

September 19, 2017

PUBLIC DOCUMENT
Inv. No. TA-201-075

VIA ELECTRONIC FILING (EDIS)

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

Re: *Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products), Inv. No. TA-201-075; Comments on Petitioners' Failure to Submit Adjustment Plans*

Dear Secretary Barton:

On behalf of the Solar Energy Industries Association (“SEIA”), we write to alert the Commission to an important development in the above-referenced investigation.

As the Commission is no doubt aware, Section 202(a)(4) of the Trade Act of 1974 establishes the procedure for petitioners to submit an adjustment plan to the Commission in Section 201 investigations, as follows:

Section 202(a)(4) A Petitioner under paragraph (1) may submit to the Commission and the United States Trade Representative (hereafter in this part referred to as the “Trade Representative”), either with the petition, ***or at any time within 120 days after the date of filing of the petition***, a plan to facilitate positive adjustment to import competition.

While the language of the provision is permissive rather than mandatory, the idea behind the petitioners’ submission of an adjustment plan is that upon seeking protection from

presumptively fair trade, petitioners should provide the authorities with an explanation of how they expect to take advantage of import relief, in the event the Commission votes in the affirmative on the issue of injury. In fact, the legislative history shows that the Senate bill had originally *required* petitioners to submit adjustment plans (and make them public and available for comment), but this requirement was replaced by the current permissive language as part of the conference agreement.¹ That being said, the legislative history of that replacement language shows how important the conferees still considered the industry's plans for adjusting to import competition:

While the conferees decided to make the submission of an adjustment plan optional, rather than to require its submission, the conferees encourage petitioners for action under this section to submit adjustment plans. The conferees believe that it is important for firms and workers in the petitioning industry to demonstrate to the ITC and the President what steps they will be taking to make a positive adjustment to import competition.²

The practice of submitting such plans has become so ingrained that petitioners have submitted them in every Section 201 investigation for the last 30 years (since 1986), except one. The only exception may be the 2000 investigation of *Extruded Rubber Thread*, in which the Commission issued a negative injury determination despite a finding of increased imports and serious injury.³

¹ *Omnibus Trade and Competitive Act of 1988*, Conference Report to Accompany H.R. 3, H. Rept. 100-576 (Apr. 20, 1988), at 663.

² *Id.*

³ *Extruded Rubber Thread*, Inv. No. TA-201-72, USITC Pub. 3375 at I-1 (Dec. 2000) (making a negative injury determination). Whereas we were able to identify the submission of adjustment plans by the domestic industry (as the petitioner under Section 202(a)(4) or as a non-petitioning stakeholder under Section 202(a)(6)) in all prior 201 cases going back to 1986, no such submission was found in the docket of the *Extruded Rubber Thread*. We note that the domestic extruded rubber thread industry might have filed an adjustment plan, possibly not as a public document, given North American Rubber Thread ("North American")'s statement in its answers to the Commission's written questions following the injury hearing (Sep. 18, 2000): "In the remedy phase, North American will present a *plan* and proposed remedy which North American believes will demonstrate that North American can be fully competitive with Malaysia" (emphasis added).

In the instant investigation, despite SolarWorld's announcement that it intended to submit an adjustment plan within the timeframe contemplated by section 202(a)(4),⁴ no such adjustment plan was submitted by either SolarWorld or Suniva by September 14, 2017, which was the 120th day following the official filing date of the petition.

As the Commissioners prepare to cast their votes on the question of injury later this week, there is good cause for the Commission to accept this letter because the failure of petitioners to submit an adjustment plan after repeated commitments to do so evidences both a lack of respect for the process contemplated by the statute and an apparent inability to devise a genuine plan for the industry's adjustment to import competition.⁵ By failing to explain, within the timeframe established by statute, how they "plan to facilitate positive adjustment to import competition," the petitioners have deprived the Commission of a key document that has – in all but perhaps one of the prior Section 201 cases over the last 30 years – helped frame the Commission's analysis.

We note that the statute contemplates that these plans will be filed on the same day as the injury vote, as both are normally set to occur on the 120th day after submission of the petition.⁶ In this investigation, the Commission extended the deadline for its injury vote because of the complicated nature of the case.⁷ The extension of the injury vote, however, did not also extend the deadline for adjustment plans. As a result, no plans were submitted within the

⁴ SolarWorld's Prehearing Injury Brief at 103 ("SolarWorld intends to submit a plan to facilitate positive adjustment to import competition, as referenced in 19 U.S.C. § 2252(a)(4), within 120 days of the date the petition for this investigation was filed."); Injury Hearing Tr. at 151 (Testimony of Mr. Brightbill) ("We'll also put forward an adjustment plan and consult with USTR on it."), 210 (Testimony of Mr. Brightbill) ("Again I think we're going to put forward an adjustment plan").

⁵ *Crystalline Silicon Photovoltaic Cells' (Whether or Not Partially or Fully Assembled Into Other Products); Institution and Scheduling of Safeguard Investigation and Determination That the Investigation Is Extraordinarily Complicated*, 82 Fed. Reg. 25331, 25333 (Jun. 1. 2017) (requiring that good cause be shown for acceptance of additional written submissions to the Commission).

⁶ 19 U.S.C. § 2252(a)(4) (setting the deadline to file adjustment plans 120 days after the date of filing the petition); 19 U.S.C. § 2252(b)(2)(A) (requiring the Commission to make its determination within 120 days after the petition is filed unless extended in investigations that the Commission finds extraordinarily complicated).

⁷ See *Notice of Institution and Scheduling*, 82 Fed. Reg. at 25331.

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statutory timeframe, and this should be considered as the Commission decides whether to send this case to the President, which is the effect of the injury vote scheduled for later this week.

Should the Commission have any questions regarding this submission, please contact the undersigned.

Respectfully submitted,

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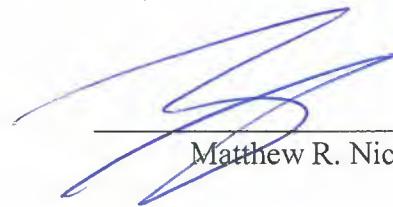
COUNSEL CERTIFICATION

Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products)

Inv. No. TA-201-75


In accordance with section 207.3(a) of the Commission's rules (19 C.F.R. § 207.3(a)), I, Matthew R. Nicely, of Hughes Hubbard & Reed LLP, counsel to Solar Energy Industries Association ("SEIA"), certify that under penalty of perjury under the laws of the United States of America and pursuant to the Commission's regulations:

- (1) I have read the foregoing submission in the above referenced case;
- (2) to the best of my knowledge and belief, the information contained therein is accurate and complete;



Matthew R. Nicely

DISTRICT OF COLUMBIA: SS
Sworn and subscribed to before me
this September 19, 2017.



Notary Public

My Commission expires: June 30 2019



PUBLIC CERTIFICATE OF SERVICE
Crystalline Silicon Photovoltaic Cells
Investigation 201-TA-075

I, Matthew R. Nicely, hereby certify that a copy of the foregoing submission has been served this day, September 19, 2017, by electronic mail or air mail*, upon the following persons:

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