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## Project, Energy and Infrastructure Finance Group Client Alert: ITC Recommends Solar Power Tariffs in *Suniva* Section 201 Trade Case

*Protectionist trade measures could raise the cost of solar power in the United States.*

The United States International Trade Commission (“ITC”) on October 31, 2017 issued its anxiously awaited recommendation for trade remedies targeting imports of crystalline silicon photovoltaic (“CSPV”) cells and modules from certain foreign countries.<sup>1</sup> The ITC earlier determined that these imports have injured local manufacturers of CSPV cells.<sup>2</sup> The recommendation issued on October 31, 2017 followed an investigation prompted by a petition seeking global safeguard import relief filed by Suniva, Inc. (“Suniva”), a Chinese-owned CSPV manufacturer based in the United States.

The ITC Commissioners recommended a range of options, including tariff-rate import quotas, hard quotas, *ad valorem* import duties, import licenses, and trade adjustment assistance. Their recommendations have no independent legal effect. The ultimate outcome of this case remains uncertain, as President Trump must now evaluate the ITC’s recommendations and decide what remedy, if any, to implement. The process now becomes as much political as it is informed by economics and underpinned by U.S. trade law.

The Suniva trade case presents the unusual situation of two foreign-owned manufacturers seeking trade protections against foreign competition in hopes of reestablishing their manufacturing capacity in the United States. Even with trade protection under Section 201, as recommended by the ITC, these companies and other manufacturers in the United States collectively may not be able to increase

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<sup>1</sup> United States International Trade Commission, *Global Safeguard Investigation Involving Imports of Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products)*, Investigation No. TA-201-75 (2017). [https://www.usitc.gov/press\\_room/news\\_release/2017/er103111857.htm](https://www.usitc.gov/press_room/news_release/2017/er103111857.htm).  
<sup>2</sup> [https://www.usitc.gov/press\\_room/news\\_release/2017/er092211832.htm](https://www.usitc.gov/press_room/news_release/2017/er092211832.htm).

manufacturing capacity profitably. Consequently, forecasted domestic manufacturing capacity, even with trade assistance, is not expected to grow sufficiently to meet current or projected demand, which could cause price spikes if imports are restricted. The increased cost of imported CSPV products if tariffs or import quotas are imposed could also dampen future demand. In any case, depending on the remedy, both the volume of product sales and the growth of installed solar capacity in the United States could be constrained, and prices to consumers and developers of solar power projects could rise.

#### A. SUNIVA'S SECTION 201 TRADE CASE

This particular trade case is not a simple foreign-versus-domestic manufacturing controversy. Suniva, together with later co-petitioner SolarWorld Americas, Inc. (“SolarWorld”), are both foreign-backed companies. Suniva, struggling to compete with less expensive imported solar cells and modules, filed for protection under Chapter 11 of the US Bankruptcy Code on April 17, 2017. Shortly thereafter, on April 26, 2017, Suniva commenced the Section 201 trade case, seeking a \$0.40/Watt tariff on imported CSPV cells and a \$0.78/Watt floor price on imported modules. The case is somewhat ironic, in that Suniva is majority Chinese owned and the case targets US imports from China, in particular, as well as other exporting countries. Shunfeng International Clean Energy Ltd., a Chinese company that once had ambitions to become the world’s biggest solar supplier, acquired 63 percent of Suniva in 2015.<sup>3</sup> Shunfeng, however, having effectively lost control of the company in the bankruptcy proceedings, opposed the ITC filing by Suniva of the Section 201 petition.<sup>4</sup> SolarWorld, a U.S. subsidiary of SolarWorld AG, a bankrupt German solar panel manufacturer, joined the Suniva case as a co-petitioner on May 25, 2017, to ask for similar trade protection.

