

# DUSTING-OFF SECTION 201: RE-EXAMINING A PREVIOUSLY DORMANT TRADE REMEDY

JOSHUA E. KURLAND\*

## ABSTRACT

*After going unused for most of two decades, Section 201 of the Trade Act of 1974 received renewed interest and attention in 2017 following the U.S. International Trade Commission’s initiation of two separate Section 201 “safeguard” investigations into relief from increased imports requested by U.S. manufacturers of solar products and large residential washers. In light of these developments, this article re-examines the Section 201 regime, focusing on how the statute functions, how U.S. courts and WTO tribunals have handled Section 201 cases, and how matters played out in the Solar Products and Large Residential Washers proceedings.*

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\* Brown University, B.A. 1997, Harvard Law School, J.D. 2002, Fletcher School of Law & Diplomacy, M.A.L.D. 2002. The views expressed in this article are solely those of the author. © 2018, Joshua Kurland.

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I. INTRODUCTION

“Safeguard” duties under Section 201 of the Trade Act of 1974 are experiencing a renaissance after being a dormant area of trade practice for most of the past two decades. Prior to 2017, the U.S. International Trade Commission (“ITC” or “Commission”)<sup>1</sup> had not completed a Section 201 safeguard investigation—designed to analyze a domestic industry’s petition for relief from serious injury due to increased imports and to produce a recommendation to the President about imposing temporary measures to permit the affected industry to adjust—since a

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1. The ITC is an independent, quasi-judicial agency with broad investigative responsibilities on international trade matters. It consists of six commissioners, who serve nine-year terms, and who generally are international trade experts nominated by the President and confirmed by the U.S. Senate. No more than three commissioners may be from the same political party. *See* 19 U.S.C. § 1330(a)-(b) (2004); *About the USITC*, U.S. INT’L TRADE COMM’N, [https://www.usitc.gov/press\\_room/about\\_usitc.htm](https://www.usitc.gov/press_room/about_usitc.htm) (last visited Apr. 15, 2018); *Commissioner Bios*, U.S. INT’L TRADE COMM’N, [https://www.usitc.gov/press\\_room/bios.htm](https://www.usitc.gov/press_room/bios.htm) (last visited Apr. 15, 2018).

## REVIVING A TRADE REMEDY: SECTION 201

2001 proceeding concerning steel products.<sup>2</sup> And in that instance the resulting safeguard duties were withdrawn after a World Trade Organization (“WTO”) dispute resolution panel and the WTO Appellate Body found them inconsistent with U.S. WTO obligations.<sup>3</sup> Previous Section 201 safeguard measures instituted following the WTO’s establishment had similarly been found to be WTO-inconsistent.<sup>4</sup> Not surprisingly, Section 201 fell out of favor as a trade remedy.

So, what has changed? In 2017, this moribund remedial regime became the focus of considerable public interest and attention. Two separate domestic industry petitions seeking Section 201 relief received affirmative injury determinations from the ITC: one concerning solar products, and the other large residential washers.<sup>5</sup> Both U.S. industries had previously obtained trade remedy relief through antidumping and countervailing duty orders targeting unfairly priced and subsidized foreign products from specific countries.<sup>6</sup> But they clearly viewed these remedies as insufficient, compared to the global reach of Section 201 safeguards, to cope with the effects of foreign competition. In response to the ITC’s determinations and the commissioners’ remedy recommendations, the President imposed safeguard tariffs on both sets of

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2. See U.S. Int’l Trade Comm’n, Steel, Inv. No. TA-201-73, USITC Pub. 3479 (Dec. 2001); OFFICE OF INVESTIGATIONS, U.S. INT’L TRADE COMM’N, IMPORT INJURY INVESTIGATIONS CASE STATISTICS (FY 1980-2008) Table 14 (Feb. 2010), [https://www.usitc.gov/trade\\_remedy/documents/historical\\_case\\_stats.pdf](https://www.usitc.gov/trade_remedy/documents/historical_case_stats.pdf) (public version); see also David Ryan, *The Effects of Section 201 Safeguards on U.S. Industries*, 44 GEO. J. INT’L L. 249, 264 (2012); Daniel B. Pickard & Tina Potuto Kimble, *Can U.S. Safeguard Actions Survive WTO Review?: Section 201 Investigations in International Trade Law*, 29 LOY. L.A. INT’L & COMP. L. REV. 43, 50 (2007); VIVIAN C. JONES, CONG. RESEARCH SERV., RL32371, TRADE REMEDIES: A PRIMER I, 22 (2012).

3. See Morgan Frohman, *Is Section 201 of the Trade Act of 1974 Consistent with the World Trade Organization Agreement on Safeguards?*, 17 N.Y. INT’L L. REV. 127 (2004); Richard W. Stevenson, *After 21 Months, Bush Lifts Tariff on Steel Imports*, N.Y. TIMES, Dec. 5, 2003, at A1; see also Panel Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO Doc. WT/DS248/R (adopted July 11, 2003) [hereinafter *Steel Products Panel Report*]; Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO Doc. WT/DS248/AB/R (adopted Nov. 10, 2003) [hereinafter *Steel Products Appellate Body Report*].

4. See, e.g., Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WTO Doc. WT/DS177/AB/R (adopted May 1, 2001) [hereinafter *Lamb Meat Appellate Body Report*].

5. See Crystalline Silicon Photovoltaic Cells (Whether or not Partially or Fully Assembled into Other Products), USITC Pub. 4739, Inv. No. TA-201-75 (Nov. 2017) [hereinafter *Solar Products ITC Report*]; Large Residential Washers, USITC Pub. 4745, Inv. No. TA-201-76 (Dec. 2017) [hereinafter *Large Residential Washers ITC Report*].

6. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, FACT SHEET, SECTION 201 CASES: IMPORTED LARGE RESIDENTIAL WASHING MACHINES AND IMPORTED SOLAR CELLS AND MODULES (2018) [hereinafter FACT SHEET].

products in the form of “tariff-rate quotas” (connoting a tariff on all merchandise above a certain volume of imports).<sup>7</sup>

These developments, a possible harbinger of future safeguards activity, warrant re-examination of the Section 201 regime. This article discusses how the regime works, examines the standards that U.S. courts and WTO tribunals apply in reviewing Section 201 cases, and explores how matters played out in the *Solar Products* and *Large Residential Washers* proceedings. Part II provides a detailed analysis of the Section 201 regime and how proceedings under the statute function, explaining the unique standards and procedures involved. Part III analyzes the domestic and international jurisprudence governing Section 201 proceedings, contrasting the evolution of extremely limited grounds for challenging Section 201 determinations in U.S. courts with the history of successful challenges based on robust review at the WTO. Part IV analyzes the *Solar Products* and *Large Residential Washers* proceedings, discussing the ways in which they addressed various salient issues and their significance for future Section 201 cases.

## II. SECTION 201 SAFEGUARD PROCEEDINGS

### A. *Nature and Goals of Section 201*

Congress enacted Section 201 of the Trade Act of 1974 as a mechanism to provide relief for domestic industries affected significantly by foreign competition.<sup>8</sup> It authorizes the President of the United States to impose temporary trade measures, known as “safeguards,” to provide relief to domestic industries facing serious injury from imports.<sup>9</sup> The safeguards are intended to facilitate efforts by the domestic industry to “make a positive adjustment to import competition” and to “provide greater economic and social benefits than [their] costs.”<sup>10</sup>

Section 201 developed from “escape clause” provisions that the United States began including in trade agreements in the 1940s.<sup>11</sup> These provisions aimed to provide “temporary relief for an industry suffering from serious injury, or the threat thereof, so that the industry will have sufficient time to adjust to the freer international competition.”<sup>12</sup>

7. See Proclamation No. 9693, 83 Fed. Reg. 3541 (Jan. 25, 2018); Proclamation No. 9694, 83 Fed. Reg. 3553 (Jan. 25, 2018).

8. See generally 19 U.S.C. §§ 2251-2254 (2012).

9. See *id.* § 2251(a); Ryan, *supra* note 2, at 251.

10. 19 U.S.C. § 2251(a).

11. For further discussion of Section 201’s origins, see Pickard & Kimble, *supra* note 2, at 44-45.

12. S. REP. NO. 93-1298, at 119 (1974), as reprinted in 1974 U.S.C.C.A.N. 7186, 7263 (discussing Section 201’s predecessors).

Hence, Section 201 investigations are sometimes called “global safeguard” or “escape clause” investigations.<sup>13</sup>

“Positive adjustment to import competition” occurs for Section 201 purposes when the domestic industry either 1) “is able to compete successfully with imports after actions taken under . . . [the statute] terminate” or 2) “experiences an orderly transfer of resources to other productive pursuits,” and dislocated workers experience an orderly transition to productive pursuits.<sup>14</sup> The statute also clarifies that the domestic industry may make a positive adjustment even if its size and composition changes compared to when the safeguard investigation started.<sup>15</sup>

Unlike U.S. antidumping and countervailing duty laws, which authorize remedial duties to combat unfair trade practices tied to foreign goods from a particular country, Section 201 does not require a predicate finding of an unfair trade practice.<sup>16</sup> Nor does a Section 201 proceeding focus solely on goods from a particular country or group of countries. As a result, the safeguard measures stemming from a Section 201 investigation—such as import duties and quotas placed on foreign merchandise—apply globally (with some limited exceptions) and do so regardless of whether foreign producers and exporters are engaging in any unfair practices, such as dumping or impermissible subsidization. At the same time, Section 201’s broader scope is tempered by the notion, incorporated into the statute, that Section 201 safeguards are intended as a temporary remedy for “serious injury,” leading to heightened injury and causation requirements compared to the “material injury” required to obtain antidumping and countervailing duty relief.<sup>17</sup>

### B. Section 201 Investigations

Under the statute, a domestic industry that believes it is seriously injured or threatened with serious injury by increased imports may submit a petition for relief to the ITC (though the ability to impose such relief ultimately lies solely with the President).<sup>18</sup> Domestic industry

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13. See *id.*; JONES, *supra* note 2, at 1; *Understanding Safeguard Investigations*, U.S. INT’L TRADE COMM’N, [https://www.usitc.gov/press\\_room/us\\_safeguard.htm](https://www.usitc.gov/press_room/us_safeguard.htm) (last visited Apr. 15, 2018).

14. 19 U.S.C. § 2251(b)(1).

15. See 19 U.S.C. § 2251(b)(2).

16. See *Understanding Safeguard Investigations*, *supra* note 13.

17. See *id.*; *cf.* 19 U.S.C. §§ 1673, 1675 (2012) (providing for relief based on “material injury” in antidumping and countervailing duty cases).

18. See 19 U.S.C. § 2252(a) (2012).

petitions may be filed by entities such as a firm, a trade association, a certified or recognized union, or a group of workers.<sup>19</sup> The petition must include a statement describing the specific purposes for which action is being sought, which may include facilitating the orderly transfer of resources to more productive pursuits, enhancing competitiveness, or other means of adjustment to new conditions of competition.<sup>20</sup> The statute also encourages domestic industry petitioners to submit an “adjustment plan” explaining how they will adjust to import competition, either with the petition or at any time within 120 days following the petition.<sup>21</sup>

Even absent a domestic industry petitioner, the ITC can initiate an investigation based on a request by the President or the U.S. Trade Representative (“USTR”), a resolution from either the House Ways and Means or Senate Finance Committee, or its own motion.<sup>22</sup> Whether by petition or request, the action triggers an investigation that results in an ITC determination on serious injury and recommendation to the President regarding the propriety and scope of relief.

Following initiation, the statute empowers the ITC to investigate whether “an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article.”<sup>23</sup> Both the terms “serious injury” and “substantial cause” are terms of art for Section 201 purposes. The statute defines “serious injury” as “a significant overall impairment in the position of a domestic industry” and defines “threat of serious injury” as “serious injury that is clearly imminent.”<sup>24</sup> It further defines a “substantial cause” of injury as “a cause which is important and not less than any other cause.”<sup>25</sup>

In conducting the investigation, the statute directs the ITC to take into account all economic factors that it considers relevant.<sup>26</sup> To determine whether an article is being imported to the United States in

19. *See id.*

20. *See* 19 U.S.C. § 2252(a)(2).

21. *See* 19 U.S.C. § 2252(a)(4).

22. *See* 19 U.S.C. § 2252(b)(1)(A).

23. 19 U.S.C. §§ 2251(a), 2252(b)(1)(A).

24. 19 U.S.C. § 2252(c)(6)(C)-(D).

25. 19 U.S.C. § 2252(b)(1)(B). This “causation” standard has been a key point of contention in the successful WTO challenges to Section 201 determinations. *See, e.g., Lamb Meat Appellate Body Report, supra* note 4, ¶ 184 (distinguishing U.S. law standard from standard under WTO agreements); *see also* Part III.B, *infra*.

26. *See* 19 U.S.C. § 2252(c)(1).

“increased quantities,” for example, the ITC can consider an increase that is “either actual or relative to domestic production.”<sup>27</sup> Consistent with the global nature of Section 201 remedies, the ITC will look at imports stemming from all sources in analyzing this and other Section 201 criteria.<sup>28</sup> In terms of a time-frame, the Commission’s standard practice is to consider import trends over the most recent five years, but it is not required to do so if it considers a longer or shorter period appropriate.<sup>29</sup>

In analyzing the “serious injury” requirement, the statute directs the ITC to consider factors such as 1) the “significant idling” of productive facilities; 2) the inability of firms to carry out domestic production operations at a “reasonable level of profit”; and 3) “significant unemployment or underemployment” within the domestic industry.<sup>30</sup> Similarly, in analyzing whether a “threat of serious injury exists,” the statute states that the Commission shall consider economic factors such as 1) a decline in sales or market share, increasing inventory, and a downward trend in production, profits, wages, productivity, or employment; 2) an inability by the domestic industry to generate adequate capital to fund modernization or research and development; and 3) the diversion of exports to the United States from other markets due to restraints on exports to third countries.<sup>31</sup> The statute cautions, however, that the presence or absence of any one of these factors is not necessarily dispositive.<sup>32</sup>

Regarding the “substantial cause” criterion, the statute requires the ITC to consider factors such as 1) an “increase in imports (either actual or relative to domestic production)” and 2) a “decline in the proportion of the domestic market supplied by domestic producers.”<sup>33</sup> It must also consider the domestic industry’s condition during the relevant business cycle (though it may not aggregate different causes of declining demand due to recession or economic downturn into a single cause of injury by reason of imports),<sup>34</sup> as well as any factor other than

27. 19 U.S.C. § 2252(c)(1)(C).

28. INTERNATIONAL TRADE LAWS OF THE UNITED STATES, ¶ 11.02 GENERAL SAFEGUARDS (Mark A. Neville, Jr. ed.), 2013 WL 5356710, at \*1 [hereinafter INTERNATIONAL TRADE LAWS OF THE UNITED STATES].

29. *Id.*; see, e.g., *Solar Products* ITC Report, *supra* note 5, at 19.

30. 19 U.S.C. § 2252(c)(1)(A).

31. 19 U.S.C. § 2252(c)(1)(B).

32. See 19 U.S.C. § 2252(c)(3).

33. 19 U.S.C. § 2252(c)(1)(C).

34. See 19 U.S.C. § 2252(c)(2)(A). Relevant legislative history states that this provision is meant to clarify that import relief should be available during a recession or economic downturn. See S.

imports that may be a cause of actual or threatened serious injury to the domestic industry.<sup>35</sup>

In discharging these responsibilities, the ITC gathers extensive information by sending detailed questionnaires, which can be enforced by subpoena, to U.S. producers, U.S. importers, U.S. purchasers, and foreign producers of the subject merchandise (much as in antidumping and countervailing duty cases).<sup>36</sup> The Commission also obtains information through staff fieldwork, staff review of literature and government publications, and information furnished by interested parties at public hearings and in pre- and post-hearing briefs. The Commission is required to publish notice of the proceeding in the Federal Register and to hold public hearings at which interested parties and consumers receive an opportunity to present evidence, to respond to other parties, to comment on any adjustment plan submissions, and generally to be heard with respect to their positions.<sup>37</sup> The *Solar Products* and *Large Residential Washers* proceedings, for example, involved a wide range of parties, from interested businesses, to industry and trade associations, to political leaders and foreign governments.<sup>38</sup>

### C. ITC Reports and Recommendations Under Section 201

The ITC has 180 days from the day on which a petition is properly filed to conduct its investigation, make its determination, and submit a report to the President. Under the statute, the ITC must make its injury determination within 120 days of the petition date and must transmit its report, including any remedy recommendations, to the President by day 180.<sup>39</sup> The Commission can extend the 120-day deadline to 150 days if it determines that an investigation is

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FIN. COMM., OMNIBUS TRADE ACT OF 1987, S. REP. NO. 100-71, at 50 (1st Sess. 1987) [hereinafter SENATE FINANCE REPORT].

35. See 19 U.S.C. § 2252(c)(2)(B). Relevant legislative history states that the “other factors” provision is meant “to assure that all factors injuring the domestic industry are identified.” SENATE FINANCE REPORT, *supra* note 34, at 50. The ITC interprets the provision as requiring the Commission to make findings regarding those other factors. See *Solar Products* ITC Report, *supra* note 5, at 23.

36. See INTERNATIONAL TRADE LAWS OF THE UNITED STATES, *supra* note 28, at \*3.

37. See 19 U.S.C. § 2252(b)(3).

38. See generally Adam Behsudi, *Solar Case Gets Red Hot with Remedy Hearing Today*, POLITICO (Oct. 3, 2017, 10:00 AM), <https://www.politico.com/tipsheets/morning-trade/2017/10/03/solar-case-get-red-hot-with-remedy-hearing-today-222617>; Alex Lawson, *Lawmakers Wade into Washing Machine Giants’ Trade Battle*, LAW360 (Sept. 8, 2017, 1:55 PM), <https://www.law360.com/articles/961524/lawmakers-wade-into-washing-machine-giants-trade-battle>.

39. See 19 U.S.C. §§ 2252(b)(2)(A)-(B), (f)(1).

extraordinarily complicated, but it still must submit its report to the President within 180 days.<sup>40</sup>

If the Commission makes an affirmative injury determination, it recommends action to the President that would address the injury and be most effective at helping the domestic industry adjust to import competition.<sup>41</sup> The President, however, has sole discretion regarding the type, duration, and amount (if any) of relief to provide.<sup>42</sup>

The statute expressly authorizes the ITC to recommend several different kinds of relief. They include: 1) an increase in, or the imposition of, any duty on the imported article (*i.e.*, a tariff); 2) a tariff-rate quota on the article; 3) a modification or imposition of any quantitative restriction on the importation of the article into the United States (*i.e.*, a quota); 4) adjustment measures, such as the provision of trade adjustment assistance authorized elsewhere in U.S. trade law; and 5) any combination of these actions.<sup>43</sup> In addition, the ITC may recommend that the President initiate international negotiations to address underlying issues or implement any other lawful action that is likely to facilitate positive adjustment to import competition.<sup>44</sup>

In recommending relief, the ITC must specify the type, amount, and duration of the action(s) it recommends.<sup>45</sup> It does so in a report setting forth the commissioners' findings and remedy recommendations, as well as any concurring or dissenting views.<sup>46</sup> The report must also include information about any adjustment plans or commitments the domestic industry proposes,<sup>47</sup> a description of the short- and long-term effects that the recommended actions are likely to have on the

40. *See id.* Separately, the statute allows a petitioner to allege in its petition that "critical circumstances" exist. Such circumstances are defined to exist when there is "clear evidence" that increased imports are a substantial cause of serious injury or threat thereof to the domestic industry and "delay in taking action . . . would cause damage to that industry that would be difficult to report." 19 U.S.C. § 2252(d)(2)(A). If the ITC finds that such circumstances exist, it recommends to the President the provisional relief that is necessary to prevent or remedy serious injury, and the President may proclaim provisional relief pending completion of the investigation. *See* 19 U.S.C. § 2252(d)(2)(B)-(D). If the petition alleges the existence of such "critical circumstances," the statute provides a 60-day period for the ITC to investigate that issue and correspondingly adds an additional 60 days to the Commission's investigatory deadlines. *See* 19 U.S.C. §§ 2252(b)(2), (d)(2)(A), (f).

