but that declining prices meant that producers' losses continued and worsened.[344]

207. And even if declining costs had resulted in the ability to lower prices, that still would not show that the raw material costs caused injury to the domestic industry. If anything, declining input costs would normally be expected to benefit an industry either by allowing for greater profit margins (the difference between costs and sales price) or by allowing the industry to lower prices and sell more product. In this case, because of the pressure from the constant influx of low-priced imports, the domestic industry was not able to benefit from the lower costs in either way. In no way were the declining polysilicon costs causing injury to the domestic industry. Rather, the inability of the industry to improve its financial condition despite these declining costs was emblematic of the dire and worsening financial condition of the industry caused by the imports. Given that the decrease in raw material costs did not cause any injury to the domestic industry, the Commission could not have acted inconsistently with Article 4.2(b) by impermissibly attributing that injury to increased imports.

[343] China First Written Submission, para. 202.

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

c. The need for CSPV products to attain parity with other on-grid sources of electricity did not cause injury to the domestic industry.

208. The USITC also carefully examined the record evidence and provided a thorough analysis addressing respondents' argument that pointed to the need for CSPV products to attain grid parity as explaining the domestic industry's condition.[345] In its analysis, the Commission noted that conventional energy prices "may account for some of the decrease in the prices of CSPV products in some years," but found that they did not explain the consistent observed price declines over the POI. The Commission examined natural gas prices and domestic prices of CSPV products and found no correlation between the price trends during the POI.[346] Moreover, questionnaire respondents pointed to large volumes of low-priced imports as the reason for price declines. Tellingly, several foreign producers' own financial disclosures had attributed the decline in prices of CSPV products to global excess capacity rather than to the need to meet grid parity or any of the other factors alleged by respondents.[347] Based upon the totality of the evidence, the Commission concluded that the need to attain grid parity was not responsible for the price decreases or a cause of injury to the domestic industry.[348]

209. China mistakenly asserts that by using the word "may" in its finding, the "Commission appears not to have even made an attempt to conclude whether or not conventional energy prices had an actual impact on prices of CSPV products."[349] When read in the entirety, it is plain that the "may" signals that the Commission is addressing a hypothetical – that it is possible in any given year that conventional energy prices could be responsible for *some* degree of decrease in prices for CSPV products. The Commission, however, definitively determined that conventional energy prices "d[id] not explain the consistent observed price declines over the 2012-2016 period."[350] In other words, the data showed that this theoretical possibility did not play out in the POI.

210. China further argues that the USITC did not adequately address the price trends for other forms of energy, despite having access to price data for wind, coal, and thin-film solar products submitted by the respondents.[351] However, the Commission did consider the effects of other sources of electricity, and found that natural-gas generated electricity generally set the levelized

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[345] USITC November Report, pp. 64-65 (Exhibit CHN-2).

[346] USITC November Report, pp. 64-65 (Exhibit CHN-2).

[347] USITC November Report, p. 65 (Exhibit CHN-2); *see also* Suniva Posthearing Injury Brief at 5, Exhibit 2, Exhibit 9 at 10-11 (Exhibit USA-06); SolarWorld Posthearing Injury Brief at Exhibit 32 (Exhibit USA-05).

[348] USITC November Report, pp. 64-65 (Exhibit CHN-2).

[349] China First Written Submission, para. 211.

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

[351] China First Written Submission, para. 212.

cost of energy that CSPV and other renewable energy systems sought to meet.[352] In this regard, such prices were the most relevant.[353] Thus, the USITC did not err in focusing on the price of natural gas electricity generation, which it found not to have any correlation with the decline in domestic prices for CSPV products throughout the POI.[354] Notably, China does not dispute this lack of correlation.

211. Notwithstanding the demonstrated lack of correspondence between declining CSPV prices and natural gas prices, China faults the USITC for failing to take into account the general argument that "there had been enormous pressure on CSPV products to become more efficient, less costly to produce, and less expensive for the consumer to buy, thereby enabling CSPV products to become price competitive with conventional forms of energy, which in-turn would increase their appeal and demand."[355] To the contrary, the Commission addressed and disproved the assumptions underlying this argument. In its analysis of the conditions of competition, it explained that grid parity was not a monolithic concept; rather grid parity prices varied by region, time of the day, and availability of other electricity sources, and even could vary widely for a given energy source.[356] Thus, it is not the case that the average prices of other energy sources determine the price for CSPV products. As the Commission observed, "during periods of peak electricity demand, even generators with somewhat higher costs may be able to sell electricity into the transmission or distribution grid."[357]

212. Nor did the evidence show that the objective of attaining grid parity overcame other business imperatives. As the Commission discussed, the domestic CSPV products industry was unprofitable and its COGS to net sales ratio remained high and accelerated over 100 percent by the end of the POI.[358] The objective of grid parity would not explain producers' acceptance of such continual losses. Indeed, as the Commission observed, most U.S. producers reported that changes in conventional energy had not affected the price of solar-generated electricity since 2012.[359]

213. China also argues that an econometric model allegedly demonstrated that technological improvements and the need to reach grid parity had a greater impact on the industry than did

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

[353] USITC November Report, p. 26 n.113 (Exhibit CHN-2).

[354] USITC November Report, pp. 64-65 (Exhibit CHN-2).

[355] China First Written Submission, para. 214.

[356] USITC November Report, pp. 25-26 (Exhibit CHN-2).

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

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

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

imports.[360] However, the facts in the record, as laid out in detail by the Commission, showed that not only did grid parity bear no relationship to the domestic industry's injury; it most certainly did not have a "larger impact" than did the imports that overwhelmed the market. The Commission, in providing a comprehensive analysis on this issue, addressed the relevant points made by the econometric analysis.

214. In any event, the SGA does not require quantification or an econometric study to analyze causation. The panel in *US – Steel Safeguards* explained that quantification is less than perfect, while an "overall qualitative assessment that takes into account all relevant information must always be performed."[361] This statement holds true with respect to respondents' modeling exercise. The study purported only to provide "estimates" of the impact of imports on prices of domestically produced CSPV products, based on a set of "theoretical" assumptions rather than the actual data collected by the Commission.[362] Indeed, the authors of the study themselves explicitly acknowledged that the study was based on an "estimation approach" with many of the variables being treated as "theoretically" inter-related.[363]

215. Rather than rely on respondents' theoretical approach, the Commission based its determination on the actual facts gathered in the extensive record, consisting of thousands of pages of questionnaire responses, party briefs, information collected by Commission Staff, and approximately ten hours of hearing testimony. The Commission comprehensively explained, with citations to the questionnaire response data and other factual information on the record, the basis for its assessment that the desire to attain grid parity did not cause injury to the domestic industry. SGA Article 4.2(b) does not require it to do anything more.

4. Conclusion on China's Article 4.2(b) arguments

216. As demonstrated, the Commission provided a reasoned and record-based explanation for finding that imports caused the serious injury to the domestic industry, and that none of the other factors cited by China caused any injury to the domestic industry. Accordingly, the Commission did not and could not have attributed the effects of any of these factors, individually or collectively, to the increased imports. China's claim that the Commission acted inconsistently with Articles 2.1 and 4.2(b) fails, as does its claim that the Commission failed to provide an adequate explanation of its reasoning in accordance with Article 3.1.

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

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

[362] *See* SEIA Prehearing Injury Brief at Appendix A (Exhibit CHN-20).

[363] *See* SEIA Prehearing Injury Brief at Appendix A at 22 (Exhibit CHN-20).

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

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

218. The increase in imports is also the result of obligations incurred under the GATT 1994, as referenced in the USITC November Report as supplemented by the Supplemental Report. These concessions prevented the United States from increasing applied tariffs so as to modulate the increase in imports, and thereby provide the domestic industry with an opportunity to adjust to import competition without resort to the emergency action at issue in this dispute.

