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

(DS562)

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TABLE OF REPORTS

Short Form	Full Citation
Korea – Dairy (AB)	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/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

Mr. Chairperson, Members of the Panel:

1. The *GATT 1994*,[1] like the *GATT 1947* before it,[2] recognizes that contracting parties might need to depart temporarily from their obligations, including their tariff concessions, to take "action" to address the "emergency" posed by increased imports that cause, or threaten to cause, serious injury to a domestic industry. Accordingly, the GATT 1994 provides that Members "*shall be free*, in respect of such product {imports}, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend {an} obligation in whole or in part or to withdraw or modify {a} concession."[3] The *Agreement on Safeguards* embodies provisions that elaborated on the steps a Member takes in adopting such measures. As part of the balance of rights and obligations agreed by WTO Members, the Safeguards Agreement also allows Members affected by a safeguard measure to take compensatory action only after a measure had been in place for three years.

2. The United States has exercised its right to remedy the undeniable serious injury suffered by its domestic industry producing solar cells and modules. The U.S. International Trade Commission ("USITC" or "Commission") undertook a substantive investigation with full participation of multiple parties representing a range of interests and views. As a result of that investigation, the USITC published detailed reports with its findings and included the reasoned conclusions that imports increased during the period of investigation and that those imports caused serious injury to the domestic industry. Albeit not required by the Safeguards Agreement, the USITC reports went further and concluded that imports increased as a result of unforeseen developments and the effect of obligations incurred.

3. The USITC reports revealed an industry suffering harm at the start of the investigation period and close to collapse by the end. Notably, the petitioners in the underlying investigation have since closed their facilities and not resumed production. This is especially remarkable since the serious injury occurred despite certain conditions – massive increases in demand and decreasing costs – that normally would be considered favorable for an industry not only to thrive but expand its operation. However, due to the imports that increased significantly during this time, the conditions of competition – especially the consistently lower price of imports comparable with U.S. products – foreclosed the ability of U.S. producers to charge prices that would allow a reasonable return on investment such that they could attain any level of profitability.

4. The Safeguards Agreement provides a roadmap for Members seeking to impose safeguard measures. It does not, as China would have the Panel believe, erect a series of barriers against their application. The United States continues to stress that preventing the ability of a

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

[2] The *General Agreement on Tariffs and Trade 1947*.

[3] Article XIX:1(a) of the GATT 1994 (emphasis added).

Member to resort to safeguard disciplines in these circumstances is tantamount to rendering Article XIX of the GATT 1994 a dead letter.

I. THE USITC'S INJURY DETERMINATION

5. The USITC's November Report fully satisfies the legal requirements set forth under the Safeguards Agreement. In this report, the Commission provided a detailed analysis of the case, explaining how objective and compelling evidence supported its ultimate conclusion that increased imports of CSPV products caused serious injury to the domestic industry.

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

6. In its second written submission, China repeats many of the same arguments that you have heard before. Specifically, China asserts that (1) the Commission "summarily dismiss{ed} certain positive trends in the injury factors";[4] (2) "the negative factors did not indicate the existence of causation when considered in light of the conditions of competition;"[5] and (3) the Commission failed to conduct a WTO-compliant non-attribution analysis.[6] Our prior written submissions have addressed and disproved China's assertions, and we will not reiterate all of our views here today. Instead, we will focus on some of the primary flaws in China's arguments.

1. The Commission Adequately Addressed Upward Movements in Certain of the Injury Trends

7. First, China asserts that the Commission "summarily dismissed" alleged "positive trends" in certain of the industry's performance factors.[7] This is not the case. The Commission recognized and squarely addressed these factors within the context of the relevant conditions of competition – specifically, the explosive growth in demand and the early, but ineffective, imposition of trade remedy orders – and in light of the negative trends in other performance factors. In doing so, the Commission conducted a holistic analysis that identified a causal link between increased import volume and market share on the one hand and the domestic industry's declining financial performance on the other. It recognized that there were upward trends in certain factors, and demonstrated that these failed to detract from the Commission's finding of an overall coincidence.

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[4] China Second Written Submission, para. 14.

[5] China Second Written Submission, para. 15.

[6] China Second Written Submission, paras. 132-222.

[7] China Second Written Submission, para. 14.