Suniva filed its petition under Section 201 of the Trade Act of 1974<sup>5</sup> (the “Trade Act”), which provides relief for domestic industries where there is serious injury or threat of serious injury by increased imports. The imposition of trade remedies under Section 201, unlike other trade actions, does not require a finding of an unfair trade act and is not targeted against any one specific country. A Section 201 “Import Relief for Domestic Industries” process can be initiated for an article of import by (i) a trade association, firm, certified or recognized union, or group of workers representative of a U.S. industry, (ii) the President or the United States Trade Representative, (iii) the House Committee on Ways and Means or Senate Committee on Finance or (iv) the ITC’s own motion. The remedies available in Section 201 trade cases range from no action to the imposition of tariffs or import duties, floor prices or quotas (with exclusions available for countries

<sup>3</sup> <https://www.bloomberg.com/news/articles/2017-04-26/china-owned-u-s-solar-maker-seeks-u-s-tariffs-on-china-imports>.

<sup>4</sup> <https://www.prnewswire.com/news-releases/shunfeng-upholds-global-free-trade-principle-on-sunivas-section-201-petition-300458230.html>.

<sup>5</sup> 19 US. Code Section 2251, implementing Pub. L. 93–618, title II, § 201, Jan. 3, 1975, 88 Stat. 2011, as amended, codified in Title 19, Chapter 12, Subchapter II, Part 1, § 2251 of the U.S. Code.

found not to be sources of injurious imports), trade adjustment assistance, or other actions as deemed appropriate by the President acting on the recommendation of the ITC.

Upon receipt of the petition, request, resolution, or institution on its own motion, the ITC generally has 120 days (150 days in more complicated cases) to make an injury finding. During the investigation, the ITC gathers information from fieldwork, other government agencies, its files, and domestic and foreign producers, importers, and consumers. Public hearings are also held at which the ITC questions representatives of domestic producers, importers, and other interested persons. Interested persons may also request to appear at such hearings to testify. Within 180 days of the initiating action, the ITC must provide the President with any recommendations for relief.

Upon receipt of the petition from Suniva, representing US CSPV manufacturers, in April 2017, the ITC conducted an investigation as to whether increased imports of CSPV cells and modules are a substantial cause of serious injury or threat of serious injury to domestic industry.

Various parties formally opposed Suniva's Section 201 petition, including the Solar Energy Industries Association (SEIA), solar power developers, major utilities, conservative think tanks and business groups, and at least 27 domestic solar racking and mounting equipment manufacturers and their suppliers. After an injury hearing on August 15, 2017, the ITC voted unanimously on September 22 to determine that CSPV imports had seriously damaged domestic manufacturers, except for imports from specified countries like Singapore and Canada and most other free-trade partners of the United States. The remedy hearing was held on October 3, 2017, leading to the final vote on October 31 to recommend various remedies to the President. The President has 60 days from the date the ITC delivers its recommendation and report to make a decision. The ITC is expected to deliver its formal report to the White House on November 13, which would give President Trump until January 12, 2018 to decide what, if any, remedial actions to adopt. The President is free to determine that no trade actions should be taken. Generally, any remedy ordered by the President would go into effect within 14 days of his final decision.

The Trade Act requires that any remedies must (1) "facilitate efforts by the domestic industry to make a positive adjustment to import competition," and (2) "cause greater economic and social benefits than costs." If the procedures are properly followed to reach that result, then the World Trade Organization ("WTO") should not allow other member states to impose retaliatory tariffs on US exports.<sup>6</sup> Nonetheless, in the rare

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<sup>6</sup> The Agreement on Safeguards and Article XIX of GATT 1994 provide that a WTO member may apply safeguard measures (such as trade measures imposed under Section 201 of the U.S. Trade Act of 1974) against imports of a product only if competent authorities of the member (here, the ITC) determine, after a thorough investigation, that "such product is being imported into its territory in such increased quantities,

instances in which the ITC has recommended Section 201 trade measures in the past, often the President has either failed to impose the measures or has withdrawn them under pressure from the WTO. The United States imposed trade measures under Section 201 of the Trade Act to protect domestic steel producers in 2002, following a 2001 injury determination and recommendations from the ITC, on facts comparable to the current solar products case. The trade measures were repealed in 2003 by President George W. Bush in the face of challenges in the WTO.<sup>7</sup>

President Trump's decision may well be driven by domestic political priorities with respect to trade and energy policies, even if they run counter to broader economic considerations.

