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

REPORT OF THE PANEL

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## CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , <a href="#">WT/DS121/AB/R</a> , adopted 12 January 2000, DSR 2000:I, p. 515
<i>Argentina – Footwear (EC)</i>	Panel Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , <a href="#">WT/DS121/R</a> , adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R, DSR 2000:II, p. 575
<i>Argentina – Preserved Peaches</i>	Panel Report, <i>Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches</i> , <a href="#">WT/DS238/R</a> , adopted 15 April 2003, DSR 2003:III, p. 1037
<i>Australia – Salmon</i>	Panel Report, <i>Australia – Measures Affecting Importation of Salmon</i> , <a href="#">WT/DS18/R</a> and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS18/AB/R, DSR 1998:VIII, p. 3407
<i>Canada – Continued Suspension</i>	Panel Report, <i>Canada – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , <a href="#">WT/DS321/R</a> and Add.1 to Add.7, adopted 14 November 2008, as modified by Appellate Body Report WT/DS321/AB/R, DSR 2008:XV, p. 5757
<i>China – Cellulose Pulp</i>	Panel Report, <i>China – Anti-Dumping Measures on Imports of Cellulose Pulp from Canada</i> , <a href="#">WT/DS483/R</a> and Add.1, adopted 22 May 2017, DSR 2017:IV, p. 1961
<i>Dominican Republic – Safeguard Measures</i>	Panel Report, <i>Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric</i> , <a href="#">WT/DS415/R</a> , <a href="#">WT/DS416/R</a> , <a href="#">WT/DS417/R</a> , <a href="#">WT/DS418/R</a> , and Add.1, adopted 22 February 2012, DSR 2012:XIII, p. 6775
<i>India – Agricultural Products</i>	Panel Report, <i>India – Measures Concerning the Importation of Certain Agricultural Products</i> , <a href="#">WT/DS430/R</a> and Add.1, adopted 19 June 2015, as modified by Appellate Body Report WT/DS430/AB/R, DSR 2015:V, p. 2663
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , <a href="#">WT/DS50/AB/R</a> , adopted 16 January 1998, DSR 1998:I, p. 9
<i>Indonesia – Iron or Steel Products</i>	Panel Report, <i>Indonesia – Safeguard on Certain Iron or Steel Products</i> , <a href="#">WT/DS490/R</a> , <a href="#">WT/DS496/R</a> , and Add.1, adopted 27 August 2018, as modified by Appellate Body Report WT/DS490/AB/R, WT/DS496/AB/R DSR 2018:VII, p. 3707
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , <a href="#">WT/DS8/AB/R</a> , <a href="#">WT/DS10/AB/R</a> , <a href="#">WT/DS11/AB/R</a> , adopted 1 November 1996, DSR 1996:I, p. 97
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , <a href="#">WT/DS98/AB/R</a> , adopted 12 January 2000, DSR 2000:I, p. 3
<i>Korea – Dairy</i>	Panel Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , <a href="#">WT/DS98/R</a> and Corr.1, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R, DSR 2000:I, p. 49
<i>Russia – Pigs (EU)</i>	Panel Report, <i>Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union</i> , <a href="#">WT/DS475/R</a> and Add.1, adopted 21 March 2017, as modified by Appellate Body Report WT/DS475/AB/R, DSR 2017:II, p. 361
<i>Ukraine – Passenger Cars</i>	Panel Report, <i>Ukraine – Definitive Safeguard Measures on Certain Passenger Cars</i> , <a href="#">WT/DS468/R</a> and Add.1, adopted 20 July 2015, DSR 2015:VI, p. 3117
<i>US – Continued Suspension</i>	Panel Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , <a href="#">WT/DS320/R</a> and Add.1 to Add.7, adopted 14 November 2008, as modified by Appellate Body Report WT/DS320/AB/R, DSR 2008:XI, p. 3891
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , <a href="#">WT/DS177/AB/R</a> , <a href="#">WT/DS178/AB/R</a> , adopted 16 May 2001, DSR 2001:IX, p. 4051
<i>US – Lamb</i>	Panel Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , <a href="#">WT/DS177/R</a> , <a href="#">WT/DS178/R</a> , adopted 16 May 2001, as modified by Appellate Body Report WT/DS177/AB/R, WT/DS178/AB/R, DSR 2001:IX, p. 4107

Short Title	Full Case Title and Citation
<i>US – Line Pipe</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , <a href="#">WT/DS202/AB/R</a> , adopted 8 March 2002, DSR 2002:IV, p. 1403
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , <a href="#">WT/DS248/AB/R</a> , <a href="#">WT/DS249/AB/R</a> , <a href="#">WT/DS251/AB/R</a> , <a href="#">WT/DS252/AB/R</a> , <a href="#">WT/DS253/AB/R</a> , <a href="#">WT/DS254/AB/R</a> , <a href="#">WT/DS258/AB/R</a> , <a href="#">WT/DS259/AB/R</a> , adopted 10 December 2003, DSR 2003:VII, p. 3117
<i>US – Steel Safeguards</i>	Panel Reports, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , <a href="#">WT/DS248/R</a> and Corr.1 / <a href="#">WT/DS249/R</a> and Corr.1 / <a href="#">WT/DS251/R</a> and Corr.1 / <a href="#">WT/DS252/R</a> and Corr.1 / <a href="#">WT/DS253/R</a> and Corr.1 / <a href="#">WT/DS254/R</a> and Corr.1 / <a href="#">WT/DS258/R</a> and Corr.1 / <a href="#">WT/DS259/R</a> and Corr.1, adopted 10 December 2003, as modified by Appellate Body Report <a href="#">WT/DS248/AB/R</a> , <a href="#">WT/DS249/AB/R</a> , <a href="#">WT/DS251/AB/R</a> , <a href="#">WT/DS252/AB/R</a> , <a href="#">WT/DS253/AB/R</a> , <a href="#">WT/DS254/AB/R</a> , <a href="#">WT/DS258/AB/R</a> , <a href="#">WT/DS259/AB/R</a> , DSR 2003:VIII, p. 3273
<i>US – Tyres (China)</i>	Appellate Body Report, <i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , <a href="#">WT/DS399/AB/R</a> , adopted 5 October 2011, DSR 2011:IX, p. 4811
<i>US – Tyres (China)</i>	Panel Report, <i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , <a href="#">WT/DS399/R</a> , adopted 5 October 2011, upheld by Appellate Body Report <a href="#">WT/DS399/AB/R</a> , DSR 2011:IX, p. 4945
<i>US – Washing Machines (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea – Recourse to Article 22.6 of the DSU by the United States</i> , <a href="#">WT/DS464/ARB</a> and Add.1, 8 February 2019
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , <a href="#">WT/DS166/AB/R</a> , adopted 19 January 2001, DSR 2001:II, p. 717
<i>US – Wheat Gluten</i>	Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , <a href="#">WT/DS166/R</a> , adopted 19 January 2001, as modified by Appellate Body Report <a href="#">WT/DS166/AB/R</a> , DSR 2001:III, p. 779
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , <a href="#">WT/DS33/AB/R</a> , adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323



**EXHIBITS REFERRED TO IN THIS REPORT**

<b>Exhibit</b>	<b>Short Title (if any)</b>	<b>Description</b>
CHN-1	Presidential Proclamation	Presidential Documents, United States Federal Register, Vol. 83, No. 17 (25 January 2018), pp. 3541-3551
CHN-2	USITC final report	USITC, Public report, Crystalline silicon photovoltaic cells (whether or not partially or fully assembled into other products), Inv. No. TA-201-75, Pub. 4739, Vol. I (November 2017)
CHN-3	USITC final staff report	USITC, Public report, Crystalline silicon photovoltaic cells (whether or not partially or fully assembled into other products), Inv. No. TA-201-75, Pub. 4739, Vol. II (November 2017)
CHN-6	USITC supplemental report	USITC, Supplemental report regarding unforeseen developments (27 December 2017)
CHN-9	Transcript of the USITC injury hearing	Transcript of the USITC hearing on injury (15 August 2017)
CHN-19	Econometric report	Thomas J. Prusa and J. Landon-Lane, <i>Econometric Analysis of Residential and Utility-Scale CSPV Pricing</i> (4 August 2017)
CHN-20	SEIA prehearing brief	Solar Energy Industries Association, prehearing injury brief (8 August 2017)
CHN-60		SEIA executive summary of US solar market on 2016
CHN-69	Affidavit of Jay Miles, Russell Pacific	Affidavit of Jay Miles, Russell Pacific (4 August 2017)
CHN-98	Affidavit of Kenny Hughes, Radiance Solar	Affidavit of Kenny Hughes, Radiance Solar (4 August 2017)
CHN-99	Affidavit of Laura E. Stern, Nautilus Solar	Affidavit of Laura E. Stern, Nautilus Solar (7 August 2017)
CHN-100	Affidavit of Zaid Ashai, Nexamp	Affidavit of Zaid Ashai, Nexamp (3 August 2017)
CHN-101	Affidavit of Richard Matsui, kWh Analytics	Affidavit of Richard Matsui, kWh Analytics (4 August 2017)
CHN-104	Affidavit of George W. Hershman, Swinerton Renewable Energy	Affidavit of George W. Hershman, Swinerton Renewable Energy (4 August 2017)
CHN-157	Affidavit of Craig Cornelius, NRG	Affidavit of Craig Cornelius, NRG (22 August 2017)
CHN-170		Supporting footnotes regarding purchasers complaints on service and delivery issues
USA-1	19 C.F.R. § 206.17	Limited disclosure of certain confidential business information under administrative protective order, United States Code of Federal Regulations, Title 19, Section 206.17 (7 November 2011)
USA-7	Application for disclosure of CBI under administrative protective order	USITC, Application for disclosure of confidential business information under administrative protective order (revised March 2005)
USA-9	Notification of final date for compliance with APO CBI requirements	USITC, Notification of final date for compliance with Administrative Protective Order confidential business information requirements, Crystalline silicon photovoltaic cells (whether or not partially or fully assembled into other products) (14 November 2017)
USA-10	SEIA's posthearing remedy brief	Solar Energy Industries Association's written response to comments concerning the administration's action following a determination of import injury with regard to certain crystalline silicon photovoltaic cells (29 November 2017)
USA-11	USITC CSPV I final report	USITC, Certain crystalline silicon photovoltaic cells and modules from China, Inv. Nos. 701-TA-481 and 731-TA-1190 (Final), Pub. 4360 (November 2012)
USA-12	USITC CSPV II final report	USITC, Certain crystalline silicon photovoltaic products from China and Taiwan, Inv. Nos. 701-TA-511 and 731-TA-1246 to 1247 (Final), Pub. 4519 (February 2015)
USA-16	SolarWorld's posthearing injury brief	Crystalline silicon photovoltaic cells (whether or not partially or fully assembled into other products): posthearing brief on injury of SolarWorld Americas, Inc. (23 August 2017)
USA-17	Suniva's posthearing injury brief	Crystalline silicon photovoltaic cells (whether or not partially or fully assembled into other products): posthearing brief of Suniva, Inc. (22 August 2017)

Exhibit	Short Title (if any)	Description
USA-24	USDOC final CVD determination	Crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China: final affirmative countervailing duty determination and final affirmative critical circumstances determination, United States Federal Register, Vol. 77, No. 201 (17 October 2012)
USA-25	Issues and decision memorandum on CVD	Memorandum dated 9 October 2012 from C. Marsh to P. Piquado concerning the issues and decision memorandum for the final determination in the countervailing duty investigation of crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China

**ABBREVIATIONS USED IN THIS REPORT**

<b>Abbreviation</b>	<b>Description</b>
APO	administrative protective order
California Solar Systems	California Solar Systems, Inc.
CBI	confidential business information
CSPV products	crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products (including, but not limited to, modules, laminates, panels, and building-integrated materials)
<i>CSPV I</i>	US anti-dumping and countervailing duties on imports of CSPV from China (2012)
<i>CSPV II</i>	US anti-dumping and countervailing duties on certain CSPV products from China and Chinese Taipei (2015)
CVD	countervailing duty
DEPCOM	DEPCOM Power, Inc.
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
FITC	Federal Investment Tax Credit
GATT 1994	General Agreement on Tariffs and Trade 1994
Hanwha	Hanwha Q Cells
Hanwha Qidong	Hanwha Q Cells (Qidong) Co., Ltd.
HS	Harmonized system
HTS	Harmonized Tariff Schedule
LCOE	levelized cost of electricity
MW	MegaWatt
NRG	NRG Energy Inc.
PERC	passivated emitter and rear contact
P-max	maximum power
POI	period of investigation
PRW	production and related workers
R&D	research and development
SEIA	Solar Energy Industries Association
SolarWorld	SolarWorld Americas, Inc.
Suniva	Suniva, Inc.
SunPower	SunPower Corporation
TPSC	Trade Policy Staff Committee
USDOC	United States Department of Commerce
USITC	United States International Trade Commission
USTR	United States Trade Representative
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WARN Act	Worker Adjustment and Retraining Notification Act
WTO	World Trade Organization
Wp	watt-peak

## **1 INTRODUCTION**

### **1.1 Complaint by China**

1.1. On 14 August 2018, China requested consultations with the United States pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 14 of the Agreement on Safeguards with respect to the measures and claims set out below.<sup>1</sup>

1.2. Consultations were held on 22 October 2018, but failed to resolve the dispute.

### **1.2 Panel establishment and composition**

1.3. On 11 July 2019, China requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994, and Article 14 of the Agreement on Safeguards with standard terms of reference.<sup>2</sup> At its meeting on 15 August 2019, the Dispute Settlement Body (DSB) established a panel pursuant to the request of China in document WT/DS562/8, in accordance with Article 6 of the DSU.<sup>3</sup>

1.4. The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by China in document WT/DS562/8 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.<sup>4</sup>

1.5. On 14 October 2019, China requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 24 October 2019, the Director-General composed the Panel as follows:

Chairperson: Mr Guillermo Valles

Members: Mr José Antonio de la Puente León  
Ms Chantal Ononaiwu

1.6. Brazil, Canada, the European Union, India, Japan, the Republic of Korea, Malaysia, Philippines, the Russian Federation, and Chinese Taipei notified their interest in participating in the Panel proceedings as third parties.

### **1.3 Panel proceedings**

1.7. After consultation with the parties, the Panel adopted its Working Procedures<sup>5</sup>, Additional Working Procedures on Business Confidential Information<sup>6</sup>, and timetable on 20 December 2019. In adopting its Working Procedures, the Panel declined the request of the United States to make the first and second substantive meetings – in whole or in part – open to public observation by other WTO Members and the public. The timetable was further revised during the panel proceedings in light of subsequent developments.<sup>7</sup>

1.8. China submitted its first written submission on 10 January 2020, and the United States submitted its first written submission on 21 February 2020. Due to the imposition of various restrictions on gatherings and international travel in relation to the COVID-19 pandemic, on 14 April 2020 the Panel postponed the original dates for the first substantive meeting. To facilitate

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<sup>1</sup> Request for consultations by China, WT/DS562/1 (China's consultations request).

<sup>2</sup> Request for the establishment of a panel by China, WT/DS562/8 (China's panel request).

<sup>3</sup> DSB, Minutes of meeting held on 15 August 2019, WT/DSB/M/433.

<sup>4</sup> Constitution note of the Panel, WT/DS562/9.

<sup>5</sup> See the Panel's Working Procedures in Annex A-1.

<sup>6</sup> See the Panel's Working Procedures on Business Confidential Information in Annex A-2.

<sup>7</sup> The timetable was updated and revised on 14 April 2020, 9 June 2020, 14 August 2020, 4 September 2020, 21 September 2020, 9 October 2020, 23 November 2020, 8 March 2021, and 19 May 2021.

its continued work on the dispute, on 8 May 2020 the Panel posed written questions to the parties and third parties concerning certain factual and legal issues, pursuant to its authority under the *chapeau* of paragraph 9 of the Working Procedures of the Panel and Article 13 of the DSU. The Panel received the parties' and certain third parties' responses to these questions on 29 May 2020, and comments from the parties on these responses on 30 June 2020.

1.9. Thereafter, in light of the continuation of the restrictions imposed on gatherings and international travel in relation to the COVID-19 pandemic, the Panel determined that it would still not be possible to hold the first substantive meeting in person at the WTO premises within a reasonable timeframe. Accordingly, after several rounds of consultations with the parties, on 14 August 2020 the Panel decided to hold the first substantive meeting virtually through the Cisco Webex platform. The Panel decided to proceed in this manner after careful consideration of the circumstances at hand. Since it did not appear likely that the parties and the Panel would be able to meet in person at the WTO premises in the foreseeable future, the Panel considered that conducting the first substantive meeting virtually was a reasonable and secure alternative that would comply with the requirements of the DSU, preserve the parties' due process rights, and avoid further delay in the proceedings.<sup>8</sup> For the purpose of the virtual substantive meeting, after again consulting with the parties, the Panel adopted Additional Working Procedures of the Panel Concerning Substantive Meetings Conducted via Cisco Webex<sup>9</sup> on 9 September 2020. These procedures stipulated how the virtual meeting would be conducted and set out certain technical and security requirements. Throughout this process, the Panel made its best effort to accommodate technological and logistical concerns raised by the parties. The Panel held the first substantive meeting with the parties on 15 and 18 September 2020. The third-party session of the first substantive meeting took place on 17 September 2020. On 21 September 2020, the Panel posed the second set of written questions to the parties and third parties. The Panel received the parties' and certain third parties' responses to these questions on 12 October 2020. This was followed by the second written submissions of the parties, which the Panel received on 6 November 2020.

1.10. Due to the continuing restrictions imposed on gatherings and international travel in relation to the COVID-19 pandemic, the Panel determined that it would not be possible to meet with the parties in person at the WTO premises for the second substantive meeting within a reasonable timeframe. Therefore, after consultations with the parties, the Panel decided to hold the second substantive meeting virtually through the Cisco Webex platform. For the purpose of this virtual substantive meeting, after again consulting with the parties, the Panel adopted Additional Working Procedures of the Panel Concerning Substantive Meetings Conducted via Cisco Webex – Second Substantive Meeting Update<sup>10</sup> on 3 December 2020. Throughout this process, the Panel again made its best effort to accommodate technological and logistical concerns raised by the parties. The Panel held its second substantive meeting with the parties on 9, 10, and 11 December 2020. On 15 December 2020, the Panel posed the third set of written questions to the parties. The Panel received the parties' responses to these questions on 15 January 2021, and comments from the parties on these responses on 29 January 2021.

1.11. On 12 March 2021, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 26 May 2021. The Panel issued its Final Report to the parties on 16 July 2021.

## 2 FACTUAL ASPECTS

### 2.1 The measures at issue

2.1. This dispute concerns a safeguard measure imposed by the United States with regard to imports of certain crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products (including, but not limited to, modules, laminates, panels, and building-integrated materials) (CSPV products), pursuant to "Proclamation 9693 of

<sup>8</sup> In this regard, we note that Article 3.3 of the DSU contemplates the prompt settlement of disputes while Article 12 of the DSU provides panels with flexibility in terms of the procedures that govern the panel process.

<sup>9</sup> See the Additional Working Procedures of the Panel Concerning Substantive Meetings Conducted via Cisco Webex in Annex A-3.

<sup>10</sup> See the Additional Working Procedures of the Panel Concerning Substantive Meetings Conducted via Cisco Webex – Second Substantive Meeting Update in Annex A-4.

January 23, 2018 – To Facilitate Positive Adjustment to Competition from Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled Into Other Products) and for Other Purposes", published in the 83 US Federal Register 3541 on 25 January 2018.<sup>11</sup>

## 2.2 Other factual aspects

2.2. In May 2017, two firms representing the United States' domestic industry, Suniva, Inc. (Suniva) and SolarWorld Americas, Inc. (SolarWorld), petitioned the United States International Trade Commission (USITC) seeking the imposition of a safeguard measure on imports of CSPV products from all sources. After conducting an investigation, the USITC unanimously determined in its final report of 13 November 2017 that CSPV products were being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry producing an article like or directly competitive with the imported article. In response to a request from the United States Trade Representative (USTR) for further information, the USITC issued a supplemental report on 27 December 2017, wherein the USITC determined that unforeseen developments had resulted in 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. Following the receipt of these reports, on 23 January 2018 the President of the United States decided to impose a safeguard measure beginning on 7 February 2018.<sup>12</sup>

2.3. The safeguard measure took the form of (a) a 2.5GW tariff-rate quota on imports of solar cells not partially or fully assembled into other products for a period of four years, with unchanging in-quota quantities and annual reductions in the rates of duty applicable to goods entered in excess of those quantities in the second, third, and fourth years; and (b) *ad valorem* duties on imports of modules for a period of four years, with annual reductions in the duty rates in the second, third, and fourth years.<sup>13</sup>

## 3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. China requests the Panel to find that the safeguard measure imposed by the United States is inconsistent with the United States' obligations under Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3, and 4.2(b) of the Agreement on Safeguards.<sup>14</sup> Specifically, China contends that the United States acted inconsistently with:

- a. Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards because the United States failed to establish, prior to the application of the measures, that the increases in imports were the result of "unforeseen developments" and were the "effect of obligations incurred" under the GATT 1994 by the United States<sup>15</sup>;
- b. Articles 2.1, 3.1, and 4.2(b) of the Agreement on Safeguards because the United States failed to establish the required "causal link" between the increased imports and the serious injury found to exist<sup>16</sup>;
- c. Articles 2.1, 3.1, and 4.2(b) of the Agreement on Safeguards because the United States failed to ensure that injury caused by other factors was not attributed to increased imports<sup>17</sup>; and
- d. Articles 3.1 and 3.2 of the Agreement on Safeguards because the United States provided non-confidential summaries to interested parties with such delay that the parties were not

<sup>11</sup> Presidential Proclamation, (Exhibit CHN-1). The safeguard measure excludes (a) thin film photovoltaic products produced from amorphous silicon, cadmium telluride, or copper indium gallium selenide; (b) CSPV cells, not exceeding 10,000 mm<sup>2</sup> in surface area, that are permanently integrated into a consumer good whose primary function is other than power generation and that consumes the electricity generated by the integrated CSPV cell; and (c) CSPV cells, whether or not partially or fully assembled into other products, if such CSPV cells were manufactured in the United States. (Presidential Proclamation, (Exhibit CHN-1), annex I).

<sup>12</sup> Presidential Proclamation, (Exhibit CHN-1).

<sup>13</sup> Presidential Proclamation, (Exhibit CHN-1).

<sup>14</sup> China's first written submission, para. 318; second written submission, para. 324.

<sup>15</sup> China's panel request, pp. 2-3; first written submission, para. 293.

<sup>16</sup> China's panel request, p. 2; first written submission, heading to section III(A).

<sup>17</sup> China's panel request, p. 2; first written submission, heading to section III(B)(2).

provided with an adequate opportunity to exercise their right to present a defence, and because the actual public summaries were not sufficient so as to permit interested parties to reasonably present a defence.<sup>18</sup>

3.2. The United States requests the Panel to find that China has failed to establish any inconsistency with Article XIX of the GATT 1994 or the Agreement on Safeguards.<sup>19</sup>

#### **4 ARGUMENTS OF THE PARTIES**

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 23 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

#### **5 ARGUMENTS OF THE THIRD PARTIES**

5.1. The arguments of Brazil, Canada, the European Union, Japan, and the Republic of Korea are reflected in their executive summaries, provided in accordance with paragraph 26 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, and C-5). India, Malaysia, Philippines, the Russian Federation, and Chinese Taipei did not submit written or oral arguments to the Panel.

#### **6 INTERIM REVIEW**

6.1. On 26 May 2021, the Panel issued its Interim Report to the parties. On 9 June 2021, China and the United States each submitted written requests for the review of precise aspects of the Interim Report. Following a request from China, the Panel held an interim review meeting with the parties on 23 June 2021. On 30 June 2021, both parties submitted comments on the other party's request for interim review and oral statement at the interim review meeting.

6.2. The parties' requests made at the interim review stage as well as the Panel's discussion and disposition of those requests are set out in Annex A-5.

#### **7 FINDINGS**

##### **7.1 General principles regarding treaty interpretation, standard of review, and burden of proof**

###### **7.1.1 Treaty interpretation**

7.1. Article 3.2 of the DSU provides that the WTO dispute settlement system serves "to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". It further provides that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements".

7.2. The customary rules of interpretation are codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention).<sup>20</sup> Article 31(1) of the Vienna Convention provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Moreover, Article 32 of the Vienna Convention provides for recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, to confirm a meaning resulting from the application of Article 31, or where application

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<sup>18</sup> China's panel request, p. 2; first written submission, para. 302.

<sup>19</sup> United States' first written submission, para. 322.

<sup>20</sup> In this respect, we agree with dispute settlement reports previously adopted by the Dispute Settlement Body (previous DSB reports) that have confirmed this understanding. (See, e.g. Appellate Body Reports, *Japan – Alcoholic Beverages II*, para. 22; and *India – Patents (US)*, paras. 45-46).



of Article 31 leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable.

### 7.1.2 Standard of review

7.3. Article 11 of the DSU sets out a general standard of review for panels, providing, in relevant part, that:

[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements[.]

7.4. With respect to the review of safeguard measures, dispute settlement reports previously adopted by the Dispute Settlement Body (previous DSB reports) have found that the obligation to conduct an "objective assessment" requires panels to evaluate whether the competent authorities provided a "reasoned and adequate explanation" that demonstrates compliance with the relevant obligations.<sup>21</sup> When carrying out this assessment, panels should not engage in a *de novo* review of the evidence or substitute their judgment for that of the competent authorities.<sup>22</sup>

7.5. Moreover, Article 3.1 of the Agreement on Safeguards requires that the competent authorities publish a report that sets forth their "findings and reasoned conclusions reached on all pertinent issues of fact and law".<sup>23</sup> Based on this requirement, previous DSB reports have found that the competent authorities' published report must contain the "reasoned and adequate explanation" that demonstrates compliance with the relevant obligations.<sup>24</sup>

7.6. As we agree with these findings, we will conduct our review of the present matter accordingly.

### 7.1.3 Burden of proof

7.7. The general allocation of the burden of proof in WTO dispute settlement requires that the complaining party assert and prove its claim.<sup>25</sup> Therefore, as the complaining party in these proceedings, China bears the burden of demonstrating that the challenged aspects of the safeguard measure at issue are inconsistent with the relevant obligations under the GATT 1994 and the Agreement on Safeguards.

## 7.2 "Unforeseen developments" and "the effect of obligations incurred" under the GATT 1994

### 7.2.1 Introduction

7.8. The parties disagree on whether the United States' safeguard measure on CSPV products complied with the requirement in the first clause of Article XIX:1(a) of the GATT 1994 that imports increased "as a result of unforeseen developments and of the effect of the obligations incurred".

7.9. China claims that the Agreement on Safeguards obligated the USITC to demonstrate in its published report that imports increased "as a result of unforeseen developments and of the effect of the obligations incurred".<sup>26</sup> China further claims that the USITC's supplemental report failed to appropriately demonstrate compliance with these requirements and advances several lines of

<sup>21</sup> Appellate Body Report, *US – Steel Safeguards*, paras. 296-297. This standard is accepted by the parties in the present dispute. (See, e.g. China's first written submission, para. 79; and United States' first written submission, para. 90). As explained below, these principles align with Article 3.1 of the Agreement on Safeguards, which requires the competent authorities in a safeguard investigation to publish a report that sets forth "findings and reasoned conclusions reached on all pertinent issues of fact and law".

<sup>22</sup> Appellate Body Report, *US – Steel Safeguards*, para. 299.

<sup>23</sup> Appellate Body Report, *US – Steel Safeguards*, paras. 296 and 299.

<sup>24</sup> Appellate Body Report, *US – Steel Safeguards*, paras. 296-297.

<sup>25</sup> In this respect, we agree with the previous DSB reports that have confirmed this principle. (See, e.g. Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16).

<sup>26</sup> See, e.g. China's first written submission, section III(C)(1); and second written submission, section IV(A).



argumentation to this effect.<sup>27</sup> Based on these claims, China submits that the safeguard measure on CSPV products is inconsistent with the United States' obligations under Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards.

7.10. For its part, the United States argues that China misapprehends the legal relationship between the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994. In its view, the Agreement on Safeguards does not require the competent authorities of a Member to demonstrate in their published report that the safeguard measure complied with the requirements in the first clause of Article XIX:1(a) of the GATT 1994. Thus, in WTO dispute settlement proceedings, a Member can modify or supplement the competent authorities' explanation as to whether imports increased "as a result of unforeseen developments and of the effect of the obligations incurred".<sup>28</sup> Nevertheless, the United States maintains that this interpretive issue does not arise in the present case, because the USITC appropriately demonstrated compliance with the requirements of the first clause of Article XIX:1(a) of the GATT 1994.<sup>29</sup>

7.11. In this context, our analysis below first addresses China's substantive claim under Article XIX:1(a) of the GATT 1994 and is organized as follows. In section 7.2.2, we set out the applicable legal requirements under the first clause of Article XIX:1(a) of the GATT 1994, focusing on the meaning of the various elements in the phrase "as a result of unforeseen developments and of the effect of the obligations incurred". Thereafter, in section 7.2.3, we turn to China's substantive claim concerning these requirements and specifically address:

- a. whether China has established that the USITC failed to appropriately demonstrate the existence of "unforeseen developments" (section 7.2.3.1);
- b. whether China has established that the USITC failed to appropriately demonstrate that imports increased as a result of the "unforeseen developments" (section 7.2.3.2); and
- c. whether China has established that the USITC failed to appropriately demonstrate that imports increased as a result "of the effect of the obligations incurred" by the United States (section 7.2.3.3).

7.12. After doing so, and to the extent necessary for the resolution of China's overall claim under Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards, in section 7.2.4 we address the disagreement between the parties concerning the interpretative issue of whether the Agreement on Safeguards requires the competent authorities to demonstrate in their published report that imports increased "as a result of unforeseen developments and of the effect of the obligations incurred".

## **7.2.2 Applicable legal requirements of Article XIX:1(a) of the GATT 1994**

7.13. Article XIX:1(a) of the GATT 1994, in full, provides:

*If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary*

<sup>27</sup> See, e.g. China's first written submission, section III(C)(2); and second written submission, section IV(B).

<sup>28</sup> United States' second written submission, para. 164; response to the Panel question No. 27(e) of the second set, para. 73; and first written submission, para. 232.

<sup>29</sup> United States' second written submission, para. 176: "[a]t the outset, the United States notes that the USITC November Report and Supplemental Report demonstrated compliance with both the unforeseen developments and obligations incurred elements of the first clause of GATT Article XIX:1(a). Therefore, the legal issue addressed by this question is not necessary to a resolution of the claims raised by China in this regard." See also United States' first written submission, para. 232, which makes the same point.

to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.<sup>30</sup>

7.14. Thus, in addition to the requirements of the Agreement on Safeguards, a safeguard measure may only be lawfully imposed if the relevant increase in imports occurs "as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions".<sup>31</sup> As we see it, this requirement contains three main elements.

7.15. First, Article XIX:1(a) of the GATT 1994 requires the existence of "unforeseen developments". Previous DSB reports have found that "unforeseen developments" are those developments that were "unexpected" at the time the importing Member incurred the relevant GATT obligation.<sup>32</sup> As such, "unforeseen developments" have both subjective (i.e. what was unforeseen in particular circumstances for specific negotiators) and objective (i.e. what should or could have been foreseen in light of the circumstances) elements.<sup>33</sup>

7.16. Second, Article XIX:1(a) of the GATT 1994 requires that imports increased "*as a result of the unforeseen developments*".<sup>34</sup> In *US – Steel Safeguards*, the Appellate Body addressed this requirement and found:

Turning to the term "as a result of" that is also found in Article XIX:1(a), we note that the ordinary meaning of "result" is, as defined in the dictionary, "an effect, issue, or outcome from some action, process or design". The increased imports to which this provision refers must therefore be *an "effect, or outcome" of the "unforeseen developments"*. Put differently, the "unforeseen developments" must "result" in increased imports of the product ("such product") that is subject to a safeguard measure.<sup>35</sup>

7.17. Third, Article XIX:1(a) of the GATT 1994 requires that imports increased "as a result ... of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions". In *Korea – Dairy* and *Argentina – Footwear (EC)*, the Appellate Body found that:

*[T]his 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.<sup>36</sup>

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<sup>30</sup> Emphasis added.

<sup>31</sup> Appellate Body Report, *Korea – Dairy*, para. 77: "any safeguard measure imposed after the entry into force of the WTO Agreement must comply with the provisions of *both* the Agreement on Safeguards and Article XIX of the GATT 1994" (fn omitted; emphasis original). See also Appellate Body Report, *Argentina – Footwear (EC)*, paras. 83-84; and Panel Reports, *US – Lamb*, para. 7.11; and *US – Steel Safeguards*, para. 10.36.

<sup>32</sup> Appellate Body Reports, *Argentina – Footwear (EC)*, para. 91; *Korea – Dairy*, para. 84.

<sup>33</sup> Panel Reports, *US – Steel Safeguards*, paras. 10.42-10.43. See also Appellate Body Report, *US – Lamb*, para. 73; and Panel Report, *Argentina – Preserved Peaches*, para. 7.23.

<sup>34</sup> Emphasis added.

<sup>35</sup> Appellate Body Report, *US – Steel Safeguards*, para. 315 (emphasis added). While China uses the term "clear linkage" to describe the requisite relationship between increased imports and "unforeseen developments", it explains that it uses this phrase "to summarize Appellate Body and panel decisions characterizing this concept as a 'logical connection', a 'clear temporal connection', and 'clear' relationship". As such, it does not appear that, by using this phrase, China is arguing that a heightened legal standard should apply. (China's response to the Panel question No. 24 of the second set, para. 232). Moreover, we note that the findings from previous DSB reports to which China refers concern the meaning of the treaty text "as a result of" in the first clause of Article XIX:1(a) of the GATT 1994. (See, e.g. Appellate Body Report, *US – Steel Safeguards*, paras. 317-318). In our view, the term "as a result of" is sufficiently clear on its own; therefore, we will analyse China's claims against the USITC's findings concerning the relationship between increased imports and "unforeseen developments" on that basis.

<sup>36</sup> Appellate Body Reports, *Korea – Dairy*, para. 84; *Argentina – Footwear (EC)*, para. 91 (emphasis added). See also Panel Reports, *Indonesia – Iron or Steel Products*, para. 7.52: "[t]he expression 'the effect of

7.18. As we agree with the findings in the previous DSB reports noted above, we will assess China's claims concerning the three elements in the first clause of Article XIX:1(a) of the GATT 1994 accordingly.

### **7.2.3 Whether the USITC's published report demonstrated compliance with the requirements of Article XIX:1(a) of the GATT 1994**

7.19. As a preliminary matter, we recall that the USITC directly addressed the issue of "unforeseen developments" in its supplemental report that was prepared in response to a request for additional information from the USTR. Specifically, the USTR requested that the USITC "identify any unforeseen developments that led to the articles at issue being imported into the United States in such increased quantities as to be a substantial cause of serious injury".<sup>37</sup>

7.20. The Agreement on Safeguards does not dictate the precise format of the "report" that the competent authorities of a Member must publish following their investigation.<sup>38</sup> We therefore consider that the USITC final report and the USITC final staff report, along with the supplemental report, collectively constitute the relevant published "report" within the meaning of Article 3.1 of the Agreement on Safeguards. Accordingly, in the sections that follow, we address whether China has established that this report failed to demonstrate compliance with the requirement in Article XIX:1(a) of the GATT 1994 that imports increased "as a result of unforeseen developments and of the effect of the obligations incurred" by the United States.

#### **7.2.3.1 The existence of "unforeseen developments"**

##### **7.2.3.1.1 Factual background**

7.21. In its supplemental report, the USITC found that US negotiators could not have foreseen, at the time that the United States acceded to GATT 1947, at the time that the United States acceded to the WTO, or at the time that the United States agreed to China's accession to the WTO<sup>39</sup>, the series of events that culminated in CSPV products being imported into the United States in increased quantities. In particular, the USITC found that US negotiators could not have foreseen that:

- a. China would implement a series of industrial policies, five-year plans, and other government support programmes favouring renewable energy product manufacturing, including CSPV products.<sup>40</sup>

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the obligations incurred by a Member under this Agreement' requires a competent authority to factually demonstrate 'that the importing Member has incurred obligations under the GATT 1994, including tariff concessions'; *Dominican Republic – Safeguard Measures*, paras. 7.145-7.146: "in the opinion of the Panel, it is clear that as a matter of fact the importing Member must have incurred obligations under the GATT 1994, for example, tariff concessions, with respect to the product in question. It then falls to the importing Member to identify those obligations incurred under the GATT 1994 that are linked with the increase in imports causing serious injury to its domestic industry"; and *US – Steel Safeguards*, para. 10.140: "the logical connection between tariff concessions and increased imports causing serious injury is proven once there is evidence that the importing Member has tariff concessions for the relevant product".

<sup>37</sup> USITC supplemental report, (Exhibit CHN-6), p. 1.

<sup>38</sup> Accordingly, we disagree with the suggestion in China's first written submission that it was improper for USITC to address "unforeseen developments" in a separate report. (China's first written submission, paras. 245-248 and 280). In this regard, we observe that the panel in *US – Steel Safeguards* also found that it was appropriate to publish the "report" in parts:

[N]othing in the requirement to publish a report dictates the form that the report must take, provided that the report complies with all of the other obligations contained in the Agreement on Safeguards and Article XIX of GATT 1994. In the end, it is left to the discretion of the Members to determine the format of the report, including whether it is published in parts, so long as it contains all of the necessary elements, including findings and reasoned conclusions on all pertinent issues of fact and law. Together, these parts can form the report of the competent authority.

(Panel Reports, *US – Steel Safeguards*, para. 10.49. See also Brazil's third-party submission, para. 10; and Japan's third-party submission, para. 10)

<sup>39</sup> USITC supplemental report, (Exhibit CHN-6), p. 5.

<sup>40</sup> USITC supplemental report, (Exhibit CHN-6), pp. 5 and 10.

- b. The effect of such industrial policies, plans, and support programmes would lead to the development and expansion of capacity to manufacture CSPV products in China to levels that substantially exceeded the level of its internal consumption.<sup>41</sup>
- c. This increased capacity would be largely directed to export markets such as the United States and would take advantage of the existence of programmes implemented by the US government to encourage renewable energy consumption.<sup>42</sup>
- d. The United States' use of authorized tools, such as anti-dumping 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 US imports of non-covered products from China and Chinese Taipei, and later US imports from Chinese producers' affiliates in other countries.<sup>43</sup> In this regard, the USITC explained that in 2012 the United States imposed anti-dumping and countervailing duties on imports from China (*CSPV I*). Before the *CSPV I* orders could have a meaningful effect, Chinese producers reorganized their production facilities to avoid being subject to the anti-dumping and countervailing duties. Consequently, in 2013, US CSPV producers filed another petition seeking the imposition of anti-dumping and countervailing duties on imports from China and Chinese Taipei, which ultimately resulted in additional duties being imposed on certain CSPV products from these sources (*CSPV II*).<sup>44</sup> However, before the *CSPV II* orders went into effect, imports from third countries started to enter the US market. By the end of 2015, total imports had almost doubled their level from 2014, and imports continued to grow into 2016. At the same time, the six largest firms producing CSPV products in China increased their global manufacturing capacity by expanding investments in the same third countries without reducing their capacity in China.<sup>45</sup> Between 2015-2016, imports from four different third countries where Chinese affiliates had added CSPV production capacity increased their share of US consumption, just after the *CSPV II* orders went into effect.<sup>46</sup>

7.22. As such, the USITC considered these events constituted "unforeseen developments" within the meaning of Article XIX:1(a) of the GATT 1994.

#### 7.2.3.1.2 Main arguments of the parties

7.23. China argues that the USITC failed to demonstrate that the events to which it referred were unforeseen by US negotiators.<sup>47</sup> In particular, China claims that the USITC failed to appropriately identify the "series of industrial policies, five-year plans, and other government support programs favouring renewable energy product manufacturing, including CSPV products" and explain why it

<sup>41</sup> USITC supplemental report, (Exhibit CHN-6), pp. 5 and 7-10.

<sup>42</sup> USITC supplemental report, (Exhibit CHN-6), p. 5.

<sup>43</sup> USITC supplemental report, (Exhibit CHN-6), pp. 5-10.

<sup>44</sup> USITC supplemental report, (Exhibit CHN-6), pp. 5-7. Pursuant to the *CSPV I* investigation, the United States imposed anti-dumping duties ranging from 18% to 249.46%. The United States further identified 12 programmes as providing countervailable subsidies to CSPV producers/exporters in China that resulted in the imposition of countervailing duties ranging from 14% to 16%. Among others, the countervailable subsidies included programmes 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.

Furthermore, pursuant to the *CSPV II* investigation, the United States imposed anti-dumping duties ranging from 26.71% to 165.04% on imports from China and 11.45% to 27.55% on imports from Chinese Taipei, and countervailing duties ranging from 27.64% to 49.79% on imports from China. The United States again identified a variety of countervailable programmes in China, including grants; provision of inputs or land for less than adequate remuneration; preferential loans and directed credit; tax benefit programmes; value added tax rebates on equipment purchases; export guarantees and insurance for green technology; and export credit subsidies.

<sup>45</sup> USITC supplemental report, (Exhibit CHN-6), p. 8 (referring to Canadian Solar (China), Hanwha Qidong (China), Shanghai JA Solar, Jinko Solar (China), Changzhou Trina (China), and Yingli Green).

<sup>46</sup> USITC supplemental report, (Exhibit CHN-6), pp. 8-9 (referring to Korea, Malaysia, Thailand, and Viet Nam).