41. *See* 19 U.S.C. § 2252(e)(1).

42. *See Understanding Safeguard Investigations, supra* note 13.

43. 19 U.S.C. §§ 2252(e)(2)(A)-(E).

44. 19 U.S.C. §§ 2252(e)(4)(A)-(B).

45. *See* 19 U.S.C. § 2252(e)(3).

46. *See generally* 19 U.S.C. § 2252(f).

47. *See* 19 U.S.C. § 2252(f)(2)(E)-(F).

petitioning industry, on other domestic industries, and on consumers,<sup>48</sup> and a description of the short- and long-term effects of not taking action on the petitioning industry, on affected workers and communities, and on other domestic industries.<sup>49</sup> As indicated above, the report is due to the President 180 days after the initial petition filing (although the statute encourages the Commission to submit it at the earliest practicable time).<sup>50</sup>

Importantly, consistent with the temporary nature of Section 201 safeguard duties, the ITC's recommendations (and ultimately the President's implementation of the recommendations) are subject to several limitations.<sup>51</sup> In particular, unlike antidumping and countervailing duty remedies, which have a potentially unlimited duration, Section 201 safeguard measures may be imposed only for a limited amount of time. The Commission can only recommend relief for up to four years (subject to limited extension by the President).<sup>52</sup> Moreover, any actions exceeding one year must be phased down at regular intervals while the action is in effect.<sup>53</sup>

The statute also imposes limitations on the amount of any import duty or quantitative restriction that the ITC may recommend. A recommendation to impose an import duty (tariff) may be no more than 50% *ad valorem*<sup>54</sup> above the rate existing at the time the action is taken.<sup>55</sup> Similarly, a quantitative restriction (quota) that the ITC recommends cannot be less than the average quantity or value of the subject imports in the most recent three years for which representative import data are available.<sup>56</sup>

The statute additionally limits how frequently Section 201 investigations and safeguard measures may be pursued. With limited exceptions, the Commission cannot initiate a new investigation regarding the same subject matter until at least one year has elapsed from its report to the President in a previous investigation.<sup>57</sup> If that investigation resulted in imposition of a safeguard measure, the statute precludes a new

48. See 19 U.S.C. § 2252(f)(2)(G)(i).

49. See 19 U.S.C. § 2252(f)(2)(G)(ii).

50. See 19 U.S.C. § 2252(f)(1).

51. See 19 U.S.C. § 2253(e)(2012).

52. See 19 U.S.C. § 2253(e)(1)(A)-(B).

53. See 19 U.S.C. § 2253(e)(5).

54. *Ad valorem* (from the Latin for "according to value") refers to a tax in proportion to the value of the thing being taxed. BLACK'S LAW DICTIONARY (10th ed. 2014).

55. See 19 U.S.C. § 2253(e)(3).

56. See 19 U.S.C. § 2253(e)(4).

57. See 19 U.S.C. § 2252(h)(2012).

investigation for the longer of two years or the amount of time the earlier measure was in place.<sup>58</sup>

Finally, the statute imposes the procedural requirement that “only those members of the Commission who agreed to the affirmative [injury] determination . . . are eligible to vote on the [remedial] recommendation[.]”<sup>59</sup> Members of the Commission who do not agree to the affirmative injury determination may submit, in the Commission’s report, separate views regarding what action(s), if any, should be taken.<sup>60</sup>

#### D. *Presidential Action Pursuant to Section 201*

The President retains sole discretion regarding whether to impose any remedial measures, and the nature and degree of relief to provide, as a result of a Section 201 investigation.

The statute directs that, within 60 days of receiving a report of an affirmative ITC Section 201 injury determination, the President “shall take all appropriate and feasible action . . . 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.”<sup>61</sup> In this way, the statute affords the President discretion to take steps including 1) implementing the ITC’s recommendations; 2) modifying the ITC’s recommendations and/or implementing a different remedy; or 3) taking no action due to U.S. economic or national security interests.<sup>62</sup>

As described above, the President may proclaim relief that includes import duties, quotas, tariff-rate quotas, trade adjustment measures, initiating international negotiations to address underlying issues, any combination of these options, or any other lawful action that will facilitate positive adjustment to import competition.<sup>63</sup> In addition to these forms of relief, which mirror those that the ITC may recommend,<sup>64</sup> the President may proclaim procedures for auctioning or otherwise allocating import licenses among importers of the subject merchandise and

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58. See 19 U.S.C. §§ 2252(h)(2), 2253(e)(7)(A).

59. 19 U.S.C. § 2252(e)(6).

60. See *id.*

61. 19 U.S.C. § 2253(a)(1)(A). The time period shortens to 50 days in a case in which the President has proclaimed provisional relief due to critical circumstances affecting the domestic industry. See 19 U.S.C. § 2253(a)(4)(A).

62. See JONES, *supra* note 2, at 25.

63. See 19 U.S.C. §§ 2253(a)(3)(A)-(E), (G), (I)-(J).

64. See 19 U.S.C. §§ 2252(e)(2), (e)(4) (listing potential ITC recommendations).

may also submit to Congress legislative proposals designed to facilitate the domestic industry's efforts at adjustment.<sup>65</sup> The relief that the President proclaims applies globally on a non-discriminatory basis against imports of the subject merchandise from all countries, except that the President may exclude imports from certain countries with which the United States has entered into a Free Trade Agreement ("FTA"), including the North American Free Trade Agreement ("NAFTA"), under certain conditions.<sup>66</sup> Imports from "developing countries" also may be excluded if they are below a certain threshold share of total imports.<sup>67</sup>

In determining whether to implement relief, the statute sets forth a number of factors for the President to consider.<sup>68</sup> These factors can be summed up as directing the President to consider the likely costs and benefits of the actions being contemplated, as well as the general economic and national security interests of the United States.<sup>69</sup> Thus, in practical terms, the statute gives the President very broad discretion to do what he or she determines is in the country's best interest. Given this discretion, the process has political elements.<sup>70</sup>

Procedurally, if the ITC reports an affirmative determination, the matter is referred by statute to an interagency trade policy committee, chaired by the USTR, for a recommendation to the President as to what action the President should take.<sup>71</sup> The committee may accept written

65. See 19 U.S.C. §§ 2253(a)(3)(F), (H).

66. See INTERNATIONAL TRADE LAWS OF THE UNITED STATES, *supra* note 28, at \*1, \*1 n.3 (citing 19 U.S.C. § 3371 (2017)) (additional citations omitted); see, e.g., *Solar Products* ITC Report, *supra* note 5, at 65-79 (analyzing the possible exclusion of goods from such countries). As discussed in Part III.B *infra*, the U.S. methodology in excluding imports from certain FTA countries has been challenged in WTO dispute settlement proceedings based on concerns about "parallelism" between the imports investigated and those subject to the ultimate safeguard measure.

67. See INTERNATIONAL TRADE LAWS OF THE UNITED STATES, *supra* note 28, at \*1, \*1 n.4 (discussing WTO rules on developing countries). Article 9.1 of the WTO Agreement on Safeguards provides that a safeguard measure may not be applied against a product originating in a developing WTO Member as long as its share of imports does not exceed 3%, provided that developing country Members with less than 3% import share collectively account for no more than 9% of total imports of the product. See *id.*; see also STATEMENT OF ADMINISTRATIVE ACTION TO THE URUGUAY ROUND AGREEMENTS ACT OF 1994 (SAA), H.R. DOC. NO. 103-316, at 958 (2d Sess. 1994).

68. See 19 U.S.C. § 2253(a)(2).

69. The factors also include some specific potential considerations such as (a) the ITC's recommendation and report; (b) the domestic industry's positive adjustment efforts (including those in any adjustment plan submitted to the ITC during the investigation); and (c) the potential for circumvention of any actions taken. See *id.*

70. See INTERNATIONAL TRADE LAWS OF THE UNITED STATES, *supra* note 28, at \*3.

71. See 19 U.S.C. § 2253(a)(1)(C).

submissions and oral testimony in formulating its recommendation. As part of this decision process, the administration may also, within 15 days after receiving an affirmative report from the ITC, request additional information from the Commission.<sup>72</sup> In such cases, the ITC has 30 days to furnish the additional information in a supplemental report, and the President then has 30 days after receiving the supplemental report to act—in effect extending the time limit for taking action by up to 15 days.<sup>73</sup>

If the President determines that action is warranted, the administration “transmit[s] to Congress a document describing the action and the reasons for taking action.”<sup>74</sup> Conversely, if the President determines that “there is no appropriate and feasible action to take” under the statute, the administration must transmit to Congress “a document that sets forth in detail the reasons for the decision” on the day of the decision.<sup>75</sup> Likewise, if the President takes action different from an overall ITC recommendation, the President must “state in detail the reasons for the difference.”<sup>76</sup> The statute further provides that, if the President declines to take action or seeks to take action differing from an overall ITC recommendation, Congress may override that determination and require implementation of the ITC’s recommendation by enacting a joint resolution within 90 days of the date on which the President transmits a report to Congress.<sup>77</sup>

Regarding the actions’ specifics, the statute authorizes the President to take action—subject to the limitations enumerated in the statute—that “shall be to such extent, and for such duration . . . that the President determines to be appropriate and feasible.”<sup>78</sup> The limitations are the same ones enumerated above in relation to the ITC’s recommendations.<sup>79</sup>

Thus, for example, the President may not impose a tariff rate more than 50% *ad valorem* above the existing duty rate<sup>80</sup> and may not impose a quota below the average quantity or value of subject merchandise imports over the most recent three years for which representative import data are available (unless the President finds that imposing a

72. See 19 U.S.C. § 2253(a)(5).

73. See 19 U.S.C. §§ 2253(a)(4)(B), (a)(5).

74. 19 U.S.C. § 2253(b)(1).

75. 19 U.S.C. § 2253(b)(2).

76. 19 U.S.C. § 2253(b)(1).

77. See 19 U.S.C. § 2253(c).

78. 19 U.S.C. § 2253(a)(1)(B).

79. See 19 U.S.C. § 2253(e).

80. See 19 U.S.C. § 2253(e)(3).

different quantity or value is “clearly justified” to prevent or remedy serious injury).<sup>81</sup> Moreover, although the ITC can only recommend relief for four years (phased down over time), the President, after obtaining a further determination and report from the Commission, may extend the period one or more times for a total of up to eight years upon determining that the relief remains necessary and that the domestic industry is making a positive adjustment.<sup>82</sup>

More generally, the President may provide relief “only to the extent the cumulative impact of such action does not exceed the amount necessary to prevent or remedy the serious injury.”<sup>83</sup> The statute, however, does not constrain the President’s judgment in making this determination.

Finally, if the President takes action, the ITC is required to monitor developments with respect to the domestic industry.<sup>84</sup> If the period of the safeguard measure or an extension exceeds three years, the ITC must submit a report to the President on its monitoring.<sup>85</sup> The ITC must submit its report by the mid-point of the safeguard action (or any covered extension), and it must hold a public hearing in the course of preparing the report.<sup>86</sup> After receiving the ITC’s report, the President may reduce, modify, or terminate the action if either 1) the domestic industry requests it based on the positive adjustments it has made or 2) the President determines that changed circumstances warrant such action.<sup>87</sup> The President may also take additional action under the statute to eliminate any circumvention of the safeguard measures.<sup>88</sup>

#### E. *Section 201’s Relationship to U.S. International Trade Obligations*

The domestic statutory criteria for Section 201 import relief are meant to reflect U.S. rights and obligations under Article XIX of the General Agreement on Tariffs and Trade 1994 (“GATT 1994”), as further elaborated in the WTO Agreement on Safeguards. Like its U.S. law

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81. See 19 U.S.C. § 2253(e)(4).

82. See 19 U.S.C. § 2253(e)(1)(A)-(B).

83. 19 U.S.C. § 2253(e)(2).

84. See 19 U.S.C. § 2254(a)(1) (2012).

85. See 19 U.S.C. § 2254(a)(2).

86. See 19 U.S.C. § 2254(a)(2)-(3). Regarding extension issues, the statute authorizes the President or the domestic industry to request that the ITC investigate and provide a report regarding whether safeguard action continues to be necessary to prevent or remedy serious injury and whether there is evidence that the industry is making a positive adjustment to import competition. See 19 U.S.C. § 2254(c).

87. See 19 U.S.C. § 2254(b)(1)(A).

88. See 19 U.S.C. § 2254(b)(2).

analogues, Article XIX of the GATT 1994 is sometimes referred to as the “escape clause” because it permits a WTO Member to “escape” temporarily from its obligations under the GATT 1994 with respect to a particular product when increased imports of that product are causing or are threatening to cause serious injury to domestic producers.<sup>89</sup> Section 201, in practical terms, provides the legal framework under U.S. law for the President to apply the remedial measures authorized under Article XIX and the Safeguards Agreement.

Entitled “Emergency Action on Imports of Particular Products,” GATT 1994 Article XIX permits parties to the agreement (called Members) to “suspend [a GATT] obligation in whole or in part or to modify [a tariff] concession” in the event of “unforeseen developments” caused by obligations or tariff concessions under the agreement.<sup>90</sup> The relevant Article XIX language, of which Section 201 is reminiscent, states in full:

If, as a result of unforeseen developments and of the effect of the obligations incurred by a [Member] under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.<sup>91</sup>

The WTO Agreement on Safeguards (“Safeguards Agreement”), in turn, sets forth rules for applying GATT 1994 Article XIX.<sup>92</sup> Under the agreement, safeguard measures are considered “emergency” actions with respect to imports of particular products.<sup>93</sup> The agreement

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89. See General Agreement on Tariffs and Trade (GATT) art. XIX, Oct. 30, 1947, 61 Stat. A-11, A-58, 55 U.N.T.S. 194, 258, as incorporated and modified by General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1A, 1869 U.N.T.S. 154 [hereinafter GATT 1994].

90. *Id.* art. XIX(1)(a)-(b); JONES, *supra* note 2, at 23.

91. GATT 1994, *supra* note 89, art. XIX(1)(a).

92. See generally Agreement on Safeguards, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1A, 1869 U.N.T.S. 154 [hereinafter WTO Agreement on Safeguards].

93. See *id.* art. 11.1(a); JONES, *supra* note 2, at 23.

requires that they be: 1) time-limited; 2) imposed only when imports are found to cause or threaten serious injury to a competing domestic industry; 3) applied on a non-selective (*i.e.*, most-favored-nation) basis; and 4) progressively liberalized while in effect.<sup>94</sup> In addition, the WTO Member imposing a safeguard measure is expected to maintain a “substantially equivalent level of concessions” between it and the exporting members affected by the safeguard measure.<sup>95</sup>

One important linguistic distinction between Section 201 and GATT 1994 Article XIX is that Article XIX (dating to the original GATT 1947) states that Members may suspend their obligations and concessions when serious injury to a domestic industry occurs “as a result of unforeseen developments”—language not present in Section 201.<sup>96</sup> As discussed in Part III.B below, WTO findings have pointed to the Article XIX “unforeseen developments” requirement as a basis for finding U.S. Section 201 actions inconsistent with WTO obligations.<sup>97</sup> Likewise, the Safeguards Agreement frames the injury and causation requirements somewhat differently than does Section 201, such as a provision that when factors other than increased imports are causing injury to the domestic industry at the same time as increased imports, the injury caused by other factors “shall not be attributed to increased imports.”<sup>98</sup> This language, too, has led to searching inquiries by WTO tribunals reviewing U.S. Section 201 determinations.<sup>99</sup> Consequently, these differences have triggered debate regarding whether Section 201 and GATT 1994 Article XIX and the Safeguards Agreement are truly compatible.<sup>100</sup>

Finally, Chapter 8 of NAFTA preserves the rights of parties to the agreement (the United States, Canada, and Mexico) to take “emergency actions” that include global safeguard measures.<sup>101</sup> However, the party implementing a global safeguard shall *exclude* imports from other

94. WTO Agreement on Safeguards, *supra* note 92, art. 7; JONES, *supra* note 2, at 23.

95. WTO Agreement on Safeguards, *supra* note 92, art. 8.1; JONES, *supra* note 2, at 23. To achieve this, the Member taking the safeguard measure may agree with affected Members to provide compensation by reducing limitations it applies to other goods. If negotiations fail, the affected Members may suspend WTO trade concessions in relation to the Member imposing the safeguard. See JONES, *supra* note 2, at 23.

96. GATT 1994, *supra* note 89, art. XIX(1)(a).

97. See, e.g., *Steel Products* Appellate Body Report, *supra* note 3, ¶¶ 269-330.

98. WTO Agreement on Safeguards, *supra* note 92, art. 4.2(b).

99. See, e.g., *Lamb Meat* Appellate Body Report, *supra* note 4, ¶¶ 162-88.

100. See, e.g., Pickard & Kimble, *supra* note 2, at 50-53; Frohman, *supra* note 3, at 169-77.

101. See North American Free Trade Agreement, ch. 8, art. 802, Sept. 14, 1993, 107 Stat. 2057, 32 I.L.M. 289, 383 [hereinafter NAFTA].

NAFTA countries absent finding that 1) imports from a NAFTA party account for a substantial share of total imports and 2) imports from the NAFTA party contribute importantly to the serious injury or threat thereof caused by imports.<sup>102</sup> Safeguard provisions allowing imports from certain countries to be excluded if they do not meet certain thresholds are also included in other U.S. FTAs.<sup>103</sup> The NAFTA and FTA exclusions have proven problematic because they implicate WTO views about “parallelism” between the imports investigated and those subject to the safeguards, leading U.S. Section 201 measures to be found WTO-inconsistent.<sup>104</sup>

### III. LEGAL CHALLENGES TO SECTION 201 SAFEGUARD PROCEEDINGS

#### A. Challenges Under U.S. Domestic Law

Most legal challenges to U.S. trade determinations proceed before the U.S. Court of International Trade (“CIT”). Parties to antidumping and countervailing duty proceedings routinely challenge different aspects of the ITC’s or Department of Commerce’s decision-making pursuant to the CIT’s exclusive jurisdiction to adjudicate such actions.<sup>105</sup> Section 201 litigation, however, is rarer. Challenges to a Section 201 decision only may be brought, if at all, pursuant to the CIT’s “residual” jurisdiction under 28 U.S.C. § 1581(i), which gives the court exclusive authority to hear cases “against the United States, its agencies, or its officers” arising from any law providing for (among other things) tariffs and quotas or other quantitative restrictions.<sup>106</sup>

Because of Section 201’s highly discretionary nature—such as the non-exclusive list of factors that the President considers in making a Section 201 determination—the substantive grounds for challenging

102. *Id.* arts. 802.1(a)-(b), 32 I.L.M. at 383-84; 19 U.S.C. §§ 3371-72 (2017) (implementing treaty); *see also* JONES, *supra* note 2, at 24. NAFTA defines a “substantial share” normally as being among the top five suppliers of the good subject to the proceeding, and lists factors to be considered in determining whether NAFTA imports contribute importantly to serious injury or the threat thereof. *See* NAFTA, *supra* note 101, arts. 802.2(a)-(b), 32 I.L.M. at 384; 19 U.S.C. § 3371(b)-(c).