## **B. ITC RECOMMENDED TRADE MEASURES**

ITC Commissioners are free to issue independent recommendations. The Commissioners on September 22, 2017 unanimously determined that imports of CSPV cells and modules from certain countries cause serious harm to the domestic manufacturing industry.<sup>8</sup> However, the Commissioners were divided in their October 31, 2017 recommendations for an appropriate remedy.<sup>9</sup> The recommendations will accompany the ITC report when submitted to the White House in mid-November.

The four Commissioners recommended three different sets of remedies to be in effect over a four year period. Rejecting the high per-Watt tariffs and floor prices requested by the petitioners, Suniva and SolarWorld, the Commissioners expressed a preference for *ad valorem* tariffs of up to 30% on imported cells and up to 35% on imported modules above specified quotas, with tariffs of zero to 10% below the respective quotas. One Commissioner rejected tariffs altogether, recommending instead considerably higher annual import quotas to be allocated via import licenses.

Specifically, ITC Chair Rhonda K. Schmidlein (a Missouri Democrat appointed to the ITC by President Barack Obama in 2014) recommended the most stringent remedy of an *ad valorem* module tariff starting at 35% that steps down in 1% increments to 32% in year 4, and a tariff-rate quota on imported cells of 0.5 GW, with imports within the quota being subject to a 10% tariff that reduces by 0.5% annually over 4 years to 8.5%, and

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absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products... [and the safeguard measures are] applied to a product being imported irrespective of its source." GATT 1994:General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) at [https://www.wto.org/english/docs\\_e/legal\\_e/25-safeg\\_e.htm](https://www.wto.org/english/docs_e/legal_e/25-safeg_e.htm).

<sup>7</sup> For a brief discussion of the WTO rules applicable to "safeguard" trade measures, as applied to the U.S. tariffs imposed under Section 201 to protect domestic steel manufacturers, see Eliza Paterson, "WTO Rules Against US Safeguard Measures on Steel", American Society of International Law *ASIL Insights*, vol. 8, issue 26 (November 18, 2003, with a December 2003 Addendum) at <https://www.asil.org/insights/volume/8/issue/26/wto-rules-against-us-safeguard-measures-steel>.

<sup>8</sup> [https://www.usitc.gov/press\\_room/news\\_release/2017/er092211832.htm](https://www.usitc.gov/press_room/news_release/2017/er092211832.htm)

<sup>9</sup> [https://www.usitc.gov/press\\_room/documents/solar201\\_remedy\\_commissionerstatements.pdf](https://www.usitc.gov/press_room/documents/solar201_remedy_commissionerstatements.pdf).

imports in excess of the quota being subject to a 30% tariff that reduces by 1% annually to 27% in year 4. Commissioner Schmidlein also called on the President to initiate international negotiations on the causes of the increases in imports of CSPV products.

Next, ITC Vice Chair David S. Johanson (a Texas Republican appointed to the ITC by President Barack Obama in 2011) and Commissioner Irving A. Williamson (a New York Democrat first appointed to the ITC by President George W. Bush in 2007) jointly recommended a 30% tariff for CSPV modules and cells in year 1, declining by five percentage points a year over 4 years, and a 30% tariff for CSPV cells applicable only to imports above a 1 GW quota, with the tariff-rate in-quota amount increasing by 0.2 GW each year. These two Commissioners also recommended trade adjustment assistance for workers and firms affected by the subject imports and non-controversial product exclusions to be agreed.

Finally, Commissioner Meredith M. Broadbent (a Virginia Republican appointed to the ITC by President Barack Obama in 2012) proposed the least stringent remedy of an 8.9 GW hard quota on imported CSPV modules and CSPV cells that increases by 1.4 GW each year over 4 years, which quota would be allocated through import licenses sold by the government at public auction with a minimum price of one cent per Watt. Proceeds from sales of import licenses, estimated to be at least \$89 million in the first year increasing by \$14 million a year thereafter, could be used to pay for development assistance to domestic CSPV manufacturers, mainly through existing Department of Energy (“DOE”) programs.<sup>10</sup> The quota quantities were meant to track the existing market share held by imports in 2016, escalated for projected demand for CSPV products. If the hard quota is adopted, Commissioner Broadbent also recommended setting aside no less than 720 MW (expanding by 115 MW per year) for Mexico within the global quantitative restriction. She did not advocate any tariffs.

