UNITED STATES OF AMERICA
BEFORE THE
OFFICE OF THE U.S. TRADE REPRESENTATIVE

Large Residential Washers	)	
	)	Docket No. USTR-2017-0023
	)	

COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE ON THE APPROPRIATENESS OF SAFEGUARD MEASURES RECOMMENDED BY THE UNITED STATES INTERNATIONAL TRADE COMMISSION CONCERNING LARGE RESIDENTIAL WASHERS

The American Antitrust Institute (AAI) appreciates the opportunity to comment on the appropriateness of safeguard measures recommended by the United States International Trade Commission (ITC) concerning Large Residential Washers (LRWs). The AAI is an independent, non-profit organization devoted to promoting competition that protects consumers, businesses, and society. We serve the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy.[1]

The AAI submits these comments because the Trade Act of 1974 requires the President to consider competition factors in determining whether to accept remedy recommendations pursuant to petitions for safeguard restrictions under Section 201. These competition factors alone counsel strongly against awarding Section 201 relief. For reasons discussed below, the President should consider the ITC's remedy recommendation with a strong presumption that safeguard restrictions will not have the statutorily required effect of restoring competition to

[1] For more information, please see http://www.antitrustinstitute.org.

functioning markets injured by an import surge, and fostering social benefits that outweigh costs. The President should also consider whether the effect of the restrictions would be to foster incentives and market structures that would lead to non-competitive outcomes after putative safeguard restrictions are implemented.

I. BACKGROUND

Before 2017, fifteen years had passed without a single petition for global import safeguards under Section 201. Earlier this year, however, two such petitions were filed within the span of two months. In April, Suniva, Inc. petitioned the ITC for, among other things, a global tariff and price floor on CSPV solar modules. *See* Crystalline Silicon Photovoltaic Cells, USITC Pub. 4739, Inv. No. TA-201-75 (Nov. 2017), https://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/pub4739-vol_i_and_vol_ii_0.pdf. In May, Whirlpool petitioned the ITC in the instant matter for a tariff on LRWs.

After public hearings, the ITC found for the petitioners in both matters. In September and October, respectively, the Commission voted 4-0 to determine that increased quantities of imported CSPV modules and LRWs are a substantial cause of serious injury to the domestic industries for each of these products.

The Commissioners have since issued remedy recommendations in the instant LRW matter. All four recommended a three-year tariff-rate quota, with a 50% ad valorem tariff on both imported LRWs and covered parts above 1.2 million and 50,000 units, respectively, with the tariff rate to decrease by five percentage points each year. However, for LRWs, Commissioners Schmidtlein & Williamson recommended an in-quota tariff rate of 20%, decreasing to 18% and 15% in years two and three, whereas Commissioners Johanson and Broadbent concluded that an in-quota tariff should not be imposed. Commissioner Johanson and

Broadbent concluded that an in-quota tariff would "exceed the amount necessary to address" any domestic injury and "would also impede competition in the U.S. market . . . and impose an undue burden on consumers and retailers." U.S. Int'l Trade Comm'n, Large Residential Washers, Comm'rs Views on Remedy 75, USITC Pub. 4745, Inv. No. TA-201-76 (Dec. 2017), https://www.usitc.gov/trade_remedy/731_ ad_701_cvd/investigations/pub4745.pdf [hereinafter "ITC LRW Report"].

For covered parts, all four commissioners agreed that an in-quota tariff should not be imposed. They also unanimously recommended that the in-quota volume level for covered parts increase from 50,000 units in year one to 70,000 and 90,000 units in years two and three. A number of countries are excluded from the proposed remedies pursuant to free trade agreements or domestic legislation.

II. FORBEARANCE FROM IMPLEMENTING SAFEGUARD RESTRICTIONS IS OFTEN WARRANTED BASED ON COMPETITION FACTORS ALONE

A. A Variety of Competition Factors Must Be Considered Under Section 2253(a)

Section 201 of the Trade Act of 1974 allows the President to impose temporary trade barriers to protect a domestic industry when the industry is seriously injured or threatened with serious injury by an increase in imports. 19 U.S.C. § 2251(a) (2017). The goal of these safeguard restrictions is to "facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs." *Id*. When Congress enacted the provision, it was concerned about the impact of import surges in the aftermath of new agreements that lowered barriers to international trade, *see* S. Rep. No. 93-1298, 93rd Cong., 2d Sess. (1974), which can suddenly and unexpectedly upend an industry.

