WORLD TRADE ORGANIZATION

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

REPORT OF THE PANEL

*Addendum*

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS562/R.

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# ANNEX A

## PANEL DOCUMENTS

## ANNEX A-1

### WORKING PROCEDURES OF THE PANEL

**Adopted on 20 December 2019**

**General**

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.

(2) The Panel reserves the right to modify these procedures, as well as any additional working procedures, as necessary, after consultation with the parties.

**Confidentiality**

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. Non-confidential summaries shall be submitted no later than ten days after the written submission in question is presented to the Panel, unless a different due date is established by the Panel upon written request of a party showing good cause.

(4) In the event business confidential information (BCI) is submitted, the parties and third parties shall treat BCI in accordance with procedures set forth in Additional Working Procedures of the Panel Concerning Business Confidential Information.

**Submissions**

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

(2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

(3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

**Preliminary rulings**

4. (1) If the United States considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or China's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

a. The United States shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. China shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

d. Any request for such a preliminary ruling by the United States before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be shared with all third parties.

(2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

**Evidence**

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.

7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by China should be numbered CHN-1, CHN-2, etc. Exhibits submitted by the United States should be numbered USA-1, USA-2, etc. If the last exhibit in connection with the first submission was numbered CHN-5, the first exhibit in connection with the next submission thus would be numbered CHN-6. If a party withdraws an exhibit or leaves one or more exhibits intentionally blank, it should indicate this on the cover page that provides the number of the blank exhibit.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit along with an indication of the date that it was accessed.

**Editorial Guide**

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

**Questions**

9. The Panel may pose questions to the parties and third parties at any time, including:

a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.

b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

**Substantive meetings**

10. The Panel shall meet in closed session.

11. The parties shall be present at the meetings only when invited by the Panel to appear before it.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.

14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

15. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite China to make an opening statement to present its case first . Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters before taking the floor.

b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to not more than [75] minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 3 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.

c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

d. The Panel may subsequently pose questions to the parties.

e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with China presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel before the end of the meeting.

16. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that the United States shall be given the opportunity to present its oral statement first. If the United States chooses not to avail itself of that right, China shall present its opening statement first, followed by the United States. The party that presented its opening statement first shall present its closing statement first.

**Third party session**

17. Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

18. Each third party shall indicate to the Panel whether it intends to make an oral statement during the third-party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days before the third-party session of the meeting with the Panel.

19. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

20. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

21. The third-party session shall be conducted as follows:

a. All parties and third parties may be present during the entirety of this session.

b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters before taking the floor.

c. Each third party should limit the duration of its statement to 15 minutes, and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.

d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

e. The Panel may subsequently pose questions to any third party.

f. Following the third-party session:

   i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

   ii. Each party may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

   iii. The Panel may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

   iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel before the end of the meeting.

**Descriptive part and executive summaries**

22. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

23. Each party shall submit a single integrated executive summary of the facts and arguments as presented to the Panel in its written submissions and oral statements in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions.

24. Each integrated executive summary shall be limited to 30 pages.

25. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

26. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission and/or oral statement does not exceed six pages in total, this shall serve as the executive summary of that third party's arguments unless that third party indicates that it does not

wish for the submission and/or oral statement to serve as its executive summary, in which case it shall submit a separate executive summary.

**Interim review**

27. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

28. Each party may submit written comments on the other party's written request for review. Such written comments shall be limited to the other party's written request for review and shall be submitted in accordance with the timetable adopted by the Panel.

**Interim and Final Report**

29. The interim report, as well as the final report before its official circulation, shall be kept strictly confidential and shall not be disclosed.

**Service of documents**

30. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:

a. Each party and third party shall submit all documents to the Panel by submitting them with the DS Registry (office No. 2047).

b. Each party and third party shall submit [1] paper copy of its submissions and [1] paper copy of its Exhibits to the Panel by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The DS Registrar shall stamp the documents with the date and time of submission. The paper version submitted to the DS Registry shall constitute the official version for the purposes of submission deadlines and the record of the dispute. If an exhibit is in a format that is impractical to submit as a paper copy, then the party may submit such exhibit in electronic format (email or on a CD-ROM or DVD). In this case, the cover page of the exhibit should indicate that the exhibit is only available in electronic format.

c. Each party and third party shall also send an email to the DS Registry, at the same time that it submits the paper versions, attaching an electronic copy of all documents that it submits to the Panel, preferably in both Microsoft Word and PDF format. All such emails to the Panel shall be addressed to DSRegistry@wto.org, and copied to other WTO Secretariat staff whose email addresses have been provided to the parties during the proceeding. If it is not possible to attach all the Exhibits to one email, the submitting party or third party shall provide the DS Registry with four copies of the Exhibits on CD-ROMs or DVDs.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve any submissions in advance of the first substantive meeting with the Panel directly on the third parties. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may serve its documents on another party or third party by email or other electronic format acceptable to the recipient without having to serve a paper copy, unless the recipient party or third party has requested a paper copy at least five working days before their filing. Each party and third party shall confirm, in writing, that copies have been served on the parties and third parties, as appropriate, at the time it provides each document to the Panel.

e. Each party and third party shall submit its documents with the DS Registry and serve copies on the other party (and third parties if appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.

f. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the Interim Report and the Final Report.

**Correction of clerical errors in submissions**

31. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

## ANNEX A-2

### ADDITIONAL WORKING PROCEDURES OF THE PANEL ON BUSINESS CONFIDENTIAL INFORMATION

**Adopted on 20 December 2019**

1. For the purpose of this proceeding, business confidential information ("BCI") is defined as any information that has been designated as such by a party submitting the information to the Panel. The parties shall only designate as BCI information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information. BCI may include information that was previously treated by the United States International Trade Commission ("USITC") as confidential in the course of the safeguard proceedings at issue in this dispute. However, these procedures do not apply to information treated as confidential in the course of the specific safeguard proceedings at issue in this dispute, if the entity that provided the information agrees in writing to make it publicly available.

2. No person may have access to BCI except a Panelist, a member of the Secretariat assisting the Panel, an employee of a party or a third party, or an outside advisor to a party or a third party for the purposes of this dispute. However, an outside advisor to a party or a third party is not permitted to access BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the proceeding[s] at issue in this dispute, or an officer or employee of an association of such enterprises.

3. When third parties receive written submissions pursuant to the Working Procedures, the third parties shall receive a version of such written submissions and any exhibits with BCI redacted. The BCI-redacted versions of written submissions and exhibits received by third parties shall be sufficient to convey a reasonable understanding of the nature of the information at issue.

4. A third party may request access to the BCI version of a BCI-redacted written submission or exhibit received pursuant to the Working Procedures. The Panel, after consulting the parties, shall decide whether to grant access to such BCI, taking into consideration the sensitivity of the information and the need for the third party to see the information for the purpose of participating effectively in the Panel proceedings. Any such request shall include a list of the third party's representatives and outside advisors who would like to review the BCI. If granted, the third party's access to the non-redacted version of a written submission or exhibit containing BCI will take place on the premises of the WTO Secretariat, unless good cause is shown for an alternative arrangement.

5. A person having access to BCI shall treat it as confidential, i.e., shall not disclose that information other than to those persons authorized to have access to it pursuant to these procedures. Each party and third party is responsible for ensuring that its employees and outside advisors comply with these procedures. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose. All documents and electronic storage media containing BCI shall be stored in such a manner as to prevent unauthorized access to such information.

6. A party submitting BCI shall mark the cover and/or first page of the document containing BCI, to indicate the presence of such information. The first page or cover of the document shall state "Contains Business Confidential Information on pages xxxxxx" at the top of the page. The specific information in question shall be placed between double square brackets, as follows: [[xx,xxx.xx]]. A party submitting BCI in the form of, or as part of, an exhibit shall, in addition to the above, indicate that it contains BCI by putting "BCI" next to the exhibit number (e.g. Exhibit CHN-1 (BCI), Exhibit USA-1 (BCI)).

7. When BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".

8. When a party submits a document containing BCI to the Panel, the other party and third parties, when referring to that BCI in its documents, including written submissions, and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked as described in paragraph 6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it, that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 6.

9. If a party considers that information submitted by the other party or a third party should have been designated as BCI and objects to such submission without BCI designation, it shall promptly bring this objection to the attention of the Panel and the other party or third party, together with the reasons for the objection. Similarly, if a party considers that the other party or a third party submitted information designated as BCI information which should not be so designated, it shall promptly bring this objection to the attention of the Panel and the other party or third party, together with the reasons for the objection. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings on the basis of the criteria set out in paragraph 1.

10. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any BCI.

11. Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded by the WTO Secretariat to the Appellate Body in the event of an appeal of the Report of the Panel, provided that the Appellate Body confirms that it will not disclose BCI in its report, or in any other way, to persons not authorized under these procedures to have access to BCI, other than members of the Appellate Body or a member of the Secretariat assisting the Appellate Body.

## ANNEX A-3

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING SUBSTANTIVE MEETINGS CONDUCTED VIA CISCO WEBEX

**Adopted on 9 September 2020**

**General**

1. These additional Working Procedures set out terms for holding a substantive meeting with the Panel via Cisco WebEx Events.

**Definitions**

2. For the purposes of these additional Working Procedures:

**"DORA"** means the Disputes Online Registry Application.

**"Host"** means the designated person within the WTO Secretariat responsible for the management of the virtual meeting.

**"Participant"** means any authorized person attending the virtual meeting, either remotely or from the designated room at the WTO premises, including the Members of the Panel, the WTO Secretariat staff involved in the dispute and the organization of the virtual meeting, and the parties' and third parties' delegations.

**"Platform"** means the Cisco WebEx Events platform.

**Equipment and technical requirements**

3. Each party and third party shall be responsible for ensuring that the members of its delegation connecting to the virtual meeting remotely join the virtual meeting and meet the minimum equipment and technical requirements for the effective conduct of the virtual meeting.

4. To the extent possible, each party and third party shall ensure that each member of its delegation connecting to the virtual meeting remotely:

(1) Uses a high-speed internet connection;

(2) Accesses the virtual meeting via desktop or laptop computer rather than by smartphone or tablet;

(3) Ensures that the devices they use are adequately charged and that power cables or back-up batteries are available;

(4) Ensures that their microphone provides sufficient amplification and clarity;

(5) Ensures that their camera creates a sufficiently clear image;

(6) Eliminates any background noise; and

(7) Speaks slowly in their statements and interventions.

**Technical support**

5. (1) The host will assist participants in planning, testing and conducting the virtual meeting and provide participants with technical support pertaining to the platform and its functionality.

(2) In light of the limitations of remote assistance, each party and third party shall be responsible for its own technical support pertaining to its computer systems and networks.

**Pre-meeting**

Registration

6. Each party and third party shall provide to the Panel a complete list of the members of its delegation no later than 5:00 p.m. (Geneva time) 2 working days before the first day of the virtual meeting. Such list shall include all members of each party's and third party's delegation, and, to the extent possible, shall indicate whether they will be participating in the virtual meeting remotely or from the designated room at the WTO premises.

Advance testing

7. In advance of the virtual meeting, each party and third party shall regularly test the platform on the devices that it intends on using to connect to the virtual meeting.

8. Before the virtual meeting, the Secretariat will hold individual test sessions with each party and third party and a joint test session with all participants. Such test sessions will seek to reflect, as far as possible, the conditions of the proposed virtual meeting. The parties and third parties should make themselves available for the test sessions.

**Confidentiality and security**

9. The virtual meeting shall be confidential.

10. Each party and third party shall follow any security and confidentiality protocols and guidelines set by the Panel in advance of the virtual meeting.

11. The participants shall connect to the virtual meeting through a secure internet connection and shall avoid the use of an open or public internet connection.

**Conduct of the virtual meeting**

Recording

12. The virtual meeting will be recorded in its entirety via the platform. The recording of the virtual meeting will form part of the panel record.

13. The parties and third parties are strictly prohibited from:

(1) Recording, via audio, video or screenshot, the virtual meeting or any part thereof; and

(2) Permitting any non-authorized person to record, via audio, video or screenshot, the virtual meeting or any part thereof.

Access to the virtual meeting room

14. The participants shall access the virtual meeting room either remotely in accordance with paragraph 4 of these additional Working Procedures or from the designated room at the WTO premises.

15. (1) The host will invite the participants accessing the virtual meeting room remotely to join the virtual meeting via email.

(2) For security reasons, access to the virtual meeting will be password-protected and limited to participants. Participants shall not forward or share the virtual meeting link or password to unauthorized persons.

(3) Each party and third party shall ensure that only participants from its delegation are present at the virtual meeting.

16. (1) The virtual meeting room will be accessible 60 minutes in advance of the scheduled start time of the virtual meeting.

(2) In order to ensure that the virtual meeting will start as scheduled, participants accessing the virtual meeting remotely must login to the platform at least 30 minutes in advance of the scheduled start time of the virtual meeting.

(3) Participants accessing the virtual meeting remotely will be placed in a virtual lobby where they will remain until the Panel is ready to start the virtual meeting, at which time the host will admit them to the virtual meeting.

Document sharing

17. Any participant wishing to share a document with the other participants during the virtual meeting shall do so by uploading it to DORA. Any such document may be shared with other participants attending the virtual meeting.

Communication breakdown

18. The parties and third parties shall immediately notify the Panel of any technical or connectivity issues affecting the participation of their delegation, or a member of their delegation, in the virtual meeting. To do so, the party or third party that experiences the technical or connectivity issue shall:

(1) If possible, immediately intervene at the virtual meeting and briefly state the nature of the issue experienced; or

(2) If doing so is not possible, immediately contact the host and explain the nature of the issue experienced. The host can be contacted via the platform, by sending an email to leslie.stephenson@wto.org, or by calling at +41227396148.

19. The Panel will pause the virtual meeting until the technical or connectivity issue is resolved, unless the affected party or third party agrees that the virtual meeting can proceed without the issue being resolved.

Participation

20. (1) If a participant attending the virtual meeting remotely wishes to take the floor at the virtual meeting, the participant should use the "raise a hand" function in the platform, so that the Panel can give the floor to the participant and allow the participant to unmute their microphone and turn their camera on.

(2) If a participant attending the virtual meeting from the WTO premises wishes to take the floor, the participant should raise their placard/flag in the designated room at the WTO premises, so that the host can register the request on the virtual meeting platform and the Panel can give the floor to the participant. When the participant takes the floor, the camera will automatically move to the participant, once their microphone is turned on.

**Structure of the virtual meeting**

21. The first substantive meeting of the Panel with the parties will be virtual meeting conducted with the following structure:

(1) The Panel will invite China to make an opening statement to present its case first. Subsequently, the Panel will invite the United States to present its point of view. Before each party takes the floor, the party shall provide the Panel and other participants at the virtual meeting with a provisional written version of its statement by uploading it to DORA.

(2) Each party should avoid lengthy repetition of the arguments in its submissions. Each party shall limit the duration of its opening statement to no more than 90 minutes.

(3) The Panel will afford each party an opportunity to present a closing statement, with China presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants with a provisional written version of its closing statement, if one is available, by uploading it to DORA. Each party shall limit the duration of its closing statement to no more than 30 minutes.

(4) Following the meeting:

a. Each party shall submit the final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the virtual meeting. By the same deadline, each party shall also submit the final written version of any prepared closing statement that it delivered at the virtual meeting.

b. Each party may send in writing, no later than 5.00 p.m. (Geneva time) on the first working day following the virtual meeting, any questions to the other party to which it wishes to receive a response in writing.

c. The Panel will send in writing, no later than 5.00 p.m. (Geneva time) on the first working day following the virtual meeting, any questions to the parties to which it wishes to receive a response in writing.

d. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the timeframe established by the Panel before the end of the meeting.

22. The format and structure of the first substantive meeting is without prejudice to how the Panel decides to conduct subsequent substantive meetings, if any.

**Structure of the third-party session**

23. The third-party session will be conducted as follows:

(1) All parties and third parties may be present during the entirety of this session.

(2) The Panel will hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement by uploading it on DORA at the start of the third-party session.

(3) Each third party shall limit the duration of its statement to 15 minutes, and avoid repetition of the arguments already in its submission.

(4) Following the third-party session:

a. Each third party shall submit the final written version of its oral statement no later than 5.00 p.m. (Geneva time) on the first working day following the third-party session.

b. Each party may send in writing, no later than 5.00 p.m. (Geneva time) on the first working day following the virtual meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

c. The Panel may send in writing, no later than 5.00 p.m. (Geneva time) on the first working day following the virtual meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

d. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel before the end of the virtual meeting.

**Relationship with the Working Procedures of the Panel adopted on 20 December 2019**

24. These additional Working Procedures complement the Working Procedures of the Panel adopted on 20 December 2019. To the extent that these additional Working Procedures conflict with the Working Procedures of the Panel, these additional Working Procedures shall prevail.

## ANNEX A-4

### ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING SUBSTANTIVE MEETINGS CONDUCTED VIA CISCO WEBEX – SECOND SUBSTANTIVE MEETING UPDATE

**Adopted on 3 December 2020**

**General**

1. These additional Working Procedures set out terms for holding a substantive meeting with the Panel via Cisco WebEx Events.

**Definitions**

2. For the purposes of these additional Working Procedures:

**"DORA"** means the Disputes Online Registry Application.

**"Host"** means the designated person within the WTO Secretariat responsible for the management of the virtual meeting.

**"Participant"** means any authorized person attending the virtual meeting, either remotely or from the designated room at the WTO premises, including the Members of the Panel, the WTO Secretariat staff involved in the dispute and the organization of the virtual meeting, and the parties' delegations.

**"Platform"** means the Cisco WebEx Events platform.

**Equipment and technical requirements**

3. Each party shall be responsible for ensuring that the members of its delegation connecting to the virtual meeting remotely join the virtual meeting and meet the minimum equipment and technical requirements for the effective conduct of the virtual meeting.

4. To the extent possible, each party shall ensure that each member of its delegation connecting to the virtual meeting remotely:

(1) Uses a high-speed internet connection;

(2) Accesses the virtual meeting via desktop or laptop computer rather than by smartphone or tablet;

(3) Ensures that the devices they use are adequately charged and that power cables or back-up batteries are available;

(4) Ensures that their microphone provides sufficient amplification and clarity;

(5) Ensures that their camera creates a sufficiently clear image;

(6) Eliminates any background noise; and

(7) Speaks slowly in their statements and interventions.

**Technical support**

5. (1) The host will assist participants in planning, testing and conducting the virtual meeting and provide participants with technical support pertaining to the platform and its functionality.

(2) In light of the limitations of remote assistance, each party shall be responsible for its own technical support pertaining to its computer systems and networks.

**Pre-meeting**

Registration

6. Each party shall provide to the Panel a complete list of the members of its delegation no later than 5:00 p.m. (Geneva time) 1 working day before the first day of the virtual meeting. Such list shall include all members of each party's delegation, and, to the extent possible, shall indicate whether they will be participating in the virtual meeting remotely or from the designated room at the WTO premises.

Advance testing

7. In advance of the virtual meeting, each party shall regularly test the platform on the devices that it intends on using to connect to the virtual meeting.

8. Before the virtual meeting, the Secretariat will hold individual test sessions with each party. Such test sessions will seek to reflect, as far as possible, the conditions of the proposed virtual meeting. The parties should make themselves available for the test sessions.

**Confidentiality and security**

9. The virtual meeting shall be confidential.

10. Each party shall follow any security and confidentiality protocols and guidelines set by the Panel in advance of the virtual meeting.

11. The participants shall connect to the virtual meeting through a secure internet connection and shall avoid the use of an open or public internet connection.

**Conduct of the virtual meeting**

Recording

12. The virtual meeting will be recorded in its entirety via the platform. The recording of the virtual meeting will form part of the panel record.

13. The parties are strictly prohibited from:

(1) Recording, via audio, video or screenshot, the virtual meeting or any part thereof; and

(2) Permitting any non-authorized person to record, via audio, video or screenshot, the virtual meeting or any part thereof.

Access to the virtual meeting room

14. The participants shall access the virtual meeting room either remotely in accordance with paragraph 4 of these additional Working Procedures or from the designated room at the WTO premises.

15. (1) The host will invite the participants accessing the virtual meeting room remotely to join the virtual meeting via email.

(2) For security reasons, access to the virtual meeting will be password-protected and limited to participants. Participants shall not forward or share the virtual meeting link or password to unauthorized persons.

(3) Each party shall ensure that only participants from its delegation are present at the virtual meeting.

16. (1) The virtual meeting room will be accessible 60 minutes in advance of the scheduled start time of the virtual meeting.

(2) In order to ensure that the virtual meeting will start as scheduled, participants accessing the virtual meeting remotely must login to the platform at least 30 minutes in advance of the scheduled start time of the virtual meeting.

(3) Participants accessing the virtual meeting remotely will be placed in a virtual lobby where they will remain until the Panel is ready to start the virtual meeting, at which time the host will admit them to the virtual meeting.

Document sharing

17. Any participant wishing to share a document with the other participants during the virtual meeting shall do so by uploading it to DORA.

Communication breakdown

18. The parties shall immediately notify the Panel of any technical or connectivity issues affecting the participation of their delegation, or a member of their delegation, in the virtual meeting. To do so, the party that experiences the technical or connectivity issue shall:

(1) If possible, immediately intervene at the virtual meeting and briefly state the nature of the issue experienced; or

(2) If doing so is not possible, immediately contact the host and explain the nature of the issue experienced. The host can be contacted via the platform, by sending an email to olga.falguerasalamo@wto.org, or by calling at +41227396746.

19. The Panel will pause the virtual meeting until the technical or connectivity issue is resolved, unless the affected party agrees that the virtual meeting can proceed without the issue being resolved.

Participation

20. (1) If a participant attending the virtual meeting remotely wishes to take the floor at the virtual meeting, the participant should use "raise a hand" function in the platform, so that the Panel can give the floor to the participant and allow the participant to unmute their microphone and turn their camera on.

(2) If a participant attending the virtual meeting from the WTO premises wishes to take the floor at the virtual meeting, the participant should raise their placard/flag in the designated room at the WTO premises, so that the host can register the request on the virtual meeting platform so that the Panel can give them the floor. When the participant takes the floor, the camera will automatically move to the participant, once their microphone is turned on.

**Structure of the virtual meeting**

21. The second substantive meeting of the Panel with the parties will be a virtual meeting conducted with the following structure:

(1) On the first meeting day, the Panel will invite the United States to make an opening statement first. If the United States chooses not to avail itself of that right, China shall present its opening statement first, followed by the United States. Before each party takes the floor, the party shall provide the Panel and other participants at the virtual meeting with a provisional written version of its statement by uploading it to DORA.

(2) Each party should avoid lengthy repetition of the arguments in its submissions. Each party shall limit the duration of its opening statement to no more than 60 minutes.

(3) On the second meeting day and, to the extent necessary, on the third meeting day, the Panel will pose questions to the parties, which it will communicate to the parties in advance.

(4) On the third meeting day, the Panel shall afford each party an opportunity to present a brief closing statement. The party that presented its opening statement first shall present its closing statement first. Before each party takes the floor, it shall provide the Panel and other participants with a provisional written version of its closing statement, if one is available, by uploading it to DORA. Each party shall limit the duration of its closing statement to no more than 10 minutes.

(5) Following the meeting:

a. Each party shall submit the final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the second working day following the virtual meeting. By the same deadline, each party shall also submit the final written version of any prepared closing statement that it delivered at the virtual meeting.

b. Each party may send in writing, no later than 5.00 p.m. (Geneva time) on the second working day following the virtual meeting, any questions to the other party to which it wishes to receive a response in writing.

c. The Panel will send in writing, no later than 5.00 p.m. (Geneva time) on the second working day following the virtual meeting, any questions to the parties to which it wishes to receive a response in writing.

d. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party within the timeframe established by the Panel before the end of the meeting.

**Relationship with the Working Procedures of the Panel adopted on 20 December 2019**

22. These additional Working Procedures complement the Working Procedures of the Panel adopted on 20 December 2019. To the extent that these additional Working Procedures conflict with the Working Procedures of the Panel, these additional Working Procedures shall prevail.

## ANNEX A-5

INTERIM REVIEW

### 1 INTRODUCTION

1.1. In compliance with Article 15.3 of the DSU, this Annex sets out the Panel's discussion and disposition of the requests for review made at interim review stage. As explained below, where we have found it appropriate, we have modified certain aspects of our Interim Report in light of the comments of the parties. We have also reflected the parties' corrections of typographical errors.

1.2. Due to changes resulting from our review, the numbering of footnotes in the Final Report has changed from the Interim Report. The text below refers to the footnote numbering in the Interim Report, with the footnote numbering in the Final Report in parentheses for ease of reference, if different.

1.3. Below, we first consider the request for interim review made by China, and then consider the request for interim review made by the United States.

### 2 CHINA'S REQUEST FOR INTERIM REVIEW

#### 2.1 General comments

2.1. China opens its comments on the Interim Report by arguing, in a section entitled "General comments", that the Panel erred in three general ways. First, China claims that the Panel "blurred the distinct legal requirements for imposing safeguard measures and lowered the standard that authorities must meet".[1] In doing so, China claims that the Panel "applied permissive legal standards, deviating from the covered agreements and opening the door to potential abuses of safeguard measures".[2] Second, China claims that the Panel failed to follow the Appellate Body's guidance that "panels should carefully review findings and critically test proffered explanations against the record evidence before the authorities".[3] Third, China claims that the Panel "simply espoused the US arguments citing the same sections of the USITC Final Report that the United States did, concluding without more that the USITC was correct in reaching its findings".[4] Based on this approach, China claims that the Panel "allowed itself to be lured into a subtle rewriting of the USITC's decision".[5]

2.2. In its oral statement at the interim review meeting and in its subsequent written comments, the United States claims that China's "general comments" are outside the purview of the interim review process, as they do not meet the basic requirements of a request for interim review. In this regard, the United States explains:

> Article 15 of the DSU establishes a process for review of a panel's interim report. The first sentence of Article 15.2 states that "the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions." The second sentence of Article 15.2 then sets out the right of a party to "submit a written request for the panel to review precise aspects of the interim report." The third sentence of Article 15.2 provides that, "[a]t the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments." Those "issues identified" are the "precise aspects of the interim report" referenced in the second sentence of Article 15. Consequently, per the third sentence of Article 15.2, a party is not free to raise issues at the "further meeting" beyond those identified in the written comments, and those issues must relate to precise aspects of the report. Finally, Article 15.3 provides that the final report "shall include a discussion

[1] China's request for interim review, para. 7.
[2] China's request for interim review, para. 7.
[3] China's request for interim review, para. 12.
[4] China's request for interim review, para. 16.
[5] China's request for interim review, para. 17.

> of the arguments made at the interim review stage." Thus, read as a whole, Article 15 grants a right to review of an interim report, including its findings and conclusions, but only where the party seeking review meets the requirements of Article 15.2.[6]

2.3. Accordingly, in the United States' view, "[a] party does not have the right, under Article 15.2, to seek review of a panel's interim report *generally*. A general review would not concern 'precise aspects' of the report, and so would not come within Article 15".[7] Based on this interpretation, the United States argues that, with its "general comments", China fails to request review consistent with Article 15.2 because those comments "do not contain *any* request of the Panel: that is, China has not requested the Panel to review – or make any changes to – any aspect of the interim report referred to in the 'general comments.'"[8] The United States further argues that, "even if its 'general comments' could be construed as a request, China has not identified the 'precise aspects of the interim report' for which it seeks review".[9]

2.4. In its subsequent written comments, China responds to the United States' position by advancing that it is based on a "misguided interpretation of Article 15 of the DSU" that focuses on the term "precise" and ignores "the relationship between China's general comments and China's specific comments".[10] China contends that the meaning of the term "aspects" in the second sentence of Article 15.2 provides "Members with the discretion to comment on any 'aspect' of the Interim Report, including general complaints as well as requests for edits to specific language, so long as those 'aspects' are 'precise[ly]' identified".[11] As a result, China takes the position that "the Panel is required to address its general comments, which identify various 'precise aspects', that are demonstrated through its 43 other comments citing to specific paragraphs or footnotes in the Interim Report".[12] In this regard, China explains that:

> [I]t formulated its general comments as overarching categories of mistakes incurred by the Panel, which are then reflected in other specific mistakes and omissions that China specifically requested be corrected. China's general comments thus set the stage for the more specific comments that followed.[13]

2.5. As support for its position, China refers to *US / Canada – Continued Suspension* for the proposition that, in prior disputes, "when a party decided to make general comments to the interim report which were directly connected with specific comments, the Panel decided to address the general comments as part of the review of the more specific paragraphs containing precise requests for reconsideration".[14]

2.6. We begin our assessment by recalling that the interim review stage of the dispute settlement process is governed by Article 15 of the DSU. Articles 15.2 and 15.3, which are pertinent to the present issue, provide in full:

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[6] United States' oral statement at the interim review meeting, para. 4; comments on China's request for interim review, para. 5. (fn omitted)

[7] United States' oral statement at the interim review meeting, para. 5; comments on China's request for interim review, para. 6. (emphasis original)

[8] United States' oral statement at the interim review meeting, para. 6; comments on China's request for interim review, para. 7. (emphasis original)

[9] United States' oral statement at the interim review meeting, para. 7; comments on China's request for interim review, para. 8.

[10] China's comments on the United States' request for interim review, para. 2.

[11] China's comments on the United States' request for interim review, para. 3.

[12] China's comments on the United States' request for interim review, para. 3.

[13] China's comments on the United States' request for interim review, para. 4. (fns omitted)

[14] China's comments on the United States' request for interim review, para. 8. In particular, China refers to the following paragraph in *US / Canada – Continued Suspension*:

> We agree with the reasoning of the above-mentioned panel and therefore consider that the general comments by the European Communities did not require a specific reply from the Panel. We limited our replies to the portions of the report on which specific comments, in the form of precise requests for reconsideration on specific paragraphs, had been made by the European Communities. We addressed the EC general comments as part of our review of specific paragraphs.
> (Panel Reports, *Canada – Continued Suspension,* para. 6.17; *US – Continued Suspension,* para. 6.18 (emphasis added by China))

> 2. Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, *a party may submit a written request for the panel to review precise aspects of the interim report* prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members.
>
> 3. The findings of the final panel report *shall include a discussion of the arguments made at the interim review stage*. The interim review stage shall be conducted within the time-period set out in paragraph 8 of Article 12.[15]

2.7. As such, Article 15.2 permits parties to submit written requests for review of "precise aspects of interim report", while Article 15.3 requires the panel to discuss those requests in its final report. Moreover, in the event an interim review meeting is held, Article 15.2 delimits the substance of the meeting to the issued identified in the written comments, i.e. the written requests for review of "precise aspects of the interim report".

2.8. Based on these principles, we have decided to not engage directly with China's "general comments" on the basis that they do not request the review of "precise aspects" of Interim Report.

2.9. As an initial matter, we note that the parties were asked to submit their written requests for review of "precise aspects" of the Interim Report on 9 June 2021. The parties were not granted the opportunity to revise or elaborate on their original requests for review at the interim review meeting or in their subsequent written comments. As such, the relevant question for our consideration of China's "general comments" is whether those comments, as formulated in China's submission of 9 June 2021, request the review of "precise aspects" of the Interim Report, thus satisfying the requirements of Articles 15.2 of the DSU.

2.10. In its submission of 9 June 2021, China's "general comments" allege three overarching errors in the Interim Report. With the exception of one instance[16], China does not refer to specific paragraphs of the Interim Report that it is commenting on. As a result, it is not clear from its 9 June submission which "precise aspects" of the Interim Report China is requesting that the Panel review through its "general comments". In these circumstances, we consider China's "general comments" to be insufficiently precise and therefore do not consider that we are required to directly engage with those comments in order to comply with the obligation in Article 15.3 of the DSU.[17] We consider that the requisite degree of precision is only provided in the sections of China's 9 June submission succeeding China's "general comments", when China – in its own words – "offers specific comments on discrete issues of the Interim Report".[18] Moreover, as we see it, directly engaging with China's "general comments" – which largely repeat legal theories and arguments from its previous written submissions – would effectively permit China the opportunity to relitigate issues from the panel proceedings, which is outside the limited function of the interim review stage.[19]

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[15] Emphasis added.

[16] China's request for interim review, para. 15. In this regard, we note that China claims that "[p]erhaps the most egregious example" of the Panel's failure to properly assess the USITC's findings "is when the Panel essentially admits the USITC had no record evidence establishing any link between China's government policies and the alleged unforeseen surge in imports, and yet blesses the USITC's finding on this point anyway (see para. 7.38 of the Interim Report)". In our view, China's characterization misrepresents the nature and extent of the Panel's findings in paragraphs 7.35-7.45 of the Interim Report and in particular ignores the significance of the USITC's finding that the "unforeseen developments" at issue consisted of a series of events. In this context, we explained in paragraph 7.36 that we did "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".

[17] Panel Reports, *Japan – Alcoholic Beverages II*, para. 5.2; *Australia – Salmon*, para. 7.3; *Canada – Continued Suspension*, paras. 6.16-6.17; and *US – Continued Suspension*, para. 6.18.

[18] China's request for interim review, para. 5. See also ibid. para. 19 ("China will now turn to some specific comments and suggestions regarding discrete aspects of the Interim Report").

