

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

**(DS562)**

**OPENING STATEMENT OF THE UNITED STATES OF AMERICA  
AT THE PANEL'S VIDEOCONFERENCE WITH THE PARTIES**

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## TABLE OF REPORTS

<b>Short Form</b>	<b>Full Citation</b>
<i>Argentina – Footwear (EC) (AB)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000
<i>Korea – Dairy (AB)</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R

Mr. Chairperson, Members of the Panel:

1. The United States thanks you for agreeing to serve on this Panel, and extends our gratitude as well to the Secretariat staff assisting you with your work. These are difficult times, and striking a proper balance between caution and carrying out our work requires a considered approach. The United States appreciates this opportunity to present its views on the issues in this dispute, and thanks the Panel for the accommodations it has considered itself able to make.
2. The *General Agreement on Tariffs and Trade 1994* (“GATT 1994”) and the *Agreement on Safeguards* (“Safeguards Agreement”) establish a Member’s right to suspend its obligations under the WTO Agreement when that Member determines that a product is being imported into its territory in such increased quantities and under such conditions as to cause serious injury or threat of serious injury to the Member’s domestic industry. The availability of this escape valve is one of the factors that gives Members the comfort to make broad tariff concessions that could in the future prove injurious to their economies and their stakeholders. Protecting this right is accordingly important to the continued acceptance of the WTO system.
3. To be clear, that is exactly what the Safeguards Agreement envisages. Its preamble calls for “multilateral control over safeguards” – not their elimination. Article 1 echoes this point, providing that the Agreement “establishes rules for the application of safeguard measures,” and the remainder of the agreement elaborates on those rules. The assumption throughout is that Members will *use* safeguard measures in the specified circumstances. China’s arguments invert this logic, advocating a reading of the Agreement’s disciplines such that no competent authorities and no Member could meet them in practice. Under this approach, rather than setting guidelines for Members, the Safeguards Agreement lays down a procedural minefield with no viable exit. The United States urges you to reject this view and its supposed grounding in past reports of panels and the Appellate Body.
4. Our written submissions demonstrated that, by any reasonable standard, the U.S. International Trade Commission (“USITC” or “Commission”) met the obligations of the Safeguards Agreement. It conducted an exhaustive investigation of the U.S. market for solar cells and modules, including the relevant tariff concessions, the conditions of competition, and the roles played by imported and domestically produced product. It evaluated the effects of increased imports and of other factors effecting the industry and determined as a result that increased imports themselves caused serious injury to that industry. And finally, the USITC issued a massive report explaining its conclusions in detail. At the request of the U.S. Trade Representative, it also issued a supplemental report explaining how these increased imports were the result of unforeseen developments.
5. The U.S. submissions demonstrated that China failed in its efforts to impugn the USITC’s findings. We will not repeat all of those observations, but will focus on three broad points. First, the USITC established a causal link between increased imports and the domestic industry’s serious injury. Second, the USITC evaluated whether factors other than imports were causing injury to the domestic industry and did not attribute any such injury to increased imports.

Third, the United States has identified that the increased imports were the result of unforeseen developments and obligations incurred, consistent with Article XIX.

6. Therefore, China has not carried its burden to show that the safeguard measure on solar products is inconsistent with the United States’ obligations under the WTO Agreement. Instead, China has simply repeated the same or similar arguments that various parties raised during the underlying investigation and that the USITC found unpersuasive or contrary to the voluminous evidence as a whole collected in the investigation. Given China’s failure, we respectfully request that the Panel find that China has not established that the United States has acted inconsistently with respect to the solar safeguard measure.

## **II. THE USITC’S INJURY DETERMINATION**

7. China does not contest the finding that imports of CSPV products increased during the period of investigation, both absolutely and relatively, and that the domestic industry producing CSPV products was seriously injured during that period. China confines its challenge to the Commission’s finding that there was a causal relationship between the concurrent increase in imports and the injury to the industry.