Relief thus can be implemented even without a showing of unfair competition. *See* 19 U.S.C. § 2253.

In deciding whether to impose safeguard restrictions, the President is required to consider a list of enumerated factors. *Id*. § 2253(a)(2). For good reason, this list includes several domestic-competition factors. If the increased domestic profits resulting from safeguard restrictions are not balanced against their competitive effects, then safeguard restrictions can increase profits for domestic firms at the expense of, rather than for the benefit of, the U.S. economy.

Among other things, the President in considering safeguard restrictions must account for (1) the efforts being made by the domestic industry to adjust to import competition; (2) the probable effectiveness of Section 201 relief in facilitating a positive adjustment to import competition; (3) the short- and long-term economic and social costs and benefits of Section 201 relief; and (4) other factors related to the national economic interest of the United States, including the effect of Section 201 relief "on consumers and on competition in domestic markets." *Id*. §§ 2253(a)(2)(C)-(E), (F)(ii).

The President is free to follow, modify, or reject the remedy recommendations of the ITC, provided the President takes into account the enumerated factors, including the aforementioned competition factors. Critically, even if import surges are a substantial cause of serious injury to the domestic industry, the President may only implement safeguard restrictions if the President determines that doing so "will facilitate efforts by the domestic industry to make a positive adjustment to import competition[.]" *Id*. § 2253(a)(1)(a). If they are unlikely to do so, the statutory language is clear that the President should not implement safeguard restrictions, no matter the severity of the import surge or the injury.

B. The Competition Factors Often Counsel Against Section 201 Relief

The domestic-competition factors alone should categorically counsel against implementing safeguard restrictions pursuant to Section 201 petitions. As an initial matter, the first and second of the aforementioned factors call on the President to predict whether safeguard restrictions will actually have a curative effect on domestic competition in the future. Very often, however, there is no sound theoretical basis whatsoever to expect safeguard restrictions to restore the competitiveness of domestic industries harmed by an increase in foreign imports.

Economists "typically" view theories that temporary safeguard restrictions will create breathing space for domestic firms to restore sustained competitiveness as "highly suspect." Alan O. Sykes, *The Safeguards Mess: A Critique of WTO Jurisprudence* 24 (John M. Olin Program in Law and Economics Working Paper No. 187, 2003), *available at* http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1570&context=law_and_economics. As one economist has explained:

> Implicitly, the argument for protection to restore competitiveness rests on some capital market imperfection that interferes with the ability of firms to raise external capital, thereby necessitating an infusion of internal capital. It is not clear why such capital market imperfections should arise. Moreover, even if capital markets imperfections exist, the logical government response would not likely be protective tariffs or similar measures.

Id.; *see also* M.J. Trebilcock, *Throwing Deep: Trade Remedy Laws in a First-Best World*, *in* Fair Exchange: Reforming Trade Remedy Laws 66 (M.J. Trebilcock and R. York eds., 1990) (Section 201 relief "rarely" restores an industry to competitiveness and "instead, it usually retards the process of rationalization and modernization"); *see also* David Ryan, *The Effects of Section 201 Safeguards on U.S. Industries*, 44 Georgetown J. Int'l Law 249, 304 (2012) (conducting case study and showing that "none of the three industries examined in this study—lamb meat, wheat gluten, or line pipe—was definitively restored to competitiveness within five years after safeguards terminated.”).

In the unlikely event that safeguard restrictions could restore an industry to competitiveness, the President cannot know this to be true at the operative moment of decision-making. As Joseph Stiglitz has explained, there is a basic problem:

> [I]t is not possible to discern whether a given [import] shock is temporary or permanent until well after the shock has hit. Since policies that impede adjustment to permanent shocks are likely to be welfare-reducing, the optimal market surge policy must compare the (potential) benefits of providing insurance against temporary surges to the (probable) costs of preventing or delaying required adjustments to permanent shocks.