8. Specifically, as the Commission detailed, imports harmed the domestic industry even during a time of exceptionally favorable market conditions. At the beginning of the period of investigation, the domestic industry was already in an injured state because of significant CSPV imports from China. The industry, which had held the largest share of apparent U.S. consumption in 2009, had seen its market share dwindle and it filed antidumping and countervailing duty petitions to resolve the injury posed by increasing imports. The subsequent imposition of the *CSPV I* orders and the initiation of additional investigations on imports from China and Taiwan in *CSPV II* were, at first, successful in curbing the growth in imports and stabilizing prices, which resulted in an increase in the industry's market share and an improvement in the industry's condition.[8] Chinese firms, however, rapidly expanded production into countries not covered by these trade measures, thwarting the protections afforded by these orders.[9] Consequently, as imports from additional sources entered the U.S. market and rapidly increased to higher volumes,[10] CSPV prices collapsed, the domestic industry's capacity utilization levels dropped, its market share declined anew, and its financial performance deteriorated.[11]

9. China attempts to minimize the importance of the antidumping and countervailing duty orders.[12] In China's view, these orders did not play any role in the stabilization of prices and improvement in the industry's condition during the period of investigation. But China's conclusory assertions do not withstand scrutiny. In fact, these orders restrained imports from China and Taiwan, which declined to lower levels in the U.S. market. Indeed, they were so effective that Chinese firms rapidly added CSPV cell and module capacity in other countries in concerted efforts to circumvent the lawfully imposed trade remedies.[13] Consistent with this shift, the Commission found that 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.[14] Clearly, these orders had an impact, and the Commission reasonably took the context and timing of these orders into account in considering the import volume and performance trends in the subsequent safeguard investigation.

10. Moreover, although the industry's production, shipments, and capacity increased overall in the face of exploding demand, China itself concedes that "an overall coincidence may be

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

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

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

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

[12] China Second Written Submission, para. 129.

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

[14] USITC November Report, p. 41 (Exhibit CHN-2).

demonstrated even when certain injury factors show positive trends."[15] This is true here, as domestic producers still lost sales and market share to low-priced imports, which also caused prices to decline. Thus, although not all the industry's factors showed downward trends, the stability or upward movement in certain factors identified by China did not halt the industry's financial deterioration. The Commission demonstrated that, notwithstanding upward movements in certain factors, an overall coincidence and a clear causal link existed between imports and the domestic industry's serious injury.

2. The Commission Adequately Considered the Negative Injury Trends within the Relevant Conditions of Competition

11. Second, China asserts that the Commission did not address the negative trends in injury factors within two relevant conditions of competition – (1) the rapid increase in demand, particularly in the utility segment, that the industry allegedly did not have the ability to supply; and (2) the role of declining costs and continuous technological innovation that purportedly resulted in "ongoing declining prices."[16]

12. China is mistaken. The Commission fully accounted for the interplay of the relevant conditions and negative factors and demonstrated, under this context, that the coincidence in negative injury trends and increasing imports, supported a finding that imports inflicted serious injury on the domestic industry. As detailed in our prior written submissions, the Commission found that, contrary to China's argument, the evidence showed that domestic producers were active in and served all segments of the market, including the utility sector.[17] And although surging demand created a favorable market condition under which the domestic industry's performance would have been expected to improve, surging imports frustrated the domestic industry's ability to fully utilize its productive capacity or increase capacity to meet a larger share of the growing apparent U.S. consumption. Domestic producers confirmed losing sales to imports, which had increased at even a greater rate than did apparent U.S. consumption in all but one year of the period of investigation. In addition, the great majority of purchasers reported that they had increased their purchases of imported CSPV products, identifying lower price most often as the reason for such purchases.[18] Moreover, as prices declined, the domestic industry incurred hundreds of millions of dollars in losses. It experienced dozens of facility closures and low capacity utilization rates even though simultaneously demand was exploding. Such objective evidence supports the finding of serious injury caused by increasing imports under

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[15] China Second Written Submission, para. 81.

[16] China Second Written Submission, paras. 91-110.

[17] *See, e.g.,* U.S. Comments on China Responses to Panel's First Set of Questions, paras. 9-14, 25-42; U.S. Second Written Submission, paras. 31-50.

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

Article 4.2(b). It also reveals the fallacy of China's reliance upon the dramatically increasing demand as a factor undermining the Commission's determination.

13. China is also mistaken that the Commission did not "consider the market context of {declining price} trends."[19] The Commission considered but found no merit to respondents' assumption that increased efficiencies and declining costs caused prices to decline during the period examined. The Commission properly declined to treat these developments as a relevant market condition that informed its causation analysis.

