

**SUPPLEMENTAL REPORT OF THE U.S. INTERNATIONAL TRADE COMMISSION
REGARDING UNFORESEEN DEVELOPMENTS**

On November 13, 2017, the U.S. International Trade Commission (“Commission”) transmitted to the President its report in *Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products)*, Investigation No. 201-TA-75, pursuant to section 202(f)(1) of the Trade Act of 1974 (the “Trade Act”) (19 U.S.C. § 2252(f)(1)).¹ As a result of its investigation, the Commission unanimously determined, pursuant to section 202(b) of the Trade Act (19 U.S.C. § 2252(b)), that the CSPV products covered by the scope of the investigation are being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry producing an article like or directly competitive with the imported article. On November 27, 2017, under the authority delegated to him by the President, the United States Trade Representative (“USTR”) requested additional information from the Commission pursuant to section 203(a)(5) of the Trade Act (19 U.S.C. § 2253(a)(5)). Specifically, to assist the President in determining the appropriate and feasible action to take that will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs, the USTR requested that, for the affirmative determination under section 202(b)(1) of the Trade Act (19 U.S.C. § 2252(b)(1)), the Commission 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.

¹ The public version of the report is contained in *Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products)*, Inv. No. 201-TA-75, USITC Pub. 4739 (Nov. 2017); see also 82 Fed. Reg. 55939 (Nov. 21, 2017).

In assessing whether any unforeseen developments led to crystalline silicon photovoltaic cells (whether or not partially or fully assembled into other products) (“CSPV products”) being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry producing an article like or directly competitive with the imported article, we first considered the relevant legal context. In this regard, we have looked to jurisprudence from the World Trade Organization (“WTO”) for guidance. Although the WTO Agreement on Safeguards (“Safeguards Agreement”) and the corresponding U.S. implementing statute do not refer to the term “unforeseen developments,” the WTO Appellate Body interpreted the Safeguards Agreement to require that any safeguard measure also comport with the unforeseen developments provision of Article XIX:1(a) of the General Agreement on Tariffs and Trade 1994 (“GATT 1994”).² Under this provision,

{i}f as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.³

Based on *Webster’s Third New International Dictionary* and *Black’s Law Dictionary* definitions, the Appellate Body equated “unforeseen” with “unexpected” and not “unforeseeable,” which the dictionaries define as “unpredictable” or “incapable of being foreseen, foretold, or

² Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear (EC)*, WT/DS/121 (“*Argentina – Footwear (EC)*”) paras. 78-98; Appellate Body Report, *Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products (“Korea – Dairy”)*, WT/DS/98 paras. 76-92.

³ Article XIX:1(a) of GATT 1994.

anticipated.”⁴ Thus, the Appellate Body explained that “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.’”⁵

The Appellate Body has stated that “the ‘unforeseen developments’ must ‘result’ in increased imports of the product (‘such product’) that is subject to a safeguard measure,”⁶ and that “{b}ecause the ‘increased imports’ must be ‘as a result’ of an event that was ‘unforeseen’ or ‘unexpected,’ it follows that the increased imports must also be ‘unforeseen’ or ‘unexpected.’”⁷ Thus, as a more recent WTO panel summarized, before the safeguard measure is applied, the competent authority must demonstrate unforeseen developments, examining why the mentioned factors may be regarded as “an unforeseen development,” offering an explanation for it, and providing an explanation of how the unforeseen developments resulted in the increase in imports causing the serious injury in question.⁸

⁴ Appellate Body Report, *Argentina – Footwear (EC)*, WT/DS/121 para 91; Appellate Body Report, *Korea – Dairy*, WT/DS98 para. 84.

⁵ Appellate Body Report, *Argentina – Footwear (EC)*, WT/DS/121 para 91, 96; Appellate Body Report, *Korea – Dairy*, WT/DS98 para. 84, 89 (referring to GATT Working Party Report, *Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade*, GATT/CP/106, para. 9 (adopted Oct. 22, 1951)).

⁶ Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products (“US – Steel Safeguards”)*, WT/DS259 para. 315.