[19] See, for example, Panel Reports, *India – Agricultural Products*, para. 6.5; and *Russia – Pigs (EU)*, paras. 6.6-6.7. We further note that the panel in *Indonesia – Iron or Steel Products* explained:

2.11. We further note that, in its subsequent written comments, China seeks to explain the connection between its "general comments" and its "specific comments".[20] Based on this connection, China argues that the Panel is required to address its "general comments" when engaging with its "specific comments".[21] However, we do not consider that China's explanations concerning the connection between its "general comments" and its "specific comments" are properly before the Panel, as they do not appear in China's submission of 9 June 2021.

2.12. Moreover, even if China's explanations were properly before the Panel, China appears to concede that its "general comments" may be addressed through its "specific comments". In this regard, we recall that China explains that its "general comments … identify various 'precise aspects'[] that are demonstrated through its 43 other comments" and that its "general comments" are formulated "as overarching categories of mistakes incurred by the Panel, which are then reflected in other specific mistakes and omissions that China specifically requested be corrected".[22] Accordingly, based on these statements, the Panel would be addressing the substantive concerns raised in China's "general comments" by addressing its "specific comments".

2.13. With that being said, we now turn to China's "specific comments", i.e. its request for the review of "precise aspects" of the Interim Report.

## 2.2 Unforeseen developments

### 2.2.1 Paragraph 7.24

2.14. Regarding paragraph 7.24, China requests that the Panel adjust the text to reflect that it is the United States that argues that "the USITC found that what was unforeseen was the scale of the effort, the speed". China further requests that the Panel delete the phrase "the USITC found" from the description of the United States' argument.[23]

2.15. In its comments, the United States objects to China's request. In its view, because the Panel is clearly summarizing the United States' position, it is unnecessary to state explicitly that it is the United States that argues "the USITC found that 'what was unforeseen was the scale of the effort, the speed".[24] The United States also claims it is unnecessary to delete the phrase "the USITC found" as that is the United States' position, which the Panel has accepted elsewhere in its report.[25]

2.16. With respect to China's first point, we have revised the text to include the clarification requested by China. With respect to China's second point, we agree with the United States that

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> It is well established that the interim review stage of a panel proceeding is intended to allow parties to "submit comments on the draft report issued by the panel, and to make requests 'for the panel to review precise aspects of the interim report'". The interim review process is not an opportunity for parties to advance arguments as to why they consider a particular 'theory' allegedly relied upon by a panel in its Interim Report to be incorrect. Neither is it a time for parties to enter into a debate about the merits of a panel's interpretation of relevant legal provisions, a fortiori when they have exchanged views on the subject matter during the course of a proceeding (as the parties have done in this dispute). Panels are not required to defend their findings and conclusions during the interim review stage. Issues of law addressed in a panel report and the legal interpretations developed by a panel may always be raised on appeal.
>
> In our view, the complainants' requests raise questions about the merits of our analysis and findings, challenging the very basis of our conclusions and, therefore, go beyond the kinds of requests that properly fall within the scope of the interim review process envisaged in Article 15.2 of the DSU. The complainants' requests in paragraphs 2.6 to 2.9 of their request for interim review do not ask us to modify any specific paragraphs of the Interim Report. In effect, the complainants ask us to reconsider our objective evaluation of, and conclusions, regarding the issues addressed in our Report.

(Panel Report, *Indonesia – Iron or Steel Products, Addendum,* Annex A-3, paras. 2.3-2.4).

[20] China's comments on the United States' request for interim review, paras. 5-9.
[21] China's comments on the United States' request for interim review, paras. 5-9.
[22] China's comments on the United States' request for interim review, paras. 3-4. (fns omitted)
[23] China's request for interim review, para. 20.
[24] United States' comments on China's request for interim review, para. 17.
[25] United States' comments on China's request for interim review, para. 18.

China's requested revision is unnecessary, given that the Panel is summarizing the United States' argument with respect to the USITC's finding.

### 2.2.2 Paragraph 7.31

2.17. Regarding paragraph 7.31, China requests that the Panel adjust the text to better reflect its argument with respect to the increased imports from third countries other than Korea and the overall relationship between alleged unforeseen developments and the increase in imports.[26]

2.18. In its comments, the United States requests that, in the event the Panel makes China's requested revision, the text should refer to "China's devised 'clear linkage' test".[27]

2.19. We have revised the text of paragraph 7.31 in line with China's request and the United States' comment.

### 2.2.3 Paragraph 7.42

2.20. Regarding paragraph 7.42, China requests that the Panel add language to footnote 105 to clarify that it refers to Korea as the most obvious example of the USITC's wrong reasoning but does not accept as undisputed the USITC's findings concerning other exporting countries. China also requests that the Panel delete language indicating that China accepts the USITC's findings on these points.[28]

2.21. In its comments, the United States objects to China's request. In its view, "China never contested any of the factual findings set forth in paragraph 7.41 above. Rather, China criticized the USITC for allegedly making 'assumptions' that the increases in exports from the countries identified came from Chinese affiliates in these other countries".[29]

2.22. We have decided not to grant China's request. In paragraphs 291-304 of its second written submission, China directly contests (a) the relationship between Chinese producers constructing factories outside China and Chinese government support[30]; and (b) the United States' "factual assertion that it was actually Chinese producers in other countries that accounted for the increased imports from that country".[31] However, the reference to uncontested findings in the first sentence of paragraph 7.42 concerns different findings of the USITC, specifically those described in paragraph 7.41. The findings referred to in paragraph 7.41 establish (i) the increase in global capacity of the six largest firms producing CSPV cells and modules in China; and (ii) the increase in share of apparent US consumption of imports from countries where Chinese affiliates added both CSPV cell and CSPV module capacity. As these findings are unchallenged in paragraphs 291-304 of China's second written submission, we consider that China has failed to show why it would be appropriate to adjust the text of paragraph 7.42 and footnote 105 in accordance with its request.

### 2.2.4 Paragraph 7.48

2.23. Regarding paragraph 7.48, China requests that the Panel add language to better reflect its argument that the USITC failed to appropriately demonstrate that imports increased "as a result … of the effect of the obligations incurred" by the United States.[32] The United States does not comment on China's request.

2.24. We have revised the text of paragraph 7.48 in line with China's request.

[26] China's request for interim review, para. 21.
[27] United States' comments on China's request for interim review, para. 19.
[28] China's request for interim review, para. 22. As support for these requests, China refers to paragraphs 291-304 of its second written submission.
[29] United States' comments on China's request for interim review, para. 20.
[30] China's second written submission, para. 291.
[31] China's second written submission, paras. 292-304.
[32] China's request for interim review, para. 23.

### 2.2.5 Paragraph 7.49

2.25. Regarding paragraph 7.49, China requests that the Panel add language to more accurately reflect its argument that the United States engages in impermissible *post hoc* rationalization in its defence of the USITC report on this issue.[33]

2.26. In its comments, the United States requests that, should the Panel decide to include China's requested revisions, the Panel also include language that clarifies it is summarizing China's argument.[34]

2.27. We have revised the text of paragraph 7.49 in line with China's request and the United States' comment.

## 2.3 Causal link

### 2.3.1 Paragraph 7.64

2.28. Regarding paragraph 7.64, China requests that the Panel use more neutral language to characterize the findings supporting the USITC's serious injury determination, specifically requesting that the Panel remove the words "significant" and "particularly" from its characterization.[35]

2.29. In its comments, the United States considers that it is appropriate to use those terms as the Panel is summarizing the USITC's serious injury findings in its report, which are unchallenged by China in the present case.[36] At the same time, the United States does not oppose the deletion of the term "significant" in one instance where it does not appear in the USITC's findings.[37]

2.30. Paragraph 7.64 appears in section 7.3.1 of the Interim Report, which sets out a general factual background to the Panel's analysis of the causal link between increased imports and serious injury. In this context, we consider that it is appropriate to use the USITC's language to describe the subsidiary findings that supported its serious injury determination, which are relevant factual background to the causal link. We have clarified the second sentence of paragraph 7.64 to reflect this. Moreover, in line with the United States' suggestion, we have deleted the term "significant" where it does not appear in the USITC's finding.

### 2.3.2 Paragraph 7.66

2.31. Regarding paragraph 7.66, China requests that the Panel insert language to make clear that China does not "wholeheartedly" accept the USITC's findings concerning product definition, increased imports, or serious injury "without reservation".[38]

2.32. In its comments, the United States considers that China's request is unnecessary, as the Panel has correctly characterized China's position.[39]

2.33. In order to provide greater clarity to China's position, we have inserted a new footnote (148) that indicates that China does not accept the existence of serious injury, even though it has not challenged the USITC's serious injury determination in these proceedings.

### 2.3.3 Paragraph 7.80

2.34. Regarding paragraph 7.80, China requests that the Panel revise the language to better reflect its argument regarding the USITC's failure to establish the existence of an overall coincidence in trends.[40] The United States does not comment on China's request.

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[33] China's request for interim review, para. 24.
[34] United States' comments on China's request for interim review, para. 21.
[35] China's request for interim review, para. 25.
[36] United States' comments on China's request for interim review, para. 23.
[37] United States' comments on China's request for interim review, para. 24.
[38] China's request for interim review, para. 26.
[39] United States' comments on China's request for interim review, para. 25.
[40] China's request for interim review, para. 27.

2.35. We have revised the text of paragraph 7.80 in line with China's request.

### 2.3.4 Paragraph 7.83

2.36. Regarding paragraph 7.83, China requests that the Panel revise the language to reflect in full China's argument concerning the legal requirements to establish an "overall coincidence" between increased imports and serious injury.[41]

2.37. In its comments, the United States criticizes China's request for conflating two of its assertions and for not accurately reflecting what China argued to the Panel.[42]

2.38. We have decided not to grant China's request. The point of paragraph 7.83 is not to fully summarize China's position concerning the legal requirements to establish an "overall coincidence" between increased imports and serious injury. Rather, the purpose of that paragraph is to address discrete aspects of China's position that the Panel has identified as being problematic. In these circumstances, we consider that the additional text suggested by China to be unnecessary.

### 2.3.5 Paragraph 7.76

2.39. Regarding paragraph 7.76, China requests that the Panel quote previous DSB reports for the proposition that "[c]ompetent authorities may not simply presume the existence of an overall coincidence but are required to 'provide sufficient explanations to justify how an overall coincidence in movements has been found'".[43]

2.40. In its comments, the United States objects to China's request. It contends that China's request "appears to represent an effort to insert China's own mistaken legal interpretations into the Panel's description of its own reasoning".[44] In any event, the United States observes that the Panel in its report "clearly understood that competent authorities are required to explain their determinations".[45]

2.41. We have decided not to grant China's request. The proposition that the competent authorities of a Member must explain relevant aspects of their determination is acknowledged and applied throughout the Interim Report (see, e.g. section 7.1.2 and paragraph 7.85). We therefore consider it unnecessary to refer to previous DSB reports for the proposition that the competent authorities must provide "sufficient explanations" to justify a finding of "overall coincidence".

### 2.3.6 Paragraph 7.86

2.42. Regarding paragraph 7.86, China requests that the Panel fully reflect its position by noting that it argued that the USITC understated the positive trends.[46]

2.43. In its comments, the United States objects to China's request on the basis that the Panel "already adequately summarizes – and addresses – China's argument that the USITC allegedly dismissed certain positive injury factors in its causation analysis in section 7.3.3.3 of the interim report".[47]

2.44. We have decided not to grant China's request. In line with the United States' objection, we note that section 7.3.3.2 of the Interim Report addresses the USITC's findings concerning the relationship between increased imports and negative factors of serious injury. As a result, we do not

[41] China's request for interim review, para. 28.
[42] United States' comments on China's request for interim review, paras. 26-27. With respect to the latter, the United States observes that China argued in its second written submission that "[i]t is incumbent on the competent authority to establish the existence of a coincidence in trends." (China's second written submission, paras. 31-32)
[43] China's request for interim review, para. 29. China refers in particular to Panel Reports, *India – Iron and Steel Products*, paras. 7.248; *US – Steel Safeguards*, paras. 10.305-10.307.
[44] United States' comments on China's request for interim review, para. 28.
[45] United States' comments on China's request for interim review, para. 28.
[46] China's request for interim review, para. 30.
[47] United States' comments on China's request for interim review, para. 29.

consider it necessary to refer to China's general position concerning positive trends in paragraph 7.86.

### 2.3.7 Paragraph 7.91

2.45. Regarding paragraph 7.91, China requests that the Panel delete the sentence indicating "by focusing on the significant growth in the utility segment, China overlooks the USITC's findings that the residential and commercial segments of the market also grew considerably during the POI". In China's view, this sentence inaccurately represents its position, as it agreed that there was growth in the residential and commercial segments.[48]

2.46. In its comments, the United States requests that the Panel retain the sentence China seeks to have deleted. To the extent that the Panel entertains China's requested change, the United States suggests replacing the term "overlooks" with "fails to account for".[49]

2.47. To accommodate China's request, we have adjusted the text of paragraph 7.91 to avoid leaving the impression that China has not acknowledged that the residential and commercial segments grew during the POI.

### 2.3.8 Footnote 207 (209)

2.48. Regarding footnote 207 (209), China requests that the Panel include text to reflect the context within which it concedes that the domestic industry competed in the utility segment.[50] The United States does not comment on China's request.

2.49. We have revised the text of footnote 207 (209) in line with China's request.

### 2.3.9 Paragraph 7.100

2.50. Regarding paragraph 7.100, China requests that the Panel reflect its argument that "competent authorities need to take into account conditions of competition even when it conducted a single causation analysis".[51]

2.51. In its comments, the United States objects to China's request on the basis that paragraph 7.100 constitutes part of the Panel's analysis and does not appear to be intended as a full recitation of China's arguments.[52]

2.52. To accommodate China's request, we have referred in footnote 210 (212) to China's argument that the competent authorities are required "to take into account the existence and factual relevance of different market segments" when conducting a single causation analysis. As the United States correctly observes, paragraph 7.100 sets out the Panel's view on the nature of the causation analysis that is required when the competent authorities are faced with products operating in various market segments and sub-segments. In this context, we do not think it is necessary (and consider that it would be inappropriate) to refer to China's position in the body text of the paragraph.

### 2.3.10 Footnotes 189 (191) and 191 (193)

2.53. Regarding footnotes 189 (191) and 191 (193), China requests that the Panel include additional language to reflect its argument concerning the factors affecting competition between domestic and imported CSPV products, specifically with respect to the different technological requirements of the residential and commercial segments (60-cell modules) in relation to the utility segment (72-cell modules).[53]

[48] China's request for interim review, paras. 31-33.
[49] United States' comments on China's request for interim review, para. 30.
[50] China's request for interim review, para. 34.
[51] China's request for interim review, para. 35.
[52] United States' comments on China's request for interim review, para. 31.
[53] China's request for interim review, para. 36.

2.54. Regarding footnote 189 (191), the United States requests that, if the Panel makes China's requested changes, then the Panel should ensure that it precisely reflects China's argument.[54] Regarding footnote 191 (193), the United States objects to China's request on the basis that the Panel is referring to arguments concerning competition in the residential and commercial segments, while China's request pertains to the utility segment.[55]

2.55. We have revised the text of footnote 189 (191) in line with China's request and the United States' comment. We have also revised the text of footnote 191 (193) in line with China's request.

### 2.3.11 Paragraph 7.96

2.56. Regarding paragraph 7.96, China requests that the Panel include language to reflect its argument 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.'"[56] The United States does not comment on China's request.

2.57. The argument to which China refers appears in the context 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".[57] However, in light of the factual parallels between China's causation and non-attribution claims concerning the USITC's analysis of competition in the utility segment, we have revised the text of footnote 194 (196) to include reference to China's argument.

### 2.3.12 Paragraph 7.103

2.58. Regarding paragraph 7.103, China requests that the Panel include language to reflect its arguments concerning the distinction between 60- and 72-cell modules.[58]

2.59. In its comments, the United States advances that, if the Panel entertains China's request, then the Panel should also include language to signal that this is an argument posed by China and not a finding by the Panel.[59]

2.60. China's argument concerning the "the distinction between 60- and 72-cell modules as well as other technological differences between domestic and imported products" is already reflected in paragraph 7.103. Nevertheless, for greater completeness, we have decided to accommodate China's request by citing in footnote 216 (218) China's comment on the United States' response to Panel question No. 36 of the third set, para. 15.

### 2.3.13 Paragraph 7.108

2.61. Regarding paragraph 7.108, China requests that the Panel delete the sentence indicating that China "failed to mention that purchasers also cited 'lower import prices' as a reason for decreasing purchases of US origin CSPV products".[60] According to China, this "is a factually incorrect description of China's argument because China did in fact recognize that prices were a factor for influencing purchasers' decisions. China's argument is that price 'was neither the only factor, nor the most important factor.'"[61]

2.62. In its comments, the United States objects to the deletion requested by China. The United States notes that the sentence at issue is a conclusion by the Panel and also that China's justification for its request "misses the point that in discussing the response to the question about changes in purchasing patterns, China only pointed to purchasers' non-price reasons for

[54] United States' comments on China's request for interim review, para. 32.
[55] United States' comments on China's request for interim review, para. 33.
[56] China's request for interim review, para. 37.
[57] China's second written submission, section III.B.1.
[58] China's request for interim review, para. 38.
[59] United States' comments on China's request for interim review, para. 34.
[60] China's request for interim review, para. 39.
[61] China's request for interim review, para. 39. As support, China refers to: China's comments on the United States' responses to Panel question Nos. 37 and 41 of the third set, paras. 16 and 26; response to Panel question No. 39 of the third set para. 46; and response to Panel question No. 7 of the second set.

decreasing purchases of US origin products when, in fact, purchasers also reported lower prices as a 'most often cited reason'".[62] Nevertheless, the United States considers that the Panel could address China's request by simply deleting the phrase "China fails to mention" from the sentence at issue.[63]

2.63. In response, we note that China correctly points out that it has acknowledged that purchasers cited lower import prices as a reason for decreasing purchases of US-origin CSPV products in its submissions. However, China has not referred us to where it acknowledged this in its arguments against the USITC's finding that domestic and imported CSPV products were interchangeable. As a result, we consider that it remains accurate to observe in paragraph 7.108 that "China fails to mention that 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". Nevertheless, to avoid leaving the wrong impression concerning China's overall position, we have decided to accommodate China's request by adopting the United States' suggested revision.

### 2.3.14 Paragraph 7.129

2.64. Regarding paragraph 7.129, China requests that the Panel replace the term "narrative" with "arguments".[64] China also requests that the Panel include the term "still" in the last sentence of the paragraph before "lost sales".[65] The United States does not comment on China's request.

2.65. We have revised the text of paragraph 7.129 in line with China's request.

### 2.3.15 Paragraph 7.130

2.66. Regarding paragraph 7.130, China requests that the Panel note that China "alleged there was an increase in shipments by the domestic industry and that its argument is that the domestic industry did not lose sales, but rather, failed to grow apace the market".[66]

2.67. In its comments, the United States objects to China's request. According to the United States, "China fails to recognize that, in this paragraph, the Panel is summarizing China's arguments with respect to the USITC's finding that imports prevented the industry from expanding capacity. On this issue, China did not point to the industry's increase in shipments, which is relevant to its arguments regarding loss of market share discussed in the previous paragraph".[67]

2.68. We have decided not to grant China's request. The United States correctly notes that the requested additions do not pertain to China's argument concerning the USITC's finding that increased imports prevented the domestic industry from expanding its capacity.

### 2.3.16 Paragraph 7.147

2.69. Regarding paragraph 7.147, China first requests that the Panel include language to reflect that China expressly noted that it did not accept the USITC's serious injury findings, even though it does not contest those findings in this dispute. China further requests that the Panel "make clear" that "findings concerning the existence of 'serious injury' and 'causal relationship' are separate findings under the Agreement on Safeguards, and that the Panel is required to make an objective assessment of the USITC's findings concerning causality".[68]

2.70. In its comments, the United States objects to China's requests. In its view, the Panel is correct to note that China has not challenged the USITC's serious injury determination.[69] The United States asserts that China's other requests are misplaced as the Panel is not discussing the relevant legal

[62] United States' comments on China's request for interim review, para. 35.
[63] United States' comments on China's request for interim review, para. 36.
[64] China's request for interim review, para. 40.
[65] China's request for interim review, para. 41.
[66] China's request for interim review, para. 42.
[67] United States' comments on China's request for interim review, para. 37.
[68] China's request for interim review, para. 43.
[69] United States' comments on China's request for interim review, para. 38.

obligations and elsewhere in its report makes clear that its function is to conduct an "objective assessment".[70]

2.71. Regarding the first aspect of China's request, we have revised the text of footnote 329 (331) to make China's position on the serious injury determination abundantly clear. We have decided not to grant the remaining aspects of China's request, as China's views on the applicable legal obligations do not directly pertain to the point being made by the Panel in paragraph 7.147.

### 2.3.17 Paragraph 7.183

2.72. Regarding paragraph 7.183, China requests that the Panel revise the language to better reflect its argument 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. In its view, this is particularly the case because the non-confidential version of the USITC final report is so heavily redacted that the explanation is deficient and ambiguous.[71] The United States does not comment on China's request.

2.73. We have revised the text of paragraph 7.183 in line with China's request.

## 2.4 Non-attribution

### 2.4.1 Paragraph 7.200

2.74. Regarding paragraph 7.200, China requests that the Panel explicitly refer to its argument that "no sufficient reasoned and adequate explanation was provided with regard to some of the injury factors, which were dismissed with mere references to petitioners' arguments without an actual analysis".[72]

2.75. In its comments, the United States objects to China's request on the basis that China has failed to provide a citation that supports its argument. The United States also contends that China's request would result in mischaracterization of the USITC's explanations.[73]

2.76. We have decided not to grant China's request. The purpose of paragraph 7.200 is not to provide a full overview of China's arguments with respect to the USITC's findings concerning the alleged missteps of the domestic industry. Rather, paragraph 7.200 more narrowly pertains to China's arguments that criticize the manner in which the USITC weighed evidence that conflicted with its findings. In these circumstances, we consider it unnecessary to reflect China's additional argument concerning the USITC's explanations of its findings.

### 2.4.2 Paragraph 7.201

2.77. Regarding paragraph 7.201, China requests that the Panel explicitly reflect its position that Article 11 of the DSU requires "a critical analysis of the findings reached by the investigating authority".[74]

2.78. In its comments, the United States objects to China's request, claiming that it would "expand the Panel's analysis of what constitutes an 'objective assessment' under Article 11 of the DSU" and also that it is unnecessary in light of section 7.1.2 (Standard of review).[75]

2.79. We have decided not to grant China's request. In line with the United States' observation, the applicable standard of review is set out in section 7.1.2 of the Interim Report. As a result, we do not consider it necessary to include any additional elaboration on this standard in paragraph 7.201.

[70] United States' comments on China's request for interim review, paras. 39-40.
[71] China's request for interim review, para. 44.
[72] China's request for interim review, para. 45.
[73] United States' comments on China's request for interim review, para. 41.
[74] China's request for interim review, para. 46.
[75] United States' comments on China's request for interim review, para. 42.

### 2.4.3 Paragraph 7.202

2.80. Regarding paragraph 7.202, China contends that "the Panel seems to provide *carte blanche* to the investigating authorities for ignoring at their own discretion large portions of the evidentiary record".[76] On this basis, China requests that the Panel explicitly reflect its position that "investigating authorities must provide explanations and discussion that demonstrate that their investigation is solid and consistent even when that omitted evidence is taken into consideration" and that "[t]he omitted evidence should not lead to alternative plausible explanations".[77]

2.81. In its comments, the United States objects to China's request, taking the position that the Panel has properly explained and applied the standard of review and that China's request appears to be based on misunderstanding of the Panel's discussion in paragraph 7.202.[78]

2.82. We have decided not to grant China's request. The last sentence of paragraph 7.202 of the Interim Report stipulates that "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". As this statement reflects both the applicable standard of review and burden of proof in these proceedings, contrary to China's contention, we do not consider that the Panel is providing *carte blanche* for competent authorities to ignore large portions of the evidentiary record at their discretion. Moreover, we recall that the general rule that the competent authorities are required to explain relevant aspects of their determination is acknowledged and applied throughout the Interim Report.

### 2.4.4 Paragraph 7.208

2.83. Regarding paragraph 7.208, China requests that the Panel refer to differences between the market segments, particularly in terms of the volume of demand. China also requests that the Panel refer to its arguments concerning "the level of specialization of each market segment", the "lack of investments by the domestic industry", and the fact that imports by the domestic industry were used to satisfy customer requirements.[79]

2.84. In its comments, the United States objects to China's request on the basis that it does not accurately reflect the arguments which China cites. The United States observes that the cited paragraph indicates that China argued that the domestic industry did not "have the product offerings necessary to effectively compete", and not that the domestic industry lacked "the required level of specialization".[80]

2.85. Regarding the first aspect of China's request, we have revised the text of paragraph 7.208 to reflect that demand grew in the utility segment during the POI. Regarding the second aspect of China's request, we note that certain of the additional arguments to which China refers appear in section II of its second written submission, which addresses the USITC's causation determination. We therefore have decided to revise the text of paragraph 7.208 to refer to China's arguments that pertain to the USITC's non-attribution analysis (specifically the arguments that appear in paragraphs 152 and 156 of its second written submission).

### 2.4.5 Paragraph 7.212

2.86. Regarding paragraph 7.212, China contends that the Panel mischaracterized its argument and requests that the Panel clarify that China's position is that the "domestic industry was specialized in other market segments (residential, commercial) and therefore could not capitalize from the increase in the demand experienced in the utility market segment".[81]

[76] China's request for interim review, para. 47.
[77] China's request for interim review, para. 47.
[78] United States' comments on China's request for interim review, paras. 43-44.
[79] China's request for interim review, para. 48.
[80] United States' comments on China's request for interim review, para. 45.
[81] China's request for interim review, para. 49.

2.87. In its comments, the United States objects to China's request, contending that the Panel correctly characterizes China's argument. As a result, the United States submits that there is nothing inaccurate about the sentence identified in China's request.[82]

2.88. We have decided not to grant China's request. China's request obscures the point being made by the Panel in paragraph 7.212, which is to narrowly reject the notion that the USITC was required to conclude that the domestic industry made a "deliberate business choice" to *avoid* competing in the utility segment. The Panel bases this finding on the record evidence described in paragraph 7.211 that showed that the domestic industry did in fact compete in the utility segment.

2.89. While China argues that the domestic industry's business decision to *focus* on the residential and commercial segments made it uncompetitive in the utility segment, the Panel addresses and rejects this argument in paragraph 7.213. We have adjusted the text of paragraph 7.213 to clarify this point.

### 2.4.6 Footnote 448 (451)

2.90. Regarding footnote 448 (451), China contends that its argument that the 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 in light of the start-up costs and different technology involved, is supported by the facts set forth in the USITC final staff report concerning the financial performance of the domestic industry. On this basis, China requests that the Panel revise the text to reflect that it is not persuaded by China's argument, rather than state that "China engages in supposition". China claims that this "strong language" is inappropriate.[83]

2.91. In its comments, the United States objects to China's request on the basis that China does not indicate where in the USITC final staff report the industry start-up costs were addressed. As a result, the United States contends that the Panel correctly found that "it would have been speculative for the USITC to have assessed the addition of capacity in light of start-up costs".[84]

2.92. We have revised the text of footnote 448 (451) in line with China's request.

### 2.4.7 Paragraphs 7.216-7.218

2.93. China contends that the Panel omits China's main argument concerning product quality, namely that "[q]uality was an important factor, and many of the purchasers complained about quality or adduced quality as a factor determining their supply source (imported versus domestic), or for stopping purchases from domestic suppliers". On this basis, China requests that the Panel include these arguments in a paragraph at the outset of its summary of China's arguments.[85]

2.94. In its comments, the United State objects to China's request. The United States contends that the requested paragraph is unnecessary given that China's arguments on quality are already summarized in paragraph 7.218. The United States also contends that China also fails to accurately summarize its arguments.[86]

2.95. The United States correctly notes that China's quality-related arguments are summarized in paragraph 7.218. In these circumstances, we have revised paragraph 7.218 to explicitly reflect China's argument that the USITC failed to appropriately analyse product quality. As a consequence of these revisions, we have modified paragraph 7.227 to address China's argument concerning the evidence demonstrating the general importance of product quality.

### 2.4.8 Paragraph 7.217

2.96. Regarding paragraph 7.217, China contends that the Panel's summary does not include China's argument concerning "the close relationship between continued technological innovation and

[82] United States' comments on China's request for interim review, para. 46
[83] China's request for interim review, para. 50
[84] United States' comments on China's request for interim review, para. 47.
[85] China's request for interim review, para. 51.
[86] United States' comments on China's request for interim review, paras. 48-51.

decreasing costs which was an essential competitive dynamic in the industry, and the fact that China referred to specific evidence showing that the domestic industry did not sufficiently innovate."[87]

2.97. In its comments, the United States objects to China's request, claiming that the arguments China seeks to insert are misplaced in the context of the paragraph.[88]

2.98. We have decided not to grant China's request. Paragraph 7.217 already indicates that China argues "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". We consider that this statement appropriately captures China's argument concerning technological innovation and cost. Moreover, we do not consider that it is necessary to refer to China's arguments that appear in sections of its submissions that address other issues.[89]

### 2.4.9 Paragraph 7.218

2.99. Regarding paragraph 7.218, China requests that the Panel refer explicitly to its argument that "some of the domestic producers failed to qualify or lost their approved status before some of the largest purchasers, and that the USITC Final Report merely addressed isolated instances of disqualifications ignoring other evidence".[90]

2.100. In its comments, the United States recommends that, if the Panel includes the sentence referred to in China's request, then it should more accurately reflect China's argument.[91]

2.101. We have modified the text of paragraph 7.218 to reflect to China's argument and the United States' suggested revisions for accuracy.[92]

### 2.4.10 Paragraph 7.219

2.102. Regarding paragraph 7.219, China requests that the Panel refer explicitly to its argument that "some financiers declined providing funding for large scale projects unless the suppliers were categorized as Tier 1", which meant that domestic suppliers without sufficient bankability "could not participate in large-scale projects which usually occurred in the utility segment".[93]

2.103. In its comments, the United States objects to China's request. In its view, China's proposal lacks precision compared to the arguments which it cites.[94]

2.104. We have revised the text of paragraph 7.219 in line with China's request. We do not share the United States' concern that China's proposal lacks precision.

### 2.4.11 Footnote 477 (484)

2.105. Regarding footnote 477 (484), China requests that the Panel include a more detailed description of the affidavit by Craig Cornelius, President of NRG Renewables.[95]

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[87] China's request for interim review, para. 52.
[88] United States' comments on China's request for interim review, para. 52.
[89] In line with the United States' observation, we consider that China's reference to its argument in paragraph 156 of its second written submission is misplaced, as that paragraph appears in section III.B.1 of its second written submission ("The USITC conducted an insufficient and contradictory analysis of the participation of the domestic industry in the utility segment").
[90] China's request for interim review, para. 53.
[91] United States' comments on China's request for interim review, para. 53.
[92] In this regard, we consider the United States correct to note that China only argued that one domestic producer (SolarWorld) was disqualified by one purchaser (NEXTracker). (China's second written submission, para. 163; SEIA Prehearing Injury Brief, (Exhibit CHN–20), pp. 77-78).
[93] China's request for interim review, para. 54.
[94] United States' comments on China's request for interim review, para. 54.
[95] China's request for interim review, para. 55.

2.106. In its comments, the United States requests that, if the Panel makes the changes requested by China, then it should ensure that the description of the affidavit is accurate.[96]

2.107. We have revised footnote 477 (484) to include a more detailed description of paragraph 12 of the affidavit, which China refers to in paragraph 164 and footnote 281 of its second written submission. As China does not refer to paragraph 27 of the affidavit, we have not included any details from that paragraph in our revision.

### 2.4.12 Paragraph 7.227

2.108. Regarding paragraph 7.227, China requests that the Panel eliminate the reference to "inaccurate reading of the record" on the basis that, during the course of the proceedings, China acknowledged that the USITC 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".[97] The United States does not comment on China's request.

2.109. We have revised paragraph 7.227 in line with China's request.

### 2.4.13 Footnote 488 (495)

2.110. Regarding footnote 488 (495), China requests that the Panel revise the text to avoid the "misleading" suggestion that "China tried to counter evidence concerning SolarWorld with evidence concerning Suniva".[98] China claims that its argument was more complex, as it argued in its opening statement at the second substantive meeting that "the ranking of SolarWorld by EuPD Research was not sufficiently tested or put in context (as it concerned installers which only operated in the residential and commercial segments and not in the utility where developers were present)".[99] China further claims that it "pointed out at other contrasting pieces of evidence in the record consisting of independent assessment of other domestic producers, which would cast doubts on the broader finding of quality offered by the domestic industry".[100]

2.111. In its comments, the United States objects to China's request, as it considers the Panel to be correct in stating that China relied upon evidence regarding Suniva to question the USITC's reliance upon the EuPD report that ranked SolarWorld's CSPV products as the most purchased brand by US installers. The United States further contends that China mischaracterizes the arguments referred to in its comments concerning the other contrasting evidence on the record.[101]

2.112. We have decided not to grant China's request. We do not consider that it is in any way misleading for the Panel to note that "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". Indeed, this is precisely what China does at paragraph 88 of China's comments on the United States' response to Panel question No. 14 of the first set. China also refers to its argument that "the ranking of SolarWorld by EuPD Research was not sufficiently tested or put in context (as it concerned installers which only operated in the residential and commercial segments and not in the utility where developers were present)". However, the Panel addressed this very argument in the same footnote, which undermines China's suggestion that the Panel overlooked the complexities of its argument. Finally, we note that China claims that it "pointed out at other contrasting pieces of evidence in the record consisting of independent assessment of other domestic producers, which would cast doubts on the broader finding of quality offered by the domestic industry". Yet, this evidence is ultimately inapposite with respect to the paragraph at issue in footnote 488 (495), which concerns the USITC's reliance on the ranking of SolarWorld. The Panel addresses in paragraph 7.228 the relevance of any limited record evidence indicating that the domestic industry did not have a perfect track record in terms of product quality.