In explaining why she did not favor tariffs or low quotas, Commissioner Broadbent stated, “My recommendations are intended to address the serious injury while seeking to avoid inflicting additional damage on the broader solar energy industry in the United States. The U.S. solar energy industry has been a relative success story in making progress toward grid parity with a carbon neutral source of power. The United States is

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<sup>10</sup> Commissioner Broadbent notes (at [https://www.usitc.gov/press\\_room/documents/solar201\\_remedy\\_commissionerstatements.pdf](https://www.usitc.gov/press_room/documents/solar201_remedy_commissionerstatements.pdf)) that “DOE should build on its extensive experience, both good and bad, in supporting US production,” an oblique reminder of the 2011 Solyndra credit default and the risks of the DOE subsidizing uncompetitive manufacturers. The default by Solyndra under its federal guaranteed loans in many ways led to the politicization of government assistance for solar power, previously supported widely on both sides of the aisle. Despite Solyndra and a few other high profile losses, the DOE ultimately realized a profit on its renewable energy loan guarantee program, which mostly financed well-structured clean energy projects and not riskier manufacturer subsidies. See <http://www.npr.org/2014/11/13/363572151/after-solyndra-loss-u-s-energy-loan-program-turning-a-profit>.

recognized as a global leader in this broader sector and U.S. taxpayers and policy makers have chosen to support this success over many years.”<sup>11</sup>

She added, “While U.S. firms and workers have been highly successful in the broader solar energy industry, I note that imports have accounted for nearly all CSPV products in the U.S. market for many years. U.S. producers of CSPV products have supplied very small quantities of these products. Therefore, any tariff, tariff rate quota, or quantitative restriction that significantly limits global imports would lead to a substantial increase in prices, suppressing demand for CSPV products in the United States. Such a decline in demand would adversely affect the hundreds of thousands of U.S. workers employed in installing solar projects, manufacturing other equipment used in CSPV installations, and providing a range of services, including cutting-edge research and development, in support of this market. . . . 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.”<sup>12</sup>

It is important to keep in mind that the trade measures recommended by the ITC would not apply to imports of other solar power technologies, like thin film or cells using a non-crystalline silicon substrate.

Also, CSPV cells and modules imported from many countries would be excluded from the trade measures.<sup>13</sup> Imports from Canada<sup>14</sup> and a number of other countries identified by the ITC would be exempt from the recommended tariffs and quotas, and imported modules using CSPV cells originally exported from the United States for offshore reassembly would likewise be excluded from the tariffs and quotas. Imports from many other countries with which the United States has free trade agreements were found not to be a substantial cause of serious injury to the domestic industry and would be exempt from the trade measures. The ITC recommendations expressly do not reach imports to the United States from Australia, Singapore, the CAFTA-DR countries, Colombia, Israel, Jordan, Panama, Peru, or the beneficiary countries under the Caribbean Basin Economic Recovery Act, as imports from those countries were not found to be sources of serious injury to US CSPV product manufacturers.

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<sup>11</sup> [https://www.usitc.gov/press\\_room/documents/solar201\\_remedy\\_commissionerstatements.pdf](https://www.usitc.gov/press_room/documents/solar201_remedy_commissionerstatements.pdf).

<sup>12</sup> *Ibid.*

<sup>13</sup> [https://www.usitc.gov/press\\_room/news\\_release/2017/er092211832.htm](https://www.usitc.gov/press_room/news_release/2017/er092211832.htm).

<sup>14</sup> Three of the four ITC Commissioners made a negative finding with respect to imports of CSPV products from Canada, recommending that they be exempt from tariffs or import quotas. Chair Schmidlein did not mention findings with respect to Canada in her remedies recommendation.

