

# Safeguard Relief – An Integral Part of the Global Trading System

January 29, 2018

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At the beginning of the week, the President issued two Proclamations providing safeguard relief to the domestic solar cell industry and to the large residential washing machine industry. These Proclamations followed investigations by the U.S. International Trade Commission pursuant to section 201 of the Trade Act of 1974, as amended (19 U.S.C. 2251 et seq.), and subsequent interagency review of potential remedies and other issues. See Proclamation 9693, 83 FR 3541-3551 (Jan. 25, 2018)[1]; Proclamation 9694, 83 F.R. 3553-3562 (Jan. 25, 2018).[2] The reaction of much of the media and a number of foreign governments (e.g., China, Korea, Mexico) seemed to be that such actions by the President were a sign of the U.S. withdrawing from the global system, were protectionist and somehow inconsistent with the global trading system. Indeed, the Republic of Korea filed two requests for consultations with the United States at the WTO last week on the two Proclamations.[3]

Missing from the commentary to date has been any evaluation of the role of safeguard provisions within the multilateral trading system. **Far from being inconsistent with the WTO system, the right to take safeguard action in appropriate circumstances has been an important part of the global trading system since the beginning of the GATT in the late 1940s and has been an important part of U.S. trade policy fostering support for trade liberalization since the 1930s.** For countries to be able to liberalize trade, the system must permit them to address situations where imports are increasing rapidly and causing serious injury to a domestic industry. GATT Article XIX and the WTO Safeguard Agreement specifically permit such action. Because an unfair trade practice (dumping or subsidization) are not alleged or found in safeguard cases, international obligations and U.S. law have a higher injury standard and greater causation standard than is true for unfair trade remedy cases (antidumping and countervailing duty). Moreover, relief is limited in duration and must be degressive if granted for more than one year.

U.S. law permits safeguard cases to be initiated by petition by domestic producers or their workers or to be initiated at the request of the Administration or the trade committees of Congress. The solar cell case and the large residential washer case were not Administration- or Congressional-requested cases but rather cases initiated by petition by domestic producers.

U.S. law provides for the U.S. International Trade Commission, an independent and bipartisan federal agency, to conduct investigations of whether a domestic industry is seriously injured and whether increased imports are a substantial cause of the injury. Those proceedings were actively engaged in by those supporting and those opposing relief, with all having an opportunity to supply information and views. **Both cases resulted in unanimous decisions that the U.S. statutory criteria were met.**[4][5] Both industries were found to be seriously injured and increased imports were found in both cases to be a substantial cause of the material injury.

The Commission makes recommendations to the President as to what remedy could be applied if the President determines that relief will be granted. Such recommendations follow opportunity for all interested parties to submit views on what type of relief should be provided and potential problems with relief being granted.

U.S. law then provides for a process for interested parties to provide further information on the various issues the President is to consider in deciding whether to grant relief, and to have an additional hearing before the interagency group makes recommendations to the President. It is then up to the President to decide whether to grant relief and of what kind. The relief provided followed the recommendations of the interagency group and in some cases provided for larger exclusions than was recommended by the USITC.

**Crystalline Silicon Photovoltaic Cells (Whether or not Partially or Fully Assembled into Other Products), Inv. TA-201-75**