[96] United States' comments on China's request for interim review, para. 55.
[97] China's request for interim review, para. 56.
[98] China's request for interim review, para. 57.
[99] China's request for interim review, para. 57.
[100] China's request for interim review, para. 57.
[101] United States' comments on China's request for interim review, para. 56.

### 2.4.14 Paragraph 7.229

2.113. Regarding paragraph 7.229, China requests that the Panel remove the "harsh language concerning China's arguments", specifically referring to the words "speculative" and "selective". China reasons that, "[r]ather than 'speculation', China's arguments were based on specific evidence in the record showing the need of domestic producers to import given their inability to fulfil customers' orders". China further contends that "evidence of the domestic producer's reliance on imported products was extensive rather than 'occasional'".[102]

2.114. In its comments, the United States objects to China's request. The United States considers that the Panel is correct to note that China engages in speculation when it argues that domestic producers had to import due to an inability to fulfil orders meant the domestic CSPV products had "technical and quality shortcomings", which it claims is an "entirely different reason for importing product".[103]

2.115. We have revised paragraph 7.229 in line with China's request.

### 2.4.15 Footnote 493 (500)

2.116. Regarding footnote 493 (500), China requests that the Panel delete the word "only" from the sentence indicating that "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". China reasons that this evidence confirms the veracity of its argument that bankability was relevant. China further reasons that, "to the extent that these importers participated in the utility segment, their reports about the purchasers' focus on bankability would be of particular significance in explaining the competitive dynamics in the utility segment and the domestic industry's limited participation".[104]

2.117. In its comments, the United States objects to China's request and sees no reason to delete the word "only".[105]

2.118. We have decided not to grant China's request. The USITC received importer questionnaire responses containing usable data from 56 US firms that it believed to account for 83% of imports of CSPV products from all sources during 2016.[106] In this context, we do not think it is inaccurate or otherwise misleading to use the word "only" in footnote 493 (500).

### 2.4.16 Paragraph 7.233

2.119. Regarding paragraph 7.233, China requests that the Panel refer explicitly to its argument that the "USITC did not address the extensive evidentiary record reflecting the multiple complaints by purchasers in their deals with the domestic industry".[107]

2.120. In its comments, the United States objects to China's requested changes on the basis that they are unnecessary and because the Panel did not "ignore[] the main argument by China". Nevertheless, the United States suggests that, if the Panel makes China's suggested changes, then it should accurately reflect what China argued.[108]

2.121. We have revised the text of paragraph 7.233 in line with China's request and the United States' comment.

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[102] China's request for interim review, para. 58.
[103] United States' comments on China's request for interim review, para. 57.
[104] China's request for interim review, para. 59.
[105] United States' comments on China's request for interim review, para. 58.
[106] USITC final staff report, (Exhibit CHN-3), p. I-41. See also ibid. pp. V-16-V-17 and table V-8 (reporting the views of 47 importers on the interchangeability of CSPV products produced in the United States and in other countries, and the views of 45 importers on the importance of factors other than price in sales competition between CSPV products produced in the United States and in other countries).
[107] China's request for interim review, para. 60.
[108] United States' comments on China's request for interim review, para. 59.

### 2.4.17 Paragraphs 7.235 and 7.236

2.122. Regarding paragraphs 7.235 and 7.236, China requests that the Panel refer explicitly to "the actual standard that the Panel should have addressed in its review".[109]

2.123. In its comments, the United States objects to China's requests. Regarding paragraph 7.235, the United States notes that the second sentence reflects the non-attribution conclusion reached by the Panel, after it finds that China failed to demonstrate that it was inappropriate for the USITC to find that the domestic industry did not suffer from widespread service and delivery issues.[110]

2.124. Regarding paragraph 7.236, the United States contends that China is seeking to change the standard of review. In its view, all that is required of the competent authorities is that they "publish a report containing a detailed analysis of the case that explains its finding and reasoned conclusions reached on the relevant issues". This does not "require a refutation to each argument or subcomponent of an argument" and "[t]he fact that there may be other asserted theories that could be plausible does not mean the authority has not met its obligation to provide reasoned and adequate explanations".[111]

2.125. We have decided not to grant China's request. As an initial matter, we agree with the United States that the second sentence of paragraph 7.235 reflects the Panel's conclusion that follows from its finding (foreshadowed in the first sentence) that China has failed to demonstrate that it was inappropriate for the USITC to find that the domestic industry did not suffer from "widespread" service and delivery issues.

2.126. With respect to the other aspects of China's request, we note that the applicable standard of review is described in section 7.1.2 of the Interim Report. We further note that in paragraph 7.194 the Panel describes the non-attribution obligation under the second sentence of Article 4.2(b) of the Agreement on Safeguards and notes specifically that "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".

2.127. In conformance with this standard, at paragraph 7.202, the Panel sets out the relevant analytical question for its assessment of China's claims concerning the alleged missteps of the domestic industry: "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".

2.128. Based on the above, we consider that we have been clear in terms of the standard of review applied in the Interim Report and specifically in our assessment of China's claims concerning the USITC's analysis of the alleged missteps by the domestic industry. As a result, we do not consider China's request for additional clarification to be necessary.

### 2.4.18 Paragraph 7.238 and footnotes 514 (522) and 518 (526)

2.129. Regarding paragraph 7.238, China requests that the Panel eliminate the term "significant" when characterizing the number of respondents' allegations concerning service and delivery issues addressed by petitioners. Moreover, regarding footnote 514 (522), China requests that the Panel eliminate the term "most" when characterizing the number of petitioners' responses to purchasers' complaints that are available in the non-confidential versions of petitioners posthearing briefs. Finally, regarding footnote 518 (526), China requests that the Panel include the phrase "a number of" in its characterization of petitioners' responses to the complaints of purchasers China defines to be "the largest". According to China, these revisions are necessary to avoid suggesting "that the large majority of purchaser complaints were addressed by the petitioners, but this is not

[109] China's request for interim review, para. 61.
[110] United States' comments on China's request for interim review, para. 60.
[111] United States' comments on China's request for interim review, para. 61.

the case as shown in footnote 515 of the Interim Report, which discussed multiple affidavits containing various complaints left unaddressed by petitioners".[112]

2.130. In its comments, the United States objects to China's requests on the basis that they inappropriately downplay the Panel's findings with respect to petitioners' responses to purchaser complaints.[113]

2.131. We have decided not to grant China's request regarding paragraph 7.238. Footnote 515 (523) refers to five affidavits that petitioners did not respond to in their public submissions. Yet, based on the public versions of petitioners' posthearing briefs, it appears that responses were provided to at least eight purchaser complaints, specifically those from DEPCOM, California Solar Systems, Borrego, Sunrun, NEXTracker, Siflab, NRG Energy, and Sunpower.[114] In these circumstances, we do not consider that it is inaccurate to state in paragraph 7.238 that petitioners responded to a "significant" number of purchaser complaints.

2.132. Regarding footnote 514 (522), we have replaced the word "most" with "certain" to accommodate China's request.

2.133. Regarding footnote 518 (526), we note that, in paragraph 145 of China's response to Panel question No. 13 of the second set, China argues that "these complaining purchasers were some of the largest", specifically referring to NextTracker, DEPCOM, California Solar Systems, Borrego, NRG Energy, and Sunrun. As petitioners appear to have responded to complaints from these purchasers in their posthearing briefs, we do not consider it necessary to include the phrase "a number of" when characterizing petitioners' responses to the complaints purchasers China defines to be "the largest". We have revised footnote 518 (526) to more accurately reflect China's argument on this point.

### 2.4.19 Paragraph 7.239

2.134. Regarding paragraph 7.239, China requests that the Panel refer to its argument that "the complaining purchasers were actually the largest purchasers by volume of CSPV products as most of them operated in the utility segment".[115]

2.135. In its comments, the United States contends that China's requested additions are unnecessary in light of footnote 518 (526), which contains the same argument.[116]

2.136. We have decided not to grant China's request. As indicated above, we refer explicitly to China's argument in footnote 518 (526). Accordingly, aside from the clarifications set out above, we do not consider it necessary to refer in greater detail to China's argument.

### 2.4.20 Footnote 517 (525)

2.137. Regarding footnote 517 (525), China requests that, in order to "provide an accurate description of the factual record", the Panel indicate "the market segments within which the questionnaire respondents are operating, and the fact that the majority of these 106 questionnaire respondents were not operating in the utility segment".[117]

2.138. In its comments, the United States contends that, if the Panel revises footnote 517 (525) pursuant to China's request, then it should correctly reflect the relevant citation (p. I-44 of the USITC final staff report).[118]

2.139. We have decided not to grant China's request. Information concerning the market segments within which questionnaire respondents operated is not directly pertinent to the point being made in

[112] China's request for interim review, para. 62.
[113] United States' comments on China's request for interim review, para. 62.
[114] 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.
[115] China's request for interim review, para. 63.
[116] United States' comments on China's request for interim review, para. 63.
[117] China's request for interim review, para. 64.
[118] United States' comments on China's request for interim review, para. 64.

footnote 517 (525), namely, that the majority of purchasers of domestic CSPV products did not report service and delivery issues.

### 2.4.21 Paragraph 7.246

2.140. Regarding paragraph 7.246, China requests that the Panel refer to its argument that, "although the USITC admitted incentives were designed to decline over time, it failed to conduct any analysis on the evolution of incentives and its relation with prices of CSPV modules".[119] China further requests that the Panel refer to its argument that "certain programs specifically directed to the residential and commercial industry where the domestic industry focused (or targeting the domestic industry itself) had expired".[120] The United States does not comment on China's request.

2.141. We have revised the text of paragraph 7.246 and footnote 535 (543) in line with China's request.

### 2.4.22 Footnote 562 (570)

2.142. Regarding footnote 562 (570), China requests that the Panel refer to its argument that "emphasized the three market segments did not experience similar levels of growth", and also mention that "the projected increase in demand particularly benefited the utility segment, where importers focused, and which was the largest in percentage of installed capacity in 2016".[121] China appears to justify these requests based on the clarification that it "did not argue that the extension [of the FITC] did not have any positive effect on the domestic industry, but rather that it mainly favoured importers which had a greater presence in the utility segment".[122]

2.143. In its comments, the United States objects to China's request on the basis that the requested changes are unnecessary and do "nothing to clarify the Panel's finding that the evidence submitted by China suggested that the FITC led to increased demand in the residential and commercial segments". Nonetheless, if the Panel makes China's requested changes, the United States requests that the Panel accurately reflect what China argued.[123]

2.144. We have decided not to grant China's request. The arguments referred to by China do not directly pertain to the main point being made in footnote 562 (570), namely, that record evidence showed that the FITC applied to *all* market segments. As a result, we do not consider it necessary to refer to those arguments in footnote 562 (570).

### 2.4.23 Footnote 567 (575)

2.145. Regarding footnote 567 (575), China requests that the Panel delete "the evaluation of the Econometric Analysis" on the basis that "although the Econometric Analysis does not contain a direct correlation between subsidies and prices, it accounted the extent to which subsidies assisted in achieving cost reductions – having an impact in final prices".[124] China further notes that "the Econometric Analysis developed on the lack of competitiveness that may result from declining level of incentives if such reductions are not accompanied by costs reductions at a similar trend".[125]

2.146. In its comments, the United States objects to China's request on the basis that the econometric study did not examine the direct correlation between subsidies and prices, but rather generally accounted for subsidies' role in achieving cost reductions.[126]

2.147. To accommodate China's request, we have revised footnote 567 (575) to clarify that the econometric report did not directly assess the impact of changes in government incentive programmes on prices of CSPV products.

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[119] China's request for interim review, para. 65.
[120] China's request for interim review, para. 65.
[121] China's request for interim review, para. 66.
[122] China's request for interim review, para. 66.
[123] United States' comments on China's request for interim review, paras. 65-66.
[124] China's request for interim review, para. 67.
[125] China's request for interim review, para. 67.
[126] United States' comments on China's request for interim review, para. 67.

### 2.4.24 Paragraph 7.261

2.148. Regarding paragraph 7.261, China requests that the Panel refer explicitly to four additional arguments when summarizing China's position.

2.149. First, China requests that the Panel clarify that it argued "that the USITC should have considered raw material costs and production efficiencies in its non-attribution analysis, given that it heavily relied upon falling prices as an injury factor".[127] Second, China requests that the Panel refer to its argument that "the USITC immediately attributed high COGS to net sales to increased imports without prior assessing alternative plausible explanations", specifically referring to: "(a) domestic producers were obliged to pass on any decrease in raw material costs to purchasers to maintain their competitiveness since foreign producers enjoyed larger economies of scale and (b) domestic producers had to make face to high factory costs at the beginning of the POI, thus not being able to enjoy higher profitability margins caused by a decrease in raw material costs".[128] Third, China requests that the Panel refer to its argument concerning "a correlation between declines in raw material costs and evolution of prices".[129] Fourth, China requests that the Panel refer explicitly to its argument concerning "the lack of analysis of the increased efficiencies including an assessment on the extent domestic producers profited from or were able to implement such increased efficiencies given their reduced economies of scale compared to foreign producers, resulting in a competitive disadvantage".[130]

2.150. In its comments, the United States objects to China's first requested change on the basis that it does not accurately characterize China's argument that "although the USITC acknowledged that declining raw material costs caused declining prices, the USITC failed to separate and distinguish this injury".[131]

2.151. In response, we note that the additional arguments identified by China do not address the key point underlying the Panel's finding on this issue, namely, that China has not established that decreased raw material costs and increased production efficiencies are separate causes of injury that are subject to the non-attribution requirement in Article 4.2(b) of the Agreement on Safeguards. Nevertheless, to accommodate China's request, we have revised the text of paragraph 7.261 to clarify China's argument. We have also revised the text of footnotes 574 (582) and 575 (583) to reflect the additional arguments identified by China that do not already appear in the text of paragraph 7.261 or in the footnotes that correspond to that paragraph. As a consequence of these revisions, we have also modified the text of footnote 583 (591).

### 2.4.25 Paragraph 7.263

2.152. Regarding paragraph 7.263, China requests that the Panel address the "core" issue raised in its submissions, specifically noting: "[h]aving considered that serious injury was manifested through declines in final prices, the USITC should have clarified to what extent decreases in prices caused by declines in raw material costs were actually attributed to increased imports".[132]

2.153. In its comments, the United States objects to China's request. It notes that this paragraph constitutes the Panel's reasoning and China is inappropriately attempting to insert its additional arguments in the Panel's analysis.[133]

2.154. We have decided not to grant China's request. As the United States observes, this paragraph is part of the Panel's analysis; therefore, it is not necessary to include a full recitation of China's argument. We already refer to the argument identified by China in paragraph 7.261 and address it in paragraphs 7.263 and 7.264 and in footnotes 584 (592) and 585 (593).

[127] China's request for interim review, para. 69.
[128] China's request for interim review, para. 70.
[129] China's request for interim review, para. 71.
[130] China's request for interim review, para. 72.
[131] United States' comments on China's request for interim review, para. 68.
[132] China's request for interim review, para. 74.
[133] United States' comments on China's request for interim review, para. 69.

### 2.4.26 Paragraph 7.268

2.155. Regarding paragraph 7.268, China requests that the Panel discuss its argument that the USITC erred by not addressing the impact of grid parity on price trends. China further requests that the Panel clarify "China's criticism to the USITC's finding on lack of correlation between natural gas and solar energy prices, provided the historical trends between the two". China reasons that "[t]his historical trend (constant reduction of solar energy prices towards the objective of grid parity with natural gas) was central to China's argument as it proved that solar energy is not sufficiently competitive and requires progressive cost reductions (and price reductions) to compete against natural gas".[134]

2.156. In its comments, the United States objects to China's request, noting that Panel already accurately summarizes China's main arguments and that China's proposed additional text is already covered by paragraph 7.268 and footnote 593 (602). Nonetheless, the United States requests that, if the Panel decides to revise paragraph 7.268 in line with China's request, then it should accurately reflect China's argument.[135]

2.157. We have revised the text of paragraph 7.268 to accommodate China's request and the United States' comment.

### 2.4.27 Paragraph 7.273 and footnote 609

2.158. Regarding footnote 609, China notes that the point concerning the need to reach grid parity in the residential segment seems to have no relation to the body text of paragraph 7.273, which addresses competition between solar electricity in the utility sector and other types of conventional energy. China thus requests that the Panel revise the text of paragraph 7.273 to align with footnote 609.[136]

2.159. In its comments, the United States objects to China's request, noting that it seeks to include an irrelevant statement about grid parity to "draw attention from and alter the Panel's actual analysis and finding that solar electricity from the utility segment appears to compete more directly with other types of conventional energy than in the residential or commercial segments".[137]

2.160. To address the concern raised by China's request and to avoid any confusion arising from the referenced witness statement, we have decided to delete footnote 609.

## 3 THE UNITED STATES' REQUEST FOR INTERIM REVIEW

### 3.1 Revisions to enhance the completeness and accuracy of the Panel's findings or to accurately characterize arguments of the parties

### 3.1.1 Paragraph 1.7

3.1. Regarding paragraph 1.7, the United States requests that the Panel note: "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."[138]

3.2. In its comments, China asserts that Article 18.2 of the DSU utilizes mandatory language with regards to the confidential treatment of submissions, and paragraphs 2 and 3 of Appendix 3 of the DSU clarify that this obligation applies equally to written submissions and oral proceedings which discuss the content of written submissions. China further notes that overwhelming past practice has been that lack of consent from the parties means that the panel meetings should remain closed.

[134] China's request for interim review, para. 75.
[135] United States' comments on China's request for interim review, paras. 70-72.
[136] China's request for interim review, para. 76.
[137] United States' comments on China's request for interim review, para. 73.
[138] United States' request for interim review, para. 4.

China therefore suggests that the United States' proposed text be amended to include these points.[139]

3.3. We have decided to accept the United States' request without China's proposed amendments. We do not consider that it is necessary in the descriptive part of our report to take a position on previous panel practice or the DSU with respect to the systemic issue of whether panel meetings are presumptively confidential (closed) absent party consent.

### 3.1.2 Paragraph 7.97

3.4. Regarding paragraph 7.97, the United States requests that the Panel revise the third sentence to reflect that utility projects had "a median size of 4.9 MW during the POI", in order to accurately reflect the record cited in footnote 200 (203).[140]

3.5. In its oral statement at the interim review meeting and in its subsequent written comments, China agrees with the United States' request and further suggests that the Panel also indicate that "the mean size was 17.15 MW during 2012-2016" to avoid conveying "the wrong idea regarding the size of a typical solar project during the period of investigation".[141]

3.6. In its comments, the United States objects to China's suggestion on the basis that it does not align with the underlying information cited by the Panel.[142]

3.7. We have revised the text of 7.97 in line with the United States' request to accurately cite its arguments and the underlying record. While China is correct to note that the record also indicated that the mean size of utility projects was 17.15 MW during the 2012-2016 POI, that information is not contained in the United States' submission which the Panel cites. As a result, we do not consider that it would be appropriate to include that information when referring to the United States' argument. We further recall that the purpose of paragraph 7.97 is to reject China's argument that it was inappropriate for the USITC to find that the domestic industry competed in the utility segment. The reference to the median size of utility projects, along with the domestic industry's capacity and participation in utility projects larger than 1 MW, supports the Panel's conclusion. The Panel discusses China's argument concerning the inability of the domestic industry to supply large-scale utility projects elsewhere in the report.

### 3.1.3 Paragraph 7.117

3.8. Regarding paragraph 7.117, the United States requests that the Panel revise the fourth sentence to better reflect its argument 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 fails to discredit the reasonableness of the USITC's finding".[143] China does not comment on the United States' request.

3.9. We have revised the text of paragraph 7.117 in line with the United States' request.

### 3.1.4 Paragraph 7.196 and footnote 413 (415)

3.10. Regarding paragraph 7.196 and footnote 413 (415), the United States requests that the Panel better reflect its argument by stating: "[n]evertheless, 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 in this case."[144]

3.11. In its oral statement at the interim review meeting and in its subsequent written comments, China opposes the United States' request. China contends that the inclusion of the phrase "such that

[139] China's comments on the United States' request for interim review, paras. 12-15.
[140] United States' request for interim review, para. 5.
[141] China's oral statement at the interim review meeting, para. 15; comments on the United States' request for interim review, paras. 16-18.
[142] United States' comments on China's request for interim review, para. 77.
[143] United States' request for interim review, para. 6.
[144] United States' request for interim review, para. 7.

the non-attribution requirement under Article 4.2(b) did not come into play in this case" would be improper as the USITC never made such a finding. In its view, the USITC "merely applied the substantial cause test established under U.S. law", which requires determining "whether increased imports are a 'substantial cause not less than any other cause'".[145]

3.12. In its comments, the United States responds to this critique by noting that China's views, while erroneous, are ultimately irrelevant, as the Panel is summarizing the United States' argument regarding the non-attribution requirement under Article 4.2(b).[146]

3.13. We have revised the text of paragraph 7.196 and footnote 413 (415) in line with the United States' request. The United States' revisions accurately reflect its argument at paragraph 107 of its first written submission. We further agree with the United States that China's critique is inapposite in this context, as the Panel is summarizing the United States' position.

### 3.1.5 Paragraph 7.227

3.14. Regarding paragraph 7.227, the United States requests that the Panel more accurately summarize China's argument in paragraph 193 of its first written submission by noting: "[s]econd, 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."[147]

3.15. In its comments, China contends that paragraph 7.227 should be revised to accurately reflect its subsequent clarification of its argument on this point, specifically the USITC's failure to analyse whether the disqualifications were suffered by importers or domestic producers.[148]

3.16. We have revised the text of paragraph 7.227 in line with the United States' request. We have decided not to integrate China's comment concerning the subsequent clarification of its position. The point of paragraph 7.227 is to reject China's reference to the questionnaire responses addressing suppliers' failure in their attempt to obtain qualification and their disqualification (i.e. loss of approved status). The point is not why purchasers reported failure to obtain qualification or disqualification occurred, but rather that this reporting pertained to both domestic and foreign suppliers. As a result, these questionnaire responses do not support China's contention that domestic CSPV products were inferior to imported products, and thus that the USITC should have interrogated this issue in greater detail.

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[145] China's oral statement at the interim review meeting, paras. 19-20; comments on the United States' request for interim review, paras. 19-21.
[146] United States' comments on China's request for interim review, paras. 78-79.
[147] United States' request for interim review, para. 8.
[148] China's comments on the United States' request for interim review, paras. 22-25.

# ANNEX B

## ARGUMENTS OF THE PARTIES

## ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

### I. The USITC Final Report Must Be Carefully Scrutinized by the Panel as Published, and the United States Cannot Explain Away its Fundamental Deficiencies in these Proceedings

1. Panels are required to examine whether the report *as published* by the competent authorities complies with the requirements set forth in Article XIX of the GATT 1994 and in Articles 2.1, 3.1 and 4.2(c) of the Agreement on Safeguards. The report must contain the "reasoned conclusions" and "detailed analysis" of the competent authorities, as well as a "demonstration of the relevance of the factors examined" and must not leave panels to "deduce for themselves" the reasons for the determinations of the competent authorities.[1] The report must contain "explicit", "clear and unambiguous" explanations and not "merely imply or suggest an explanation".[2] Importantly, the report of the competent authorities must be examined *as published*.[3] A Member cannot offer additional *post hoc* argumentation for the conclusions or determinations set forth in the report - deficiencies cannot be remedied by *post hoc* reasoning, analysis or argumentation.

2. The United States agrees with these well-established principles but then ignores them. It improperly attempts to rewrite entire sections of the USITC Final Report, attempting to remedy the deficiencies of the report, expansively interpreting the USITC's analysis, and reading explanations that are not there into gaps of the analysis. The United States also tries to justify any gaps in the USITC's analysis as consequence of redactions of confidential information. Nonetheless, it is the non-confidential version of the USITC Final Report, *as published*, that must be examined by the Panel. Thus, the USITC Final report is inconsistent with the GATT 1994 and the Agreement on Safeguards because the public version does not provide the required explicit, clear, and unambiguous explanations for its findings, but merely implies or suggests such explanations.

### II. The USITC's Explanation for its Finding of Causal Link Fails to Meet the Requirements of the Agreement on Safeguards

#### A. Competent Authorities are Required to Establish a Casual Link Between the Increase in Imports and the Serious Injury

3. Articles XIX:1(a) of the GATT 1994 and 4.2(b) of the Agreement on Safeguards establish the general conditions for imposing a safeguard measure and expressly require that the increase of imports "cause" serious injury to the domestic industry that produces the like or directly competitive product. The first sentence of Article 4.2(b) of the Agreement on Safeguards elaborates on the meaning of the core requirements of "causality" and provides that no determination shall be made unless the investigating authority "demonstrates, on the basis of objective evidence, the existence of the *causal link* between increased imports of the product concerned and serious injury".

##### 1. Competent authorities are required to provide a compelling explanation for their finding of a causal link when there is no overall coincidence in trends

4. To find the existence of a causal link, competent authorities must determine whether there is a "genuine and substantial" relationship of cause and effect between the increased imports and serious injury. The Agreement on Safeguards does not prescribe any particular method or analytical tool for making a determination of causal link. Nonetheless, the Appellate Body frequently examines whether an upward trend in imports coincides with a downward trend in those factors about the domestic industry that might suggest serious injury and whether the competent authority has

[1] Appellate Body Report, *US – Steel Safeguards*, paras. 269-297, 304.
[2] Ibid. See also, Appellate Body Report, *US – Line Pipe*, para. 217.
[3] Panel Reports, *Ukraine – Passenger Cars*, para. 7.26; *Dominican Republic – Safeguard Measures*, para. 7.9; and Appellate Body Reports, *US – Steel Safeguards*, para. 299; *US – Lamb*, para. 105.

provided a reasoned and adequate explanation of this coincidence. This is because an overall coincidence in such trends is indicative of the existence of a causal link. But even when there is a general coincidence in trends, competent authorities still must provide a reasoned and adequate explanation why the increase in imports caused the injury to the domestic industry.[4]

5. The competent authority cannot simply presume the existence of a coincidence in trends through superficial observations of the movements in the different trends. Rather, the finding that there is a coincidence in trends must be based on a reasoned and adequate analysis based on objective evidence and such analysis must be made explicit by the competent authority - in particular when there is a divergence between the trend of increasing imports and certain injury indicators. The fact that there may be coincidence with a few select injury factors does not establish an *overall* coincidence.

6. The USITC failed to demonstrate the existence of an overall coincidence, and in these proceedings, the United States' defence of the USITC overlooks this key point and instead focuses on individual factors that seem to show coincidence and ignores or dismisses the other factors that show a lack of coincidence. However, although an "overall coincidence" does not require absolute conformity, it does require an *overall* coincidence in trends. This means that "a few select factors" do not establish the existence of an overall coincidence. To the contrary, the competent authority must look to more than just one or two factors to demonstrate the existence of an overall coincidence in trends - it should consider *all* of the factors, and not just those most convenient to its finding.

7. An absence of a coincidence in trends, on the other hand, signals that factors other than the increase in imports may be affecting the domestic industry and thus, the competent authority's explanation of the existence of a causal link between the increase in imports and the alleged serious injury must be *compelling*.[5]

8. The United States disagrees with the proposition that to satisfy the "reasoned and adequate" standard in the absence of a coincidence in trends, the explanation provided by the competent authority must be "compelling" and tries to dismiss the findings of the panels cited by China in support of its argument. But the United States' reasoning contradicts the well-settled interpretation of the text of Article 3.1 and does not detract from the explanatory force of those prior panel decisions. The fact remains that prior WTO panels have interpreted the text of the Agreement on Safeguards to mean that when the competent authority is unable to demonstrate the existence of an overall coincidence in trends the authority must provide a compelling explanation why it believes causality nevertheless exists even in the absence of such overall coincidence, in order for the determination to meet the "reasoned and adequate" standard.[6]

9. The United States alleges that China's argument regarding causal link is undermined by the fact that it did not challenge the existence of serious injury. However, that an industry may be suffering serious injury has nothing to do with showing the required causal relationship between the increased imports and the alleged serious injury. The Agreement on Safeguards sets forth at Article 2.1 that a Member may apply a safeguard measure in respect of a product only if it has determined that the increase in imports of such product causes or threatens to cause serious injury to its domestic industry. The first sentence of Article 4.2(b), on the other hand, requires the competent authorities to make a determination on the basis of objective evidence that there is a causal link between the increase in imports and the serious injury or threat thereof. Under either of these provisions, "serious injury" and "causal link" are distinct elements that both must be established in a safeguard investigation. That is why the Agreement on Safeguards defines "serious injury" in Article 4.1(a), clarifies what factors shall be considered for determining the existence of "serious injury" in Article 4.2(a), and then focuses separately on the concept of "causal link" in Article 4.2(b). This is why competent authorities could find the existence of serious injury while still failing to explain the existence of a causal link. And because China has made a claim that the USITC's causal link determination is inconsistent with Article 4.2(b) of the Agreement on Safeguards, the Panel should conduct an objective assessment of that claim as required by Article 11 of the DSU.

[4] Panel Report, *Argentina – Footwear (EC)*, para. 8.250; Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.

[5] Panel Reports, *US – Steel Safeguards*, para. 10.308.

[6] Panel Reports, *US – Steel Safeguards*, para. 10.308; *Argentina – Footwear (EC)*, para. 8.238; *US – Wheat Gluten*, para. 8.95; Appellate Body Report, *Argentina – Footwear (EC)*, para. 145.

10. Finally, both WTO and U.S. law treat the issues of serious injury and causal link as legally distinct. And the practice of the USITC shows that it agrees with this interpretation given that, as a practical matter, USITC's final reports in safeguard investigations attempt to follow this structure through separate sections that addressed these distinct issues: first, whether "the domestic industry is seriously injured", and second, the separate question of whether "increased imports are a substantial cause of serious injury". In this case, however, the United States has been unable to show that the USITC did in fact provide a compelling explanation for its finding of causation.

#### 2. The existence of a causal link must also be evaluated in light of the relevant conditions of competition

11. The existence of a causal link between increased imports and injury suffered by the domestic industry also needs to be evaluated in light of the conditions of competition of the particular industry,[7] which goes to the "substance" of the causal link analysis. In some cases, an apparent coincidence between imports and injury factors could be explained by conditions of competition present in a particular industry rather than the increased imports. It is essential for a competent authority to analyse the impact, if any, that such conditions of competition may have on its analysis of causation and whether a coincidence in trends - in light of the conditions of competition - actually support a finding of causation.

12. To satisfy this obligation, competent authorities must demonstrate why they believe that the conditions of competitions demonstrate the existence of a causal link. The specific conditions of competition relevant for the analysis of the competent authority will depend on the products and the market. While conditions of competition would typically include sales price, price is certainly not the only condition of competition, and indeed may be irrelevant or only marginally relevant in any given case. Failure to take into account conditions of competition of the relevant industry, however, would result in an "explanation" of the existence of a causal link that is neither reasoned or adequate, nor on the basis of objective evidence. Such "explanation" would be ignoring key factors relevant for the causation analysis.

13. The United States has not disputed the relevance of the conditions of competition to the causal link analysis and has instead embraced China's formulation of the analytical framework. It simply argues that the USITC's analysis of the conditions of competition demonstrates the existence of a causal link between the increase in imports of CSPV products and the injury allegedly suffered by the domestic industry. However, as China showed, the USITC's determination, as written, failed to properly take into account the conditions of competition. Even when the conditions of competition showed that certain trends were to be expected given the conditions of the CSPV market, the USITC instead jumped to the conclusion that there was an overall coincidence in trends and a causal link existed between the increase in imports and the serious injury. However, a finding that fails to take into account the conditions of competition in the relevant industry does not comply with the applicable standard.

### B. The USITC's Finding of the Existence of a Causal Link is Inconsistent with the Agreement on Safeguards

#### 1. The USITC did not demonstrate the existence of a coincidence in trends

14. Objective evidence in the underlying investigation indicates there was an absence of an overall coincidence between the increase in imports and the movements in injury factors in this case. While the United States asserts the USITC did demonstrate an overall coincidence, the actual USITC's determination merely describes a few select indicators of injury, without ever explicitly showing and explaining why it found an overall coincidence, particularly in light of positive trends that undermine any conclusion of overall coincidence. Given that there was no overall coincidence in trends, the USITC was required to provide a compelling explanation why the alleged injury suffered by the domestic industry was caused by the increase in imports.

15. The United States' argument that the USITC demonstrated the existence of an overall coincidence in trends forgets that the analysis or demonstration of the existence of an overall

[7] Appellate Body Reports, *US – Wheat Gluten*, para. 78; *Argentina – Footwear (EC)*, para. 144; Panel Report, *Argentina – Footwear (EC)*, para. 8.250.

coincidence must be explicit. This means more than just describing trends and noting that some are negative while some are positive. An explicit showing of overall coincidence must directly address why the contrary trends - improving trends in injury indicators even in the face of increasing imports - do not undermine the finding of overall coincidence. It is not enough to note a trend without any discussion of what that trend means or how it fits in with other trends. The United States cannot rewrite the USITC Final Report and thus, absent an explicit analysis or demonstration of the existence of an overall coincidence, the Panel must proceed on the basis that there was an absence of such overall coincidence.

