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

(DS562)

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

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TABLE OF REPORTS

Short Form	Full Citation
Korea – Dairy (AB)	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R
US – Lamb (AB)	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001
US – Steel Safeguards (Panel)	Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R / WT/DS249/R / WT/DS251/R / WT/DS252/R / WT/DS253/R / WT/DS254/R / WT/DS258/R / WT/DS259/R / and Corr.1, adopted 10 December 2003, as modified by Appellate Body Report WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R
US – Wheat Gluten (Panel)	Panel Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R, adopted 19 January 2001, as modified by Appellate Body Report WT/DS166/AB/R

Mr. Chairperson, Members of the Panel:

1. The USITC's investigation revealed a domestic industry performing poorly at the beginning of the investigation, and deteriorating at the end after massively increased imports at consistently lower prices prevented domestic producers from taking advantage of an unprecedented boom in demand. The causal link between the industry's poor performance and the increased imports is clear and, in our view, irrefutable. China's opening statement does nothing to undermine the USITC's conclusions with regard to all of the U.S. obligations in GATT 1994 and the Safeguards Agreement. As China's opening statement contained numerous flaws, and we have limited time, we will necessarily focus on the most egregious errors. Therefore, please do not consider that our silence on any issue reflects acquiescence.

I. OVERARCHING PROBLEMS WITH CHINA'S APPROACH IN THIS DISPUTE

2. We will begin by addressing two overarching problems that arise again and again in China's opening statement. The first of these is China's approach to the USITC's weighing of the evidence. You will no doubt have noted that in its opening statement, just as in previous submissions, 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.[1] China provides no justification for these characterizations, and there is none.

3. 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.

4. 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.[2] This represents a

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[1] *See, e.g.*, China Opening Statement, paras. 37, 43, 47, 49-50.

[2] *See, e.g.*, China Opening Statement, paras. 34, 40, 42, 46, 53, 59, 71, 78.

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.

II. THE USITC'S INJURY DETERMINATION

A. The USITC Complied with SGA Article 4.2(b) in Finding a Causal Link Between Increased Imports and the Domestic Industry's Serious Injury

5. We explained that objective and compelling evidence supported the Commission's detailed analysis of the causal link between increased imports and the domestic industry's serious injury. To summarize, the Commission found a clear overall coincidence between the low-priced imports that surged by 492.4 percent into the U.S. market between 2012 to 2016 and the collapse in prices that caused the domestic industry's condition to deteriorate, particularly between 2015 and 2016 as imports reached their highest levels. Earlier this week, we focused our opening statement on how China's challenge to the Commission's analysis failed on the facts. Today, we will highlight how China's unavailing arguments rests, in the first instance, upon a misunderstanding of the causation analysis required under Safeguards Agreement Article 4.2(b).

6. China erroneously asserts that to establish a causal link, competent authorities must apply a two-step analysis of first evaluating whether there is an "overall coincidence" in trends, and that if conflicting trends exist, to provide a "compelling" explanation before imposing a safeguard measure.[3] In other words, China insists that any evidence that detracts from an affirmative causation finding must be entitled to more weight and assigned more significance than evidence that demonstrates a causal link. Article 4.2(b) imposes no such requirement. To the contrary, the entirety of the relevant text states that in determining causation, competent authorities must demonstrate "on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof." It does not impose any particular order of analysis or priority of any relevant factor or piece of evidence having a bearing on the situation of the domestic industry. Nor does it otherwise direct *how*

[3] China Opening Statement, para. 6-7.

competent authorities are to comply with its obligations. Thus, competent authorities have discretion in applying any reasonable methodology to determine whether a causal link exists.

7. In the underlying investigation, the Commission reasonably performed a holistic analysis of the trends in imports and the developments in each of the factors identified in the Safeguards Agreement, as well as other relevant factors. It found that declining prices and the industry's dismal and deteriorating financial condition directly corresponded to increasing import trends.[4] Consistent with the hundreds of millions of dollars in net and operating losses, 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 expenditures.[5] The Commission also considered the dozens of firm closures, low capacity utilization, and significant unemployment and underemployment that pervaded throughout the period of investigation.[6]

8. The Commission weighed the significance of the data collected for each of the relevant factors in light of the important conditions of competition, which provided critical context for evaluating the industry's performance. As the Commission explained, the market was extremely favorable to domestic producers, with explosive demand growth and issuance of antidumping and countervailing duty orders at the end of 2012 and additional orders in February 2015.[7] It found that notwithstanding these favorable conditions, most of the factors having a bearing on the domestic industry deteriorated, particularly at the end of the period of investigation as producers in China shifted their production facilities to other third countries in their relentless pursuit to avoid the U.S. trade measures, resulting in a continuous surge of low-priced imports into the U.S. market.[8]

9. The Commission further concluded that factors showing contrary trends were not significant in light of these conditions of competition. As the Commission explained, although the domestic industry's capacity and production increased, they did not reach levels that should have been expected given the favorable conditions in the U.S. market. Instead, dozens of facilities closed and temporarily shut or slowed production, and capacity utilization rates remained low and dropped at the end of the period of investigation. Moreover, the significant idling of production facilities continued into 2017 as two major domestic producers closed their facilities by July 2017.[9]

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[4] USITC November Report, pp. 43-46 (Exhibit CHN-2).