⁷ Appellate Body Report, *US – Steel Safeguards*, WT/DS259 para. 350.

⁸ Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415R paras. 7.128, 7.149; *see also* Appellate Body Report, *US – Steel Safeguards*, WT/DS259 paras. 315-319, 350; Appellate Body Report, *Argentina – Footwear (EC)*, WT/DS/121 paras. 91-92, 96; Appellate Body Report, *Korea – Dairy*, WT/DS98 paras. 84, 89; Panel Report, *US – Steel Safeguards*, WT/DS248 paras. 10.39 and 10.41 to 10.43. Several respondents argued that any declines in prices of CSPV products were foreseeable developments. *See, e.g.*, Transcript of Commission’s August 15, 2017 Hearing on Injury Issues (“Injury Hearing Transcript”) at 399-404. We addressed in our injury views their arguments regarding factors other than imports that allegedly led to price declines. *See, e.g.*, USITC Pub. 4739 at 41-43, 61-65; Confidential Injury Views, EDIS Doc. 628913 file 1241487-628913

Based on the data and other information we evaluated at the time that we reached our affirmative injury determination in this case, we 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.

In this case, the increased imports were largely attributable to increased CSPV cell and CSPV module capacity by Chinese producers both within China and globally.⁹ The United States has been a GATT member since January 1, 1948, and has incurred the obligations of WTO membership since January 1, 1995, whereas the government of China acceded to the WTO effective December 11, 2001. Prior to China's WTO accession, there were a series of negotiations with individual and collective WTO members, including the United States, before they agreed to extend the WTO's trade liberalization and market access benefits to China.¹⁰ As part of its WTO accession, the government of China made a series of commitments concerning a variety of topics, including non-discrimination; transparency; investment; state-owned and state-invested enterprises; pricing policies; and fiscal, financial, and budgetary activities by the central government and sub-national levels of government.¹¹ For example, the government of China agreed to implement market-oriented economic reforms and to abide by WTO rules and

at 56-59, 85-90. We describe below why we found that the increase in imports was unforeseen, an issue also briefed by the parties during the injury phase of this investigation. *See, e.g.*, SEIA's Prehearing Injury Brief at 160-61; SEIA's Posthearing Injury Brief at Exhibit A at 109-11; KOPIA's Prehearing Injury Brief at 51-53; Government of China's Posthearing Injury Statement at 6; EU Posthearing Injury Statement at 2; Government of Indonesia's Prehearing Injury Brief at 7; KOPIA's Posthearing Injury Brief at 14-15.

⁹ USITC Pub. 4739 at 40-41, 44-45; Confidential Injury Views at 54-55, 61-63.

¹⁰ Imported 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. CR at I-52; PR at I-38.

¹¹ Report of the Working Party on the Accession of China, WTO Doc. WT/ACC/CHN/49 (Oct. 1, 2001) (*cited in* SolarWorld's Prehearing Injury Brief at 79-81).

principles, including to “allow prices for traded goods and services in every sector to be determined by market forces,” to “eliminate all subsid{ies}” contingent on export performance or the use of domestic goods, and to “not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises.”¹²

In direct contradiction of these commitments – and unforeseen by the U.S. negotiators 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 – the government of China implemented a series of industrial policies, five-year plans, and other government support programs favoring renewable energy product manufacturing, including CSPV products. The government of China’s industrial policies, plans, and support programs took advantage of the existence of programs implemented by the U.S. government to encourage renewable energy consumption that, consistent with U.S. WTO obligations, did not favor U.S. manufacturers but instead were directed at owners of renewable energy systems.¹³ These industrial policies, plans, and government support took a variety of forms and led to vast overcapacity in China and subsequently in other countries as Chinese producers built facilities elsewhere, which in turn ultimately resulted in the increased imports of CSPV products causing serious injury to the domestic industry in the United States.

On October 19, 2011, U.S. producer SolarWorld filed antidumping and countervailing duty petitions regarding U.S. imports of CSPV products from China. After conducting investigations of these imports, the U.S. Department of Commerce (“Commerce”) issued a final

¹² SolarWorld’s Prehearing Injury Brief at 79-81 (citing Report of the Working Party on the Accession of China, WTO Doc. WT/ACC/CHN/49 at 10 para. 50, 33 para. 167, 9 para. 46 (Oct. 1, 2001)).