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

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

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

222. China refers to statements by the Appellate Body in support of the view that a reasoned and adequate finding as to "unforeseen developments" must appear in the report of the competent authorities. It fails to recognize, however, that these statements reflect an incorrect understanding of the relevant obligations, both because they did not address all of the potentially relevant arguments and because they disregard the ordinary meaning of the terms in their context and in light of the object and purpose of the relevant agreements. Therefore, the statements in question are erroneous and should not be regarded by the Panel as persuasive as it undertakes its evaluation of China's claims under Article XIX or SGA Article 3.1.

223. Similarly, China has erred in its arguments regarding the "obligations incurred." The USITC Supplemental Report described the tariff concession the United States undertook with

respect to the CSPV products at issue in this investigation, which is sufficient to establish that the increased imports are a result of "the obligations incurred by a contracting party under this Agreement, including tariff concessions."

A. China Fails to Establish That There Were No Unforeseen Developments.

224. Unforeseen developments are those that are unexpected or unanticipated at the time the Member took on obligations, including concessions, with respect to the product that is subject to a safeguard measure. China asserts that the USITC did not adequately demonstrate the existence of unforeseen developments because the factors the USITC identified were not "truly unexpected" and there was no "clear linkage" between the unforeseen developments and obligations incurred, on the one hand, and the increased imports, on the other. This argument errs as a legal matter in focusing on whether these developments were foreseeable (rather than actually foreseen) by the U.S. negotiators and in essentially imposing a double causation requirement that unforeseen developments cause the increased imports that caused serious injury.

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

1. The framework under Article XIX and the Safeguards Agreement concerning unforeseen developments.

226. The phrase "unforeseen developments" appears only once in the covered agreements, in Article XIX:1(a) of GATT 1994:

> If, as a result of unforeseen developments and of the effect of the obligations incurred by a {WTO Member} under this Agreement, including tariff concessions, any product is being imported into the territory of that {WTO Member} 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…

227. The ordinary meaning of "unforeseen" is "not anticipated or predicted." The "as a result" phrase sets out a temporal and logical connection between the developments that were not

anticipated or predicted and the "obligations incurred"[364] by a Member. That is, had the developments been anticipated or predicted, the Member might well *not* have incurred the obligation, and Article XIX affords a right for a Member to take emergency action with respect to the commitment. The working party in *Felt Hats* accordingly found that the proper focus was on the knowledge of a Contracting Party's negotiators at the time they undertook a particular obligation or tariff concession:

> {T}he term 'unforeseen developments' should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated.[365]

228. As the Appellate Body also observed with regard to the ordinary meaning of "unforeseen":

> {T}he dictionary definition of "unforeseen," particularly as it related to the word "developments," is synonymous with "unexpected." "Unforeseeable," on the other hand, is defined in the dictionaries as meaning "unpredictable" or "incapable of being foreseen, foretold or anticipated." Thus it seems to us that the ordinary meaning of the phrase "unforeseen developments" requires that the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been "unexpected."[366]

229. There are important differences between the first and second clauses of Article XIX:1(a). While both contain clauses modifying the main verb "is being imported," the first clause is triggered "as a *result* of" unforeseen developments, while the sub-clause in the second clause is triggered by "as to *cause* serious injury." The Appellate Body has stated that "{a}lthough we do not view the first clause in Article XIX:1(a) as establishing independent *conditions* for the application of a safeguard measure, additional to the *conditions* set forth in the second clause of that paragraph, we do believe that the first clause describes certain *circumstances* which must be demonstrated as a matter of fact . . . ."[367] Another significant point, which the Appellate Body

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[364] For purposes of this section, the United States uses the phrase "obligations incurred" in the sense it is used in Article XIX of GATT 1994, as "including tariff concessions."

[365] *Felt Hats*, para. 9.

[366] *Korea – Dairy (AB)*, para. 84. The *US – Lamb* panel, in a finding that the Appellate Body did not address, found that "the distinction drawn by the Appellate Body between *unforeseen* and *unforeseeable* {is} important. In our view, the former term implies a lesser threshold than the latter one. . . . {W}e must consider what was and was not actually 'foreseen', rather than what might or might not have been theoretically 'foreseeable.'" *US – Lamb (Panel)*, para. 7.22. *But see also India – Iron and Steel Products (Panel)*, para. 7.88 (citing *US – Steel (Panel)* in ascribing both "objective" and "subjective" elements to unforeseen developments).

[367] *Korea – Dairy (AB)*, para. 85.

did not note, is that the circumstances covered by the first clause occur *before* the main verb, while the situations covered by the second occur *after and concurrently with* the main verb.

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

231. China considers that findings to this effect must appear in the report of the competent authorities. In the following parts of this section, the United States demonstrates that China's argument fails *on its own terms* because the USITC November Report, as supplemented by the Supplemental Report, establishes that the increased imports are as a result of unforeseen developments and obligations incurred by the United States under the GATT 1994.

232. Moreover, China errs in assuming that the Panel must limit its evaluation of unforeseen developments and the obligations incurred to the context of the November and Supplemental Reports of the USITC. Article XIX:1 of the GATT 1994 and the SGA are silent as to when and how a Member may address assertions that the factual "circumstances" for taking a safeguard measure do not exist. That means that, when challenged in WTO dispute settlement, a Member remains free to amplify or modify the explanation as to why it considers that those factual circumstances exist.[368] While the United States does not consider this situation arises in this dispute, it remains free to adduce, and the Panel is free to review, additional explanation as necessary.

233. As noted above, Article XIX:1 differentiates between the factual circumstances in which a Member may take a safeguard measure (set out in the first clause of Article XIX:1) and the conditions that must be established before applying the safeguard measure (set out in the second clause of Article XIX:1).

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

235. Under the heading "Conditions," Article 2.1 provides that:

[368] A Member would also be free to demonstrate the existence of the unforeseen developments and obligations incurred for the first time during a WTO dispute settlement proceeding. However, the Panel need not address this question, as there is no dispute that the United States made findings regarding unforeseen developments and identified the obligations incurred before taking the safeguard measure on CSPV products.

> A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions 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 . . . .

Thus, the *conditions* referenced in Article 2.1 consist exclusively of those contained in the second clause of Article XIX. It requires the Member to *determine* only that the product is imported in such quantities and under such conditions as to cause serious injury. The omission of any reference to "unforeseen developments" is glaring, and signifies that the determination as to serious injury need not include unforeseen developments. This conclusion finds confirmation from the requirement that the determination be made "pursuant to the provisions set out below."

236. Prominent among these provisions is Article 4.2(a), which provides that "the competent authorities" make the "determination" envisaged in Article 2.1, following an "investigation" into whether "increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement." The Article calls on them to evaluate all relevant factors of an objective and quantifiable nature, and lists several such factors. Article 4.2(b) instructs the competent authorities to demonstrate the existence of a causal link between imports and serious injury or threat thereof, and not to attribute to imports the effects of other factors causing injury at the same time. There is no mention of the circumstances in the first clause of Article XIX:1(a), including unforeseen developments.

237. Article 3 sets forth what a competent authority must do in the "investigation" referenced in Article 4. These include the publication of a "report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." Like Article 4, Article 3 makes no reference to unforeseen developments. Thus, like the "investigation" and the "determination," the "issues" in question are those "pertinent" to the question whether "increased imports have caused or are threatening to cause serious injury." Since Articles 2.1 and 4 do not require a consideration of unforeseen developments as part of that analysis, the report of the competent authorities need not contain a finding with regard to that "circumstance."

238. China, however, seeks to impute into SGA Articles 3.1 and 4.2 an obligation for the competent authorities to make findings on unforeseen developments by citing Appellate Body statements from safeguard-related reports such as *Argentina – Footwear*, *Korea – Dairy*, *US – Lamb*, and *US – Steel*. China is mistaken in this view. The statements that it cites fail to take account of several important legal considerations, and in some instances reach conclusions at odds with the text of the obligations they seek to apply. As such, they do not support China's argument, and as they are erroneous, they should not be regarded by the Panel as persuasive.