### 2. The USITC did not provide a compelling explanation for its finding of a causal link

16. The failure to show overall coincidence means that the USITC must provide a compelling explanation of its finding of a causal link. However, instead of providing a compelling explanation of causality in light of the numerous positive factors in this case, the USITC ignored or downplayed these positive factors. The USITC also did not provide a compelling explanation why the negative factors it relied upon demonstrated the existence of causality notwithstanding the positive factors. In particular, the USITC did not consider the negative trends in context - in light of the conditions of competition in the CSPV industry - that presented certain negative trends in a very different light than the USITC's simplistic explanations of its findings.

17. The USITC was free to decide what methodology it would use to conduct its analysis of the existence of a causal link between the increase in imports and the alleged injury. The USITC chose to employ the most commonly observed methodology followed by competent authorities in prior WTO decisions: first, demonstrate the existence of an overall coincidence in trends, and then examine whether it could conclude a causal link existed based on such overall coincidence. The fact remains that the USITC did not propose any other method to examine whether a causal link existed. The United States confirmed that a coincidence analysis was the methodology chosen by the USITC and so, as a consequence of its choice, 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. Thus, having failed to demonstrate the existence of a coincidence in trends, the USITC was required to provide a compelling explanation for its finding of causality in light of the conditions of competition.

18. However, the USITC's explanation understated the numerous positive trends in certain injury factors in light of the conditions of competition, failed to account for such trends and to address the combined weight of those factors. While a number of positive trends were present during all or part of the POI, these positive trends were largely dismissed by the USITC without a sufficient explanation, which cast doubt on the USITC's explanation that the increase in the volume of CSPV imports caused the alleged injury suffered by the domestic industry. First, at the time imports were increasing, the domestic industry increased its capacity for producing US cells and modules. Second, the production by the domestic industry actually increased during the POI. Third, shipments of CSPV products by the domestic industry also increased during the POI. Fourth, while there was a small decrease in employment at the beginning of the POI, employment for CSPV cell production actually increased, by the end of the POI, when imports were at their highest levels. Fifth, over the course of the POI, the domestic industry increased its capital expenditures, and its overall financial performance improved. These positive trends point to the contrary proposition that there is no overall coincidence, and further, no causal link between the increase in imports and the changes in the domestic industry.

19. The USITC's explanation overstated the importance of negative trends in certain injury factors in light of the conditions of competition. The presence of both positive and negative trends means that the USITC was required to provide a compelling explanation in light of the conditions of competition as to why the negative trends were the result of the increase in imports. However, the USITC glossed over the negative trends by merely noting certain injury factors without further analysis, misrepresenting the data it collected during the investigation, and making conclusory statements asserting there was a connection between imports and the injury factors. The United States did not point to where the USITC provided an explanation for the causal link between increased imports and negative injury factors; instead, the United States argues any one negative development may indicate the existence of a causal link. This is mistaken.

20. In short, the USITC failed to examine the combined weight of all of the positive and negative factors in its analysis of causality. No single injury factor is, by itself, dispositive or a reason sufficient for a finding that the increase in imports caused the alleged injury to the domestic industry. The USITC merely noted the existence of positive trends as it summarized data collected during its investigation, only to then dismiss them without explaining why they were of minor or no importance for purposes of its analysis. The United States, on the other hand, tries to explain why each individual positive factor is not significant, but this *post hoc* attempt must be rejected. Regarding the negative trends, the USITC and the United States singled out each one of those factors and emphasized each individual trend, mischaracterizing them to appear more negative than the actual market situation. However, the USITC and the United States failed to consider any negative trends in the context of other positive trends.

### 3. Consideration of the conditions of competition further detracts from the explanatory force of the USITC's explanation

21. An important reason why the United States cannot seriously assert that the USITC's explanation of causality is "compelling" is that the USITC failed to properly consider all the relevant factors in its determination, including the key conditions of competition.

22. Contrary to the United States' argument, the conditions of competition weigh in favour of a finding that there was no causation. The two key conditions of competition during the POI were (1) the small size of the domestic industry throughout the period, and (2) the explosive growth in demand over the period. Taken together, these two conditions of competition severely attenuated the ability of changes in imports to affect the domestic industry.

23. Not only has the USITC failed to account for positive factors during the POI in light of these conditions of competition, the conditions of competition put certain apparently negative trends - including the domestic industry's declining market share - in a very different light. A proper examination of certain trends that the USITC considered negative results in a different interpretation. The USITC's failure to properly analyse the interplay between trends and the interaction between imports and the alleged injury suffered by the domestic industry in light of those trends and the conditions of competition results in an explanation that is simply not compelling.

24. The USITC's explanation is deficient as it failed to properly consider the conditions of competition. First, it places too much significance on the fact that the US industry's market share decreased over the course of the POI at the time when imports were increasing, without providing a compelling explanation for how this indicates the existence of a causal link. The analysis failed to consider the fact that the US industry's market share decreased because of the speed at which the market grew in relation to the small size of the domestic industry, and not because the domestic industry had any alleged "lost sales".

25. Second, the USITC exaggerated the importance of price and financial indicators as explanatory factors, without giving due consideration to non-price factors and without providing a compelling explanation in this respect. Considered as a whole, the record evidence shows that non-price factors were more important than price in describing the market dynamic - and describe a more complex market dynamic - demonstrating that falling prices were not the result of increased imports, as the USITC assumed. In addition, non-price factors also better explain the domestic purchasers' decision to purchase imported products. Nonetheless, the USITC relied on declining prices during the POI as a key injury factor - ignoring that such decline in prices was caused by other factors, and is part of an industry-wide, long-term trend.

26. Third, the USITC's explanation also failed to seriously consider the consequences resulting from the existence of distinct segments in the market: the residential and commercial segments on the one hand, and the utilities segment on the other. The USITC failed to account for the fact that US producers chose to focus on the residential and commercial segments instead of participating in the utility segment, whereas most imports focused on the utility segment.

27. Fourth, the USITC's determinations also failed to provide a compelling explanation for how increased imports resulted in plant closures. The USITC failed to address the year-over-year trends of plant closures and misrepresented period data, which did not demonstrate an overall coincidence. Most closures took place at the beginning of the POI, prior to the larger increase in imports. When

imports were at their highest level, the number of closures were at their lowest. Certain plant closures were the result of other conditions of competition, including corporate restructurings and shifting priorities.

28. The United States and the USITC try to explain away evidence on the record concerning the positive trends of the domestic industry by linking the evidence to the effects of AD/CVD orders, but its explanation is also flawed. The USITC simplistically attributed an effect to the AD/CVD orders, suggesting that improvement in the financial conditions of the domestic industry towards the end of the POI was the consequence of such orders, which caused prices to stabilize. However, its claim that the AD/CVD orders "stabilized" market prices were unfounded because CSPV cells and modules increased modestly for only 6 out of 16 quarters, and the average price for CSPV modules over the full period still fell by half. Likewise, the USITC observed that data collected through its questionnaires seemed to indicate that price trends "stabilized somewhat" early in the period, but this does not mean that the AD/CVD orders were the main driver of such price "stabilization". In fact, an objective examination of the data shows that price trends during the POI reflect instead the overall longer-term trend in the industry, where prices have decreased over time.

29. Ultimately, during the course of these proceedings, the United States has never seriously disputed that the USITC's explanation for its finding of a causal link is not "compelling".

## III. The USITC Failed to Conduct a Non-Attribution Analysis and the United States' Arguments Cannot Cure these Fundamental Defects

### A. The USITC Did Not Ensure that Injury Caused from Other Factors was Not Attributed to the Increased Imports

30. The non-attribution obligation set forth in the second sentence of Article 4.2(b) requires the competent authorities to ensure they do not "attribute{e} injury caused by other factors to increased imports". This is a separate and distinct legal obligation from the requirement to establish a causal link. Thus, the outcome of the "causal link" test - or the strength of any such link - is not determinative of the outcome of the non-attribution test.

31. The second sentence of Article 4.2(b) does not dictate a specific methodology. Nonetheless, the Appellate Body has interpreted the text to require that competent authorities "separate" and "distinguish" other factors of injury, as well as identify "the nature" and "extent" of their effects in the domestic industry. As such, competent authorities are required to do more than making conclusory statements when conducting the non-attribution analysis, and instead must provide a reasoned and adequate explanation, unambiguously and explicitly establishing how they separated and distinguished other factors and ensured that no other factors of injury are attributed to increased imports.

32. The United States argues that the USITC fulfilled the non-attribution requirement by applying the "substantial cause" test under U.S. law, which compares the importance of increased imports versus each other individual cause to see if imports are an important cause and *no less* than any other cause.

33. However, the USITC did not conduct an analysis of the "nature" and "extent" of each individual factor, despite recognizing that several other factors were having a negative impact on the domestic industry. Moreover, the USITC recognized that other factors were having a negative impact on the domestic industry and then dismissed them in a cursory manner as *less important* and not capable of explaining the situation of the domestic industry.

34. The United States also argues that the other factors alleged by the respondents in the USITC investigation were mere "symptoms" or "effects" of the increased imports and not "other factors". While there may be situations where other factors are at interplay with increased imports and are not completely independent. This is precisely why competent authorities are required to "disentangle" different factors of injury. The USITC never engaged in this exercise.

### B. The USITC Dismissed Other Factors as not Causing Injury Without Providing a Reasoned and Adequate Explanation why these Factors Were Having no Effect at all

35. The United States has not justified in the course of these proceeding the overly simplistic analysis performed by the USITC in assessing how injury caused by other factors that were advanced by the parties in the safeguard investigation was not attributed to increased imports. First, the USITC did not sufficiently address the domestic industry's lack of participation in the utility segment and its focus on the commercial and residential segments. In this context, the USITC did not clarify how the domestic industry would be suffering injury when imports served an increased demand that the domestic industry was not able to supply. Second, the USITC did not address quality as a factor for competitive differentiation between imports and the domestic industry. Third, the USITC did not address compelling evidence concerning the domestic industry's delay in implementing technological changes, as well as the delivery and service problems experienced by the domestic industry.

#### 1. The USITC did not sufficiently address the domestic industry's lack of participation in the utility segment

36. The USITC did not conduct a serious analysis about the level of participation of the domestic industry in the utility segment. The USITC simply dismissed this factor by asserting that the domestic industry "clearly" sought to compete in the large, concentrated, and price-sensitive utility market, but that the domestic competitiveness was impacted by large volume of imports. The USITC's analysis is unsupported by an actual analysis of the level of participation of the domestic industry in each market segment, and the consequences of such levels of participation.

37. The USITC failed to take into consideration the different competitive dynamics governing each market segment. The utility segment presented particular characteristics such as booming demand, different level of participation by the domestic industry, size of projects, concentration of purchasers, higher economies of scale or different channels of distribution.

38. The domestic industry made the conscious choice to focus in the residential and commercial segment, declining to scale-up its capacities until very late in the POI to serve the larger utility segment. This choice resulted in significant missed business opportunities. This choice was reflected by the fact that the domestic industry did not serve up to 85 percent of the utility segment prior to POI, and up to 95 percent at the end of the period due to the boom in demand. Thus, imports were not to blame for the large portion of the market that the domestic industry never service and could not service in the first place.

39. The USITC also erred in inferring the domestic industry competed in the whole utility segment from its very limited participation among smaller scale utility projects. The domestic industry, however, was not present in the large-scale projects - which constituted the bulk of the overall utility segment. The record evidence shows that the domestic industry only had capacity to serve projects of a size between 7 and 14 MW, although 82 percent of installed capacity in 2016 corresponded to projects larger than 20 MW. Large projects in the utility segment could reach up to 200 MW as witnessed by experts in the industry during the original proceedings.

40. Moreover, the domestic industry was not even competitive in the "small utility" segment, as evidenced by multiple complaints on the foreign source (e.g. Thailand, Germany) of 72-cell modules which were purchased to domestic producers. Solarworld indeed only introduced a 72-cell module line in 2016, although this was the predominant product in the utility segment since 2013-2014. Thus, it needed to import 72-cell modules in order to serve the customer demand for this product. As to Suniva, although 45 percent of the production lines were devoted to 72-cell modules, they were shared between the commercial and "small utility" segments.

41. The United States' argument that the lack of capacity of the domestic industry was a "result" or "symptom" of the increase in imports fails. Both the United States and the USITC ignore the fact that the domestic industry expanded its capacity late in the POI by 34 percent (42 percent of which occurred in 2016). The United States has not explained such expansions, why they were not made earlier, whether they were sufficient for addressing the demand in the utility segment (they were not), and whether the switch in the focus of business (i.e. entrance in utility segment) had a negative impact in the domestic industry's performance.

42. In any case, even where the USITC asserted that the domestic industry's lack of participation was purely the result of increased imports, it was required to disentangle the effects of different factors before reaching the superficial conclusion that the lack of competitiveness was purely an "effect" of increased imports as the United States pictures. The USITC never engaged in such exercise. That evaluation would have shed light on the "cause" and "effect" relationship between increased imports and domestic industry's participation in the utility segment, if any. Indeed, record evidence suggests the contrary to what the United States argues: the earlier lack of competitiveness of the domestic industry was the "cause" for imports serving a market where the domestic industry was not present or was not competitive.

43. In sum, the USITC failed to "disentangle" the effects of the domestic industry's business decision to focus in the residential and commercial segment) from the effects of increased imports, and the United States has not cured this defect in the USITC's reasoning.

### 2. The USITC erred in concluding that quality was not a factor distinguishing domestic CSPV products from imports

44. Both the USITC and the United States have dismissed the quality factor with sweeping assertions and simplistic reliance on U.S. producers' arguments. Quality, however, was considered among either the first-most or the second-most often cited in the ranking of three factors that customers consider in their purchasing decisions, even ahead of price. Thus, the USITC should have paid closer attention to the evidence on record suggesting quality problems experienced by the domestic industry.

45. In this regard, the record evidence shows that the domestic producers themselves needed to import products to meet the customers' specifications and requirements on quality. The USITC never looked at the reason why domestic producers themselves had to import rather than relying on their own products to meet domestic demand.

46. On the issue of qualification, the USITC itself found that at least 19 purchasers (19 out of 95, that is, 20 percent of the respondents) reported that producers failed in the attempt to qualify a product or lost their approved status since 2012. Some of the reasons cited for not qualifying a producer included "customer service, financial strength, broken commitments, cell cracks, use of thinner frame, quality control, bankability, failed audit, efficiency, delivery rates". The USITC, however, failed to provide a detailed analysis of the identity of the producers which did not qualify, the specific products concerned, the identity of disqualifying purchasers and their relevance in the market. The USITC only addressed in its Final Report NEXTracker's disqualification of SolarWorld, by denying its importance on the basis of petitioner's argument that the U.S. producer continued to be on the list of approved vendors. Such explanation is wholly insufficient since the U.S. producer could have been disqualified for certain products, project or period of time. Neither the USITC nor the United States addressed record evidence on other disqualifications, such as Suniva's second failure in its attempt to qualify before Sunrun in 2016, due to quality reasons. Likewise, neither the USITC nor the United States have commented on lack of serious attempts of U.S. producers to qualify before some of the largest purchasers in the utility segment including DEPCOM or NRG Energy.

47. The domestic industry did not adopt some of the most important innovations that took place during the POI, resulting in reduced competitiveness and lowered quality. The USITC did not sufficiently scrutinize this evidence during the investigation, and the United States has not contested the abundant evidence in the record concerning technological differentiation between domestic and imported CSPV products.

48. The United States has also tried to downplay USITC's lack of analysis of the bankability factor, which is closely connected to quality. As acknowledged by the USITC itself, the plurality of stakeholders operating in the utility segment chose module suppliers with high bankability. Domestic producers also noted the importance of bankability and five of them referred to the "{i}nability to obtain adequate financing" as a factor of injury. In light of this, the USITC should have conducted a deeper assessment on the relevance of bankability.

49. The United States has repeatedly rejected the quality factor on the basis of the high "interchangeability" between the domestic and imported CSPV modules. The United States'

argument, however, is largely based on similarity in physical characteristics between products and ignores other range of factors affecting competition between domestic and imported CSPV products, including quality, performance, reliability, conditions of sale, and others. Further, even as regards the physical characteristics alone, the USITC Final Staff Report showed mixed views on the issue, with a third of importers and a fourth of purchasers considering the products as "non-interchangeable". China has also questioned the notion of "interchangeability" which did not capture the differences in wattage ranges and conversion efficiencies between different categories of the same product, as well as the focus on different market segments for the domestic producers and importers, which required different product categories.

50. In sum, the United States has not cured the lack of analysis by the USITC on the impact of quality as another factor causing injury.

#### 3. The USITC ignored competing evidence showing the serious service and delivery problems the domestic industry had in supplying CSPV products

51. The United States has not justified the very superficial analysis conducted by the USITC on the service and delivery problems reported by independent purchasers. The USITC's analysis in its Final Report was reduced to three sparse sentences, which do not amount to a reasoned and adequate explanation. This is particularly true in light of the abundant conflicting evidence presented by purchasers about the service and delivery problems of the domestic industry, which was not assessed by the USITC but dismissed uncritically.

52. The analysis by the USITC is all the more obscure when considering that the supporting evidence (U.S. producers post-hearing briefs as well as attachments) cited in footnote of the USITC Final Report is largely confidential, as recognized by the United States in some of its submissions. The level of confidentiality and the lack of an accompanying non-confidential summary concerning such a significant causal factor is incompatible with the requirement of stating findings in a public report in a manner that is "explicit", "clear" and "unambiguous".

53. The United States has tried to minimize the importance of the USITC's insufficient analysis by representing the complaints as "isolated" or "anecdotal" and rebutted by the petitioners. However, the number of complaints were large, and they covered a broad categories of topics: from foreign origin of the product when the order was made for domestic products, service problems, delays, defective modules and broken cells, to others. A close look at the petitioners' post-hearing briefs shows that their arguments were not "more compelling". Rather, in some cases, the service and delivery problems were not sufficiently justified to the customers. By not explaining how the USITC assessed the evidence, or why it rejected each of the purchasers' complaints, the USITC failed in conducting an objective assessment of the record.

### C. The USITC Did Not Evaluate the Nature and Extent of Injurious Effects Caused by Other Factors that Were Admitted to Have Some Effect

54. The USITC also dismissed other factors despite having recognized that they were having some impact. These factors include evolution of incentives, decline in raw material costs, and the imperative to meet grid parity. The USITC did not provide a reasoned and adequate explanation about how it ensured that the admitted effects were not attributed to increased imports. And the United States' has failed to justify the USITC's perfunctory analysis of these factors.

#### 1. The USITC acknowledged the relevance on the evolution of incentives, but unjustifiably dismissed this factor on the basis of a superficial link with increased demand

55. The USITC "recognize[d] that changes in the availability and scope of Federal, state, and local government incentives and regulations *continue* to affect the price of and demand for CSPV products". The United States has tried to dismiss this assertion by suggesting that these effects did not take place over the POI. However, such a *post hoc* justification is completely at odds with the USITC's own admission that changes in availability in incentive "*continue* to affect" the price of and demand for CSPV products, in the present tense.

56. Even if the USITC's recognized that "evolution" of incentives affected price and demand for CSPV products, the USITC did not assess the development of government support as such. The USITC does little more than listing a limited number of government incentives and providing minimum descriptions of them without addressing their availability. On the issue of trends of government incentives, the USITC made ambiguous statements noting that "some programs have expired, while others continue", or that "these incentives and their benefits were designed to decline over time" without any specification. To sidestep the USITC's lack of analysis, the United States tries to put the focus on growing demand and explain that incentives did not have any effect on the domestic industry because demand continues to grow. Nevertheless, this justification cannot cure the defective analysis.

57. Despite the evidence on the record about market segmentation, the USITC never considered the effects of incentives in different segments of the CSPV market, including to what extent incentives that specifically benefited the residential and commercial segments where the domestic industry focused continued at the same level as prior to the POI. This assessment was necessary considering the differentiated demand, and the project-scale and focus of the different producers.

58. The USITC makes an overbroad connection between increased demand and the maintenance of the Federal Tax Income Credit. At the federal level, the USITC only looked at the extension of the Federal Income Tax Credit in 2016 when dismissing the evolution of incentives as a factor of injury. However, this incentive program particularly benefited the utility segment where demand was booming, but where the domestic industry was not focused. On the other hand, incentives which particularly targeted the domestic industry or the residential and commercial segments where the domestic industry was focusing declined or were terminated (e.g. advanced energy manufacturing tax credit ("MTC"); Section 1705 Loan Guarantee Program; and Section 1603 Treasury Cash Grant Program). The United States tries to dismiss the importance of these terminations by mentioning that they occurred prior to the POI. However, the reality is that these programs were still active during the POI and in any event, their termination had an impact on the domestic industry during the POI. Ultimately, as the Appellate Body made clear in *US – Wheat Gluten*, what matters is that the serious injury is suffered at the same time of increased imports, regardless of when the events giving rise to serious injury took place.[8]

59. At the state level, the questionnaire responses evidenced that the overall level of incentives actually declined, including programs which were particularly beneficial for the residential and commercial segments (e.g., net metering). The questionnaire responses that referred to increased demand due to availability of State incentives also mentioned the importance of programs particularly beneficial to the utility segment, where the domestic industry did not focus (e.g., renewable portfolio standards or the Public Utility Regulatory Policies Act of 1978).

60. The USITC also failed to perform any analysis on the impact of incentives on prices. The United States justifies this lack of analysis by referring to questionnaire responses reporting on the availability of programs making solar energy more competitive. However, as long as *any* level of incentive exists, the price gap between solar energy and prices of traditional energy will be reduced, thus making solar energy more competitive. But this does not address whether the reduced level of incentives exerted a downward pressure on CSPV module prices, which needed to maintain the same level of competitiveness they had with prior level of incentives.

61. The United States asserts that the U.S. producers of CSPV modules did not have to reduce their prices because of the availability of incentive programs. This, however, is mere speculation as the United States is unable to point to any evidence on the record. To the contrary, the reduction in the level of incentives generated a downward pressure on prices of U.S. producers, as they could not keep abreast of technological developments and cost reductions. From evidence in the record, it can be inferred that the domestic producers could do nothing but to absorb the decline in government incentives by reducing the profit margin to keep the competitiveness of their product in a highly price sensitive market.

62. The United States also referred to questionnaire responses reporting that changes in the price of solar generated electricity had no effect at all on the prices of CSPV products since 2012. The United States' effort to decouple prices from CSPV modules and solar energy fails. Several respondents reported that the price of CSPV modules is a large factor in the price of solar electricity;

[8] Appellate Body, *US – Wheat Gluten*, para. 88.

and therefore, that declining CSPV module prices translate directly into less expensive solar generated electricity. Moreover, the USITC itself also rejected this disconnect by explaining that CSPV modules represented the largest cost in installations, and that any governmental action affecting prices of CSPV modules would impact the demand for solar energy. The USITC thus admitted that certain government action (i.e. incentives) affected CSPV module prices and this effect was also reflected in solar energy prices.

63. In sum, the United States has failed to justify USITC's the lack of analysis of evolution of incentives in the demand and prices of the domestic industry. The USITC failed to provide a reasoned and adequate explanation on how the negative impact of declined incentives was not attributed to increased imports under the disputed case.

### 2. The USITC recognized significant declines in raw material costs and increased efficiencies, but then never assessed how these changes affected the final prices

64. The USITC recognized that there was an extraordinary decline in the prices of polysilicon ingots (52.6 percent) and wafers (54.5 percent), the main components of CSPV. The USITC, however, failed to explain how these decreases in raw material prices were reflected in the price declines of the domestic industry. Such an analysis was particularly relevant considering the USITC focused the analysis of injury and causation on the in declines of domestic prices.

65. The United States has insisted that the decline in raw material costs should have served as a positive factor, and that a mere characterization as "beneficial" was sufficient for purposes of a reasoned and adequate explanation under the non-attribution obligation. China disagrees because a mere categorization of a factor as "positive" cannot equal a "reasoned and adequate" explanation under the exacting requirements of the non-attribution analysis. Moreover, in claiming that the decline in raw material costs is a positive factor, the United States ignores the level of transparency in the market under which U.S. domestic producers had no option but to react to customer demands that raw material declines be reflected in the final prices customers paid.

66. Further, the United States ignores the possibility that decline in raw material costs, coupled with increased efficiencies (which neither the USITC nor the United States evaluated), can serve as a factor of injury when they generate a competitive differentiation among producers. To the extent that certain producers enjoyed greater economies of scale and increased efficiencies, the decreases in raw material costs played to their favour creating a competitive advantage as they were able to save additional costs by increased production, thus enjoying greater profit margins. In these circumstances, U.S. domestic producers were even more compelled to reduce their final prices given the level of transparency in the market and the need to remain competitive despite more limited economies of scale and reduced efficiencies. That the decline in raw material costs was a factor of injury was indeed admitted by U.S. producers themselves, with almost half of reporting U.S. producers, noting this factor in their questionnaire responses and some of them ranking it as an "extremely important" cause of injury.

67. China has also shown that the price trends of domestic CSPV modules and trends of main raw materials (i.e., polysilicon ingots and wafers) were very similar during the 2012-2016 period. The USITC Final Report described how domestic prices of CSPV modules declined substantially in 2012 but stabilized between 2013-2015 and then steadily fell throughout 2016. The trends are very similar to the unit value of dollars per kW of raw material costs as shown in the U.S. producers financial results. The magnitude of the change is also similar, with reductions in total costs of production by 46 percent and reduction in U.S. CSPV module prices around 58.5 percent between 2012-2016. Thus, the United States' contention that domestic prices of CSPV modules are not related to costs, and particularly costs of raw materials, is not supported by record evidence.

68. Finally, a close look at the U.S. domestic industry financial results shows, that contrary to the USITC conclusions, the disproportionate ratio between COGS to net sales ration had nothing to do with increased imports, but was due to other reasons. The domestic industry's financial results show that the ratio of gross loss to net sales was particularly negative on 2012 (-41.3 percent) because of the very high "other factor costs" (amounting to $317,456,000 in the first year of the POI). The financial results also show important swings in the SG&A expense ratios at initial high levels in 2012 (216 $/kW) declined until 2015 (103 $/kW) before rising again in 2016 (338 $/kW). The reason for

this sudden increase seems to be domestic industry's "impairments", which the USITC did not address in its Final Report, despite having the evidence at hand, and despite the Staff Report showing the USITC had further enquiries about them.

69. In conclusion, the USITC never addressed the evolution of raw material costs and its relationship with declines of final prices of domestic producers.

### 3. The USITC noted grid parity, but then ignored evidence in the record showing the important pressure exerted by this factor in declining prices of solar energy

70. The USITC acknowledged the impact of grid parity on prices by admitting that "prices of conventional energy may account for some of the decrease in prices of CSPV products over years". The USITC never clarified the ambiguous meaning of the terms "may" or "some".

71. Despite admitting its impact, the USITC rejected that the imperative to meet grid parity was another factor of injury through a very superficial analysis. In particular, the USITC determined that there was no "correlation" between natural gas and solar energy prices. Nevertheless, the USITC Final Report does not contain a serious analysis of correlation. While it addressed the interim trends of natural gas prices, it only mentioned that solar energy prices continued to decline throughout the POI, without addressing the intermediary trends for solar as it did for natural gas prices. However, the year-over-year changes in the price of solar energy closely followed the interim trends of the price of natural gas, and with the steeper declines in prices of CSPV products occurring in parallel when natural gas prices were at their lowest (i.e., 2012 and 2016). The USITC's separate and superficial analysis of natural gas and solar energy loses sight of the broader picture, which is that solar energy continued a decline trend seeking to approach the natural gas price levels, and such declining trends softened or sharpened in response to changes of natural gas prices

72. The United States has tried to justify the lack of serious analysis of the USITC by arguing the "great variability" in grid parity and the impossibility to identify an absolute target price. However, any complexity concerning the actual target level of "grid parity" cannot be used as an excuse to justify the USITC's complete lack of analysis. The USITC was not required to determine an "absolute" price target. In this regard, regardless of the time or geographic location used for calculating grid parity, there was a constant price gap between prices of solar energy and natural gas. Such a gap resulted in a downward pressure on solar prices to achieve parity over the years.

73. The United States has also tried to downplay the importance of grid parity by arguing there is a disconnect between prices of solar energy and prices of CSPV products. However, the record offers declarations from industry experts showing that CSPV manufacturers (including U.S. manufacturers) recognized that solar could achieve grid parity in the U.S. if innovative technologies were introduced and costs savings created allowing to reduce prices and increasing demand. As a consequence, U.S. CSPV manufacturers had the incentive to decrease prices and achieve grid parity to increase demand for their product.

74. The whole record before the USITC, including testimonies during the hearing and public information, evidenced the important price differences between conventional energies and solar energy prices. The levelized cost of energy ("LCOE") of natural gas was much lower than solar generated electricity. Such differences generated a pressure on U.S. producers to decrease prices. That the imperative to meet grid parity constituted a factor of injury was also admitted by the domestic industry itself, with a third of reporting U.S. producers identifying grid parity as an "injury factor".

75. The United States also made little effort in responding to China's argument on the greater competitiveness of alternative sources of renewable energy, which presented lower LCOE (34.50/MWh subsidized versus 52.40/MWh unsubsidized) than solar produced energy. The USITC and the United States completely ignored that wind energy acted as perfect substitute for solar energy in the market, not only for cost-conscious consumers (as in the case of natural gas) but also for environmentally aware consumers who wished to switch to "clean energy", and that. competition with these alternative renewable energy sources also created pressure on U.S. CSPV producers to reduce prices.

76. The gap between prices of solar and conventional energy prices was particularly acute for solar energy produced by residential and commercial segments. The USITC Final Report acknowledged that the residential and commercial segments could not enjoy the same economies of scale than the utility segment whose prices were closer to conventional energy prices. As a consequence, U.S. producers of CSPV modules which focused particularly in the residential and commercial segment were less competitive.

77. Finally, the United States has attempted to downplay grid parity as a factor by referring to China's argument that in some cases, solar energy produced by utilities almost achieved or even achieved grid parity with natural gas, resulting in increased demand. The United States, however, ignores that China's argument referred to grid parity between solar energy produced in new plants and natural gas produced in new plants. However, in most of the cases, solar energy plants were not competing with new plants of natural gas, but rather, with plants that have been in operation for decades whose costs were already depreciated. Competition between solar energy and natural gas from new plants was the exception, not the rule, given the limited new demand of energy. Even in that case, grid parity was only achieved when solar energy benefitted from government incentives. And only for the utility segment but not for residential and commercial installations where a considerable price gap remained, and on which the domestic industry focused.

78. The United States also fails in trying to minimize the importance of grid parity by referring to the increased demand in solar new installations in 2016. However, the year 2016 cannot be used as a benchmark given the unprecedented demand experienced in the utility segment because of the uncertainty as to the termination of the Federal Income Tax Credit and the rushed investment that it generated. Analysis of the prior years show that, although the demand for new electricity was limited, a significant part of that demand was still satisfied by natural gas and other renewable energies such as new wind power plants. The demand for new renewable energy plants (solar, wind) fluctuated significantly as they were subject to complex competitive dynamics including their price sensitiveness and dependence on governmental action. In sum, the USITC did not conduct a sufficient analysis of the grid parity factor, and did not provide a reasoned and adequate explanation on how it ensured the impact of this factor was not attributed to increased imports.

### D. The USITC Failed to Address Key Pieces of Evidence that Quantified the Effects of Different Factors, and the United States Has Not Justified these Failures

79. The USITC did not provide any analysis concerning the Econometric Report or explain why this key piece of evidence about the relative effect of different causes was ignored. Competent authorities must address the totality of the evidence. If the USITC considered that it was necessary to dismiss this key piece of evidence, it should have explicitly explained why, which it did not do.

80. In the case at hand, it was particularly important for the USITC to assess the Econometric Report on its record, which provided a quantification or the relative importance of imports versus other factors. The nature and complexity of the data, as well as the intricate relations between the different competitive forces called for a formal analysis of the relevant contribution of each of the factors having an impact on the domestic industry. Prior panels have offered guidance as to the need to provide a reasoned and adequate explanation on how other factors have not been attributed to increased imports, particularly when the market is characterized by complex competitive dynamics.[9]

### E. The USITC Did Not Engage in any Cumulative Assessment of Other Factors and the United States' Reasons for Ignoring Such Analysis Are Unsatisfactory

81. The USITC concluded that "alternative causes cannot individually or *collectively* explain the serious injury to the domestic industry". The USITC, however, never conducted any cumulative assessment. There is no single analysis of the cumulative assessment of other factors in the USITC Final Report.

82. The United States excuses the USITC's omission on the basis that no other factor was causing injury, and therefore, no cumulative analysis is required. This argument fails because the USITC did not separate and distinguish other factors of injury, determining their "nature" and "effects".

[9] Panel Reports, *US – Steel Safeguards*, para. 10.340.