8. In this regard, China argues that the Commission’s determination does not satisfy the legal requirements set forth under Safeguards Agreement Article 4.2(b) in establishing a causal link between increased imports and the domestic industry, and ensuring that injury caused by other factors are not attributed to the increased imports. We have demonstrated in our written submissions that China’s arguments in support of its claims rely on misunderstandings of the relevant obligations, misapprehensions of the Commission’s findings, and a failure to account for the totality of the evidence. China, therefore, has failed to meet its burden of making a *prima facie* case that the Commission’s determination is inconsistent with the Safeguards Agreement.

### **A. The USITC Complied with Safeguards Agreement Article 4.2(b) in Finding a Causal Link Between Increased Imports and the Domestic Industry’s Serious Injury**

9. Article 4.2(b) states that an affirmative determination under Article 4.2(a) shall not be made unless “the 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.” It further states that “{w}hen factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.” Together, these two obligations require competent authorities to demonstrate a relationship of cause and effect – a “causal link” – between the increased imports and the serious injury experienced by the domestic industry and to ensure that, *if* a factor different from increased imports is causing injury to the domestic industry simultaneously with the serious injury caused by increased imports, injury from that factor shall not be ascribed to imports.

10. Notably, and as China itself concedes in its first written submission, Article 4.2(b) imposes no obligation as to *how* a competent authority is to comply with its obligation.<sup>1</sup> Thus, competent authorities have discretion to apply any reasonable methodology to determine whether a causal link exists and to assure that injuries from other factors are not attributed to the imports.

11. The Commission’s reports set out in detail how it properly evaluated all of the evidence in the record and made an objective determination that the increased imports caused the injury to the domestic industry. It carefully examined other factors that were assertedly causing injury at the same time, and explained why those alleged factors did not diminish the causal link between the imports and the injury. Our submissions demonstrate that these findings satisfy our obligations under the Safeguards Agreement, and that China’s arguments to the contrary are invalid.

12. We know that you are familiar with the reports and the parties’ arguments, but would like to highlight a few of the more critical findings. First, a coincidence existed between the upward trend in imports and overall downward trends in the CSPV industry’s injury factors. That increase in imports was massive by any measure – 492.4 percent between 2012 and 2016. Imports as a ratio to domestic production also increased overall and in each year.<sup>2</sup> During this same period, the domestic industry’s financial condition was poor, and deteriorated, particularly between 2015 and 2016 as imports reached their pinnacle.

13. Second, the Commission explained that the imports were highly substitutable with and lower priced than the domestically produced product.<sup>3</sup> As these imports surged into the market, they caused domestic prices to collapse, which, in turn led to the industry’s already high ratio of cost of goods sold to net sales to climb even higher and net and operating losses to worsen for the already unprofitable domestic industry.<sup>4</sup> Dozens of firms closed or temporarily shut or slowed production. There were significant layoffs and underemployment.<sup>5</sup> Moreover, the industry was unable to generate adequate capital to finance the modernization of their domestic plants and equipment or maintain existing research and development expenditure levels.<sup>6</sup> This marked decline occurred even though demand was exploding, as seen by the 338 percent increase in U.S. installations of on-grid photovoltaic systems during the investigation period. These and the other findings in the Commission’s report provide objective and compelling

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<sup>1</sup> China First Written Submission, para. 91.

<sup>2</sup> USITC November Report, p. 21 (Exhibit CHN-2).

<sup>3</sup> USITC November Report, pp. 29-30, 42 (Exhibit CHN-2).

<sup>4</sup> USITC November Report, pp. 38, 42-47 (Exhibit CHN-2).

<sup>5</sup> USITC November Report, pp. 31-34, 48-49 (Exhibit CHN-2).

<sup>6</sup> USITC November Report, p. 47 (Exhibit CHN-2).

support for the finding of a causal link between the increased imports and the domestic industry’s serious injury.<sup>7</sup>

14. China raises a number of spurious criticisms of these findings. Our submissions address and disprove each of China’s arguments, and we will not seek to summarize all of that analysis in this statement. We will instead focus on three areas that are emblematic of the flaws with China’s arguments.