239. China begins with the following passage from the Appellate Body report in *Argentina – Footwear*:

> We see nothing in the language of either Article 1 or Article 11.1(a) of the Agreement on Safeguards that suggests an intention by the Uruguay Round

> negotiators to subsume the requirements of Article XIX of the GATT 1994 within the Agreement on Safeguards and thus to render those requirements no longer applicable… [Article 1 of the GATT 1994] suggests that Article XIX continues in full force and effect, and, in fact, establishes certain prerequisites for the imposition of safeguard measures.
>
> The Panel states that the "express omission of the criterion of unforeseen developments" in Article XIX:1(a) from the Agreement on Safeguards "must, in our view, have meaning." On the contrary, in our view, if they had intended to expressly omit this clause, the Uruguay Round negotiators would and could have said so in the Agreement on Safeguards. They did not.

240. This passage fails to take account of the fact, observable from the text and recognized elsewhere by the Appellate Body, that the requirements in the first clause of Article XIX:1(a) are not coequal "prerequisites" with the requirements of the second clause. Rather, "as a result of unforeseen developments and of the effect of the obligations concurred" are at most circumstances that must be shown, 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.[369] Thus, from the outset, the quoted statement from *Argentina – Footwear* contradicts the Appellate Body's recognition later in the same report that the two clauses operate differently.[370]

241. This false start leads to China's final conclusion, quoting the Appellate Body's statement in *Korea – Dairy*, that a safeguard measure can only be imposed "in situations when, as a result of obligations incurred under the GATT 1994, an importing Member finds itself confronted with developments it had not 'foreseen' or 'expected' when it incurred that obligation."[371] As explained above (and as is clear from the text itself), Article 2.1 *does not refer to unforeseen developments*. Thus, the erroneous conflation of the "circumstances" in Article XIX:1(a)'s first clause with the "conditions" in its second clause leads to a facially incorrect characterization of the requirements of Article 2.1. This flawed analysis provides no support for China's argument, and provides no guidance on which the Panel can rely.

242. China also quotes the Appellate Body from the report in *US – Lamb*, which states:

> In our view, the logical connection between the "conditions" identified in the second clause of Article XIX:1(a) and the "circumstances" outlined in the first

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[369] *Korea – Dairy (AB)*, para. 85. *Accord Argentina – Footwear (EC) (AB)*, para. 92.

[370] *US – Steel Safeguards (AB)*, para. 277 ("the Panel in the current dispute correctly noted that 'the circumstances of unforeseen developments within the meaning of Article XIX:1(a) of GATT 1994 must be demonstrated as a matter of fact, together with the conditions mentioned in Article 2.1 of the Agreement on Safeguards, in the report of the competent authority and before a safeguard measure can be applied.'").

[371] China First Written Submission, para. 240, *quoting Korea – Dairy (AB)*, para. 86.

> 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. Any other approach would sever the "logical connection" between these two clauses, and would also leave vague and uncertain how compliance with the first clause of Article XIX:1(a) would be fulfilled.[372]

243. This passage presents a series of *non sequiturs* resulting in a conclusion untethered from any of the obligations it purports to apply. The initial observation that there is a "logical connection" between the first and second clauses is a truism – they are in the same sentence. But the conclusion that the Appellate Body reaches does not follow from this fact. That there is a logical connection indicates nothing about the nature of the connection or the legal consequences of that connection – critical considerations for evaluating whether one side of the connection (unforeseen developments) must appear in a report that, under the terms of the SGA, contains a determination as to whether increased imports cause serious injury.

244. The second point in this passage is the assertion that to address unforeseen developments separately from the injury caused by increased imports would "sever the 'logical connection.'" It is unsupported, and another *non sequitur*. As a matter of logic one entity could evaluate whether imports caused serious injury – the question charged to the competent authorities – and another could evaluate whether those imports were "as a result of unforeseen developments." Those evaluations could occur in that order, in the reverse order, or simultaneously and in each case reach a valid conclusion as to whether the circumstances existed and the conditions were met.

245. The passage ends with another assertion, equally unsupported and equally wrong, that evaluation of compliance with Article XIX:1(a)'s first sentence would be "vague and uncertain" without a demonstration of unforeseen developments in the report of the competent authorities. The Appellate Body does not explain why this would be the case, and it is difficult to see why. WTO panels routinely address complex questions of law and fact without the benefit of domestic competent authorities or their reports. As a substantive matter, there is simply nothing that would prevent a panel from evaluating whether an increase in imports was as a result of unforeseen developments based on argumentation and evidence presented exclusively in dispute settlement.[373]

246. As this passage relies at each step on flawed reasoning and an incorrect understanding of Article XIX:1(a) and Article 3.1, it provides no support for China's argument and no valid guidance for this Panel.[374]

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[372] China First Written Submission, para. 241, *quoting US – Lamb (AB)*, para. 72.

[373] By way of example, WTO panels in proceedings under the *Agreement on Subsidies and Countervailing Measures* Articles 5 and 6.3 routinely analyze whether subsidies conferred a benefit at the time of conferral based on evidence and argumentation submitted in WTO proceedings that occur long afterward.

[374] *See India – Patents (AB)*, paras. 45-46; *Japan – Alcoholic Beverages II (AB)*, p. 14.

247. Finally, China again relies on *US – Lamb*, this time for the proposition that a competent authority must provide a reasoned conclusion *set forth in its published reports* that demonstrates a connection between the "unforeseen developments" and "obligations incurred" and the increased imports." Specifically, China argues that:

> Article 3.1 of the Agreement on Safeguards requires that the "competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." That report must set forth the finding and conclusions on "unforeseen development" and the other necessary conditions to impose safeguard measures, as explained by the Appellate Body in *US – Lamb*, where the Appellate Body clarified that the requirements of Article 3.1 of the Agreement on Safeguards relating to the need to provide "reasoned conclusions" also applies to the demonstration of "unforeseen developments".[375]

248. This analysis, however, fails to address Article 3.1 in the context of Articles 2.1, 4.2(a), and 4.2(b). As explained above, Article 2.1 does not mention unforeseen developments. The only obligation is that a Member apply a safeguard measure only after it has determined that a product is being imported in such quantities and under such conditions as to cause or threaten to cause serious injury. Article 4.2(a) calls for the "competent authorities" to conduct an investigation to determine "whether increased imports have caused or are threatening to cause serious injury." Under the heading of "investigation," Article 3.1 provides that the competent authorities "shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of law or fact."

249. In this context, the "findings" and "conclusions" can only be understood as relating to the investigation and determination, which cover only whether increased imports have caused or are threatening to cause serious injury." They cannot be read as covering other issues that may be "pertinent" to application of a safeguard measure. In fact, the Appellate Body recognized that this was the case in *Korea – Dairy*, when it found:

> {W}e do not see anything in Article 5.1 that establishes such an obligation for a safeguard measure other than a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years. In particular, a Member is not obliged to justify in its recommendations or determinations a measure in the form of a quantitative restriction which is consistent with "the average of imports in the last three representative years for which statistics are available".[376]

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[375] China First Written Submission, para. 244, n. 303, *quoting US – Lamb (AB)*, para. 76.

[376] *Korea – Dairy (AB)*, para. 99.

In *US – Line Pipe*, the Appellate Body reiterated this finding, and differentiated the "demonstration" as to whether a safeguard measure was "necessary to prevent or remedy serious injury and to facilitate adjustment" for purposes of Article 5.1 from the report under Articles 3.1 and 4.2(c) which "should provide a benchmark against which the permissible extent of the measure should be determined."[377] By any standard, compliance with Article 5.1 is a "pertinent" issue within the context of the SGA as a whole. The fact that a Member's conclusions on that issue need not appear in the competent authorities' report on their determination of serious injury signifies that the obligation does not apply to "pertinent issues" outside of those mentioned in Articles 2, 3, and 4.