<sup>47</sup> China's first written submission, paras. 260-273; comments on the United States' response to Panel question No. 23 of the first set, paras. 175-190.

considered those developments to be unforeseen.<sup>48</sup> In China's view, it is "hardly 'unforeseen' that countries would seek economic development and energy security".<sup>49</sup> In addition, China argues that the USITC failed to demonstrate that it was "completely unforeseen" that, in a situation where US demand for CSPV products significantly exceeds US CSPV production capability, the imposition of anti-dumping and countervailing duties against China would lead to increased imports from other countries.<sup>50</sup> China further claims that US negotiators would have foreseen that the imposition of anti-dumping and countervailing duty orders on products from one country would naturally lead to increased imports from another country with lower duties, especially considering that this proposition is well-established in economic literature.<sup>51</sup> According to China, the USITC recognized this very dynamic in its 2001 safeguard investigation against steel products.<sup>52</sup>

7.24. For its part, the United States submits that the USITC identified a number of developments that were unforeseen.<sup>53</sup> According to the United States, WTO Members have declared that their economies will participate in the international trading system based on "open, market-oriented policies and the commitments set out in the Uruguay Round Agreements and Decisions".<sup>54</sup> In this context, the United States argues that the USITC appropriately identified the "industrial policies, five-year plans, and other government support programs" by reference to China's subsidy programmes and explained that they resulted in a massive and unforeseen increase in Chinese production capacity for CSPV products.<sup>55</sup> The United States asserts that, contrary to China's argument concerning economic development and energy security, the USITC found "what was unforeseen was the *scale* of the effort, the *speed* with which it boosted Chinese production, the *overcapacity* that it created, and the degree to which these effects spilled into other countries where Chinese producers expanded their operations".<sup>56</sup> In this respect, the United States contends that China essentially ignores "the speed of its industry's growth and the overcapacity that resulted, which are central to the USITC's conclusions".<sup>57</sup> Relatedly, the United States advances that the intentional development of overcapacity in China and in other countries after the imposition of the *CSPV I* and *CSPV II* orders demonstrates that China is incorrect to argue that CSPV production "naturally" shifted to countries with lower duties and therefore would have been foreseen.<sup>58</sup>

#### 7.2.3.1.3 Evaluation of the Panel

7.25. We do not consider that China has demonstrated that it was inappropriate for the USITC to find that "unforeseen developments" existed during the period of investigation (POI).

7.26. First, in line with the United States' argument, we note that the USITC identified China's "industrial policies, five-year plans, and other government support programs" by reference to the findings in the previous countervailing duty investigations on CSPV products from China (i.e. *CSPV I* and *CSPV II*).<sup>59</sup> We further note that the USITC found that the same "industrial policies, five-year plans, and other government support programs" were connected to the rapid increase of

<sup>48</sup> China's first written submission, paras. 261-263.

<sup>49</sup> China's first written submission, para. 261.

<sup>50</sup> China's second written submission, paras. 269-277.

<sup>51</sup> China's response to Panel question No. 21 of the second set, para. 220; first written submission, para. 270.

<sup>52</sup> China's second written submission, paras. 277-279; first written submission, paras. 271-272; and response to Panel question No. 21 of the second set, paras. 221-222.

<sup>53</sup> United States' first written submission, paras. 262-266 and 276-285; second written submission, paras. 157-158; and response to Panel question No. 23 of the first set, paras. 67-77.

<sup>54</sup> United States' response to Panel question No. 23 of the first set, para. 76; second written submission, para. 157.

<sup>55</sup> United States' first written submission, paras. 277-278.

<sup>56</sup> United States' first written submission, para. 278 (emphasis original). See also United States' response to Panel question No. 23(a) of the first set, paras. 67-73.

<sup>57</sup> United States' first written submission, para. 278.

<sup>58</sup> United States' first written submission, paras. 279 and 281; second written submission, paras. 157-158.

<sup>59</sup> USITC supplemental report, (Exhibit CHN-6), pp. 5-7. In this respect, we recall that the USITC referred to a variety of countervailable programmes in China that were identified in the *CSPV I* and *CSPV II* investigations and the resultant countervailing duty rates that were imposed on imports from China. (See fn 44 above).

CSPV capacity in China that significantly exceeded domestic consumption within China.<sup>60</sup> Based on these findings, we do not consider that the USITC failed to appropriately identify developments that could not have been foreseen by US negotiators, contrary to China's view.

7.27. Second, we are not persuaded by China's claim that it was inappropriate for the USITC to find that the ineffectiveness of anti-dumping and countervailing duty orders could not have been foreseen by US negotiators. As noted above, China bases its argument on general economic principles and on a statement from the USITC in its 2001 steel safeguard investigation, both of which allegedly suggest that the USITC would have anticipated that the imposition of trade remedy orders on products from one country would lead to an increase in imports from other countries. However, even if it was generally foreseeable that anti-dumping and countervailing duty orders might lead to trade diversion, the USITC's finding in the present case was more specific. The USITC found that what was unexpected was the "rapid changes in the global supply chains and manufacturing processes" that immediately followed the imposition of the *CSPV I* and *CSPV II* orders, combined with the significant increase in global capacity of CSPV production.<sup>61</sup> As these particular developments are documented in record evidence (which China does not contest)<sup>62</sup>, we agree with the United States that China has not demonstrated that it was inappropriate for the USITC to find that these developments could not have been foreseen by US negotiators.<sup>63</sup>

7.28. Based on the foregoing, we reject China's claim that the USITC failed to appropriately identify the existence of "unforeseen developments" within the meaning of Article XIX:1(a) of the GATT 1994.

### **7.2.3.2 The relationship between increased imports and "unforeseen developments"**

#### **7.2.3.2.1 Factual background**

7.29. The USITC found that the unforeseen developments described in section 7.2.3.1.1 above "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".<sup>64</sup>

#### **7.2.3.2.2 Main arguments of the parties**

7.30. China argues that the USITC failed to establish the requisite connection between increased imports and the "unforeseen developments".<sup>65</sup> China contends that the USITC failed to demonstrate that increased imports "were largely attributable to increased Chinese CSPV capacity and China's government policies".<sup>66</sup> China further contends that the USITC failed to demonstrate that China's government policies encouraged production outside of China<sup>67</sup> and that Chinese producers actually took advantage of such policies to build production facilities in countries outside of China.<sup>68</sup>

<sup>60</sup> In this respect, we note that record evidence identified by the USITC shows that, within China, CSPV capacity grew significantly and far exceeded domestic consumption, particularly for CSPV modules. Record evidence identified by the USITC also shows that the largest Chinese producers substantially increased their global capacity over the 2012-2016 period. (USITC supplemental report, (Exhibit CHN-6), fns 24, 25, and 29; see also USITC final staff report, (Exhibit CHN-3), pp. IV-20-IV-35). In addition, we note that the findings in the *CSPV I* and *CSPV II* investigations are pertinent to the safeguard investigation due to the temporal connection between the POIs in all three proceedings. (USITC CSPV I final report, (Exhibit USA-11), fn 63 (noting that the POI was January 2009 to June 2012); USITC CSPV II final report, (Exhibit USA-12), fn 30 (noting that the POI was January 2011 to June 2014)).

<sup>61</sup> USITC supplemental report, (Exhibit CHN-6), p. 10.

<sup>62</sup> USITC supplemental report, (Exhibit CHN-6), p. 10 and fn 32; USITC final staff report, (Exhibit CHN-3), pp. IV-26-IV-29. See also United States' response to Panel question No. 23 of the first set, paras. 67-77; and China's comments on the United States' response to Panel question No. 23 of the first set, paras. 178-190.

<sup>63</sup> United States' second written submission, paras. 157-158.

<sup>64</sup> USITC supplemental report, (Exhibit CHN-6), p. 10.

<sup>65</sup> China's second written submission, paras. 280-305; first written submission, paras. 279-292.

<sup>66</sup> China's first written submission, para. 284.

<sup>67</sup> China's second written submission, paras. 284 and 290.

<sup>68</sup> China's second written submission, paras. 284 and 291. According to China, although some Chinese producers constructed factories outside China, there is no evidence that these Chinese producers received any support from the government of China to do so.



China considers that such a demonstration was necessary because imports of CSPV products from China decreased in the 2015-2016 period when imports from other sources increased.<sup>69</sup>

7.31. In a related line of argumentation, China claims that the USITC failed to establish that increased imports originated from Chinese-affiliated companies that had expanded to third countries.<sup>70</sup> In China's view, it was improper for the USITC to infer that Chinese-affiliated CSPV producers that had expanded to third countries contributed to the increase in US imports because the increase "could have come from other non-Chinese producers in these countries".<sup>71</sup> In addition, China advances that Korea was responsible for the single largest increase in imports<sup>72</sup>; however, no Chinese producer had "substantial CSPV production factories"<sup>73</sup> or "controlled" the export market in Korea.<sup>74</sup> Accordingly, China argues that, even if the USITC correctly found that the increase in imports from certain third countries other than Korea came from Chinese-owned companies, "there is still a very large increase in imports that has nothing to do with the USITC's alleged unforeseen development", and therefore there is no "clear linkage" between the alleged unforeseen development and the increase in imports.<sup>75</sup>

7.32. The United States argues that the USITC appropriately demonstrated that imports increased "as a result of unforeseen developments".<sup>76</sup> Contrary to China's argument, the USITC explained how China's policies, plans, and programmes resulted in increased imports not only from China, but also from third countries where Chinese-affiliated producers had expanded their production capacity, without reducing their production capacity in China.<sup>77</sup> By demonstrating that US imports from the same third countries increased massively after this expansion, the USITC established that increased imports were the result of this unexpected development.<sup>78</sup>

7.33. In response to China's argument that it was improper for the USITC to infer that imports increased as a result of the expansion of Chinese-affiliated producers in third countries, the United States advances the following arguments. The United States asserts that the unforeseen developments requirement in Article XIX:1(a) of the GATT 1994 does not require import-specific information on a transaction-by-transaction (or company-by-company, or country-by-country) basis.<sup>79</sup> Thus, the United States contends that it was appropriate for the USITC to base its conclusion that imports increased "as a result" of unforeseen developments on evidence demonstrating that Chinese-affiliated producers massively increased their production in Korea, Malaysia, Thailand, and Viet Nam, and that the imports from these countries, collectively, more than doubled their share of the US market during the time just after the trade remedy orders in *CSPV II* took effect.<sup>80</sup> According to the United States, China cannot reasonably argue that its producers' massive increase in production capacity in third countries is unrelated to the significant increase in US imports from those same countries, when both developments occurred at the same time.<sup>81</sup>

<sup>69</sup> China's second written submission, para. 281; response to Panel question No. 54 of the third set, para. 144.

<sup>70</sup> China's second written submission, paras. 284 and 292-302; response to Panel question No. 21 of the second set, paras. 216-217.

<sup>71</sup> China's second written submission, paras. 237 and 286-288.

<sup>72</sup> China's second written submission, para. 301.

<sup>73</sup> China's second written submission, para. 294.

<sup>74</sup> China's second written submission, paras. 297-302.

<sup>75</sup> China's second written submission, para. 303.

<sup>76</sup> United States' first written submission, para. 293.

<sup>77</sup> United States' first written submission, paras. 282-285; second written submission, para. 17; response to Panel question No. 22 of the second set, paras. 52-54; and response to Panel question No. 55 of the third set, paras. 48-52.

<sup>78</sup> United States' first written submission, paras. 282-285; second written submission, paras. 154-155.

<sup>79</sup> United States' second written submission, para. 156.

<sup>80</sup> United States' second written submission, para. 17. The United States further argues that the USITC also found that four of the six largest Chinese firms added CSPV module capacity in two additional countries (Canada and Indonesia). This, coupled with the USITC's findings concerning the "large and attractive nature of the U.S. market and the large and growing size of the export-oriented foreign industries", reveals that the increased imports resulting from China's efforts to target the United States' market are not limited to Korea, Malaysia, Thailand, and Viet Nam. (United States' response to Panel question No. 22 of the second set, para. 53).

<sup>81</sup> United States' second written submission, para. 156; response to Panel question No. 22 of the second set, para. 54; and response to Panel question No. 55 of the third set, para. 52.

7.34. Finally, the United States argues that China's argument concerning Korea is flawed on several fronts. According to the United States, the USITC found that Hanwha Qidong was one of the six largest CSPV cell and module producers in China, and that Hanwha Qidong's corporate parent (Hanwha) produced CSPV cells and modules in Korea.<sup>82</sup> Thus, regardless of whether Chinese producers controlled significant production in Korea, Korea was one of the countries where Chinese-affiliated CSPV producers expanded their production "in efforts to circumvent the *CSPV I* and *CSPV II* orders".<sup>83</sup> The United States also argues that China fails to cite the most accurate record evidence regarding the increase in imports from Korea.<sup>84</sup> Yet, even the record evidence to which China refers shows that imports from Malaysia, Thailand, and Viet Nam (the three other countries where Chinese firms had added both cell and module capacity) accounted for almost two-thirds of the total increase in imports.<sup>85</sup> In the United States' view, this was sufficient for the USITC to establish that increased imports were "as a result of unforeseen developments" for purposes of Article XIX:1(a) of the GATT 1994.<sup>86</sup>

#### 7.2.3.2.3 Evaluation of the Panel

7.35. Article XIX:1(a) of the GATT 1994 requires that increased imports occur "*as a result of the unforeseen developments*".<sup>87</sup> Consistent with the ordinary meaning of this phrase, we consider that this element of Article XIX:1(a) of the GATT 1994 may be satisfied where increased imports are an effect or outcome of the "unforeseen developments".<sup>88</sup>

7.36. In this context, the parties' arguments raise two main issues: (a) whether the USITC appropriately demonstrated that imports increased as a result of China's "industrial policies, five-year plans, and other government support programs" that supported the development of CSPV capacity; and (b) whether the USITC appropriately demonstrated that imports increased as a result of the overall increase in global capacity and the rapid reorganization of global supply chains that followed the imposition of the *CSPV I* and *CSPV II* orders. Since the "unforeseen developments" found by the USITC consisted of a series of events, we do not consider that it was necessary for the USITC to directly connect each specific development to the increase in imports so long as there was sufficient evidence to find that the "unforeseen developments", overall, resulted in increased imports.

7.37. Turning to the first main issue, we recall that the USITC identified record evidence demonstrating that China adopted "industrial policies, five-year plans, and other government support programs" that benefitted CSPV producers and exporters in China and led to a significant and rapid expansion of their capacity and production for CSPV cells and modules.<sup>89</sup> We also recall that the USITC found that this increased capacity significantly exceeded domestic consumption within China.<sup>90</sup> In addition, the USITC identified record evidence demonstrating that US imports of CSPV products from China increased significantly over the POI, from 326,846 kW in 2012 to 2,720,193 kW in 2016.<sup>91</sup> The USITC further recognized that, with the exception of 2013 (i.e. immediately after the imposition of the *CSPV I* order), imports from China were consistently a significant source of CSPV imports in the US market.<sup>92</sup> Based on this evidence, contrary to China's view, we do not consider that the USITC failed to demonstrate that increased imports were attributable to "increased Chinese CSPV capacity and China's government policies".<sup>93</sup>

<sup>82</sup> United States' response to Panel question No. 56 of the third set, para. 53.

<sup>83</sup> United States' response to Panel question No. 56 of the third set, para. 54.

<sup>84</sup> United States' response to Panel question No. 56 of the third set, para. 55.

<sup>85</sup> United States' response to Panel question No. 56 of the third set, para. 56.

<sup>86</sup> United States' response to Panel question No. 56 of the third set, para. 56.

<sup>87</sup> Emphasis added.

<sup>88</sup> See section 7.2.2 above.

<sup>89</sup> USITC supplemental report, (Exhibit CHN-6), pp. 6-7 (referring to the US Department of Commerce (USDOC) investigations that determined countervailable subsidies were being provided to producers and exporters of CSPV products from China; USITC CSPV I final report, (Exhibit USA-11), p. I-5; USITC CSPV II final report, (Exhibit USA-12), p. I-5). See also USDOC final CVD determination, (Exhibit USA-24); and Issues and decision memorandum on CVD, (Exhibit USA-25).

<sup>90</sup> USITC supplemental report, (Exhibit CHN-6), fns 24, 25, and 29; see also USITC final staff report, (Exhibit CHN-3), pp. IV-20-IV-35.

<sup>91</sup> USITC final staff report, (Exhibit CHN-3), p. IV-2, table IV-1.

<sup>92</sup> USITC final report, (Exhibit CHN-2), p. 29.

<sup>93</sup> China's first written submission, para. 284.



7.38. In line with China's argument, we note that record evidence does not appear to directly connect China's "industrial policies, five-year plans, and other government support programs" to the expansion of capacity and production of CSPV products in third countries. However, we do not consider that the absence of such direct evidence undermines the linkage that the USITC established between those policies, plans, and programmes and the significant volume of increased imports from China. Nor do we consider that the relevance of imports from China, or the connection between those imports and the "industrial policies, five-year plans, and other government support programs", is undermined by the fact that import volumes from China declined in 2016. As noted above, CSPV imports from China were consistently a significant source of the overall imports of CSPV products in the US market.

7.39. This brings us to the second main issue. As indicated above, the USITC found that the overall increase in global CSPV capacity and the rapid reorganization of global supply chains that followed the imposition of the *CSPV I* and *CSPV II* orders was part of the "unforeseen developments" that resulted in increased imports of CSPV products.<sup>94</sup> In particular, the USITC found that, after the imposition of the *CSPV I* order, "rapid changes in the global supply chains and manufacturing processes" facilitated US imports of non-covered products from China and Chinese Taipei.<sup>95</sup> It also found that, after the imposition of the *CSPV II* order, "rapid changes in the global supply chains and manufacturing processes" facilitated US imports from Chinese producers' affiliates in third countries.<sup>96</sup>

7.40. China argues that the USITC's finding on this point is deficient because it (a) relied on an inference to find that Chinese-affiliated CSPV producers in third countries contributed to the increase in US imports<sup>97</sup>; and (b) ignored that a significant share of the increased imports originated from Korea, where no Chinese producer that had "substantial CSPV production factories"<sup>98</sup> or "controlled" the export market.<sup>99</sup> However, for the reasons explained below, we are not convinced by either of China's arguments.

7.41. Regarding China's argument that it was inappropriate for the USITC to infer that Chinese-affiliated CSPV producers in third countries contributed to the increase in imports, we note that the USITC relied on evidence demonstrating that the six largest firms producing CSPV cells and modules in China increased their global capacity over the POI.<sup>100</sup> Four of these six firms added CSPV cell manufacturing capacity in one or more of the following countries: Korea, Malaysia, the Netherlands, Thailand, and Viet Nam.<sup>101</sup> Meanwhile, four of these six firms added CSPV module manufacturing capacity in one or more of the following countries: Canada, Indonesia, Korea, Malaysia, Thailand, and Viet Nam.<sup>102</sup> In addition, imports from four countries where Chinese affiliates added both CSPV cell and CSPV module capacity, i.e. Korea, Malaysia, Thailand, and Viet Nam, increased their share of apparent US consumption, particularly in 2015 and 2016.<sup>103</sup> Collectively, imports from these countries more than doubled their share of the US market just after the *CSPV II* orders took effect in 2015.<sup>104</sup>

7.42. Aside from its argument concerning Korea, China does not contest any of these findings. Rather, China claims that it was inappropriate for the USITC to infer that the increase in production capacity of Chinese-affiliated CSPV producers in these countries contributed to the increased imports in the United States, advancing that the "increase in exports could have come from other

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<sup>94</sup> Based on our reading of the supplemental report, we understand that the USITC found that the increase in global CSPV capacity and the rapid reorganization of global supply chains, as well as the consequent ineffectiveness of the *CSPV I* and *CSPV II* orders, collectively constituted an independent explanation for why imports of CSPV products increased in the US market. As such, we do not consider that the appropriateness of the USITC's finding concerning the connection between these unforeseen developments and increased imports depends on whether record evidence showed that the same developments directly resulted from China's "industrial policies, five-year plans, and other government support programs".

<sup>95</sup> USITC supplemental report, (Exhibit CHN-6), pp. 6-7 and 10.

<sup>96</sup> USITC supplemental report, (Exhibit CHN-6), pp. 8-10.

<sup>97</sup> China's second written submission, paras. 286-287.

<sup>98</sup> China's second written submission, para. 294.

<sup>99</sup> China's second written submission, paras. 297-302.

<sup>100</sup> USITC supplemental report, (Exhibit CHN-6), p. 8; USITC final report, (Exhibit CHN-2), p. 44.

<sup>101</sup> USITC final report, (Exhibit CHN-2), pp. 40-41 and 44.

<sup>102</sup> USITC final report, (Exhibit CHN-2), pp. 40-41.

<sup>103</sup> USITC supplemental report, (Exhibit CHN-6), pp. 8-9.

<sup>104</sup> USITC supplemental report, (Exhibit CHN-6), p. 9.

non-Chinese producers in these countries".<sup>105</sup> Yet, in our view, even if this were a hypothetical possibility, the circumstantial evidence relied upon by the USITC suggests otherwise. Indeed, in line with the United States' argument, the fact that Chinese-affiliated companies significantly increased their production capacity in third countries in the same years when imports from those countries into the US market significantly increased suggests to us that there was a meaningful connection between these developments.<sup>106</sup> Therefore, we disagree with China that it was inappropriate for the USITC to rely on this evidence to find that US imports increased as a result of the increase in global capacity and the rapid reorganization of global supply chains, particularly from Chinese-affiliated producers that expanded outside of China in the 2015-2016 period.

7.43. We are also not persuaded by China's argument concerning the significant share of increased imports that originated in Korea. The USITC found that, following the imposition of the *CSPV II* order, the largest firms producing CSPV products in China increased their global manufacturing capacity by expanding investments in affiliated companies in third countries without reducing their capacity in China.<sup>107</sup> With respect to Korea, record evidence indicates that Hanwha, a Korea-based CSPV producer, also produced CSPV products in China under the affiliated company Hanwha Qidong<sup>108</sup>, and that Hanwha increased its production of CSPV products in Korea following the imposition of the *CSPV II* order. Based on these circumstances, and noting that Hanwha is therefore a "Chinese-affiliated" company that increased its production in Korea, we do not consider the fact that no Chinese producers had "substantial CSPV production factories"<sup>109</sup> or "controlled" the market<sup>110</sup> in Korea would contradict the USITC's finding regarding the activities of Chinese-affiliated companies, contrary to China's argument.

7.44. In any event, even if we were to accept China's contention that a significant share of the increased imports originated from Korea had nothing to do with the "unforeseen developments", we fail to see why this would undermine the USITC's finding that a significant share of imports also increased as a result of the expansion of Chinese-affiliated CSPV operations in other third countries, particularly Malaysia, Thailand, and Viet Nam.<sup>111</sup> In this regard, we do not read Article XIX:1(a) of the GATT 1994 to require that all of the increased imports are a result of the "unforeseen developments".

7.45. Based on the foregoing, we reject China's claim that the USITC failed to appropriately demonstrate that imports increased "as a result of unforeseen developments".

### **7.2.3.3 The relationship between increased imports and "obligations incurred" by the United States**

#### **7.2.3.3.1 Factual background**

7.46. In its final staff report, the USITC noted:

The imported articles are provided for in subheading 8541.40.60 (statistical reporting numbers 8541.40.6020 ("solar cells, assembled into modules or made up into panels") and 8541.40.6030 ("solar cells, other")) of the Harmonized Tariff Schedule of the United States ("HTS"), and have been free of duty under the general duty rate since at least 1987.<sup>112</sup>

<sup>105</sup> China's second written submission, para. 237.

<sup>106</sup> United States' second written submission, para. 156.

<sup>107</sup> USITC supplemental report, (Exhibit CHN-6), pp. 8-10.

<sup>108</sup> USITC final staff report, (Exhibit CHN-3), tables IV-16, IV-17, and IV-18. See also *ibid.* fn 38: Hanwha is based in Korea, but \*\*\* of its cell and module production occurred in China. Hanwha's first large scale entry into the solar business was via its 2010 acquisition of 49.99 percent of Solarfun, a Chinese firm that was at the time the fourth largest module producer in China. In 2012, Hanwha acquired bankrupt German manufacturer QCells, which had production in Germany and Malaysia. (redacted original)

<sup>109</sup> China's second written submission, para. 294.

<sup>110</sup> China's second written submission, paras. 297-302.

<sup>111</sup> USITC final staff report, (Exhibit CHN-3), pp. C-10-C-11; USITC supplemental report, (Exhibit CHN-6), pp. 7-9 and fns 24, 26-28, and 29-31.

<sup>112</sup> USITC final staff report, (Exhibit CHN-3), p. I-38.

7.47. The USITC referred to the same tariff treatment of CSPV products in footnote 10 in the supplemental report:

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.<sup>[9]</sup> 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.<sup>[10]</sup>

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

<sup>10</sup> 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.<sup>113</sup>

#### 7.2.3.3.2 Main arguments of the parties

7.48. China advances a series of arguments in support of its claim that the USITC failed to appropriately demonstrate that imports increased "as a result ... of the effect of the obligations incurred" by the United States. In particular, China argues that the USITC failed to identify the specific obligations that the United States incurred<sup>114</sup>, as the US general zero duty rate on CSPV products since at least 1987 is neither a "commitment" nor a "tariff concession" reflecting an obligation incurred by the United States under Article II of the GATT 1994, or through any prior GATT round of negotiations.<sup>115</sup> China further argues that the USITC supplemental report provides no discussion at all "of the effect of" those obligations and how they resulted in increased imports, and specifically how and why those obligations constrained the United States' ability to react to increased imports of CSPV products.<sup>116</sup> To do so, the USITC was required to analyse the timing and magnitude of the tariff concessions on CSPV products to demonstrate that imports increased as a result of those obligations.<sup>117</sup> Finally, China claims that, even if the USITC identified a zero bound tariff rate as the obligation incurred, the WTO covered agreements allow Members to impose anti-dumping, countervailing, and safeguard measures. Therefore, it would not necessarily be inconsistent with Article II of the GATT 1994 to use a safeguard measure to increase tariffs above the bound levels to remedy the serious injury caused by increased imports.<sup>118</sup>

7.49. In addition to these arguments, China advances that the United States engages in impermissible *post hoc* rationalization in its defence of the USITC report on this issue, contending that the United States is now asserting that the zero general duty rate was the actual bound rate established during the GATT negotiations, and that the USITC intended to refer to this bound rate as the obligation incurred. China argues that this fact was not set forth in the USITC supplemental report. Moreover, China argues that the United States did not identify where the USITC mentioned the bound duty rate of zero on CSPV products under GATT 1994.<sup>119</sup>

7.50. For its part, the United States argues that the USITC appropriately demonstrated that the increase in imports was the result of the obligations incurred. In its view, the supplemental report clearly identified that CSPV products covered by the safeguard measure "are provided for in subheading 8541.40.60 of the U.S. Harmonized Tariff Schedule [and] have been free of duty under

<sup>113</sup> USITC supplemental report, (Exhibit CHN-6), p. 4.

<sup>114</sup> China's first written submission, paras. 251, 253, and 255; second written submission, paras. 258-268.

<sup>115</sup> China's second written submission, paras. 263 and 265; first written submission, paras. 257-258. China further argues that the United States cannot submit that it *logically follows* that subheading 8541.40.60 of the US HTS is part of the US Schedule annexed to the GATT 1994 as its binding tariff. (China's second written submission, para. 264).

<sup>116</sup> China's first written submission, para. 282; comments on the United States' response to Panel question No. 27 of the first set, para. 206; and response to Panel question No. 26 of the second set, para. 250.

<sup>117</sup> China's second written submission, para. 266; response to Panel question No. 26 of the second set, paras. 255-258.

<sup>118</sup> China's response to Panel question No. 23 of the second set, para. 229.

<sup>119</sup> China's response to Panel question No. 57 of the third set, para. 163.

the general duty rate since at least 1987".<sup>120</sup> This "commitment represents a tariff concession that the United States undertook as part of its obligation to bind its Schedule under Article II of the GATT 1994".<sup>121</sup> The United States further advances that, due to this concession, it was unable to increase its tariffs above the duty-free bound level, so as to modulate the increase in imports.<sup>122</sup> As such, the USITC's reference to this concession established that the increased imports were a result of the "obligations incurred".<sup>123</sup> Finally, the United States argues that China is incorrect to argue that Members' ability to use anti-dumping, countervailing, and safeguard measures (if they meet the requisite conditions) means that tariff concessions do not prevent Members from increasing tariffs to remedy the serious injury caused by increased imports.<sup>124</sup>

7.51. With respect to China's claim that the United States engages in *post hoc* rationalization, the United States responds by arguing that "it is an incontrovertible fact that the U.S. duty rate for imports of CSPV products is bound at zero percent".<sup>125</sup> Thus, "[t]he only thing necessary to carry out this task is an identification of the tariff lines in question for a cross reference within the WTO systems".<sup>126</sup>

### 7.2.3.3.3 Evaluation of the Panel

7.52. Article XIX:1(a) of the GATT 1994 stipulates that imports must increase "as a result ... of the effect of the obligations incurred" by the Member implementing the safeguard measure. We agree with previous DSB reports to the effect that this requirement may be satisfied when the Member implementing the safeguard measure identifies a WTO obligation that would have prevented it from raising tariffs on the product at issue.<sup>127</sup>

7.53. In the present case, the USITC identified the United States' domestic tariff treatment of CSPV products when it observed that CSPV products covered by the safeguard measure "are provided for in subheading 8541.40.60 of the U.S. Harmonized Tariff Schedule [and] have been free of duty under the general duty rate since at least 1987".<sup>128</sup> Although we recognize that this statement does not explicitly establish that such tariff treatment was required under the United States' WTO obligations, we consider that the supplemental report appropriately demonstrates that this was the implication of the USITC's statement.

7.54. In the supplemental report, we recall that the USITC found:

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.<sup>[9]</sup> 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.<sup>[10]</sup>

<sup>120</sup> United States' first written submission, paras. 272-273; comments on China's response to Panel question No. 57 of the third set, para. 91.

<sup>121</sup> United States' first written submission, paras. 272-273; comments on China's response to Panel question No. 57 of the third set, para. 91.

<sup>122</sup> United States' second written submission, para. 159; response to Panel question No. 28 of the first set, para. 82; first written submission, para. 218; and comments on China's response to Panel question No. 57 of the third set, para. 91.

<sup>123</sup> United States' first written submission, paras. 269 and 275. Additionally, the United States advances that a tariff rate bound at 0% is more than sufficient to constitute a restraint on a Member's freedom to raise its ordinary customs duties, and thereby qualifies as a *per se* commitment that satisfies the requirement in Article XIX:1(a) concerning the "effect of obligations incurred". (United States' second written submission, para. 175; opening statement at the first meeting of the Panel, para. 43; response to Panel question No. 26 of the second set, para. 59; and comments on China's response to Panel question No. 57 of the third set, para. 91).

<sup>124</sup> United States' second written submission, para. 161.

<sup>125</sup> United States' comments on China's response to Panel question No. 57 of the third set, para. 90. (emphasis omitted)

<sup>126</sup> United States' comments on China's response to Panel question No. 57 of the third set, para. 90.

<sup>127</sup> See section 7.2.2 above.

<sup>128</sup> USITC supplemental report, (Exhibit CHN-6), fn 10.

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

<sup>10</sup> 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.<sup>129</sup>

7.55. In our view, the USITC's placement of footnote 10 immediately after two sentences concerning the United States' rights and obligations under the WTO agreements – including those arising from its trade liberalization and market-access commitments to China following a series of negotiations – reasonably reflects a connection between those rights and obligations and the duty-free treatment of CSPV products under subheading 8541.40.60 of the US HTS.<sup>130</sup> Implicitly, therefore, the USITC supplemental report indicates that the United States' duty-free treatment of CSPV products was related to its WTO obligations. In a similar vein, the placement of the same two sentences immediately after a sentence explaining why imports increased logically establishes a connection between the United States' WTO obligations and the increase in imports during the POI.

7.56. While we recognize that the USITC could have been clearer on this issue, we consider the foregoing aspects of the USITC supplemental report appropriately identified a WTO obligation that would have prevented the United States from raising its tariffs on CSPV products. On this basis, we consider that the USITC appropriately demonstrated that imports increased "as a result ... of the effect of the obligations incurred", as required under Article XIX:1(a) of the GATT 1994. Accordingly, we reject China's argument that the USITC's reference to the United States' domestic tariff treatment of CSPV products does not satisfy this requirement and that the United States' attempt to "link the general duty rate under its own Harmonized Tariff Schedule to the U.S. schedule to the GATT 1994 constitutes post-hoc rationalization".<sup>131</sup> Indeed, accepting China's argument would involve an overly formalistic approach to Article XIX:1(a) of the GATT 1994 and would ignore the connection drawn in the USITC supplemental report between the United States' WTO obligations and the treatment of CSPV products under its domestic tariff schedule.

7.57. We are also not persuaded by the other arguments raised by China on this issue.

7.58. First, contrary to China's position concerning when the United States started applying duty-free treatment to CSPV products<sup>132</sup>, we do not think that the fact that the United States extended this treatment *prior* to incurring WTO obligations (i.e. since at least 1987) means that it did not incur relevant obligations within the meaning of Article XIX:1(a) of the GATT 1994. In this regard, we consider that the USITC was correct to point out that the United States incurred obligations when it joined the WTO and agreed to make its tariff concessions subject to Article II of the GATT 1994 – treatment that was later extended to China when the Members agreed to its accession to the WTO.<sup>133</sup> In our view, the legal status of these obligations, and their practical consequences (such as the inability to raise tariffs rates beyond the bound rate), are unaffected by the fact that the relevant tariff treatment existed before they were incurred.

7.59. Second, we disagree with China's argument that it was necessary for the USITC to assess the magnitude of a tariff concession to determine whether imports increased as a result of that obligation.<sup>134</sup> While it is true that a tariff concession involving a significant reduction in the applied

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<sup>129</sup> USITC supplemental report, (Exhibit CHN-6), p. 4. (emphasis added)

<sup>130</sup> More generally, we observe that the tariff code used for import classifications under the US HTS corresponds with the United States' WTO Schedule of Concessions. In this regard, we note that the arbitrator in *US – Washing Machines* made the factual observation that "[t]he Harmonized System (HS) classifies goods by six-digit codes. The United States classifies imports on the basis of a 10-digit classification system, the Harmonized Tariff Schedule (HTS). Notably, an HTS code shares the same beginning six digits as an HS code." (Decision by the Arbitrator, *US – Washing Machines* (Article 22.6 – US), fn 248). Moreover, as noted by the Appellate Body in *Korea – Dairy*, "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." (Appellate Body Report, *Korea – Dairy*, para. 84).

<sup>131</sup> China's comments on the United States' response to Panel question No. 57 of the third set, para. 99. In arriving at this finding, we note that China has not referred to record evidence that demonstrates – directly or indirectly – that the United States had *not* incurred GATT 1994 obligations that would have prevented it from raising tariffs on CSPV products.

<sup>132</sup> China's second written submission, paras. 263 and 265; first written submission, paras. 257-258.

<sup>133</sup> See, e.g. USITC supplemental report, (Exhibit CHN-6), p. 4.

<sup>134</sup> China's second written submission, para. 266; response to Panel question No. 26 of the second set, paras. 255-258.

duty rate may result in increased imports due to the increased market access that becomes available after the concession, it is also true that tariff concessions in the form of bound rates prevent Members from being able to raise tariff rates beyond the bound rate in reaction to an increase in imports. This fact is unchanged by the magnitude of the tariff concession.

7.60. Finally, we disagree with China's contention that, because the United States could have increased duties on CSPV products through the imposition anti-dumping, countervailing, and safeguard measures, "obligations incurred" did not prevent the United States from raising duties on CSPV products.<sup>135</sup> Although the WTO agreements permit Members to raise tariffs through, *inter alia*, the application of trade remedies under certain circumstances, we fail to see why the existence of these rights means that tariff concessions – i.e. "obligations" – do not prevent Members from being able to raise tariffs in reaction to an increase in imports. In this respect, we note that China's argument is at odds with the text of Article XIX:1(a) of the GATT 1994, which explicitly contemplates that "obligations incurred" include "tariff concessions".

7.61. For the above reasons, we reject China's claim that the USITC failed to appropriately demonstrate in its report that imports increased "as a result ... of the effect of the obligations incurred" by the United States.

#### **7.2.4 Whether the Agreement on Safeguards obligates the competent authorities of a Member to demonstrate in their published report that imports increased "as a result of unforeseen developments and of the effect of the obligations incurred"**

7.62. In the sections above we have rejected China's claims that the USITC failed to appropriately demonstrate that imports of CSPV products increased "as a result of unforeseen developments and of the effect of the obligations incurred". Based on these findings, we do not consider it necessary to resolve the disagreement between the parties concerning the interpretative issue of whether the Agreement on Safeguards requires the competent authorities of a Member to make this demonstration in their published report.

### **7.3 The causal link between increased imports and serious injury**

#### **7.3.1 General factual background**

7.63. In the safeguard investigation, the USITC adopted a single product definition (CSPV products) that included CSPV cells and modules.<sup>136</sup> The USITC also determined that imports of CSPV products increased significantly over the 2012-2016 POI, specifically along the following trajectory:

Imports of CSPV products increased by 492.4 percent between 2012 and 2016. They increased each year, from 2.1 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. Imports as a ratio to domestic production also increased overall and in each year, 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.<sup>137</sup>

7.64. In addition, the USITC found that the domestic industry producing CSPV products was seriously injured during the POI. The USITC based this determination on a variety of factors concerning the condition of the domestic industry, specifically finding: (a) significant idling of domestic production facilities<sup>138</sup>; (b) significant unemployment and underemployment<sup>139</sup>; (c) inability of a significant number of firms to operate at a reasonable level of profit<sup>140</sup>, generate adequate capital to finance plant and equipment modernization, and maintain existing research and development (R&D) expenditures<sup>141</sup>; (d) declines in sales, market share, and other operating

<sup>135</sup> China's response to Panel question No. 23 of the second set, para. 229.

<sup>136</sup> USITC final report, (Exhibit CHN-2), pp. 13-16.

<sup>137</sup> USITC final report, (Exhibit CHN-2), p. 21. (fns omitted)

<sup>138</sup> USITC final report, (Exhibit CHN-2), pp. 31-33.

<sup>139</sup> USITC final report, (Exhibit CHN-2), pp. 33-34.

<sup>140</sup> USITC final report, (Exhibit CHN-2), pp. 34-35.

<sup>141</sup> USITC final report, (Exhibit CHN-2), pp. 35-37.

indicators<sup>142</sup>; and (e) adverse price conditions.<sup>143</sup> The USITC noted that the domestic industry's condition particularly declined in 2015 and 2016, and appeared to be continuing to decline in 2017.<sup>144</sup> The USITC further took into account that the US market was a focal point for exports.<sup>145</sup>

7.65. As part of its serious injury determination, the USITC also recognized that certain injury factors improved during the POI, such as the domestic industry's capacity, production, and shipments.<sup>146</sup> However, for certain of these factors, the USITC found that, because the improvements were not commensurate with the increase in demand in the US market, they supported its overall conclusion that the domestic industry was seriously injured.<sup>147</sup>

7.66. China does not challenge the USITC's determinations concerning the product definition, increased imports, or serious injury in these proceedings. Rather, China challenges the USITC's determination that a causal link existed between increased imports and serious injury.<sup>148</sup>

7.67. The USITC determined that such a causal link existed based on the following subsidiary findings:

- a. Declining prices and market share: During a period of substantial and growing volumes of low-priced imports, the domestic industry had to reduce prices and/or roll back announced price increases to compete with imported CSPV products, which were highly substitutable for US-manufactured CSPV products and were generally lower priced. Prices declined substantially in 2012, but temporarily stabilized as a result of the *CSPV I* and *CSPV II* orders. However, as imports from additional sources rapidly entered the US market and increased to higher volumes, the domestic industry's prices fell significantly throughout 2016 as the domestic industry's market share fell to its lowest level.<sup>149</sup> Although the domestic industry increased its shipments during the POI, this overall increase was dwarfed by growth in US consumption. Domestic producers reported losing sales to low-priced imports of CSPV products, and the majority of purchasers reported that they had increased their purchases of imported CSPV products.<sup>150</sup>
- b. Deteriorating financial conditions: The domestic industry's financial condition, which was at its worst at the beginning of the POI, improved marginally after the imposition of the *CSPV I* and *CSPV II* orders, but remained poor and deteriorated further in 2016, as imports peaked and market share and prices dropped anew. Consequently, a significant number of domestic producers were unable to generate adequate capital to finance plant and equipment modernization, and a significant number of domestic producers were unable to maintain existing R&D expenditures.<sup>151</sup>
- c. Poor operating indicators: Despite the need in the CSPV industry to increase capacity in order to achieve economies of scale, domestic capacity and production did not grow commensurately with demand, and capacity utilization remained low and dropped at the end of the POI when imports reached their summit. This resulted in the closure of facilities, layoffs, and increased trade adjustment assistance claims.<sup>152</sup>

<sup>142</sup> USITC final report, (Exhibit CHN-2), pp. 37-38.

<sup>143</sup> USITC final report, (Exhibit CHN-2), pp. 41-43.

<sup>144</sup> USITC final report, (Exhibit CHN-2), p. 43.

<sup>145</sup> USITC final report, (Exhibit CHN-2), pp. 38-41.

<sup>146</sup> USITC final report, (Exhibit CHN-2), pp. 32-33 and 37.

<sup>147</sup> USITC final report, (Exhibit CHN-2), pp. 33 and 37-38 (finding this dynamic to exist specifically with respect to increases in the domestic industry's capacity, production, and shipments).

<sup>148</sup> We note, however, that China claims that its lack of challenge should not be construed as acceptance that there was serious injury. (China's comments on the United States' response to Panel question No. 33 of the third set, para. 4; response to Panel question No. 33 of the third set, paras. 9-10; second written submission, para. 17 and fn 25; and responses to Panel question Nos. 1(a) and 1(b) of the second set).

<sup>149</sup> USITC final report, (Exhibit CHN-2), pp. 45-46.

<sup>150</sup> USITC final report, (Exhibit CHN-2), p. 49.

<sup>151</sup> USITC final report, (Exhibit CHN-2), p. 47.

<sup>152</sup> USITC final report, (Exhibit CHN-2), pp. 47-48.



7.68. Based on these findings, the USITC determined that "increased imports are a substantial cause of serious injury to the domestic industry manufacturing CSPV products based on a clear causal link between them".<sup>153</sup>

**7.3.2 Applicable legal requirements concerning the causal link between increased imports and serious injury under Articles 2.1, 3.1, and 4.2(b) of the Agreement on Safeguards**

7.69. The core conditions for applying a safeguard measure are set out in Article 2.1 of the Agreement on Safeguards, which in full provides:

A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.<sup>154</sup>

7.70. Accordingly, a safeguard measure may only be imposed when a product (a) is being imported in such increased quantities, (b) and under such conditions, that (c) cause or threaten to cause serious injury to the domestic industry.

7.71. The requirements concerning serious injury are elaborated in Article 4 of the Agreement on Safeguards. Article 4.1(a) defines "serious injury" as "a significant overall impairment in the position of a domestic industry", while Article 4.1(c) clarifies that a "domestic industry" is "the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products".

7.72. Articles 4.2(a) and 4.2(b) specifically pertain to the causal link between increased imports and serious injury. In full, they provide:

(a) In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

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

7.73. Pursuant to these provisions, the competent authorities of a Member must analyse whether increased imports are causing, or threatening to cause, serious injury to the domestic industry. They must also consider whether "factors other than increased imports are causing injury to the domestic industry at the same time" as increased imports and ensure that the injury caused by those factors is not "attributed to increased imports".

