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**VIA ELECTRONIC FILING (EDIS)**

The Hon. Lisa R. Barton  
Secretary to the Commission  
U.S. International Trade Commission  
500 E Street, SW  
Washington, D.C. 20436

**Re: Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products), Inv. No. TA-201-75 (Safeguard) Injury Phase**

Dear Secretary Barton:

On behalf of the R Street Institute, a pragmatic free-market think tank headquartered in Washington, D.C., I write to register our opposition to the relief requested by Suniva Inc. (Suniva), joined by SolarWorld AG (SolarWorld) in the above-captioned investigation. If granted by the International Trade Commission (ITC), the petitioners' requested relief would essentially double the price of solar products in the United States,<sup>1</sup> which would devastate the domestic solar market and harm the environment.

**LEGAL STANDARD NECESSARY TO PROVIDE SAFEGUARD PROTECTIONS**

The criteria for the relief requested by the petitioners is established by Section 201 of the Trade Act of 1974<sup>2</sup> as well the United States' commitments to the World Trade Organization's (WTO) Agreement on Safeguards, which the United States ratified with the passage of the Uruguay Round Agreements Act in 1994. In order to demonstrate injury during an ITC safeguard investigation, a petitioner must establish that increased imports were a substantial cause of a serious injury to the domestic industry, or that increased imports pose a "clearly imminent" threat of injury. Before import relief can be awarded, the WTO imposes an additional obligation on petitioners to show that, even if imports increased, such increase must be "unforeseen." It is worth noting that safeguards apply to fairly traded imports. There is

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<sup>1</sup>Joe Ryan and Jennifer A. Dlouhy, "This Case Could Upend America's \$29 Billion Solar Industry," Bloomberg, June 15, 2017. <https://www.bloomberg.com/news/articles/2017-06-15/this-case-could-upend-america-s-29-billion-solar-industry>

<sup>2</sup> 19 U.S.C. § 2251 et seq.

no requirement to show any unfair or illegal trade practice. Given that safeguard measures typically apply to all imports from all countries, the standard for relief is higher than typical antidumping or countervailing duty cases, which apply to imports from one company or one country. As a result of this heightened standard, the petitioners have failed to meet the threshold established by law.

#### **INCREASE IN IMPORTS DUE TO POOR BUSINESS DECISIONS OF PETITIONERS**

First, the petitioners failed to establish a significant increase in imports of crystalline silicon photovoltaic (CSPV) cells. While it is true that imports of CSPV cells have increased, such increase is due to the petitioners' inability or unwillingness to meet demand for large-scale utility projects. An "increased imports" standard as the basis for a domestic injury determination cannot and should not hinge on whether the domestic industry petitioning for import relief has failed to meet demand in a growing segment of the market, which caused imports to increase.

In addition, the WTO's appellate body has ruled that Article XIX:1(a) of the General Agreement on Tariffs and Trade (GATT) and the WTO's Agreement on Safeguards requires that such increase in imports must have been "unforeseen."<sup>3</sup> The petitioners' claim that increases in CSPV imports was unforeseen fails on the merits. Given rapid technological advancements in the solar industry, the increase in imports was not unforeseen or unexpected.

#### **FACTORS MORE IMPORTANT THAN INCREASED IMPORTS LED TO DECLINE IN CSPV PRICES**

Next, even if the ITC assumes the petitioners showed an increase in imports, Suniva and SolarWorld must demonstrate that such imports were a "substantial cause" of serious injury or threatened injury. In the safeguard context, "substantial cause" means that imports were as important as or more important than other factors in the decline in prices.<sup>4</sup> Here, too, the petitioners fail to persuasively meet their burden for three major reasons.

First, petitioners' own choice not to compete in the large-scale utility market is a large driver of imports into the United States. These increased imports to meet utility demand put downward pressure on the entire market. Failing to compete in the utility solar market was perhaps a mistake on the part of the petitioners, but punishing Suniva and SolarWorld's competitors who did meet the demand would be a mistake.

Next, solar prices have been declining for reasons beyond increased imports. CSPV competes with myriad other sources of energy for space on the electricity grid. The fracking-driven boom in natural gas and resulting decline in natural gas prices, coupled with the declining cost of wind power, further

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<sup>3</sup> AB Report, Korea -- Dairy Safeguard; AB Report, Argentina -- Footwear Safeguard; AB Report, US -- Lamb Safeguard; AB Report, US -- Steel Safeguard.

<sup>4</sup> 19 U.S.C. § 2252(b)(1)(A), (B)

lowered prices of solar products. Finally, rapid technological advancement of solar products has put downward pressure on CSPV prices.

Together, these factors demonstrate that the primary causes of the decline in CSPV prices is due to developments other than an increase in imports. Again, to the extent that imports are causing prices to decline, such decline is driven largely petitioners' own decisions not to compete for market share in the growing utility segment.

### **PETITIONERS DID NOT SUFFER SERIOUS INJURY OR THREAT OF SERIOUS INJURY AS A RESULT OF INCREASED IMPORTS**

In addition to the above requirements, the petitioners must show that they suffered "serious injury" as a result of increased imports or are facing a "clearly imminent" threat of injury. While it is true the petitioners in this case have filed for bankruptcy protections due to distressed financial positions, they are not representative of the entire solar industry. In fact, much of the domestic solar industry is growing considerably. Solar production is up twentyfold from 2010 to today and the broader domestic industry added more than 50,000 jobs in the United States in 2016. The petitioners' financial positions are due to their own lack of foresight and business acumen, rather than a flood of imports causing them injury.

Next, when determining whether increased imports pose a threat of serious injury, the ITC reviews all relevant economic factors. As demonstrated above, the domestic solar manufacturing industry's recent growth belies the petitioners' claims. In recent years, demand for solar cells and modules has grown considerably.<sup>56</sup> Likewise, despite being slightly down from 2016, the projections for 2017-2022 for future solar deployment and the overall trend for the domestic solar industry is overwhelmingly positive.<sup>7</sup>

### **CONCLUSION**

In light of the petitioners' failure to meet the legal standards for import relief under U.S. safeguard laws and WTO commitments, R Street respectfully requests that the ITC reach a negative determination in the injury phase of the investigation.

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<sup>5</sup> U.S. Solar Market Insight Q2 2017, at 58-59.

<sup>6</sup> Department of Energy, SunShot Solar Industry Update, p. 77

<sup>7</sup> U.S. Solar Market Insight Q2 2017, at 59.