**1. Demand**

15. First, China raises several criticisms of the Commission’s analysis of demand. It does not dispute the agency’s finding that U.S. demand for CSPV products was extremely favorable for both domestic producers and importers during the period of investigation. The Commission cited a variety of evidence suggesting that the domestic industry’s capacity, production, and shipments, would have been expected to improve under such favorable conditions. The Commission then evaluated the industry’s poor and deteriorating performance in light of those expectations. As the Commission emphasized, rather than improve, the industry instead experienced hundreds of millions of dollars in losses, dozens of facility closures, and low capacity utilization rates.<sup>8</sup> China instead seeks to dismiss this analysis as relying on a “premise” that the domestic industry’s growth would be “commensurate” with demand. But the Commission did no such thing. It simply recognized growing demand as an important condition of competition that provided critical context for evaluating the industry’s declining performance.

16. China also seeks to blame the domestic industry’s poor performance on its “small” size. China overlooks the Commission’s analysis demonstrating that increasing quantities of low-priced imports stifled the industry’s ability to meet a larger share of the growing apparent U.S. consumption in the first instance and, therefore, made it impossible to justify increased productive capacity. In fact, in all but one year of the period of investigation, imports actually increased at a greater rate than apparent U.S. consumption year over year, ensuring their dominant position in the U.S. market as demand surged forward.<sup>9</sup> Many companies *sought* to open or add production in the United States to take advantage of the demand growth, but low import-driven prices foreclosed profits, forcing new entrants and existing producers to shut down their facilities.<sup>10</sup> The firms that did not exit the industry saw low capacity utilization rates, with excess capacity for module producers increasing from 391 MW in 2012 to 577 MW in 2016.<sup>11</sup>

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<sup>7</sup> USITC November Report, p. 50 (Exhibit CHN-2).

<sup>8</sup> USITC November Report, pp. 47-49 (Exhibit CHN-2).

<sup>9</sup> USITC November Report, p. 48 (Exhibit CHN-2).

<sup>10</sup> USITC November Report, pp. 48-49 (Exhibit CHN-2).

<sup>11</sup> USITC November Report, p. 32 (Exhibit CHN-2).

17. The record demonstrates that increased volumes of low-priced imports blocked the domestic industry’s expansion in *all* three segments – residential, commercial, and utility – of the U.S. market.<sup>12</sup> China responds by seeking to revitalize the myth, advanced by importers in the underlying investigation, that the domestic industry made a business decision to abandon the fast-growing utility segment.<sup>13</sup> As discussed in detail in the United States written submissions, the record evidence demonstrates otherwise.<sup>14</sup> The domestic producers were active in and actively sought to expand their presence in the utility sector. Indeed, China itself acknowledges that the domestic industry had a presence in the utility segment.<sup>15</sup>

18. To the extent that domestic producers did not have the capability to supply large scale utility projects, this was directly due to the flood of low-priced imports that entered the U.S. market. The record shows that the domestic industry produced both 60-cell and 72-cell modules throughout the period of investigation,<sup>16</sup> and that as the utility segment shifted from the use of 60-cell modules to 72-cell modules over the course of the period of investigation, the domestic industry increased its capacity and production of 72-cell modules.<sup>17</sup> In addition, the domestic industry pioneered certain other CSPV technologies such as monocrystalline products that converted sunlight more efficiently than multicrystalline products and were sold in all segments of the U.S. market. The large volume of imports at low and declining prices, however, adversely impacted the domestic industry’s financial performance. This in turn made it difficult for the domestic industry to add capacity to a scale that made it more competitive in the utility segment, even as it managed to develop and pioneer innovative products that utilities and others sought.<sup>18</sup>

## **2. Declining Prices**

19. Second, China makes extensive efforts to blame factors other than imports for the declining prices and the industry’s financial deterioration. But these efforts fail. The Commission considered the role of the factors cited by China, specifically the decline in raw material costs and increased production efficiencies, and explained why they did not explain the collapse in prices that occurred during the period of investigation.