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<sup>153</sup> USITC final report, (Exhibit CHN-2), p. 50.

<sup>154</sup> Fn omitted.



7.74. Previous DSB reports have found that the Agreement on Safeguards does not establish any specific methodology as to how the existence of a causal link must be determined; as a consequence, the competent authorities of a Member have discretion in this regard.<sup>155</sup>

7.75. Moreover, when assessing whether the causation requirement in Article 4.2(b) of the Agreement on Safeguards has been fulfilled, previous DSB reports have considered, *inter alia*: (i) whether an upward trend in imports coincides with downward trends in relevant injury factors, and if not, whether an appropriate explanation was provided as to why nevertheless the data show causation; and (ii) whether the conditions of competition between the imported and domestic products as analysed demonstrate the existence of a causal link between the imports and serious injury.<sup>156</sup>

7.76. Previous DSB reports have also found that, if the competent authorities decide to base their causation analysis on the coincidence between increased imports and downward injury factors, "overall coincidence" is what matters and *not* whether coincidence or lack thereof can be shown in relation to a few selected factors. Thus, the mere presence of positive injury factors does not necessarily negate the existence of an "overall coincidence".<sup>157</sup> Moreover, in the absence of an "overall coincidence", the competent authorities may still be able to demonstrate the existence of a causal link if they can explain why a causal link nevertheless exists.<sup>158</sup>

7.77. Lastly, previous DSB reports have found that, regardless of the methodology used, in order to demonstrate that increased imports are causing serious injury, the competent authorities must find a "sufficiently clear" contribution by those imports.<sup>159</sup> However, the increased imports do *not* need to be the sole cause of injury, and the causal link between increased imports and serious injury may exist even though other factors are also contributing at the same time to the situation of the domestic industry.<sup>160</sup>

7.78. As we agree with the foregoing findings in previous DSB reports, we will assess China's claims against the USITC's determination of a causal link between increased imports and serious injury accordingly.

### **7.3.3 Whether the USITC acted inconsistently with Articles 2.1, 3.1, and 4.2(b) of the Agreement on Safeguards in respect of its determination of a causal link between the increased imports of CSPV products and serious injury of the domestic industry**

#### **7.3.3.1 Introduction**

7.79. The parties disagree on whether the USITC appropriately demonstrated that increased imports caused serious injury to the domestic industry.

7.80. China argues that the USITC failed to establish an "overall coincidence" between increased imports and the indicators of serious injury due to the prevalence of significant positive injury trends during the POI.<sup>161</sup> Relying on previous DSB reports, China contends that the failure of the USITC to establish an "overall coincidence" meant that it was required to explain why, notwithstanding the

<sup>155</sup> Panel Reports, *Korea – Dairy*, para. 7.96; *US – Steel Safeguards*, paras. 10.294 and 10.296; and *Ukraine – Passenger Cars*, para. 7.296.

<sup>156</sup> See also Panel Reports, *Argentina – Footwear (EC)*, para. 8.229 (confirmed in Appellate Body Report, *Argentina – Footwear (EC)*, para. 145); *US – Wheat Gluten*, para. 8.91; and *US – Lamb*, para. 7.232.

<sup>157</sup> Panel Reports, *US – Steel Safeguards*, para. 10.302; *US – Wheat Gluten*, para. 8.101. (emphasis omitted)

<sup>158</sup> Panel Reports, *US – Steel Safeguards*, paras. 10.303-10.304.

<sup>159</sup> Appellate Body Report, *US – Wheat Gluten*, para. 67.

<sup>160</sup> Appellate Body Report, *US – Wheat Gluten*, para. 67. See also Panel Report, *China – Cellulose Pulp*, paras. 7.26-7.27.

<sup>161</sup> China's first written submission, paras. 111-115; response to Panel question No. 2 of the second set, para. 11: "China argues that an overall coincidence is absent in the underlying investigation because even as imports increased, significantly important injury factors such as U.S. cell and module production, production capacity, cell capacity utilization, U.S. shipments, employment for cell manufacturing, and capital expenditures and financial performance actually *improved*" (fns omitted; emphasis original). See also China's second written submission, paras. 56-57.

absence of a coincidence, a causal link existed by providing an explanation that was "compelling".<sup>162</sup> According to China, the USITC did not meet this standard, as it failed to appropriately explain "why any negative trends that might exist are in fact linked to imports, and in fact demonstrate the required nexus between imports and the trends".<sup>163</sup> In this context, China submits that the USITC's analysis failed to properly account for key conditions of competition in the US market.<sup>164</sup> China alleges that, as a consequence of these deficiencies, the USITC's explanation is not "compelling".<sup>165</sup>

7.81. For its part, the United States claims that the USITC grounded its causation analysis in the findings that imports increased and that the domestic industry was experiencing serious injury, which are not challenged in this dispute.<sup>166</sup> The United States further argues that, contrary to China's claims, the USITC appropriately demonstrated an "overall coincidence" between the increased imports and the serious injury that it determined to exist, taking into account positive and negative injury trends, as well as the prevailing conditions of competition in the market.<sup>167</sup>

7.82. At the outset, we note that the USITC determined that increased imports caused serious injury to the domestic industry based on a coincidence between increased imports and a variety of injury factors, as well as on the conditions of competition between domestic and imported CSPV products. As noted above, the USITC identified downward injury factors, as well as fluctuating or positive injury factors that, when viewed in light of the conditions of competition, the USITC considered to support its determination that increased imports caused serious injury to the domestic industry.

7.83. China argues that the presence of positive injury trends during the POI means that there was no "overall coincidence" between increased imports and serious injury factors.<sup>168</sup> We disagree. In our view, the mere presence of positive trends or lack of perfect correlation between increased imports and serious injury trends do not necessarily preclude the existence of an "overall coincidence".<sup>169</sup> Moreover, contrary to China's view, we consider that our assessment of whether the USITC appropriately demonstrated an "overall coincidence" requires that we account for the full context of the USITC's causation determination, and specifically the relative importance of particular injury factors to the overall causal link. We base this understanding on the fact that certain injury factors may be less relevant due to the prevailing conditions of competition in the market or the nature of serious injury found to exist, and therefore are less relevant to whether a coincidence between increased imports and serious injury exists *overall*.<sup>170</sup>

7.84. China also argues that, due to the absence of an "overall coincidence", the USITC was required to provide a "compelling explanation as to why a causal link exists notwithstanding the absence of coincidence".<sup>171</sup> Based on this requirement, China contends that the USITC was further required to provide a "compelling" explanation to justify the linkage that it found between increased imports and specific injury factors.<sup>172</sup> Here we also disagree. As noted above, previous DSB reports have

<sup>162</sup> China's first written submission, paras. 116-125. For a general overview of the structure of China's causation claims, see China's first written submission, paras. 106-110; and second written submission, paras. 13-18.

<sup>163</sup> China's first written submission, para. 126.

<sup>164</sup> China's second written submission, para. 54; first written submission, paras. 130-132.

<sup>165</sup> China's first written submission, paras. 116-125; second written submission, paras. 51-55.

<sup>166</sup> United States' first written submission, paras. 109-111.

<sup>167</sup> For an overview of the United States' response to China's causation claims, see United States' first written submission, paras. 112-113; and second written submission, paras. 22-30.

<sup>168</sup> China's first written submission, paras. 111-115; second written submission, paras. 46-50.

<sup>169</sup> We agree with previous DSB reports that have addressed this issue. See Panel Reports, *US – Steel Safeguards*, para. 10.302; *US – Wheat Gluten*, para. 8.101; and *US – Tyres (China)*, para. 7.244 (upheld on appeal; see Appellate Body Report, *US – Tyres (China)*, paras. 244-248).

<sup>170</sup> In this regard, we note that the panel in *US – Tyres (China)* found that it was appropriate for the USITC to "support its determination of 'significant cause' with a finding of overall coincidence between an upward trend in subject imports from China and downward trends in the *relevant* injury factors". (Panel Report, *US – Tyres (China)*, para. 7.234 (emphasis added)). In the same case, the Appellate Body similarly observed that "[w]e do not consider that a single injury factor should be determinative, provided that the investigating authorities' correlation analysis provides a reasoned and adequate explanation for a determination that subject imports are a significant cause of material injury to the domestic industry". (Appellate Body Report, *US – Tyres (China)*, para. 246).

<sup>171</sup> China's first written submission, paras. 25 and 116 (quoting Panel Reports, *US – Steel Safeguards*, para. 10.308). See also China's second written submission, paras. 51-52.

<sup>172</sup> See, e.g. China's second written submission, paras. 18, 91, 102, 115, and 119-120.

found that the Agreement on Safeguards does not establish any specific methodological requirements with respect to the causation analysis so long as the competent authorities of a Member provide a reasoned and adequate explanation demonstrating a causal link between increased imports and serious injury.<sup>173</sup> This standard remains the same irrespective of whether an "overall coincidence" has been demonstrated between increased imports and relevant serious injury factors. While it may be the case that, as a factual matter, it is more difficult to demonstrate a causal link when a significant number of injury factors are positive, we reject the notion that a more exacting legal standard would be applicable in those circumstances. Rather, the explanation demonstrating the causal link would need to properly account for any positive injury factors to be reasoned and adequate.<sup>174</sup>

7.85. In accordance with these considerations, our analysis below focuses on whether China has demonstrated that the USITC's determination that "increased imports are a substantial cause of serious injury to the domestic industry" failed to appropriately address the relevant injury factors and account for the prevailing conditions of competition in the US market for CSPV products. In section 7.3.3.2, we address whether China has established that the USITC failed to provide a reasoned and adequate explanation linking increased imports to the negative injury factors. We do so by first addressing the USITC's findings concerning certain key conditions of competition before addressing the USITC's specific findings concerning the relationship between increased imports and the specific negative injury factors that existed during the POI, i.e. adverse price conditions, lost market share, deteriorating financial performance, and plant closures. Thereafter, in section 7.3.3.3, we address whether China has established that the USITC failed to appropriately reconcile the seemingly positive injury factors that existed during the POI with its determination that increased imports caused serious injury to the domestic industry, focusing on the USITC's specific findings concerning increases in the domestic industry's capacity, production, and shipments; employment; and capital expenditures, R&D expenses, and value of production assets. Finally, we conclude in section 7.3.3.4 by addressing whether China has established that the USITC's overall causation determination failed to comply with the requirements of the Agreement on Safeguards.

### **7.3.3.2 The USITC's findings concerning the relationship between increased imports and negative factors of serious injury**

7.86. As noted above, China contends that the USITC failed to appropriately explain why the negative trends were linked to imports, so as to demonstrate an "overall coincidence" between imports and trends.<sup>175</sup> According to China, the USITC overstated the importance of negative trends in light of the conditions of competition and thereby failed to provide a "compelling" explanation to justify the causal link.<sup>176</sup> The United States responds to these claims by arguing that the USITC provided a reasoned and adequate explanation demonstrating an overall coincidence between increased imports and negative injury trends that took into account relevant conditions in the US market.<sup>177</sup>

7.87. Below, we address this disagreement by first considering the parties' arguments concerning the USITC's analysis of the conditions of competition in the US market, focusing on the key issues of market segmentation and the substitutability of domestic and imported CSPV products. We address these conditions of competition at the outset as they directly pertain to several aspects of the parties' disagreement concerning the USITC's analysis. After doing so, we address the parties' disagreement concerning the USITC's analysis of the relationship between increased imports

<sup>173</sup> Panel Reports, *Korea – Dairy*, para. 7.96; *US – Steel Safeguards*, paras. 10.294 and 10.296; and *Ukraine – Passenger Cars*, para. 7.296. In this context, we disagree with China's argument that, as a consequence of the USITC's "choice" to conduct a coincidence analysis, the USITC was *required* to "first demonstrate the existence of such overall coincidence, and then provide a reasoned and adequate explanation for its finding of causality", which must be "compelling" explanation because it "failed to establish that an overall coincidence exists". (China's second written submission, para. 51).

<sup>174</sup> China effectively concedes this point. (China's second written submission, para. 29: "[t]o be clear, asking for the explanation to be 'compelling' does not mean that the panels – or China – are reading additional requirements into Article 3.1 of the Agreement on Safeguards, nor a 'heightened standard' under Article 3.1 as alleged by the United States. This is merely a reflection of the requirement that the explanation must be 'reasoned and adequate' in a context where there is an absence of a coincidence in trends, and how the requirement ought to be applied in such a scenario" (fn omitted)).

<sup>175</sup> China's first written submission, paras. 126-127.

<sup>176</sup> China's second written submission, paras. 87-90. See also China's first written submission, paras. 158-159.

<sup>177</sup> United States' first written submission, paras. 114-116.

and the specific negative injury factors that existed during the POI, i.e. adverse price conditions, lost market share, deteriorating financial performance, and plant closures.

### 7.3.3.2.1 Key conditions of competition

7.88. The parties disagree on whether the USITC's analysis of the causal link between increased imports and serious injury appropriately accounted for the prevailing conditions of competition in the US market.

7.89. China argues that the USITC failed to properly account for key conditions of competition, which weighed in favour of a finding that no causal relationship existed between increased imports and serious injury.<sup>178</sup> According to China, the relatively small size of the domestic industry and the explosive growth in demand "severely attenuated the ability of changes in imports to affect the domestic industry".<sup>179</sup> China contends that this was the case particularly because the domestic industry focused on the residential and commercial segments of the US market, whereas the explosive growth in demand occurred in the utility segment.<sup>180</sup> As a consequence of this segmentation, as well as differing product features and customer preferences, China claims that the domestic industry was unable to supply CSPV products that were substitutable with imports.<sup>181</sup> China contends that it was for these reasons, rather than competition from low-priced imports, that the domestic industry was unable to capitalize on the growth in the US market during the POI.<sup>182</sup>

7.90. The United States disputes China's characterization of these conditions of competition in the US market. According to the United States, "China's argument that the domestic industry did not have the ability to meet increasing demand fails because it misses the point that increased imports themselves directly impeded the domestic industry's ability to compete with low-priced imports in the first instance".<sup>183</sup> In this context, the United States contends that the USITC properly found that domestic and imported CSPV products competed in the residential, commercial and utility segments<sup>184</sup> and also that domestic and imported CSPV products were "highly substitutable".<sup>185</sup>

7.91. Overall, we are not persuaded by China's argument that key conditions of competition (rather than increased imports) meant that the domestic industry was unable to capitalize on growth in the domestic market. As an initial matter, we fail to see why the small size of the domestic industry in relation to the overall US market necessarily demonstrates that the domestic industry would have been unaffected by the significant increase in imports that occurred over the POI. This is particularly the case because the USITC found that the domestic industry had significant unused capacity<sup>186</sup> and was prevented by increased imports from meaningfully increasing its capacity to become more competitive.<sup>187</sup> In addition, by focusing on the significant growth in the utility segment, China's argument concerning the conditions of competition fails to account for the USITC's findings that the residential and commercial segments of the market also grew considerably during the POI.<sup>188</sup> Further to these shortcomings, as explained below, we do not consider that China has

<sup>178</sup> China's second written submission, para. 54.

<sup>179</sup> China's second written submission, para. 54; first written submission, paras. 130-132.

<sup>180</sup> China's second written submission, para. 54 ("the explosive growth in demand in the utility segment explains the increase in imports, which focused on satisfying that unmet demand. The relatively small domestic industry, focused on the residential and commercial segment, simply could not satisfy this rapidly growing demand"), para. 96 ("[i]f imports can better meet changing needs because the domestic industry cannot offer products demanded by the growing market, as a result of its focus on a different market segment and the consequent lack of product substitutability, imports might well grow faster than the competing domestic industry"), and heading of section II(B)(2)(b)(iii) ("The US industry chose to focus on the residential and commercial segments, giving up the more profitable utility segment"); first written submission, paras. 134-137.

<sup>181</sup> China's second written submission, paras. 97-101. See also China's first written submission, paras. 138-139.

<sup>182</sup> See fnns 180-181 above.

<sup>183</sup> United States' first written submission, para. 119. See also United States' second written submission, paras. 31-36.

<sup>184</sup> United States' first written submission, paras. 121-125; second written submission, paras. 31-50.

<sup>185</sup> United States' first written submission, para. 119; second written submission, paras. 51-65.

<sup>186</sup> USITC final report, (Exhibit CHN-2), fn 261; USITC final staff report, (Exhibit CHN-3), pp. III-10-III-13.

<sup>187</sup> USITC final report, (Exhibit CHN-2), pp. 60-61.

<sup>188</sup> USITC final staff report, (Exhibit CHN-3), p. V-1 and figure V-1; USITC final report, (Exhibit CHN-2), p. 58.

demonstrated that the USITC erred in finding that domestic and imported CSPV products competed in the residential, commercial, and utility segments and were "highly substitutable". As such, we do not consider that China has established that, as a general matter, the USITC's causation determination was deficient as a result of failing to account for these conditions of competition.

#### **7.3.3.2.1.1 Segmentation in the US market for CSPV products**

7.92. In its final report, the USITC found that CSPV products are sold into three main segments in the US market, i.e. the residential, commercial, and utility segments:

The vast majority of CSPV modules sold in the U.S. market are connected to the electricity grid, although some CSPV products are sold for off-grid applications. There are three grid-connected market segments – residential, non-residential/commercial, and utility – although the segments overlap somewhat. Installation sizes vary by segment, but the size of installations generally has grown over time in each segment due to a combination of greater cell efficiency (more kW/cell) and/or larger installations (more modules/installation).

Annual U.S. installations of on-grid photovoltaic systems increased from 3,373 MW in 2012 to 14,762 MW in 2016, an increase of 338 percent. All three on-grid segments experienced considerable growth in both the number of installations and the total wattage of installation projects during the POI. By December 2016, more than 19,770 MW of utility photovoltaic generating capacity was in operation across the United States, representing 60 percent of total U.S. solar photovoltaic installations (including thin film).

Since 2009 – the first year of the period examined in the *CSPV I* antidumping and countervailing duty investigations – there has been a shift in the distribution of sales among the three market segments. In 2009, the commercial segment accounted for the largest share of the market, followed by the residential and utilities segments, whereas throughout the 2012 to 2016 POI in the instant safeguard investigation, utilities were the largest segment of the U.S. market, followed by the residential and commercial segments. During the POI, the domestic industry and importers each sold CSPV products in the U.S. market to distributors, residential and commercial installers, and utility customers. The vast majority of the domestic industry's shipments served residential and commercial installers in 2016, whereas a majority of imports were shipped to the utility segment.<sup>189</sup>

7.93. In the final staff report, the USITC further explained:

CSPV products are generally sold in the United States to distributors, residential and commercial installers, and utility/developers. Domestic producers sold CSPV products to all channels of distribution during the period of investigation, but sold a majority of their products to distributors (a majority of which were then sold to residential installers) and a substantial amount to commercial installers. ... A majority of sales of imported products by U.S. importers were to utility/developers, with a substantial amount going to commercial and residential installers.<sup>190</sup>

7.94. China challenges the USITC's finding that domestic and imported CSPV products competed in the residential, commercial, and utility segments in the US market.

7.95. With respect to the residential and commercial segments, China argues that the USITC failed to precisely analyse both the extent to which domestic and imported products competed in the residential and commercial segments, and record evidence that showed that non-price factors limited competition between domestic and imported products.<sup>191</sup> Yet, in line with the

<sup>189</sup> USITC final report, (Exhibit CHN-2), pp. 27-28. (fns omitted)

<sup>190</sup> USITC final staff report, (Exhibit CHN-3), p. I-28. (fns omitted)

<sup>191</sup> China's response to Panel question No. 3 of the second set, paras. 14-21; response to Panel question No. 4 of the second set, paras. 22-30. See also China's response to Panel question No. 38 of the third set, paras. 36-38; second written submission, para. 98. China points to the difference in technological requirements

United States' response to China's arguments<sup>192</sup>, we do not consider that record evidence supports the view that only "limited" competition existed between domestic and imported products in the residential and commercial market segments.<sup>193</sup> To the contrary, based on evidence provided by US producers and importers concerning their commercial shipments, the USITC found that a majority of domestic products were sold to residential and commercial segments where a substantial amount of imports were also sold.<sup>194</sup>

7.96. With respect to the utility segment, China contends that the USITC improperly focused on the "limited instances in competition in the small utility segment", which was not sufficient to support a finding that the domestic industry competed in the utility segment as a whole.<sup>195</sup> China further argues that the USITC's analysis of competition in the "small utility" segment was "absolutely insufficient" in light of the record evidence that showed that the domestic industry was not competitive even in this part of the market for reasons unrelated to imports.<sup>196</sup> In response to these arguments, the United States submits that China fails to discredit the appropriateness of the USITC's findings.<sup>197</sup>

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between the residential and commercial segments, which typically required 60-cell modules, and the utility segment, which typically used 72-cell modules.

<sup>192</sup> United States' second written submission, paras. 37-38; response to Panel question No. 4 of the second set, paras. 6-7; and comments on China's response to Panel question No. 38 of the third set, paras. 25-26. See also United States' first written submission, para. 122.

<sup>193</sup> In particular, China does not explain why the relatively small size of the domestic industry and the increase in demand in the residential and commercial market segments show that domestic and imported products did not meaningfully compete. As support for its position, China relies on the domestic industry's limited capacity and inability to supply the full extent of the market during the POI as well as the technological differences between the CSPV products typically demanded in the different segments. (See, e.g. China's response to Panel question No. 3 of the second set, paras. 16-19; response to Panel question No. 38 of the third set, paras. 36-38; and second written submission, para. 98). However, in our view, this evidence does not demonstrate that domestic and imported products did not compete in the residential and commercial segments.

In addition, we do not think that it was necessary for the USITC to delineate more precisely the extent to which domestic and imported products competed in the residential and commercial market segments. As already noted, the USITC found that domestic and imported CSPV products were sold to overlapping market segments through overlapping channels of distribution, particularly to residential and commercial installers, which was supported by questionnaire responses it received from domestic producers and importers. Based on this evidence, we do not consider that it was inappropriate for the USITC to find that domestic and imported products both competed in the residential and commercial market segments. (USITC final report, (Exhibit CHN-2), pp. 29-30; USITC final staff report, (Exhibit CHN-3), p. I-28).

Furthermore, China fails to explain why the non-price factors to which it refers establish that imported products had a clear competitive advantage over domestic products, such that domestic and imported products did not compete for sales to residential and commercial installers. While China refers to evidence that generally establishes that non-price factors were relevant to US purchasers of CSPV products, we do not consider that this establishes that domestic and imported products did not compete for sales in the residential and commercial segments of the US market. (China's response to Panel question No. 7 of the second set; response to Panel question No. 38(1) of the third set).

<sup>194</sup> USITC final staff report, (Exhibit CHN-3), p. I-28.

<sup>195</sup> China's response to Panel question No. 5 of the second set, paras. 46-49. See also China's second written submission, para. 115.

<sup>196</sup> China's response to Panel question No. 5 of the second set, para. 49; response to Panel question No. 38 of the third set, paras. 40-43. See also China's second written submission, para. 112. We further note that, as part of its non-attribution claim that "[t]he USITC conducted an insufficient and contradictory analysis of the participation of the domestic industry in the utility segment", China alleges that the domestic industry only participated "to a limited degree in the smaller projects" of less than 10 MW, which represented "about 15-20% of the market". (China's second written submission, para. 151).

<sup>197</sup> United States' second written submission, paras. 46-49 and 54; first written submission, paras. 124-125. In particular, the United States contends that China is wrong to assert that the USITC failed to assess competition in the utility market segment as a whole, as the USITC "examined the effect of imports on sales that domestic producers could supply and also on sales that they could not supply, including sales for high-volume projects. In so doing, it accounted for the prevailing conditions of competition in the market and fully explained how, in that context, increased imports caused serious injury throughout the utility segment". (United States' second written submission, para. 46). In this connection, the United States contends that China ignores or fails to discredit the record evidence demonstrating that the domestic industry in fact competed in the utility segment.

7.97. In line with the United States' position, we are not convinced by China's claim that it was inappropriate for the USITC to find that the domestic industry competed in the utility segment.<sup>198</sup> While the USITC found that a majority of imports were shipped to the utility segment, it also found that domestic CSPV products were sold to utility customers.<sup>199</sup> As noted by the United States<sup>200</sup>, this finding is supported by record evidence that indicates (a) that the utility segment covered projects of a capacity of 1 MW or above<sup>201</sup> and that these projects had a median size of 4.9 MW during the POI<sup>202</sup>; and (b) that the domestic industry was capable of supplying, and did in fact participate in, utility projects that were larger than 1 MW.<sup>203</sup>

7.98. In addition, when rejecting respondents' argument that the domestic industry focused on the residential and commercial segments and decided not to compete for utility sales until late in the POI, the USITC found that the domestic industry had participated in bids in the utility segment.<sup>204</sup> The USITC also found that, throughout the POI, the domestic industry produced the types of CSPV modules that the utility installations typically required (in particular 72-cell modules, which became the standard for utility installations by 2013-2014).<sup>205</sup> These findings informed the USITC's conclusion that the domestic industry "sold or tried to sell CSPV products to utilities throughout the POI" and "clearly sought to compete" in the utility segment.<sup>206</sup>

7.99. We are also not convinced by the allegedly contrary evidence to which China refers. Most notably, China argues that the USITC failed to properly account for the domestic industry's smaller size<sup>207</sup> and for complaints from market participants that identify instances where the domestic industry was allegedly unable to fulfil specific orders or otherwise did not satisfy customer requirements or expectations.<sup>208</sup> In our view, however, the alleged inability of the domestic industry to supply large-scale projects in the utility segment does not render inappropriate the USITC's finding that the domestic industry nevertheless competed in the utility segment based on the capacity that it had.<sup>209</sup> Moreover, certain of the complaints to which China refers show that the domestic industry made sales to customers in the utility segment.<sup>210</sup> As a result, we do not consider that these statements support China's view that the domestic industry did not participate in the utility segment or otherwise undermine the appropriateness of the USITC's finding on this point.<sup>211</sup>

<sup>198</sup> As a result, we reject China's argument that the USITC failed to explain why "its unitary analysis was valid for the three market segments described in its determination which were not subject to the same conditions of competition". (China's response to Panel question No. 37 of the third set, paras. 28-33).

<sup>199</sup> USITC final report, (Exhibit CHN-2), pp. 27-28.

<sup>200</sup> United States' second written submission, para. 47.

<sup>201</sup> USITC final report, (Exhibit CHN-2), fn 334 (indicating that, pursuant to the US Energy Information Administration, "utility projects are defined as those having a capacity of 1 MW and above"); SEIA prehearing brief, (Exhibit CHN-20), p. 19 and fn 49.

<sup>202</sup> USITC final report, (Exhibit CHN-2), fn 334; USITC final staff report, (Exhibit CHN-3), p. I-27.

<sup>203</sup> Transcript of the USITC injury hearing, (Exhibit CHN-9), pp. 163-165.

<sup>204</sup> USITC final report, (Exhibit CHN-2), p. 59; USITC final staff report, p. V-3 and fn 13. See also Suniva's posthearing injury brief, (Exhibit USA-17), exhibit 9, pp. 1-2; SolarWorld's posthearing injury brief, (Exhibit USA-16), exhibit 1, p. 23. We further note that Suniva referred to the portion of the utility segment where it competed as the "small utility" market. (USITC final report, (Exhibit CHN-2), pp. 59-60; Transcript of the USITC injury hearing, (Exhibit CHN-9), p. 101).

<sup>205</sup> USITC final report, (Exhibit CHN-2), p. 60.

<sup>206</sup> USITC final report, (Exhibit CHN-2), pp. 58-61. In this regard, we note that the USITC found that, regardless of the domestic industry's presence in the utility segment, "the large volume of imports at low and declining prices adversely impacted the domestic industry's financial performance, making it difficult for the domestic industry to increase capacity to a scale that made it more competitive in this segment, even if it managed to develop and even pioneer innovative products that utilities and others sought". (USITC final report, (Exhibit CHN-2), pp. 60-61). These findings show that the USITC's analysis of the conditions of competition was not confined to the "small utility" segment, contrary to China's view. (China's response to Panel question No. 5 of the second set, para. 46).

<sup>207</sup> China's response to Panel question No. 5 of the second set, paras. 35, 41, and 48.

<sup>208</sup> China's response to Panel question No. 5 of the second set, para. 49; response to Panel question No. 38 of the third set, paras. 40-43.

<sup>209</sup> China appears to concede this point when it notes, in the context of its non-attribution claim, that the domestic industry participated in projects of less than 10 MW, "about 15-20% of the market". (China's second written submission, para. 151).

<sup>210</sup> China's response to Panel question No. 5 of the second set, para. 49; response to Panel question No. 38 of the third set, paras. 40-43.

<sup>211</sup> In this regard, we agree with the United States' observation that the evidence to which China refers does not "cast doubt on the reasonableness of the Commission's finding that the domestic industry was



7.100. Finally, regarding China's argument that it was improper for the USITC to rely on the "limited instances in competition in the small utility segment" as support for its finding that the domestic industry competed in the utility segment as a whole, we note the following. Article 4.1(c) of the Agreement on Safeguards requires that serious injury be demonstrated in respect of the domestic industry *as a whole*, while Article 2.1 stipulates that safeguard measures may be applied with respect to a "product" when "such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products". Thus, when a singular "product" is under investigation, the competent authorities are only required to conduct a single causation analysis; they are not required to conduct disaggregated analyses in which serious injury and causation must be demonstrated with respect to individual market segments.<sup>212</sup> In this context, we do not consider that it is necessary to analyse or find competition in specific market sub-segments, provided that the conditions of competition, overall, are properly accounted for in the analysis.<sup>213</sup>

7.101. In the present case, the USITC adopted a single product definition, which China does not challenge in these proceedings. Moreover, as we have found above, China has not demonstrated that it was inappropriate for the USITC to find that domestic and imported CSPV products competed for sales in the residential and commercial segments of the US market, as well as in a portion of the utility segment.<sup>214</sup> We further note that, during the POI, all three market segments grew considerably<sup>215</sup> and the domestic industry had significant unused production capacity.<sup>216</sup> Based on these circumstances, we do not consider that the limited participation of the domestic industry in a portion of the utility segment would undermine the ability of increased imports to adversely impact the domestic industry as a whole. As a result, we do not consider that the USITC's analysis of the conditions of competition, or causation more generally, is flawed in this regard, contrary to China's view.

### 7.3.3.2.1.2 Substitutability of domestic and imported CSPV products

7.102. The USITC also found that domestic and imported CSPV products were "highly substitutable" based on the following considerations:

Throughout the POI, U.S. producers and importers made commercial shipments of a wide variety of CSPV products, predominantly in the form of modules. Imported and U.S.-manufactured CSPV products were sold in a range of wattages and conversion efficiencies, and modules were sold in both 60-cell and 72-cell forms. Imported and U.S.-manufactured CSPV products also were sold to overlapping market segments through overlapping channels of distribution, particularly to residential and commercial installers. In the U.S. market for CSPV products, purchasers consider a variety of factors in their purchasing decisions, but price continues to be an important factor. Additionally,

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competitive in the portion of the utility segment it was able to supply". (United States' comments on China's response to Panel question No. 38 of the third set, para. 28).

<sup>212</sup> This approach has been adopted in previous dispute settlement proceedings involving safeguard measures. (Panel Reports, *Argentina – Footwear (EC)*, para. 8.137; *Korea – Dairy*, para. 7.58). We further note that China agrees with this general approach, although it contends that the causation analysis "needs to take into account the existence and factual relevance of different market segments". (China's response to Panel question No. 36 of the third set, paras. 24-26).

<sup>213</sup> In this regard, we recall that Article 2.1 of the Agreement on Safeguards stipulates that a Member may only apply a safeguard measure if it has determined that imports increased "under *such conditions* as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products" (emphasis added). As such, we do not consider that the Agreement on Safeguards establishes an independent requirement to precisely delineate the competitive conditions between domestic and imported products. Rather, it requires that the conditions of competition be properly accounted for in the analysis of the causal link between increased imports and serious injury. (Panel Report, *Ukraine – Passenger Cars*, para. 7.190 (noting that conditions of competition "must be such as to make it possible for those increased quantities to cause serious injury or threat thereof")). More generally, we note that the phrase "and under such conditions" has been previously interpreted to "not provide for an additional criterion or analytical requirement to be performed before imposing a safeguard measure", but rather refers to the substance of the causation analysis that must be performed under Articles 4.2(a) and 4.2(b) of the Agreement on Safeguards. (Panel Reports, *Korea – Dairy*, para. 7.52; *US – Wheat Gluten*, para. 8.108).

<sup>214</sup> USITC final staff report, (Exhibit CHN-3), p. I-28.

<sup>215</sup> USITC final staff report, (Exhibit CHN-3), p. V-1 and figure V-1.

<sup>216</sup> USITC final report, (Exhibit CHN-2), pp. 32 and 47 and fns 261 and 262.



most U.S. producers, importers, and purchasers reported that U.S.-produced CSPV products were interchangeable with imported CSPV products. Accordingly, we find that imported CSPV products are highly substitutable for U.S.-manufactured CSPV products and price is an important consideration in purchasing decisions.<sup>217</sup>

7.103. China advances a series of arguments contending that the USITC's finding on substitutability is deficient. In particular, China argues that the USITC ignored or failed to properly analyse (a) the distinction between 60- and 72-cell modules<sup>218</sup> as well as other technological differences between domestic and imported products<sup>219</sup>; and (b) evidence demonstrating that market participants did not consider domestic and imported products to be interchangeable<sup>220</sup>, and that customers preferred imported over domestic CSPV products irrespective of their similar physical properties.<sup>221</sup> For its part, the United States contends that the USITC's analysis appropriately accounted for all relevant evidence and that China's claims do not withstand scrutiny.<sup>222</sup>

7.104. Here also we agree with the United States. The USITC found that domestic and imported products were "highly substitutable" based on questionnaire responses that indicated that 10 of 11 domestic producers, 33 of 47 importers, and 78 of 102 purchasers considered CSPV products produced in the United States and in other countries to be interchangeable.<sup>223</sup> Although questionnaire responses also indicated that product differentiation existed within the market, and that non-price factors were relevant to purchasing decisions, they indicated that price was still an important factor in competition between domestic and imported CSPV products.<sup>224</sup> As we see it, this price competition confirms the USITC's finding that CSPV products from domestic and imported sources were substitutable.

7.105. The USITC also found that the domestic industry sold both 60-cell and 72-cell modules throughout the POI and lost market share to imports for both types of modules.<sup>225</sup> It observed that SolarWorld added a 72-cell module assembly line to its facilities in 2016 due to increasing demand in the utility market, and that Suniva devoted 45% of its cell manufacturing capacity to 72-cell modules.<sup>226</sup> As such, although China may be correct in asserting<sup>227</sup> that 60-cell modules were typically used in the residential and commercial segments of the US market, whereas 72-cell modules were typically used in the utility segment (particularly as of 2013-2014), we consider that the USITC appropriately accounted for this distinction by finding that the domestic industry sold both types of modules and competed in all three market segments.<sup>228</sup>

7.106. Relatedly, we are not convinced by China's claim that the USITC ignored technological differentiation between domestic and imported products. While the USITC found that the domestic industry focused on the production of more efficient monocrystalline cell modules, it also found that purchasers did not generally specify whether they wanted monocrystalline or less efficient multicrystalline CSPV products.<sup>229</sup> The USITC further found that, since both technologies were sold in all segments of the US market, prices of multicrystalline CSPV products affected prices of monocrystalline products and *vice versa*.<sup>230</sup> These findings, which China has not challenged, serve to disprove China's claim. The same findings also align with certain of the statements from the USITC injury hearing cited by China, which indicate that differences in technology between domestic and

<sup>217</sup> USITC final report, (Exhibit CHN-2), pp. 29-30. (fns omitted)

<sup>218</sup> China's second written submission, para. 98; comment on the United States' response to Panel question No. 36 of the third set, para. 15.

<sup>219</sup> See, e.g. China's response to Panel question No. 6 of the second set, paras. 59-60 and 76-77; and response to Panel question No. 13 of the second set, para. 152.

<sup>220</sup> See, e.g. China's response to Panel question No. 6 of the second set, paras. 59-60 and 73-78.

<sup>221</sup> See, e.g. China's response to Panel question No. 13 of the second set, paras. 151-155.

<sup>222</sup> United States' second written submission, paras. 51-65. See also United States' response to Panel question No. 4 of the first set, para. 7; response to Panel question No. 20 of the first set, para. 49; comments on China's response to Panel question No. 38 of the first set, para. 27; and comments on China's response to Panel question No. 40 of the first set, paras. 37-42.

<sup>223</sup> USITC final staff report, (Exhibit CHN-3), table V-8.

<sup>224</sup> USITC final report, (Exhibit CHN-2), pp. 29-30; USITC final staff report, (Exhibit CHN-3), pp. V-13-V-15 and tables V-4-V-6.

<sup>225</sup> USITC final report, (Exhibit CHN-2), p. 60.

<sup>226</sup> USITC final report, (Exhibit CHN-2), p. 60.

<sup>227</sup> China's second written submission, para. 98.

<sup>228</sup> USITC final report, (Exhibit CHN-2), p. 60.

<sup>229</sup> USITC final report, (Exhibit CHN-2), p. 60.

<sup>230</sup> USITC final report, (Exhibit CHN-2), p. 60.

imported products could have been accounted for by price.<sup>231</sup> In our view, this dynamic corroborates the USITC's finding that domestic and imported products were substitutable, despite any technological differences that may have existed. Moreover, while the USITC recognized that certain types of products were only available from foreign sources, it found that this was only a small share of all product offerings.<sup>232</sup>

7.107. China more generally contends that the USITC's finding that the domestic and imported CSPV products were interchangeable failed to account for the segmentation in the US market and for any capacity limitations of the domestic industry.<sup>233</sup> However, as we have already found in the section above, we do not consider that China has established that the USITC erred in finding that domestic and imported CSPV products competed in each of the residential, commercial, and utility market segments. Moreover, China fails to explain why any capacity limitations that may have prevented the domestic industry from producing certain types and quantities of CSPV modules would vitiate the USITC's more general finding that domestic and imported products were interchangeable. Again, the USITC based this finding on the clear majority view among producers, importers, and purchasers.<sup>234</sup>

7.108. China also argues that the role of non-price factors in sales competition demonstrates that customers did not actually consider domestic and imported CSPV products to be interchangeable.<sup>235</sup> Yet, in our view, the simple fact that non-price factors were relevant in CSPV market competition does not show that it was inappropriate for the USITC to find that domestic and imported products were interchangeable. China further advances that "the Final Staff Report also showed that reasons reported [by purchasers] for not purchasing the domestic product included 'limited availability' and no possibility to send 'stand-alone CSPV products'".<sup>236</sup> However, we note that only seven of the 35 responding purchasers that reported that they did not purchase US-origin CSPV products provided these reasons.<sup>237</sup> In addition, China observes that "[r]easons adduced for decreasing purchases of U.S.-origin products included 'lack of availability' as well as 'longer-lead times'".<sup>238</sup> But purchasers also cited "lower import prices" as a reason for decreasing purchases of US-origin CSPV products, which supports the USITC's finding that domestic and imported products were interchangeable.<sup>239</sup>

7.109. Finally, we are not convinced by China's assertion that the USITC based its determination of substitutability "fundamentally ... on similarities in the physical properties" and ignored customers' preferences with respect to other product features.<sup>240</sup> Indeed, it appears that the USITC accounted for such features when it assessed the interchangeability between domestic and imported products. For example, the USITC noted that "[t]hree importers stated that performance data and bankability of the CSPV products can limit the degree of interchangeability".<sup>241</sup> The USITC also noted that certain importers reported that technological differences affected interchangeability.<sup>242</sup> These views, however, were ultimately in the minority, as only 14 of 47 reporting importers indicated that

<sup>231</sup> China's response to Panel question No. 6 of the second set, para. 60: "Affidavit Craig Cornelius (NRG Energy): 'By end of the POI, Suniva's modules has only increased to 340W while conventional 72-cell mono PERC [i.e. passivated emitter and rear contact] modules had improved to 360W; this 20W deficit for Suniva panels would require a \$0.02/W price discount to yield equivalent project returns on utility-scale projects, and higher discounting for commercial rooftop projects. *Thus, in order to remain competitive due to the deterioration in the competitiveness of its technology, Suniva would have had to decrease its pricing during the POI by as much as \$0.07/W or more than other suppliers*'". (emphasis added)

<sup>232</sup> USITC final report, (Exhibit CHN-2), p. 52.

<sup>233</sup> China's response to Panel question No. 8 of the first set, paras. 56-60; response to Panel question No. 6 of the second set, paras. 52-61.

<sup>234</sup> Based on these views, we disagree with China's contention that the USITC's conclusion was "overbroad" and that the evidence on this issue was "mixed". (China's response to Panel question No. 6 of the second set, para. 52; response to Panel question No. 13 of the second set, para. 152).

<sup>235</sup> China's response to Panel question No. 8 of the first set, paras. 60-61; response to Panel question No. 13 of the second set, paras. 153-154.

<sup>236</sup> China's response to Panel question No. 13 of the second set, para. 155.

<sup>237</sup> USITC final staff report, (Exhibit CHN-3), pp. V-15-V-16.

<sup>238</sup> China's response to Panel question No. 13 of the second set, para. 155.

<sup>239</sup> USITC final staff report, (Exhibit CHN-3), p. V-16.

<sup>240</sup> China's response to Panel question No. 13 of the second set, paras. 151-155; second written submission, para. 159.

<sup>241</sup> USITC final staff report, (Exhibit CHN-3), p. V-16.

<sup>242</sup> USITC final staff report, (Exhibit CHN-3), p. V-16.

domestic and imported products were not interchangeable in addition to 1 of 11 reporting producers and 24 of 102 reporting purchasers.<sup>243</sup>

7.110. Based on the foregoing, we do not consider that China has established that the USITC erred in finding that domestic and imported CSPV products were "highly substitutable". As such, we do not consider that China has demonstrated that the USITC's causation determination is deficient on this basis.

### 7.3.3.2.2 Adverse price conditions

#### 7.3.3.2.2.1 Factual background

7.111. As part of its causation determination, the USITC found that the domestic industry experienced adverse price conditions as a result of increased low-priced imports.<sup>244</sup> According to the USITC, these adverse price conditions led to several other aspects of serious injury experienced by the domestic industry during the POI, such as the overall financial deterioration of the domestic industry; the inability of a significant number of domestic producers to finance plant and equipment modernization and maintain R&D expenditure levels; and the inability of the domestic industry to increase its capacity to achieve economies of scale.<sup>245</sup>

7.112. In its final report, the USITC found that the domestic industry experienced adverse price conditions as a result of increased low-priced imports, based on the following subsidiary findings:

- a. Domestic and imported products were highly substitutable, and price was an important factor in purchasing decisions.<sup>246</sup>
- b. Imports were priced lower than domestic products.<sup>247</sup>
- c. Prices for surveyed types of CSPV cells and modules declined over the POI.<sup>248</sup>

<sup>243</sup> USITC final staff report, (Exhibit CHN-3), table V-8.