14. The Commission illustrated how increased low-priced imports rather than these alternative factors placed pricing pressure on the domestic industry, resulting in declining prices. The Commission began by recognizing the high substitutability between the domestically produced and imported products and the importance of price in purchasing decisions. Within this context, it found a direct correlation between movements in prices and imports. Indeed, prices declined substantially in 2012, but stabilized after imposition of the *CSPV I* orders on imports from China and commencement of additional investigations on imports from China and Taiwan in *CSPV II*. For a short time, imports grew at a slower pace than apparent U.S. consumption. The data further showed that as low-priced imports from additional sources entered the U.S. market and rapidly surged to higher volumes, they exerted pricing pressures on the domestic industry, and domestic prices consequently collapsed throughout 2016.[20]

15. The Commission found that, consistent with this analysis, domestic producers reported the need to reduce prices to compete with imported CSPV products, and a substantial number of purchasers likewise reported that producers had to reduce prices of their CSPV products to compete.[21] Several purchasers also confirmed steeper price reductions in 2016, as the domestic industry's share of the market fell to its lowest level.[22] Even respondent SEIA's own publications confirmed this link, attributing the stabilization of prices in 2013 and 2014 to the trade remedy orders and the subsequent collapse in prices in 2016 to a supply and demand imbalance.[23]

16. These trends in prices, particularly the stabilization of prices following the imposition of the orders, run contrary to China's theory of "ongoing declining prices" that have "spanned decades."[24] Moreover, as discussed in our prior written submissions, declining raw material

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[19] China Second Written Submission, para. 103.

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

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

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

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

[24] China Second Written Submission, para. 106.

costs, when viewed in light of the domestic industry's abysmal and unprofitable state, should have been a beneficial factor. However, as the Commission found, the domestic industry's net sales values declined at a pace that canceled out and even surpassed decreasing costs at the end of the period of investigation.[25] Our prior submissions have discussed the flaw posed by China's theory,[26] but China has yet to address these facts. Nor has it pointed to any record evidence establishing that prices must follow decreases in raw material costs. Thus, the inability of the industry to improve its financial condition despite these declining costs was, in fact, emblematic of the dire and worsening financial condition of the industry caused by the imports.

3. The Commission Conducted a Non-attribution Analysis that Fully Satisfied its Obligations under the Safeguards Agreement

17. Finally, China asserts incorrectly that the Commission, in applying the "substantial cause test" did not conclude "in a clear and explicit manner that other factors were not causing any injury to the domestic industry."[27]

18. The USITC's November Report unequivocally demonstrates that factors other than increased imports were not causing injury. The Commission carefully considered the two alternative causes posited by respondents – first, the domestic industry's alleged missteps; and second, factors other than imports that assertedly impacted domestic prices – and explicitly found that "respondents' arguments are not supported by the facts."[28] Because these other factors failed to explain the domestic industry's injury, the Commission concluded that "increased imports are a substantial cause of serious injury to the domestic industry . . . that is not less than any other cause."[29] The Commission framed this ultimate conclusion in accordance with U.S. law. And in reaching that conclusion, the Commission made express findings that satisfied the substantive obligation in the second sentence of Article 4.2(b).

19. Moreover, the Commission's analysis was not "cursory" by any means. It devoted several pages of analysis to each of the asserted "other" factors and provided detailed and record-based explanations supporting its findings. The Commission found to be factually nonexistent the alleged "business missteps" conjured by respondents – including assertions that the domestic industry made a business decision not to compete in the utility segment and that domestic producers suffered from widespread quality, delivery, and service issues. As we noted earlier,

[25] U.S. First Written Submission, paras. 205-207; U.S. Responses to Panel's First Set of Questions, paras. 45-55; U.S. Comments to China Responses to Panel's First Set of Questions, paras. 147-153; USITC November Report, p. 64 (Exhibit CHN-2).

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

[27] China Second Written Submission, paras. 138-144.

