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Government of India

Ministry of Commerce and Industry

Department of Commerce

(Directorate General of Trade Remedies)

4th Floor, Jeevan Tara Building, -Parliament Street, New Delhi -110001

16th July, 2018

Subject: Safeguard investigation concerning imports of “Solar Cells whether or not assembled in modules or panels” into India – Final Findings - Proceedings under the Customs Tariff Act, 1975 and the Custom Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 - Reg.

(A) Introduction

1. An application dated 28.11.2017 has been filed before me on 05.12.2017 under Rule 5 of the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 (hereinafter also referred to as the “said Rules”) by the Indian Solar Manufacturers Association (ISMA) on behalf of five Indian producers, namely (i) M/s Mundra Solar PV Limited, Adani House, Meetha Khali 6 Road, Navrangpura, Ahmedabad-380009, Gujarat; (ii) M/s Indosolar Limited, 3C/1, EcoTech-II, Udyog Vihar, Dist: Gautam Budh Nagar, Greater Noida-201306, Uttar Pradesh; (iii) M/s Jupiter Solar Power Limited, Village Katha, Post Office Baddi, Teh. Nalagarh, Dist. Solan, Himachal Pradesh-173205; (iv) M/s Websol Energy Systems Limited, Falta SEZ Sector-II, Falta, Dist: 24 South Praganas, West Bengal-743504; and (v) M/s Helios Photo Voltaic Limited, 43B, Okhla Industrial Estate, Phase-III, New Delhi-110020, through M/s Athena Law Associates, 808, L&T Building, Sector 18B, Dwarka, New Delhi-110075, seeking imposition of Safeguard Duty on imports of “Solar Cells whether or not assembled in modules or panels” (hereinafter also referred to as the “product under consideration” or “PUC”) into India to protect the Domestic Industry of like or, directly competitive products from serious injury / threat of serious injury caused by their increased imports. The applicants have claimed that on account of the surge in imports of the PUC many domestic producers have kept their production facilities almost idle and the heavy losses have crippled the Domestic Industry. For this reason, the applicants had requested for imposition of provisional Safeguard Duty as a measure to mitigate their injury.

2. An examination of the application and the evidence / details / documents submitted under said Rules was undertaken. Thereafter, a Safeguard investigation against imports of the PUC into India was initiated vide Notice of Initiation (NOI) dated 19.12.2017. The NOI was published in the Gazette of India, Extraordinary dated 19.12.2017 vide GSR No.1522 (E).

3. In accordance with sub-rules (2) and (3) of Rule 6 of the said Rules, a copy of the NOI dated 19.12.2017 and a copy of a Non-confidential Version (NCV) of the application dated 28.11.2017 filed by the Domestic Industry were forwarded to the Central Government in the

Ministry of Commerce & Industry, Ministry of Finance and Ministry of New and Renewable Energy, the Governments of major exporting countries through their Embassies in India, and the interested parties mentioned in the said application. Further, the questionnaire to be answered by the exporters / importers / domestic producers, as prescribed under Rule 6(4) of the said Rules, was forwarded to the known interested parties with a request to make their views known in writing within 30 days from the date of issue of the NOI.

4. On 20.12.2017, the two associations of the domestic Solar Cells producers, namely (i) M/s Indian Solar Manufacturers Association (ISMA) and (ii) M/s Solar Power Developers Association (SPDA) were sent a copy of the NOI dated 19.12.2017, a copy of the NCV of the application dated 28.11.2017 and the questionnaire to be answered by the exporters / importers / domestic producers.

5. The request made by the domestic industry for imposition of provisional safeguard duty was examined and it was prima facie found that there existed critical circumstances which warranted imposition of provisional safeguard duty in order to provide interim relief to the domestic industry from suffering irreparable damage, which could have been difficult to repair.

6. Accordingly, the Preliminary Findings for Provisional safeguard duty was issued under Rule 9 (2) of the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 on 5th January, 2018 and was published in the Gazette of India on the same day. However, the Provisional safeguard duty was not implemented due to stay granted by the Hon'ble Chennai High Court which was vacated after a period of almost 3 months.

7. Either request to consider as an interested parties or submissions were received from the following parties:

1.	Indian Solar Manufacturing Association (ISMA)
2.	M/s Mundra Solar PV Limited
3.	M/s Indosolar Limited
4.	M/s Jupiter Solar Power Limited Limited,
5.	M/s Websol Energy Systems Limited
6.	M/s Helios Photo Voltaic Limited,
7.	Indian Solar Association
8.	Indian Solar Power Producers Alliance
9.	US-India strategic Partnership Forum
10.	Indian Electrical & Electronics Manufacturers' Association
11.	Gintech, 9F no 295 tiding blvd. Sec 2 Taipei, Taiwan 11493 R.O.C
12.	Sterling and Wilson Pvt. Ltd.
13.	Cells OT Thalheim, Sonnenalle 17-21, 06766 Bitterfeld-Wolfen, Germany
14.	JA Solar No 36, Jiang Chang San Road, Zhabei, Shanghai 200436, China
15.	Delsolar, 6 Kebei 2nd Road, Zhunan Science Park, Zhunan Township, Miaoli County 35053 Taiwan, ROC
16.	Sunengine Corporation Ltd., No. 10 Wenhua Rd., Hukou Township, Hsinchu County 30352, Taiwan
17.	TSI (Topcell Solar International Co Ltd, No 1560, Sec 1, Zhongshan Rd., Guanyin Township, Taoyuan County 328, Taian ROC
18.	E Ton Solar, No 498 sec 2, Bentian St. , Tainan, 709, Taiwan ROC

19.	Big Sun Energy Technology Inc No 458-9 Sinsing Rd. Hukou Township, Hsinchu County 30353, Taiwan
20.	Goldpoly, Economic Development Zone, Jin Jiang 363300, Fujian, China
21.	KPE, 1985-12 Yeonsan - dong, Yeonje-gu, Busan-611832 Korea, 23-2 Palyong-dong , Changwon, Gyeongsangnam-do 6410847, Korea
22.	Sharp Corporation, 3, Stockley Park, Uxbridge, Middlesex, UK (europe)
23.	Q-Cells, Bitterfeld-Wolfen, Germany
24.	Tsec, 9F, No. 10, Sec 3, Minsheng E. Rd., Jhongshan Dist., Taipei City 10480 Taiwan ROC
25.	Solar Tech Energy, No. 51, Dinghu 1st Street 4th Industrial Park, Guelshan, Taoyuan 333, Taiwan RO China
26.	Shin Sung, 404-1 Baekhyeon-dong, Bundang-gu Seongnam-SI, Gyeonggi-do, Korea: 463420
27.	NSP (Neo Solar Corporation), 7, Li-hsin 3rd Rd. , Hsinchu Science Park, Hsinchu, 30078, Taiwan
28.	TGE(Top Green Energy Technology), 9F No 246 Lien Chen Road, Chung Ho City, Tapei Hsien Taiwan ROC
29.	Taienergy (Thai Solar Energy Corporation Ltd.), 3199 Maleenont Tower, 16th floor, RAMA IV Rd. Klongtan, Klongtoey, Bangkok 10110
30.	Unitech Solar Corp, Mno. 16, sec 2, Lkigong 1st Road, Wujiw Township Yilan County 26841, Taiwan
31.	Motech, Southern Taiwan Science Park, No. 2, Dashun 9th Rd., Xinshi Dist., Tainan City 74145, Taiwan
32.	Schott, Hattenbergstr 1055122 Mainz
33.	Hanwha Solar One, 1199 Minsheng Road Building 1, Room 1801 Shanghai, China 200135
34.	Renewable Energy Corporation (REC), Sandvika, Norway
35.	AE Solar GmbH, Messerschmittring 54, 86343 Konigsbrunn, Germany
36.	Ningbo Reneled New Energy Co. Ltd.
37.	Panasonic Energy Malaysia SDN. BHD
38.	Zhejiang Beyondsun Pv Co. Ltd.
39.	Zhejiang Trunsun Solar Co. Ltd.
40.	Wuxi Saijing Solar Co., Ltd.
41.	Anhui Yinxin New Energy Technology Co., Ltd.
42.	Win Win Precision Technology Co., Ltd
43.	Zhejiang Trunsun Solar Co., Ltd.
44.	Tongwei Solar (Hefei) Co., Ltd Tongwei Solar (Chengdu) Co. Ltd.
45.	Gintech Energy Corporation
46.	Tainergy Tech. Co., Ltd Vietnergy Co., Ltd
47.	Suzhou Talesun Solar Technologies co., Ltd
48.	AU Optronics Corporation
49.	China Sunenergy (Nanjing) Co., Ltd
50.	JianxiRisun Green Energy co., Ltd
51.	Renesola Jiangsu Ltd
52.	Ming Hwei Energy Co. Ltd.
53.	Ningbo Osda Solar Co., Ltd

54.	LOF Solar Corp.
55.	Hareon Solar Technology Co., Ltd Hareon (Wuxi) New Energy Technology Co., Ltd Hareon Solar Equipment Sales Co., Ltd Hareon Solar Co., Ltd Hareon International Co., Ltd. Hefei Hareon Solar Technology co., Ltd JiangyinHareon Power Co., Ltd. TaicangHareonSolar Co., Ltd Altusvia Energy (Taicang) Co., Ltd JiangyinXinhui Solar Energy Co., Ltd
56.	Solartech Energy Corp
57.	Trina solar Co., Ltd Trina Solar (Vietnam) Schience& Technology Co. Ltd Trina Solar Science & Technology (Thailand) Ltd
58.	Jiangsu Shunfeng Photovoltaic Technology Co., Ltd
59.	Jetion Solar (China) co., Ltd
60.	SUMEC Hong Kong Co., Ltd
61.	Ningbo Reneled New Energy co., Ltd
62.	Lightway Green New Energy Co., Ltd
63.	Anji Dasol Solar Energy S&T Co., Ltd
64.	Jiangsu Aiduo Photovoltaic Technology Co., Ltd
65.	Canadian Solar Manufacturing (Thailand) Co., Ltd CSI Solar Power Group Co., Ltd
66.	Yingli Solar
67.	Alternative Energy (AE) Solar Co., Ltd
68.	Jiangsu Green Power PV Co., Ltd
69.	Hengdian Group DMEGC Magnetics Co., Ltd
70.	China Machinery Engineering Wuxi Co., Ltd
71.	E-TON Solar Tech co., Ltd
72.	TSEC Corporation
73.	Ningbo Qixin Solar Electrical Appliance Co., Ltd
74.	LONGi Solar Technology Co., Ltd
75.	Sino-American Silicon Products Inc.
76.	Phono Solar Technology Co., Ltd
77.	Zhejiang Aiko Solar Energy Technology co., Ltd
78.	CCCME
79.	Anhui Yingfa Ruineng Technology Co., Ltd.
80.	Levosolar Technology Co., Ltd
81.	Zhejiang Sunflower Light Energy Science & Technology Limited
82.	Jinneng Clean Energy Technology Ltd.
83.	GCL System Integration Technology Co., Ltd
84.	Risen Energy Co., Ltd
85.	ZNSHINE PV-TECH Co., Ltd
86.	Changzhou GS Energy & Tech. Co., Ltd
87.	Panasonic Corporation / SANYO Electric
88.	First Solar FE Holdings Pte. Ltd. (Singapore) and First Solar Inc (USA)
89.	M/s Zhejiang Sunflower Light Energy Science and Technology LLV
90.	Panasonic Energy Malaysia Sdn Bhd
91.	Nice Sun PV Co., Ltd

92.	Jiangsu Seraphim Solar System Co., Ltd
93.	ACME Solar Holdings Ltd.
94.	Neo Solar Power Corporation
95.	Motech Industries Inc
96.	JA Solar PV Technology Co., Ltd.
97.	Acess Solar Ltd. Plot #s5, Phasr-II, TIE, Balanagar, Hyderabad, 500037-Telangana
98.	Jain Irrigation Systems Ltd. jain Plastic Paek, Jalgoan 425001
99.	Kotak Urja Pvt. Ltd. , 378, 10th Cross , 4th Phase, Peenya Indudustrial Area, Bengalore, 560058, Karnataka
100.	PLG Power Limited 139, A-1 Shah & Nahar Ind. Est. Lower Parel(W) Mumbai
101.	Ever Green Solar System India Pvt. Ltd. Sulochana mills Mettupalayam Road Coimbatore. Tamil nadu
102.	Ammini Group Plot. No.33-37, KINFRA Small Industries Park St. Xaviers Collage PO, Trivandrum 695582
103.	KL Solar Company Pvt. Ltd. 1/482-B Transport Nagar, Neelambur, Coimbatore. Tamil nadu
104.	PHOTONIX Solar Private Limited, 38/A, saharak Vrind Society, Paud Road, Opposite Vanaz Factory, Kothrud, Pune 411038 Maharastra
105.	JJ PV Solar PVT LTD. Suryvey no. 237,238 Plot no. 2,3 N/H 8B village veraval Shapar dist. Rajkot 360024 Gujarat.
106.	L&T Construction, Power Transmission and Distributionj, IFCI Tower, 14 th Floor, 61, Nehru Place, New Delhi-110019.
107.	Amplus Energy Solutions Private Ltd.
108.	Clean Max Enviro Energy Solutions Pvt. Ltd.
109.	Green Energy Association
110.	North India Module Manufacturer Association
111.	ACME Cleantech Solutions Pvt. Ltd
112.	Vikram Solar Limited
113.	Madhav Infra Projects Limited
114.	Aditya Birla Renewables Limited
115.	Solar Power Developers Association
116.	Krishiraj Renewables Energy Private Limited
117.	Viraj Solar Maharasthra
118.	Avaada Power Private Limited
119.	The Embassy of Republic of Korea
120.	The Embassy/High Commission of the United Kingdom

121.	The Embassy/High Commission of Singapore
122.	The Embassy/High Commission of Malaysia
123.	The Embassy of Italy
124.	The Embassy of Germany
125.	The Embassy of Taiwan
126.	The Embassy of Japan
127.	The Embassy of People's Republic of China
128.	The Embassy of Norway
129.	The Embassy of Royal Thai
130.	Taiwan Economic & Cultural Centre
131.	The Embassy of Mexico
132.	United States International Trade Commission
133.	China Chamber of Commerce for Import & Export of Machinery & Electronic Products
134.	Taiwan Photovoltaic Industry Association
135.	European Commission
136.	DGFT, Govt. of Indonesia
137.	Sterling and Wilson Pvt. Ltd.
138.	Guangdong Aiko Solar Energy Technology Company Ltd.
139.	Schutten Solar Energy Co. Ltd.
140.	Econess Energy Co. Ltd.
141.	JA Solar including JA Shanghai, JA Hefei, JA Xingtai, JA Yangzhou, JingAo Solar and JA Solar Malaysia Sdn. Bhd.
142.	Yingli Energy (China) Co. Ltd.
143.	Yixing JS Solar Co. Ltd.
144.	Yuhuan Sinosola Science and Technology Co. Ltd.
145.	Anhui Daheng Energy Technology Co. Ltd.
146.	Jiangsu Eco Green Energy Co. Ltd.

147.	Big Sun Energy Technology Inc., Taiwan
148.	Zhejiang Isola New Energy Co. Ltd.
149.	Simax (Suzhou) green New Energy Co. Ltd.
150.	Anhui Technology Imp. And Exp. Co. Ltd.
151.	Ningbo Fuxing Electric Co. Ltd.
152.	Wuxi Suntech Power Co. Ltd.
153.	Zhejiang G&P New Energy Technology Co, Ltd.
154.	Changzhou Eging Photovoltaic Technology Co. Ltd.
155.	Shenzen Topray Solar Co. Ltd.
156.	Yarrow Infrastructure Pvt. Ltd.
157.	Rattan India Solar 2 Pvt. Ltd.
158.	Leapton Solar (changshu) Co. Ltd.
159.	CECEP Solar Energy (Zhenjiang) Co. Ltd.
160.	Sepset Constructions Ltd.
161.	Zhejiang Kingdom Solar Energy Technic Co. Ltd.
162.	Anhui Schutten Solar Energy Co. Ltd.
163.	High Hope Int'l Group Jiangsu Foodstuffs Imp & Exp Corp. Ltd.
164.	EEPV Corp., Taiwan
165.	Sichuan Yingfa Solar Energy Technology Co. Ltd
166.	Warburg Pincus India Pvt. Ltd.
167.	Harsha Abakus Solar Private Limited
168.	Solar Energy Equipment Manufacturers Association of Telangana (SEEMAT)
169.	Anchor Electricals Private Limited
170.	Chloride Power System & Solutions Limited
171.	Advaita Legal representing M/s Renew Solar Power Private Limited, M/s Solar Edge Power and Energy Private Limited and M/s Shapoorji Pallonji Infrastructure Capital Company Private Limited

172.	Hild Energy Pvt. Ltd. Eagle Press Pvt. Ltd.
173.	ASYS Group Asia Pte. Ltd
174.	Hanwha Q Cells Corp India
175.	Neosol Technologies Pvt. Ltd.
176.	Waree Energies Limited
177.	Solsys Koncepts LLP
178.	Mytrah Energy (India) Private Limited
179.	BSES Rajdhani Power Limited
180.	REC Solar Pte Ltd, Singapore
181.	Mehar Solar Technology Pvt Ltd
182.	Germany Trade and Invest
183.	Maxop Research & Testing Institute Pvt Ltd
184.	Tata Cleantech Capital Limited
185.	Enkay Solar Power & Infrastructure Pvt Ltd.
186.	Azure Power
187.	Heraeus Photovolatics
188.	Mahindra Susten Pvt. Ltd.
189.	Renewsys India Pvt. Ltd.
190.	Council On Energy, Environment and Water (CEEW)
191.	Bharat Light & Power Private Limited
192.	Jinko Solar Trading Private Limited
193.	E. I DuPont IndIa Pvt. Ltd
194.	Applied Materials India Pvt. Ltd.
195.	Canadian Solar Manufacturing Inc.
196.	Godrej & Boyce Mfg. Co. Ltd.
197.	LVN Technology Pvt. Ltd.

198.	Nextech Electronics Pvt. Ltd.
199.	UL India Pvt. Ltd.
200.	Uratom Solar (India) Pvt. Ltd.
201.	Tata Power Company
202.	Sembcorp Green Infra Limited
203.	BHEL
204.	Rhine Solar Limited
205.	Hero Future Energies

8. The submissions made by all interested parties either in public hearing or otherwise have been appropriately examined and addressed under relevant paras. As many issues are repetitive, they have been collectively addressed. Data submitted by the DI has been verified onsite/desk study to the extent possible and considered appropriately.

9. In addition to the above, some of the interested parties including M/s Shree Cements Ltd and Pricewaterhouse Coopers (PWC) requested to attend the public hearing on 26th June, 2018. The Authority has granted the permission for the same.

10. A public hearing was held on 26th June, 2018. The interested parties, along with the Domestic Industry made oral submissions at the time of public hearing. In terms of sub rule (6) of rule 6 of the Custom Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997, all the interested parties who participated in the public hearing were requested to file written submission of the views presented orally.

11. Copy of written submissions filed by one interested party was made available to all the other interested parties. Interested parties were also given an opportunity to file rejoinders, if any, to the written submissions of other interested parties.

12. All the views expressed by the interested parties in their written submissions in pursuant to the public hearing held on 26th June, 2018 were examined and have been taken into account in making appropriate determination. The non-confidential version of the information received or acquired has been kept in the public file.

13. The list of interested parties and those who filed rejoinders were hosted on the DGTR's website for information of all concerned.

C. POST INITIATION SUBMISSIONS:

14. The submissions received in response to the initiation notice but prior to the Public Hearing are summarized as under:

(i) M/s Green Energy Association

- a. The main reasons for the petitioner's losses have not been increased imports of PUC but erroneous business decisions, global turmoil, European financial crash, etc. Till 2012-13 the Petitioners, specifically, Indo Solar, Websol, Jupiter and Moser Baer were engaged mostly in exports and least considerations were on the domestic market.
- b. Indo Solar was focused on export to the European market and also applied for being converted into a 100% EOU Company. The economic crisis in Europe due to Lehman Brother's crash on 15th September, 2008 led to the solar industry crashing and the prices falling.
- c. In 2011, the demand in Italy & Germany collapsed and the true wafer prices started showing steep downward trend. Indo Solar had signed a long term agreement at committed prices and incurred significant financial losses.
- d. Similarly, Moser Baer has also suffered losses due to the Italian government dialling down the solar policy which has resulted in demand falling much below the supply. Consequently, the prices for solar panels have gone down by 50%.
- e. Moser Baer went into losses before the start of the national solar mission, before the imports started in the country and primarily due to venturing into amorphous silicon technology and loss in advances paid to wafer/cell suppliers which did not allow the company to recover.
- f. Websol, XL Energy, etc. have faced losses due to heavy inventories being piled up in markets which have crashed such as Europe. Financial losses which have restricted them to compete in the Indian market is therefore on account of poor export performance rather than increased imports of the PUC.
- g. Petitioners have shown total production induced, comparing them to imports whereas they have not shown how much they have produced and sold from their total manufacturing capacity. Petitioners have also shown increase in the manufacturing capacity of China in terms of %age growth while not showing the manufacturing capacity in the country.
- h. The operational capacity of Mundra Solar when added, increases the petitioners capacity by a further 1200 MW. The National Solar Mission has also resulted in increase in capacity. Other solar PV module manufacturers will start suffering if safeguard duty is imposed.

(ii) M/s Eastman and Auto Power Limited

- a. Levy of SGD would result in project escalation, burden the domestic developers of solar projects, increase the tariffs and impact state DISCOMs and ultimately the end consumers.

- b. Any new imposition of duty should happen in the sunset period and must not be applicable in this fiscal year. Duty, if any, imposed must be prospective in nature and should not impact ongoing solar projects.
- c. Imposition of SGD will have far reaching consequences on India's mission to reduce carbon emission by 35% till year 2030 as per the Paris Summit.
- d. The domestic industry has been performing poorly since the country does not have a manufacturing base for polysilicon, ingots and wafers, i.e., the upstream stages of the Solar PV manufacturing chain; there is lack of setup, economies of scale and modern technology and the assured market available to the domestic manufacturers is not fully explored for the foregoing reasons.
- e. Implementation of safeguard duties is a protectionist measure and may not help the domestic industry in the medium to long run; create a huge demand supply gap.
- f. Imposition of SGD would be detrimental to the success of Indian Solar Mission.

(iii) M/s Windsor Export

- a. Indigenous manufacturers who operate out of the SEZ will be adversely affected by any blanket safeguard duties. As a result, the imposition of SGD will be counterproductive.
- b. Higher costs of power due to the duties will discourage the overall industry and lead to a decrease in demand resulting in serious setback to the National Solar Mission.
- c. Imposition of SGD must happen after the sunset review and must not be applicable this fiscal year.

(iv) M/s Vikram Solar

- a. Large proportion of the solar power production facilities located in the SEZ's; more than 60% of the solar cells and 40% of the module manufacturing facilities are located in the SEZs and therefore the imposition of safeguard duty would be counterproductive to the domestic industry.
- b. Preliminary report also suggested exempting goods coming from the SEZ units from the levy of safeguard duties.
- c. Achieving government target of 100 GW by 2022 would require the SEZ units to run at full capacity without making them uncompetitive and loading them with any extra burden. Solar units in the DTA can cater to only 1164 MW of the annualized demand of 10573 MW, which is only 11% of the demand.
- d. Imposition of SGD on imports which are required to cater to the domestic demand would only lead to an increase in the deployment cost of solar projects. Imposition of duties would therefore also be against the public interest.

(v) Economic Division, Taipei Economic and Cultural Center in India

- a. Petitioners do not have adequate standing as the domestic industry under Article 4.1(c) of the Agreement on Safeguards since, while as per MNRE there are 20 manufacturers of solar cells and 117 manufacturers of solar modules in India, the petitioners claim that these other Indian producers are importers without providing any proof to substantiate their claim.

- b. Petitioner Helios does not find mention in the MNRE table dated 28th August 2017. There must be clarity as to whether this Petitioner is a producer of solar cells, modules or both.
- c. The standing of the petitioners must be evaluated for solar cells as well as solar modules. Excluding the data submitted for Helios, the petitioners have a mere 15% share of installed capacity for solar modules out of the total capacity in India.
- d. Even the combined share of capacity of solar module is only 26.5%. Petitioners therefore do not have the standing of the domestic industry and the investigation must be terminated accordingly.
- e. Imports did not increase because of the allegedly unforeseen circumstances as is the requirement under Article XIX:1(a) of the GATT but because of the Government of India's vision to promote solar power in India, installing 100 GW of solar power grid by 2022 while being fully aware that manufacturers can cater only to 10% of the annual demand. This is the sole reason for such increase in imports.
- f. Petitioners have also failed to show how commitments entered into pursuant to ITA 1 in 2005, much before the period under consideration, could be the reason for sudden, sharp significant and recent increase in imports. Petitioners have failed to show unforeseen developments and GATT obligations as a cause for the increase in imports.
- g. Position of 3 petitioners has been improving during the POI only two petitioners have faced losses due to internal problems. While Mundra Solar PV has started commercial manufacturing in 2017 and requires more time to stabilize capacities, etc, annual reports of Indo Solar, Websol Energy Systems Limited as well as Jupiter Solar have shown either significant decline in losses or increase in profitability. Helios has been undergoing corporate debt restructuring, which is the reason for high losses to the company.
- h. Petitioners are further injured due to obsolete technology and not imports as stated by the MNRE.
- i. Major cause of injury to the petitioners has been a decline in exports from 100 indexed points in 2014-15 to 13 indexed points in 2017-18. Injury due to such factors cannot be attributed to imports of the PUC.
- j. Petitioners are also finding it difficult to stabilise rapidly increasing capacities which are leading to increasing losses due to interest and depreciation.
- k. The number of employees of petitioners has increased by 5 times during the injury period which has led to an increase in the wage costs incurred by them by 4 times.
- l. There are no critical circumstances that warrant the levy of provisional duties since the MNRE has proposed to have a Central Public Sector Undertaking (CPSU) scheme of 12,000 MW having an assured DCR component. This would provide the domestic industry with an assured market.
- m. Adjustment plan given by the petitioners indicate plans of backward integration. However, a backward integration would only lead to higher costs in the next few years and the petitioners would not be able to adjust to imports.

(vi)M/s China Chamber of Commerce for Imports and Exports of Machinery and Electronic Products

- a. DG did not wait for parties to submit their views within 30 days of initiation notice and in a hasty manner issued its Preliminary Findings within 18 days of the initiation of the investigation.
- b. SGD's can only be imposed after investigation. Without giving the interested parties an opportunity to present their view, investigation could not have been completed
- c. The entire proceedings in the instant investigation are vitiated as the same were carried out in violation of the Principles of Natural Justice. Wrongs done at various stages of the investigation cannot be rectified now by any act of DG.
- d. There is a huge domestic demand which needs to be met in light of inability of the DI to do so. Imposition of SGD will increase the cost of production. For the same reason positive findings on ADD were made but duty was not levied in public interest. Same reasons must operate here.
- e. India needs high quality imported PV products, especially from China, to meet revised targets under JNNSM.
- f. India needs a constant supply of PV Cells. SGD's would have adverse effect on downstream industries; healthy development of solar cell industry and rural electrification projects initiated by the Govt.
- g. It is normal that exports from China to EU and USA decline due to trade remedies. However, increase in exports from China to India has nothing to do with this issue. It is a free market where sales volume is market oriented. Signing ITA-1; GATT or Paris Agreement are of no consequence since it is the natural law of the market that increasing demand fuelled imports
- h. It is a trend that the price is declining; therefore the same can't be termed as unforeseen.
- i. Increase in imports is in tandem with increase in demand of Indian Industry
- j. The domestic industry thinks that the data cannot prove material injury suffered by the domestic industry, otherwise it would not have decided to request to terminate the anti-dumping investigation in the final stage.
- k. Data submitted by the domestic industry cannot even prove existence of material injury, then it can be easily inferred that serious injury will not be determined. There was no need of increasing the capacity every year by the applicant. Such inappropriate decisions of increasing the capacity every year might have caused injury to the applicants not the imports from subject countries
- l. There is no correlation between the landed price and net sales realization for the Domestic Industry.
- m. First the domestic producers must establish that there is increased imports and the Domestic producer needs time and plan to adjust themselves to meet the situation of competition offered by such increased imports
- n. the applicant's claim is inaccurate and misleading, as the differences between products manufactured from both technologies are significant in several aspects, such as raw materials, production processes, efficiency, flexibility and prices, etc

- o. CCCME as well as other interested parties have emphasized the negative influence of trade remedy measures on the public interests for several times in the written submissions and on the hearing for the anti-dumping investigation.
- p. The following should be removed from the PUC: (i) Solar cells using the “PERC” (Passivated Emitter Rear Cell) based technology; (ii) Thin films & Bi-facial N-type solar cells; (iii) High efficiency solar cells using 5 and 6 bus bar production terminology; and (iv) Solar modules of mono crystalline technology since Adjustment Plan states that DI will produce PERC type cells.
- q. Petitioner Helios Photo Voltaic Limited does not find mention in the list of MNRE dated 28 August 2017. The DGTR must clarify whether Helios is a producer of cells, modules or both.
- r. Standing of the Petitioners should be examined separately for solar cells and solar modules. It is requested that the Designated Authority should follow its established practice and examine standing of Petitioners for solar cells and solar modules separately.
- s. India stands to act directly contrary to its obligations under the AoS by imposing a safeguard duty without demonstrating that unforeseen developments exist in the present case.
- t. Increase in imports is only due to the demand-supply gap in India. Demand has been created by the Government of India under National Solar Mission and the domestic producers and exporters are enabling the nation to fulfil the commitments under the National Solar Mission.
- u. Neither the Petition nor the Preliminary Findings objectively identify the specific GATT obligation incurred by India that led to sudden, sharp, significant and recent increase in imports of the subject goods.
- v. None of the above identified GATT obligations led to recent, sudden, sharp and significant increase in imports of the subject goods in terms of Article XIX(1)(a) of GATT.
- w. There is no nexus between India’s ITA-1 commitment for the subject goods and the alleged recent and sudden increase in imports. Production and sales of the domestic industry have increased by 253% and 305%, respectively during the injury period. This increase is significant.
- x. The Indian industry can only satisfy 10-15% of the Indian demand. The remaining demand has to be met by imports to meet the target under the National Solar Mission.
- y. Domestic industry’s selling price sharply declined in the export market from 100 indexed points in 2014-15 to 56 indexed points in 2017-18. Imports have nothing to do with injury suffered. Real cause of injury to the domestic industry is aggressive pricing practices of other Indian producers and not imports. Backward integration in this manner will only lead to higher cost in the next few years. The Petitioners will not be able to adjust to imports if the adjustment plan requires incurring more cost rather than reduction of the same.

(vii) Solar Power Developers Association

- a. The domestic industry does not produce Solar cells using the “PERC” (Passivated Emitter Rear Cell) based technology; Thin films & Bi-facial N-type solar cells; High

- efficiency solar cells using 5 and 6 bus bar production terminology; and Solar modules of mono crystalline technology.
- b. Standing of the domestic industry should be examined separately for solar cells and solar modules.
 - c. Relied on MNRE data for May 2017 and stated that for solar cells, the share is 56% and for modules, it is mere 15%. Arguendo, the total installed capacity is 26.5%. These data are not sufficient to constitute domestic industry.
 - d. Three entities are SEZ units and these should be excluded as they cater primarily to the export market. Reliance placed on Electric Insulators.
 - e. The data shows only the surge was in 2015-16. (228%) Other increases are mere (52% and 49% in subsequent years). No recent, sharp, sudden and enough imports in 2016-17 & 2017-18.
 - f. Huge demand and the domestic industry can only meet 15% of the demand. Production and sales have increased by 253% and 305% respectively. Decline in utilization is temporary and will improve when production is stabilized. Mundra began its production demonstrates that the DI is doing well. Increase in wages led to decline in profits of the industry. The selling price is in line with the cost of sales in 2017-18, therefore, there's no price suppression and price depression. Indosolar's revenues have sharply increased which led to the decrease in losses by 8,322.91 lakhs. Websol improved its performance and incurred huge profit in 2016-17 of Rs. 8,594.36 lakhs. Websol also expanded its operations. Jupiter also registered a profit of Rs. 3,999 lakhs.
 - g. Increase in installed capacity, net fixed assets and interest cost led to the decline in profitability. Imports of subject goods have nothing to do with the deteriorating export performance. Usage of Obsolete technology. Aggressive pricing by Adani, BHEL, Tata Power and Central Electronics have sold panels at a record low of 30 cents/kwh capacity.
 - h. China's capacity is not unforeseen as it is the result of market reality. The demand for the goods have been created under the JNNSM which aims to deploy 100GW of solar power by 2022. It is reasonably expected that dumped or unfairly subsidized products face trade remedy action. The products have come from China because the state governments or public bodies have floated tenders. India ratified the United Nation Framework Convention on Climate Change in November 1993 before joining the WTO. The Paris Agreement is an agreement within UNFCCC. The commitment in Paris is result of commitments under UNFCCC.
 - i. The duties became zero in 2005 only as result of India's commitments under ITA-1. Imports increased after 2010 (JNNSM). No data has been demonstrated to show that the Solar Cells case affected the imports. MNRE proposes to have a CPSU scheme of 12,000 MW with assured DCR.
 - j. India expects to reach 100 GW of solar power grid connectivity. India's current solar capacity is 20GW. This is insufficient to meet the target of the solar mission. Imposition of Safeguard duty will adversely affect the National Solar Mission as the tariffs for future solar projects could rise substantially. Safeguard duty will put more than Rs. 1,00,000 crore worth of solar power projects in jeopardy

- k. DISCOMs have indicated that they would purchase solar power only if the cost is around INR 3 per kWh. The safeguard duty in range of around 12-15 cents a year would increase the duty upto Rs 4 per kWh. There are a number of power purchase agreements between DISCOMS and project developers with capacity of around 9000 MW. Imports of such goods would be detrimentally impacted by imposition of safeguard duty.
- l. The safeguard investigation for solar cells has been hastily initiated. The examination of dumping and injury margin by DGAD was still undergoing when the safeguard had been initiated.
- m. 70% safeguard duty had been imposed without seeking any comments from interested parties. If the safeguard duty is imposed, it will distort the entire market. DISCOMS will not purchase from solar power developers as the tariffs will shoot up.
- n. The unforeseen developments mentioned by the Ld. DG did not lead to increase in imports. The increase in imports had increased because of the Government's vision to promote the renewable source of energy. The Government of India floated tenders keeping in mind that the Indian manufacturers could only cater to less than 10% of the demand.
- o. Moreover, 70% of the domestic manufacturing capacity are located in the SEZ area, mainly targeting the exports market. Therefore, such imports are not the result of unforeseen developments, rather demand created due to National Solar Mission.
- p. The DI's data for the same period reflects profits in the anti-dumping investigation. The inclusion of the recent facility, Mundra Solar PV Limited, has resulted in showing the losses to the DI.
- q. The available Annual Reports of Websol Energy Systems and Jupiter Solar Power show that there has been significant decline in losses or high profitability. The reason for losses to Helios is because of undergoing corporate debt structuring.
- r. MNRE has also proposed that the technological facility is obsolete. Moreover, the injury will not happen to the DI as MNRE is planning to include DCR in 12,000 MW of the power generation.
- s. The tariffs will increase substantially and will reach Rs. 4 per unit which will defeat the purpose of cheap supply of power. All the projects would be challenged in the courts seeking relief under 'change in law' clause.

(viii) M/s. Renew Solar Power Private Limited and M/s Solar Edge power and Energy Private Limited.

- a. The DI has emphasized on the fact that solar cells and modules manufactured using c-Si technology and thin film technology are like articles and should be treated as Product under consideration (PUC). PUC has been incorrectly defined as solar cells manufactured from c-Si and thin film technologies are two separate products and cannot be considered as like articles and cannot form part of a single investigation. The two products are differentiated on the basis physical characteristics, raw material, production process, wattage output uses and interchangeability.

- i. Solar cells manufactured from c-Si technology and thin film technology cannot be used interchangeably as solar cells manufactured using thin film technology have lower conversion efficiencies and lower wattage output in comparison to solar cells manufactured using c-Si technology.
 - ii. At the stage of conceiving the project, the developer has the option of choosing either of the two technologies depending upon geographical indications, efficiency sought to be achieved and financial consideration. Once chosen a particular technology, it is not feasible to switch to solar cells of different technology.
 - iii. In the tenders issued by the MNRE, the government carves out distinction for solar cells of the two technologies treating them as two separate products.
 - iv. At the stage of replacement, the subject goods of thin film technology cannot be substituted with the subject goods of crystalline technology.
 - v. Post installation, the end user cannot replace a thin film technology with the module of a c-Si technology. The only way to switch from C-Si technology to thin film technology or vice-versa is if the whole of the installation under one technology is changed making it highly cost-inefficient and impractical.
- b. The DI does not manufacture solar cells using thin film industry and both products i.e. products using thin film and c-Si technology are not like article and subject goods manufactured using thin film technology cannot be treated as a part of the present investigation.
- c. Solar cells and solar modules cannot form a part of a single investigation in as much as they do not qualify as 'like article'. Module is a value added product which involves a solar cell as a raw material/input. A solar cell has limited capacity to generate electricity as opposed to a module which can generate desirable and useable electricity on a standalone basis. A solar cell cannot be inter-changeable substituted with a solar module for the purpose of generation of power.
- d. A DI comprises of the domestic producers who are engaged in the manufacture of the like article in India or those producers whose collective output constitute major proportion of the total domestic production. Certain applicant domestic producers are importers of solar cells and engaged in assembling solar cells into modules, and cannot constitute DI as they are engaged in import of subject goods and are not producers of the like article.
- e. As per MNRE's notice, there are 117 solar module 20 solar cell manufacturers in India. The application is filed by ISMA which comprises 23 members. Applicant producers have failed to provide any evidence in support that the remaining producers which do not form a part of ISMA do not manufacture the subject goods.
- f. Applicant producers located in EOU and SEZ units do not constitute DI for the purposes of the initiation notification and the preliminary finding notice because an SEZ is deemed to be a territory outside the customs territory of India for the purposes of authorised operations. Further, any goods removed from the EOU unit to the DTA will be chargeable to duties of customs including safeguard duties where applicable on such goods when imported. Therefore, units located in SEZ and EOUs are units outside the domestic territory of India and cannot be considered

DI as they are at a separate commercial position on account of various incentives and benefits accruing to them, and production and sales of SEZ/EOU units are not impacted by conditions of competition in the domestic market.

g. The power of the DGS is limited to investigations of existence of serious injury or threat of serious injury, identification of the article, submissions of provisional and final findings, recommending the amount and duration of duty and reviewing the need for continuance of safeguard duty. The recommendation of the DG for exemption of safeguard duty on goods cleared into the domestic market from the SEZ units because of certain applicant operating in the SEZs is without any authority.

h. Factors such as Chinese excess capacities, scrapping of the domestic content requirement, India's commitment to Paris 2015, declining landed prices of imports due to decrease in global prices of inputs such as wafers, cells, silicone etc., India's obligations under the GATT and the ITA leading to its Customs Tariff elimination on imports of PUC cannot be unforeseen and unexpected.

i. While the volume of imports increased from the base year, there has been a reduction in the percentage volume of imports on a year on year basis. The performance of the DI improved during the POI. With the increase in volume of imports, the volume of domestic sales has also risen. This evidences that there has been a substantial increase in the volume and value of domestic sales and no injury has been caused to the domestic industry. Further, there has been a significant decrease in the volume of imports of thin films and such decreased imports cannot cause serious injury or threat thereof.

j. Decrease in market share of the applicant domestic producers is on account of the significant gap between capacities of domestic industry engaged in the manufacture of the subject goods and the actual demand for the subject goods in the country. This is evident from the fact that demand for the subject goods in the POI has consistently increased but the installed capacity of the applicant domestic producers has not increased in a proportionate manner to meet such increased demand. Therefore, there has been an increase in the market share of the import of the subject goods so as to meet the increased domestic demand.

k. The applicant domestic producers seek to take refuge under the garb of safeguard duty for furthering their own objectives of increasing their market share without fairly competing with international players.

l. Economic parameters such as total production, capacity utilisation, domestic sales and employment of labour force are critical in determining the level of injury. These parameters establish that the domestic industry is in-fact growing establishing that the DI has not suffered any injury on account of the imports of the subject goods.

m. With the scrapping of DCR, developers have the option of using goods manufactured by the domestic industry or imported goods. Price of subject goods along with factors like efficiency, wattage output, after sales service etc determine the type of module that a developer will use for its projects. If subject goods manufactured by the DI fare well on these factors *vis a vis* the subject goods imported into India, there cannot be any reasonable probability of injury to the

domestic industry on account of scrapping of the DCR. Therefore, scrapping of DCR leading to an injury to the DI is misplaced.

n. There is no causal link between the alleged injury and the alleged increased imports as injury is on account of other reasons such as decrease in global demand of subject goods, reduced demand for subject goods manufactured by applicant producers, facilities such 25 year warranties not being provided by the DI, inability to employ new technological changes in the quality of solar cells and modules offered by the DI. Thus, injury caused to the DI on account of developments in technology and competition with foreign producers cannot be linked to the imports of the subject goods.

o. The preliminary finding notice issued by the DGS disregards principles of natural justice as it does not afford any opportunity of hearing to the interested parties and makes a preliminary determination of 70% ad valorem duty before the expiry of the time period provided to the interested parties.

p. Critical circumstances for undertaking a preliminary determination contemplate principles of natural justice in as much as critical circumstances require clear evidence and clarity of evidence cannot be arrived at unless representations of the other side are taken cognizance of. Evidence adduced by applicant DI cannot be clear evidence as it is open for rebuttal by other interested parties. Therefore, until this evidence is subject to some verification and cross-questioning which make it precise and explicit; it cannot be treated as clear evidence.

q. Irreparable damage is a sine qua non for recording preliminary findings by the DGS. The recommendation for the impositions fails to justify/explain the irreparable damage which would be caused to the DI justifying the preliminary determination. 'Further damage' to the DI cannot be equated with 'irreparable damage'.

(ix)M/s. ACME Solar Holdings Ltd.

- a. They are the largest solar power developers with a portfolio of more than 2GW with 874MW operational capacity working in 12 different states. Solar modules constitute more than 50% of the components required for setting up a solar power plant and are therefore, critical to the business of the company.
- b. 60% of the petitioner companies are placed in Special Economic Zones and enjoy many fiscal and non-fiscal benefits extended by the government and cannot be treated as DI for the purposes of safeguard duty. Data related to these petitioners should be excluded for representing and calculating the injuries to the Indian DI.
- c. There is a complete mismatch in the data of DI production in investigation report which is 544MW in contrast to data from government sources which is 7173MW. There is a huge difference between these two numbers and relying on the number in the investigation report has led to a flawed recommendation of imposition of safeguard duty.
- d. There has been a misrepresentation of the DI capacity as the DI constitutes much less than 72% share in the domestic solar manufacturing industry in 2017 as 10.5% of the industry in 2016.

- e. There is no unforeseen circumstance arising out of the commitment to the Paris Agreement or the National Solar Mission as the Ministry of New & Renewable Energy in their Annual Report Solar 2016-17 acknowledged that the mission targeted included deployment of 20,000 MW of grid connected solar power by 2022. The DI was never prepared to cater to the increasing demand of solar modules and panels due to the government's commitment for 100GW by 2022. This forced solar power developers to import modules and panels to fulfil rising demand.
- f. The DGS linking India's commitment under the Information Technology Agreement providing for exemption of BCD for ITA-1 goods was undertaken way back in 1996 and any recent increase in imports of PUC are remote and cannot be unforeseen.
- g. These circumstances of increase in imports aren't unforeseen and are not an effect of obligations under the GATT including tariff concessions. Therefore, the requirement under Article XIX of the GATT is not satisfied.
- h. The cost of a solar cell is 50 to 60% of the total cost of module. The prices of Indian models have gone down by margin of 27 to 30% in contrast to the decrease shown in the report in the period of 2014-15 to 2017-18. The cost of cell has gone down by 38% in 2017 with respect to 2014-15 whereas the cost of module has gone down by only 8%. This is contrary to logic as cells are approximately 60% of the cost of module. Therefore, the effect of decline in cell price should be more significant on the module price. Therefore, there has been a blemished assumption of Net sales realisation of DI.
- i. The growth of solar power sector has created more number of semi skilled jobs providing opportunity to youth in rural areas. The growth in employment opportunities is depending on the cheaper power to be made available to the DISCOMS.
- j. The DI is making noticeable profits in their margin and equity portion in the past 2 years which is contradictory to their claims of incurring significant losses as per the balance sheet obtained from the Registrar of Companies.
- k. The growth of total production of DI has grown from 473 to 838 which is near to 100% of growth in the production. Therefore, it is not appropriate to look at the import data in isolation when the complete ecosystem of solar business grew by 100% in year of 2016-2017.
- l. Imposition of the safeguard duty has violated principles of natural justice as the DGS did not afford an opportunity to exporters or other interested parties to raise their objections against the initiation.
- m. The DGS solely relied on the data provided by the DI regarding injury to the DI without verifying the authenticity of the information so provided. Only in respect of the import data, the same has been obtained from the DGCI & S, Department of Commerce for POI till June 2017 and thereafter from Infodrive Media for the balance period of the POI. No independent data has been produced by the DI to show serious injury to DI as a result of increased imports. Most of the data provided by DI pertaining to profit/loss, employment, and production is wrong and misleading as demonstrated with independent data from an authentic source.

- n. Any levy should be supported by data and reason for arriving at the levy and there should be a direct nexus between the levy and the object being achieved by introducing such a levy. Such reason is absent in the preliminary finding of the DGS.
- o. The government notified the revised Tariff policy on January 28, 2016 wherein the policy recognised the need to attract adequate investments in the power sector for ensuring availability of electricity to different categories of consumers at reasonable rates and for achieving rapid economic growth and improvement in living standard of citizens. All the PPAs except those mandating domestic procurement factored in the costs of import of solar cells and modules. Increase in the cost of import of solar cells and modules will have a direct and material impact on the solar power development industry.
- p. The indigenous module manufacturing industry only contributes about 10-13% jobs in the entire value chain. The ancillary sector named BOS has 60 industries wherein the total employment generation is 70-90%. With developers under strain, this entire quantum will come under jeopardy.
- q. Due to competitive bidding process, solar power developers take into account customs duty in respect of solar modules used for setting up the power plant. The rate quoted by solar power developers is required to be maintained for 25 years subject to change in law clause in the PPA. At the time of bidding, the company did not take into account safeguard duty for the purpose of quoting the unit price and any levy of safeguard duty would increase the cost of power rendering the entire project unviable. Further, in respect of contracts already awarded, the company placed order for import of solar cells and modules, levy of duty would lead to a huge cash flow issue when the imports are cleared from the customs on payment of such duty. The exercise of filing a petition before the Commission to amend the change in law clause in the PPA to cover levy of safeguard duty will be a long drawn process and delay in getting the tariff revised would impact the business.
- r. Due to delay, most projects will fail to take off and banks will be reluctant to infuse funds in light of uncertainty over the levy of safeguard duty.
- s. Imports in India increased because of the Government's vision to promote renewable sources of energy in contrast to the DG's view that China diverted its exports to India because of trade remedy measures by the US and that India can no longer provide the protective ambit of Domestic Content Requirement to the domestic industry. Imports from China and other countries fill the demand supply gap in India wherein the Indian manufacturers could cater to only less than 10% of the demand.
- t. The DI paints a picture of losses due to the addition of a company with a new manufacturing facility in 2017. New facilities involve high cost of interest and depreciation which have a detrimental impact on profitability. Injury to such companies is not because of imports but because of high interest cost and depreciation cost.
- u. Position of three petitioners have improved in the injury period in contrast to two petitioners who faced losses due to intrinsic problems such as a new manufacturing

facility, restructuring and obsolete technology. Therefore, an increase in imports has not led to injuries.

- v. The MNRE has proposed to have an additional CPSU scheme of 12,000MW which will have an assured DCR component allowing the domestic industry an assured market. This, the DG's conclusion that serious injury will occur if provisional safeguard duty is not imposed is incorrect.

(x) M/s. Amplus Energy Solutions Private Limited

- a. The proposed safeguard duty imposition of 70% duty on imports of "Solar Cells whether or not assembled in modules or panels" will lead to an NPA of INR 700 Crores in projects due to inability of the company to pay immediate imposition of the duty leading to 100% equity write-off of the company and non-commissioning of under construction solar projects.
- b. Imposition of duty will cause reputation loss to India's "Ease of Doing Business" and "Investor Friendly Policy" due to FDI Investment of INR 1000 Crore.
- c. Imposition of duty will lead to the company's inability to supply at the tariff contracted in Power Purchase Agreements with leading global companies and shake their confidence in Indian policy regime and hinder further expansion.
- d. The company's financial distress will result in loss of jobs for 2700 people, which is higher than the employment in Domestic Cell Industry.
- e. Impact on employment will be worse with large solar developers and the EPC Industry due to employment of 10,000 employees, therefore, imposition of the duty with a grace period will provide adequate period to domestic solar EPC industries.