83. In prior disputes, the Appellate Body has called for a cumulative analysis where the circumstances of the case indicated a need to do so.[10] Under the present circumstances, such a cumulative analysis was required under the circumstances given the interplay between the different competitive dynamics and conditions influencing the market (e.g., steady cost reductions, the level of incentives and technological developments, importance of achieving the grid parity imperative, competition with alternative energy sources representing perfect substitutes, price sensitiveness of purchasers, etc.). Nonetheless, the United States has not justified the omission of analysis by the USITC and has not justified why this deficiency is not relevant.

## IV. The United States Failed to Establish that the Increases in Imports Were the Result of "Unforeseen Developments"

### A. Members are Required to Demonstrate the Existence of the Unforeseen Developments and the Obligations Incurred, as well as their "Clear Linkage" with the Increased Imports Before Safeguard Measures Can Be Imposed

84. In addition to the two conditions relating to causation and non-attribution, the investigating authority must also find "unforeseen developments". More specifically, Article XIX:1(a) of the GATT 1994 requires that the significant increase in imports has occurred "as a result of *unforeseen developments* and of the effect of the obligations incurred by a contracting party under this Agreement". Thus, a Member can only take the extraordinary step of imposing safeguard measures if the increase in imports is the result of developments that are unexpected.

#### 1. There is no legitimate legal basis for the United States' position that there is no requirement to demonstrate "unforeseen developments" before the imposition of a safeguard measure

85. The United States' challenge to the very existence of the unforeseen developments obligation can be summarily rejected since that position is simply inconsistent with its obligations under the Agreement on Safeguards and the GATT 1994.

86. The United States denies the necessity to demonstrate a "clear linkage" between unforeseen developments and increased imports. The United States wrongly contends that unforeseen developments "do not appear as 'conditions' under the Safeguards Agreement that a competent authority must evaluate and include in its report". It further argues that the omission of any reference to unforeseen developments or obligations incurred in the Agreement on Safeguards is pivotal, and signifies that the published report of the competent authority need not include such determinations.

87. This is not the first time the United States wrongly argues that the unforeseen developments obligation is absent in the Agreement on Safeguards when its safeguard measures is challenged by another Member at the WTO. In *US – Lamb*, the United States argued that "it is sufficient for purposes of Article XIX:1(a) that the existence of unforeseen developments can be inferred from the factual record of the competent authority, and that the existence of such developments can be 'demonstrated during' dispute settlement proceedings in the WTO".[11] However, the Appellate Body disagreed and found that the USITC did not comply with this requirement.

88. It is clear that the text, context, object and purpose of the applicable WTO provisions demonstrate unequivocally that WTO Members must comply with the unforeseen developments obligation before imposing safeguard measures. This is confirmed by the actual text of Article XIX of the GATT 1994 and the Preamble and articles 1 and 11 of the Agreement on Safeguards.

89. The United States ultimately excuses the failure of the USITC by implying that the meaning of the WTO provisions is obscure but there is no such obscurity. This Panel should refuse to accept the United States' suggestion to ignore the numerous Appellate Body decisions that have effectively rejected the United States argument by ruling that any safeguard measure imposed after the entry

[10] Appellate Body Reports, *EC – Tube or Pipe Fittings*, para. 192; and *US – Steel Safeguards*, para. 490.
[11] Appellate Body Report, *US – Lamb*, para. 67.

into force of the WTO Agreement must comply with the provisions of both the Agreement on Safeguards and Article XIX of the GATT 1994.

### 2. The need to demonstrate a clear linkage between the obligations incurred and the increased imports is not a "double causation argument" as suggested by the United States

90. The United States maintains that, by citing to established prior Appellate Body and panel reports confirming an affirmative obligation of a Member to demonstrate a clear linkage between the obligations incurred and the increased imports, China is advocating for a "double causation" test. The United States is wrong. This is not China's argument at all.

91. China simply reiterates the conclusions of past Appellate Body and prior panel decisions that the compliance with Article XIX.1(a), first clause, necessitates a demonstration (in the published report of the competent authority) of a clear linkage between the unforeseen developments and increased imports.

92. The requirement to demonstrate a "clear linkage" between unforeseen developments and increased imports and the requirement to establish a "causal link" between increased imports and serious injury entail different standards. While both address similar concepts, they demand distinct legal tests within the framework of Article XIX of the GATT 1994 and the Agreement on Safeguards, and represent two separate conditions, which need to be met prior to the imposition of a safeguard measure. Moreover, while for "causal link" the increased imports are the cause of serious injury, for "clear linkage," the increased imports are the effect resulting from unforeseen developments and obligations incurred by the Member. In either case, the assessment of both the "clear linkage" and "causal link" requires thorough explanations, that the USITC report does not include.

93. Relying on an incorrect distinction between first and second clauses of Article XIX GATT 1994, vis-à-vis the Agreement on Safeguards, the United States asserts that China abandoned this argument during the proceedings before the Panel. This is not true. China's position is that, if a substantial portion of imports are sourced from countries other than the country in which the specific unforeseen development occurred, the USITC had to provide a reasoned and adequate explanation as to how the specific "unforeseen developments" that occurred in that particular country resulted in the increase in imports from all these other countries.

94. Conversely, the United States does not provide any actual evidence. While it alleged that the industrial policies adopted by China ultimately led Chinese producers to expand capacity in third countries, the United States fails to demonstrate how the USITC Supplemental Report contains information showing that the increase in exports from countries other than China came directly from the Chinese affiliates operating within those countries. The USITC made such assumption without any serious effort to establish any factual basis for those assumptions.

95. The United States did not demonstrate that the USITC established the clear linkage between the unforeseen developments and the increase in imports, originating either in China or in third countries.

### 3. The demonstration of the unforeseen developments, the obligations incurred, the increased imports, and the clear linkage among them must be explained in the safeguard report before the imposition of the safeguard measure

96. The United States is wrong to claim that under Article XIX it is enough to demonstrate compliance with the unforeseen developments obligation *during this proceeding*, rather than at the time of the measure. Likewise, the United States wrongly asserts that the demonstration of unforeseen developments in the published report is an option - rather than a requirement - under Article XIX.1(a).

97. The United States' position is wrong given that the demonstration of unforeseen developments must be made before the imposition of the safeguard measure. WTO panels, such as the *US – Line*

*Pipe* panel, have previously rejected this practice by the United States to provide *post hoc* demonstrations of the unforeseen developments during WTO dispute settlement proceedings.[12]

98. Further, the United States wrongly distinguishes between the first and second clauses in Article XIX.1(a) by arguing that, because only the second clause corresponds to injury and causation conditions under Article 4.2 of the Agreement on Safeguards, the demonstration of unforeseen developments (in the first clause) does not need to be shown in the report. The United States' position is flawed for three reasons.

99. First, under Articles 1 and 11.1(a) of the Agreement on Safeguards, safeguard measures must comply with Article XIX of the GATT 1994, including the requirement for competent authorities to demonstrate unforeseen developments. Therefore, compliance with the requirement to demonstrate the existence of unforeseen developments is mandatory and not discretionary for the competent authorities.

100. Second, the conditions prescribed by the first clause of Article XIX.1(a) of the GATT 1994, must also be investigated under the Agreement on Safeguards. The relevant question is not only whether the USITC complied with Article 4.2 of the Agreement on Safeguards, but also whether it complied with Article XIX.1.a of the GATT 1994, first clause, on unforeseen developments and obligations incurred. The United States' interpretation simply renders void the unforeseen developments obligation under Article XIX.1(a), first clause.

101. Third, the United States' reliance on *Korea – Dairy* in support of this argument is misleading and contradicts the Appellate Body's identical position in *US – Lamb*. In *Korea – Dairy*, the Appellate Body found that Article XIX.1(a) of the GATT 1994, first clause, describes certain circumstances which must be demonstrated as a matter of fact.[13] Nowhere in that case did the Appellate Body suggest not including this demonstration in the published report.

102. Finally, the United States insists that the issue of unforeseen developments does not need to be examined in the USITC's published report by arguing that it is not among those pertinent issues of fact and law that need to be demonstrated under Article 3.1 of the Agreement on Safeguards. However, this argument ignores that Article 3.1 of the Agreement on Safeguards does not place any limits on the "pertinent" issues of fact and law that need to be addressed in the published report. By taking this position, the United States simply excludes Article XIX.1(a) of the GATT 1994, first clause from the "pertinent issues of fact and law", thereby suggesting that competent authorities only need to investigate the injury referred to in the second clause thereof. This is a blatant mischaracterization of the relationship between Article XIX of the GATT 1994 and the Agreement on Safeguards.

### B. The USITC Supplemental Report Fails to Satisfy the Unforeseen Developments Requirements of the GATT 1994

#### 1. The USITC Supplemental Report does not sufficiently identify the "obligations incurred" that supposedly resulted in the increased import

103. China has made clear that the United States has not sufficiently identified the "obligations incurred" that allegedly resulted in the increased imports. The unforeseen developments requirement contains a *bona fide* obligation for a Member to identify the specific "obligations incurred" at issue and to demonstrate that the relevant "obligations incurred" constrained the Member's ability to react to the increased imports causing serious injury to its domestic industry. The United States argues no such obligation exists, regardless of the text of Article XIX of the GATT 1994 and the Agreement on Safeguards.

104. The United States claims that this specific requirement was met because the USITC generally referenced the U.S. tariff schedule that was at zero for CSPV products since 1987, since the tariff duty for CSPV products was bound under GATT 1994. The United States claims that such general reference fulfils the requirement to demonstrate "obligations incurred" under Article XIX:1(a).

[12] Panel Report, *US – Line Pipe*, para. 7.297-298.
[13] Appellate Body Report, *Korea – Dairy*, para. 85.

105. The only discussion of obligations incurred in the USITC Supplemental Report was a short and generic reference to the obligations of the United States' WTO and GATT membership,[14] which is glaring evidence that the USITC did not comply with the unforeseen developments obligation. First, the United States did not comply with the level of specificity required in demonstrating the "obligations incurred". A general statement by the USITC referring to its WTO and GATT membership does not meet the requirement to identify the specific obligations incurred. Further, while a footnote in the USITC Supplemental Report noted in passing that the subheading for CSPV products in the U.S. Harmonized Tariff Schedule has been free of duty since 1987, such a simple factual statement in the USITC Supplemental Report regarding the period of application of the current existing general duty rate does not constitute sufficient identification of the obligations incurred as contemplated by the unforeseen developments requirement.

106. Moreover, the United States' argument for an obvious "logical" connection between its HTS schedule for CSPV products and its corresponding WTO schedule of concessions must also fail. The requirement to identify the obligations incurred would be rendered meaningless if no actual identification of the obligations incurred were required prior to the imposition of the safeguard measure. It does not "logically follows", and it is not obvious, that subheading 8541.40.60 of the U.S. Harmonized Tariff Schedule is part of the U.S. schedule annexed to the GATT 1994 pursuant to paragraph 7 of Article II thereof, as its binding tariff. In fact, neither the USITC Supplemental Report nor the Final Report even reference a relevant "tariff concession".

107. By no means did the USITC Supplemental Report attempt to provide an identification of the United States' obligations incurred in a manner at all similar to the above guidance about the degree of specificity.

### 2. The USITC Supplement Report's claim that it was completely unforeseen that the imposition of AD-CVD duties against China would lead to increased imports from other countries is both not credible and demonstrably false

108. The USITC Supplemental Report maintains that it was completely unforeseen that, in a situation in which U.S. demand for CSPV products significantly exceeds U.S. CSPV production capability, the imposition of AD and CVD duties against China would lead to increased imports from other counties. Such assertion of unforeseen development is demonstrably false.

109. U.S. demand for CSPV products has significantly exceeded U.S. producers' capability to produce and supply CSPV products for quite a long time. As early as 2012 - essentially before the significant increase in imports that led to the serious injury at issue in this case - U.S. CSPV producers could only produce about 15 percent of total U.S. demand.

110. As of 2012, China was a primary supplier of CSPV products to the U.S. market. However, in December 2012, AD-CVD were imposed on Chinese CSPV exporters, restricting Chinese imports.

111. The USITC Supplemental Report claimed that it was "unforeseen" that other CSPV product exporting countries would increase their exports to the United States given the decrease in exports from China because of the AD-CVD duties. However, it is common knowledge that if the domestic industry cannot supply total domestic demand, foreign sources will step in. And so, other countries would naturally increase their exports to the United States if imports from China are reduced.

112. The Panel has before it *bona fide* proof that the United States was fully aware of the real-world consequences of the imposition of AD-CVD duties on one exporting country leading to increases from other exporting countries. The USITC itself foresaw this very economic dynamic 20 years ago in its December 2001 safeguard investigation on steel products. The USITC acknowledged that previous anti-dumping and countervailing orders did not prevent a significant increase in imports of the very same product, and that such increase was a substantial cause of serious injury. The USITC was, indeed, well aware of these trade diversions.

[14] USITC Supplemental Report, Exhibit CHN–6, p. 4.

### 3. The USITC Supplemental Report does not adequately demonstrate or explain how government policies by China led to increased exports from countries other than China

113. The USITC had a clear obligation to provide an adequate explanation of how and why the specific unforeseen developments identified resulted in the increase in imports that the USITC found caused the serious injury to the domestic industry. Such obligation necessarily requires a clear linkage between the unforeseen developments and the increased quantity of imports that allegedly caused the serious injury. If a substantial portion of imports are sourced from countries other than the country in which the specific unforeseen development occurred, the Panel will need to look for a reasoned and adequate explanation offered by the USITC about how the specific "unforeseen developments" that occurred in one particular country resulted in the increases in imports from all these other countries.

114. However, the import data compiled by the USITC itself demonstrates that imports from within China did not contribute to the increased imports in 2016, at the end of the POI. Rather, the increase came from countries other than China. Therefore, there is no clear linkage between alleged government policies by China - the only allegedly "unforeseen development" source identified by the USITC - and the increased imports that caused serious injury. Imports from China were decreasing, not increasing.

115. Moreover, the USITC's Supplemental Report contains only a single sentence representing its entire discussion about the alleged linkage between government policies by China and increases in exports from other countries. This sentence contains several assumptions turned into logical conclusions for which the USITC provides no explanation and cites to no evidence. The USITC's and United States' logic in this sentence appears to suggest, at least, three baseless assumptions. The first assumption is that there were government policies by China to encourage production both inside and outside of China. Second, that Chinese producers took advantage of such government policies to build production facilities in countries outside China. And third, that the increase in U.S. imports from these other countries came from those Chinese producers that had built the production factories. Although the United States has advanced this logic, neither the USITC determinations at the time nor the United States before this Panel have identified sufficient underlying factual evidence to support each of these claimed "facts".

116. There is simply no adequate explanation that the alleged government policies in China led to unexpected increased imports from other countries in the USITC Supplemental Report. Except for noting that some Chinese companies allegedly created production operations outside China, there is simply no discussion of, or evidence for, this link alleged by the United States in the USITC Supplemental Report. Rather, this conclusion is simply asserted as fact by the United States.

117. The USITC was also equally wrong in suggesting that the production of CSPV products by Hanwha in Korea was somehow controlled by a Chinese affiliate (at the behest of the Chinese government, no less). However, the opposite was in fact the case because Hanwha is a Korean company seeking to expand its production in China by establishing a Chinese affiliate. There is no factual basis to support the argument that Hanwha's Chinese affiliate in China or any Chinese company had anything to do with Hanwha's production in Korea.

118. The United States implicitly conceded the lack of evidentiary basis of its unforeseen developments conclusion when it argued mightily that the USITC's conclusions on this issue could be supported by "reasonable inferences" - instead of the stricter requirement of compelling evidence. China disagrees with this United States' position, given that a safeguard measure is an exceptional, extraordinary measure that demands the exhaustion of a rigorous investigation leading to a decision based on solid evidence, not inferences.

119. Accordingly, if the country locations where the unforeseen development occurred differs from the countries where increased imports originated, the investigating authority would fail its obligations under Article XIX of the GATT 1994 unless it provides a reasoned and adequate explanation for this country mismatch. The USITC's Supplemental Report suffers from this fundamental failing as the USITC did not demonstrate the required "clear linkage" between the unforeseen developments and the increase in imports by alleging without proving that the policies promulgated by the Government of China somehow lead to Chinese companies producing in other

countries that then exported to the United States. Accordingly, the USITC's determination does not comply with the obligation to identify and explain the required unforeseen development.

## V. The USITC Failed to Provide a Sufficient Public Summary of the Confidential Data in Its Reports to Allow for a Meaningful Defence

### A. The USITC Was Required to Publish Non-Confidential Summaries of Its Reports and Intermediate Decisional Documents

120. Article 3.1 of the Agreement on Safeguards requires competent authorities to publish a report setting forth its findings and reasoned conclusions on all pertinent issues of fact and law, and the USITC is not released from this obligation even when its explanation relies on confidential data. However, read in conjunction with their obligation to respect confidentiality of confidential information under Article 3.2, competent authorities are required to publish a non-confidential summary of the confidential data relied upon in their report.

121. Confidential data can be redacted in the non-confidential summary of the authorities' report, but authorities still must present such confidential data in a summarized and modified form while protecting confidentiality through a presentation of aggregated or indexed data, or other alternatives - they can only provide no data when all these methods fail.[15] As a consequence, the USITC should have characterized 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.

122. The United States also argues that there is no obligation to publish non-confidential summaries of intermediate decisional documents. However, the consequence of this argument is that a competent authority would only need to include all confidential information on an "intermediate decisional document", and then subsequently publish a final report to avoid its obligation to publish a non-confidential summary of such information. Moreover, intermediate decisional documents frequently form part of the final report of the authorities - or are themselves documents in respect of which the interested parties have a right to present evidence and their views. Consequently, a harmonious interpretation of the obligation to publish a non-confidential summary of the report requires the publication of a non-confidential summary of any intermediate decisional document incorporated or reproduced in the report. This is also the interpretation by the United States, as the practice of the USITC itself is to publish non-confidential summaries of its staff reports, which it now qualifies as an "intermediate decisional document".

123. The United States asserts that there is no obligation on competent authorities to publish non-confidential summaries of their reports, but only an obligation to publish a final report of their findings and reasoned conclusions. But this argument ignores consistent practice by WTO Members, whose competent authorities invariably publish non-confidential summaries of their reports - including the USITC itself. While the United States has challenged claims by other members in other WTO proceedings as to the appropriateness of the USITC's non-confidential summaries, it has not challenged the existence of the obligation itself. Finally, WTO panels must rely on the non-confidential versions of the reports in order to conduct their assessment.

### B. The USITC Was Required to Publish the Non-Confidential Summaries Promptly, with Sufficient Time to Permit Interested Parties to Meaningfully Exercise their Right to Present Evidence and Their Views

124. In a safeguard investigation, interested parties have a right under Article 3.1 to "present evidence and their views". If no sufficient time is provided for the parties to comment on the final report, this right would be rendered meaningless. Article 3.1 must further be read in conjunction with Article 4.2(c) which requires the competent authorities to "publish *promptly*" a detailed analysis of the case under investigation in accordance with the provisions of Article 3. The consequence of the foregoing is that non-confidential summaries should be published "promptly", but the meaning of "promptly" is closely related to the context of the proceeding at issue. A report that is not

[15] Panel Reports, *US – Steel Safeguards*, para. 10.274. See also, Panel Report, *US – Wheat Gluten*, para. 8.23.

published promptly would impede - or even effectively negate - the parties' ability to meaningfully exercise that right.

### C. The USITC Acted Inconsistently with Its Obligations Regarding the Publication of the Non-Confidential Summaries

#### 1. The USITC's Non-Confidential Summaries failed to provide characterizations of confidential data in the non-confidential summaries sufficient for interested parties to meaningfully exercise their rights

125. The non-confidential version of the USITC Final Report is excessively redacted, entirely omitting key sections of extremely important data necessary for interested parties understand the USITC's analysis. As regards the USITC's analysis of causality, we note that these omissions of data meant China had to resort to alternative public data in these proceedings - data that did not expressly form part of the USITC's "reasoned and adequate" explanation on those points - because the lack of characterization or explanation makes the reasons for the USITC's finding extremely ambiguous, and certainly not "compelling".

126. The excessive redaction without proper characterization of confidential data also meant that interested parties were unable to meaningfully exercise their right to present evidence and their views, both before the USITC - in the case of the USITC Final Staff Report - and before the TPSC - in the case of the USITC Final Report. As published, the public version of the USITC Final Report is deficient and inconsistent with the USITC's obligation to publish a non-confidential summary.

127. The United States' allegation that the USITC goes further than required by the Agreement on Safeguards by allowing parties, through their US counsel, to access confidential information through APO is irrelevant. The terms of the USITC APO impede US counsel from discussing confidential information with their clients, the interested parties. In addition, China's claim is not that US counsel of interested parties were unable to examine confidential information, but rather that the USITC acted inconsistently with its obligation to publish non-confidential summaries of such confidential information. Moreover, the USITC required counsel to the interested parties to destroy all confidential information before they even had an opportunity to present their arguments or comments to the TPSC, making it impossible to rely on confidential information.

#### 2. The non-confidential summaries were not published "promptly" effectively negating the ability of interested parties to meaningfully exercise their rights

128. The timing between the date when the non-confidential summaries of the USITC's reports - the "public versions" - were available to the interested parties and the deadline for the submission of briefs and the hearings effectively negated the ability of the parties to meaningfully exercise their rights. The non-confidential summaries were published and made available one and two business days prior to the deadline for the submission of prehearing briefs on injury and remedy, respectively, and on the same day comments were due before the TPSC.

129. China does not dispute that "promptly" does not mean that the non-confidential summaries must be published "simultaneously with" the confidential version of the report - but it does mean "quickly, without delay or at the arranged time". Given the timeline of the USITC's investigation, the delay in publication of the non-confidential summaries means that they cannot be said to have been published promptly.

130. Finally, the United States argues that competent authorities are not required to provide sufficient time for interested parties to comment on their final report. This argument has two substantive flaws. First, in the United States, a safeguards investigation does not conclude with the USITC Final Report, but has an additional stage before the TPSC, where interested parties have a right to present evidence and their views. Second, interested parties do have a right to comment on the USITC Final Report. By issuing the non-confidential summary on the date when comments before the TPSC were due, the USITC effectively negated the meaningful exercise of this right by interested parties.

## ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE
ARGUMENTS OF THE UNITED STATES

## EXECUTIVE SUMMARY OF THE U.S. FIRST WRITTEN SUBMISSION

### I. INTRODUCTION

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

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

3. In 2017, the domestic industry filed a petition with the USITC requesting imposition of a safeguard measure on imports of CSPV products from all sources. The USITC conducted an investigation and found that increased imports were causing serious injury to the domestic industry. On September 22, 2017, the Commission reached a unanimous affirmative determination that CSPV products were being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry. The investigation then proceeded to the remedy phase, so the Commission could provide remedy recommendations in its report to the President.

4. The Commission issued a report in November 2017, containing its affirmative serious injury determination and recommendations for action to take. On November 27, 2017, the United States Trade Representative requested the USITC to provide additional information in the form of a supplemental report identifying any unforeseen developments that led to the articles at issue being imported into the United States in such increased quantities as to be a substantial cause of serious injury. The Commission responded to this request by issuing a supplemental report on December 27, 2017, containing its finding that the increased imports were a result of unforeseen developments and the reasons for that finding. These reports taken together constitute the report of the U.S. competent authorities for purposes of Articles 3.1 and 4.2(c) of the Safeguards Agreement.

5. Following receipt of the Commission's reports, the President imposed a safeguard measure beginning on February 7, 2018, that he determined "will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs". The safeguard measure imposed a 2.5 GW tariff rate quota ("TRQ") on imports of CSPV cells for a period of four years, with unchanging within-quota quantities and annual reductions in the rates of duty applicable to goods entering in excess of those quantities in the second, third, and fourth years. The measure also imposed *ad valorem* duties on imports of

CSPV modules for a period of four years, with annual reductions in the rates of duty in the second, third, and fourth years.

## II. STANDARD OF REVIEW AND BURDEN OF PROOF

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

7. Under these standards, panels are charged with the mandate to determine the facts of the case and to interpret and apply the relevant text of the covered agreements to the challenged measures. In challenging action to impose a safeguard measure, a complaining party brings forward evidence and argument relating to the investigation carried out, the findings by the competent authority, and the remedy imposed. Therefore, past reports have examined whether the authorities have provided a reasoned and adequate explanation as to how the evidence on the record supported its factual findings and how those factual findings support the overall determination. In reviewing agency action, the Panel must not conduct a *de novo* evidentiary review, but instead should bear in mind its role as reviewer of agency action. Indeed, it would not reflect the function set out in Article 11 of the DSU for a panel to go beyond its role as reviewer and instead substitute its own assessment of the evidence and judgment for that of the competent authority.

## III. THE USITC'S SERIOUS INJURY DETERMINATION IS CONSISTENT WITH ARTICLE XIX OF GATT 1994 AND SAFEGUARDS AGREEMENT ARTICLES 2, 3, AND 4

### A. Overview of the USITC Serious Injury Determination

#### 1. Conditions of Competition

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

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

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

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

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

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

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

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

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

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

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

19. As part of its serious injury analysis, the Commission also examined the extent to which the U.S. market was a focal point for diversion of exports. It found that foreign industries had substantial and increasing capacity to manufacture CSPV cells and CSPV modules and significant unused capacity. Foreign producers' collective capacity consistently exceeded their combined production levels by large margins and their excess capacity exceeded the size of the entire U.S. market in each full year of the POI. In addition, their combined end-of-period inventories increased each year from 2012 to 2016.

20. The Commission found that foreign industries had not only the available capacity, but also the incentive to export significant volumes of CSPV products to the United States. Although the foreign industries collectively consumed the majority of the CSPV cells that they manufactured in their home market CSPV module assembly operations, their CSPV module operations were export oriented.

Indeed, their combined exports of CSPV modules more than quintupled from 2,300 MW in 2012 to 11,800 MW in 2016.

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

22. Finally, the Commission examined prices of CSPV products during the POI. Specifically, the Commission examined the pricing data comparing import and domestic prices on the five pricing products agreed by the investigation participants to be representative of CSPV sales in the United States. These products included 60-cell modules as well as 72-cell modules. These comparisons demonstrated that imports of CSPV products were priced lower than domestically produced products in 33 of 52 instances involving approximately two-thirds of the total volume of products for which the Commission had pricing data, and were priced higher in only 19 instances. The Commission observed that domestic producers documented 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. It found that the domestic industry experienced adverse price conditions as imports were lower priced than domestically produced CSPV products and domestic prices fell between 2012 and 2016 despite very strong demand growth. The domestic industry's COGS to net sales ratio was high throughout the POI with its costs remaining near or above its net sale values.

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

#### 2. Increased Imports were a Substantial Cause of Serious Injury and an Important Cause not less than any Other Cause

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

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

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

27. The Commission found that while the volume of imports that were highly substitutable with the domestically produced product and generally lower priced, grew, prices for all five pricing

products declined between January 2012 and December 2016. Specifically, prices declined substantially in 2012. Prices stabilized somewhat after imports from China became subject to antidumping and countervailing duty orders in December 2012, additional investigations on imports from China and Taiwan were commenced at the end of 2013, and imports grew at a slower pace than apparent U.S. consumption between 2013 and 2014. As imports from additional sources entered the U.S. market and rapidly increased to higher volumes, however, the domestic industry's prices steadily fell throughout 2016. Several purchasers also reported steeper price reductions in 2016, as the domestic industry's share of the market fell to its lowest level.

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

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

30. Consistent with the declines in many of the domestic industry's trade and financial indicators between 2015 and 2016, as imports reached their POI pinnacle, the Commission found that available information suggested that the domestic industry's condition continued to deteriorate into 2017, continuing beyond the end of the POI in December 2016. Two additional U.S. production facilities closed by July 2017. The domestic industry's unemployment and underemployment also worsened in 2017, with Suniva's bankruptcy filing and SolarWorld's additional layoffs and issuance of worker training and readjustment ("WARN Act") notices.

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

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

33. The Commission first addressed respondents' claims concerning alleged missteps by the domestic industry, which respondents identified in terms of the types of products the domestic industry manufactured, the market segments they served, and the quality, delivery, and service the domestic producers provided. The Commission acknowledged that certain foreign producers may have produced CSPV products that were unique or unavailable from other sources, but explained that the record evidence indicated that these products accounted for only a small share of the U.S. market for CSPV products. Moreover, it found that there was more overlap between U.S. and imported specialized CSPV products than acknowledged by respondents.

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

35. Although the great majority of the domestic industry's shipments went to residential and commercial installers, the USITC found that the domestic industry also competed for and shipped to the utility segment of the market. The Commission found that the evidence showed that the domestic industry sold both 60-cell and 72-cell modules, and that the utility segment purchased both types of modules during the POI. Respondents even acknowledged that 60-cell modules predominated in all three segments of the market, including the utility segment, at the beginning of the POI. Although the utility segment later shifted to 72-cell modules, SolarWorld added a 72-cell module assembly line to its U.S. facilities due to increasing demand and Suniva devoted 45 percent of its cell production capacity to 72-cell modules.

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

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

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

## IV. CHINA HAS FAILED TO ESTABLISH THAT IMPORTS DID NOT INCREASE AS A RESULT OF UNFORESEEN DEVELOPMENTS AND OF THE EFFECT OF OBLIGATIONS INCURRED

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

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

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

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

43. China also argues that the findings on obligations incurred and unforeseen developments must appear in the report of the competent authorities. China's argument fails on its own terms as the

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

### A. The Framework Under Article XIX and the Safeguards Agreement Concerning Unforeseen Developments and Obligations Incurred

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

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

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

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

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

48. Specifically, the USITC found that:

> U.S. negotiators could not have foreseen at the time that the United States acceded to GATT 1947, at the time that the United States acceded to the WTO, or at the time that the United States agreed to China's accession to the WTO that the government of China would implement the industrial policies, plans, and government support programs such as those described above that directly contradicted the obligations that China committed to undertake as part of its WTO accession. U.S. negotiators also could not have foreseen that such industrial policies, plans, and support programs would lead to the development and expansion of capacity to manufacture CSPV products in China to levels that substantially exceeded the level of internal consumption. They could not have foreseen that this capacity would largely be directed to export markets such as the United States. U.S. negotiators also could not have foreseen that the U.S. government's use of authorized tools, such as antidumping and countervailing duty measures on

> imports from China, would have limited effectiveness and instead lead to rapid changes in the global supply chains and manufacturing processes in order to facilitate U.S. imports of non-covered products from China and Taiwan and later U.S. imports from Chinese producers' affiliates in other countries.

49. China asserts that the Supplemental Report "does not actually identify any specific 'obligation incurred' as a result of the GATT or WTO negotiations", and asserts that the only reference to an obligation in the Supplemental Report is the statement that "[t]he United States has been a GATT member since January 1, 1948, and has incurred the obligations of WTO membership since January 1, 1995". However, as even China notes, the Supplemental Report says more than this.

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

51. China contends that "it is hardly 'unforeseen' that countries would seek economic development and energy security". But that was not the USITC's point. What was unforeseen was the scale of the effort, the speed with which it boosted Chinese production, the overcapacity that it created, and the degree to which these effects spilled into other countries where Chinese producers expanded their operations. It is telling that China essentially ignores the points about the speed of its industry's growth and the overcapacity that resulted, which are central to the USITC's conclusions.

52. China argues that negotiators would certainly have foreseen that trade remedies on China would result in increased shipments from other countries because "trade will naturally shift to the countries with lower duties". However, the USITC did not erroneously treat a "natural" shift in sourcing as "unforeseen" Rather, it found that China's policies, plans, and programs "led to vast overcapacity in China and subsequently in other countries as Chinese producers built facilities elsewhere". Thus, this was not a case of supply and demand "naturally" leading purchasers to source from the country with the lowest prices, but one of China's practices allowing its producers to move their production from one place to another in ways that were completely unforeseen. Thus, China's assertions do nothing to cast doubt on the USITC's finding that Chinese producers' ability to avoid trade remedies by shifting production to other countries was unforeseen.

53. China also argues that the specific focus on China's policies, plans, and programs in the USITC Supplemental Report does not explain the connection between these unforeseen developments and the increase in imports from other countries, particularly towards the end of the investigation period in 2016. China's argument is incorrect because both the USITC November Report and the Supplemental Report explain how China's policies, plans, and programs resulted in Chinese producers shifting production facilities to other countries and that U.S. imports from these other countries increased massively following this shift.

54. Specifically, the USITC Supplemental Report found that:

> the six largest firms producing CSPV cells and CSPV modules in China increased their global CSPV cell and CSPV module manufacturing capacity by expanding investments in third countries without reducing their capacity in China. Imports from four countries where Chinese affiliates added both CSPV cell and CSPV module capacity – Korea, Malaysia, Thailand, and Vietnam – increased their share of apparent U.S. consumption from *** percent in 2012 to *** percent in 2016. Much of this increase occurred between 2015 and 2016, as their collective share of the U.S. market more than doubled from *** percent in 2015 to *** percent in 2016, which occurred just after the CSPV II orders went into effect in February 2015.

## V. THE USITC PROPERLY PUBLISHED ITS FINDINGS AND REASONED CONCLUSIONS UNDER SAFEGUARDS AGREEMENT ARTICLE 3.1 AND PROTECTED BCI UNDER ARTICLE 3.2

55. Article 3.1 of the Safeguards Agreement provides that a Member may take a safeguard measure only after its competent authorities have conducted an investigation, provided appropriate means for interested parties to present evidence and their views, allowed them to respond to each others' arguments, and published a report setting out their findings and reasoned

conclusions on all pertinent issues of fact and law. Article 3.2 requires that the competent authorities not disclose any confidential information they receive in this process without permission of the party submitting it. Both articles are mandatory, and the USITC complied with both. At the outset of the proceeding, it published a non-BCI version of the petition. It gave parties multiple opportunities to present their views and evidence in writing, and required that they serve each other with copies of the submissions. It conducted two public hearings.