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

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

the Commission found that the domestic industry had not purposefully decided to supply the residential and commercial segments to the exclusion of the large utility sector, but rather, participated in all segments of the market.[30] Our prior written submissions discussed the many pieces of objective record evidence showing the industry's active involvement in the utility segment. We will not repeat all the evidence here,[31] but would like to point out that China itself recognizes the industry's participation in utility projects.[32] China would like to believe, however, that because these projects were on the smaller side, they somehow did not qualify as utility scale projects. There is, however, no factual or legal basis for China's assertion. Information submitted by the parties, including respondent SEIA itself, confirmed that the "utility segment" encompassed projects with a capacity of 1 MW or above, and that the domestic industry had the capacity of supplying and did, in fact, participate in projects several times larger.[33] In any event, imports competed against the domestic industry in all segments of the U.S. market, and China's contention that the industry could not supply large scale utility projects does not even address the injury caused by imports in the so-called small utility sector as well as the residential and commercial market segments.

20. The Commission also rejected the other alleged "missteps," making explicit and clear findings that "the domestic industry supplied quality products," and that the "evidence simply d{id} not support the widespread {delivery and service} problems alleged by respondents."[34] In its second written submission, China seeks to portray this as "a very superficial assessment." It presents a three-page (and one-sided) summary of respondents' points regarding four of those allegations.[35] China errs in assuming that the volume of argumentation on one side dictates a corresponding volume of explanation. The obligation under the Safeguards Agreement is to provide findings and reasoned conclusions. The Commission did this by explaining in its report that it made credibility determinations and found in light of contrary evidence that respondents' specific concerns lacked merit.[36] There was no further obligation to identify and address each piece of evidence individually.

21. Moreover, the small number of criticisms did nothing to detract from the fact that most of the 106 purchasers submitting a questionnaire response did not report having any such issues. To the contrary, the vast majority of responding purchasers reported that no domestic supplier

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

[31] *See, e.g.*, U.S. Comments on China's Responses to Panel's First Set of Questions, paras. 9-14.

[32] China Second Written Submission, paras. 151.

[33] SolarWorld Posthearing Injury Brief, Exhibit 1 p. 23 (Exhibit USA-05); SEIA Prehearing Injury Brief, p. 19 n.49 (Exhibit CHN-20); Transcript of Hearing on Injury, p. 164 (Exhibit CHN-9).

[34] USITC November Report, pp. 59-61 (Exhibit CHN-2).

[35] China Second Written Submission, para. 171.

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

had failed in its attempt to qualify product, or had lost its approved status since 2012.[37] In addition, most market participants viewed products from both domestic and foreign sources as being interchangeable, with price being an important purchasing factor.[38] Even respondent SEIA acknowledged that competition was based on "price and price alone."[39] Consequently, it was reasonable for the Commission to have concluded that the domestic industry did not have "widespread" quality, delivery, and service problems.

22. Regarding respondents' other asserted alternative cause of injury – factors other than imports that purportedly caused prices to decline – the Commission found that each of those other factors could not individually or collectively explain the domestic industry's injury.[40] We already discussed earlier that there is nothing in the record supporting respondents' belief that domestic producers had to cut prices at the same pace as declining costs.

23. In addition, we detailed in our prior written submissions how the Commission adequately addressed and provided reasoned conclusions that the other factors – specifically, changes in government incentive programs and the concept of grid parity – did not cause U.S. producers to sell CSPV products at decreasing prices during the period of investigation.[41] China's second written submission is largely repetitive in arguing that the Commission's analysis of incentive programs and their impact on prices "is nowhere to be found."[42] But this assertion ignores the comprehensive analysis set forth by the Commission in its November Report. Our prior written submissions have explained how, as an initial matter, objective evidence did not even indicate an overall decline in the level of government support, as China asserts. The Commission found further that the existence of such programs made solar electricity *more* cost-competitive with other sources of electricity since 2012. In other words, during the period examined, domestic producers had not faced the need to reduce their prices on CSPV modules in order for solar to remain at the same level of cost competitiveness.[43] Indeed, this was confirmed by most U.S. producers, importers, and purchasers, which reported that changes in the price of solar generated electricity had not at all affected the prices of CSPV products.[44]

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

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

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

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

[41] *See, e.g.*, U.S. Responses to Panel's First Set of Questions, paras. 56-61; U.S. Responses to Panel's Second Set of Questions, paras. 44-46; U.S. Second Written Submission, paras. 127-146.

[42] China Second Written Submission, para. 186.