Joseph E. Stiglitz, *Dumping on Free Trade: The U.S. Import Trade Laws*, 64(2) Southern Econ. J. 402, 407 (1997). In other words, the appropriate premise from which to begin evaluating safeguard restrictions is that they are at best a high-stakes gamble with poor odds.

Economists have also shown that safeguard restrictions are an enormously costly and ineffectual means of preserving jobs. *See, e.g.,* Trebilcock, *supra*, at 66 (noting, among other examples, that restrictions in the U.S. steel industry cost consumers $1 million for each $60,000-wage job saved); Sykes, *supra*, at 24 (“A superior policy would be to subsidize borrowing by the firms in question, to the extent of removing any unjustified premium in the cost of capital to the industry—this policy would allow worthwhile investments to be financed through borrowing, without introducing the deadweight costs of protectionism.”).

The President therefore should consider the ITC’s remedy recommendation with a strong presumption that safeguard restrictions will not have the statutorily required effect of restoring competition to functioning markets injured by an import surge, and fostering social benefits that outweigh costs.

III. U.S. CONSUMERS SHOULD NOT BE ASKED TO SUBSIDIZE DOMESTIC FIRMS' IMPORT ADJUSTMENTS BY PAYING SUPRACOMPETIVE PRICES

The fourth of the aforementioned factors – the effect of safeguard restrictions on consumers and competition in domestic markets – also can counsel strongly against Section 201 relief. When safeguard restrictions would free domestic firms from import competition, whether partially or totally, it is important to consider the competitive incentives that will arise once the putative restrictions take effect.

Notwithstanding that domestic firms may be in dire financial straits prior to the imposition of safeguard restrictions, they may be suddenly thrust into monopolistic or oligopolistic conditions after safeguard restrictions are implemented, depending on the extent to which the restrictions reduce competition. Safeguard restrictions that over-correct – by creating market conditions conducive to anticompetitive outcomes – fail to have the statutorily required effect of restoring *competition* every bit as much as safeguard restrictions that are ineffectual because they simply delay and distort an inexorable rationalization process. *See supra* Section II. The President should consider whether any safeguard restrictions sought in the LRW market may suffer from this over-correction deficiency.

A. An Unconditional 50% Tariff on LRWs Threatens Substantial Harm to Domestic Competition and Consumers

According to public filings by opponents of the petition, Whirlpool's proposal to implement an unconditional 50% tariff on imported LRWs would create a temporary duopoly in the LRW market.[2] *See, e.g.*, Sears Post-Hearing Remedy Br. at 3, n.8 ("The only two [domestic] producers with a meaningful commercial presence in the U.S. market are GE and Whirlpool.

[2] The public filings do not clarify whether LRWs in the United States constitute a relevant product and geographic market for antitrust purposes. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4 (2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

Any other U.S. producers would be small specialty producers with no market penetration and no market power . . . ."); Samsung Post-Hearing Remedy Br. at 9 ("Even with imports from Korea and new production in Newberry, Whirlpool and Haier/GE in 2018 will control more than 80% of the U.S. market—a market that will be more concentrated than at any time in the last 15 years.").

The AAI's analysis of the Whirlpool/Maytag merger in 2006, which took the domestic laundry market from 4 to 3 firms, concluded that the transaction should be blocked under Section 7 of the Clayton Act because it threatened to substantially reduce competition. *See* Diana Moss, Antitrust Analysis of Whirlpool's Proposed Acquisition of Maytag (Jan. 17, 2006), http://www.antitrustinstitute.org/files/477.pdf. Market characteristics in the washing machine market at the time provided ample support for concerns that manufacturers could reach and maintain coordinated price terms, because of standardized and predictable pricing patterns, readily available information on non-price terms of sale, and the ability to quickly match price cuts. *Id*. at 14. In addition, the transition from 4-3 firms would have increased the remaining players' ability and incentive to engage in strategic anticompetitive behavior at the distribution level. *Id*.

The Justice Department nonetheless approved the transaction, in significant part because it believed "any attempt by the merged entity to raise prices" would be checked by the threat that "washers made in Mexico or overseas could be sold into the United States." Press Release, U.S. Dep't of Justice, Antitrust Div., Department of Justice Antitrust Division Statement on the Closing of Its Investigation of Whirlpool's Acquisition of Maytag (Mar. 29, 2006), https://www.justice.gov/archive/atr/public/press_ releases/2006/215326.pdf.

