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

**(DS562)**

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

**December 11, 2020**

Mr. Chairperson, Members of the Panel:

1. Article XIX of the GATT 1994 authorizes a Member to apply measures that would otherwise be inconsistent with its obligations when, as a result of unforeseen developments and the effect of the obligations, increased imports of a product have caused, or threaten to cause, serious injury to a domestic industry. The WTO Agreement on Safeguards preserves the ability of a Member to depart temporarily from its obligations for the purpose of remedying or preventing that serious injury and establishes procedural requirements for taking such action.

2. In other words, the Safeguards Agreement "establishes ***rules*** for the application of safeguard measures."[1] The Safeguards Agreement recognizes the objective of these disciplines is "to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards." The WTO Agreement could have abolished Article XIX safeguard measures, as it did with transitional safeguards under Article 6 of the *Agreement on Textiles and Clothing*. But it did not. Thus, in accordance with the rule of effectiveness in treaty interpretation, the disciplines adopted in the Safeguards Agreement must be interpreted so as to allow the use of safeguard measures.

3. Indeed, in Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") WTO Members recognized that the dispute settlement system is

> to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB *cannot add to or diminish the rights and obligations provided in the covered agreements*.[2]

The arguments advanced by China in this dispute depart from the treaty text in order to elevate substantive standards, erect procedural barriers, and generally exalt form over substance, the effect of which is exactly what the DSU precludes – to diminish the right to take a safeguard measure.

4. This dispute has called upon the Panel to scrutinize the USITC's reports. You have seen that the data show an industry that had every chance for success – booming domestic demand, products that its customers rated as competitive over all other sources, and numerous plans to expand existing facilities and build new ones. You have seen that throughout the period of investigation, imports entered at increasingly lower prices. Domestic products lost sales and market share in every sector in the market. Ambitions for expansion became impossible in light

[1] Safeguards Agreement, Article 1 (emphasis added).

[2] DSU Article 3.2 (emphasis added).

of consistent large losses, start-ups failed, and existing producers exited the market. The Commission thoroughly documented each of its findings based on a record thousands of pages long, derived from the Commission's own detailed questionnaires, written submissions by interested parties, and testimony at two day-long public hearings. If this exhaustive review of the evidentiary record is not enough to comply with Article XIX and the Safeguards Agreement, it is difficult to imagine what competent authority could comply. In other words, China's view of these disciplines would effectively nullify the right to take a safeguard measure. That might be an outcome satisfactory to China, but it would not be consistent with the terms of Article XIX and the Safeguards Agreement.

5. In light of the detailed discussion we have had so far, the United States will not provide a point-by-point refutation of China's argument. We will instead identify a few of the more egregious flaws, which are illustrative of the broad problems with its overall approach.

## I. THE USITC'S INJURY DETERMINATION

6. As we have demonstrated in our written submissions and oral statements, objective evidence supported the Commission's determination that a causal link existed between the surging imports and the domestic industry's undisputed significant overall impairment. This determination was based on an exhaustive investigation in which the Commission collected and reviewed a massive amount of information including, amongst other things, questionnaire response data submitted by 16 U.S producers, 56 U.S. importers, 106 U.S. purchasers, and 100 foreign producers and exporters of CSPV products.[3] The Commission also received and considered several prehearing and posthearing briefs from petitioners, respondents, foreign governments, and non-party firms and associations,[4] and listened to almost 11 hours of hearing testimony on injury issues.[5] In total, the volume of evidence collected was staggering – thousands of pages of evidence – upon which the Commission rendered its November Report. The report itself was also substantial, consisting of two separate volumes spanning 422 pages, and set forth the Commission's detailed analysis and reasoned conclusions.

7. In light of this large record, which consisted in part of the submissions of interested parties vehemently opposed to the imposition of safeguard measures, it is not surprising that China can point to pieces of evidence and arguments to support its alternative theory of the case. This is inevitable in any rigorous investigation. It is also irrelevant to evaluating the USITC's compliance with the Safeguards Agreement. The relevant obligation is for the competent authorities to publish a report containing their findings and reasoned conclusions on all pertinent issues of fact and law. It is not to address every single piece of evidence and every permutation of every argument. Through this approach, China is in effect asking the Panel to make a new determination based on the evidence and arguments in support of China's favored view, without

[3] USITC November Report, p. 9 (Exhibit CHN-2).

[4] USITC November Report, pp. 7-8 (Exhibit CHN-2).

[5] Injury Hearing Transcript (Exhibit CHN-9).

regard to the contrary evidence. But of course, the DSU does not call on panels to substitute their own findings and conclusions for those of the competent authorities.

8. A prime example of the flaw in China's challenge is its assertion that because certain of the factors showed improving trends, the Panel should give less deference to the Commission's robust demonstration of how the increased imports led to deterioration in the industry's overall condition. As the Commission explained, the improvement in certain of these trends were directly attributable to the extraordinarily favorable market conditions and imposition of protective trade measures that occurred during the period of investigation. Some divergence in trends, in fact, reflects the realities of companies operating in a market economy, and the impact of market conditions. In this type of market, not every single performance factor of an injured domestic industry will necessarily move downward in the face of unfairly traded imports. It is precisely for this reason that the Commission, consistent with the Safeguards Agreement's definition of serious injury as "overall impairment,"[6] conducted a holistic analysis of causation.