250. These passages from Appellate Body reports comprise the legal support China advances for its argument that a Member must demonstrate that increased imports are "as a result of unforeseen developments" through a finding in the report of the competent authorities. They fail to take account of all of the terms and relevant context for Article XIX:1(a) and Articles 1 and 3.1, and in fact reach conclusions directly contrary to those provisions. The Appellate Body statements cited by China are erroneous and should not be regarded by the Panel as persuasive as it undertakes its evaluation of China's claims. Therefore, they do not support China's argument that the Panel must limit its analysis of unforeseen developments to findings and information in the USITC November and Supplemental Report.

2. The framework under Article XIX and the Safeguards Agreement concerning obligations incurred.

251. The second circumstance of Article XIX:1 of GATT 1994, first clause, is that the condition of the increase in imports in the second clause of Article XIX:1 of GATT 1994 be a result of the "effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions." GATT 1994 uses the term "obligations" to refer to the substantive commitments that a Member undertakes with respect to the products of another Member under the provisions of the agreement. "Tariff concessions" refers to the Schedule of Concessions granted by a Member under Article II of GATT 1994, and in particular to commitments not to impose ordinary customs duties in excess of the amount set out in the schedule. "Effect" means "{s}omething accomplished, caused or produced; a result, a consequence."[378] Thus, the "effect of the obligations incurred" refers to the consequences of a Member's substantive commitments, including tariff bindings, namely that the Member cannot take certain trade-restrictive measures.

252. The Appellate Body report in *Korea – Dairy* understood the phrase to mean:

> With respect to the phrase "of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions," we believe that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing

[377] *US – Line Pipe (AB)*, para. 236.

[378] New Shorter Oxford English Dictionary, p. 786.

> Member has incurred obligations under the GATT 1994, including tariff concessions. Here, we note that the Schedules annexed to the GATT 1994 are made an integral part of Part I of that Agreement, pursuant to paragraph 7 of Article II of the GATT 1994. Therefore, any concession or commitment in a Member's Schedule is subject to the obligations contained in Article II of the GATT 1994.[379]

253. In other words, WTO obligations in the form of tariff concessions bound in a Member's Schedule under Article II of the GATT 1994 represent "obligations incurred" for purposes of GATT Article XIX:1 that prevent the Member from raising its ordinary customs duties on increased imports of a product, covered by such tariff lines, that are causing serious injury to a domestic industry.

254. China's interpretation of Article XIX:1 of the GATT 1994 is that "a Member imposing a safeguard measure must demonstrate that a product has been imported in increased quantities as a result of the effect of relevant obligations of the Member concerned."[380] China's interpretation, however, is inconsistent with the framework above as it does not recognize that a Member may identify "any concession or commitment in [that] Member's Schedule" as an obligation the effect of which has prevented it from raising tariffs on the imports in question. The panel report in *Ukraine – Passenger Cars* that China quotes does not contradict the Appellate Body's statement above, and only reinforces the point that "the bound tariff rate applicable to the product is directly relevant" when considering whether a Member is precluded from applying increased duties on a particular product.

3. Article XIX requires only that imports increase "as a result of" unforeseen developments and obligations incurred.

255. Article XIX of the GATT 1994 requires that the unforeseen developments and obligations incurred result in the increased imports of the product causing serious injury. The Appellate Body has "characterized the term 'as a result of' as implying that there should be a 'logical connection' between 'unforeseen development' and the conditions set forth in the second clause of Article XIX:1(a)."[381] The term "logical connection" may be an accurate characterization, in a colloquial sense, of this language but it cannot assist the Panel with the correct interpretation of Article XIX. In particular, it does not illuminate the nature of the connection that a Member must show between the increased imports and the unforeseen developments and obligations incurred.

256. China mistakenly interprets this connection as essentially establishing a second causation requirement in addition to the conditions found in Article 2 of the SGA. The relevant text in

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[379] *Korea – Dairy (AB)*, para. 84.

[380] China First Written Submission, para. 233.

[381] *US – Steel (AB)*, para. 317.

Article XIX:1, however, does not include an additional causation requirement beyond the finding that a "product is being imported … in such increased quantities … and under such conditions as to cause or threaten to cause serious injury." Specifically, there is no separate requirement that the relationship between unforeseen developments and increased imports be a "clear linkage" as opposed to a "logical connection" or some other qualitative judgment. Nor is there a non-attribution requirement to inquire whether increased imports are a result of "other developments." Under the relevant terms of Article XIX, it is enough that the imports are "a result" of unforeseen developments and obligations incurred.

257. China's argument on this point is even at odds with the WTO reports it cites as authority. In claiming that the USITC's Supplemental Report must consider alternative explanations for the increased imports, China quotes the Appellate Body in *US – Lamb* that "[a] panel must find, in particular, that an explanation is not reasoned, or is not adequate, *if some alternative explanation of the facts is plausible, **and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation***."[382] As an initial matter, the quotation concerns a WTO panel's evaluation of alternative explanations (and not that by the competent authority) when raised during a dispute settlement proceeding. The quotation, therefore, says nothing about a requirement on the competent authority to consider alternative explanations for increased imports or to explain why increased imports are not the result of circumstances other than unforeseen developments. Most importantly, and consistent with the above, the relevant provision of the agreement does not contain a requirement for the competent authority to include such a finding in its report, and China provides no basis to impute such an obligation.

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

258. The USITC November and Supplemental Reports contain explicit findings on the unforeseen developments and obligations incurred that resulted in the increased imports that caused serious injury to the domestic industry in the United States. Thus, even on its own terms, China's argument fails.

1. The USITC Supplemental Report.

259. The USITC issued its November Report in this investigation to the President on November 13, 2017. The USITC November Report included the Commission's determination and findings that increased imports of CSPV products were a substantial cause of serious injury on the domestic industry in the United States producing like or directly competitive products.

[382] China First Written Submission, para. 283, n. 343, quoting *US – Lamb (AB)*, para. 106 and *India – Iron and Steel Products (Panel)*, para. 7.4 (emphasis added).

Two weeks later, the United States Trade Representative (USTR), acting pursuant to authority delegated from the President, requested additional information from the USITC.[383]

260. Specifically, the USTR requested that the USITC identify any unforeseen developments that led to the articles at issue being imported into the United States in such increased quantities as to be a substantial cause of serious injury. The USITC provided the additional information in response to this request on December 28, 2017 (slightly more than a month after transmission of the USITC November Report). The USITC's response took the form of a "Supplemental Report" that included its additional findings. Notably, the USITC grounded the findings in the Supplemental Report "on the data and other information [it] evaluated at the time that [it] reached [the] affirmative injury determination in this case." On that basis, it "found and confirmed the existence of unforeseen developments that led to the articles at issue being imported into the United States in such increased quantities as to be a substantial cause of serious injury."[384]

261. Based on its understanding of Article XIX:1(a), the USITC set out to (a) evaluate whether factors existed that constitute unforeseen developments in this context, (b) examine why any such factors were unforeseen developments, and (c) provide an explanation of how any unforeseen developments identified resulted in the increase of imports causing the serious injury in question.

2. The USITC's findings on unforeseen developments.

262. The Supplemental Report identified the following factors that culminated in support of its finding regarding in the unforeseen developments:

- China made a series of commitments during its WTO accession concerning a variety of trade-focused topics, such as non-discriminatory practices; increased transparency; investment opportunities; disciplines regarding state-owned and state-invested enterprises; pricing policies; and fiscal, financial, and budgetary activities by the central government and at the sub-national levels.

- Despite these commitments, China implemented a series of industrial policies, five-year plans, and other government support programs favoring the manufacture of renewable energy product, including CSPV products.

- These took a variety of forms and led to vast overcapacity in China and subsequently in other countries as Chinese producers built additional facilities elsewhere, which in turn

[383] *See* USTR's Request for Supplemental Report (Exhibit CHN-5).

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

ultimately resulted in the increased imports of CSPV products causing serious injury to the domestic industry in the United States.

- To counter these practices, U.S. producers of certain CSPV products filed petitions for trade remedies investigations. During the course of these investigations, U.S. investigating authorities identified 12 programs that provided countervailable subsidies to producers/exporters in China.