(xi) M/s. Clean Max Enviro Energy Solutions Pvt. Ltd.

- a. They are the largest "Rooftop Solar Developer" in India with an average 22% market share in the last 3 years.
- b. The company will have to pay safeguard duty of INR 350 Crores which is a loss as it is greater than the total equity investment of INR 260 Crores in the project to develop 166MW AC Capacity of solar in Karnataka. This will cause the company to declare bankruptcy.
- c. The cascading effect of the duty will be an increase in banking NPA upto INR 660 Crores due to inability of the company to pay immediate imposition of the duty leading to 100% equity write-off of the company and non-commissioning of under construction solar projects.
- d. The company's financial distress will result in loss of jobs for 2165 people, which is higher than the employment in Domestic Cell Industry.
- e. Impact on employment will be worse with large solar developers and the EPC Industry due to employment of 10,000 employees, therefore, imposition of the duty with a grace period will provide adequate period to domestic solar EPC industries.
- f. Imposition of duty will cause reputation loss to India's "Ease of Doing Business" ranking of World Bank and "Investor Friendly Policy" due to FDI Investment of INR 250 Crores.
- g. Impact on financial health of sub-contractors who are small scale businesses due to the financial distress of the company.

(xii) Government/Embassy of Mexico

- a. Imports of Mexican product carried out by India during the period of January 1, 2014 to September 30, 2017 are less than 3% of the total imports by India in the same period. Mexico is a developing country and the exports of Mexico should be excluded from the application of the safeguard duty by virtue of Article 9.1 of the Agreement on Safeguards.

(xiii) European Commission

- a. The major quantity of the PUC is imported from China. The entire reasoning used to justify the need for imposition of the safeguard duty is built around imports from China. Increase in imports from one country only, even if sharp and significant is not enough to justify the use of safeguards which applies equally to all imports. Chinese imports are currently subject to an anti-dumping and it seems appropriate to wait for the conclusion of this ongoing AD investigation before imposition of a safeguard duty.
- b. Based on the data provided, it not possible to draw a conclusion of a surge in import volumes during the first six months of 2017-18 by 74% as compared to imports in 2016-17. To make a consistent comparison, the first six months of 2017-18 should be compared to the same period in the previous year. The alleged surge of 76% remains unclear, wherein on the contrary there was a decrease of 26%. The investigating authorities should clarify these figures and provide the relevant data.
- c. Imposition of trade remedy measures by the EU and US on imports of the same product from China and scrapping of the DCR in India are seen as unforeseen developments. Following the imposition of AD and CVD measures by the EU and US, India did not immediately suffer from increased imports due to the DCR. Following a challenge in 2013, the WTO declared the DCR as inconsistent and India had to abandon it. This took place in 2013 and cannot constitute an unforeseen development for increase of imports in 2017.
- d. Commitments to reduce CO2 emissions have caused an increased in Indian demand for solar energy. If an increase in demand results in an increase of imports, it may indicate that the DI did not have enough capacity to satisfy the increased domestic demand.
- e. Serious injury in safeguard investigations is more demanding that the material injury required in AD/CVD investigations. Total sales of the DI increased more than 5 times and production increased more than 3 times over the period considered. The DI installed an additional capacity of 1000MW in 2017-18 when it still has 22% unutilised capacity. The drop in capacity utilisation is a consequence of investment in additional capacity.
- f. A new company entered the domestic markets leading to an overall increase in the total number of employees. DI argued that jobs generated by new company should be taken out of figure to observe decline in employment. Such exclusion is artificial and intends to hide relevant facts in the assessment of employment.
- g. The DI incurred losses throughout the whole period considered before the alleged increase in imports. This means there are causes other than imports that must be investigated as a cause of losses.
- h. export markets combined with a negative performance in the domestic Factors such as decisions to invest in additional capacity, heavy losses in industry during a period of increase in demand, imports constituting a major and stable

share of the domestic market which put the causal link in question have not been taken into account.

- i. Any safeguard measure would equally affect imports from all sources which enter the Indian market in low quantities and which are not responsible for any injury caused to the DI.
- j. Huge increase in domestic demand of more than 600% over the period considered means that even if the DI were to produce at 100% of its capacity, it would cover only 16% of the total Indian demand. Therefore, any safeguard measure will apply to almost 85% of the market which would lead to unduly increase in prices for Indian importers and downstream users, limit product choice and lead to serious shortages in the domestic market which would additionally not help India in achieving its commitments under the Paris Agreement.

(xiv) Taiwan Photovoltaic Industry Association

- a. Three out of five applicant domestic producers are located in the SEZ and cannot be treated as domestic industry as SEZ area is deemed to be territory outside India and all governing legislations for import or export goods will apply to them. Goods produced by an SEZ unit cannot be said to be domestically manufactured.
- b. Application filed by the DI is not maintainable due to excessive confidentiality claimed by the DI affecting rights of defence of interested parties, falling prices, excess capacity not being justifiable grounds to substantiate injury to the DI, imposition of duties significantly impacting the National Solar Mission, increase in imports not being unexpected and sharp and significant enough for imposition of the duty.
- c. Growing demand for subject goods is met by both DI and imports due to lack of capacity of the DI to meet the demand. Domestic demand is much higher than the installed capacity of the DI.
- d. DGAD has initiated Anti-Dumping Duty Investigations on imports of solar cells whether or not assembled from China PR, Taiwan and Malaysia. Interest of the DI is being protected by the AD investigations from potential material injury caused due to increased dumped imports if a finding is made by the DGAD. Levy of both AD Duty and Safeguard duty amounts to double jeopardy.
- e. Domestic producers namely Indosolar, Websol and Jupiter Solar filed petition for imposition of AD Duty and vide final finding, the DGAD imposed such a duty. However, the Central government didn't notify imposition of such duty. The DI since then, is on a course to eliminate competition from import of subject goods. The DI has filed another application for imposition of safeguard duty as method of forum shopping and creating a cartel to gain advantage under the garb of safeguard duty and eliminate fair competition.

(xv) First Solar FE Holdings Pte. Ltd. (USA, Singapore)

- a. Thin film products and c-SI PV are not like article or directly competitive articles on the basis of parameters such as physical and technical properties, production technology, etc. Neither of the two products can generate useable

electricity without Balance of System. It is only after integration with Balance of System that the two products can generate useable electricity. This makes them two alternatives and not like articles. Thin film products are required to be excluded from the purview of the PUC. Present investigation tantamount to investigating two alternate products in one investigation.

- b. The fundamental objective of establishing of SEZ units is promotion of exports. Areas of the SEZ are excluded from the definition of Domestic Tariff Area and removals therefrom are subject to duties of customs. DTA sale of goods manufactured by a SEZ unit can be made only on submission of import license. The contentions for treating the SEZ unit as part of the DI are not acceptable.
- c. Term used in the safeguard law is 'producers in India' and the SEZ unit established in SEZs are very much producers in India being the same is not tenable as SEZ unit is deemed to be a territory outside the customs territory of India. SEZ producer cannot be a DI and should be excluded from the scope of DI.
- d. Petitioners do not have standing to maintain the present petition as their production does not constitute a major proportion in Indian Production and largely constitutes production for exports.
- e. Import of cells is import of raw materials and cannot be included in imports. There is no surge in Imports as module production in India by other producers must be added to Indian production. Thin films should not be included in the purview of causing injury as surge in imports are predominantly due to C-SI PV.
- f. The notice of initiation does not identify any unforeseen development and is inconsistent. Surge in imports of cell is due to industry itself importing the cell rather than producing in India. Imports by other producers not part of the petition cannot be described as unforeseen.
- g. Performance of the DI has materially improved. Products and sales of the DI have shown a significant increase over the injury period. DI has not suffered injury due to imports into India. Petitioners have suffered injury to exports which cannot be remedied by safeguard duty.
- h. Threat of serious injury parameters cannot be same as injury parameters as no further data or analysis in the notice of initiation shows that there is threat of serious injury.
- i. As a result of collapse of export market for the DI, the cost of production of the DI has substantially increased. The domestic market as a result of several govt initiatives to enhance solar power capacity in India has shown an upturn. Companies which have not been able to utilise capacity for significant part of last four years has recommenced commercial production.
- j. The DGAD has earlier recommended ADD which were not imposed by the Central Govt. in absence of serious injury to the DI from imports, a safeguard duty increased prices of imported goods for the domestic consumers and provides cushion for DI to increase prices, where the ultimate sufferer is the domestic consumer. This establishes that imposition of safeguard duty is not in public interest.

(xvi) First Solar Inc.

- a. Preliminary objection on the ground that an SEZ unit had been deemed to be part of the Domestic Industry. SEZ unit cannot be considered as part of the domestic industry, as was also evident from inconsistency with the past decisions of the Director General. This issue should be decided before proceeding further in the case.

(xvii) Solar Energy Equipment Manufacturers Association of Telangana

- a. There is a solar cell manufacturing capacity of 1.6GW and module manufacturing capacity of 5.5GW in the country. Solar cell manufacturers have a solar module manufacturing facility which consumes solar cells produced by them. Imposition on safeguards duty in solar cells will lead to a problem in procuring solar cells by solar module manufacturers.
- b. Solar cells and modules are considered as single entity for imports, the solar modules and solar cells are allowed at zero duty. Solar cells consist 60% of the cost of solar module and 40% of the material required for manufacture of the solar module is procured by the solar modules manufacturers by paying import duties but imported modules is allowed free of duty. Imposition of SME solar module manufacturers will be in a severe disadvantage compared to the solar cells manufacturers.
- c. Solar cells are not available in India as most solar cell manufacturers have module manufacturing capacity to use up all their production. Manufacturing cost for the solar module manufacturers which are mostly SME will go up by 42% compared to the manufacturers who have cell manufacturing as they are forced to import cells by paying 70% duty.
- d. There should be a different safeguard duty for solar cells and modules. There is no enough capacity in solar cells and creating capacity is expensive and time consuming, so there shouldn't be an imposition of safeguard duty on solar cells.

(xviii) Warburg Pincus India Pvt. Ltd.

- a. The company has invested in CleanMax Solar, which is executing about 300MW solar projects across India serving leading domestic and multi-national corporate as well as government owned entities. Safeguard duty on the company's ongoing projects will result in job losses and impairment of investor capital damaging its long-term prospects.
- b. Debt financing of ongoing projects provided by Indian banks will be at the risk of turning into non-performing assets.

(xix) M/s Vikram Solar Limited

- a. Solar Cells are the most basic unit of a solar PV system. A PV module consists of multiple PV cells connected in a series to provide higher voltage output. Modules are value added products that convert solar cells into a commercially useful commodity used for generation of electric power. In light of the limited domestic capacity for manufacture of solar cells, module manufacturers have to depend on imported cells.

- b. Safeguard duties imposed on solar cells will have the effect of the SEZ unit paying the duties for all its solar cells modules being removed from the DTA. Such a measure will lead to adverse impacts on SEZ units.
- c. The government's plan to install 100GW of Solar energy by the year 2022 requires SEZ units to be allowed to run to their full capacities without loading them with any extra burden and without making them uncompetitive. The domestic solar energy demand to a great extent depends upon the production in SEZ units and on imported solar cells. Imposition of duty will lead to increase in deployment cost of solar projects.
- d. There is a huge gap in the demand and supply of solar modules manufactured by domestic producers. Large fractions of domestic production is located in SEZ's and imposition of Safeguard duties would not only adversely affect such manufacturers but also make it impossible to attain the target of 100GW of solar power by 2022 as large parts of the 100GW target has to be catered through imports. This will lead to generation of power through conventional fuels such as coal and related environmental issues. Imposition of safeguard duties is therefore clearly against public interest, which is the guiding principle for imposing SGD.
- e. If SGD is imposed, DG must prescribe a Tariff Rate Quota (TRQ) of 5GW at nil rate of duty. TRQ would address most of the concerns of the stakeholders. It would cater to the demand-supply gap without any additional burden on the cost of production of solar power generation while giving relief to the domestic production facilities set up in the SEZ's and protecting the DTA producers by providing SGD on imports beyond the prescribed quotas under the TRQ regime.
- f. Government of India should grant specific exemption under section 25(1) of the Customs Act, 1962 from payment of SGD on solar modules removed from SEZ to DTA.
- g. Relied on the USITC Safeguard recommendations wherein it recommended a higher Safeguard duty on the Solar Cells assembled in Modules/Panels as compared to Solar Cells to request an imposition of a higher safeguard duty on solar cells assembled in Modules/Panels.

(xx) Department of Foreign Trade, Royal Thai Government

- a. Safeguard measures shall not be applied against a product originating in a developing country member as long as its share of imports of the product concerned in the importing Member does not exceed 3%. Imports from Thailand are below 3% in the past three years. Therefore, Thailand should be excluded from the imposition of these measures.

(xxi) Green Energy Association

- a. There are two products under consideration in the instant case, (i) Solar cells unassembled in modules or panels and (ii) Solar cells assembled in modules or panels. The petitioners do not fulfil the requirements of the DI in both the PUCs.
- b. In both the PUCs, the petitioners do not fulfil the criteria of Domestic Industry as the operational facility of the petitioners is less than 50%.
- c. The production of the cell manufacturers which operational facilities have increased y-o-y and the overall productivity has also been more than 90%.
- d. The Government has committed to generate electricity from Solar Energy. For the same, Ujwal DISCOM Assurance Yojna (UDAY) was launched providing for

financial turnaround and revival of Power Distribution Companies in aiming to ensure a sustainable permanent solution to the problem.

- e. The business and profitability of the Indian module and cell manufacturers have gone up.

(xxii) Mahindra Susten Pvt. Ltd.

- a. India is set to become the third biggest solar market globally in 2017. Many solar power developers of India have accordingly built up projects exceeding 1 GW mark. This has led to steep fall in the prices of the cells and modules which subsequently pushed India to achieve 100 GW of solar power by 2022.
- b. This has been possible because of efficient and low cost solar modules. Module prices account for 75% of the total cost of the solar project. Since the module transactions are entirely dependent on market and environmental factors, the companies have bid on these criteria only. The protection under Safeguards has not been accounted at the time of bidding. Therefore, the prices of the products will subsequently rise leading to increased rate of tariff.
- c. It will also lead to the drying up the future projects as the investors will be more circumspect and wary of investigating in the future. This will break the entire chain and a lot of people will remain unemployed.
- d. One of the biggest fallouts will be the banks/financial institutions, who have provided loans to the solar companies. These banks will have additional non-performing assets due to solar projects being non-viable and the new NPAs are expected to be anywhere between Rs. 12,000-20,000 crores.

(xxiii) Clean Max Enviro Energy Solutions Pvt. Ltd.

- a. Clean Max has received government approval to develop 166 MW AC capacity in Karnataka, 40 MW of rooftop projects and 24 MW of solar capacity under the Solar Energy Corporation of India rooftop allocation programmes.
- b. It has also attracted the Foreign Direct Investment of Rs. 245 crores. For fulfilling the above demand, it has taken term loans to develop from Yes Bank, State Bank of India, RBL Ltd., IDFC and Tata Capital.
- c. The proposed imposition will result bankruptcy and subsequent litigation under the contracted price increase.
- d. There would be total loss of Rs. 350 Crores which is more loss as compared to the estimates. This will create potential NA of Rs. 660 crores. 2000+ people will lose their jobs, 165 direct and the rest in the chain supply. The ease of doing business rank of India will also go down.

(xxiv) M/s ACME

- a. The safeguard investigation for solar cells has been hastily initiated. The examination of dumping and injury margin by DGAD was still undergoing when the safeguard had been initiated.
- b. 70% safeguard duty had been imposed without seeking any comments from interested parties. If the safeguard duty is imposed, it will distort the entire market. DISCOMS will not purchase from solar power developers as the tariffs will shoot up.

- c. The unforeseen developments mentioned by the Ld. DG did not lead to increase in imports. The increase in imports had increased because of the Government's vision to promote the renewable source of energy. The Government of India floated tenders keeping in mind that the Indian manufacturers could only cater to less than 10% of the demand.
- d. Moreover, 70% of the domestic manufacturing capacity are located in the SEZ area, mainly targeting the exports market. Therefore, such imports are not the result of unforeseen developments, rather demand created due to National Solar Mission.
- e. The DI's data for the same period reflects profits in the anti-dumping investigation. The inclusion of the recent facility, Mundra Solar PV Limited, has resulted in showing the loss to the DI.
- f. The available Annual Reports of Websol Energy Systems and Jupiter Solar Power show that there has been significant decline in losses or high profitability. The reason for losses to Helios is because of undergoing corporate debt structuring.
- g. MNRE has also proposed that the technological facility is obsolete. Moreover, the injury will not happen to the DI as MNRE is planning to include DCR in 12,000 MW of the power generation.
- h. The tariffs will increase substantially and will reach Rs. 4 per unit which will defeat the purpose of cheap supply of power. All the projects would be challenged in the courts seeking relief under 'change in law' clause.

(xxv) Solar Power Developers Association

- a. The safeguard investigation for solar cells has been hastily initiated. The examination of dumping and injury margin by DGAD was still undergoing when the safeguard had been initiated.
- b. 70% safeguard duty had been imposed without seeking any comments from interested parties. If the safeguard duty is imposed, it will distort the entire market. DISCOMS will not purchase from solar power developers as the tariffs will shoot up.
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- Solar Power Developers Association – Letter to CBEC

- a. The domestic PV manufacturing sector is not aligned to support the 100 GW Solar Mission due to obsolete technology, high cost of land/electricity, low capacity utilization, high cost of financing, and lack of skilled workforce.
- b. MNRE came up with a concept note for creating the value chain of PV manufacturing capacity within India and adequate support to be competitive with other countries like China, USA, etc.
- c. Investors trusted Government's policies and increased solar power capacity from 1.4GW to 16GW in 2018. 80% of the country's module requirements is met through imports with solar cells & modules manufactured on latest technologies, high efficiencies and at competitive price.
- d. Since the anti-dumping investigation has not been concluded, there is no point of having a parallel safeguard investigation. DG Safeguard has imposed provisional duty within 17 days only without even waiting for the submissions.
- e. Imposition of duty will prompt countries to increase the cost of silicon and wafers which will subsequently lead to increase in the module prices.
- f. The costs of modules have increased significantly, and developers are putting hold on the further dispatches of module. Coal Mafia is also involved to halt the growth of renewable sector. At the current domestic production, it is not possible to meet the requirements of the nation. All the development done in the field of renewable energy will come to halt and the government will move towards the thermal energy. It may result in the increase in imports of coal.
- g. The total employment generation in the ancillary sector amounts to 70 to 90% whereas the manufacturing sector only contributes 10 to 13%. Imposition of safeguard will hamper the employment generation and also will stop the investments in the Indian solar sector. Moreover, it would also lead to the germination of a lot of legal disputes.

- Solar Power Developers Association – Letter to DGS

- a. The country is aiming for 100 GW of power generation. India has currently achieved a little more than 12 GW. India's demand of power cannot be met by the domestic producers.
- b. Investments of around 40,000 crores have happened recently and more than 50,000 jobs have been created lately. Any duty would adversely affect the financial viability of these projects and render the bank loans into NPAs.
- c. Since the anti-dumping investigation has not been concluded, there is no point of having a parallel safeguard investigation. DG Safeguard has imposed provisional duty within 17 days.

(xxvi) Aditya Birla Renewables Limited

- a. Government is offering protection to the domestic cell manufacturers by way of tenders under DCR category.

- b. There are no poly-silicon and wafer manufacturing capacity in India and prices of both the items are quite volatile in the global market. All these work on the cost-plus model which makes estimates of tariffs to be bid in the auctions extremely challenging. In India, the monopolistic situation will not be able to take bids.
- c. The current pricing is competitive as they have control over entire value chain. Overseas manufacturers have the advantage of economy of scale, low rate of interest, low electricity cost, higher productivity, common Effluent Treatment Plants, the complete eco-system involving the machinery and raw materials for solar manufacturing and logistics infrastructure. All these lead to the reduction in costs.
- d. Imposing the safeguard duty will increase the electricity tariff and consumers have to pay the electricity tariff.

(xxvii) First Solar Inc

- a. Thin Films products and c-SI PV products are not like articles or directly competitive products because there is a significant difference in physical & technical properties, production technology, manufacturing process, plant & equipment, raw materials, difference in Balance of System (BOS), costs and prices. Without BOS, the two products are two alternatives and cannot make like products.
- b. BOS are different for Thin Film and c-SI PV. The findings in USA have provided that Thin film and crystalline modules are different articles.
- c. Based on Unwrought Aluminium, First Solar submits that the SEZ units cannot be considered as Domestic Industry. The SEZ unit is deemed to be a territory outside customs territory of India and all produce therein treated as a produced outside India.
- d. Reliance is placed on the findings in Electrical Insulators and it was stated that these SEZ units are not competing with other domestic units, therefore, it cannot be treated as Domestic Industry.
- e. The petitioners do not constitute major proportion in the Indian production as the production constitute below 25% of the product. The imported cells used for making modules should not be included in the Domestic Industry. The petitioners have not quantified the Indian production in an objective manner.
- f. Assuming that the petitioners produce more than 50% of the products, the DG Safeguards have to determine the Domestic Industry which did not happen in the present case and the DG Safeguards accepted the claims of the petitioners without any evidence.
- g. Imports of cells should not be included as these are imports of raw materials. Cells imports in India for production of modules should be excluded from imports. The surge is because of c-SI PV and not because of thin films.
- h. There have not been any unforeseen developments demonstrated in the initiation. Government of India has planned for development of solar power in the country. Trade measures are also not recent and therefore, cannot be seen as unforeseen developments.
- i. The performance of the domestic industry has significantly improved. The sales and production have shown a substantial increase over the period. Productivity and Capacity Utilization have shown marked improvement.
- j. Initiation notice lacks objectivity as certain parameters after segregating the domestic industry into two parts while certain parameters have not been.

- k. Market share presented by the Domestic Industry is incorrectly presented as it does not include the production of modules by other parties whereas market share of domestic industry by their own claim increased in the recent period.
- l. Capacity Utilization has declined due to addition of new producer. Employment has shown massive increase.
- m. There has been substantial decline in exports of the products. As a result, the cost of production has substantially increased. The per unit costs determined by the petitioners are based on the actual sales made by the domestic industry in domestic and export market. The export performance has materially deteriorated, thus, leading to showing the deterioration in both domestic and export market.

(xxviii) Harsha Abakus Solar

- a. Duties should not be levied on under construction projects as the modules are ordered or are yet to be ordered or in the pipeline in logistics.

15. A brief summary of the written submissions filed by the interested parties are as under:

(i) European Commission

- a. Use of the SGD instrument is not appropriate for the present case as it is restricted for extraordinary cases as they apply to imports from all sources. Imports have increased mainly from China, which also accounts for 94% of import volumes and 95% of import values, while minor quantities are imported from other countries.
- b. Increase in imports only from one country are not enough to justify imposition of global Safeguard measures. Use of such trade restrictive measure must be deferred till determination of the anti-dumping investigations against imports from China.
- c. Use of safeguard measures would affect imports from all sources, including those that account for less than 5% of total import value which cannot be responsible for injury to the domestic industry.
- d. Article XIX of GATT permits the use of SGD measures to instances where imports increase as a result of unforeseen developments.
- e. Imposition of trade remedy measures by US and EU in 2012 and 2013 have taken place much before the considered period.
- f. The dismissal of the Domestic Content Requirement as WTO-incompatible following a 2013 WTO ruling cannot form part of unforeseen developments as contemplated under Article XIX of GATT as the same happened 4 years ago.
- g. Imports increased to satisfy increased domestic demand since the Domestic Industry was unable to meet the surge in demand following India's commitments under the Paris Agreement.
- h. No Causal Link has been established since the Domestic Industry was already facing losses at the beginning of the period of investigation, i.e., since before the imports increased; while key indicators such as total sales and production has been increasing.
- i. Other factors as prescribed under Article 4.2(a) of the Agreement on Safeguards need to be evaluated.
- j. The loss making domestic industry has made investments to increase its capacity rather than exploiting the 22% capacity that already lies unutilized. Consequent drop in capacity utilization has proven that the same wasn't a prudent business decision and its impact on the Domestic Industry needs to be taken into account.

- k. There has been a significant decline in export performance of the Domestic Industry which has led to decrease in overall profitability. Inefficiencies and other reasons for negative export performance must be identified before attributing the same to increased imports.
- l. Imports have always maintained an important share of the domestic solar market suggesting that the domestic industry has not been able to meet the domestic demand.
- m. Imposition of SGD measures are against public interest since the unduly increased price restricts product choice and in light of increased demand and Domestic Industry's inability to meet the same, lead to serious shortages and adversely affect India's commitments under the Paris Agreement.

(ii) Embassy of the People's Republic of China in India

- a. Anti-dumping investigation against Chinese imports was terminated on 23rd March, possibly, for the lack of any injury or dumping and the final finding would not favour the Domestic Industry. Safeguard measures require stricter conditions and if no injury was determined in the anti-dumping investigation, then serious injury or threat thereof could not have existed. The investigations must therefore be terminated without any measures.
- b. Half of the 80% of the imports that the total solar installation capacity of 100 GW sought to be achieved relies on comes from China. Imposition of Safeguard measures could therefore increase India's power generation cost and consequently India's infrastructure construction and development of the economy.
- c. Investigations must be conducted in a fair and objective manner in accordance with the WTO rules. Safeguard measure is a strong tool to provide overprotection to the Domestic Industry and the same is to the disadvantage of the development of India's solar photovoltaic industry.
- d. Imports from China to India are made under fair and normal conditions and haven't caused or threatened to cause serious injury to the Domestic Industry. Chinese producers have maintained good trading partnerships with Indian companies and developed effective cooperation with India's relevant institutions in the aspects of investment, technology transfer, etc. There is huge scope for cooperative business opportunities in the field of renewable energy between China and India.

(iii) M/s WAAREE Energies Ltd.

- a. Close to 90% of estimated 10.7 GW of modules installed in India in previous financial year was captured by overseas module manufacturers with almost all major utility scale installations using Chinese modules. This has been possible in spite of multiple BNEF Tier 1 Domestic Manufacturers and more than adequate domestic capacity.
- b. Major markets for Chinese modules have imposed anti-dumping barriers and consequent increased imports are stifling the growth of domestic manufacturing segment.
- c. There are signs of predatory pricing to hold and expand existing market share, as reflected in one instance, where the Chinese module prices came down by more than 21% in a span of 3 weeks without any accompanying technological breakthrough or changes. No commercial economies of scale can be expected to bring such drops other than predatory pricing.

(iv) M/s First Solar Inc., First Solar FE Holding Pte. Ltd. & First Solar Malaysia SDN. BHD.

- a. Petitioner has been forum shopping as is evident from the withdrawal of ADD Application on 27th February, 2018 after Provisional SGD of 70% was imposed on 5th January, 2018. Petitioner withdrew ADD application, as the dumping margins and injury margins would not have been high enough to warrant such a high duty.
- b. Articles are not like/directly competitive on basis of physical and technical properties, production technology, manufacturing process, plant and equipment, raw materials, difference in balance of systems (BOS), costs and prices. The only rationale behind the inclusion of thin film products within the scope of product under consideration seems to be that they are used for the same purpose.
- c. Substantial investments in BOS required for converting electricity into AC form that is usable. Cost of systems for Thin Film and c-Si Cells constitute 45-50% of total project costs and the same vary significantly.
- d. Without integration with BOS, neither cell can create usable electricity and this makes them 2 alternatives instead of like/directly competitive products. The BOS are different, with entirely different cost structures, in respect of thin film products and c-Si PV products.
- e. Petitioner has misled the Authority into believing that the consumers have interchangeably used thin film products and c-Si cells and modules. While consumers of the products have set up plants using both the technologies, there is no evidence to show that these consumers have interchangeably used thin film products and its BOS in the same c-Si photovoltaic plant.
- f. Once a developer has chosen one of the two technologies and has started implementation of the project, the developer is not in a position to switch over to other type of technology.
- g. Merely because thin film products and c-Si can be used for the same purpose does not justify inclusion thereof within the scope of PUC. There are other products which convert solar energy into electrical energy and if a criterion applied at present to treat them is to be adopted, there are other products as well which shall become like article to the products under consideration
- h. Investigating authorities in US and EU determined that c-Si and thin film products have limited interchangeably and the two products are not similar with reference to findings in ADD, SGD and CVD investigations.
- i. In investigations conducted in US and EU, Domestic Industry producers were producing both the product but still the investigating authorities took note of the fact that thin film products and c-Si products are extremely different in their nature and characteristics and cannot be clubbed under one investigation
- j. Present investigation is a different investigation having no linkage with the previous ADD investigation where duty wasn't even levied by the Government of India. Scope of PUC's across findings has been changed in some ADD investigations such as the PUC as Ammonium Nitrate differed between different investigations. Therefore, when the scope of PUC in a previous ADD investigation was not considered binding in the subsequent investigation, it cannot be argued that the scope of product under consideration in the previous ADD investigation of the subject goods is binding on the present safeguard investigation.
- k. Similarly, PUC has also changed between ADD investigations and SGD investigations for the same product such as in the case of scope of Caustic Soda under ADD investigation and SGD investigations
- l. Since none of the petitioning producers or any other domestic producer of the subject goods is producing and selling thin film products, and their claim for safeguard duty is not maintainable on this account.

- m. 3 of the producers are SEZ units, with objectives of export promotion, etc. Facility for sale in DTA is a concession given to surpass the volatility of export markets, however such sales to the DTA attract customs duties. When the sale in the domestic market by such units is allowed merely as a liberty, it cannot be treated as a matter of right by such units so as to entitle them to seek protection as domestic industry. Further, given the fact that their supplies are attracting customs duties in the DTA, it follows that they are not at par with domestic manufacturers.
- n. Past investigations of the DG have held that SEZ units are not part of DI. Ref. made to “safeguard investigations concerning imports of Electrical Insulators into India” where the Director General, Safeguards gave a categorical finding on a principle of law that a unit operating under SEZ cannot be considered as a part of the domestic industry. These findings have attained finality and have not been upset by any judicial decision to the contrary.
- o. Reference made to “Safeguard investigation concerning Imports of ‘Unwrought Aluminium (Aluminium not alloyed and Aluminium alloys)’ into India”. Previous findings of the DA (quoted findings from Para 25&26) show that DA has made findings on a principle of law w.r.t. SEZ’s not being part of the DI and the same should be followed since DA is a quasi-judicial body and must maintain uniformity in decision making process.
- p. Both requirements of constituting DI in terms of S-8B(6)(b) of Customs Tariff Act, 1975 have not been met.
- q. The petitioner is estopped from claiming a different list of producers as constituting the DI when 25 other producers (including Vikram Solar, Evergreen Solar Systems, etc.) that found mention in the ADD application filed by the petitioner themselves as being producers of the PUC have been omitted from the present application.
- r. The petitioner has not come with clean hands as a number of these producers, who are in fact, members of the Association have not been disclosed in the application. Presumably, the members of the Association must be manufacturers of the subject goods, and that these members were well within the knowledge of the petitioner. There has thus been gross suppression of facts which should not be condoned.
- s. In the absence of a corresponding eligibility under S-8B to omit the producers, who undertake imports, from the definition of DI as required under the Rule 2(b) of the AD Rules, the share of the DI must be calculated accordingly.
- t. Production of manufacturers producing modules out of imported solar cells must be included as part of the DI and the production share of the DI must be calculated thereafter. Such a determination would show that petitioners do not account for major proportion of domestic production and accordingly do not constitute DI as u/s-8B of the Act.
- u. Increase in imports must not be seen in isolation from other factors. Imports increased to meet deficit in supply. There was a spike in the demand for PUC by 9000 MW, but corresponding increase in capacity of the DI was only 1200 MW. MSPVL started production only in May, 2017 and could not achieve desirable level of production instantaneously. Indian industry was in no position to cater to increased demand.
- v. Relative increase in market share of imports is not significant @4%, given the circumstances. Imports relative to production have increased since the capacities of the producers, as being SEZ/EOU units, have been set up majorly to serve the export markets. Production of petitioners has been suppressed due to collapse of exports. Increase in production not proportionate to the rise in demand
- w. Market share of imports have shown insignificant change only due to increase in domestic demand not being met by the DI. Petitioners had capacity of only 109%

of the domestic demand before the setting up of MSVPL. Share of DI has also increased by 3%.

- x. Petitioners are not facing injury as volume parameters are showing exceptional performance. Capacity, production and sales of the petitioners have shown a significant increase over the injury period. Sales have quadrupled. Despite being a nascent industry, participating producers have managed to increase their domestic sales in line with the increase in capacity with both increasing to four times of that in the beginning of the period.
- y. All petitioners with the exception of Jupiter Solar are SEZ/EOU units. Their primary focus is on export markets. Decline in capacity utilization has been caused by a decrease in export sales of the producers and not on account of their performance in the domestic market.
- z. MSPVL started operations recently and accounts for a major chunk of the capacity of the petitioning producers while not having reached expected capacity utilization, giving impression of overall low capacity utilization, which might not be the case.
- aa. Data w.r.t. productivity per employee has been unduly distorted due to entry of MSVPL which is still in the initial phases of production.
- bb. Petitioners have been suffering losses even before the increase in imports, so injury not attributable to sudden increase in imports. Petitioners have suffered losses even during base year of 2014-15 when volume of imports was low. Petitioner claimed losses on account of increased imports with respect to 2017-18, however during that year losses are 16% lesser in comparison to base year and 65% less in comparison to 2015-16
- cc. Decline in employment as a result of poor export performance and cannot be considered as a factor for indicating injury.
- dd. Selective analysis of data for injury analysis with respect to inclusion of MSVPL on certain counts where it helps the case of the Petitioners.
- ee. Petitioner has listed entities which had to shut down operations as a result of imports when in fact these were SEZ units that suffered due to poor export performance
- ff. Petitioner has not provided weighted average price undercutting. Even if price cutting is positive no visible impact has occurred to the plaintiff. No price undercutting has been calculated for Thin Film products.
- gg. Both, selling price as well as cost have reduced proportionately, each declining by 16 index points during the POI. Petitioner cannot claim there is price suppression.
- hh. Decline in imports of PUC are only on account of increased efficiency of modules from 260 Watt peak to 330 Watt peak; creation and benefit of economies of scale enjoyed in the supply chain for polysilicon, wafers and ingots production; creation of integrated manufacturing capacities with the major module suppliers and further improvements in capacity utilization and overall manufacturing cost brought about by the vertical integration; and introduction of new processes like PERC, which allows further efficiency improvements, due to which lower cost per watt can be achieved
- ii. Injury on account of increase in inventory defies logic in light of increased domestic sales.
- jj. Entire revenue of Jupiter Solar, the only producer not an SEZ unit/EOU has come from sale of solar cells and earned profits. Other producers, being SEZ units/EOU's incurred loss on account of poor export performance
- kk. While export performance has materially deteriorated, domestic sales of producers have increased. Adverse performance with respect to capacity utilization on account of global downturn. Therefore, while domestic sales have increased by 304%, the export sales have reduced by 87%.

- ll. Excerpts from the annual reports of Indosolar clearly show it has suffered on account of poor export performance.
- mm. Number of factors such as lack of access to low cost financing; inadequate infrastructure, lack of raw materials, etc. with no relation to imports are affecting poor performance.
- nn. Liquidity constraints are a major reason for poor performance with respect to Helios and Moserbaer as reflected in annual statement.
- oo. Petitioners are engaged in low value addition without any backward integration. As a result, even if SGD imposed, the industry would remain uncompetitive.
- pp. Capacity addition during 2016-17 saw huge jump pursuant to revised targets by MNRE which is why sales as well as imports increased.
- qq. Injury margin under SG laws mean the same thing as under AD law and requires determination of NIP. DA had already applied the same principles for determination of NIP even before it was codified in 2011.
- rr. Determination of NIP specifically done for SGD imposition since the remedies are protectionist in nature and the duty is not levied to offset any unfair pricing behavior of the exporters
- ss. Signing GATT and ITA does not amount to unforeseen developments.
- tt. No concrete adjustment plan has been provided as to how the producers are going to become more competitive. There is absolutely no quantification regarding what measures would be taken and what cost benefits would be achieved thereby
- uu. No backward integration was attempted by the domestic producers even when protection in the form of Domestic Content Requirements was in force. Even if such steps are taken, it would take years for the same to materialize and ambitious targets for clean energy set by the Govt. would not be realized.

Additional Submissions by Parties:

- vv. In light of the petitioner's submissions that cells and modules are different products, there is no basis for the petitioner's case that module manufacturers not be considered as part of the Domestic Industry. The Authority must examine the cells and modules separately.
- ww. Much of the petitioner's emphasis has been on how the Domestic producers produce like or directly competitive products. Petitioner now seeks to include these items as different products, however the same wasn't represented in the petition and now the petitioners cannot claim that they are one article.
- xx. Petitioners reliance on Canadian authorities judgment for supporting the inclusion of thin film is misplaced since the USA and EU decided not to include thin film despite domestic production and the investigation authorities clearly held that thin film products were different from c-Si products.
- yy. Petitioner's reliance on previous findings of the DG is misplaced because the duty pursuant to that finding was not imposed by the Ministry and consequently such a determination cannot be said to have achieved finality.
- zz. Module manufacturers must not be excluded from the scope of investigations. The Authority must direct petitioners to give details of list of manufacturers that are only producing modules. The SEZ units cannot be considered as part of the Domestic Industry since the mere fact that the company may be producers of the PUC, is not reason enough to hold that such a company forms part of the domestic industry since the SEZ has created a deeming fiction that such companies shall be treated as foreign entities.

- aaa. Unforeseen developments must be seen in the context of surge in imports and the Domestic Industry is required to identify the period when imports surged and identify the unforeseen circumstances accordingly. The POI having been determined as April '16 to September '17, the unforeseen developments must pertain to this period and not before such period as identified by the petitioners.
- bbb. Petitioner has not updated the data since September 2017 for the simple reason that such updated data will not show that industry continues to suffer serious injury.
- ccc. Even in Anti-dumping investigations the Designated Authority found that injury margins were negligible. In such a situation, the decline in prices cannot be indicative of a situation requiring safeguard remedies.
- ddd. Shifting of China's exports from third countries into India is not a cause but an effect, and unforeseen developments required to be causes for the surge in imports.
- eee. It is an admitted position that if petitioner is not able to meet domestic demand, the Authority shall not levy SGD.
- fff. Impact of SGD must be seen only in the specific case of solar power and not other sources of power. Even an increase of 1 paisa of the solar power generation is a significant increase. A significant proportion of cost of module is only on the basis of the basic raw material, being the solar cells. Proposed SGD will therefore not save foreign exchange.
- ggg. The petitioner was on the one hand convinced that the injury margin was negative or low, while on the other contending that even 70% SGD is inadequate to them. It is therefore, evident that the petitioner has made blatantly misleading and inaccurate claims.

(v) M/s Panasonic Energy Malaysia SDN BHD (PECMY)

- a. Product exported by PECMY are different than the subject goods and should be removed from the scope of the PUC;
- b. Solar cells and modules cannot be treated 'like' to each other as both solar cells and modules have different costs and prices, therefore they are two separate products.
- c. Silicon Heterojunction (SHJ) is a very unique technology and was under a patent to Panasonic Corporation, Japan until 2016. The solar modules manufactured using SHJ Technology is different than the Subject Goods.
- d. 3 applicants namely M/s Mundra Solar PV Limited, M/s Websol Energy Systems Limited and M/s Helios Photo Voltaic Limited are based in Special Economic Zones (SEZ) and they cannot be included in the calculation of domestic installed capacity;
- e. SEZ plant is only for export;
- f. The applicants cannot claim to be DI in view of earlier DG Safeguards finding in Unwrought Aluminum (Aluminium not alloyed and Aluminium alloys);
- g. Initiation is bad in law in view of Section 53 of Special Economic Zone Act, 2005 (SEZ Act) which provides that SEZ is deemed to be a territory outside the custom territory of India;
- h. As per Section 30 of SEZ Act and para 6.08 of Foreign Trade Policy, units located in SEZs and EOUs are deemed to be situated outside India, and therefore cannot be considered as DI.
- i. PECMY has imported only to M/s Anchor Electricals Pvt. Ltd. (AEPL) during POI. Both are 100% subsidiary companies of Panasonic Japan;
- j. No injury caused to the petitioners by PECMY as the landed value in India of exports of its SHJ technology based solar cells and modules is substantially higher (nearly double) than the landed value in India of imports by other Indian importers.
- k. Imports only increased because of Government of India's vision to promote renewable source of energy;

- l. Indian manufacturers could cater to only less than 10% of the demand in India;
- m. Imports from other countries including Malaysia happened only to fill demand-supply gap created by Indian manufacturers;
- n. Domestic demand of the Subject Goods was much higher than installed capacity of the DI. Thus, demand of the DI during the POI was largely fed by imports as the DI was incapable to meet the demand of indigenous customers;
- o. Therefore, such imports are not a result of any unforeseen developments but because of huge demand-supply gap.
- p. Currently 80% of India's production capacity of photovoltaic products is based on the imported solar cells, and duty on imports of solar products will harm the interests of India's downstream users like power station operators, investors and importers;
- q. This may subsequently increase the power generation cost which will adversely affect the India's infrastructure construction and the development of economy;
- r. In the preliminary findings, interest of importers, end users and overall public interest was not mentioned;
- s. Therefore, imposition of safeguard measures will affect the development of Indian economy.

(vi) M/s North India Module Manufacturer Association (NIMMA)

- a. Solar Modules are different from Solar cells and the SGD must be levied only on the modules and not on cells since there is a huge demand supply gap for solar cells.
- b. Solar Cell manufacturers can cater to only 15% of the domestic demand at 100% capacity utilisation.
- c. Solar module manufacturers are facing tough and unhealthy completion from imported modules and running from pillar to post to protect the manufacturing base.
- d. Safe Guard Duty at this juncture on solar cells that too when there is a huge demand supply gap for solar cells, would lead to further increase in import of solar modules and the limited availability of solar cells in India will further weaken the position of Indian manufacturers of solar modules. The users of solar modules will prefer to import modules to avoid the burden of Safe Guard Duty on solar cells and this will lead to complete collapse of solar panel manufacturing in India.
- e. Any injury occurred to the domestic industry on account of the inability of the domestic industry to meet the demand cannot be used as a tool to seek Safe Guard Duty on a misleading claim of surge in imports.
- f. Petitioners could not establish causal link between the increase in imports and injury to the Domestic industry.

(vii) M/s REC Solar Pte Ltd

- a. REC Solar Pte Ltd has been the only Singaporean CSPV manufacturer of the PUC during the POI, and thereby grants exemption from any Safeguard measures any solar cells, whether or not assembled into modules or panels, manufactured in Singapore.
- b. The imports from REC Solar Pte Ltd (in such a case to be representative of Singapore) individually do not account for more than 3%.
- c. Throughout the period of investigation, REC Solar Pte Ltd's shipments to India have been less than 1.4% of total demand for PUC in India while the Domestic Industry supplied on average 10% of the total demand for PUC in India over the POI.

(viii) M/s China Chamber of Commerce for Imports and Exports of Machinery and Electronic Products

- a. DG did not wait for parties to submit their views within 30 days of initiation notice and in a hasty manner issued its Preliminary Findings within 18 days of the initiation of the investigation.
- b. SGD's can only be imposed after investigation. Without giving the interested parties an opportunity to present their view, investigation could not have been completed
- c. The entire proceedings in the instant investigation are vitiated as the same were carried out in violation of the Principles of Natural Justice. Wrong done at various stages of the investigation cannot be rectified now by any act of DG.
- d. There is a huge domestic demand which needs to be met in light of inability of the DI to do so. Imposition of SGD will increase the cost of production of PUC for the same reason positive findings on ADD were made but duty was not levied in public interest. Same reasons must operate here.
- e. India needs high quality imported PV products, especially from China, to meet revised targets under JNNSM.
- f. India needs a constant supply of PV Cells. SGD's would have adverse effect on downstream industries; healthy development of solar cell industry and rural electrification projects initiated by the Govt.
- g. It is normal that exports from China to EU and USA decline due to trade remedies. However, increase in exports from China to India has nothing to do with this issue. It is a free market where sales volume is market oriented. Signing ITA-1; GATT or Paris Agreement are of no consequence since it is the natural law of the market that increasing demand fuelled imports
- h. It is a trend that the price is declining; therefore the same can't be termed as unforeseen.
- i. Increase in imports is in tandem with increase in demand of Indian Industry
- j. the domestic industry thinks that the data cannot prove material injury suffered by the domestic industry, otherwise it would not have decided to request to terminate the anti-dumping investigation in the final stage.
- k. Data submitted by the domestic cannot even prove existence of material injury, then it can be easily inferred that serious injury will not be determined.
- l. there was no need of increasing the capacity every year by the applicant. Such inappropriate decisions of increasing the capacity every year might have caused injury to the applicants not the imports from subject countries
- m. There is no correlation between the landed price and net sales realization for the Domestic Industry.
- n. First the domestic producers must establish that there is increased imports and the Domestic producer needs time and plan to adjust themselves to meet the situation of competition offered by such increased imports
- o. the applicant's claim is inaccurate and misleading, as the differences between products manufactured from both technologies are significant in several aspects, such as raw materials, production processes, efficiency, flexibility and prices, etc

- p. CCCME as well as other interested parties have emphasized the negative influence of trade remedy measures on the public interests for several times in the written submissions and on the hearing for the anti-dumping investigation.
- q. The following should be removed from the PUC: (i) Solar cells using the “PERC” (Passivated Emitter Rear Cell) based technology; (ii) Thin films & Bi-facial N-type solar cells; (iii) High efficiency solar cells using 5 and 6 bus bar production terminology; and (iv) Solar modules of mono crystalline technology since Adjustment Plan states that DI will produce PERC type cells.
- r. Petitioner Helios Photo Voltaic Limited does not find mention in the list of MNRE dated 28 August 2017. The DGTR must clarify whether Helios is a producer of cells, modeules or both.
- s. standing of the Petitioners should be examined separately for solar cells and solar modules.
- t. it is requested that the Designated Authority should follow its established practice and examine standing of Petitioners for solar cells and solar modules separately.
- u. India stands to act directly contrary to its obligations under the AoS by imposing a safeguard duty without demonstrating that unforeseen developments exist in the present case.
- v. Increase in imports is only due to the demand-supply gap in India. Demand has been created by the Government of India under National Solar Mission and the domestic producers and exporters are enabling the nation to fulfil the commitments under the National Solar Mission.
- w. Neither the Petition nor the Preliminary Findings objectively identify the specific GATT obligation incurred by India that led to sudden, sharp, significant and recent increase in imports of the subject goods.
- x. None of the above identified GATT obligations led to recent, sudden, sharp and significant increase in imports of the subject goods in terms of Article XIX(1)(a) of GATT.
- y. There is no nexus between India’s ITA-1 commitment for the subject goods and the alleged recent and sudden increase in imports
- z. Production and sales of the domestic industry have increased by 253% and 305%, respectively during the injury period. This increase is significant.
- aa. The Indian industry can only satisfy 10-15% of the Indian demand. The remaining demand has to be met by imports to meet the target under the National Solar Mission.
- bb. Domestic industry’s selling price sharply declined in the export market from 100 indexed points in 2014-15 to 56 indexed points in 2017-18. Imports have nothing to with injury suffered
- cc. Injury to the domestic industry is entirely due to such reasons and not due to alleged dumped imports.
- dd. Real cause of injury to the domestic industry is aggressive pricing practices of other Indian producers and not imports.
- ee. Backward integration in this manner will only lead to higher cost in the next few years.