**Remedy Requested, Proposed, and Granted**

Petitioners' Requested Remedy	ITC Recommendation	Presidential Decision																																
<p><b>SolarWorld</b> proposed a remedy of a specific tariff and a quota for both cells and modules.</p> <p><b>Cells</b></p> <table border="1" style="width: 100%;"> <thead> <tr> <th></th> <th style="text-align: center;">Tariff</th> <th style="text-align: center;">Quota</th> </tr> </thead> <tbody> <tr> <td>Year 1</td> <td style="text-align: center;">\$0.25 per watt</td> <td style="text-align: center;">0.22 gigawatts</td> </tr> <tr> <td>Year 2</td> <td style="text-align: center;">\$0.245 per watt</td> <td style="text-align: center;">0.27 gigawatts</td> </tr> <tr> <td>Year 3</td> <td style="text-align: center;">\$0.24 per watt</td> <td style="text-align: center;">0.32 gigawatts</td> </tr> <tr> <td>Year 4</td> <td style="text-align: center;">\$0.235 per watt</td> <td style="text-align: center;">0.37 gigawatts</td> </tr> </tbody> </table> <p><b>Modules</b></p> <table border="1" style="width: 100%;"> <thead> <tr> <th></th> <th style="text-align: center;">Tariff</th> <th style="text-align: center;">Quota</th> </tr> </thead> <tbody> <tr> <td>Year 1</td> <td style="text-align: center;">\$0.32 per watt</td> <td style="text-align: center;">5.7 gigawatts</td> </tr> <tr> <td>Year 2</td> <td style="text-align: center;">\$0.31 per watt</td> <td style="text-align: center;">8.50 gigawatts</td> </tr> <tr> <td>Year 3</td> <td style="text-align: center;">\$0.30 per watt</td> <td style="text-align: center;">8.75 gigawatts</td> </tr> <tr> <td>Year 4</td> <td style="text-align: center;">\$0.29 per watt</td> <td style="text-align: center;">9.00 gigawatts</td> </tr> </tbody> </table>		Tariff	Quota	Year 1	\$0.25 per watt	0.22 gigawatts	Year 2	\$0.245 per watt	0.27 gigawatts	Year 3	\$0.24 per watt	0.32 gigawatts	Year 4	\$0.235 per watt	0.37 gigawatts		Tariff	Quota	Year 1	\$0.32 per watt	5.7 gigawatts	Year 2	\$0.31 per watt	8.50 gigawatts	Year 3	\$0.30 per watt	8.75 gigawatts	Year 4	\$0.29 per watt	9.00 gigawatts	<p>Various remedy recommendations by the Commissioners. See below.</p>	<b>Cells</b>		
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<p><b>Suniva</b> proposed the same specific tariff remedy for cells and modules as SolarWorld. In lieu of a quota, however, Suniva proposed a \$0.74 price per watt floor price on modules for 2018 (in addition to the recommended tariff).</p>		
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**Chairman Schmidlein**

	<b>Year 1</b>	<b>Year 2</b>	<b>Year 3</b>	<b>Year 4</b>
<b>Cells: Tariff rate Quota</b>				
In-Quota Tariff Rate	10%	9.50%	9.00%	8.50%
In-Quota Volume Level	0.5 gigawatts	0.6 gigawatts	0.7 gigawatts	0.8 gigawatts
Out-of-Quota Tariff Rate	30%	29%	28%	27%
<b>Modules: Tariff (Ad Valorem)</b>	35%	34%	33%	32%

**Vice Chairman David S. Johanson and Commissioner Irving A. Williamson**

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**Commissioner Meredith M. Broadbent**

	Year 1	Year 2	Year 3	Year 4
<b>Cells and Modules</b>				
Quantitative Restriction	8.9 gigawatts	10.3 gigawatts	11.7 gigawatts	13.1 gigawatts

Commissioner Broadbent also recommended that the President administer these quantitative restrictions by selling import licenses at public auction at a minimum price of one cent per watt.

Far from being protectionist, providing relief to seriously injured industries where increased imports are a substantial cause of the injury is a demonstration that the promises made for more than eighty years to companies and workers that relief is available under the global trading system in such circumstances will be honored. Those who argue otherwise are essentially saying the bargain of trade liberalization based on rules which permit such actions in appropriate circumstances is invalid. Yet, the perception of too many broken promises and a system that doesn't actually work for many companies and their employees is certainly part of the sea change in feelings about the global trading system that has occurred in recent years in many countries.

The President, in both Proclamations, complied with WTO Safeguard Agreement obligations to exclude imports from WTO-member developing countries where imports are less than 3% of total imports (unless collectively more than 9%). In the solar case, the President also reviewed the unforeseen developments issue and found the surge in imports flowed from unforeseen developments (a requirement of GATT Article XIX but not specifically included in the Safeguard Agreement, although construed by the Appellate Body as being an ongoing obligation).