9. The Commission, in considering increased imports in conjunction with all the relevant factors, found and adequately demonstrated that increased imports caused serious injury by not only directly taking sales and market share from the domestic industry, but also through adverse effects on the industry's sales prices, which in turn, negatively affected the domestic industry's profitability and its financial performance. Through this demonstration, the Commission established a logical and reasoned connection between the increased imports and the industry's serious injury.

10. As we explained yesterday in our answers to the Panel's questions, the manner in which increased imports cause serious injury to a domestic industry will vary depending upon the interplay of "conditions of competition" and "relevant factors" in a given investigation. That does not mean, however, that the legal standard for the Panel's review changes based on the presence or absence of a certain fact pattern, such as a coincidence of trends. Rather, the legal standard is the same regardless of the facts – does the competent authorities' report contain findings and reasoned conclusions on all pertinent issues of fact and law. And, if a party asserts that one set of facts disfavors the finding of a causal link, that does not mean that the remainder of the analysis must be more "compelling." As long as the competent authorities account for those facts in a conclusion reached in a connected or logical manner, their conclusion is consistent with Article 3.1(a) of the Safeguards Agreement.

11. Finally, China appears to believe that because the Commission did not explicitly discuss or address each single piece of evidence identified by it, that the Commission did not consider such evidence. This is not the case. The Commission considered all the relevant evidence and opposing arguments and China has provided no basis, other than its conclusory assumptions, to assert that the Commission did otherwise. Moreover, China fails to demonstrate that the Commission acted inconsistently with the Safeguards Agreement by not including all the

[6] Safeguards Agreement, Article 4.1(a).

evidence and arguments presented during the administrative proceedings in its November Report. Articles 3.1 and 4.2(c) call for the report of the competent authorities to provide "their findings and reasoned conclusions on all pertinent issues of fact and law," including a "detailed analysis of the case" and a "demonstration of the relevance of the factors considered." Neither these articles nor any other article in the Safeguards Agreement require that the competent authorities touch on every single point and evidence put forth by the parties. Indeed, that would be a herculean and nearly impossible task for any competent authorities addressing a record of this magnitude to meet.

12. In sum, the Commission's November Report included an evaluation of all relevant factors. Moreover, it contained a detailed analysis of the case, explaining how the facts supported the Commission's ultimate conclusion that CSPV products were being imported into the United States in such increased quantities as to have caused serious injury to the domestic industry. China's arguments that rely on its cherry-picked evidence do nothing to detract from the force of the Commission's conclusion.

## II. IMPORTS INCREASED AS A RESULT OF UNFORESEEN DEVELOPMENTS AND THE EFFECT OF OBLIGATIONS INCURRED

13. China's assorted positions in this dispute have some themes in common. Many rely on textual arguments that would raise the bar for a Member to take a safeguard measure under Article XIX of the GATT 1994. Others misapply the standards provided in the Safeguards Agreement. Others would adopt irrational approaches to safeguard disciplines generally. China's arguments concerning "obligations incurred" under Article XIX:1(a) of the GATT 1994 are illustrative of this last problem. China has acknowledged that the U.S. tariff for the solar products at issue is bound at zero percent based on concessions in the U.S. Schedule to the GATT 1994. Based on this acknowledgment, there is no dispute that the United States was precluded from raising its duties to address the influx in imports and needed to invoke Article XIX of the GATT 1994 to remedy the domestic industry's serious injury.

14. China's only argument is that despite this indisputable fact, the United States may not take a safeguard measure because the USITC in its published schedule mentioned the U.S. zero duty, but did not specifically cite the Schedule provision binding that zero rate under Article II of the GATT 1994. China's arguments are wrong. The reference to "obligations incurred" in the treaty text "*simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions*."[7] China has never confronted this issue or explained how it has not been established that the United States has incurred an obligation in the form of a tariff concession concerning the importation of the solar products in question.

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

15. Nor has China refuted the point made by the United States that, as the Schedules annexed to the GATT 1994 are made an integral part of Part I of that Agreement, the United States commitment to bind its tariff schedule at zero percent is subject to the obligations contained in Article II of the GATT 1994. Moreover, as the U.S. tariff concession requires duty-free entry of the relevant solar products, it represents a commitment that, *per se*, prevents the United States from raising its tariffs above its bound rate to address any harm caused by increased imports.

16. As such, China's argument exalts form over substance. This is contrary to the explicit terms of Article XIX, which authorize a safeguard measure whenever an increase in imports is . . . "an effect of the obligations incurred . . . including tariff commitments." Article XIX requires only that this circumstance exist. It does not require that the Member, or its competent authorities, state, at the time of taking the measure, that the circumstance exists. And, the Safeguards Agreement does not impose such a requirement. It does not even mention the "obligations incurred" in an otherwise exhaustive discussion of the investigation and determination charged to the competent authorities. To accept China's argument would accordingly diminish the rights and add to the obligations of the covered agreements, contrary to Article 3.2 of the DSU.

## III. CONCLUSION

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