- The countervailable subsidies included programs that provided preferential policy lending; provision of polysilicon, land, and electricity for less than adequate remuneration; preferential taxes; import tariff and value added tax exemptions for use of imported equipment; value added tax rebates on foreign-invested enterprises' purchase of Chinese-made equipment; and export credit subsidies.

- The trade remedies investigations resulted in antidumping and countervailing duty orders on dumped and subsidized U.S. imports of CSPV products produced in China, but before the orders could have a meaningful effect, Chinese producers relocated their production facilities.

- U.S. solar producers initiated a second round of antidumping and countervailing duty investigations that resulted in additional orders applying duties on certain imported CSPV products from China and Taiwan.

- During this period favorable government industrial policies, plans, and support, capacity and production of CSPV products in China increased significantly, with a substantial share of the CSPV modules manufactured in China directed for export to foreign markets such as the United States.

- By the end of 2015, U.S. imports had almost doubled their level from 2014, and they continued to grow in 2016, while the six largest firms producing CSPV products in China increased their global manufacturing capacity by expanding investments in third countries without reducing their capacity in China.[385]

263. The USITC ultimately concluded that these targeted practices of the Chinese government contributed significantly to the increased imports causing serious injury to the relevant industry in the United States. The USITC also found that such circumstances were not foreseen by the U.S. negotiators at the time of China's WTO accession, at the time the United States joined the WTO in 1994, or at the time the United States undertook its GATT commitments in 1947.

264. Specifically, the USITC found that:

[385] USITC Supplemental Report, pp. 5-9 (Exhibit CHN-6).

> U.S. negotiators could not have foreseen at the time that the United States acceded to GATT 1947, at the time that the United States acceded to the WTO, or at the time that the United States agreed to China's accession to the WTO that the government of China would implement the industrial policies, plans, and government support programs such as those described above that directly contradicted the obligations that China committed to undertake as part of its WTO accession. U.S. negotiators also could not have foreseen that such industrial policies, plans, and support programs would lead to the development and expansion of capacity to manufacture CSPV products in China to levels that substantially exceeded the level of internal consumption. They could not have foreseen that this capacity would largely be directed to export markets such as the United States. U.S. negotiators also could not have foreseen that the U.S. government's use of authorized tools, such as antidumping and countervailing duty measures on imports from China, would have limited effectiveness and instead lead to rapid changes in the global supply chains and manufacturing processes in order to facilitate U.S. imports of non-covered products from China and Taiwan and later U.S. imports from Chinese producers' affiliates in other countries.[386]

265. Accordingly, during its consideration of USTR's request for additional information, the USITC was familiar with the Appellate Body's statements concerning the first clause of Article XIX:1(a) and laid out a framework to apply when undertaking its analysis of unforeseen developments. In providing that analysis, the USITC was cognizant that the meaning of "unforeseen developments" equated to unexpected events, and not "unforeseeable" events.

266. Furthermore, the USITC identified relevant factors and examined why they may be regarded as unforeseen developments, with an explanation how these unforeseen developments resulted in the increase of imports causing the serious injury in question. Therefore, consistent with GATT 1994 Article XIX:1(a), the USITC established that increased imports were the result of unforeseen developments.

3. The USITC's findings on obligations incurred.

267. Along with its findings on "unforeseen developments," the USITC Supplemental Report also referenced obligations the United States incurred that, under Article XIX:1(a), resulted in increased imports that caused serious injury to the U.S. solar industry. These include the commitments the United States made when becoming a GATT member in 1948 and those with respect to its membership in the WTO as of 1995. Furthermore, as the USITC pointed out, the United States and other WTO Members agreed to "extend the WTO's trade liberalization and market access benefits to China" based on a series of negotiations and reciprocal commitments that, as noted above, China has ignored. The reciprocal commitments referenced above include

[386] USITC Supplemental Report, p. 10 (Exhibit CHN-6).

tariff concessions that were already in place for the United States and that it had already granted to other WTO Member on a most-favored nation basis under Article I of the GATT 1994.

268. As the USITC noted, the tariff concessions that are relevant to this dispute created a circumstance where "[i]mported articles that are provided for in subheading 8541.40.60 of the U.S. Harmonized Tariff Schedule have been free of duty under the general duty rate since at least 1987."[387] In fact, China even acknowledges that the USITC identified this reference to the tariff heading and that imports have been duty-free since the United States incurred the commitment.[388]

269. As discussed in more detail below, the USITC Supplemental Report contains a description of the tariff lines at issue, including the bound (MFN) rates. These are the tariff concessions that the United States made, which prevented it from increasing applied tariffs so as to modulate the increase in imports. Thus, the ITC Supplemental Report explicitly demonstrates that the United States incurred obligations – tariff concessions – with respect to the CSPV products at issue in this proceeding. Accordingly, the USITC Supplemental Report demonstrates that the United States undertook obligations with respect to the products at issue in in this investigation. It logically follows that the increased imports of CSPV products resulted from the United States binding its tariff for these products at zero percent.

C. China Fails to Refute the Findings in the USITC Supplemental Report on Unforeseen Developments and the Obligations Incurred.

270. China raises a number of flawed arguments regarding the completeness of the USITC's Supplemental Report on unforeseen developments and obligations incurred by the United States. China's arguments are based on misapplication of the relevant provisions and citation to standards that are inconsistent with the text of the covered agreements. Accordingly, China's arguments are irrelevant to the question at issue and do not provide a sound basis for the Panel's consideration when evaluating China's claims. The United States turns to each of China's arguments below.

1. China fails to recognize that a tariff concession setting a duty-free bound rate for CSPV products prevented the United States from responding to the increase in imports.

271. China asserts that the Supplemental Report "does not actually identify any specific 'obligation incurred' as a result of the GATT or WTO negotiations," and asserts that the only reference to an obligation in the Supplemental Report is the statement that "[t]he United States has been a GATT member since January 1, 1948, and has incurred the obligations of WTO

[387] USITC Supplemental Report, p. 4, n 10 (Exhibit CHN-6).

[388] China First Written Submission, para. 258, n. 320.

membership since January 1, 1995." However, as even China notes, the Supplemental Report says more than this.

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

273. China seeks to dismiss this clear reference to a tariff concession by arguing that "the applied tariff rate on CSPV products has been 0% since at least 1987, well before the United States Incurred [sic] any obligations under the WTO."[389] China appears to be arguing 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. There is no basis for this argument. 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. It does not exclude tariff bindings that reflected the levels agreed under GATT 1947, as China seems to believe. The relevant U.S. tariff concession is that incurred by the United States when it entered into the WTO and is set out in the U.S. Schedule annexed to GATT 1994. Moreover, it is also relevant that the United States extended these bindings *to China* well after entry into force of GATT 1994. Thus, China's argument does not even apply with respect to the Commission's findings regarding the expectations of U.S. negotiators during China's accession to the WTO.

274. Moreover, China's argument disregards the Appellate Body's guidance in *Korea – Dairy* that

> With respect to the phrase "of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions", we believe that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions. **Here, we note that the Schedules annexed to the GATT 1994 are made an integral part of Part I of that Agreement, pursuant to paragraph 7 of Article II of the GATT 1994. Therefore, any concession or commitment in a Member's Schedule is subject to the obligations contained in Article II of the GATT 1994**.[390]

275. Accordingly, since the Schedules annexed to the GATT 1994 are an integral part of the WTO Agreement, the duty-free treatment in the Schedule of the United States for tariff lines covering CSPV products represents a concession the effect of which prevented the United States

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[389] China First Written Submission, para. 258.

[390] *Korea – Dairy (AB)*, para. 84 (emphasis added).

from raising duties on such products to stem the increase in imports that caused serious injury to the U.S. solar industry. As such, the Commission's reference to this concession established that the increased were a result of the "obligations incurred."

2. China provides no valid criticism of the USITC findings that the developments it identifies were unforeseen, and that the increased imports were a result of those developments.

276. As section B.2 demonstrates, the USITC identified a number of developments that were unforeseen by U.S. negotiators, and that resulted in the increased imports that caused serious injury to the U.S. solar products industry. China takes issue with some of the USITC's observations and findings, asserting that particular developments were not "unforeseen" or that the USITC failed to provide sufficient detail in its discussion. None of these criticisms are valid.

