



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

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY CHINA

The following communication, dated 11 July 2019, from the delegation of China to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 14 August 2018 the Government of China ("China") requested consultations with the Government of the United States ("United States") pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and Article 14 of the *Agreement on Safeguards* concerning the definitive safeguard measure imposed by the United States on imports of certain crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products (including, but not limited to, modules, laminates, panels, and building-integrated materials) ("CSPV products").

Consultations were held on 22 October 2018 with a view to reaching a mutually satisfactory solution. However, these consultations failed to resolve the dispute.

Therefore, China respectfully requests, pursuant to Articles 4.7 and 6 of the DSU and Article XXIII of the GATT 1994, and Article 14 of the Agreement on Safeguards that the Dispute Settlement Body ("DSB") establish a panel to examine this matter, with the standard terms of reference as set out in Article 7.1 of the DSU.

Pursuant to Article 6.2 of the DSU, China identifies the specific measures at issue (Section A) and provides a brief summary of the legal basis of the complaint (Section B). This discussion below explains the connection between the measures and the legal basis and thus presents clearly the problems at issue in this dispute.

A. Measures at Issue

The United States imposed the definitive safeguard measure on imports of crystalline silicon photovoltaic products pursuant to *Proclamation 9693 of January 23, 2018 – To Facilitate Positive Adjustment to Competition from Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled Into Other Products) and for Other Purposes*, 83 Fed. Reg. 3541 (25 January 2018). This safeguard measure was notified to the WTO on 26 January 2018.¹

The safeguard measure on CSPV products was based on the United States International Trade Commission ("USITC") determination of injury on September 22, 2017 and the report to the President on November 13, 2017 regarding the Investigation No. TA-201-75.²

¹ Notified by the United States to the WTO Committee on Safeguards in document with reference: G/SG/N/8/USA/9/Suppl.4; G/SG/N/10/USA/7; G/SG/N/11/USA/6.

² See, Public Report, *Crystalline Silicon Photovoltaic Cells (Whether or not Partially or Fully Assembled into Other Products)*, Inv. No. TA-201-75, USITC Pub. 4739 (Nov. 2017), a summary of which was published in the U.S. Federal Register. See 82 Fed. Reg. 55393 (21 November 2017).

On 27 November 2017, the United States Trade Representative ("USTR") subsequently requested that the USITC identify any unforeseen developments that led to the CSPV products at issue being imported into the United States in such increased quantities to cause serious injury. The USITC's supplemental report was forwarded to the President on 27 December 2017.³

The measure took the form of a tariff-rate quota on imports of solar cells imposed for a period of 4 years, with unchanging in-quota quantities and annual reductions in the rates of duty applicable to goods entered in excess of those quantities in the second, third, and fourth years. In addition, the measure took the form of an increase in duties on imports of modules, imposed for a period of 4 years with annual reductions in the rates of duty in the second, third, and fourth years. The duty rate for the first year was set at 30%.

Subsequently, on 18 February 2018, USTR established additional procedures for interested parties to request that certain products be excluded from the safeguard measure on CSPV products.⁴ Fifty three individual exclusion requests were submitted to USTR.⁵ As of 8 July 2019, eleven of those exclusion requests had been granted.⁶ Based on the content of the USTR Notice, it appears that all other individual exclusion requests were denied.⁷

This request also concerns any modification, review, replacement or amendment to the definitive safeguard measure, including any closely connected, subsequent measures affecting the form, amount, or implementation of the safeguard remedy, as well as the underlying reports, memoranda and other documents supporting the safeguard measure.

B. Legal Basis of the Complaint

China considers that the safeguard measure imposed by the United States on CSPV products is inconsistent with the obligations of the United States under the GATT 1994 and the Agreement on Safeguards. In particular, China considers that the safeguard measure fails to comply with, among others, the following provisions:

- a. **Article XIX:1(a) of the GATT 1994 and 3.1 of the Agreement on Safeguards**, because the United States failed to establish, prior to the application of the measures, that the increases in imports and the conditions of importation of the products covered by the measures at issue were the result of "unforeseen development" and were the "effect of obligations incurred" under the GATT 1994 by the United States.

In particular, among other actions and omissions:

- The United States failed to explain the "unforeseen" nature of the developments it considered relevant in this respect;
- The United States failed to explain the required connection between the alleged unforeseen developments and the increase in imports of each of the covered CSPV products;
- The individual country-specific circumstances that the United States considers to have been "unforeseen developments" are neither relevant to nor can justify the imposition of a global safeguard measure; The United States also failed to provide a reasoned and

³ See, Supplemental Report of the U.S. International Trade Commission Regarding Unforeseen Developments; see also "Proclamation 9693 of January 23, 2018 – To Facilitate Positive Adjustment to Competition from Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled Into Other Products) and for Other Purposes", 83 Federal Register 3541 (25 January 2018), para. 4.

⁴ See, Office of the U.S. Trade Representative, Procedures to Consider Additional Requests for Exclusion of Particular Products from the Solar Products Safeguard Measure, 83 Fed. Reg. 6670 (14 February 2018).

⁵ See Solar Product Exclusion Requests (USTR-2018-0001), available at <https://ustr.gov/issue-areas/enforcement/section-201-investigations/investigation-no-ta-201-75-cspv-cells/product> (providing a list of all exclusion requests filed).

⁶ See Exclusion of Particular Products From the Solar Products Safeguard Measure, 83 Fed. Reg. 47,393, 47,394 (19 September 2018) (excluding eight products); Exclusion of Particular Products From the Solar Products Safeguard Measure, 84 Fed. Reg. 27,684, 27,685 (13 June 2019) ("June 13 Exclusion Notice") (excluding three products).

⁷ June 13 Exclusion Notice, 84 Fed. Reg. 27,684, 27,685.

adequate explanation of the particular "obligations incurred" that had as their effect that imports of CSPV products increased in such quantities and under such conditions as to cause serious injury.

- b. **Articles 2.1, 3.1 and 4.2(b) of the Agreement on Safeguards** because the United States failed to establish the required "causal link" between the increased imports and the serious injury found to exist.

In particular, among other actions and omissions: The United States failed to demonstrate on the basis of objective evidence that the increased imports of the subject imports "caused or threatened to cause" serious injury to the domestic industry given the lack of coincidence in the relevant trends and in light of the specific conditions of competition in the market.

- c. **Articles 2.1, 3.1 and 4.2(b) of the Agreement on Safeguards** because the United States failed to ensure that injury caused by other factors was not attributed to increased imports.

In particular, among other actions and omissions: The United States failed to separate and adequately distinguish the injury caused by other factors and failed to ensure that injurious effects from other causal factors were not included in the assessment of injury that are ascribed to increased imports.

- d. **Articles 3.1 and 3.2 of the Agreement on Safeguards** because the United States did not provide the interested parties with sufficient opportunities to participate in the investigation, including as a result of the failure to respect the requirements on granting confidential treatment and the availability of sufficiently informative non-confidential summaries, and because the United States failed to set forth in the published report the findings and reasoned conclusions on all pertinent issues of fact and law, including the conditions on which the measure was imposed, the nature and level of the actual measure, and the ground for excluding certain sources.

In particular, among other actions and omissions: The United States required the destruction of all confidential (APO) material before briefing during the USTR phase concerning the Administration's action following a determination of import injury with regard to CSPV and the non-confidential summaries available to the parties were insufficient.

The United States' safeguard measure on CSPV products nullifies or impairs benefits accruing to China, directly or indirectly, under the above cited agreements.

China further asks that this request for the establishment of a panel be placed on the agenda of the next meeting of the DSB to be held on 22 July 2019.