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<sup>12</sup> USITC November Report, pp. 59-60 (Exhibit CHN-2).

<sup>13</sup> *See, e.g.*, China Response to Written Questions para. 19-21, 24, 57-58; China Comments on the Responses of the United States and Third Parties to the Panel’s Questions, para. 43.

<sup>14</sup> *See, e.g.*, U.S. Comments on China’s Responses to the Panel’s Questions, paras. 9-14.

<sup>15</sup> China Comments on the Responses of the United States and Third Parties to the Panel’s Questions, para. 70.

<sup>16</sup> USITC November Report, p. 60.

<sup>17</sup> USITC November Report, p. 60 (Exhibit CHN-2).

<sup>18</sup> USITC November Report, pp. 52-52, 60-61 (Exhibit CHN-2).

20. The Commission began by demonstrating how import prices affected domestic producers' prices. It evaluated all the parties' arguments and found that imports were highly substitutable with the domestic like product, and price was an important factor in purchasing decisions. The Commission's survey of five narrowly defined products showed that imports were generally lower priced than the domestic like product, and that prices for all five surveyed products declined overall during the period of investigation.<sup>19</sup> Domestic producers reported the need to reduce prices, and, a substantial number of purchasers likewise reported that producers had to reduce prices of their CSPV products to compete with lower-priced imports. Several purchasers also reported steeper price reductions in 2016, as the volume of imports reached its highest level and the domestic industry's market share fell to its lowest level.<sup>20</sup> Based on this correlation under these market conditions, the Commission established a clear causal link between increased imports and the declining prices.

21. China has failed to show that the decline in raw material costs and increased production efficiencies are responsible for the decline in domestic prices. As the Commission explained, the declines in the domestic industry's net sales values kept pace with declines in its costs, and that its costs remained near or above its net sales values for most of the investigation period.<sup>21</sup> But prices collapsed even further than its costs in 2016. The COGS-to-net-sales ratio accordingly soared above 100 percent, leading to further deterioration of and losses to an already unprofitable domestic industry.<sup>22</sup>

22. In arguing that a decline in raw material costs and increased efficiencies necessarily led to declining prices, China does not account for other competing factors that were in play. Such other factors included increasing demand and substantial and increasing global overcapacity to produce CSPV cells and modules.<sup>23</sup> China also fails to consider the context of the domestic industry's already unprofitable and dismal financial condition and reconcile why domestic producers would purposely lower their prices for CSPV products in tandem with decreasing costs. Declining costs and increased efficiency, exploding demand, and imposition of trade remedy orders collectively should have permitted U.S. producers to achieve some level of profitability, or at least reduce its losses from 2012 to 2016. This did not occur, however. Instead, low-priced imports surged into the market and exerted downward pressure on the domestic industry's prices. As a result, the industry incurred hundreds of millions of dollars in net and operating losses during the period of investigation.

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<sup>19</sup> USITC November Report, pp. 41-43 (Exhibit CHN-2).

<sup>20</sup> USITC November Report, p. 42 (Exhibit CHN-2).

<sup>21</sup> USITC November Report, p. 34 (Exhibit CHN-2).

<sup>22</sup> USITC November Report, pp. 38, 43 (Exhibit CHN-2).

<sup>23</sup> USITC November Report, p. 38 (Exhibit CHN-2).



23. The industry’s condition also continued to decline in 2017. Suniva, one of the largest producers in the U.S. market, suspended operations at its cell and module factories and declared bankruptcy. SolarWorld, another one of the largest domestic producers, laid off 360 employees.<sup>24</sup> It is impossible to reconcile this evidence with China’s assertion that the “domestic industry’s operating performance actually improved.”<sup>25</sup> To the contrary, the evidence clearly demonstrates that the surge of low-priced imports caused prices to fall, resulting in further losses to the domestic industry, which prevented them from fully utilizing existing capacity and adding capacity to take advantage of booming demand. With this chain of reasoning, the Commission established a causal link between increased imports and the domestic industry’s serious injury.