[5] USITC November Report, pp. 47-49 (Exhibit CHN-2).

[6] USITC November Report, pp. 47-48 (Exhibit CHN-2).

[7] USITC November Report, pp. 26-28, 40 (Exhibit CHN-2).

[8] USITC November Report, pp. 40, 46 (Exhibit CHN-2).

[9] USITC November Report, p. 38.

10. The Commission's holistic assessment in finding an overall coincidence in the increased imports and the domestic industry's condition is fully consistent with the Safeguards Agreement. As the panel explained in *US – Steel Safeguards*, "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] That panel referred to the reasoning of the *US – Wheat Gluten* panel, which found an "*overall* coincidence of the upward trend in increased imports and the negative trend in injury factors over the period of investigation," despite that "the USITC Report indicates that several injury factors actually improved."[11]

11. Here, the Commission focused on the industry's overall dire and declining financial condition, which corresponded to trends in the volume of imports. In doing so, it did not as China argues "assume" that the upward-trending factors were "irrelevant" nor did it summarily dismiss them.[12] Rather, it considered these trends within the context of the limited effectiveness of the trade remedy orders and provided a reasoned conclusion that these seemingly "positive" factors did not arrest the domestic industry's financial deterioration.[13] China's criticisms of this conclusion simply represent an effort to reweigh the evidence so that the less probative cherry-picked facts that China favors can be controlling of the outcome, notwithstanding that the compelling and objective evidence supports the Commission's finding of an *overall* deterioration. As such, China fails to demonstrate any inconsistency with U.S. obligations under the Safeguards Agreement.

B. The USITC Complied with SGA Article 4.2(b) in Ensuring that Injury Caused from Other Factors are Not Attributed to the Increased Imports

12. China also misapprehends the non-attribution obligation under Article 4.2(b). In particular, China complains that the Commission, in applying the "substantial cause" test required under U.S. law, failed to "separate and distinguish" the injury caused by other factors.[14]

13. As explained in our written submissions, the "separate and distinguish" language cited by China does not appear in Article 4.2(b) or anywhere else in the Safeguards Agreement.[15] Rather, this article states that "{w}hen factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports."

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[10] *US – Steel Safeguards (Panel)*, para 10.302.

[11] *US – Steel Safeguards (Panel)*, para 10.302; *US – Wheat Gluten (Panel)*, para. 8.100-8.101 (emphasis in original).

[12] *See, e.g.*, China Opening Statement, paras. 12-13.

[13] USITC November Report, pp. 48-49 (Exhibit CHN-2).

[14] China Opening Statement, paras. 33-34.

[15] U.S. First Written Submission, paras. 101-105; U.S. Comments on China's Responses to Panel's Questions, para. 85.

Thus, Article 4.2(b) requires competent authorities to adopt an analysis that ensures non-attribution, but it does not – as China asserts – dictate any particular methodology.

14. Even setting aside China's erroneous understanding of Article 4.2(b), China's argument fails because it misconstrues the Commission's determination as having "acknowledge{ed} the factors' negative impact."[16] For this proposition, China simply cites to the Commission's application of the "substantial cause" standard to argue, incorrectly, that this implies a finding that the other factors caused injury.

15. China argues that the non-attribution analysis under Article 4.2(b) is irreconcilable with the substantial cause test because the USITC "never concluded that other factors were not causing *any* injury to the domestic industry."[17] This question, however, whether the latter comports with the former must be assessed on a case-by-case basis. And furthermore, there is no assertion here that the statute, on its face, is inconsistent with any WTO obligation and no prior panel has so found. Accordingly, China is not raising a *de jure* (or, in other words, an "as such") challenge to the United States' substantial cause test. And while China's opening statement asserts that the Appellate Body "dismissed similar cursory applications of the 'substantial cause' test" in *US – Lamb*,[18] this fails to recognize that the Appellate Body did not find that the statutory test invalidated the USITC's analysis *ab initio*. Rather, it stated that

> a review of whether the United States complied with the non-attribution language in the second sentence of Article 4.2(b) can only be made in the light of the explanation given by the USITC for its conclusions on the relative causal importance of the increased imports, as distinguished from the injurious effects of the other causal factors.[19]

It then continued to evaluate whether the USITC's individual findings were sufficient to satisfy the WTO standard, independent of the fact that the Commission reached those findings in support of its ultimate "substantial cause" determination. In any event, the analysis in the *CSPV Products* report is readily distinguishable because, unlike in the *Lamb* report, the Commission found that no other factors were causing any injury.