¹³ CR at V-51; PR at V-31.

affirmative antidumping duty determination finding *ad valorem* antidumping duty margins of at least 18 percent for certain individual firms and as high as 249.46 percent for all others.¹⁴ Commerce also identified twelve programs that provided countervailable subsidies to producers/exporters in China and assigned subsidy rates of 14 percent to 16 percent to their imports.¹⁵ Among others, the countervailable subsidies included programs involving 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.¹⁶ The Commission found that the domestic industry was materially injured by reason of these unfairly traded imports from China.¹⁷ As a result, the United States imposed antidumping and countervailing duty orders on dumped and subsidized U.S. imports of CSPV cells produced in China, CSPV modules assembled in China from CSPV cells made in China, and CSPV modules assembled in third countries from CSPV cells made in China.¹⁸

Before those imports began to recede from the U.S. market, imports of CSPV modules assembled in China from CSPV cells manufactured outside of China, CSPV cells manufactured in Taiwan, and CSPV modules manufactured outside of China from CSPV cells manufactured in

¹⁴ 77 Fed. Reg. 63791 (Oct. 17, 2012); *Crystalline Silicon Photovoltaic Cells and Modules from China*, Inv. Nos. 701-TA-481 and 731-TA-1190 (Final), USITC Pub. 4360 at 35, I-4 (Nov. 2012) (“CSPV I”).

¹⁵ 77 Fed. Reg. 63788 (Oct. 17, 2012); USITC Pub. 4360 at 35, I-5.

¹⁶ 77 Fed. Reg. 63788 (Oct. 17, 2012); USITC Pub. 4360 at 35, I-5; *see also, e.g.*, Petitioners' Prehearing Injury Brief at 75-80, Exhibit 2-56 to Exhibit 2-66, Exhibit 12, Exhibit 21 to Exhibit 24; Injury Hearing Transcript at 228-29 (Brightbill).

¹⁷ USITC Pub. 4360 at 3-38; Confidential *CSPV I* Views, EDIS Doc. 618909, file 1215366 at 3-58.

¹⁸ 77 Fed. Reg. 73017 (Dec. 7, 2012); 77 Fed. Reg. 73018 (Dec. 7, 2012); USITC Pub. 4739 at 44; Confidential Injury Views at 60-61.

Taiwan increased their presence in the U.S. market.¹⁹ On December 31, 2013, SolarWorld filed additional countervailing and/or antidumping duty petitions regarding those imports of CSPV products from China and Taiwan. Based on its investigation of those imports, Commerce assigned antidumping duty margins of 26.71 percent to 165.04 percent on imports from China and 11.45 percent to 27.55 percent on imports from Taiwan, and it assigned subsidy rates of 27.64 to 49.79 percent on imports from China.²⁰ Commerce again identified a variety of countervailable programs in China, including grants; provision of inputs or land for less than adequate remuneration; preferential loans and directed credit; tax benefit programs; value added tax rebates on equipment purchases; export guarantees and insurance for green technology; and export credit subsidies.²¹ The Commission found that the domestic industry was materially injured by reason of these unfairly traded imports from China and Taiwan.²² Effective February 18, 2015, the United States imposed antidumping and countervailing duty orders on those imports from China, and it imposed an antidumping duty order on imports from Taiwan.²³

During a period of favorable government industrial policies, plans, and support, capacity and production of CSPV products in China increased significantly.²⁴ A substantial share of the CSPV modules manufactured in China was directed to markets outside of China.²⁵

¹⁹ *Crystalline Silicon Photovoltaic Products from China and Taiwan*, Inv. Nos. 701-TA-511 and 731-TA-1246 to 1247 (Final), USITC Pub. 4519 at 34 (Feb. 2015) (“CSPV II”).

²⁰ USITC Pub. 4519 at 44, I-5 to I-6.

²¹ USITC Pub. 4519 at 44, I-5 to I-6.