### **3. Non-attribution**

24. Third, China argues that the Commission failed to comply with the obligation under Safeguards Agreement Article 4.2(b), if factors other than imports were causing injury to the domestic industry, not to attribute any such injury to increased imports. The Commission’s report shows that it did not attribute injury from other factors to imports in assessing the causal link. During proceedings at the Commission, respondents identified two alternative causes of injury. First, they alleged that the domestic industry made a series of “missteps” – failing to provide quality products, abandoning the utility segment, and providing unreliable delivery and service. Second, respondents argued that factors other than imports, were responsible for declining prices. The Commission provided a thorough explanation, with references to the record evidence, for its findings that these factors alleged by respondents did not cause any injury to the domestic industry.<sup>26</sup>

25. The Commission showed that the “missteps” alleged by China either did not exist, or were actually the result of increased imports. The first of these – domestic producers’ difficulty in serving the largest utility segment projects – is actually a slight variant of China’s argument in the injury context that the domestic industry did not have sufficient capacity to service U.S. demand, especially in the utility segment. As we demonstrated earlier, that is not the case. Domestic producers competed directly with imports in all segments of the U.S. market, including the utility segment. They tried to expand further in the utility segment, but were stymied by the increase in low-priced imports. Thus, domestic producers did not (as China argues) willingly restrict their capacity, abandon the utility segment, or underutilize the capacity they did have. As the Commission explained, the industry’s lack of capacity was a *result* of serious injury caused by increased imports and was not, as China argues, an independent cause of injury. Article

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<sup>24</sup> USITC November Report, p. 49 (Exhibit CHN-2).

<sup>25</sup> China Comments on the Responses of the United States and Third Parties to the Panel’s Questions, para. 28.

<sup>26</sup> USITC November Report, 50-65 (Exhibit CHN-2); U.S. First Written Submission, paras. 176-216; U.S. Responses to Questions from the Panel, paras. 26-61; U.S. Comments on China’s Responses to the Panel’s Questions, paras. 82-85.

4.2(b) of the Safeguards Agreement calls for injuries that *are being caused* by other factors not to be attributed to increased imports. It does not call on competent authorities to treat the consequential effects of increased imports (in this case, stymied capacity) as constituting an independent causal factor. To do so would reverse cause and effect in an illogical manner.

26. As to respondents’ allegations that the domestic industry was unable to provide quality products, the Commission found that this was not a factor distinguishing domestic products from imports. The Commission cited extensive evidence, including pricing data that reflected domestic industry and importer sales of CSPV products within similar efficiency and wattage ranges, in support of its finding of a significant and direct overlap in the types of CSPV products offered by both domestic and foreign suppliers.<sup>27</sup>

27. In its most recently filed written submission, China asserts that the Commission did not explain whether the domestic industry was able to effectively scale-up their innovations, or maintain the level of innovation ahead of foreign suppliers during the period of investigation.<sup>28</sup> The Commission’s detailed analysis, however, refutes China’s arguments. As we just noted, increased imports themselves negatively affected the ability of domestic producers to increase capacity. Moreover, the Commission provided examples of how the domestic industry innovated and even pioneered CSPV products during the investigation period. These included products such as bifacial cells and modules, that were only starting to become widespread toward the end of the period.<sup>29</sup>

28. The Commission found further that specialized products available only from foreign sources accounted for only a small share of the full U.S. CSPV market.<sup>30</sup> In addition, competition existed between such products in that they all served the same function in converting sunlight into electricity and essentially competed against each other on the basis of electrical output and cost.<sup>31</sup> As the Commission observed, most domestic producers, U.S. importers, and purchasers reported that domestic and imported CSPV products were interchangeable.<sup>32</sup> The Commission, therefore, reasonably concluded that the objective evidence demonstrated that the domestic industry supplied quality products that overlapped with imported product.

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<sup>27</sup> USITC November Report, p. 51 (Exhibit CHN-2).

<sup>28</sup> China Comments on the Responses of the United States and Third Parties to the Panel’s Questions, para. 74.