103. *See, e.g.*, 19 U.S.C. § 4101 (2017) (authorizing exclusion of imports from parties to the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR)); *see also* JONES, *supra* note 2, at 24; INTERNATIONAL TRADE LAWS OF THE UNITED STATES, *supra* note 28, at \*1, \*1 n.3. The exclusion of imports from these FTA countries is discretionary. *See Solar Products* ITC Report, *supra* note 5, at 71-79 (noting permissive nature and analyzing possible exclusion of goods).

104. *See* Part III.B, *infra*.

105. *See* 28 U.S.C. § 1581(c) (1980) (granting CIT exclusive jurisdiction over antidumping and countervailing duty cases).

106. 28 U.S.C. § 1581(i).

Section 201 proceedings under domestic U.S. law are limited or non-existent. A party that is dissatisfied with the outcome of a Section 201 proceeding generally may raise only issues of fundamental statutory compliance and procedural fairness, and cannot challenge the substance of the President's and ITC's actions or lack thereof. Indeed, recent court decisions have narrowed what was already deferential review in Section 201 cases even further.

The United States Court of Appeals for the Federal Circuit, which serves as the supervisory appellate court for the CIT (and thus most international trade litigation), has played a leading role in defining the contours of what can and cannot be challenged about a Section 201 proceeding, and how searching or deferential the courts' review will be even if a case does go forward. The most salient decisions affecting Section 201 litigation are discussed below.

### 1. *Maple Leaf Fish Co. v. United States* and Other Historical Precedents

Historically, the Federal Circuit required that “[f]or a court to interpose [in a Section 201 case], there has to be a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority.”<sup>107</sup> This approach stemmed from a broader recognition that the President's findings of fact and motivations in discretionary international trade matters are “not subject to review”<sup>108</sup> and that related considerations barred substantive review of the ITC's actions in recommending relief to the President.<sup>109</sup>

In *Maple Leaf Fish Co. v. United States*, for example, a Canadian importer of frozen mushrooms challenged whether the ITC (and subsequently the President) properly included frozen mushrooms within the scope of Section 201 relief that had been imposed on mushrooms generally, even though frozen products constituted a very small portion of the market and were not a focus of the investigation.<sup>110</sup> The Federal Circuit explained that the case presented the question of “to what extent the courts can review the challenged actions of the Commission

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107. *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985).

108. *Id.* (quoting *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 795 (Fed. Cir. 1984), in turn citing *United States v. George S. Bush & Co., Inc.*, 310 U.S. 371, 379-80 (1940)). Subsequent Supreme Court jurisprudence has held that Presidential decisions are not subject to judicial review under the Administrative Procedures Act (APA) because the President is not an “agency” for APA purposes. *See, e.g.*, *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992).

109. *Maple Leaf*, 762 F.2d. at 89-90 (citing *Sneaker Circus, Inc. v. Carter*, 566 F.2d 396, 401-02 (2d Cir. 1977)).

110. *See id.* at 88-89.

and the President in such a case.”<sup>111</sup> The court then recognized that Section 201 proceedings are closely tied to foreign affairs and the “external ramifications of international trade” and that the ITC’s and President’s determinations in Section 201 proceedings are highly discretionary, both in terms of the factors to be considered and the decision to recommend or to impose relief.<sup>112</sup> Noting the “very limited role of reviewing courts” in international trade controversies of this highly discretionary kind, the Federal Circuit rejected the Canadian importer’s claim.<sup>113</sup>

Consistent with these basic holdings, the Federal Circuit in *Maple Leaf* also rejected the notion that the ITC’s findings in a Section 201 proceeding should be subject to a typical administrative law standard of review—*i.e.*, scrutinizing the findings to determine whether they were supported by “substantial evidence.”<sup>114</sup> Thus, for example, the court held that it would be improper for it to decide whether the ITC was required to articulate more specific findings about injury or threat due to *frozen* mushrooms because “[i]t is enough for this case that, as we have held, the ITC did in fact make the ultimate finding and determination that there was such injury (or threat).”<sup>115</sup> The practical implication of this holding is that numerous aspects of the ITC’s and President’s determinations are effectively insulated from review.<sup>116</sup>

## 2. *Corus Group PLC v. International Trade Commission*

*Corus Group PLC v. International Trade Commission* concerned the 2001 steel products Section 201 proceeding in which the U.S. safeguard measure was subsequently found to be inconsistent with WTO rules.<sup>117</sup> The case involved a claim by a group of foreign steel exporters that the President had acted beyond his delegated authority in applying Section

111. *Id.* at 89.

112. *Id.*

113. *Id.* at 89-90.

114. *See id.* at 90. In administrative law parlance, “substantial evidence” connotes “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Under this standard, a court will uphold an agency determination if it is reasonable and supported by the record as a whole, even if some evidence detracts from it. *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984). “Substantial evidence” is itself a fairly deferential standard—but it is not nearly as deferential as the standard the Federal Circuit ultimately applied in *Maple Leaf*.

115. *Maple Leaf*, 762 F.2d. at 90.

116. *See id.*; *see also id.* at 90-91 (Cowan, J., concurring) (arguing that *Maple Leaf*’s holding did not preclude all review of agency findings).

117. 352 F.3d 1351 (Fed. Cir. 2003).

201 relief to their products because the ITC (allegedly) had not reached an affirmative injury determination with respect to their products and had not sufficiently explained its decision as required by the statute under 19 U.S.C. § 2252(f)(1).<sup>118</sup>

In safeguard proceedings, the President may treat either side of an “equally divided” three-to-three vote among the ITC commissioners as the Commission’s determination, such that a tie vote can constitute an affirmative determination.<sup>119</sup> In the steel products investigation, the ITC reached a tie vote on serious injury with respect to the “tin mill” products that the *Corus Group* plaintiffs produced and exported.<sup>120</sup> Underlying this result, however, four of the six commissioners determined that tin mill products should be analyzed as a separate product category from other steel products, and only one of these commissioners determined that the domestic industry was seriously injured or threatened with serious injury as a result of the tin mill products.<sup>121</sup> The remaining two commissioners, by contrast, concluded that tin mill and other products should be considered part of a single, broader “flat steel” category and that the domestic industry was seriously injured by imports of this broader category of steel products.<sup>122</sup>

The President’s subsequent proclamation imposing Section 201 safeguard measures noted the Commission’s evenly divided injury determination with respect to tin mill products and, relying on the President’s authority under 19 U.S.C. § 1330(d) to side with either of the evenly divided groups of commissioners, treated the determinations of the commissioners voting in the affirmative as that of the Commission.<sup>123</sup> The President thus imposed import duties for a three-year period on “certain flat steel” entering the United States, including tin mill products.<sup>124</sup>

The *Corus Group* plaintiffs asserted that the Commission had not, in fact, been evenly divided regarding tin mill products because the votes of commissioners applying different market scope definitions had been aggregated improperly as a tie.<sup>125</sup> Absent an affirmative ITC injury

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118. *See id.* at 1353.

119. *See* 19 U.S.C. § 1330(d) (2004). In the ITC’s more common antidumping and countervailing duty investigations, an “evenly divided” vote is simply considered an affirmative determination. *See* 19 U.S.C. § 1677(11) (2012).

120. *See Corus Group*, 352 F.3d at 1355-56.

121. *See id.* at 1355.

122. *See id.*

123. *See id.* at 1356 (discussing Proclamation No. 7529, 3 C.F.R. 15, 15-16 (2003)).

124. *See id.*

125. *See id.*

determination, according to the plaintiffs, the President lacked authority to impose safeguards on tin mill products, and the import duty that the President had imposed was invalid.<sup>126</sup> The *Corus Group* plaintiffs additionally asserted that the safeguard duties were invalid because the two commissioners who treated steel products as a single market category had failed to articulate an injury or causation analysis specific to tin mill products.<sup>127</sup> The CIT, however, granted summary judgment for the government, applying the standards articulated in *Maple Leaf*.<sup>128</sup>

Analyzing these claims, the Federal Circuit explained that the discretionary nature of the President's actions in Section 201 cases "raises a question as to whether either of [the President's and the ITC's] actions is amenable to judicial review, an issue not previously addressed in *Maple Leaf*, which predated the pertinent Supreme Court decisions."<sup>129</sup> In other words, the court examined its ability to review the actions at all, and not just whether they should be reviewed under a deferential standard, as in *Maple Leaf*.

The court then compared the nature of the ITC's serious injury determination in Section 201 proceedings with Supreme Court jurisprudence establishing, on the one hand, that when the President has discretion whether or not to take an action, courts are "without authority to review the validity of an agency recommendation to the President regarding such action,"<sup>130</sup> and, on the other hand, that an agency recommendation is reviewable if "the action . . . mark[s] the consummation of the agency's decisionmaking process" and "the action [is] one by which rights or obligations have been determined, or from which legal consequences will flow."<sup>131</sup>

The Federal Circuit found that the *Corus Group* plaintiffs' challenge to the ITC's basic injury determination—a fundamental aspect of the Commission's determination compared to other advisory functions—fell into the reviewable category because "the President does not have complete discretion under the statute, and the Commission's report had 'direct and appreciable legal consequences'"<sup>132</sup> in that "[t]he statute only gives the President authority to impose a duty if the

126. *See id.*

127. *See id.*

128. *See id.* at 1356-57 (discussing *Corus Group PLC v. Bush*, 217 F. Supp. 2d 1347, 1352 (Ct. Int'l Trade 2002) (citing *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985))).

129. *Id.* at 1358.

130. *Id.* (discussing *Dalton v. Specter*, 511 U.S. 462, 469-70 (1994); *Franklin v. Massachusetts*, 505 U.S. 788, 797-99 (1992)).

131. *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted)).

132. *Id.* at 1359 (quoting *Bennett*, 520 U.S. at 178).

Commission makes ‘an affirmative finding regarding serious injury.’<sup>133</sup> The court further reasoned that the President’s action was lawful only if the ITC indeed was evenly divided.<sup>134</sup> Thus, it concluded that the ITC injury determination and related explanation were reviewable.<sup>135</sup>

At the same time, the Federal Circuit concluded that the President himself could not be sued.<sup>136</sup> The court explained that “[a]lthough the President’s actions are subject to judicial review, it does not necessarily follow that a claim for relief may be asserted against the President directly.”<sup>137</sup> Reasoning that the President is not an “agency” or “officer” of the United States for purposes of the CIT’s residual jurisdiction under 28 U.S.C. § 1581(i), the court held that the President should have been dismissed as a defendant.<sup>138</sup> It also stated, however, that plaintiffs like those in *Corus Group* could sue executive officers to bar them from enforcing an allegedly illegal presidential order.<sup>139</sup> Hence, the court determined overall that it had authority to consider the appeal’s merits, just not with respect to the President individually.<sup>140</sup>

Upon reaching the merits on the two claims, the Federal Circuit held that the ITC had properly tallied its determination as a tie vote with respect to the tin mill products at issue,<sup>141</sup> and that the Commission had provided adequate explanation for its determination.<sup>142</sup> On the tie-vote issue, the court reasoned that the differing scope definitions applied by the three commissioners who voted in the affirmative with respect to tin mill products did not prevent their affirmative votes from being counted together.<sup>143</sup> On the explanation issue, the court reasoned that “[s]o long as the Commission’s analysis does not violate any statute and is not otherwise arbitrary and capricious,” the various commissioners composing a majority need not rely on identical or consistent methodologies in explaining their conclusions.<sup>144</sup> Nonetheless, the court viewed it as necessary that each commissioner’s separate opinion required to reach a three-vote plurality be *internally* consistent and

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133. *Id.* (quoting 19 U.S.C. § 2253(a)(1)(A) (2000)).

134. *See id.* at 1359.

135. *See id.* at 1359, 1361-63.

136. *See id.* at 1359-60.

137. *Id.* at 1359.

138. *See id.*

139. *See id.* at 1359-60.

140. *See id.* at 1360.

141. *See id.* at 1360-61.

142. *See id.* at 1363-64.

143. *See id.* at 1361.

144. *Id.* at 1363 (quoting *U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1362 (Fed. Cir. 1996)).

adequately explain the commissioner's vote.<sup>145</sup> Finding that to be the case in the steel products proceeding, the Federal Circuit affirmed the result.<sup>146</sup>

### 3. *Motion Systems Corporation v. Bush*

The Federal Circuit—sitting en banc—reverted to a narrower interpretation of its ability to review presidential action on discretionary trade matters in *Motion Systems Corporation v. Bush*.<sup>147</sup> *Motion Systems* did not involve a Section 201 proceeding, but an analogous determination by the President under Section 421 of the U.S.-China Relations Act of 2000.<sup>148</sup>

Section 421, enacted as a transitional measure in connection with China's accession to the WTO, authorized proceedings similar to those under Section 201, except that the ITC was charged with investigating whether increased Chinese imports had caused “market disruption,” rather than “serious injury” to the domestic industry.<sup>149</sup> Like a Section 201 proceeding, the ITC under Section 421 was to investigate an allegation of injury due to increased imports and to make a recommendation to the President regarding the imposition of safeguard measures, which the President then had discretion to implement (with input from the USTR) in light of certain standards concerning the “national economic interest of the United States.”<sup>150</sup>

The plaintiff in *Motion Systems*, a U.S. domestic producer of pedestal actuators, had initiated a Section 421 petition with the ITC, resulting in an affirmative finding of market disruption and an ITC recommendation that the President impose a “quantitative restriction” (quota) for three years on pedestal actuator imports from China.<sup>151</sup> The President, however, did not provide the requested relief.<sup>152</sup> Rather, following a statutory review and recommendation by the USTR, the President determined that “providing import relief for the U.S. pedestal actuator industry is not in the national economic interest of the United States”

145. *See id.* at 1363.

146. *See id.* at 1363-64.

147. 437 F.3d 1356 (Fed. Cir. 2006) (*en banc*).

148. Pub. L. No. 106-286, 114 Stat. 880 (codified at 19 U.S.C. § 2451 (2000)). Section 421 expired in December 2013 and is no longer in effect. *See* 19 U.S.C. § 2451 (2013).

149. 19 U.S.C. §§ 2451(a), (b)(1), (c)(1) (2000). Section 421 “market disruption” differs from Section 201 “serious injury” in that the quantum of injury (“material” versus “serious” injury) and the causation standard (“significant” versus “substantial” cause) are different. 19 U.S.C. § 2451(c).

150. *Motion Systems*, 437 F.3d at 1358-59 (quoting 19 U.S.C. § 2451(k) (2000)).

151. *See id.* at 1357-58.

152. *See id.* at 1358.

because “the import relief would have an adverse impact on the United States economy clearly greater than the benefits of such action.”<sup>153</sup> The President further determined that imposing a quota would likely just cause imports to shift to other offshore sources and that any benefits would be substantially outweighed by the increased cost to downstream purchasers and consumers.<sup>154</sup>

Dissatisfied, Motion Systems sued the President and USTR, alleging that the President’s denial of relief was beyond his Section 421 authority because he had misconstrued statutory limits on denying import relief and because his cost-benefit conclusions were unsupported.<sup>155</sup> Motion Systems also argued that the USTR’s actions in making a recommendation to the President were erroneous.<sup>156</sup> The CIT, considering the claims on the merits, granted judgment in the government’s favor, concluding that the President did not exceed his statutory authority and that his action was not invalidated by any procedural misstep by the USTR.<sup>157</sup>

The Federal Circuit held that “[n]o right of judicial review exists to challenge the acts of either the President or the Trade Representative in this case.”<sup>158</sup> Contrary to the trial court’s consideration of the case on the merits, the Federal Circuit explained that there was no statutory cause of action empowering the plaintiff to sue the President and USTR for declining to impose Section 421 relief.<sup>159</sup> Thus, the attempt to sue the President for failing to impose relief reduced to the “simple issue” of “Can Motion Systems challenge the President’s discretionary actions under 19 U.S.C. § 2451 as outside the scope of authority delegated to him by Congress?”<sup>160</sup>

Answering this question in the negative, the Federal Circuit compared *Motion Systems* to the Supreme Court’s decision in *Dalton v. Specter*,<sup>161</sup> one of the cases that the court previously had distinguished in reviewing the merits of the *Corus Group* challenge to the ITC’s and

153. *Id.* (quoting Presidential Determination on Pedestal Actuator Imports from the People’s Republic of China, 68 Fed. Reg. 3157 (Jan. 17, 2003)).

154. *See id.*

155. *See id.*

156. *See id.*

157. *See id.* (citing *Motion Systems Corp. v. Bush*, 342 F.Supp.2d 1247, 1262, 1265 (Ct. Int’l Trade 2004)).

158. *Id.* at 1359.

159. *See id.*

160. *Id.*

161. 511 U.S. 462 (1994).

President's tie-vote determination in the steel products investigation.<sup>162</sup> The Federal Circuit explained that *Dalton*, in examining claims that the President had exceeded his delegated authority under the Defense Base Closure and Realignment Act of 1990, had distinguished between categories of cases involving claims of constitutional violations and cases involving claims that an official merely acted in excess of his or her statutory authority.<sup>163</sup> In the latter case, claims that the President exceeded his or her statutory authority are "precluded by the long-standing rule that: '[Judicial] review [of Presidential action] is not available when the statute in question commits the decision to the discretion of the President.'"<sup>164</sup>

Based on *Dalton* and its underlying Supreme Court precedents, the Federal Circuit concluded that the discretion afforded to the President under Section 421 fell within the rule precluding judicial review.<sup>165</sup> The court explained that "[h]ere, there is no colorable claim that the President exceeded his statutory authority. Instead, this case presents nearly the same situation as in *Dalton*."<sup>166</sup> It elaborated that "Motion Systems alleges the President violated the terms of section 421 by opting to protect national interests over domestic industry without evidentiary support. Motion Systems thus accuses the President of acting beyond the scope of authority delegated to him under the statute."<sup>167</sup> Based on this understanding, the court held that "[t]he President's actions cannot be challenged because judicial review is unavailable when a statute allegedly violated itself commits a decision to the discretion of the President."<sup>168</sup>

The court granted that "section 421 places some restriction on the President's discretion to grant or deny import relief" but noted that past cases had "insulated Presidential action from judicial review for abuse of discretion despite the presence of some statutory restrictions on the President's discretion."<sup>169</sup> Moreover, the court found "no

162. See *Motion Systems*, 437 F.3d at 1359-60; cf. *Corus Group PLC v. Int'l Trade Comm'n*, 352 F.3d 1351, 1358-59 (2003) (distinguishing *Dalton*, 511 U.S. 462).

