



[Billing Code 3290-F0]

**OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE**

**[Docket No. USTR-2020-0001]**

**Determination on the Exclusion of Bifacial Solar Panels from the Safeguard Measure on Solar Products**

**AGENCY:** Office of the United States Trade Representative.

**ACTION:** Notice.

**SUMMARY:** On January 23, 2018, the President imposed a safeguard measure on imports of certain solar products pursuant to a Section 201 investigation. On February 14, 2018, the U.S. Trade Representative established procedures for interested persons to request product-specific exclusions from application of the safeguard measure and to comment on the submitted requests. Based on the requests and comments received, the U.S. Trade Representative granted certain requests on June 13, 2019, including a request to exclude from the safeguard measure bifacial solar panels that consist only of bifacial solar cells. On January 27, 2020, the U.S. Trade Representative established procedures to consider whether to maintain, withdraw, or take some other action with respect to the exclusion of bifacial solar panels from the safeguard measure. Based on an evaluation of the comments received, and responses to those comments, and in consultation with the Secretaries of Commerce and Energy, the U.S. Trade Representative has determined that the bifacial solar panel exclusion is undermining the objectives of the safeguard measure. Accordingly, the U.S. Trade Representative will request that the U.S. Court of International Trade lift the order preliminarily enjoining the withdrawal from entering into effect.

**DATES:** Withdrawal of the exclusion for bifacial solar panels from application of the safeguard measure will apply to imported panels if the Court lifts the preliminary injunction but in no case earlier than [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Victor Mroczka, Office of WTO and Multilateral Affairs, at vmroczka@ustr.eop.gov or (202) 395-9450, or Dax Terrill, Office of General Counsel, at Dax.Terrill@ustr.eop.gov or (202) 395-4739.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

On January 23, 2018, the President issued Proclamation 9693 (83 FR 3541) to impose a safeguard measure under section 201 of the Trade Act of 1974 (19 U.S.C. 2251) with respect to certain crystalline silicon photovoltaic cells and other products containing these cells. The Proclamation directed the U.S. Trade Representative to establish procedures for interested persons to request product-specific exclusions from the safeguard measure. It also authorized the U.S. Trade Representative, after consultation with the Secretaries of Commerce and Energy, to exclude products upon publication of a notice in the *Federal Register* modifying the Harmonized Tariff Schedule of the United States (HTSUS).

On February 14, 2018, the U.S. Trade Representative established procedures to request a product exclusion and opened a public docket. *See* 83 FR 6670 (February 2018 notice). Under the February 2018 notice, requests for exclusion were to identify the particular product in terms of its physical characteristics (such as dimensions, wattage, material composition, or other

distinguishing characteristics) that differentiate it from other products subject to the safeguard measure. The February 2018 notice provided that the U.S. Trade Representative would not consider requests identifying the product at issue in terms of the identity of the producer, importer, or ultimate consumer; the country of origin; or trademarks or tradenames. The notice also confirmed that the U.S. Trade Representative only would grant exclusions that did not undermine the objectives of the safeguard measure. The Office of the U.S. Trade Representative (USTR) received 48 product exclusion requests and 213 comments responding to the various requests. The exclusion requests generally fell into seven categories, one of which concerned bifacial solar panels.

On September 19, 2018, and June 13, 2019, the U.S. Trade Representative granted certain product exclusion requests and modified the HTSUS accordingly. *See* 83 FR 47393 and 84 FR 27684. The notice published on June 13, 2019 (June 2019 notice) excluded from application of the safeguard measure “bifacial solar panels that absorb light and generate electricity on each side of the panel and that consist of only bifacial solar cells that absorb light and generate electricity on each side of the cells.”

On October 9, 2019, the U.S. Trade Representative concluded, based on an evaluation of newly available information and after consultation with the Secretaries of Commerce and Energy, that maintaining the exclusion would undermine the objectives of the safeguard measure. Accordingly, the U.S. Trade Representative published a notice withdrawing the exclusion of bifacial solar panels, effective as of October 28, 2019. *See* 84 FR 54244.

On October 21, 2019, Invenergy Renewables LLC (Invenergy) filed a complaint with the U.S. Court of International Trade alleging that USTR failed to provide notice and comment required under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, before withdrawing the exclusion of bifacial solar panels. Invenergy filed a motion for a preliminary injunction to prevent the withdrawal from entering into effect. The Court issued a preliminary injunction on December 5, 2019, enjoining the U.S. Trade Representative from withdrawing the exclusion on bifacial solar panels from the safeguard measure.

On January 27, 2020 (85 FR 4756), the U.S. Trade Representative issued a notice (January 2020 notice) noting concerns that:

1. The bifacial solar panel exclusion will result in significant increases in imports of bifacial solar panels and therefore will undermine the objectives of the safeguard measure.
2. The precise definition of bifacial solar panels excluded from the safeguard measure may require clarification.
3. The exclusion in the June 2019 notice is broader than the category of products described in the exclusion requests submitted as of March 16, 2018.

The U.S. Trade Representative established procedures and opened a public docket to seek comment on whether to maintain the exclusion of bifacial solar panels from the safeguard measure, withdraw the exclusion, or take some other action with respect to this exclusion. The January 2020 notice confirmed that the U.S. Trade Representative would request the Court to lift the injunction if he determined that it would be appropriate to withdraw the bifacial exclusion or take some other action with respect to this exclusion.