<sup>29</sup> USITC November Report, pp. 52-54 (Exhibit CHN-2); USITC November Report, p. I-36 (Exhibit CHN-3).

<sup>30</sup> USITC November Report, p. 52 (Exhibit CHN-2).

<sup>31</sup> USITC November Report, pp. 54-55 (Exhibit CHN-2).

<sup>32</sup> USITC November Report, p. 30 (Exhibit CHN-2).

29. Finally, the Commission objectively evaluated the conflicting evidence regarding delivery and service, and reasonably concluded that the record simply did not support the sort of widespread problems alleged by respondents.<sup>33</sup> It observed that respondents’ allegations consisted of anecdotes and criticisms from only a handful of the 106 reporting purchasers. Giving another perspective, SolarWorld and Suniva offered competing hearing testimony and posthearing submissions, in which the companies responded in detail to these isolated allegations of quality, delivery, and service concerns.<sup>34</sup> The Commission considered these submissions, weighed the evidence, and found that the petitioners made the more compelling case. China has provided no basis for the Panel to reweigh the evidence and reach a different finding.

30. The Commission also evaluated and rejected respondents’ assertions that raw material costs, government incentives, and the need to attain grid parity caused the declines in domestic prices. The Commission concluded that these alternative causes could not individually or collectively explain the serious injury to the domestic industry.<sup>35</sup>

31. In challenging this finding, China reprises its assertion that prices for CSPV products move in lock step with raw material costs. As we explained earlier, this is inaccurate. Given explosive demand, the reasonable expectation was that the domestic industry would seek to maintain prices as raw material costs fell, and thereby reverse or lessen its unprofitable state.<sup>36</sup>

32. The Commission also explained why changes in government incentive programs did not cause the price declines or any injury to the domestic industry. Although some incentive programs had expired, many other programs – including the Federal Income Tax Credit, which respondents themselves recognized as playing the most influential role in solar deployment – continued during the period of investigation.<sup>37</sup> The data showed, and most producers, importers, and purchasers confirmed, that changes in the overall level of incentives offered were either positive or neutral. Demand continued to grow, but prices failed to follow as would have been expected.<sup>38</sup> Judged against what China itself agrees to be “explosive” demand that occurred during the period of investigation,<sup>39</sup> objectively, any changes in the incentive programs could not be characterized as injurious.

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<sup>33</sup> USITC November Report, p. 61 (Exhibit CHN-2).

<sup>34</sup> USITC November Report, p. 61 n.355 & n.356 (Exhibit CHN-2).

<sup>35</sup> USITC November Report, p. 65 (Exhibit CHN-2).

<sup>36</sup> USITC November Report, p. 64 (Exhibit CHN-2).

<sup>37</sup> SEIA Prehearing Injury Brief, p. 105 (Exhibit CHN-20).

<sup>38</sup> USITC November Report, p. 63 (Exhibit CHN-2).

<sup>39</sup> *See, e.g.*, China Comments on the Responses of the United States and Third Parties to the Panel’s Questions, paras. 9-11, 18, 43, 48.

33. China postulates that changes in the government incentive programs made solar system owners more price sensitive, which increased price pressure on producers of CSPV products.<sup>40</sup> But this argument fails on several levels. First, the Commission found that overall levels of incentives either remained the same or increased. Second, most U.S. producers, importers, and purchasers reported that changes in the price of solar generated electricity had not affected the prices of CSPV products.<sup>41</sup> Third, most incentive programs sought to increase demand for solar energy by decreasing generators’ costs.<sup>42</sup> Any effects on prices for solar generators’ inputs – such as CSPV products – would be secondary effects, resulting from increased demand for solar energy. In light of booming demand for solar energy during the investigation period, any change in the levels of incentive programs cannot have had a meaningful effect. In any event, most questionnaire respondents reported that incentive levels had led to a decrease in the price of solar generated electricity since 2012, demonstrating that system owners continued to financially benefit – and to an increasing degree – from the availability of government incentive programs.<sup>43</sup>