163. See *Motion Systems*, 437 F.3d at 1360 (quoting *Dalton*, 511 U.S. at 472).

164. *Id.* (quoting *Dalton*, 511 U.S. at 474).

165. See *id.* ("Section 421 thus accords the President the same discretion found to remove Presidential action from judicial review in other Supreme Court cases."); *id.* at 1360-61 (discussing *United States v. George S. Bush & Co., Inc.*, 310 U.S. 371 (1940); *Dakota Cent. Tel. Co. v. South Dakota*, 250 U.S. 163 (1919)).

166. *Id.* at 1360.

167. *Id.*

168. *Id.* at 1362.

169. *Id.* at 1361.

colorable claim that the President has violated an explicit statutory mandate.”<sup>170</sup> Consequently, it concluded that “the President’s actions under section 421 are still sufficiently discretionary to preclude judicial review.”<sup>171</sup>

Likewise, the Federal Circuit held that the actions of the USTR were not within the trial court’s ability to review because they were not final actions. The court construed the USTR’s actions as more “like a tentative recommendation” or “the ruling of a subordinate official” because they were only recommendations to the President as the final decision-maker.<sup>172</sup> Hence, they did not carry “a direct and immediate consequence” that would make a subordinate officer’s non-final actions reviewable.<sup>173</sup>

#### 4. *Michael Simon Design, Inc. v. United States*

The Federal Circuit again took a narrow view of U.S. courts’ (specifically the CIT’s) ability to review discretionary presidential action in international trade matters in *Michael Simon Design, Inc. v. United States*.<sup>174</sup> Like *Motion Systems*, the case did not involve a Section 201 proceeding directly but nonetheless defined the contours of when the Federal Circuit will and will not permit judicial review in discretionary international trade matters, such as Section 201.

*Michael Simon Design* involved the President’s determination to modify the Harmonized Tariff Schedule of the United States (“HTSUS”). The trade statute, at 19 U.S.C. § 3005, authorizes the ITC to assist the President by keeping the HTSUS under “continuous review” and recommending changes that the Commission considers “necessary or appropriate” to comport with the United States’ obligations under the International Convention on the Harmonized Commodity Description and Coding System.<sup>175</sup> The President, under 19 U.S.C. § 3006, may make HTSUS modifications based on the ITC’s recommendation, after determining that they 1) conform to the United States’ obligations under the convention and 2) are in the national economic interest.<sup>176</sup>

The appellants in *Michael Simon Design* were importers of certain “festive apparel” that the ITC had recommended and the President had

170. *Id.*

171. *Id.* at 1362.

172. *Id.* (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 798 (1992)).

173. *Id.* (citation omitted).

174. 609 F.3d 1335 (Fed. Cir. 2010).

175. *Id.* at 1336.

176. *Id.*

proclaimed would no longer receive tariff-free treatment that it had previously enjoyed under the HTSUS chapter for “[t]oys, games and sports equipment; parts and accessories thereof.”<sup>177</sup> The new classification language that the ITC had recommended and the President had adopted made various “utilitarian” articles subject to tariffs, while exempting certain types of “festive articles” that did not include apparel.<sup>178</sup> The appellants challenged the tariff modification, asserting that the ITC recommendation and the President’s subsequent proclamation conflicted with jurisprudence holding that the apparel was properly classified under the “festive articles” rubric, and thus that the ITC’s recommendation to modify the HTSUS was unlawful and could not form the basis for valid Presidential action.<sup>179</sup>

The trial court dismissed the case, and the Federal Circuit affirmed, holding that the acts forming the basis for the appellants’ complaint were either non-final or not “agency” actions (because the President is not considered an “agency” under the APA) and that judicial review was precluded outside the APA framework due to the discretionary nature of the President’s authority to make HTSUS modifications.<sup>180</sup> As in *Motion Systems*, the court compared the claims before it to those that the Supreme Court found unreviewable in *Dalton v. Specter*.<sup>181</sup> It explained that “it is the President’s proclamation—not the Commission’s recommendations—that effects the amendments to the HTSUS” because the President determines whether to adopt them.<sup>182</sup> Hence, as in *Dalton*, the Commission’s actions “serve as non-final recommendations that do not directly affect tariffs or bind importers,” making them not judicially reviewable under the APA.<sup>183</sup>

Conversely, the Federal Circuit distinguished the case from *Bennett v. Spear*, the Supreme Court decision on which *Corus Group* relied for the proposition that agency action is reviewable if it “has direct and appreciable legal consequences.”<sup>184</sup> The court explained that in *Michael Simon Design*, by contrast, the ITC’s recommendations to modify the HTSUS were purely advisory and “did not alter the legal regime to which the decision-maker was subject, nor did they have any binding legal effect on

177. *Id.* at 1337.

178. *See id.*

179. *See id.*

180. *See id.* at 1338.

181. *See id.* at 1338-39 (discussing *Dalton v. Specter*, 511 U.S. 462, 469-70 (1994)).

182. *Id.* at 1339.

183. *Id.*

184. *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

the relevant actors.”<sup>185</sup> Moreover, the recommendation “does not contain terms or conditions that circumscribe the President’s authority to act; it does not limit the President’s potential responses; and it does not directly modify the HTSUS.”<sup>186</sup> Hence, the recommendations “have no legal impact on the President’s exercise of discretion” and “cannot directly impact legal rights or alter any legal regime in the sense described in *Bennett*.”<sup>187</sup> As a consequence, the court concluded that the Commission’s recommendations “are not ‘final’ and consequently are not subject to judicial review under the APA.”<sup>188</sup>

*Michael Simon Design* likewise rejected the notion that the President’s actions in adopting the ITC recommendation were reviewable outside the context of the APA because the President allegedly exceeded his statutorily delegated authority. The court stated that the trade statute “does not implicitly or explicitly limit the President’s discretion in a way that would render the President’s actions in this case judicially reviewable for exceeding his authority.”<sup>189</sup> It also rejected the appellants’ argument that the statute’s language authorizing the President to act based on an ITC recommendation “under” 19 U.S.C. § 3005 limited the President’s discretion and subjected the President’s actions to review based on an allegation that the ITC had violated § 3005 in making its recommendation.<sup>190</sup> The court reasoned that the appellants were reading “far too much” into the word “under” and explained that in *Dalton* the Supreme Court had concluded that the statute at issue in that case—despite using the word “under”—neither “requires the President to determine whether the Secretary or Commission committed any procedural violations in making their recommendations,” nor “prohibit[s] the President from approving recommendations that are procedurally flawed.”<sup>191</sup> Consequently, in *Michael Simon Design*, “the [trade] statute’s delineation of the agency’s duties in preparing recommendations did not limit the President’s discretion to approve or disapprove the recommendations.”<sup>192</sup>

The Federal Circuit elaborated that, as in *Dalton*, the appellants’ limited discretion argument in *Michael Simon Design* “conflate[d] the duties of the . . . Commission with the authority of the President” because

185. *Id.*

186. *Id.*

187. *Id.* at 1339-40.

188. *Id.* at 1340.

189. *Id.* at 1340.

190. *See id.* at 1341.

191. *Id.* (quoting *Dalton v. Specter*, 511 U.S. 462, 476 (1994)).

192. *Id.*

“nothing in 19 U.S.C. § 3006(a) makes the President’s authority to act contingent” on the Commission’s compliance with § 3005’s requirements, and because nothing in the statute “require[s] the President to review or reject recommendations for non-compliance with section 3005.”<sup>193</sup> The court thus rejected the appellants’ interpretation of § 3006 and their argument that the President had exceeded his statutory authority.<sup>194</sup>

Additionally, the court likened the case before it to one of those on which the Supreme Court had relied in *Dalton: United States v. George S. Bush & Co.*<sup>195</sup> In *George S. Bush*, the Supreme Court held that Congress’s delegation of power to the President to modify tariff rates pursuant to a recommendation of the ITC’s predecessor entity, the U.S. Tariff Commission, had the effect of barring judicial review, notwithstanding a claim that the Tariff Commission’s recommendation was legally flawed.<sup>196</sup> The Supreme Court had reasoned in *George S. Bush* that the Tariff Commission’s role was that of an expert advisor that investigates and submits facts and recommendations in a manner akin to “one stage in the legislative process” and that “the judgment of the President that on the facts, adduced in pursuance of the procedure prescribed by Congress, a change of [tariff] rate is necessary is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment.”<sup>197</sup> The Federal Circuit described the parallels between the “recommendation and proclamation” processes at issue in *George S. Bush* and in *Michael Simon Design* as “striking”—further confirming that the Presidential proclamation at issue in *Michael Simon Design* was not reviewable based on the claim that the ITC’s recommendation was legally flawed.<sup>198</sup>

Finally, the Federal Circuit compared and contrasted the case before it in *Michael Simon Design* with its previous decisions in *Motion Systems* and *Corus Group*.<sup>199</sup> The court explained that, in *Motion Systems*, it had held that statutory language that “limited to some degree the President’s discretion” was nonetheless insufficient to permit judicial review where there was no colorable claim that the President violated those express statutory limits and the President’s action was “sufficiently discretionary”

193. *Id.*

194. *Id.*

195. *Id.* at 1344 (discussing *United States v. George S. Bush & Co., Inc.*, 310 U.S. 371 (1940)).

196. *See id.*

197. *Id.* (quoting *George S. Bush*, 310 U.S. at 379-80).

198. *Id.* at 1344-45.

199. *See id.* at 1342-43.

to preclude such review.<sup>200</sup> The court concluded that the statutory restrictions on Presidential authority to modify the HTSUS under 19 U.S.C. § 3006 likewise “are self-limiting, as it is solely for the President to decide whether to modify the HTSUS in light of the nation’s [c]onvention obligations and economic interests.”<sup>201</sup>

Unlike in *Motion Systems*, however, the Federal Circuit also explicitly distinguished its decision in *Corus Group*. It explained that *Corus Group* was a case in which the President’s authority to act under Section 201 “turned on the presence or absence of a necessary and independent factual predicate: an affirmative injury finding by the Commission.”<sup>202</sup> The appellants’ claims in *Michael Simon Design*, by contrast, did not implicate an independent predicate to Presidential action, and the President’s authority turned solely on discretionary assessments of convention obligations and national economic interests that were not at issue.<sup>203</sup> Hence, the court concluded that *Corus Group* “is inapplicable here.”<sup>204</sup>

## 5. Implications

The upshot of this jurisprudence is that affected parties have a very narrow scope for challenging a Section 201 determination under U.S. domestic law. Substantive aspects of the ITC’s and the President’s actions are essentially unreviewable.

Hence, at least on the domestic level, efforts to contest Section 201 proceedings are more likely to involve *policy* disputes over the wisdom and propriety of imposing and maintaining safeguards in a particular case, rather than legal challenges to safeguard measures once imposed. As discussed below, Section 201 proceedings may also be subject to greater legal scrutiny in international fora, such as before the WTO.

### B. WTO Challenges

#### 1. Background

In contrast to the extremely limited scope for review under U.S. domestic law, the WTO has on multiple occasions found Section 201 safeguard measures to be inconsistent with U.S. international trade

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200. *See id.* at 1342 (quoting *Motion Systems Corp. v. Bush*, 437 F.3d 1356, 1361-62 (Fed. Cir. 2006)).

201. *Id.* at 1343 (citing *Motion Systems*, 437 F.3d at 1360).

202. *Id.*

203. *See id.* (citing 19 U.S.C. § 3006(a)(1)-(2)).

204. *Id.*

obligations. Indeed, WTO dispute resolution proceedings have found against every U.S. Section 201 measure that has been challenged since the WTO's inception in 1994.<sup>205</sup> These include the *Wheat Gluten*,<sup>206</sup> *Lamb Meat*,<sup>207</sup> *Line Pipe*,<sup>208</sup> and *Steel Products*<sup>209</sup> cases.

WTO dispute settlement proceedings review trade determinations for consistency with Members' obligations under the WTO agreements.<sup>210</sup> In the case of Section 201 safeguard measures, the relevant agreements are the WTO Safeguards Agreement and GATT 1994.<sup>211</sup> Under the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("Dispute Settlement Understanding" or "DSU"), WTO panels review challenged U.S. trade determinations to "make an objective assessment of the . . . facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the [Dispute Settlement Body] in making the recommendations or in giving the rulings provided for in the covered agreements."<sup>212</sup> Following a panel report, parties may appeal to the WTO Appellate Body.<sup>213</sup>

At a broad level, the scrutiny that Section 201 actions have received at the WTO reflects the fact that the WTO is charged with enforcing tariff-reducing obligations in an international context that differs somewhat from the separation-of-powers concerns that underlie domestic judicial deference to discretionary executive action. Moreover, GATT 1994 Article XIX and the WTO Safeguards Agreement approach safeguards as "[e]mergency [a]ction" intended as a limited exception to

205. See Pickard & Kimble, *supra* note 2, at 44, 49.

206. See generally Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WTO Doc. WT/DS166/AB/R (adopted Dec. 22, 2000) [hereinafter *Wheat Gluten* Appellate Body Report].

207. See generally *Lamb Meat* Appellate Body Report, *supra* note 4.

208. See generally Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WTO Doc. WT/DS202/AB/R (adopted Feb. 15, 2002) [hereinafter *Line Pipe* Appellate Body Report].

209. See generally *Steel Products* Appellate Body Report, *supra* note 3.

210. See John M. Ryan, *Interplay of WTO and U.S. Domestic Judicial Review: When the Same U.S. Administrative Determinations Are Appealed Under the WTO Agreements and Under U.S. Law, Do the Respective Decisions and Available Remedies Coexist or Collide?*, 17 TUL. J. INT'L & COMP. L. 353, 356 (2009) (citing Understanding on Rules and Procedures Governing the Settlement of Disputes arts. 3.3, 11, 19, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, [http://www.wto.org/English/docs\\_e/legal\\_e/28-dsu.pdf](http://www.wto.org/English/docs_e/legal_e/28-dsu.pdf) [hereinafter DSU]).

211. See generally WTO Agreement on Safeguards, *supra* note 92.

212. DSU, *supra* note 210, art. 11; see also Ryan, *supra* note 210, at 364.

213. See DSU, *supra* note 210, art. 17; Ryan, *supra* note 210, at 366-68.

member countries' free trade obligations.<sup>214</sup> Hence, it is unsurprising that WTO decisions have scrutinized Section 201 actions to ensure that they remain the exception, rather than the rule.<sup>215</sup>

One further reason for the difficulties Section 201 measures have encountered at the WTO is that GATT 1994 Article XIX states that Members may suspend their obligations and concessions when serious injury to a domestic industry occurs “as a result of unforeseen developments,” whereas Section 201 does not include this “unforeseen developments” language.<sup>216</sup> Although the “unforeseen developments” language also does not appear in the WTO Safeguards Agreement,<sup>217</sup> the WTO Appellate Body has found that Article XIX and the Safeguards Agreement must be read “cumulatively” so that safeguard measures must still comply with the “unforeseen developments” requirement.<sup>218</sup> As noted above, this difference has triggered debate regarding whether Section 201 and Article XIX are compatible.<sup>219</sup>

In any event, prior to Section 201's falling out of favor as a trade remedy after the early 2000s, the WTO had found repeatedly against U.S. Section 201 safeguard measures. The WTO Appellate Body has not found that Section 201 is *per se* inconsistent with the WTO agreements, but instead has identified specific aspects of the various U.S. Section 201 actions that it has deemed incompatible with WTO obligations.<sup>220</sup> The most cross-cutting aspects of these decisions are discussed below.

214. GATT 1994, *supra* note 89, art. XIX; WTO Agreement on Safeguards, *supra* note 92, pmbll., arts. 1, 11.1.

215. *See* WTO Agreement on Safeguards, *supra* note 92, pmbll. (recognizing need “to re-establish multilateral control over safeguards and eliminate measures that escape such control”); *see, e.g.*, Appellate Body Report, *Korea – Safeguard Measure on Imports of Certain Dairy Products*, WTO Doc. WT/DS//AB/R, ¶ 88 (adopted Dec. 14, 1999) [hereinafter *Korea Dairy Appellate Body Report*] (“In furthering this statement of the object and purpose of the *Agreement on Safeguards*, it must always be remembered that safeguard measures result in the temporary suspension of treaty concessions or the temporary withdrawal of treaty obligations, which are fundamental to the WTO Agreement[.]”); *Steel Products Appellate Body Report*, *supra* note 3, ¶ 347 (“Because safeguard measures are ‘emergency actions,’ we have noted as well that when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account.”) (citation and internal quotation marks omitted).

216. *Compare* GATT 1994, *supra* note 89, art. XIX(1) (a), with 19 U.S.C. § 2251 (2012). *See also* *Lamb Meat Appellate Body Report*, *supra* note 4, ¶ 74 (discussing the distinction between GATT 1994 and U.S. domestic law).

217. *Compare* GATT 1994, *supra* note 89, art. XIX(1) (a), with WTO Agreement on Safeguards, *supra* note 92, art. 2.

218. *E.g.*, Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WTO Doc. WT/DS121/AB/R, ¶ 89 (adopted Dec. 14, 1999); *see also* *Korea Dairy Appellate Body Report*, *supra* note 215, ¶¶ 85-87.

219. *See, e.g.*, Pickard & Kimble, *supra* note 2, at 50-53; Frohman, *supra* note 3, at 169-77.

220. *See* Frohman, *supra* note 3, at 146-47.

2. *Wheat Gluten*

The first safeguards case initiated against the United States under the WTO regime involved the European Community (“EC”)’s challenge to a Section 201 “quantitative restriction” on U.S. imports of wheat gluten.<sup>221</sup> The ITC initiated the wheat gluten investigation in 1997, resulting in a safeguard measure that commenced in 1998.<sup>222</sup> The measure consisted of an annual import quota to be imposed for a period of three years and one day based on the average wheat gluten imports for the years 1993 to 1995.<sup>223</sup> The EC requested establishment of a panel under the WTO Dispute Resolution Understanding in June 1999, and the case ultimately reached the WTO Appellate Body, which found in December 2000 that the Section 201 safeguard measure was inconsistent with U.S. WTO obligations.<sup>224</sup>

The Appellate Body found several aspects of the *Wheat Gluten* investigation inconsistent with the United States’ WTO obligations. Most significantly, it found fault with the causation analysis underlying the ITC’s determination that the domestic industry had suffered serious injury due to wheat gluten imports.<sup>225</sup> Employing a different, and in certain respects more stringent, standard than the ITC’s Section 201 test (which requires that imports be no less important than any other source of injury),<sup>226</sup> the Appellate Body concluded that, under the WTO Safeguards Agreement, the effects caused by increased imports must be “*distinguished from the injurious effects caused by other factors.*”<sup>227</sup> The Appellate Body based its approach on Article 4.2(b) of the Safeguards Agreement, which requires a “causal link” between increased imports and serious injury, while stating that “[w]hen factors other than increased imports are causing injury to the domestic industry at the same time, such injury *shall not be attributed* to increased imports.”<sup>228</sup>

From this language, the Appellate Body (adopting the reasoning of the underlying panel decision) distilled a “non-attribution” principle

221. See Christy Ledet, *Causation of Injury in Safeguards Cases: Why the U.S. Can’t Win*, 34 LAW & POL’Y INT’L BUS. 713, 723 (2003).

