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

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| Certain Crystalline Silicon Photovoltaic | ) | |
| (CSPV) Cells (Whether or Not Partially or | ) | Docket No. USTR-2017-0020 |
| Fully Assembled Into Other Products) | ) | |

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**COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE ON THE APPROPRIATENESS OF SAFEGUARD MEASURES RECOMMENDED BY THE UNITED STATES INTERNATIONAL TRADE COMMISSION CONCERNING CERTAIN CRYSTALLINE SILICON PHOTOVOLTAIC CELLS (WHETHER OR NOT PARTIALLY OR FULLY ASSEMBLED INTO OTHER PRODUCTS)**

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 certain crystalline silicon photovoltaic (CSPV) cells. 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 often counsel strongly against awarding Section 201 relief. For reasons discussed below, the President should consider the ITC's remedy recommendations with a strong presumption that safeguard restrictions will not have the statutorily required effects of restoring competition to

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[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 the 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, U.S.-based Suniva, Inc. petitioned the ITC in the instant matter for, among other things, a global tariff and price floor on CSPV solar modules. In May, U.S.-based Whirlpool petitioned the ITC for a tariff on imported large residential washers (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 solar matter. Commissioners Irving Williamson and David Johanson recommended a 30 percent ad valorem tariff on imported CSPV modules, to decline by 5 percentage points per year over four years. They also recommended a four-year tariff-rate quota on solar cells, which would allow foreign competitors to import 1 gigawatt of solar cells tariff-free, but would impose a 30 percent tariff on imports above 1 gigawatt, with the gigawatt allotment increasing by 0.2 gigawatts per year and the tariff rate decreasing at 5% per year during the four-year period.

Chairman Rhonda Schmidtlein offered a similarly structured proposal, but with more onerous terms. She would impose a 35% tariff on imported modules (rather than 30%), and a tariff-rate quota allowing foreign competitors to import 0.5 gigawatts of solar cells at a 10 percent tariff (rather than 1 gigawatt tariff-free). The gigawatt allotment and tariff rate would also increase and decrease, respectively, in smaller degrees than under the proposal from Commissioners Williamson and Johanson.

Commissioner Meredith Broadbent, who was concerned about the impact of safeguard restrictions on domestic competition and consumers, made the least-intrusive proposal. She explained, "I am firmly of the view that damaging the domestic consumers, installers, and manufacturers supporting CSPV deployment is not an effective way to save domestic producers of CSPV products." Statement of Comm'r Meredith M. Broadbent on Her Remedy Recommendations (Oct. 31, 2017), https://www.usitc.gov/press_room/documents/solar201_ remedy_commissionerstatements.pdf [hereinafter "Comm'r Broadbent Statement"].

Commissioner Broadbent recommended an 8.9-gigawatt quota on imported CSPV modules and cells, to increase by 1.4 gigawatts per year during the four-year period. She explained that her recommendations "are consistent with the market share held by imports in 2016, adjusted to reflect projected changes in demand for photovoltaic products over the next four years." Comm'r Broadbent Statement. She believes, therefore, that her proposal "will not disrupt expected growth in CSPV demand but will help address the serious injury to the domestic industry by preventing further surges in imports." Views of Comm'r Meredith M. Broadbent on Remedy I-127 [hereinafter "Views of Comm'r Broadbent"], *in* Determination and Views of the Commissioners, USITC Pub. 4739, Vol I., 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 [hereinafter "Determ. and Views of Comm'rs Vol I."].

## 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. Safeguard restrictions can increase profits for domestic firms, but if there is no accounting for their competitive effects, the increased profits may come 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 often categorically counsel against implementing safeguard restrictions pursuant to Section 201 petitions. As an initial matter, the first, second, and third 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.").[2]

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.

[2] The prospect of "restoring" an industry to competitiveness should be even more remote if the industry already lacks hallmarks of competitiveness to begin with. Some believe this is true of the solar industry. *See, e.g.*, Katie Tubb, *The Absurdity of Propping Up 2 Favored Solar Companies*, The Heritage Foundation (Sep. 21, 2017), http://www.heritage.org/renewable-energy/commentary/the-absurdity-propping-2-favored-solar-companies (noting that market participants have "for decades received special tax credits, grants, loan programs, regulatory preferences, research and development, and other programs to 'jumpstart' the solar industry").

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 effects 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' COMPETITIVE ADJUSTMENTS TO IMPORT SURGES 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 the safeguard restrictions sought in the CSPV market may suffer from this over-correction deficiency. In the solar matter, even the *perceived* tariff risk reportedly led to a price increase for CSPV modules prior to the ITC's remedy recommendations. This had the effect of increasing the overall cost of installing solar power in the United States "for the first time in ages," in stark contrast to installation costs globally. Shayle Kann & MJ Shiao, *The Potential Impact of Solar Tariffs in 12 Charts*, GTM Research (Oct. 17, 2017), https://www.greentech media.com/articles/read/the-potential-impact-of-solar-tariffs-in-12charts#gs.Gia9MxY. According to one estimate, the net impact of import tariffs on cells ranging from 10 cents-per-gigawatt to 40 cents-per-gigawatt would be installed-base reductions in solar generation ranging from 9% to "a devastating 48%," respectively. *Id*.

At the same, all of the ITC Commissioners acknowledge that the CSPV industry is comprised separately of (1) integrated cell and module producers, such as the petitioners, and (2) independent module producers that purchase cells for assembly into modules. Determ. and Views of Comm'rs Vol I. at 82, 92, 113-16. They acknowledge further that the independent module producers are highly reliant on imported CSPV cells, because most domestic CSPV cell production is used to satisfy the integrated producers' internal demand. *Id*.

After safeguard restrictions on imported cells, then, the independent domestic module producers facing higher costs and no viable cell suppliers stand to be foreclosed from accessing an essential input. *See* Views of Comm'r Broadbent 124 ("These producers, which already operate at low capacity utilization rates and have accounted for most of the industry's closures over the last five years, will see both output and operating income decline as a result of the high tariff[,]" and "[i]t is likely that many of these producers will exit the market or will be unable to undertake planned expansions").

In addition, domestic entry barriers will be raised, because new firms will have to enter at two levels of the supply chain (cells and modules) to compete effectively with the likes of the petitioners, who are integrated.[3] Moreover, prospects for attracting investment to fund new two-level entry in the near term likely would be dim to non-existent, because investors will know that another import surge awaits at the end of the temporary safeguard period. *See id*. at 124-25. Thus, if the 40% percent tariff sought by petitioners were to be adopted, vertically integrated incumbents in the domestic industry likely would be *completely* insulated from competition, both foreign and domestic, during the safeguard period. With such power, they likely would be able to hold the rest of the supply chain, and end-user consumers, hostage to higher prices, reduced output, and diminished quality and service.[4]

## 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 this matter. Accordingly, the President should forbear from implementing Section 201 relief.

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[3] Suniva is currently in Chapter 11 bankruptcy but plans to continue operating as an integrated producer.

[4] The number and market shares of vertically integrated domestic CSPV producers is redacted from publicly available ITC filings in this matter.

Respectfully submitted,

Randy M. Stutz

Associate General Counsel
American Antitrust Institute
(202) 905-9420
rstutz@antitrustinstitute.org

Diana L. Moss, Ph.D.

President
American Antitrust Institute
(720) 233-5971
dmoss@antitrustinstitute.org

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