<sup>244</sup> USITC final report, (Exhibit CHN-2), pp. 45-46. See also *ibid.* pp. 41-43.

<sup>245</sup> USITC final report, (Exhibit CHN-2), p. 47.

<sup>246</sup> USITC final report, (Exhibit CHN-2), pp. 29-30, 41, and 45. In particular, the USITC found that imported and US-manufactured CSPV products were sold in a range of wattages and conversion efficiencies, and modules were sold in both 60-cell and 72-cell forms. It also found that imported and US-manufactured CSPV products were sold to overlapping market segments through overlapping channels of distribution, particularly to residential and commercial installers. In addition, although purchasers consider a variety of factors in their purchasing decisions, price was an important factor. Further, most US producers, importers, and purchasers reported that US-produced CSPV products were interchangeable with imported CSPV products. (USITC final report, (Exhibit CHN-2), pp. 29-30).

<sup>247</sup> USITC final report, (Exhibit CHN-2), p. 42. In particular, the USITC found that imported CSPV products were priced lower than US-manufactured products in 33 of 52 instances involving approximately two-thirds of the total volume in the pricing data and were priced higher in 19 instances. Seven domestic producers reported that they had lost sales to imported CSPV products since 2012. The majority of purchasers reported that they had increased their purchases of imported CSPV products, and they identified lower price most often as the reason for increasing their purchases of imported CSPV products. Purchasers reported that imported CSPV modules as a share of their total purchases of CSPV products increased by 15.6% points from 75.6% of total CSPV purchases in 2012 to 91.2% of total CSPV purchases in 2016.

<sup>248</sup> USITC final report, (Exhibit CHN-2), pp. 41-42 and 45; USITC final staff report, (Exhibit CHN-3), pp. V-21 and V-26. In particular, the USITC found that quarterly prices for all five products declined between January 2012 and December 2016, with prices of US-manufactured products declining between 48.5% and 73.2% and imported CSPV products declining between 45.7% and 51.0%. (USITC final report, (Exhibit CHN-2), p. 42; USITC final staff report, (Exhibit CHN-3), p. V-26). The USITC based this finding on the following five product types: (a) Monocrystalline cells with an efficiency between 17.0% and 22.0%; (b) 60 cell Multicrystalline silicon module, with a peak power wattage between 240w to 290w, inclusive, P-max or Wp; (c) 60 cell Monocrystalline silicon module, with a peak power wattage between 250w to 300w, inclusive, P-max or Wp; (d) 72 cell Multicrystalline silicon module, with a peak power wattage between 290w to 340w, inclusive, P-max or Wp; and (e) 72 cell Monocrystalline silicon module, with a peak power wattage between 300w to 350w, inclusive, P-max or Wp. (USITC final staff report, (Exhibit CHN-3), p. V-21).

- d. Prices for domestic products were reduced or prevented from increasing due to imports.<sup>249</sup>
- e. Movements in prices of domestic CSPV products correlated with import trends and the imposition of the *CSPV I* and *CSPV II* orders.<sup>250</sup>

### 7.3.3.2.2 Main arguments of the parties

7.113. China argues that the USITC improperly assumed that declining US prices were the result of increased imports, and that low-priced imports injured the domestic industry.<sup>251</sup> Although China concedes that "some" record evidence shows that price is one of *several* factors considered by domestic purchasers for their purchasing decisions<sup>252</sup>, it advances that the USITC's analysis of price is flawed for two primary reasons.

7.114. First, China argues that the USITC exaggerated the importance of price as the dominant explanatory factor and failed to appropriately account for evidence that showed that factors other than price were the most important in purchasing decisions.<sup>253</sup> In particular, China contends that the USITC's finding that price was an important factor is flawed because only 38 of 103 US purchasers reported that US producers had reduced prices to compete with imports, while other purchasers did not know if this was true.<sup>254</sup> Further, China notes that purchasers most frequently cited "quality/performance", rather than price, as the first and second most important factor.<sup>255</sup> China also argues that the USITC's finding that price was an important factor in purchasing decisions is problematic because: (a) a majority of purchasers chose higher priced products due to non-price factors when a lower priced product was available<sup>256</sup>; (b) a majority of purchasers chose imported instead of domestic products for non-price reasons<sup>257</sup>; and (c) a majority of domestic producers did not announce price rollbacks to compete with imports.<sup>258</sup>

7.115. Second, China argues that the USITC failed to properly account for evidence demonstrating that non-import factors better explained declining market prices for CSPV products.<sup>259</sup> According to China, price declines occurred because of decreasing costs, increasing efficiency, and technological innovation, which benefitted the CSPV industry as a whole.<sup>260</sup> In this context, China argues that in the *CSPV II* investigation the USITC correctly found that imports were not the cause of price suppression or depression due to various other factors exerting downward pressure on US prices,

<sup>249</sup> USITC final report, (Exhibit CHN-2), pp. 42 and 45-46. In particular, the USITC found that 8 of 12 responding domestic producers reported that they had to reduce prices, and three reported having to roll back announced price increases in order to avoid losing sales to competitors selling imported CSPV products during the POI. Of the 103 responding purchasers, 38 reported that US producers had reduced prices of their CSPV products in order to compete with lower-priced imports, and 44 of them reported that they did not know whether US producers had reduced their prices to compete with lower-priced imports. Several purchasers reported steeper price reductions in 2016.

<sup>250</sup> USITC final report, (Exhibit CHN-2), p. 46. In particular, the USITC found that: "Prices declined substantially in 2012, but stabilized somewhat after imports from China became subject to antidumping and countervailing duty orders in December 2012, additional investigations on imports from China and Taiwan were commenced at the end of 2013, and imports grew at a slower pace than apparent U.S. consumption between 2013 and 2014. As imports from additional sources entered the U.S. market and rapidly increased to higher volumes, however, the domestic industry's prices steadily fell throughout 2016. Several purchasers also reported steeper price reductions in 2016, as the domestic industry's share of the market fell to its lowest level." (USITC final report, (Exhibit CHN-2), p. 46 (fns omitted))

<sup>251</sup> China's first written submission, paras. 149-150.

<sup>252</sup> China's response to Panel question No. 7 of the second set, para. 79.

<sup>253</sup> China's first written submission, para. 150; response to Panel question No. 7 of the second set, paras. 79-88.

<sup>254</sup> China's first written submission, para. 150.

<sup>255</sup> China's response to Panel question No. 7 of the second set, para. 83. Relatedly, China also argues that the USITC final report, particularly table V-5 of the USITC final staff report, is ambiguous regarding the frequency with which purchasers cited decisions based on price. (China's response to Panel question No. 7 of the second set, para. 84).

<sup>256</sup> China's response to Panel question No. 7 of the second set, para. 85.

<sup>257</sup> China's response to Panel question No. 7 of the second set, para. 86.

<sup>258</sup> China's response to Panel question No. 7 of the second set, para. 87.

<sup>259</sup> China's second written submission, paras. 104-109. See also China's response to Panel question No. 7 of the second set, para. 79.

<sup>260</sup> China's first written submission, paras. 151-153; second written submission, para. 104.

including declining raw material costs.<sup>261</sup> Since the *CSPV II* investigation covered a period that overlapped with the safeguard investigation, China argues that it was improper for the USITC to ignore the role of the same factors in its analysis of price trends.<sup>262</sup> Finally, China claims that due to its higher costs, smaller scale, and inefficiency, the domestic industry was unable to capitalize on the global decline in CSPV prices.<sup>263</sup>

7.116. For its part, the United States argues that the USITC provided a reasoned and adequate explanation demonstrating that increased imports caused declines in domestic prices and that China's claims do not withstand scrutiny.<sup>264</sup>

7.117. First, with respect to China's argument concerning the importance of price in purchasing decisions, the United States advances that, given that 44 of the 103 US purchasers did not know why domestic producers reduced prices, the 38 purchasers that blamed low-priced imports represent two-thirds of the 59 purchasers expressing a view.<sup>265</sup> As such, it was appropriate for the USITC to rely upon this evidence for its finding that linked imports to declining prices.<sup>266</sup> The United States also advances that, contrary to China's view, it was reasonable for the USITC to consider the most-often cited top three factors – i.e. price, quality/performance, and availability – to conclude that price was an important factor in market competition.<sup>267</sup> Regarding China's other arguments, the United States contends that China misrepresents the USITC's findings with respect to the questionnaire responses of purchasers and domestic producers and that China's alternative characterizations of the data ultimately fail to discredit the reasonableness of the USITC's finding.<sup>268</sup>

7.118. Second, with respect to China's argument that non-import factors better explained declining market prices for CSPV products, the United States argues that the USITC found that the domestic industry remained unprofitable as it continued to incur hundreds of millions of dollars in losses over the POI, notwithstanding its declining costs, which should have been beneficial.<sup>269</sup> The United States further argues that China's reliance on the USITC's finding of no price depression in *CSPV II* is unavailing because those proceedings concerned anti-dumping and countervailing measures, which are subject to different WTO disciplines, and also concerned a different time period with different data.<sup>270</sup> Finally, the United States contends that China fails to properly substantiate or explain the

<sup>261</sup> China's second written submission, paras. 107-108.

<sup>262</sup> China's second written submission, paras. 107-108.

<sup>263</sup> China's second written submission, paras. 105 and 109; response to Panel question No. 39 of the third set, paras. 44-52.

<sup>264</sup> United States' first written submission, section II(D)(2)(a)(ii); second written submission, paras. 66-80.

<sup>265</sup> United States' first written submission, para. 136.

<sup>266</sup> United States' first written submission, para. 136.

<sup>267</sup> United States' second written submission, para. 69. Contrary to China's argument that the USITC was ambiguous regarding the frequency with which US purchasers made purchasing decisions based on price, the United States argues that, pursuant to table V-5 of the USITC final staff report, it was not unreasonable for the USITC to rely on the fact that only 23 of 105 responding purchasers reported that they never purchased the lowest price product, while 79 reported that they sometimes or usually did. (United States' second written submission, para. 70).

<sup>268</sup> United States' second written submission, paras. 71-75. Specifically, with respect to the USITC's finding that the majority of purchasers reported choosing higher priced products due to non-price factors, the United States argues that the fact that 64 of the 105 responding purchasers reported an instance of buying a product from a source despite the availability of a comparable product at a lower price from another source does not say anything about the frequency with which purchasers would forego purchasing comparable, but lower-priced CSPV products. Moreover, with respect to the USITC's finding that "the majority of purchasers reported that they had increased their purchases of imported CSPV products, most often identifying lower price as the reason for increasing their purchases of imported CSPV products", the United States argues that the fact that 53 of 86 purchasers cited a variety of factors other than price as their primary reason for purchasing imported products does not undermine the fact that price was the most-often identified factor. Finally, with respect to the USITC's finding concerning the frequency in which domestic producers rolled back planned price increases, the United States argues China's statement that "only 3 of 8 domestic producers had to roll back planned price increases" is misleading as it ignores the full context of the USITC's finding: "[o]f the 12 responding U.S. producers, eight reported that they had to reduce prices and three reported that they had to roll back announced price increases in order to avoid losing sales to competitors selling imported CSPV products since 2012". (Ibid. paras. 72 and 75).

<sup>269</sup> United States' first written submission, paras. 138-139; second written submission, para. 77; response to Panel question No. 20 of the first set, para. 51; response to Panel question No. 18 of the second set, para. 42; and comments on China's response to Panel question No. 47 of the third set, para. 63.

<sup>270</sup> United States' second written submission, paras. 78-79.

relevance of its claim that any price differences between the domestic like product and lower-priced imports were due to "the domestic industry's higher costs and efficiency issues".<sup>271</sup>

### 7.3.3.2.3 Evaluation of the Panel

7.119. As noted above, China contends that the USITC failed to appropriately account for evidence demonstrating that: (a) factors other than price were the most important factors behind purchasing decisions; and (b) non-price factors better explained declining prices for CSPV products. For the reasons explained below, we are not persuaded by either of these arguments.

7.120. With respect to China's first argument, we are not persuaded that the USITC exaggerated the importance of price as the dominant explanatory factor without giving sufficient consideration to record evidence concerning the role of non-price factors.<sup>272</sup> While the evidence to which China refers shows that non-price factors were relevant to purchasers of CSPV products, it also shows that price was an important factor.<sup>273</sup> The USITC explicitly referred to this dynamic in its finding that domestic and imported products were "highly substitutable" described in section 7.3.3.2.1.2 above<sup>274</sup>, which the USITC subsequently relied upon as support for its finding that the domestic industry experienced adverse price conditions as a result of increased low-priced imports.<sup>275</sup> In addition, record evidence relied upon by the USITC indicates that prices of domestic products were lowered in response to imports, which suggests that competition in the market was sensitive to price.<sup>276</sup> In line with the United States' arguments, these findings and evidence serve to confirm that, contrary to China's view, it was appropriate for the USITC to find that price was an important factor for purchasing decisions. Accordingly, we do not consider that China has demonstrated that the USITC inappropriately emphasized the importance of price or ignored the relevance of non-price factors.

7.121. With respect to China's second argument, we are not persuaded that the USITC failed to account for the evidence allegedly demonstrating that non-import factors better explained declining market prices for CSPV products.

7.122. As an initial matter, we do not consider that the existence of long-term market trends under which costs for the CSPV industry as a whole declined demonstrates that it was inappropriate for the USITC to find that the domestic industry experienced adverse price conditions as a result of increased imports. Conceptually, multiple factors may be affecting price at the same time and certain of those factors may not be injurious. In its final report, the USITC found increased imports to be an injurious factor affecting price on the basis of record evidence that showed, *inter alia*, that prices of imported CSPV products were regularly lower than domestic products<sup>277</sup>, and that prices of domestic products were reduced and prevented from increasing as a result of imports.<sup>278</sup> In our view, the fact

<sup>271</sup> United States' second written submission, para. 80; comments on China's response to Panel question No. 39 of the third set, paras. 29-32.

<sup>272</sup> China's response to Panel question No. 7 of the second set, para. 79.

<sup>273</sup> USITC final report, (Exhibit CHN-2), pp. 29-30 and fn 144.

<sup>274</sup> USITC final report, (Exhibit CHN-2), pp. 29-30 ("[i]n the U.S. market for CSPV products, purchasers consider a variety of factors in their purchasing decisions, but price continues to be an important factor").

<sup>275</sup> USITC final report, (Exhibit CHN-2), p. 41 ("[a]s discussed above, imported CSPV products are highly substitutable with U.S.-manufactured products, and price is an important consideration in purchasing decisions in this industry") and p. 45 ("[a]s indicated above, these imports were highly substitutable for U.S.-manufactured CSPV products and generally were lower priced.")

<sup>276</sup> USITC final report, (Exhibit CHN-2), pp. 42 and 45-46.

<sup>277</sup> USITC final report, (Exhibit CHN-2), p. 42 (reporting that imported CSPV products were priced lower than US-manufactured products in 33 of 52 instances involving approximately two-thirds of the total volume in the pricing data, and were priced higher in 19 instances. Seven domestic producers reported that they had lost sales to imported CSPV products since 2012. The majority of purchasers reported that they had increased their purchases of imported CSPV products, and they identified lower price most often as the reason for increasing their purchases of imported CSPV products. Purchasers reported that imported CSPV modules as a share of their total purchases of CSPV products increased by 15.6% points from 75.6% of total CSPV purchases in 2012 to 91.2% of total CSPV purchases in 2016).

<sup>278</sup> USITC final report, (Exhibit CHN-2), pp. 42 and 45-46 (reporting that 8 of 12 responding domestic producers reported that they had to reduce prices, and three reported having to roll back announced price increases in order to avoid losing sales to competitors selling imported CSPV products during the POI. Of the 103 responding purchasers, 38 reported that US producers had reduced prices of their CSPV products in order to compete with lower-priced imports, and 44 of them reported that they did not know whether US producers had reduced their prices to compete with lower-priced imports. Several purchasers reported steeper price reductions in 2016). In this respect, we agree with the United States' argument that, given that

that other factors may have also been affecting price does not undermine the relevance or probative value of this evidence.

7.123. Record evidence also casts doubt on China's contention that non-import factors (such as decreasing costs, increased efficiencies, and technological innovation) "better explain" declining market prices for CSPV products.<sup>279</sup> In this regard, we note that the domestic industry's per unit net sales value declined at a *greater pace* than its cost of goods sold in the 2015-2016 period.<sup>280</sup> These circumstances correspond with the overall price dynamic described by the USITC under which the domestic industry's prices declined significantly when imports increased from sources not covered by the *CSPV I* and *CSPV II* orders, which also occurred in 2015-2016.<sup>281</sup> The same dynamic was confirmed in a 2016 industry publication filed by respondents during the safeguard investigation, which reported that "[i]n the past few years, U.S. module price trends were largely driven by anti-dumping and countervailing duties on Chinese suppliers. But recently the main driver has shifted; current module price trends are largely a result of supply-demand imbalance".<sup>282</sup>

7.124. We are also not persuaded by China's reference to the USITC's finding in the *CSPV II* investigation. The United States correctly notes that the *CSPV II* proceedings covered a different period of time and included different data sets and questionnaire responses.<sup>283</sup> However, even if it did not, it is not clear to us why, having regard to our standard of review, the USITC would need to reach the same conclusion in the safeguard investigation for us to consider that its finding was reasoned and adequate.<sup>284</sup>

7.125. Finally, we are not convinced by China's claim that the domestic industry's higher costs, small scale, and inefficiency prevented it from capitalizing on the global decline in CSPV prices. Even if we were to accept that the domestic industry was unable to capitalize on the global decline in CSPV prices to the same extent as foreign producers, we fail to see how this would undermine the USITC's finding that linked the domestic industry's adverse price conditions to increased imports. Moreover, in line with the United States' argument, we do not consider that China has explained why this argument is relevant to its overall claim. Indeed, given that the USITC found that the domestic industry experienced adverse price conditions as a result of increased lower-priced imports, it is not clear to us why the premise of China's claim – which purports to establish why the domestic industry's prices were higher – would undermine the USITC's finding.

7.126. Based on the foregoing, we reject China's argument that the USITC failed to appropriately explain why the domestic industry experienced adverse price conditions as a result of increased imports.

### 7.3.3.2.3 Lost market share

#### 7.3.3.2.3.1 Factual background

7.127. The USITC found that the domestic industry lost market share to increased imports:

Although the domestic industry increased its U.S. shipments over the POI, this overall increase was dwarfed by the \*\*\* percent growth in apparent U.S. consumption during this period, meaning that the domestic industry lost market share to the consistently growing low-priced imports. The domestic industry's share of apparent U.S. consumption fell from \*\*\* percent in 2012 to \*\*\* percent in 2013, and increased to \*\*\* percent in 2014, as prices stabilized somewhat while imports temporarily grew at a slower pace than apparent U.S. consumption. The domestic industry's market share declined anew to \*\*\* percent in 2015 and \*\*\* percent in 2016, as imports peaked.

44 of the 103 US purchasers did not know why domestic producers reduced prices, it was not inappropriate for the USITC to rely on the fact that 38 purchasers blamed low-priced imports, as it represented two-thirds of the 59 purchasers expressing a view. (United States' first written submission, para. 136).

<sup>279</sup> China's second written submission, para. 104.

<sup>280</sup> USITC final staff report, (Exhibit CHN-3), table III-21.

<sup>281</sup> USITC final report, (Exhibit CHN-2), pp. 45-46.

<sup>282</sup> SEIA executive summary of US solar market on 2016, (Exhibit CHN-60), p. 16. See also USITC final report, (Exhibit CHN-2), p. 46 and fn 252 (referring to USITC final staff report, (Exhibit CHN-3), p. V-27).

<sup>283</sup> United States' second written submission, paras. 78-79.

<sup>284</sup> See section 7.1.2 above.



Domestic producers reported losing sales to low-priced imports of CSPV products, and the majority of purchasers reported that they had increased their purchases of imported CSPV products, most often identifying lower price as the reason for increasing their purchases of imported CSPV products.<sup>285</sup>

7.128. Relatedly, the USITC found that "the large volume of imports at low and declining prices adversely impacted the domestic industry's financial performance, making it difficult for the domestic industry to increase capacity to a scale that made it more competitive in [the utility] segment, even if it managed to develop and even pioneer innovative products that utilities and others sought."<sup>286</sup>

#### 7.3.3.2.3.2 Main arguments of the parties

7.129. China argues that the USITC failed to appropriately explain why the domestic industry lost market share as a result of increased imports.<sup>287</sup> In its view, despite the fact there "may have been a superficial coincidence between increasing imports and falling domestic market share during the POI", the USITC failed to account for prevailing conditions of competition.<sup>288</sup> In particular, consistent with its argument concerning the prevailing conditions of competition described in section 7.3.3.2.1 above, China contends that the USITC's analysis of market share failed to account for (a) the massive increase in demand and market growth during the POI, which the domestic industry was unable to supply due its small size; (b) the domestic industry's lack of participation in the utility segment; and (c) the deficiencies associated with the quality, performance, and availability of domestic CSPV products.<sup>289</sup> According to China, the USITC also failed to properly explain why the domestic industry still lost sales to imports when its overall sales increased during the POI.<sup>290</sup>

7.130. With respect to the USITC's finding that increased imports prevented the domestic industry from expanding its capacity, China advances that the USITC incorrectly relied on (a) the false premise that the domestic industry had the right to grow in parallel with the market<sup>291</sup>; and (b) its deficient findings that domestic and imported CSPV products competed in residential, commercial, and utility market segments and were "highly substitutable".<sup>292</sup> China also claims that the USITC's finding on this point is undermined by the fact that the domestic industry increased its capacity and production during the POI.<sup>293</sup>

7.131. For its part, the United States argues that the USITC provided a reasoned and adequate explanation demonstrating that increased imports caused decreases in the domestic industry's market share.<sup>294</sup> In its view, the USITC properly demonstrated that changes in the domestic industry's market share correlated with import volumes over the POI, which the USITC situated in the broader context of the import trends that led to the imposition of the *CSPV I* and *CSPV II* orders.<sup>295</sup> In addition, the United States submits that (a) the USITC properly demonstrated that domestic producers lost bids and sales to low-priced imports; and (b) China's arguments to the contrary are based on the fallacy that the increase in the domestic industry's shipments during the POI means that it did not lose sales.<sup>296</sup>

7.132. As explained in section 7.3.3.2.1 above, the United States responds to China's claim that the domestic industry did not have the capacity to supply increasing demand by referring to the USITC's findings that increased imports impeded the domestic industry's ability to compete with increased low-priced imports.<sup>297</sup> In this regard, the United States argues that the USITC properly demonstrated that increased imports caused domestic prices to decline, which led to operating and

<sup>285</sup> USITC final report, (Exhibit CHN-2), p. 49. (fns omitted; redacted original)

<sup>286</sup> USITC final report, (Exhibit CHN-2), pp. 60-61.

<sup>287</sup> China's first written submission, para. 129; second written submission, para. 91.

<sup>288</sup> China's first written submission, para. 129.

<sup>289</sup> China's first written submission, paras. 130-139; second written submission, paras. 91-94.

<sup>290</sup> China's second written submission, para. 95; response to Panel question No. 40 of the third set, paras. 53-62.

<sup>291</sup> China's second written submission, paras. 96-97.

<sup>292</sup> China's second written submission, paras. 97-100.

<sup>293</sup> China's second written submission, para. 96.

<sup>294</sup> United States' first written submission, section II(D)(2)(a)(i).

<sup>295</sup> United States' first written submission, para. 118; second written submission, paras. 91-95.

<sup>296</sup> United States' first written submission, para. 118; second written submission, paras. 87-90.

<sup>297</sup> United States' first written submission, para. 119.



financial losses that negatively impacted the domestic industry's ability to expand to capitalize on increased US consumption.<sup>298</sup> The United States further argues that China's attempt to discredit the USITC's findings on market segmentation and product substitutability do not withstand scrutiny.<sup>299</sup> As such, these arguments fail to support China's claim that the USITC failed to demonstrate that increased imports impeded the domestic industry's expansion.<sup>300</sup>

### 7.3.3.2.3.3 Evaluation of the Panel

7.133. Although the parties agree that the domestic industry lost market share during the POI<sup>301</sup>, they disagree on whether the USITC appropriately accounted for prevailing conditions of competition in finding that the domestic industry lost market share as a result of increased imports. Overall, we are not persuaded by China's arguments that the USITC's analysis is deficient in this regard.

7.134. We begin by noting that, contrary to China's argument<sup>302</sup>, the USITC did not ignore or overlook the significant increase in domestic consumption when it found that the domestic industry lost market share to increased imports. In fact, the USITC recognized this dynamic when it found that, in all but one year of the POI (2013-2014), imports increased *at a greater rate than apparent US consumption*.<sup>303</sup> This finding supported the USITC's conclusion noted above that increased US shipments were "dwarfed" by the "*growth in apparent U.S. consumption during this period*", meaning that the domestic industry lost market share to the consistently growing low-priced imports".<sup>304</sup>

7.135. China further argues that the USITC ignored that the domestic industry lost market share to increased imports because it did not have the capacity to supply the explosive growth in demand.<sup>305</sup> To support its argument, China points to record evidence showing that US demand increased by 338% during the POI, which meant that the "domestic industry could only supply 27 percent of demand at the beginning of the POI, and ... only supply 8 percent towards the end of the POI".<sup>306</sup> As explained in section 7.3.3.2.1.1 above, we are not persuaded by China's contention that the relatively small size of the domestic industry meant that the domestic industry was not affected by the significant increased imports. With respect to declining market share specifically, even if the domestic industry lacked the capacity to supply the full extent of the US market demand during the POI, we do not consider that this would demonstrate that it was inappropriate for the USITC to find that import competition contributed to the domestic industry's declining market share based on the capacity that it had.<sup>307</sup>

7.136. In this regard, we note that the USITC found that the domestic industry lost sales to low-priced imports. The USITC based this finding on questionnaire responses reporting that a majority of domestic producers lost sales to imports, and that a majority of purchasers increased their purchases of imported CSPV products (most often identifying lower price as the reason for increasing their purchases of imported CSPV products).<sup>308</sup> Four of these producers estimated that

<sup>298</sup> United States' first written submission, paras. 119-120; response to Panel question No. 41 of the third set, paras. 18-21.

<sup>299</sup> United States' first written submission, paras. 121-128; second written submission, paras. 51-65. See also United States' response to Panel question No. 4 of the first set, para. 7; response to Panel question No. 20 of the first set, para. 49; and comments on China's response to Panel question No. 2 of the first set, paras. 27 and 37-42.

<sup>300</sup> United States' first written submission, paras. 121-128.

<sup>301</sup> China accepts that the domestic industry lost market share during the POI. (China's first written submission, para. 129; second written submission, para. 95; and response to Panel question No. 40 of the third set, para. 54).

<sup>302</sup> China's first written submission, para. 130.

<sup>303</sup> USITC final report, (Exhibit CHN-2), p. 48.

<sup>304</sup> USITC final report, (Exhibit CHN-2), p. 49. (emphasis added; fn omitted)

<sup>305</sup> See, e.g. China's first written submission, paras. 130-132 and 137; and second written submission, para. 93.

<sup>306</sup> China's second written submission, para. 93.

<sup>307</sup> We note in this regard that record evidence indicates that the domestic industry had significant unused capacity throughout the POI. (USITC final report, (Exhibit CHN-2), fn 261; USITC final staff report, (Exhibit CHN-3), pp. III-10-III-13). Moreover, as noted below, the USITC also found that increased imports impeded the domestic industry's ability to increase its capacity to achieve economies of scale.

<sup>308</sup> USITC final report, (Exhibit CHN-2), p. 49; USITC final staff report, (Exhibit CHN-3), pp. V-16 and V-28.

their lost sales totalled 950,000 kW, while another domestic producer, which did not provide a quantity estimate, estimated that its lost sales totalled USD 148.7 million.<sup>309</sup>

7.137. China claims that the USITC's finding concerning lost sales is flawed because the domestic industry increased production and shipments during the POI. Yet, as a logical matter, we fail to see why an increase in its production and shipments would mean that the domestic industry did not lose sales to imports, particularly in the context of the market that was growing. Moreover, China has not convincingly explained why this would be the case.<sup>310</sup>

7.138. China further argues that the USITC failed to explain why the domestic industry lost sales, particularly in light of the importance of non-price factors to purchasers of CSPV products. We are also not persuaded by this argument. As noted in section 7.3.3.2.1.2 above, the USITC assessed the mix of price and non-price factors in its finding that domestic and imported CSPV products were "highly substitutable", and that price was an important factor in market competition. As we have rejected China's arguments that these findings were inappropriate, we do not consider that it was inaccurate or otherwise inappropriate for the USITC to highlight that the domestic industry lost sales to imports that were "low-priced".

7.139. Finally, we note that the USITC found that increased imports adversely impacted domestic prices and, as a consequence, the financial condition of the domestic industry, thereby impeding its ability to increase its capacity to achieve economies of scale.<sup>311</sup> China claims that the USITC's conclusion was flawed because domestic producers targeted different market segments than foreign producers, and consequently produced CSPV products that were not substitutable with imports.<sup>312</sup> Again, for the reasons discussed in sections 7.3.3.2.1.1 and 7.3.3.2.1.2 above, we reject these arguments. China's other criticism is that the domestic industry increased its capacity and production during the POI.<sup>313</sup> However, this argument misses the point. The USITC specifically found that increased imports prevented the domestic industry from increasing capacity *at a scale* that would have made it more competitive, particularly in the utility segment.<sup>314</sup> As such, we do not consider the fact that the domestic industry increased its capacity and production demonstrates that the USITC's finding on this point was inappropriate.

7.140. Based on the foregoing, we reject China's argument that the USITC failed to appropriately explain why the domestic industry lost market share as a result of increased imports.

#### **7.3.3.2.4 Financial deterioration**

##### **7.3.3.2.4.1 Factual background**

7.141. In its serious injury determination, the USITC found that the domestic industry incurred "hundreds of millions of dollars in losses throughout the POI" and that its overall financial performance was "dismal and declining".<sup>315</sup> The USITC based this determination on various financial indicators such as the value of net sales, cost of goods sold to net sales ratio, operating losses, net losses, and net income margin.<sup>316</sup> The USITC further noted that the domestic industry's poor overall performance is illustrated by the closures and bankruptcies of domestic producers over the POI.<sup>317</sup>

7.142. Returning to these findings in its causation analysis, the USITC found that the financial condition of the domestic industry deteriorated during the POI along a similar trend as the decline in the domestic industry's prices and market share:

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<sup>309</sup> USITC final staff report, (Exhibit CHN-3), p. V-28 and fn 53.

<sup>310</sup> China's response to Panel question No. 9 of the second set, paras. 101-106; second written submission, para. 95; and response to Panel question No. 40 of the third set, paras. 57-62.

<sup>311</sup> USITC final report, (Exhibit CHN-2), pp. 47 and 60-61. These findings directly disprove China's claim that the USITC relied on the false premise that the domestic industry had the right to grow in parallel with the market. (China's second written submission, paras. 96-97).

<sup>312</sup> China's first written submission, paras. 137-138; second written submission, paras. 96-101.

<sup>313</sup> China's second written submission, para. 96.

<sup>314</sup> USITC final report, (Exhibit CHN-2), pp. 60-61.

<sup>315</sup> USITC final report, (Exhibit CHN-2), p. 35.

<sup>316</sup> USITC final report, (Exhibit CHN-2), pp. 34-35.

<sup>317</sup> USITC final report, (Exhibit CHN-2), p. 35.

The domestic industry's net sales fell overall between 2012 and 2016, and its cost of goods sold declined by a greater amount. The domestic industry's cost of goods sold to net sales ratio was high, near or exceeding \*\*\* percent throughout this period, decreasing from \*\*\* percent in 2012 to \*\*\* percent in 2013, \*\*\* percent in 2014, and \*\*\* percent in 2015, and increasing to \*\*\* percent in 2016. Accordingly, the domestic industry's financial condition, which was at its worst at the beginning of the POI before the antidumping and countervailing duty orders were imposed on imports from China in December 2012, improved marginally after imposition of the orders and the filing of new antidumping and countervailing duty cases, but remained poor and deteriorated further in 2016, as imports peaked in terms of volume and market share and prices dropped anew.<sup>318</sup>

#### 7.3.3.2.4.2 Main arguments of the parties

7.143. China argues that the USITC failed to appropriately explain why the domestic industry's financial performance deteriorated as a result of increased imports.<sup>319</sup> According to China, the USITC ignored that the domestic industry's financial performance improved over the POI and relied upon evidence concerning financial losses "divorced from their proper context".<sup>320</sup> China contends that the USITC recognized "this fundamental weakness in its theory of causation" and "tried to explain away the improvement as due to the imposition of anti-dumping and countervailing duty orders".<sup>321</sup> In its view, this was improper because, "if the conditions already improved because of the anti-dumping and countervailing duty orders, that shows the increasing imports ... were no longer the problem".<sup>322</sup> Finally, China argues that the USITC improperly tried to shift the focus away from overall changes over the POI and year-over-year trends to cumulative losses over the entire period; those losses, however, "say[] nothing about the causal link to increased imports".<sup>323</sup>

7.144. For its part, the United States submits that the USITC provided a reasoned and adequate explanation demonstrating that increased imports caused the poor and deteriorating financial performance of the domestic industry.<sup>324</sup> According to the United States, the USITC reasonably demonstrated that the financial condition of the domestic industry was adversely affected by unfairly traded imports from China and Chinese Taipei at the start of the POI, then improved marginally as a result of the imposition of the *CSPV I* and *CSPV II* orders. Thereafter, in 2016, the financial condition of the domestic industry declined anew when prices dropped and imports surged from countries not covered by the *CSPV I* and *CSPV II* orders.<sup>325</sup> Based on these findings, the United States argues that China ignores the explosive growth in demand and the early, but ineffective, imposition of trade remedy orders.<sup>326</sup> In addition, the United States argues that, contrary to China's suggestion, when the domestic industry's hundreds of millions of dollars in net and operating losses throughout the POI are viewed in the context of the booming demand, the marginal

<sup>318</sup> USITC final report, (Exhibit CHN-2), p. 47 (fns omitted; redacted original). See also USITC final report, (Exhibit CHN-2), fn 257 where the USITC observed:

The domestic industry's operating loss improved from \$\*\*\* in 2012 to operating losses of \$\*\*\* in 2013, \$\*\*\* in 2014, and \$\*\*\* in 2015 but deteriorated to an operating loss of \$\*\*\* in 2016. The domestic industry's net losses improved from a net loss of \$\*\*\* in 2012 to net losses of \$\*\*\* in 2013, \$\*\*\* in 2014, and \$\*\*\* in 2015 and deteriorated to a net loss of \$\*\*\* in 2016. The domestic industry's net income margin improved from a loss of \*\*\* percent in 2012 to losses of \*\*\* percent in 2013, \*\*\* percent in 2014, and \*\*\* percent in 2015, but deteriorated to a loss of \*\*\* percent in 2016.

Redacted original.

<sup>319</sup> China's first written submission, paras. 140-148.

<sup>320</sup> China's first written submission, paras. 140-148; second written submission, paras. 120-123; and response to Panel question No. 5 of the first set, para. 44.

<sup>321</sup> China's first written submission, para. 144.

<sup>322</sup> China's first written submission, para. 144. Relatedly, China contends that the USITC's focus on the effectiveness of the trade remedies orders was flawed as it "ignores the simple truth that there could be other factors at work affecting pricing, volume of imports, and other competitive dynamics in the CSPV market". (China's response to Panel question No. 6 of the first set, para. 53).

<sup>323</sup> China's first written submission, para. 146.

<sup>324</sup> United States' first written submission, section II(D)(2)(a)(iii).

<sup>325</sup> United States' first written submission, paras. 144-149.

<sup>326</sup> United States' comments on China's response to Panel question No. 5 of the first set, paras. 63-64; second written submission, paras. 29-30.

and temporary improvements of the domestic industry's financial performance are not indicative of good performance.<sup>327</sup>

#### 7.3.3.2.4.3 Evaluation of the Panel

7.145. As an initial matter, we note that the USITC's finding that the domestic industry's financial condition deteriorated as a result of increased imports largely flowed from its findings concerning the domestic industry's declining prices and lost market share. In sections 7.3.3.2.2.3 and 7.3.3.2.3.3 above we have already rejected China's arguments that the USITC erred in respect of its findings concerning the relationship between increased imports and the domestic industry's declining prices and lost market share. As such, we consider that the USITC's findings concerning the relationship between increased imports and the domestic industry's declining prices and lost market share support the appropriateness of its finding concerning the domestic industry's financial performance.<sup>328</sup>

7.146. We are also not convinced by China's argument that the USITC failed to appropriately account for the fact that the domestic industry's financial condition improved during the POI. As noted above, the USITC found that the domestic industry's financial situation improved when the *CSPV I* and *CSPV II* orders were imposed and prices stabilized, and deteriorated when imports surged from countries not covered by those orders and prices declined.<sup>329</sup> In our view, these findings suggest that increased imports negatively impacted the financial condition of the domestic industry, particularly in the 2015-2016 period. Thus, by ignoring these year-over-year developments, China's claims concerning the improvement of the financial condition of the domestic industry are premised on a static – and ultimately misleading – comparison of the situation of the domestic industry at the start and at the end of the POI.<sup>330</sup>

7.147. Relatedly, we recall that China does not challenge the USITC's serious injury determination in these proceedings.<sup>331</sup> As a result, we accept as uncontested the USITC's assessment that the overall financial condition of the domestic industry was "dismal and declining" and indicative of serious injury.<sup>332</sup> With respect to the USITC's causation determination, these findings further diminish the significance of any improvements to the domestic industry's financial condition, as the causal link required under the Agreement on Safeguards is between increased imports and the serious injury *found to exist* during the investigation.<sup>333</sup>

7.148. For these reasons, we reject China's argument that the USITC failed to appropriately explain why the domestic industry's financial performance deteriorated as a result of increased imports.

<sup>327</sup> United States' comments on China's response to Panel question No. 5 of the first set, para. 65. See also United States' second written submission, para. 26.

<sup>328</sup> China's response to Panel question No. 6 of the first set, para. 53.

<sup>329</sup> USITC final report, (Exhibit CHN-2), p. 47 and fn 257.

<sup>330</sup> China's second written submission, para. 123. China argues that, by focusing on the cumulative financial losses incurred by the domestic industry over the POI, the USITC failed to "consider the changes in a domestic industry over time". However, this seems to be the very approach taken by China in its argument that the financial condition of the domestic industry improved over the POI. In this respect, we agree with previous DSB reports that have found that end-to-end comparisons do not adequately explain the relationship between imports and indicators of serious injury. (See, e.g. Appellate Body Reports, *US – Steel Safeguards*, para. 354; and *Argentina – Footwear (EC)*, para. 129).

<sup>331</sup> See section 7.3.1 above. We recall that, regardless of its lack of challenge, China maintains that it does not accept the USITC's serious injury determination. (China's comments on the United States' response to Panel question No. 33 of the third set, para. 4; response to Panel question No. 33 of the third set, paras. 9-10; second written submission, para. 17 and fn 25; and responses to Panel question Nos. 1(a) and 1(b) of the second set).

<sup>332</sup> USITC final report, (Exhibit CHN-2), p. 35.

<sup>333</sup> As noted above, in its safeguard investigation the USITC found that, regardless of the overall improvement of the financial condition of the domestic industry over the POI, the financial condition of the domestic industry was still indicative of serious injury due to that fact that it was "dismal and declining", particularly in 2015-2016. Accordingly, the relevant question with respect to causation is whether *this situation* occurred as a result of increased imports, and *not* whether the financial condition of the domestic industry improved over the 2012-2016 period.

### 7.3.3.2.5 Plant closures

#### 7.3.3.2.5.1 Factual background

7.149. In its serious injury determination, the USITC found that 33 CSPV cell or CSPV module facilities operated in the United States as of 1 January 2012, but only 13 of those facilities remained open by 31 December 2016. Moreover, of the 16 additional facilities that opened during the POI, 5 had closed, and although 2 firms announced plans for new facilities, those facilities were not commercially operational by July 2017.<sup>334</sup>

7.150. When returning to this issue in its analysis of causation, the USITC explained:

*[D]espite the need in this industry to increase capacity in order to achieve economies of scale, the domestic industry's capacity and production levels did not increase commensurately with demand growth, and its capacity utilization levels remained low and dropped at the end of the POI, as imports reached their summit. A substantial number of domestic CSPV cell and CSPV module facilities closed during the POI, resulting in numerous layoffs and the need for trade adjustment assistance for the highly trained, skilled workers affected by these closures.*<sup>335</sup>

7.151. In a related finding, the USITC further noted that "[a]lthough many U.S. producers entered the U.S. market seeking to take advantage of this demand growth, the consistent inability of the domestic industry to compete with low-priced imports forced many of these firms, as well as others, to shut down their facilities".<sup>336</sup> The USITC also found that this dynamic continued after the POI on the basis that, by July 2017, two additional US production facilities had closed.<sup>337</sup>

#### 7.3.3.2.5.2 Main arguments of the parties

7.152. China contends that the USITC failed to appropriately explain why the domestic industry's plant closures were a result of increased imports.<sup>338</sup> According to China, the USITC (a) did not address why plant closures were caused by increased imports; (b) ignored the fact that plants opened throughout the POI; (c) did not address year-over-year trends, which showed that most plant closures occurred at the start of the POI when imports were at their lowest; and (d) improperly relied upon closures that took place after the POI.<sup>339</sup> With respect to the USITC's reliance on developments after the POI, China contends that the determinations of serious injury should focus on the "recent past, 'up to and including the very end' of the POI".<sup>340</sup> Based on this principle, China argues that it would only have been appropriate for the USITC to take this evidence into account if it explained why doing so was necessary and ensured that the evidence was considered in a balanced manner.<sup>341</sup> However, in its view, the USITC failed to do so.<sup>342</sup>

7.153. The United States responds by arguing that the USITC appropriately considered plant closures to be the natural result of the domestic industry's poor operational and financial performance.<sup>343</sup> With respect to the USITC's reliance on evidence from after the POI, the United States contends that the only limitation set forth in the Agreement on Safeguards is that the evidence be part of the competent authorities' record.<sup>344</sup> In the safeguard investigation, the record

<sup>334</sup> USITC final report, (Exhibit CHN-2), pp. 31-32.