- ff. The Petitioners will not be able to adjust to imports if the adjustment plan requires incurring more cost rather than reduction of the same

(ix) M/s Vikram Solar Limited

- a. Solar Cells are the most basic unit of a solar PV system. A PV module consists of multiple PV cells connected in a series to provide higher voltage output. Modules are value added products that convert solar cells into a commercially useful commodity used for generation of electric power. In light of the limited domestic capacity for manufacture of solar cells, module manufacturers have to depend on imported cells.
- b. Safeguard duties imposed on solar cells will have the effect of the SEZ unit paying the duties for all its solar cell modules being removed from the DTA. Such a measure will lead to adverse impacts on SEZ units.
- c. There is a huge gap in the demand and supply of solar modules manufactured by domestic producers. Large fractions of domestic production is located in SEZ's and imposition of Safeguard duties would not only adversely affect such manufacturers but also make it impossible to attain the target of 100GW of solar power by 2022 as large parts of the 100GW target has to be catered through imports. This will lead to generation of power through conventional fuels such as coal and related environmental issues. Imposition of safeguard duties is therefore clearly against public interest, which is the guiding principle for imposing SGD.
- d. If SGD is imposed, DG must prescribe a Tariff Rate Quota (TRQ) of 5GW at nil rate of duty. TRQ would address most of the concerns of the stakeholders. It would cater to the demand-supply gap without any additional burden on the cost of production of solar power generation while giving relief to the domestic production facilities set up in the SEZ's and protecting the DTA producers by providing SGD on imports beyond the prescribed quotas under the TRQ regime.
- e. Government of India should grant specific exemption under section 25(1) of the Customs Act, 1962 from payment of SGD on solar modules removed from SEZ to DTA.

(x) M/s LNV Technology Limited

- a. Three of the complainants (Mundra, Websol and Helios Photo Voltaic) operate from SEZ's, supplies to and from which are exempt from imposition of any duties and taxes.
- b. All imports into SEZ are excluded from application of ADD and Safeguard duties. Since SEZ's are treated differently for import-exports, the same should not be clubbed with DI
- c. Increase in imports do not result in impact on units in SEZ. There is a no. of cases where the Authority has regarded SEZ to not be a part of DI. Resultantly, these three complainants cannot be considered to be a part of the domestic industry (DI) and the remaining complainants do not cross the threshold of 'collective output constituting a major share of total article in India', which results in such a standing requirement not being satisfied.
- d. the remedy of duty exemption to the extent of safeguard measure when the PUC is cleared by an SEZ into a domestic unit would be harmful at large to the DI itself.
- e. The determination on increase in imports does not evaluate all relevant factors on objective and quantifiable basis as specified by Rule 8 of Customs (Identification

- and Assessment of Safeguard Duty) Rules, 1997. This is especially the case when it comes to evaluating domestic demand and capacity
- f. With reference to the data provided, it has been argued that the domestic demand has increased 7 times between 2014-15 to 2017-18, whereas the capacity of DI has increased only 4 times. Assuming that DI worked at 70% capacity, the aggregate of domestic production and imports exceeded demand in 2014-15, 2015-16 and 2017-18 by 5%, 3% and 1% respectively, which can be explained due to exports by DI.
 - g. Many developers including LNV are contracted with PSUs to develop Solar Parks and such clauses have prices as all-inclusive with no flexibility for change even in imposition of such a duty.
 - h. Since Solar Panels constitute 60% of the cost, developers would not be in a position to clear imports and would lead to these projects reaching standstill. As a solution, the safeguard duty should be imposed only for imports involving future projects which have not been awarded.

(xi) Trina Solar (Vietnam) Science & Technology Co. Ltd.

- a. No provisional safeguard duty has been recommended against Vietnam as import of subject goods do not exceed 3% individually and 9% collectively when taken along with imports from other developing countries (other than China & Malaysia).
- b. In case the Designated Authority issues positive final findings, it is a request no definitive safeguard duty should be imposed on Vietnam in line with the recommendation in preliminary findings.

(xii) Trina Solar (Thailand) Science & Technology Co. Ltd.

- a. No provisional safeguard duty has been recommended against Thailand as import of subject goods do not exceed 3% individually and 9% collectively when taken along with imports from other developing countries (other than China & Malaysia).
- b. In case the Designated Authority issues positive final findings, it is a request no definitive safeguard duty should be imposed on Thailand in line with the recommendation in preliminary findings.

(xiii) Icon Solar-En Power Technologies Pvt. Ltd.

- a. A 95% SG duty as proposed by other parties however, would be detrimental to the growth of the Indian Solar Industry and would result in an oligopolistic cartel.
- b. Renewable energy targets of India can only be achieved by stabilization of costs.
- c. A significant portion of the manufactured modules are being utilized in the successful execution of schemes such as “Solar Pumps in Agriculture” and the “Saubhagya Home Lighting System” which directly relate to boosting the agricultural income and rural equitable growth.
- d. The revision of tariffs in PRC has resulted in plummeting prices, thereby affecting the DI seriously.

(xiv) Vibgyor Energy/Sunbeam Corporation

- a. Recent emergence of solar rooftop solutions as an alternative, which is also not in sync with the yearly additions required to meet target of 40 GW by 2022.

- b. Existence of regulatory ambiguities such as rate of GST on Solar Systems, constant scare of duties being imposed, poor net metering implementation have created an unsettling atmosphere for the players.
- c. Due to relatively recent emergence, most consumers have only now started shifting towards solar rooftop solutions. Most contracts for these have either been awarded or are in a late stage of negotiation. Companies do not have the capacity to factor in such a duty at this point of time.
- d. Imposition of the duty will endanger the fulfilment of these contracts, cause significant losses and would also deviate from the targets that the government wishes to achieve.
- e. The safeguard duty has no benefit since DI does not have the capacity to cater to their demands.
- f. Even if duty were to be imposed, a reasonable time period (of 6 months) should be considered before giving effect to the same. A reasonable and correctly timed duty levy will not hamper the economic adoption of solar in India.
- g. India must plan to create a “planned support mechanism” to increase capability of domestic manufacturers while avoiding collateral damage to ancillary service providers.

(xv) Solar Power Developers Association

- a. Interested parties were given 30 days to make their views known as per Initiation Notice but Preliminary findings were issued before we could make our views known.
- b. DA expressed displeasure as anti-dumping investigation was withdrawn at conclusive stage and on unconvincing grounds. As per Para 18 and 21 of ADD Termination Order, the DI is bound to undergo change in injury suffered during course of investigation and if petitions start getting withdrawn on this basis then it will lead to a chaotic situation.
- c. DA possesses the data from the ADD investigation and ongoing safeguard petition and the investigation period overlaps, the DA can compare the two data sets to examine whether the safeguard petition has any merit.
- d. The recommendation of 70% provisional safeguard duty on 5 January 2018 indeed led to a chaotic situation. Many solar tenders by India’s state government have failed to attract good responses from bidders because of the uncertainty on the duties.
- e. To fulfil solar Mission target of 80GW by 2022 in Phase III, there must be average annual installation of 20GW per year. The preset domestic manufacturing capacity of solar cells (3164 MW/year) and solar modules (8398 MW/year) is clearly insufficient to meet the target.
- f. DISCOMS who are ultimate purchasers of solar power have clearly indicated that they would purchase solar power only if the cost is under INR 3 per kWh. In the light of impending safeguard duties, it will not be feasible for the developers to offer tariff which is under INR 3 per kWh thereby making it commercially unviable to participate in bids and projects and offer such low tariffs

Even if definitive safeguard duty is in range of 12-15 cents per watt which is equivalent to INR 8-11 per watt depending on exchange rate, it will lead to increase in tariff by 80 paisa to INR 1.30 per kWh, thereby increasing the tariff up

to a range of about Rs. 4 per kWh. At this rate solar power would become uncompetitive and developers would also abandon ongoing projects. Enclosed reports establishing that solar power tariff are below INR 3 per kWh and have achieved grid parity.

- g. Disturbing solar power grid parity would adversely affect both developers and end customers. Petitioner's calculation that modest duty of 20 cents would increase power tariff by 70 paise per watt is incorrect. A duty in range of 12 – 15 cents would significantly increase tariff as demonstrated above.
- h. Number of power purchase agreements has been entered into between project developers and DISCOMS with capacity of 9000 MW and 18000 MW is also tendered out for allocation. Imports required for such projects are yet to commence or under shipment and imposition of safeguard duty will impact these imports thereby increasing the power tariffs.
- i. Imposition of safeguard will be counterproductive and will have adverse effect on NSM since increase in tariffs will never be absorbed by state DISCOMs.
- j. In April 2018, the MNRE issued clarification on the clause w.r.t "Change in Law" in the bidding norms for solar projects whereby duties and cess have been included in the said clause. Even if the safeguard duty to be considered as the pass-through, the same is yet to be tested and established under the regulatory process. It is to be noted, No off-taker is going to bear the impact under the pass through mechanism and same would have an adverse effect on entire solar industry. The process of pass through is also very uncertain, long and complex and does not provide any assurance of protecting the ongoing projects, if the duty is imposed. With current average tariffs INR 2.75/Kwh, these tariffs are likely to be hit by 35-40% if the duty is imposed and would not attract any DISCOM to come forward and sign power sale agreements above INR 3. Entire mission will fail by killing the solar industry, interdependent MSMEs, jobs, and banks with loan defaults.
- k. Safeguard duty will put more than INR 1,00,000 crore worth of solar power projects under jeopardy, since our members have already committed to ongoing projects of about 27 GW.
- l. Due to uncertainty over safeguard, there has already been a hike of around 20-25% in tariffs in recent bids in Karnataka and Maharashtra. Our analysis indicates tariff for future solar power projects could rise substantially by more than 40% to nearly INR 4 per unit instead of INR 2.98 per unit recently discovered in bids conducted by Gujrat Urja Vikas Nigam Ltd and INR 2.71 per unit discovered in bids conducted by Maharashtra State Electricity Distribution Company Limited. These hikes will adversely affect end consumer.
- m. DI is weak in terms of scale, technology and lack of investments in technology up-gradation resulting in to low efficiency of solar cells and modules produced in India. DI is restricted to mere assembly of solar cells into modules which is last stage in entire value chain. Dependency on importing silicon Ingots, wafers, and cells from China would continue to keep India's manufacturing uncompetitive from other Asian giants in solar manufacturing.
- n. GOI may consider providing DI other incentives such as low interest loans. Imposition of safeguard may not be best option considering its spill over impact on project developers and end consumers who will have to pay higher tariffs.
- o. Following products should be excluded from the product scope-

- (i) Solar cells using PERC technology.
 - (ii) Thin films & Bi facial N type solar cells
 - (iii) High efficiency solar cells using 5 and 6 bus bar production terminology; and
 - (iv) Solar modules of mono crystalline technology
- p. Petitioner has admitted in petition that they can't manufacture thin film solar cells and modules. Further they have claimed in adjustment plan that they will be manufacturing PERC based cells. Thus, admittedly, petitioner cannot presently manufacture these cells. We are aware and it is common knowledge that petitioner cannot manufacture solar cells using 5 and 6 bus bar production terminology and on mono-crystalline technology. As DI cannot manufacture these articles, they should be excluded from product scope immediately.
- q. The petitioner companies do not have adequate standing to be considered as DI in present case in terms of article 4.1(c) of the Agreement on Safeguards read with section 8B(6)(b) of Customs Tariff Act, 1975.
- r. Standing of petitioners should be examined separately for solar cells and solar modules without considering the data for Helios PV Ltd as their data is not available with MNRE. The total installed capacity of petitioners for solar modules is mere 15% of total Indian production capacity. Thus, petitioners do not have standing as DI in solar modules. Further, the combined capacity of cells and modules is 26.5% in total installed capacity of India. Therefore, standing as DI for both cells and modules is not present.
- s. Data of total Indian production in Petition is incorrect because it fails to consider production of other producers in its entirety as the Petitioners claim that all the other producers are importers of subject goods. This claim is unsubstantiated and thus, lacks merit. Data of MNRE should be considered for examining standing of DI in this case.
- t. This investigation covers two articles, namely, Solar cells and solar modules. While assessing the standing of DI, DGTR is requested to exclude those solar cells and modules manufacturers that had imported solar cells and modules respectively during the injury period.
- u. When two products are subject to same investigation, DA follows consistent practice of examining the standing of DI separately. This has been done in following investigations:
- (i) Penicillin-G Potassium and 6-APA imports from China PR and Mexico. Final findings issued vide Notification No. 14/19/2009-DGAD dated 20 January 2011.
 - (ii) Front Axle Beams and Steering Knuckles imports from China PR Final findings issued vide Notification No. 14/19/2008-DGAD dated 5 March 2010.
- v. Further petitioners located in SEZ should be excluded from standing as their primary goal is to cater to the export market. In final findings of DG Safeguards dated 27 September 2012 in Electrical Insulators case, WSI Industries (located in SEZ) was excluded from the scope of the domestic industry. Once the SEZ units are excluded the remaining petitioners would be miniscule (a few hundred MW) in comparison to annual demand in India.
- w. Pursuant to obligation under article XIX(1)(a) of GATT, India may not impose safeguard duty unless it can be demonstrated to the satisfaction of DA that increased imports and consequential injury arise a result of unforeseen developments and of the effect of obligations incurred by India under the GATT.

- x. As per WTO Appellate Body in DS 98 Korea – Dairy, petitioners have to show how certain developments were unforeseen to the negotiators when India incurred obligations under the GATT, which led to the increase of imports of the subject goods during the investigation period. If petitioners fail to explain the same, the burden still lies on the DA to carry out the above analysis. Failure to do so would render the subject investigation liable to be terminated.
- y. Developments identified by the Petitioners are not unforeseen within the meaning of Article XIX (1) (a) of GATT. The rapid expansion in capacity, production and exports in China is a result of rise in demand for renewable energy in India. The petitioners have failed to explain how expansion in capacity, production and export orientation of producers in China led to recent, sudden, sharp and significant increase in imports during investigation period. Demand for subject goods has been created by Government of India under NSM. This is the sole reason that led to increase in imports.
- z. Petitioners have failed to demonstrate how imposition of trade remedy measures on China led to diversion of China's export to Indian market. Exporters cannot just decide on a given day that they will divert their exports to India because the EU and the USA have been blocked. If the state government or public bodies do not float any tender, no party can supply the subject goods, and thus, imports of the subject goods from any source would not happen.
- aa. The contention that India's commitment under Paris Agreement is unforeseen is comical. India ratified the United Nations Framework Convention on Climate Change (UNFCCC) in November 1993, much before joining the WTO. Under this India signed two protocols, namely, Kyoto Protocol in 2002, and Paris Agreement in 2016. At the time of joining WTO, India was aware of its commitments under UNFCCC.
- bb. There is no recent, sudden, sharp and significant increase in imports that meets the requirement under Article XIX: (1) (a) of GATT. The last time imports of subject goods witnessed a sudden surge was in 2015-16 that saw imports increase by 228%. After that imports increased by a mere 52% in 2016-17 and only 49% in 2017-18 annualised. Increase is due to demand supply gap created by GOI under NSM.
- cc. The Petition does not identify any obligation incurred by India including tariff concessions for the subject goods under GATT that resulted in sudden surge in imports.
- dd. The petition and Preliminary findings identify two alleged obligations that India incurred, namely, commitment under ITA-1 that led to elimination of custom duty and India honouring the WTO ruling in DS456- India – Solar Cells. None of the above obligations led to recent, sudden, sharp and significant increase in imports due to firstly, import duty became zero in 2005. But the petition and preliminary finding fails to identify that how this GATT obligation that came into effect more than 12 years ago, led to recent, sudden, sharp and significant increase in imports, during the injury period. Imports did not significantly increase for many years after 2005. Imports increased after GOI launched NSM. The only reason behind increase in imports of the subject goods is that India had created demand for the subject goods by floating more tenders and inviting bids. Second, the petition and preliminary findings present no data to demonstrate that as soon as DCR were removed from the tenders, imports of the subject goods suddenly increased. Without any data, the Petitioners contention is purely academic. MNRE plans to continue to support the Indian industry by applying DCR under CPSU scheme, which is also WTO compliant.

- ee. The Petitioners had not suffered any serious injury with reference to Section 8B(6)(c) of the Act and Rule 8 read with Annexure of Safeguard Rules as Imports increased by only 49% in most recent period when compared to 2016-17. There is huge demand in India and DI is capacity is mere 15% of the total demand. Production and sales of DI have increased by 253% and 305% respectively during injury period. Capacity utilisation of DI has increased from 60% in 2014-15 to 78% in 2016-17.
- ff. Mundra began production in 2017 that led to increase in installed capacity and production in 2017-18(A). This demonstrates that DI is performing well and is ready to invest to cope up with growing demand. The decline in capacity utilisation is only temporary and will improve with the stabilisation of production over time.
- gg. Productivity per day and per employee increased manifold during injury period. Wages in absolute terms and per KW increased during injury period, which led to decline in profits and could be the reason for injury. Other reasons include increase in installed capacity, interest cost and depreciation cost.
- hh. The cost of sales and selling price declined from 100 indexed points in 2014-15 to 84 indexed points each in 2017-18(A). The DI selling price is in line with cost of sales. There is no price suppression. Had imports exerted any pressure on DI, the selling price would have been much lower. Hence, there is no price depression. DI selling price in export market declined from 100 indexed points in 2014-15 to 56 indexed points in 2017-18(A). This is the reason for injury.
- ii. Indosolar's performance has improved significantly in FY 2016-17. Its revenues sharply jumped to Rs. 44,231.09 Lakhs in FY 2016-17, its losses decreased by Rs. 8,322.91 lakhs in the same period. This is significant improvement in a period during which Indosolar has claimed injury due to imports in the petition. Clearly, Indosolar's injury claim is not supported by its own data. Further, Indosolar has projected better performance during the FY 2017-18 in its Annual Report 2016-17 as it expects the Government to adopt certain favourable policies.
- jj. Websol's financial situation significantly improved during FY 2016-17. In fact, from a loss of Rs. 647.48 lakhs in FY 2015 – 16, Websol incurred huge profit of Rs. 8,594.36 lakhs during FY 2016-17. It has also settled its Working capital and term loans. Websol expanded its cell capacity from 100 to 200MW and intends to expand its cell line capacity to 280-300 MW and Module line Capacity to 300 MW from 100 MW. In view of such strong financials, we fail to understand how Websol claims injury due to imports of the subject goods.
- kk. In FY 2016 -17, Jupiter Solar registered profits of Rs 3,999 lakhs. This is exceptional performance by the company.
- ll. Mundra started its production about a year ago in 2017. When new manufacturing facility is set up, it takes a long time to achieve break even. Further, the initial period also involves high interest and depreciation cost which is the possible reason of injury.
- mm. Helios PV Ltd. was undergoing corporate debt restructuring for a long period and has accumulated very high liabilities in the balance sheet. This is the reason for losses to this company.
- nn. Causal Link is absent because decline in profitability in 2015-16 and 2017-18(A) directly coincides with sudden increase in installed capacity, net fixed assets and interest cost during the period. Injury to DI is caused due to decline in selling prices in export market. Injury to DI is also due to the fact that it still uses obsolete technology. In an article published in the Hindu Business Line on 19 December 2017, the MNRE stated that 'the cell/module manufacturing capacity in the country is obsolete'. The petitioner ISMA and Indosolar have admitted that Indian

Manufacturers could not invest in technology up gradation as there was no visibility of market.

- oo. The real cause of injury to the DI is aggressive pricing practices by other Indian producers and not imports. In this regard, the DA is requested to refer to the news articles enclosed, which stated that Indian producers such as Adani Green Energy, Bharat Heavy Electricals, Tata power Solar and Central Electronics have together sold 300 MW solar panels to Energy Efficiency Services (EESL) at a record low price of 30 cents/Kwh capacity (Rs 2.63/Kwh), which is cheaper than the rate of good quality Chinese solar panels. This demonstrates that price war between the Petitioners and other Indian producers are the real cause of injury to DI and not the alleged imports of the subject goods.
- pp. As a requirement, the DI has to provide an adjustment plan in the petition to demonstrate how they plan to adjust during the tenure of the safeguard measure. The petitioners have claimed confidentiality on their individual adjustment plans which makes it difficult to make any meaningful comments. Further, the NCV of petition provides only the vague information on the adjustment plan. The Petitioners are requested to clarify in written submissions their plans on the structural adjustments that each petitioner endeavours to undertake in terms of Article 7.1 of the AoS read with proviso to Rule 11(3) of the Safeguard Rules.
- qq. However, based on available information in the Petition, the Petitioner claims that they will achieve economies of scale by backward integration, viz., establishing plants for manufacturing wafers and ingots. However, this manner will lead to higher cost in next few years than reduction of the same to adjust to imports. Such an adjustment plan is, therefore, not feasible and practical.
- rr. Imports which occur as a result of recent bids, signed LOIs or power purchase agreements of roughly 9000MW that have been signed prior to levy of safeguard duty be exempt from scope of duty.
- ss. MNRE has proposed to have an additional CPSU scheme of 12000 MW, which would have an assured DCR component. This will allow the DI an assured market. Therefore there is no future threat of serious injury also to the domestic industry.
- tt. The DI at full capacity could meet only 10% of the Indian demand for solar power during 2017-18(A). The remaining could only be met by imports.
- uu. The share of imports in period under examination grew from 86% to 90% of the total domestic consumption – which can hardly be called a massive growth.
- vv. There is no serious injury and causal link as DI's EBITDA margins at 16% for the period under investigation are roughly 60% higher than EBITDA margins for top global manufacturers. This indicates that high interest burdens due to higher capex/ interest costs are to blame and not imports.
- ww. The Petitioners do not comprise 51% of Domestic Industry for a majority of the control period as per MNRE data. Further, if domestic industry excludes SEZ units as has been held in DG Safeguards investigations in 2016 and 2012, then the petitioners are much lesser than the needed 51%.
- xx. Imports only increased due to Government of India's vision to promote this renewable source of energy and not due to unforeseen developments of imposition of trade measures by EU and US or loss of protective ambit of DCR or India's obligation under ITA-1. The Government was well aware that Indian manufacturers could only cater to only less than 10% of the demand in India. Had the Government not created the demand, the imports would not have happened. Rather, the NSM envisages participation of domestic and global players so that the best and most advanced solar cells and modules fulfil the Mission of 175 GW solar power grid connectivity by 2022. The Ld. DG has found that the DI is

- suffering losses. In contrast, the DI's data for the same period reflects profits in the ongoing anti dumping investigation. There is a serious mismatch. Further, there are discrepancies in the information provided to DG (Safeguards) (Utilisation fell from 78% to 51%) in their statements in their own annual reports.
- yy. The DI could paint a picture of losses because of addition of M/s Mundra solar PV Limited in the safeguard petition. This petitioner has setup a new manufacturing facility and with new facility comes high interest and depreciation cost. Injury to this company is not because of imports but high interest and depreciation cost.
 - zz. The 3 DIs have reported revenue at a CAGR of 18.2% since FY 2015 and average EBITDA margin has improved from 9.4% in 2016 to 22.3% in 2017.
 - aaa. The data for Helios PV Pvt Ltd (formerly Moser Baer) should be excluded as the company is engaged in manufacturing of various products including CDs, investment in power and has been making losses since 2008. The company was undergoing corporate debt restructuring for a long time and has very high liabilities in the balance sheet, therefore their data cannot be considered.
 - bbb. It is evident that cell manufacturer enjoy much higher profit margin at operating level which is an indicator of whether or not imports are causing injury to DI. There losses are due to high capital cost per MW, high interest cost and management inefficiencies.
 - ccc. Domestic Industry constitutes operational capacity of 56% of total cell capacity with significant instalments completed in the year 2017. During the year 2016 the DIs constitutes operational cell capacity of 49.7%.
 - ddd. Further, solar manufacturing should include both cell and module manufacturing. In 2017, DI constituted 56% for total cell manufacturing capacity of India whereas it constituted only 2.6% of total module manufacturing capacity of India for period ending 31st May 2017.
 - eee. Further, in December 2017, the MNRE has made a statement that installed capacity of Indian Manufacturers is obsolete and it proposes an investment of INR 11,000 Crores by way of Govt. assistance.
 - fff. The Ld. DG's conclusion that serious injury would occur if provisional safeguard duty is not imposed is incorrect. The MNRE plans to continue DCR support through CPSU scheme of 12,000 MW. Therefore, there are no critical circumstances.
 - ggg. DG (Safeguards) have previously ruled (2016 & 2012) that SEZ units cannot be considered as DI.
 - hhh. SEZ units should be treated as outside India as held in case of imposition of safeguard duty in April 2016 on imports of "Unwrought Aluminium (Aluminium not alloyed and Aluminium alloys)".

(xvi) M/s Avaada Ltd.

- a. Interested parties were given 30 days to make their views known as per Initiation Notice but Preliminary findings were issued before we could make our views known.
- b. DA expressed displeasure as anti-dumping investigation was withdrawn at conclusive stage and on unconvincing grounds. As per Para 18 and 21 of ADD Termination Order, the DI is bound to undergo change in injury suffered during course of investigation and if petitions start getting withdrawn on this basis then it will lead to a chaotic situation.

- c. DA possesses the data from the ADD investigation and ongoing safeguard petition and the investigation period overlaps, the DA can compare the two data sets to examine whether the safeguard petition has any merit.
- d. The recommendation of 70% provisional safeguard duty on 5 January 2018 indeed led to a chaotic situation. Many solar tenders by India's state government have failed to attract good responses from bidders because of the uncertainty on the duties.
- e. To fulfil solar Mission target of 80GW by 2022 in Phase III, there must be average annual installation of 20GW per year. The present domestic manufacturing capacity of solar cells (3164 MW/year) and solar modules (8398 MW/year) is clearly insufficient to meet the target.
- f. DISCOMS who are ultimate purchasers of solar power have clearly indicated that they would purchase solar power only if the cost is under INR 3 per kWh. In the light of impending safeguard duties, it will not be feasible for the developers to offer tariff which is under INR 3 per kWh thereby making it commercially unviable to participate in bids and projects and offer such low tariffs. Even if definitive safeguard duty is in range of 12-15 cents per watt which is equivalent to INR 8-11 per watt depending on exchange rate, it will lead to increase in tariff by 80 paise to INR 1.30 per kWh, thereby increasing the tariff up to a range of about Rs. 4 per kWh. At this rate solar power would become uncompetitive and developers would also abandon ongoing projects. Enclosed reports establishing that solar power tariff are below INR 3 per kWh and have achieved grid parity.
- g. Disturbing solar power grid parity would adversely affect both developers and end customers. Petitioner's calculation that modest duty of 20 cents would increase power tariff by 70 paise per watt is incorrect. A duty in range of 12 – 15 cents would significantly increase tariff as demonstrated above.
- h. Number of power purchase agreements has been entered into between project developers and DISCOMS with capacity of 9000 MW and 18000 MW is also tendered out for allocation. Imports required for such projects are yet to commence or under shipment and imposition of safeguard duty will impact these imports thereby increasing the power tariffs.
- i. Imposition of safeguard will be counterproductive and will have adverse effect on NSM since increase in tariffs will never be absorbed by state DISCOMs.
- j. In April 2018, the MNRE issued clarification on the clause w.r.t "Change in Law" in the bidding norms for solar projects whereby duties and cess have been included in the said clause. Even if the safeguard duty to be considered as the pass-through, the same is yet to be tested and established under the regulatory process. It is to be noted, No off-taker is going to bear the impact under the pass through mechanism and same would have an adverse effect on entire solar industry. The process of pass through is also very uncertain, long and complex and does not provide any assurance of protecting the ongoing projects, if the duty is imposed. With current average tariffs INR 2.75/Kwh, these tariffs are likely to be hit by 35-40% if the duty imposed and would not attract any DISCOM to come forward and sign power sale agreements above INR 3. Entire mission will fail by killing the solar industry, interdependent MSMEs, jobs, and banks with loan defaults.
- k. Safeguard duty will put more than INR 1,00,000 crore worth of solar power projects under jeopardy, since our members have already committed to ongoing projects of about 27 GW.

- l. Due to uncertainty over safeguard, there has already been a hike of around 20-25% in tariffs in recent bids in Karnataka and Maharashtra. Our analysis indicates tariff for future solar power projects could rise substantially by more than 40% to nearly INR 4 per unit instead of INR 2.98 per unit recently discovered in bids conducted by Gujrat Urja Vikas Nigam Ltd and INR 2.71 per unit discovered in bids conducted by Maharashtra State Electricity Distribution Company Limited. These hikes will adversely affect end consumer.
- m. DI is weak in terms of scale, technology and lack of investments in technology up-gradation resulting in to low efficiency of solar cells and modules produced in India. DI is restricted to mere assembly of solar cells into modules which is last stage in entire value chain. Dependency on importing silicon Ingots, wafers, and cells from china would continue to keep India's manufacturing uncompetitive from other Asian giants in solar manufacturing.
- n. GOI may consider providing DI other incentives such as low interest loans. Imposition of safeguard may not be best option considering its spill over impact on project developers and end consumers who will have to pay higher tariffs.
- o. Following products should be excluded from the product scope-
 - (v) Solar cells using PERC technology.
 - (vi) Thin films & Bi facial N type solar cells
 - (vii) High efficiency solar cells using 5 and 6 bus bar production terminology; and
 - (viii) Solar modules of mono crystalline technology
- p. Petitioner has admitted in petition that they can't manufacture thin film solar cells and modules. Further they have claimed in adjustment plan that they will be manufacturing PERC based cells. Thus, admittedly, petitioner cannot presently manufacture these cells. We are aware and it is common knowledge that petitioner cannot manufacture solar cells using 5 and 6 bus bar production terminology and on mono-crystalline technology. As DI cannot manufacture these articles, they should be excluded from product scope immediately.
- q. The petitioner companies do not have adequate standing to be considered as DI in present case in terms of article 4.1(c) of the Agreement on Safeguards read with section 8B(6)(b) of Customs Tariff Act, 1975.
- r. Standing of petitioners should be examined separately for solar cells and solar modules without considering the data for Helios PV Ltd as their data is not available with MNRE. The total installed capacity of petitioners for solar modules is mere 15% of total Indian production capacity. Thus, petitioners do not have standing as DI in solar modules. Further, the combined capacity of cells and modules is 26.5% in total installed capacity of India. Therefore, standing as DI for both cells and modules is not present.
- s. Data of total Indian production in Petition is incorrect because it fails to consider production of other producers in its entirety as the Petitioners claim that all the other producers are importers of subject goods. This claim is unsubstantiated and thus, lacks merit. Data of MNRE should be considered for examining standing of DI in this case.
- t. This investigation covers two articles, namely, Solar cells and solar modules. While assessing the standing of DI, DGTR is requested to exclude those solar cells and modules manufacturers that had imported solar cells and modules respectively during the injury period.

- u. When two products are subject to same investigation, DA follows consistent practice of examining the standing of DI separately. This has been done in following investigations:
 - (iii) Penicillin-G Potassium and 6-APA imports from China PR and Mexico. Final findings issued vide Notification No. 14/19/2009-DGAD dated 20 January 2011.
 - (iv) Front Axle Beams and Steering Knuckles imports from China PR Final findings issued vide Notification No. 14/19/2008-DGAD dated 5 March 2010.
- v. Further petitioners located in SEZ should be excluded from standing as their primary goal is to cater to the export market. In final findings of DG Safeguards dated 27 September 2012 in Electrical Insulators case, WSI Industries (located in SEZ) was excluded from the scope of the domestic industry. Once the SEZ units are excluded the remaining petitioners would be miniscule (a few hundred MW) in comparison to annual demand in India.
- w. Pursuant to obligation under article XIX(1)(a) of GATT, India may not impose safeguard duty unless it can be demonstrated to the satisfaction of DA that increased imports and consequential injury arise a result of unforeseen developments and of the effect of obligations incurred by India under the GATT.
- x. As per WTO Appellate Body in DS 98 Korea – Dairy, petitioners have to show how certain developments were unforeseen to the negotiators when India incurred obligations under the GATT, which led to the increase of imports of the subject goods during the investigation period. If petitioners fail to explain the same, the burden still lies on the DA to carry out the above analysis. Failure to do so would render the subject investigation liable to be terminated.
- y. Developments identified by the Petitioners are not unforeseen within the meaning of Article XIX (1) (a) of GATT. The rapid expansion in capacity, production and exports in China is a result of rise in demand for renewable energy in India. The petitioners have failed to explain how expansion in capacity, production and export orientation of producers in China led to recent, sudden, sharp and significant increase in imports during investigation period. Demand for subject goods has been created by Government of India under NSM. This is the sole reason that led to increase in imports.
- z. Petitioners have failed to demonstrate how imposition of trade remedy measures on China led to diversion of China's export to Indian market. Exporters cannot just decide on a given day that they will divert their exports to India because the EU and the USA have been blocked. If the state government or public bodies do not float any tender, no party can supply the subject goods, and thus, imports of the subject goods from any source would not happen.
- aa. The contention that India's commitment under Paris Agreement is unforeseen is comical. India ratified the United Nations Framework Convention on Climate Change (UNFCCC) in November 1993, much before joining the WTO. Under this India signed two protocols, namely, Kyoto Protocol in 2002, and Paris Agreement in 2016. At the time of joining WTO, India was aware of its commitments under UNFCCC.
- bb. There is no recent, sudden, sharp and significant increase in imports that meets the requirement under Article XIX: (1) (a) of GATT. The last time imports of subject goods witnessed a sudden surge was in 2015-16 that saw imports increase by 228%. After that imports increased by a mere 52% in 2016-17 and only 49% in 2017-18 annualised. Increase is due to demand supply gap created by GOI under NSM.

- cc. The Petition does not identify any obligation incurred by India including tariff concessions for the subject goods under GATT that resulted in sudden surge in imports.
- dd. The petition and Preliminary findings identify two alleged obligations that India incurred, namely, commitment under ITA-1 that led to elimination of custom duty and India honouring the WTO ruling in DS456- India – Solar Cells. None of the above obligations led to recent, sudden, sharp and significant increase in imports due to firstly, import duty became zero in 2005. But the petition and preliminary finding fails to identify that how this GATT obligation that came into effect more than 12 years ago, led to recent, sudden, sharp and significant increase in imports, during the injury period. Imports did not significantly increase for many years after 2005. Imports increased after GOI launched NSM. The only reason behind increase in imports of the subject goods is that India had created demand for the subject goods by floating more tenders and inviting bids. Second, the petition and preliminary findings present no data to demonstrate that as soon as DCR were removed from the tenders, imports of the subject goods suddenly increased. Without any data, the Petitioners contention is purely academic. MNRE plans to continue support the Indian industry by applying DCR under CPSU scheme, which is also WTO compliant.
- ee. The Petitioners had not suffered any serious injury with reference to Section 8B(6)(c) of the Act and Rule 8 read with Annexure of Safeguard Rules as Imports increased by only 49% in most recent period when compared to 2016-17. There is huge demand in India and DI capacity is mere 15% of the total demand. Production and sales of DI have increased by 253% and 305% respectively during injury period. Capacity utilisation of DI has increased from 60% in 2014-15 to 78% in 2016-17.
- ff. Mundra began production in 2017 that led to increase in installed capacity and production in 2017-18(A). This demonstrates that DI is performing well and is ready to invest to cope up with growing demand. The decline in capacity utilisation is only temporary and will improve with the stabilisation of production over time.
- gg. Productivity per day and per employee increased manifold during injury period. Wages in absolute terms and per KW increased during injury period, which led to decline in profits and could be the reason for injury. Other reasons include increase in installed capacity, interest cost and depreciation cost.
- hh. The cost of sales and selling price declined from 100 indexed points in 2014-15 to 84 indexed points each in 2017-18(A). The DI selling price is in line with cost of sales. There is no price suppression. Had imports exerted any pressure on DI, the selling price would have been much lower. Hence, there is no price depression. DI selling price in export market declined from 100 indexed points in 2014-15 to 56 indexed points in 2017-18(A). This is the reason for injury.
- ii. Indosolar's performance has improved significantly in FY 2016-17. Its revenues sharply jumped to Rs. 44,231.09 Lakhs in FY 2016-17, its losses decreased by Rs. 8,322.91 lakhs in the same period. This is significant improvement in a period during which Indosolar has claimed injury due to imports in the petition. Clearly, Indosolar's injury claim is not supported by its own data. Further, Indosolar has projected better performance during the FY 2017-18 in its Annual Report 2016-17 as it expects the Government to adopt certain favourable policies.
- jj. Websol's financial situation significantly improved during FY 2016-17. In fact, from a loss of Rs. 647.48 lakhs in FY 2015 – 16, Websol incurred huge profit of Rs. 8,594.36 lakhs during FY 2016-17. It has also settled its Working capital and term loans. Websol expanded its cell capacity from 100 to 200MW and intends to

- expand its cell line capacity to 280-300 MW and Module line Capacity to 300 MW from 100 MW. In view of such strong financials, we fail to understand how Websol claims injury due to imports of the subject goods.
- kk. In FY 2016 -17, Jupiter Solar registered profits of Rs 3,999 lakhs. This is exceptional performance by the company.
 - ll. Mundra started its production about a year ago in 2017. When new manufacturing facility is set up, it takes a long time to achieve break even. Further, the initial period also involves high interest and depreciation cost which is the possible reason of injury.
 - mm. Helios PV Ltd. was undergoing corporate debt restructuring for a long period and has accumulated very high liabilities in the balance sheet. This is the reason for losses to this company.
 - nn. Causal Link is absent because decline in profitability in 2015-16 and 2017-18(A) directly coincides with sudden increase in installed capacity, net fixed assets and interest cost during the period. Injury to DI is caused due to decline in selling prices in export market. Injury to DI is also due to the fact that it still uses obsolete technology. In an article published in the Hindu Business Line on 19 December 2017, the MNRE stated that 'the cell/module manufacturing capacity in the country is obsolete'. The petitioner ISMA and Indosolar have admitted that Indian Manufacturers could not invest in technology up gradation as there was no visibility of market.
 - oo. The real cause of injury to the DI is aggressive pricing practices by other Indian producers and not imports. In this regard, the DA is requested to refer to the news articles enclosed, which stated that Indian producers such as Adani Green Energy, Bharat Heavy Electricals, Tata power Solar and Central Electronics have together sold 300 MW solar panels to Energy Efficiency Services (EESL) at a record low price of 30 cents/Kwh capacity (Rs 2.63/Kwh), which is cheaper than the rate of good quality Chinese solar panels. This demonstrates that price war between the Petitioners and other Indian producers are the real cause of injury to DI and not the alleged imports of the subject goods.
 - pp. As a requirement, the DI has to provide an adjustment plan in the petition to demonstrate how they plan to adjust during the tenure of the safeguard measure. The petitioners have claimed confidentiality on their individual adjustment plans which makes it difficult to make any meaningful comments. Further, the NCV of petition provides only the vague information on the adjustment plan. The Petitioners are requested to clarify in written submissions their plans on the structural adjustments that each petitioner endeavours to undertake in terms of Article 7.1 of the AoS read with proviso to Rule 11(3) of the Safeguard Rules.
 - qq. However, based on available information in the Petition, the Petitioner claims that they will achieve economies of scale by backward integration, viz., establishing plants for manufacturing wafers and ingots. However, this manner will lead to higher cost in next few years than reduction of the same to adjust to imports. Such an adjustment plan is, therefore, not feasible and practical.
 - rr. Imports which occur as a result of recent bids, signed LOIs or power purchase agreements of roughly 9000MW that have been signed prior to levy of safeguard duty be exempt from scope of duty.
 - ss. MNRE has proposed to have an additional CPSU scheme of 12000 MW, which would have an assured DCR component. This will allow the DI an assured market. Therefore there is no future threat of serious injury also to the domestic industry.
 - tt. The DI at full capacity could meet only 10% of the Indian demand for solar power during 2017-18(A). The remaining could only be met by imports.

(xvii) M/s ACME

- a. Domestic manufacturing capabilities of solar PV modules are very low only around 10% of the total requirement. The DI at full capacity could meet only 105 of the Indian demand for solar power during 2017-18(A). The remaining could only be met by imports. As a result, the Solar Power Developers predominantly rely on imports for the purpose of sourcing the solar PV modules and solar cells.
- b. Ministry of Communications and Information Technology notified policy for M-SIPS to encourage investments in Electronics System Design and Manufacturing ("**ESDM**") sector. Financial incentives in terms of 25% of capex (20% for SEZ units) and reimbursement of excise/CVD on capital equipment were made available to units engaged in the design and manufacturing of solar PV cells and modules.
- c. The National Policy on Electronics notified on 19th November, 2012 observes the steep demand supply gap prevailing in the electronic market and, accordingly, has set out various objectives that are *inter alia* aimed at building manufacturing capacity of solar PVs to support the generation of 20GW of solar power by 2020. Various incentives in terms of infrastructure, loans and tax benefits were made available to the ESDM sector.
- d. Despite continuous incentives given by the Government since 2012, the domestic manufacturers have failed to increase its production or capacity. Till the end of FY 2016-17, total installed capacity built up by domestic manufacturers of solar cells and PV modules was a meagre 573 MW against a demand of 7,157 MW. since the JNNSM was announced by the Government of India and despite granting both fiscal and other incentives, domestic manufacturers failed to install and manufacture capacities required for catering to the huge requirement of solar cells and PV modules. domestic manufacturers were fully aware of the vision under the JNNSM to achieve 100 GW by 2022. DI already enjoying several incentives from the Government to enable them to improve their performance such as Modified Special Incentive Package Scheme (**M-SIPS**) and the Domestic Content Requirement (**DCR**).
- e. The Government also notified the Solar Photovoltaics, Systems, Devices and Components Goods (Requirements for Compulsory Registration) order, 2017 dated August 30, 2017 effectively ensuring that solar cells and modules being imported into India conform to Specified Standard and bear the Standard Mark. this Order effectively ensured that no poor-quality products are imported into India. However, the domestic industry was not capable enough to maximise the opportunities made available to it and no steps were taken by them to meet the upcoming demands and to become competitive. The existing obsolescence of domestic technology is an admitted fact. Entire thrust of Government's policy is to update the domestic industry with technology and make it competitive in the international market.
- f. MNRE has devised a program in pursuance of WTO guidelines, wherein central public-sector undertakings shall install 12 GW of solar PV modules manufactured by DI under government procurements.
- g. AD in earlier investigation was not imposed since strong opposition was received from MNRE as JNNSM would not be met and therefore, ISMA withdrew their petition.

- h. ISMA withdrew 2017 AD petition because it was unable to demonstrate the dumping of PUC to the extent of the levels claimed in their petition and the investigation would not lead to the intended outcome.
- i. Data submitted with petition does not match MNRE data wherein installed capacity in India is states to be 11562 MW and as such, Domestic Industry constitutes only 7.5% of it.
- j. Data of imports taken from multiple sources which lead to differences and less reliable. Therefore, the Application relying upon data sourced from various places becomes vague and erroneous.
- k. 3 of the petitioners are based in SEZs and therefore, cannot claim to be DI in view of earlier DG Safeguards finding in Unwrought Aluminium.
- l. Mundra Solar cannot be part of DI because it was established only 6 months before the application filed by ISMA. Mundra cannot claim injury on account of increased import of PUC without effectively competing in the domestic space. At best, the claim by Mundra is a pre-emption of injury which cannot be a basis for initiating investigation concerning safeguard duty.
- m. Gradual increase in demand matched with increase in imports and proportional to the increase in demand meeting the supply demand gap. Therefore, not sudden, significant, unexpected [and] rapid.
- n. No injury to the Domestic Industry as installed capacity increased by 1000 MW and production of PUC by DI also increased. Despite rapid expansion in demand, sales and share of the DI has more or less remained constant in recent years.
- o. Applicants are increasing their capacity every year despite having huge unutilized capacities. production facilities of the DI were under- utilised during the entire POI and the capacity utilisation declined significantly. They were not operating at optimum level because of which they still have 49% unutilized capacity utilization. capacity utilization decreased due to its inappropriate decision of increasing the capacity.
- p. There was a proportionate increase in market share of the domestic sales.
- q. Production of DI increased from 473 MW to 838 MW and the imports increased from 6375 MW to 9334 MW. Therefore, it cannot be held that only imports have increased in the POI
- r. No serious injury. Safeguard findings of FSP relied upon where it was found that 1.) as imports increased along with the domestic production and consumption and 2.) loss to DI due to non-appropriating of the cost of production and sales of PUC on proportional basis to other products and not on account of imports.
- s. No causal link because the loss to domestic industry, if any, is due to idle production capacity and investment made in unplanned increase in installed capacity and not being able to utilise their capacity fully.
- t. Losses claimed by the Applicants are false and misleading. The balance sheet of two of the Applicants who were operational during the POI viz. Jupiter solar and Websol. The status of the said Applicants have been summarized in a table where it can be seen that revenue earned by both Applicants in 2017 are higher than 2016. Jupiter Solar earned Rs.287 crore in 2017 in contrast to Rs. 213 Cr. Websol earned Rs. 296 Cr in 2017 in contrast of Rs.279 Cr. Noticeable profits in their margin and equity portion in the past 2 years, which is clearly contrary to findings. Annual reports tendered as exhibits.
- u. As per annual reports, Indosolar show either decline in losses or high profitability. Another Applicant, Helios was undergoing corporate debt

- restructuring for a long time and has very high liabilities in the balance sheet which is the reason for losses shown by it.
- v. Exemption granted by India to ITA-1 products pursuant to signing the ITA-1 did not cause increased imports. The increase in imports was owing to increased demand by domestic solar power developers for setting up solar power projects which is on account of Indian Government's policy to promote solar power generation. Thus, no nexus between India's obligations under ITA-1 in 1996 and increased imports of PUC in 2015 -16 and as such, nexus and causal link attempted by ISMA to link two separate events is without any basis. With launch of NSM, the solar power sector saw emergence of new players and increased investment in the sector with the view to meet the target solar production, which was subsequently increased to 100 GW to be achieved by 2022. Hence, the demand for solar panels/modules increased and became huge. The expected future demand devised certain schemes viz. MSIP and DCR, but domestic industry was not capable enough to capture the opportunity and no steps were taken by them to meet the upcoming demand while China, noticed the emerging market of PUC in India and it started increasing its industries with a view to export the PUC in India.
 - w. Domestic Industry was never prepared to cater to increasing demand of solar modules & panels to fulfill Government's commitment for 100GW by 2022. This forced Solar Power Developers to import the modules & panels to fulfill this steeply rising demand.
 - x. While China was already exporting the PUC to India, the protective measure on the PUC imported from China into the EU and USA were imposed in 2015. Therefore, it will be incorrect to state that the actions/policies occurred after almost two decades from the year of signing the agreement i.e. from 1996 were due to the obligation of India on becoming the signatory in 1996.
 - y. ISMA has contended that India's obligation under GATT & ("ITA-1") led to the reduction of customs duty of PUC to nil vide Customs Notification No. 24/2005- Cus. dated 01st March, 2005. This contention of **ISMA** is wrong and without any basis. Object of ITA-I was to achieve free movement of Information Technology Products without any tariff barrier. Therefore, there is no nexus between the ITA-1 and PUC.
 - z. One-page statement filed by DI cannot be termed as Adjustment Plan unless same is duly supported by technical details on how these will make DI more competitive. Bald claims cannot be termed as adjustment plan. Being "emergency" actions against "fair trade", safeguard measures are typically temporary import restraints to allow some "breathing time" to DI for adapting to a new market situation through appropriate restructuring. Therefore, Applicant should have provided detailed Adjustment Plan.
 - aa. Demand of the PUC in India is higher than the capacity of the DI whereby there is bound to be a demand-supply gap.
 - bb. Various distribution utilities (DISCOMS) who are sole purchasers of solar power have indicated their willingness to buy sizeable quantity of solar power at lowest possible tariff around Rs.2.50 per unit. Solar power at this tariff is lower than variable cost of coal and gas based thermal power plants. Thus integrating large quantity of solar power would actually help reduce mounting losses and also support commitments to rapidly electrify rural areas. A recent industry research also highlights that at a tariff of Rs.3.0 per unit solar power, India would be able to set up only 30 GW of solar plant but at Rs.2.50 per unit it would be possible to achieve the target of 100 GW easily. Further, in the event of tariff getting reduced to Rs.

- 2/unit, there would be a demand for nearly 200 GW of solar power by various utilities, Railways and other bulk consumers. Levy of SGD would ultimately impact solar power generation and render tariffs expensive to the consumers and therefore, impact the economy. Depending on amount of DC to AC loading at a plant, tariff would increase from Rs.2.44/kWh to Rs.3.13/kWh if safeguard duty is levied @25% and to Rs.3.25/kWh if safeguard duty is levied @30% thereby resulting in a considerable increase in tariff. It will ultimately impact the cost of power to the public at large and thus will jeopardise the public interest.
- cc. India has formulated various plans, mission, policies due at National as well as International level, due to which the surge in demand of PUC arose.

