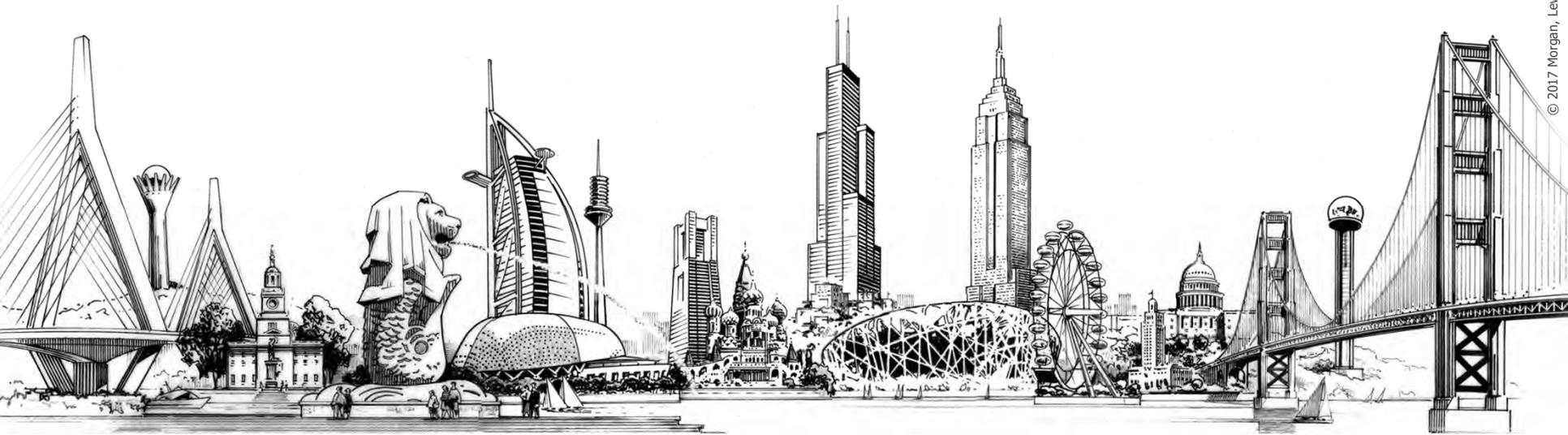


Morgan Lewis

SECTION 201 PETITION FOR IMPORT RELIEF CRYSTALLINE SILICON PHOTOVOLTAIC CELLS AND MODULES

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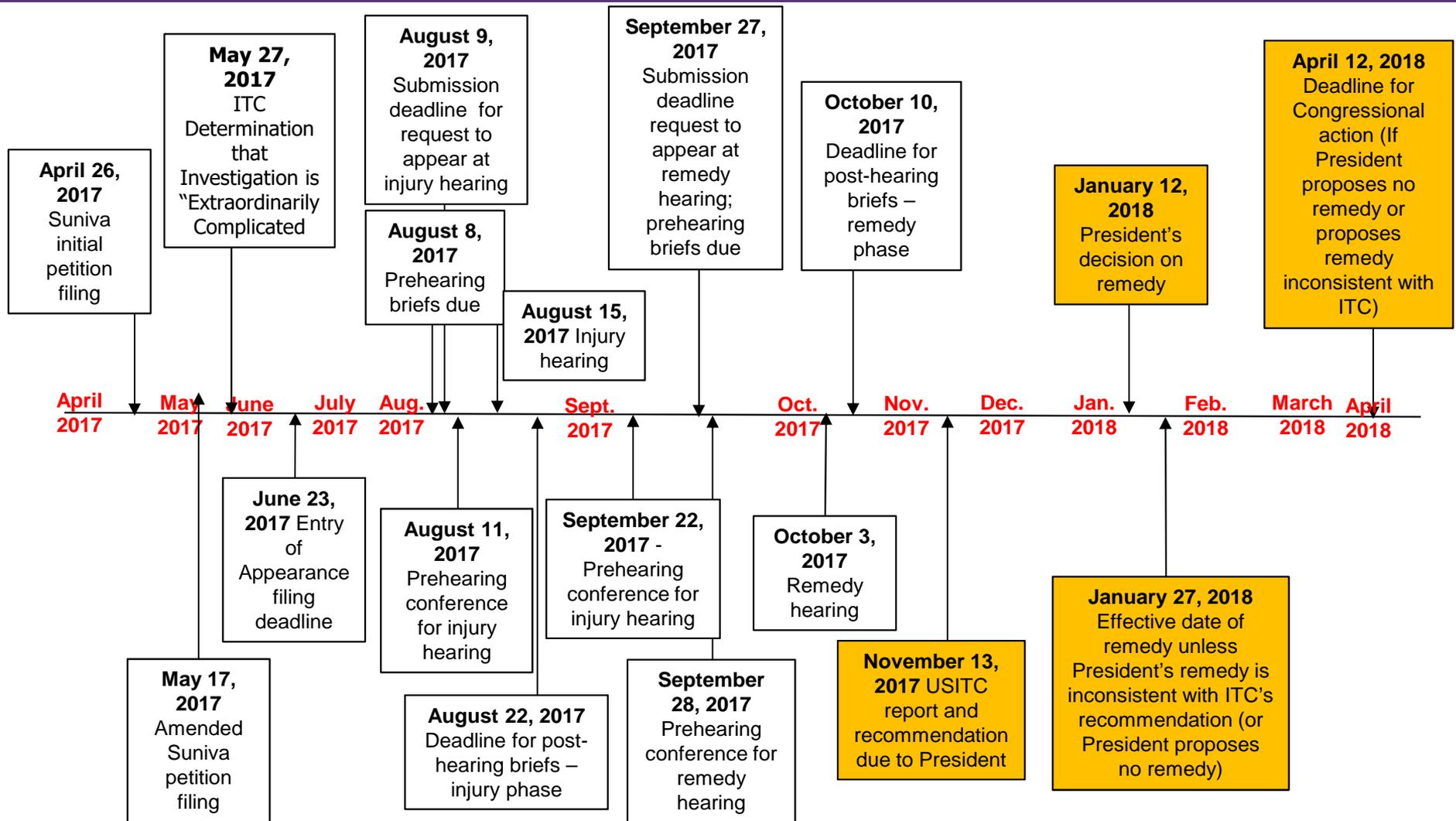
SECTION 201 OF THE TRADE ACT OF 1974 ("Section 201")

- ❖ If the US International Trade Commission (the "USITC") determines that an article is being imported into the United States in such increased quantities as to be a *substantial cause of serious injury* (or threat of serious injury) to the *domestic industry* producing an *article like or directly competitive with the imported article*, then the President
 - "shall take all appropriate and feasible action within his power 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" 19 U.S.C. § 201(a)
- ❖ Known as a "safeguard action" – operates as an exception to the General Agreement on Tariffs and Trade ("GATT"), which would otherwise prohibit the type of import relief section 201 provides

Section 201

- ❖ How it works (simplified version)
 - ITC accepts petition and initiates an investigation
 - Receives written submissions and holds hearings
 - Injury
 - Remedies
 - ITC recommends relief to President (or finds no injury) (limited by statute)
 - President implements ITC recommendation or decides on alternative remedies (subject to same limitations)
 - If President disagrees with the ITC, Congress has 90 days to pass a joint resolution implementing the ITC's remedies (binary)

Section 201 Timeline



STATUTORY REQUIREMENTS – INJURY/THREAT OF INJURY

- ❖ ITC may consider all relevant economic factors, including
 - Injury
 - Significant idling of productive facilities in the domestic industry
 - Inability of a significant number of firms to carry out domestic production operations at a reasonable profit
 - Significant unemployment or underemployment within the domestic industry
 - Imminent threat of serious injury
 - Myriad factors relating to the domestic industry, including (by way of example)
 - Decline in sales or market share
 - Higher and growing inventory
 - Downward trend in production, profits, wages, productivity, or employment

STATUTORY REQUIREMENTS – SUBSTANTIAL CAUSE

- ❖ The imports must be the “substantial cause” of serious injury or the threat of serious injury
 - A “cause which is important and not less than any other cause”
 - Qualitative, not quantitative, at injury phase
 - Compare and decide how much of the injury or threat is due to import versus other factors
 - ITC considers all economic factors including
 - An increase in the actual or relative amounts of imports
 - Decrease in domestic industry market share
 - Looks at the condition of the industry over the relevant business cycle
 - Examines relevant economic data, focusing on price and volume changes in imports, trends, and competition
 - Consider alternative reasons contributing to the injury or threat