<sup>335</sup> USITC final report, (Exhibit CHN-2), pp. 47-48. (fns omitted; emphasis added)

<sup>336</sup> USITC final report, (Exhibit CHN-2), pp. 48-49.

<sup>337</sup> USITC final report, (Exhibit CHN-2), p. 49.

<sup>338</sup> China's first written submission, para. 154; second written submission, para. 119.

<sup>339</sup> China's first written submission, paras. 154-155; response to Panel question No. 5 of the first set, paras. 46-47; comments on the United States' response to Panel question No. 4(b) of the first set, paras. 33 and 35; and second written submission, paras. 117-118.

<sup>340</sup> China's response to Panel question No. 35 of the third set, para. 21.

<sup>341</sup> China's response to Panel question No. 35 of the third set, paras. 17-23; comments on the United States' response to Panel question No. 35 of the third set, para. 10.

<sup>342</sup> China's response to Panel question No. 35 of the third set, paras. 22-23; comments on the United States' response to Panel question No. 35 of the third set, paras. 11-12.

<sup>343</sup> United States' first written submission, para. 152; comments on China's response to Panel question No. 5 of the first set, paras. 66-67; and response to Panel question No. 5 of the second set, para. 11.

<sup>344</sup> United States' response to Panel question No. 35 of the third set, paras. 9-10; comments on China's response to Panel question No. 35 of the third set, paras. 9-11.



included testimony regarding the failing operations of two of the largest domestic producers, i.e. petitioners Suniva and SolarWorld.<sup>345</sup> This testimony specifically informed the USITC of Suniva's April 2017 suspension of its cell and module operations as part of its chapter 11 bankruptcy filing, and SolarWorld's June 2017 issuance of Worker Adjustment and Retraining Notification (WARN) Act notifications and layoff of 360 employees in mid-July 2017.<sup>346</sup> Thus, the United States submits that it was appropriate for the USITC to consider this evidence in its finding of the causal link between increased imports and serious injury and that China's arguments to the contrary do not withstand scrutiny.<sup>347</sup>

### 7.3.3.2.5.3 Evaluation of the Panel

7.154. We are not persuaded by China's argument that the USITC failed to properly explain how plant closures were linked to increased imports. To the contrary, the USITC appears to have found that plant (facility) closures were connected to the domestic industry's poor financial circumstances and its inability to increase its capacity to achieve economies of scale that would have allowed it to compete more effectively against low-priced imports.<sup>348</sup> As we have already rejected China's arguments that it was inappropriate for the USITC to link these developments to increased imports, we do not consider that it was inappropriate to also link these same developments to plant closures.

7.155. In addition, we are not persuaded by China's argument concerning the coincidence between increased imports and plant closures. As an initial matter, we do not consider that the appropriateness of the USITC's findings on this issue turns on whether the USITC demonstrated a perfect correlation between increased imports and plant closures. Given that plant closures would be expected to follow from the more direct effects of the increased imports – here, adverse price conditions and their financial consequences – it would be logical to expect a lag between the increased imports and plant closures.<sup>349</sup>

7.156. In this context, we do not consider that the USITC's finding concerning the relationship between increased imports and plant closures is vitiated by the fact that a number of plant closures occurred early in the POI.<sup>350</sup> The USITC found that the financial condition of the domestic industry was at its lowest point at the start of the POI<sup>351</sup>, which coincided with the import competition from China that culminated in the imposition of the CSPV I order.<sup>352</sup> As such, it seems reasonable that plant closures would occur around this point in time. Moreover, the fact that plant closures declined

<sup>345</sup> United States' response to Panel question No. 35 of the third set, para. 11.

<sup>346</sup> United States' response to Panel question No. 35 of the third set, para. 11.

<sup>347</sup> United States' response to Panel question No. 35 of the third set, para. 11.

<sup>348</sup> USITC final report, (Exhibit CHN-2), pp. 47-49.

<sup>349</sup> In this respect, we note that previous DSB reports have similarly found that there may be instances where there is a lag between the influx of imports and the manifestation of the injurious effects on the domestic industry. (See, e.g. Panel Reports, *US – Steel Safeguards*, paras. 10.310-10.312). In that case, the panel explicitly noted that lags concerning certain factors *such as employment* may be expected. (See *ibid.* para. 10.312).

<sup>350</sup> USITC final report, (Exhibit CHN-2), fn 263; USITC final staff report, (Exhibit CHN-3), table III-3.

<sup>351</sup> USITC final report, (Exhibit CHN-2), p. 47.

<sup>352</sup> USITC final report, (Exhibit CHN-2), p. 44:

In 2009, the beginning of the period of investigation in the CSPV I investigations, the domestic industry held the largest share of apparent U.S. consumption (\*\*% percent), followed by imports from China corresponding to the scope of those investigations (\*\*% percent), and imports from all other sources (\*\*% percent). Imports from China overtook the domestic industry's U.S. shipments by 2010, and by the end of 2011, imports from China had nearly doubled from their 2009 level.

Fns omitted; redacted original.

See also USITC CSPV I final report, (Exhibit USA-11), p. 38:

Consequently, the picture emerges of a domestic industry: (1) with a steadily declining market share despite phenomenal demand growth, (2) that has lost market share due primarily to the significant and increasing volume of subject imports from China, (3) that has faced significant underselling by subject imports from China and depressed and suppressed prices, (4) that consistently lost money throughout the POI despite the tremendous demand growth and significant cost reductions, (5) that by the end of the POI experienced declines even in many of the performance indicators that previously had shown some improvement, and (6) that reported recognizing asset write-offs and/or costs related to the closure of production facilities, revalued inventories, and/or asset impairments. Based on the foregoing trends, we find that there is a causal nexus between subject imports and the poor condition of the domestic industry and that the domestic industry is materially injured by reason of subject imports.

and that new firms entered the market after the start of the POI corresponds with the improving financial condition of the domestic industry that followed the imposition of the *CSPV I* and *CSPV II* orders and the growth in the US market. However, as noted above, these improvements were short-lived; the financial condition of the domestic industry deteriorated further in 2016, as import volumes increased from sources not covered by the *CSPV I* and *CSPV II* orders, and the domestic industry's market share and prices dropped anew.<sup>353</sup> As the USITC found that plant closures followed these developments<sup>354</sup>, we do not consider that the USITC failed to address year-over-year trends, contrary to China's view.<sup>355</sup>

7.157. This brings us to whether it was appropriate for the USITC to take into account plant closures that occurred immediately after the POI, i.e. following the significant increase in imports. While the parties agree that the Agreement on Safeguards does not prescribe explicit rules for considering evidence from outside of the POI<sup>356</sup>, they disagree on when it is appropriate to do so and also on whether the USITC considered post-POI evidence concerning plant closures in a balanced manner.

7.158. As noted above, China argues that it is only appropriate for the competent authorities of a Member to consider developments following the POI in limited circumstances, specifically where the competent authorities explain why doing so is "necessary".<sup>357</sup> However, in line with the United States' argument, we consider this understanding to be overly restrictive.<sup>358</sup> The Agreement on Safeguards does not discipline the temporal scope of the evidence that the competent authorities may consider, so long as the evidence is on the competent authorities' record and the procedural rights of interested parties are respected. Moreover, contrary to China's reference to the principle that the determinations of serious injury should focus on the "recent past", we think that the principle to which China refers favours taking into account post-POI developments.<sup>359</sup> Indeed, those developments would reflect the most recent circumstances of the domestic industry, including any injurious effects of increased imports.

7.159. Finally, we do not consider that China has demonstrated that the USITC failed to evaluate post-POI evidence in a balanced manner. The USITC recognized that "[t]wo firms announced plans for new facilities, but those facilities were not commercially operational by July 2017" in its assessment of whether there was significant idling of US productive facilities.<sup>360</sup> The USITC also relied upon table III-3 in the final staff report, which shows that a limited number of cell and module facilities opened in the 2016-2017 period.<sup>361</sup> Importantly, however, this evidence contrasts with the larger number of closures that occurred in the same period.<sup>362</sup> The USITC also relied on evidence from Suniva – one of the largest domestic producers and one of the petitioners in the safeguard investigation – regarding the April 2017 suspension of operations at its cell and module facilities as

<sup>353</sup> USITC final report, (Exhibit CHN-2), p. 49.

<sup>354</sup> USITC final report, (Exhibit CHN-2), p. 49.

<sup>355</sup> Relatedly, we also reject China's contention that the USITC ignored the fact that plants opened throughout the POI. Indeed, as noted by the United States, the USITC addressed this dynamic explicitly when it found that of the 16 additional facilities that opened during the POI, 5 had closed, and that, although 2 firms had announced plans for new facilities, those facilities were not commercially operational by July 2017. (United States' comments on China's response to Panel question No. 5 of the first set, para. 66). As noted above, the USITC also found that "[a]lthough many U.S. producers entered the U.S. market seeking to take advantage of this demand growth, the consistent inability of the domestic industry to compete with low-priced imports forced many of these firms, as well as others, to shut down". (USITC final report, (Exhibit CHN-2), pp. 48-49).

<sup>356</sup> China's response to Panel question No. 35 of the third set, para. 17; United States' response to Panel question No. 35 of the third set, para. 9.

<sup>357</sup> China's response to Panel question No. 35 of the third set, paras. 17-23; comments on the United States' response to Panel question No. 35 of the third set, para. 10.

<sup>358</sup> United States' response to Panel question No. 35 of the third set, paras. 9-10; comments on China's response to Panel question No. 35 of the third set, paras. 9-11.

<sup>359</sup> China's response to Panel question No. 35 of the third set, paras. 20-21; Panel Report, *US – Wheat Gluten*, para. 8.81.

<sup>360</sup> USITC final report, (Exhibit CHN-2), pp. 31-32.

<sup>361</sup> USITC final report, (Exhibit CHN-2), pp. 31-32 and fns 155-158.

<sup>362</sup> USITC final report, (Exhibit CHN-2), pp. 31-33, 38, and 49; USITC final staff report, (Exhibit CHN-3), table III-3; and Transcript of the USITC injury hearing, (Exhibit CHN-9), pp. 95-96. Although China claims that "[w]hen imports were at their highest level, the number of firm closures were at their lowest", it fails to demonstrate that this was the case, particularly in light of the documented closures in the 2016-2017 period. (China's second written submission, para. 118).



part of its chapter 11 bankruptcy filing.<sup>363</sup> As the balance of this evidence appears to support the USITC's finding that the domestic industry's plant closures worsened after the POI, we disagree with China's claim that the USITC cherry-picked facts in isolation or failed to consider the evidence as a whole.<sup>364</sup>

7.160. Based on the foregoing, we reject China's argument that the USITC failed to appropriately explain why the domestic industry's plant closures were a result of increased imports.

### **7.3.3.3 The USITC's findings concerning the relationship between increased imports and the seemingly positive factors of serious injury**

7.161. The parties also disagree on whether the USITC properly addressed the seemingly positive factors of serious injury that were present during the POI, i.e. increases in the domestic industry's capacity, production, and shipments; employment; and capital expenditures, R&D expenses, and value of production assets.

7.162. China contends that the USITC largely dismissed the existence of these factors, which, in China's view, cast doubt on the USITC's finding that increased imports caused serious injury to the domestic industry.<sup>365</sup> In opposition, the United States argues that China disregards that the USITC addressed these factors in its serious injury analysis and found that they did not detract from its finding that the totality of the evidence demonstrated a significant overall impairment in the position of the domestic industry. Thus, the existence of the seemingly positive factors of serious injury does not undermine the USITC's finding of a causal link.<sup>366</sup>

7.163. At the outset, we note that the parties' disagreement directly implicates the legal status of the USITC's serious injury determination in these proceedings. The fact that China has not challenged the USITC's serious injury determination means that it is uncontested for the purposes of our evaluation. Moreover, because the requisite "causal link" under the Agreement on Safeguards is between increased imports and the serious injury *found to exist*, the underlying serious injury determination establishes the factual parameters of the causal link that must be demonstrated. This has direct implications for our assessment of the USITC's analysis of the seemingly positive factors in its causation determination. Since the USITC found that the seemingly positive factors either supported, or did not undermine, its determination that the domestic industry was seriously injured, we consider that these factors are necessarily less relevant to the causal link between increased imports and serious injury.<sup>367</sup>

<sup>363</sup> USITC final report, (Exhibit CHN-2), pp. 33-34; Transcript of the USITC injury hearing, (Exhibit CHN-9), pp. 95-96; and USITC final staff report, (Exhibit CHN-3), p. III-8.

<sup>364</sup> China's comments on the United States' response to Panel question No. 4(b) of the first set, para. 36.

<sup>365</sup> China's second written submission, para. 56.

<sup>366</sup> See also United States' first written submission, paras. 157-159; and second written submission, para. 27.

<sup>367</sup> In this regard, we disagree with China's contention that the Panel is required to review the reasonableness and adequacy of the USITC's factual findings in its serious injury determination on the basis that they are relevant to the Panel's assessment of the causation determination. (China's response to Panel question No. 1(b) of the second set, paras. 3-4). In our view, doing so would effectively amount to reviewing the serious injury determination, which is outside of our terms of reference.

Based on the legal distinction between "serious injury" and "causal link" in the Agreement on Safeguards, China further claims that the serious injury determination is "context for, but does not dictate, the 'causal link' determination, even though both of these legal determinations will draw on the same underlying facts". China also argues that "the overall determination about 'serious injury' does not extinguish the relevance of the individual injury factors for which there is evidence on the record. Those facts are themselves still highly relevant for the assessment of the alleged 'causal link'". In this context, China notes the analysis of the "causal link" must focus on how the injury factors have changed over time. (China's response to Panel question No. 33 of the third set, paras. 3-9).

While we agree with China that serious injury and causation are legally distinct requirements under the Agreement on Safeguards and that movement in individual injury factors must be accounted for in the causation analysis, we disagree with China to the extent it argues that the serious injury determination does not establish the factual parameters of the causal link that must be demonstrated. In this regard, we recall that Article 4.2(b) of the Agreement on Safeguards stipulates that the requisite "causal link" is "between increased imports and serious injury". Thus, in our view, the underlying serious injury determination establishes the factual parameters of the overall causal link that must be demonstrated, and therefore establishes the relevance of specific injury factors to the competent authorities' analysis.

7.164. In this context, we now turn to the parties' arguments concerning each of the seemingly positive injury factors.

### **7.3.3.3.1 Capacity, production, and shipments**

#### **7.3.3.3.1.1 Factual background**

7.165. As part of its serious injury determination, the USITC found that, although the domestic industry's capacity, production, and shipments increased during the POI, those increases were dwarfed by the increase in US consumption and the domestic industry lost market share as a result.<sup>368</sup> On this basis, the USITC considered that the inability of the domestic industry to meaningfully increase its capacity, production, and shipments during a period of favourable market conditions was indicative of serious injury, regardless of whether these factors improved during the POI.<sup>369</sup>

7.166. In its examination of whether increased imports were a substantial cause of serious injury to the domestic industry, the USITC found that the domestic industry lost sales and market share as a result of increased low-priced imports, despite the fact that it increased its shipments over the POI.<sup>370</sup> The USITC also found that increased imports prevented the domestic industry from increasing its capacity and production levels commensurately with demand growth.<sup>371</sup> In particular, the USITC linked the inability of the domestic industry to increase its capacity "in order to achieve economies of scale" to "the hundreds of millions of dollars in net and operating losses throughout the POI", which meant that "a significant number of domestic producers were unable to generate adequate capital to finance the modernization of their domestic plants and equipment, and a significant number of them were unable to maintain existing research and development expenditure levels".<sup>372</sup>

#### **7.3.3.3.1.2 Main arguments of the parties**

7.167. China argues that the USITC failed to appropriately explain why increased imports caused serious injury to the domestic industry, notwithstanding the increases in the domestic industry's capacity, production, and shipments.<sup>373</sup> For each of these factors, China claims that it was insufficient for the USITC to recognize the existence of the trend and dismiss it on the basis that the domestic industry did not increase its performance commensurately with demand growth.<sup>374</sup> In this regard, China contends that the USITC's analysis contained an "implicit false premise" that the domestic industry had the right to grow in line with the expansion of the US market.<sup>375</sup>

7.168. For its part, the United States contends that the USITC addressed these trends in its serious injury analysis and found that they did not detract from the conclusion that the totality of the evidence demonstrated "a significant overall impairment in the position of the domestic industry".<sup>376</sup> The United States further contends that, contrary to China's assertion that the USITC relied upon an "implicit false premise" that the domestic industry had a right to grow as the market expanded, the USITC appropriately found that increased imports prevented the domestic industry from being able to meaningfully improve its performance.<sup>377</sup>

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<sup>368</sup> USITC final report, (Exhibit CHN-2), pp. 37-38. Relatedly, as part of its serious injury determination, the USITC found that, while the domestic industry increased capacity and production for both CSPV cells and CSPV modules during the POI, these increases did not approach the magnitude of the explosive growth in apparent US consumption during this period. (USITC final report, (Exhibit CHN-2), p. 33).

<sup>369</sup> USITC final report, (Exhibit CHN-2), pp. 37-38. The USITC linked this dynamic to other aspects of the serious injury it found to exist, e.g. the closure of domestic production facilities, increased inventories at facilities that remained open, and the inability for a significant number of firms to generate reasonable levels of profit.

<sup>370</sup> USITC final report, (Exhibit CHN-2), p. 49.

<sup>371</sup> USITC final report, (Exhibit CHN-2), p. 47.

<sup>372</sup> USITC final report, (Exhibit CHN-2), p. 47.

<sup>373</sup> China's first written submission, paras. 118-121; second written submission, paras. 58-66.

<sup>374</sup> China's first written submission, paras. 120-121; second written submission, paras. 60, 63, and 66.

<sup>375</sup> China's first written submission, paras. 120-121; second written submission, paras. 60, 63, and 66.

<sup>376</sup> United States' second written submission, para. 27. See also United States' first written submission, paras. 157-159.

<sup>377</sup> United States' first written submission, paras. 157 and 161-163; second written submission, paras. 34-36; and comments on China's response to Panel question No. 2 of the first set, para. 33.

### 7.3.3.3.1.3 Evaluation of the Panel

7.169. In our view, the United States correctly notes that China fails to situate its claim in the context of the USITC's serious injury determination, which it does not challenge in these proceedings. As indicated above, the absence of such a challenge means that the USITC's serious injury determination is uncontested for the purposes of our evaluation. As part of its serious injury determination, the USITC found that the extent of the improvements in the domestic industry's capacity, production, and shipments during the POI, when viewed in the context of the growth in the US market, *supported* its finding that the domestic industry was seriously injured.<sup>378</sup> Therefore, with respect to the USITC's causation determination, the relevant issue is *not* whether the domestic industry's performance improved, but rather whether the domestic industry's inability to *meaningfully* improve its performance occurred as a result of increased imports. By focusing narrowly on the fact that certain of the domestic industry's performance indicators improved over the POI, China's arguments ignore the nature of the serious injury found to exist, and thus are not calibrated to the relevant issue.

7.170. China also overlooks the linkages drawn by the USITC between increased imports and the inability of the domestic industry to improve its performance in light of increasing demand in the US market. As noted above, the USITC found that, irrespective of the fact that the domestic industry increased its shipments during the POI, it still lost sales to low-priced imports, which contributed to its declining market share.<sup>379</sup> The USITC also found that the inability of the domestic industry to achieve economies of scale by increasing its capacity and production was linked to the "the hundreds of millions of dollars in net and operating losses throughout the POI", which the USITC attributed to increased imports.<sup>380</sup> As we have already rejected China's claims that these findings were not appropriately explained, we consider that the same findings demonstrate that the USITC properly accounted for seemingly favourable increases in the domestic industry's capacity, production, and shipments in its causation analysis. These findings also demonstrate that, contrary to China's view, the USITC did not rely on an "implicit false premise" that the domestic industry had the right to grow commensurately with the expansion of the US market.

7.171. Based on the foregoing, we reject China's claim that the USITC failed to appropriately explain why increased imports caused serious injury to the domestic industry, notwithstanding the domestic industry's increases in its capacity, production, and shipments.

### 7.3.3.3.2 Employment

#### 7.3.3.3.2.1 Factual background

7.172. As part of its serious injury determination, the USITC found that the substantial number of facility closures resulted in extensive layoffs and the award of US Trade Adjustment Assistance Act benefits to many workers during the POI. In addition, workers at some facilities experienced temporary shutdowns or production slowdowns, which led to layoffs and underemployment.<sup>381</sup> Specifically, with respect to CSPV cell operations, the USITC noted that:

[T]he overall number of production and related workers ("PRWs") engaged in U.S. CSPV cell operations declined from \*\*\* PRWs in 2012 to \*\*\* PRWs in 2013 and \*\*\* PRWs in 2014, and increased to \*\*\* PRWs in 2015 and \*\*\* PRWs in 2016, an overall increase of \*\*\* percent. Although the overall increase in employment over the POI appears consistent with the \*\*\* percent increase in U.S. production of CSPV cells, the increase at the end of the POI is primarily explained by \*\*\*.<sup>382</sup>

7.173. Moreover, with respect to CSPV module operations:

For U.S. CSPV module operations, overall employment declined from 1,293 PRWs in 2012 to 1,080 PRWs in 2013 and 956 PRWs in 2014, and increased to 1,038 PRWs in 2015 and 1,253 PRWs in 2016, an overall decrease of 3.1 percent despite dramatic

<sup>378</sup> USITC final report, (Exhibit CHN-2), pp. 37-38.

<sup>379</sup> USITC final report, (Exhibit CHN-2), p. 47.

<sup>380</sup> USITC final report, (Exhibit CHN-2), pp. 47 and 60-61.

<sup>381</sup> USITC final report, (Exhibit CHN-2), p. 33.

<sup>382</sup> USITC final report, (Exhibit CHN-2), p. 33. (fns omitted; redacted original)

growth in apparent U.S. consumption of CSPV products. These employment data do not reflect post-POI developments, such as Suniva's April 2017 suspension of operations for its cell and module factories as part of its chapter 11 bankruptcy filing or SolarWorld's June 2017 issuance of WARN Act notifications to \*\*\*, layoff of 360 employees in mid-July 2017, and \*\*\*.<sup>383</sup>

7.174. Returning to these findings in its causation analysis, the USITC found that the domestic industry's poor operational and financial performance over the POI resulted in a substantial number of facility closures, which in turn resulted in "numerous layoffs and the need for trade adjustment assistance for the highly trained, skilled workers affected by these closures".<sup>384</sup>

#### 7.3.3.3.2.2 Main arguments of the parties

7.175. China contends that the USITC failed to appropriately explain why the increased imports caused injury to the domestic industry, notwithstanding the improvements in the domestic industry's employment indicators.<sup>385</sup> In particular, China argues that the USITC downplayed the fact that employment of cell production related workers increased "year-on-year" throughout the POI, and that employment for module production related workers recovered towards the end of the POI when imports peaked.<sup>386</sup> China further argues that the USITC erred in its consideration of data concerning employment from after the POI for its determination of causation within the POI.<sup>387</sup>

7.176. In response, the United States advances that China does not deny the USITC's observation that dozens of domestic facilities closed over the POI, which logically resulted in layoffs.<sup>388</sup> In addition, contrary to China's argument, the United States argues that the USITC appropriately relied upon post-POI evidence concerning SolarWorld's issuance of WARN Act notices and Suniva's bankruptcy because that evidence was highly relevant and interested parties had the opportunity to address it during the investigation.<sup>389</sup>

#### 7.3.3.3.2.3 Evaluation of the Panel

7.177. The USITC found that, regardless of certain increases in the domestic industry's cell and module employment during the POI, the overall employment data supported its finding of "significant unemployment and underemployment".<sup>390</sup> As China does not challenge the serious injury determination in these proceedings, we accept these findings as uncontested. In our view, the same findings also diminish the significance of any improvements to the domestic industry's employment indicators to the USITC's causation analysis, as the causal link required under the Agreement on Safeguards is between increased imports and the serious injury *found to exist*. Thus, the simple fact that certain of these factors improved over the POI does not demonstrate the absence of a causal link between increased imports and serious injury.

7.178. In addition, we note that the USITC connected the movement in the domestic industry's employment indicators to the domestic industry's poor operational and financial performance, which resulted in a substantial number of plant closures.<sup>391</sup> In sections 7.3.3.2.4.3 and 7.3.3.2.5 above, we have already rejected China's arguments that the USITC failed to appropriately explain why the domestic industry's financial deterioration and plant closures occurred as a result of increased imports. Thus, the USITC's findings with respect to these factors – which worsened at the end of the POI – disprove China's contention that the USITC failed to appropriately address the relationship between increased imports and the movement in the domestic industry's employment indicators.<sup>392</sup>

<sup>383</sup> USITC final report, (Exhibit CHN-2), pp. 33-34. (fns omitted; redacted original)

<sup>384</sup> USITC final report, (Exhibit CHN-2), pp. 47-48.

<sup>385</sup> China's first written submission, para. 122; second written submission, paras. 67-70.

<sup>386</sup> China's second written submission, para. 68.

<sup>387</sup> China's first written submission, para. 122; second written submission, para. 69.

<sup>388</sup> United States' first written submission, para. 165.

<sup>389</sup> United States' first written submission, para. 165.

<sup>390</sup> USITC final report, (Exhibit CHN-2), pp. 33-34.

<sup>391</sup> USITC final report, (Exhibit CHN-2), pp. 47-48.

<sup>392</sup> We note in particular that certain of the domestic industry's employment indicators worsened in 2017, which aligns temporally with the rise in the domestic industry's plant closures. (USITC final report, (Exhibit CHN-2), pp. 33-34).

7.179. In this connection, we reject China's argument that it was inappropriate for the USITC to consider evidence concerning the domestic industry's employment indicators from after the POI. As noted in section 7.3.3.2.5.3 above, the Agreement on Safeguards does not discipline the temporal scope of the evidence that may be considered so long as that evidence is on the competent authorities' record, and provided that the procedural rights of interested parties are respected. Thus, we agree with the United States that it was appropriate for the USITC to consider record evidence concerning Suniva's April 2017 suspension of operations and SolarWorld's June 2017 issuance of WARN Act notifications and laying off 360 employees. In our view, this evidence shows that, contrary to China's claims, it was not inappropriate for the USITC to find that the domestic industry's employment indicators were adversely impacted by the increase in imports at the end of the POI.

7.180. Based on the foregoing, we reject China's claim that the USITC failed to appropriately explain why increased imports caused injury to the domestic industry, notwithstanding the improvements in the domestic industry's employment indicators during the POI.

### **7.3.3.3.3 Capital expenditures, R&D expenses, and value of production assets**

#### **7.3.3.3.3.1 Factual background**

7.181. As part of its serious injury determination, the USITC found that:

The domestic industry's capital expenditures increased overall between 2012 and 2016, reaching their highest level in 2015, but the largest share of these expenditures was related to expenditures by one firm (\*\*\*) on new CSPV cell operations that have not yet become commercially operational. The domestic industry's research and development expenses generally declined between 2012 and 2015, but increased in 2016, largely due to \*\*\*. The value of the domestic industry's production assets increased overall, again largely due to \*\*\*. Other domestic producers recognized asset impairments, reserved or wrote off production equipment, \*\*\*, \*\*\*, and otherwise slowed or shut down production.

Domestic producers also identified a series of actual negative effects on their investment, growth, and development due to imports. These included tabling, postponing, and deferring projects; rejection of investment proposals; reduction in the size of capital investments; negative returns on investments; inability to generate adequate capital to finance modernization of domestic plants and equipment; increased costs for debt financing; inability to maintain existing levels of research and development expenditures; rejection of bank loans; lowering of credit ratings; inability to issue stocks or bonds; inability to service debt; lowered bankability; and other such difficulties. Domestic producers also anticipated additional negative effects from imports. Based on this evidence, we find that a significant number of domestic producers were unable to generate adequate capital to finance the modernization of their domestic plants and equipment, and a significant number of domestic producers were unable to maintain existing levels of expenditures for research and development, despite explosive demand growth during the POI.<sup>393</sup>

7.182. When returning to these findings in its analysis of causation, the USITC observed:

Consistent with the hundreds of millions of dollars in net and operating losses throughout the POI, a significant number of domestic producers were unable to generate adequate capital to finance the modernization of their domestic plants and equipment, and a significant number of them were unable to maintain existing research and development expenditure levels. This inability to generate adequate capital for investments and research and development impaired the domestic industry's ability to develop next-generation products in this highly capital-intensive and technologically sophisticated market.<sup>394</sup>

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<sup>393</sup> USITC final report, (Exhibit CHN-2), pp. 35-37. (fns omitted; redacted original)

<sup>394</sup> USITC final report, (Exhibit CHN-2), p. 47. (fns omitted)



### 7.3.3.3.2 Main arguments of the parties

7.183. China contends that the USITC failed to appropriately explain why increased imports caused injury to the domestic industry, notwithstanding the increases in the domestic industry's capital expenditures, R&D expenses, and value of its production assets.<sup>395</sup> Regarding capital expenditures, China argues that it was inadequate for the USITC to recognize the existence of increased capital expenditures, but dismiss the significance of that increase on the basis that it was carried out by a single firm, particularly when the non-confidential version of the USITC final report is so heavily redacted on this point that the explanation is deficient and ambiguous.<sup>396</sup> Regarding R&D expenses, China argues that it was inappropriate for the USITC to find a causal link between increased imports and serious injury when at least one domestic firm increased its R&D expenses in 2016, when imports were at their highest. According to China, the USITC's finding that some firms "were unable to maintain existing research and development expenditure levels" did not sufficiently represent the state of the domestic industry as a whole.<sup>397</sup> Finally, regarding the value of the domestic industry's production assets, China argues that the USITC relied on conclusory statements and did not appropriately address how improvements in the value of the domestic industry's production assets were consistent with its finding of causality.<sup>398</sup>

7.184. For its part, the United States takes the position that the USITC appropriately explained that the largest share of capital expenditures was "related to expenditures by one firm on new CSPV cell operations that had not yet become operational by the end of the POI".<sup>399</sup> The United States further advances that the USITC appropriately explained that the financial losses incurred by the domestic industry throughout the POI meant that "a significant number of domestic producers were unable to generate adequate capital to finance the modernization of their domestic plants and equipment or maintain existing research and development expenditure levels", which in turn impaired the domestic industry's ability to develop next-generation products.<sup>400</sup>

### 7.3.3.3.3 Evaluation of the Panel

7.185. As part of its serious injury determination, the USITC found that the improvements in the domestic industry's capital expenditures, R&D expenses, and value of its production assets were not representative of the domestic industry as a whole.<sup>401</sup> This finding supported its conclusion that "a significant number of domestic producers were unable to generate adequate capital to finance the modernization of their domestic plants and equipment, and a significant number of domestic producers were unable to maintain existing levels of expenditures for research and development, despite explosive demand growth during the POI".<sup>402</sup>

7.186. Since China does not challenge the serious injury determination in these proceedings, we accept these findings as uncontested. In our view, these findings also diminish the significance of any improvements to the domestic industry's capital expenditures, R&D expenses, and value of production assets to the USITC's causation analysis. As explained above, the causal link required under the Agreement on Safeguards is between increased imports and the serious injury *found to exist*. The simple fact that the domestic industry's capital expenditures, R&D expenses, and value of production assets improved does not demonstrate the absence of a causal link between increased imports and serious injury. This is particularly the case because the USITC found in its serious injury determination that these improvements were not representative of the domestic industry as a whole.

7.187. Accordingly, by overlooking the context of the USITC's serious injury determination, China's arguments fail to demonstrate that the USITC's causation analysis inadequately accounted for the improvements to the domestic industry's capital expenditures, R&D expenses, and value of production assets. In this regard, we note that several of China's arguments improperly seek to challenge (either directly or indirectly) various aspects of the underlying serious injury

<sup>395</sup> China's first written submission, paras. 123-124; second written submission, paras. 71-79.

<sup>396</sup> China's second written submission, paras. 73-76.

<sup>397</sup> China's second written submission, paras. 76-78.

<sup>398</sup> China's second written submission, para. 79.

<sup>399</sup> United States' first written submission, para. 166.

<sup>400</sup> United States' first written submission, para. 166.

<sup>401</sup> USITC final report, (Exhibit CHN-2), pp. 35-36.

<sup>402</sup> USITC final report, (Exhibit CHN-2), pp. 36-37. (emphasis added)

determination, which is not part of the matter under review in this dispute.<sup>403</sup> We further note that China's arguments do not address the USITC's central finding that the "hundreds of millions of dollars in net and operating losses throughout the POI" adversely impacted the domestic industry's ability to generate capital or maintain existing R&D expenditure levels, which in turn "impaired the domestic industry's ability to develop next-generation products in this highly capital-intensive and technologically sophisticated market".<sup>404</sup>

7.188. Based on these shortcomings, we reject China's claim that the USITC failed to appropriately explain why increased imports caused injury to the domestic industry, notwithstanding the increases in the domestic industry's capital expenditures, R&D expenses, and value of its production assets.

#### **7.3.3.4 Overall conclusion regarding the USITC's determination of a causal link between increased imports of CSPV products and serious injury of the domestic industry**

7.189. In the foregoing sections we have found that China has failed to establish that the USITC erred in respect of its analysis of the relationship between increased imports and the negative and seemingly positive factors of serious injury that existed during the POI. Based on these findings, we reject China's argument that the USITC failed to demonstrate an "overall coincidence" between increased imports and serious injury.<sup>405</sup> Accordingly, we reject China's overall claim that the United States failed to evaluate whether increased imports were a cause of serious injury in accordance with Articles 2.1, 3.1, and 4.2(b) of the Agreement on Safeguards.

### **7.4 "Other" factors allegedly causing injury to the domestic industry**

#### **7.4.1 General factual background**

7.190. US domestic law requires the USITC to find whether the product under investigation is being imported in such increased quantities as to be a "substantial cause" of serious injury or threat thereof, i.e. "a cause which is important and not less than any other cause".<sup>406</sup> This requirement directs the USITC to, *inter alia*, "examine factors other than imports" that may be a cause of serious injury or threat thereof and include the results of its examination in its report.<sup>407</sup>

7.191. In the safeguard investigation, respondents argued that causes other than imports were more important and explain any injury to the domestic industry, identifying two such causes: (a) alleged missteps by the domestic industry and (b) factors other than imports that allegedly led to declines in domestic prices. More specifically, respondents referred to:

- a. Alleged missteps by the domestic industry:
  - i. the alleged decision of the domestic industry to focus on the commercial and residential segments and to avoid competing in the utility segment;
  - ii. alleged quality and product-type issues; and

<sup>403</sup> See, e.g. China's second written submission, paras. 73-76 (challenging the USITC's finding that increased capital expenditures were not representative of the domestic industry as a whole); para. 77 (claiming that the USITC's finding that a significant number of firms "were unable to maintain existing research and development expenditure levels" was inadequate); para. 78 (advancing that "[t]he inability for individual firms to maintain existing research and development expenditures is not indicative of injury, especially in light of the absence of coincidence between the increase in research and development expenditures and the increase in imports for the overall industry in 2016" (emphasis added)); and para. 79 (arguing that "the USITC again failed to provide an explanation why it found causality even when the value of the domestic industry's total assets 'increased overall' by the end of the POI" (emphasis added)).

<sup>404</sup> USITC final report, (Exhibit CHN-2), p. 47.

<sup>405</sup> Relatedly, we also reject China's argument that the USITC failed to examine the "combined weight" of positive and negative factors in its analysis of causality. In particular, we note that China's argument is premised on its claim that the USITC failed to provide a sufficient explanation with respect to serious injury factors that showed a positive trend. However, as we have found in section 7.3.3.3 above, we do not consider that China has demonstrated that the USITC's report is deficient in this regard. (China's second written submission, paras. 125-131).

<sup>406</sup> USITC final report, (Exhibit CHN-2), p. 23.

<sup>407</sup> USITC final report, (Exhibit CHN-2), p. 23.



- iii. alleged service and delivery issues.<sup>408</sup>
- b. Factors other than imports that allegedly led to declines in domestic prices:
  - i. declining government incentive programmes;
  - ii. declining raw material costs; and
  - iii. the need to attain "grid parity" with other sources of electricity.<sup>409</sup>

7.192. In its final report, the USITC examined these factors but found that respondents' arguments were not supported by the facts.<sup>410</sup>

#### **7.4.2 Applicable legal requirements concerning the assessment of "other" factors allegedly causing injury to the domestic industry under Article 4.2(b) of the Agreement on Safeguards**

7.193. Article 4.2(b), second sentence, of the Agreement on Safeguards reads as follows:

When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

7.194. As such, the second sentence of Article 4.2(b) envisages that the competent authorities of a Member are required to conduct a non-attribution analysis when factors other than increased imports are found to be causing injury to the domestic industry simultaneously with increased imports. Conversely, if the competent authorities determine that the "other" factors are *not* causing injury at the same time as increased imports, there is no requirement to conduct a non-attribution analysis. However, because such a determination is subject to review, it should be supported by an explanation that is reasoned and adequate.<sup>411</sup>

#### **7.4.3 Whether the USITC failed to ensure that the injurious effects of "other" factors were not attributed to increased imports**

##### **7.4.3.1 Introduction**

7.195. The parties disagree on whether the USITC's assessment of the allegedly injurious effects of factors other than increased imports complied with Article 4.2(b), second sentence, of the Agreement on Safeguards. China claims that the USITC (i) improperly dismissed the alleged missteps by the domestic industry<sup>412</sup>; and (ii) improperly dismissed non-import factors that allegedly caused prices of CSPV products to decline, and failed to satisfy the non-attribution requirement in respect of the injurious effects of those factors.<sup>413</sup> The United States asks us to reject China's claims. The United States submits that the USITC properly found that the alleged missteps by the domestic industry were not a cause of injury. The United States also denies that the USITC found that non-import factors that allegedly caused prices of CSPV products to decline were a cause of injury to the domestic industry.<sup>414</sup>

7.196. In their arguments concerning the USITC's compliance with Article 4.2(b), second sentence, the parties also disagree on (i) the degree of discretion the competent authorities enjoy in discharging their non-attribution obligation under Article 4.2(b)<sup>415</sup>; (ii) whether the

<sup>408</sup> USITC final report, (Exhibit CHN-2), pp. 50-61.

<sup>409</sup> USITC final report, (Exhibit CHN-2), pp. 50 and 61-65.

<sup>410</sup> USITC final report, (Exhibit CHN-2), p. 50.

<sup>411</sup> We agree in this regard with the approach taken by the panel in *Ukraine – Passenger Cars*. (Panel Report, *Ukraine – Passenger Cars*, para. 7.334).

<sup>412</sup> China's first written submission, para. 182.

<sup>413</sup> China's first written submission, heading of section III(B)(2)(b) and para. 197.

<sup>414</sup> United States' first written submission, paras. 107 and 170-171.

<sup>415</sup> While China recognizes that Article 4.2(b) does not dictate a specific methodology for conducting a non-attribution analysis, it also refers to previous DSB reports that, according to China, clarify what the competent authorities are required to do to comply with this obligation. (China's first written submission,

USITC's application of the "substantial cause" test sufficiently discharged the United States' obligations under Article 4.2(b)<sup>416</sup>; and (iii) whether the USITC was required to conduct a cumulative assessment of factors other than the increased imports that allegedly caused injury to the domestic industry.<sup>417</sup>

7.197. We begin by considering China's claims against the USITC's analysis of the alleged missteps by the domestic industry (section 7.4.3.2). We then consider China's claims against the USITC's analysis of the non-import factors that allegedly caused prices of CSPV products to decline (section 7.4.3.3). Finally, we address any outstanding issues and conclude whether China has established that the USITC's assessment of "other" factors allegedly causing injury to the domestic industry did not comply with the requirements of Article 4.2(b) of the Agreement on Safeguards (section 7.4.3.4).

#### **7.4.3.2 Alleged missteps by the domestic industry**

7.198. During the safeguard investigation, respondents argued that missteps by the domestic industry were a cause other than imports that explained any injury to the domestic industry.<sup>418</sup> As noted above, respondents identified three alleged missteps: (a) the alleged decision of the domestic industry to focus on the commercial and residential segments and to avoid competing in the utility segment; (b) alleged quality and product-type issues; and (c) alleged service and delivery issues.<sup>419</sup> The USITC examined respondents' allegations and found that they were not supported by the facts on the record.<sup>420</sup>

7.199. China claims that the USITC failed to adequately assess the nature and the extent of the injurious effects of the alleged missteps by the domestic industry, and improperly dismissed these factors.<sup>421</sup> The United States disagrees.<sup>422</sup>

7.200. At the outset, we note that several of China's arguments criticize the manner in which the USITC weighed evidence that conflicted with its findings concerning the alleged missteps by the domestic industry. In a number of instances, China claims that the USITC erred by not analysing

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paras. 163-166 and 174). For its part, the United States submits that Article 4.2(b) does not specify how the competent authorities may comply with this non-attribution obligation. (United States' first written submission, para. 100; see also *ibid.* paras. 101-105; and comments on China's response to Panel question No. 10 of the first set, para. 85). Nevertheless, the United States maintains that the USITC fully complied with its non-attribution obligation in the present case, because the USITC correctly found that "other" factors did not cause injury to the domestic industry, such that the non-attribution requirement under Article 4.2(b) did not come into play. (United States' first written submission, para. 107; comments on China's response to Panel question No. 10 of the first set, para. 85).

<sup>416</sup> China argues that the USITC's "substantial cause" test, as applied in this case, fails to comply with the requirement of "separating and distinguishing" the injurious effects of all "other" factors. (China's first written submission, para. 178; see also *ibid.* para. 177). In response, the United States submits that "[e]ven setting aside China's erroneous understanding of Article 4.2(b), China's argument fails because the Commission looked individually at each of the alleged 'other factors,' and determined that it did not cause injury to the domestic industry. Article 4.2(b) [of the Agreement on Safeguards] does not require anything more". (United States' first written submission, para. 169 (fn omitted)).

<sup>417</sup> China argues that the USITC was required to cumulatively assess the non-import factors that allegedly caused prices of CSPV products to decline considering the complex interrelation between those factors, but failed to do so. (China's first written submission, paras. 218-226; second written submission, paras. 218-222). For its part, the United States argues that the USITC was not required to conduct a cumulative analysis since it found that "other" factors did not cause injury to the domestic industry. (United States' response to Panel question No. 22 of the first set, para. 62; closing statement at the first meeting of the Panel, para. 18).

<sup>418</sup> USITC final report, (Exhibit CHN-2), p. 50.

<sup>419</sup> USITC final report, (Exhibit CHN-2), p. 50.

<sup>420</sup> USITC final report, (Exhibit CHN-2), p. 61.

<sup>421</sup> China's first written submission, para. 181.