ACME Writ Petition filed in Delhi High Court

- dd. A Writ petition was filed by ACME before the Delhi High Court seeking an order to quash the notice of initiation and preliminary findings issued by the DG Safeguards. The issues raised in this Writ petition is to be considered as submissions in the present investigation.
- ee. ACME has contended that the current domestic manufacturing capability of solar PV modules is around 10% of the total requirement. In respect of the Power Purchase Agreements (PPA) signed by the Respondents and DISCOMS, SPD's have already placed orders for import of solar cells and PV modules.
- ff. Domestic Industry withdrew from the AD investigation because it was unable to demonstrate dumping of PUC to the extent of levels claimed by it.
- gg. DG Safeguards directed interested parties to make views known respect of application filed by the ISMA within a period of 30 days from the date of notice. However, without awaiting the views of the interested parties, the DG Safeguards unilaterally passed the public notice giving preliminary findings to impose a provisional safeguard duty of 70% on imports of PUC which has violated the principles of natural justice. Opportunity to make representation ought to have been provided before issuing preliminary findings.
- hh. Safeguard duty, whether provisional/final, should be levied prospectively i.e. in respect of imports made pursuant to PPAs signed after the date when the safeguard duty whether provisional/final is notified. Levying of safeguard duty in respect of PPAs already executed will adversely impact the cash flow to these projects rendering them unviable.
- ii. The DG Safeguards has erred in initiating the investigation and recommending the levy of duty as it is in contravention of Section 8B read with the Safeguard rules as three out of the 5 applicants are units located in SEZs and therefore, cannot form a part of the DI as held by the DG Safeguards in previous cases. On exclusion of the 3 applicants from the definition of DI, the application will not be maintainable.
- jj. Mundra Solar has no standing as Domestic Industry as it was established only in May 2017 i.e. 6 months before filing of the application. Therefore, it is yet to compete in the PUC market in India and cannot claim injury without effectively competing in the domestic space.
- kk. In the absence of a complaint filed by the Domestic Industry, the DG Safeguards does not have jurisdiction to initiate investigation and has assumed jurisdiction which never vested in it.
- ll. The DG Safeguards has initiated the investigation without examining the accuracy and adequacy of documents/information provided by the applicants. The DG Safeguards has solely relied upon data submitted by the applicants in respect of the PUC wherein it says their collective output of PUC is 381 MW in comparison to

the total production of 544MW and as such, held that the applicants constitute more than 50% of the total production. Data provided by applicants is incorrect because respondents have not indicated the source of their information, neither any independent source of data for the above particulars. The applicants have relied upon a list of 23 manufacturers wherein 8 of them are in the SEZ. Information regarding production has no independent basis and authentic source. The official data of the Govt. reveals that aggregate operational capacity of the DI on 31.05.2017 was 7173 MW and therefore, data provided by the applicants is erroneous.

- mm. The applicants constitute a mere 10.5% of production capacity which is lesser than their claim of 72% in 2016-2017.
- nn. There is no unforeseen circumstance arising out of the commitment to the Paris Agreement or the National Solar Mission as the Ministry of New & Renewable Energy in their Annual Report Solar 2016-17 acknowledged that the mission targeted included deployment of 20,000 MW of grid connected solar power by 2022. The DI was never prepared to cater to the increasing demand of solar modules and panels due to the government's commitment for 100GW by 2022. This forced solar power developers to import modules and panels to fulfil rising demand.
- oo. Applicants have to show how the unforeseen developments were unforeseeable when India incurred the obligations under GATT.
- pp. Safeguard measures are a type of measure taken as a part of emergency actions and no emergent situation has arisen which warrants invocation of the measure. The Government's policy measures and the Domestic Industry's failure to cater to the huge demand by executing projects awarded by the Government has led to increased imports.
- qq. The object of ITA-1 is to achieve free movement of IT products without any tariff barrier and there is no nexus between India signing the ITA-1 and increased imports of PUC in India.
- rr. Increase in imports is not due to excess capacity of China or protective measures by the US/EU, it is due to the Govt.'s policy to encourage solar power development.
- ss. The Respondent should not have invoked emergency provisions because they have already conceptualised a plan to revamp the domestic solar industry through a dedicated scheme for providing financial support of INR 11,000 Crore to the domestic manufacturers through capital and production subsidies; installation of 12GW of solar PV modules manufactured by the DI under govt. procurement.
- tt. The DI is making noticeable profits in their margin and equity portion in the past 2 years which is contradictory to their claims of incurring significant losses as per the balance sheet obtained from the Registrar of Companies. Mundra Solar being a new facility should not be included in determining the profitability/loss of the DI as being a new facility would mean high cost of interest and depreciation which would have an adverse impact on the profitability during the initial years of operation.
- uu. Position of three petitioners have improved in the injury period in contrast to two petitioners who faced losses due to intrinsic problems such as a new manufacturing facility, restructuring and obsolete technology. Therefore, an increase in imports has not led to injuries.
- vv. The DG Safeguards has taken a one sided view as it has overlooked the fact that developers generate huge employment opportunities, especially in rural areas where the projects are being set up.

- ww. No critical circumstances have been established by the DG Safeguards to levy provisional duty.
- xx. The applicants in the petition have admitted that imposition of safeguard duty would lead to an increase in power tariffs but the respondents in their preliminary findings have not considered this.
- yy. Safeguard measure has to be restricted to temporary withdrawal or modification of the exemption from BCD provided to PUC. Respondent under the garb of safeguard duty cannot levy AD duty.
- zz. High provisional safeguard duty will render the existing projects unviable and would affect the National Solar Mission adversely. Any increase in the cost of import of solar cells and modules will have a direct and material impact on the entire solar power development industry in India as domestic solar generation is dependent on imports because the DI is not growing at the same pace as the solar generation industry.
- aaa. Basis of determination of provisional duty on the method disclosed is arbitrary and vague and not in line with the requirements of Article XIX of GATT.
- bbb. Depending on amount of DC to AC loading at a plant, tariff would increase from Rs. 2.44/kWh to Rs. 4.54/kWh if safeguard duty is levied at 70% resulting in considerable increase in tariff corresponding to the rate at which safeguard duty is levied.
- ccc. The change in law clause in the PPA may cover levy of safeguard duty, however filing a petition before the Central Commission and to ascertain the revised tariff is a long drawn process and delay in getting tariff revised will adversely impact the business. Because of this projects would fail to take off and banks will be reluctant to infuse funds in light of the uncertainty over the levy of safeguard duty.

(xviii) M/s Canadian Solar Ltd.

- a. Solar cells and modules are not like product in view of definition of 'Like Article' in WTO Anti-Dumping disputes of Korea-Certain Paper (WT/DS312) and EC-Fasteners WT/DS397/R).
- b. Solar cells are inputs for modules. Therefore, a solar cell is not commercially substitutable with a module and they are different in terms of end-use/ applications. A single solar cell cannot typically generate electricity which can be used for any commercial application. A module made up of several solar cells can be used for commercial applications due to higher amount of electricity generation. Therefore, solar cells/modules are different from perspective of end-user.
- c. Process of assembling cells into modules is technical & sophisticated process requiring value addition of up to 35% of cost of cells. LV of solar cells ranges from INR 13.71 to 18.59 whereas LV of modules is 24.19 to 36.58. one is an upstream product to the other.
- d. Petitioners may not have suffered injury on modules (data in AD investigation shows no price undercutting on modules). If imports of modules are compared to injury parameters of modules, this would become readily evident. By combining data, Petitioners have obscured the analysis and added modules into scope of duty.
- e. Domestic Industry is not representative of 'major share' of production in India in view of MNRE data on solar cell and module manufacturers as on 28th August, 2017.
- f. Separate analysis of cells and modules will have an impact on standing of DI. No data provided about percentage share of production split between solar cells and modules of DI Companies (as against the total production of solar cells and modules).

- g. 5 DI Companies would constitute only 3.25% of the domestic production of modules. In PF, DG has not examined standing of 5 DI Companies with respect to modules and instead, assessed their standing by taking solar cells and modules together.
- h. 3 are in SEZs and Indosolar is 100% EOU. SEZ or EOU units focus is on export market and do not compete primarily in domestic market whereas purpose of safeguard law is to protect the Domestic Industry from import competition in domestic market. Therefore, EOU and SEZ may form DI only to the extent of their entitlement permitted under the extant laws.
- i. DG Safeguards must follow its earlier determination in unwrought aluminium.
- j. In parallel AD investigation, price undercutting for solar modules during POI (1 April 2016 to 30 June 2017) for subject countries was negative. In present case, the same is very high. Therefore, false simulation in this case.
- k. There is only one year in injury analysis period where price has not moved in tandem with cost of sales i.e. 2015-16. In all other years, Petitioners have been able to price their goods in line with how their costs have moved and therefore, undercutting has not suppressed their prices.
- l. PF established causal link between imports and serious injury on account of price undercutting which has been shown to be wrong above and hence, breaks the causal link.
- m. Petitioners admitted that performance has seen decline due to withdrawal of DCR. This reflects a clear breach of the causal link requirement.
- n. Serious injury, if any, suffered by DI is on account of start-up cost of Mundra Solar PV Ltd. Capacity utilization declined on account of capacity addition of 1.2GW set up by Mudra Solar PV Ltd and not on account of imports.
- o. The tariff prices of solar energy generated out of PV modules have seen a steep decline in India since 2010. India's solar power tariffs fell to a new low of INR 2.44 per unit during the auction of a 250-megawatt (MW) capacity plant at Bhadla in Rajasthan. This is one of the lowest prices offered globally. When compared to the rates of 2010, this indicates a decrease in tariffs of nearly 86%.
- p. This tariff war led to squeezing the margins of domestic solar cells and modules manufacturers. The steep decline in tariff was, in part, result of decline in international price of solar modules. For Petitioners to compete in this market, they needed to drop its prices in line with the lower bid made by the solar power developers and declining international prices. The fall in net sales realization or the revenue of the Petitioners due to the aggressive competition in the downstream industry i.e. solar power developers cannot be and must not be attributed to imports of the PUC.
- q. According to one report by Mercom India, a leading clean energy and consulting firm, while solar installations in India have increased, tender and auction activity have been slowing down over the last couple of quarters. According to the Mercom India Solar Project Tracker, approximately 1.9 GW of solar projects was tendered in the first quarter of 2017 compared to 3.4 GW in last quarter of 2016. The decrease in auction activity can be attributed to factors such as weak financial condition of DISCOM, inefficient transmission, less power demand and increase in captive generation by commercial and industrial companies, and the WTO ruling against India's DCR in its renewable energy policy.
- r. Additionally, the recent record low bid of INR 3.30/kWh at REWA Solar Park Auction has resulted in decrease in auction activity since government agencies are stalling to renegotiate PPAs that are more expensive than bids received at REWA.

- s. Solar Energy Corporation of India and NTPC have set a maximum capacity for a single bidder at 1800 MW and 2000MW. This is being protested by leading developers in the solar market. This is causing hurdles to other domestic producers in the solar market from successfully participating in solar projects.
- t. Annual Reports state reasons for injury to petitioners which are not inclusive of imports.
- u. Indosolar in “Statement of Audited Financial for the Quarter and Year ended on 31 March 2018” reported exceptional items losses on account of impairment of plant and machinery under installation during end of 2017.
- v. Helios reported in its Standalone Financial Statement for January 2015 to March 2016 that the operations of the company were affected due to stoppage of work for a period of 34 days due to workers. Helios, in their Standalone Financial Statement for April 2016 to March 2017 stated that liquidity constraints faced by the company have critically impacted their ability to enhance their manufacturing operations and capacity utilization levels. Further, Helios has stated that the volatility in DCR orders and delay in disbursement of subsidies has impacted its manufacturing operations. Helios vide Standalone Financial Statement for April 2016 to March 2017 at page 8 reported its concern of inability to be cost effective due to lack of consistent demand because of intermittent release of tenders. Websol in Financial Statement (Notes to Accounts) March 2018 stated that there was no full production for quarter ending March 2018.
- w. Indosolar Limited at page 16 of the Annual Report 2014-15 has stated that capacities were unutilized due to the industry downturn and resultant fall in demand.
- x. Unforeseen developments should be the effect of the obligations incurred by a Member under the GATT. it must be explained as to why the developments in question were unforeseeable and how they led to an increase in imports.
- y. Expansion in capacities cannot be an unforeseen development as held in unwrought aluminium. China’s export orientation and change in direction towards India also cannot be an unforeseen development.
- z. Events qualifying as ‘unforeseen’ must have been unexpected when the concession was negotiated. At the time of negotiation of Marrakesh agreement, contracting parties also negotiated agreements pertaining to anti-dumping, anti-subsidy and safeguard. Since parties knew that every Members State has right to adopt trade remedy measures when the circumstances arise, adoption of these measures by other members cannot be ‘unexpected’ at the time when concessions were negotiated.
- aa. All investigations by EU & US were initiated *well before any alleged surge in imports* so could not have caused the surge in imports.
- bb. PF notes that WTO ruling in DS 456 against India was an unforeseen development. inconsistency with WTO law cannot be considered as “unforeseen”. By stating in PF that “India truly believed that its DCR under JNNSM was consistent with the exception contained in Article XX of GATT 1994”, WTO’s removal of DCR cannot be termed “unforeseeable”. WTO rules were ratified by India in 1994. therefore, it was foreseeable that violation of WTO would result in DCR being removed.
- cc. Commitments by India on enhancing solar capacity under Paris Agreement cannot be considered as unforeseen as it is nothing but an extension of India’s commitments under the “UNFCCC” which India ratified on 1 November 1993. Therefore, India was always committed to reduce its carbon emissions and was fully aware of its commitments at the time when WTO concessions were negotiated.
- dd. Petitioners plan to cut costs by taking measures like ramping up capacity utilization, reduction of financing cost, reduction of raw material cost etc. These adjustment

- plans have no commercial basis as this is either not in their control or not commercially feasible.
- ee. For example, cost of raw material is not in their control. No whisper of evidence that input suppliers would renegotiate their prices. Petitioners plan to reduce financing cost by converting Rupee borrowings into USD borrowings without explaining how they plan to convert Rupee loans to USD loans and what would be the basis and commercial terms of such conversion. Adjustment plan does not even find a mention in the PF. This is a clear indication of non-application of mind by DG while issuing PF.
 - ff. Government has recently been contemplating to benchmark the rates for solar projects. However, few experts have noted that such benchmarking could affect the players in the solar market as benchmarking has come at a time when the players in the market are unsure about the costs on solar power.
 - gg. Experts have also noted that if the Director General of Safeguard's recommended duty of 70% were to be implemented, it could increase the costs of solar power to almost 3 Rupees/unit. While the provisional recommendation was never levied, the core principle remains the same even for a final finding recommendation. In public interest, the DG Safeguards should not recommend any safeguard duties on the PUC and terminate the investigation as the ultimate impact would be on the users of the PUC in the solar market due to imposition of duties.
 - hh. Present investigation is currently proceeding on the basis of outdated data, which does not appear to have been updated. As background, it may be noted that it is established practice in safeguard investigations to examine the most recently available data for both imports and injury.
 - ii. Since six months have passed from the initiation of investigation, the data for the year 2017-18 is now available for both imports as well as injury. However, the Petitioners do not seem to have brought any recent data on record.
 - jj. The Domestic Industry in the Anti-dumping investigation had actually alluded to the grave injury suffered by it in the period following the period of investigation. In this behalf, it is interesting to note that the period of investigation and injury period in both investigations remains largely common, with the only three months differentiating the two investigation periods.
 - kk. The Exporters submit must have an opportunity to file further submissions as and when the updated data becomes available. The DG Safeguards should refer to letter dated 21st June 2018 filed by the Exporters pursuant to DGTR letter dated 18th June, 2018 wherein the Exporters have questioned the Designated Authority's requirement of filing the Written Submissions prior to the public hearing and have reserved their right to file further submissions in the event new and recent data is made available
 - ll. 3 Petitioning Companies, who were also in parallel AD investigation, admitted that injury to DI was on account of *dumped imports* for POI April 2016 to June 2017 (which also nearly covers POI in present investigation). Consequently, injury suffered by DI cannot be now attributed to surge in imports to justify a safeguard investigation. Petitioners are engaging in forum shopping and therefore, DG should terminate investigation as injury is due to dumped imports which fall under ambit of AD laws and not Safeguard.
 - mm. Further, the Annexure to the Safeguard Rules states that – if there are factors other than increased imports that are causing injury to the Domestic Industry, such factors “shall” not be attributed to the increased imports.
 - nn. DA in parallel AD investigation found no merit in the grounds raised by Indian producers.

- oo. Since DA found no merit in DI's reasons for withdrawal for POI covering 1 April 16 to June 17 of AD investigation, it is unlikely that the DG Safeguards will find "serious" injury when POI is 14-15 to 17-18.

(xix) M/s Renew Solar Power Private Limited

- a. Units located in the SEZ cannot be considered as part of the Domestic Industry under section 8(6)(b)(ii) of the Customs Tariff Act. The data given by petitioners does not in any manner provide a correct and realistic picture of the entire domestic manufacturing industry and hence, cannot be relied upon to establish injury of the Domestic Industry.
- b. Developers and Co-developer units in the SEZ's are given various exemptions and concessions under the SEZ Act, 2005 in the form of tax and fiscal benefits with a view to increase exports and therefore operate in a different sphere.
- c. Units located in the SEZ are export oriented and not set up for meeting the domestic demand.
- d. It is due to competitive and better technology of imports that the applicants are not able to create a domestic demand for their products in the domestic market.
- e. Applicants have failed to establish that circumstances claimed as unforeseen were actually so, and that there was a causal link between such circumstances and an increase in the imports.
- f. Applicants' rationale for linking the increased imports to the increased capacity of China is completely illogical, flawed and reeks of malafide intention to cover its own shortcomings. As increase in the imports was on account of the National Solar Mission, the same cannot be related to increased production capacity of China.
- g. China's domestic solar policy was the reason for consistent investments in technology which resulted in increased production capacity, efficiencies and economies of scale. Increase in capacity requires a minimum gestation period of 3 years and the same cannot be termed as an unforeseen development.
- h. No country would increase its capacity for the sole purpose of exporting to India. Data submitted by the applicants themselves show that most of the increase in capacity is for domestic consumption within China and not for the purpose of Exports.
- i. Withdrawal of DCR is not an unforeseen development that led to increase in imports as the same was in operation for most of the POI. Applicants have themselves admitted that the effects of the unforeseen development were not visible till the DCR's presence. Even the removal of the DCR has not put the domestic industry in a disadvantageous position on account of various government schemes.
- j. Installed production capacity of the domestic industry is not enough to cater to domestic demand as even its full utilization would only lead to satisfying 9.12% of the domestic demand which is the root cause for the imports.
- k. Data of the POI relating to production capacity to establish injury cannot be relied upon as large proportion of the Applicant's production data is on account of the 1200 MW plant set up by Mundra Solar PV Limited which has not started production line till May, 2017 and hence, hasn't achieved full utilization.
- l. Underutilization of the DI is on account of seasonal tenders issued by the Government. There is no constant demand throughout the year as a result of which at time of sudden demand of modules close to the commissioning of the Projects, the domestic industry is unable to meet the demand due to the constraints of limited production capacity every month.
- m. Technology used by the DI is inferior to efficient technology used by global manufacturers. Maximum annual capacity of the only applicant having superior

technology, Mundra Solar PV Limited, is only 1200 MW and the domestic industry would be constrained to import modules equipped with superior technology from outside India.

- n. Solar Power Developers are responsible for generation of considerable employment within India with every 1MW of solar power giving direct employment to at least 2 persons. Imposition of SGD would lead to drastic reduction in employment generated by the industry due to setting up of new projects becoming financially unviable.
- o. Imposition of safeguard duties would be detrimental to the growth of the industry as it would lead to increase tariffs by Rs. 3.95-4.05 per unit.
- p. DI has not been able to establish whether the injury, if any, is on account of dumping by certain countries or due to increased imports. The Applicants clearly believed that injury was suffered on account of dumping by the subject countries as is evident from the application made for antidumping investigations, therefore they cannot now claim injury due to increased imports.
- q. SGD is against public interest as imposition of the duties would lead to a situation where solar power would become high and unaffordable by the public. Any such trade measure would severely hamper the ability of the government to honour international commitments as well as achieving the target of 100 GW by 2020.

(xx) M/s Cleanmax Ltd.

- a. There is a history of trade remedy investigations against the PUC. DGAD had recommended ADD on imports of this product from China, Malaysia and Taiwan in 2014. However, GOI did not implement the duty in light of its mission to power every home in rural and urban India with solar power. Cleanmax is working hard to fulfil this mission.
- b. SGD will distort the entire solar market in India. Existing PPAs will be in jeopardy – as Discoms will contest / litigate attempts by Developers to pass on tariff hikes. Solar power tariffs will shoot up, foreclosing developers from quoting fair prices in prospective tenders. DISCOMS will lose interest in purchasing from solar power developers and may shift to conventional source of power. The NSSM target by 2022 will never see fruition.
- c. The share of imports in period under examination grew from 86% to 90% of the total domestic consumption – which can hardly be called a massive growth.
- d. There is no serious injury to domestic industry and even if so, there is no link of trade to woes of domestic manufacturers. The DI's EBITDA margins at 16% for the period under investigation are roughly 60% higher than EBITDA margins for top 10 global manufacturers. This indicates that high interest burdens due to higher capex/ interest costs are to blame – and not imports.
- e. The petitioners to DG, Safeguards do not comprise 51% of domestic industry for a majority of the control period as per MNRE data (vs. DG Safeguards assertion that DI is 96% of industry). Further, if domestic industry excludes SEZ units, then the petitioners are much lesser than the needed 51% share.
- f. The DG Safeguards finding that China diverted its exports to India because of trade remedy measures by the EU and US, that imports increased as India could no longer provide the protective ambit of DCR to the domestic industry which led to the increase in imports and that imports also increased because India reduced the customs duty to zero on solar cells and modules under the ITA-1 is wrong. Imports increased because of GOI's vision to promote solar energy. GOI was aware that Indian manufacturers could only cater to less than 10% of the demand. However,

- the Government could foresee that imports would be able to fill this demand-supply gap. This is the sole reason behind imports of this product. Imports from China and other countries happened only to fill this demand-supply gap. Therefore, such imports are not a result of any unforeseen developments.
- g. The domestic industry could paint a picture of losses because of the addition of M/s Mundra Solar PV Limited. Mundra set up a new manufacturing facility and began commercial production in 2017. With new facilities came high interest cost and depreciation which had a detrimental impact on profitability. Injury to this company is not because of imports but because of high interest cost and depreciation cost.
 - h. Helios Photo voltaic Pvt. Ltd. (formerly Moser Baer), a Company engaged in manufacturing of various products including CDs, has been making losses from the year 2008. The Company was undergoing corporate debt restructuring for a long time and has very high liabilities in the balance sheet.
 - i. Indian cell manufacturer enjoy much higher profit margin at operating level which is an indicator of whether or not imports are causing injury to DI. Their losses are factors of high capital cost per MW, high interest cost and management inefficiencies.
 - j. Based on data from MNRE, Domestic Industry has operational capacity of 933 MWs which is 56% of the total cell capacity with significant instalments completed in the year 2017. During the year 2016 the DIs constitute operational capacity of 49.7%.
 - k. Definition of Solar Manufacturing should include both Cell and Module manufacturing. While in the year 2017, DIs constitute 56% in cell manufacturing of the total Cell Capacity in India, DI constitute only 2.6% in the module manufacturing for the period ending 31st May 2017.
 - l. In December 2017, MNRE made a statement that installed capacity of Indian manufacturers is obsolete and it proposes an investment of INR 11,000 Crores by way of Govt. assistance.
 - m. MNRE has proposed to have an additional CPSU scheme of 12,000 MW which would have an assured DCR component. This will allow the domestic industry an assured market.
 - n. DG Safeguards has previously ruled that SEZ units cannot be considered as DI.
 - o. The domestic industry is injured because of obsolete technology and not imports

(xxi) M/s Taiwan Photovoltaic Industry Association

- a. No justification has been offered by the DG for imposing provisional duties at 70% ad valorem. Justifications required to be provided in terms of Rule 11(2) of the SGD Rules, 1997 have not been given by the DG to show how such an amount is adequate to prevent or remedy serious injury and to facilitate positive adjustment.
- b. Preliminary findings have been issued in violation of principles of Natural justice as initiation notification had been issued on December 19, 2017 giving 30 days' time to the Interested Parties to make their views known on the investigation while the Preliminary Findings were issued on January 5, 2018 before the completion of such period, without giving an opportunity hearing to the Interested Parties.
- c. Provisional safeguard measures cannot be imposed without an evaluation of critical circumstances. The DG has only narrated the circumstances which according to it has caused injury without citing any evidence in support of the Preliminary Findings. Imposition of such duty, in absence of any cogent evidence of such

- ‘critical situation’ or critical state of DI is violative of Article 6 of the Safeguards Agreement and Rule 9 of Safeguard Duty Rules.
- d. C-si and Thin Film cells are not like articles and the DG’s determination of the two as the same product is a result of blindly following the Domestic Industry’s application. Recording of such findings in the Preliminary Findings show complete misapplication of the DG’s mind and is a violation of principles of natural justice.
 - e. C-si and Thin Film cells are different products on account of difference in raw materials used, manufacturing process, conversion efficiency, output and other capabilities, which affect relative prices, limit interchangeability and also limit any overlap in channels of distribution.
 - f. C-si cells have a higher module conversion efficiency than thin film on account of different manufacturing processes. The two cells are also not commercially interchangeable. DI does not constitute majority of the producers of the PUC and therefore, in terms of requirement of Section 8B of the Customs Tariff, the petition is not maintainable
 - g. On the basis of the installed and operational capacity for manufacture as specified in the report, it has been contended that production by DI is a mere 26.41% as a whole for the industry
 - h. the claim that the Applicants satisfy the definition of DI was accepted without verifying accuracy and adequacy of evidence, and thus the initiation of the present investigation should be set aside.
 - i. The standing of DI is vitiated as Mundra, Websol and Helios Photo Voltaic cannot be treated as a domestic industry since 3 out of 5 are based in SEZ and thus cannot be treated as DI.
 - j. As a result of such exclusion, the installed capacity and other economic data with respect to Mundra and Helios are to be excluded (specifically Mundra’s 2400 MW installed capacity), which would render the contribution of DI in production of PUC to a mere 5.73% and would effectively disqualify remaining applicants as DI.
 - k. With inclusion of Mundra, Websol and Helios, in case they sell their products in DTA, the products would be subject to Safeguards Duty thus making their products uncompetitive in the domestic market. To avoid the same, the applicants as a part of well-conceived plan first got their SEZ units included as a part of DI and thereafter requested for their exclusion from imposition of safeguard duty. This uncovers the mala fide intent of the Applicant to offer protection to DI and exclude competition arising out of Solar Cell imports, which are more efficient and is a reason why it is preferred by buyers in India
 - l. Existence of unforeseen developments under domestic safeguard laws is an essential and primary condition for initiating investigations for levy of Safeguards Duty as contemplated under Article XIX of GATT.
 - m. PRC’s domestic consumption of Solar Cells is far more than exports. In solar modules, while exports exceeded domestic consumption in 2014, by 2016 domestic consumption had surpassed exports. Thus allegation on excessive production and capacity of PRC being an unforeseen development is unfounded
 - n. USA challenged DCR requirements before the WTO Appellate Body. Eventual withdrawal of DCR was not unforeseen since it fell foul of National Treatment obligations under GATT and there was always a possibility that the same could be challenged at WTO. Eventually, DCR had also lost its utility to domestic manufacturers who were losing out to imports due to a number of factors. Eventually, the Panel Report relating to India-Solar Cells matter referred to the fact

- that DCR affects a relatively small amount of production. Hence it was not an unforeseeable development
- o. The Paris Agreement was not an unforeseeable event but rather a culmination of agreements and developments that had been underway from 1992 (when enacted) and 1994 (when it came into force) which attempted to deal with environmental issues and specifically climate change. Accordingly, the same cannot be considered to be unforeseen.
 - p. In light of the Preamble of ITA-1, it can be inferred that it was not unforeseen by the GoI at the time of granting concession under ITA-1 that certain developments may arise to encourage continued technological development of IT industry on a world-wide basis. Moreover, the Applicants have failed to demonstrate as a matter of fact how imports of the PUC being made free under ITA-1 has led to unexpected increase in imports only during the POI, when India became a signatory to ITA-1 in 1997 and tariffs were eliminated by 2000. Thus obligations arising under ITA-1 could not be termed as an unforeseen development.
 - q. The contention of the Applicants that the import of the PUC increased by 732% in the course of 2014-15 to 2017-18 relying upon the data mentioned under Annexure 9 of the application has been questioned. On perusal of data given by Annexure 1.3 of the Anti-Dumping Investigation Petition filed by ISMA, it is claimed that different figures of import are given, which proves the fact that evidence provided by the applicant is doctored.
 - r. The actual import value of PUC is INR 505,000 lakhs in 2014-15, 1.55 mn lakhs in 2015-16, 2.14 mn lakhs in 2016-17 and 2.47 mn lakhs in 2017-18. (Para 5.8.17) Import data of PUC also establishes that percentage of increase in imports on a year to year basis has actually declined by 27.98%. As a result, increase in import is not such that it would cause serious injury to DI such that it would require imposition of Safeguard Duty.
 - s. The DI has maximum production, maximum sales, maximum capacity utilization and has been undertaking capacity expansion during the entire POI. As cannot be said to be in the position of significant overall impairment in the present case. Further, no serious injury is demonstrated through financials of DI in any of these factors
 - t. Due to increasing market share of the DI, along with the facilitator role of the imports establish that no serious injury is being caused to the DI.
 - u. in determination of cost of solar module 50-60% cost is of solar cells which means that decrease in cost of solar cells is directly proportional to cost of solar module. From an analysis above data of sales realisation of domestic producers, it can be inferred that price of solar cells is decreasing whereas price of solar modules is increasing, which is contrary to logic because effect of decline in solar cell price should be more significant on module price.
 - v. Employment in DI increased by 450% (by around 2600 employees) from 2014-15 to 2017-18. Exclusion of Mundra Solar employees was bad in law, and if such were the case then they should have been withdrawn from the scope of DI altogether. On perusal of the data, even if Mundra Solar's employees are excluded from the purview, there would still be a rise in no. of employees by about 27.1%. reliance is placed on financial statements of the Applicants to establish that 3 out of 5 Applicants were running in profit. The profitability of Mundra was irrelevant since it became operational only in May, 2017 and therefore, have detrimental impact on profitability due to high cost of interest and depreciation initially.

- w. In the absence of missing causal link, without considering and evaluating other relevant factors in the investigation, serious injury cannot be determined within scope of Rule 8 of the Safeguard Duty Rules.
- x. In view of above submissions, without considering and evaluating other relevant factors in the investigation, serious injury cannot be determined within scope of Rule 8 of the Safeguard Duty Rules.
- y. Levy of safeguard duty would make imports of PUC expensive which would hinder the development of solar sector, currently in full swing, and also may lead to targets set under JNNSM unachievable.
- z. Concerns on loss of employment alleged by the Applicants is unsubstantiated and needs to be looked in a broader perspective with creation of more employment opportunities in the present solar power development crusade.
- aa. ADD imposed earlier was eventually not renewed since the Power Minister had stated that domestic solar equipment manufacturing capacity of 700-800 MW is not sufficient to meet the government's ambitious plans of adding more power generation capacity through renewable energy sources.
- bb. imposition of Safeguard Duty would increase price of the PUC, hurdle progress of JNNSM and create huge gap in supply and demand of the PUC in India. Moreover, it will also lead to denial of new and more efficient technologies from being imported in the country. Therefore, imposition of Safeguard Duty is not in public interest.
- cc. Imports from Taiwan should be excluded as the imports have been less than 5% during the POI.
- dd. Solar Modules are made from Solar Cells, which is one of the inputs required for its production. Solar Cells assembled in panel being a value-added product requires various production activities to be carried out and substantial investment for the production facility needs to be treated differently by providing a higher level of protection against Solar Cells assembled in panels than Solar Cells.

(xxii) M/s Shapoorji Pallonji Infrastructure Capital Co. Ltd.

- a. Units located in the SEZ cannot be considered as part of the Domestic Industry under section 8(6)(b)(ii) of the Customs Tariff Act. The data given by petitioners does not in any manner provide a correct and realistic picture of the entire domestic manufacturing industry and hence, cannot be relied upon to establish injury of the Domestic Industry.
- b. Developers and Co-developer units in the SEZ's are given various exemptions and concessions under the SEZ Act, 2005 in the form of tax and fiscal benefits with a view to increase exports and therefore operate in a different sphere.
- c. Units located in the SEZ are export oriented and not set up for meeting the domestic demand.
- d. It is due to competitive and better technology of imports that the applicants are not able to create a domestic demand for their products in the domestic market.
- e. Applicants have failed to establish that circumstances claimed as unforeseen were actually so, and that there was a causal link between such circumstances and an increase in the imports.
- f. Applicants' rationale for linking the increased imports to the increased capacity of China is completely illogical, flawed and reeks of malafide intention to cover its own shortcomings. As increase in the imports was on account of the National Solar Mission, the same cannot be related to increased production capacity of China.

- g. China's domestic solar policy was the reason for consistent investments in technology which resulted in increased production capacity, efficiencies and economies of scale. Increase in capacity requires a minimum gestation period of 3 years and the same cannot be termed as an unforeseen development.
- h. No country would increase its capacity for the sole purpose of exporting to India. Data submitted by the applicants themselves show that most of the increase in capacity is for domestic consumption within China and not for the purpose of Exports.
- i. Withdrawal of DCR is not an unforeseen development that led to increase in imports as the same was in operation for most of the POI. Applicants have themselves admitted that the effects of the unforeseen development were not visible till the DCR's presence. Even the removal of the DCR has not put the domestic industry in a disadvantageous position on account of various government schemes.
- j. Installed production capacity of the domestic industry is not enough to cater to domestic demand as even its full utilization would only lead to satisfying 9.12% of the domestic demand which is the root cause for the imports.
- k. Data of the POI relating to production capacity to establish injury cannot be relied upon as large proportion of the Applicant's production data is on account of the 1200 MW plant set up by Mundra Solar PV Limited which has not started production line till May, 2017 and hence, hasn't achieved full utilization.
- l. Underutilization of the DI is on account of seasonal tenders issued by the Government. There is no constant demand throughout the year as a result of which at time of sudden demand of modules close to the commissioning of the Projects, the domestic industry is unable to meet the demand due to the constraints of limited production capacity every month.
- m. Technology used by the DI is inferior to efficient technology used by global manufacturers. Maximum annual capacity of the only applicant having superior technology, Mundra Solar PV Limited, is only 1200 MW and the domestic industry would be constrained to import modules equipped with superior technology from outside India.
- n. Solar Power Developers are responsible for generation of considerable employment within India with every 1MW of solar power giving direct employment to at least 2 persons. Imposition of SGD would lead to drastic reduction in employment generated by the industry due to setting up of new projects becoming financially unviable.
- o. Imposition of safeguard duties would be detrimental to the growth of the industry as it would lead to increase tariffs by Rs. 3.95-4.05 per unit.
- p. DI has not been able to establish whether the injury, if any, is on account of dumping by certain countries or due to increased imports. The Applicants clearly believed that injury was suffered on account of dumping by the subject countries as is evident from the application made for antidumping investigations, therefore they cannot now claim injury due to increased imports.
- q. SGD is against public interest as imposition of the duties would lead to a situation where solar power would become high and unaffordable by the public. Any such trade measure would severely hamper the ability of the government to honour international commitments as well as achieving the target of 100 GW by 2020.

(xxiii) Taiwan Economic and Cultural Centre

- a. The authority was earlier handling the anti-dumping investigation on the PUC and should have no difficulty in comparing the data sets from the anti-dumping

- investigation and the ongoing safeguard investigation and determine whether the safeguard petition has any merit.
- b. Taiwan is a developing country and has not reached the de-minimis level required in Article 9.1 of the Agreement on Safeguards (AOS) and cannot be subject to duty.
 - c. Many solar tenders by India's state governments have failed to attract good responded from bidders because of the uncertainty on the duties.
 - d. Petitioners do not have adequate standing to be considered as DI in terms of Article 4.1 of the AOS as standing of the petitioners should be examined separately for solar cells and solar modules. The installed capacity of Petitioners for solar modules is 15% of the installed capacity in India, meaning that the share of petitioners for solar modules is 15% if they manufactured at their full capacity. Therefore, their collective output does not constitute major proportion of total domestic production of solar cells and solar modules.
 - e. The Preliminary findings fail to examine unforeseen developments as imports increased due to demand created by NSM.
 - f. Import duties on PUC became zero in 2005 as a result of India's commitments under ITA-1, but preliminary findings fail to identify how this GATT obligation that came into effect 12 years ago led to a significant increase in imports. Imports increased after the Indian govt. inaugurated NSM in January, 2010.
 - g. Indian manufacturers can cater to about 10-15% of the annual demand on India leaving the remaining to be fulfilled by imports.
 - h. The financial position of three of the petitioners improved during the injury period but only two other petitioners faced losses due to intrinsic problems such as corporate debt restructuring, etc.
 - i. A major cause of injury is decline in exports by the petitioners. The petition shows a sharp decline in exports of the petitioners from 100 indexed points in 2014-15 to 13 indexed points in 2017-18 (Annualised). Injury due to such factors cannot be attributed to imports of the PUC.
 - j. Rapidly increasing capacities which the petitioners are finding hard to stabilise has led to high cost related to interest and depreciation.
 - k. Number of employees of petitioners have increased 5 times in the injury period, leading to a 4 times increased in the wage cost incurred by the petitioners which is another reason of injury.
 - l. MNRE plans to have an assured DCR component means that the DI has an assured market.
 - m. Imports of thin films are less than 1% of total products into India and cannot cause serious injury and should be excluded from the product scope.
 - n. Petitioners have claimed confidentiality on their individual adjustment plans which makes it difficult for Taiwan to provide any meaningful comment to the Petitioner's endeavours under Article 7.1 of the AOS.
 - o. Backward integration in the form of reduction in cost, achieving economies of scale, establishing plants for manufacturing wafers and ingots as a part of the adjustment plan will only lead to higher cost in the next few years. Such an adjustment plan is not feasible and will not facilitate adjustment in terms of Article 7.1 of the AOS/
 - p. Taiwan should be considered as a developing country because Taiwan recognises itself as one according to the self-recognition principle enshrined in WTO Agreements.

(xxiv) Domestic Industry

- a. The product under consideration is 'Solar Cells, whether or not assembled in Modules or Panels'. The product is classified under sub-heading 8541.40 of the

Harmonized Commodity Description and Coding System, popularly called HSN, and sub-heading 8541.40.11 of the Indian Customs Tariff Classification.

- b. The products are covered under Attachment A, Section 1 of the *Ministerial Declaration on Trade in Information Technology Products*, popularly known as Information Technology Agreement (ITA-1). The ITA-1 mandated elimination of customs duties and other duties / charges of any kind [within the meaning of Article II:1(b) of the GATT 1994] on the products listed therein. Since India is a signatory to ITA-1, the imported products are exempt from basic customs.
- c. The relevant tariff heading identifies cells, modules and thin film modules as one product and the duty exemption is applicable to all the three types i.e. c-Si solar cells, c-Si solar modules/panels and Thin film modules/panels.
- d. There are two major types of solar cells, one that use Crystalline Silicon (c-Si) Technology and the other using Thin Film technology. The Applicants are producing only c-Si type solar cells, while the cells imported are both c-Si type as well as Thin Film type.
- e. The identification process starts with the identification of the product under investigation or (PUC). The PUC comprises of Solar Cells whether or not assembled in modules or panels. The PUC covers solar cells irrespective of the technology used to manufacture them. The imports into India comprise of Solar cells of c-Si as well as thin film technologies. For the c-Si technology products imported, domestically produced c-Si technology cells would be the like articles. For the thin film technology products imported into India, domestically produced c-Si technology products would be the 'directly competitive' articles.
- f. In the absence of any material differences between the two types of Solar Cells, any attempt at drawing a distinction between c-Si technology products and thin film technology products in this case would result in defining not the “like or directly competitive product” but a *portion* of such like or directly competitive products. Such an approach is inconsistent with the determination of like or directly competitive product as mandated under the Agreement as held by the WTO Panel’s in Dominican Republic – Safeguard Measures.
- g. There are no material differences between the two Solar Cells manufactured in terms of function or end use, since Solar Cells based on both c-Si and Thin Film technologies are used to generate electricity using the photovoltaic process. Accordingly, there being no basis for differentiating between the two types of Solar Cells for the determination of a “directly competitive/substitutable product” in relation to the imported products, the PUC has correctly been determined as “Solar Cells whether or not assembled in modules or panels”.
- h. The Designated Authority, Directorate of Anti-Dumping & Allied Duties (DGAD) had earlier recommended imposition of anti-dumping duties against imports from China, Malaysia, Taiwan and USA. The scope of subject goods in this application is similar to the said anti-dumping investigation.
- i. The inclusion and/or exclusion of thin films from the scope of product under consideration is a case-by-case determination based on facts of each case. The facts surrounding the present case in India make it essential to include thin films also in the scope of product under investigation. Otherwise, the entire exercise may lead to circumvention of safeguard duties since the importers may simply switch to thin films to avoid any duties. It is also pertinent to note that “Thin Film Modules” are also imported under the same heading and are exempt from basic customs duty like solar cells/modules. In the 2014 final findings of the antidumping investigation on solar cells, the Ld. Designated Authority held that c-Si products and Thin film products shall be covered within the scope of the product under investigation.

- j. Finally, the Ld. Designated Authority correctly appreciated that thin film should be considered within the scope of like article as in India, the competition between thin films and crystalline products are very high and significant and the low efficiency of thin film modules hasn't vitiated the growth of demand for thin film products. Consumers perceive both the products as similar and find them as perfect substitutes. Under such market conditions prevailing in India, exclusion of one product will open up backdoor entries to the other type nullifying the purpose of entire exercise. Therefore, thin film cannot be excluded from the scope of like article as otherwise, users will simply switch over to thin film technology nullifying the purpose of the entire exercise.
- k. Cells and modules form a single product. The Designated Authority, in its earlier 2014 decision, had also considered Solar Cells and Modules to be a single product.
- l. The petitioners constitute a major proportion of the total Indian production of the subject goods and therefore, constitute Domestic Industry within the meaning of 8B(6)(b) of the Customs Tariff Act, 1975 as the collective production of the petitioners accounts for more than 50% of the total production of the PUC in India. Therefore, they represent a major proportion of the total Indian production and therefore, constitute Domestic Industry of the like article in India. The Ld. DG Safeguards also confirmed in the Preliminary Findings dated 05.01.2018 that the petitioners accounted for a major share of production of the subject goods in India and therefore, constituted Domestic Industry.
- m. The Ld. DG Safeguards observed that M/s Mundra Solar PV Limited, M/s Websol Energy Systems Limited and M/s Helios Photo Voltaic Limited are based in Special Economic Zones (SEZ) and therefore, while imposing the safeguard duty, the same may be exempted from its levy by means of an adequate measure. However, clearance of subject goods from an SEZ to the DTA will not attract any safeguard duty in the event that the same is levied. This is clear from a combined reading of Section 8B(2A) and Section 30 of the SEZ Act, 2005. For ease of reference, Section 30(a) of the SEZ Act, 2005.
- n. The levy of the ADD, CVD and SGD under Section 30 of the SEZ Act, 2005 are qualified by the words 'where applicable'. Therefore, one needs to ascertain as to when anti-dumping duty, countervailing duty or safeguard duty is applicable in any given case.
- o. The language of Section 9A pertaining to the levy of anti-dumping duty, Section 9 with respect to countervailing duty and Section 8B pertaining to the levy of safeguard duty all state, in no uncertain terms, that the same are applicable on imports of an article into India. Therefore, if an article is not imported into India, none of the aforesaid duties are payable. Though by a deeming provision, a legal fiction is created whereby SEZ's are considered to be outside the customs territory of India, there is no provision under any extant law in India which deems the clearance of goods manufactured in an SEZ to the DTA as an import. The fact that clearance of goods manufactured in an SEZ to the DTA does not amount to import into the territory of India has also been reiterated in a catena of judgments including *Essar Steel v. Union of India* [2010 GLH (1) 52], *India Exports v. State of U.P. & Ors* [(2012) 47 VST 126], *Tirupathi Udyog Limited rep. by its Manager-Administration Shri D.V. Saradhy v. Union of India (UOI) through the Secretary, Ministry of Finance and Ors.* [2011 (272) ELT 209(A.P.)]. Therefore, without the factum of import, there can be no levy of anti-dumping duty, countervailing duty or safeguard duty.
- p. Anti-dumping duties and countervailing duties are country specific and therefore, even if the aforesaid duties are levied on the description of a like article which is

manufactured in an SEZ and eventually cleared into the DTA, the same can never attract the aforesaid duties as there can never be an anti-dumping or countervailing investigation alleging dumping or subsidies against an SEZ in the territory of India itself and consequently, the question of levying any such duty would not arise. Therefore, to give effect to the meaning of the words in section 30 of the SEZ Act, 2005, the mention of levy of anti-dumping duty and countervailing duty mentioned therein during DTA clearance has to mean duty payable on the value of the inputs (*in the event that the inputs imported from specified countries attract anti-dumping duty or countervailing duty*) used on the finished product and not on the finished product itself, the latter being an impossibility.

- q. The same principle is also applicable to safeguard duties levied against any like article that is also manufactured in an SEZ and cleared into the DTA. Unless safeguard duty has been imposed on the description of the inputs which have been imported and used in the manufacture of the finished product that is eventually cleared into the DTA, in which case the safeguard duty will be levied only to the extent of the value of the input (*assuming the input attracts safeguard duty*) employed in the manufacture of the finished article, no safeguard duty will be attracted on the finished product itself even though the same may be a like article against which India has imposed safeguard duties. This is also evident from Section 8B(2A) of the Customs Tariff Act, 1975. Therefore, Section 30 of the SEZ Act, 2005 read with Section 8B(2A) of the Customs Tariff Act, 1975 make it abundantly clear that safeguard duty is only payable on the inputs used in the finished products and not the finished product itself that is manufactured in the SEZ and cleared into the DTA.
- r. Safeguard Duty would not be payable on the finished product manufactured in an SEZ and cleared into the DTA for one additional reason i.e. in a situation where safeguard duty has been levied by India on the description of inputs used in the manufacture of a finished product in the DTA as well as on the description of the finished product as well, then while clearance into the DTA, both the inputs used as well as the finished product will attract safeguard duty which will amount to double taxation. Such a levy being illegal, the reference to anti-dumping duties, countervailing duties and safeguard duties in section 30 of the SEZ Act, 2005 will always have to mean on the value of inputs as otherwise, the duty will be unworkable.
- s. India has faced a massive surge in imports of the subject goods during the period of investigation. The PUC is being imported into India from various countries including China PR, Malaysia, Singapore and Taiwan. Major quantity of the subject goods are being imported from China PR. Imports of the product concerned increased from 1,275 MW in 2014-15 to 9,474 MW in 2017-18 (Annualised), an increase of over 643% during the last three years. Import volumes have increased steadily over the past three years.
- t. The imports increased by 228% in 2015-16 over the previous year. Similarly, year on year increase in imports was 52% in 2016-17 and 49% in 2017-18 which leaves no manner of doubt that import volumes increased significantly each year. Moreover, the Ld. DG Safeguards has also arrived at a finding in the Preliminary Findings dated 05.01.2018 there has been a sudden surge in import volumes during the first six months of 2017-18 which is equivalent to approximately 74% of the imports in 2016-17. Therefore, there was an absolute increase in imports which was recent, sudden, sharp and significant by any standard.
- u. Furthermore, imports also increased in relation to production of the subject goods in India which was also appreciated by the DG Safeguards who found that relative

to domestic production, imports of the PUC consistently increased between 2014-15 and 2017-18 (Annualized). The growth rate of such imports as a percentage of the domestic production was a remarkable 1,371% during the intervening year 2015-16. Even the overall growth rate of imports of the subject goods in relation to domestic production rose from 519% in 2014-15 to 814% in 2017-18. Thus, during the entire POI, the import volumes of the PUC relative to its domestic production were found to have not only increased consistently but such increase was also found to be significant.

