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Legal Sidebar

Shining a Light on the Solar Trade: Investigation Leads to Tariffs on Solar Energy-Related Imports (Part II)

Caitlain Devereaux Lewis
Legislative Attorney

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As discussed in Part I of this two-part Sidebar, on January 23, 2018, President Trump proclaimed a four-year safeguard measure in the form of a tariff-rate quota on imports of certain crystalline silicon photovoltaic ("CSPV") products that enter the United States after midnight on February 7, 2018. The Proclamation follows a U.S. International Trade Commission ("ITC" or "Commission") safeguard investigation ("Solar Investigation") conducted pursuant to section 201 of the Trade Act of 1974. While Part I provides background on section 201 safeguard investigations generally, this Part discusses the Solar Investigation that led to the new tariff-rate quota specifically. It then concludes with some options for Congress moving forward.

The Section 201 Investigation of Solar Energy-Related Products. On May 17, 2017, Suniva, Inc., a U.S.-based manufacturer of CSPV cells and modules, majority owned by Chinese firm Shunfeng International Clean Energy Limited, filed an amended petition with the ITC seeking temporary relief against imported CSPV cells and modules. Based on this petition, the ITC instituted a section 201 investigation of certain CSPV products that are detailed in the institution notice. Notably, in December 2012 and in February 2015, the United States imposed antidumping and countervailing duties on imports of CSPV products from China, as well as an antidumping duty order on imports of CSPV products from Taiwan, after the Commission found that such imports were causing material injury, or a threat thereof, to a domestic industry. While antidumping and countervailing duties are imposed on imports from a particular country, safeguard measures under section 201 (including tariffs) are imposed on all imports of covered products without regard to country of origin (with some exceptions for countries with which the United States has a free trade agreement and for certain member-countries the WTO classifies as "developing"). Tariffs resulting from a section 201 investigation are imposed in addition to any duties

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already in place.

While the ITC ultimately issued a unanimous affirmative injury determination among the four participating Commissioners, the Commissioners issued three different recommendations as to a remedy, summarized below in **Table 1**.

Table 1. ITC Four-Year Remedy Recommendations

Product & Remedy	Remedy Details	Year 1	Year 2	Year 3	Year 4
Chairman Rhonda K. Schmidtlein's Recommendation					
CSPV Cells: Tariff-Rate Quota	Quota Volume Level	0.5 gigawatts	0.6 gigawatts	0.7 gigawatts	0.8 gigawatts
	In-Quota Tariff Rate	10%	9.5%	9.0%	8.5%
	Above-Quota Tariff Rate	30%	29%	28%	27%
CSPV Modules: Tariff	Ad Valorem Tariff	35%	34%	33%	32%
Vice Chairman David S. Johanson and Commissioner Irving A. Williamson's Recommendation					
CSPV Cells: Tariff-Rate Quota	Quota Volume Level	1.0 gigawatts	1.2 gigawatts	1.4 gigawatts	1.6 gigawatts
	In-Quota Tariff Rate	*No Change to Current Tariff Rate*			
	Above-Quota Tariff Rate	30%	25%	20%	15%
CSPV Modules: Tariff	Ad Valorem Tariff	30%	25%	20%	15%
Commissioner Meredith M. Broadbent's Recommendation					
CSPV Cells & Modules: Quantitative Restriction	Quota Volume Level	8.9 gigawatts	10.3 gigawatts	11.7 gigawatts	13.1 gigawatts
	Public Auction of Import Licenses	*To administer this quota, import licenses are to be sold at public auction at a minimum price of $0.01 per watt with the revenue generated being used, "to the extent permitted by law, to provide development assistance to domestic CSPV product manufacturers for the duration of the remedy period."*			

Source: Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products), Inv. No. TA-201-75, USITC Pub. 4739, at 2–3.

On November 13, 2017, the Commission transmitted a report containing its affirmative injury determination and remedy recommendations to the President. On January 23, 2018, President Trump proclaimed a four-year safeguard measure similar, but not identical, to those recommended by Chairman Schmidtlein, Vice Chairman Johanson, and Commissioner Williamson, as detailed below in **Table 2**. The Proclamation specifies the particular CSPV products that are subject to these safeguards and the effective dates of the measures: February 7, 2018 through February 6, 2022. The Proclamation also notes the countries from which imports will be exempted based on the ITC's country-specific findings made pursuant to various free trade agreements. The Proclamation also includes a provision under which the U.S. Trade Representative may, upon request, exempt certain additional goods from the safeguard measures.

Table 2. Safeguard Measures Imposed by Presidential Proclamation No. 9693

Product & Remedy	Remedy Details	Year 1	Year 2	Year 3	Year 4
CSPV Cells: Tariff-Rate Quota	Quota Volume Level	2.5 gigawatts	2.5 gigawatts	2.5 gigawatts	2.5 gigawatts
	In-Quota Tariff Rate	*No Change to Current Tariff Rate*			
	Above-Quota Tariff Rate	30%	25%	20%	15%
CSPV Modules: Tariff	Ad Valorem Tariff	30%	25%	20%	15%

Source: Proclamation No. 9693, 83 Fed. Reg. 3541 (Jan. 25, 2018).