<sup>422</sup> United States' first written submission, paras. 176 and 196.

allegedly contrary evidence.<sup>423</sup> In other instances, China claims that the USITC erred by not affording more probative weight to allegedly contrary evidence.<sup>424</sup>

7.201. As noted in section 7.1.2 above, the Panel's role in these proceedings is to objectively assess whether China has established that the USITC failed to provide reasoned and adequate explanations that demonstrated compliance with the relevant obligations under the Agreement on Safeguards. Our role is *not* to conduct a *de novo* review of the evidence, or to substitute our judgment for that of the USITC.<sup>425</sup> Therefore, with respect to China's claim under Article 4.2(b), second sentence, the relevant question is whether China has established that the USITC failed to provide reasoned and adequate explanations demonstrating that alleged missteps by the domestic industry did not cause injury to the domestic industry.

7.202. In this context, the simple fact that the USITC did not explicitly address certain evidence or afford more probative weight to certain evidence does not mean that it acted inconsistently with these principles, as any such omissions would not dispositively establish that the USITC's findings and conclusions were unreasoned or inadequate. This is particularly the case because, when conducting safeguard investigations, the competent authorities are expected to accumulate an extensive record comprising arguments, data, and evidence from different sources, including from parties with conflicting interests in the outcome of the investigation.<sup>426</sup> Accordingly, to demonstrate that the USITC's treatment of certain evidence was improper, China must explain why the treatment of such evidence, when viewed in the context of the overall evidentiary record, demonstrates that the USITC's findings and conclusions were unreasoned or inadequate.

7.203. We now turn to China's claims concerning the alleged missteps committed by the domestic industry.

#### **7.4.3.2.1 The alleged decision of the domestic industry to focus on the commercial and residential segments and to avoid competing in the utility segment**

##### **7.4.3.2.1.1 Factual background**

7.204. During the safeguard investigation, respondents argued that domestic producers focused on the residential and commercial segments and did not seek to compete for utility sales until late in the POI, even though the utility segment was the largest and fastest-growing segment.<sup>427</sup> Respondents also reported being unaware of any domestic producer that was able "to provide the required combination of product type and demonstrated product performance" demanded by the utility segment.<sup>428</sup> Respondents further alleged that the domestic industry was either unable to produce or lacked sufficient capacity to produce 72-cell modules, which became the standard for utility installations by 2013-2014.<sup>429</sup>

7.205. In response, the USITC observed that since 2009 there has been a shift in the distribution of sales among the three market segments.<sup>430</sup> In 2009, the commercial segment accounted for the largest share of the market, followed by the residential and utility segments, whereas throughout the POI, utilities were the largest market segment, followed by the residential and commercial

<sup>423</sup> See, e.g. China's second written submission, paras. 161-162; response to Panel question No. 15 of the first set, para. 122; comments on the United States' response to Panel question No. 14 of the first set, paras. 82 and 87-89; and response to Panel question No. 13 of the second set, para. 149.

<sup>424</sup> See, e.g. China's second written submission, paras. 163 and 173; comments on the United States' response to Panel question No. 14 of the first set, para. 86; and response to Panel question No. 13 of the second set, para. 145.

<sup>425</sup> Our approach is consistent with that taken in previous dispute settlement proceedings. (See, e.g. Appellate Body Report, *US – Steel Safeguards*, para. 299).

<sup>426</sup> Indeed, Article 3.1 of the Agreement on Safeguards envisages that the investigation "shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest".

<sup>427</sup> USITC final report, (Exhibit CHN-2), p. 56.

<sup>428</sup> USITC final report, (Exhibit CHN-2), pp. 56-57.

<sup>429</sup> USITC final report, (Exhibit CHN-2), p. 60.

<sup>430</sup> USITC final report, (Exhibit CHN-2), p. 57.

segments.<sup>431</sup> The USITC also noted that all three market segments experienced considerable growth during the POI.<sup>432</sup>

7.206. In this context, the USITC rejected respondents' arguments and found that:

[T]he domestic industry sold or tried to sell CSPV products to utilities throughout the POI in addition to the residential and commercial segments, but was frequently unable to win large bids in this segment. Moreover, the domestic industry lost market share to imports regardless of the segment.<sup>433</sup>

[T]he evidence indicates that the domestic industry clearly sought to compete in the large, concentrated, and price-sensitive utility market, but the large volume of imports at low and declining prices adversely impacted the domestic industry's financial performance, making it difficult for the domestic industry to increase capacity to a scale that made it more competitive in this segment, even if it managed to develop and even pioneer innovative products that utilities and others sought.<sup>434</sup>

7.207. As support for its finding, the USITC relied on evidence demonstrating that the domestic industry and importers each sold CSPV products to all three market segments during the POI.<sup>435</sup> The USITC further explained that, although most of the domestic industry's shipments went to residential and commercial segments, SolarWorld and Suniva demonstrated that they competed for and shipped to the utility segment.<sup>436</sup> In addition, the USITC noted that the record showed that the domestic industry sold both 60-cell and 72-cell modules throughout the POI and lost market share to imports for both types of modules.<sup>437</sup> It observed that SolarWorld added a 72-cell module assembly line to its facilities in 2016 due to increasing demand in the utility market and that Suniva devoted 45% of its cell manufacturing capacity to 72-cell modules to serve the commercial and "small utility" market.<sup>438</sup>

#### 7.4.3.2.1.2 Main arguments of the parties

7.208. China submits that the USITC failed to address the effect of the domestic industry's decision to focus on the commercial and residential segments, rather than the utility segment.<sup>439</sup> According to China, this "deliberate business choice"<sup>440</sup> "influenced the limited participation of the domestic industry in the utility segment" where demand was booming.<sup>441</sup> China acknowledges that the domestic industry had some capacity to supply small-scale projects in the utility segment, but states that, as a result of its "deliberate business choice", it had no capacity to compete for the large-scale projects, which accounted for the bulk of that segment.<sup>442</sup> China further argues that the lack of competitiveness of the domestic industry in the utility segment is evidenced by the domestic industry's importation of CSPV products to meet demand, its late investment in 72-cell module lines (in the case of SolarWorld), and its decision not to produce cost-competitive 72-cell modules (in the case of Suniva).<sup>443</sup>

7.209. The United States responds by arguing that the factual premise for China's claim is flawed, since there was no decision by the domestic industry not to compete in the utility segment.<sup>444</sup> To the contrary, the United States argues that the USITC considered this possibility but found, based on record evidence, that the domestic industry did in fact compete in the utility segment.<sup>445</sup> In addition,

<sup>431</sup> USITC final report, (Exhibit CHN-2), pp. 57-58.

<sup>432</sup> USITC final report, (Exhibit CHN-2), p. 58.

<sup>433</sup> USITC final report, (Exhibit CHN-2), p. 59.

<sup>434</sup> USITC final report, (Exhibit CHN-2), pp. 60-61.

<sup>435</sup> USITC final report, (Exhibit CHN-2), p. 58.

<sup>436</sup> USITC final report, (Exhibit CHN-2), p. 59.

<sup>437</sup> USITC final report, (Exhibit CHN-2), p. 60.

<sup>438</sup> USITC final report, (Exhibit CHN-2), p. 60.

<sup>439</sup> China's first written submission, para. 184.

<sup>440</sup> China's second written submission, para. 158.

<sup>441</sup> China's second written submission, para. 158.

<sup>442</sup> China's first written submission, para. 186; second written submission, paras. 150-151.

<sup>443</sup> China's second written submission, paras. 152 and 156.

<sup>444</sup> United States' first written submission, para. 178.

<sup>445</sup> United States' first written submission, paras. 177-179; response to Panel question No. 12 of the first set, paras. 26-30.

the United States claims that China's argument that the domestic industry did not have capacity for the large-scale projects fails to properly account for the USITC's finding that the domestic industry's lack of capacity was a result of increased imports, rather than an independent cause of injury.<sup>446</sup>

#### 7.4.3.2.1.3 Evaluation of the Panel

7.210. For the reasons explained below, we are not persuaded by China's arguments.

7.211. The USITC found that the domestic industry "clearly sought to compete in the large, concentrated, and price-sensitive utility market" based on record evidence indicating that: (a) "the domestic industry and importers each sold CSPV products in the U.S. market to distributors, residential and commercial installers, and the utility segment"<sup>447</sup>; (b) the domestic industry participated in bids in the utility segment<sup>448</sup>; and (c) the domestic producers produced 72-cell modules, which became the standard for the utility installations by 2013-2014.<sup>449</sup> As noted above, the USITC also situated its finding in the context of the distribution of sales among the three market segments that had changed since 2009.<sup>450</sup> As we have already found in section 7.3.3.2.1.1 above, China has not established that it was inappropriate for the USITC to rely on any of this evidence as support for its finding that the domestic industry competed in the utility segment.

7.212. Since record evidence supported the USITC's finding that the domestic industry was present in the utility segment, we see no reason why the USITC was required to conclude that the domestic industry made a "deliberate business choice" to avoid competing in that segment. Accordingly, the USITC was not obligated to consider that the domestic industry's "deliberate business choice" constituted an "other" factor of injury.

7.213. Further, although China asserts that, due to its focus on the residential and commercial segments, the domestic industry was not able to meaningfully compete in the utility segment, we recall that in section 7.3.3.2.1.1 we have rejected China's argument that it was inappropriate for the USITC to find that the domestic industry competed more generally in the utility segment based on the capacity that it had. In these circumstances, we are also not persuaded by China's argument that the reason the domestic industry did not have sufficient capacity to compete for large-scale projects in the utility segment was because of its business decision not to focus on that segment. In this regard, we recall our finding in section 7.3.3.2.3.3 above that China has not demonstrated that it was inappropriate for the USITC to find that increased imports prevented the domestic industry from increasing capacity at a scale that would have made it more competitive in the utility segment. Moreover, we do not consider that China has demonstrated why we should arrive at a different conclusion in respect of its non-attribution claim on the same point.<sup>451</sup>

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<sup>446</sup> United States' first written submission, para. 181; comments on China's response to Panel question No. 13 of the first set, para. 101.

<sup>447</sup> USITC final report, (Exhibit CHN-2), p. 58. (fns omitted)

<sup>448</sup> USITC final report, (Exhibit CHN-2), p. 59. In this context, we note that China has not substantiated its argument that the USITC did not explore whether the domestic industry had submitted realistic bids. (China's response to Panel question No. 13 of the first set, para. 100).

<sup>449</sup> USITC final report, (Exhibit CHN-2), p. 60.

<sup>450</sup> USITC final report, (Exhibit CHN-2), pp. 57-58.

<sup>451</sup> We are unpersuaded by China's arguments that challenge the appropriateness of the USITC's finding that increased imports impeded the expansion of the domestic industry in the utility segment. In particular, contrary to China's argument, we fail to see how the fact that the domestic industry was not a major participant of the utility segment before the POI would demonstrate that imports did not impede its expansion in this segment, especially considering that the utility segment only grew to be the largest market segment during the POI. (See, e.g. China's response to Panel question No. 13 of the first set, paras. 101 and 107; and second written submission, para. 155). Relatedly, we fail to see why the fact that, at the beginning of the POI, "the domestic industry could supply only a small fraction of total U.S. demand" would demonstrate that the increased imports did not contribute to the domestic industry's insufficient capacity and its inability to serve the "booming demand in the utility segment". (China's response to Panel question No. 11 of the second set, para. 126; see also second written submission, para. 154). In addition, contrary to China's argument, we do not consider that the USITC was required to find that imports impeded expansion planned by the domestic industry in order to reasonably demonstrate that imports impeded the domestic industry's ability to increase its capacity to a scale that would have made it more competitive in the utility segment. (China's response to Panel question No. 11 of the second set, paras. 127-128). Finally, we are unpersuaded by China's contention that the

7.214. Based on the foregoing, we reject China's claim that the USITC did not appropriately address the effect of the alleged decision of the domestic industry to focus on the commercial and residential segments, rather than the utility segment.

#### 7.4.3.2.2 The alleged quality and product-type issues

##### 7.4.3.2.2.1 Factual background

7.215. During the safeguard investigation, respondents advanced that the domestically produced CSPV products suffered from various quality and product-type issues that amounted to a separate cause of injury.<sup>452</sup> In response, the USITC examined evidence concerning these issues, and ultimately concluded that the record did not support respondents' contentions.<sup>453</sup> The USITC made the following subsidiary findings in this regard:

- a. Regarding the range of CSPV products available from domestic sources, the USITC found that domestic producers pioneered certain CSPV technologies and continued to manufacture leading-edge products.<sup>454</sup> While certain foreign producers may have produced CSPV products that were unavailable from domestic sources<sup>455</sup>, these products accounted for only a small share of the US market and there was more overlap between domestic and imported specialized CSPV products than acknowledged by respondents.<sup>456</sup> The domestic industry supplied a wide variety of monocrystalline and multicrystalline CSPV products that overlapped with imports.<sup>457</sup> Moreover, despite the existence of some variations in product offerings, all CSPV products converted sunlight into electricity, and CSPV products made from different technologies competed based on electrical output and cost.<sup>458</sup>
- b. Regarding the quality of domestic CSPV products, the USITC found that (a) SolarWorld reported that it was the first to offer a 25-year warranty, a 30-year warranty, and a 20-year workmanship warranty, which it was able to do because of its low warranty claim rate<sup>459</sup>; (b) most interested parties reported that domestic CSPV products were interchangeable with imports; (c) independent research firm EuPD Research ranked SolarWorld as the most purchased brand by US installers; and (d) most purchasers

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USITC should have assessed the domestic industry's "sudden decision to increase capacity in the utility segment in light of increased demand at the end of the POI" and whether this decision was "commensurate and adequate in light of the start-up costs, and different technology involved". While China claims that its argument "is based on the facts set forth in the USITC Final Staff Report showing that the financial performance of the domestic industry decreased at the same time it decided to expand its capacities", it does not cite that report in this context. As a result, we do not consider China's argument to be sufficiently substantiated. (China's response to Panel question No. 11 of the second set, para. 128; request for interim review, para. 50).

<sup>452</sup> USITC final report, (Exhibit CHN-2), p. 50.

<sup>453</sup> USITC final report, (Exhibit CHN-2), p. 61.

<sup>454</sup> USITC final report, (Exhibit CHN-2), pp. 51-52 and fns 290-291.

<sup>455</sup> In particular, the USITC noted that (a) several purchasers stated that the higher efficiency modules are manufactured primarily in Asia and are not available from any US producers; (b) six purchasers reported that multicrystalline PERC CSPV products are primarily only available in Chinese Taipei, Korea, Japan, China, and Malaysia; (c) two purchasers stated that n-type monocrystalline CSPV products are only available from LG Electronics in Korea; and (d) three importers and one purchaser reported that interdigitated back contact solar CSPV products are not manufactured in the United States and are not interchangeable with front-contact CSPV products. (USITC final report, (Exhibit CHN-2), fn 295).

<sup>456</sup> USITC final report, (Exhibit CHN-2), p. 52. For example, the USITC indicated that as of 2016, n-type monocrystalline cells accounted for less than 5% of the global CSPV cell production and there was a relatively small number of manufacturers of these products, including LG, Panasonic, SunPower, and Yingli. (USITC final report, (Exhibit CHN-2), pp. 52-53). In addition, the USITC noted that, contrary to respondents' assertion, there was domestic production of n-type monocrystalline CSPV products in the United States during the POI. (USITC final report, (Exhibit CHN-2), p. 53).

<sup>457</sup> USITC final report, (Exhibit CHN-2), pp. 53-54.

<sup>458</sup> USITC final report, (Exhibit CHN-2), pp. 54-55.

<sup>459</sup> The USITC also found that Suniva reported that its warranty claim rate was below 0.05%. (USITC final report, (Exhibit CHN-2), fn 308).



reported that no domestic or foreign supplier had failed in its attempt to qualify product or lost its approved status since 2012.<sup>460</sup>

- c. Regarding the "bankability" of domestic producers<sup>461</sup>, the USITC found that (a) purchasers of CSPV products did not attach great importance to bankability<sup>462</sup>; and (b) petitioners' bankability problems further confirmed that the serious injury was substantially caused by increased imports.<sup>463</sup>

#### 7.4.3.2.2.2 Main arguments of the parties

7.216. China submits that the USITC failed to adequately assess the domestic industry's quality and product-type issues and their effect on the domestic industry.

7.217. First, China claims that, despite the arguments, facts, and data presented by respondents, the USITC failed to adequately explain whether the domestic industry's lack of prioritization of technological development and scale adversely impacted its financial performance.<sup>464</sup> In this context, China contends that the USITC uncritically "cited information provided and arguments made by the domestic producers".<sup>465</sup> China also argues that, although the availability of innovative products offered only by foreign suppliers was an important factor in purchasing decisions, the USITC did not specify which products were unavailable from domestic sources and did not assess the impact of the lack of availability of those products.<sup>466</sup>

7.218. Second, China submits that the USITC failed to appropriately analyse product quality. As support for its argument, China refers to documented complaints that allegedly show that domestic CSPV products had quality issues.<sup>467</sup> China further contends that, while the USITC acknowledged that "19 US purchasers reported that a domestic supplier had failed in its attempt to provide a quality product or had lost its approved status", it failed to analyse this issue in sufficient detail.<sup>468</sup> China claims that the USITC provided no analysis of the relative size of the 19 purchasers that reported domestic products having quality issues.<sup>469</sup> China posits that these 19 purchasers may have accounted "for the majority of purchased CSPV products during the POI".<sup>470</sup> In addition, China refers to record evidence that, in its view, shows that certain domestic producers failed to qualify some of their products, and that one domestic producer was disqualified by one purchaser. China stresses

<sup>460</sup> USITC final report, (Exhibit CHN-2), p. 55 and fns 308-311. In addition, the USITC found that 19 of the 95 responding purchasers reported that a domestic or foreign supplier had failed in its attempt to qualify product or had lost its approved status since 2012 for reasons such as customer service, financial strength, broken commitments, cell cracks, use of thinner frame, quality control, bankability, failed audit, efficiency, delivery rates, and prefer a local manufacturer. Three purchasers stated that both SolarWorld and Yingli had lost their approved status due to financial distress. (USITC final report, (Exhibit CHN-2), p. 55 and fn 311).

<sup>461</sup> The USITC noted that the industry does not have a standard definition of bankability but "[a]t a minimum, bankability encompasses both the financial viability of a supplier and the product's performance reliability, especially in the CSPV industry where manufacturers provide warranties of 25 years or longer on their products; bankability also allows installing firms to apply for non-recourse loans for their solar development projects". (USITC final report, (Exhibit CHN-2), p. 55 and fn 313).

<sup>462</sup> The USITC explained that (a) purchasers did not identify "bankability" as one of their "top three" purchasing factors (bankability was rather a "distant fourth" factor in purchasing decisions); (b) only three of 56 responding importers indicated that purchasers chose module suppliers with high bankability that are listed as Tier 1 suppliers; and (c) Bloomberg cautioned banks and module producers against relying heavily on its list. (USITC final report, (Exhibit CHN-2), pp. 55-56 and fn 315).

<sup>463</sup> The USITC explained that (a) SolarWorld qualified as a Bloomberg Tier 1 supplier in 2014-2016, and through February 2017; its subsequent loss of bankability was a result of serious injury caused by increased imports; (b) Suniva reported that "the unrelenting pressure of low-priced imports" forced it out of the utility segment and necessitated that the firm shift its focus to projects that did not rely on non-recourse loan funding, which implicated the firm's ability to achieve Tier 1 status. (USITC final report, (Exhibit CHN-2), p. 56 and fn 319).

<sup>464</sup> China's first written submission, paras. 189-190. See also China's second written submission, para. 164.

<sup>465</sup> China's first written submission, paras. 189-190.

<sup>466</sup> China's response to Panel question No. 15 of the first set, paras. 116-117.

<sup>467</sup> China's first written submission, para 192; response to Panel question No. 15 of the first set, para. 125.

<sup>468</sup> China's first written submission, para. 193; second written submission, paras. 162-163.

<sup>469</sup> China's first written submission, para. 193.

<sup>470</sup> China's first written submission, para. 193.



that these facts were not sufficiently accounted for by the USITC.<sup>471</sup> More generally, China argues that the USITC's analysis of product quality was deficient because questionnaire responses reported that this factor was important in purchasing decisions.<sup>472</sup>

7.219. Third, China submits that the USITC's analysis of bankability was insufficient because it ignored petitioners' issues with bankability and unreasonably characterized "bankability" as a "distant fourth" factor in purchasing decisions.<sup>473</sup> China stresses the importance of bankability in obtaining funding for large-scale projects, since some of the purchasers would not work with vendors that were not categorized as Tier 1 suppliers. China further contends that the poor bankability of domestic producers negatively impacted their competitiveness in the utility segment.<sup>474</sup>

7.220. In response to these claims, the United States submits that the USITC reasonably found that record evidence does not support respondents' allegations.

7.221. First, the United States argues that the USITC evaluated respondents' arguments concerning the alleged failure of the domestic industry to adopt technological improvements and innovations, and found that record evidence did not support these allegations.<sup>475</sup> Relatedly, the United States submits that the USITC explained that the types of products only available from non-US sources accounted for only a small share of the US market and that, in any event, there was more overlap between domestic and imported specialized CSPV products than acknowledged by respondents.<sup>476</sup>

7.222. Second, regarding China's reliance on the fact that 19 responding purchasers referred to producers having quality issues, the United States notes that the USITC found that those purchasers actually reported that a "domestic or foreign" supplier had failed in its attempt to qualify product or had lost its approved status.<sup>477</sup> In its view, since this finding concerns both foreign and domestic producers of CSPV products, it does not support China's assertion that domestic CSPV products were inferior.<sup>478</sup> Further, the United States argues that the domestic industry's ability to provide quality products is corroborated by (a) the USITC's finding concerning interchangeability between domestic and imported CSPV products<sup>479</sup>; and (b) the evidence indicating that SolarWorld was ranked by EuPD Research as the most purchased brand by US installers and that petitioners' warranty claims were low.<sup>480</sup>

7.223. Third, contrary to China's claims, the United States argues that the USITC adequately rejected respondents' argument concerning bankability, on the basis that bankability was a "distant" fourth factor in purchasing decisions, and that SolarWorld's loss of bankability resulted from serious injury caused by increased imports.<sup>481</sup>

#### **7.4.3.2.2.3 Evaluation of the Panel**

7.224. For the reasons explained below, we do not consider that China has established that the USITC inappropriately rejected respondents' arguments that domestically produced CSPV products suffered from quality and product-type issues that amounted to a separate cause of injury.

7.225. First, we do not consider that China has demonstrated that the USITC failed to adequately analyse the alleged effect of the domestic industry's failure to prioritize technological development and scale.<sup>482</sup> To the contrary, the USITC considered respondents' arguments on this point and, based

<sup>471</sup> China's second written submission, para. 163.

<sup>472</sup> China's second written submission, para 160.

<sup>473</sup> China's response to Panel question No. 15 of the first set, paras. 125-126; second written submission, paras. 165-166.

<sup>474</sup> China's second written submission, para. 165.

<sup>475</sup> United States' first written submission, paras. 183-187.

<sup>476</sup> United States' first written submission, paras. 183-186; comments on China's response to Panel question No. 15 of the first set, paras. 109 and 111-112.

<sup>477</sup> United States' first written submission, para. 195.

<sup>478</sup> United States' first written submission, para. 195.

<sup>479</sup> United States' first written submission, para. 192.

<sup>480</sup> United States' first written submission, para. 193; comments on China's response to Panel question No. 15 of the first set, para. 117.

<sup>481</sup> United States' comments on China's response to Panel question No. 15 of the first set, paras. 127-130 and fn 236.

<sup>482</sup> China's first written submission, paras. 189-190.

on record evidence, found that the range of products that the domestic industry could manufacture did not constitute an "other" factor of injury.<sup>483</sup> Moreover, even if China were correct that the respondents submitted evidence to the USITC suggesting that certain domestic CSPV producers did not adopt particular technological innovations<sup>484</sup>, we do not consider that this would demonstrate that the USITC was precluded from relying on evidence submitted by domestic producers to find that the domestic industry "continued to innovate, develop, and manufacture leading-edge products".<sup>485</sup>

7.226. Relatedly, contrary to China's position, the USITC explicitly recognized that certain types of products were only available from foreign sources.<sup>486</sup> However, it also found that these products accounted only for a small share of all product offerings<sup>487</sup>, and that there was more overlap between domestic and imported specialized products than acknowledged by respondents.<sup>488</sup> The USITC further explained that, notwithstanding the existence of some variations in domestic and imported product types, all CSPV products converted sunlight into electricity, and CSPV products made from different technologies competed with each other on the basis of electrical output and cost.<sup>489</sup> In addition, as we have already observed, only a few purchasers reported that they did not purchase US-origin CSPV products because of reasons that included "limited availability".<sup>490</sup> Moreover, we recall that the USITC found domestic and imported products were "highly substitutable", and we have rejected China's claim against this finding.<sup>491</sup> Based on this evidence, we do not consider that China has demonstrated that it was inappropriate for the USITC to find that any limitation in the range of products offered by the domestic industry was not an "other" cause of injury.

7.227. Second, on quality, China asserts that the USITC's finding was flawed because it failed to properly analyse the fact that 19 (out of 95) US purchasers reported that a domestic supplier failed "to provide a quality product" or lost their approved status.<sup>492</sup> China's characterization of the record is inaccurate. As observed by the United States, the USITC actually found that 19 of 95 responding purchasers reported that "a domestic *or foreign* supplier had failed in its attempt to qualify product or had lost its approved status since 2012".<sup>493</sup> Thus, this statement does not demonstrate that qualification issues were limited to domestic producers, or that domestic products were of an inferior quality to imported products. In these circumstances, we see no need for the USITC to have analysed this issue in greater detail. Similarly, contrary to China's argument, we do not consider evidence demonstrating the general importance of product quality to purchasers of CSPV products establishes that the USITC was required to conduct a more detailed assessment of whether domestic CSPV products were inferior in terms of their quality.

7.228. China also argues that the USITC failed to test the statements concerning (a) the low warranty claim rates of petitioners, and (b) the ranking of SolarWorld by the independent research firm EuPD Research against contrary record evidence.<sup>494</sup> In our view, however, the contrary evidence to which China refers does not undermine the probative weight of the evidence that supported the

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<sup>483</sup> USITC final report, (Exhibit CHN-2), pp. 50-55.

<sup>484</sup> In particular, China refers to the affidavit of Craig Cornelius of NRG (one of the largest power producers in the United States), which claimed that Suniva failed to adopt certain technological innovations (improvement in mono wafer pulling, the transition to diamond wire saws, and the change to PERC cell architectures). According to Mr Cornelius, these innovations were relevant for achieving competitiveness in the utility segment, which was particularly cost-sensitive. (Affidavit of Craig Cornelius, NRG, (Exhibit CHN-157), para. 12).

<sup>485</sup> USITC final report, (Exhibit CHN-2), fns 290-291.

<sup>486</sup> USITC final report, (Exhibit CHN-2), pp. 52-53 and fn 295. According to the USITC, only one-third of purchasers (29 of 97) reported that certain types of products were only available from a single source. For example, several purchasers stated that the higher efficiency modules are manufactured primarily in Asia and are not available from any US producers. Six purchasers reported that multicrystalline PERC cells are primarily only available in Chinese Taipei, Korea, Japan, China, and Malaysia. Two purchasers stated that N-type monocrystalline cells are only available from LG in Korea. (USITC final staff report, (Exhibit CHN-3), p. V-14).

<sup>487</sup> USITC final report, (Exhibit CHN-2), p. 52.

<sup>488</sup> USITC final report, (Exhibit CHN-2), p. 52.

<sup>489</sup> USITC final report, (Exhibit CHN-2), pp. 54-55.

<sup>490</sup> See section 7.3.3.2.1.2 above.

<sup>491</sup> See section 7.3.3.2.1.2 above.

<sup>492</sup> China's first written submission, para. 193.

<sup>493</sup> USITC final report, (Exhibit CHN-2), fn 311; USITC final staff report, (Exhibit CHN-3), p. V-15. (emphasis added)

<sup>494</sup> China's comments on the United States' response to Panel question No. 14 of the first set, paras. 88-89.

USITC's finding.<sup>495</sup> Furthermore, even if certain record evidence were to indicate that the domestic industry did not have a perfect track record in terms of quality, we are not persuaded that any limited evidence to this effect would undermine the evidence relied upon by the USITC to find that the domestic industry was able to supply quality products. We recall again that the USITC found that domestic and imported products were "highly substitutable" and have rejected China's claim against this finding.<sup>496</sup> The fact that any quality issues were not sufficient to prevent domestic and imported products from being substitutable supports the USITC's view that such quality issues were not a separate cause of injury.

7.229. As a final point on quality, we are unpersuaded by China's argument that evidence demonstrating instances where domestic producers relied on imported products to fulfil orders shows that the domestic industry's products, overall, had "technical and quality shortcomings".<sup>497</sup> In our view, such evidence does not demonstrate that it was inappropriate for the USITC to reject respondents' argument that the domestic industry was unable to provide quality products – a finding that it based on extensive record evidence, as noted above.<sup>498</sup>

7.230. Third, with respect to bankability, we are not persuaded by China's claim that the USITC failed to sufficiently assess respondents' claims. As an initial matter, we agree with the United States that it was not inappropriate for the USITC to find that bankability was not a significant feature in the competition between domestic and imported CSPV products. The record indicates that purchasers did not report bankability to be of significant importance in their purchasing decisions<sup>499</sup> and only a few importers reported the importance of this factor.<sup>500</sup> In any event, the USITC accounted for bankability in determining that domestic and imported CSPV products were interchangeable<sup>501</sup>, which supported its finding that domestic and imported products were "highly substitutable".<sup>502</sup> The USITC also considered bankability problems experienced by the domestic

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<sup>495</sup> Specifically, China's argument that the USITC failed to test the evidence concerning the ranking of *SolarWorld* against contrary evidence is mainly based on evidence that *Suniva's* products performed poorly. (China's comments on the United States' response to Panel question No. 14 of the first set, para. 88 (referring to SEIA prehearing brief, (Exhibit CHN-20), pp. 88 and 90; Affidavit of Richard Matsui, kWh Analytics, (Exhibit CHN-101); and Affidavit of Laura E. Stern, Nautilus Solar, (Exhibit CHN-99))). In this regard, we are not persuaded that this evidence necessarily vitiates the USITC's finding that *SolarWorld* was ranked by the independent research firm EuPD Research as the most purchased brand by US installers. In addition, China argues that since "[i]n installers are not active in the utility segment, which is served instead by developers", EuPD Research "does not provide any information about the perception of the domestic CSPV products in the wider market". (China's opening statement at the second meeting of the Panel, para. 44). We disagree. Considering that installers represented one of the channels of distribution for CSPV products, we do not consider that it was inappropriate for the USITC to rely on the ranking of *SolarWorld* by the independent research firm EuPD Research (which ranked *SolarWorld* as the brand most purchased by US installers) as further support for its finding that quality was not an "other" factor of injury. (USITC final staff report, (Exhibit CHN-3), pp. I-28-I-30).

China also submits that the USITC's reference to the warranties offered by the petitioners was not tested against contrary evidence demonstrating that: (a) *Suniva's* warranties had multiple constraints; (b) purchasers reported "warranty backstop protection" as a non-price reason for purchasing imported products; (c) one purchaser reported that the petitioners were unable to meet its criteria (one of which was warranty); and (d) since some purchasers in the utility segment did not buy the domestic products, there was no need to enforce warranty for domestic products. (China's comments on the United States' response to Panel question No. 14 of the first set, para. 89). In our view, this evidence does not conflict with the USITC's finding that petitioners' warranty claim rates were low and that *SolarWorld* was first to offer long-term warranties. Moreover, we do not consider that the record evidence suggesting that the domestic industry did not have a perfect track record in terms of product quality dispositively establishes that the domestic industry had quality problems that the USITC was required to treat as an "other" cause of injury.

<sup>496</sup> See section 7.3.3.2.1.2 above.

<sup>497</sup> China's second written submission, para. 161.

<sup>498</sup> See section 7.4.3.2.2.1 above. See also USITC final report, (Exhibit CHN-2), p. 55.

<sup>499</sup> According to the USITC final staff report, only 15 purchasers reported that bankability was an important factor in purchasing decisions, while 81 purchasers identified price as an important factor, 77 purchasers – quality/performance, and 42 purchasers – availability. (USITC final staff report, (Exhibit CHN-3), table V-4).

<sup>500</sup> According to the USITC final staff report, only three importers stated that (a) developers, installers, and project owners chose module suppliers with high bankability that are listed as Tier 1 by Bloomberg and that funding for projects using low Tier modules are often rejected by financiers; and (b) performance data and bankability of the CSPV products can limit the degree of interchangeability. (USITC final staff report, (Exhibit CHN-3), pp. V-16-V-17).

<sup>501</sup> See section 7.3.3.2.1.2 above.

<sup>502</sup> See section 7.3.3.2.1.2 above.

industry and linked those problems to the injurious effects of increased imports, particularly the negative financial consequences of the adverse price conditions that the domestic industry experienced over the POI.<sup>503</sup>

7.231. For the above reasons, we reject China's claim that the USITC failed to properly assess the alleged quality and product-type issues of the domestic industry.

#### **7.4.3.2.3 The alleged service and delivery issues of the domestic industry**

##### **7.4.3.2.3.1 Factual background**

7.232. During the safeguard investigation, respondents argued that "the domestic industry had delivery and service issues or failed to compete for certain sales".<sup>504</sup> Rejecting this claim, the USITC noted that "[p]etitioners responded to these allegations, often with detailed explanations", and found that "[t]he evidence simply does not support the sort of widespread problems alleged by respondents".<sup>505</sup> As support for its finding, the USITC referred to arguments of both respondents and petitioners and also described certain purchaser complaints and petitioner responses.<sup>506</sup>

##### **7.4.3.2.3.2 Main arguments of the parties**

7.233. China argues that the USITC dismissed serious service and delivery problems of the domestic industry on the basis of the petitioners' rebuttals, without considering conflicting arguments.<sup>507</sup> In this regard, China contends that the USITC did not discuss multiple arguments made by purchasers and only addressed a handful of them in a dismissive manner.<sup>508</sup> In its view, the USITC had to do more than to merely acknowledge certain arguments and cite counterarguments made by the parties.<sup>509</sup> China also contends that the USITC's reliance on the petitioners' rebuttals was inadequate because (a) they contain significant portions of redacted information, and do not permit a review of whether the USITC considered all the evidence presented and whether petitioners rebutted each purchaser complaint<sup>510</sup>; and (b) they do not address the conflicting record evidence demonstrating the widespread nature of the purchaser complaints against the domestic industry.<sup>511</sup> Finally, China claims that the USITC's analysis is deficient because the references to the record in the USITC final report are incomplete and they omit multiple complaints and petitioners' counterarguments.<sup>512</sup>

7.234. For its part, the United States submits that the USITC appropriately found that record evidence does not support respondents' allegations that the domestic industry suffered from widespread delivery and service problems.<sup>513</sup> In particular, the United States argues that the USITC (a) considered respondent arguments and petitioner counterarguments; (b) found that petitioners provided credible documentation refuting respondents' allegations; and (c) by way of

<sup>503</sup> The USITC noted that SolarWorld's "subsequent loss of bankability provides added confirmation of the serious injury substantially caused by increased imports" and that "Suniva reported that 'the unrelenting pressure of low-priced imports' forced it out of the utility segment and necessitated that the firm shift its focus to projects that did not rely on such non-recourse loan funding, which implicated the firm's ability to achieve Tier 1 status". (USITC final report, (Exhibit CHN-2), p. 56 and fn 319). In addition, in the context of its serious injury determination, the USITC indicated that the domestic industry reported a rejection of bank loans, lowering of credit ratings, inability to service debt, and lowered bankability due to imports. (USITC final report, (Exhibit CHN-2), p. 36).

<sup>504</sup> USITC final report, (Exhibit CHN-2), p. 61.

<sup>505</sup> USITC final report, (Exhibit CHN-2), p. 61.

<sup>506</sup> USITC final report, (Exhibit CHN-2), fns 354-356.

<sup>507</sup> China's second written submission, heading to section III(B)(3), and para. 167.

<sup>508</sup> China's response to Panel question No. 12 of the second set, para. 139.

<sup>509</sup> China's first written submission, para. 191; comments on the United States' response to Panel question No. 14 of the first set, para. 79.

<sup>510</sup> China's second written submission, paras. 169-170; response to Panel question No. 12 of the second set, para. 139.

<sup>511</sup> China's second written submission, paras. 170-172 (referring to Supporting footnotes regarding purchasers complaints on service and delivery issues, (Exhibit CHN-170)); response to Panel question No. 13 of the second set, paras. 145-149 and 165. See also China's second written submission, para. 173.

<sup>512</sup> China's comments on the United States' response to Panel question No. 14 of the first set, para. 80.

<sup>513</sup> United States' first written submission, paras. 188-191; comments on China's response to Panel question No. 15 of the first set, paras. 121-126; and response to Panel question No. 13 of the second set, paras. 24-28.

example, addressed the testimony of certain purchasers.<sup>514</sup> Further, the United States maintains that, against the backdrop of other evidence on the record, respondents' allegations consisted of criticisms from only a handful of purchasers.<sup>515</sup> Relatedly, the United States submits that the Agreement on Safeguards does not require the competent authorities to address every assertion made by every party<sup>516</sup>, and that the mere presence of redacted information does not establish a failure to provide findings and reasoned conclusions, as required under Article 3.1 of the Agreement on Safeguards.<sup>517</sup>

#### 7.4.3.2.3.3 Evaluation of the Panel

7.235. Overall, we do not consider that China has demonstrated that it was inappropriate for the USITC to find that the domestic industry did not suffer from widespread service and delivery issues. China has therefore failed to establish that the USITC was required to treat this factor as an "other" cause of injury.

7.236. As an initial matter, we note, in line with the United States' argument, that the Agreement on Safeguards does not obligate the competent authorities of a Member to explicitly address in their report every assertion made by interested parties during the investigation.<sup>518</sup> We also agree with the United States that the redaction of confidential information does not necessarily establish a failure of the competent authorities to provide findings and reasoned conclusions within the meaning of Article 3.1 of the Agreement on Safeguards.<sup>519</sup> In this context, the relevant question for our purposes is whether China has established that the USITC failed to appropriately demonstrate that the domestic industry did not suffer from "widespread" service and delivery issues.

7.237. In its final report, when rejecting respondents' claim concerning the alleged service and delivery issues of the domestic industry, the USITC noted that the petitioners responded to respondents' allegations, "often with detailed explanations"<sup>520</sup>, and concluded that "[t]he evidence simply does not support the sort of widespread problems alleged by respondents".<sup>521</sup> As such, we do not consider that China is correct to argue that the USITC simply accepted petitioner arguments without considering conflicting evidence. To the contrary, it appears implicit in its finding that the USITC weighed evidence and arguments of both respondents and petitioners and ultimately determined petitioners' submissions to convincingly demonstrate that the domestic industry did not suffer from "widespread" service and delivery issues.

7.238. We further observe that, although the petitioners addressed a significant number of respondents' allegations concerning service and delivery issues<sup>522</sup>, they did not address every allegation.<sup>523</sup> Moreover, in our view, at least one petitioner response does not persuasively address

<sup>514</sup> United States' first written submission, paras. 188-191; response to Panel question No. 14 of the first set, paras. 31-35.

<sup>515</sup> United States' response to Panel question No. 13 of the second set, paras. 27-28; second written submission, paras. 122-123. In particular, the United States refers to record evidence that (a) domestic and imported products were substitutable; (b) the vast majority of purchasers reported that no domestic supplier had failed in its attempt to qualify product or had lost its approved status in 2012; and (c) the sheer number of purchasers did not report having delivery or service issues with domestic producers.

<sup>516</sup> United States' second written submission, paras. 103-104 and 106-107.

<sup>517</sup> United States' second written submission, para. 105.

<sup>518</sup> See, e.g. United States' second written submission, para. 103.

In this context, we do not agree with China that it was inappropriate for the USITC to summarize the parties' arguments in its report and provide certain complains and rebuttals thereto as examples. (China's comments on the United States' response to Panel question No. 14 of the first set, para. 80).

<sup>519</sup> United States' second written submission, para. 105.

<sup>520</sup> USITC final report, (Exhibit CHN-2), p. 61.

<sup>521</sup> USITC final report, (Exhibit CHN-2), p. 61.

<sup>522</sup> Although certain explanations and underlying evidence submitted by the petitioners are redacted, certain of the petitioners' responses to purchasers' complaints are available in non-confidential versions of their posthearing briefs. (SolarWorld's posthearing injury brief (Exhibit USA-16), exhibit 1, pp. 5-21; Suniva's posthearing injury brief, (Exhibit USA-17), exhibit 9, pp. 4-8). As such, we do not agree with China's argument that the confidentiality of this information demonstrates that the USITC's determination concerning alleged service and delivery issues of the domestic industry is not reasoned and adequate. (China's second written submission, para. 169).

<sup>523</sup> For example, we agree with China that petitioners did not respond to purchaser complaints contained in the following affidavits: Affidavit of Jay Miles, Russell Pacific, (Exhibit CHN-69); Affidavit of Kenny Hughes, Radiance Solar, (Exhibit CHN-98); Affidavit of Laura E. Stern, Nautilus Solar, (Exhibit CHN-99); Affidavit of

the conflicting evidence submitted by respondents.<sup>524</sup> Nonetheless, regardless of these shortcomings, we consider that petitioners' responses overall provided an appropriate basis for the USITC to conclude that the domestic industry did not suffer from "widespread" service and delivery issues.

7.239. In this regard, we agree with the United States that the number of purchasers that submitted questionnaire responses without reporting service and delivery issues far exceeded the handful of complaints to which China refers.<sup>525</sup> Moreover, while China advances a number of arguments purporting to demonstrate that the complaints submitted were significant, we do not consider that these arguments contradict the USITC's finding that service and delivery issues were not "widespread".<sup>526</sup> As such, even if the purchasers to which China refers had credible service and delivery issues with domestic products, China has not demonstrated that the USITC was precluded from relying on other record evidence to find that the domestic industry did not have widespread service and delivery issues.<sup>527</sup> The mere presence of conflicting evidence on the record does not demonstrate that the USITC's finding was unreasoned and inadequate, or that it should have treated service and delivery issues as an "other" factor of injury.

7.240. Based on the foregoing, we reject China's claim that the USITC improperly dismissed respondents' arguments concerning the alleged service and delivery issues of the domestic industry.

#### **7.4.3.3 Non-import factors that allegedly caused prices of CSPV products to decline**

7.241. During the safeguard investigation, respondents argued that factors other than imports, namely declining government incentive programmes, declining raw material costs, and the need to

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Zaid Ashai, Nexamp, (Exhibit CHN-100); and Affidavit of George W. Hershman, Swinerton Renewable Energy, (Exhibit CHN-104).