- v. This significant increase in the volume of imports has also been reflected in terms of increase in value of imports. From Rs. 3,991.21 crores during 2014-15, import value increased to Rs. 21,701.38 crores during 2017-18 (Annualised). The increase in value was, however, not in proportion to the increase in volume of imports as import prices declined significantly during the same period. CIF Price was Rs.30.98 Per Watt during 2014-15 but it declined to Rs. 23.03 during 2017-18 (annualised).
- w. The surge in imports has been at extremely cheap prices and prices of imports have consistently been reducing throughout the POI. Consequently, this surge in cheap imports has caused serious injury to the Domestic Industry and is threatening its very existence.
- x. In view of the substantive requirement of Article XIX, the developments which led to *Solar Cells* being imported in such increased quantities and under such conditions as to cause serious injury to domestic producers should have been “unforeseen”. While determining the scope and meaning of the term ‘unforeseen developments’, the Appellate Body of the WTO in *Korea – Dairy* and *Argentina – Footwear (EC)*, held that the same is synonymous with “unexpected”.
- y. The test to be applied for the purpose of determining whether any event was an unforeseen development is whether the same was expected at the time of incurring the obligations. As held by the Appellate Body, the test is not whether the developments were unforeseeable. Rather, the test is whether the same were unexpected at the time of incurring the obligations, i.e. accession to WTO, resolving to abide by the commitments under various WTO Agreements, providing tariff concessions and subsequently amending those tariff concessions through *Ministerial Declaration on Trade in Information Technology Products* (ITA 1). Therefore, the developments should have been unforeseen or unexpected on December 13, 1996 – the date on which the Ministers agreed on ITA 1.
- z. The developments which led to the massive surge of subject goods into India was the shift in trade pattern between Chinese imports and India as a result of the Anti-dumping and Countervailing duty orders in the USA associated with (i) the Crystalline Silicon Photovoltaic (CSPV 1) investigations, which became effective on 07.12.2012 and (ii) the CSPV 2 investigations, that became effective on 18.02.2015. Also, in the EU, the provisional measure with respect to the same subject goods came into effect on 05.06.2013 and the final measure was imposed on 05.12.2013. The timelines of the measures imposed by the US and the EU more or less coincided with each other with minimal or no variance. The immediate impact of these measures was not visible because of the presence of Domestic Content Requirements (DCR) under the JNNSM.
- aa. The DCR was challenged in the year 2013 before the Dispute Settlement Body of the World Trade Organisation by the United States. In September 2016, the United States won when the WTO Appellate Body held the DCR to be inconsistent with the obligations incurred by India under Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. Pursuant to the removal of DCR, the change in pattern of trade became pronounced as the products have a robust demand in India. More

- so, because of India establishing an ambitious and laudable target of achieving 100 GW of solar power generation by the year 2022.
- bb. Unforeseen developments have modified the conditions of competition between imported subject goods and the goods produced by the domestic industry as before the imposition of countervailing and Anti-Dumping duties by US and EC, China's exports to India accounted for a meagre 1.52% while those to EC and USA accounted for 75.93%. However, after these trade remedy measures, there was a tectonic shift in China's export markets. As of 2017, the USA and EC collectively account for only 10.7% of China's exports whereas India now accounts for 29.8%.
 - cc. There is no evidence on record to suggest that India had foreseen the contemporaneous levy of trade remedy measures on imports from China by the EU and US and therefore, these developments were unexpected. Further, India truly believed that the DCR under JNNSM was consistent with the exceptions contained in Article XX of GATT 1994. Therefore, India could not have expected at the time of incurring the obligations under ITA:1 that its DCR, which it believed to be consistent with Article XX of the GATT, would be considered as inconsistent with its obligations incurred under the treaties and agreements. Consequently, the Indian market for the PUC became open for unrestricted imports from all countries.
 - dd. Such a significant shift in pattern of trade in which China started targeting the Indian market more vigorously as compared to developed countries / markets like EU and USA etc. could not have been reasonably expected. The Domestic Industry was thus faced with completely new dynamics operating in the market. The Domestic Industry was further distressed on account of unprecedented and unforeseen capacity expansion undertaken by Chinese exporters, which was backed by state support in the form of incentives, subsidies and tariffs.
 - ee. Another unexpected development is that at the initial stages of the development of the Chinese solar industry, China used to import a lot of the raw material required to manufacture solar cells and modules, in particular, polysilicon. However, an unexpected turn of events fueled the growth of the Chinese polysilicon industry giving China a sharp competitive edge. In the early years, China did not have the extensive capital or technical expertise required to manufacture polysilicon. But when three Chinese companies viz. Suntech, Yingli and Canadian Solar went public on the New York Stock Exchange in 2005 and 2006, it spurred a massive solar manufacturing expansion. The demand for polysilicon soared and the spot price surged from less than \$50 per kilogram in 2004 to approximately \$475 per kilogram in 2008. Sensing a huge opportunity, the Chinese company GCL began to manufacture polysilicon and over the next decade grew phenomenally to become the world's largest polysilicon manufacturer. Trade wars between the US and China also worked out in the latter's favour. After the US imposed tariffs in 2012 on Chinese-made solar cells sold in the US, China imposed tariffs of its own on U.S.-made polysilicon sold in China, a move that created an advantage for companies that produce polysilicon in China. That advantage has proved decisive in the global market. China now produces over 90% of all the polysilicon in the world. This capacity to produce a critical raw material in the manufacture of solar goods, allows Chinese companies to export their products at a much lower price than any of their competitors. As indicated earlier, the Indian domestic industry is suffering major setbacks as a result of the aggressive pricing strategies of the Chinese solar companies.
 - ff. Apart from polysilicon, all manner of other materials required for the manufacture of solar cells and modules are made in China itself. Companies that were earlier engaged in other businesses, jumped on the solar bandwagon to meet the strong

demand for solar materials and tooling. China's escalating manufacturing capacity offers ample market opportunities for existing regional suppliers, as well as newcomers. In addition to the benefits of low cost labour and economies of scale that China already enjoyed, the ability to produce raw materials and tooling domestically is among the most important reasons why solar goods made in China are so much cheaper than everywhere else. Thus, it is evident that the development of the Chinese polysilicon and solar tooling industry is a result of an unexpected and unintended turn of events which rendered it nearly impossible for countries like India to compete against China or even keep their own solar industry afloat.

- gg. Another unexpected development is that the support to manufacturing extended by the Chinese government to its producers. In this regard, especially critical to the rapid growth of the Chinese solar manufacturing industry has been financial support from commercial and state-owned banks, municipal governments and investment corporations (*with municipal government backing*). This is in addition to a host of generous incentives offered to solar manufacturers including refund or exemption of land fee and tax (*corporate income tax, VAT and interest on loans*), refund of electricity consumption fees, refund of VAT and import fees for R&D equipment, various investment grants, loan guarantee etc.
- hh. In 2010 alone, the Chinese Development Bank (CDB) authorized an unprecedented \$30.41 billion in total credit facilities to five top domestic manufacturers: LDK Solar, Suntech Power, Yingli, JA Solar, and Trina. In fact between 2005 and 2013, the CDB extended nearly \$31.35 billion in credit facilities to China's major solar manufacturers. This is only about 70% of the total *publicly* disclosed credit made available to these companies during this period. So, Chinese solar manufacturers had a bank willing to lend them billions of dollars, at a time when the financial markets in much of the world had seized up. This is in complete contrast to the rest of the world where bank lending to finance solar and other renewable-energy projects had slowed considerably. This liquidity and almost unrestricted access to capital allowed the Chinese solar manufacturers to expand immensely giving them a strategic advantage over companies in other countries which were struggling to survive.
- ii. In 2016, when Yingli, China's largest solar manufacturer was in serious financial trouble, the China Banking Regulatory Commission, asked the CDB to "ensure" that Yingli receives \$1.16 billion in new loans. This debt helped Yingli pay off its existed debt, avoiding a potential default and also ramp up production in its factories to resuscitate the cash flow. A couple of years earlier, Suntech was also supported in a similar fashion. Suntech, the company that essentially launched China's solar boom, became, in March 2013, the first Chinese company to default on publicly traded debt. It subsequently filed for bankruptcy protection in both China and the United States. During this time, the Wuxi municipal government in Jiangsu province city where Suntech is located provided \$150 million to resurrect the company and subsequently also gave a five year exemption from revenue taxes. Even LDK received a variety of grants and subsidies in 2016 when some of its subsidiaries filed for bankruptcy. Bailing out large solar companies by way of cash injections and incentives in this manner is a uniquely Chinese phenomenon and has helped several companies maintain their position in the global market and is certainly an unexpected and unforeseen occurrence in the solar industry.
- jj. China's treatment of renewable energy development as a high national priority was also an unexpected development which spurred its exports and consequently, imports into India. In fact, renewable energy development is one of seven strategic industries the government supports as foundations of future economic growth. To

this end, the Chinese government has introduced a number of programs and initiatives to help foster technological development in the field of solar energy. Of particular note here, is the fact that China lays a lot of emphasis on technology which can be quickly and efficiently commercialized.

- kk. The National High Tech R&D (863) program funds research that can be brought to the market within a year or two. China has established 2 State Key Labs (SKLs) and 3 State Engineering and Research Centres for solar research which too function in a similar manner, in close co-ordination with the government and large private solar companies on whose premises these labs are located. The research undertaken is applied in nature, focussing on iterating improvements in the easily marketable silicon-based technologies rather than any new emerging technology. This explains the string of improvements achieved in silicon cell efficiencies in the last few years in China.
- ll. This approach also extends to the securing of solar patents by Chinese companies. Patents that had a lower lapse rate were, generally, those for which there is a commercial market: polysilicon, monocrystalline-silicon, PERC, IBC, HIT, and multijunction (a technology in which the cell has multiple interfaces between p-type and n-type semiconductor material), in addition to amorphous-silicon and gallium-arsenide (*another thin-film technology*). That suggests that the Chinese research community values patents on near-term technologies more than on emerging ones. Such intense focus on marketable solar technologies has helped China remain ahead of its competitors in a very significant manner and could hardly have been foreseen by India, given the opacity in the functioning of the Chinese government.
- mm. Subsequent to these developments, Chinese exporters, armed with a fortified production capacity, found a new market in India for it to export its Solar Cells. The same started and continued on a massive scale, with imports increasing by over 643% over a period of 4 years. There has been a year-on-year growth in the imports of PUC from China increasing by 3.3 times during 2015-16 over the previous year, 1.52 times in 2016-17 and 1.48 times during 2017-18 over the respective preceding years.
- nn. In light of these sudden, sharp and drastic developments, the Domestic Industry has been faced with a situation where they are not able to sustain themselves against the imports. Neither the trade remedies that were adopted by USA and EC against China prompting it to focus its supply into India, nor those by USA against India, which lifted the protection of DCR offered to the domestic Industry were foreseen on 13.12.1996 i.e. the date on which India acceded to obligations under the WTO.
- oo. There is sufficient data to indicate that China has more than doubled its solar cell and module production capacity between the years 2012 to 2016. In the year 2012, China had 11.12 GW of Cells production which reached 27.78 GW in the year 2016. Similarly, the module assembly expanded from 12.46 GW in the year 2012 to 35.47 GW in the year 2016.
- pp. The data furnished by the petitioners demonstrates that China's capacity for producing subject goods is export oriented. It also demonstrates that China has significantly high excess capacities.
- qq. The ITC Trade Map data is self-explanatory in demonstrating the surge of imports inasmuch as while India accounted for only 1.52% of the exports from China in 2012, developed countries and territories such as USA and EU were the focus of around 76%, of exports. However, due to various trade measures resorted to by these countries and territories, there was a paradigm shift in the trend of exports. Whereas the exports to India in 2014 were only 3.97% of the total value of Chinese

exports to the world, in a short span of 3 years, Chinese exports to India had overtaken that of its combined exports to that of EU and the US and amounted to nearly 30%, the highest amongst all countries that it exports to. Such a surge in exports from China, which far outstripped that to developed nations and territories such as the US and EU, was not foreseen by India at the time of incurring the obligations.

- rr. In another development that could not be foreseen, India assumed leadership in the fight against climate change. In 2015, India committed to lower the emissions intensity of its economy by 33%–35% of 2005 levels by 2030 and increase the share of non-fossil based power generation capacity to 40%. These developments which could not have been foreseen, require a greater commitment by India towards renewable energy, especially solar. The commitment towards climate change, which was also one of the reasons for the government increasing its solar installation targets, has pushed up the demand for solar power generation projects in India. The commitment given by India under the 2015 Paris Agreement that was signed by 197 countries (as on date ratified by 172 countries) was unforeseen at the time the import tariff concession for solar cells was agreed to under ITA-1 on 13th December, 1996.
- ss. Therefore, (i) rapid expansion in capacities, production and export orientation of China; (ii) imposition of trade remedy measures by major consumption market such as the EU and the USA; and (iii) commitments under the Paris Agreement which call for reduction by 33-35% of CO₂ emissions (from 2005 levels) to address the global warming, were unforeseen by India on December 13, 1996.
- tt. Article XIX of the GATT requires that increase in imports should be as a result of the effect of obligations incurred by the Member under GATT 1994. The effect of the clause is that the investigating authority in the concerned importing member, seeking to resort to safeguard measures, must also demonstrate as to how the obligations incurred under the GATT 1994, including tariff concessions, prevented the competent authorities from taking WTO-consistent measures to address the surge in imports.
- uu. In the present context, increased importation of the subject goods in India is directly attributable to tariff concessions incurred by it as an effect of obligations and of not being able to address the surge in imports through WTO consistent measures. In this regard, two factors which are required to be taken note of are *firstly*, India provided a schedule of concession to the WTO and resolved to abide by the commitments under GATT. India subsequently amended those tariff concessions through the Ministerial Declaration on Trade in Information Technology Products (ITA 1). India's import tariff on the subject goods falling under Customs Tariff Item 85414011 of the Customs Tariff Act, 1975 is 'Free'. This 'Free' tariff was introduced pursuant to the obligations on India under GATT 1994, including the tariff concessions thereunder read with the Ministerial Declaration on Trade in Information Technology Products dated 13th December, 1996 ("ITA-1"). The subject goods are covered under Attachment A, Section 1 of the ITA-1. The ITA-1 mandated elimination of Customs duties and other duties / charges of any kind within the meaning of Article II:1(b) of GATT 1994 on the products listed therein. Therefore, since India is a signatory to ITA-1, the imports of PUC are free of Customs duties. Thus, ITA-1 binds India's "*freedom of action*"¹ with respect to the imported subject goods and prevents it from taking other WTO-consistent measures, such as increasing the Customs duties. *Second*, the Domestic Industry

¹ Panel Report, *Ukraine – Passenger Cars*, para. 7.96.

- initially had the assurance of a captive domestic market to the extent dictated by the Domestic Content Requirements (“DCR”) under JNNSM. However, in 2013, USA challenged the DCR under JNNSM before the WTO Dispute Settlement Body. India believed that the Domestic Content Requirements (“DCR”) under JNNSM were consistent with GATT on the ground that the exceptions contained in Article XX of GATT 1994 applied to such measures. However, the outcome of the dispute was that in October 2016, the WTO Appellate Body held the DCR to be inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. Hence, India had to withdraw the DCR. Therefore, India’s obligations under Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement prevents India from addressing the current situation.
- vv. The exponential increase in imports over the years and data pertaining to sales volumes and domestic consumption clearly paint the picture of serious injury or at the very least an imminent threat of serious injury to the Domestic Industry. The data reflects that with increased demand the market share of imports also increased from 86% to 90%, further pushing down the market share of the domestic producers from 14% to a paltry 10%.
 - ww. Price undercutting for both cells and modules increased substantially which subsequently led to the reduction of the selling price of the solar cells and modules. During the injury analysis period, prices declined cumulatively by 15.77%. Despite the cost going up because of inflation, the domestic producers could not raise their prices. Therefore, the Domestic Industry has not been able to make profits and invest in feasible research and development to put them at par with the imports both in terms of efficiency as well as quality.
 - xx. The workers also faced unemployment because of this situation. Compared to the total installed capacity, there is a potential employment loss for about 2384 employees.
 - yy. The Indian solar industry bore the brunt of low priced imports for many years. However, in recent times, these imports have sharply increased whereas the prices have decreased consistently which is demonstrated in detail hereinafter. It is an established proposition of law that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause ‘serious injury’, all of which are satisfied in the present case.
 - zz. The Domestic Industry has made large investments to produce the subject goods looking at the robust demand of the product in India. However, the investments have been vulnerable to imports from various countries at very low prices. Therefore, the domestic industry pursued imposition of anti-dumping duties in the past. The Directorate of Anti-Dumping & Allied Duties (DGAD) had earlier recommended imposition of anti-dumping duties against exporters from China, Malaysia, Taiwan and USA. However, the Ministry of Finance, in the year 2014, decided not to levy the duty. The industry was looking at complete closure but for the introduction of DCR which provided a fresh lease of life to the domestic producers. The improvements are reflected in the intermediary years. The DCR ensured usage of Indian made solar cells in the projects which helped the domestic industry to realize some volume of the subject goods at a reasonable price.
 - aaa. The WTO Appellate Body held the DCR to be inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. The exporters took advantage of the policy latency between 2014 to 2017 leading to the sudden and sharp surge in imports.

- bbb. The impact of removal of DCR is such that a surge in import is already apparent since the users are no longer bound to buy domestically produced solar cells. The deterioration in performance and the injury is reflected in many of the parameters and the threat of further injury is real and imminent. If no safeguard duty is imposed at this juncture, the upcoming quarters will reflect irreparable losses in terms of sales and price parameters. The Domestic Industry requires the protection of safeguards measures at the earliest to arrest such unfortunate and irreparable developments.
- ccc. China is the largest exporter of the subject good to India (share of more than 94% of imports). Exporters from China, Taiwan, Malaysia and other countries are facing significant hurdles in exporting the subject goods on account of various trade remedy measures (anti-dumping, anti-subsidy and safeguards measures) and local content requirements in markets with large consumption such as the EU, the USA, Egypt, Turkey and Russia. The outcome of safeguards investigation conducted by the United States has meant that the doors to the US for exports of Solar Cells are also closed. Therefore, should India remain an unprotected zone for the subject goods any longer, producers from countries like China will push for a further spike in exports which will inevitably lead to the end of the solar industry in India forever.
- ddd. The current situation requires immediate imposition of safeguard duties. While certain injury parameters such as losses have declined in the intermediate period when compared to the base year, such improvements were directly attributable to the DCR which was in force during that period. The benefits of DCR were visible on employment as well as on the ability of the industry to ensure reasonable payments to its employee. The price realization, which was higher while DCR was in force, is in jeopardy once again with the removal of DCR. This has already led to large scale retrenchment of employees and the indication is clear that employment generated by the domestic industry is under serious threat and will result in further loss of employment unless it is safeguarded against the onslaught of imports.
- eee. There was a significant increase of imports in absolute terms. The year on year increase was a substantial 228% in 2015-16 over the previous year. Thereafter, the increase in imports from 2015-16 to 2016-17 was also a substantial 52%. Finally, imports in 2017-18 increased by approximately 49% over 2016-17. Increase in imports was recent, sudden, sharp and significant. Furthermore, imports increased not only in absolute terms but also in relative terms i.e. in relation to production of the subject goods in India. The increase in imports was also reflected in terms of value which increased from Rs. 3,991.21 crores during 2014-15, import value increased to Rs. 21,701.38 crores during 2017-18 (Annualised). The increase in value was, however, not in proportion to the increase in volume of imports as import prices declined significantly during the same period as found by the DG Safeguards in its preliminary findings.
- fff. While the landed value of imports was around Rs.18.78 and 36.95 for cells and modules respectively during 2014-15, the same sharply declined to Rs. 23.03 during 2017-18 (annualized). This sharp increase in volumes coupled with an equally drastic reduction in value per watt had an extremely adverse effect on the prices of the like article in the Domestic Market and consequently, resulted in severe price suppression and depression whereby the Domestic Industry was prevented from selling the subject goods produced by it at a remunerative price. However, despite the Domestic industry selling the subject goods at below cost, the prices of imports continued to massively undercut the prices of the Domestic Industry which, in turn, prevented the Domestic Industry from producing and selling the subject goods to a

reasonable extent of its installed capacity despite a colossal increase in the demand of the like article in the domestic market.

ggg. As a result of the massive surge in imports at rock bottom prices, the Domestic Industry has not been able to sell the subject goods despite a massive increase in demand in the domestic market which is reflected in the market share of the Domestic Industry. While demand increased from 1476 MW in 2014-15 to 10,573 MW in 2017-18 (Annualised), market share of imports increased from 86% to 90% and consequently, the minuscule amount of market share that was initially held by the domestic producers as a whole at the beginning of the POI to the tune of 14% shrunk to 10% of the total domestic consumption in 2017-18.

hhh. The Domestic Industry faced significant price undercutting from the imported goods throughout the POI. As a result thereof, price suppression and depression was also faced by the Domestic Industry which is palpable from the fact that its net sales realization kept on reducing and was also below the cost of sales throughout the period of investigation. Such significant price depression could not be attributed to any cause other than unprecedented increase in imports. The price depression was coupled with a significant price suppression as well. The domestic producers could not raise their prices even when the costs increased significantly. During 2015-16, costs increased by 9% per watt from that of the year immediately preceding it whereas the selling prices declined by 13% per watt, thereby leading to an increase in price suppression by 24% per watt. As a result of such price suppression and depression, the petitioners were prevented from increasing their prices to the break-even level and consequently suffered massive losses.

iii. The data with respect to production and sales is reflective of the abysmal market share held by the domestic industry which when compared to the demand of the subject goods in the domestic market and the volume of imports.

jjj. Production of the Domestic Industry increased from 237 MW in 2014-15 to 838 MW in 2017-18 (Annualized). In this regard, it is relevant to note that installed capacity of the Domestic Industry to produce the subject goods also increased by an additional 1,000 MW in 2017-18 (Annualized) as a result of one of the petitioners viz. Mundra Solar PV Limited commencing operations. However, despite the increase in installed capacity in 2017-18, the production of the Domestic Industry managed to increase by only 365 MW. Furthermore, while import volumes of the PUC increased by 643% i.e. from 1,275 MW in 2014-15 to 9,474 MW in 2017-18 (Annualized), the production of DI increased by only 254% during the same period i.e. from 237 MW to 838 MW.

kkk. The data with respect to sales of the Domestic Industry reveals an even worse state of affairs inasmuch as despite the burgeoning demand of the subject goods which has facilitated such a tremendous increase in imports, the Domestic Industry was not even able to sell all of the subject goods produced by it. While sales increased from 191 MW to 774 MW (Annualized), it is to be noted that the Domestic Industry was only able to sell the subject goods by pricing them much lower than its cost of sales which consequently resulted in huge losses. Notwithstanding the fact that the Domestic industry was forced to sell the subject goods at unremunerative prices, as the imports continued to significantly undercut the prices of the Domestic Industry, it could not even sell all of the subject goods produced by it during the POI. This is also clearly reflected in the mounting inventories.

III. The Ld. DG Safeguards correctly observed that increased imports of the subject goods have substituted the subject goods produced by the Domestic Industry while meeting the demand in the domestic market.

- mmm. The most revealing factor which demonstrates serious injury being suffered by the Domestic Industry is its capacity utilisation which stands at only 51% of its installed capacity. In a situation where the demand of the subject goods increased by 9097 MW, which is approximately 616% and more than sufficient to cater to the entire installed capacity of the Domestic Industry which stands at 1653 MW, there is absolutely no reason other than the surge in imports of the subject goods at rock bottom prices which has led to the drop in the capacity utilization of the Domestic Industry from 60% in the base year to 51% in 2017-18 (Annualized). In fact, despite the production capacity being further enhanced by 1,000 MW in 2017-18 (Annualized), only 35% of this additional capacity was actually utilized. Even otherwise, the production facilities of the Domestic Industry were grossly underutilized during the entire POI. Coupled with the increasing trend of imports of the PUC, this low level of capacity utilization clearly shows that there has been a significant overall impairment of the Domestic Industry and thus, it has suffered serious injury.
- nnn. Additionally, a number of other domestic producers of the like article were keeping their production facilities idle such as Surana Solar, Udhaya Energy, Maharishi Solar, Dev Solar, Bharat Electronic Ltd, Excel Energy, IYSERT Energy and K I Solar. Their production was either nil or insignificant. Euro Multivision and Premier Solar had no production at all during July-September 2017 (Q2 of 2017-18). Thus, there was significant underutilization of production facilities during the period under examination. Even when the plants were being operated, domestic producers were not able to run their plants continuously. It is submitted that these plant shut downs were only due to increased imports coming into India which stopped the Domestic Industry from selling the subject goods produced by it.
- ooo. The employment generated by the Domestic Industry also declined despite significant capacity addition. The commencement of operations of one of the petitioners viz. M/s. Mundra Solar PV Ltd. (MSPVL) in May 2017 contributed to the overall increase in the total number of employees in the industry as a whole but the DG Safeguards has correctly appreciated in the Preliminary Findings dated 05.01.2018 that the same is not reflective of the industry trend. If the employment of the Domestic Industry is viewed de hors the number of employees of MSPVL, the declining employment in the industry as a whole is evident. Further, as also correctly appreciated by the DG Safeguards in its Preliminary Findings, the Domestic Industry has been operating far below their installed capacity and as such, there has been a significant loss in potential employment opportunities. In fact, owing to its mounting losses and reducing capacity utilization, one of the petitioners viz. Indosolar, has had to lay off 250 employees in recent times.
- ppp. Though the Domestic Industry was able to maintain the wages paid to its employees at more or less the same level till 2016-17, as a result of the tremendous financial strain faced by the Domestic Industry due to mounting losses, the Domestic Industry was unable to maintain the wages at the same level any longer and therefore, the remuneration paid to its employees has also declined sharply.
- qqq. Even with the addition of a significant number of employees by the entrance of MSPVL into the Domestic Industry in May 2017, the productivity of the Domestic Industry continued to suffer. Per employee production was 0.316 MW during 2014-15 which further fell down to 0.291 MW in 2015-16. Though this figure rose slightly to 0.492 MW in 2016-17, it declined significantly in 2017-18 to a low 0.243 MW. Thus, productivity per employee has decreased throughout the POI, save for a slight increase in 2016-17 which did not last. The current situation indicates a

- downward trend that is likely to be aggravated even further in the near future unless an adequate safeguard duty is imposed to protect the Domestic Industry.
- rrr. The Domestic Industry has incurred significant losses on domestic sales over the course of the POI. Due to a significant decline in the net sales realization as a result of the price suppressing and depressing effects of cheap imports on the subject goods being produced by the Domestic Industry, its losses have compounded during 2017-18 as compared to 2014-15. In fact, the losses more than doubled during 2017-18 (Annualized) when compared to the year immediately preceding it i.e. 2016-17. When compared to the base year, i.e. 2014-15, the losses have quadrupled. Such increase in losses has to be seen in the light of contrasting parameters such as the increase in capacity, increase in production and increase in domestic sales. This in turn has also resulted in a negative return on capital employed. The Domestic Industry cannot sustain itself much longer and will have to shut down operations permanently if the influx of such cheap imports continues unabated.
 - sss. The inventories held by the Domestic Industry increased by more than 4 times during the POI. The fact that domestic sales could not keep pace with the production of the Domestic Industry, which was paltry in itself considering its installed capacity and demand in the domestic market, is clearly demonstrated in the figures with respect to inventory which have shown a very sharp increase in 2017-18 from that of the base year. The factum of ever mounting inventories of the Domestic Industry in a domestic market having such a huge demand for the subject goods unerringly points towards the fact that the Domestic Industry is suffering serious injury.
 - ttt. There is a overwhelming demand for the subject goods in India and there are no other known factors that may be contributing to the market disruption other than low priced imports in significant volumes from various sources.
 - uuu. Causal Link is established as imports of subject goods increased from 1,275 MW in 2014-15 to 9,474 MW in 2017-18, an increase of over 643% over 3 years. Further, the imports increased by up to 3.3 times during 2015-16 and by 1.52 and 1.48 times during 2016-17 and 2017-18. The increase in import is therefore recent, sudden, sharp and significant. The market share of imports has increased from 86% to 90% and, consequently, market share of the DI has declined from 13% to 7%. The serious injury is not attributable to any factor other than the increased imports.
 - vvv. Imports of the subject goods during each of the last two half yearly periods were significantly higher (2.7 times higher) than the imports during the first half of 2016-17. The import prices also came down to Rs. 23.04 per watt during first half of 2017-18, a decline of over 23%. As import prices declined, ability of the DI to get remunerative prices also declined. As a consequence, sales and capacity utilization also suffered.
 - www. Imports cater to more than 90% of the demand and have adversely impact the investments made by the domestic industry. It is also evident that imports are causing market disruption in the Indian market. The abovesaid data makes it evident that the precarious state of the Domestic Industry has only worsened in 2017-18 and therefore, safeguard duties are essential for the existence of the solar industry in India.
 - xxx. The petitioners have planned to reduce their cost to become cost-competitive with exporters from outside India by (i) Renegotiation with existing suppliers of raw materials as well as identifying new suppliers of raw materials with a view to reduce the cost of raw material by entering into long term bulk contracts as may be required; (ii) Taking up projects for backward integration by establishing plants for manufacture of wafers and ingots from the basic raw material. Backward

integration would help realise larger economics of scale. This will, in turn, lead to a robust return. Such a return will enable multiple entrepreneurs to invest in wafer manufacturing facilities which accounts for a significant proportion of the cost of production of solar cells and modules. Some of the petitioners would also invest in ingot manufacturing facilities; (iii) Taking up projects for forward integration by establishing facilities for manufacturing modules by those who only have facilities for making cells; (iv) Taking up projects, wherever feasible, for technically superior products using PERC technology or Bi-facial technology; (v) Reduction of cost of conversion primarily by ramping up utilisation of capacity, which to an extent would be dependent upon favourable changes in the market due to imposition of protective measures such as safeguard duties (vi) Reduction of financing cost by converting Rupee borrowings into USD borrowings.

yyy. The readjustment plan is to be considered in light of the certain macro-economic issues such as the fact that India has established a target of achieving 100 GW of solar power generation by the year 2022 and as such, the demand for the product is continuously increasing. The target is essential for achieving India's commitments under the Paris Agreement which calls for reduction by 33-35% of CO₂ emissions by the year 2022 (from 2005 levels). The petitioners support the initiatives and have made significant investments in installed capacity. However, the exporters, especially from China, Malaysia and Taiwan, intend to annihilate the domestic industry in India. The safeguard duties will provide an incentive for continuous investment, capex expansion and reduction in cost by achieving the economies of scale.

zzz. Imposition of safeguard duty is also in the larger public interest as (i) It will lead to an increase in employment, increase in capex expansion, increase in capacity utilization and will also promote investment in R&D; (ii) Increase in FDI flow and the exporters will be encouraged to invest and make in India. In fact, the initial recommendation of provisional safeguard duties resulted in additional capacity announcement by Longi, CETC and GCL in India; (iii) Suppliers of raw materials and consumable (such as wafer, paste, EVA, junction box, glass, etc.) will be encouraged to establish new units; (iv) Every 1 GW of cell + module production provides direct employment to approx. 3000 people. The petitioners estimate that such production also generates indirect employment to the tune of 3.5x (i.e. 10,500 people) on account of supply chain and logistics; (v) Every 1 GW of cell + module production requires an investment of approx. INR 2,000 Crores of which 30% is met with equity infusion and 70% is met with debt. The debt is serviced at the average 9-10% cost of borrowing / interest rate (the rates would vary from producer to producer based on credit worthiness). With a marginal return and frequent upgradation in technology, it could take a longer duration for the producers to recoup the investment; (vi) The industry is subject to frequent technology upgradation which could be in form of efficiency (for instance - increasing the busbars in a cell) or upgradation from one generation to another (for instance - on account of change in material or fundamental architecture of solar cells). In other words, the cost of upgradation could be a huge drain on producers. Therefore, large amounts are continuously invested in Research and Development; (vii) The backward integration (such as a wafer production facility) could require equal amount of investment. However, the scale of economies can only be achieved from backward integration. Such integration develops the eco- systems of suppliers and create large scale employment and economic activity; (viii) The imports which currently account for above 90% of the total domestic consumption in India are a huge drain on the foreign exchange reserves and responsible for increase in current

account deficit. The forex outflow by 2020 on account of imported products is expected to be approximately 60% of the budget allocated by the GOI for MNREGA for the FY 2017-18; (ix) even with 70% ad valorem duty as recommended in the preliminary findings, the increase in power tariffs is going to be negligible which is only short term since the petitioners will be competitive with the temporary protection. The increased government revenue from indigenization could also be used to compensate DISCOMs for any increase in power tariff. Therefore, any arguments which may be raised by developers regarding increased power tariffs will not only be baseless but also disingenuous; (x) a substantial portion of the amount is remitted abroad on account of imported solar cells and modules. Such transactions only promote middleman without any real economic benefit to India. The only tangible economic benefits are those occurring in exporting countries especially China, Malaysia and Taiwan; (xi) With imposition of SGD, petitioners will have even chance of retaining that amount, attempting backward integration, achieving economies of scale and putting it to use for real economic activity. Petitioners have demonstrated that they are capable of producing world-class products meeting all technical requirements; (xii) Further, any argument regarding employment generation by developers will also be baseless because the employment for installation, operation and maintenance of the facility is origin neutral. In other words, same employment will be generated even if goods produced by the petitioners is used in the installation, operation and maintenance of solar power projects (xiii) A task force has also been formed by CII under the directive of PMO for a road map for enhanced local manufacturing targeting 50GW local capacity; (xiv) Bank liabilities of the Indian manufacturers will be streamlined and relieve pressure of NPA on Banks. A vibrant solar supply chain will fuel growth in multiple other industries (Ecosystem) and creating over 1.20 million jobs.

aaaa. Non-levy of safeguard duty would be against the public interest of India because (i) Local manufacturing will cease to Exist and Rs. 11,000 Crores investment will become insolvent and result in mass unemployment (ii) Addition of Capacity announced by Overseas manufactures will never be realized and will be halted; (iii) BHEL had recently invested in a 100 MW line which will be idled if safeguard duty is not levied; (iv) CEL EOI for setting up Module and/or Cell and further expanding to Wafering will also fail to attract any bids (v) The already existing skewed import dependence of Government of India will continue to inflate exponentially as India is already China's top export destination and our imports have increase by 20% Year-on-year to US\$ 4.1 billion in FY 2017-18.

bbbb. The underlying objective of imposing Safeguard duties is to protect the domestic industries in the face of a global shift towards trade liberalization where goods compete in the global market. Comparative advantages are exploited by states in order to ensure maximum benefit can be reaped of the open trading system. Safeguard duties, which are interim measures, provide for the domestic industries to calibrate their position in their industry on being faced with international competition. Accordingly, a safeguard duty is not merely a protectionist measure in the garb of a fair-trade remedy but rather, demands that a domestic industry come up with an adjustment plan that necessitates governmental support in the form of the adequate duties that not only allows the Domestic Industry to recover its actual cost of production as it stands during the current period but also, such a protective environment that the industry may be allowed to implement its adjustment plan for the purpose of becoming more cost effective and competitive. In this regard, the Appellate Body has also underscored the importance of the adjustment plan in the Safeguard process in Korea-Dairy.

cccc. 95% Safeguard duty should be imposed for four years, to curtail the impact of the damage that happened in the past few years and allow the Domestic Industry to recover its cost as well as implement its adjustment plan to bring it at par with the producers in other countries. Furthermore, the duty should be liberalized keeping in view the adjustment plan of the Domestic Industry.

16. The brief summary of the rejoinders filed by the interested parties to the written submissions of other interested parties are as under:

(i) Domestic Industry

- a. The Ld. DG Safeguards has clarified that the scope of the PUC is ‘Solar Cells, whether or not assembled in Modules or Panels’.
- b. The product scope includes both solar cells that use Crystalline Silicon (c-Si) Technology as well as modules or panel that use Thin Film technology.
- c. Respondents have objected to considering solar cells using thin film technology as like article as they contend that production technology, manufacturing process, raw material and difference in balance of systems (BOS) renders them different. However, respondents have not disputed the fact that thin film solar cells are used for generation of electricity using photovoltaic process as well. Though respondents have claimed that thin film solar cells may not be preferred by users for certain applications, it has not been denied that thin film solar cells and c-Si type solar cells are interchangeable on this aspect. Solar power projects do not specify whether c-Si type solar cells or thin film solar cells are to be provided by the developer bidding for the project and it is admitted that the discretion vests with the developer in choosing to employ either technology.
- d. The respondents have sought to introduce a new concept by stating that thin film solar cells and c-Si solar cells are not interchangeable or directly competitive but rather, ‘alternative’ products. However, the word ‘alternative’ is synonymous with the words ‘substitute’ and ‘replacement’. Therefore, this argument of the respondents is self-defeating. Respondents themselves have conceded that developers can choose between either c-Si solar cells or thin film solar cells while implementing a project.
- e. Any distinction on production process is not relevant while deciding the scope of ‘like article’ as held by the WTO Appellate Body in US – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia wherein it was held *the focus must be on the identification of the products and their "like or directly competitive" relationship and not on the processes by which those products are produced*.
- f. Difference in production technology, manufacturing process and raw materials used are of no consequence and the only relevant factor is whether the articles are directly competing with each other. The process starts with the identification of the product under investigation or (PUC). For c-Si technology products imported, domestically produced c-Si technology cells would be like article. For thin film technology products imported into India, domestically produced c-Si technology products would be the 'directly competitive' articles.
- g. When it is not disputed that both types of cells are used for the generation of electricity from solar energy, any attempt at drawing a distinction between c-Si technology products and thin film technology products based on their manufacturing process or the material used therein would result in defining not the “like or directly competitive product” but rather, a *portion* of such like or directly competitive products. Such an approach is inconsistent with the Safeguard

Agreement as held by the WTO Panel's observation in the dispute of Dominican Republic – Safeguard Measures.

- h. Respondents claimed that inclusion and/or exclusion of thin films from product under consideration should be made on a case-by-case determination. The Designated Authority and Canada had considered thin films within the scope of product under consideration. Facts surrounding the present case make it essential to include thin films in the scope of product under investigation as otherwise, the entire exercise may lead to circumvention of safeguard duties since the importers may simply switch to thin films to avoid duties. "Thin Film Modules" are also imported under the same heading and are exempt from basic customs duty like solar cells/modules.
- i. In the earlier finding, the Designated Authority concluded that different technologies do not make end products different. Notwithstanding the fact that the Designated Authority was aware that solar cells made of crystalline and thin film technology differed in terms of (a) technology (b) usage of basic raw materials (c) production process (d) plant and machinery (e) Balance of System and (f) efficiency levels, it considered thin film solar cells to be within the scope of the product under consideration because it was of the opinion that difference in technology does not alter or impede the end uses of solar panels.
- j. The Designated Authority noted that both C-si solar cells as well as thin film solar cells were semiconductor p-n junction diodes which convert light into electricity. Solar Cells made from both these technologies were being offered in module/panel form to the ultimate end user and that the cost/pricing was also being decided based on factors such as Watt per unit, efficiency of the cell/modules and competition in market parlance between C- si and thin film products were generally based on such factors under both technologies. Furthermore, Solar Cells of both technologies were also classified under the common customs classification and tariff heading i.e. 8541 40 11. Finally, the Ld. Designated Authority observed that the most important fact which warranted the inclusion of thin film solar cells was the fact that there was direct competition between the products using both technologies as they could both produce power out of solar light and developers could choose either of the technologies for their power projects in the inception stage and thereafter, simultaneously in independent lines. Imposition of antidumping duty on the product of one technology, which is functionally substitutable with the product of another technology would be futile, as the product having no duty can replace the other in the market.
- k. Respondents emphasized that BOS utilized in c-Si solar cells and thin film solar cells are different and contended that since the BOS is different in both cases and as its cost is significant, thin film solar cells and c-Si solar cells are not like article. However, respondents have not denied that while initiating a project, a developer may use solar cells of both technologies interchangeably. The respondents have only contended that it would not be feasible for solar cells using either technology to be used interchangeably post the implementation phase.
- l. Non-compatibility of parts of the like article due to its own unique design which limits the choice of the user post purchase does not render an article different e.g. if cellular phones of different brands are dumped into the territory of India and each brand uses their own proprietary charger which limits the choice of the user to such proprietary charger post purchase, this difference would not render cellular phones of different brands as not like article.
- m. In fact, even in the earlier Final Findings on dumping of solar cells, the Ld. Designated Authority had noted that c-Si Solar Cells and Thin Film solar cells

differed on the count of BOS. However, the Ld. Designated Authority considered the same to be like article.

- n. The Ld. Designated Authority had concluded that thin film should be included within the scope of like article by observing that under the market conditions prevailing in India wherein consumers perceived both products as similar and found them to be perfectly substitutable, exclusion of one product would open up backdoor entries to the other type nullifying the purpose of the entire exercise. Therefore, thin film cannot be excluded as otherwise, users will simply switch over to thin film technology nullifying the purpose of the entire exercise.
- o. Respondents have contended that the earlier final findings in the AD Investigation on solar cells had not attained finality as the duty was not imposed by the Central Government. However, this contention proceeds on an erroneous premise that determination with respect to injury, causal link and dumping made by the Designated Authority in a Final Findings are merely recommendatory. Rather, Rule 17 clearly indicates that only the quantum of duty specified under Rule 17(1)(b) is recommendatory whereas every other determination made under Rule 17 is final and not open to further review by the Central Government. The objective determinations made by the Ld. Designated Authority are conclusive of the issues therein. The Central Government is only vested with the subjective discretion to levy the duty based on the quantum recommended by the Designated Authority. The fact that findings of the Designated Authority are not open for further review by the Central Government was also observed by the Hon'ble High Court of Gujarat in the case of *Alembic v. Union of India* [2012 (291) ELT 327]. Therefore, there is no embargo in considering the reasoning of the Ld. Designated Authority in the earlier final findings on solar cells.
- p. It is preferable to adopt the reasoning of the Ld. Designated Authority in the earlier Final Findings as determination of the PUC in an earlier investigation in the Indian context would be more relevant than a determination made by the US and the EU in their own peculiar facts and circumstances. There is no consensus internationally on whether thin film solar cells are to be considered as like article with c-Si based solar cells. Each investigating authority has taken a stand on its inclusion/exclusion based on the facts of their own case e.g. Canada also included thin films into the scope of the product under consideration.
- q. Respondents have submitted that Solar cells using the "PERC" (Passivated Emitter Rear Cell) based technology, Bi-facial N-type solar cells, High efficiency solar cells using 5 and 6 bus bar production technology and Solar modules of mono crystalline technology are not being manufactured by the Domestic Industry. However, the said contention is without any basis as proof of production of all the aforesaid cells have been provided during verification.
- r. According to the respondents, an SEZ unit is set up with the objective of generation of additional economic activity, promotion of exports, creation of employment opportunities and increasing investment in India (Section 5 of SEZ Act) and the Government grants several concessions to encourage and enable them to export. The facility for sale in the domestic market or Domestic Tariff Area (DTA) is only a liberty given to such units for the reason that such units may at times, face difficulties in finding steady export markets for their products, and to allow them to achieve continuity in their production. The respondents have further contended that when sale in the domestic market is allowed merely as a liberty, it cannot be treated as a matter of right by such units so as to entitle them to seek protection as domestic industry. However, this contention is without merit as respondents have themselves admitted that SEZ units are set up with the objective of generation of

additional economic activity, creation of employment opportunities and increasing investment in India. Therefore, when the effect of it is to benefit economic activity, create investment and employment in India, the fact that they are deemed to be outside the customs territory of India pursuant to a legal fiction is of no consequence.

- s. Reliance by Taiwan Photovoltaic Industry Association (TPVIA) on the non-obstante clause at Section 51 of SEZ Act stating that it would prevail over all other legislation is of no consequence as it is a fundamental principal of law that it would come into operation only when there is a conflict between provisions of the SEZ Act and any other legislation. However, TPVIA has failed to point any inconsistency between the SEZ Act and Section 8B of the Customs Tariff Act 1975.
- t. The determination of whether any unit producing the PUC can be considered as a domestic producer of the subject goods is also to be performed on a case by case basis. Although in the ordinary course, SEZ clearances to the DTA attract customs duties, since India has reduced its customs duties to 'nil' for the PUC pursuant to being a signatory to ITA:1, DTA clearances for the PUC by the petitioners based in the SEZ do not attract any customs duties. Furthermore, with respect to SEZ clearances being a 'liberty' granted by the Government of India, there is an obligation for units based in an SEZ to maintain positive Net Foreign Exchange (NFE). However, in the case of units based in the SEZ manufacturing the PUC, this obligation to achieve positive NFE can be discharged by way of DTA clearances in view of Sub-rules (a) to (o) in Rule 53 which list certain items whose clearance into the DTA shall be count towards the Free on Board (FOB) value of exports for the purpose of calculating whether the unit has achieved positive NFE. Therefore, SEZ Units can sell the PUC in the DTA without any compulsion to export. There is no embargo and in fact there is a specific provision which facilitates the sales in DTA by such SEZ units. Such DTA sales by the SEZ units compete in the domestic market with other manufacturers based in the DTA. It has also been clarified that safeguard duties are not leviable on DTA clearances by an SEZ unit. Therefore, SEZ units are also domestic producers.
- u. The ratio laid down in *Unwrought Aluminium and Electrical Insulators* is bad law, being in derogation of the judgment of the judgments of the Hon'ble High Courts in *Essar Steel v. Union of India* [2010 GLH (1) 52], *India Exports v. State of U.P. & Ors* [(2012) 47 VST 126], *Tirupathi Udyog Limited rep. by its Manager-Administration Shri D.V. Saradhy v. Union of India (UOI) through the Secretary, Ministry of Finance and Ors.* [2011 (272) ELT 209(A.P.)] wherein it has categorically been held that DTA clearances from SEZs are not imports. Therefore, if sale by SEZ units into DTA are not imports and subject goods manufactured by SEZs compete in the domestic market without any restriction on the clearance thereof into the DTA, there is no reason why the DTA units cannot be treated as domestic producers of the subject goods.
- v. The reasoning of Ld. DG Safeguards in Final Findings in Safeguard Investigation concerning imports of "Saturated Fatty Alcohols" into India wherein it was held that even a 100% EOU is a domestic producer is squarely applicable to the facts and circumstances of the present investigation. Just as there is no restriction on sales of goods in the DTA by an EOU, similarly there is no restriction on sale of goods from an SEZ to a DTA either. The Ld. DG Safeguards had held that although DTA sales by an EOU are an exception, a domestic producer availing such an exception consistently was liable to be considered as Domestic Industry. In the present case also, the petitioners based in the SEZ units have been making DTA sales consistently. Furthermore, quantity of PUC sold in the DTA by the domestic

producers based in the SEZ constitutes an overwhelming portion of the total production and sales of Indian producers and therefore, such producers have the right to seek protection.

- w. In the case of Unwrought Aluminium, the Ld. DG Safeguards had relied upon the fact that sales from the DTA to an SEZ are considered as exports under the SEZ Act, 2005. However, SEZ clearances to the DTA are not counted as either 'exports' from the SEZ or 'imports' into India. Therefore, the provision of law relied upon by the Ld. DG Safeguards has no relevance as far as treatment of SEZ units within the scope of Domestic Industry is concerned. The fact that an SEZ is outside the customs territory of India is also of no relevance as the Ld. DG Safeguards failed to notice the judgment by the Hon'ble High Courts in *Essar Steel v. Union of India* (Supra), *India Exports v. State of U.P. & Ors* (Supra) and *Tirupathi Udyog Limited* (Supra) wherein it was held that SEZ units are very much within the territory of India and they are only deemed to be outside the customs territory of India by a legal fiction. In *Tirupati Udyog* (Supra), the High Court held that SEZ units have to be considered as units in India as otherwise, they would not be subject to Indian laws and regulations and the SEZ Act, 2005 in itself would be inapplicable to it which would render the same an absurdity.
- x. In unwrought aluminium, the Ld. DG Safeguards observed that SEZ units considered to be domestic producers in anti-dumping investigations are not relevant and the same are not applicable on safeguard investigations without any discussion on the reasons for such differential treatment under the two laws. There is no prescription either in anti-dumping or safeguard provisions with respect to treatment of EOUs and SEZ units as domestic producers. Therefore, while choosing not to consider SEZ units as domestic producers notwithstanding the fact that SEZ units are considered to be domestic producers in anti-dumping investigations, it was incumbent to furnish reasons for the same. The reasons that weighed with the Designated Authority while considering an SEZ unit as a domestic producer in the earlier anti-dumping investigation are squarely applicable to the facts and circumstances of the present safeguard investigation also.
- y. While observing that SEZ Units cannot be considered as domestic producers of a like article in Unwrought Aluminium, the Ld. DG Safeguards (i) failed to note the aforesaid judgments of the Hon'ble High Courts wherein it was specifically held that DTA sales by an SEZ unit are not imports into India or exports by the SEZ and that SEZ units are very much inside the territory of India; (ii) failed to distinguish how SEZ units are domestic producers within the ambit of anti-dumping laws but not safeguard laws; and (iii) also failed to distinguish how the tests applied for considering a 100% EOU as a domestic producer cannot be applied for determining whether an SEZ unit can also be considered to be a domestic producer. the Ld. DG Safeguards also failed to consider the law laid down by the High Courts and did not provide reasons for the difference between SEZ units being considered as domestic producers for anti-dumping laws and not safeguard laws as well as non-applicability of the tests for considering a 100% EOU as a domestic producer on SEZ units. therefore, the aforesaid finding of the Ld. DG Safeguards in the case of Unwrought Aluminium is both per incuriam and sub silentio and as such, not binding on the Ld. DG Safeguards. As held by the Hon'ble Supreme Court in the case of *State of U.P. & Anr. v. Synthetics and Chemicals Ltd. & Anr.* [(1991) 4 SCC 139], a decision on an issue which is per incuriam and sub-silentio is not a binding precedent and can be discarded from consideration when deciding a subsequent case
- z. The respondents have raised a contention that the petitioners do not account for a major share of the production of the subject goods based on MNRE data as total

installed capacity of cells and modules in India is 11562 MW whereas the total installed capacity of the petitioners is only 3164 MW. However, this contention is based on an incorrect premise and understanding of safeguard law as the relevant factor for determination of standing of the Domestic Industry is not installed capacity of the domestic producers in India but rather, actual production of the subject goods.