Options for Congress

Under certain circumstances, the statute contemplates an immediate role for Congress in reviewing the President's decision. Specifically, if the President reports to Congress that the safeguard action taken (1) "differs from *the action* recommended by the Commission" or (2) "no action will be taken," then "*the action* recommended by the Commission shall take effect . . . upon the enactment of a joint resolution" within ninety days of receipt of the President's decision. That is, a joint resolution disapproving of the President's decision is available only if the President reports to Congress that (1) he is imposing a safeguard measure that differs from the action the ITC recommended, or (2) he is taking no action. Importantly, such a resolution, if enacted following presentment to the President, does not simply undo the President's action, but, instead, puts into effect the action recommended in the Commission's report. This provision therefore raises the question of what constitutes "*the action* recommended by the Commission," where, as here, the ITC report contains more than one recommendation. The statute contains a tie-breaking provision that states if "there is an affirmative determination of the Commission . . . that serious injury . . . exists . . . and a majority of the commissioners voting are unable to agree on a . . . recommendation," then:

> (A) if a plurality of *not less than three commissioners* so voting agree on a remedy finding, such remedy finding shall . . . be treated as the remedy finding of the Commission, or
>
> (B) if two groups, both of which include *not less than 3 commissioners* [(i.e., a 3-3 tie)], each agree upon a remedy finding and the President reports . . . that—
>
> > (i) he is taking the action agreed upon by one such group, then the remedy finding agreed upon by the other group shall . . . be treated as the remedy finding of the Commission, or
> >
> > (ii) he is taking action which differs from the action agreed upon by both such groups, or that he will not take any action, then the remedy finding agreed upon by either such group may be considered by the Congress as the remedy finding of the Commission and shall, for purposes of [the joint resolution provision], be treated as the remedy finding of the Commission.

As is evident, none of the ITC's recommended actions in this case was agreed upon by "not less than three commissioners" as required by this provision. Thus, one could conclude under the tie-breaking provision that there is no recommendation from the Commission (because none garnered three votes) for purposes of determining whether the President's action differs from the ITC's recommendation, thereby making the joint resolution provision available. Perhaps suggesting this view, the President's Proclamation states: "The ITC did not recommend an action within the meaning of section 202(e) of the Trade Act (19 U.S.C. 2252(e))."

One could also conclude that "action," as used in the statute, refers more generally to the enumerated actions the statute allows the ITC to recommend. That is, the term "action" may refer to a type of measure (e.g., a duty, a tariff-rate quota, a quantitative restriction) instead of the specific recommended implementation of that action (e.g., a 30% duty). Interpreted this way, at least three Commissioners in the Solar Investigation recommended a tariff-rate quota, and therefore it could arguably be concluded that "a plurality of not less than three commissioners so voting" agrees on a tariff-rate quota, and therefore this remedy could "be treated as the remedy finding of the Commission." Under this interpretation, the joint resolution provision would *not* be available because the President imposed a tariff-rate quota, the same action three Commissioners recommended.

On the other hand, under a stricter reading of the statute, the President's imposed safeguard measures could arguably be read as differing from the ITC's recommendation, thereby making the joint resolution available. Support for this view may come from the fact that the President imposed a quota volume level that is higher than that recommended by the ITC—5 times higher than that recommended by Chairman Schmidtlein and 2.5 times higher than that proposed by Vice Chairman Johanson and Commissioner Williamson—and with no annual increase. Read this way, the joint resolution provision may arguably be available because the President's action differs from that recommended by the ITC. This interpretation, however, does not avoid the question of what constitutes *the* ITC's recommendation in this case, as the joint resolution provision works to put into effect "*the action* recommended by the Commission." Ultimately, the paucity of case law concerning the availability of the joint resolution of disapproval does not give conclusive support to either interpretation. And, such a resolution would be subject to the President's veto.

To avoid this interpretive puzzle, Congress could pass legislation that, inter alia, amends or repeals section 201 or imposes a different trade remedy. As discussed in this CRS report, "Congress is constitutionally authorized to raise revenue through taxes, tariffs, duties, and the like, and to regulate international commerce" and "has the accompanying authority to 'make all Laws which shall be necessary and proper for carrying into Execution' these powers." Any such action on the part of Congress, however, would also be subject to the President's veto. Some may wonder whether a cancellation of the President's Proclamation might be available under the Congressional Review Act ("CRA"), which allows Congress to overturn certain agency actions, again subject to the President's veto. (For a discussion of the CRA generally, see these CRS products). The CRA, however, applies to an agency "rule" that the Act requires *administrative agencies* to submit to Congress. As such, it is questionable whether this mechanism is available to counteract a presidential proclamation of a safeguard measure imposed pursuant to section 201.

What appears to be more certain is that the President's actions could result in a dispute before the WTO to challenge the United States' imposition of these safeguard measures, which, in turn, could lead to a finding that the safeguards violate the country's obligations under the WTO agreements. The WTO's ruling with regard to the 2002 safeguard measures on certain steel imports could be an indication of how the body might rule on the Trump Administration's new measures. As one commentator has observed, the WTO "has ruled that every single safeguard measure implemented by the United States since 1994 has violated, at least partially, WTO law." An adverse ruling from the WTO could potentially lead to the imposition of retaliatory measures against U.S. exports by other member countries.