PETITIONER'S KEY ARGUMENTS -- INJURY

- ❖ Imports of CSPV's "unexpectedly exploded and prices have collapsed"
- ❖ Relief is needed to prevent the permanent loss of a competitive domestic industry
- ❖ Anti-dumping and countervailing duties systematically evaded
 - Therefore broader relief needed
- ❖ Includes cells plus panels and laminates when produced outside the US from cells produced outside the US
 - Excludes panels and laminates if produced from cells produced in the US, even if panels and laminates produced outside the US
 - Statutory requirements met
 - Argues most of the statutory reasons apply
- ❖ Imports are the *primary* cause for the harm to the domestic industry

OPPONENTS' KEY ARGUMENTS -- INJURY

- ❖ Led by SEIA
 - Argued ITC should look at the solar industry as a whole, not just modules
 - Installers, downstream, etc.
 - CSPV < 1% of “solar market” and solar industry jobs
 - Solar cells/modules compete with alternative energies and fossil fuels
 - Two markets – 60 cell residential; 72 cell utility
 - Petitioners could not service both
 - Primary cause = bad decisions and missteps/product issues
 - Product obsolescence contributes to impact more than imports
 - Petitioners “elected” not to participate in the utility segment
 - No substantial cause from imports
 - Relief to this segment will be “at the expense” of other segments of the industry

COMMISSION FINDINGS-- INJURY

- ❖ Injury caused by imports
- ❖ Required to make specific findings/take votes for agreement countries
- ❖ Resulted in the following determinations:
 - Harm from Mexican imports (4-0)
 - No harm from Canadian imports (3-1)
 - Harm from Korean imports (4-0)
 - No harm, individually, all other free trade countries (4-0)
- ❖ These do not include non-agreement countries
 - Thus, harm from all others (i.e., Malaysia, Vietnam, etc.)
- ❖ ITC can recommend/President can implement
 - Global application
 - Targeted application—only those countries found to be causing the harm

REMEDIES--STATUTORY

- ❖ Remedies ITC recommends are specifically limited to the following (including combinations of them)
 - An increase in, or the imposition of, duties (cannot exceed 50% increase ad valorem)
 - A tariff-rate quota
 - Quantitative restrictions on imports
 - Adjustment measures (*i.e.*, trade adjustment assistance)
- ❖ Commission recommends specific package including
 - Type, amount and duration
- ❖ Commission may also recommend
 - Initiate international negotiations to address underlying cause
 - Engage in bilateral negotiations
- ❖ President not similarly constrained – recall section 201(a)

REMEDIES--REQUESTED

- ❖ Remedies requested in Petition
 - Tariff and price floor on imports
 - Equitable distribution of anti-dumping and countervailing duties collected (once suspension is removed)
 - Use additional tariffs collected to create an economic investment development fund
 - Bilateral and multilateral negotiations to reduce “excess global capacity”

REMEDIES--REQUESTED

- ❖ Remedies requested in Petition
 - Tariff and price floor on imports
 - Two proposed remedial structures to be implemented over a four-year period:
 - Tariffs of \$0.25/watt for CSPV cells and \$0.32/watt for CSPV modules.
 - Suniva proposes a minimum import price of \$0.74/watt on CSPV modules
 - SolarWorld proposes an import quota of at least 0.22 gigawatts for CSPV cells and at least 5.7 GW for CSPV modules
 - The quota and floor price are meant as backstops, to ensure that domestic producers maintain market share
 - The goal is to return solar prices to late 2015/early 2016 levels (before the 40% price crash)
 - Both express support for the other's proposals
 - Agree that **both** increased tariff and quota remedies

REMEDIES--REQUESTED

❖ Remedies requested in Petition

➤ Anti-circumvention measures

- Import monitoring
- Certification
- Argument based on alleged “ease” with which foreign producers can move production

➤ Grab bag of additional ideas

- Domestic sourcing preferences for government contracts
- Tax credits

NEXT STEPS

- ❖ Remedy hearing October 3, 2017
- ❖ Post-hearing briefing October 10, 2017
- ❖ ITC recommendation and report to President not later than November 13, 2017
 - Petitioners urged faster action to avoid adverse impacts from build-up of inventory pending ruling
- ❖ Presidential (initial) decision January 12, 2018 (using Nov. 13)
- ❖ Additional tariffs could be seen as soon as January 27, 2018
- ❖ The “retroactive question”
 - Unliquidated entries
 - Unentered goods

QUESTIONS?