<sup>524</sup> In particular, we observe that Suniva's response to the complaint of California Solar Systems does not appear convincing in light of the conflicting evidence on the record. While Suniva indicated that it "can find no record of any of its distributors in Southern California issuing a warranty claim, or even a comment, on any transaction with California Solar Systems", testimony from California Solar Systems suggests otherwise. (Supporting footnotes regarding purchasers complaints on service and delivery issues, (Exhibit CHN-170)).

<sup>525</sup> Specifically, we note that the USITC received questionnaire responses from 106 purchasers, most of which did not report any service and delivery issues of the domestic industry during the safeguard investigation. In addition, SolarWorld testified that it works with nearly 5,000 solar installers. Of those 349 are authorized installers and 36 have been designated as platinum installers. (Transcript of the USITC injury hearing, (Exhibit CHN-9), p. 107). Moreover, Suniva testified that it "had approximately 340 distinct customers who placed thousands of purchase orders". (Suniva's posthearing injury brief, (Exhibit USA-17), exhibit 9, p. 8).

<sup>526</sup> In particular, we do not agree with China's arguments that the fact that complaining purchasers were "some of the largest" and that the complaints addressed "different competitiveness aspects" suggests that the domestic industry had "widespread" service and delivery issues. (China's response to Panel question No. 13 of the second set, paras. 145-148). Moreover, we note that petitioners appear to have responded to the complaints of the purchasers that China defines to be "some of the largest" (i.e. NEXTracker, DEPCOM, California Solar Systems, Borrego, NRG Energy, and Sunrun). (SolarWorld's posthearing injury brief, (Exhibit USA-16), exhibit 1, pp. 5-21; Suniva's posthearing injury brief, (Exhibit USA-17), exhibit 9, pp. 4-8). Relatedly, we agree with the United States that China speculates by submitting that "the fact that 7 purchasers explicitly complained during the course of the public hearing or in an affidavit serving as evidence to a written submission, does not mean that other purchasers did not have similar concerns regarding quality and service issues". (China's response to Panel question No. 13 of the second set, para. 148). China also argues that "the fact that 42 out of these 106 purchasers reported availability concerns, 9 cited delivery time, 6 cited relationship with supplier/contract, and 5 cited customer supports, was representative that over half of the purchasers from different market segments expressed concerns on service and delivery issues". (China's response to Panel question No. 13 of the second set, para. 165). We agree with the United States that China's argument is misleading. In line with the United States' observation, we note that, while China did not provide any support for this assertion, it appears to be referring to table V-4 of the USITC final staff report. However, that table represents only purchasers' ranking of factors used in their purchasing decisions, and has nothing to do with the alleged service and delivery issues of the domestic industry.

<sup>527</sup> In addition, China refers to record evidence demonstrating that (a) four domestic producers reported "labor problems or shortages" as a factor causing injury; and (b) two domestic producers reported "production problems" as a factor causing injury as support to its argument that service and delivery issues was a factor of injury. (China's second written submission, para. 173 (referring to USITC final staff report, (Exhibit CHN-3), table F-2)). However, we do not think that this record evidence demonstrates that the domestic industry suffered from service and delivery issues.



attain "grid parity" with other sources of electricity, "explain any declines in prices of CSPV products and the condition of the domestic industry".<sup>528</sup> The USITC rejected these arguments.<sup>529</sup>

7.242. In its first written submission, China asserts that the USITC acknowledged that these factors had some injurious effect on the domestic industry, by causing price declines or negatively impacting demand for CSPV products. China claims that the USITC failed to ensure that the injurious effects of those factors were not attributed to increased imports.<sup>530</sup> The United States responds by arguing that, contrary to China's characterization, the USITC found that these factors did not cause injury to the domestic industry, and, therefore, there was no injury that the USITC might have erroneously attributed to increased imports.<sup>531</sup> In its subsequent submissions, China clarifies that the USITC improperly dismissed these factors, and maintains its position that the USITC failed to evaluate the nature and extent of the injurious effect that the USITC accepted these factors to have.<sup>532</sup>

7.243. In this context, China's claims raise two primary issues: (a) whether the USITC improperly dismissed the non-import factors that allegedly caused prices of CSPV products to decline; and (b) whether the USITC failed to satisfy the non-attribution requirement in respect of any injurious effect of these factors. For the reasons explained below, we do not consider that the USITC accepted that these factors caused injury to the domestic industry. Nor do we consider that China has demonstrated that the USITC improperly dismissed these factors. On this basis, we also disagree with China that the USITC failed to ensure that the injurious effect of these factors was not attributed to increased imports.

#### **7.4.3.3.1 Changes in availability of government incentive programmes**

##### **7.4.3.3.1.1 Factual background**

7.244. In the safeguard investigation, respondents argued that declining government incentive programmes was one of the factors other than imports that explained "any declines in prices of CSPV products and the condition of the domestic industry".<sup>533</sup>

7.245. In response, the USITC acknowledged that changes in the availability and the scope of government incentives continued to affect the price of and demand for CSPV products, but found that changes in government incentive programmes did not explain the condition of the domestic industry.<sup>534</sup> The USITC made the following subsidiary findings in this regard:

- a. Government incentive programmes influence the price of renewable energy, thereby stimulating its demand and assisting developers of renewable energy to achieve sufficient economies of scale to become more competitive with conventional energy sources. These programmes benefit systems owners, and are typically not directed at producers of CSPV products. These incentives and their benefits were designed to decline over time, with the expectation that the cost to generate solar electricity would also fall.<sup>535</sup>
- b. Over the POI, some government incentives expired, while others continued.<sup>536</sup>
- c. Most firms reported that the availability of these incentives led to a decrease in the price of solar electricity. The existence of these incentive programmes made CSPV products more cost-competitive with other sources of electricity.<sup>537</sup>

<sup>528</sup> USITC final report, (Exhibit CHN-2), p. 61.

<sup>529</sup> USITC final report, (Exhibit CHN-2), pp. 61-65.

<sup>530</sup> China's first written submission, paras. 196-198.

<sup>531</sup> United States' first written submission, paras. 171 and 174-175.

<sup>532</sup> China's second written submission, para. 176. See also *ibid.* para. 143.

<sup>533</sup> USITC final report, (Exhibit CHN-2), p. 61.

<sup>534</sup> USITC final report, (Exhibit CHN-2), pp. 61-62.

<sup>535</sup> USITC final report, (Exhibit CHN-2), p. 62.

<sup>536</sup> USITC final report, (Exhibit CHN-2), p. 62. The USITC referred in its final report to the extension of the Federal Investment Tax Credit (FITC), expirations of the Advanced Energy Manufacturing Tax credit, the US Department of Energy's Section 1705 Loan Guarantee programme, the US Treasury Department's cash grant programme under Section 1603 of the Recovery and Reinvestment Tax Act and continuation of the US Department of Energy's SunShot Initiative. (USITC final report, (Exhibit CHN-2), fn 259 and pp. 62-63).

<sup>537</sup> USITC final report, (Exhibit CHN-2), p. 63.



- d. Any decline in government incentives did not result in a decline in US consumption of CSPV products.<sup>538</sup>
  - i. According to most questionnaire respondents, changes to Federal incentive programmes did not change the demand for CSPV products; those that reported an increase in demand for CSPV products identified the level of Federal incentives as the reason for the increase, noting the extension of the Federal Investment Tax Credit (FITC). A plurality of firms reported that the demand for CSPV products increased due to the availability of state and local incentives.<sup>539</sup>
  - ii. Between 2015 and 2016, US installation of on-grid photovoltaic systems (which included thin film) increased 97%. This growth, primarily in the utility segment, was driven by the anticipated expiration of the FITC at the end of 2016.<sup>540</sup>
  - iii. Demand for CSPV products continued to experience robust growth throughout the POI, including in states most affected by changes in incentive programmes, such as California. Indeed, in 2016, solar power was the largest source of new electric generating capacity, accounting for 39% of all new electric generating capacity installed in the United States.<sup>541</sup>

#### 7.4.3.3.1.2 Main arguments of the parties

7.246. China argues that the USITC improperly dismissed the decline in government incentive programmes and failed to satisfy the non-attribution requirement in respect of the injury caused by this factor.<sup>542</sup> In particular, China argues that the USITC failed to conduct a detailed analysis of the government incentive programmes that were terminated or reduced, and the impact of such terminations or decline on the domestic industry, and particularly, on prices of CSPV products.<sup>543</sup> In its view, the USITC's failure to conduct such analysis was problematic, since any decline in incentives would affect the cost-sensitiveness of system users and would, as a result, force CSPV producers to offer lower prices to remain competitive.<sup>544</sup> In addition, China submits that the USITC's focus on the growing demand for CSPV products to dismiss the impact of declines in government incentive programmes on the domestic industry was inadequate.<sup>545</sup> Specifically, China argues that the USITC failed to consider that (a) the major incentive programme (i.e. the FITC) contributed to growth in demand primarily in the utility segment (where the domestic industry did not focus), while other incentives that were directed to the residential and commercial segments (where the domestic industry focused) or targeted the domestic industry itself had expired; and (b) the USITC failed to distinguish how much of this growth was for in-scope CSPV products compared with out-of-scope thin film.<sup>546</sup>

7.247. The United States submits that the USITC properly found that changes in the availability of government incentive programmes did not cause injury to the domestic industry.<sup>547</sup> In its view, the USITC considered respondents' argument that the alleged "decline" in such programmes explained price declines of CSPV products, but found that "some programs expired while others continued", and, more significantly, that any change in the overall mix of government incentive programmes did not lead to any decrease in demand.<sup>548</sup> In this regard, the United States argues that China's argument concerning the FITC (a) is based on the incorrect premise that the domestic industry decided not to compete in the utility segment<sup>549</sup>; and (b) fails to demonstrate that

<sup>538</sup> USITC final report, (Exhibit CHN-2), p. 63.

<sup>539</sup> USITC final report, (Exhibit CHN-2), p. 63.

<sup>540</sup> USITC final report, (Exhibit CHN-2), p. 62.

<sup>541</sup> USITC final report, (Exhibit CHN-2), p. 63.

<sup>542</sup> China's first written submission, paras. 202 and 204; second written submission, heading to section III(C)(1).

<sup>543</sup> China's first written submission, para. 200; second written submission, paras. 179 and 186. In this context, China claims the USITC admitted that incentives were designed to decline as the cost of generating solar electricity was expected to decrease over time. (China's second written submission, para. 187).

<sup>544</sup> China's first written submission, para. 202; second written submission, paras. 187 and 190.

<sup>545</sup> China's first written submission, para. 201; second written submission, para. 181.

<sup>546</sup> China's first written submission, para. 201; second written submission, paras. 182, 185, and 188.

<sup>547</sup> United States' first written submission, heading to section II(E)(3)(a).

<sup>548</sup> United States' first written submission, para. 199.

<sup>549</sup> United States' first written submission, para. 203.

fluctuations in demand for in-scope CSPV products as compared with out-of-scope thin film moved independently, or that the incentive programmes affected demand for them differently.<sup>550</sup> Finally, the United States submits that China has failed to substantiate its argument that any decline in incentives would result in decline of CSPV product prices.<sup>551</sup>

#### 7.4.3.3.1.3 Evaluation of the Panel

7.248. For the reasons explained below, we are not persuaded by China's claim.

7.249. As an initial matter, we observe that the USITC found that "some" incentive programmes had expired and "others continue"<sup>552</sup> and referred to specific government incentive programmes that either remained in force, changed, or expired.<sup>553</sup> The USITC also took into account questionnaire respondents' views on whether the overall level or availability of Federal and state and local incentives had changed since 2012.<sup>554</sup> As noted in the USITC's final staff report, "most U.S. producers, importers, and purchasers indicated that the level or availability of Federal incentive programs has not changed since January 1, 2012"<sup>555</sup>, while "[f]irms' responses varied regarding how the level or availability of state and local incentives has changed since 2012".<sup>556</sup> Moreover, the USITC assessed how such changes in government incentive programmes affected the demand for CSPV products and the prices for solar electricity during the POI.<sup>557</sup>

7.250. In our view, China fails to demonstrate why the constellation of facts before the USITC necessitated a more detailed analysis concerning the impact of the expiry of specific government incentive programmes on the domestic industry. China reasons that more detailed analysis was necessary because any decline in incentives would affect the cost-sensitiveness of system users and would, as a result, force CSPV producers to offer lower prices to remain competitive.<sup>558</sup> However, the facts before the USITC do not indicate that this dynamic occurred over the POI.

7.251. In particular, the USITC found that the aim of the government incentive programmes was to offset the cost of generating solar energy<sup>559</sup> and that most questionnaire respondents reported that overall changes in the availability of government incentives led to a *decrease* in the price of solar electricity during the POI.<sup>560</sup> This dynamic indicates that solar producers continued to benefit

<sup>550</sup> United States' first written submission, para. 202.

<sup>551</sup> United States' first written submission, para. 204; second written submission, para. 140; and comments on China's response to Panel question No. 18 of the first set, para. 141. In its view, the USITC, by finding that changes in government incentive programmes did not have negative impact on the demand for CSPV products and prices of solar electricity, reasonably concluded that any changes in government incentive programmes did not cause prices of CSPV products to decline. (United States' second written submission, paras. 134 and 137). In particular, the United States argues that incentives sought to increase demand of solar electricity, and this goal was achieved during the POI. According to the United States, any effect on prices for solar generators' inputs would be secondary, resulting from increased demand for solar energy. (United States' response to Panel question No. 15 of the second set, para. 33; response to Panel question No. 17 of the first set, paras. 42-43). Moreover, the United States submits that, since the changes in government incentives caused prices of solar electricity to decrease over the POI, solar producers continued to benefit from the incentive programmes and this development did not translate automatically into declining prices of CSPV products. (United States' second written submission, para. 141; comments on China's response to Panel question No. 18 of the first set, para. 143).

<sup>552</sup> USITC final report, (Exhibit CHN-2), p. 62.

<sup>553</sup> For example, the USITC explicitly noted the extension of the FITC and the expiration of the US Treasury Department's cash grant programme under Section 1603 of the Recovery and Reinvestment Tax Act, the Advanced Energy Manufacturing Tax credit and the US Department of Energy's section 1705 Loan Guarantee programme. In addition, according to the USITC final staff report, 29 states plus the District of Columbia had renewable portfolio standards policies in place in 2016 and the Public Utility Regulatory Policies Act of 1978 emerged as a significant driver of utility-scale solar installations in certain states. (USITC final report, (Exhibit CHN-2), pp. 62-63 and fn 359); USITC final staff report, (Exhibit CHN-3), pp. V-32-V-36).

<sup>554</sup> USITC final report, (Exhibit CHN-2), p. 63; USITC final staff report, (Exhibit CHN-3), table V-22.

<sup>555</sup> USITC final staff report, (Exhibit CHN-3), p. V-35.

<sup>556</sup> USITC final staff report, (Exhibit CHN-3), p. V-36.

<sup>557</sup> USITC final report, (Exhibit CHN-2), pp. 62-63.

<sup>558</sup> China's first written submission, para. 202; second written submission, paras. 187 and 190.

<sup>559</sup> USITC final report, (Exhibit CHN-2), p. 62.

<sup>560</sup> USITC final report, (Exhibit CHN-2), p. 63; USITC final staff report, (Exhibit CHN-3), p. V-37 and table V-24.

from the availability of government incentive programmes during the POI and casts doubt on China's assertion that "*any* decline in incentives would affect the cost-sensitiveness of system users".<sup>561</sup>

7.252. In addition, the USITC found that "any decline in incentives has not led to declines in apparent U.S. consumption" and "demand continued to experience robust growth throughout the POI, including in states most affected by changes in incentive programs, such as California".<sup>562</sup> In our view, these findings demonstrate that changes in the availability of government incentive programmes did *not* negatively impact demand for CSPV products and further serve to disprove China's argument.<sup>563</sup> Since increased demand for CSPV products would ordinarily be expected to result in a price increase, it is unclear on what basis China suggests that declines in government incentive programmes, in light of this positive dynamic, contributed to a decline in CSPV prices.<sup>564</sup>

7.253. In this connection, we are also unconvinced by China's arguments that the USITC's focus on demand to dismiss the impact of declines in government incentive programmes was inadequate.

7.254. China argues that the USITC failed to distinguish how much of the growth in demand that resulted from the continuation of the FITC was for in-scope CSPV products compared with out-of-scope thin film.<sup>565</sup> However, this argument ignores that, while the USITC found that "[b]etween 2015 and 2016, U.S. installations of on-grid photovoltaic systems (which include thin film) increased 97 percent", it also found that interested parties reported that the continuation of the FITC led to increase in demand specifically for *CSPV products*.<sup>566</sup>

7.255. China further argues that the USITC ignored that the domestic industry did not benefit from the continuation of the FITC because it primarily supported the growth in demand for CSPV products in the utility segment.<sup>567</sup> However, this argument is based on the incorrect premise that the domestic industry did not participate in the utility segment, which we have already rejected.<sup>568</sup> Moreover, China ignores that the FITC applied to *all* market segments.<sup>569</sup> As such, the domestic industry would have benefitted from the extension of this programme, as well as other programmes targeting the utility segment, regardless of its varying degrees of participation in the different segments of the US market.<sup>570</sup>

7.256. We are also unpersuaded by China's argument that the USITC's assessment of the impact of declining incentive programmes on demand for CSPV products did not account for the termination of incentive programmes directly linked with the residential and commercial segments (where the

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China argues that table V-24 of the USITC final staff report demonstrates that "when incentive programs were available during the period, these incentives lowered the price of solar generated energy" but "this dynamic does not negate the fact that, as subsidies declined, domestic producers had to incrementally introduce price reductions". (China's response to Panel question No. 15 of the second set, para. 193). Contrary to China's understanding, table V-24 of the USITC final staff report depicts firms' questionnaire responses regarding how *changes in the availability* of government incentive programmes affected the price of solar electricity *since 2012*.

<sup>561</sup> See, e.g. China's first written submission, para. 202. (emphasis added). Moreover, questionnaire respondents indicate that "most U.S. producers (7 of 10), importers (24 of 44), and purchasers (53 of 95) reported that changes in the price of solar generated electricity did not affect the prices of CSPV products". (USITC final staff report, (Exhibit CHN-3), p. V-37).

<sup>562</sup> USITC final report, (Exhibit CHN-2), p. 63. The USITC also found that the increased demand for CSPV products resulted from, *inter alia*, the existence of federal, state, and local incentive programmes. (USITC final report, (Exhibit CHN-2), p. 26).

<sup>563</sup> Even the Solar Energy Industries Association (SEIA) – one of the respondents in the safeguard investigation – acknowledged that there is normally a direct relationship between demand and prices, stating that "it is only logical that these incentives drive demand, *and therefore prices*, to such a significant degree". (SEIA prehearing brief, (Exhibit CHN-20), p. 107 (emphasis added)).

<sup>564</sup> China's comments on the United States' response to Panel question No. 17 of the first set, para. 110; response to Panel question No. 15 of the second set, paras. 182 and 184; and second written submission, para. 190.

<sup>565</sup> China's first written submission, para. 201.

<sup>566</sup> USITC final report, (Exhibit CHN-2), p. 63; USITC final staff report, (Exhibit CHN-3), p. V-36.

<sup>567</sup> See, e.g. China's first written submission, para. 201; and second written submission, para. 183.

<sup>568</sup> See sections 7.3.3.2.1.1 and 7.4.3.2.1.3 above.

<sup>569</sup> USITC final report, (Exhibit CHN-2), fn 361; USITC final staff report, (Exhibit CHN-3), p. V-32.

<sup>570</sup> Moreover, China itself submitted evidence suggesting that the FITC led to increased demand in residential and commercial segments. (China's response to Panel question No. 43 of the third set, paras. 81-84).

domestic industry focused).<sup>571</sup> In this regard, we observe that China is correct to note that certain of these programmes (such as the US Treasury Department's cash grant programme under section 1603 of the Recovery and Reinvestment Tax Act<sup>572</sup>, and various state-level net metering programmes<sup>573</sup>) expired during the POI. However, China overlooks that the USITC based its finding that "any decline in incentives has not led to declines in apparent U.S. consumption" on the overwhelming majority of questionnaire respondents reporting that any changes in government incentives did not have a negative impact on the demand for CSPV products.<sup>574</sup> As such, the specific evidence to which China refers does not undermine the evidence supporting the USITC's conclusion that overall demand for CSPV products did not decline as a result of those changes.

7.257. Accordingly, because record evidence indicates that overall changes in the availability of government incentive programmes (a) caused solar electricity prices to decline, and (b) did not lead to decline in demand for CSPV products, it does not appear that those changes would have reduced the cost-competitiveness of solar energy. As a result, we do not consider that the USITC was required to conduct a more detailed analysis of whether the expiry of specific incentive programmes would have increased the burden associated with maintaining the cost-competitiveness of solar energy and thus resulted in downward price pressure on CSPV products (as an input in producing solar energy). Therefore, we disagree with China's claim that the USITC erred by not explicitly addressing whether any decline in government incentive programmes would have forced CSPV producers to offer lower prices to remain competitive. Indeed, China's claim seems to be premised on a hypothetical scenario for which China has provided no valid support, and which is not borne out by the evidence on the USITC's record.<sup>575</sup> In these circumstances, we do not consider that it was necessary for the USITC

<sup>571</sup> China's second written submission, para. 182.

<sup>572</sup> USITC final staff report, (Exhibit CHN-3), p. V-35.

<sup>573</sup> The USITC final staff report, (Exhibit CHN-3), p. V-35. Of the firms that had indicated a decline in state and local incentives, most attributed the decrease to changes in net metering policies. (USITC final staff report, (Exhibit CHN-3), p. V-36).

<sup>574</sup> USITC final staff report, (Exhibit CHN-3), p. V-36. With respect to China's argument that the USITC overlooked termination of incentive programmes directly benefitting producers of CSPV products, we observe that the USITC's finding that "any decline in incentives has not led to declines in apparent U.S. consumption" would also cover incentive programmes directly benefitting producers of CSPV products during the POI (such as the Advanced Energy Manufacturing Tax credit and the US Department of Energy's section 1705 Loan Guarantee programme). In any event, China has not explained why termination of these incentive programmes would have negatively affected demand for CSPV products. (China's response to Panel question No. 18 of the first set, para. 133; opening statement at the first meeting of the Panel, para. 53).

<sup>575</sup> For example, China relies on the USITC's general finding that incentives were designed to decline as the cost of generating solar was expected to decrease over time. According to China, this evidence suggests that domestic producers were under the pressure "to escalate their technological innovation" to compensate for the decline in incentives. (China's second written submission, para. 187). Contrary to China's argument, the USITC recognized the interconnection between declines in incentive programmes and declines in the *cost of generating solar energy*. While we recognize that this dynamic might also suggest a general connection between declines in incentive programmes and *cost reductions and efficiency enhancements* of CSPV products (as an input in producing solar energy), we do not consider that this demonstrates that the domestic industry was pressured to lower *prices of CSPV products* in response to *any* decline in incentive programmes. Similarly, we fail to see how China's reliance on the USITC's finding that "existence of these incentive programs has made CSPV products more cost-competitive with other sources of electricity" would support its assumption that any decline in incentive programs necessarily had a negative impact on prices of CSPV products. (USITC final report, (Exhibit CHN-2), p. 63. See, e.g. China's first written submission, para. 202).

We also do not agree with China that the econometric report submitted by respondents to the USITC showed that changes in government incentive programmes "was a way more important factor in explaining the evolution of prices over the period". (See, e.g. China's response to Panel question No. 15 of the second set, para. 195; response to Panel question No. 14 of the second set, para. 181; and response to Panel question No. 18 of the first set, para. 143). The econometric report more generally described incentive programmes, their impact on demand for CSPV products, and their interrelation with "grid parity" and CSPV costs. (Econometric report, (Exhibit CHN-19), pp. 14-16, 18, and 23). While the econometric report accounted in its assessment for the impact of state-level subsidies on CSPV demand, it did not directly assess the impact of changes in government incentive programmes on prices of CSPV products. (Econometric report, (Exhibit CHN-19), pp. i and 3).

In addition, China argues that domestic producers admitted themselves that declining government support had a "negative" impact in prices. (China's second written submission, para. 189 (referring to USITC final staff report, (Exhibit CHN-3), table F-2)). In this context, we observe that out of 16 domestic producers that provided questionnaire responses to the USITC, only seven producers reported "changes in government incentive programs" as a factor causing injury; three of them ranked the importance of this factor as one out of five (the lowest degree of importance), one producer ranked it as two out of five, one producer ranked it as three out of five, and two producers ranked it as five out of five ("an extremely important cause of injury"). We

to explicitly consider such a scenario to reasonably conclude that changes in the availability of government incentive programmes did not cause injury to the domestic industry.<sup>576</sup>

7.258. For these reasons, we reject China's claim that the USITC improperly dismissed decline in government incentive programmes as an "other" cause of injury. As a consequence, we also reject China's claim that the USITC failed to ensure that the injury caused by this factor was not attributed to increased imports.

#### **7.4.3.3.2 Declining raw material costs and increased production efficiencies**

##### **7.4.3.3.2.1 Factual background**

7.259. In the safeguard investigation, respondents argued that declining raw material costs, rather than increased imports, explained "any declines in prices of CSPV products and the condition of the domestic industry".<sup>577</sup>

7.260. In response, the USITC noted that polysilicon is a key raw material used in the production of the wafers that are used to manufacture CSPV cells, and that raw material costs account for the largest component of the total cost of goods sold for CSPV products. During the POI, the price of polysilicon ingots and wafers (key inputs in the production of CSPV products) fluctuated, but declined overall.<sup>578</sup> Based on this, the USITC found:

Despite declining polysilicon costs, which would help make CSPV products more cost competitive with other sources of electricity, declines in the domestic industry's net sales values kept pace with declines in its costs, leading to substantial losses throughout the POI.<sup>579</sup>

##### **7.4.3.3.2.2 Main arguments of the parties**

7.261. China submits that the USITC improperly dismissed decreasing raw material costs and increased production efficiencies and failed to satisfy the non-attribution requirement in respect of these factors.<sup>580</sup> In particular, China argues that, although the USITC acknowledged that it had considered the role of raw material costs in the decline of CSPV prices<sup>581</sup>, it failed to clarify to what extent declines in CSPV prices were attributed to declining raw material costs, as opposed to price competition from imports.<sup>582</sup> Moreover, China contends that the USITC failed to address the evidence

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do not consider that the fact that only a few domestic producers reported "changes in government incentive programs" as "an extremely important cause of injury" demonstrates that the USITC was required to treat this factor as an "other" cause of injury (which pertains to the domestic industry overall). At any rate, the USITC analysed whether the changes in government incentive programmes caused injury to the domestic industry and found that this factor did not explain the condition of the domestic industry. In our view, the fact that certain interested parties expressed contrary views does not render the USITC's determination unreasoned and inadequate.

<sup>576</sup> Relatedly, we note that China also refers to the expiry of government incentive programmes that directly benefitted domestic producers of CSPV products when arguing that the USITC failed to properly analyse whether changes in government incentive programmes adversely impacted prices of CSPV products. (China's second written submission, para. 188). However, China fails to explain why the expiry of such programmes would have resulted in the decline of domestic prices or otherwise amounted to a separate cause of injury to the domestic industry. As a result, we do not consider that China has established that the USITC was required to assess these programmes in greater detail.

<sup>577</sup> USITC final report, (Exhibit CHN-2), p. 61.

<sup>578</sup> USITC final report, (Exhibit CHN-2), p. 64.

<sup>579</sup> USITC final report, (Exhibit CHN-2), p. 64.

<sup>580</sup> China's first written submission, paras. 206-207; second written submission, heading to section III(C)(2).

<sup>581</sup> China's first written submission, para. 205.

<sup>582</sup> China's first written submission, para. 206. In this context, China argues that the USITC disregarded record evidence demonstrating that (a) the high level of transparency in the market for solar energy impeded the domestic producers from increasing their profit; (b) the whole market worked under the assumption that declines in raw material costs and enhanced efficiencies would allow for greater price competitiveness of solar energy; (c) seven domestic producers reported the decrease in raw material costs as a factor of injury, with two of them ranking this factor as "being an extremely important cause of injury"; and (d) price declines for CSPV products and raw material followed the same trends with very similar magnitudes. China also argues that

regarding the increased production efficiencies that also contributed to decreases in CSPV prices.<sup>583</sup>

7.262. For its part, the United States submits that China neither provides support for its presumption that declining raw material prices cause the price of a finished product to decrease, nor points to anything to detract from the USITC's determination.<sup>584</sup> For the United States, even if declining costs resulted in the domestic industry's ability to lower prices, that still would not show that this factor caused injury to the domestic industry.<sup>585</sup> According to the United States, this is because declining input costs would normally allow a firm to (a) increase profit margins, or (b) lower prices and sell more product.<sup>586</sup> In the present case, according to the United States, the domestic industry was not able to benefit from declining costs in either way because of the increased low-priced imports.<sup>587</sup>

#### 7.4.3.3.2.3 Evaluation of the Panel

7.263. As described above, China advances a series of arguments contending that the USITC failed to appropriately analyse the impact of declining raw material costs and increased production efficiencies on prices for CSPV products.<sup>588</sup> China further contends that the USITC disregarded record evidence demonstrating that declining raw material costs and increased production efficiencies should have led to declines in prices for domestic CSPV products.<sup>589</sup> Yet, in our view, these arguments ultimately fail to explain why declining raw material costs and increased production efficiencies would have caused injury to the domestic industry, even if they did contribute to declining prices of CSPV products.<sup>590</sup> Indeed, China itself concedes that it is not arguing "that falling

the econometric report submitted by respondents during the investigation demonstrates that declines in raw material costs contributed to price decline of CSPV products. (China's response to Panel question No. 19 of the first set, paras. 150-151; comments on the United States' response to Panel question No. 20 of the first set, paras. 121-122 and 126; response to Panel question No. 18 of the second set, paras. 212-213; and second written submission, paras. 195-199).

In addition to these arguments, China contends that the USITC attributed the high costs of goods sold to net sales value ratio to increased imports, without prior consideration of alternative plausible explanations: (a) domestic producers were obliged to pass on any decrease of raw material costs to purchasers in order to remain competitive with foreign producers that enjoyed greater economies of scale; and (b) domestic producers were facing high factory costs at the beginning of the POI, and therefore could not enjoy higher profitability margins caused by any decrease raw material costs. (China's response to Panel question No. 47 of the third set, paras. 112-118).

<sup>583</sup> China's first written submission, para. 208; second written submission, para. 199; and comments on the United States' response to Panel question No. 20 of the first set, paras. 125-127. In particular, China claims that the USITC should have assessed the possibility that "[d]ifferent producers might have exploited increased efficiencies to a different extent, depending on their market focus and production system, resulting in competitive disadvantages". (China's second written submission, para. 199).

<sup>584</sup> United States' first written submission, para. 206.

<sup>585</sup> United States' first written submission, para. 207.

<sup>586</sup> United States' first written submission, para. 207.

<sup>587</sup> United States' first written submission, para. 207; second written submission, para. 151.

<sup>588</sup> See section 7.4.3.3.2.2 above.

<sup>589</sup> See section 7.4.3.3.2.2 above.

<sup>590</sup> Even if China were correct that, because of the underlying market dynamic the domestic industry reduced its prices in line with declines in raw material costs and increased production efficiencies, such price decline should have helped the domestic industry to increase cost-competitiveness of domestic CSPV products. China has not demonstrated that this type of price decline would have caused injury to the domestic industry. (China's comments on the United States' response to Panel question No. 20 of the first set, paras. 121 and 126; response to Panel question No. 18 of the second set, para. 212; and second written submission, paras. 196-197 and 199).

In a similar vein, the econometric study to which China refers does not demonstrate that the domestic industry was injured as a result of declining raw material costs and increased production efficiencies. (China's response to Panel question No. 19 of the first set, para. 151; response to Panel question No. 18 of the second set, para. 213).

With respect to China's argument that seven domestic producers reported the decrease in raw material costs was a factor of injury, we note that, contrary to China's submission, seven domestic producers reported "[c]hange in raw material costs" was a factor of injury, rather than "decrease in raw material costs". (China's comments on the United States' response to Panel question No. 20 of the first set, para. 122; second written submission, para. 197 (referring to USITC final staff report, (Exhibit CHN-3), table F-2) (emphasis added)). In our view, "[c]hange in raw material costs" is ambiguous as it would encompass both increases and decreases in raw material costs. In addition, only two domestic producers reported "[c]hange in raw material costs" as "being an extremely important cause of injury". (USITC final staff report, (Exhibit CHN-3), table F-2). As such, we do not consider that this evidence demonstrates that declining raw material costs caused injury to the domestic industry.

costs *per se* are injurious, but rather that falling costs explain the declining prices that the USITC sought to blame on increasing imports".<sup>591</sup>

7.264. In this context, we recall that the non-attribution obligation in Article 4.2(b) of the Agreement on Safeguards pertains to "other" factors that are causing *injury* to the domestic industry at the same time as increased imports.<sup>592</sup> Since China does not argue, let alone establish, that declining raw material costs and increased production efficiencies were themselves "other" causes of injury to the domestic industry, China has failed to *prima facie* establish that the USITC was required to treat declining raw material costs and increased production efficiencies as "other" factors causing injury. As a consequence, we reject China's claims that the USITC improperly dismissed these factors, and that the USITC failed to ensure that the injury caused by these factors was not attributed to increased imports.<sup>593</sup>

7.265. In making this finding, we further observe that the USITC found that "[d]espite declining polysilicon costs, which would help make CSPV products more cost-competitive with other sources of electricity, declines in the domestic industry's net sales values kept pace with declines in its costs, leading to substantial losses throughout the POI".<sup>594</sup> As such, we agree with the United States' observation that the USITC effectively treated declining costs as a positive factor that should have improved the situation of the domestic industry (which ultimately did not occur because of declining net sales values).<sup>595</sup> In our view, this approach was not inappropriate, as declining costs would ordinarily be expected to help an industry either to increase cost-competitiveness of its

<sup>591</sup> China's response to Panel question No. 47 of the third set, para. 108. Moreover, in response to the Panel's question concerning whether record evidence directly demonstrated that the domestic industry was injured as a result of declining raw material costs and increased production efficiencies, China fails to refer to any record evidence demonstrating that declining costs caused *injury* to the domestic industry. (China's response to Panel question No. 47 of the third set, paras. 110-118). In addition, we note that China acknowledges that "[t]he increasing cost competitiveness depends on the net effect of falling costs in light of those other factors affecting price" and that "there is no general rule that decreases in raw material costs are themselves necessarily a benefit or a 'positive factor'. *The key issue is the relationship of costs and prices, and how they translate into increased or decreased profit margins*". (China's response to Panel question No. 18 of the second set, paras. 210-211 (emphasis added)).

In this context, we are not persuaded by China's argument that the USITC attributed the high cost of goods sold to net sales value ratio to increased imports, without considering other factors. While China claims that "producers with larger capacities enjoyed greater economies of scale and could leverage from raw material reductions to a greater extent" and that "the domestic industry faced very elevated factory costs which it needed to reduce", we do not consider that these arguments establish that the declining raw material costs themselves were a cause of injury to the domestic industry. (China's response to Panel question No. 47 of the third set, paras. 110-114). We further recall that the USITC found that increased imports prevented the domestic industry from increasing its capacity to achieve economies of scale, which it linked to "the hundreds of millions of dollars in net and operating losses throughout the POI". Consistent with these losses, the USITC found that "a significant number of domestic producers were unable to generate adequate capital to finance the modernization of their domestic plants and equipment, and a significant number of them were unable to maintain existing research and development expenditure levels". (USITC final report, (Exhibit CHN-2), p. 47). In light of these findings (which China has not established were inappropriate), we do not consider that the USITC was required to assess, as "other" causes of injury, the domestic industry's lack of scale or higher cost structure. For the same reasons, we are not persuaded by China's claim that the USITC erred by not assessing the possibility that "[d]ifferent producers might have exploited increased efficiencies to a different extent, depending on their market focus and production system, resulting in competitive disadvantages". (China's second written submission, para. 199).

<sup>592</sup> As a result, we disagree with China that, under Article 4.2(b), second sentence, the USITC was required to "quantitatively or qualitatively address and distinguish price changes associated with changing raw material cost and price changes occurring for other reasons". (China's first written submission, para. 206. See also China's second written submission, para. 194).

<sup>593</sup> In this respect, we recall that China, in the context of its causation claim, similarly advances that price declines occurred because of decreasing costs, increasing efficiency, and technological innovation, which benefitted the CSPV industry as a whole. (China's first written submission, paras. 151-153; second written submission, para. 104). While we recognize that China's argument is conceptually relevant in the context of its causation claim, we fail to see the relevance of such argument in the context of the non-attribution claim considering that Article 4.2(b), second sentence, only requires determining whether "other" factors are causing *injury* to the domestic industry.

<sup>594</sup> USITC final report, (Exhibit CHN-2), p. 64.

<sup>595</sup> See, e.g. United States' first written submission, para. 207; second written submission, para. 151; response to Panel question No. 20 of the first set, para. 52; response to Panel question No. 18 of the second set, para. 42; and comments on China's response to Panel question No. 47 of the third set, para. 63.



product (by allowing to lower the price of the finished product, while maintaining the same level of profit margin) or to increase its profit margin, rather than impair its position.

#### **7.4.3.3.3 The need to attain "grid parity" with other sources of electricity**

##### **7.4.3.3.3.1 Factual background**

7.266. During the safeguard investigation, respondents argued that the need to attain "grid parity" with other sources of electricity – i.e. the point at which the cost of energy generated from renewable sources equals the cost from conventional energy sources on the grid – also explained "any declines in prices of CSPV products and the condition of the domestic industry".<sup>596</sup>

7.267. The USITC rejected respondents' argument based on the following explanation:

A plurality of importers and purchasers reported that changes in the price of conventional energy have decreased the price of solar-generated electricity. In addition, firms reporting that changes in the price of U.S. conventional energy have increased demand cited a positive relationship between electricity rates and the demand for [photovoltaic] systems and modules. While conventional energy prices may account for some of the decrease in the prices of CSPV products in some years, they do not explain the consistent observed price declines over the 2012-2016 period. The price of natural gas for electricity generation increased in the latter half of 2012 and 2013, peaked in February 2014, and declined to its lowest level in March 2016 after which it rose and is projected to increase. The domestic prices of CSPV products, on the other hand, decreased throughout the POI.<sup>597</sup>

##### **7.4.3.3.3.2 Main arguments of the parties**

7.268. China argues that the USITC improperly dismissed the need to achieve price competitiveness on the electrical grid (i.e. "grid parity") and failed to satisfy the non-attribution requirement in respect of the injury caused by this factor.<sup>598</sup> First, China argues that the USITC's statement that conventional energy prices "may account for some of the decrease" "does not sufficiently explain the nature and extent of the harm caused by competing energy sources".<sup>599</sup> China argues that the USITC should have conducted a deeper analysis on the impact of any desire of electricity providers to achieve grid parity on prices for solar energy.<sup>600</sup> Second, China claims that the USITC considered price trends of natural gas only, without addressing respondents' argument that other energy sources also exerted downward pressure on solar energy prices.<sup>601</sup> Third, China submits that the USITC's conclusion concerning the lack of correlation between natural gas and CSPV product prices "is grossly inadequate considering the data presented to the USITC during its investigation"<sup>602</sup> and fails to account for other evidence concerning the historical relationship between price trends.<sup>603</sup> Fourth, China submits that the USITC failed to address the econometric report that respondents presented, which provided a quantitative analysis of the impact of the need for solar energy to attain "grid parity" on the domestic industry.<sup>604</sup> Finally, China contends that the USITC did not address the

<sup>596</sup> USITC final report, (Exhibit CHN-2), pp. 61 and 64.

<sup>597</sup> USITC final report, (Exhibit CHN-2), pp. 64-65. (fns omitted)

<sup>598</sup> China's first written submission, heading to section III(B)(2)(b)(iii); second written submission, heading to section III(C)(3).

<sup>599</sup> China's first written submission, para. 211. See also China's second written submission, para. 200.

<sup>600</sup> China's response to Panel question No. 51 of the third set, paras. 129-130.

<sup>601</sup> China's first written submission, para. 212; second written submission, para. 206.

<sup>602</sup> China's first written submission, para. 213.

<sup>603</sup> China's first written submission, paras. 213-214; second written submission, paras. 201-204; comments on the United States' response to Panel question No. 21 of the first set, paras. 150-153. In particular, China submits that the USITC ignored (a) the constant gap between prices of natural gas and solar energy, which created "enormous pressure on CSPV products to become more efficient, less costly to produce, and less expensive for the consumer to buy"; (b) its own admissions that conventional energy prices acted as a target price for renewable energy to become competitive; and (c) that the price of natural gas fell significantly over the POI regardless of fluctuations in certain years.

<sup>604</sup> China's first written submission, para. 215. See also China's second written submission, paras. 209-217.

contrasting evidence showing that multiple domestic producers reported "grid parity with natural gas" as a key factor of injury.<sup>605</sup>

7.269. For its part, the United States submits that the USITC properly demonstrated that the need to attain "grid parity" was not responsible for the decrease in CSPV prices, and did not cause injury to the domestic industry.<sup>606</sup> First, the United States argues that, contrary to China's contention, the use of word "may" in the USITC's statement that conventional energy prices "may account for some of the decrease" signals that the USITC was addressing a hypothetical possibility. However, upon evaluation, the USITC definitively found that conventional energy prices did not explain the consistent price declines.<sup>607</sup> Second, the United States contends that the USITC did not err in focusing on the prices of natural gas, because those prices generally set the target price that CSPV and other renewable energy systems sought to meet.<sup>608</sup> Third, the United States submits that China's arguments fail to demonstrate any inadequacy with the USITC's finding concerning the lack of correlation between natural gas prices and domestic CSPV prices.<sup>609</sup> Fourth, the United States maintains that the USITC addressed the relevant points made by the econometric report, but rather than relying on respondents' theoretical approach, it based its determination on the actual facts gathered in the extensive record.<sup>610</sup> Finally, the United States submits that the objective of attaining "grid parity" would not explain producers' acceptance of continual losses during the POI.<sup>611</sup>

#### 7.4.3.3.3 Evaluation of the Panel

7.270. Our analysis proceeds by first considering the USITC's factual findings concerning the conceptual nature of "grid parity". We then turn to China's specific claim that the USITC's rejection of the respondents' arguments concerning the need to attain "grid parity" was inconsistent with the non-attribution requirement in Article 4.2(b), second sentence, of the Agreement on Safeguards. We proceed in this manner to facilitate our analysis of the parties' disagreement concerning this issue.