222. See *id.*

223. See *id.*

224. See *Wheat Gluten* Appellate Body Report, *supra* note 206; Ryan, *supra* note 2, at 284.

225. See *Wheat Gluten* Appellate Body Report, *supra* note 206, ¶¶ 60-92.

226. See 19 U.S.C. § 2252(b)(1)(B) (2012) (defining “substantial cause” of injury as “a cause which is important and not less than any other cause”).

227. *Wheat Gluten* Appellate Body Report, *supra* note 206, ¶¶ 69-70.

228. *Id.* ¶¶ 65, 67-70 (quoting and interpreting WTO Agreement on Safeguards, *supra* note 92, art. 4.2(b)) (emphasis added).

requiring the type of causal distinctions that the *Wheat Gluten* decision ultimately demanded.<sup>229</sup> The Appellate Body reasoned: “Clearly, the process of attributing ‘injury’, envisaged by [Article 4.2(b) of the Safeguards Agreement], can only be made following a separation of the ‘injury’ that must then be properly ‘attributed’.”<sup>230</sup> Thus, “competent authorities must take account, in their determination, of the effects of increased imports *as distinguished from* the effects of other factors.”<sup>231</sup> At the same time, rejecting the underlying panel’s conclusion that the “non-attribution” principle required that increased imports *alone* be the cause of serious injury, the Appellate Body found that

[a]lthough [the contribution of increased imports to causing injury] must be sufficiently clear as to establish the existence of ‘the causal link’ required, the language in the first sentence of Article 4.2(b) does *not* suggest that increased imports be *the sole* cause of the serious injury, or that ‘*other factors*’ causing injury must be excluded from the determination of serious injury.<sup>232</sup>

In practical terms, while the Section 201 causation standard does not necessarily require the ITC to disaggregate other potential causes of injury to determine that imports are a cause that is no less important than any other, the WTO’s “non-attribution” approach suggests that the investigative authority should separate out the different causes of injury and attribute individual injurious effects to those different causes, including imports, in order to ensure that effects stemming from other causes are not improperly attributed to imports.<sup>233</sup> This may be a difficult task.<sup>234</sup> Indeed, the Appellate Body’s analysis in *Wheat Gluten* itself illustrates the searching review and difficulties of compliance connected with the “non-attribution” principle.

Applying the principle to the *Wheat Gluten* case, the Appellate Body concluded that the ITC’s causation analysis had failed to explain how imports were a greater cause of declining domestic capacity utilization than other factors.<sup>235</sup> It found that “the data relied upon by the USITC indicate that the relationship between the increases in average capacity,

229. *See id.* ¶¶ 66, 68, 70, 79.

230. *Id.* ¶ 68.

231. *Id.* ¶ 70.

232. *Id.* ¶ 67; *see id.* ¶ 79.

233. *See* Ledet, *supra* note 221, at 721-22, 725; Pickard & Kimble, *supra* note 2, at 53-54.

234. *See* Ledet, *supra* note 221, at 721, 725; Pickard & Kimble, *supra* note 2, at 55-56.

235. *See Wheat Gluten* Appellate Body Report, *supra* note 206, ¶¶ 80-92; Ryan, *supra* note 2, at 284.

the increases in imports and the overall situation of the domestic industry was far more complex than suggested by the text of the USITC Report.”<sup>236</sup> Hence, the Appellate Body was “not satisfied, in light of the data that was before the USITC, that the USITC adequately evaluated the complexities of this issue and, in particular, whether the increases in average capacity, during the investigative period, were causing injury to the domestic industry at the same time as increased imports.”<sup>237</sup> Consequently, it found that the ITC had failed to “ensure that injury caused by other factors is not ‘attributed’ to increased imports.”<sup>238</sup>

The Appellate Body made a second finding of WTO inconsistency based on a principle it derived from Articles 2.1 and 2.2 of the Safeguards Agreement: that the imports covered by the serious injury determination should also be covered by the remedy.<sup>239</sup> The Appellate Body noted that Article 2.1 of the Safeguards Agreement used the phrase “product being imported” to refer to the products found to cause serious injury, while Article 2.2 used the same phrase to refer to products subject to the resulting safeguard measure, and found that it would be “incongruous and unwarranted” to have them consist of different groups of imports.<sup>240</sup> Thus, the Appellate Body found that imports included in the injury and causation determinations under Articles 2.1 and 4.2 of the Safeguards Agreement should correspond to those included in the measure applied under Article 2.2 of the agreement.<sup>241</sup> This principle has become known as “parallelism.”<sup>242</sup>

As explained above, U.S. law permits the President to exclude from a safeguard measure imports from NAFTA countries that the President determines do not “account for a substantial share of total imports” or do not “contribute importantly to the serious injury, or threat thereof, found by the [ITC].”<sup>243</sup> The Appellate Body concluded that because the ITC included Canadian wheat gluten imports in its injury analysis,

236. *Wheat Gluten* Appellate Body Report, *supra* note 206, ¶ 90.

237. *Id.* ¶ 91.

238. *Id.*

239. *See id.* ¶¶ 93-100; Pickard & Kimble, *supra* note 2, at 56-57 (citation omitted).

240. *Wheat Gluten* Appellate Body Report, *supra* note 206, ¶¶ 95-96; Pickard & Kimble, *supra* note 2, at 57.

241. *See Wheat Gluten* Appellate Body Report, *supra* note 206, ¶¶ 95-96; Pickard & Kimble, *supra* note 2, at 57.

242. *See* Pickard & Kimble, *supra* note 2, at 56.

243. *Id.* (quoting 19 U.S.C. § 3372(a)-(b) (2017)).

the parallelism principle precluded the President from excluding Canadian imports from the safeguard.<sup>244</sup>

Moreover, although the ITC had made a separate finding that Canadian imports did not contribute importantly to serious injury, the Appellate Body determined that the separate finding was not sufficient to satisfy the “parallelism” principle.<sup>245</sup> The Appellate Body stated that “although the USITC examined the importance of imports from Canada separately, it did not make any explicit determination relating to increased imports, *excluding imports from Canada*.”<sup>246</sup> Thus, it found that the ITC’s separate examination of Canadian imports did not justify the President’s failure to provide parallelism in the remedy.<sup>247</sup>

The Appellate Body also faulted aspects of the United States’ notifications to the WTO and consultations with other Members in connection with its *Wheat Gluten* Section 201 actions, but these more case-specific findings are of lesser significance for future Section 201 cases.<sup>248</sup>

### 3. *Lamb Meat*

*Lamb Meat* was the second WTO dispute settlement case to challenge a U.S. Section 201 safeguard measure in the WTO era.<sup>249</sup> The ITC initiated its investigation of fresh, chilled, and frozen lamb meat imports in 1998 and found an affirmative threat of serious injury in 1999.<sup>250</sup> The resulting safeguard measure consisted of a tariff-rate quota to be implemented for three years, with annual increases in the quota amount and decreases in the tariff rates.<sup>251</sup> As in the case of *Wheat Gluten*, imports from certain countries were ultimately excluded from the measure.<sup>252</sup>

Australia and New Zealand challenged the lamb meat measure, and (as in *Wheat Gluten*) both a WTO dispute resolution panel and the Appellate Body found that it was inconsistent with U.S. international obligations.<sup>253</sup>

244. *Id.* at 57 (citing and quoting *Wheat Gluten* Appellate Body Report, *supra* note 206, ¶ 96); Ryan, *supra* note 2, at 284 (citing *Wheat Gluten* Appellate Body Report, *supra* note 206, ¶¶ 93-100).

245. *See Wheat Gluten* Appellate Body Report, *supra* note 206, ¶¶ 97-99.

246. *Id.* ¶ 98.

247. *See id.*

248. *See* Ryan, *supra* note 2, at 284 (citing *Wheat Gluten* Appellate Body Report, *supra* note 206, ¶¶ 101-130, 143).

249. *See* Ledet, *supra* note 221, at 730.

250. *See id.*

251. *See id.*

252. *See id.*

253. *See id.*; *Lamb Meat* Appellate Body Report, *supra* note 4, ¶ 3.

The Appellate Body's May 2001 *Lamb Meat* report concluded that multiple aspects of the safeguard measure were WTO-inconsistent. First the Appellate Body found that the ITC had failed to consider whether the increase in lamb meat imports threatening the U.S. industry with injury was an "unforeseen development" under GATT 1994 Article XIX.<sup>254</sup> In doing so, the Appellate Body built upon earlier findings that Article XIX and the Safeguards Agreement should be treated cumulatively as a single package so that safeguard measures must comply with Article XIX's "unforeseen developments" language, despite the lack of such language in the Safeguards Agreement.<sup>255</sup> It thus affirmed that unforeseen developments "must be demonstrated as a matter of fact" for a safeguard measure to comply with Article XIX.<sup>256</sup> The ITC's *Lamb Meat* report, which had preceded the WTO findings that the "unforeseen developments" requirement remained in effect, did not make this demonstration in the Appellate Body's view because it did not contain a "finding" or "reasoned conclusion" regarding unforeseen developments.<sup>257</sup>

Second, as in its *Wheat Gluten* report, the Appellate Body found that the ITC causation analysis was WTO-inconsistent because the ITC had failed to distinguish adequately, and to analyze separately, multiple factors potentially contributing to the threat of injury to the domestic industry, in order to comply with the admonition under Article 4.2(b) of the Safeguards Agreement not to attribute to increased imports the injury due to other factors.<sup>258</sup> Building on *Wheat Gluten*, the Appellate Body reasoned that, in a situation in which several factors are causing injury, "a final determination about the injurious effects caused by increased imports can only be made if the injurious effects caused by all the different causal factors are distinguished and separated."<sup>259</sup> It elaborated that "[t]he non-attribution language in Article 4.2(b) . . . requires that the competent authorities assess appropriately the injurious effects of the other factors, so that those effects may be disentangled from the injurious effects of the increased imports" and that, "[i]n this way, the final determination rests, properly, on the genuine and substantial

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254. See *Lamb Meat* Appellate Body Report, *supra* note 4, ¶¶ 65-76; Ryan, *supra* note 2, at 270 (citing *Lamb Meat* Appellate Body Report, *supra* note 4, ¶ 197).

255. *Lamb Meat* Appellate Body Report, *supra* note 4, ¶¶ 69-71.

256. *Id.* ¶ 72.

257. *Id.* ¶¶ 74, 76.

258. See *id.* ¶¶ 162-88; Ryan, *supra* note 2, at 270 (citation omitted).

259. *Lamb Meat* Appellate Body Report, *supra* note 4, ¶ 179.

relationship of cause and effect between increased imports and serious injury.”<sup>260</sup>

Applying these principles to its review of the ITC’s determination in *Lamb Meat*, the Appellate Body highlighted the distinction between its approach and the ITC’s “substantial cause” test under U.S. law, requiring that increased imports be no less important than other causes of injury. It stated that “[a]lthough an examination of the *relative* causal importance of the different causal factors may satisfy the requirements of United States law, such an examination does not, for that reason, satisfy the requirements of the *Agreement on Safeguards*.”<sup>261</sup> The Appellate Body added that “to be certain that the injury caused by these other factors, whatever its magnitude, was not attributed to increased imports, the USITC should also have assessed, to some extent, the injurious effects of these other factors. It did not do so.”<sup>262</sup> Thus, the Appellate Body found the ITC’s causation analysis inadequate.

Additionally, the Appellate Body found fault with other aspects of the ITC’s analysis. In particular, it found that it was WTO-inconsistent for the ITC to include lamb growers and feeders in its definition of the domestic lamb meat industry and that ITC provided inadequate analysis of domestic lamb meat prices in making its determination that the domestic industry was threatened with serious injury.<sup>263</sup> Following the Appellate Body’s negative finding, the President terminated the lamb meat Section 201 safeguard measure in November 2001.<sup>264</sup>

#### 4. *Circular Welded Carbon Quality Line Pipe (“Line Pipe”)*

This third WTO case challenging a U.S. Section 201 safeguard action involved an investigation of imports of circular welded carbon quality line pipe that the ITC had initiated in August 1999 and concluded in October 1999 with a split affirmative determination.<sup>265</sup> The resulting safeguard measure, imposed in February 2000, took the form of a

260. *Id.*; see also *id.* ¶ 180 (“If the effects of the different factors are not separated and distinguished from the effects of increased imports, there can be no proper assessment of the injury caused by that single and decisive factor.”).

261. *Id.* ¶ 184.

262. *Id.* ¶ 185.

263. See Ryan, *supra* note 2, at 270 (discussing *Lamb Meat* Appellate Body Report, *supra* note 4, ¶¶ 77-96, 150-61).

264. See *id.* (citing Proclamation No. 7502, 66 Fed. Reg. 223 (Nov. 14, 2001)).

265. See Ledet, *supra* note 221, at 737. Among the six ITC commissioners, three found serious injury, two found a threat of serious injury but not present serious injury, and one found no injury or threat. See *id.* at 737-78. The ITC treated this split vote as an affirmative finding of either serious injury or threat of injury. See *id.* at 738.

three-year tariff-rate quota that applied to imports from all countries, excluding the NAFTA countries Canada and Mexico.<sup>266</sup> South Korea, the primary exporter of line pipe to the United States, invoked WTO dispute resolution, and the Appellate Body found the measure WTO-inconsistent in March 2002.<sup>267</sup>

Following its earlier findings on “parallelism” issues, the Appellate Body found that the President’s exclusion of imports from Mexico and Canada from the safeguard measure was contrary to WTO rules because the ITC included those countries in its injury determination.<sup>268</sup> It explained that domestic authorities can justify such a gap between the imports investigated and those covered only if they “establish explicitly”—meaning by reasoned and adequate explanation—that imports from sources ultimately covered by the measure, alone, satisfy the conditions for the imposition of safeguards.<sup>269</sup>

The Appellate Body further found that the ITC report in *Line Pipe* failed to meet this standard, despite the Commission’s attempts to address parallelism issues in a footnote by distinguishing between NAFTA and non-NAFTA sources of imports and indicating that it would have reached the same result based solely on non-NAFTA sources.<sup>270</sup> The Appellate Body explained that the ITC’s statements in the footnote were insufficiently explicit and inadequately reasoned to constitute the type of “clear and unambiguous” determination that it considered necessary.<sup>271</sup> In other words, the Appellate Body did not merely articulate these standards, but also applied them robustly in concluding that the ITC’s reasoning did not meet them.

Next, applying the “non-attribution” principle, the Appellate Body found (as in *Wheat Gluten* and *Lamb Meat*) that the ITC had not adequately explained its conclusion that increased imports were a cause

266. *See id.* at 738; Ryan, *supra* note 2, at 293; *Line Pipe* Appellate Body Report, *supra* note 208, ¶ 6. Notably, the safeguard that the President proclaimed differed in several ways from what the ITC had recommended. *See* Ryan, *supra* note 2, at 293.

267. *See* Ryan, *supra* note 2, at 293.

268. *See Line Pipe* Appellate Body Report, *supra* note 208, ¶¶ 178-99; Ryan, *supra* note 2, at 294; Ledet, *supra* note 221, at 740.

269. *Line Pipe* Appellate Body Report, *supra* note 208, ¶ 181 (quoting *Wheat Gluten* Appellate Body Report, *supra* note 206, ¶ 98; *Lamb Meat* Appellate Body Report, *supra* note 4, ¶ 103); *see also* Ledet, *supra* note 221, at 740.

270. *See Line Pipe* Appellate Body Report, *supra* note 208, ¶¶ 194-95; Ledet, *supra* note 221, at 740.

271. *Line Pipe* Appellate Body Report, *supra* note 208, ¶¶ 194-95; *see also* Ledet, *supra* note 221, at 740.

of serious injury or threat to the domestic industry.<sup>272</sup> In doing so, the Appellate Body again highlighted the distinction between the ITC's approach of determining that imports were not a lesser cause of injury than any other factor and its own insistence that the analysis "separate and distinguish the injurious effects of the increased imports from the injurious effects of the other factors."<sup>273</sup>

The Appellate Body additionally articulated its view that, as in the case of parallelism issues, the competent domestic authorities are obligated to "establish explicitly" through a "reasoned and adequate explanation," and in a "clear and unambiguous" manner, that injury caused by factors other than increased imports is not being attributed to increased imports.<sup>274</sup> Finding the ITC's attempts to address the non-attribution principle inadequate in this regard, the Appellate Body concluded that the "mere assertion" of non-attribution in the ITC's report "falls short of what we have earlier described as a reasoned and adequate explanation."<sup>275</sup> Hence, the Appellate Body, again, applied the standards it articulated in a stringent manner.

The Appellate Body's conclusions on causation also led to an additional finding that the United States had acted inconsistently with Article 5.1 of the Agreement on Safeguards by imposing a measure that exceeded the amount necessary to prevent or remedy serious injury and to facilitate adjustment by the domestic industry.<sup>276</sup> The Appellate Body reasoned that the WTO agreements limit safeguard remedies to addressing the serious injury caused by increased imports, rather than injury from any and all causes, and that the ITC's failure to distinguish the effect of imports and other causes made a *prima facie* case that the United States had failed to observe this limitation.<sup>277</sup>

Finally, the Appellate Body found against the United States on several subsidiary issues. It found that the United States had provided inadequate notice and opportunity for consultations before the tariff-

272. See *Line Pipe* Appellate Body Report, *supra* note 208, ¶¶ 200-22; Ryan, *supra* note 2, at 294; Ledet, *supra* note 221, at 743-44.

273. *Line Pipe* Appellate Body Report, *supra* note 208, ¶¶ 206, 215 (citing *Wheat Gluten* Appellate Body Report, *supra* note 206, ¶ 70; *Lamb Meat* Appellate Body Report, *supra* note 4, ¶ 179); see also Ledet, *supra* note 221, at 743.

274. *Line Pipe* Appellate Body Report, *supra* note 208, ¶¶ 216-17; see also Ledet, *supra* note 221, at 743-44.

275. *Line Pipe* Appellate Body Report, *supra* note 208, ¶ 220.

276. See *id.* ¶¶ 237-62; Ryan, *supra* note 2, at 294 (citing *Line Pipe* Appellate Body Report, *supra* note 208, ¶ 263(i)); WTO Agreement on Safeguards, *supra* note 92, art. 5.1.

277. See *Line Pipe* Appellate Body Report, *supra* note 208, ¶¶ 260-62.

rate quota went into effect.<sup>278</sup> Relatedly, because the United States had not satisfied the consultation requirement, the Appellate Body found that it had violated the Agreement on Safeguards' requirement to "endeavour to maintain" an adequate balance of concessions.<sup>279</sup> The Appellate Body also found that the United States improperly failed to exempt *de minimis* imports from developing countries from its safeguard remedy because it set the per-country quota above which it would impose tariffs at an amount lower than a Safeguard Agreement's definition of *de minimis*.<sup>280</sup>

Following issuance of the Appellate Body's report, and subsequent negotiations between the United States and South Korea, the U.S. President issued an August 2002 proclamation that substantially eased the line pipe quota with respect to imports from South Korea, prior to the safeguards terminating altogether in March 2003.<sup>281</sup>

### 5. *Steel Products*

The Appellate Body reaffirmed several of these principles in its most recent Section 201 decision concerning the 2001-2002 *Steel Products* safeguard proceeding (the same one that the Federal Circuit had reviewed in *Corus Group* and that was the last completed Section 201 investigation prior to the two that were initiated in 2017).