56. China asserts that the USITC acted inconsistently with Article 3 of the Safeguards Agreement because it allegedly failed to provide a sufficient public summary of confidential data to allow for a meaningful defense. China presents this argument as having a procedural dimension with respect to the timing of the ITC's release of certain documents, and a substantive dimension with respect to the adequacy of public summaries of BCI.

57. An examination of Articles 3.1 and 3.2 and the evidence before the Panel shows these arguments to be meritless. First, the USITC had no obligation under Articles 3.1 and 3.2 to provide non-confidential summaries of BCI to the parties during its investigation. Therefore, the timing of release of documents during the investigation is irrelevant. Second, the USITC published its non-BCI report in a manner that gave parties ample time to review it and present their views to the U.S. government. Third, the USITC had no obligation to include non-confidential summaries of submitted BCI in its published report. The relevant obligation is for the competent authorities' report to "set[] forth their findings and reasoned conclusions reached on all pertinent issues of fact and law". China's examples of redactions provide no basis to conclude that the USITC report failed to comply with this obligation.

## EXECUTIVE SUMMARY OF U.S. RESPONSES TO THE PANEL'S FIRST SET OF QUESTIONS

### U.S. RESPONSE TO PANEL QUESTION 4

58. The USITC considered the domestic industry's excess capacity and inability to meet the entirety of apparent U.S. consumption, and provided a reasoned and adequate explanation linking these circumstances to the serious injury caused by increased imports. Pages 43 to 50 of the USITC November Report provide a detailed analysis explaining how the increased imports caused firms to incur hundreds of millions of dollars in losses throughout the POI, resulting in significant idling of production facilities and hindering the industry's ability to increase capacity commensurate with demand growth. To summarize, the domestic industry's inability to expand capacity in parallel with the growth in domestic demand was one element of the serious injury caused by increased imports and not, as China seems to argue, an independent cause of injury.

59. These imports were highly substitutable with and priced lower than the domestically produced like product. Given that price was an important consideration in purchasing decisions, prices declined as the volume of lower priced imports grew between January 2012 and December 2016. The data demonstrated that prices declined substantially in 2012. Prices stabilized somewhat after imports from China became subject to antidumping and countervailing duty orders in December 2012, additional investigations on imports from China and Taiwan were commenced at the end of 2013, and imports grew at a slower pace than apparent U.S. consumption between 2013 and 2014. As imports from additional sources entered the U.S. market and rapidly increased to higher volumes, however, the domestic industry's prices steadily fell throughout 2016. Several purchasers also reported steeper price reductions in 2016, as the domestic industry's share of the market fell to its lowest level.

60. The Commission found that as prices declined over the POI, the domestic industry's net sales values fell overall and its COGS to net sales ratio was high and exceeded 100 percent at the end of the POI, leading to further deterioration of the industry's condition. Consistent with overall declines in its net sales value and high COGS to net sales ratio, the domestic industry experienced hundreds of millions of dollars in operating and net losses throughout the POI.

61. Thus, despite extremely favorable demand conditions, the domestic industry's performance was "dismal and declining" during the POI. The Commission found that consistent with the hundreds of millions of dollars in net and operating losses throughout the POI, a significant number of domestic producers were unable to generate adequate capital to finance the modernization of their domestic plants and equipment, and a significant number of them were unable to maintain existing research and development expenditure levels. This inability to generate adequate capital for investments and

research and development impaired the domestic industry's ability to develop next-generation products in a highly capital intensive and technologically sophisticated market.

62. The Commission also found that, although the remaining firms were capable of supplying additional demand, they were unable to do so due to the increasing volume of lower priced imports. Domestic producers reported and documented losing bids and sales to low-priced imports of CSPV products during the POI. Thus, the remaining firms experienced low capacity utilization even with increasing demand throughout the POI, with excess capacity for module producers increasing from 391,194kW in 2012 to 576,718kW in 2016.

63. Thus, compelling evidence supported the Commission's findings that the increasing volumes of low-priced subject imports resulted in underutilization of the domestic industry's production assets, underinvestment, and closures, which in turn, affected the industry's ability to capitalize on the strong and increasing domestic demand. These findings are consistent with and support the Commission's ultimate finding that increased imports caused serious injury to the domestic industry.

**U.S. RESPONSE TO PANEL QUESTION 20**

64. The Commission based its finding of a causal link between increased imports and the declining prices on a detailed evaluation of the evidence and consideration of the parties' arguments. The Commission also evaluated whether other factors might explain the declining prices and attenuate the causal link identified in the first stage of its analysis. It considered the other causes posited by respondents, including declining raw material costs and increased production efficiencies. The Commission found that the record did not support respondents' arguments. Notwithstanding this decline in raw material costs – which should have benefitted the domestic industry – the Commission observed that the domestic industry remained unprofitable as it continued to incur hundreds of millions of dollars in losses over the POI. Like declining raw material costs, any achievement in higher levels of production efficiencies should have been a favorable factor that benefitted the domestic industry by lowering its overall costs. As explained, however, the domestic industry's COGS to net sales ratio was consistently high, and exceeded 100 percent in 2016. Thus, rather than being able to take advantage of lower overall costs resulting from gains in production efficiencies, prices declined at a level that kept pace with their declines in costs.

65. In sum, China's allegation that other factors were responsible for falling prices does nothing to cast doubt on the link the Commission found between increasing low-priced imports and decreased prices for domestic CSPV products.

**EXECUTIVE SUMMARY OF U.S. COMMENTS ON CHINA'S RESPONSES TO THE PANEL'S FIRST SET OF QUESTIONS**

**U.S. GENERAL COMMENTS ON CHINA'S RESPONSES TO PANEL QUESTIONS ABOUT THE USITC'S DETERMINATION**

66. Many of China's responses to the Panel's questions concerning the Commission's causation and non-attribution analysis suffer from the same overarching factual inaccuracies and misapprehension of the Panel's role. Rather than make the same points repeatedly each time China's response commits one of the errors, the United States provided consolidated comments with respect to each issue.

67. **General Comment 1.** In arguing that other factors caused injury to the domestic industry, China repeatedly relies upon respondents' unproven assertion in the USITC investigation that the domestic industry made a business decision to focus on the residential and commercial segments of the U.S. market, and to abandon the fast-growing utility segment. As the Commission explained, however, the totality of the evidence belied this assertion. Rather, as the Commission found upon thorough examination of the complete record, 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". The Commission identified, with direct citations to the record evidence, the many ways in which domestic producers were active in and sought to expand their presence in the utility sector.

68. Other compelling evidence likewise demonstrated the industry's genuine efforts to compete in the utility segment. As the Commission observed, SolarWorld added a 72-cell module assembly line to its U.S. facilities specifically to serve the increasing demand in the utility market, and Suniva dedicated nearly half of its cell manufacturing capacity to 72-cell modules. The domestic industry also pioneered certain other CSPV technologies, such as monocrystalline products, which converted sunlight more efficiently than multicrystalline products and were sold in all segments of the U.S. market.

69. **General Comment 2.** China repeatedly, and wrongly, accuses the Commission of mischaracterizing the importance of price as reported in the purchaser questionnaire responses. Specifically, China asserts that the Commission misleadingly "paints the picture" that price was the most important factor in purchasing decisions, and that price was the primary reason for purchasers' purchases of imported product over the domestically produced product. It is China, however, that mischaracterizes the Commission's price findings, which are fully consistent with the purchaser questionnaire response data.

70. Contrary to China's claim, the Commission did not find that price was the most important factor in purchasing decisions. Rather, the Commission stated that 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". Moreover, the Commission did not find that price was purchasers' primary reason for purchasing imports over domestic product. Instead, the Commission stated 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".

71. **General Comment 3.** In its efforts to attack the reasonableness and adequacy of the Commission's analysis, China repeatedly cites to individual assertions and statements made by respondents during the course of the administrative proceedings, while ignoring the substantial and contradictory evidence and arguments on the record. Articles 3.1 and 4.2(c) call for the report of the competent authorities to provide "their findings and reasoned conclusions on all pertinent issues of fact and law", including a "detailed analysis of the case" and a "demonstration of the relevance of the factors considered". Nowhere does the Agreement require that the competent authorities touch on every single point put forth by the parties, as China seems to suggest. Given the voluminous amount of information on the record in this case – literally thousands of pages – such a requirement would be onerous and unfeasible.

**U.S. COMMENT ON CHINA'S RESPONSE TO PANEL QUESTION 24**

72. Article XIX:1 of the GATT 1994 provides for a safeguard measure when increased imports are "as a result of" unforeseen developments. China errs in asserting that, to establish that this circumstance exists, a Member must demonstrate a "clear linkage" between unforeseen developments and increased imports. "Link" is a term of art that appears only in the Safeguards Agreement Article 4.2(b) obligation to demonstrate the existence of a "causal link" between increased imports and serious injury. As neither GATT 1994 nor the Safeguards Agreement requires such a showing with respect to unforeseen developments, the term "link" has no place in the evaluation of a claim that a Member has failed to demonstrate that increased imports are "as a result of" unforeseen developments.

73. Indeed, the interpretation advanced by China imposes a double causation requirement that unforeseen developments cause the increased imports that caused serious injury. China nowhere provides a basis in GATT 1994 or the Safeguards Agreement to set the same causal standard for unforeseen developments and serious injury. China's approach, however, is even more problematic because it would require not only that the competent authority show that unforeseen developments caused the increased imports that caused serious injury but that the unforeseen developments caused the increased imports during a particular year.

74. China's response to the Panel's question argues that "[t]he question before this Panel is: does the USITC's identification of the unforeseen developments adequately explain the increased imports during the most recent time period, that is, from 2015 to 2016?" According to China, not only does a competent authority have to establish a link between increased imports and unforeseen developments, but the link needs to account for increases from one year to the next during the

period of investigation. This particularized conception of unforeseen developments under the WTO safeguards disciplines is completely unfounded.

**EXECUTIVE SUMMARY OF THE U.S. OPENING STATEMENT AT FIRST VIDEOCONFERENCE WITH THE PANEL**

75. The U.S. written submissions have demonstrated that, by any reasonable standard, the USITC met the obligations of the Safeguards Agreement. It conducted an exhaustive investigation of the U.S. market for solar cells and modules, including the relevant tariff concessions, the conditions of competition, and the roles played by imported and domestically produced product. It evaluated the effects of increased imports and of other factors affecting the industry and determined as a result that increased imports themselves caused serious injury to that industry. And finally, the USITC issued a massive report explaining its conclusions in detail. At the request of the U.S. Trade Representative, it also issued a supplemental report explaining how these increased imports were the result of unforeseen developments.

76. The U.S. submissions demonstrated that China failed in its efforts to impugn the USITC's findings. We will not repeat all of those observations, but will focus on three broad points. First, the USITC established a causal link between increased imports and the domestic industry's serious injury. Second, the USITC evaluated whether factors other than imports were causing injury to the domestic industry and did not attribute any such injury to increased imports. Third, the United States has identified that the increased imports were the result of unforeseen developments and obligations incurred, consistent with Article XIX.

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

**EXECUTIVE SUMMARY OF THE U.S. CLOSING STATEMENT AT FIRST VIDEOCONFERENCE WITH THE PANEL**

78. Two overarching problems arise again and again with respect to China's opening statement. The first of these is China's approach to the USITC's weighing of the evidence. China repeatedly portrays the importers and customers who appeared as respondents in the USITC investigation as neutral observers whose assertions the Panel should accept as "compelling", and the domestic producers who appeared as petitioners as partisans whose assertions are invariably "self-serving" and inherently unreliable. China provides no justification for these characterizations, and there is none.

79. In its role as competent authority, the USITC was not permitted to, and did not, presume that one side was impartial and the other unreliable. Instead, the USITC treated each party's assertions equally, and relied on what the evidence in the record actually showed in reaching its factual findings. Where there was conflict between the views advocated by the interested parties, the USITC analyzed and weighed the submitted evidence as a competent authority must to arrive at a reasoned conclusion. This approach fully comports with the obligations under Article 3.1 of the Safeguards Agreement to provide interested parties and the public opportunities to present evidence and their views, to respond to each others' presentations, and to provide findings and reasoned conclusions. In a WTO proceeding, it is not sufficient for a Member to observe that one set of parties to the investigation presented views and evidence that conflict with the competent authorities' determination, or that the Member challenging the determination considers the conflicting views and evidence to be more "compelling". That would call for a re-weighing of the evidence, which is not the job of a panel.

80. A second overarching problem with China's opening statement lies in its repeated assertions that U.S. rebuttals of China's arguments constitute "post hoc" reasoning whenever they do not duplicate the text used in the Commission's determination. This represents a fundamental misunderstanding of the role of a party responding to WTO challenges to the determinations of its competent authorities. China, as the complaining party, bears the burden of proof with respect to

its arguments that the USITC failed to comply with U.S. WTO obligations. In rebutting those arguments, the United States has the right both to point out legal misinterpretations by China and to provide the Panel with further detail and explanation of the Commission's analysis. Where China has misunderstood, misrepresented, or omitted aspects of the findings, the United States is free to identify the errors and point to portions of the record that support the Commission's conclusions. In doing so, the United States has demonstrated why China has failed to make a prima facie case that the Commission's determination is inconsistent with the Safeguards Agreement. Such illumination of the Commission's analysis and exchange of positions and arguments between the parties are integral features of the WTO dispute settlement process.

## EXECUTIVE SUMMARY OF U.S. RESPONSES TO THE PANEL'S SECOND SET OF QUESTIONS

### U.S. RESPONSE TO PANEL QUESTION 1

81. China's decision not to bring a claim contesting the USITC finding that the U.S. CSPV products industry was experiencing serious injury precludes review of that finding. Therefore, the Panel must accept that finding as an undisputed fact when assessing the causal link between increased imports and that serious injury. Specifically, given that China did not raise a claim with respect to the USITC's determination of serious injury, it may not contest that the state of the domestic industry at the time of the determination was one of serious injury. Nor may it assert that individual pieces of evidence or certain aspects of the industry's condition, individually or collectively, are inconsistent with serious injury. Such arguments would in effect require assessment of a claim that China has not brought under the Safeguards Agreement or GATT 1994.

### U.S. RESPONSE TO PANEL QUESTION 11

82. The domestic solar industry's limited production capacity is a symptom of the serious injury suffered during the period of investigation, not a cause thereof. In this way, lack of capacity is no different from the domestic industry's inability to capture market share or invest in research and development as it increasingly lost sales and had to lower prices in response to competition from the growing imports into the United States. The USITC's report identified such factors as indicators of serious injury caused by increased imports and not as independent causes of injury.

83. This approach comports with the language of Article 4.2(b). The first sentence of that provision states that a determination that increased imports have caused serious injury "shall not be made unless this investigation demonstrates ... the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof". The relevant meaning of link is "{a} connecting part; esp. a thing or a person serving to establish or maintain a connection; a member of a series; a means of connection or communication". "Causal" means "of or relating to a cause or causes". Thus, a "causal link" exists if increased imports result in conditions that lead to serious injury, or if those imports start a causal chain connecting them to the development of conditions indicative of serious injury.

84. The second sentence of Article 4.2(b) calls on the competent authorities to evaluate whether "factors other than increased imports are causing injury to the domestic industry". "When" that is the case, the sentence states that "such injury shall not be attributed to increased imports". On its face, this provision distinguishes between factors that "are causing" injury and the injury itself. To treat "the injury" itself as also being a factor that is "causing" injury would reverse the analysis envisaged in Article 4.2(b). The second clause of the sentence confirms this conclusion – it would be absurd to instruct competent authorities not to "attribute" to increased imports an injury that they have found to be the result of increased imports.

### U.S. RESPONSE TO PANEL QUESTION 23

85. There is no dispute that the USITC identified in its report that the U.S. tariff schedule provided for duty-free treatment of CSPV products from 1987 forward, or that these rates are bound under GATT 1994. Neither of these facts constitutes a post hoc rationalization and are sufficient to establish U.S. conformity with Article XIX:1(a). Indeed, as a previous report has noted:

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

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

86. The USITC report did what was necessary to comply with the "obligations incurred" language of Article XIX:1(a) when it identified the relevant tariff concession. It is not post hoc rationalization for the United States, in response to China's claim in this proceeding, to point to the relevant USITC finding, or to observe that this finding was sufficient to satisfy the Article XIX:1(a) "obligations incurred" language.

**U.S. RESPONSE TO PANEL QUESTION 26**

87. A tariff rate bound at zero percent has significant implications for demonstrating that increased imports are the result "of the effect of obligations incurred". When a Member undertakes an obligation in the form of a tariff concession pursuant to Article II of the GATT 1994, it represents a commitment that, per se, prevents that Member from raising its tariffs to ameliorate any harm caused by increased imports.

88. Accordingly, a Member may establish that increased imports are the "effect of obligations incurred" simply by identifying a commitment, such as a tariff concession, that prevents it from raising duties on the imports in question. A tariff rate bound at zero percent, while not necessary, is more than sufficient to constitute a restraint on a Member's freedom to raise its duties and thereby qualify as a per se commitment that satisfies the requirement in Article XIX:1(a) concerning the "effect of obligations incurred".

## EXECUTIVE SUMMARY OF THE U.S. SECOND WRITTEN SUBMISSION AND U.S. COMMENTS ON CHINA'S RESPONSES TO THE PANEL'S SECOND SET OF QUESTIONS

### I. THE COMMISSION PROPERLY WEIGHED THE EVIDENCE AND PROVIDED REASONED AND ADEQUATE EXPLANATIONS OF ITS FINDINGS AND CONCLUSIONS

89. China's arguments suffer from the same thematic difficulties that afflicted the arguments in each of its prior submissions. First, in challenging the reasonableness and adequacy of the Commission's findings, China ignores the detailed analyses actually undertaken by the Commission and points to specific pieces of evidence and individual assertions made by respondents that, in its view, the Commission did not consider. Articles 3.1 and 4.2(c) call for the report of the competent authorities to provide "their findings and reasoned conclusions on all pertinent issues of fact and law", including a "detailed analysis of the case" and a "demonstration of the relevance of the factors considered". Thus, while an investigating authority must evaluate all relevant evidence and explain the basis for its conclusions, nowhere does the Safeguards Agreement mandate that the explanation discuss each piece of evidence and assertion put forward by the parties in its published report.

90. In fact, the Commission considered the evidence or assertions identified by China, but found them to be outweighed by other evidence which the Commission found to be more compelling. The Commission provided reasoned and adequate explanations regarding its findings. That the analysis did not descend to the granular level of minute detail suggested by China does not render the determination WTO-inconsistent. As explained in the U.S. submissions, the USITC's November Report contained all the elements called for under the Safeguards Agreement. It explicitly included an evaluation of all relevant factors. Moreover, it contained a detailed analysis of the case, explaining how the facts supported the Commission's ultimate conclusion that CSPV producers were being imported into the United States in such increased quantities as to be a substantial cause of injury to the domestic industry. In doing so, the Commission fully complied with the obligations required of competent authorities under the Safeguards Agreement.

91. China's criticisms of the Commission's findings simply amount to a view that the Commission should have weighed the evidence differently. China repeatedly points to different methodologies with respect to tabulation of the data and provides different characterizations of the evidence to support its own preferred theory of the case. However, none of China's claims demonstrate any inconsistency with U.S. obligations under the Safeguards Agreement.

92. On this last point, it is important to note that it is China, as the complaining party, that bears the burden of demonstrating that the safeguard measure within the Panel's terms of reference is inconsistent with the cited provisions of the Safeguards Agreement. In challenging an action to impose a safeguard measure, a complaining party brings forward evidence and argument relating to the investigation carried out, the findings by the competent authority, and the remedy imposed. And in reviewing the competent authority's action, a panel must not conduct a de novo evidentiary review, but instead should bear in mind its role as reviewer of agency action. Indeed, it would not reflect the function set out in Article 11 of the DSU for a panel to go beyond its role as reviewer and instead substitute its own assessment of the evidence and judgment for that of the competent authority.

## II. CHINA HAS FAILED TO CARRY ITS BURDEN ON UNFORESEEN DEVELOPMENTS AND OBLIGATIONS INCURRED UNDER ARTICLE XIX

93. China has erred, as a legal matter, when describing the requirements under Article XIX of the GATT 1994 and has failed, as a factual matter, to rebut the findings in the USITC's November Report and Supplemental Report on these issues. Accordingly, China cannot carry its burden because it identifies the wrong framework for the Panel's evaluation and has not submitted arguments or evidence that establish any way in which the USITC's detailed findings and reasoned conclusions are inconsistent with the relevant WTO obligations.

94. On the legal question, China repeatedly mischaracterizes the requirements in Article XIX:1(a), including the connection that must be established between the different elements. Article XIX:1(a) applies when "any product is being imported into the territory of [a] contracting party in such increased quantities," without regard as to the source or origin of that product. Thus, in evaluating whether this situation is "as a result of unforeseen developments", a Member is free to examine increased imports of the "product" as a class, and need not separately evaluate imports from individual sources.

95. Furthermore, China argues that, for a Member to apply a safeguard measure, its competent authorities must address the question of increased imports that are as a result of unforeseen developments and the effect of obligations in its published report. While a Member may elect to have its competent authorities address this question in their report, there is no requirement to demonstrate the satisfaction of the first clause of GATT 1994 Article XIX:1(a) before the Member applies a safeguard measure. As explained, the references in Article XIX to unforeseen developments and the effect of obligations incurred are circumstances that must exist for application of a safeguard measure. They are not conditions under Article 2 of the Safeguards Agreement that must be demonstrated in the competent authorities' report.

96. The USITC found, for example, in the Supplemental Report that "the six largest firms producing CSPV cells and CSPV modules in China increased their global CSPV cell and CSPV module manufacturing capacity by expanding investments in third countries without reducing their capacity in China. Imports from four countries where Chinese affiliates added both CSPV cell and CSPV module capacity – Korea, Malaysia, Thailand, and Vietnam – increased their share of apparent U.S. consumption from *** percent in 2012 to *** percent in 2016. Much of this increase occurred between 2015 and 2016, as their collective share of the U.S. market more than doubled from *** percent in 2015 to *** percent in 2016, which occurred just after the CSPV II orders went into effect in February 2015". The USITC specifically noted that the imports from these countries, collectively, more than doubled their share of the U.S. market during the time just after the trade remedy orders in CSPV II took effect. China cannot reasonably argue that its producers' massive increase in production capacity in certain countries is unrelated to a significant increase in exports to the United States from those same countries at the same time.

## U.S. COMMENT ON CHINA'S RESPONSE TO PANEL QUESTION 2

97. It is important to note that China's response to this question reveals two general flaws with its approach. First, China misapprehends the role of the Panel. China acknowledges that "serious injury" and "causation" are two distinct legal issues, and that it has not challenged the Commission's finding of serious injury. In light of this, the Panel's review of causal link starts with the given that the domestic industry suffered serious injury during the period of investigation. Notwithstanding this, China suggests that the Panel should conduct its own new assessment of the facts, including those related to serious injury. However, this approach would be exactly the type of de novo review

that panel and appellate reports have universally found to be improper for a panel. Thus, to the extent that China raises the state of the domestic industry as an issue in its challenge to the Commission's finding of a causal link, the Panel should reject such arguments. China's decision not to bring a claim contesting the Commission's serious injury finding, precludes Panel review of that finding.

98. Second, China misapprehends the legal obligations applicable to the competent authorities' determination. The Appellate Body in *US – Lamb* confirmed that "the method and approach WTO Members choose to carry out the process of separating the effects of increased imports and the effects of the other causal factors is not specified by the Agreement on Safeguards".

99. In addition to misapprehending the relevant legal obligations, China fails to resolve the contradiction at the heart of the Panel's question – that China's assertions that trends in the relevant factors were moving upward is inconsistent with the USITC's unchallenged finding that the domestic industry was experiencing serious injury. China seeks to reconcile its position by arguing that there was not causation because, while the industry was injured, its condition was improving at the same time that imports were increasing.

100. The effort is unavailing. China's argument that trends in the domestic industry's performance were improving relies on upward movement in a subset of the performance factors. The Commission recognized these upward movements in its analysis of serious injury, but found that when these factors were considered within the context of the relevant conditions of competition and in light of the downward trends in other significant factors, and the overall downward trends, particularly between 2015 and 2016 as imports reached their peak, there was a direct correlation between increasing imports and the industry's dismal and deteriorating financial performance. The Commission provided detailed analyses on how declining prices and the industry's dismal and deteriorating financial condition corresponded to import trends. The Commission explained that the market otherwise was favorable to domestic producers, with explosive demand growth and trade measures in place against sources of dumped and subsidized imports that had previously caused material injury. However, instead of benefitting from this rapidly expanding demand, the domestic industry struggled and remained unprofitable, as low-priced, highly substitutable imports flooded the market. The industry incurred hundreds of millions of dollars in net and operating losses throughout the POI and was unable to generate adequate capital to finance modernization of their domestic plants and equipment and unable to maintain existing research and development expenditure levels.

101. Thus, the Commission objectively found that the domestic industry's financial condition, which was at its worst at the beginning of the POI, improved marginally after imposition of the orders and the filing of new antidumping and countervailing duty cases, but remained poor, and then deteriorated further in 2016, as imports peaked in terms of volume and market share and prices dropped anew. By demonstrating how global capacity and supply chains shifted and how imports harmed the domestic industry's condition after imposition of the CSPV I and CSPV II orders, the Commission not only established an overall coincidence between increased import volume and market share, on the one hand, and the domestic industry's dismal and deteriorating financial condition, on the other, but the Commission also demonstrated that the seemingly positive trends in other factors did not detract from this conclusion. China has accordingly failed to establish that the Commission's analysis was inconsistent with Article 4.2(b).

**U.S. COMMENT ON CHINA'S RESPONSE TO PANEL QUESTION 12**

102. As the United States pointed out in its answer to this question, where interested parties to a safeguards investigation offer conflicting views on a specific issue, a competent authority must determine which evidence it finds to be the most probative. During the course of an investigation, a competent authority may conclude that certain evidence outweighs other evidence or is more credible. This is consistent with the obligations of Articles 3.1 and 4.2(c), which do not establish an abstract level or nature of explanation that competent authorities must provide for each finding. Instead, these provisions require only that the analysis be "detailed" and the findings and conclusions be "reasoned". There is no obligation to explain how the competent authority weighed the evidence or argumentation beyond what is needed to meet these standards as set out in the Safeguards Agreement.

103. It is important to interpret these obligations in their broader context. The Safeguards Agreement requires the competent authorities to provide importers, exporters, and other interested parties to present evidence and their views, and to respond to presentations of other parties. They must conduct an investigation of and evaluate "all relevant factors of an objective and quantifiable nature having a bearing on the situation of the industry". If they perform these tasks diligently – as the USITC did in the CSPV Products investigation – they will have before them a huge mass of evidence and argumentation, which may run (as it did in this case) to many thousands of pages. And, any public discussion must avoid any disclosure of business confidential information. By necessity, any "findings and reasoned conclusions" consistent with these principles will involve summarization of evidence and parties' views. To conclude otherwise would present the competent authorities with an impossible task.

104. That is exactly what China seeks to do. It seeks to frame the task as one where a competent authority must "explain its reasoning in a manner that makes sense and is supported by objective evidence on the record", which "needs to be satisfactory in light of all relevant fact and more reasonable than other plausible explanations". However, its critique of the USITC applies these principles in an unreasonably extreme way.

105. For example, it accuses the USITC of failing to address "all the evidence" because it summarized parties' positions ("the USITC set up many issues as 'petitioner argued on the one hand' and 'respondents replied on the other hand'") and did not reference every point made by every respondent ("complaints against Suniva by DEPPCOM, Borrego, NRG Energy, Silfab Solar, and SunPower are not even mentioned."). But the Safeguards Agreement does not require the competent authorities to address every single assertion made by every party. The USITC cited relevant assertions by petitioners and respondents, provided specific allegations as examples, and explained why petitioners' rebuttals led them to discredit the allegations – generally because other statements by the respondents showed the allegations to be insubstantial. The Commission also considered these allegations within the context of other relevant evidence, including questionnaire responses from 104 purchasers and found that, in any event, these specific allegations failed to demonstrate any "widespread" delivery and service problems. This approach of references and examples provides a "reasoned explanation" for the USITC's conclusion, and China provides no basis to believe that the examples were unrepresentative or that other evidence would have led to a different conclusion.

106. China does not dispute that Article 3.2 requires competent authorities to protect BCI from disclosure to the public, but nonetheless criticizes the USITC for redacting BCI from its public report, arguing that "a mere reference to confidential information is not sufficient for the purposes of providing a 'detailed analysis' as requirement by Article 4.2(c)". Article 3.2's explicit provisions for collection and protection of BCI recognize that BCI may be critical for making the determination called for in Article 4.2(a), and that parties will not provide such information absent assurances that it will be protected. Thus, to argue – as China does – that the mere fact of redactions evidences a failure to provide findings and reasoned conclusions would make it impossible for competent authorities to comply with the Safeguards Agreement.

**U.S. COMMENT ON CHINA'S RESPONSE TO PANEL QUESTION 21**

107. As the United States noted in its answer to the Panel's question, China cannot reasonably argue that its producers' massive increases in production capacity in certain countries have no effect on the significant increase in exports to the United States from those same countries at the same time. And since Article XIX does not require arguments or evidence on unforeseen developments with more particularity than this, the United States does not need to show import-specific information on a transaction-by-transaction (or company-by-company or country-by-country) basis.

108. As for China's second response that such developments were not "unforeseen", China argues that the Chinese producers' expansion into other countries represents a "natural shift" or "well-documented phenomenon" according to market-based principles and economic concepts that the USITC comprehends. Notably, China does not respond to the United States' point that, under the Marrakesh Declaration, 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". Nor does it have any reply to the USITC's findings in the Supplemental Report regarding China's pervasive and unexpected practices to pursue industrial policies and government programs to distort the market and manipulate the behavior of individual firms. As such, China's "store" analogy in its response to the Panel's question only applies

if one store was able to undercut the other on price by misappropriating its trade secrets or engaging in some other form of unfair trade practices.

109. Despite China's protestations, the USITC specifically found that U.S. negotiators could not have foreseen that China would contradict its commitments by implementing a series of industrial policies and government programs favoring renewable energy product manufacturing, and that this would "lead to the development and expansion of capacity to manufacture CSPV products in China at levels that substantially exceeded the level of internal consumption". The intentional development of overcapacity in China and, following the U.S. trade remedy orders, in other countries, belies China's argument that the findings identified in the Supplemental Report merely represent a natural ebb and flow according to market dictates rather than purposeful and export-oriented manipulation of the CSPV market.

**EXECUTIVE SUMMARY OF THE U.S. OPENING STATEMENT AT SECOND VIDEOCONFERENCE WITH THE PANEL**

110. The USITC's November Report fully satisfies the legal requirements set forth under the Safeguards Agreement. In this report, the Commission provided a detailed analysis of the case, explaining how objective and compelling evidence supported its ultimate conclusion that increased imports of CSPV products caused serious injury to the domestic industry. The USITC complied with Safeguards Agreement Article 4.2(b) in finding a causal link between increased imports and the domestic industry's serious injury. In particular, the USITC (1) adequately addressed upward movements in certain of the injury trends; (2) adequately considered the negative injury trends within the relevant conditions of competition; and conducted a non-attribution analysis that fully satisfied its obligations under the Safeguards Agreement.

111. In particular, China is confusing the substantive obligations regarding the existence of unforeseen developments and obligations incurred with a procedural obligation that the competent authorities demonstrate the existence of these circumstances in their report. The United States does not dispute the existence or applicability of these obligations to the safeguard measure on CSPV products. What the United States disputes is China's non-textual assumption that, because the Safeguards Agreement charges the competent authorities with a determination as to serious injury, those same competent authorities must also address unforeseen developments and obligations incurred. China's second written submission does nothing to counter the U.S. showing that there is no such obligation on the competent authorities.

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

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

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

**EXECUTIVE SUMMARY OF THE U.S. CLOSING STATEMENT AT SECOND VIDEOCONFERENCE WITH THE PANEL**

115. This dispute has called upon the Panel to scrutinize the USITC's reports. The Panel has seen that the data show an industry that had every chance for success – booming domestic demand, products that its customers rated as competitive over all other sources, and numerous plans to expand existing facilities and build new ones. The Panel has also seen that throughout the period of investigation, imports entered at increasingly lower prices. Domestic products lost sales and market share in every sector in the market. Ambitions for expansion became impossible in light of consistent large losses, start-ups failed, and existing producers exited the market. The Commission thoroughly documented each of its findings based on a record thousands of pages long, derived from the Commission's own detailed questionnaires, written submissions by interested parties, and testimony at two day-long public hearings. If this exhaustive review of the evidentiary record is not enough to comply with Article XIX and the Safeguards Agreement, it is difficult to imagine what competent authority could comply. In other words, China's view of these disciplines would effectively nullify the right to take a safeguard measure. That might be an outcome satisfactory to China, but it would not be consistent with the terms of Article XIX and the Safeguards Agreement.