16. China errs in stating that the Commission found the other factors had "some" impact on the domestic industry. Although the Commission framed its ultimate conclusion in the language

[16] China Opening Statement, para. 34.

[17] China Opening Statement, para. 34.

[18] China Opening Statement, para. 33.

[19] *US – Lamb (AB)*, para. 184.

of the U.S. statute, [20] it based this conclusion on subsidiary findings that the other factors alleged by respondents did not cause any injury to the domestic industry.

17. The Commission stated that it had examined the other factors, but found the respondents' arguments "are not supported by the facts."[21] The Commission later elaborated further that "the record does not support respondents' contentions that the domestic industry was unable to provide quality products, failed to serve certain segment of the market, or suffered widespread delivery issues."[22] The Commission also explicitly found that changes in incentive programs could not explain the domestic industry's condition;[23] that declining net sales values kept pace with declining costs despite the industry being in a poor and unprofitable financial condition,[24] and that conventional energy prices did "not explain the consistent observed price declines over the 2012-2016 period."[25] The Commission thus definitively concluded that none of the other factors individually or collectively caused injury to the domestic industry.[26] These findings are in the absolute. Contrary to China's arguments, they do not suggest that these factors caused *some* injury that the Commission disregarded because of the substantial cause test. Moreover, these findings establish that this was not a case "{w}hen factors other than increased imports are causing injury to the domestic industry at the same time" as increased imports for purposes of Article 4.2(b). Therefore, there was no need for further analysis to ensure that "such injury shall not be attributed to increased imports."

18. Nor was the Commission required to conduct an additional collective assessment of these non-injury causing factors. China argues otherwise, asserting that "{p}rior panels have recognized the importance of conducting a collective assessment where the factual circumstances so require."[27] But, China fails to demonstrate that *these* "factual circumstances" required a collective assessment. China simply ignores the critical fact-based findings that none of these factors caused injury at all. Given these findings, a collective assessment would have been an entirely pointless exercise. Zero injury multiplied by any number of asserted factors still equals zero.

19. In sum, China misunderstands the relevant obligations set forth under Article 4.2(b) and fails to demonstrate any way in which the Commission's causation analysis was inconsistent

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

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

[22] USITC November Report, p. 61 (Exhibit CHN-2).

[23] USITC November Report, p. 61 (Exhibit CHN-2).

[24] USTIC November Report, pp. 64-65 (Exhibit CHN-2).

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

[26] USITC November Report, pp. 50-65 (Exhibit CHN-2).

[27] China Opening Statement, para. 38.

with the Safeguards Agreement. The Commission found a clear causal link between the concurrent increase in imports and the injury to the domestic industry and fulfilled its obligation not to attribute to imports any injury caused by other factors. Article 4.2(b) did not require the Commission to do anything more.

III. THE UNITED STATES HAS ADEQUATELY SHOWN THAT IMPORTS INCREASED AS A RESULT OF UNFORESEEN DEVELOPMENTS AND THE EFFECT OF OBLIGATIONS INCURRED

20. In its opening statement, China mischaracterizes the U.S. position on unforeseen developments and obligations incurred. Our opening statement and our previous submissions clearly state that we do ***not*** dispute that the first clause in Article XIX:1 of GATT 1994 sets out circumstances that must exist for taking a safeguard measure. Instead, our disagreement is with China's efforts to ***raise the bar*** for establishing these circumstances beyond what Article XIX:1 and the Safeguards Agreement require.

A. The United States has Demonstrated that Increased Imports are the Effect of Obligations Incurred

21. China has endeavored in this dispute to inflate Article XIX's language concerning the "effect of obligations incurred" into an arduous prerequisite requiring extensive information and analysis. The language is straightforward – a Member shows that increased imports are the "effect of obligations incurred by a Member under this Agreement, including tariff concessions" by identifying an obligation or concession that requires it to allow entry of imports despite the existence of the conditions specified later in the sentence. Therefore, the text does not imply an additional *causation* test, but a reference to the *context* in which a Member finds itself.