34. With respect to the third alleged alternative factor for price declines, the need for CSPV products to attain parity with other on-grid sources of electricity, the Commission found that this factor also did not impact prices or otherwise explain the domestic industry’s condition.<sup>44</sup> 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 decrease in the prices for CSPV products over the period of investigation. The Commission examined natural gas prices and domestic prices of CSPV products and found no correlation between their price trends.<sup>45</sup> The Commission also considered that questionnaire respondents pointed to large volumes of low-priced imports as the reason for price declines, and that 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.<sup>46</sup>

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<sup>40</sup> See, e.g., China Comments on the Responses of the United States and Third Parties to the Panel’s Questions, paras. 109-110.

<sup>41</sup> USITC November Report, p. V-37 (Exhibit CHN-3).

<sup>42</sup> USITC November Report, p. 63 (Exhibit CHN-2).

<sup>43</sup> USITC November Report, p. 63 (Exhibit CHN-2).

<sup>44</sup> USITC November Report, pp. 64-65 (Exhibit CHN-2).

<sup>45</sup> USITC November Report, pp. 64-65 (Exhibit CHN-2).

<sup>46</sup> 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).

35. In its most recent written submission, China criticizes the Commission’s analysis as being one of “minimal assessment.”<sup>47</sup> In particular, China complains that the Commission focused on a single source of energy – natural gas – over a “narrow period of time.”<sup>48</sup> As the Commission explained, however, electricity generated by natural gas generally set the levelized cost of energy that solar and other renewable energy systems sought to meet.<sup>49</sup> Even respondents’ own expert witness relied upon natural gas prices in conducting an econometric analysis.<sup>50</sup> The Commission, therefore, 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 during the period of investigation. Nor did the Commission err in examining natural gas prices between the time period 2012 to 2016. This time period constituted the period of investigation for which the Commission collected questionnaire data from U.S. producers, importers, and purchasers.

36. For the reasons discussed, China has failed to establish any inconsistency of the Commission’s determination with Safeguards Agreement Article 4.2(b). The Commission provided a reasoned explanation, based on objective evidence, for finding that increased imports of CSPV products caused serious injury to the domestic industry and that none of the other factors cited by China caused any injury to the domestic industry. The United States thus respectfully requests the Panel to reject China’s claims.

## **II. INCREASED IMPORTS CAUSING SERIOUS INJURY WERE THE RESULT OF UNFORESEEN DEVELOPMENTS AND OBLIGATIONS INCURRED FOR PURPOSES OF ARTICLE XIX OF GATT 1994**

37. Article XIX of the GATT 1994 provides for a safeguard measure when increased imports are “as a result of” unforeseen developments. China has erred in this dispute by asserting that, to establish that this circumstance exists, a Member must demonstrate a “clear linkage” between unforeseen developments and increased imports. While “unforeseen developments” are included in Article XIX as a circumstance that must be shown during a WTO challenge to a safeguard measure, they do not appear as “conditions” under the Safeguards Agreement that a competent authority must evaluate and include in its report. This difference set out in the relevant texts has meaning and significance, in particular with respect to the Safeguards Agreement’s explicit obligations on analysis of serious injury and causation, as contrasted with the absence of such obligations with respect to unforeseen developments.

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<sup>47</sup> China Comments on the Responses of the United States and Third Parties to the Panel’s Questions, para. 150.

<sup>48</sup> China Comments on the Responses of the United States and Third Parties to the Panel’s Questions, para. 156.

<sup>49</sup> USITC November Report, p. 26 (Exhibit CHN-2).

<sup>50</sup> Econometric Analysis by Thomas Prusa (Exhibit CHN-19).

38. In other words, the first clause of Article XIX:1(a) does not create prerequisites coequal with the conditions that appear in the second clause, which are further elaborated in the Safeguards Agreement. Rather, “as a result of unforeseen developments and of the effect of the obligations concurred” are circumstances that must be shown to exist, whereas “any product is being imported . . . in such increased quantities and under such conditions as to cause or threaten serious injury” are conditions that a competent authority must establish.