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

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

24. Regarding grid parity, China asserts that "the overarching issue is that prices of solar generated electricity are always above the prices of conventional energy, and consequently are less competitive, no matter the time, region or source."[45] But the Commission closely examined the prices of CSPV products and natural gas and found that any disparity between them did not demonstrate that the need to attain grid parity was responsible for the price declines. Grid parity prices were not uniform, but varied by region, time of day, and availability of other electricity sources, and even could vary widely for a given energy source. CSPV products did not necessarily need to sell at a certain price in order to be competitive with other sources of electricity.[46] In fact, as China itself observes, the cost for solar-generated electricity systems in the utility segment was already at grid parity, which "made them cost-competitive with other energy sources."[47] In any event, notwithstanding China's observation that a consistent gap existed between prices of solar generated electricity and prices of conventional energy, demand for CSPV products still experienced unprecedented growth during the period of investigation. This fact disproves the notion that the purported need to meet grid parity forced CSPV producers to sell their products at declining prices.

25. In finding that none of the alleged "other" factors were a cause of injury, the Commission ensured that it did not attribute the effects of either of these factors, individually or collectively, to the increased imports. In doing so, the Commission fully satisfied the obligation under 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.

26. In sum, the Commission's determination is fully consistent with the Safeguards Agreement. The United States, therefore, respectfully requests the Panel to reject China's claims.

II. China has not Disproved That Unforeseen Developments and the Effect of Obligations incurred Resulted in Increased Imports

27. Pursuant to Article XIX:1(a) of the GATT 1994, the United States has established in this dispute that imports of CSPV products increased during the period of investigation as a result of unforeseen developments and the effect of obligations incurred. The United States has made this showing based on the USITC reports during the investigation and with its submissions to the Panel. China has not contradicted this showing as a legal or factual matter. Instead, China misrepresents the U.S. position on this question and equates the WTO obligations on Members under GATT 1994 Article XIX with the responsibilities on competent authorities under the Safeguards Agreement. Finally, China challenges the reasoned conclusions in the USITC

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[45] China Second Written Submission, para. 202.

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

[47] China Comments on U.S. Reponses to Panel's First Set of Questions, para. 144.

reports, but has not refuted those conclusions or the evidence the United States has presented as support.

A. China has Mischaracterized or Failed to Recognize the United States' Arguments in this Dispute

28. In its second written submission, China broadly proclaims that "{t}he United States continues to challenge the *very existence* of the unforeseen developments obligation."[48] As for "the effect of the obligations incurred," China similarly maintains that "{t}he United States argues no such obligation exists."[49] This is patently incorrect. China either fails to provide a single citation to a U.S. submission for this view, or cites arguments that actually contradict its position.

29. In fact, the United States "explained in its first written submission and in response to the Panel's questions that the references in Article XIX to unforeseen developments and the effect of obligations incurred are circumstances *that must exist for application of a safeguard measure*."[50] China also cites paragraph 79 of the U.S. response to Panel Question 27, which notes that:

> As a legal matter, Article XIX:1 of the GATT 1994 and the Safeguards Agreement do not require a finding that unforeseen developments or a specific obligation *are linked to each other or that such developments or obligations must be causally linked with the increased imports at issue*. ***Moreover, there is no requirement in either for a competent authority to include findings in its report regarding unforeseen developments or obligations incurred***.[51]

This argument does not deny the applicability of the obligation, as China asserts. It simply explains the relationship of the unforeseen developments obligation under Article XIX:1 of the GATT 1994 (which does not reference the competent authorities) to the analyses that the Safeguards Agreement calls on the competent authorities to conduct.

30. China is confusing the *substantive* obligations regarding the existence of unforeseen developments and obligations incurred with a *procedural* obligation that the competent authorities demonstrate the existence of these circumstances in their report. The United States does not dispute the existence or applicability of these obligations to the safeguard measure on CSPV products. What the United States disputes is China's non-textual assumption that, because the Safeguards Agreement charges the competent authorities with a determination as to serious injury, those same competent authorities must also address unforeseen developments and

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[48] China Second Written Submission, para. 223 (emphasis added).

[49] China Second Written Submission, para. 258.

[50] U.S. Responses to Panel's Second Set of Questions, para. 60 (emphasis added).

[51] U.S. Responses to Panel's Questions, para. 79 (emphasis added).

obligations incurred. China's second written submission does nothing to counter the U.S. showing that there is no such obligation on the competent authorities.

31. To be clear, this is a moot point, as the USITC provided the necessary findings in the November Report and the Supplemental Report. Nonetheless, if the Panel finds a shortcoming in the USITC analysis, the question of how a Member may demonstrate compliance with the unforeseen developments and obligations incurred becomes relevant. The United States has shown that, in that case, the Panel is free to rely on additional argumentation presented in this proceeding, and China has not shown otherwise.