The *Steel Products* ITC proceeding was the Commission's largest and most complex safeguard investigation.<sup>282</sup> It was initiated at the President's request as part of a comprehensive policy initiative in response to challenges facing the U.S. steel industry and concerned numerous different categories of steel products (only a portion of which were ultimately found to be causing serious injury and subjected to safeguards).<sup>283</sup> The March 2002 safeguard measures covered \$8.5 billion worth of steel products, excluding products from NAFTA countries

278. See Ryan, *supra* note 2, at 294 (citing *Line Pipe* Appellate Body Report, *supra* note 208, ¶¶ 103, 118-19). This finding reflected the fact that the relief that the President ultimately imposed differed from that recommended by the ITC, about which the U.S. had pursued consultations with South Korea. See *id.* (citing *Line Pipe* Appellate Body Report, *supra* note 208, ¶ 119).

279. *Id.* at 293 n.266 (quoting WTO Agreement on Safeguards, *supra* note 92, art. 8.1).

280. See *id.* at 293-94, 294 n.267 (citing *Line Pipe* Appellate Body Report, *supra* note 208, ¶¶ 130, 133; WTO Agreement on Safeguards, *supra* note 92, art. 9.1).

281. See *id.* at 294 (citing Proclamation No. 7585, 67 Fed. Reg. 56,207 (Aug. 30, 2002); Press Release, U.S. Trade Representative, United States and Korea Resolve WTO Dispute on Line Pipe (July 29, 2002), [https://ustr.gov/archive/Document\\_Library/Press\\_Releases/2002/July/United\\_States\\_Korea\\_Resolve\\_WTO\\_Dispute\\_on\\_Line\\_Pipe.html](https://ustr.gov/archive/Document_Library/Press_Releases/2002/July/United_States_Korea_Resolve_WTO_Dispute_on_Line_Pipe.html)).

282. See Frohman, *supra* note 3, at 133; Pickard & Kimble, *supra* note 2, at 49-50.

283. See Frohman, *supra* note 3, at 133.

and other U.S. trade agreement partners, and consisted of a combination of tariffs and tariff-rate quotas for different product categories that were to last for three years.<sup>284</sup>

The steel safeguards were challenged by multiple countries, leading to a July 2003 panel report and November 2003 Appellate Body report, both finding the measures inconsistent with the United States' WTO obligations.<sup>285</sup> The most salient issues were again unforeseen developments, parallelism, and causation issues.<sup>286</sup>

First, the Appellate Body reiterated that a Member implementing a safeguard measure—in this case the United States—needs to demonstrate that the increase in imports causing or threatening injury to the domestic industry resulted from “unforeseen developments.”<sup>287</sup> Seeking to address this issue, the ITC had found that unforeseen developments, such as economic crises in Russia and Asia, the continued strength of the U.S. economy, and the persistent appreciation of the U.S. dollar, had caused an increase in steel imports.<sup>288</sup> The WTO panel, although agreeing that these represented “a plausible set of unforeseen developments that may have resulted in increased imports to the United States from various sources,” nonetheless found that the ITC's Report “[fell] short of demonstrating that such developments actually resulted in increased imports into the United States causing serious injury to the relevant domestic producers.”<sup>289</sup> The panel reasoned that the ITC had only demonstrated that unforeseen developments had caused a general increase in steel imports without showing how unforeseen developments had resulted in increased imports for *each of the specific products* to which the United States had applied safeguards.<sup>290</sup>

The Appellate Body affirmed the panel's decision, making several significant findings in the process. The Appellate Body first concluded that the “reasoned and adequate explanation” standard that it had articulated in reviewing other aspects of safeguard determinations applied in the context of reviewing the ITC's reasoning regarding “unforeseen developments.”<sup>291</sup> Similarly, the Appellate Body found that domestic authorities must go beyond presenting a “logical basis”

284. *See id.*, at 133-35, 134-45 nn.38-41.

285. *See* Pickard & Kimble, *supra* note 2, at 50.

286. *See id.*

287. *See id.* at 52-53.

288. *See id.* at 53.

289. *Id.* (quoting *Steel Products* Panel Report, *supra* note 3, ¶ 10.122).

290. *See id.*; *Steel Products* Panel Report, *supra* note 3, ¶ 10.44; *Steel Products* Appellate Body Report, *supra* note 3, ¶ 269 (characterizing the issue before it).

291. *See Steel Products* Appellate Body Report, *supra* note 3, ¶¶ 273-81.

for their determination (as the United States had argued) to set forth a “reasoned conclusion” regarding unforeseen developments.<sup>292</sup> Most critically, the Appellate Body agreed with the panel that it was, indeed, necessary for the ITC to have shown that unforeseen developments had resulted in increased imports for each of the specific products to which the United States had applied safeguards.<sup>293</sup> It stated:

[W]hen an importing Member wishes to apply safeguard measures on imports of several products, it is not sufficient merely to demonstrate that “unforeseen developments” resulted in increased imports of a broad category of products that included the specific products subject to the respective determinations by the competent authority. If that could be done, a Member could make a determination and apply a safeguard measure to a broad category of products even if imports of one or more of those products did not increase and did not result from the “unforeseen developments” at issue. Accordingly, we agree with the Panel that such an approach does not meet the requirements of [GATT 1994] Article XIX:1(a), and that the demonstration of “unforeseen developments” must be performed for each product subject to a safeguard measure.<sup>294</sup>

Additionally, the Appellate Body found that the panel was not required to consider data that the ITC had included in its report but had not discussed specifically in relation to the “unforeseen developments” issue, reasoning that it was the ITC’s responsibility to provide an adequately supported conclusion.<sup>295</sup>

Second, the WTO in *Steel Products* continued to fault the United States for disregarding “parallelism.” The Appellate Body affirmed the findings in *Wheat Gluten* and *Line Pipe* that imports included in the injury determination must correspond with those products covered in the remedy, or, if there is a “gap” between the two, then the relevant authority must explicitly demonstrate that the imports included in the safeguard remedy, alone, are sufficient to satisfy all of the conditions for a safeguard action.<sup>296</sup> Although the ITC report in *Steel Products*

292. *Id.* ¶ 291; *see generally id.* ¶¶ 282-305.

293. *See id.* ¶¶ 306-23.

294. *Id.* ¶ 319.

295. *See id.* ¶¶ 324-29.

296. *See id.* ¶¶ 433-74; Pickard & Kimble, *supra* note 2, at 58 (describing this aspect of the WTO’s findings).

sought to demonstrate that imports from non-excluded countries, alone, were a substantial cause of serious injury, the Appellate Body (affirming the earlier panel decision) concluded that the Commission's reasoning was insufficient to "establish explicitly" the Commission's conclusion with respect to any of the covered products.<sup>297</sup> In particular, both the panel and the Appellate Body found that the ITC was required to account for any injury attributable to products from the excluded countries in order to find that non-excluded imports, alone, caused serious injury to the domestic industry—which they found the ITC had not done.<sup>298</sup>

Third, regarding "causation" and "non-attribution" issues, the Appellate Body in *Steel Products* declined to reach these issues formally, but nonetheless reaffirmed the findings *Wheat Gluten*, *Lamb Meat*, and *Line Pipe* (consistent with requests that it clarify the analysis in past reports).<sup>299</sup> The Appellate Body also clarified, drawing upon findings in antidumping disputes, that non-attribution "does not require, in each and every case, an examination of the *collective* effects of other causal factors, in addition to an examination of the *individual* effects of those causal factors."<sup>300</sup>

In addition to these more cross-cutting findings, the Appellate Body found that the ITC had not sufficiently justified its finding of increased imports with respect to several of the products covered by the safeguard measures, while also reversing the panel's finding of an inadequate explanation with respect to others.<sup>301</sup>

Following the adverse WTO findings, the European Union announced that it would retaliate against the U.S. safeguards by establishing substantial tariff penalties against \$2 billion in imports from the United States beginning in December 2003.<sup>302</sup> On December 8, 2003, the President terminated the Section 201 safeguard measures on steel, while continuing licensing and monitoring requirements for certain steel products.<sup>303</sup> The administration indicated that the termination was the result of a midterm review of the progress of the steel

297. See *Steel Products* Appellate Body Report, *supra* note 3, ¶ 474.

298. See *id.* ¶¶ 453-56.

299. See *id.* ¶¶ 475-91.

300. *Id.* ¶ 490 (citing Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WTO Doc. WT/DS219/AB/R, ¶ 190 (adopted Aug. 18, 2003)).

301. See *id.* ¶¶ 331-429, 513(c)-(d).

302. JONES, *supra* note 2, at 28.

303. See *id.* (citing Proclamation No. 7741, 68 Fed. Reg. 68,481 (Dec. 4, 2003)).

industry in coping with increased competition and changed economic circumstances.<sup>304</sup>

## 6. Implications

The implications of these decisions are that it will be difficult for any new U.S. Section 201 safeguard measure to pass muster under WTO review. Not only are the standards applied under the WTO agreements in some respects stricter (and in practical terms more difficult to meet) than under domestic law, but WTO panels and the organization's supervisory Appellate Body have also shown willingness to perform searching reviews of the ITC's analysis to satisfy themselves that the Commission's reasoning sufficiently connects all of the dots to meet these standards.

Proponents of Section 201 remedies may take some comfort, however, knowing that, in the interim between the *Steel Products* decision and the most recent Section 201 ITC proceedings, the WTO did uphold in its entirety a U.S. safeguard action under Section 421 of the U.S.-China Relations Act of 2000 (the China-specific provision discussed above in relation to the *Motion Systems* Federal Circuit decision).<sup>305</sup> That September 2009 safeguard action involved measures directed at imports of Chinese tires and involved tariffs starting at 35% *ad valorem* and decreasing to 25% *ad valorem* over a three-year period.<sup>306</sup>

Among the issues that China raised in challenging the Section 421 tires action was a claim that the ITC's determination failed to comply with the "causation" requirement of the U.S.-China WTO Accession Protocol, which limited safeguards to circumstances in which a rapid increase in imports constituted "a significant cause" of material injury to the domestic industry.<sup>307</sup> This claim was reminiscent of those that led the WTO to find against U.S. Section 201 safeguards in cases like *Wheat Gluten* and *Steel Products*. Yet in the *Tires* decision, the WTO Appellate Body upheld the ITC's causation analysis—at least for purposes of the language contained in the U.S.-China Accession Protocol to the

304. *See id.*

305. *See generally* Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WTO Doc. WT/DS399/AB/R (adopted Sept. 5, 2011) [hereinafter *Tires* Appellate Body Report]; James Clifford Anderson, *WTO Appellate Body Upholds U.S. Safeguard Measures on Imported Tires from China: Legal Implications and Ramifications to Subsequent Trade Disputes and to Other Trade Industries*, 26 PAC. MCGEORGE GLOB. BUS. & DEV. L.J. 187 (2013).

306. *See* Anderson, *supra* note 305, at 196.

307. *See id.* at 199-200.

WTO.<sup>308</sup> Although the decision concerned the dictates of a different agreement than the WTO Agreement on Safeguards at issue in Section 201 proceedings, it may signal a somewhat more favorable inclination toward safeguard actions.

#### IV. THE *SOLAR PRODUCTS* AND *LARGE RESIDENTIAL WASHERS* PROCEEDINGS

The 2017 proceedings in *Solar Products* and *Large Residential Washers* represent a revival of the earlier enthusiasm for Section 201 safeguards. Both proceedings resulted in the President imposing broad tariffs and tariff-rate quotas on affected foreign goods.

##### A. Solar Products Proceedings

###### 1. Background

The *Solar Products* proceedings arose in April 2017 when the ITC received and later accepted a petition by U.S.-based (but majority Chinese-owned) solar cell manufacturer Suniva Inc., following the company's request for Chapter 11 bankruptcy protection.<sup>309</sup> The petition alleged that surging global solar product production and falling prices meant that U.S. companies "simply cannot survive" absent safeguards.<sup>310</sup> A second U.S.-based solar cell manufacturer, SolarWorld Americas Inc., whose German parent company had also sought bankruptcy protection, subsequently joined the proceeding as co-petitioner.<sup>311</sup> The companies, accounting for a large majority of U.S. solar cell production,<sup>312</sup> requested that the ITC recommend imposing remedial tariffs and either a price-floor or a quota on solar product imports.<sup>313</sup> Although SolarWorld had previously obtained antidumping and countervailing duty orders against solar products from China and Taiwan, the petitioners asserted that these country-specific orders had been ineffective because of foreign producers' ability to avoid

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308. See *id.* at 200 (citing *Tires* Appellate Body Report, *supra* note 305, ¶¶ 175-81).

309. See Brian Eckhouse & Andrew Mayeda, *China-Owned U.S. Solar Maker Seeks U.S. Tariffs on China Imports*, BLOOMBERG (Apr. 26, 2017, 5:20 PM), <https://www.bloomberg.com/news/articles/2017-04-26/china-owned-u-s-solar-maker-seeks-u-s-tariffs-on-china-imports>; *Solar Products* ITC Report, *supra* note 5, at 6 n.9 (describing the initial filings).

310. Eckhouse & Mayeda, *supra* note 309.

311. See Alex Lawson, *Crucial Ally Joins Suniva's Quest For Solar Cell Tariffs*, LAW360 (May 25, 2017, 3:46 PM), <https://www.law360.com/articles/928432/crucial-ally-joins-suniva-s-quest-for-solar-cell-tariffs>.

312. See *Solar Products* ITC Report, *supra* note 5, at 6 n.10.

313. See Behsudi, *supra* note 38.

them by moving their supply chains to other countries, necessitating a global safeguard measure.<sup>314</sup>

The ITC's resulting investigation—which ultimately produced an affirmative “serious injury” determination and remedial recommendations—was particularly contentious because it sharply divided the U.S. solar energy industry.<sup>315</sup> On the one hand, the struggling manufacturers asserted, in the words of a Suniva spokesperson, that without safeguards

the U.S. solar manufacturing industry will die and we will not only lose solar manufacturing jobs today, but also those future jobs that will come from investing in the solar manufacturing industry of tomorrow.<sup>316</sup>

On the other hand, a coalition of downstream U.S. solar distributors, installers, manufacturers of related products, and other industry participants who benefit from access to low-priced foreign imports—particularly from China—argued that the manufacturers' troubles were of their own making through poor business decisions and that safeguard measures would increase prices and reduce demand to derail tens-of-thousands of jobs just as solar energy was becoming competitive with other energy sources.<sup>317</sup> Politicians, industry groups, foreign companies, and foreign governments weighed in on behalf of the opposing sides.<sup>318</sup>

## 2. ITC Injury Determination

Notwithstanding arguments by the downstream users and their allies, the ITC determined that the manufacturers were being seriously injured by increased foreign imports.

The Commission first defined the subject merchandise as a single product consisting of all forms of crystalline silicon photovoltaic (“CSPV”) cells (*i.e.*, solar cells), whether or not partially or fully

314. See Lawson, *supra* note 311; *Solar Products* ITC Report, *supra* note 5, at 24, 40-41, 44-45.

315. See generally *Solar Products* ITC Report, *supra* note 5.

316. Eckhouse & Mayeda, *supra* note 308.

317. See Solar Energy Indus. Ass'n (SEIA) & SunPower Corp., Posthearing Remedy Br., at 1-2, 5-12, USITC Inv. No. TA-201-75, EDIS Doc. 625290; Ana Swanson, *Solar Trade Case Weighs Whether Protection Will Save or Sink Industry*, WASH. POST (Aug. 15, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/08/15/solar-trade-case-weighs-whether-protection-will-save-or-sink-industry/>.

318. See *Solar Products* ITC Report, *supra* note 5, at 7-9; Behsudi, *supra* note 38; Bryan Koenig, *Senate Dems Urge Trump To Impose Solar Panel Tariffs*, LAW360 (Dec. 20, 2017, 3:22 PM), <https://www.law360.com/internationaltrade/articles/996957/senate-dems-urge-trump-to-impose-solar-panel-tariffs>.

assembled into other products, such as solar panels (referred to in the industry as modules).<sup>319</sup> Likewise, the ITC defined the relevant domestic industry as all U.S. producers of CSPV cells, whether or not assembled into other products.<sup>320</sup> Consistent with its past practice, the Commission considered import trends of the most recent five-year period in its analysis.<sup>321</sup>

Based on the data, the ITC determined that imports of CSPV solar products increased by 492.4% between 2012 and 2016 and had increased in each individual year during that period—which the Commission elsewhere described as reflecting “explosive” demand growth.<sup>322</sup> Likewise, it determined that imports increased in proportion to U.S. domestic production during the five-year period, both overall and in each individual year.<sup>323</sup> This significant increase met the statutory criteria of an increase in absolute or relative imports.<sup>324</sup>

Turning to whether this increase in imports was a substantial cause of serious injury or threat to the domestic industry, the Commission explained at the outset that, under the statute, increased imports must be “both an important cause of serious injury or threat and a cause that is equal to or greater than any other cause.”<sup>325</sup> It also noted—in a manner relevant to the WTO’s “non-attribution” analysis faulting previous ITC determinations for insufficiently analyzing causes of injury other than increased imports—that it was required by statute to examine factors other than increased imports and to make findings with respect to those other factors.<sup>326</sup>

The ITC began its injury and causation analysis by examining U.S. conditions of competition for solar products. It found that U.S. demand for CSPV products had increased during the five-year investigation period as a result of factors such as reduced prices and costs, technological improvement, government incentive programs, and greater public awareness of and interest in renewable energy sources.<sup>327</sup> Hence, annual U.S. installations of “on-grid” photovoltaic systems increased by 338%, with the domestic industry and importers both selling products to distributors, residential and commercial installers, and

319. See *Solar Products* ITC Report, *supra* note 5, at 13.

320. See *id.* at 17-18.

321. See *id.* at 19-20.

322. See *id.* at 21, 33, 37, 43.

323. See *id.* at 21.

324. See *id.*; see also 19 U.S.C. § 2252(c)(1)(C) (2012).

325. *Solar Products* ITC Report, *supra* note 5, at 23 (discussing 19 U.S.C. § 2252(b)(1)(B)).

326. *Id.* (discussing 19 U.S.C. § 2252(c)(2)(B)).