- aa. Respondents have contended that since solar modules have been considered as like article, therefore, solar modules produced from imported solar cells should also be taken into consideration for the purpose of calculating total production and in the alternative, the standing of Domestic Industry be examined by considering domestic production of solar cells and solar modules separately. However, these submissions are baseless as product under consideration is solar cells and therefore, imported solar cells can never account for domestic production of like article as the fact that they are assembled into modules by module manufacturers does not change them from an imported solar cell into a domestically produced one. Solar modules produced from domestically produced solar cells cannot be taken into consideration for the purpose of calculating total domestic production of the subject goods either as this would result in double counting of the total production of the like article because domestically produced solar cells will first be accounted for at the time of production by the Solar Cell manufacturers and thereafter, again be counted at the time of arrangement into modules by the domestic module manufacturers. This would lead to counting the same solar cell twice for calculating total output of the PUC in India and is therefore, impermissible.
- bb. Even if imported solar cells which are subsequently arranged into modules are considered for the purpose of computing the total production of the PUC in India, petitioners would still constitute a major proportion of the total production of the like article. However, no data has been provided by any of the interested parties regarding the quantum of production of solar modules from imported cells in India.
- cc. With respect to request by respondents to exclude Mundra Solar PV limited from Domestic Industry as it is still in its initial stages, safeguard law does not disqualify or distinguish between domestic producers based on the duration of their operations. Furthermore, as Mundra has produced the PUC and sold it in the Domestic Market, the allegation that it is not competing in the domestic market of the PUC is entirely baseless. Though Mundra has commenced operations recently, it is unable to sell the subject goods in the domestic market due to presence of cheap imports and therefore, facing serious injury along with other domestic producers.
- dd. Dome respondents have contended that increase in imports was not sharp or sudden so as to satisfy the requirements under Article XIX of GATT and that imports have kept pace with the demand and therefore, increase was gradual. In this regard, the Ld. DG Safeguards arrived at a finding in the Preliminary Findings dated 05.01.2018 that in the time period immediately preceding the initiation of the investigation i.e. during the first six months of 2017-18, there had been a sudden and massive surge in import volumes which was equivalent to approximately 74% of the imports in 2016-17. Therefore, there was an absolute increase in imports which was recent, sudden, sharp and significant by any standard.
- ee. Increase in imports required for meeting the requirements of Article XIX can be both with respect to absolute increase in the quantum of imports as well as in relation to domestic production and consumption. There has been a massive increase in imports in relation to Indian production of the subject goods. Furthermore, imports in relation to consumption in India has also increased

- notwithstanding the addition of capacity by the petitioners and commencement of sales of the subject goods by other Indian producers.
- ff. Revised target under the JNNSM created a sudden huge demand of the PUC in India and coupled with the removal of the DCR, this was followed by an equally sudden and massive surge in the volume of imports of the PUC into India. The surge in imports was not only because of the huge demand of the PUC that was suddenly created in 2015 but was also due to the fact that these imports were being made at extremely cheap prices. Therefore, such a massive surge of cheap imports has seriously injured the Domestic Industry threatening its very existence.
 - gg. Certain interested parties have contended that unforeseen developments cannot relate to the remote past. The said assertion has been made without averring to the necessary facts and details required to substantiate it as the interested parties have failed to demonstrate which unforeseen developments were in the 'distant' past and how, in light of the timeline to which such unforeseen developments pertain to, such unforeseen developments can be said to be in the 'distant' past.
 - hh. The first Anti-dumping and Countervailing duty orders in the USA with respect to Crystalline Silicon Photovoltaic (CSPV 1) became effective on 07.12.2012 and the duty pursuant to the second investigation on Crystalline Silicon Photovoltaic (CSPV 2) became effective on 18.02.2015. In the EU, the provisional measure with respect to the same subject goods came into effect on 05.06.2013 and the final measure was imposed on 05.12.2013. The timelines of the measures imposed by the US and the EU more or less coincided with each other with minimal or no variance. The imposition of these measures did not result in an immediate surge in imports because of the Domestic Content Requirements (DCR) under the JNNSM. However, shortly thereafter the JNNSM was held by the WTO to be inconsistent with the obligations incurred by India under Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement in 2016. These unforeseen developments directly led to the surge in imports and coincided with the surge and therefore, can hardly be said to be in the past.
 - ii. The understanding of certain interested parties that unforeseen developments which are referred to as responsible for the surge in imports should be a result of the effect of an obligation under the GATT or the multilateral agreements is wrong as the language of Article XIX of the GATT does not state or indicate this in any manner. Rather, what it envisages is that the surge in imports should have been a result of both unforeseen development as well as an effect of obligations incurred under the GATT. The words 'as a result of' in Article XIX of GATT precedes the condition of both 'unforeseen developments' and 'effect of obligations' and does not connect the two. Rather, it is important to note that the words 'unforeseen developments' and 'effect of obligations' are connected in the sentence with the word 'and' between them. It is a settled principle of law that words in a statute have to be given their ordinary meaning unless it results in an absurdity or a different intention appears from the context of the statute. It is pertinent to note that 'and' is synonymous with the words 'along with', 'as well as', 'in addition to', 'including', 'also' etc. and is used as a conjunction to connect words of clauses or sentences. However, the interested parties have sought to replace the words 'and' with 'due to' and thereby, read the conditions in Article XIX as "*as a result of unforeseen developments due to the effect of obligations*". Such a construction of Article XIX is not tenable as it is impermissible to add or read words into the statute which have not been provided by the drafters thereof, either expressly or through necessary implication. The condition of unforeseen developments is in addition to the effect of obligations under GATT. Therefore, as long as there is a surge in imports and it

- can be shown that the cause thereof is a result of the existence of both these conditions i.e. effect of obligations and unforeseen developments, the requirements of Article XIX are fulfilled.
- jj. Respondents have also contended that developments that led to imports must have been unforeseeable and it must be explained why they were unforeseeable. However, the understanding of the respondents is hinged on the erroneous premise that ‘unforeseen developments’ should have been ‘unforeseeable’ as the test to be applied for the purpose of determining whether any event was an unforeseen development is whether the same was ‘expected’ at the time of incurring the obligations. The Appellate Body, in *Argentina Footwear*, held that the test to be applied is not whether the developments were unforeseeable. Rather, the test is whether the same were unexpected at the time of incurring the obligations, i.e. accession to WTO, resolving to abide by the commitments under various WTO Agreements, providing tariff concessions and subsequently amending those tariff concessions (*through the Ministerial Declaration on Trade in Information Technology Products (ITA 1) in the context of the present case*). In other words, the developments which led to *Solar Cells* being imported in such increased quantities and under such conditions as to cause serious injury to domestic producers should have been unforeseen or unexpected on December 13, 1996 – the date on which the Ministers agreed on ITA 1.
 - kk. Before the imposition of trade measures by the EC and the US, China’s exports to these territories accounted for 75.93% of its total exports whereas India accounted for a meagre 1.52%. However, after imposition of these measures, the USA and EU collectively accounted for only 10.7% of China’s exports whereas India now accounts for 29.8%, signaling a tectonic shift in China’s export pattern. Therefore, unforeseen developments indeed modified the conditions of competition between the PUC being imported and that produced by the Domestic Industry in India. Such a significant shift in pattern of trade in which China started targeting the Indian market more vigorously as compared to developed countries / markets like EU and USA etc. could not have been reasonably expected. Furthermore, the unprecedented and unforeseen capacity expansion undertaken by Chinese exporters (not only within China but also in South East Asia), which was backed by state support in the form of incentives, subsidies and tariffs was also not expected by India at the time of incurring its obligations.
 - ll. There is no evidence on record to suggest that India had expected the contemporaneous levy of trade remedy measures on imports from China by the EU, US and Canada at the time of incurring the obligation under ITA:1. Furthermore, India truly believed that the DCR under JNNSM was consistent with the exceptions contained in Article XX of GATT 1994. Therefore, India could not have expected at the time of incurring the obligations under ITA:1 that its DCR, which it believed to be consistent with Article XX of the GATT, would be declared as inconsistent with its obligations under the GATT.
 - mm. Neither the trade remedies that were adopted by USA and EC against China prompting it to focus its supply into India, nor those by USA against India, which lifted the protection of DCR offered to the domestic Industry were foreseen 18 long years before 13.12.1996 i.e. the date on which India incurred obligations under the GATT. It is evident that the foregoing events were not expected and India could not have reasonably foreseen the same to be a result of the culmination of events in the usual course of transaction between nations.
 - nn. The fact that India would assume leadership in the fight against climate change by committing to lower emissions by 33%–35% of 2005 levels by 2030 and increase

the share of non-fossil based power generation capacity to 40% were also not foreseen. The commitment given by India under the 2015 Paris Agreement that was signed by 197 countries (as on date ratified by 172 countries) was unforeseen at the time the import tariff concession for solar cells was agreed to under ITA-1 on 13th December, 1996. One of the respondents viz. ACME has itself admitted that demand for solar panels/modules increased and became huge pursuant to India increasing its target to 100GW. The fact that India would set up such an ambitious target and the fact that the DCR, which mandatorily required domestic content, would be removed was definitely unexpected by India at the time of incurring the obligations under ITA:1.

- oo. It cannot be denied that all of the unforeseen developments which occurred simultaneously and coincided in the same time period i.e. the contemporaneous imposition of trade remedy measures by multiple countries, the shift in China's trade export pattern as a result of these measures and the removal of the DCR at a point of time immediately thereafter which meant that domestically produced subject goods were no longer mandatorily required, were not expected by India at the time of signing ITA:1.
- pp. Certain parties have raised an objection stating that the effect of obligations of India under ITA:1 has no nexus with the surge in imports in 2015 as both events are disconnected in time. However, the respondents have failed to appreciate the words used in Article XIX which provide on the face of the record that effect of obligations would include tariff concessions. India provided a schedule of concession to the WTO and resolved to abide by these commitments under GATT. India and certain other member countries of the WTO subsequently modified this schedule of concessions through the Ministerial Declaration on Trade in Information Technology Products (ITA 1). India's import tariff on the subject goods falling under Customs Tariff Item 85414011 of the Customs Tariff Act, 1975 is 'Free'. This 'Free' tariff was introduced pursuant to the obligations on India under GATT 1994, including the tariff concessions thereunder which were modified pursuant to the Ministerial Declaration on Trade in Information Technology Products dated 13th December, 1996 ("ITA-1"). The subject goods are covered under Attachment A, Section 1 of the ITA-1. The ITA-1 mandated elimination of Customs duties and other duties / charges of any kind within the meaning of Article II:1(b) of GATT 1994 on the products listed therein. Therefore, due to the effect of India's obligations under ITA:1, India had to eliminate custom duties on the PUC which facilitated the surge in imports which would not have happened to the present extent had the same been subject to customs duties. Furthermore, ITA-1 also bounds India's "*freedom of action*"² with respect to the imported PUC and prevented it from increasing Customs duties to contain the surge in imports.
- qq. Unlike unforeseen developments which must coincide with the increase in imports, there is no requirement that obligations incurred under GATT must also coincide with the increase in imports.
- rr. Another instance of the effect of obligations which resulted in the surge in imports of the PUC was those incurred by India under Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. The Domestic Industry initially had the assurance of a captive domestic market to the extent dictated by the Domestic Content Requirements ("DCR") under JNNISM. However, the same was held by the WTO Appellate Body to be inconsistent with India's obligations under the aforesaid provisions pursuant to USA's challenge to the DCR. Therefore, India's obligations

² Panel Report, *Ukraine – Passenger Cars*, para. 7.96.

- under the GATT prevented it from maintaining measures which necessitated domestic procurement and checked the influx of imports. The removal of the DCR pursuant to the WTO Appellate Body ruling meant that India had to withdraw the DCR and therefore, India's obligations under the GATT which prevented it from maintaining the DCR which then led to the surge in imports.
- ss. Certain respondents claimed that the Domestic industry producing the subject goods have not faced any serious injury as the installed capacity of the Domestic Industry is not sufficient to meet the demand of the subject goods in India and that due to insufficient capacity to service the demand of the subject goods in India, imports were necessitated and therefore, no serious injury could have been caused to the Domestic Industry. The said contention is without merit as the very reason for the petitioners inability to ramp up capacity is due to presence of cheap imports which are stopping the Domestic Industry from producing and selling the subject goods to the extent of its current capacity. When the Domestic Industry is not able to produce or sell the subject goods to the extent of its current capacity and when the capacity utilisation is reducing year on year despite the huge demand, it is impracticable for the petitioners to add more capacity as that would increase fixed costs even more. Since the subject goods produced and sold by it are at extremely low prices, the fact that it cannot get remunerative prices for the subject goods produced by it acts also acts as a deterrent to add more capacity.
 - tt. Due to selling the subject goods produced by it at unremunerative prices, the Domestic industry has suffered huge losses which has also made it difficult for it to raise capital for further investments. In fact, it is relevant to point out that Indosolar was in the process of adding another production line for manufacturing cells (doubling the capacity of Indosolar) and Mundra Solar PV Limited was also in the process of increasing the capacity from 1.2 GW to 3.0 GW (increase of 150%). However, being unable to sell the subject goods produced by it in the domestic market any longer due to influx of much cheaper imports, all expansion plans have been put on hold and in fact, most of the petitioners have halted operations currently with Mundra Solar PV Limited operating its production line only intermittently. Similar is the situation with Helios Photovoltaic Limited which shut down its line in May 2017 and Jupiter Solar which shut down production in November 2017.
 - uu. Respondents have claimed that the Domestic Industry is not suffering serious injury as certain economic parameters do not show a significant deterioration. For this purpose, they have relied upon data with respect to market share of Indian producers which has shown a decline of 4% overall. However, the same has to be appreciated in the context of the increase in demand of the subject goods in India. Despite the demand being sufficient for the Domestic Industry to manufacture the subject goods to the entire extent of its production capabilities, the Domestic Industry could not utilize even a reasonable level of its installed capacity to produce the subject goods and furthermore, was not even able to sell the entire quantity produced by it. Consequently, this was reflected in the market share of the Indian producers which fell by 4% in a robust market capable of consuming the entire extent of the installed capacity of Indian producers. Rather, the inventories of the Domestic Industry increased.
 - vv. Respondents have claimed that Domestic Industry has not suffered any serious injury as production and sales figures have improved. However, the same has to be considered in light of the addition of capacity to manufacture the subject goods by the Domestic Industry. Had production and sales of the Domestic Industry improved without the installation of additional capacity, it could have perhaps been contended that the situation of the Domestic Industry has improved. However,

though the Domestic Industry has installed additional capacity, their production and sales have not increased commensurately. The fact that production of other Indian producers has increased also has to be examined in light of the fact that their sales were negligible in 2014-15 and 2015-16. Rather, it needs to be considered that despite sales of the other domestic producers as well as the Domestic Industry increasing on a standalone basis, the market share of Indian producers actually reduced by 4%.

- ww. Respondents have contended that imports increased in relation to production as 3 units based in SEZs have been unable to export. However, this contention is as there is no compulsion SEZ units of the PUC to export as they can achieve positive NFE by DTA clearances also. *Second*, the sales to the export markets were negligible to begin with and only constituted a very small fraction of the subject goods being produced for sale in the domestic market and therefore, any drop in the performance thereof will be reflected only to an insignificant extent in the production and capacity utilization of the Domestic Industry. *Third*, comparison of imports in relation to production has not been restricted to extent of production of the subject goods by the Domestic Industry and rather, includes entire domestic production in India by all domestic producers. *Fourth*, the injury parameters have been submitted after excluding the effects of exports.
- xx. Respondents have claimed that capacity utilization, productivity per employee and profitability of the Domestic Industry has decreased in view of addition of Mundra Solar PV Limited who has commenced production in 2017-18. However, in this respect, it may be noted that even if these parameters of the Domestic Industry are examined after excluding the data of Mundra Solar PV limited, it will still demonstrate that Domestic Industry has suffered considerably.
- yy. Respondents have claimed that price undercutting data does not indicate any price suppression or depression. While the range of undercutting for imports of solely solar cells has gone down, it is not due to the fact that the landed value thereof has increased. Rather, the Domestic Industry has been attempting to price the subject goods as competitively as possible with that of imports in order to sell its inventory. However, the range of undercutting is still significant to the extent that the landed value of imports is less than half of the cost of sales of the Domestic Industry. Therefore, the Domestic Industry has been compelled to price the subject goods much below its cost of sales and incurring losses.
- zz. Landed value of solar modules has reduced drastically to the extent that even solar modules are being imported at a price that is lower than the cost of sales of the Domestic Industry for producing the solar cells not arranged into modules. Consequently, the range of undercutting for solar cells arranged in modules has increased manifold. The Domestic Industry has been unable to fetch remunerative prices for the subject goods sold by it throughout the duration of the POI clearly establishes that the Domestic Industry is suffering from price suppression.
- aaa. Respondents have claimed that shutdown of M/s Surana Ventures, M/s Udhaya Energy Photovoltaics Private Limited and M/s XL Energy Limited was on account of poor export performance as they were SEZ units. This contention is entirely baseless as there is no compulsion on SEZ units to export. Rather, these SEZ units should have been able to thrive in view of the huge demand of subject goods in India.
- bbb. Furthermore, the respondents have claimed that prices of imports have decreased due to increased efficiency of modules from 260 Watt peak to 330 Watt peak, creation and benefit of economies of scale enjoyed in the supply chain for polysilicon, wafers and ingots production, creation of integrated manufacturing

- capacities with the major module suppliers and further improvements in capacity utilization and overall manufacturing cost brought about by the vertical integration and introduction of new processes like PERC, which allows further efficiency improvements, due to which lower cost per watt can be achieved. It is to be noted that Domestic Industry is already implementing these measures and the very reason why safeguard duties have been sought is to afford protection to the Domestic Industry while implementing them.
- ccc. Respondents have contended that the profit/loss of the Domestic Industry has improved in 2017-18. However, it seems that most respondents have misconstrued the increase in losses of the Domestic Industry as increase in profitability as otherwise, it is clear on the face of the record that the losses of the Domestic Industry has quadrupled from that of the base year.
- ddd. Respondents have relied upon certain averments by the petitioners in their annual reports whereby it has been stated that a slowdown in the global market. However, the said observations have been taken out of context as none of the averments referred to have indicated that the losses suffered by the petitioners is due to not being able to export the subject goods. In fact, a closer scrutiny of the statements extracted from the annual reports of the petitioners indicate that they were gearing up to service the demand of the subject goods in the domestic market of India. However, due to the influx of cheap imports, the Domestic Industry has either not been able to sell the subject goods or able to sell them only at unremunerative prices.
- eee. Certain respondents claimed that imports are more competitively priced due to cheaper raw material, backward integration by producers of the subject goods in the exporting countries, superior technologies such as PERC being employed by these producers, lower cost of conversion etc. In this regard, it is relevant to note the adjustment plan of the Domestic Industry is also based upon implementing the aforeasaid measures. Therefore, the respondents cannot now contend that the adjustment plan of the Domestic Industry is not sufficient to help it compete with imports.
- fff. Evaluation of public interest essentially evolves balancing the competing interests of different interested parties which are as follows in the present case:
- a) The domestic manufacturers (petitioners in the present case) of solar cells whether or not assembled in modules or panels;
 - b) The domestic manufacturers of solar modules who rely on imported solar cells;
 - c) The power developers which can be divided into the following categories
 - (i) Category 1 - The developers who have entered into PPAs with DISCOMS and have already imported the product under consideration;
 - (ii) Category 2 - The developers who have entered into PPAs with DISCOMS but have not yet imported the product under consideration;
 - (iii) Category 3 - The developers which may bid on future projects and are hoping to import the product under considerations.
 - d) The consumer of electricity.
- ggg. Foreign governments and exporters have no role to play as regards public interest in India is concerned as foreign governments would only look after the interests of foreign producers and be interested in supplying the product under

consideration which maximizes their return and eliminates all sources of competition.

- hhh. The interest of the Domestic Industry must be weighed against the interest of solar module manufacturers who rely on imported solar cells, Category 2 developers and the consumer of electricity. It is submitted that Category 1 power developers would be unaffected by the imposition of safeguard duty since imports have already been completed. Similarly, Category 3 power developers would incorporate the enhanced import price (as a result of imposition of safeguard duty) into their tariff quotations or possibly receive viability gap funding. The only affected party is the extremely narrow Category 2 power developers who have quoted the tariff based on prevailing import prices of product under consideration but are yet to import the product under consideration. Even for such Category 2 power developers, the Ministry of New and Renewable Energy (MNRE) has already notified pass-through facility¹ i.e. the imposition of duty will be covered under the Change in Law clause and the impact of duty will be passed on by the developers to the DISCOM. Therefore, it is humbly submitted that Central Government has already taken steps to balance the interests of the extremely narrow category of power developers who will be actually affected by the imposition of the safeguard duty.
- iii. The only economic players whose interests are at odds are the petitioners, the module producers who rely on imported solar cells and the consumers of electricity. However, one of the largest module producers, Waree Energies Ltd., has supported the imposition of safeguard duties
- jjj. As regards the consumers of electricity are concerned, their interest is in obtaining electricity at the cheapest rate possible. While some interested parties have argued that the increase in price of electricity must be computed for solar electricity alone, the argument is fallacious because the ultimate consumer of electricity does not receive electricity which could be identified based upon origin. The state electricity distribution companies obtain electricity from different sources and such electricity is supplied to various consumers. Therefore, impact of safeguard duty must be assessed for the entire power matrix comprising of electricity produced from all different sources.
- kkk. While most interested parties have made bare assertions regarding the increase in solar tariff, projections filed by ACME must be disregarded as ACME has considered module prices at USD 0.31/Wp whereas the prices quoted from China are already at USD 0.27/Wp. While ACME has considered the impact of safeguard duty on imports, ACME has not accounted for viability gap funding (VGF) proposed to be provided by the Ministry of New and Renewable Energy. Furthermore, ACME has considered the impact of safeguard duty on the entire Indian demand whereas the impact would be limited to Indian Modules made from Indian cells (approximately 25 %). For the remaining demand, the impact would be offset by the VGF provided to the developers from the safeguard duty collected.
- iii. Certain interested parties alleged that imposition of safeguard duty will be against public interest due to the gap between demand and supply relying upon Final Findings in *Safeguard investigation concerning imports of White/Yellow Phosphorus into India*. However, gap between demand and supply was one of the several factors which were considered by the Hon'ble DG Safeguards in that investigation. Rather, the Hon'ble DG Safeguards has recommended imposition of safeguard duties in other cases wherein capacity of Domestic industry was lesser than demand such as Safeguard investigation concerning imports of Industrial

- Sewing Machine Needles, Safeguard investigation concerning imports of Oxo Alcohols, Safeguard investigation concerning imports of Sodium Nitrite, etc.
- mmm. Certain interested parties have argued that projections submitted by the Domestic Industry for foreign exchange outflow for importation is misleading. Parties have not contested the computation but merely argued that there will be foreign exchange outflows on account of importation of raw materials. As demonstrated during verifications, the petitioners are attempting for backward integration. Certain key supplies such as solar glass, EVA Sheet, back sheet, etc. have already made significant investments for improving production capacity in India. Therefore, the backward integration along with assured returns will augment domestic production in India and stem the huge outflow of foreign exchange from India.
- nnn. Respondents have contended that no backward integration was attempted by the Domestic Industry even when DCR was in effect. Such submissions are far removed from the truth as the Ld. DG Safeguards has already witnessed during verification that two plants of raw material suppliers – for EVA and back sheet are already operating in India near the largest producer of solar cells and modules in the country.
- ooo. Certain interested parties have contended that imposition of SGD would lead to increase in cost of solar power to the tune of 3 Rs./Unit. However, the statements from unnamed experts in a newspaper article cannot be relied on without any factual basis or providing an opportunity to the Domestic Industry to confront such baseless accusations.
- ppp. The interested parties have argued that imposition of safeguard duty will be significant impediment to achieving the target of 100 GW of solar power. It may be observed that the target was announced in early 2015 when the prices of imported solar cells and modules were much higher than prevailing during the period 2017-18. Therefore, if those prices were not an impediment in achieving the target of 100 GW, the present prices after the imposition of safeguard duty cannot be termed as an impediment to installation of 100 GW of solar power.
- qqq. The only requirement for SGD is that the measure shall be applied to the extent necessary to meet the three objectives - prevent serious injury; remedy serious injury and facilitate adjustment. The measure may be applied to the extent necessary to prevent 'or' remedy serious injury but in either case, it has to facilitate adjustment. Not only, there is no guidance on the extent of duty necessary to prevent or remedy serious injury, but also there is no guidance whatsoever on the extent necessary to facilitate adjustment.
- rrr. It must be noted that the requirement to facilitate adjustment is not present in other trade remedy instruments such as antidumping and countervailing duties. WTO Antidumping Agreement has two provisions one - addressing the injury and the other addressing the limitation or ceiling of duty. While the objective is to impose duties to the extent necessary to counteract dumping which is causing injury, the ceiling is that the duty shall not exceed the margin of dumping. Similar situation exists in the case of countervailing duties also. However, no such ceiling has been provided for under the Safeguards Agreement. In view of the differences in the legal provisions concerning safeguard measures as compared to antidumping or countervailing duty measures, it is not appropriate to apply the principles followed in antidumping or countervailing duty laws for the purpose of determining the duty amount that may be applied in the case of safeguards.
- sss. India has introduced rules relating to determination of NIP in antidumping laws. The law requires the authority to determine costs under normal conditions of

operations by normalizing certain costs such as raw materials, utilities, etc. and also in not recognizing expenses incurred after the factory gate such as commission, warehousing expenses, bad debts, etc. and also requires addition of an appropriate rate of return on capital employed instead of actual interest and a profit. It must be noted that Safeguards law addresses an emergency situation calling for emergency measures. In such a situation, it would be anathema to apply normalization principles in arriving at the 'extent' of duty that may be imposed.

- ttt. The NIP model does not meet the third requirement i.e. a component that is necessary to facilitate adjustment. So long as there is no provision to consider what is necessary to facilitate adjustment, NIP law cannot be followed for determining the extent of safeguard duty. Therefore, it is necessary to find alternate methods of arriving at the 'extent' of safeguard duty. WTO Members are free to choose any methodology reasonable enough to meet the objectives of Article 5.1. There is no guidance in the Indian law also. In this regard, one may look at the methodologies followed by USA, Canada and EU.
- uuu. The allegation that the Domestic Industry withdrew from the investigation because the dumping margin and/or injury margin does not have any foundation in facts and is entirely in the realm of surmises and conjecture. The domestic industry has established all the ingredients necessary for imposition of safeguards duty namely – (i) unforeseen development; (ii) effect of obligations incurred under GATT; (iii) sudden surge in imports; (iv) serious injury; (v) causal link between increased imports and serious injury; (vi) standing; and (vii) public interest.

(ii) Taiwan Photovoltaic Industry Association.

- a. DI does not satisfy requirement of Section 8B(6)(b) as their production does not constitute major share. As per MNRE data, there are about 20 Solar Cell manufacturers and 117 Solar Module manufacturers in India. Accordingly, capacity of Domestic Industry for Solar cells and Solar modules as on May 31, 2017 is merely 26.41% of total installed capacity in India.
- b. Data provided in DI's submissions completely excludes solar module manufacturing capacity in India to determine standing though solar cells and modules are both covered in scope of the PUC. Therefore, investigation should be terminated on the ground of deliberate miscalculation..
- c. SEZs cannot be treated as domestic industry. Section 51 of the the SEZ Act has overriding effect on other domestic legislation. SEZ are immune from vagaries domestic market.
- d. SEZ offer concessions to companies for exports and entities have a choice to set up units in SEZ or in DTA. Thus, setting up a unit in SEZ confirms that the SEZ Units have opted primarily for catering to export market and not DTA. Hence, SEZ Units cannot be extended the status of Domestic Industry.
- e. DI's stand is contradictory as on one hand, they want inclusion of SEZ Units in determining standing of DI and on the other, seek exemption from levy of SGD on the SEZ Units. Case laws cited only hold that clearance of goods manufactured in SEZ to DTA does not amount to import. Section 8B(2A)(ii) expressly provides that Safeguard Duty shall be levied. Strict interpretation should be applied for the purpose of levy of Duty as held in Sneh Enterprises [2006 (202) ELT 7 (SC)].
- f. Mundra Solar and Helios Photo Voltaic are producers of the PUC as they are involved only in assembly of imported solar cells into modules in view of the AntiDumping investigation initiated on July 21, 2017 wherein Mundra Solar

- and Helios Photo Voltaic were excluded from the scope of the Domestic Industry as these companies import Solar Cell or buy from domestic producers.
- g. Mundra Solar with installed capacity of 2400 MW became operational only in May, 2017. Without including this installed capacity, standing of DI would be merely 5.73% and remaining applicants would not qualify to be Domestic Industry. Present investigation ought to be terminated on this ground alone.
 - h. Domestic Industry has presented wrong data in terms of increase in value of imports of PUC. Increase in imports in 2017-18 has been 15% from 2016-17 which cannot be said to be sharp, sudden and significant, compared to previous years.
 - i. DI has mentioned various circumstances as unforeseen developments. TPVIA vehemently opposes that these circumstances were not unexpected at the time of incurring such obligations under GATT and DI provides no credible factual or legal basis for these submissions that unforeseen developments.
 - j. Data relied upon by DI itself suggests that China PR's capacity is not export oriented as its domestic consumption of Solar Cells is more than exports.
 - k. Though exports of Solar Modules were higher as compared to domestic consumption in 2014, the scenario gradually changed in 2016 when domestic consumption was higher. DI has completely misunderstood China's solar market and the allegation that its capacity for producing the PUC is export oriented is baseless.
 - l. Arguments made by DI on support extended to Chinese producers by their government are relevant for a Subsidy investigation, not Safeguard. Reasons and justifications by DI are grounds to establish existence of subsidies and not unforeseen developments.
 - m. Requirement of unforeseen developments is supplemented by condition of being an effect of obligations undertaken under the WTO Agreement to justify increased import. By no stretch of imagination can achieving economies of scale by China PR in solar sector can be said to be an effect of obligation incurred under the WTO.
 - n. Imports have not only increased from China PR but from other countries as well on account of increased demand and incapacity of DI. However, there is no whisper in DI's submissions about increasing imports from other countries. Global safeguard cannot be initiated when injury is caused due to one specific country. SGD is aimed at providing emergency protection from imports and in principle, cannot be targeted at imports from a particular country.
 - o. It cannot be ignored that DCR requirement was always at the risk of running afoul of the WTO Obligations and the Government of India kept on pushing to protect domestic manufacturers.
 - p. DI's contention that change in pattern of trade was pursuant to removal of DCR is misplaced as DCR affected only a small amount of production in India as noted by the Panel in India - Certain Measures Relating to Solar Cells and Solar Modules vide WT/DS456/R. Imports were equally high with DCR in place.
 - q. Standard to determine existence of unforeseen development is "*not what the specific negotiators had in mind but rather what they could (reasonably) have had in mind*" as observed by the Panel in United States - Definitive Safeguard Measures on Imports of Certain Steel Products vide WT/DS248, 249, 251, 252, 253, 254, 258, 259/AB/R. Paris Agreement, being an agreement within the UNFCCC, came into force in 1994 and as such, cannot be said to be unforeseen but a culmination of efforts of two decades of reducing greenhouse gas emissions and taking care of global warming amongst WTO Members.

- r. In view of Preamble to ITA:1, it can be inferred that it was not unforeseen by the Government, of India at the time of granting concession under ITA-1 that certain developments may arise to encourage continued technological development of information technology industry on a world-wide basis. Circumstances must be unforeseen by Government while undertaking an obligation and not by DI as held by Panel in Dominican Republic - Polypropylene Bags (WT/DS415,416,417,418/R).
- s. DI failed to demonstrate as a matter of fact how imports of the PUC being made free under ITA-1 led to unexpected increase in imports only during the POI when India became a signatory to ITA-1 in 1997 and tariffs were eliminated by 2000.
- t. If injury analysis in Anti-Dumping Investigation was not sufficient to establish injury, it would not suffice the requirement to show serious injury in a Safeguard investigation as *"the word 'serious' connotes a much higher standard of injury than the word 'material' as observed by the Appellate Body in the US - Lamb (WT/DS 177,178/AB/R).*
- u. According to Mercom's 2017 Q-4 and Annual India Solar Market Update, average selling price of modules imported from China PR saw an increase from 22.80/W in Q-3 2017 to t23.45/W in Q-4 2017. Increase of module price by 4% shows picture of injury presented by DI to be tainted.
- v. DI failed to demonstrate causal link between increased imports and serious injury by failing to consider non-attribution from other sources of injury such as inefficiency and incapacity of domestic producers, lower quality of domestically manufactured PUC, commencement of production by Mundra Solar only in May, 2017, Increasing demand due to ambitious target of Government to make India one of the largest green energy producers in the world, Government support through various schemes to build up manufacturing capacity of the PUC in India, such as Central Public-Sector Undertakings Scheme, fiscal incentives in the form of exemption from Customs Duty on import of capital good, creation of Technology Up-gradation Fund (TUF) for solar sector, etc., Compulsory registration of the PUC under the Solar Photovoltaics, Systems, Devices and Component Goods (Requirement for Compulsory Registration) Order, 2017, and Capital and technology intensive nature of solar industry.
- w. DI blandly mentions that even with levy of 70% ad valorem duty, increase in power tariffs will be negligible. According to Mr. Subodh Rai, Senior Director, CRISIL Ratings, imposition of SGD would inflate project costs by 25% and increase viable tariff to <3.75 per unit from around <3 per unit, making solar power less attractive to discoms.
- x. Levy of Safeguard Duty would burden the ultimate end-consumer.
- y. DI assertion that addition of capacity announced by overseas manufacturers would never be realised if SGD is not levied is baseless as companies have already put investment plans in place which will support domestic producers achieve economies of scale. The DI is aiming to seek dual-protection in form of investment and loans for its operations from all sources and other in guise of protectionism from the Government to cover up for inefficiencies.
- z. Safeguard Duty should be proposed only to offset injury caused by increased imports and not for other causes as held in Appellate Body Report in United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (WT/DS202/AB/R).

(iii)M/s First Solar Inc., USA; M/s First Solar FE Holding Pte. Ltd. & M/s First Solar Malaysia SDN. BHD.

- a. Majority of the injury parameters relating to the domestic industry are showing improvement. Analysis of past SGD investigations has shown that existence of serious injury is made out only when majority of the parameters show deterioration. Rules also require the authority to examine whether performance of domestic industry has deteriorated, so in a situation where performance of the domestic industry is improving, the DG Safeguards must hold that the domestic industry has not suffered serious injury.
- b. Parameters such as production, sales, capacity utilisation, losses, market share, return on investment etc. have improved. Any deterioration in parameters such as capacity utilisation, profits and return on investment is a result of significant capacity addition by Mundra Solar from 653 MW to 1000MW. Losses incurred by the domestic industry have increased significantly on account of Mundra Solar. If the same is excluded, the losses suffered by the domestic industry have reduced significantly.
- c. Petitioners have relied upon the preliminary findings at various places, however, such reliance is grossly misplaced for the findings were made without consideration of the interested parties and based predominantly on the petitioners claims. No reliance can therefore be placed on the preliminary findings in support of their submissions.
- d. Petitioners are trying to lump c-Si and Thin-Film products by professing them to be the same products using different technology. However the products here are inherently different, not just in the type of raw material and technology used, but also, the physical and technical characteristics of the product.
- e. In light of inherent differences between the two products as well as the submissions of the respondents in relation to the different BOSs required for the two, c-Si photovoltaic and thin film products are not inter-changeable but alternative products.
- f. End product substitutability can never be a criterion for holding that the products themselves are substitutable. Petitioners cannot include two different articles in the scope of PUC on the ground that the product produced out of these two different articles is interchangeable and competing with each other.
- g. Petitioners have not explained how the c-Si products produced by them are directly competitive with each other. These are merely baseless arguments made by the petitioners. The product produced by the petitioners is not like or directly competitive to thin film products, and accordingly, the latter must be excluded from the scope of product under consideration.
- h. Reliance of the petitioners on the previous findings of the Authority is misplaced. Since the duty itself was not imposed, the respondents could never avail the opportunity of filing an appeal against the decision and the previous order of the Designated Authority. The previous finding has also not attained finality and therefore should not be relied upon.
- i. In coming to a conclusion that c-Si photovoltaic products and thin film products are like article, the Authority had relied upon, amongst others, the following facts:

1. Thin film imports were 25% of the total imports from the subject countries.
 2. There was a very insignificant price difference between the price per watt of less than 5% between the two products.
 3. The cost/pricing and competition (in market parlance) is also decided based on factors such as Watt per unit, efficiency of the cell/modules under both technologies.
- j. However, there has been a dramatic change in the position of thin film products vis-à-vis c-Si products, with regard to the above factors.
1. As per data supplied by petitioners, the imports of thin films is only 0.15% of the total imports of the subject goods into India.
 2. Further, the price difference between the two products is not insignificant, as noted in the earlier case, but rather there is a difference of 15% in the price of thin film products and c-Si products.
 3. While the price per watt of thin film products has been increasing over the period, that of c-Si products has been declining.
- Therefore, clearly the two products are not competing with each other in the market insofar as the prices are concerned.
- k. Petitioners have claimed that the safeguard findings of the Canadian Authorities in relation to solar cells must be relied upon rather than the US and EU findings that have considered the two products not fall within the scope of the same PUC without offering any reasons for the same. If at all any findings were to be referred, the findings of the USITC in the safeguard findings are most relevant to the present case.
- l. If the US and EU authorities did not include c-Si and Thin Film products within the scope of the PUC, it goes on to show that there is higher degree of justification that the present case also should not include the two under the same scope of the PUC.
- m. Piece-meal reliance by the petitioners on the same findings cannot and should not be accepted. Petitioners have failed to point to a single fact that must distinguish the findings of the USITC on the issue of thin film products and justify the exclusion thereof.
- n. When petitioners have themselves accepted and relied upon the findings of the USITC on the issue of inclusion of cells and modules, they cannot claim that the findings should not be followed on the issue of inclusion of thin film products.
- o. Data in the preliminary findings and the written submissions has undergone a change compared to the data as given in the petitioners' application. This change has not been explained in the preliminary findings or the written submissions.
- p. The issue of SEZ units as not forming part of the DI has attained finality in light of previous findings of the Authority and the same cannot be contended by the petitioners.
- q. The issue of Safeguard duty being applicable only if the input used for making the finished products attracted the SGD cleared to the DTA attracted the levy is irrelevant in determining whether SEZ units should be considered as DI or not.
- r. Unforeseen developments took place in 2016 and the increase in imports must be evaluated for periods thereafter and not before that. When compared with 2015-16

rather than 2014-15, the imports have increased only by 123% while the demand during this period had increased by 133%. Imports thus, increased only as a response to increase in demand.

- s. While the imports may appear to have increased in relation to production, the same is on account of the fact that the production is suppressed due to decline in imports.
- t. Petitioners arguments in relation to the increase in the volume and value of imports is misleading as it draws attention to the decline in prices in isolation of other reasons for the said decline that are part of the detailed submissions of the respondents.
- u. Imports increased after the removal of DCRs. the development leading to an increase in imports was therefore the removal of DCRs, pursuant to the decision of the Appellate Body of the WTO rather than the imposition of duties by the EU and USA.
- v. Inconsistency of DCR with the obligations incurred under GATT is not an unforeseen development as DCR was not in existence when obligations were incurred and was introduced recently.
- w. Petitioners have failed to bring to light any development which brought about an increase in imports as only prices of Chinese imports have declined. Imposition of SGD would serve no purpose.
- x. In relation to the petitioner's claim of unforeseen development, the law requires existence of unforeseen developments and not unknown facts. Merely because of benefits enjoyed by producers in China, duty cannot be imposed against all countries across the globe.
- y. Petitioners seem to believe that investigations are only against China as each of the unforeseen development mentioned by them pertains wholly and exclusively to China. It was very much foreseen that the measures to develop industries would be taken, which is why the Anti Subsidy Agreement was entered into. It would not be appropriate to subject all exporters of the subject goods to duty, and increase the cost of imports, merely due to developments taking place in China.
- z. The increase in share of imports is not significant, as they have increased by merely 4%. This can, under no circumstances, qualify as sudden, sharp, significant increase.
- aa. Despite the continued positive price undercutting, there appears to have been no impact thereof on the petitioners; as neither there has been a decline in their production, sales, capacity utilization, nor any price suppression or depression, decline in profits, and ROI (excluding the data for Mundra Solar).
- bb. No price undercutting has been provided for thin film products, which again establishes that neither cells nor modules can directly compete with such products.
- cc. The decline in selling price of the petitioners has been commensurate with the decline in costs. If raw materials costs have declined and total cost of production has increased, it is clearly indicative of the fact that the costs have increased because of addition of Mundra Solar.
- dd. Production of the companies increased even after excluding Mundra Solar. Under these circumstances, there can be no question of decline in employment due to alleged surge in imports.

- ee. Petitioners have not established that they have suffered serious injury, in accordance with the parameters laid down under the Safeguard Rules. Contentions that point to injury on account of loss due to striking down of DCR by the WTO-AB report are merely attempts at gaining sympathy in the absence of any case on merits.
- ff. Any new plant takes some time to become fully operational and the capacity utilization in the initial period is always low. Therefore, the production achieved is quite understandably going to be low at 365 MW even after the increase in installed capacity of 1000 MW on account of entry by MSPVL. Low levels of production also attributable to the decline in sales performance of the petitioners.
- gg. Claimed inability of the petitioners, if any, to sell as much as they produce must be only on account of their poor export performance since sales during the period have quadrupled.
- hh. Petitioners' submissions with regard to increase in losses on account of increased sales due to pricing the products lower than cost are devoid of merit as the loss per unit of the petitioners has actually declined. If losses have increased it is due to overhead costs of Mundra Solar.
- ii. Sales of petitioners have admittedly increased and not declined. The rules require the Authority to examine serious injury and therefore possible significant decline in various economic parameters. The Authority cannot hold that the domestic industry suffered serious injury as some parameters did not increase as much as it could have in the absence of increased imports.
- jj. Attributing decrease in productivity per employee to increased imports despite the addition of MSPVL is erroneous since, if the new entrant set up with a huge workforce, the productivity per employee would show a decline in the short run. However, there is no decrease in the productivity of the petitioners, and actually the productivity per day has increased.
- kk. Petitioners had been suffering losses much before the increase in imports. In fact, the losses decreased only in 2014-15. Therefore, 2014-15 may be an abnormal year. Historically, the petitioners have been making losses, and the same has no correlation with the increase in imports.
- ll. In relation to causal link the following submissions of the respondent have been relied upon:
 1. The increase in imports volumes is because of the demand supply gap in the country.
 2. The import prices declined due to decline in raw material cost.
 3. First Solar request the authority to kindly consider the changes in raw material and prices of the product.
 4. The claim of price suppression and depression is strongly refuted. The increase in cost of production has been reported by including data of Mundra Solar. If data of Mundra Solar is excluded, it would be seen that the decline in cost is more than decline in selling price. Thus, despite price undercutting, there is no price suppression or depression effects. If the data shows increase in cost, it is only because of the fact that Mundra Solar recently commenced its commercial production and was faced with significantly high overhead cost which remained unabsorbed due to low production.

5. The domestic industry has been suffering financial losses for quite some time because of collapse of their export market and resultant underutilisation of production capacities. Even before the surge happened, the domestic industry was not able to get prices above their actual costs.
6. The domestic industry has claimed that their sales and capacity utilisation suffered. The domestic industry has not claimed that these volumes have declined. In fact, sales volumes have increased significantly. If the sales volumes have increased, there is no basis to claim serious injury on this account.
7. The market share of domestic industry has not declined. In fact, the market share of domestic industry in prior to surge was much lower.
8. The decline in return on investment is due to inclusion of Mundra Solar data which commenced commercial production only in the recent period. If Mundra Solar data is excluded, it would be seen that ROI of the domestic industry has improved.
9. As regards increase in inventories, the same is on account of commencement of commercial production by Mundra Solar. It is quite obvious that the capacity of the petitioning companies increased from __ to __, the inventories with the domestic industries would also increase over the period. However, what is required to be considered is the inventory in relation to production. The inventory in relation to production has not increased to an alarming level.
It is thus evident that the petitioners are not been able to establish any adverse effect of increased imports on the petitioning domestic industry.
- mm. The adjustment plan of the petitioners is too vague and superficial.
- nn. China, Malaysia and Taiwan have been exporting the PUC to Indian market for considerably long period. If imports are at fair price (which is why Safeguard Duty), there is no basis for the argument that the exporters from subject countries are trying to annihilate the domestic industry. By the very concept itself, while imports are at fair price, the Indian industry is not competitive.
- oo. The DI cannot cater to the demand and the DG Safeguards has declined to recommend duties in the past when there has been a substantial demand supply gap.
- pp. The petitioners have given no evidence to support their claim that increase in tariffs would be negligible. Further, they have not explained how the government revenue would increase on account of indigenization.
- qq. Petitioners have not established how non-levy of duty will be against public interest in India. It is purely presumptive that the local manufacturing will cease.
- rr. The production of the domestic industry has been increasing and the capacity utilisation would also show increase if production of Mundra Solar is excluded. It is therefore, without any basis that the imports are going to have adverse effect on the productions line in India.
- ss. The petitioners have conveniently ignored the fact that it had withdrawn its application for anti-dumping duty for the reason that the injury margin was either negligible or negative. Under these circumstances, it is not fathomable as to how the petitioners can claim a duty as high as 95% in case of safeguard measures.
- tt. The duty, if levied, should be based on injury margin on the basis of non-injurious price calculated after applying the same principles as are applied in an anti-dumping investigation.

(iv) M/s North India Module Manufacturer Association

- a. Solar cell produced by the petitioners is not sufficient to take care of their own module manufacturing.

- b. Petitioners have falsely argued that extra capacity is going to come up after the imposition of safeguard duty.
- c. Imposition of duties must be on solar modules and not on solar cells since there is a huge demand supply gap between the demand for the final product, being solar modules and the domestic industry's capacity of solar cells. Even at optimum capacity utilization, the capacity is available to meet only 15% of the total demand. Adani Power has been captively consuming their entire capacity and is a net importer of solar cells.
- d. The petition does not disclose extraordinary or emergency situation which warrants imposition of safeguard duty. The petition must be dismissed on this ground itself.
- e. There has been no unforeseen development. Basic problem of the petitioner is non availability of wafer which is a well known factor. Every increase in import or availability of materials at lower prices outside India should not be discouraged.
- f. No causal link between the increase in imports and the injury caused to the DI has been made out since the problem of the DI remains the non availability of wafer in India. DI has not given any material basis on which it can be demonstrated that the injury claimed by them is due to the increased import.
- g. DI has failed to provide a credible and viable adjustment plan. Unless Silicon Ingot and Silicon Wafer is manufactured in India, Indian cell manufacturers cannot compete with imports at all.
- h. Imposition of safeguards is against public interest.

(v) M/s Avaada Power Private Limited

- a. In terms of Rule 2(e) of the Safeguard Rules, the following articles should be excluded from the product scope as the same are not being manufactured by the domestic industry:
 - i. Solar cells using the "PERC" (Passivated Emitter Rear Cell) based technology
 - ii. Thin films & Bi-facial N-type solar cells;
 - iii. High efficiency solar cells using 5 and 6 bus bar production terminology;
 - iv. Solar modules of mono crystalline technology.
- b. DI has miserably failed to fulfil and/or prove their eligibility for imposition of safeguard duty under the legal requirements for imposition of safeguard duty.
- c. Standing should be examined separately for solar cells and solar modules. Petitioners do not have standing as domestic industry for solar modules in this investigation.
- d. Petitioners located in SEZ units should be excluded from the standing analysis as their primary goal is to cater to the export market.
- e. Import of the subject goods increased as a result of the Government of India's vision to promote solar power in India. This is the only reason behind increase in imports of the subject goods. Imports occurred only to fill the huge demand-supply gap.
- f. Petitioners have failed to identify any development that qualifies as unforeseen within the meaning of Article XIX(1)(a) of the GATT.
- g. Petitioners have failed to identify any specific GATT obligation that led to sudden, sharp, significant and recent increase in imports of the subject goods in terms of Article XIX(1)(a) of the GATT.
- h. The Petitioners' claim of serious injury has no merit. This is reflected from the annual reports of the petitioners.