**EXECUTIVE SUMMARY OF U.S. RESPONSES TO THE PANEL'S THIRD SET OF QUESTIONS**

**U.S. RESPONSE TO PANEL QUESTION 45**

116. The Commission found that any changes in the overall availability of incentives had not resulted in an increase in the net cost to solar electricity generators. This meant that domestic producers did not need to reduce their prices to make solar energy more competitive with other sources of energy. Most questionnaire respondents confirmed that the availability in incentives led to a decrease in the price of solar generated electricity and that changes in the price of solar generated electricity had not at all affected the prices of CSPV products since 2012. Based upon the totality of the evidence concerning these incentives and in light of the continued robust demand for CSPV products, the Commission reasonably concluded that the availability of government incentive programs had not caused injury to the domestic industry.

**U.S. RESPONSE TO PANEL QUESTION 49**

117. The domestic industry's unprofitable financial state was one of the compelling pieces of evidence supporting the Commission's conclusion that the need for solar generators to attain grid parity was not the reason for the domestic industry producing CSPV products to reduce prices for its cells and modules during the period of investigation.

118. Other record evidence supporting the Commission's conclusion demonstrated the complexities of grid parity. Far from being a uniform concept, the data showed that the levelized cost of energy of photovoltaic systems varied by region, time of day, and availability of other electricity sources, and even could vary widely for a given energy source. Indeed, as the Commission observed, installed photovoltaic system prices differed greatly from state to state and project to project, with a considerable spread among the prices in each market segment. Respondent SEIA's own expert confirmed that "{i}t is possible that, within a particular state, the residential solar segment might have achieved grid parity but the utility-scale segment has not, or vice versa". And China itself stated that the cost for solar-generated electricity systems in the utility segment was already at grid parity, which "made them cost-competitive with other energy sources". Given this great variability, there could not have been one absolute target price that all domestic producers strove to meet in selling their CSPV products.

119. In addition, the record evidence further demonstrated that the need to attain grid parity had not even translated into continuously declining prices for CSPV products as China asserts. Rather, the price data showed that prices for CSPV products, in fact, had stabilized after the CSPV I orders were imposed and new investigations were initiated in CSPV II. The Commission observed that although installed photovoltaic system prices declined steadily in all three market segments, this was due to falling non-module costs rather than to any price changes in CSPV products between 2013 and 2015. Although U.S. module prices declined in 2016, this was, as the Commission explained, a direct result of low-priced imports from additional sources that entered the U.S. market. Moreover, as those imports rapidly increased to higher volumes in 2016, U.S. module prices rapidly declined. This correspondence demonstrates that, rather than the need for solar generators to attain

grid parity, low-priced imports were the real factor in the overall price declines of CSPV products during the period of investigation.

**U.S. RESPONSE TO PANEL QUESTION 56**

120. First, China asserts that the USITC based its unforeseen developments analysis only on "Chinese producers" who "did not control any significant CSPV production in Korea". That is not the case. The ITC based its analysis on "the six largest firms producing CSPV cells and CSPV modules in China". The USITC November Report lists Hanwha Qidong as one of these six companies. Hanwha Qidong's corporate parent (Hanwha) produces cells and modules in Korea.

121. Second, regardless of whether Chinese producers controlled significant production in Korea, this country was one of four specifically targeted by Chinese firms to offshore their production operations in efforts to circumvent the CSPV I and CSPV II orders. The increase in imports from Korea therefore provided direct support for the Commission's finding of unforeseen developments.

122. Third, China does not even cite to the most accurate table for its assertions regarding the increase in imports from Korea. Table C-7 of the Annex to the November Report, upon which China relies, was sourced from U.S. customs statistics for headings 8541.40.6020 and 8541.40.6030. These headings covered all solar cells and modules, including out of scope thin film photovoltaic products. In addition, those headings were underinclusive, as they did not account for some of the covered imported products. Consequently, the USITC did not rely on these data in its unforeseen developments analysis, citing instead to tables derived from questionnaire responses limited to covered products. Thus, the data on which China relies is not relevant to the USITC's unforeseen developments analysis.

123. In any event, Table C-7 indicates that Korea accounted for one-third of the increase in imports by value. Malaysia, Thailand, and Vietnam (the three other countries where Chinese firms had added both cell and modules capacity) accounted for almost two-thirds of the total increase shown in that table. The USITC's findings regarding increased imports from all of these countries where Chinese companies had added both CSPV cell and module capacity were sufficient to establish that increased imports were "as a result of unforeseen developments" for purposes of Article XIX:1(a).

**EXECUTIVE SUMMARY OF U.S. COMMENTS ON CHINA'S RESPONSES TO THE PANEL'S THIRD SET OF QUESTIONS**

**U.S. COMMENT ON CHINA'S RESPONSE TO PANEL QUESTION 36**

124. China insists that it "has not argued that there is any need for separate causation analysis for each segment," but asserts that the Commission erred by "ignor{ing}" the existence and factual relevance of different market segments. China cites to the panel findings in *US – Lamb* as an example of "how an authority should deal with different segments". This panel report, however, is inapposite because it involved the issue of industry segments, and not market segments.

125. Specifically, in *US – Lamb*, the panel accepted arguendo the Commission's domestic industry definition as including all industry segments, including growers and feeders of live lamb, on the one hand, and packers and breakers of lamb meat, on the other. The panel explained that to provide an adequate explanation, the Commission report should have contained a discussion regarding:

> (i) why conclusive inferences from the data concerning one industry segment can be drawn for another industry segment, or (ii) why the factual constellation in particular industry segment in the given case does not permit data collection (i.e., not a "factor of a objective and quantifiable nature"), or (iii) renders a certain injury factor not probative in the circumstances of a particular industry segment (i.e., not a factor "having a bearing on the situation of that industry" within the meaning of SG Article 4.2(a).

126. Unlike in *US – Lamb*, the issue raised by China is not whether the Commission collected and analyzed trade and financial data separately for different types of producers along the production chain. (In fact, the Commission did just this sort of analysis by gathering and analyzing separate data on CSPV cell producers and CSPV module producers.) Rather, the question raised in this dispute

is whether the Commission sufficiently analyzed the factual distinctions and degree of competition within the three sectors (residential, commercial, and utility) of the U.S. market.

127. As the United States has explained, the Commission gathered data on and examined the distinctions that existed in the different market segments to determine the degree of competition between imports and the domestic like product. The Commission determined that all three segments experienced considerable growth, imports and domestically produced CSPV products competed against each other across all three sectors of the U.S. market, and that domestic producers lost market share in each of the market segments to imports that were lower priced than domestically produced products and that caused domestic prices to decline during the period of investigation. Contrary to China's view, this analysis "address{ed} specifically the nature of the interaction between the imported and domestic products". It provided a holistic analysis of the three segments that supported the ultimate conclusion with respect to injury to "the producers as a whole of the like or directly competitive products". That is all that the Safeguard Agreement calls for.

**U.S. COMMENT ON CHINA'S RESPONSE TO PANEL QUESTION 39**

128. In its response to this question, China asserts that the "global decline in CSPV prices" and the domestic industry's failure to increase capacity to a larger scale and innovate explained the lower prices of imported CSPV products compared to the domestically produced product. China's assertions are factually flawed because China ignores the record evidence demonstrating that the domestic industry did, in fact, innovate and supply CSPV products that were highly substitutable with imports. China also fails to account for the imports' role in hindering the domestic industry's ability to increase capacity to a larger scale in the first instance.

129. Specifically, the Commission found that domestic producers pioneered certain CSPV technologies, and that they continued to innovate, develop, and manufacture leading-edge products during the period of investigation. The record demonstrated that the domestic industry supplied a wide variety of monocrystalline and multicrystalline products that competed against imported CSPV products, including CSPV products with 2, 3, 4, and 5 busbars, PERC products, frameless modules, heterojunction cells, bifacial products, and hybrid CSPV products. To the extent that certain CSPV products were only available from foreign suppliers, the Commission explained that available objective evidence indicated that CSPV products that were unique or unavailable from other sources accounted for only a small share of the U.S. market. Indeed, most U.S. producers, importers, and purchasers confirmed that product from domestic and foreign sources were interchangeable.

130. Regarding the domestic industry's asserted inability to increase capacity to a larger scale, China ignores a critical finding made by the Commission – that increasing imports at declining prices adversely affected the industry's financial performance, making it difficult for the industry to increase capacity to a scale that made it more competitive. Indeed, of the 33 CSPV cell or CSPV module facilities operating in the United States as of January 1, 2012, only 13 of those facilities remained open by December 31, 2016. And although 16 additional facilities opened seeking to take advantage of the demand growth, the consistent inability of the domestic industry to compete with low-priced imports, forced many of these firms to close. The domestic producers remaining in the market continued to operate at below full capacity, particularly for CSPV module assembly operations. China's argument fails, in that it amounts to a circular attempt to attribute the domestic industry's higher costs to its smaller scale, which itself was causally linked to the pricing pressure exerted by the flood of lower priced imports.

131. In any event, China still does not explain the overall relevance of its assertions regarding the alleged global decline in CSPV prices to its claim that the ITC's price analysis was inconsistent with the Safeguards Agreement. In fact, this assertion serves only to disprove that other factors identified by China as causing the declines in domestic prices (i.e., the domestic industry's decreasing costs, increased efficiency, and technological innovation) were responsible for the domestic industry's serious injury. Indeed, China contradictorily argues in response to this question that the "small scale of the domestic industry' and its "inefficiencies" resulted in "higher costs for the domestic industry", explaining why "import prices were lower than domestic products". The logical conclusion of China's argument is that the lower-priced imports were the real culprit in the price declines of domestic products over the period of investigation.

**U.S. COMMENT ON CHINA'S RESPONSE TO PANEL QUESTION 57**

132. China's response attempts to undermine the U.S. position by arguing that the United States is now asserting for the first time that the zero general duty rate is the actual bound rate established during the GATT negotiations and that this position constitutes a post hoc rationalization. However, instead of a mere assertion, it is an incontrovertible fact that the U.S. duty rate for imports of CSPV products is bound at zero percent. Referring to this fact during WTO dispute settlement proceedings cannot constitute post hoc rationalization, as China continues to argue, because its self-evident nature is apparent to any user of the WTO's publicly available systems that contain a Member's tariff bindings. The 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.

133. The USITC's identification of the relevant tariff lines in the November and Supplemental Reports, along with the reference to their duty-free treatment, is directly related to the tariff concession that the United States undertook to bind its rate of duty at zero percent. Accordingly, by identifying the tariff treatment under the relevant tariff schedule, the USITC identified the commitment that the United States has taken in the form of a rate of duty bound at zero percent. Moreover, as in this dispute, where a Member has undertaken an obligation to bind its rate of duty at zero, there can be no legitimate question that the Member is prevented from raising its tariffs on the imported products causing serious injury and that such a concession per se qualifies as an "obligation incurred" necessary for exercising the right under Article XIX of the GATT 1994 to apply a safeguard measure and temporarily depart from the WTO obligation preventing such action.

**CONCLUSION**

134. For the foregoing reasons, the United States respectfully requests that the Panel find the safeguard measures at issue consistent with the United States' obligations under Article XIX of the GATT 1994 and the Safeguards Agreement.

# ANNEX C

## ARGUMENTS OF THE THIRD PARTIES

## ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

### I. Introduction

1. Brazil welcomes this opportunity to present its views before the Panel as a third party in this dispute. Brazil does not wish to delve into the factual issues in the current dispute or to take a definite position on the arguments submitted by the parties. Rather, Brazil would like to present certain comments of systemic interest so as to ensure the proper and consistent interpretation of the WTO Agreements, notably the Agreement on Safeguards and the GATT 1994.

2. In this submission, Brazil will comment on three issues raised by the parties with respect to the interpretation of Article XIX of the GATT 1994: (1) the requirements of Article XIX:1(a) of the GATT 1994 and the Agreement on Safeguards are cumulative; (2) the analysis of the linkage between unforeseen developments/obligations and increase on imports; and (3) applied tariff rates prior to WTO Membership should not have a bearing on tariff commitments upon joining the Organization.

*I.* *The Requirements of Article XIX:1(a) of the GATT 1994 and of the Agreement on Safeguards are cumulative*

3. Brazil believes that, in order for a safeguard measure to be in accordance with the Covered Agreements, it must comply with the requirements of both the Agreement on Safeguards and the Article XIX of the GATT cumulatively.

4. Brazil is of the view that Article XIX:1(a) of the GATT sets out the factual circumstances, as well as the conditions, that must be present in order for a safeguard measure to be legitimate. The surge of imports that are allegedly causing or threatening to cause serious prejudice to the domestic industry of the imposing Member must have happened "as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement".

5. Therefore, it is Brazil's view – and the parties do not seem to dispute it – that, in the absence of unforeseen developments, a safeguard measure cannot be said to be in accordance with the provisions of Article XIX of the GATT.

*II.* *The analysis of the linkage between unforeseen developments/obligations and increase on imports*

6. In the present dispute, China argues that the "unforeseen developments" and "the effect of GATT obligations" requirements must be demonstrated concurrently with the conditions set out in Article 2.1 of the Agreement on Safeguards and be contained in the same report. China further questions the timing of the "Supplementary Report".

7. Brazil, nevertheless, is of the view that, if a Member assesses the unforeseen developments and all the other safeguards conditions before the final decision to apply the safeguards measures, it will have met all the necessary elements to make its decision regarding the application of safeguards and will have complied with the relevant provisions of the WTO Agreements.

8. As there is no clear procedural guidance in the text of Article XIX:1(a) of the GATT 1994 as to how the investigating authority must proceed, there should not be too strict a reading for the investigating authority to meet this requirement, for instance, to gather the factual circumstances and conditions in one single document.

9. Brazil recognizes the logical connection between "unforeseen developments" and "safeguards conditions" set forth, respectively, in the first and second clause of Article XIX:1(a) of the GATT, the investigating authority must be aware of all conditions and circumstances before enacting the legal order to impose safeguards.

10. Nevertheless, Brazil cannot see in the Agreement on Safeguards, nor in Article XIX:1(a), an obligation for investigating authorities to address all the safeguards criteria in one single report. If the connection between the two clauses occurred in a Supplementary Report, but the interested parties defence rights have been respected, this procedure should not be considered as a violation.

*III. Applied tariff rates prior to WTO Membership should not have a bearing on tariff commitments upon joining the Organization*

11. China[1] seems to argue that the applied tariff rate on CSPV products has been 0% since at least 1987 and, because this tariff reduction has been in place well before the United States incurred obligations under the WTO, the United States could not demonstrate that the increase on imports would be a result of tariff commitments undertaken.

12. Brazil does not see how an applied tariff rate, which is not a tariff commitment neither under the WTO, nor previously under the GATT, can preclude an analysis of the trade effects of the bound tariff rate to which a Member committed upon joining the WTO. Even if a Member's applied tariff was 0% before joining the Organization, this cannot be understood to imply that a tariff binding on that good was not an obligation incurred by that Member, nor that such obligation is not capable of preventing it from appropriately responding to an unforeseen surge of imports.

[1] China, FWS, paras. 257-258.

## ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

### I. CAUSAL LINK BETWEEN INCREASED IMPORTS AND SERIOUS INJURY

#### A. Legal standard for "causal link"

1. In *US – Steel Safeguards*, the Appellate Body elaborated upon the legal standard for determining a "causal link" under the Agreement on Safeguards.[1] Article 2.1, read in conjunction with Articles 3.1 and 4.2, requires a competent authority's determination to demonstrate a causal link between increased imports and serious injury on the basis of objective evidence[2], while Article 4.2(c) requires a competent authority to provide a "detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined". When considered together, the evidence must demonstrate a "genuine and substantial" relationship of cause and effect between increased imports and serious injury.[3]

2. Once the competent authority has identified and evaluated all relevant factors, the results must be compared with increases in imports to determine whether a genuine and substantial causal relationship exists between increased imports and serious injury.[4] The Appellate Body has confirmed that "it is the *relationship* between the *movements* in imports (volume and market share) and the *movements* in injury factors that must be central to a causation analysis and determination".[5] Accordingly, an overall coincidence in trends exists where an unambiguous inverse correlation is present between substantially all of the relevant factors, on the one hand, and the increase in imports, on the other.[6]

3. Regardless of whether or not there is an overall coincidence in trends, the Agreement on Safeguards requires the competent authorities to produce a report that provides a reasoned and adequate explanation of why serious injury is causally linked to imported products.[7] Where a competent authority does identify positive trends in relevant factors showing an improvement in the situation of a domestic industry, the competent authority will need to provide a compelling explanation of why and how the domestic industry is injured despite such positive trends.[8]

#### B. The USITC's evaluation of causal link

4. The USITC Final Report identified and highlighted a coincidence in trends between many relevant import and injury factors, including profitability, productivity, employment and excess capacity, which, when viewed together, were said to indicate an overall coincidence in trends.[9] The USITC also identified positive trends in several injury factors, including increases in domestic cell and module production, production capacity, cell capacity utilization, US domestic industry shipments, employment for cell manufacturing, and capital expenditures.[10] The USITC was required to explain how, notwithstanding the positive increase in capacity and production, and especially in

[1] Appellate Body Report, *US – Steel Safeguards*, paras. 485-491; and Panel Reports, *US – Steel Safeguards*, paras. 10.290-10.293.
[2] Ibid. para. 489.
[3] Appellate Body Reports, *US – Wheat Gluten*, paras. 67-70; *US – Lamb*, para. 179; and Panel Reports, *US – Steel Safeguards*, paras. 10.290-10.315.
[4] Appellate Body Reports, *US – Steel Safeguards,* para. 488; *US – Wheat Gluten*, paras. 67-70; and *US – Lamb*, paras. 179-180; and Panel Reports, *US – Steel Safeguards*, paras. 10.290-10.315.
[5] Appellate Body Report, *Argentina – Footwear (EC)*, para. 144 (emphasis original).
[6] Panel Reports, *US – Steel Safeguards*, paras. 10.301-10.302.
[7] Appellate Body Reports, *US – Lamb*, paras. 103-104; and *US - Steel Safeguards*, para. 486.
[8] Panel Reports, *India – Certain Measures on Imports of Iron and Steel Products*, para. 7.209; and *US – Steel Safeguards*, paras. 10.306-10.308.
[9] USITC Final Report, Exhibit CHN-2, p. 43.
[10] USITC Final Report, Exhibit CHN-2, pp. 32-37.

light of these positive trends that occurred at the same time as increased imports, there was still a causal link between increased imports and serious injury.[11]

5. With respect to price effects, the USITC Final Report identified lower-priced imports as a major contributor to decreasing financial performance in the domestic industry[12], despite noting that less than 40 percent of producers indicated having to reduce their prices to compete with lower-priced imports.[13] In finding a causal link, the USITC Final Report relied on negative pricing effects from increased competition driven by growth concentrated in the utility segment of the CSPV market.[14] Among other evidence, the USITC considered that the vast majority of the domestic industry's shipments served the residential and commercial installers in 2016, whereas a majority of imports were shipped to the utility segment.[15]

6. In terms of the effect on employment, the USITC Final Report discussed evidence that cell manufacturing employment increased over the POI, while module employment decreased overall by 3.1% over the POI of 2012-2016, with employment increasing each year between 2014 and 2016.[16] Nevertheless, the USITC found significant unemployment and underemployment in the domestic industry.

7. In accordance with the requirements under Articles 3.1 and 4.2, a competent authority must provide a reasoned and adequate explanation of why the serious injury is causally linked to imported products.[17] Further, where positive trends are present in injury indicators, as in the present case, a competent authority is required to provide a "compelling explanation" for its finding of an overall coincidence in spite of such trends.[18] In the present dispute, the Panel must examine whether the USITC Final Report satisfied these requirements in examining the factors discussed above.

## II. NON-ATTRIBUTION

### A. Legal standard for non-attribution analysis

8. The non-attribution analysis and its associated legal standard are part of the overall requirement to demonstrate the existence of a causal link between increased imports and serious injury. To satisfy this portion of the standard, it is incumbent on the competent authority to "establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports".[19]

9. Accordingly, the competent authority must separate and distinguish the injurious effects caused to the domestic industry by increased imports from those caused by other factors[20], then attribute "injury" caused by increased imports and by other relevant factors.[21] This process ensures that any injury caused by factors other than increased imports is not attributed to increased imports.[22]

10. Where several factors are causing injury at the same time, a final determination about the injurious effects caused by increased imports can only be made if the injurious effects caused by all the different causal factors are distinguished and separated.[23] Otherwise, any conclusion based exclusively on an assessment of only one of the causal factors – increased imports – rests on an

[11] Panel Reports, *India – Certain Measures on Imports of Iron and Steel Products*, para. 7.209; and *US – Steel Safeguards*, paras. 10.306-10.308.

[12] USITC Final Report, Exhibit CHN-2, pp. 41-43.

[13] Ibid. p. 42.

[14] Ibid. p. 28. The USITC cited evidence of a shift in the distribution of sales among the three market segments. The commercial segment was the largest segment of US market by installation in 2009, whereas the utility segment was three times larger than the commercial and residential segments combined by 2016.

[15] Ibid. p. 28, see also p. 59.

[16] Ibid. pp. 33-34.

[17] Appellate Body Reports, *US – Lamb*, paras. 103-104; and *US – Steel Safeguards*, para. 486.

[18] Appellate Body Report, *Argentina – Footwear (EC)*, para. 144; Panel Reports, *India – Iron and Steel Products*, para. 7.20; *US – Wheat Gluten*, para. 8.95; and *US – Steel Safeguards*, paras. 10.303-10.308.

[19] Appellate Body Report, *US – Steel Safeguards*, para.451, quoting Appellate Body Report, *US – Line Pipe*, para. 217.

[20] Appellate Body Report, *US – Wheat Gluten*, paras. 68-69.

[21] Ibid. para. 69; and *US – Lamb*, paras. 179-180.

[22] Appellate Body Report, *US – Steel Safeguards*, para. 451.

[23] Appellate Body Report, *US – Lamb*, para. 179.

uncertain foundation, because it assumes that the other causal factors are not causing the injury which has been ascribed to increased imports.[24]

11. Only after conducting this analysis can the competent authority finally determine whether a causal link, or genuine and substantial relationship of cause and effect, exists between increased imports and serious injury suffered by the domestic industry.[25] The competent authority must provide a reasoned and adequate explanation of how it ensured that it did not attribute the injurious effects of factors other than imports to the imports included in the measure.[26] Otherwise, a panel is not in a position to find that the competent authority complied with the non-attribution requirement under Article 4.2(b) of the Agreement on Safeguards.[27] Moreover, Article 4.2(b) must be read in conjunction with the obligation of competent authorities under Article 3.1 to "publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law".[28]

### B. The USITC's non-attribution analysis

12. With respect to whether the domestic industry failed to serve the utility segment of the market, the Panel must take into account the explanation provided by the USITC for rejecting the allegation that the domestic industry did not serve this segment, along with the confidential data on the US industry's level of participation in each segment of the market.[29] In light of this evidence, and in accordance with the legal standard discussed above, the Panel must determine whether the USITC provided a reasoned and adequate explanation of how imports could have caused injury in this segment.

13. Regarding declining government incentive programs, the USITC Final Report repeatedly recognized that incentive programs have had an effect on prices and indicated that certain programs may have had an effect on demand.[30] The USITC further stated that, "we recognize that changes in the availability and scope of Federal, state, and local government incentives and regulations continue to affect the price of and demand for CSPV products".[31] Yet, the USITC dismissed this factor because "demand continued to experience robust growth throughout the POI"[32], despite questionnaire respondents reporting that "the availability of these incentives has led to a decrease in the price of solar-general electricity, and several attributed the decline in the price of solar-generated electricity to the increase in supply of solar-generated electricity in the market place".[33]

14. Throughout its Final Report, the USITC placed a high importance on declining prices as an injury factor during the POI, with USITC discussions on several factors highlighting evidence that the factor had an impact on price.[34] In particular, the USITC Final Report explained that raw material costs constitute the largest component of the total cost of production, accounting for 84.9% of module production costs in 2016, while a halving in the costs of polysilicon ingots and wafers resulted in a decline in the production costs of CSPV products over the POI.[35] Yet, the USITC found that this factor did not explain the injury to domestic industry given declines in net sales values and increases in low-priced imports.[36]

15. Relatedly, many interested parties reported that declines in the price of conventional energy have caused declines in the price of solar-generated electricity.[37] While the USTIC did find that conventional energy prices may account for some of the decline in the prices of CSPV products, it was determined that these did not explain the consistent observed price declines over the entire POI.

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[24] Ibid.
[25] Appellate Body Report, *US – Wheat Gluten*, paras. 69-70.
[26] Appellate Body Report, *US – Steel Safeguards*, para. 452.
[27] Ibid. citing Appellate Body Report, *US – Line Pipe*, para. 217.
[28] Appellate Body Report, *US – Steel Safeguards*, paras. 303-304.
[29] USITC Final Report, Exhibit CHN-2, pp. 60-61.
[30] See USITC Final Report, Exhibit CHN-2, p. 63: "Questionnaire respondents were divided on whether the level or availability of state and local incentives had changed since 2012, but a plurality of them reported an increase in the demand for CSPV products due to the availability of state and local incentives."
[31] Ibid. p. 61.
[32] Ibid. p. 63.
[33] Ibid. p. 63.
[34] Ibid. pp. 45-47.
[35] Ibid. p.64.
[36] Ibid.
[37] Ibid. p. 65.

16. In light of the legal standard discussed above, the Panel must examine whether the USITC's non-attribution analysis properly separated and distinguished the effects of these factors on the domestic industry from the effects of imported products.[38]

17. With respect to the collective effects of the non-attribution factors, the Appellate Body in *US – Steel Safeguards* found that an examination of collective effects may be necessary if a failure to do so would result in the competent authority improperly attributing the effects of other factors to imports.[39] Accordingly, the Panel must examine whether an analysis of the collective effects of the non-attribution factors was necessary and, if so, whether the USITC improperly attributed to imports the collective effects of other factors of injury.

## III. UNFORESEEN DEVELOPMENTS

18. The text of Article XIX:1(a) of the GATT 1994 establishes a condition that increased imports causing or threatening to cause injury must be "as a result of unforeseen developments and the effect of obligations incurred by a contracting party under this Agreement". It is clear from an ordinary reading of this text that there is a logical connection between unforeseen developments and the effect of obligations incurred, on the one hand, and increased imports on the other hand, based on the use of the words "as a result of" linking the two clauses.

19. Emergency actions under Article XIX:1(a) are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, an importing Member finds itself confronted with developments it had not "foreseen" or "expected" when it incurred that obligation, leading to increased imports causing serious injury.[40] In addition, the competent authority's published report must demonstrate that a WTO Member imposing a safeguard measure is subject to an obligation under the GATT 1994 and explain how that obligation constrains its ability to react to the import surge causing injury to its domestic industry.[41]

20. Therefore, there must be a rational connection or a relational nexus between "unforeseen developments and the effect of the obligations incurred" and increased imports. The competent authorities must explain this connection or nexus in sufficient detail in their report, in accordance with Article 3.1 of the Agreement on Safeguards whereby the competent authorities must "set forth their findings and reasoned conclusions on all pertinent issues of fact and law".

## IV. PROVISION OF MEANINGFUL NON-CONFIDENTIAL SUMMARIES

21. A competent authority is obliged to provide meaningful non-confidential summaries of confidential information relied on to make a determination. While a competent authority is permitted to protect confidential data, it is "still required to provide through means other than full disclosure of that data, a reasoned and adequate explanation" of the information and the conclusions to be drawn from it.[42] In other words, a competent authority is obliged to provide these explanations to the fullest extent possible without disclosing confidential information.[43] A competent authority can comply with this obligation using an explanation in words and without numbers, summarizing the conclusions and analysis to be derived from data within a non-confidential public summary.[44]

22. In order for interested parties to meaningfully exercise their right to respond to the evidence and views presented, they must have timely access to non-confidential versions of the "presentations of other parties". If a competent authority publishes confidential intermediate decisional documents that are made available to certain parties, but not to other parties who cannot be given access to confidential information, this would vitiate the procedural right of the latter parties to "respond to the presentations of other parties and to submit their views".

[38] Appellate Body Reports, *US – Wheat Gluten*, para. 69; *US – Lamb*, paras. 179-180; and *US – Steel Safeguards*, para. 451.
[39] Appellate Body Report, *US – Steel Safeguards*, para. 490.
[40] Appellate Body Report, *Korea – Dairy*, paras. 85-87.
[41] Panel Report, *India – Iron and Steel Products*, para. 7.89.
[42] Panel Reports, *US – Steel Safeguards*, paras. 10.272-10.275.
[43] Ibid. para. 10.274.
[44] Ibid. para. 10.275.

23. This obligation is established through a reading of Articles 3.1 and 3.2 together, an approach that is in line with the principles of treaty interpretation and the Panel Reports in *US – Steel Safeguards*.[45] Article 3.2 states that interested parties providing confidential information may be requested to furnish non-confidential summaries thereof, ostensibly so that interested parties have access to information that could otherwise not be disclosed for reasons of confidentiality. This requirement is linked to Article 3.1, which sets out that interested parties have the procedural right to "present evidence and their views" and the right to respond to the presentations (i.e. evidence and views) of other parties, which is crucial since interested parties are a primary source of information for competent authorities.[46]

24. While Canada does not have access to the confidential information in this report, if the Panel finds that the non-confidential summaries did not provide a reasoned and adequate explanation of how the facts support the determination "to the fullest extent possible without disclosing confidential information", this would constitute a violation of Article 3 of the Agreement on Safeguards.[47]

[45] Panel Reports, *US – Steel Safeguards*, para. 10.274. See also Appellate Body Reports, *Argentina – Footwear (EC)*, para. 81; *US – Gasoline,* p. 23; *Japan – Alcoholic Beverages II*, p. 12; and *India – Patents (US)*, para. 45.

[46] Appellate Body Report, *US – Wheat Gluten*, para. 54.

[47] Panel Reports, *US – Steel Safeguards*, para. 10.274.

## ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS
OF THE EUROPEAN UNION

### I. Whether the USITC failed to properly demonstrate that CSPV imports were a cause of serious injury to the domestic industry

1. The function of panels comprises an objective assessment of the facts of the case under Article 11 of the DSU. When a complainant does not challenge the serious injury determination but makes claims only with regard to the causal link, a panel, in making an objective assessment of the existence or not of the causal link between increased imports and serious injury should not simply accept the findings in the serious injury determination as undisputed facts.

2. Similarly, the objective assessment of the matter before a panel, including the applicability of and conformity with the relevant covered agreements, means that even if the parties to a dispute agree on the approach to a certain legal provision, this does not mean that panels or the Appellate Body are bound by that.

3. A clear example is *Indonesia – Iron or Steel Products*, where both complainants and the respondent agreed that the measure at issue was a safeguard measure. The measure at issue was taken pursuant to Indonesia's domestic safeguards law and following those proceedings. However, on the basis of the objective characteristics of the measure at issue (Indonesia has no tariff binding on galvalume in its WTO Schedule of Concessions), the panel and the Appellate Body have found that the measure at issue cannot be objectively characterized as a safeguard measure (the imposition of the specific duty did not suspend any of Indonesia's GATT obligations, nor did it withdraw or modify any of Indonesia's GATT concessions).

4. The Panel should take into account all evidence before it. The Panel should ascertain whether in establishing the causal link between increased imports and serious injury/threat of injury, the competent authorities have separated the effects of imports from the effects of other factors. In doing so, the Panel should determine whether the domestic industry's inability to further improve certain aspects of its performance during a period of favourable market conditions is or not attributable to increased imports.

### II. Whether the USITC failed to ensure that the injurious effects of other factors were not attributed to increased imports

5. The non-attribution analysis in the second sentence of Article 4.2(b) of the Agreement on Safeguards requires that "other" factors are distinguished from increased imports. The phrase "other than increased imports" suggests that such factors should be, indeed, different from increased imports.

6. Article 4.2(b) presupposes two steps: first, in the competent authorities' examination of causation, the injurious effects caused to the domestic industry by increased imports must be distinguished from the injurious effects caused by other factors. Second, the competent authorities can then attribute to increased imports "injury" caused by them, separately from other factors.

7. Under Article 3.1 of the Agreement on Safeguards, "the competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law". Thus, competent authorities are required to offer a reasoned and adequate explanation of their findings.

8. A panel must examine whether the explanation given by the competent authorities in their published report is reasoned and adequate without conducting a *de novo* review of the evidence nor substituting the authorities' conclusions; this does not mean that panels must simply accept the conclusions of the competent authorities. They must find that an explanation is not reasoned, or is not adequate, if some alternative explanation of the facts is plausible, and if the competent

authorities' explanation does not seem adequate in the light of that alternative explanation, as stated by the Appellate Body Report in *US – Lamb*.

9. As part of the objective assessment of the matter before it, a panel has the duty to choose the explanation which meets that legal standard. In order to be able to do so, a panel may need to look into (1) how competent authorities weighed competing evidence and arguments submitted by interested parties in the course of the safeguards investigation; and (2) why they considered the evidence of certain interested parties to be more compelling.

## III. China's claims with regard to imports not increased as a result of "unforeseen developments"

10. In *US – Steel Safeguards*, the Appellate Body has stated that the circumstances of unforeseen developments within the meaning of Article XIX:1(a) must be demonstrated as a matter of *fact*, together with the conditions mentioned in Article 2.1 of the Agreement on Safeguards, in the report of the competent authority and before a safeguard measure can be applied.