327. See *id.* at 26-27.

utilities.<sup>328</sup> On the supply side, however, the ITC found that during the period of investigation the U.S. market was supplied primarily by imports, and that the domestic industry's share dwindled to a continually lesser portion of the market.<sup>329</sup> Correspondingly, several domestic firms closed their solar cell or solar module manufacturing operations during or immediately after the investigation period.<sup>330</sup>

The ITC next concluded that the domestic industry had been seriously injured by analyzing the relevant statutory factors.<sup>331</sup> It found a "significant idling of productive facilities" because, although the U.S. industry had increased its capacity and production during the investigation period, neither increase "approached the magnitude of the explosive growth in apparent U.S. consumption during this period."<sup>332</sup> Instead, "dozens of U.S. facilities closed their operations during this period as imports captured most of the growth in demand," while "[t]hose producers remaining in the market continued to operate at below full capacity[.]"<sup>333</sup> The Commission similarly determined that the domestic industry had experienced "significant unemployment and underemployment" because "[t]he substantial number of facility closures described above resulted in extensive layoffs and the award of U.S. Trade Adjustment Assistance Act benefits to many workers during the [period of investigation]; in addition, workers at some facilities experienced temporary shutdowns or production slowdowns, which led to layoffs and underemployment."<sup>334</sup> Moreover, the Commission found an "Inability of a Significant Number of Firms to Carry Out Domestic Production Operations at a Reasonable Level of Profit" based upon the fact that, despite extremely favorable demand conditions, the domestic industry experienced operating and net losses throughout the investigation period.<sup>335</sup>

Applying similar analyses, the Commission concluded that the statutory factors for a threat of serious injury were also satisfied. The Commission explained that, despite explosive demand growth, 1) a significant number of domestic producers were unable to generate adequate capital for plant and equipment modernization or for

328. *See id.* at 27-28 (citations omitted).

329. *See id.* at 28.

330. *See id.* at 28-29.

331. *See id.* at 31-43 (discussing factors set forth in 19 U.S.C. § 2252(c)(1) (2012)).

332. *Id.* at 33.

333. *Id.*

334. *Id.* at 33-34.

335. *See id.* at 34-35.

research and development;<sup>336</sup> 2) there were declines in sales or market share, increasing inventory, and a downward trend in production, profits, wages, productivity, or employment;<sup>337</sup> and 3) the United States had become a focal point for the diversion of exports from other markets.<sup>338</sup> In addition, the Commission determined that the domestic industry experienced adverse price conditions, given that imports were lower-priced than U.S.-manufactured products, prices of the domestic industry's products fell between 2012 and 2016 despite very strong demand growth, and the domestic industry's costs remained near or above its net sales values throughout the period of investigation.<sup>339</sup> Thus, the Commission concluded that the injury prong for a safeguard action was satisfied.<sup>340</sup>

The Commission then turned to a key aspect of its analysis: the causation determination (a significant source of WTO litigation in previous safeguard cases).<sup>341</sup> The Commission in this case explained why the data supported a connection between the increase in imports and domestic injury—tying its determination to a) the ways in which imports sidestepped attempts to remedy unfair trade practices through antidumping and countervailing duty orders, b) the manner in which imports could be substituted for domestic production while undercutting domestic prices, c) the degree to which the domestic industry reporting having to roll back prices and capital investments in order to compete with low-priced foreign imports, and d) the various ways in which the domestic industry's fortunes deteriorated despite extremely favorable demand conditions and cost improvements as imports surged into the market and prices dropped.<sup>342</sup> Notably, the Commission highlighted that the majority of solar product purchasers reported that they had increased their purchases of imported CSPV products, most often identifying lower price as the reason for increasing their import purchases.<sup>343</sup>

Most importantly in relation to WTO review, the ITC addressed, individually, other potential sources of injury that the respondents in the investigation had alleged, concluding that these causes were not more

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336. *See id.* at 35-37.

337. *See id.* at 37-38.

338. *See id.* at 38-41.

339. *See id.* at 41-43.

340. *See id.* at 43.

341. *See id.* at 43-65.

342. *See id.* at 43-50.

343. *Id.* at 49, 49 n.272 (detailing the underlying data).

important than increased imports.<sup>344</sup> Although the Commission conducted this analysis under the rubric of determining whether imports were an “important cause not less than any other” of injury, it stated that, in making its causation determination, it had “considered the impact of imports as well as the impact of other possible causes.”<sup>345</sup>

First, the Commission addressed, and rebuffed at length, the respondents’ claims that the domestic industry’s sagging performance stemmed from mismanagement rather than increased imports.<sup>346</sup> Specifically, it rejected as unfounded the notion that domestic producers had failed to keep up with technological change, determining (with supporting examples) that “[d]omestic producers pioneered certain CSPV technologies, and they have continued to innovate, develop, and manufacture leading-edge products.”<sup>347</sup> And it additionally found that the domestic industry and importers of foreign products reported sales of solar products “within similar efficiency and wattage ranges.”<sup>348</sup> The Commission similarly rejected the respondents’ claim that the domestic industry had unwisely ignored the utility market and the 72-cell module it consumed, stating that the domestic industry made 72-cell modules that it sold or tried to sell to utilities, but frequently was unable to win large bids in that segment, while also losing market share to imports regardless of segment.<sup>349</sup> In the Commission’s words, the influx of low-priced imports “adversely impacted the domestic industry’s financial performance, making it difficult for the domestic industry to increase capacity to a scale that made it more competitive in this segment, even if it managed to develop and even pioneer innovative products that utilities and others sought.”<sup>350</sup>

Moreover, contrary to the respondents’ claims that the domestic industry suffered from delivery and service issues, the Commission found that “[t]he evidence simply does not support the sort of

344. *See id.* at 50-65.

345. *Id.* at 43, 50. The rubric that the Commission applied, whether imports were an “important cause not less than any other” cause of injury, is one that the WTO has indicated is different from what is required under the GATT 1994 and WTO Safeguards Agreement. *Id.* at 50; *see also Lamb Meat Appellate Body Report*, *supra* note 4, ¶ 184 (distinguishing U.S. law and WTO standards).

346. *See Solar Products ITC Report*, *supra* note 5, at 50-61.

347. *Id.* at 50-55 (footnotes omitted). Relatedly, the Commission cited evidence that domestic innovations were quickly met with competition from lower-priced foreign imports of similar products. *See id.* at 52.

348. *Id.* at 54.

349. *See id.* at 56-60.

350. *Id.* at 60-61.

widespread problems alleged by respondents.”<sup>351</sup> Consequently, the Commission determined that the respondents’ allegation of mismanagement as a supervening cause of injury to the domestic industry was unsupported.<sup>352</sup>

Next, continuing to analyze the effects of causes other than increased imports, the ITC examined and rejected the respondents’ claims that factors such as declining government incentive programs, declining raw material costs, and the need to meet grid parity with other sources of electricity explained any declines in prices of solar products and the condition of the domestic industry.<sup>353</sup> Thus, for example, the Commission, although recognizing that incentive programs affected pricing and demand for solar products, stated that “[w]e do not find that changes in incentive programs explain the domestic industry’s condition” and observed that “[a]lthough some programs have expired, others continue.”<sup>354</sup> It added that “any decline in incentives has not led to declines in apparent U.S. consumption” because “demand continued to experience robust growth throughout the [period of investigation], including in states most affected by changes in incentive programs, such as California.”<sup>355</sup> Similarly, regarding the role of declining raw material costs in price declines, the Commission explained that “declines in the domestic industry’s net sales values kept pace with declines in its costs, leading to substantial losses throughout the [investigation period].”<sup>356</sup> Finally, regarding the need for solar products to gain parity to compete with other electricity-generation sources, the Commission explained that “[w]hile conventional energy prices may account for some of the decrease in the prices of CSPV products in some years, they do not explain the consistent observed price declines over the 2012-2016 period” and noted that the foreign producers’ own financial disclosures attributed the decline in prices to excess capacity.<sup>357</sup>

Thus, rejecting the respondents’ position on other causes of injury, the Commission concluded that the alternate causes that the respondents had alleged “cannot individually or collectively explain the serious injury to the domestic industry, particularly the declining market share,

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351. *Id.* at 61.

352. *See id.*

353. *See id.* at 61-65.

354. *Id.* at 61-62.

355. *Id.* at 63.

356. *Id.* at 64.

357. *Id.* at 64-65.

low capacity utilization levels, facility closures, and abysmal financial performance.”<sup>358</sup>

### 3. ITC Remedy Recommendations

The four serving ITC commissioners at the time of the *Solar Products* determination split in their remedy recommendations (though the recommendations by three of four were similar).<sup>359</sup>

The Commission’s Chairman, for example, recommended that separate safeguard measures be applied to solar cells and to solar modules for a four-year period.<sup>360</sup> For solar cells, she recommended that the President apply a tariff-rate quota under which solar cells imported up to an in-quota volume level of 0.5 gigawatts would be subject to a tariff rate of 10% *ad valorem* and imports of cells above the 0.5 gigawatts threshold would be subject to a tariff rate of 30% *ad valorem*.<sup>361</sup> The in-quota volume level would then increase, while the tariff rates would decrease slightly, over the measure’s four-year term.<sup>362</sup> For solar modules, the Chairman recommended that the President implement a straight *ad valorem* tariff of 35%, to be slightly reduced during the four-year remedy period.<sup>363</sup> Because she disagreed with a majority view that imports from Canada should be excluded from the remedy, she recommended including them, while excluding imports from the other FTA countries for which the commissioners agreed exclusion was appropriate.<sup>364</sup> The Chairman also recommended that the President initiate international negotiations to address the underlying cause of the injury.<sup>365</sup>

The ITC’s Vice Chairman and one other commissioner recommended a similar measure combining a tariff-rate quota for solar cells and a tariff for solar modules, but with somewhat looser parameters.<sup>366</sup> Specifically, they recommended a higher in-quota volume level for cell imports of 1 gigawatt, a lower tariff rate for module imports of 30%, and more significant decreases in the tariffs on both above-quota cell

358. *Id.* at 65.

359. *See generally* *Solar Products* ITC Report, *supra* note 5, at 2-3, 81-133; *see also id.* at 82 (indicating that the Chairman “join[ed]” two other commissioners in overall approach but disagreed on precise terms).

360. *See id.* at 2, 81-82.

361. *See id.*

362. *See id.*

363. *See id.*

364. *See id.*; *see also id.* at 67 n.387.

365. *See id.* at 2, 82.

366. *See id.* at 2-3, 89-90.

imports and modules over the four-year period (while keeping the in-quota tariff rate for solar cells unchanged).<sup>367</sup> These commissioners also recommended excluding imports from Canada, as well as other FTA countries.<sup>368</sup> They additionally recommended that the President consider any appropriate funding mechanisms to facilitate a positive adjustment to import competition and that the administration expedite applications for trade adjustment assistance for affected workers and firms.<sup>369</sup>

The three Commissioners proposing a tariff-rate quota on cells and tariff on modules noted the domestic industry's precarious position, but found that relief from imports would allow a modest increase in prices, in turn increasing the domestic industry's cash flow and spurring investment.<sup>370</sup> They further found that, absent a safeguard, "the domestic industry, including both CSPV cell and module producers, would likely cease to exist in the short term."<sup>371</sup>

Finally, the fourth commissioner recommended that, rather than imposing tariffs, the President implement a quota and licensing scheme.<sup>372</sup> Specifically, she recommended that the President impose an across-the-board quantitative restriction on imports of CSPV products, including cells and modules, for a four-year period, administered on a global basis.<sup>373</sup> The quantitative restriction would be set at 8.9 gigawatts in the first year and increase by 1.4 gigawatts each subsequent year.<sup>374</sup> She further recommended, in accordance with 19 U.S.C. § 2581 and the President's authority set forth in 19 U.S.C. § 2253(a)(3)(F), that the President administer the quota by selling import licenses at public auction at a minimum price of one cent per watt.<sup>375</sup> The funds could then be used to provide development assistance to domestic solar product manufacturers for the duration of the remedy period, such as through authorized programs at the U.S. Department of Energy.<sup>376</sup> The final commissioner recommended excluding imports from Canada and other FTA countries and that the President implement

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367. *See id.* at 2.

368. *See id.* at 2-3.

369. *See id.* at 3.

370. *See id.* at 85-86, 100.

371. *Id.* at 86, 101.

372. *See id.* at 3, 105-06.

373. *See id.*

374. *See id.*

375. *See id.*

376. *See id.*

other trade adjustment measures, such as the provision of trade adjustment assistance.<sup>377</sup>

The Commission thus placed several options before the President for implementing a *Solar Products* safeguard action, leading to debate over their merits.<sup>378</sup>

#### 4. ITC Supplemental Report Regarding “Unforeseen Developments”

Following the ITC’s report, the USTR, under authority delegated by the President, requested additional information from the Commission pursuant to 19 U.S.C. § 2253(a)(5).<sup>379</sup> Specifically, the USTR requested that the Commission identify any “unforeseen developments” that led to the solar products at issue being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry.<sup>380</sup> The request further indicated that it was intended to “assist the President in determining the appropriate and feasible action to take that will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.”<sup>381</sup>

In response, the ITC issued a supplemental report specifying unforeseen developments that led to increased imports and the resulting injury.<sup>382</sup> At the outset, the Commission discussed the WTO findings requiring an analysis of “unforeseen developments” for a safeguard measure to comply with GATT 1994 Article XIX.<sup>383</sup> It summarized the WTO reports as requiring that

before the safeguard measure is applied, the competent authority must demonstrate unforeseen developments, examining why the

377. *See id.*

378. *See, e.g.*, Editorial, *Solar Tariffs Would Kill Jobs, Harm Environment*, USA TODAY (Jan. 16, 2018), <https://www.usatoday.com/story/opinion/2018/01/16/solar-tariffs-would-kill-jobs-harm-environment-editorials-debates/1028510001/>; Matt Card, *Save America’s Solar Manufacturers*, USA TODAY (Jan. 16, 2018), <https://www.usatoday.com/story/opinion/2018/01/16/save-american-solar-manufacturers-suniva-editorials-debates/109510548/>.

379. *See* Amb. Robert E. Lighthizer, Nov. 27, 2017, USITC Inv. No. TA-201-75, EDIS Doc. 629905.

380. *See id.*

381. *Id.*

382. *See* Supplemental Report of the U.S. International Trade Commission Regarding Unforeseen Developments, USITC Inv. No. TA-201-75, EDIS Doc. 632645 [hereinafter *Solar Products* ITC Supplemental Report].

383. *See id.* at 2-3, 3 n.8.

mentioned factors may be regarded as “an unforeseen development,” offering an explanation for it, and providing an explanation of how the unforeseen developments resulted in the increase in imports causing the serious injury in question.<sup>384</sup>

The Commission then stated that

[b]ased on the data and other information we evaluated at the time that we reached our affirmative injury determination in this case, we found and confirmed the existence of unforeseen developments that led to the articles at issue being imported into the United States in such increased quantities as to be a substantial cause of serious injury.<sup>385</sup>

The ITC supplemental report went on to explain that the increased imports of solar products were largely attributable to increased CSPV cell and module capacity by Chinese producers, both within China and globally, and to detail the ways in which that development and the resulting influx of imports were unforeseen.<sup>386</sup> In brief, the Commission found that U.S. trade negotiators at the time of the GATT 1947, creation of the WTO, and China’s accession to the WTO (with attendant commitments to market reform) could not have foreseen the various steps that China would take in contravention of these commitments to implement policies, plans, and subsidy programs to bolster the renewable energy sector.<sup>387</sup> Nor, in the Commission’s view, could they have foreseen that China’s actions would create a vast overcapacity in China, as well as the other countries in which Chinese firms added facilities.<sup>388</sup> The Commission also detailed the history of difficulties in implementing U.S. trade remedies against Chinese products, as firms altered their supply chains following various antidumping and countervailing duty orders, so that U.S. negotiators could not have foreseen that the U.S. Government’s use of these authorized tools would have limited effectiveness.<sup>389</sup>

Thus, the ITC concluded that the increase in imports injuring the domestic industry was due to unforeseen developments.

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384. *Id.* at 3.

385. *Id.* at 4.

386. *See id.* at 4-10.

387. *See id.* at 4-5, 9-10.

388. *See id.* at 10.

389. *See id.* at 5-9, 10.

## 5. Presidential Action

The President followed the approach recommended by three of the four ITC commissioners and adopted a four-year, global tariff-rate quota on solar cell imports, combined with a straight tariff on solar module imports,<sup>390</sup> but he did so with certain modifications.

First, the measure's terms were somewhat less stringent than the ITC's recommendations. Specifically, while the ITC commissioners recommended an in-quota volume of .5 to 1 gigawatts for solar cells, to be increased over four years, the President only imposed tariffs on solar cell imports above an unchanging in-quota volume of 2.5 gigawatts (solar modules were subjected to an across-the-board tariff as recommended).<sup>391</sup> The President also determined not to impose any tariff on in-quota imports.<sup>392</sup> Nonetheless, the safeguard tariffs were set in a manner likely to affect the majority of imports, given that the ITC found that imports reached 8.4 gigawatts in 2015 and 12.8 gigawatts in 2016 (the majority of which did not involve imports of solar cells).<sup>393</sup>

For both solar modules and solar cell imports outside the 2.5 gigawatt in-quota volume, the President set the initial tariffs at 30%, dropping down to 15% over the safeguard measure's four-year term in increments of 5% annually.<sup>394</sup> This was in line with what the majority of the ITC commissioners had recommended (though less stringent than the Chairman's recommendation).<sup>395</sup>

In proclaiming the safeguard, the President specifically stated that he had "determined that this safeguard measure will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs."<sup>396</sup>

The President also departed from commissioners' recommendations for excluding imports from FTA countries, with implications for WTO "parallelism." The majority of the commissioners had recommended excluding imports from Canada (and various other FTA countries).<sup>397</sup> The President, however, determined that the safeguard tariffs would apply to imports from "all countries," save for those required to be

390. *See generally* Proclamation No. 9693, 83 Fed. Reg. 3541 (Jan. 25, 2018).

391. *See* Proclamation No. 9693, 83 Fed. Reg. at 3548, 3549; FACT SHEET, *supra* note 6.

392. *See* Proclamation No. 9693, 83 Fed. Reg. at 3548, 3549.

393. *See Solar Products* ITC Report, *supra* note 5, at 21.

394. *See* Proclamation No. 9693, 83 Fed. Reg. at 3542, 3548, 3549.

395. *Compare id.*, with *Solar Products* ITC Report, *supra* note 5, at 2-3.

396. Proclamation No. 9693, 83 Fed. Reg. at 3,542.

397. *See Solar Products* ITC Report, *supra* note 5, at 65-79, 81-82, 89-90, 105 n.2; *see also* 19 U.S.C. § 3371 (2017).

excluded for WTO purposes as “developing countries” each of whose products accounted for less than 3% of total imports.<sup>398</sup> In making the determination, the President determined that NAFTA imports “from each of Mexico and Canada, considered individually, account for a substantial share of total imports and contribute importantly to the serious injury or threat of serious injury found by the ITC.”<sup>399</sup>

## B. Large Residential Washers *Proceedings*

### 1. Background

The *Large Residential Washers* proceedings involved many issues similar to the *Solar Products* proceedings. The investigation started in June 2017 when Whirlpool Corporation, a U.S. producer of large residential washers (“LRWs”) and related parts, filed its amended petition for Section 201 relief.<sup>400</sup> Whirlpool’s petition received support from a second U.S. producer, GE Appliances, which filed independent briefs at the injury phase of the investigation, but filed joint submissions with Whirlpool at the remedy phase.<sup>401</sup>

Unlike the *Solar Products* proceeding, in which the imports stemmed from multiple producers, the *Large Residential Washers* proceeding primarily concerned two foreign producers and their affiliates, LG Electronics, Inc. and Samsung Electronics Co., Ltd. But reminiscent of the claim that solar products safeguard measures would cost jobs, the *Large Residential Washers* respondents asserted that planned U.S. operations and the jobs they would create meant that imposing safeguard measures would harm U.S. workers.<sup>402</sup> Also as in *Solar Products*, numerous actors, ranging from politicians, to industry groups, to foreign governments, participated in and/or commented on the proceedings in favor of the opposing sides.<sup>403</sup>

398. Proclamation No. 9693, 83 Fed. Reg. at 3,542.

399. *Id.*; see also 19 U.S.C. § 3372 (2017) (authorizing the President’s determination).