- i. Indo Solar and Websol's performance has improved significantly in the financial year 2016-17 while Jupiter Solar Power Limited registered a profit of Rs. 3,999 lakhs during the same period. Mundra Solar PV Limited has started commercial production only about a year ago and cannot be expected to operate at optimum capacity. Injury to this company is on account of high interest and depreciation costs. M/s Helios Photo Voltaic Limited was undergoing corporate debt restructuring for a long period and has accumulated very high liabilities in the balance sheet and that is the reason for this petitioners losses.
- j. Petitioners' adjustment plan is not feasible and practical, and shall not facilitate adjustment in terms of Article 7.1 of the Agreement on Safeguards read with Rule 11(3) of the Safeguard Rules.
- k. Ultimate purchasers of solar power, which are various DISCOM's have clearly stated that solar power shall be purchased at not more than INR 3/kWh. However, imposition of duties would make this rate unfeasible. Post-levy rates of solar power will not only become uncompetitive but the developers will also have to abandon the development of the ongoing projects.
- l. any duty that disturbs the solar power grid parity would adversely affect not only the project developers but also the end-customers
- m. Indians at the bottom of the pyramid, especially, in rural areas have been able to switch to solar power at the current prices. Imposition of safeguard duty will have an adverse effect on rural electrification too.
- n. As petitioners are not legally entitled for imposition safeguard duty, their request for imposition of 95% safeguard duty does not arise.

(vi) M/s China Chamber of Commerce for Import and Export of Machinery and Electronic Products

- a. Applicant's claims regarding the scope of the PUC is misleading since differences between products manufactured from both technologies are significant in several aspects, such as raw materials, production processes, efficiency, flexibility and prices, etc.
- b. In the anti-dumping investigations initiated by other countries, crystalline products and thin films have been regarded as different products as evidenced by the USITC and EU's findings.
- c. Claims of the petitioner regarding solar cells and solar modules forming part of the same product are erroneous. Module manufacturers in India rely on the imports of solar cells from other countries like China. Solar cells are the raw materials of modules, several other materials and additional production processes are needed to manufacture modules from solar cells. They are different products, which are needed by different types of clients.
- d. Claims of the petitioners with respect to unforeseen circumstances are unreasonable since no causal relationship between the increase in imports and such claimed unforeseen circumstances is made out by them. Imports have only increased as a result of increase in demand and not because of any unforeseen circumstances.
- e. While concrete commitments under certain international agreements may be unforeseen, but it is indeed foreseen that certain international agreement may be signed and may cause influence and change to relevant market.
- f. Claim of the DI stating that the serious injury caused is due also to the fact that protective ambit of DCR can no longer be offered in light of the WTO Appellate Body decision cannot be allowed since the WTO-AB has held the DCR to be

- inconsistent with relevant WTO rules. To protect the domestic industry through DCR is by nature unfair and inconsistent with WTO rules.
- g. Alleged injury may be due to the domestic industry's incorrect operating decision to make excessive investment in increasing capacity and production not being proportionate to the increase in demand.
 - h. Imposition of safeguard duties is against India's public interest since currently 80% of India's production capacity of photovoltaic products is based on the imported solar cells, among which half are from China. To impose safeguard measures on imports of solar products will harm the interests of India's downstream users like power station operators, investors and importers.
 - i. The indigenous manufactures situated in SEZ will come under the ambit of any blanket duty that will be imposed on solar cells and modules which will make them uncompetitive.
 - j. The investigating authority mentioned neither the interests of importers or end users nor the overall public interests, but only emphasized that the proposed provisional Safeguard Duty is to protect the interests of the Domestic Industry.
 - k. Quantum of duty proposed by the DI at 95% is even higher than the duty rate proposed in the preliminary findings.

(vii) M/s Solar Power Developers Association

- a. In terms of Rule 2(e) of the Safeguard Rules, the following articles should be excluded from the product scope as the same are not being manufactured by the domestic industry:
 - i. Solar cells using the "PERC" (Passivated Emitter Rear Cell) based technology;
 - ii. Thin films & Bi-facial N-type solar cells;
 - iii. High efficiency solar cells using 5 and 6 bus bar production terminology;
 and
 - iv. Solar modules of mono crystalline technology.
- b. DI has miserably failed to fulfil and/or prove their eligibility for imposition of safeguard duty under the legal requirements for imposition of safeguard duty.
- c. Standing should be examined separately for solar cells and solar modules. Petitioners do not have standing as domestic industry for solar modules in this investigation.
- d. Petitioners located in SEZ units should be excluded from the standing analysis as their primary goal is to cater to the export market.
- e. Import of the subject goods increased as a result of the Government of India's vision to promote solar power in India. This is the only reason behind increase in imports of the subject goods. Imports occurred only to fill the huge demand-supply gap.
- f. Petitioners have failed to identify any development that qualifies as unforeseen within the meaning of Article XIX(1)(a) of the GATT.
- g. Petitioners have failed to identify any specific GATT obligation that led to sudden, sharp, significant and recent increase in imports of the subject goods in terms of Article XIX(1)(a) of the GATT.
- h. The Petitioners' claim of serious injury has no merit. This is reflected from the annual reports of the petitioners.
- i. Indo Solar and Websol's performance has improved significantly in the financial year 2016-17 while Jupiter Solar Power Limited registered a profit of Rs. 3,999

lakhs during the same period. Mundra Solar PV Limited has started commercial production only about a year ago and cannot be expected to operate at optimum capacity. Injury to this company is on account of high interest and depreciation costs. M/s Helios Photo Voltaic Limited was undergoing corporate debt restructuring for a long period and has accumulated very high liabilities in the balance sheet and that is the reason for this petitioners losses.

- j. Petitioners' adjustment plan is not feasible and practical, and shall not facilitate adjustment in terms of Article 7.1 of the Agreement on Safeguards read with Rule 11(3) of the Safeguard Rules.
- k. Ultimate purchasers of solar power, which are various DISCOM's have clearly stated that solar power shall be purchased at not more than INR 3/kWh. However, imposition of duties would make this rate unfeasible. Post-levy rates of solar power will not only become uncompetitive but the developers will also have to abandon the development of the ongoing projects.
- l. any duty that disturbs the solar power grid parity would adversely affect not only the project developers but also the end-customers
- m. Indians at the bottom of the pyramid, especially, in rural areas have been able to switch to solar power at the current prices. Imposition of safeguard duty will have an adverse effect on rural electrification too. As petitioners are not legally entitled for imposition safeguard duty, their request for imposition of 95% safeguard duty does not arise.

(viii) M/s REC Solar

- a. Safeguard duty, if any, should not be imposed on imports of PUC that:
 - originates from Singapore, and
 - utilise high-efficiency CSPV cells manufactured in Singapore
- b. SEZ units should not be part of the domestic industry as these units fall outside the custom territory of India.
Section 26 of the Special Economic Zones Act, 2005 provide for special incentives in the form of duty free imports for SEZ units which are not available to a unit in the DTA.
- c. They relied on the final finding in Safeguards Investigation concerning imports of Electrical Insulators into India from People's Republic of China, which was further confirmed in Safeguard Investigation concerning imports of 'Unwrought Aluminium (Aluminium not alloyed and Aluminium alloys) into India.
- d. The Domestic Industry for the same PUC and for the same POI and injury analysis period is claiming material injury in the anti-dumping investigation and serious injury in the safeguard investigation which in turn shows that Injury segregation has not been provided.
- e. If there are factors other than increase in imports which are causing injury to the domestic industry, those factors should not be attributed to increased imports and in such cases, the complaint may be referred for anti-dumping or countervailing duty investigation.
- f. The DI should be directed to provide a segregation of injury suffered on account of dumped imports from the injury suffered on account of increased imports. *Front Axle Beam, Steering Knuckle & Crankshaft of medium and heavy commercial vehicles*
- g. Where the applicants themselves are admitting and claiming 'market disruption' on account of imports of the PUC, which is only applicable to the imports from China

PR, the DI's present application for imposition of safeguard duty on all the imports of the PUC is devoid of merit and is liable to be terminated.

- h. There is insufficiency in showing increased imports and even though there has been an increase in the volume of imports, the rate of the increase in imports shows a declining trend.
- i. The Indian domestic industry for the PUC has improved its performance significantly throughout the POI.
- j. The imports of the PUC into India must be allowed to meet the domestic demand for the PUC in India.
- k. There is inherent deficiency in Indian solar manufacturing industry. A concept note dated 15 December 2017 was issued by Ministry of New and Renewable Energy which provides that the injury suffered by the Domestic Industry is not account of increased imports of the PUC, but on account of its inherent deficiencies.
- l. The causal link between the imports of the PUC and the alleged serious injury to the DI is broken due to the following:
 - (i) Decline in the rate of increase in imports of the PUC
 - (ii) Inability of the DI to meet the demand
 - (iii) Inherent weakness in the Indian solar manufacturing industry
- m. Injury suffered by the Domestic industry, if any, on account of factors other than increased imports should not be attributed to the increased imports of the PUC.
- n. The DI has failed to justify that India being a signatory to the ITA and the removal of DCR is an unforeseen or unexpected circumstance leading to the increase in imports.
- o. With respect to the removal of DCR policy, no evidence has been provided with respect to import trend from the time of the removal of DCR in December 2016 till the time of the finalization of the DI application in May 2017. The reason of removal of DCR as constituting unforeseen circumstances also cannot be accepted. Thus, in view of the arguments made above, the respondent respectfully submits that the DI has not been able to meet the requirements of GATT Article XIX.
- p. The adjustment plan provided by the applicants is highly speculative and devoid of concreteness. The DI has not provided any specifics of the adjustment plan with respect to timelines or details regarding its implementation and therefore, the same cannot be considered as a viable adjustment plan.
- q. The imposition of safeguard duty, if any, will have a negative impact on the overall solar user industry and the same will prove detrimental to the larger public interest.

(ix) M/s Vikram Solar Ltd.

- a. The inclusion of units set up in SEZs as domestic industry, as held by the DG (Safeguards) in his preliminary findings dated January 5, 2018. This inclusion of units set up in SEZs as domestic industry by the investigating authority and in support of this decision it is submitted that there is no bar under the Agreement on Safeguards or under the Indian Safeguard law against considering units set up in SEZs as domestic industry.
- b. The solar units set up in the SEZs are contributing to the socio-economic growth and development of the country by providing employment and adding to the national GDP and are an important tool in realising the Government's target of 100 GW of solar power by 2022.

- c. The domestic industry is not manufacturing the articles listed below, these articles should be excluded from product under consideration of the safeguard investigation.
 - (i) Solar Cell using Passivated Emitter Rear Cell (PERC) technology;
 - (ii) Thin Films and Bi-facial Solar cells;
 - (iii) High Efficiency Solar Cells using 5 and 6 bus bar production terminology;
 - (iv) High Efficiency Solar Cells based on Heterojunction Technology
- d. The injury faced by both the SEZ units and units set up in the DTA area can be remedied by imposing safeguard duty in the form of Tariff Rate Quotas (TRQ) and by allocating a substantial portion of the TRQ to units set up in the SEZs.
- e. The domestic production capacity of solar cells is far lesser than the domestic requirement for the production of solar modules or panels

(x) M/s Trina Solar science & technology (Vietnam)

- a. Imports of the subject goods from Vietnam do not exceed 3% individually and 9% collectively when taken along with imports from other developing countries (other than China and Malaysia). As such, no provisional safeguard duty was recommended on Vietnam.

(xi) Trina Solar science & technology (Thailand)

- a. Imports of the subject goods from Thailand do not exceed 3% individually and 9% collectively when taken along with imports from other developing countries (other than China and Malaysia). As such, no provisional safeguard duty was recommended on Thailand.

(xii) M/s Canadian Solar Manufacturing (Luoyang) Inc and Canadian Solar Manufacturing (Changshu) Inc

- a. Since six months have passed from the initiation of investigation, the data for the year 2017-18 is now available for both imports as well as injury. However, the Petitioners do not seem to have brought any recent data on record (whether for import or injury) and have simply relied on the annualized POI in its analysis.
- b. The period of investigation and injury period in both investigations remains largely common, with the only three months differentiating the two investigation periods.
- c. Solar cells and modules differ from each on account of end-use, technical and commercial substitutability, pricing, and product characteristics as follows:
 - (i) Product Characteristics: Solar cells are inputs for modules. A module is composed of several solar cells.
 - (ii) End-use: While both solar cells and modules have a similar basic property i.e., generation of electric energy from sunlight, a solar cell is not commercially substitutable with a module and they are different in terms of end-use/ applications. A single solar cell cannot typically generate electricity which can be used for any commercial application. A module which is made up of several solar cells, on the other hand, can be used for

commercial applications due to higher amount of electricity generation. Therefore, solar cells and modules are different from the perspective of an end-user.

(iii) Technically and Commercially Un-substitutable: The process of assembling solar cells into modules is a technical and sophisticated process that requires value addition of up to 30% to 35% of the cost of solar cells. The landed value of solar cells from the Subject Countries, in terms of the Petition itself, ranges from INR 13.71/Watt to INR 18.59/Watt and the landed value of modules ranges from INR 24.19/Watt to INR 36.58/Watt during the POI.

- d. Solar cells and modules do not compete with each other – one is an upstream product to the other. Imports of modules do not compete with products sold by cell manufacturers and vice versa.
- e. Given solar cells and modules are separate products (as already emphasized above), no data whatsoever has been provided with respect to % share of production split between solar cells and modules by the five Petitioning Companies (as against the total production of solar cells and modules respectively).
- f. Based on public domain information, the five Petitioning Companies together would constitute a mere 3.25% of the total domestic production of modules.
- g. Three of the Petitioning companies are SEZ, they should be excluded from the domestic industry pursuant to the final finding in *Safeguard Investigation concerning Imports of “Unwrought Aluminium (Aluminium not alloyed and Aluminium alloys)”*
- h. The Exporters agree with the position that the safeguard duties, if any, would “not” be applicable to the finished goods manufactured in the SEZ and moved to the DTA – but would apply to the inputs that are used to make the said finished goods (assuming the duty is imposed on inputs and the finished goods are like article to the inputs).
- i. Since both solar cells and modules are neither like article nor directly competitive (as elaborated herein at Section B above), the Hon’ble Designated Authority is requested to direct the Petitioners to provide data in respect of increased imports – separately for solar cells and modules so as to make an effective assessment of serious injury.
- j. The Petitioners have limited their averments in respect of unforeseen developments solely to China at paragraph no. 50 to 68 of their Written Submissions and have failed to illustrate any unforeseen developments in respect of other countries from which there have been alleged imports to India.
- k. The events qualifying as ‘unforeseen’ must have been so at the time when concession was negotiated. At the time of negotiation of Marrakesh package, the contracting parties also negotiated agreements pertaining to trade-remedy measures i.e. anti-dumping, anti-subsidy and safeguard. Adoption of trade remedy measures on certain products was not ‘unexpected’ as such at the time when concessions were negotiated
- l. Inconsistency with WTO law cannot be considered as “unforeseen”.
- m. The figures provided in this behalf seem unsubstantiated and require further authentication. These events are business decisions taken by Companies globally to make their businesses efficient. Such events would continue to exist in any industry irrespective

of the imposition of the safeguard duty. Mere increase in volume of trade or export orientation of the Chinese exporters cannot be termed as ‘unforeseen development’.

- n. The incentives provided to the Chinese domestic producers remains irrelevant for the purpose of the present safeguard investigation. What remains relevant is the demand that grew globally including in India. The subsidy measures adopted by China cannot be termed as ‘unforeseen developments’ by India within the meaning of Article XIX:1(a) of the GATT 1994. The Petitioners are attempting to counteract China’s subsidy measures by requesting for a levy of safeguard duties.
- o. Paris Agreement is nothing but an extension of India’s commitments under the United Nations Framework Convention on Climate Change (“UNFCCC”) which India ratified on 1 November 1993 and therefore, India was always committed to reduce its carbon emissions and it had full knowledge about its ongoing commitments under the UNFCCC at the time even COP21 were to be seen as new development, it can never be termed as ‘unforeseen development’.
- p. The Petitioners have themselves admitted that injury suffered to the domestic industry is on account of dumped imports and since the relevant investigation to tackle dumped imports is anti-dumping investigation – the Hon’ble Designated Authority is requested to direct the Petitioners to relevant investigation pursuant to its obligation under Safeguard Rules and the WTO.
- q. The present investigation is currently proceeding on the basis of outdated and erroneously annualized data, which does not appear to have been updated. The Hon’ble Designated Authority is requested to not proceed with the investigation unless new and most recent injury data is made available to the interested parties.
- r. The Petitioners have conveniently ignored the fact that their capacities (until the inclusion of Mundra Solar PV Limited) could not even cover India’s demand in the period of investigation, and developers had no choice but to import cells and modules at reasonable prices to meet the lofty targets set by the Government of India.
- s. The demand for the PUC significantly increased throughout the POI, however, the Indian capacity did not increase at the same rate so as to meet the demand for PUC in India.
- t. The Hon’ble Designated Authority in the past have decided not to impose safeguard duty in respect of subject goods wherein there were increased imports in India on account of meeting with the growing domestic demand in India and for the purpose of filling the gap in demand – supply in India.
- u. The Petitioners have attempted to simulate fictitious injury as will be demonstrated on the basis of the facts below. In a parallel anti-dumping investigation against imports of subject goods originating in or exported from China PR, Taiwan and Malaysia (“subject countries”), price undercutting for solar modules during the POI (1 April 2016 to 30 June 2017) for subject countries was negative.
- v. The Petitioners herein have conveniently provided separate data for cells and modules in respect of price undercutting, whereas in respect of other injury parameters like suppression and depression, the Petitioners have chosen to provide the combined effect of the solar cells and modules imports on domestic industry (when the solar cells and module if individually determined may not show alleged injury).

- w. The Hon'ble Designated Authority is requested to make a separate analysis of alleged injury on account of imports of solar cells and modules separately as cells and modules are not like and directly competitive.
- x. There is no price suppression/depression in the present facts as the selling price has been maintained at the same rate as that of the cost of sales. There is only one year in the entire injury period where the price has not moved in tandem with the cost of the Petitioners i.e. 2015-16. There were bound to be inflated costs for the new producer (as is the case for any new plant) due to high depreciation, high interest cost, higher fixed cost and slow ramping up of capacity utilization.
- y. Sales made by the Petitioners have improved throughout the POI and serious injury, if any, to the Petitioners is on account of various non-attributable factors discussed at relevant section below.
- z. The capacity has increased and capacity utilization of the Domestic Industry seems to have decreased. The Petitioners herein are conveniently seeking to provide the capacity data of the other producers of the PUC when they have consciously excluded the said producers from the ambit of "domestic industry".
- aa. Surana Solar Ltd.- the Petitioners are seeking to rely on its injury analysis at paragraph 113, it is evident that the company has been consistently making profits from the year 2013.
- bb. XL Energy at page 43 of their Annual Report 2016-2017 has stated that capacities were unutilized due to the industry downturn and resultant fall in demand.
- cc. The Exporters submit that the averment made by the Petitioners in respect of Euro Multivision must be rejected as alleged injury to Euro Multivision was self-inflicted and was not on account of imports.
- dd. Alleged declining trend in the productivity of the domestic industry is clearly on account of the Petitioners' own inefficiencies.
- ee. It is reiterated that since Mundra is a newly established company – it should have certainly incurred certain setup costs, production costs and overheads (which ought to have been higher than any other established company) – consequently affecting the overall performance of the domestic industry in respect of the PUC.
- ff. The Hon'ble Designated Authority should determine if the exports of the said Petitioners have decreased and thereby, have led to the alleged increase in inventory.
- gg. The serious injury, if any, suffered by the Domestic Industry is self-inflicted. The steep decline in tariff was, in part, result of decline in international price of solar modules. For Petitioners to compete in this market, they needed to drop its prices in line with the lower bid made by the solar power developers and the declining international prices.
- hh. The decrease in auction activity can be attributed to factors such as weak financial condition of DISCOM, inefficient transmission, less power demand and increase in captive generation by commercial and industrial companies, and the WTO ruling against India's DCR in its renewable energy policy.

- ii. The Solar Energy Corporation of India and the NTPC have set a maximum capacity for a single bidder at 1800 MW and 2000MW and the same is being protested by leading developers in the solar market.
- jj. One of the Petitioning Companies, Indosolar Limited vide their “Statement of Audited Financial for the Quarter and Year ended on 31 March 2018” have reported exceptional items losses on account of impairment of plant and machinery under installation during the end of 2017.
- kk. The company lost over 300 crores in this period, for reason completely unrelated to the impugned imports.
- ll. Helios Photo Voltaic Limited (in short “Helios”) - the operations of the company were affected due to stoppage of work for a period of 34 days.
- mm. Helios vide the:
 - (i) liquidity constraints faced by the company have critically impacted their ability to enhance their manufacturing operations and capacity utilization levels.
 - (ii) concern of inability to be cost effective due to lack of consistent demand because of intermittent release of tenders.
- nn. Websol Energy System - there was no full production for the quarter that ended March 2018.
- oo. Indosolar Limited at page 16 of the Annual Report 2014-15 has stated that capacities were unutilized due to the industry downturn and resultant fall in demand.
- pp. The petitioners reduce their costs by reducing the raw material prices in pursuance to renegotiation by entering into long-term contracts – it is respectfully submitted that such a practice should have been followed regardless of safeguard duties being levied.
- qq. If the Petitioners are taking up forward and backward integration projects for reducing their costs – it is submitted that the profit-making Petitioning companies like Mundra Solar PV Ltd (Adani Group) cannot be short of any resources to enter into such long-term projects and thereafter can effectively be successful in reducing their costs as part of the adjustment plan. Petitioners plan to reduce financing cost by converting Rupee borrowings into USD borrowings – the Exporters submit that the Petitioners have failed to explain how they plan to convert Rupee loans to USD loans and what would be the basis and commercial terms of such conversion, if possible at all.
- rr. The levy of safeguard duty on PUC would be against public interest of India as it would have a huge negative impact on solar market in India for the following reasons.
 - (i) The Designated Authority should not recommend any safeguard duties on the PUC and terminate the investigation as the ultimate impact would be on the users of the PUC in the solar market due to imposition of duties.
 - (ii) If safeguard duty is levied on the PUC which will in turn effect the entry of advance technology imports – the domestic market would not be able to meet the increasing demand in Indian solar market.
 - (iii) If safeguard duty is imposed it will lead to a situation of loss of jobs.

- ss. There are no unforeseen developments that could have caused increase in imports in India, there is no serious injury to the domestic industry on account of imports and existence of break in causal link between increased imports and injury on account of self-inflicted injury to domestic industry – the averment of the Petitioners that 95% of safeguard duty be imposed is ought to be rejected by the Hon’ble Designated Authority in public interest.

(xiii) M/s ACME Solar Holdings Ltd. (“Acme Solar”) and M/s ACME Cleantech solutions Private Ltd. (“ACME Cleantech”)

- a. Section 2(e) of the Safeguard Duty Rules define ‘like articles’ as, “an article which is identical or alike in all respects to the article under investigation”.
- b. Differences in c-Si & thin film
- (i) Solar cells made from thin film technology and Solar cells made from c-Si technology cannot be substituted or mixed with each other.
- (ii) Solar cells manufactured using c-Si technology are made through a process involving growth of crystals from crystalline silicon, production of wafers and thereafter conversion of wafers into cells, while under the thin film technology, thin PV material are placed onto dye sensitized substrates such as glass or stainless steel.
- (iii) Solar cells manufactured using c-Si technology have higher wattage output and higher conversion efficiencies in comparison to solar cells manufactured using thin film technology.
- (iv) Solar cells made from c-Si technology are space efficient but costly and they are mostly used for residential and small areas while solar cells made from thin film technology are opposite in terms of space and price from the latter and they are used for areas having high temperatures and larger space.
- c. Domestic Industry in its written submissions have admitted that they don’t manufacture solar cells using thin film technology.
- d. The Domestic industry, whose total production by their own admission is 381 MW, constitute a mere 7.5% of the total production of the PUC in the country. The MNRE is annexed as Annexure “A” in the rejoinder submission.
- e. Balance sheet of two of the companies included in the DI, who were operational during the POI viz. Jupiter solar and Websol shows a clear considerable increase in revenues.
- f. Domestic Industry has contended that the imposition of Safeguard duty would result in increase of tariff by INR/kWh 0.70 which would lead to a meagre increase of tariff to INR/kWh 3.14. The rate of safeguard duty as proposed by the DI (i.e. 95%) is hypothetical and not based on any empirical study of data and other factors involved therein.
- g. The tariff would increase from INR 2.87/kWh to INR 3.56/kWh, if safeguard duty is levied @25% to INR 3.67/kWh, if safeguard duty is levied @30% and to INR 4.54/kWh if safeguard duty is levied @70% thereby resulting in a considerable increase in tariff corresponding to the rate at which safeguard duty is levied.

- h. Levying safeguard duty on the product will be contrary to public interest because the gap between demand and supply of PUC will increase manifold due to weak capacity utilization by the DI and it would delay the plans stipulated under the NSM.

D. EXAMINATION & FINDINGS OF DIRECTOR GENERAL (SAFEGUARDS)

17. Based on the submissions made by various interested parties in response to Initiation, preliminary finding and Public hearing, various primary and secondary records available, Domestic verification undertaken, I have examined concerns on various aspects and record my final finding as under:
18. Section 8B of the Customs Tariff Act, 1975 deals with imposition of safeguard duty on imports. Its sub-section (1) provides for imposition of safeguard duty by the Central Government on an article if the article is being imported into India in such increased quantities and under such conditions so as to cause or threaten to cause serious injury to the Domestic Industry.
19. The Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 provide the manner and principles governing investigation.
20. The investigation has been conducted in accordance with the said rules and the final findings are recorded through this notification.

a) The Product Under Consideration (PUC)

21. In the preliminary finding, the following was held regarding PUC:
- (i) *“The PUC is “Solar Cells whether or not assembled in modules or panels” classifiable under Tariff Heading 8541 and Tariff Item 85414011 of the Customs Tariff Act, 1975. Solar Cells are also known as Photovoltaic Cells in the market parlance. Photovoltaic technology enables direct conversion of sunlight into electricity at the atomic level and Solar Cells are solid state electrical devices that convert sunlight directly into electricity by the photovoltaic effect. For practical use, Solar Cells are packaged and connected into an assembly and such an assembly of Solar Cells is referred to as a Solar Panel or Solar Module. The electrical connections are made to the Solar Cells in series to achieve desired output wattage and / or in parallel to provide a desired current capability.*
- (ii) *The PUC is being manufactured using either of the two major technologies: (1) Crystalline Silicon (c-Si) based Solar Cell technology, also known as Silicon Wafer based technology, and (2) Thin Film technology. The c-Si technology may use n-type and p-type Silicon, and also mono crystalline and multi crystalline Silicon materials. The Thin Film technology may use Amorphous Silicon, Cadmium Tellurium (CdTe) or Copper Indium Gallium Selenium as semi-conductor materials. Solar Cells based on both c-Si technology and Thin Film technology are imported into India.*
- (iii) *The applicants manufacture Solar Cells / modules / panels using only c-Si technology and not Thin Film technology. The applicants have claimed that Solar Cells based on both c-Si and Thin Film technologies are used in Solar power plants. According to the applicants, the Central Government projects such as Jawaharlal Nehru National Solar Mission (JNNSM) or projects of various State Governments neither differentiate the technologies nor award separate auction price for projects based on different technologies. Moreover, there are no material differences between Solar Cells based on either of these technologies and these are all meant for the same end uses. Therefore, the applicants contend that the*

domestically produced PUC based on c-Si technology are like and directly competitive products to the imported PUC based on either c-Si technology or Thin Film technology.”

22. Some interested parties have submitted that DI does not possess Thin-film technology and “PERC” (Passivated Emitter Rear Cell) based technology, & Bi-facial N-type solar cells; High efficiency solar cells using 5 and 6 bus bar production terminology; and Solar modules of mono crystalline technology and therefore PUC should be restricted only to the scope of production capability/ production by the DI. I have carefully examined this aspect and noted that Solar cells of various types produced by different technologies vary in terms of efficiency, price, physical characteristics, like size and weight etc. These variations though lead to trade off in price and efficiency, the final usage of the PUC is only to produce power.
23. The Safeguard duty rules (Custom Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 –Notification No. 35/97-NT-Customs dated 29.07.1997(hereinafter called as Safeguard Rules) hold a domestic producer as “*a producer of the like article or directly competitive article in India or a trade or business association, a majority of members of which produce or trade the like article or directly competitive article in India*” and “like article” defined as “*like article means an article which is identical or alike in all respects to the article under investigation.*” The common and overlapping applications of PUC establishes that imported and domestically produced subject goods are directly competitive. This therefore does not warrant any exclusion from the scope of PUC as stated in initiation notification. I therefore uphold and confirm the scope of PUC as considered and mentioned in para 5.1 of the preliminary finding dated 5.01.2018.

b) Scope and Standing of Domestic Industry (DI)

24. Clause (b) of sub-section (6) of Section 8B of the Customs Tariff Act, 1975 defines Domestic Industry (hereinafter also referred to as the "DI"), as follows:

‘(b) “Domestic industry” means the producers -

- i. as a whole of the like article or a directly competitive article in India; or*
- ii. whose collective output of the like article or a directly competitive article in India constitutes a major share of the total production of the said article in India.’*

25. As regards scope and standing of the DI, in the initiation dated 19.12.2017 and the preliminary finding dated 5.01.2018, the applicant considered included SEZ units as well in the scope of the DI. The justification in the preliminary finding for this scoping was as under:

“The SEZ scheme, an export promotion scheme of the Ministry of Commerce and Industry, Government of India extends certain fiscal and non-fiscal benefits to the units operating thereunder with a view to encourage exports and that by creating a legal fiction, the SEZ units are treated as if these are outside India. However, the SEZ units are physically very much in India and in like manner of other domestic manufacturing units, these units adhere to domestic laws (though at times with some relaxations), generate employment, make domestic sales etc. Thus, increase in imports of any item also impacts SEZ units in like manner as it does any other domestic producer operating outside the SEZs. Therefore, the applicant SEZ units qualify as part of the DI (indeed, by virtue of the quantum of production of the applicants, as the DI itself). All other SEZ units that are similarly engaged in production of like or directly competitive products would also be treated as a part of the DI”.

26. However, post initiation and preliminary finding and further in response to the Public hearing (both submissions and rejoinders) many interested parties have argued for exclusion of SEZ units from the scope of DI on the following grounds.

Submissions by Interested parties other than Domestic Industry.

- a. Three out of five applicant domestic producers are located in SEZ and cannot be treated as domestic industry as SEZ area is deemed to be territory outside India and all governing legislations for import or export goods will apply to them. Goods produced by an SEZ unit cannot be said to be domestically manufactured. Initiation is therefore bad in law in view of Section 53 of Special Economic Zone Act, 2005 (SEZ Act) which provides that SEZ is deemed to be a territory outside the custom territory of India
- b. As per Section 30 of SEZ Act and para 6.08 of Foreign Trade Policy, units located in SEZs and EOUs are deemed to be situated outside India, and therefore cannot be considered as DI.
- c. The fundamental objective of establishing of SEZ units is promotion of exports. Areas of the SEZ are excluded from the definition of Domestic Tariff Area and removals therefrom are subject to duties of customs. DTA sale of goods manufactured by a SEZ unit can be made only on submission of import license. The contentions for treating the SEZ unit as part of the DI are not acceptable.
- d. The term used in the safeguard law is ‘producers in India’ and SEZ unit are deemed to be a territory outside the customs territory of India. SEZ or EOU units focus is on export market and do not compete primarily in domestic market whereas purpose of safeguard law is to protect the Domestic Industry from import competition in domestic market. Therefore, EOU and SEZ may form DI only to the extent of their entitlement permitted under the extant laws. Developers and Co-developer units in the SEZ’s are given various exemptions and concessions under the SEZ Act, 2005 in the form of tax and fiscal benefits with a view to increase exports and therefore operate in a different sphere.
- e. DA has made findings on a principle of law w.r.t. SEZ’s not being part of the DI and the same should be followed since DA is a quasi-judicial body and must maintain uniformity in decision making process. In final findings of DG Safeguards dated 27 September 2012 in Electrical Insulators case, WSI Industries (located in SEZ) was also excluded from the scope of the domestic industry.
- f. Increase in imports do not result in impact on units in SEZ. There are number of cases where the Authority has regarded SEZ to not be a part of DI. Resultantly, these three complainants cannot be considered to be a part of the domestic industry (DI) and the remaining complainants do not cross the threshold of ‘collective output constituting a major share of total article in India’, which results in such a standing requirement not being satisfied.
- g. In the “Safeguard investigation concerning Imports of ‘Unwrought Aluminium (Aluminium not alloyed and Aluminium alloys)’ into India”, DG-Safeguards has not considered SEZ units as part of DI.
- h. 5 DI Companies would constitute only 3.25% of the domestic production of modules. In PF, DG has not examined standing of 5 DI Companies with respect to modules and instead, assessed their standing by taking solar cells and modules together.
- i. As a result of such exclusion, the installed capacity and other economic data with respect to Mundra and Helios are to be excluded (specifically Mundra’s 2400 MW installed capacity), which would render the contribution of DI in production of PUC to a mere 5.73% and would effectively disqualify remaining applicants as DI.

27. I have carefully gone through the arguments of both sides. The past decisions of DG Safeguards in Safeguard finding of “**Unwrought Aluminium (Aluminium not alloyed and Aluminium alloys)**” and “**Electrical Insulators**” have been recalled. The following aspects regarding the SEZ units are underscored in this regard:

- a) **The SEZ Act, 2005 was enacted to provide for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto.**
- b) **Domestic Tariff Area in section 2(i) of the SEZ Act, 2005 means** the whole of India (including the territorial waters and continental shelf) but does not include the areas of the Special Economic Zones.
- c) As per Section 2(m) (ii) of the SEZ Act, 2005 “export” means “supplying goods, or providing services, from the Domestic Tariff Area to a Unit or Developer.
- d) Section 30 of the SEZ Act, 2005 provides that:

“Subject to the conditions specified in the rules made by the Central Government in this behalf:-

- (a) any goods removed from a Special Economic Zone to the Domestic Tariff Area shall be chargeable to duties of customs including anti-dumping, countervailing and safeguard duties under the Customs Tariff Act, 1975, where applicable, as leviable on such goods when imported; and
 - (b) the rate of duty and tariff valuation, if any, applicable to goods removed from a Special Economic Zone shall be at the rate and tariff valuation in force as on the date of such removal, and where such date is not ascertainable, on the date of payment of duty.”
- e) Section 53 of the SEZ Act, 2005 further provides that:-

“(1) A Special Economic Zone shall, on and from the appointed day, be deemed to be a territory outside the customs territory of India for the purposes of undertaking the authorized operations.

(2) A Special Economic Zone shall, with effect from such date as Central Government may notify, be deemed to be a port, inland container depot, land station and land customs stations, as the case may be, under section 7 of the Customs Act, 1962: Provided that for the purposes of this section, the Central Government may notify different dates for different Special Economic Zones.”

- f) Rule 47 of the Special Economic Zones Rules, 2006 states as under:

“Sales in Domestic Tariff Area — (1) A Unit may sell goods and services including rejects or wastes or scraps or remnants or broken diamonds or by-products arising during the manufacturing process or in connection therewith, in the Domestic Tariff Area on payment of customs duties under section 30, subject to the following conditions, namely:

Domestic Tariff Area sale under sub-rule (1), of goods manufactured by a Unit shall be on submission of import licence, as applicable to the import of similar goods into India, under the provisions of the Foreign Trade Policy”

- g) As per Section 2(o) of SEZ act, 2005 “import” means-
- (i) bringing goods or receiving services, in a Special Economic Zone, by a Unit or Developer from a place outside India by land, sea or air or by any other mode, whether physical or otherwise; or
 - (ii) receiving goods, or services by, Unit or Developer from another Unit or Developer of the same Special Economic Zone or a different Special Economic Zone;
- h) Section 53, Sub-rule (1) and (2) provides for considering certain DTA clearances towards counting of NFE. SEZ is deemed to be a territory outside the customs territory of India and is also deemed to be a port, inland container depot, land station and land customs stations, as the case may be, under section 7 of the Customs Act, 1962.
- i) The above provisions and features of SEZ Act and SEZ units therein establish that though SEZ units are a part of India in terms of territorial sovereignty considerations but they have been economically delineated from the DTA to attain a specified objective of exports ‘DTA sales’ though permitted under the SEZ Act/Rules thereof are only exceptions and not a business as usual model like a domestic producer in DTA primarily focussing on home market sales. There could be instances where in, the conditions of DTA clearances may be quite conducive and liberal for a SEZ unit but it in no way alters or modifies the prime objective of SEZ unit to remain export oriented.
- j) Though section 2(i) of SEZ Act does not specifically mention about DTA clearances by a SEZ unit as an import in the DTA, but such clearances are subjected to duties like Anti-dumping duty, Countervailing duty and Safeguard duty as applicable in accordance with section 9A and section 8B of the Custom tariff Act, 1975. Section 30 of SEZ Act, 2005 stipulating collection of applicable Anti-dumping, Countervailing and Safeguard duties requires filing of a bill of entry which validates the fact that such DTA clearances are infact to be treated as imports. Therefore the following is concluded:
- (i) The fundamental objective of establishing SEZ units is promotion of exports governed by a specific SEZ Act, 2005. The area of SEZ are excluded from the definition of DTA under section 2(i) of SEZ Act, 2005. Supply of goods from DTA to SEZ constitutes exports.
 - (ii) DTA sale of goods manufactured by a SEZ unit can be made only on submission of import licence, as applicable to the import of similar goods into India. Sale or clearance of goods from SEZ to DTA is subject to various duties i.e. Anti-dumping duty, Countervailing duty and Safeguard duty imposed as per section 9 and 8B respectively as per Custom Tariff Act, 1975 and levied as per Section 30 of SEZ Act, 2005.

- (iii) EOU's are governed by specific Foreign Trade Policy provisions and its sales to SEZ units are considered as export. The Foreign Trade Policy provisions also apply to DTA units as well as to those who wish to undertake imports/exports. Further DTA clearances by an EOU are liable for payment of applicable Excise duties/taxes. They operate outside the SEZ territories quite analogous to normal DTA units in the same ecosystems
- (iv) Therefore, on the basis of the above, I hold that the provision of Sales to DTA by a SEZ unit as an exception with features varying in different cases, does not justify a SEZ unit to be considered as a domestic producer in the context of trade remedial measures keeping in view the context of the larger framework of SEZ Act, 2005. Therefore the scope of DI in this investigation is restricted only to the producers i. e. M/s Indosolar Limited (EOU) and M/s Jupiter Solar Power Limited, which includes the EOU unit also, since they are physically located in DTA governed by Foreign Trade Policies though with export orientation.
- (v) With the exclusion of 3 SEZ units, the DI is now restricted to M/s Indosolar Limited and M/s Jupiter Solar Power Limited which collectively account for 38% of the total domestic production in the DTA. The support of ISMA rendered through the resolution of its managing committee and with no opposition qualifies the 2 applicant units meeting the requirements of major share of Indian Industry.

Particulars	Unit	2014-15	2015-16	2016-17	2017-18 (Upto Sept. 2017)	2017-18 (Annualized)
Total Indian production	MW	170	206	587	421	842
Production of the DI (applicants)	MW	141	191	314	159	318
Share of production of the DI in total Indian production	%	83	93	53	38	38

- (vi) I notice that certain module manufacturers who have imported cells have made submissions for being considered part of the domestic industry. Since 'PUC' which itself being imported in entirety to be converted to modules, such entities qualify only as importers and not as part of DI. The two producers mentioned in para (v) above constitutes DI in terms of Clause (b) of the Sub Section (6) of Section 8B of the Custom Tariff Act, 1975.

c) Period of Investigation

28. The Customs Tariff Act, 1975 and the said Rules as well as the WTO Agreement on Safeguards and Article XIX of GATT neither define nor provide guidance regarding the period of investigation. However, it is evident that the investigation

period should be adequately long and sufficiently recent in time to allow reasonable conclusions to be drawn on the basis of various relevant factors such as domestic market conditions, performance of DI etc., as to whether or not the increased imports are indeed causing serious injury or threatening to cause serious injury to the DI and therefore justify the need for imposition of Safeguard Duty. On this basis, in the present case, it is considered reasonable and just to determine the period of investigation (POI) as 2014-15 to 2017-18 (Annualized).

d) Source of Information

29. The DI at the time of initiation submitted transaction-wise import data for the PUC, which has been sourced from: (i) Directorate General of Commercial Intelligence & Statistics (DGCIS), Department of Commerce, Government of India for the period from 2014-15 till the end of First Quarter of 2017-18; and (ii) M/s Infodrive India, New Delhi for the period of the second quarter (July, 2017 to September, 2017) of 2017-18. The corresponding data for the period 2014-15 to 2017-18 (upto September, 2017) in respect of the DI itself has been submitted by the applicants and the same was verified on the basis of their (i) cost audit reports; (ii) financial records; (iii) various other records pertaining to production, sales, inventory etc. at the time of initiation. In addition, the import data for the period July, 2017 to September, 2017 was separately obtained from DGCIS, Ministry of Commerce, Kolkata at the stage of Preliminary Finding. This data was taken into consideration for analysis for the Preliminary Finding. Subsequently transaction wise data for entire injury period i.e. 2014-2015 to 2017-2018 was called for from DGCIS for the Final Finding and the same has been adopted for computation of landed value of PUC for determination of Injury Margin.

e) Confidentiality and information submitted

30. The DI have provided some information in their application on confidential basis and has requested that it be treated as confidential. The DI have also provided a non-confidential version (NCV) of their application, as required under Rule 7 of the said Rules read with Trade Notice dated 21.12.2009 issued by Director General (Safeguards) under File No. D-22011/75/2009. Further, the DI have submitted reasons justifying their claim of confidentiality of this information.
31. In terms of Rule 7 of the said Rules, the applicant may choose not to disclose information which is by nature confidential and provide a non-confidential summary thereof. The DI have submitted reasons for claiming confidentiality of the information and furnished a non-confidential summary of the information filed on confidential basis. Upon a careful examination of the reasons advanced by the DI, I find that these reasons satisfy the requirements of Rule 7 of the said Rules. Accordingly, the confidentiality claimed by the applicants is hereby granted.

f) Nature and quantum of import

a) Absolute terms

The PUC is being imported into India from various countries including China PR, Malaysia, Singapore and Taiwan. The major quantity of the PUC is being imported from China PR. As seen, the import volumes of the PUC have increased from 1,275 MW in 2014-15 to 9,833 MW in 2017-18 (Annualized). As per the updated DGCIS for 2017-18 the total imports of PUC are 9790 MW. This is an increase of

671% in 2017-18 (Annualized) (668% as per actual) from the base year 2014-15. Thus, there is no doubt that the import volumes have increased significantly each year. Moreover, there has been a sudden surge in imports volumes during the first six months of 2017-18 which is 77% of the imports in 2016-17. The increasing import volumes of the PUC both in absolute terms and percentage. terms during the period 2014-15 to 2017-18 (Annualized) is indicated in the table below.

Particulars	Unit	2014-15	2015-16	2016-17	2017-18 (upto Sept. 2017)	2017-18 (Annualized)	2017-18 Actual
Total imports	MW	1,275	4,186	6,375	4,917	9,833	9790
% increase in imports over previous year	%	-	228	52	-	54	54

b) Relative terms

Relative to domestic production, imports of the PUC are found to have consistently increased between 2014-15 and 2017-18 (Annualized). The growth rate of such imports as a percentage of the domestic production was a remarkable 2036% during the intervening year 2015-16. Even the overall growth rate of the imports of the PUC relative to its domestic production is very significant, rising from 750% in 2014-15 to 1169% in 2017-18 Thus, during the entire POI, the import volumes of the PUC relative to its domestic production have consistently increased significantly, as indicated in the table below.

Particulars	Unit	2014-15	2015-16	2016-17	2017-18 (Upto Sept. 2017)	2017-18 (Annualized)
Total imports	MW	1,275	4,186	6,375	4,917	9,833
Indian production	MW	170	206	587	421	842
Imports as a % of Indian production	%	750	2036	1086	1169	1169 (*)

***Based on the actual imports during the period 2017-18, the import as a% of Indian production comes to 1162.**

g) Unforeseen developments

32. I recall and reproduce the finding in the preliminary determination in this regard:

“5.8.1 Neither Section 8B of the Customs Tariff Act, 1975 nor the Rules made thereunder impose an obligation on the Director General (Safeguards) to analyse the unforeseen developments as a result of which the increased imports have occurred. The legal provisions neither contain any parameters that must be verified to identify the unforeseen developments nor do they specify any methodology that must be followed in the analysis of such unforeseen developments. However, the WTO Agreement on Safeguards read with Article XIX of GATT obligates the national authorities to examine “unforeseen developments” that led to the increase in imports and the consequent serious injury to the DI. In view of this requirement, this Directorate has consistently been examining the issue of “unforeseen developments” in its investigations. Therefore, even in the present case, it is considered appropriate to examine the unforeseen developments or circumstances that have led to the sharp increase in the imports of the PUC during the period of investigation. However, in order to do so, it is necessary to first appreciate the import of the term “unforeseen developments or circumstances” and for this, a reference needs to be made to various rulings of the Appellate Body of WTO.

5.8.2 The Appellate Body of WTO in Argentina–Footwear (EC)³ case held that imports in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers, must have been ‘unexpected’. In that case it was also held that the development of increased imports must have been due to “unforeseen developments”. Similarly, the Appellate Body of WTO in Korea–Dairy⁴ case held that unforeseen developments are developments not foreseen or expected when member incurred that obligation. In that case it was also recognized that unforeseen developments are circumstances which must be demonstrated as a matter of fact. In another case, the Panel on US–Steel Safeguards⁵ concluded that the confluence of several events can unite to form the basis of an unforeseen development. It was also noted that increased imports must be an outcome of unforeseen developments i.e., it is the unforeseen developments that resulted in increased imports.

5.8.3 Applying the aforementioned findings to the present case, it is clear that the temporal nature of the increase in imports of the PUC so as to cause serious injury to the DI or give rise to a threat of such serious injury must have been unforeseen or unexpected and factual. Whereas the event of increased imports itself must be demonstrable on the basis of data on imports, a finding on its unforeseen or unexpected nature must be contextual. In the present case, a relevant context

³ Appellate Body Report, *Argentina – Footwear (EC)*, para. 91
https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds121_e.htm;

⁴ Appellate Body Reports, *Korea – Dairy*, para. 85 and 89
[\[https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds98_e.htm\]](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds98_e.htm).

⁵ Appellate Body Report, *US – Steel Safeguards*, para. 315
[\[https://www.wto.org/english/tratop_e/dispu_e/248_259_abr_e.pdf\]](https://www.wto.org/english/tratop_e/dispu_e/248_259_abr_e.pdf).

for this would be the event or events that resulted in tariff concessions on the import of the PUC into India. In other words, the factum of increased imports of the PUC during the POI must have been unforeseen at the time of incurring the obligations i.e., accession to WTO, resolving to abide by the commitments under various WTO Agreements, providing tariff concessions and subsequently amending those tariff concessions through the Ministerial Declaration on Trade in Information Technology Products (ITA-1) on 13th December, 1996.