277. China does not dispute the USITC's finding that "industrial policies, five-year plans, and other government support programs favoring renewable energy product manufacturing, including CSPV products" resulted in a massive increase in Chinese capacity for producing solar products, leading to overcapacity, massive exports, and plummeting prices.[391] Instead, it criticizes the USITC for failing to specify exactly which policies, plans, and programs were responsible, and argues that they were not unforeseeable. China effectively concedes the first point when it acknowledges that the USITC identified specific Chinese subsidy programs, but asserts the USITC "does not explain why these programs were unforeseen, nor whether these are the programs that the USITC considers the 'industrial policies, five-year plans, and other government support programs.'"[392] The connection, however, between these policies, plans, and programs and the increased imports is clear from the subsequent paragraph that describes how the U.S. CSPV industry resorted to domestic trade remedies authority to address the exports generated by the policies, plans, and programs referenced in the previous paragraph.

278. China also contends that "it is hardly "unforeseen' that countries would seek economic development and energy security." But that was not the USITC's point. What was unforeseen was the *scale* of the effort, the *speed* with which it boosted Chinese production, the *overcapacity* that it created, and the degree to which these effects spilled into other countries where Chinese producers expanded their operations.[393] It is telling that China essentially ignores the points about the speed of its industry's growth and the overcapacity that resulted, which are central to the USITC's conclusions.

279. Similarly, China rejects the Supplemental Report's finding that U.S. negotiators did not foresee that trade remedies against Chinese CSPV products would lead to an increase in exports

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[391] China First Written Submission, para. 261.

[392] China First Written Submission, para. 261.

[393] USITC Supplemental Report, p. 5 (Exhibit CHN-6).

from other countries.[394] This critique misses the point entirely. The USITC is not suggesting that trade negotiators did not recognize that Members may breach obligations under the WTO Agreement or that trade remedies may be insufficient at times to address all of the negative effects of import competition. Instead, the USITC observed that negotiators did not expect – and should not have expected – such a determined, systematic, and coordinated effort by a WTO Member to bolster its domestic industry to the point of massive overcapacity, with ripple effects throughout the world.

280. China also seeks to dismiss the USITC's observations regarding China's failure to take steps envisaged at the time of its accession to the WTO on the ground that the Supplemental Report "does not provide any specific evidence or discussion whatsoever that China has failed to comply with the commitments."[395] China fails to understand that the USITC was not making a finding of WTO inconsistency. It was describing the expectations China created with its commitments, and observing that these expectations were not borne out in China's practices with regard to the solar products industry.

281. China argues that negotiators would certainly have foreseen that trade remedies on China would result in increased shipments from other countries because "trade will naturally shift to the countries with lower duties."[396] However, the USITC did not erroneously treat a "natural" shift in sourcing as "unforeseen." Rather, it found that China's policies, plans, and programs "led to vast overcapacity in China and subsequently in other countries as Chinese producers *built facilities elsewhere*."[397] Thus, this was not a case of supply and demand "naturally" leading purchasers to source from the country with the lowest prices, but one of China's practices allowing its producers to move their production from one place to another in ways that were completely unforeseen. Thus, China's assertions do nothing to cast doubt on the USITC's finding that Chinese producers' ability to avoid trade remedies by shifting production to other countries was unforeseen.

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

283. Specifically, the USITC Supplemental Report found that:

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[394] China First Written Submission, para. 268.

[395] China First Written Submission, para. 267.

[396] China First Written Submission, paras. 269-70.

[397] USITC Supplemental Report, p. 5 (Exhibit CHN-6).

> 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.[398]

284. The USITC's finding in the Supplemental Report regarding these "Chinese affiliates" shifting their operations to other countries finds further support in the USITC November Report, which notes that "[c]onsistent with these shifts, a substantial number of U.S. importers and purchasers reported that the origin of their purchases had shifted, as they purchased CSPV products imported from other countries."[399]

285. The USITC did not fail to identify unforeseen developments related to increased imports from countries other than China, as China asserts. Rather, both the USITC November Report and Supplemental Report include specific findings demonstrating that the unforeseen developments related to China's policies, practices, and programs resulted not only in increased imports from China but from other countries where Chinese producers added production capacity for CSPV cells and modules.

3. The "alternative explanations" posited by China do not demonstrate any error in the USITC's finding that increased imports were "a result of" unforeseen developments and obligations incurred.

286. The USITC identified unforeseen developments, such as China's policies, plans, and programs to promote the production of CSPV products, which resulted in the targeting of the United States market for exports and facilitated the rapid shift among production facilities when the United States took action to address unfair trade practices. In addition, the Supplemental Report noted that the relevant tariff lines for CSPV products have received duty-free treatment, due to U.S. bindings, which means that, except for tools such as its domestic trade remedies authority, the United States was not able to raise its rates of duty on CSPV products.

287. Accordingly, in this factual context, the USITC drew the reasonable inference that imports increased because (1) China promoted its production of CSPV products through a web of policies, plans, and programs; (2) these resulted in massive overcapacity that exceeded domestic demand for such products; (3) Chinese producers targeted foreign markets, including the United

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

[399] USITC November Report, p. 41 (Exhibit CHN-2).

States, for export; (4) Chinese producers were able to avoid the U.S. trade remedies imposed to offset the advantage of subsidies and dumping by rapidly shifting to new production facilities; and (5) with the limited effectiveness of the trade remedies tools and in light of its tariff bindings providing duty-free treatment to CSPV products, the United States was not able to take action that would modulate imports and restore balance. Accordingly, the increase in imports of CSPV products was a natural consequence of China's unexpected practices and the United States' WTO commitments.

288. China argues that these findings were insufficient for two reasons. The first is basically procedural, grounded in the fact that the findings of unforeseen develop appear in a Supplemental Report issued after the November Report containing findings of serious injury. The second challenges the substance of the finding, contending that the absence of an analysis of alleged "other developments" undermines the USITC's conclusion that increased imports were a result of unforeseen developments and obligations incurred. Neither argument, procedural or substantive, is availing.

289. On the procedural side, China argues that the identification and explanation of the relevant unforeseen developments and obligations incurred in the Supplemental Report creates a "disconnect" with determination on serious injury in the USITC November Report, and that this is a "fatal flaw."[400] As support for this view, China relies on the Appellate Body's statement in *US – Lamb* that omitting a finding on unforeseen developments from the report of the competent authorities would "leave vague and uncertain how compliance with the first clause of Article XIX:1(a) would be fulfilled."[401] But China fails to recognize that, as a supplement *to* the USITC November Report, the Supplemental Report is *part* of the report of the U.S. competent authorities for purposes of SGA Article 3.1. As such, the situation envisaged by the Appellate Body in *US – Lamb* does not arise.

290. The panel in *US – Steel Safeguards* addressed precisely this argument, and concluded that:

> nothing in the requirement to publish a report dictates the form that the report must take, provided that the report complies with all of the other obligations contained in the Agreement on Safeguards and Article XIX of GATT 1994. In the end, it is left to the discretion of the Members to determine the format of the report, including whether it is published in parts, so long as it contains all of the necessary elements, including findings and reasoned conclusions on all pertinent

[400] China First Written Submission, para. 280.

[401] *US – Lamb (AB)*, para. 72.

> issues of fact and law. Together, these parts can form the report of the competent authority.[402]

Moreover, as a factual matter, the Supplemental Report cites extensively to the USITC November Report,[403] belying any notion that there is a "disconnect" between the two.

291. China's argument about the substance of the USITC Supplemental Report centers on the contention that "the USITC also failed to demonstrate why other alternative explanations for the increase in imports could be dismissed."[404] However, China merely hypothesizes certain alternative developments without explaining why they detract from the USITC's conclusion that the increase in imports is a result of the developments cited in the Supplemental Report. For example, China claims that the Supplemental Report "ignores factors that affected imports in general, including imports from these other countries."[405] Such a generalized statement, however, does nothing to cast doubt on the conclusion, based on detailed findings in the Supplemental Report, that increased imports are the result of the unforeseen developments.

