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

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE REPUBLIC OF KOREA

The following communication, dated 14 August 2018, from the delegation of the Republic of Korea to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

1. On 14 May 2018, the Government of the Republic of Korea ("Korea") requested consultations with the Government of the United States of America ("United States") pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), and Article 14 of the Agreement on Safeguards, regarding 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) ("crystalline silicon photovoltaic (CSPV) products").

2. Consultations were held on 26 June 2018 with a view to reaching a mutually satisfactory solution. However, these consultations failed to resolve the dispute.

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

4. Pursuant to Article 6.2 of the DSU, Korea proceeds below to identify the specific measures at issue and to provide a brief summary of the legal basis of the complaint.

I. Identification of the Measure

5. This request concerns the definitive safeguard measure imposed by the United States on imports of certain CSPV products. In accordance with Sections 201-204 of the Trade Act of 1974, as amended (19 U.S.C. §§ 2251-2254), the United States International Trade Commission ("USITC") initiated the CSPV investigation on 17 May 2017, covering the years 2012-2016, to determine whether increased imports of the CSPV products at issue were a substantial cause of serious injury to domestic producers.

6. On 22 September 2017, the USITC determined that imports of CSPV products were imported in such increased quantities as to be a substantial cause of serious injury to a domestic industry in the United States, and submitted a report to the U.S. President on 13 November 2017 forwarding its injury findings and remedy recommendations.¹ Following the issuance of USITC's report, the Office of the United States Trade Representative (USTR) established a procedure for the

¹ See, U.S. International Trade Commission, Public Report, Volume I (Determination and Views of Commissioners) and Volume II (Information Obtained in the Investigation), Crystalline Silicon Photovoltaic Cells (Whether or not Partially or Fully Assembled into Other Products), Inv. No. TA-201-75, USITC Pub. 4739 (Nov. 2017); and U.S. International Trade Commission, Crystalline Silicon Photovoltaic Cells (Whether or not Partially or Fully Assembled into Other Products), Inv. No. TA-201-75, 82 Federal Register 55393 (21 November 2017) (Publication of summary of the USITC's report on the investigation).

submission of written comments and the conduct of a hearing concerning the action to be taken by the U.S. Administration following the USITC's determination that imported CSPV products were a substantial cause of serious injury to domestic producers.²

7. On 27 November 2017, the President 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

8. Finally, on 23 January 2018, the President determined to impose a safeguard measure on the CSPV products at issue, which entered into force on 7 February 2018. The United States imposed the definitive safeguard measure on imports of CSPV 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 Federal Register 3541 (Jan. 25, 2018). The safeguard measure was notified to the WTO on 26 January 2018.⁴

9. 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%.⁵

10. 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.⁶ As of 14 August 2018, it appears that so far no particular products have been granted an exclusion pursuant to the procedures established by USTR.

11. 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.

II. Legal Basis

12. According to Article 11.1(a) of the Agreement on Safeguards, a Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of the GATT 1994 unless such action conforms to the provisions of that Article applied in accordance with the Agreement on Safeguards.

13. In this respect, the safeguard measure imposed by the United States on crystalline silicon photovoltaic products is inconsistent with the obligations of the United States under the GATT 1994 and the Agreement on Safeguards.

² See, Office of the U.S. Trade Representative, Request for Comments and Public Hearing About the Administration's Action Following a Determination of Import Injury With Regard to Certain Crystalline Silicon Photovoltaic Cells, 82 Federal Register 49469 (25 October 2017); and Office of the U.S. Trade Representative, Additional Information About Participating in the Process Concerning the Administration's Action Following a Determination of Import Injury With Regard to Certain Crystalline Silicon Photovoltaic Cells, 82 Federal Register 52764 (14 November 2017).

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 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.

⁵ See, "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).

⁶ 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 Federal Register 6670 (14 February 2018).