5.8.4 In the context of determining if the present development of a significant and sharp increase in imports of the PUC during the POI was indeed an unforeseen or unexpected development, the evidence furnished by the applicants has been examined and the findings thereon are, as follows:

- (i) *China⁶ has more than doubled its production capacity of Solar Cells from 11.12 GW in 2012 to 27.78 GW in 2016. Similarly, the production capacity of Solar Modules increased from 12.46 GW in 2012 to 35.47 GW in 2016. Further, data of 35 producers who collectively account for 57% of Solar Cells and 67% of Solar Modules production in China reveals excess capacity, as indicated in the table below. This aspect of having a huge production base coupled with excess capacity have a bearing on the applicants' case that there has been a surge in imports of the PUC from China.*

Solar Cells					
In GW	2012	2013	2014	2015	2016
Capacity (Cells)	16.70	19.30	22.19	26.46	33.13
Production (Cells)	11.12	14.03	18.54	22.72	27.78
Domestic consumption	10.68	13.06	17.31	22.26	26.76
Exports	0.40	0.81	0.87	0.52	0.50
Idle capacity	33.41%	27.31%	16.49%	14.13%	16.15%
Solar Modules					
Capacity (Solar Modules)	20.13	22.77	27.99	34.71	46.40
Production (Solar Modules)	12.46	16.32	22.07	28.79	35.47
Domestic consumption	2.46	5.94	7.73	12.86	20.69
Exports	9.61	10.39	13.64	15.62	13.93
Idle capacity	38.10%	28.32%	21.15%	17.05%	23.99%
Exports share in production	77.12%	63.66%	61.80%	54.25%	39.27%

- (ii) *China's export orientation in respect of the PUC is unquestionable, but a material fact that emerges is that during the past two years, both its direction and volume*

⁶ Findings of the United States International Trade Commission [USITC] in Section 201 proceedings against Crystalline Silicon Photovoltaic Cells (Whether or not Partially or Fully Assembled into Other Products) - Publication No. 4739 [https://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/pub4739-vol_i_and_vol_ii_0.pdf]

of export trade changed in a significant manner towards India, as is established from the table below. To illustrate, while China's exports to India constituted a paltry 1.52% of its total global exports during 2012, this increased to 21.58% during 2016.

Chinese Exports To (USD 000')⁷	2012	2013	2014	2015	2016
World	12,775,263	10,150,759	12,319,183	12,938,427	11,347,462
Japan	892,923	2,794,236	4,394,922	3,341,833	2,558,724
India	193,756	510,278	488,619	1,356,754	2,448,216
USA	1,416,963	1,208,074	1,818,175	1,634,799	1,368,664
EU	8,283,128	2,914,197	2,352,842	2,054,177	1,288,605
Share of India	1.52%	5.03%	3.97%	10.49%	21.58%
Share of EU + USA	75.93%	40.61%	33.86%	28.51%	23.42%

- (iii) The aforementioned shift in direction of Chinese exports of the PUC to India gets re-confirmed from the data of more current times. As indicated in the table below, during the first half of 2016 (H1 2016) Chinese exports to India were 18.51% of its total exports, as compared to which its combined exports to EU and USA were 30.65% (of its total exports). The situation turned dramatically during the succeeding two half yearly periods. In the second half of 2016 (H2 2016), China's exports to India constituted 25.09% while its exports to EU & USA fell to 15.12%. Again, in the first half of 2017 (H1 2017), China's exports to India increased to a staggering 38.77% of its total exports while its exports to EU and USA shrunk to just 5% (of its total exports). Such a significant shift in pattern of trade in which China started targeting the Indian market more vigorously as compared to developed countries / markets like EU and USA etc. could not have been foreseen.

Chinese Exports To (USD 000')⁸	H1 2016	H2 2016	H1 2017
World	6,062,679	5,284,783	5,350,966
India	1,122,083	1,326,133	2,074,573
Japan	1,219,493	1,339,231	1,095,773
EU	838,606	450,002	233,481
USA	1,019,870	348,793	34,268
Share of India	18.51%	25.09%	38.77%

⁷ www.trademap.org

⁸ www.trademap.org

Share of EU + USA	30.65%	15.12%	5.00%
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5.8.5 Another unforeseen development that contributed in the surge in imports of the PUC in India and a shift away from other foreign markets was the imposition of trade remedy measures by the EU and USA on imports from China. The Anti-dumping and Countervailing duty orders in the USA associated with (i) the Crystalline Silicon Photovoltaic (CSPV 1) investigations became effective on 07.12.2012 and (ii) the CSPV 2 investigations became effective on 18.02.2015. Also, in the EU, the provisional measure came into effect on 05.06.2013 [Commission Regulation (EU) No. 513/2013 of 04.06.2013] and the final measure was imposed on 05.12.2013 [Commission Regulation (EU) No. 1238/2013 of 02.12.2013]. The immediate impact of these measures was not visible in India because of the requirement of Domestic Content Requirements (DCR) under the Jawaharlal Nehru National Solar Mission (JNNSM). Thus, the DI had the assurance of a captive domestic market to the extent dictated by the DCR. However, in 2013, the USA challenged the DCR under JNNSM before the WTO Dispute Settlement Body and the outcome was that in October 2016, the WTO Appellate Body held the DCR to be inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. Hence, India withdrew the DCR. Pursuant to the withdrawal of DCR, the changes in the pattern of trade became more pronounced with imports of the PUC increasing substantially. As afore stated, these developments could not have been foreseen.

5.8.6 In 2015, India committed to the Paris Agreement on climate change for reduction of CO₂ emissions by 33-35% from 2005 levels, to address global warming. In line with this commitment, India established a target of achieving 100 GW of Solar power generation by the year 2022. This commitment pushed up the demand for Solar power generation projects in India. It is clear that the commitment given by India under the Paris Agreement that was signed by 197 countries (as on date ratified by 172 countries) was unforeseen at the time the import tariff concession for the PUC was agreed to under ITA-1 on 13th December, 1996. Similarly, the huge increase in the demand for the PUC in India in a short period of time which has in part fuelled the surge in imports was also unforeseen.

5.8.7 Another relevant factor that has emerged is that the imports of the PUC are taking place at very low prices; there has been a sudden and appreciable drop in the landed value of the imported PUC, as evident from the table below. The immediate impact of this has been that the Domestic Industry faced a drop in sales realisation of their products. Thus, the surge in imports at consistently falling landed price changed the competitive relationship between imports and domestic production, to the disadvantage of the latter. This has hampered the DI's ability to compete and make and sell the PUC. It is but evident that this change in the competitive relationship was entirely unforeseen.

<i>Particulars</i>	<i>Unit</i>	<i>2014-15</i>	<i>2015-16</i>	<i>2016-17</i>	<i>2017-18 (upto Sept. 2017)</i>	<i>2017-18 (Annualized)</i>
<i>Landed value of imports</i>						
<i>Solar Cells</i>	<i>Rs./Watt</i>	<i>18.78</i>	<i>18.81</i>	<i>15.42</i>	<i>14.04</i>	<i>14.04</i>
<i>Solar Modules</i>	<i>Rs./Watt</i>	<i>36.95</i>	<i>36.18</i>	<i>29.20</i>	<i>24.77</i>	<i>24.77</i>
<i>Net sales realisation of Domestic Industry</i>						
<i>Solar Cells (Indexed)</i>	<i>Rs./Watt</i>	<i>100</i>	<i>94</i>	<i>88</i>	<i>62</i>	<i>62</i>
<i>Solar Modules (Indexed)</i>	<i>Rs./Watt</i>	<i>100</i>	<i>103</i>	<i>82</i>	<i>92</i>	<i>92</i>

5.8.8 India's import tariff on the PUC falling under Customs Tariff Item 85414011 of the Customs Tariff Act, 1975 is 'Free'. This 'Free' tariff was introduced pursuant to the obligations on India under GATT 1994, including the tariff concessions thereunder read with the Ministerial Declaration on Trade in Information Technology Products dated 13th December, 1996 (hereinafter also referred to as the "ITA-1"). The PUC is covered under Attachment A, Section 1 of the ITA-1. The ITA-1 mandated elimination of Customs duties and other duties / charges of any kind within the meaning of Article II:1(b) of GATT 1994 on the products listed therein. Since India is a signatory to ITA-1, the imports of PUC are free of Customs duties. Thus, ITA-1 binds India's "freedom of action"⁹ with respect to the imported PUC and prevents it from taking other WTO-consistent measures, such as increasing the Customs duties. It merits mention that India truly believed that its DCR under JNNISM was consistent with the exceptions contained in Article XX of GATT 1994, but after the rejection of this measure by the WTO Appellate Body in 2016, the Indian market for the PUC became open for unrestricted imports from all countries. Thus, India's obligation under GATT 1994 and ITA-1 to allow unrestricted tariff free imports of the PUC without giving preference to domestic production has led to a significant and unforeseen increase in the import volumes of the PUC into India.

5.8.9 The conclusion is that the sudden and sharp increase in imports of the PUC during the POI is an outcome of a combination of various global and domestic events, all of them unforeseen and unexpected. For purposes of clarity, these unforeseen and unexpected developments are briefly reiterated, as follows:

- (i) When faced with hindrances in exports to the EU and USA, China's huge production and excess capacities of the PUC which even otherwise is export oriented, had to find an alternative outlet, which they found in India;
- (ii) The imposition of protective measures on the PUC imported from China into the EU and USA shifted China's export focus towards India;
- (iii) The USA challenge to India's DCR under JNNISM resulting in the WTO Dispute Settlement Body holding the DCR to be inconsistent with Article III:4 of the GATT

⁹ Panel Report, *Ukraine – Passenger Cars*, para. 7.96.
[[http://www.worldtradelaw.net/reports/wtopanels/ukraine-passengercars\(panel\).pdf.download](http://www.worldtradelaw.net/reports/wtopanels/ukraine-passengercars(panel).pdf.download)]

1994 and Article 2.1 of the TRIMs Agreement, led to its withdrawal and consequential surge in imports to fill the space lost by the DI;

- (iv) India's commitment to the 2015 Paris Agreement paved the way for a domestic commitment to enhance the use of the PUC, which coupled with other events led to a surge in imports;*
- (v) Declining landed price of the increasing imports of the PUC combined with other factors to change the competitive equation and place the DI at a disadvantage which was manifested in them i.e., the DI losing its share of the domestic market of the PUC to the imports; and*
- (vi) India's obligations under GATT 1994 and the ITA-1 led to its Customs tariff on the imports of the PUC being made 'Free'.*

5.8.10 As a result of the various aforementioned global and domestic unforeseen and unexpected developments, there has been an unquestionable verified surge in imports of the PUC into India. This surge in imports has significantly modified the competitive relationship between the imported and domestically produced PUC to the disadvantage of the DI."

- 33. Post preliminary finding and public hearing:-** a number of interested parties have made submissions that the development reported of unforeseen are indeed foreseen nature. For the sake of clarity, these issues have been examined though there could be some repetition of analysis which has been done to emphasize and clarify contentions.
34. I have examined the provisions of Section 8B of the Customs Tariff Act, 1975 and the Indian Safeguard Rules. Neither of the two obligates me to analyse the (i) unforeseen developments; and (ii) the effect of the obligations incurred by a contracting party under this Agreement, as a result of which the increased imports have occurred. The legal provisions neither contain any parameters that must be verified to identify the unforeseen developments nor do they specify any methodology that must be followed in the analysis of such unforeseen developments. However, I recognise that the WTO Agreement on Safeguards read with Article XIX of GATT obligates the national authorities to examine both factors that led to the increase in imports and the consequent serious injury to the Domestic Industry. In view of this requirement, the DG Safeguards has consistently been examining the issue of "unforeseen developments" and "obligations incurred under GATT" in its investigations. Therefore, even in the present case, I consider it appropriate to examine both factors that have led to the sharp increase in the imports of the PUC during the period of investigation.
35. The Preliminary Findings record the legal standard laid down in the various WTO Appellate Body Reports and Panel Reports. I have examined the same in detail and various contentions made by the interested party. I observe that the legal test has been correctly outlined. For ease of reference, the same is explained again. The Preliminary Findings relied on the Appellate Body of WTO in *Argentina–Footwear (EC)*¹⁰ case in

¹⁰ Appellate Body Report, *Argentina – Footwear (EC)*, para. 91
https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds121_e.htm];

which it was held that imports in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers, must have been unexpected. In that case it was also held that the development of increased imports must have been due to “unforeseen developments”. Similarly, the Appellate Body of WTO in Korea-Dairy¹¹ case held that unforeseen developments are developments not foreseen or expected when member incurred that obligation. It was also recognized by the Appellate Body that unforeseen developments are circumstances which must be demonstrated as a matter of fact.

36. The interested parties have argued that unforeseen development is *not what the specific negotiators had in mind but rather what they could (reasonably) have had in mind*. There is no doubt that such a consideration must be an integral part of the analysis. Attention has been drawn to the Appellate Body Report in US-Steel Safeguards¹² and the Panel Report¹³ in which it was concluded that the confluence of several events can unite to form the basis of an unforeseen development. It was also noted that increased imports must be an outcome of unforeseen developments i.e., it is the unforeseen developments that resulted in increased imports. For ease of reference, the observations are reproduced below:

10.99 Article XIX does not preclude consideration of the confluence of a number of developments as "unforeseen developments". Accordingly, the Panel believes that confluence of developments can form the basis of "unforeseen developments" for the purposes of Article XIX of GATT 1994. The Panel is of the view, therefore, that it is for each Member to demonstrate that a confluence of circumstances that it considers were unforeseen at the time it concluded its tariff negotiations resulted in increased imports causing serious injury.

37. In view of the aforesaid, I am of the view that it is the confluence of a number of developments, explained in detail in Preliminary Finding, which constitute the unforeseen developments. At this juncture, I observe that the interested parties have individually addressed each factor which was outlined in the Preliminary Finding. However, no submission has been made how the confluence of events could have been foreseen. For instance, the interested parties have argued that imposition of trade remedy measures and reduction in carbon emissions were foreseen the moment India signed various international agreements. However, India could not have expected that both EU and the United States would simultaneously levy trade remedy measures against China and certain other countries which would also coincide with the increase in demand due to commitments undertaken under COP21 (Paris Agreement).
38. Applying the aforementioned findings to the present case, it is clear and that the temporal nature of the increase in imports of the PUC so as to cause serious injury to the DI or give rise to a threat of such serious injury must have been unforeseen or unexpected and factual. Whereas the event of increased imports itself must be demonstrable on the basis of data on imports, a finding on its unforeseen or unexpected nature can only be contextual. I reiterate that, a relevant context for this would be the event or events that resulted in tariff concessions on the import of the PUC into India.

¹¹ Appellate Body Reports, *Korea – Dairy*, para. 85 and 89
[https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds98_e.htm].

¹² Appellate Body Report, *US – Steel Safeguards*, para. 315
[https://www.wto.org/english/tratop_e/dispu_e/248_259_abr_e.pdf].

¹³ Panel Report, *US – Steel Safeguards*, para. 10.99
[https://www.wto.org/english/tratop_e/dispu_e/248_259_abr_e.pdf].

In other words, the factum of increased imports of the PUC during the POI must have been unforeseen at the time of incurring the obligations i.e., accession to WTO, resolving to abide by the commitments under various WTO Agreements, providing tariff concessions and subsequently amending those tariff concessions through the Ministerial Declaration on Trade in Information Technology Products (ITA-1) on 13th December, 1996. While the reference to ITA-1 is not an unforeseen development, the obligation which was incurred under GATT is an unforeseen development.

39. In the Preliminary Findings it was observed that China has more than doubled its production capacity of Solar Cells from 11.12 GW in 2012 to 27.78 GW in 2016. Similarly, the production capacity of Solar Modules increased from 12.46 GW in 2012 to 35.47 GW in 2016.
40. The interested parties have not questioned the data. They have only argued that domestic consumption in China is more than its exports in the year 2017. However, such submissions fails to address the idle capacity in China and the shift in pattern of trade.
41. In the Preliminary Findings, it was observed that during the past two years, both its direction and volume of export trade changed in a significant manner towards India.
42. It is clear that while China's exports to India constituted a paltry 1.52% of its total global exports during 2012, this increased to 29.8% during 2017 (updated).
43. In the preliminary findings I had observed that another unforeseen development that contributed to the surge in imports of the PUC in India and a shift away from other foreign markets was the imposition of trade remedy measures by EU and USA on imports from China in 2012 and 2013.
44. One of the interested parties has contended that unforeseen developments cannot relate to the remote past. They have also contended that the developments that led to the imports must have been unforeseeable and it must be explained as to why the developments in question were unforeseeable. In this regard, the respondents have claimed that resorting to trade remedy measures by a contracting member, such as the EU and the US in the context of the present case, cannot be said to be unforeseeable at the time of India incurring the obligations under the GATT and the multilateral agreements under the WTO. The observation of the WTO Appellate Body in its Report in Argentina – Footwear (EC) clarifying that the development leading to import surge must have been unexpected is relevant in this regard.
45. I reiterate the conclusions/considerations in the Preliminary Findings that the immediate impact of these measures was not visible in India because of the requirement of Domestic Content Requirements (DCR) under the Jawaharlal Nehru National Solar Mission(JNNSM). Thus, the DI had the assurance of a captive domestic market to the extent dictated by the DCR. However, in 2013, the USA challenged the DCR under JNNSM before the WTO Dispute Settlement Body and the outcome was that in October 2016, the WTO Appellate Body held the DCR to be inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. Hence, India withdrew the DCR. Pursuant to the withdrawal of DCR, the changes in the pattern of trade became more pronounced with imports of the PUC increasing substantially. As afore stated, these developments could not have been foreseen.

46. In 2015, India committed to the Paris Agreement on climate change for reduction of CO₂ emissions by 33-35% from 2005 levels, to address global warming. In line with this commitment, India established a target of achieving 100 GW of Solar power generation by the year 2022. This commitment pushed up the demand for Solar power generation projects in India. It is clear that the commitment given by India under the Paris Agreement that was signed by 197 countries (as on date ratified by 172 countries) was unforeseen at the time the import tariff concession for the PUC was agreed to under ITA-1 on 13th December, 1996. Similarly, the huge increase in the demand for the PUC in India in a short period of time which has in part fueled the surge in imports was also unforeseen.
47. I note that the imports of the PUC are taking place at very low prices; there has been a sudden and appreciable drop in the landed value of the imported PUC, as evident from the table below. This fact has not been contested by any interested party. The immediate impact of this has been that the Domestic Industry faced a drop in sales realisation of their products. Thus, the surge in imports at consistently falling landed price changed the competitive relationship between imports and domestic production, to the disadvantage of the latter. This has hampered the DI's ability to compete and make and sell the PUC. It is but evident that this change in the competitive relationship was entirely unforeseen. This data trend was highlighted in the preliminary finding as well.

Particulars	Unit	2014-15	2015-16	2016-17	2017-18 (upto Sept. 2017)	2017-18 (Annualized)
Landed value of imports						
Solar Cells	Rs./Watt	18.96	18.99	15.58	13.61	13.61
Solar Modules	Rs./Watt	36.18	36.53	29.49	22.63	22.63
Net sales realisation of Domestic Industry						
Solar Cells (Indexed)	Rs./Watt	100	87	82	60	60

48. India's import tariff on the PUC falling under Customs Tariff Item 85414011 of the Customs Tariff Act, 1975 is 'Free'. This 'Free' tariff was introduced pursuant to the obligations on India under GATT 1994, including the tariff concessions thereunder read with the Ministerial Declaration on Trade in Information Technology Products dated 13th December, 1996 (hereinafter also referred to as the "ITA-1"). The PUC is covered under Attachment A, Section 1 of the ITA-1. The ITA-1 mandated elimination of Customs duties and other duties / charges of any kind within the meaning of Article II:1(b) of GATT 1994 on the products listed therein. Since India is a signatory to ITA-1, the imports of PUC are free of Customs duties. Thus, ITA-1 binds India's "freedom of action"¹⁴ with respect to the imported PUC and prevents it from taking other WTO-consistent measures, such as increasing the Customs duties. India believed that its DCR under JNNSM was consistent with the exceptions contained in Article XX of GATT 1994, but after the rejection of this measure by the WTO Appellate Body in 2016, the Indian market for the PUC became open for

¹⁴ Panel Report, *Ukraine – Passenger Cars*, para.7.96. [[http://www.worldtradelaw.net/reports/wtopanels/ukraine-passengercars\(panel\).pdf.download](http://www.worldtradelaw.net/reports/wtopanels/ukraine-passengercars(panel).pdf.download)]

unrestricted imports from all countries. Thus, India's obligation under GATT 1994 and ITA-1 to allow unrestricted tariff free imports of the PUC without giving preference to domestic production has led to a significant and unforeseen increase in the import volumes of the PUC into India.

Therefore, I reiterate that the developments reported as unforeseen in the preliminary finding stand the scrutiny of analysis being unexpected, and unforeseen in the context of these being appreciated as a confluence of a number of developments and provision of Article XIX of GATT and relevant panel reports of WTO.

h) Serious injury and/or threat of serious injury

49. The next matter for determination is whether the substantially increased imports of the PUC have caused and / or are threatening to cause serious injury to the Domestic Industry of like or directly competitive products. By its very nature this is a complex exercise as injury to the DI of the PUC is a function of various parameters like its share in the domestic market viz. a viz. imports; sales; production; capacity utilization, to name a few. Moreover, it is important that any negative parameter must not be a one-off event but it must display a consistent trend. Accordingly, various relevant parameters, as indicated below, are being examined to assess whether or not the increased imports of the PUC during the POI have caused and / or are threatening to cause serious injury to the Domestic Industry of like or directly competitive products.

- (i) **Share of domestic market:** Despite the rapid expansion in domestic demand, the market share of the DI has decreased; the DI had a market share of 8% in 2014-15 which declined to 3% during 2017-18 (A). During the same period, the market share of imports increased from 90% to 93%.

Market Share	Unit	2014-15	2015-16	2016-17	2017-18 (upto Sept. 2017)	2017-18 (Annualized)
Imports	MW	1,275 (90%)	4,186 (96%)	6,375 (92%)	4,917 (93%)	9,833 (93%)
Domestic sales by the applicants / DI	MW	115 (8%)	178 (4%)	299 (4%)	157 (3%)	314 (3%)
Domestic sales by other Indian producers	MW	28 (2%)	15 (0.3%)	244 (4%)	235 (4%)	471 (4%)
Total domestic sales	MW	143 (10%)	193 (4%)	543 (8%)	392 (7%)	785 (7%)
Domestic Demand	MW	1419 (100%)	4381 (100%)	6918 (100%)	5309 (100%)	10618 (100%)

- (ii) **Sales:** The above table also reveals that sales of the domestic producers increased from 115 MW to 314 MW i.e. by 199 MW. However, it is material to note that while domestic sales increased by 199 MW, imports increased by 8,558 MW. Thus, the increase in imports was more than that of the increase in sales of the DI. Also, as the

domestic demand increased from 1,419 MW in 2014-15 to 10,618 MW in 2017-18 (Annualized), it is clear that the increased imports of the PUC have substituted for the domestic production in meeting the domestic demand for the PUC.

- (iii) **Production:** Production of the DI increased from 141 MW in 2014-15 to 318 MW in 2017-18 (Annualized). Also, while the import volumes of the PUC have increased from 1,275 MW in 2014-15 to 9,833 MW in 2017-18 (Annualized) i.e., an increase of 671%, in comparison the production of DI increased 126% during the same period. This conclusion is based on the data in the table below.

Particulars	Unit	2014-15	2015-16	2016-17	2017-18 (Upto Sept. 2017)	2017-18 (Annualized)
Total imports	MW	1,275	4,186	6,375	4,917	9,833
Production of DI	MW	141	191	314	159	318

- (iv) **Capacity utilisation** The capacity utilisation of the DI increased from 48% in 2014-15 to 85% in 2017-18 (Annualized).

When compared with the growth in demand which increased to 10618 MW in 2017-18, the DI's total capacity should have got utilised. The capacity remaining below 100% even in such a enhanced demand indicates a clear preference for the imported PUC.

Particulars	Unit	2014-15	2015-16	2016-17	2017-18 (upto Sept. 2017)	2017-18 (Annualized)
Installed Capacity	MW	292	373	373	185	373
Production of DI	MW	141	191	314	159	318
Capacity Utilisation	%	48	51	84	86	85

- (v) **Employment:** The employment generated by the DI has slightly declined in 2017-18, but by and large remained stable.

Particulars	2014-15	2015-16	2016-17	2017-18 (upto Sept. 2017)
No. of employees (Indexed)	100	108	106	99

- (vi) The productivity per employee showed increasing trend similar to the production trend which is also rising. This is expected in a scenario where there is a huge demand supply gap.

Particulars	2014-15	2015-16	2016-17	2017-18 (upto Sept. 2017)	2017-18 (Annualized)
Production of DI (MW)	141	191	314	159	318
Productivity per employee (MW)	0.290	0.365	0.607	0.329	0.660

- (vii) **Profit / Loss – The profitability per watt was severely impacted during (April 17-Sept17) period as compared to previous year and even the base year of injury period.**

Particulars	2014-15	2015-16	2016-17	2017-18 (upto Sept. 2017)
Loss in Rs. Watt (Indexed)	-100	-143	-22	-107

- (viii) **Inventory:** The inventory carried by the DI increased by more than 2 times during the POI, as indicated in the table below.

Particulars	2014-15	2015-16	2016-17	2017-18 (upto Sept. 2017)
Closing Inventory (Indexed)	100	114	243	251

- (ix) **Price Undercutting:** There was a significant price undercutting by the imported goods throughout the POI, as borne out from the table below. It is evident that the high level of price undercutting prevented the DI from increasing their prices as a result of which they suffered losses.

Particulars	Unit	2014-15	2015-16	2016-17	2017-18 (April - Sept. 2017)	2017-18 (Oct. – March-2018)
Landed value of imports						
Solar Cells	Rs./Watt	18.96	18.99	15.58	13.61	13.96
Solar Modules	Rs./Watt	36.18	36.53	29.49	22.63	22.96
Net sales realisation of Domestic Industry						
Solar Cells (Indexed)	Rs./Watt	100	87	82	60	48
Price Undercutting						
Solar Cells (Indexed)	Rs./Watt	100	61	83	36	-4

i) Injury Margin and Threat of Injury

For the purpose of quantifying the level of protection, the Cost of Production of the domestic industry has been computed for PUC (Cells) manufactured by them during 1/4/2017 to 30/9/2017. A reasonable return on Cost of Production minus interest has been added to Cost of Production to determine the Fair selling price (FSP). The injury margin has been computed as difference of landed value of imported cells and the FSP. The analysis of post POI data indicates that as compared to the landed value the Cost of Production (COP) in the post POI and Net Sales Realisation (NSR) shows continued price suppression. The continued price undercutting has finally led to a situation where the domestic industry is not able to raise prices above the landed value. The threat of serious injury is established.

j) Causal link

50. The WTO Panel on *Korea-Dairy*¹⁵ set forth the basic approach for determining “causation”, as follows:

“In performing its causal link assessment, it is our view that the national authority needs to analyse and determine whether developments in the industry, considered by the national authority to demonstrate serious injury, have been caused by the increased imports. In its causation assessment, the national authority is obliged to evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry. In addition, if the national authority has identified factors other than increased imports which have caused injury to the Domestic Industry, it shall ensure that any injury caused by such factors is not considered to have been caused by the increased imports. To establish a causal link, Korea has to demonstrate that the injury to its Domestic Industry results from increased imports. In other words, Korea has to demonstrate that the imports of SMPP cause injury to the Domestic Industry producing milk powder and raw milk. In addition, having analyzed the situation of the Domestic Industry, the Korean authority has the obligation not to attribute to the increased imports any injury caused by other factors.”

51. The analysis of data for the period 2014-15 to 2017-18 (upto Sept., 2017) indicates that imports of the PUC have remained at significantly higher levels and also the import prices of the PUC have come down drastically. This has led to the DI revising their own prices downwards shows a clear bootstrapping phenomena. As a result, the net sales realization of the DI has sharply declined when compared to the base year. As a result of significant price undercutting by the imports, domestic selling prices depicts significant price depression, as shown in the table below.

¹⁵WTO Panel on *Korea-Dairy*. Para VII.887

[https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds98_e.htm]

Particulars (Indexed)		2014-15	2015-16	2016-17	2017-18 (H1)
Sales realisation	Rs./watt	100	87	82	60
Price Depression (Y-o-Y)	Rs./watt		100	37	173
Price Depression (Cumulative)	Rs./watt		100	137	309
Cost of sales	Rs./watt	100	95	74	86
Cost increase (Y-o-Y)	Rs./watt		100	437	(248)
Price Suppression (Y-o-Y)	Rs./watt		100	(283)	509
Extent of Prevention of Price Increase	Rs./watt	100	142	22	238

52. The following factors are also relevant in regard to determining the cause and effect relationship of increased imports and the serious injury during the POI and the threat of serious injury in the future, to the DI:

- (i) The volume of imports has increased significantly from 1275 MW in base year to 9833 MW in POI in absolute terms;
- (ii) The market share of imports has increased from 90% to 93% and, consequently, market share of the DI has declined from 8% to 3%;
- (iii) As the imports are available at prices lower than the selling price of the DI and are also decreasing over the time, the consumers are switching over to imported PUC with the effect that the DI are unable to not only sustain their prices but also have to face rising inventories (of the PUC);
- (iv) Another impact of the increased imports at low prices is that the DI are unable to increase their production and sales as compared to the rate of increase in demand / consumption of the PUC in India;
- (v) Though the Indian industry including the DI established capacities to contribute towards meeting the growing demand for the PUC, the substantially increased imports at consistently reducing landed prices have led to idle production capacities, falling sales realization etc.; and
- (vi) The DI is incurring significant losses.

53. To sum up, a comprehensive evaluation of parameters enumerated above demonstrates that serious injury is being caused to the DI and is likely to continue in future by the significantly increased and continually increasing imports of the PUC. It is also relevant to note that while arriving at this conclusion, all relevant factors of an objective and quantifiable nature having a bearing on determining the causation of serious injury to the DI have been evaluated.

k) Adjustment plan

54. One of the core features of the WTO Agreement on Safeguards is emphasis on adjustment by the domestic industry. In this regard, the Preamble to the Agreement on Safeguards provides as follows:

Recognizing the importance of structural adjustment and the need to enhance rather than limit competition in international markets; and

55. Further, Article 5.1 of the Agreement on Safeguards provides that *[a] Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment*. Article 7.1 of the Agreement on Safeguards mandates a WTO member country to *apply safeguard measures only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment*. Article 7.4 mandates that *[i]n order to facilitate adjustment in a situation where the expected duration of a safeguard measure as notified under the provisions of paragraph 1 of Article 12 is over one year, the Member applying the measure shall progressively liberalize it at regular intervals during the period of application*. The provisions are pari-materia with Safeguard Rules 4(4)(ii), 11(2), proviso to 11(3), 12(1), 16(1) and proviso to 16(2). In addition Rule 5(2) of the Safeguard Rules provides as under:

(2) *An application under sub-rule (1) shall be in the form as may be specified by the Director General in this behalf and such application shall be supported by, -*

(b) *a statement on the efforts being taken, or planned to be taken, or both, to make a positive adjustment to import competition.*

56. The interested parties opposing the levy of safeguard duty have argued that the adjustment plan provided by the DI is highly speculative and does not provide concrete steps or real significant measures for adjustment. They have also argued that renegotiations or long term contract with suppliers cannot be adopted as adjustment plan. The interested parties opposing the levy of safeguard duty have also submitted that the Domestic Industry has not provided specific timelines and other details regarding implementation and hence adjustment plan does not meet the requirement of the Rules.

57. I observe that Rule 5(2) of the Safeguard Rules does not provide a format for the statement of adjustment referred to as adjustment planned. No guidance is provided in the Agreement on Safeguards also. I have examined the statement of the efforts planned to be taken by the Domestic Industry enclosed by each of the producers constituting the Domestic Industry with their individual questionnaire response. The salient features of the statement are summarised below:

- a) The domestic industry has provided a forecast of future performance for the next 3 years in the form of concrete steps such as (i) long term procurement of raw material, rate and volume discounts if better cash flow is achieved; (ii) higher utilisation of capacity leading to better conversion cost; (iii) better apportionment of semi-fixed and fixed costs; (iv) better credit ratings would lower the cost of borrowing and better servicing of debt; (v) efforts towards backward integration and developing an entire eco-system; (vi) technology development and R&D.
- b) The domestic industry has quantified the impact of each step and the timeframe within which such impact could be visible.
- c) The adjustment plan therefore covers efforts on cost reduction, efficiency improvement, forward and backward integration of value chain, in terms of technology and production.

58. I observe that raw material is a significant proportion (about 45%) of the cost of the finished solar module, with the wafer component roughly being half of this cost. Therefore, long term price negotiation with major suppliers is a credible and realistic effort. The domestic industry's projection is credible that a better demand outlook will aid targeted negotiations with wafer suppliers. The depreciation costs are a significant component of the cost structure and better utilization of capacity would aid in recovery of depreciation.

59. I note that the panel report in Korea-Dairy case (WT/D598) held the following regarding adjustment plan *“We wish to make it clear that we do not interpret Article 5.1 as requiring the consideration of an adjustment plan by the Authorities, as the European Communities asserts. The panel finds no specific requirement that an adjustment plan as such must be requested and considered in the text of the Agreement on Safeguards. Although there are references to industry adjustment in two of its provisions, nothing in the text of the Agreement on Safeguards suggests that consideration of a specific adjustment plan is required before a measure can be adopted. Rather, we believe that the question of adjustment, along with the question of preventing or remedying serious injury, must be a part of the Authorities’ reasoned explanation of the measure it has chosen to apply. Nonetheless, we note that examination of an adjustment plan, within the context of the application of a Safeguard measure, would be strong evidence that the Authorities considered whether the measure was commensurate with the objective of preventing or remedying serious injury and facilitating adjustment.”*
60. Therefore, in view of the aforesaid and the adjustment plan submitted by the Domestic Industry, I hold that the adjustment plan contemplated by industry in the given ecosystem is quite pragmatic. Needless to mention that since relief under a safeguard measure is only for a limited period of time as an emergency measure, industry’s adjustment efforts to withstand the surge in imports needs to be seen primarily during this time span.

1) Public Interest

61. Article 3.1 of the Agreement on Safeguards states as follows:

“A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, inter alia, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

62. Though Section 8B of the Customs Tariff Act 1975 and the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997, do not require an examination of public interest, public interest, has been consistently evaluated before recommending levy of a safeguard duty. Various interested parties have made submissions on public interest, as detailed in the paras under submissions.
63. In view of the aforesaid, even though Article 3.1 also does not provide any guidance on evaluation of public interest, public interest evaluation, inter alia requires evaluating impact of a safeguard measure comprehensively on various stakeholders, and taking a balanced view keeping in view competing interests of different interested parties. There are various interested parties in the present case - (i) the domestic producers of solar cells, (ii) the domestic manufacturers of solar modules who do not manufacture cells themselves and rely upon domestic and imported cells, and (iii) the power developers and (iv) the consumer of electricity who may bear the brunt of safeguard measures in form of increased electricity tariff.

64. Undoubtedly levy of Safeguard duty would not only lead to mitigation of serious injury to the DI but would also improve viability of the upstream and downstream industry associated in the value chain of the manufacturing of solar cells /modules. The prices of cells/modules which would no doubt increase, would also have some adverse impact on the user industry i.e. module manufacturers using imported cells or domestic cells, module importers, power developers and consumers.
65. The interested parties opposing domestic industry have also claimed that when the Domestic Industry does not have sufficient capacity to meet the demand of the PUC in India, levy of safeguard duty will not be in public interest. In this regard, the interested parties have drawn my notice to the Final Findings in Safeguard investigation concerning imports of White/Yellow Phosphorus into India. On perusal of the Final Findings, we observed that in addition to insufficient capacity, levy of safeguard duty was held not to be in public interest due to inability of the domestic industry to achieve cost competitiveness, captive requirements of the domestic industry, imports under export promotion schemes and competition in the downstream markets. On the other hand, the Domestic Industry has drawn our attention to safeguard investigations where duty has been levied despite the Domestic Industry not having sufficient capacity to meet the entire demand in the domestic market – (i) Safeguard investigation concerning imports of Industrial Sewing Machine Needles, (ii) Safeguard investigation concerning imports of Oxo Alcohols, (iii) Safeguard investigation concerning imports of Sodium Nitrite; On perusal of the submissions made by the interested parties, I am of the view that capacity demand gap, though an important aspect, it cannot be considered in isolation. The public interest needs to be determined in every case based on the relevant facts and circumstances.
66. In the facts of the present case, when the Domestic Industry has made significant investments to cater to the domestic market and for backward integration, it must be protected against the sudden and sharp surge in imports. Further, the safeguard duty is not a quantitative restriction. Therefore, there is no embargo on procurement of the PUC by way of imports. Even in a situation where the Domestic Industry has the capability to meet the demand of the PUC, the effect of safeguard duty is that the domestic producers raise their prices to recover their cost, earn a reasonable return and to implement their adjustment plan.
67. As far as the interest of the power developers are concerned, the domestic industry has raised certain arguments. Power developers could be sub-divided into three categories i.e. (a) developers who entered into PPAs with DISCOMS and have already imported the product under consideration; (b) developers who entered into PPAs with DISCOMS but have not yet imported the product under consideration, and (c) developers which may bid on future projects and are hoping to import the product under consideration would incorporate the enhanced import price into their tariff quotations and may become uncompetitive. The power developers who would be presently affected are those that have entered into PPAs with DISCOMS and quoted the tariff based on prevailing import prices of product under consideration but have not yet imported the product under consideration. However, as Central Government has already taken steps to balance the interests of such affected power developers with the Ministry of New and Renewable Energy having notified a pass-through facility through a clarification on “change in law” clause of the agreements and therefore, I feel that the imposition of safeguard duty is covered under the ‘change in law’ clause and the impact of duty will be passed on to the DISCOMs.

68. It is clear that while on one hand, the Solar Manufacturing Industry in India needs to be strengthened, at the same time an equally important objective of achieving a 100 GW target from Solar power requires Solar Cells/Modules to be imported as the domestic supply base in the country is extremely low at present juncture.
69. I have examined the simulations on various levels of Safeguard duty protection submitted by the DI and also by one of the power developers i.e. M/S ACME. Both simulations are based on certain set of assumptions. I notice that broad conclusions from M/S ACME's simulations are that 25% Safeguard duty on PUC will lead to 23% increase in tariff while the projection of DI is that in case of 30% levy of Safeguard, tariff increase will only be 5%., which will further get dampened by a lower weight of solar power in overall energy mix of the country. The domestic industry has made such optimistic submissions based on the assumption that developers who may bid on future projects and are hoping to import the product under consideration could receive viability gap funding. However, they have been unable to provide any evidence that such a scheme exists. Therefore, I have not considered such submissions in the analysis. As cost of module in the project cost is estimated as about 60%, the dimension of impact, projected in the simulation by M/S ACME seems unrealistic being quantified on the higher side. On the other hand projection of domestic industry on tariff increase is much on the lower side. As simulations are assumptions based, and two extremes have been presented, it can be reasonably concluded that increase in power tariff would lie somewhere between the two extremes.
70. The aforesaid considerations establish that it is in public interest to recommend imposition of a Safeguard measure of quantum and tenure which will balance the two competing concerns. Also while ensuring a reasonable level of safeguard measure, it is important to apply same quantum (advalorem %) of measure to solar cells as stand alone or in assembled in modules/panels, so as to avoid any situation of duty inversion which may be counter-productive to the spirit of the measure compromising the envisaged balancing of public interest.

m) Developing nations

71. Proviso to Section 8B(1) of the Customs Tariff Act, 1975 provides that Safeguard Duty shall not be imposed on article originating from a developing country so long as its share of imports does not exceed 3% of the total imports of that article or, where the article is originating from more than one developing country, then, so long as the aggregate of the imports from all such developing countries, each with less than 3% import share taken together, does not exceed 9% of the total imports of that article. Further, Notification No.19/2016-Custom (NT), dated 5th February, 2016 specifies the developing countries for the purposes of this provision. Upon applying this legal provision read with the said notification to the available data in the present case, the finding is that import of the PUC is originating from more than one specified developing country including China PR and Malaysia. However, as a percentage of the total imports of the PUC into India, the imports from China PR and Malaysia individually account for more than 3% while the share of every other developing country is individually less than 3%. Also, the collective share of the developing countries whose individual share is less than 3% does not exceed 9% of the total imports of the PUC into India. Therefore, the import of the PUC originating from developing countries except China PR and Malaysia, need not be subjected to levy of Safeguard Duty in terms of proviso to Section 8B(1) of the Customs Tariff Act, 1975.

n) Other issues and Coverage of Safeguard measures

72. I recall para G of the preliminary finding where it was stated that “*the application of Section 30 of the SEZ Act, 2005 would negate the imposition of Safeguard measures under Section 8B of the Customs Tariff Act, 1975 and be counter-productive. The remedy to this could be a duty exemption to the extent of the Safeguard measure when the PUC is cleared by a SEZ unit into the domestic market. This would maintain the relevance of the Safeguard measures in the interest of the DI. This would also satisfy the cannon of equity by placing all domestic producers or all constituents of the DI at par with regard to the applicability of the Safeguard measures on the imported PUC. However, this matter falls outside the ambit of the present proceedings which are governed strictly by the provisions of the Section 8B of the Customs Tariff Act, 1975 read with its Rules and is, therefore, left for the consideration of the Government. Needless to state, the provisions of Section 8B(2A)(ii) of the Customs Tariff Act, 1975 dealing with the levy of Safeguard Duty, if an article subjected to a Safeguard Duty on import is cleared as such from the SEZ into the domestic market or is used in the manufacture of any goods that are cleared by the SEZ unit into the domestic tariff area would apply.*”

73. The DI has also made detailed submissions related to this aspect as under:

- a. The petitioners constitute a major proportion of the total Indian production of the subject goods and therefore, constitute Domestic Industry within the meaning of 8B(6)(b) of the Customs Tariff Act, 1975 as the collective production of the petitioners accounts for more than 50% of the total production of the PUC in India. Therefore, they represent a major proportion of the total Indian production and therefore, constitute Domestic Industry of the like article in India. The Ld. DG Safeguards also confirmed in the Preliminary Findings dated 05.01.2018 that the petitioners accounted for a major share of production of the subject goods in India and therefore, constituted Domestic Industry.
- b. The Ld. DG Safeguards observed that M/s Mundra Solar PV Limited, M/s Websol Energy Systems Limited and M/s Helios Photo Voltaic Limited are based in Special Economic Zones (SEZ) and therefore, while imposing the safeguard duty, the same may be exempted from its levy by means of an adequate measure. However, clearance of subject goods from an SEZ to the DTA will not attract any safeguard duty in the event that the same is levied. This is clear from a combined reading of Section 8B(2A) and Section 30 of the SEZ Act, 2005. For ease of reference, Section 30(a) of the SEZ Act, 2005.
- c. The levy of the ADD, CVD and SGD under Section 30 of the SEZ Act, 2005 are qualified by the words ‘where applicable’. Therefore, one needs to ascertain as to when anti-dumping duty, countervailing duty or safeguard duty is applicable in any given case.
- d. The language of Section 9A pertaining to the levy of anti-dumping duty, Section 9 with respect to countervailing duty and Section 8B pertaining to the levy of safeguard duty all state, in no uncertain terms, that the same are applicable on imports of an article into India. Therefore, if an article is not imported into India, none of the aforesaid duties are payable. Though by a deeming provision, a legal fiction is created whereby SEZ’s are considered to be outside the customs territory of India, there is no provision under any

extant law in India which deems the clearance of goods manufactured in an SEZ to the DTA as an import. The fact that clearance of goods manufactured in an SEZ to the DTA does not amount to import into the territory of India has also been reiterated in a catena of judgments including *Essar Steel v. Union of India* [2010 GLH (1) 52], *India Exports v. State of U.P. & Ors* [(2012) 47 VST 126], *Tirupathi Udyog Limited rep. by its Manager-Administration Shri D.V. Saradhy v. Union of India (UOI) through the Secretary, Ministry of Finance and Ors.* [2011 (272) ELT 209(A.P.)]. Therefore, without the factum of import, there can be no levy of anti-dumping duty, countervailing duty or safeguard duty.

- e. Anti-dumping duties and countervailing duties are country specific and therefore, even if the aforesaid duties are levied on the description of a like article which is manufactured in an SEZ and eventually cleared into the DTA, the same can never attract the aforesaid duties as there can never be an anti-dumping or countervailing investigation alleging dumping or subsidies against an SEZ in the territory of India itself and consequently, the question of levying any such duty would not arise. Therefore, to give effect to the meaning of the words in section 30 of the SEZ Act, 2005, the mention of levy of anti-dumping duty and countervailing duty mentioned therein during DTA clearance has to mean duty payable on the value of the inputs (*in the event that the inputs imported from specified countries attract anti-dumping duty or countervailing duty*) used on the finished product and not on the finished product itself, the latter being an impossibility.
- f. The same principle is also applicable to safeguard duties levied against any like article that is also manufactured in an SEZ and cleared into the DTA. Unless safeguard duty has been imposed on the description of the inputs which have been imported and used in the manufacture of the finished product that is eventually cleared into the DTA, in which case the safeguard duty will be levied only to the extent of the value of the input (*assuming the input attracts safeguard duty*) employed in the manufacture of the finished article, no safeguard duty will be attracted on the finished product itself even though the same may be a like article against which India has imposed safeguard duties. This is also evident from Section 8B (2A) of the Customs Tariff Act, 1975. Therefore, Section 30 of the SEZ Act, 2005 read with Section 8B(2A) of the Customs Tariff Act, 1975 make it abundantly clear that safeguard duty is only payable on the inputs used in the finished products and not the finished product itself that is manufactured in the SEZ and cleared into the DTA.
- g. Safeguard Duty would not be payable on the finished product manufactured in an SEZ and cleared into the DTA for one additional reason i.e. in a situation where safeguard duty has been levied by India on the description of inputs used in the manufacture of a finished product in the DTA as well as on the description of the finished product as well, then while clearance into the DTA, both the inputs used as well as the finished product will attract safeguard duty which will amount to double taxation. Such a levy being illegal, the reference to anti-dumping duties, countervailing duties and safeguard duties in section 30 of the SEZ Act, 2005 will always have to mean on the value of inputs as otherwise, the duty will be unworkable.

74. I have gone through the observations made in the preliminary finding and submissions of domestic industry. Since the scope of DI has been modified with exclusion of the three SEZ units, the issue of levy of Safeguards duty on DTA sales/clearances by SEZ units through interpretation of section 30 of SEZ Act and Section 8 B of the Custom Tariff Act, 1975 are required to be dealt by the relevant competent authorities and are outside the purview of this investigation.

o) Conclusions

75. On the basis of the above examination and analysis, it is concluded that:

- i. There has been a significant increase in imports of the PUC in absolute terms as well as in relation to total Indian domestic production over the entire POI.
- ii. The domestic industry has suffered serious injury, considering overall performance, on the basis of listed economic parameters such as market share and profitability, which have sharply declined over the injury period 2014-2015 to 2017-2018 (Annualised) whereas market share of imports have increased during the same period. This has caused significant overall impairment to the domestic industry. The rise in imports and coinciding serious injury caused to the domestic industry during the injury period, establishes causality.
- iii. The domestic industry has been able to demonstrate that the developments in the market on surge in imports of the PUC were unforeseen in the context of Article XIX of GATT.
- iv. There will be some impact on the Solar Power Developers and also ultimate consumer as a result of safeguard duty on the PUC.
- v. It is however concluded that imposition of safeguard duty in this case would be in public interest because it will prevent complete erosion of manufacturing base of Solar industry in the country which is upcoming and holds promise for a stronger manufacturing base in the country in future, at the same time, it is also in the public interest, to prevent undue escalation of Solar power cost, tariff to the final customer and that attainment of the target of 100 GW of Solar Power Deployment by 2022 is not derailed. The consideration of two competing interests require a balanced view.
- vi. From the analysis of post POI data, it has been observed that the position of domestic industry further deteriorated on account of continued low price of import of PUC which continued price injury to the domestic industry, thereby establishing the threat of injury as well.

p) Recommendations

76. The increased imports of 'PUC' into India, have caused serious injury and threaten to cause serious injury to the domestic producers of "PUC" and it will be in the public interest to impose safeguard duty on imports of "PUC" into India in terms of Rule 12 of the Customs Tariff (Identification And Assessment of Safeguard Duty) Rules'97, for a period of two years. Considering the average cost of production of "PUC" of the domestic producers after allowing a reasonable return on cost of production minus interest, safeguard duty as indicated below, which is considered to be adequate to protect the interest of domestic industry on PUC being imported falling under sub-heading 85414011 of the First Schedule of the Customs Tariff Act, 1975, is recommended to be imposed. The Tariff Item

mentioned herein is indicative only and the description of the imported goods will determine the applicability of the recommended Safeguard Duty.

Year	Safeguard duty recommended
First Year	Safeguard duty @ 25% ad valorem
Second Year (for first 6 months)	Safeguard duty @ 20% ad valorem
Second Year (For next 6-months)	Safeguard duty @ 15% ad valorem

77. As the imports from developing nations, as listed in Notification No.19/2016-custom(NT) dated 5th February,2016, except China PR and Malaysia do not exceed 3% individually and 9% collectively, the import of product under consideration originating from developing nations except China PR , and Malaysia will not attract Safeguard Duty in terms of proviso to Section 8B (1) of the Customs Tariff Act, 1975.

(Sunil Kumar)
Director General (Safeguard)