400. See Large Residential Washers ITC Report, *supra* note 5, at 3-4.

401. See *id.* at 4.

402. See *id.* at 26 (discussing planned U.S. operations); David Lawder, *Whirlpool Seeks 50 Pct Duties on LG, Samsung Washers in U.S. Trade Case*, REUTERS (Oct. 19, 2017, 5:07 PM), <https://in.reuters.com/article/trade-whirlpool/whirlpool-seeks-50-pct-duties-on-lg-samsung-washers-in-u-s-trade-case-idINKBN1CO32D>; Makini Brice & Hyunjoo Jin, *U.S. Commission Recommends Tariffs to Curb Samsung, LG Washer Imports*, REUTERS (Nov. 21, 2017, 1:28 PM), <https://www.reuters.com/article/us-usa-trade-washers/u-s-commission-recommends-tariffs-to-curb-samsung-lg-washer-imports-idUSKBN1DL2CI>.

403. See Large Residential Washers ITC Report, *supra* note 5, at 4-5; Megan Cassella, *Michigan Senators Weigh in on Washers at ITC*, POLITICO (Nov. 7, 2017, 10:00 AM), <https://www.politico.com/ipsheds/morning-trade/2017/11/07/ag-struggles-to-find-its-voice-in-nafta-debate-223214>; Megan

## 2. ITC Injury Determination

The ITC's December 2017 affirmative determination in *Large Residential Washers* involved several notable findings in relation to potential WTO review and the proceeding's future impact.<sup>404</sup>

Resolving several foundational matters, the ITC first clarified the proceeding's scope by finding that domestically produced LRWs (as well as certain other washers and parts) are like or directly competitive products to imported LRWs and that the domestic industry comprised all domestic producers of these products and parts, including Whirlpool, GE, and two other companies.<sup>405</sup> In doing so, it rejected the respondents' contentions that certain of their product lines should not be considered competitive to U.S. products because they did not have a precise domestic analogue.<sup>406</sup> The Commission further determined, after analyzing import trends over the most recent five-year period, that imports had increased during the period of investigation, both in absolute terms and relative to domestic production.<sup>407</sup>

Turning to the injury and causation requirements, the ITC stated at the outset (as it had in *Solar Products*) that it was required by statute to "examine factors other than imports" that may be a cause of serious or threatened injury and to make findings with respect to those other factors.<sup>408</sup> It then reviewed the conditions of competition and concluded that demand for LRWs was driven by necessity and had increased during the investigation period, while on the supply side, the domestic companies had invested in returning production to the United States.<sup>409</sup> At the same time, however, the Commission found that LG and Samsung (who together accounted for virtually all subject imports during the investigation period) had continually replaced their U.S. imports from South Korea, Mexico, and China, with imports from other countries, as products from South Korea, Mexico, and China

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Cassella, *Free Market Groups to Trump: Don't Tax Washers*, POLITICO (Dec. 8, 2017, 10:00 AM), <https://www.politico.com/newsletters/morning-trade/2017/12/08/grassley-trump-sticking-to-his-guns-on-nafta-tactics-045738>; Emma Dumain, *S.C. Delegation Prepares to Confront Trump to Protect Local Plant*, CHARLOTTE OBSERVER (Nov. 21, 2017, 05:21 PM), <http://www.charlotteobserver.com/news/politics-government/article185904058.html>.

404. See generally *Large Residential Washers* ITC Report, *supra* note 5.

405. See *id.* at 12-15.

406. See *id.* at 10-11.

407. See *id.* at 20.

408. *Id.* at 22 (discussing 19 U.S.C. § 2252(c)(2)(B) (2012)). As noted above, this approach is relevant to the WTO's "non-attribution" analysis faulting previous ITC determinations for insufficiently analyzing causes of injury other than increased imports.

409. See *id.* at 23-26.

became subject to antidumping and countervailing duty orders.<sup>410</sup> In addition, notwithstanding the respondents' claim that they had differentiated their products from others, the Commission found that there was a moderate to high degree of substitutability between imported and domestic LRWs and that price was an important factor in LRW purchasing decisions (although non-price factors were important as well).<sup>411</sup>

Next, the Commission determined that the domestic LRW industry had been seriously injured.<sup>412</sup> It explained that the domestic industry's substantial investments in the development and production of competitive new LRWs during the investigation period should have made it well positioned to capitalize on increased U.S. consumption, but "instead, a significant number of firms were unable to carry out domestic production operations at a reasonable level of profit, necessitating cuts to capital investment and [research and development] spending that imperiled the industry's competitiveness."<sup>413</sup> Likewise, the Commission noted that the domestic industry's financial performance declined precipitously during the investigation period, with both Whirlpool and GE suffering worsening losses.<sup>414</sup>

Notably, the Commission reached its injury conclusion despite recognizing that the domestic industry had suffered neither a significant idling of productive facilities nor significant unemployment or underemployment.<sup>415</sup> It explained that, these factors notwithstanding, the domestic industry's dramatically worsening financial position, evident in the magnitude of its losses and cuts in spending, led the commissioners to conclude that there has been a "significant overall impairment in the position of" the domestic industry under the statutory standard defining "serious injury" for Section 201 purposes.<sup>416</sup>

Regarding the crucial causation question, the Commission determined that increased imports were a substantial cause of the serious injury to the domestic industry that was no less important than any other cause.<sup>417</sup> In doing so, the Commission concluded that the domestic industry's financial losses during the investigation period occurred as a "direct consequence" of declining prices on sales of domestically

410. *See id.* at 25.

411. *See id.* at 27-32.

412. *See id.* at 33-37.

413. *Id.* at 33.

414. *Id.* at 33-34.

415. *See id.* at 37.

416. *Id.*; *see also* 19 U.S.C. § 2252(c)(6)(C) (2012) (defining "serious injury").

417. *See* Large Residential Washers ITC Report, *supra* note 5, at 38-51.

produced LRWs, which, given the otherwise favorable conditions and domestic industry's competitiveness, could only be due to "the significant increase in low priced imports of LRWs during the period of investigation."<sup>418</sup> It also indicated that, although the domestic industry had maintained market share, this stemmed from the effects of successive antidumping and countervailing duty orders and the domestic industry's price reductions in response to foreign competition.<sup>419</sup>

As in *Solar Products*, moreover, the Commission stated that it had "considered the impact of imports as well as the impact of other possible causes" and then examined the other potential causes of injury individually.<sup>420</sup> Specifically, it rejected the respondents' argument that the domestic industry's practice of selling LRWs and matching dryers for the same retail and wholesale prices was a more important cause of the industry's injury than imports, allegedly because it lowered the profitability of low-margin washers compared to high-margin dryers.<sup>421</sup> The commissioners stated bluntly that "we find that the domestic industry's 'joint pricing' of matching LRWs and dryers was not an important cause of injury to the domestic industry, much less a more important cause than imports."<sup>422</sup>

Likewise, the ITC rejected the respondents' claim that alleged "deterioration" of U.S. brands in the eyes of consumers was a more important cause of injury to the domestic industry than imports because it led to declining market share.<sup>423</sup> The Commission explained that, contrary to the premise of this argument, "the record shows that the domestic industry lost no market share during the period of investigation" and that "the serious injury experienced by the domestic industry resulted from the adverse impact of low priced imports on the industry's sales prices" (as opposed to loss of market share based on brand deterioration).<sup>424</sup> Nor, in the ITC's view, did "the record support the respondents' contention that consumers, and by extension retailers, increasingly favored imported LRWs over domestically produced LRWs during the period of investigation for non-price reasons."<sup>425</sup> Hence, the Commission

418. *Id.* at 38. Elsewhere, the Commission stated that "[w]e find that the significant and growing quantity of low-priced imports depressed and suppressed prices for the domestic like product." *Id.* at 42.

419. *See id.* at 39-40.

420. *Id.* at 38, 45-51.

421. *See id.* at 45-47.

422. *Id.* at 47.

423. *See id.* at 47-51.

424. *Id.* at 48.

425. *Id.*

found that the “respondents’ ‘brand deterioration’ theory [did] not explain the domestic industry’s declining sales prices during the period of investigation, or any of the resulting injury.”<sup>426</sup>

The Commission stated, in sum, that “neither the alleged ‘joint pricing’ of matching LRWs and dryers, nor the alleged deterioration of U.S. brands in the eyes of consumers, were important causes of serious injury to the domestic industry” because “[n]either . . . is supported by the record evidence.”<sup>427</sup>

### 3. ITC Remedy Recommendations and “Unforeseen Developments” Issues

Whirlpool in its Section 201 petition had requested that the ITC recommend a 50% tariff on all covered imports.<sup>428</sup> The four commissioners serving at the time of the *Large Residential Washers* determination, however, recommended that the President establish a three-year tariff-rate quota of 1.2 million units, with an initial tariff of 50% on imports above the quota level, which would decline to 45% and 40% in the second and third years.<sup>429</sup> In addition, two of the four commissioners recommended that the President not impose any tariffs on washers within the 1.2 million quota, while the other two recommended an initial 20% in-quota duty, dropping to 18% and 15% in years two and three.<sup>430</sup> The commissioners also unanimously recommended a similar three-year tariff-rate quota, with no tariff for in-quota imports, for covered washer parts.<sup>431</sup>

The ITC in *Large Residential Washers* recommended excluding from the safeguard measure imports from a variety of countries with which the United States has FTAs or similar trade obligations, including imports from both Canada and Mexico under NAFTA.<sup>432</sup> In most of these cases the Commission found that imports from the countries at issue were either non-existent or negligible during the investigation period.<sup>433</sup>

With respect to imports from South Korea, the home market of the respondents Samsung and LG, the ITC found that both the volume of

426. *Id.*

427. *Id.* at 51.

428. *See* Lawder, *supra* note 402.

429. *See* Large Residential Washers ITC Report, *supra* note 5, at 1-2.

430. *See id.*

431. *See id.* at 2.

432. *See id.* at 2, 65-66.

433. *See id.* at 53-54, 60-62. In the case of Mexico, the country remained in the top five exporting countries to the U.S., but the volume of imports had declined. *See id.* at 53-54.

imports and the extent to which they were priced lower than domestic products had declined following antidumping and countervailing duty orders in 2013 and Samsung's and LG's subsequent relocation of production to China.<sup>434</sup> Consequently, the Commission stated that "imports from Korea, alone, did not depress or suppress domestic like product prices during the period of investigation" and thus were not a substantial cause of serious injury to the domestic industry because they did not contribute meaningfully to the domestic industry's financial losses.<sup>435</sup> The Commission further stated that "imports of LRWs from Korea were a less important cause of serious injury than imports of LRWs from other sources" and elaborated that it was the "significant increase in low priced imports from sources other than Korea during the period of investigation, at prices that were pervasively lower than the domestic like product" that had significantly depressed and suppressed domestic like product prices.<sup>436</sup> Hence, the Commission recommended excluding imports from South Korea.<sup>437</sup>

Regarding "unforeseen developments" in *Large Residential Washers*, unlike in *Solar Products*, the USTR did *not* request a supplemental report on these issues from the ITC.

#### 4. Presidential Action

As in *Solar Products*, the President in *Large Residential Washers* instituted a tariff-rate quota, as the ITC had recommended.<sup>438</sup> The three-year measure consisted of a tariff on imports of LRWs above an in-quota volume of 1.2 million units and on imports of parts above an initial in-quota volume of 50,000 units (to be increased to 90,000 units over the safeguard's term).<sup>439</sup> The President set the tariff on non-quota washers and parts at 50%, declining by 5% each year to 40% in year three.<sup>440</sup> Unlike in *Solar Products*, moreover, the President did impose a tariff on in-quota washer imports (though not on imports of parts), instituting a 20% tariff on LRWs, declining to 16% in year three.<sup>441</sup>

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434. *See id.* at 56-57.

435. *Id.* at 57. The Commission likewise found that imports from South Korea also did not cause a threat of serious injury due to the pricing discipline imposed by the ongoing antidumping and countervailing duty orders and the fact that Samsung and LG were developing production facilities in the U.S. *See id.* at 59.

436. *Id.* at 57.

437. *See id.* at 2, 65-66.

438. *See* Proclamation No. 9694, 83 Fed. Reg. 3553 (Jan. 25, 2018).

439. *See* Proclamation No. 9694, 83 Fed. Reg. at 3554-55, 3560-62; FACT SHEET, *supra* note 6.

440. *See* Proclamation No. 9694, 83 Fed. Reg. at 3554-55, 3560-62.

441. *See id.*

As in *Solar Products*, the President stated explicitly that the safeguard measure would facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than its costs.<sup>442</sup>

Additionally, as in *Solar Products*, the President departed in the final safeguard measure from the exclusions that the ITC recommended. Although the ITC had recommended excluding imports from both Canada and Mexico under NAFTA requirements, noting that Mexican imports were among the top five sources of foreign goods but that the overall volume from Mexico had declined, the President determined to include imports from Mexico.<sup>443</sup> Invoking the NAFTA criteria for inclusion, the President determined that “imports from Mexico of washers and covered washer parts, considered individually, account for a substantial share of total imports and have contributed importantly to the serious injury or threat of serious injury found by the ITC.”<sup>444</sup> Only imports from Canada were excluded.<sup>445</sup> Likewise, the President declined to exclude imports from South Korea.<sup>446</sup>

## 5. Implications

The *Solar Products* and *Large Residential Washers* determinations—which the President announced jointly on January 22, 2018—sparked considerable public comment and debate.<sup>447</sup> Unsurprisingly, they have also drawn condemnation from some U.S. trading partners, especially those that they most affect.<sup>448</sup> Indeed, for example, South Korea (the home market for Samsung and LG in the washers proceeding and a major exporter of solar products to the United States) requested

442. See Proclamation No. 9694, 83 Fed. Reg. at 3554.

443. Compare Large Residential Washers ITC Report, *supra* note 5, at 53-54, with Proclamation No. 9694, 83 Fed. Reg. at 3554.

444. Proclamation No. 9694, 83 Fed. Reg. at 3554.

445. See *id.*

446. See Proclamation No. 9694, 83 Fed. Reg. at 3557 (listing Canada and developing country WTO members as the only exclusions).

447. See, e.g., Editorial, *Mr. Trump's Tariffs Will Not Bring Back Manufacturing Jobs*, N.Y. TIMES (Jan. 23, 2018), <https://www.nytimes.com/2018/01/23/opinion/trumps-tariffs-manufacturing-jobs.html>; Jeff Spross, *In Praise of Trump's Solar Panel Tariffs*, THE WEEK (Jan. 24, 2018), <http://theweek.com/articles/750306/praise-trumps-solar-panel-tariffs>; Willem Marx, *Will the Solar Tariffs Be a Boon for the US? The Answer Is Far from Straightforward*, CNBC (Jan. 29, 2018), <https://www.cnbc.com/2018/01/29/will-the-solar-tariffs-be-a-boon-for-the-us-the-answer-is-far-from-straightforward.html>.

448. See Ana Swanson & Brad Plumer, *Trump Slaps Steep Tariffs on Foreign Washing Machines and Solar Products*, N.Y. TIMES (Jan. 22, 2018), <https://www.nytimes.com/2018/01/22/business/trump-tariffs-washing-machines-solar-panels.html>.

consultations with the United States under the WTO Safeguards Agreement.<sup>449</sup>

Nonetheless, one implication of the *Solar Products* and *Large Residential Washers* proceedings is that there may be other Section 201 petitions in the future. This is because the petitioning industries were successful in obtaining fairly significant tariffs, on a global basis (albeit for a limited time), against foreign competitors.

Moreover, in both cases, the impetus to institute safeguard measures was driven in part by the domestic industries' contention, reflected in the ITC's investigation, that more common trade remedies such as antidumping and countervailing duty orders had proved inadequate to address foreign companies' shifting supply chains. Although both the solar products and washers industries had obtained country-specific antidumping and countervailing duty relief, they explained, and the ITC documented, the ways in which foreign competitors were able to shift production to avoid the orders, necessitating a more global remedy.<sup>450</sup> One can imagine that this problem would not be limited to the solar products and washers industries. Thus, future domestic industry petitioners may pursue a similar approach, notwithstanding Section 201's heightened injury and causation requirements. Due to the heightened requirements, however, only a domestic industry suffering significantly would be likely to pursue or obtain Section 201 relief.

## V. CONCLUSION

In sum, after bringing considerable attention to a previously dormant area of trade law, the *Solar Products* and *Large Residential Washers* proceedings may be the beginning of renewed interest in pursuing Section 201 safeguard remedies. The global nature of Section 201 relief in an era of increasingly adaptable supply chains that may be difficult to counter through country-specific antidumping and countervailing duty proceedings, the lack of a need to prove unfair trade practices, and the narrow grounds under domestic law for challenging Section 201 measures may lead other domestic industries to pursue global safeguards relief. The impetus to do so may be tempered by countervailing factors such as heightened injury requirements before the ITC, political

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449. Alex Lawson, *S. Korea Fights New US Solar, Washer Tariffs at WTO*, LAW360 (Jan. 25, 2018, 12:27 PM), <https://www.law360.com/internationaltrade/articles/1005561/s-korea-fights-new-us-solar-washer-tariffs-at-wto>.

450. See *Solar Products* ITC Report, *supra* note 5, at 40-41, 44-45; *Solar Products* ITC Supplemental Report, *supra* note 381, at 5-9, 10; *Large Residential Washers* ITC Report, *supra* note 5, at 25-26.

elements of the President's discretionary determination to grant relief, and uncertain and potentially stringent review by the WTO. These opposing influences may lead to an increase in Section 201 petitions by particularly hard-hit industries, without leading to a flood of such petitions. Only time will tell, however, whether the safeguards measures the *Solar Products* and *Large Residential Washers* proceedings produced will achieve their broader purpose of improving the fortunes of the injured domestic industries and their workers.

## VI. POSTSCRIPT

Following the President's January 2018 proclamation arising from the *Solar Products* investigation, a group of Canadian solar manufacturers sued to block the Section 201 tariffs at the CIT. The CIT in March 2018 denied the Canadian plaintiffs' request for a preliminary injunction suspending the solar tariffs, holding that the plaintiffs had failed to demonstrate a likelihood of success on the merits, and in June 2018 the Federal Circuit affirmed this holding in a precedential decision.<sup>451</sup> These developments are consistent with narrow scope of review under U.S. law for Section 201 actions described throughout this article.

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451. *See Silfab Solar, Inc. v. United States*, 296 F. Supp. 3d 1295 (Ct. Int'l Trade 2018), *aff'd*, 892 F.3d 1340 (Fed. Cir. 2018).