32. China seeks support for its view by stating that "the central question in this dispute is whether the United States complied with the obligations set forth in the Agreement on Safeguards (and Article XIX of GATT 1994) *at the time* the United States imposed the safeguard measure."[52] As a substantive matter, this is correct – Article XIX and the Safeguards Agreement specify that certain circumstances and conditions exist at the time that a Member exercises its right to take a safeguard measure. But this does not mean that *the report* of the competent authorities must demonstrate "at the time" how the safeguard measure complies with all of the relevant obligations. For example, in *US – Line Pipe* it was found that the competent authorities' report need not address whether the safeguard measure complies with the Article 5 obligation to "apply safeguard measures only to the extent and for such time as may be necessary to prevent or remedy."[53]

33. The United States has also observed that prior dispute settlement reports have differentiated between the "circumstances" set out in the first clause of Article XIX:1(a) and the "conditions" set out in the second clause. China recognizes this distinction, but argues that it is subject to three "clarifications."[54] None of those supposed "clarifications" support China's position.

34. First, China notes that although the Safeguards Agreement does not refer to the "unforeseen developments" or "obligations incurred" language in Article XIX, a Member must nonetheless comply with those obligations. But this is a point not even in dispute.

35. Second, China asserts that "the conditions (sic) prescribed by the first clause of Article XIX.1(a) of GATT 1994, must also be investigated under the Agreement on Safeguards" because to do otherwise "simply renders void the obligation of unforeseen developments."[55] The statement is simply conclusory. It is also incorrect. Just as with other WTO obligations, nothing

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[53] *US – Line Pipe (AB)*, para. 234.

[54] China Second Written Submission, para. 243.

[55] China Second Written Submission, para. 245.

would prevent a Panel from evaluating a Member's compliance with the first clause of Article XIX:1(a) in a WTO dispute based on arguments made and evidence submitted in that proceeding.

36. Third, China criticizes the "United States' reliance on *Korea – Dairy* in support of this argument" as "misleading" and contrary to the Appellate Body's reasoning in *US – Lamb*.[56] To begin, the United States does not "rely" on the Appellate Body's reasoning. Consistent with DSU Article 3.2, it relies on the ordinary meaning of the terms of Article XIX:1(a) and the Safeguards Agreement, interpreted in their context and in light of the object and purpose of the agreements. The Appellate Body reasoning cited by the United States confirms these conclusions, and demonstrates errors in China's efforts to find support for its views in other appellate findings.

37. Specifically, the Appellate Body noted 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.[57]

This statement indicates that establishing compliance with the "circumstances" in the first clause of Article XIX:1(a) may be "simple," and may require only reference to a Member's GATT 1994 Schedule without further investigation or findings by the competent authorities.

38. China's arguments concerning the interpretation of "all pertinent issues of fact and law" fail for the same reason. While there is no question that an incurred obligation must be established as a matter of "fact" for purposes of the first clause in Article XIX:1(a), *Korea – Dairy* shows that nothing in any covered agreement prevents this factual matter from being established by a Member during a dispute settlement proceeding.

39. China's second written submission also seeks to deny the criticism that its Article XIX:1(a) argument amounts to a "double causation" requirement, asserting a "clear linkage"

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[56] China Second Written Submission, para. 246.

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

standard under Article XIX:1(a) that is purportedly different from the "causal link" standard in Article 4.2(b). It fails to identify any substantive difference, so the criticism still stands.[58]

40. China also argues that "the United States does not provide any actual evidence, but only a 'reasonable inference' leading to 'natural' conclusions."[59] In fact, the quoted terms are not the "only" part of the U.S. analysis. The "inference" at issue addressed one element of China's argument. The United States noted that the USITC November Report found that four of the six largest Chinese firms added CSPV module capacity in Canada and Indonesia, and stated that "{t}he only *reasonable inference* to draw is that increased imports from export-oriented module producers *also entered the United States from Canada and Indonesia* as a result of the production capacity that Chinese companies added there."[60] That inference is plainly "reasonable." China hypothesizes that "{t}he increase in exports could have come from other non-Chinese producers in these countries,"[61] but fails to explain how such a possibility would be inconsistent with the inference that such increases were "as a result of" Chinese producers' increased capacity.