²² USITC Pub. 4519 at 3-50; *Confidential CSPV II Views*, EDIS Doc. 618909, file 1215370 at 3-71.

²³ 80 Fed. Reg. 8597 (Feb. 18, 2015); 80 Fed. Reg. 8596 (Feb. 18, 2015); 80 Fed. Reg. 8592 (Feb. 8, 2015); USITC Pub. 4739 at 43-44; *Confidential Injury Views* at 60-61.

²⁴ According to questionnaire data, CSPV cell production capacity in China increased from 16,698,039 kW in 2012 to 19,299,708 kW in 2013, 22,186,285 kW in 2014, 26,457,091 kW in 2015, and 33,133,986 kW in 2016, and CSPV cell production increased from 11,124,972 kW in 2012 to

Before the *CSPV II* orders became effective in February 2015, imports from additional countries entered the U.S. market.²⁶ By the end of 2015, imports had almost doubled their level from 2014, and imports continued to grow into 2016.²⁷ Notably, the six largest firms producing CSPV cells and CSPV modules in China increased their global CSPV cell and CSPV module manufacturing capacity by expanding investments in third countries without reducing their capacity in China.²⁸ Imports from four countries where Chinese affiliates added both

14,027,686 kW in 2013, 18,537,642 kW in 2014, 22,720,444 kW in 2015, and 27,779,992 kW in 2016. Confidential Report, Memorandum INV-PP-119 (Sept. 11, 2017), *as corrected by* Memorandum INV-PP-139 (Oct. 31, 2017) (“CR”) at Table IV-21; Public Report, USITC Pub. 4739 (“PR”) at Table IV-21. According to questionnaire data, CSPV module production capacity in China increased from 20,131,407 kW in 2012 to 22,767,513 kW in 2013, 27,994,412 kW in 2014, 34,715,630 kW in 2015, and 46,399,800 kW in 2016, and CSPV module production increased from 12,462,092 kW in 2012 to 16,326,264 kW in 2013, 22,071,981 kW in 2014, 28,792,042 kW in 2015, and 35,470,622 kW in 2016. CR/PR at Table IV-22. Questionnaire data understate capacity and production levels in China for both CSPV cell and module operations. CR at IV-36; PR at IV-23. According to publicly available information, CSPV cell production capacity in China increased from 40 GW in 2012 to 53 GW in 2015 (the most recent year available), and production of CSPV cells in China increased from 21 GW in 2012 to 49 GW in 2016. CR at IV-47; PR at IV-30. Publicly available information indicates that CSPV module production capacity in China increased from 40 GW in 2012 to 71 GW in 2015 (the most recent year available), and total production of CSPV modules in China more than doubled from 23 GW in 2012 to 53 GW in 2016. CR at IV-50; PR at IV-32.

²⁵ According to questionnaire data, home market shipments accounted for 20.4 percent of total shipments by the industry in China in 2012, 36.4 percent in 2013, 36.2 percent in 2014, 45.2 percent in 2015, and 59.8 percent in 2016. CR/PR at Table IV-22. SolarWorld observes that an explicit goal of the government of China’s programs, plans, and support was to expand capacity and production and to target export markets where governments offered support for solar installations (*i.e.*, solar consumption). SolarWorld’s Posthearing Injury Brief at Exhibit 1 at 77-78. Although a greater share of this production was consumed in China more recently, production capacity in China continued to greatly exceed consumption of CSPV products in China. *See, e.g.*, CR/PR at Table IV-22 (indicating that by 2016, CSPV module capacity in China of 46,399,800 kW greatly exceeded home market shipments of 20,686,496 kW). *See also generally* Suniva’s Posthearing Injury Brief at Exhibit 9 at 24-25; SolarWorld’s Prehearing Injury Brief at 80-85, Exhibit 2-67 to Exhibit 2-73; Suniva’s Prehearing Injury Brief at 81-83; Injury Hearing Transcript at 228-29 (Brightbill). In addition, the absolute volume of exports of CSPV modules from China increased from 9,607,543 kW in 2012 to 13,928,826 kW in 2016. CR/PR at Table IV-22.