14. In particular, Korea considers that the safeguard measure fails to comply with the following provisions:

- a. Article XIX:1(a) of the GATT 1994 and Articles 1 and 3.1 of the Agreement on Safeguards because the United States failed to provide the necessary reasoned and adequate explanation of the fact that the increased imports in covered CSPV products resulted from "unforeseen developments" and were "the effect of the obligations incurred" by the United States. In particular, among others:
 - 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 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, 4.1(c) and 4.2 of the Agreement on Safeguards since the United States failed to determine properly the "domestic industry" allegedly injured by the increased imports. In particular, the United States defined the domestic industry in a manner that failed to limit the scope to only those producers producing the "like or directly competitive products" as it lumped together producers of CSPV cells and modules.
- c. Articles 2.1 and 3.1 of the Agreement on Safeguards because the United States failed to provide a reasoned and adequate explanation that the subject imports increased "in such quantities and under such conditions" to cause serious injury to the domestic industry. In particular, among others:
 - The United States failed to explain the basis for its selection of certain data for purposes of examining the increase in imports of all covered products;
 - The United States failed to provide a reasoned and adequate explanation that the increase in imports of covered CSPV products would have been sufficiently recent, sudden, sharp and significant enough, both quantitatively and qualitatively, to warrant an emergency safeguard measure.
- d. Articles 2.1, 3.1, 4.1(a) and (b), and 4.2(a) of the Agreement on Safeguards as the United States failed to provide a reasoned and adequate explanation of a significant overall impairment in the position of the domestic industry to support its conclusion that the domestic industry was suffering "serious injury or threat of serious injury". In particular, among others:
 - The United States failed to evaluate "all relevant factors" having a bearing on the situation of the industry and in particular not all of the factors listed in Article 4.2(a);
 - The United States failed to engage in the necessary substantive "evaluation" of the relevant factors listed under Article 4.2 for examining the state of the domestic industry and failed to assess the explanatory force of the increased imports;
 - The United States failed to provide a reasoned and adequate explanation that the factors examined supported a conclusion of a "significant overall impairment" of the domestic industry given several positive trends.

- e. 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 and failed to ensure that injury caused by other factors was not attributed to increased imports. In particular, among others:
- 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 trends and in light of the specific conditions of competition in the market;
 - The United States failed to separate and 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.
- f. Articles 3.1, 3.2 and 4.2(c) of the Agreement on Safeguards because the United States did not provide the interested parties with sufficient opportunities to participate in the investigation and respond to the presentations of other parties, including as a result of the failure to respect the requirement on granting confidential treatment only "upon cause being shown" and the absence of availability of sufficiently informative non-confidential summaries. In addition, 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 for imposing the measure, and the nature and level of the measure imposed. In particular, the published reports of the competent authorities fail to present the required "reasoned and adequate explanation" and "detailed analysis" of the case under investigation as well as a demonstration of the relevance of the factors examined.
- g. Articles 5.1 and 7.4 of the Agreement on Safeguards as the United States failed to apply the safeguard measure only to the "extent necessary to prevent or remedy serious injury. In particular, among others:
- The United States failed to limit the application of the measure to the serious injury allegedly caused by increased imports and not by other factors;
 - The United States failed to provide a reasoned and adequate explanation of the methodology used to support the particular type of measure and the level at which the measure was imposed, including in the light of less restrictive measures that were available and that provided an equivalent contribution to preventing or remedying injury and facilitating adjustment;
 - The United States also failed to provide a reasoned and adequate explanation of the extent to which the measure would facilitate adjustment;
 - The United States failed to ensure that the measure was not applied beyond what is necessary not only at the time of the imposition of the measure but also at the various stages of progressive liberalization;
 - The United States failed to explain why the safeguard measure against imports of CSPV products from Korea was "necessary" given that the United States did not find that imports from Korea were a substantial cause of current serious injury.
- h. Article 7.1 of the Agreement on Safeguards since the United States failed to apply the safeguard measure only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment. In particular, the United States failed to provide a reasoned and adequate explanation of the basis for its determination of the length of time the measure was necessary to stay in place and for the time needed for the adjustment efforts that would be undertaken by the domestic industry;
- i. Article 8.1 of the Agreement on Safeguards because the United States failed to endeavor to maintain a substantially equivalent level of concessions and other obligations under

the GATT 1994 between the United States and Korea in accordance with Article 12.3 of the Agreement on Safeguards. In particular, the United States failed to provide an adequate opportunity for prior consultations given the very short period of time provided for such prior consultations and never engaged on any adequate means of trade compensation;

- j. Articles 12.1, 12.2 and 12.3 of the Agreement on Safeguards because the United States failed to provide immediate notifications of the different decisions given the time between the decision in question and the time of notification of the decision in question. In addition, in its notifications, the United States failed to provide all pertinent information including evidence of serious injury or threat thereof caused by increased imports among others as a result of the undue redaction of allegedly confidential information and the failure to provide adequate non-confidential summaries. Furthermore, the United States failed to provide Korea with an adequate opportunity for prior consultations given the short period of time between the decision to apply the measure, its notification and the application of the measure; and
- k. Article II:1 of the GATT 1994 because the safeguard measure amounts to a withdrawal or modification of the United States' concessions without a justification under Article XIX of the GATT 1994, the Agreement on Safeguards, or any other provisions of the WTO Agreement.

III. CONCLUSION

15. The United States' safeguard measures on CSPV products nullifies or impairs benefits accruing to Korea, directly or indirectly, under the cited agreements.

16. Therefore, Korea respectfully requests, pursuant to Article 6 of the DSU, Article XXIII of the GATT 1994, Article 14 of the Agreement on Safeguards, that the Dispute Settlement Body establish a panel to examine this matter, with the standard terms of reference as set out in Article 7.1 of the DSU.

17. Korea further asks that this request for the establishment of a panel be placed on the agenda of the next meeting of the Dispute Settlement Body to be held on 27 August 2018.