292. China also notes that "solar costs decreased due to rapid technological increases, which drove solar production costs down and **arguably could have contributed** to global excess capacity, and increased imports into the United States."[406] Again, this alternative (and highly tentative) explanation does not cast doubt on the USITC's findings. It would at best be a factor that may have contributed to the increase, in addition to those already identified in the Supplemental Report. Such attenuated alternatives do not provide a basis for the Panel to consider other explanations and certainly do not contradict the USITC's findings on the question.

293. For the reasons provided above, China has failed to establish that increased imports were not the result of unforeseen development and obligations incurred and has not shown any inconsistency of the safeguard measure with Article XIX:1(a) of the GATT 1994 or Article 3.1 of the SGA.

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[402] *US – Steel Safeguards (Panel)*, para. 10.49

[403] USITC Supplemental Report, p. 3, n. 10; p. 4, nn. 9 and 10; p. 5, n. 13; p. 6, n. 18; p. 7, nn. 23 and 24; p. 8, nn. 25-28; p. 9, nn. 29-31; and p. 10, n. 32. (Exhibit CHN-6).

[404] USITC Supplemental Report, para. 284. (Exhibit CHN-6). The "other" in this quotation refers to an assertion earlier in the paragraph that "[t]he USITC Supplemental Report does not adequately address why the alleged increase in imports . . . occurred due to the unforeseen developments surrounding China measures affecting Chinese capacity and shipments from China." However, as China's submission provides no support for or explanation of this assertion, it is irrelevant to the Panel's analysis.

[405] China First Written Submission, para. 288.

[406] China First Written Submission, para. 289 (emphasis added).

IV. THE USITC PROPERLY PUBLISHED ITS FINDINGS AND REASONED CONCLUSIONS UNDER SGA ARTICLE 3.1 AND PROTECTED BCI UNDER ARTICLE 3.2.

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

295. Throughout this process, the USITC protected BCI by committing not to release that information except as the submitting parties consented. At the end, the USITC published a massive report setting forth its findings and a compendium of the data collected in its proceeding. Where possible, it provided narrative descriptions of BCI relevant to its conclusions. Where information was BCI or would reveal BCI, the USITC redacted the information.

296. China asserts that the USITC acted inconsistently with SGA Article 3 because it allegedly failed to provide a sufficient public summary of confidential data to allow for a meaningful defense. China presents this argument as having a procedural dimension with respect to the timing of the ITC's release of certain documents, and a substantive dimension with respect to the adequacy of public summaries of BCI.[407]

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

A. Competent Authorities' Obligations under Articles 3.1 and 3.2

298. SGA Article 3.1 sets out that a safeguards investigation

[407] *See* China First Written Submission, paras. 294-317.

> shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

Thus, under Article 3.1, interested parties must be given reasonable notice and an opportunity to present evidence and their views and respond to the views of other parties. After that, the competent authority must also publish a report with its findings and reasoned conclusions.

299. Article 3.2 sets out certain mandatory and discretionary elements, of relevance here, for a competent authority's treatment of submitted BCI as part of a safeguards investigation. Under the mandatory element, Article 3.2 provides that "[a]ny information which is by nature confidential or which is provided on a confidential basis *shall*, upon cause being shown, be treated as such by the competent authorities."[408] As the *US – Wheat Gluten* panel explained, this provision "furnishes an assurance that the confidentiality of qualifying information will be preserved in the course of a domestic safeguards investigation, and encourages the fullest possible disclosure of relevant information by interested parties."[409] This conclusion led the panel to stress the "fundamental importance of maintaining the confidentiality of sensitive business information in order to ensure the effectiveness of domestic safeguards investigations . . . ."[410]

300. Under Article 3.2's discretionary element, parties submitting confidential information "*may* be requested to furnish non-confidential summaries thereof or, if such parties indicate that such information cannot be summarized, the reasons why a summary cannot be provided." This *permissive* provision signifies that the competent authorities also need not request non-confidential summaries. The decision is in their discretion. SGA Article 3.2 cannot properly be read to require the competent authorities to request non-confidential summaries, let alone to prepare confidential summaries on their own initiative.

301. China contends that reading Article 3.1 and 3.2 together creates (1) a right for participants in the competent authorities' investigation to receive non-confidential summaries,

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[408] *See US – Wheat Gluten (Panel)*, para. 8.24 (noting "the specific and mandatory prohibition in that provision against disclosure by them of such information without permission of the party submitting it.").

[409] *US – Wheat Gluten (Panel)*, para. 8.20.

[410] *See US – Wheat Gluten (Panel)*, paras. 8.20, 8.24 ("The provision is specific and mandatory in this regard. This furnishes an assurance that the confidentiality of qualifying information will be preserved in the course of a domestic safeguards investigation, and encourages the fullest possible disclosure of relevant information by interested parties.").

aggregate data, indexed data of submitted confidential information; and (2) a requirement that "an investigating authority may withhold publication of a 'modified form' or a non-confidential summary only if no method to prevent a loss of confidentiality exists."[411]

302. China is incorrect both as a matter of law and of fact. As described above, there is no foundation in Articles 3.1 or 3.2 for either of these purported obligations.[412] Under Article 3.2, there is no right for interested parties to demand non-confidential summaries of confidential information. Moreover, under Articles 3.1 and 3.2, there is no obligation to publish non-confidential summaries. Instead, Article 3.1 only requires that competent authorities publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law. And, as shown above, the USITC complied with that obligation.

B. The USITC Took Actions Beyond the Requirements of Articles 3.1 and 3.2 to Provide Parties an Opportunity to Participate in Its Investigation.

303. In addition to the steps described above, consistent with U.S. law and its own internal regulations, the USITC did more than Article 3.1 and 3.2 require to allow parties to present their views and otherwise participate in the investigation. Two have relevance to an evaluation of China's claims.

304. First, the USITC allowed certain representatives of interested parties to have access to BCI submitted by other participants in the investigation, subject to the requirements of an administrative protective order ("APO"). Access to such information is limited to attorneys who do not participate in competitive decisionmaking and who agree to be bound by the USITC rules forbidding disclosure of such information outside of the proceeding in which it is submitted, with violations subject to disbarment or other serious penalties.[413] Under the USITC regulations, persons receiving BCI subject to an APO may use that information solely for purposes of the particular USITC proceeding and must at the end of that proceeding "return or destroy all copies of materials released to authorized applicants pursuant to this section and all other materials containing confidential business information, such as charts or notes based on any such information received under administrative protective order."[414]

305. Second, during an investigation, the USITC staff prepares a staff report compiling the data gathered from parties along with other information submitted and otherwise obtained by the Commission. USITC regulations provide for copies of the current draft of the staff report to be provided to parties to the proceeding in advance of the hearings, with a BCI version to persons entitled to access under the APO, and a non-BCI version for other interested persons. The final

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[411] China First Written Submission, para. 301 citing *US – Steel (Panel)* para. 10.272-10.275.

[412] DSU Art. 3.2 ("[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.").

[413] Application for Disclosure of Business Proprietary Information (Exhibit USA-07).

[414] 19 CFR § 206.17(c) (Exhibit USA-01).

version of the staff report appears along with the Commissioners' explanations of their findings in the November Report, which serves as the report of the U.S. competent authorities for purposes of Articles 3.1 and 4.2(c).

306. Because the Commission allows time for its staff and the parties to carefully check reports to assure that it did not inadvertently fail to bracket any BCI, there is usually a necessary delay between provision of the BCI version of the report to interested parties and the release of a public version. The USITC released the pre-hearing report for the serious injury phase of its proceeding containing BCI on August 1, 2017 to counsel under APO, including counsel for respondents. On August 4, 2017, the USITC released the non-BCI version, containing no confidential information, of the pre-hearing report. Pre-hearing briefs were due on August 8, 2017, and the hearing was held on August 15, 2017.