11. Indeed, Article 1 of the Agreement on Safeguards refers to the "measures provided for in Article XIX of GATT 1994". Article XIX:1(a) of GATT 1994 contains in the relevant part references to "unforeseen developments" and "the effect of the obligations incurred by a [Member] under this Agreement". Thus, all the relevant provisions of Article XIX of the GATT 1994 and the Agreement on Safeguards should be given their full meaning and their full legal effect.

12. A competent authority would normally clearly show in its findings that the issue of unforeseen developments has been examined and would present a reasoned and adequate explanation to that effect, in line with the requirements contained in Article XIX of the GATT 1994 and the Agreement on Safeguards.

13. The competent authorities are required to demonstrate compliance with the first clause of GATT Article XIX:1(a) in their report. In a safeguard investigation, like in an antidumping investigation, the relevant documents are those on the competent authorities' record, which were considered when conducting the investigation.

14. Thus, the European Union disagrees with the US that the competent investigating authorities are under no legal obligation to assess whether there were "unforeseen developments" as a "result of the obligations occurred" in their report. The European Union is also reluctant to the US ex-post rationalization argument, according to which "unforeseen developments" may be explained for the first time in litigation proceedings.

15. The Panel should objectively assess whether the explanations in the USITC Supplemental Report with regard to China's increased manufacturing capacity and to the shifting in production from one country to another meet the required standard in order to amount to a demonstration of "unforeseen developments" and not to a mere allegation.

16. Article XIX:1(a) refers to "as a result of" unforeseen developments and "the effect of" the obligations incurred. When something is "a result of" or an "effect of" something else, then it is, indeed, a relational nexus between the two elements, which follows a cause and effect logic.

17. Both Article XIX:1(a) of the GATT 1994 and Article 4.2(b) of the Agreement on Safeguards contain a causality test, whether it may be called relational nexus or causal link.

18. However, there are important differences between the two provisions. Under Article XIX:1(a) of the GATT 1994, two factual pre-requisites should be demonstrated before any safeguard may be applied: (a) the existence of unforeseen developments, and (b) the existence of one or several obligation(s) under the GATT 1994. These pre-requisites are linked to the very notion of economic emergency a safeguard measure responds to.

19. Article 4.2(b) of the Agreement on Safeguards refers to a subsequent stage, when during the investigation a competent authority is called to establish the connection between increased imports and serious injury or threat thereof.

20. Both the pre-requisites of Article XIX:1(a) and the requirements of Article 4.2(b) are conditions for the legality of a safeguard measure, for its consistency with the covered agreements and must not be conflated with the two defining characteristics of a safeguard measure.

21. As there may be several obligations that apply to the product in question, Article XIX:1(a) requires an identification of the specific relevant obligation(s) and their effects. WTO Members' Schedules annexed to the GATT 1994 are made an integral part 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.

22. Thus, a tariff rate bound at zero percent may have implications for demonstrating compliance with the requirement emanating from the phrase "of the effect of the obligations incurred" under GATT Article XIX:1(a). In most cases, there is a difference between the bound level and the applied level of duties, referred to as "water" or "binding overhead". When the bound level is set at zero percent, such a difference does not exist and there is thus much less flexibility in modulating the response to an injurious increase in imports.

## IV. Whether the USITC failed to provide a sufficient public summary of confidential data to allow for interested parties to present a meaningful defence

23. Articles 3.1 and 3.2 of the Agreement on Safeguards establish a balance between the principle of due process and the confidentiality of certain aspects of a safeguard investigation. As a safeguard investigation addresses an emergency action with regard to imports, and taking into account the fact that an investigation is usually framed by precise deadlines under domestic law, the publication of the report without undue delays is in the very nature of a safeguard investigation exercise. Though, there is no express obligation to publish the report promptly in Article 3.1.

24. Article 3.1 does not provide for an additional opportunity to comment on the final report. However, such an opportunity may be part of "procedures previously established and made public in consonance with Article X of GATT 1994".

25. Furthermore, the notification requirements in Article 12 are complementing the obligations incumbent on the competent authorities under Article 3. Under Article 12, the adopting Member shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned.

26. The text of Article 3.2 provides for the possibility ("may be requested", as opposed to "shall be requested") that competent authorities ask for non-confidential summaries from the Parties providing confidential information. The European Union considers that this is an important element for a proper exercise of the rights of defence.

27. A competent authority is obliged to provide these explanations to fullest extent possible without disclosing confidential information. This implies that if there are ways of presenting data in a modified form (e.g. aggregation or indexing), which protects confidentiality, a competent authority is obliged to resort to these options. Conversely, the provision of no data at all is permitted only when all these methods fail in a particular case.

## V. With regard to virtual panel meetings

28. The European Union welcomes the Panel's decision to conduct its first substantive meeting, including the third party session, online. This is the first time such a solution is adopted, in light of exceptional circumstances.

29. The Covid-19 pandemic should not indefinitely paralyse the WTO dispute settlement system because it is considered that in-person hearings should not be held for public health reasons, or because of applicable travel restrictions. Rather, once the period within which hearings would normally be expected has clearly passed, and if there is little prospect of normal operation resuming within the immediately foreseeable future, virtual hearings must be organised instead, on an even-handed basis in all cases, for all Members.

30. Among the various controlling principles in the DSU, which are sometimes in competition with each other, two of the most important are prompt settlement, that is, resolution of the dispute within

the time-frames set out in the DSU, and due process, which finds expression in various provisions throughout the DSU. The Covid-19 situation requires a reasonable balance to be found between these competing principles.

31. Parties and third parties have a right to at least one meeting or hearing, as indicated in Article 10 of the DSU. A second hearing is the normal practice, as foreshadowed in Appendix 3 of the DSU, but it is not an absolute right, as demonstrated, for example, by the practice of single hearings in compliance and arbitration panel proceedings.

32. Virtual hearings are sufficiently similar to in-person hearings that, against the backdrop of Covid-19, panels have the discretion, and indeed the obligation at some point, to organise virtual hearings in lieu of in-person hearings. This is the only way to ensure compliance with the principle of prompt settlement. This can also be done in a manner that ensures compliance with the principle of due process, having regard to the Covid-19 situation. Steps can also be taken to ensure the confidentiality of such hearings.

## ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

### I. OBLIGATIONS RELATED TO "UNFORESEEN DEVELOPMENTS"

1. The requirement to determine whether the increase in imports is the result of "unforeseen developments" is an affirmative obligation that is based on the text of the first sentence of Article XIX:1(a) of the GATT 1994. The Appellate Body in *Korea – Dairy* clarified that "unforeseen developments" are "circumstances which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994".[1] Thus, the existence of "unforeseen developments" is one of the express requirements imposed by Article XIX:1(a) in order for a safeguard measure to be applied consistently with the relevant WTO obligations.

2. The phrase "as a result of unforeseen developments" in the first sentence of Article XIX:1(a) indicates that such developments are "circumstances" that must exist before the "increased" imports, because the increased imports must be a "result" of the "unforeseen developments". A "result" is defined as "an effect, issue, or outcome from some action, process or design". Thus, logically, the unforeseen developments must precede the increase in imports. This, in turn, means that the unforeseen developments are circumstances that must exist before a safeguard measure is applied. The requirement that unforeseen developments exist before application of a safeguard measure is therefore firmly grounded in the text of Article XIX:1(a) of the GATT 1994 and follows from the ordinary meaning of the terms used in that provision.

3. Furthermore, competent authorities must make affirmative findings as to the existence of "unforeseen developments" in their published reports, as required under Articles 3.1 and 4.2(c) of the Safeguards Agreement.[2] An authority must provide a "reasoned and adequate explanation" of how the facts therein support its determination of "unforeseen developments".[3] A published report that does not discuss or offer any explanation as to why certain factors mentioned in it are to be considered "unforeseen developments" cannot be held to demonstrate that the safeguard measure has been applied "as a result of unforeseen developments".

4. As to the timeframe for assessing the "unforeseen developments", panels and the Appellate Body have considered that, to be consistent with the text of Article XIX:1(a) of the GATT 1994, such developments had to be unforeseen at the time the importing Member negotiated the relevant tariff concessions (usually the time at which the Member concerned became a Member of the WTO).[4] The importing Member must demonstrate that, at that time, it did not foresee the developments that gave rise to the increased quantity of imports.[5] Therefore, Japan is of the view that certain circumstances under the first clause of Article XIX:1(a) of the GATT 1994 – namely, unforeseen developments and obligations incurred by a Member under the GATT 1994, including tariff concessions – must be demonstrated as a matter of fact, as part of the substantive obligations before a safeguard measure can be lawfully imposed.

5. Thus, in accordance with Articles 3.1 and 4.2(c) of the Safeguards Agreement and Article XIX:1(a) of the GATT 1994, the competent authorities' published report must contain, at a minimum, some discussion as to why the alleged "unforeseen developments" were "unexpected" for the importing Member concerned at the time that Member negotiated the tariff concessions at issue. This required discussion forms part of "their findings and reasoned conclusions reached on all pertinent issues of fact and law" under Article 3.1 of the Safeguards Agreement.[6] It should be also

[1] Appellate Body Report, *Korea – Dairy*, para. 85. See also Appellate Body Report, *Argentina – Footwear (EC)*, para. 92.
[2] Appellate Body Report, *US – Lamb*, para. 72.
[3] Appellate Body Report, *US – Steel Safeguards*, paras. 279, 290.
[4] Appellate Body Reports, *Argentina – Footwear (EC)*, para. 96; and *Korea – Dairy*, para. 89.
[5] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.128 and footnote 210. See also Appellate Body Report, *Korea – Dairy*, para. 85.
[6] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.141.

noted that "[a] mere phrase in a conclusion, without supporting analysis of the existence of unforeseen developments, is not a substitute for a demonstration of fact".[7]

6. In this case, as China noted[8], although the USITC Final Report does not contain any express discussion of "unforeseen developments", the USITC Supplemental Report apparently refers to the issue of "unforeseen developments". The report notes that China implemented "the industrial policies … favoring renewable energy product manufacturing, including CSPV products"[9], including subsidies[10], which resulted in the significant increase of "capacity and production of CSPV products in China"[11], mainly "directed to markets outside of China".[12] It also mentions a series of trade remedies[13] intended to address the relevant "imports from China and Taiwan" and concludes that these imports materially injured the domestic industry. The Panel should examine if these statements fulfill the United States' obligation to include in the "findings and reasoned conclusions" a discussion of the "developments" that were not foreseen when the relevant tariff concessions were negotiated, and that gave rise to the alleged increase in imports.

7. In this regard, China emphasized the "failure of the main USITC Report (dated 13 November 2017) to address this issue at all" and claimed that "the belated and brief later discussion" in the USITC Supplemental Report (dated 27 December 2017) is a "fatal flaw".[14] Considering the text of Article 3.1 of the Safeguards Agreement ("[t]he competent authorities shall publish a report setting forth their finding and reasoned conclusions") and its function (due process objective in the safeguard investigation), it would be ideal to include all of the "findings and reasoned conclusions" in one single report, but issuing more than one report is not prohibited under Articles 3.1 and 4.2(c) of the Safeguards Agreement.

## II. "LOGICAL CONNECTION" BETWEEN THE UNFORESEEN DEVELOPMENTS AND THE SERIOUS INJURY

8. The clause "as a result of unforeseen developments" in Article XIX:1(a) of the GATT 1994 has been interpreted to require a "logical connection" between the "unforeseen developments" identified by an authority and the increase in imports causing or threatening to cause serious injury. Based on the plain language of Article XIX:1(a) of the GATT 1994 and the requirement in Article 4.2(c) of the Safeguards Agreement, an authority's published report must not only demonstrate the existence of "unforeseen developments", but it must also explain how these "unforeseen developments" had the effect of resulting in an increase in imports that has caused or is threatening to cause serious injury to the domestic industry. In other words, the competent authorities are required to demonstrate the "logical connection" between these two elements in their published reports, in accordance with Article XIX:1(a) of the GATT 1994, as well as Articles 3.1 and 4.2(c) of the Safeguards Agreement.

9. Japan further notes that, in order to substantiate the explanation of the "logical connection", the increased imports must be found to cause or threaten to cause serious injury to the "domestic industry" of the importing Member. The "domestic industry" is defined under Article 4.1(c) of the Safeguards Agreement as the domestic producers "of the like or directly competitive products". Japan is therefore of the view that the competent authorities must show *how* the "unforeseen developments" have modified the competitive relationship between the imported and domestic products to the detriment of the latter and to such a degree as to result in an increase in imports that causes, or threatens to cause, serious injury to the domestic industry. If the "unforeseen developments" have not modified this competitive relationship, it should follow that the increase in imports alone did not cause injury to the domestic industry because imports did not replace sales of the domestic like product.

10. Japan's view is consistent with the function of Article XIX of the GATT 1994 and the purpose of the Safeguards Agreement. Taking into account the tariff concessions Members make on a product-by-product basis when entering the WTO, safeguard measures function as a "safety net" to

[7] Panel Report, *Argentina – Preserved Peaches*, para. 7.33.
[8] China's First Written Submission, paras. 245-248.
[9] USITC Supplemental Report, Exhibit CHN-6, page 5.
[10] Ibid, page 6.
[11] Ibid, page 7.
[12] Ibid, page 7.
[13] Ibid, pages 5-6.
[14] China's First Written Submission, para. 280.

convince interested parties to recognize the importance of "the need to enhance rather than limit competition in international markets" (Preamble of the Safeguards Agreement).

11. At the same time, if there are "unforeseen developments" affecting the competitiveness of the domestic industry and which result in increased imports, a Member would need some time to "prevent or remedy such injury" (Article XIX:1(a) of the GATT 1994) by way of a "structural adjustment" (Preamble of the Safeguards Agreement) that restores the industry's international competitiveness. That is the logical reason why a safeguard measure is designed to be implemented where "unforeseen developments" are connected to increased imports that cause serious injury, but only "to the extent and for such time as may be necessary to prevent or remedy such injury" (Article XIX:1(a) of the GATT 1994).

12. The competent authorities must explain not only *why* the event constitutes an "unforeseen development", but also *how* such event actually resulted in the increased imports that caused serious injury or threat thereof to the domestic industry. Also, the competent authorities must show how the "unforeseen developments" have modified the competitive relationship between the imported and domestic products to the detriment of the latter and to such a degree as to result in an increase in imports that cause, or threaten to cause, serious injury to the domestic industry.

13. In this case, the USITC Supplemental Report seems to identify as "unforeseen developments" China's industrial policies favoring renewable energy product manufacturing, including CSPV products. If the Panel recognizes that these factors can qualify as "developments" unforeseen at the time of the relevant tariff negotiation, the Panel must examine the logical connection between such "developments" and the increase in imports causing serious injury to the domestic industry.

14. China has identified a few issues that indicate the United States' failure to provide an adequate explanation of the required "logical connection". In particular, China notes the United States' (i) improper treatment of positive or diverse trends in the injury factors[15]; and (ii) lack of a reasoned and adequate explanation of the non-attribution factors[16], such as the different market segments targeted by the domestic industry and imports, domestic producers' business decisions, and quality issues with the domestic products. Although China discusses these issues with regard to the requirement for a causal link between imports and serious injury under Articles 2.1, 3.1 and 4.2(b) of the Safeguards Agreement, these issues also concern the required "logical connection" between the "unforeseen developments" and the increase in imports causing or threatening to cause serious injury.

15. China insists that the US domestic industry did not have the capacity to meet the "explosive growth in demand" in the utility segment because of the industry's own business choice and that the "demand" was thus largely served by imports. If, as China insists, the market segments of domestic products and imported products are so different as to raise doubts about the products' competitive relationship, a question could arise as to whether the United States has fulfilled the "logical connection" requirement. China emphasizes the "important distinctions" between the utility segment and other segments, and that the "domestic shipments were not displaced" by imports, since the domestic industry did not adjust to, and could not compete in, that "distinct" utility segment.[17]

16. The crucial issue here is then, whether the competitive relationship between the imported and domestic products has been modified by the alleged "unforeseen developments" in reality, whether such modification actually resulted in an increase in imports that caused serious injury to the domestic industry, and whether the Member is prevented from taking measures to offset it (e.g., the increase in the applicable import duty rate due to its tariff bindings).

17. Unless the authority finds that the "unforeseen developments" have modified the competitive relationship to the disadvantage of the domestic products, it should follow that any concurrent increase in imports must not have displaced sales of the domestic product thus causing "injury" to the domestic industry, which could be prevented or remedied by suspending, withdrawing or modifying the relevant tariff concession. The second clause of Article XIX:1(a) of the GATT 1994 provides "any product is imported … in such increased quantities and under such conditions as to cause or threaten serious injury". These terms should be interpreted as follows: if imports have not

[15] China's First Written Submission, paras. 111-158.
[16] China's First Written Submission, paras. 181-226.
[17] China's Responses to Panel's Questions, paras. 9-29.

displaced domestic products in the market, the increase in imports, if any, must not have been "in such … quantities" nor "in such conditions" "as to cause or threaten serious injury" to the domestic industry. Japan is of the view that this is the "causal link" required under Article 4.2(b) of the Agreement on Safeguards.

18. Thus, the "causal link" requirement under Article 4.2(b) of the Agreement on Safeguards is, according to the text, between "increased imports" and "serious injury or threat thereof", both of which must result from the "unforeseen development", i.e., at the end of the flow of the "logical connection" required under Article XIX:1(a) of the GATT 1994, as discussed above, and be linked to each other through the changes in the competitive relationship resulted from the "unforeseen development". Article XIX:1(a) of the GATT 1994, which constitutes part of the context for Article 4.2(b), requires this interpretation. Japan further notes that this understanding makes clear why the consideration of "other factors" is required.

19. Also, even if China's industrial policy is found to have resulted in a change in the competitive relationship between imports from China and the domestic like products, then the United States still must explain how such "developments" resulted in increased imports of a product that warrant the application of safeguard measures "irrespective of its source" (Article 2.2 of the Safeguards Agreement). To justify a global safeguard measure, the United States must therefore explain how the industrial policies of China have resulted in an increase in imports from both China and other exporting countries, including Mexico and Korea, which caused serious injury by changing the competitive relationship between the imports from all of these Members and the domestic like products.

20. In this regard, the USITC Supplemental Report seems to imply a correlation between a series of US trade remedy measures on CSPV exports from China and the capacity development of Chinese producers in third countries.[18] The Panel should examine if the United States' statements, including the above, fulfill its obligation to explain how "developments" in one Member resulted in the increased imports from all relevant Members as to cause injury.

## III. PUBLICATION OF NON-CONFIDENTIAL INFORMATION

21. As for the issue of whether the competent authorities should publish non-confidential versions of intermediate decisional documents during the investigation, Japan notes that the third sentence of Article 3.1 of the Agreement on Safeguards refers to "a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law", but does not directly indicate whether "non-confidential versions" are required. Japan does not contend that any specific measures such as preparing a preliminary report and "promptly" publishing a non-confidential version thereof are always required. Japan maintains that how competent authorities must treat confidential information, or whether such treatment violates Article 3, must be analysed in line with the ultimate due process function of Article 3, and the nature and importance of the confidential information at issue.

22. In this respect, Japan maintains, and the Parties seem to agree, that neither Article 3.1 nor 4.2(c) of the Safeguards Agreement requires that the report must address every piece of evidence and that every minor error would invalidate the otherwise substantiated conclusions. Perfection is not the standard to meet under the Safeguards Agreement. The text of Article 3.1 relevantly requires only "findings and reasoned conclusions" on all "pertinent" issues of fact and law.

23. Japan notes that which issues of fact and law that are "pertinent" and what constitutes "reasoned conclusions" should be analyzed in parallel with the core requirement in Article XIX:1(a) of the GATT 1994 – the existence of a "logical connection" between the "unforeseen developments" and the increase in imports causing or threatening to cause serious injury. One minor error on marginal facts may not affect the "logical connection". This being said, certain facts and evidence may be essential to the establishment of the basis for the finding of the required "logical connection". This is a "pertinent" issue that must be supported by a sufficiently "reasoned conclusion". A substantial error in the assessment of such "pertinent" factual issues, for example, will call into question the affirmative conclusions on the "logical connection", pursuant to Article 3.1 of the Safeguards Agreement.

[18] USITC Supplemental Report, Exhibit CHN-6, pages 6-9.

## ANNEX C-5

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE REPUBLIC OF KOREA

### I. INTRODUCTION

1. Korea is participating in this dispute because of its systemic interest in the proper interpretation of the legal disciplines applying to Members' safeguard measures taken under Article XIX of the General Agreement on Tariffs and Trade ("GATT") 1994 and the Agreement on Safeguards.

2. It is important to underscore at the outset that safeguard measures are "extraordinary remedies" allowed by the WTO covered agreements in "emergency situations" as they restrict imports from other Members in the absence of any allegation of unfair trade practices.[1] Indeed, safeguard measures are intended to provide temporary relief to industries suffering economic harm that have been caused by an unexpected surge in imports. Safeguards are available to Members as an insurance mechanism if unexpected harm is caused by trade liberalization, in particular as a result of the lowering of import tariffs under the GATT 1994. The unforeseen nature of the developments that result in the increased imports is an essential aspect of this emergency insurance mechanism.

3. Thus, safeguards are of a fundamentally different nature than the unfair trade-related forms of contingent trade protection (i.e. anti-dumping and anti-subsidy/countervailing duty measures). This fundamental difference in nature cannot be ignored. Otherwise safeguards would effectively become just an easier-to-use form of trade remedy, as it would do away with complex dumping and subsidy calculations while allowing for the same remedy. Safeguards are, and should remain, the exceptional, temporary adjustment-related insurance remedy that they were meant to be.

### II. APPLICABLE STANDARD OF REVIEW

4. The general standard of review contained in Article 11 of the Dispute Settlement Understanding ("DSU") is applicable also to disputes under the Agreement on Safeguards.[2] Pursuant to this provision, a WTO panel is required to 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 agreements. In the specific context of disputes brought under the Agreement on Safeguards, this standard has been interpreted to mean that:

> [P]anels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data.[3]

5. Panels must also examine whether the Member imposing a safeguard measure provided "explicit" explanations in the sense that they are "clear and unambiguous" and do "not merely imply or suggest an explanation". This review is to be based on the published report(s), which must contain the "reasoned conclusions", "detailed analysis", and "demonstration of the relevance of the factors examined".[4]

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[1] Appellate Body Reports, *US – Line Pipe*, para. 80; *Korea – Dairy*, para. 86; *US – Steel Safeguards*, para. 347; and *Indonesia – Iron or Steel Products*, para. 5.53.

[2] Appellate Body Reports, *Argentina – Footwear (EC)*, para. 120; *US – Lamb*, paras. 100-102; and Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.4.

[3] Appellate Body Reports, *US – Cotton Yarn*, para. 74; *Argentina – Footwear (EC)*, para. 121; *US – Lamb*, para. 103; and *US – Wheat Gluten*, para. 55.

[4] Appellate Body Report, *US – Steel Safeguards*, para. 304.

## III. PROPER INTERPRETATION OF ARTICLES 2.1, 3.1, AND 4.2(B) OF THE AGREEMENT ON SAFEGUARDS FOR ESTABLISHING A CAUSAL LINK BETWEEN THE INCREASED IMPORTS AND THE SERIOUS INJURY TO THE DOMESTIC INDUSTRY

6. To make a proper causation determination under the Agreement on Safeguards, Korea considers the following aspects are important to bear in mind.

7. First, the Appellate Body has explained that there must be a "genuine and substantial relationship of cause and effect" between the increased imports and the serious injury to the domestic industry, and that the requirement implies that the increased imports must have contributed to "bringing about", "producing" or "inducing" the serious injury of threat thereof.[5]

8. The relationship between the "movements" in imports and the "movements" in injury factors is central to finding causation. In *Argentina – Footwear (EC)*, the Appellate Body agreed with the panel that "the words 'rate and amount' and 'changes' in Article 4.2(a) mean that 'the *trends* -- in both the injury factors and the imports -- matter as much as their absolute levels'", and that "it is the *relationship* between the *movements* in imports (volume and market share) and the *movements* in injury factors that must be central to a causation analysis and determination".[6]

9. In *US – Steel Safeguards*, the panel found that upward movements in imports should normally occur at the same time as downward movements in injury factors in order for coincidence to be indicative of a causal link.[7] While such a coincidence by itself cannot prove causation, an absence of a coincidence in time would create serious doubts as to the existence of a causal link, and would require a very compelling analysis of why causation still is present.[8] This is also supported by the way in which the causation requirement is interpreted in the similar context under the SCM Agreement and the Anti-Dumping Agreement.[9]

10. As the panel explained in *US – Steel Safeguards*, the "*overall* coincidence is what matters and not whether coincidence or lack thereof can be shown in relation to a few select factors which the competent authority has considered".[10] This means that the competent authorities must look at "the *overall* trends in imports and the *overall* trends in serious injury factors pertaining to the *overall* situation of the industry over the period of investigation" to see whether "there is a *general* coincidence between the trends in injury factors and the trends in imports which would support a finding by the investigating authority of a causal connection between increased imports and serious injury".[11] Thus, the competent authorities must examine the trends for all injury factors in order to be in a position to determine whether there is a coincidence between the trends in imports and the trends in injury factors.

11. Second, the terms "under such conditions" in Article 2.1 has been interpreted as requiring an examination of the conditions of competition between the imported product and the domestic like product in order to support a determination of causation.[12] A proper examination of price developments between the increased imports and the like domestic product is an essential aspect of assessing the conditions of competition. The panel in *US – Steel Safeguards* found that proper consideration of prices "is an important, if not the most important, factor in analyzing the conditions of competition in a particular market".[13]

12. In the present case, the USITC found that increased imports are a substantial cause of serious injury to the domestic industry of solar products. Korea invites the Panel to examine the USITC's analysis with the above interpretative guidance in mind.

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[5] Appellate Body Report, *US – Wheat Gluten*, paras. 67-69.

[6] Appellate Body Report, *Argentina – Footwear (EC)*, para. 144 (emphasis original).

[7] Panel Report, *US – Steel Safeguards*, para. 10.299.

[8] Appellate Body Report, *Argentina – Footwear (EC)*, para. 144; and Panel Report, *Argentina – Footwear (EC)*, para. 8.238.

[9] See, e.g. Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 132.

[10] Panel Reports, *US – Steel Safeguards*, para. 10.302 (emphasis original); see also, Panel Reports, *US – Wheat Gluten*, paras. 8.97, 8.101.

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

[12] Appellate Body Report, *Argentina – Footwear (EC)*, para. 145; and Panel Reports, *Argentina – Footwear (EC)*, para. 8.229; *US – Wheat Gluten*, para. 8.91; *US – Lamb*, para. 7.232; and *US – Steel Safeguard*, paras. 10.313-10.321.

[13] Panel Reports, *US – Steel Safeguards*, para. 10.320.

## IV. PROPER INTERPRETATION OF ARTICLES 2.1, 3.1, AND 4.2(B) OF THE AGREEMENT ON SAFEGUARDS WITH RESPECT TO THE NON-ATTRIBUTION ANALYSIS

13. Korea notes that, in order to make a proper causation determination, competent authorities are required to ensure that, when factors other than increased imports are causing injury to the domestic industry at the same time, any injury from such other factors must not be attributed to the increased imports.[14] This non-attribution requirement requires the *separation and distinguishing* of the injurious effects of the known other injury factors from the injury caused by the increased imports.[15] This requires competent authorities to "identify" and to sufficiently "explain" the nature and extent of the injurious effects of the other factors.[16]

14. Korea considers the following two aspects are important to recall.

15. First, to ensure that the injurious effects caused by all the different causal factors are distinguished and separated from the increased imports, the Appellate Body has clarified that authorities must "establish explicitly, through a reasoned and adequate explanation" that "injury caused by factors other than increased imports is not attributed to increased imports". This explanation must be "clear and unambiguous" and must be explained in "express terms".[17]

16. Second, WTO panels have found that the Agreement on Safeguards and relevant jurisprudence anticipate that quantification of the impact of the different injury factors can be particularly desirable in cases involving complicated factual situations, especially where qualitative analyses may not be sufficient to understand fully the dynamics of the relevant market.[18] The panel in *US – Steel Safeguards* even considered that "quantification may, in certain cases, be entailed in the obligation on competent authorities to establish non-attribution 'explicitly' on the basis of a reasoned and adequate explanation", and may thus be "necessary to rebut allegedly plausible alternative explanations that have been put forward".[19]

17. Korea invites the Panel to examine the USITC's analysis with the above interpretative guidance in mind.

## V. PROPER INTERPRETATION OF ARTICLE XIX:1(A) OF THE GATT 1994 THAT THE INCREASED IMPORTS MUST BE THE RESULT OF "UNFORESEEN DEVELOPMENTS" AND OF THE "EFFECT OF THE OBLIGATIONS INCURRED"

18. Korea notes that establishing that the increased imports were the result of "unforeseen developments" and "the effect of the obligations incurred [under the GATT 1994]" are foundational requirements to justify the imposition of a safeguard measure.

### A. "Unforeseen Developments" that Resulted in Such Increased Imports

19. Korea notes that Article 1 of the Agreement on Safeguards provides that this Agreement "establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994". In turn, Article XIX:1(a) of the GATT 1994 enumerates the circumstances and conditions that must be met for the imposition of a safeguard measure, providing in relevant part that an "emergency action on imports of particular products" in the form of a temporary suspension of concessions is possible:

> If, *as a result of unforeseen developments and of the effect of the obligations incurred* by a [WTO Member] under this Agreement, including tariff concessions, any product is being imported into the territory of that [WTO Member] in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products. (emphasis added)

[14] Appellate Body Reports, *US – Line Pipe*, para. 208; and *US – Steel Safeguard*, para. 485.
[15] Appellate Body Report, *US – Line Pipe*, para. 215 (referred to in Panel Report, *Ukraine – Passenger Cars*, para. 7.316).
[16] Appellate Body Report, *US – Line Pipe*, para. 215 (referred to in Panel Report, *Ukraine – Passenger Cars*, para. 7.316).
[17] Appellate Body Report, *US – Line Pipe*, paras. 200-222.
[18] See, e.g. Panel Reports, *US – Steel Safeguards*, para. 10.336.
[19] Panel Reports, *US – Steel Safeguards*, para. 10.340.

20. Given the reference in Article 1 of the Agreement on Safeguards to Article XIX of the GATT 1994, Korea agrees with the Appellate Body that the demonstration of "unforeseen developments" is a prerequisite for the imposition of a safeguard measure.[20]

21. It is not sufficient for a competent authority to satisfy itself merely that "unforeseen developments" exist as a factual matter. Rather, the existence must be found affirmatively and supported by reasoned conclusion in the published report.[21]

22. What constitutes "unforeseen developments" must be determined on a case-by-case basis. The key condition for identifying "unforeseen developments" is that they were *unexpected* at the time the imposing Member incurred the relevant GATT obligation.[22] The standard is based on what the Member in question could not have reasonably foreseen or expected when it incurred the relevant GATT obligations – which for the United States was at the completion of the Uruguay Round on 1 January 1995.

23. It is particularly important to distinguish the unforeseen developments, on the one hand, from the increased imports, on the other. Since a competent authority must establish that the increased imports are a result of the unforeseen developments, an increase in imports cannot, by definition, constitute the unforeseen developments. That would be circular and inconsistent with the legal disciplines.[23]

## B. The "Effect of the Obligations Incurred" under the GATT 1994

24. Separately from determining the existence of "unforeseen developments", Article XIX of the GATT 1994 also provides that the increased imports must be the "effect of the obligations incurred" by the Member in question under the GATT 1994. Thus, the report of the competent authorities must clearly identify and explain which the relevant "obligations incurred" are that resulted in the increased imports.

25. Since there are two-parts to this obligation (i.e. identification and explaining the link with the increase imports), it does not suffice for a Member to state merely that the imports in question are subject to certain tariff bindings. Rather, it must be demonstrated that the increased imports were a result of the tariff bindings.[24]

26. The panel in *Dominican Republic – Safeguard Measures* added that it falls on the Member in question "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 that "[t]hese findings and conclusions must be reflected in the report of the competent authority".[25] In that dispute, the panel found that the Dominican Republic incurred obligations under the GATT 1994 with respect to the covered products as it had granted a tariff concession of 40% *ad valorem* on those products, but that the Dominican Republic's investigation report did not link this element with the alleged increased imports.[26] Thus, it was not possible for the panel to conclude that the Dominican Republic complied with Article XIX:1(a) of the GATT 1994.[27]

27. Korea invites the Panel to examine the USITC's analysis on "unforeseen developments" and "the effect of the obligations incurred [under the GATT 1994]" with the above interpretative guidance in mind.

[20] See, e.g. Appellate Body Report, *US – Lamb*, para. 72.
[21] Appellate Body Report, *US – Lamb*, paras. 72, 76.
[22] Appellate Body Reports, *Argentina – Footwear (EC)*, para. 93; and *Korea – Dairy*, para. 86.
[23] Panel Reports, *Ukraine – Passenger Cars*, para. 7.83; and *Indonesia – Iron or Steel Products*, para. 7.51.
[24] Panel Report, *Ukraine – Passenger Cars*, para. 7.96.
[25] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.146.
[26] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.147, 7.149.
[27] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.149.

## VI. CONCLUSION

28. Korea welcomes the opportunity to present its views on the legal standards that must be satisfied to justify the imposition of extra-ordinary, emergency safeguard measures under the Agreement in Safeguards and Article XIX of the GATT 1994. This dispute presents an important opportunity to confirm that strict adherence to these standards is essential to avoid that safeguards become simply another easy-to-use form of contingent trade protection.