²⁶ CR/PR at Table IV-3, Table C-1b; USITC Pub. 4739 at 44; Confidential Injury Views at 61.

²⁷ CR/PR at Table IV-3, Table C-1b; USITC Pub. 4739 at 44; Confidential Injury Views at 61.

²⁸ CR/PR at Table IV-17, Table IV-18 (referring to Canadian Solar (China), Hanwha Qidong (China), Shanghai JA Solar, Jinko Solar (China), Changzhou Trina (China), and Yingli Green); Injury Hearing Transcript at 401 (Prusa); USITC Pub. 4739 at 44; Confidential Injury Views at 62.

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 2015.²⁹

Although the composition of imports changed between 2012 and 2016, imports from China maintained a substantial presence in the U.S. market throughout the period of investigation despite the existence of two sets of antidumping and countervailing duty orders.³⁰ The large and attractive nature of the U.S. market and the large and growing size of the export-oriented foreign industries caused U.S. imports of CSPV products to increase both absolutely and relative to domestic production in each year since 2012, reaching record highs in 2016.³¹

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

²⁹ CR/PR at Table IV-3, Table C-1b; USITC Pub. 4739 at 44-45; Confidential Injury Views at 62. The foreign industries' collective CSPV cell capacity increased from 27.3 million kW in 2012 to 31.2 million kW in 2013, 36.4 million kW in 2014, 43.3 million kW in 2015, and 56.9 million kW in 2016. CR/PR at Table IV-89. Their collective CSPV module capacity increased from 25.2 million kW in 2012 to 29.2 million kW in 2013, 36.4 million kW in 2014, 47.9 million kW in 2015, and 66.6 million kW in 2016. CR/PR at Table IV-90. Their excess capacity, which grew between 2014 and 2016, consistently exceeded the size of the entire U.S. market. The foreign industries' excess CSPV module capacity was 9.4 million kW in 2012, 8.3 million kW in 2013, and increased from 7.8 million kW in 2014 to 9.4 million kW in 2015 and 15.2 million kW in 2016. Derived from CR/PR at Table IV-90. These levels consistently exceeded apparent U.S. consumption of *** kW in 2012, *** kW in 2013, *** kW in 2014, *** kW in 2015, and *** kW in 2016. CR/PR at Table C-1b.

³⁰ CR/PR at Table IV-4; USITC Pub. 4739 at 45; Confidential Injury Views at 62.

³¹ Imports increased absolutely from 2.2 million kW in 2012 to 3.1 million kW in 2013, 4.6 million kW in 2014, 8.4 million kW in 2015, and 12.8 million kW in 2016. CR/PR at Table II-2, Table IV-3, Table C-1b. As a ratio to domestic production, imports increased from 733.9 percent in 2012 to 948.4 percent in 2013, 1,141.0 percent in 2014, 1,593.5 percent in 2015, and 2,276.2 percent in 2016. CR/PR at Table II-2, Table IV-3, Table C-1b; USITC Pub. 4739 at 45; Confidential Injury Views at 62-63.

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.³² These unforeseen developments led to CSPV products being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry producing an article like or directly competitive with the imported article.

³² As petitioners observed and the events described above support, in order to avoid the remedies on unfair trade imposed by the United States, firms in China took steps that resulted in increased imports, including by using CSPV cells manufactured in Taiwan while continuing to assemble CSPV modules in China and by investing heavily in CSPV production elsewhere in Asia, particularly Southeast Asia and South Korea. *See, e.g.*, CR/PR at Table IV-17 and Table IV-18 (showing rapid increases in CSPV cell and CSPV module production capacity, particularly in South Korea and Malaysia); SolarWorld's Prehearing Injury Brief at 18-19, 78-85 (also describing efforts to evade EU measures); Suniva's Prehearing Injury Brief at 30-34, 81-82; SolarWorld's Posthearing Injury Brief, Exhibit 1 at 77-79, 91-93, Exhibit 2-11, Exhibit 2-12, Exhibit 40; Suniva's Posthearing Injury Brief at Exhibit 9 at 24-25.