41. In any event, the United States is relying on more than reasonable inferences to establish unforeseen developments. The import data underlying the USITC findings, which establishes the significant increase in exports from specific countries that, not by coincidence, are the same countries where Chinese companies added production capacity, is concrete evidence to support the USITC's reasonable conclusions on this question.

B. The USITC Reports Demonstrate That Imports of CSPV Products Increased as a Result of Unforeseen Developments and the Effect of Obligations Incurred

42. China does not challenge that the USITC confirmed in its report that the U.S. tariff schedule provided for duty-free treatment of CSPV products from 1987 forward, nor has China ever disputed that this rate of duty is bound at zero pursuant to Article II of the GATT 1994.

43. Accordingly, there can be no question that when a Member undertakes an obligation in the form of a tariff concession pursuant to Article II of the GATT 1994, it represents a commitment that, *per se*, prevents that Member from raising its tariffs above its bound rate to address any harm caused by increased imports. When a bound rate requires duty-free treatment,

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[58] China's Second Written Submission, paras. 233-235; *see also* U.S. Second Written Submission, para. 163.

[59] China's Second Written Submission, para. 236.

[60] U.S. Responses to Panel's Second Set of Questions, para. 53 (emphasis added).

[61] China Second Written Submission, para. 237.

a Member's only recourse is to Article XIX:1(a) of the GATT 1994 to temporarily suspend its obligations.

44. As noted above with respect to "unforeseen developments," the United States' position is that "the effect of the obligations incurred" may be established during dispute settlement proceedings. However, as again with "unforeseen developments," the USITC also included findings on these circumstances in its published reports. The USITC specifically referenced the tariff treatment for the CSPV products at issue under the relevant tariff schedule. That tariff schedule reflects the rates in the Schedule of the United States annexed to the GATT 1994 as an integral part of Part I of the WTO Agreement, as provided for in paragraph 7 of Article II of the GATT 1994. For this reason, by identifying the tariff treatment under the relevant tariff schedule, the USITC identified the commitment that the United States has taken in the form of a rate of duty bound at zero percent.

45. China also challenges the USITC's Supplemental Report by questioning a supposed finding by the USITC that "the United States was completely surprised – it was 'unforeseen' – that other CSPV product exporting countries would increase their exports to the United States given the decrease in exports from China because of the AD-CVD duties."[62] Of course, the relevant standard is not whether circumstances were a "complete surprise." That would mean that they were "unforeseeable" in the sense of "unpredictable" or "incapable of being foreseen, foretold or anticipated." This is contrary to the ordinary meaning of "unforeseen," namely, that "unforeseen developments" are those that were simply "unexpected."[63] The USITC's findings establish that this was the case with respect to the developments identified in the USITC November Report and Supplemental Report.

46. China tries to counter that since "it was a known fact that U.S. CSPV product producers did not have sufficient production capacity to satisfy U.S. demand for CSPV products, such claim of unforeseen consequences is simply not credible."[64] China's argument concerning the asymmetry of U.S. demand and production capacity leaves out that low-priced imports exerted downward pressure on U.S producers, resulting in deep losses that forced many producers to close and made it difficult for the remainder to increase capacity. The USITC found that:

> {Q}uestionnaire respondents point to large volumes of low-priced imports as the reason for price declines. Indeed, rather than changes in availability of incentive programs, changes in raw material costs, or the need to meet grid parity, foreign

[62] China Second Written Submission, para. 274.

[63] *See Korea – Dairy* (AB), para. 84.

[64] China Second Written Submission, para. 275.

> producers' own financial disclosures attribute the decline in prices of CSPV products to *global excess capacity*.[65]

47. Accordingly, these developments were not a simple product of supply and demand considerations. Instead, they represent the market distorting effects of excess capacity and the export-oriented nature of Chinese producers' production of modules that U.S. negotiators would not have foreseen at the time that the United States undertook commitments to bind its rate of duty for such products at zero percent. In particular, the magnitude of these market distortions and the speed by which the largest Chinese solar producers were able to set up new production facilities in other countries, without decreasing their domestic operations, is contrary to market-based firm behavior. U.S. negotiators would not have foreseen such behavior, as the USITC found in its Supplemental Report.

III. CONCLUSION

48. China has failed to meet its burden to show that the U.S. safeguard measure on solar products is inconsistent with the WTO Agreement. This concludes the U.S. opening statement. Thank you.

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