While some have raised the question of the President's authority to make a determination of whether imports from a NAFTA country should be excluded, 19 U.S.C. 3372(a) has the President making that determination. Where the President disagreed with the ITC finding, he so noted in the Proclamation. It is also the case that members of the WTO have never agreed that countries taking safeguard actions can exempt FTA partners (it remains an open issue). See Safeguard Agreement, Article 2:1 footnote 1 ["Nothing in this Agreement prejudices the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994."].<sup>[6]</sup>

## Conclusion

Within the WTO and under U.S. law, industries and workers have the right to seek relief from surges of imports that cause serious injury. This is not objectionable but rather part of the long-standing commitment of the U.S. Government and the global trading system that under appropriate circumstances temporary and degressive relief is properly taken. Both actions by President Trump comply with those requirements and were appropriate actions consistent with domestic law and WTO obligations. WTO-consistent trade enforcement, either when import surges occur and domestic industries' survival is threatened or when unfair trade practices harm U.S. industries, is a critical component to restoring U.S. competitiveness and employment growth in critical sectors and to rebuilding public support for liberalized trade in America. It is a pity that so few seem willing to acknowledge the same.

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[1] <https://www.gpo.gov/fdsys/pkg/FR-2018-01-25/pdf/2018-01592.pdf>

**[2]** <https://www.gpo.gov/fdsys/pkg/FR-2018-01-25/pdf/2018-01604.pdf>

**[3]** Imposition of a Safeguard Measure by the United States on Imports of Large Residential Washers, Request for Consultations Under Article 12.3 of the Agreement on Safeguards, Republic of Korea, G/SG/147 (January 24, 2018); Imposition of a Safeguard Measure by the United States on Imports of Crystalline Silicon Photovoltaic Cells, Request for Consultations Under Article 12.3 of the Agreement on Safeguards, Republic of Korea, G/SG/146 (January 24, 2018).

**[4]** See *Crystalline Silicon Photovoltaic Cells (Whether or not Partially or Fully Assembled into Other Products)*, Inv. TA-201-75, USITC Pub. 4739 (November 2017) (Vol. 1: Determination and Views); *Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled Into Other Products)*, Inv. TA-201-75, 82 FR 55393-95 (USITC Nov. 21, 2017) (summary of ITC's report) <https://www.gpo.gov/fdsys/pkg/FR-2017-11-21/pdf/2017-25134.pdf>; *Large Residential Washers*, Inv. TA-201-76, USITC Pub. 4745 (December 2017); *Large Residential Washers*, Inv. TA-201-76, 82 FR 58026-27 (USITC Dec. 8, 2017) (summary of ITC's report) <https://www.gpo.gov/fdsys/pkg/FR-2017-12-08/pdf/2017-26451.pdf>. The ITC also issued a supplemental report on solar cells regarding unforeseen developments. See *Supplemental Report of the U.S. International Trade Commission Regarding Unforeseen Developments*, available at [https://d12v9rtnomnebu.cloudfront.net/paychek/ITC\\_Report\\_Suniva.pdf](https://d12v9rtnomnebu.cloudfront.net/paychek/ITC_Report_Suniva.pdf).

**[5]** For an article reviewing the extent of injury to the domestic solar cell industry and whether new tariffs would hurt the solar industry, see *Will New Tariffs Hurt the U.S. Solar Industry?*, Wall Street Journal (on-line), Nov. 13, 2017, <https://www.wsj.com/articles/will-new-tariffs-hurt-the-u-s-solar-power-industry-1510628400> (subscription required). In the article, I argue that the answer is No, that safeguard tariffs would level the playing field and aid U.S. manufacturers.

**[6]** Similarly, while the President did not address other FTA potential exemptions in the Proclamations, if a commercially relevant issue to FTA countries, that is not a WTO issue but rather an issue for them to raise within the FTA context with the United States. Obviously, for countries with which the U.S. has an FTA and the country is a WTO-developing country, their exports may otherwise be excluded. See WTO Agreement on Safeguards, Article 9.1 ("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 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned.").