39. Thus, the relevant question in this regard is whether the United States has established, for purposes of Article XIX:1 of the GATT 1994, that “as a result of unforeseen developments . . . any product is being imported into [its] territory in such increased quantities and under such conditions as to cause or threaten serious injury . . . .” The parties agree with prior reports that in this context, “the ordinary meaning of the phrase ‘as a result of 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.’”<sup>51</sup>

40. China has at no point demonstrated that the U.S. negotiators “expected” the unforeseen developments that the USITC identified in its Supplemental Report, namely China’s development of excess capacity to levels that far exceeded internal demand, and the domino effect that this expansion caused in the global solar market.

41. China instead argues that the USITC findings on developments in China are insufficient by themselves because the USITC had an obligation to identify how these “unforeseen developments” resulted in the increases from other countries.<sup>52</sup> As the United States has noted, this would be tantamount to a double causation requirement contrary to both GATT 1994 Article XIX and the Safeguards Agreement.<sup>53</sup> Thus, the premise of China’s position is invalid as a matter of law. China appears to have abandoned this particular argument in its responses to the Panel’s questions,<sup>54</sup> and argues instead that a competent authority must explain the “mismatch” when the country where the unforeseen developments occurs is different from the countries where increased imports originated.<sup>55</sup> China ignores that the USITC’s Supplemental Report does just that with the explanation that imports from other countries increased as Chinese companies offshored their production to such countries when faced with U.S. trade remedy orders. China

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<sup>51</sup> *Argentina – Footwear (AB)*, para. 91; *Korea – Dairy (AB)*, para. 84; accord U.S. First Written Submission, para. 228; China First Written Submission, para. 236.

<sup>52</sup> China First Written Submission, para. 277.

<sup>53</sup> U.S. Comments on China Response to Written Questions, para. 159.

<sup>54</sup> China Response to Written Questions, para. 166.

<sup>55</sup> China Response to Written Questions, para. 172.

has accordingly failed to demonstrate any way in which the USITC’s unforeseen developments findings are inconsistent with GATT 1994 or the Safeguards Agreement.

42. Turning to “obligations incurred” under Article XIX, there is no disagreement that the relevant obligations may include tariff concessions by the Member seeking to impose a safeguard measure. As a previous report found, “[T]he 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.*”<sup>56</sup>

43. The USITC Supplemental Report noted that the tariff concessions relevant to this dispute created a circumstance where “[i]mported articles that are provided for in subheading 8541.40.60 of the U.S. Harmonized Tariff Schedule have been free of duty under the general duty rate since at least 1987.”<sup>57</sup> The USITC also made the same finding in its November Report.<sup>58</sup> There is no dispute that, because of these concessions, it would be inconsistent with Article II of GATT 1994 for the United States to increase its tariffs above the bound rates to remedy the serious injury caused by increased imports. Since there is no dispute that the U.S. tariff rate on the solar products in question is bound at zero percent, this “obligation incurred” would otherwise prevent the United States from raising its duties to respond to the increase in imports, and thus qualifies as the justification for the safeguard measure. Accordingly, the United States needed to invoke Article XIX of the GATT 1994 to suspend its concessions and increase its rate of duty on the increased imports to remedy the serious injury.

### III. CONCLUSION

44. Before concluding, I would like to deviate briefly from our opening statement to observe that the written version of China’s statement contains multiple footnotes with narrative text. The text of those footnotes with narrative text was not presented as part China’s statement today and we would accordingly expect that text not to form part of the record of this proceeding.

45. With that, based on the evidence and the law, China has failed to meet its burden to show that the safeguard measure on solar products is inconsistent with the United States’ obligations under the WTO Agreement. This concludes the U.S. opening statement. Thank you.

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<sup>56</sup> *Korea – Dairy (AB)*, para. 84 (emphasis added).

<sup>57</sup> USITC Supplemental Report, p. 4, n.10 (Exhibit CHN-6).

<sup>58</sup> USITC November Report, Vol. II, p. I-38 (Exhibit CHN-3).