307. On September 11, 2017, the USTIC released the confidential version of the pre-hearing report for the remedy to counsel under APO, including counsel for respondents, and released the public version on September 22, 2017. The pre-hearing briefs were due on September 27, 2017, and the hearing for the remedy phase was held on October 3, 2017.

308. Finally, the USITC released the BCI version of the Final USITC report to counsel under APO, including counsel for respondents, and transmitted the report to the President on November 13, 2017. It issued the public version of the Final USITC report on November 20, 2017.

309. Nothing in the SGA requires that the USITC provide participants in its investigation access to BCI, or that it share a copy of the work of its staff with participants during the course of the investigation. U.S. law and the USITC regulations deliberately go beyond the requirements to provide for more and greater participation in safeguard proceedings.

C. The United States Satisfied the "Procedural" Requirements of Articles 3.1 and 3.2.

310. China argues that the alleged "delay" in the release of the non-BCI versions of staff reports during the investigation, and in the publication of the non-BCI version of the November Report meant that "the parties were not provided with an adequate opportunity to exercise their right to present a defence."[415] This contention is baseless.

1. China's assertions regarding the release of the staff pre-hearing staff reports in the serious injury and remedy phases of the proceeding are irrelevant.

311. In its descriptions of the USITC's actions, China notes the dates for release of BCI and non-BCI versions of the staff report in relation to the serious injury and remedy hearings. However, as noted above, nothing in Article 3.1 requires the competent authorities even to compile a report and release it to the parties during the course of their proceedings. Thus, the

[415] China First Written Submission, para. 302.

timing of the release of the staff reports (whether BCI or non-BCI) that the USITC nevertheless generated in the CSPV products proceeding cannot give rise to a breach of Article 3.1.

312. This is doubly true with respect to the BCI versions of the reports, as Article 3 does not provide interested parties the right to review confidential information submitted by another party. Instead, the USITC has the *obligation* to not disclose confidential information without permission from the submitting party.[416] It is also worth noting that SGA Article 3 does not give the parties to an investigation a "right" to request and review non-confidential summaries of confidential information. Instead, under Article 3.2, it is the competent authority that *may* request non-confidential summaries of the confidential information from the submitting party.

313. In any event, the access provided to the staff reports was more than sufficient to allow parties to use the contents of the reports to "present evidence and their views" consistent with Article 3.1. While China focuses on the fact that the public versions of reports were released on or shortly before the dates for submission of prehearing briefs, the parties were free to reference those documents in their presentations at the Commission hearings, in their responses to questions from the Commissioners, and in their post-hearing submissions. SGA Article 3.1 does not require more.

2. The timing of publication of the USTIC November Report and the disposition of BCI were consistent with SGA Article 3.

314. China also argues that the timing of the publication of the USITC November Report and of the mandatory destruction or return of BCI resulted in interested parties "not being able to reliably refer to the USITC November Report" during the TPSC's evaluation of the USITC injury finding and recommendation of a remedy."[417] China argues that this outcome is inconsistent with Article 3 because it "negated the ability of the interested parties to rely on information that could support their arguments that no measure was needed."[418] It is incorrect both as a matter of law and of fact.

315. As a matter of law, Article 3 addresses the "Investigation" of the competent authorities. The publication of the USITC November Report marked the end of 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

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[416] *See US – Wheat Gluten (Panel)*, para. 8.19-8.20; *US – Steel (Panel)*, para. 10.272 ("[c]ompetent authorities may rely on confidential data, even if these data are not disclosed to the Public in their Reports.").

[417] China First Written Submission, para. 308. China's rhetoric that this procedural requirement "baffled veteran Washington trade lawyers," China first written submission, para. 19, is itself baffling. As described above, the APO that these lawyers themselves signed (Exhibit USA-08), as well as the longstanding applicable USITC regulations (Exhibit USA-01 specify that counsel will be required to return or destroy all BCI received under APO at the end of the USITC's investigation.

[418] China First Written Submission, para. 310.

were not subject to the disciplines of Article 3.1. Therefore, as a matter of law, interested parties' ability to rely on the BCI or non-BCI version of the USITC November Report during the TPSC evaluation process is not relevant to the question of U.S. compliance with Article 3.1.

316. China's argument fails for a second and independent legal reason because nothing in SGA Article 3 obligates the competent authorities to provide BCI to the parties to their investigation. Similarly, nothing dictates when competent authorities that allow access to BCI must do so, or when they can terminate access. Thus, nothing in Article 3 prevented the USITC from terminating access to BCI at the time it did, or in the manner than it did, namely, by requiring the return or destruction of all material containing BCI obtained pursuant to the APO.

317. Finally, China's argument fails at a factual level because it has not demonstrated that the termination of access to BCI or the publication date of the non-BCI version of the USITC November Report "negated the ability of the interested parties to rely on information that could support their arguments that no measure was needed."[419] While the USITC published the non-BCI version of the November Report on the date for initial submissions to the TPSC, interested persons also had an opportunity to make rebuttal submissions and raise issues at the TPSC hearing. Moreover, Members had the option of referring to the non-BCI version of the USITC November Report to support views raised during consultations under SGA Article 12.3.

318. To the extent that access to BCI is relevant, the USITC released the BCI version of the November report to the parties' representatives one week before comments to the TPSC were due. The next day it informed them that, pursuant to the agency's rules addressing disclosure of BCI under APOs, they would have to return or destroy the information no later than "14 days after the completion of this investigation (*e.g.* after publication in the Federal Register of the Commission's determination"[420] – namely**,** December 5, 2017. Thus, interested parties who received BCI under the APO had an opportunity to review the report, note segments that contained information that they considered relevant, and direct the TPSC to those pages. Some interested parties did just that.[421]

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[419] China First Written Submission, para. 310.

[420] Notification of Final Date for Compliance with Administrative Protective Order Confidential Business Information Requirements, *Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products)*, Inv. No. TA-201-75 (Nov 14, 2017) (Exhibit USA-09).

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

D. The USITC Report Published Findings and Reasoned Conclusions Under Article 3.1 Consistent with its Obligations Under Article 3.2

319. According to China, the USITC's November Report was inconsistent with Article 3 because it did not "provide meaningful non-confidential summaries of submitted confidential data."[422] As the United States showed above, the SGA contains no such obligation. The relevant obligation is under Article 3.1, which requires the competent authorities to publish a report "setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." China's examples of redactions do nothing to address this standard – they identify redacted data, but do not explain why the Panel should consider the explanations as published to fail to present findings and reasoned conclusions.[423] China's argument fails, and the USITC's actions were consistent with Article 3.

320. Moreover, there is no obligation under Article 3.2, as China theorizes, that the competent authority "characterize the confidential information."[424] The mandatory obligation under Article 3.2 is for competent authorities to not disclose submitted confidential information without permission. China provides no basis to conclude that it was even possible for the USITC to provide nonconfidential summaries of BCI in a way that would prevent those knowledgeable about the industry from deriving the underlying data.

321. In sum, there is no legal or factual basis to support China's contention that the USITC's actions were "substantive[ly]" deficient and inconsistent with Article 3. The USITC published its findings and reasoned conclusions, protected submitted confidential information, and despite not being obliged, provided respondents ample opportunity to review confidential information and USITC reports. The actions of the USITC complied with Article 3 of the SGA.

CONCLUSION

322. For the reasons set out above, the United States requests that the Panel find that China has failed to establish any inconsistency with Article XIX of GATT 1994 or the Safeguards Agreement.

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[422] China First Written Submission, para. 312.

[423] China notes that the BCI version of the USITC November Report contained 511 pages and the non-BCI version contained 424 pages, and surmises that "there were more than80 pages of confidential information and data for which absolutely no public summary was provided at all." China First Written Submission, para. 313. A comparison of length, however, is not a meaningful indicator of the volume of redacted BCI. In particular, in the BCI version of the report, the views of the Commission are printed in double-spaced form, while they are printed single spaced in the non-BCI version.

[424] China First Written Submission, para. 316.