22. Article XIX:1 makes this understanding clear by providing that a Member that finds itself in this circumstance "shall be free … to suspend the obligation in whole or in part or to withdraw or modify the concession." The express reference to tariff concessions recognizes that tariff bindings could prevent a Member from taking action in the normal course, such as raising its ordinary customs duties, to modulate the increased imports of a certain article. Therefore, a Member establishes that increased imports are the "effect of obligations incurred" by identifying a commitment, such as a tariff concession, that prevents it from raising duties on imports.

23. The Appellate Body has reached the same conclusion. It found in *Korea – Dairy* 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."[28] As we have noted, the USITC report stated that tariff concessions the United States undertook created a circumstance where "[i]mported articles that are provided for in subheading 8541.40.60 of the

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

U.S. Harmonized Tariff Schedule have been free of duty under the general duty rate since at least 1987." It logically follows that the increased imports of CSPV products were the effect of the United States binding its tariff for such products at zero percent.

24. China does not dispute that the U.S. tariff rate is bound at zero, or that this binding would preclude raising tariffs to a level that would prevent imports "in such increased quantities and under such conditions as to cause . . . serious injury." Instead, China rests its argument on the mistaken view that as a formal matter, the USITC's Supplemental Report does not explicitly reference the tariff rate. As a matter of law, the U.S. defense is not limited to the contents of the Supplemental Report, but may also look to the ITC November Report. As a matter of fact, the reports do reference the relevant tariff concession. And, even if they did not, China provides no basis to conclude that a failure as a formal matter to hew to a particular formula for stating the obvious – that the U.S. tariff binding has the effect of imports entering "in such increased quantities . . ." – precludes application of a safeguard measure. Therefore, China has failed to establish any inconsistency with the "effect of obligations" language in Article XIX:1 of GATT 1994.

B. The United States has Correctly Identified the Unforeseen Developments that Resulted in Increased Imports

25. China likewise errs in several ways in its arguments regarding unforeseen developments. It first errs in its assertion that Article XIX:1 imposes a "subsidiary obligation" to link the unforeseen developments identified to the obligations that resulted in increased imports. While Article XIX:1 refers to a circumstance in which increased imports are a result of unforeseen developments and also that the increased imports are the effect of obligations incurred under the WTO Agreement, it contains no requirement of a link between the two. The "and" in the text signals that it is permissible to consider these circumstances separately.

26. Second, while China does not challenge the relevant standard, it provides no basis to question the USITC's findings that the developments identified in the Supplemental Report were unexpected by U.S. negotiators. Instead, China begins by accusing the USITC of making "factual claims" that "are demonstrably not true." We regret China's overheated rhetoric which itself suggests the lack of any factual basis for China's accusation.

27. China also argues that the USITC's "singular focus" on developments in China is inconsistent with Article XIX. Article XIX:1 calls for an analysis of whether increased imports as a whole are a result of "unforeseen developments," and does not require an atomized evaluation of each source. In other words, a Member does not have to show unforeseen developments for each exporting country. It is sufficient to demonstrate that "imports" as a class have increased "as a result of unforeseen developments."

28. In any event, there is no dispute that China during this period accounted for the large majority of global production of CSPV products, or that the USITC report discussed how

developments in China led directly to unexpected increased production and capacity in other countries that increased their exports to the United States. That was sufficient to show that increased imports were as "a result of" the identified unforeseen developments.

IV. CONCLUSION

29. The United States began its opening statement with the reminder that the preamble to the Safeguards Agreement instituted "multilateral control over safeguards" and that this statement reflected an understanding that WTO Members would resort to safeguard measures when needed to remedy serious injury caused by increased imports to their respective domestic industries. The Safeguards Agreement, therefore, is not intended as an intricate labyrinth or trap to confuse and ambush Members who seek to exercise their rights under Article XIX. Instead, it "establishes rules for the ***application*** of safeguard measures … as provided for in Article XIX of the GATT 1994."

30. You have read the ITC reports. They depict an industry that was performing poorly at the beginning of the investigation period, and had deteriorated markedly at the end. The increase in imports was massive, and the conditions surrounding them – particularly prices consistently lower than comparable U.S. products – prevented U.S. producers' from charging prices that would improve their profitability. This occurred despite conditions where they would otherwise be expected to flourish – massive increases in demand and decreasing costs. Respectfully, the United States notes that the application of the Safeguards Agreement in a way that prevents a safeguard measure in these circumstances would mean that a safeguard measure is in practice impermissible. The Safeguards Agreement would represent an illusory right at odds with the principle of effectiveness in treaty interpretation, and the clear object and purpose of the agreement itself. None of China's arguments justify such an outcome.

31. We appreciate the Panel's consideration of these views and its reflection on the significance of the current dispute. This concludes the U.S. closing statement. Thank you.