In the January 2020 notice, the U.S. Trade Representative specifically requested information or views regarding the following, with sufficient evidence to support a particular position:

- Global and United States production and production capacity for bifacial solar panels prior to and following the exclusion of these products in the June 2019 notice, along with any information on expected changes in production and production capacity for the remaining term of the safeguard measure (*i.e.*, until February 6, 2022).
- Projections for the production and importation into the United States of bifacial solar panels for the remaining term of the safeguard measure.
- Import data and entry documentation to establish the level of bifacial solar panels imported into the United States prior to and following the exclusion of these products in the June 2019 notice.
- Projections of demand for bifacial solar panels by companies building or planning to build solar facilities or otherwise to install bifacial solar panels.
- Contracts, purchase orders, or other agreements that establish sales or other transactions, including those between suppliers and customers, regarding bifacial solar panels that have been or will be imported into the United States or will be produced in the United States.
- Production cost and price differential between the manufacture and distribution of monofacial and bifacial solar panels.
- Substitutability or competitiveness between monofacial and bifacial solar panels in the United States.

- Domestic production and production capacity of bifacial solar cells or bifacial solar panels in the United States.
- Whether the U.S. Trade Representative should modify the exclusion to implement a tariff-rate quota (TRQ) on the importation of bifacial solar panels that enter with no additional duty and, if so, the level (*e.g.*, in megawatts) of that TRQ.
- The potential impact, if any, on the domestic workforce and economy in general should the exclusion be withdrawn.
- Any other information or data that interested persons consider relevant to the U.S. Trade Representative's evaluation.

USTR received 15 comments regarding the bifacial exclusion and 49 subsequent comments responding to the initial comments. The determination below is based on these comments.

The U.S. International Trade Commission (ITC) issued a report in March 2020 (March Report) in response to a request from the U.S. Trade Representative for advice regarding potential modifications to the safeguard measure, which provided certain information with regard to the bifacial exclusion. In the March report, the ITC found that bifacial panels are projected to gain a large share of total demand in the coming years due to their power-generation advantages and relative cost competitiveness with monofacial panels - particularly the price advantage that the bifacial exclusion conferred upon them. *See* ITC March Report, at ES-5. Accordingly, the ITC found that the bifacial exclusion (a) likely will result in substantial increases in imports of bifacial panels, and (b) that these

products likely will compete with domestically produced solar products in the U.S. market. *See* ITC March Report, at I-4 and 5.

**B. Determination Regarding the Bifacial Exclusion**

Section 201(a) provides that, when the ITC finds that increased imports are causing or threatening serious injury to a domestic industry, the President “shall take all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.” Proclamation 9693 provided that “[i]f the USTR determines, after consultation with the Secretaries of Commerce and Energy, that a particular product should be excluded, the USTR is authorized, upon publishing a notice of such determination in the *Federal Register*, to modify the HTS provisions created by the Annex to this proclamation to exclude such particular product from the safeguard measure.” The February 2018 notice provided that the U.S. Trade Representative would “grant only those exclusions that do not undermine the objectives of the safeguard measures,” which signifies that an exclusion is not appropriate if it would interfere with the domestic industry’s “positive adjustment to import competition.” The information and comments provided in response to the January 2020 notice indicate that the bifacial exclusion is doing this.

Specifically, the information and comments support the following findings:

1. Global capacity to produce bifacial solar panels is likely to increase significantly over the next three years.
2. As bifacial solar panel production currently is low in the United States, and the vast majority of bifacial solar panel capacity is foreign, allowing import of bifacial solar

- panels free of safeguard tariffs disincentivizes U.S. producers from converting existing monofacial production to bifacial production or opening new bifacial production.
3. Imports of bifacial solar panels were rising even before the bifacial exclusion and continued to increase after the exclusion.
  4. Demand both globally and domestically for bifacial solar panels is likely to increase significantly for at least the next three years.
  5. The cost of producing bifacial solar panels is not more than 10 percent higher than the cost of producing monofacial panels.
  6. Bifacial solar panels and monofacial solar panels are substitutes from the perspective of utilities planning solar generating facilities in locations where both are cost-competitive with conventional forms of energy.
  7. Bifacial solar panels are expected to offer a 5 to 10 percent improvement in energy output over a same-size monofacial panel, and removing the safeguard tariff will enable their sale for prices below those of monofacial panels, which will depress prices for monofacial panels.
  8. The proposed TRQ for bifacial solar panels would allow importation of massive quantities of bifacial solar panels and therefore would duplicate the negative effects of the bifacial exclusion.
  9. Competition from low-priced imports prevented domestic producers from selling significant quantities of solar panels in the utility segment during the ITC's original investigation period, and low-priced imports of bifacial solar panels due to the exclusion are likely to have a similar effect under current market conditions.

Moreover, bifacial solar panels are an innovative technology that represents a major area of growth for all producers of solar products. Utilities are the largest and most rapidly growing purchasers of solar panels in the United States. By disincentivizing domestic producers' production of bifacial solar panels, interfering with their ability to increase sales of monofacial and bifacial products into the utility segment, and having a depressive effect on prices for monofacial solar panels, the bifacial exclusion is hindering the domestic industry's adjustment to import competition.

Therefore, the U.S. Trade Representative has determined that the bifacial exclusion is undermining the objective of the safeguard measure on solar products, does not meet the criteria for a legitimate exclusion, and should be withdrawn. The U.S. Trade Representative has found further and additionally that the findings in the ITC March Report support the conclusion that the bifacial exclusion is undermining the objectives of the safeguard measure.

**C. Consultation with Other Government Agencies**

As with the initial determination to exclude bifacial solar panels from the safeguard measure, the U.S. Trade Representative consulted with the Secretaries of Commerce and Energy regarding the comments, responses, and supporting evidence received with respect to the January 2020 notice to reach this determination.

Jeffrey Gerrish,  
Deputy United States Trade Representative,  
Office of the United States Trade Representative.  
[FR Doc. 2020-08189 Filed: 4/16/2020 8:45 am; Publication Date: 4/17/2020]