If opponents of the petition are correct that Whirlpool's proposed tariff would completely foreclose import competition in what would become a *two-firm* domestic market, there would likely be a whipsaw effect: All of the competitive threats identified by AAI would be significantly exacerbated, and yet a key disciplining force in the market would be eliminated. This would cause a significant over-correction and fail to yield a competitive LRW market.

B. A Tariff-Rate Quota on LRWs, Particularly if Coupled with a 20% In-Quota Tariff, Threatens Substantial Harm to Domestic Competition and Consumers

Understandably, none of the Commissioners accepted Whirlpool's proposed 50% unconditional tariff on LRWs. However, all four Commissioners recommended a tariff-rate quota, with a 50% tariff applying to imported LRWs above 1.2 million units. And further, the Commission split 2-2 on whether to impose a tariff within the 1.2 million-unit quota. Chairman Schmidtlein and Commissioner Williamson recommended a 20% in-quota tariff (hereinafter "Schmidtlein-Williamson Proposal"), whereas Vice Chairman Johanson and Commissioner Broadbent recommended that no in-quota tariff be imposed (hereinafter "Johanson-Broadbent Proposal").

The Commission found that the tariff-rate quota alone, without any in-quota tariff, "will reduce the volume of imported LRWs by more than half." ITC LRW Report, Comm'rs Views on Remedy at 75. If such a significant output reduction would prevent existing importers from achieving sufficient economies of scale, while creating additional costs associated with maintaining unused capacity during the safeguard period, importers' competitive incentives may change substantially during the safeguard period. In what apparently would be a four-firm market dominated by Whirlpool, GE, Samsung, and LG, with the two importers only plausibly able to compete for sales up to 1.2 million units, it may no longer be financially feasible or strategically sensible for the importers to seek to win market share by offering superior products at lower prices. Instead, the two large importers may have the ability and incentive to tacitly coordinate with the two large domestic sellers, so they can earn supracompetitive profits on the 1.2 million units they are permitted to sell. Antitrust law would be powerless to police this coordination, although anti-merger policy seeks to prevent the emergence of market conditions that would allow such coordination to occur in the first place. It would be anathema to sound competition policy to risk creating such conditions voluntarily.

Under the circumstances, the Schmidtlein-Williamson Proposal, which was not sought by either petitioners or respondents and has not been briefed by any stakeholders, seems particularly unjustifiable. In the ITC Report's explanation of the Commissioners' Views on Remedies, the Commission acknowledges, in discussing the Johanson-Broadbent Proposal, that the 50% above-quota tariff alone will "cause market prices to increase," without any in-quota tariff. *Id*. The sparse, one-paragraph discussion of the Schmidtlein-Williamson Proposal states only that "we would expect an in-quota tariff to have some effect on prices," without elaborating on the nature of the effect. *Id*. at 75. A "Remedy Modeling Attachment" is included with the Commissioners' Views on Remedies, but much of the relevant econometric data is redacted from public view. *See id*. at 81-84.

Unless the pricing advantages that have allowed existing importers to win domestic market share to date exceed the 20% cost increase associated with the Schmidtlein-Williamson Proposal's in-quota tariff, the effect of the in-quota tariff may well be to *eliminate* effective import price competition in a four-firm market. This threatens to significantly exacerbate what is already a very risky proposition for domestic competition.

IV. CONCLUSION

Given the very low probability that temporary safeguard restrictions will facilitate a successful competitive adjustment by domestic firms, the President should have a strong presumption against implementing them. Such restrictions should only be seriously considered if the risk of harm to competition and consumers is negligible. The opposite appears to be true in both of the Section 201 matters awaiting the President's review.[3] Accordingly, the President should forbear from implementing Section 201 relief in both of these matters.

Respectfully submitted,

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[3] *See* Comments of the American Antitrust Institute, Certain Crystalline Silicon Photovoltaic Cells, Docket No. USTR-2017-0020 (filed Nov. 21, 2017), https://www.regulations.gov/document?D=USTR-2017-0020-1454.