7.271. As the USITC explained, electricity providers using renewable energy sources seek to achieve "grid parity" with other sources of electricity.<sup>612</sup> Although "grid parity" is a relevant condition of competition in the market affecting demand for CSPV products<sup>613</sup>, we agree with the United States that it is not a monolithic concept.<sup>614</sup>

7.272. In this regard, we note that record evidence relied upon by the USITC suggests that the average prices of conventional energy sources did not determine a single absolute target price for CSPV products. As the USITC found, "grid parity" prices varied by region, time of day, and availability of other electricity sources; and even varied widely for a given energy source.<sup>615</sup> The same

<sup>605</sup> China's comments on the United States' response to Panel question No. 21 of the first set, para. 137; second written submission, para. 205.

<sup>606</sup> United States' first written submission, para. 208.

<sup>607</sup> United States' first written submission, para. 209.

<sup>608</sup> United States' first written submission, para. 210.

<sup>609</sup> United States' first written submission, para. 211. In its view, the purported "gap" between price trends of solar energy and natural gas relied upon by China is based upon the false premise that there is one single levelized cost of energy that solar generators seek to meet. The United States further submits that the USITC, however, explained that "grid parity" was not a monolithic concept, as prices of conventional energy varied by region, time of the day, and availability of other electricity sources. Thus, according to the United States, it is not the case that the average prices of other energy sources determine the price for CSPV products.

<sup>610</sup> United States' first written submission, paras. 213-215. According to the United States, the Agreement on Safeguards does not require quantification to analyse causation.

<sup>611</sup> United States' first written submission, para. 212.

<sup>612</sup> USITC final report, (Exhibit CHN-2), p. 25; USITC final staff report, (Exhibit CHN-3), p. V-37. "Grid parity" is based on the levelized cost of electricity (LCOE) which during peak periods of demand is set by natural gas generated electricity. (USITC final report, (Exhibit CHN-2), fn 378; USITC final staff report, (Exhibit CHN-3), pp. V-37-V-38). LCOE represents the per-kilowatt hour cost of building and operating a generating plant over an assumed financial life. (USITC final staff report, (Exhibit CHN-3), p. V-37).

<sup>613</sup> USITC final report, (Exhibit CHN-2), pp. 25-26.

<sup>614</sup> See, e.g. United States' first written submission, para. 211; and response to Panel question No. 21 of the first set, para. 57.

<sup>615</sup> USITC final report, (Exhibit CHN-2), pp. 25-26; USITC final staff report, (Exhibit CHN-3), p. V-38. In the safeguard investigation, one of the respondents (Solar Energy Industries Association) also submitted evidence suggesting that the "grid parity" was not a monolithic imperative. (Econometric report, (Exhibit CHN-19), pp. 12-13).

understanding can be discerned in the USITC's finding that "during periods of peak electricity demand, even generators with somewhat higher costs may be able to sell electricity into the transmission or distribution grid".<sup>616</sup>

7.273. In addition, record evidence indicates that the need to attain "grid parity" affected individual CSPV market segments (i.e. the commercial, residential, and utility segments) differently. As indicated above, "grid parity" concerns the competition between energy sources *on the grid*. However, it is only the utility segment that competes directly with other types of electricity being sold to the grid<sup>617</sup>; the residential and commercial segments generate electricity for use in individual homes and commercial, and industrial, government buildings and sites, respectively, and only feed energy back into the grid when it is not consumed onsite.<sup>618</sup> In this context, solar electricity from the utility segment appears to compete more directly against conventional electricity sold to the grid. This understanding is generally consistent with the USITC's factual findings that (a) "[f]or peak periods, natural-gas generated electricity generally sets the [levelized cost of electricity (LCOE)] that CSPV and other renewable energy systems seek to meet, *especially for utility sales*"<sup>619</sup>; and (b) "[t]he LCOE for a new combined-cycle natural gas-fired power plant ... has set the benchmark for low-cost energy *within the utility segment* of the market".<sup>620</sup>

7.274. Record evidence also suggests that "[s]olar energy is ... essentially cost-competitive with other forms of electricity generation, which has supported robust growth in utility installations".<sup>621</sup> In particular, while the LCOE for a new combined-cycle natural gas-fired power plant was at about 4-5 cents per kW/hour, the LCOE for solar photovoltaic systems (incorporating tax credits) was just over 5 cents per kW/hour, and was lower in many locations.<sup>622</sup> By contrast, because the residential and commercial segments do not benefit from the same efficiencies and economies of scale as in the utility segment, they have higher LCOE.<sup>623</sup>

7.275. Finally, we observe that record evidence indicates that "grid parity" functions in combination with, or through, various market trends and instruments. For example, record evidence demonstrates that government incentive programmes were aimed at offsetting the cost of generating solar energy, thereby stimulating demand for renewable energy and assisting developers of solar power to become more competitive with conventional energy sources.<sup>624</sup>

7.276. With these facts in mind, we now turn to China's specific claim against the USITC's rejection of respondents' arguments concerning the impact on CSPV prices of the need for solar energy to attain "grid parity" with conventional energy sources.

7.277. We begin by noting that the USITC focused its determination concerning the need to attain "grid parity" with conventional energy sources on natural gas price trends. It did so based on record evidence demonstrating that, for peak demand periods, natural gas generated electricity generally sets the LCOE that CSPV systems must seek to meet.<sup>625</sup> Since China does not dispute the USITC's use of natural gas prices as a proxy for assessing "grid parity" as an alleged "other" factor

<sup>616</sup> USITC final report, (Exhibit CHN-2), p. 26.

<sup>617</sup> USITC final staff report, (Exhibit CHN-3), p. I-27.

<sup>618</sup> According to the USITC final staff report, residential systems are installed at individual homes, and the electricity generated by the system is used for power therein. Homeowners use grid energy when solar electricity generation is not sufficient to meet demand and often feed energy back into the grid when solar electricity generation exceeds home use. Non-residential systems are installed at commercial, industrial, government, and similar buildings and sites. They function similar to residential installations, providing electricity to meet onsite need, pulling additional electricity from the grid when needed, and feeding excess electricity back into the grid when it is not needed. (USITC final staff report, (Exhibit CHN-3), pp. I-25-I-26).

<sup>619</sup> USITC final report, (Exhibit CHN-2), p. 26; USITC final staff report, (Exhibit CHN-3), p. V-38. (emphasis added)

<sup>620</sup> USITC final report, (Exhibit CHN-2), p. 109. (emphasis added)

<sup>621</sup> USITC final report, (Exhibit CHN-2), p. 110.

<sup>622</sup> USITC final report, (Exhibit CHN-2), pp. 109-110.

<sup>623</sup> USITC final report, (Exhibit CHN-2), p. 110.

<sup>624</sup> USITC final report, (Exhibit CHN-2), p. 62. The USITC also found that incentive programmes made solar CSPV products more cost-competitive with other sources of electricity. (USITC final report, (Exhibit CHN-2), p. 63).

<sup>625</sup> USITC final report, (Exhibit CHN-2), fn 378; USITC final staff report, (Exhibit CHN-3), p. V-38.

of injury<sup>626</sup>, our analysis focuses on whether China has established that the USITC's assessment of the impact of natural gas prices on CSPV products was inappropriate.<sup>627</sup>

7.278. As we see it, the USITC rejected the need to attain "grid parity" as an "other" factor of injury primarily because prices of natural gas did not correlate with prices of CSPV products during the POI.<sup>628</sup> In this regard, we note that prices of natural gas increased in the latter half of 2012 and throughout 2013, peaked in February 2014, and then declined to their lowest level in March 2016, after which they rose and were projected to increase.<sup>629</sup> By contrast, prices for CSPV products declined steeply in 2012, then began to increase through the fourth quarter of 2013, and continued to increase through 2014. By the first quarter of 2016 prices of CSPV products began to fall.<sup>630</sup> In our view and in line with the United States' position, the lack of correlation between price trends of natural gas and CSPV products casts reasonable doubt as to whether the prices of natural gas directly exerted downward price pressure on CSPV products during the POI. Based on this evidence, we do not consider that it was inappropriate for the USITC to find that the need for solar energy to attain "grid parity" with conventional energy prices did not explain the consistent observed price declines during the POI, and, on this basis, reject such need to attain "grid parity" as an "other" factor of injury.

7.279. While China advances that the USITC's analysis of need to attain "grid parity" was inadequate, we do not consider that China's arguments withstand scrutiny.

7.280. In particular, China argues that, although the USITC acknowledged that "conventional energy prices may account for some of the decrease in the prices of CSPV products in some years", it failed to "sufficiently explain the nature and extent of the harm caused by competing energy sources".<sup>631</sup> While China views specific language used by the USITC in isolation, we consider that the remainder of the relevant paragraph in the USITC's final report provides meaningful clarification of its finding:

While conventional energy prices may account for some of the decrease in the prices of CSPV products in some years, they do not explain the consistent observed price declines over the 2012-2016 period. The price of natural gas for electricity generation increased in the latter half of 2012 and 2013, peaked in February 2014, and declined to its lowest level in March 2016 after which it rose and is projected to increase. The domestic prices of CSPV products, on the other hand, decreased throughout the POI.<sup>632</sup>

7.281. Viewed in this context, we are not persuaded by China's argument that the USITC's observation that "conventional energy prices may account for some of the decrease in the prices of CSPV products in some years" amounts to an acknowledgement of the injurious effect on the domestic industry of the need for solar energy to attain "grid parity" with conventional energy sources. To the contrary, the USITC found that the need to attain "grid parity" was *not* a cause of injury because conventional energy prices – specifically for natural gas – did "not explain the consistent observed price declines over the 2012-2016 period".<sup>633</sup>

7.282. Further, we disagree with China that the USITC's finding of a lack of correlation between price trends of natural gas and CSPV products (a) conflicted with its own admissions that

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<sup>626</sup> "China does not dispute the finding of using gas natural prices to assess the grid parity factor". (China's response to Panel question No. 51 of the third set, para. 129).

<sup>627</sup> Contrary to China's arguments, we do not consider that the fact that the USITC did not explicitly address respondents' arguments that other energy sources also exerted downward pressure on solar energy prices demonstrates that the USITC's determination was inappropriate. (China's first written submission, para. 212; second written submission, para. 206). Because record evidence demonstrates that natural gas generated electricity generally sets the LCOE during peak periods of demand, we do not consider that it was inappropriate for the USITC to focus its analysis on natural gas prices.

<sup>628</sup> "[Conventional energy prices] do not explain the consistent observed price declines over the 2012-2016 period". (USITC final report, (Exhibit CHN-2), p. 64).

<sup>629</sup> USITC final report, (Exhibit CHN-2), pp. 64-65.

<sup>630</sup> USITC final report, (Exhibit CHN-2), p. 46.

<sup>631</sup> China's first written submission, para. 211. See also China's second written submission, para. 200.

<sup>632</sup> USITC final report, (Exhibit CHN-2), pp. 64-65. (fn omitted)

<sup>633</sup> USITC final report, (Exhibit CHN-2), p. 64. The USITC further referred in support of this finding to the lack of correlation between price trends of natural gas and CSPV products. (USITC final report, (Exhibit CHN-2), pp. 64-65).

conventional energy prices acted as a target price for renewable energy to become competitive; (b) ignored the constant gap between prices of solar energy and natural gas; and (c) ignored that prices of natural gas significantly fell during the POI, regardless of fluctuations in certain years.<sup>634</sup> In this regard, we agree with the United States that China's arguments are based on an incorrect factual premise that the need to attain "grid parity" with conventional energy sources was a monolithic concept. As described above, record evidence suggests that there was no one single absolute target price set by natural gas that CSPV producers sought to meet. As such, we do not consider that the mere existence of a price gap between natural gas and solar energy necessarily demonstrates that natural gas exerted downward price pressure on CSPV products. Moreover, the fact that prices of CSPV products stabilized between 2013-2015, irrespective of the price gap with natural gas during the same period, casts reasonable doubt as to whether natural gas exerted downward price pressure on prices of CSPV products. Furthermore, contrary to China's argument, we consider that, in finding a lack of correlation between price trends of natural gas and CSPV products, the USITC's analysis also accounted for the fact that natural gas prices fell during the POI.

7.283. Relatedly, we do not agree with China that the USITC was required to assess the constant price gap between natural gas and solar energy that existed prior to the POI. The non-attribution requirement in Article 4.2(b) of the Agreement on Safeguards calls for an examination of whether "factors other than increased imports are causing injury to the domestic industry *at the same time*".<sup>635</sup> Since the USITC made its serious injury and causation determinations based on developments that generally occurred during the 2012-2016 POI, we do not agree with China that it was inappropriate for the USITC to focus its analysis on the relationship between prices of natural gas and CSPV products over the same period, rather than on the historical price gap.

7.284. China also contends that the USITC failed to address the econometric report submitted by respondents, which allegedly provided quantitative analysis of, among other things, the impact of "grid parity" on prices of CSPV products.<sup>636</sup> As an initial matter, we note that the Agreement on Safeguards does not require that the competent authorities of a Member address explicitly in their report every argument and element of evidence raised by interested parties, so long as their conclusions on the relevant issues are supported by reasoned and adequate explanations. The USITC explicitly recognized and addressed respondents' claim that the need to attain "grid parity" led to price decline of CSPV products. This is precisely the point that was made in the econometric report.<sup>637</sup> Having addressed the issue raised by respondents on the basis of the record evidence noted above, we do not consider that the USITC was required to explicitly address the quantitative "estimation approach" set forth in the respondents' econometric report.

7.285. Finally, China argues that the USITC failed to address the questionnaire evidence indicating that multiple domestic producers reported "grid parity with natural gas" as a factor causing injury.<sup>638</sup> In this regard, we note that out of the 16 domestic producers that provided questionnaire responses to the USITC<sup>639</sup>, only 5 domestic producers reported "grid parity with natural gas" as a factor causing injury: 4 of them ranked the importance of this factor as 1 out of 5 (the lowest degree of importance); and 1 domestic producer ranked it 4 out of 5 (the second highest degree of importance).<sup>640</sup> We do not consider that the fact that only one domestic producer reported "grid parity with natural gas" as a relatively important factor causing injury demonstrates that the USITC was required to treat the need to attain "grid parity" as an "other" cause of injury (which pertains to the domestic industry overall). Moreover, China has not explained why the USITC should have preferred this evidence over other record evidence that supported its finding that conventional energy prices did not "explain the consistent observed price declines over the 2012-2016 period".

<sup>634</sup> See section 7.4.3.3.3.2 above.

<sup>635</sup> Emphasis added.

<sup>636</sup> China's first written submission, para. 215. See also China's second written submission, paras. 209-217.

<sup>637</sup> Econometric report, (Exhibit CHN-19), p. 31.

<sup>638</sup> China's second written submission, para. 205; comments on the United States' response to Panel question No. 21 of the first set, para. 137; and comments on the United States' response to Panel question No. 50 of the third set, para. 74.

<sup>639</sup> The USITC received questionnaire responses from 16 firms that are estimated to have accounted for all known US production of CSPV cells and 63.9% of US production of CSPV modules in 2015. (USITC final report, (Exhibit CHN-2), p. 9).

<sup>640</sup> USITC final staff report, (Exhibit CHN-3), table F-2.

7.286. For the above reasons, we reject China's claim that the USITC improperly dismissed the need to attain "grid parity" as an "other" cause of injury. As a consequence, we also reject China's claim that the USITC failed to ensure that the injury caused by this factor was not attributed to increased imports.

#### **7.4.3.4 Overall conclusion regarding the USITC's assessment of "other" factors allegedly causing injury to the domestic industry**

7.287. For all of the above reasons, we reject China's claims that the USITC acted inconsistently with Article 4.2(b), second sentence, of the Agreement on Safeguards by (i) improperly dismissing alleged missteps by the domestic industry, and (ii) improperly dismissing non-import factors that allegedly caused prices of CSPV products to decline and failing to satisfy the non-attribution requirement in respect of the injury caused by these factors.

7.288. Since we reject China's claim that the USITC improperly dismissed non-import factors that allegedly caused prices of CSPV products to decline as "other" factors causing injury to the domestic industry, we also reject China's claim that the USITC was required to conduct a cumulative assessment of these factors.

7.289. Relatedly, since China has not demonstrated that the USITC improperly dismissed "other" factors allegedly causing injury to the domestic industry, we do not consider it necessary to resolve the disagreements between the parties as to (i) the degree of discretion the competent authorities enjoy in discharging their non-attribution obligation under Article 4.2(b), second sentence, of the Agreement on Safeguards; and (ii) whether the USITC's application of the "substantial cause" test sufficiently discharged the United States' obligations under Article 4.2(b), second sentence, of the Agreement on Safeguards.

### **7.5 The USITC's treatment of confidential information**

#### **7.5.1 Applicable legal requirements of Article 3 of the Agreement on Safeguards**

7.290. Article 3 of the Agreement on Safeguards ("Investigation") provides for the following:

1. A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

2. Any information which is by nature confidential or which is provided on a confidential basis shall, upon cause being shown, be treated as such by the competent authorities. Such information shall not be disclosed without permission of the party submitting it. Parties providing confidential information may be requested to furnish non-confidential summaries thereof or, if such parties indicate that such information cannot be summarized, the reasons why a summary cannot be provided. However, if the competent authorities find that a request for confidentiality is not warranted and if the party concerned is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.

7.291. Accordingly, Article 3 establishes certain procedural rules that must be followed before applying a safeguard measure. Specifically, Article 3.1, first sentence, establishes that a Member may only apply a safeguard measure following an investigation conducted by the competent authorities of that Member. That investigation must include, according to Article 3.1, second sentence, "reasonable public notice to all interested parties and public hearings or other appropriate

means in which importers, exporters and other interested parties could present evidence and their views". Moreover, Article 3.1, third sentence, requires the competent authorities to publish a report that sets forth "findings and reasoned conclusions reached on all pertinent issues of fact and law".

7.292. Article 3.2 mandates the protection of confidential information received by the competent authorities during the investigation. Article 3.2, third sentence, also permits the competent authorities to request non-confidential summaries from the parties providing confidential information.

## **7.5.2 Whether the USITC failed to provide sufficient non-confidential summaries of confidential information to allow for interested parties to present a meaningful defence**

### **7.5.2.1 Introduction**

7.293. China contends that the USITC failed to provide sufficient non-confidential summaries of confidential information to allow for interested parties to present a meaningful defence, and therefore acted inconsistently with Article 3 of the Agreement on Safeguards. In this regard, China argues that both the procedure followed by the USITC in providing non-confidential summaries of confidential information to interested parties, and the actual content of the non-confidential summaries in the USITC final report and USITC final staff report were inconsistent with Article 3 of the Agreement on Safeguards.<sup>641</sup>

7.294. For its part, the United States argues that China bases its claim on an incorrect understanding of relevant obligations under Article 3 of the Agreement on Safeguards.<sup>642</sup> In addition, the United States submits that the USITC went beyond the obligations under Articles 3.1 and 3.2 and provided interested parties with ample opportunity to present their evidence and views.<sup>643</sup>

7.295. Our analysis in the sections below first addresses whether China has demonstrated that the procedure followed by the USITC in providing non-confidential summaries of confidential information to interested parties was inconsistent with Article 3 of the Agreement on Safeguards (section 7.5.2.2). We then address whether China has demonstrated that the USITC, in violation of Article 3 of the Agreement on Safeguards, failed to provide sufficient non-confidential summaries of confidential information in its final report and final staff report (section 7.5.2.3).

### **7.5.2.2 The procedure followed by the USITC in providing non-confidential summaries of confidential information to interested parties**

#### **7.5.2.2.1 Factual background**

7.296. As envisaged under US law, the USITC made available all confidential information contained in the USITC prehearing and final reports and in written submissions of interested parties to authorized counsel under an administrative protective order (APO). Access to the APO is limited to attorneys who do not participate in competitive decision-making and who agree to be bound by the USITC's rules, forbidding disclosure of such information outside of the proceeding in which it is submitted.<sup>644</sup> When requested by the USITC, counsel receiving confidential information under an APO are required to "return or destroy all copies of materials released to authorized applicants pursuant to this section and all other materials containing confidential business information [(CBI)]".<sup>645</sup>

7.297. During the safeguard investigation, the USITC issued prehearing injury and remedy reports in both confidential and non-confidential versions. The confidential versions were issued to counsel under the APO. Thereafter, the non-confidential version of the prehearing injury report was publicly issued one business day before the deadline for submitting prehearing briefs to the USITC. The

<sup>641</sup> China's first written submission, para. 302, heading to section III(D)(2)(a), and heading to section III(D)(2)(b).

<sup>642</sup> See, e.g. United States' first written submission, para. 297.

<sup>643</sup> United States' first written submission, para. 303.

<sup>644</sup> Application for disclosure of CBI under administrative protective order, (Exhibit USA-7).

<sup>645</sup> 19 C.F.R. § 206.17, (Exhibit USA-1), p. 4.



non-confidential version of the prehearing remedy report was publicly issued two business days before the deadline for submitting prehearing briefs to the USITC.<sup>646</sup>

7.298. At the conclusion of its investigation, the USITC issued confidential versions of its final report and final staff report on 13 November 2017, and transmitted them to the President on the same day. The next day (14 November 2017), the USITC issued a notification indicating that "[a]ll authorized applicants shall return or destroy all copies of all CBI disclosed under protective order within 14 days after the completion of this investigation (e.g. after publication in the *Federal Register* of the Commission's determination) and all other materials containing such CBI such as charts or notes based on such CBI".<sup>647</sup> The USITC issued the non-confidential versions of its final report and final staff report on 20 November 2017.<sup>648</sup> This was also the deadline for parties to submit their comments on the USITC final report and final staff report to the Trade Policy Staff Committee (TPSC), which advises the President on whether to impose any safeguard measure.

#### 7.5.2.2.2 Main arguments of the parties

7.299. China argues that the USITC failed to comply with the requirements of Article 3 of the Agreement on Safeguards because it "provided non-confidential summaries to interested parties with such delay that the parties were not provided with an adequate opportunity to exercise their right to present a defence".<sup>649</sup>

7.300. First, China submits that the USITC provided non-confidential summaries of its prehearing reports to the interested parties with such delay<sup>650</sup> that they were deprived of an adequate opportunity to present a defence.<sup>651</sup>

7.301. Second, China submits that the timing of the publication of the non-confidential versions of the USITC final report and final staff report<sup>652</sup> effectively negated the interested parties' right to present evidence and views before the TPSC.<sup>653</sup> In China's view, the sequence of events surrounding the issuance of the confidential and non-confidential versions of the USITC final report and final staff report, and the deadline for submitting comments to the TPSC, effectively resulted in the interested

<sup>646</sup> China's first written submission, paras. 305-306; United States' first written submission, paras. 306-307. The USITC issued a confidential version of its prehearing injury report on 1 August 2017 and the non-confidential version on 4 August 2017; prehearing briefs for the USITC injury hearing were due on 8 August 2017. The USITC issued a confidential version of its prehearing remedy report on 11 September 2017 and the non-confidential version on 22 September 2017; prehearing briefs for the USITC remedy hearing were due on 27 September 2017.

<sup>647</sup> Notification of final date for compliance with APO CBI requirements, (Exhibit USA-9).

<sup>648</sup> China's first written submission, para. 307; United States' first written submission, para. 308.

<sup>649</sup> China's first written submission, para. 302.

<sup>650</sup> China submits that the non-confidential versions of the USITC prehearing injury and remedy reports were issued 3-10 days later than the confidential version, and only 1-2 business days prior to the deadline for prehearing briefs. (China's first written submission, paras. 305-306).

<sup>651</sup> China's second written submission, paras. 321 and 323; response to Panel question No. 29 of the first set, para. 184; and response to Panel question No. 29 of the second set, para. 298. In this regard, China submits that the obligation to publish a non-confidential summary of the competent authorities' report logically entails that the competent authorities are also required to publish non-confidential versions of intermediate documents, to the extent that they form part of their final report or are themselves documents in respect of which the interested parties have a right to present evidence and their views. (China's second written submission, paras. 310, 313, and 316. See also China's response to Panel question No. 30 of the first set, para. 188).

<sup>652</sup> China submits that the non-confidential version of the USITC final report and final staff report was published (a) a week later than the confidential version; and (b) on the same date when the interested parties were required to submit their comments on these reports to the TPSC. (China's first written submission, paras. 307-308).

<sup>653</sup> China's first written submission, paras. 307-308; second written submission, paras. 314, 321, and 323; response to Panel question No. 29 of the first set, para. 185; and response to Panel question No. 29 of the second set, para. 298. In this regard, China submits that, if sufficient time is not provided to comment on the competent authorities' report, interested parties' right to "present evidence and their views" under Article 3.1 of the Agreement on Safeguards would be rendered meaningless. China contends that its interpretation is further supported by Article 4.2(c), which requires that the competent authorities publish their report "promptly". (China's response to Panel question No. 31 of the first set, paras. 192-193; comments on the United States' response to Panel question No. 31 of the first set, para. 217).

parties not being able to reliably refer to the USITC final report and final staff report given the risk of referring to confidential information.<sup>654</sup>

7.302. Third, China submits that "[t]he USITC exacerbated its unfairness" by requiring counsel for interested parties to destroy confidential information received under the APO, including the confidential versions of the USITC final report and final staff report, before making arguments or comments to the TPSC.<sup>655</sup> For China, this requirement to destroy confidential information "effectively negated the ability of the interested parties to rely on information that could support their arguments that no measure was needed".<sup>656</sup>

7.303. In response, the United States submits that China's claims are legally and factually incorrect.

7.304. According to the United States, Article 3.1 of the Agreement on Safeguards does not require the competent authorities to prepare prehearing reports. Therefore, there can be no obligation for the competent authorities to publish a non-confidential version of such documents, let alone to do so within a specific timeframe.<sup>657</sup> For the United States, the USITC went beyond the requirements prescribed in Article 3 by providing interested parties with prehearing injury and remedy reports.<sup>658</sup>

7.305. The United States further contends that, contrary to China's view, Article 3 of the Agreement on Safeguards does not require that the competent authorities provide interested parties with an opportunity to comment on their report.<sup>659</sup> As a result, the United States takes the view that the publication of the USITC final report and final staff report marked the end of the investigation, and that commenting on these reports for the purposes of the TPSC's evaluation was a separate process not subject to the requirements of Article 3.1.<sup>660</sup> In any event, the United States maintains that China has failed to demonstrate why and how the timing of the publication of the USITC final report and final staff report interfered with the right of interested parties to properly present their "evidence and ... views".<sup>661</sup>

7.306. Finally, with respect to China's argument concerning the termination of access to confidential information, the United States submits that Article 3 neither obligates the competent authorities to provide confidential information to interested parties, nor dictates when the competent authorities

<sup>654</sup> China's first written submission, para. 308.

<sup>655</sup> See, e.g. China's first written submission, paras. 309-310; second written submission, para. 319; and response to Panel question No. 29 of the first set, para. 187.

<sup>656</sup> China's first written submission, para. 310.

<sup>657</sup> United States' first written submission, paras. 309 and 311; response to Panel question No. 30 of the first set, para. 83; comments on China's response to Panel question No. 29 of the first set, para. 169; comments on China's response to Panel question No. 30 of the first set, paras. 177-178; and second written submission, para. 191. More generally, the United States submits that the Agreement on Safeguards is not concerned with how the competent authorities reach their determinations in applying safeguard measure. (United States' response to Panel question No. 30 of the first set, para. 84 (referring to Appellate Body Report, *US – Line Pipe*, para. 158)).

<sup>658</sup> United States' first written submission, paras. 305-307 and 313; response to Panel question No. 30 of the first set, para. 85.

<sup>659</sup> United States' response to Panel question No. 31 of the first set, paras. 86-87; comments on China's response to Panel question No. 31 of the first set, para. 182; and second written submission, para. 197. According to the United States, Article 3.1, second sentence, only requires that interested parties are afforded the right "to present evidence and their views" (a) prior to the publication of the final report, and (b) in response to the evidence and arguments provided by the parties (rather than the competent authorities). (United States' response to Panel question No. 31 of the first set, para. 87; comments on China's response to Panel question No. 31 of the first set, para. 182). Moreover, the United States argues the obligation under Article 4.2(c) to publish the final report "promptly" only concerns the right of interested parties to receive a detailed analysis from the competent authorities. (United States' comments on China's response to Panel question No. 31 of the first set, para. 183).

<sup>660</sup> United States' first written submission, para. 315; comments on China's response to Panel question No. 29 of the first set, para. 171.

<sup>661</sup> United States' first written submission, para. 317. In this regard, the United States further submits that while the USITC published the non-confidential versions of its final report and final staff report on the date for initial submissions to the TPSC, interested persons also had an opportunity to make rebuttal submissions and raise issues at the TPSC hearing. In addition, the United States notes that Members had the option of referring to the non-confidential version of the USITC report during consultations under Article 12.3 of the Agreement on Safeguards. (Ibid. para. 317).

should grant or terminate such access.<sup>662</sup> The United States further argues that China has not demonstrated that the termination of access to confidential information negated the ability of the interested parties to defend their interests.<sup>663</sup>

#### 7.5.2.2.3 Evaluation of the Panel

7.307. We agree with the United States that China's claims concerning the procedure followed by the USITC in providing non-confidential summaries of confidential information to interested parties are premised on an incorrect interpretation of Article 3 of the Agreement on Safeguards.

7.308. First, China's claim concerning the timing of publication of the non-confidential versions of USITC prehearing injury and remedy reports is premised on an obligation for the competent authorities to provide such intermediate decisional documents to interested parties. However, the Agreement on Safeguards does not contain any such obligation. While the third sentence of Article 3.1 envisages the publication of a report, that report need only contain "findings and reasoned conclusions *reached* on all pertinent issues of fact and law".<sup>664</sup> There is no requirement to publish a report containing intermediate findings or conclusions. Nor does any other part of Article 3 address this issue. Because Article 3 does not require publication of intermediate decisional documents, we reject China's claim that the timing of the publication of the non-confidential versions of the USITC's prehearing injury and remedy reports was inconsistent with Article 3.<sup>665</sup>

7.309. Second, China's claim concerning the timing of the publication of the non-confidential versions of USITC final report and final staff report is premised on an obligation that the competent authorities provide interested parties with an opportunity to comment on their published report. Again, we do not consider that any such obligation exists. As China clarified, its claim is based on the second sentence of Article 3.1, which provides that interested parties should have an opportunity to present "evidence" and "views".<sup>666</sup> As an initial matter, we note that the structure of Article 3.1 suggests that interested parties should be afforded these procedural rights before publication of the report envisaged in the third sentence of Article 3.1. However, even if this were not the case, Article 3.1, second sentence, requires that the competent authorities hold public hearings "or" provide other appropriate means for interested parties to present evidence and views. The use of the disjunctive conjunction "or" signifies that when public hearings are held, as was the case in the USITC's safeguard investigation, there is no obligation to provide "other appropriate means" for interested parties to provide further input.<sup>667</sup> Accordingly, we reject China's claim that the timing of the publication of the non-confidential versions of the USITC final report and final staff report was inconsistent with Article 3.

7.310. Third, China's claim concerning the termination of access to confidential information is similarly flawed as it is premised on the existence of a requirement that the competent authorities must provide interested parties with a right to comment on the final report. However, as we have

<sup>662</sup> United States' first written submission, para. 316; second written submission, para. 203; and comments on China's response to Panel question No. 29 of the first set, para. 172.

<sup>663</sup> United States' first written submission, para. 317; comments on China's response to Panel question No. 29 of the first set, para. 173. In this context, the United States submits that the USITC released the confidential versions of its final report and final staff report to the parties' counsel one week before comments to the TPSC were due and thereafter requested to return or destroy confidential information no later than 14 days after the completion of this investigation. According to the United States, interested parties who received confidential information under the APO had an opportunity to review the final report and final staff report and direct the TPSC to certain confidential information that they considered relevant.

(United States' first written submission, paras. 317-318; comments on China's response to Panel question No. 29 of the first set, paras. 173-174). The United States notes that SEIA in fact did so. (United States' first written submission, fn 421 (referring to SEIA's posthearing remedy brief, Appendix A, (Exhibit USA-10), p. 17 and fn 14)).

<sup>664</sup> Emphasis added.

<sup>665</sup> We note that our finding on this issue generally aligns with how previous panels have addressed similar claims. For example, in *Ukraine – Passenger Cars*, the panel found that the Agreement on Safeguards does not require the competent authorities to provide substantive information to the interested parties in advance of a public hearing. (Panel Report, *Ukraine – Passenger Cars*, para. 7.423). Moreover, in *US – Steel Safeguards*, the panel found that Article 3 does not require the competent authorities to send to interested parties "draft findings" of their determination for comments prior to the publication of their report. (Panel Reports, *US – Steel Safeguards*, paras. 10.64-10.65).

<sup>666</sup> China's response to Panel question No. 29 of the first set, para. 185.

<sup>667</sup> We agree in this regard with the Panel Report, *Ukraine – Passenger Cars*, para. 7.422.

just explained, no such obligation exists. We therefore reject China's argument that the USITC acted inconsistently with Article 3 by requiring APO-authorized counsel to destroy or return confidential information.

7.311. Based on the above, we reject China's claim that the procedure followed by the USITC in providing non-confidential summaries of confidential information to interested parties was inconsistent with Article 3 of the Agreement on Safeguards.

### **7.5.2.3 The substance of non-confidential summaries of confidential information in the USITC final report and final staff report**

#### **7.5.2.3.1 Factual background**

7.312. The USITC issued both confidential and non-confidential versions of its final report and final staff report. In the non-confidential versions of its final report and final staff report, the USITC redacted or modified information that it considered "would reveal confidential operations of individual concerns".<sup>668</sup>

#### **7.5.2.3.2 Main arguments of the parties**

7.313. Relying on previous DSB reports, China argues that a harmonious interpretation of Articles 3.1 and 3.2 of the Agreement on Safeguards requires that the competent authorities publish non-confidential summaries of the confidential data relied upon in their report so that interested parties can exercise their right to present a defence.<sup>669</sup> China also submits that, when relying on confidential information in their findings, the competent authorities are required to "characterize[] the confidential information as much as possible without compromising the confidential nature of the information, ideally being as creative as possible in trying to provide the essence of the confidential information".<sup>670</sup> Based on this standard, China argues that the actual non-confidential summaries produced by the USITC did not satisfy the requirements of Article 3 because they did not permit the interested parties to reasonably present a defence.<sup>671</sup> As support for its position, China refers to certain pages in the USITC final staff report<sup>672</sup> and the USITC's serious injury determination in its final report<sup>673</sup>, as examples of the substantive deficiencies of the non-confidential versions of these reports.<sup>674</sup>

7.314. The United States advances that China's arguments fail for several reasons. As a matter of law, the United States contends that (a) Article 3 does not require the competent authorities to provide non-confidential summaries of confidential information relied upon in their final report<sup>675</sup>; and (b) the alleged "harmonious interpretation" of Articles 3.1 and 3.2 does not establish any such obligation.<sup>676</sup> In the United States' view, "the relevant obligation is for the competent authorities' report to 'set[] forth their findings and reasoned conclusions reached on all pertinent

<sup>668</sup> USITC final report, (Exhibit CHN-2), p. i; USITC final staff report, (Exhibit CHN-3), para. iv.

<sup>669</sup> China's first written submission, paras. 297-301 (referring to Panel Reports, *US – Steel Safeguards*, paras. 10.274-10.276; and *US – Wheat Gluten*, para. 8.23); second written submission, para. 308; and response to Panel question No. 31 of the second set, para. 304. China also argues that a harmonious interpretation of Articles 3.1, 3.2, and 4.2(c) of the Agreement on Safeguards required the USITC to publish a non-confidential summary of the USITC final report. (China's second written submission, para. 315; response to Panel question No. 32 of the first set, para. 194, comments on the United States' response to Panel question No. 33 of the first set, para. 222; and response to Panel question No. 31 of the second set, para. 307). In addition, China argues that (i) Article 3.1 and (ii) Article 3.2 of the Agreement on Safeguards contain such an obligation. (China's first written submission, paras. 294 and 312).

<sup>670</sup> China's second written submission, para. 317; first written submission, paras. 297-300; and opening statement at the first meeting of the Panel, para. 99.

<sup>671</sup> China's first written submission, para. 302; second written submission, paras. 318 and 320.

<sup>672</sup> China's first written submission, para. 314; opening statement at the first meeting of the Panel, para. 100.

<sup>673</sup> China's first written submission, para. 315.

<sup>674</sup> China's first written submission, para. 316; response to Panel question No. 59 of the third set, para. 168.

<sup>675</sup> United States' first written submission, paras. 297 and 319; second written submission, para. 201; response to Panel question No. 33 of the first set, para. 88; and comments on China's response to Panel question No. 59 of the third set, para. 94.

<sup>676</sup> United States' comments on China's response to Panel question No. 32 of the first set, para. 184.

issues of fact and law".<sup>677</sup> As a matter of fact, the United States argues that the non-confidential versions of the USITC final report and final staff report contain the USITC's findings and reasoned conclusions.<sup>678</sup> It further submits that China's examples of redacted or omitted confidential information do not demonstrate that the USITC final report and final staff report fail to "set[] forth their findings and reasoned conclusions reached on all pertinent issues of fact and law".<sup>679</sup>

### 7.5.2.3.3 Evaluation of the Panel

7.315. As a preliminary matter, we note that a measure of ambiguity exists concerning the legal basis of China's claim. As support for its claim, China has inconsistently referred to Article 3.1<sup>680</sup>, Article 3.2<sup>681</sup>, a harmonious reading of Articles 3.1 and 3.2<sup>682</sup>, and a harmonious reading of Articles 3.1, 3.2, and 4.2(c).<sup>683</sup> Regardless of this ambiguity, we do not agree with China that the USITC was required to provide "non-confidential summaries" of the confidential information relied upon in its final report and final staff report.

7.316. In this regard, we recall that Article 3.1 of the Agreement on Safeguards requires that the competent authorities "publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law". Moreover, Article 3.2 prohibits the competent authorities from disclosing confidential information submitted by the interested parties without their permission. Article 3.2 also allows – but does not require – the competent authorities to request that the interested parties furnish "non-confidential summaries" of confidential information. In cases where the competent authorities are required to redact certain confidential information from the non-confidential version of their report to meet their obligations under Article 3.2, they may elect to include "non-confidential summaries" of the confidential information when presenting their "findings and reasoned conclusions". However, the text of Article 3 does not require them to do so. Nor does the mere absence of "non-confidential summaries" in the report mean that the competent authorities failed to publish a report "setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law".<sup>684</sup>

7.317. In this context, we agree with the United States that China's claim is premised on an incorrect interpretation of Article 3 of the Agreement on Safeguards. We also agree with the United States that China has not demonstrated that the non-confidential versions of the USITC final report and final staff report suffer from any inadequacy resulting from the redaction of confidential information. While China complains that certain of the USITC's redactions were overbroad or

<sup>677</sup> United States' first written submission, paras. 297 and 319. According to the United States, the presence or absence of summarized confidential information is not dispositive, as the competent authorities' compliance with the obligation to provide "findings and reasoned conclusions" is a substantive question. (United States' comments on China's response to Panel question No. 32 of the first set, para. 184).

<sup>678</sup> United States' first written submission, para. 319.

<sup>679</sup> United States' first written submission, paras. 297 and 319.

<sup>680</sup> See, e.g. China's first written submission, para. 294.

<sup>681</sup> See, e.g. China's first written submission, para. 312; and response to Panel question No. 29 of the first set, para. 183.

<sup>682</sup> See, e.g. China's first written submission, paras. 297-300; second written submission, para. 308; and response to Panel question No. 31 of the second set, para. 304.

<sup>683</sup> See, e.g. China's second written submission, para. 315; response to Panel question No. 32 of the first set, para. 194; comments on the United States' response to Panel question No. 33 of the first set, para. 222; and response to Panel question No. 31 of the second set, para. 307.

<sup>684</sup> In this context, we do not find China's references to the panel reports in *US – Steel Safeguards* persuasive to the extent they promulgate a general rule that the competent authorities must, to the fullest extent possible, provide non-confidential summaries of all confidential information referenced in their final report. (Panel Reports, *US – Steel Safeguards*, paras. 10.274-10.275). In particular, we do not consider that the text of Article 3.1 supports an affirmative requirement for the competent authorities to explain their findings "to the fullest extent possible without disclosing confidential information" or an affirmative requirement to present confidential data in a modified form (e.g. aggregation or indexing) that protects confidentiality. We similarly do not consider that, in order to withhold (and not summarize or index) confidential data, Article 3.1 affirmatively requires the competent authorities to explain "why there was no possibility of presenting any facts in a manner consistent with the obligation of protecting confidential information". (Ibid. para. 10.275 (emphasis original)).

In addition, we do not agree with China to the extent it argues that the panel in *US – Wheat Gluten* interpreted Article 3.1, third sentence, to require that the competent authorities provide a non-confidential summary of confidential information in their report. (China's first written submission, paras. 300-301; second written submission, para. 317; and comments on the United States' response to Panel question No. 30 of the first set, para. 213 (referring to Panel Report, *US – Wheat Gluten*, para. 8.23)).

inadequately summarized with non-confidential information<sup>685</sup>, it does not explain how these redactions meant that the USITC final report and final staff report failed to set forth "findings and reasoned conclusions reached on all pertinent issues of fact and law".

7.318. Based on the above, we reject China's claim that the USITC, in violation of Article 3 of the Agreement on Safeguards, failed to provide sufficient non-confidential summaries of confidential information in its final report and final staff report.

## **8 CONCLUSIONS AND RECOMMENDATION**

8.1. For the reasons set forth in this Report, the Panel finds that China has failed to demonstrate that the United States acted inconsistently with:

- a. Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards by failing to establish, prior to the application of the measures, that the increases in imports were the result of "unforeseen developments" and were the "effect of obligations incurred" under the GATT 1994 by the United States;
- b. Articles 2.1, 3.1, and 4.2(b) of the Agreement on Safeguards by failing to establish the required "causal link" between the increased imports and the serious injury found to exist;
- c. Articles 2.1, 3.1, and 4.2(b) of the Agreement on Safeguards by failing to ensure that injury caused by other factors was not attributed to increased imports; and
- d. Articles 3.1 and 3.2 of the Agreement on Safeguards by providing non-confidential summaries to interested parties with such delay that the parties were not provided with an adequate opportunity to exercise their right to present a defence, and because the actual public summaries were not sufficient so as to permit an interested party to reasonably present a defence.

8.2. In light of these findings, the Panel makes no recommendation to the DSB pursuant to Article 19.1 of the DSU.

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<sup>685</sup> China's first written submission, paras. 313-316; second written submission, para. 318; and response to Panel question No. 59 of the third set, para. 168.