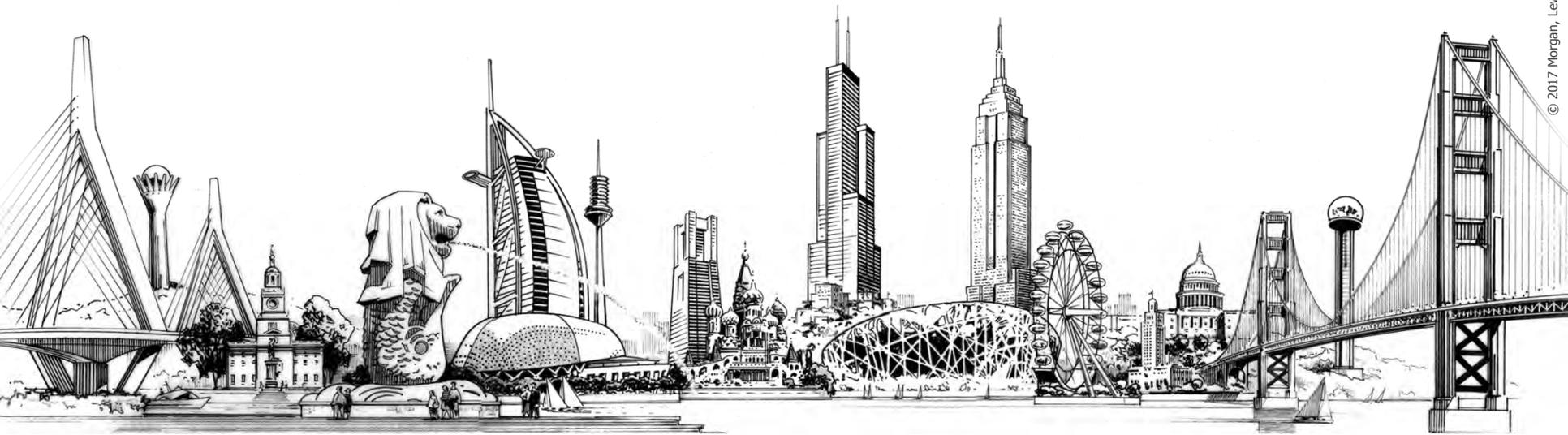


# Morgan Lewis

## **SECTION 201 PETITION FOR IMPORT RELIEF**

### **CRYSTALLINE SILICON PHOTOVOLTAIC CELLS AND MODULES**

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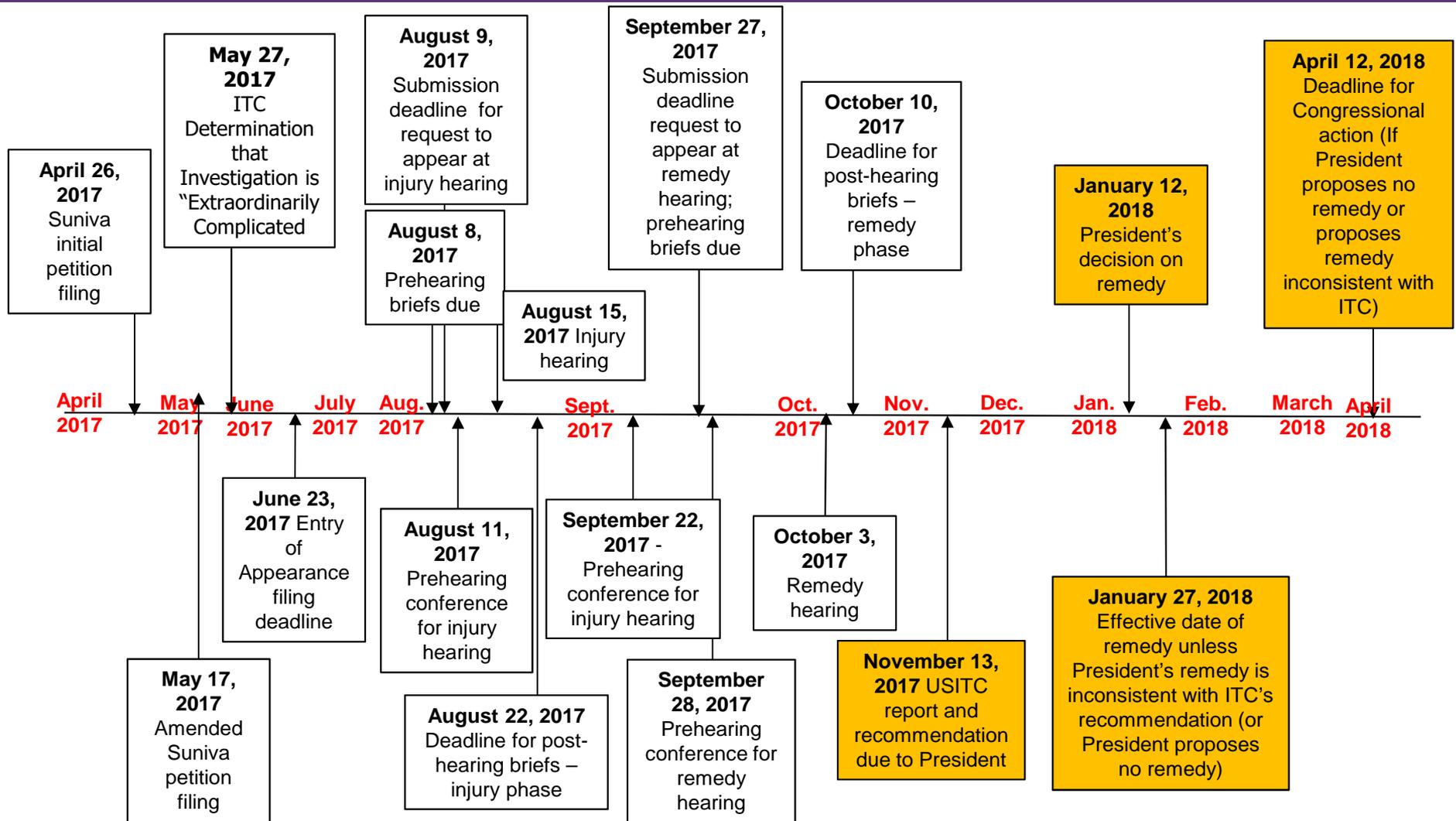
# SECTION 201 OF THE TRADE ACT OF 1974 ("Section 201")

- ❖ 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?