It is not yet clear how trade remedies, if adopted in this case, might apply to imports from Mexico<sup>15</sup> and South Korea<sup>16</sup>, which are manufacturing countries with which the United States has free trade agreements and which the ITC identified in its findings as sources of injury to domestic manufacturers of CSPV products.

### C. POTENTIAL IMPACT OF TRADE REMEDIES ON THE U.S. SOLAR POWER INDUSTRY

Tariffs and quotas could lead to a rise in the installed cost of solar power in the United States by driving up the cost of imported CSPV cells and modules. A material increase in such costs could chill new investment, especially in states that do not have strong incentives for renewable power or where incumbent generating assets have a cost advantage and power demand growth is weak. Meanwhile, growing markets such as California with ambitious renewable-portfolio-standards and other mitigants could likely still see sustained new solar investment, although at a higher cost.

Even with trade protection under Section 201, as recommended by the ITC, Suniva, SolarWorld and other panel manufacturers in the United States collectively may not be able to increase manufacturing capacity profitably within the four-year remedy period. Consequently, forecasted domestic manufacturing capacity, even with trade assistance, is not expected to grow sufficiently to meet current or projected demand. That supply deficit could cause price spikes if imports are restricted. In any case, the increased cost of imported CSPV products if tariffs or import quotas are imposed could dampen future demand. Depending on the remedy, both the volume of product sales and the growth of installed solar capacity in the United States could be constrained, and prices to consumers and developers of solar power projects could rise.

As in other areas of the economy, regulatory uncertainty makes investments difficult to price and may chill some investment in needed energy infrastructure. Once the President decides (by January 2018) what, if any, trade measures to impose, the market will be able to react with more clarity.

By some estimates, the tariff remedies proposed by the ITC would move module costs to levels about the same as solar developers were paying in late 2016. Exact price

<sup>15</sup> Imports from Mexico of CSPV products may be subject to Section 201 trade actions in accordance with Section 311(a) of the NAFTA Implementation Act if the products are found by the ITC affirmatively to “account for a substantial share of total imports” and to “contribute importantly to the serious injury...caused by imports.” 19 U.S. Code § 3371.

<sup>16</sup> All four Commissioners found that imports of CSPV cells (whether or not partially or fully assembled into other products) from Korea are a substantial cause of serious injury or threatened injury. Section A of Chapter 10 of the US-Korean Free Trade Agreement (the “KORUS FTA”) generally preserves each country’s right to impose “safeguard” measures under the WTO Safeguards Agreement and GATT 1994 Article XIX. *Free Trade Agreement between the Republic of Korea and the United States of America, U.S.-S. Kor., June 30, 2007, modified, Dec. 5, 2010, entered into force on March 15, 2012.* With reference to safeguards and trade remedies under the KORUS FTA, see <http://www.uskoreaconnect.org/about/korus/trade-remedies.html>. The provisions of the KORUS FTA were adopted by the United States with the enactment of the United States-Korea Free Trade Agreement Implementation Act, Public Law 112-41, 125 Stat. 428 (19 U.S.C. 3805 note), on October 21, 2011.

comparisons are challenging, especially since prices of CSPV products in the United States (including imports) increased in 2017 as developers stocked up on panels in anticipation of the ITC Suniva decision, even as prices dropped on global markets.

Industry experts suggest that the solar power market may be able to absorb additional costs of up to 10 cents per Watt with relatively little adverse impact to volumes and installed solar power capacity additions. Increasing component costs by more than 10 cents per Watt could have serious negative consequences for the solar power industry.

Despite the remaining uncertainty about what the Trump Administration will do with respect to trade measures in this case, it is clear that the ITC's recommendations are substantially less severe than the measures requested by Suniva and SolarWorld. The petitioners had sought remedies that could have doubled the prices of CSPV imports. In contrast, based on current module prices of about 45 to 55 cents per Watt, the proposed 35% above-quota tariffs could add as much as 15 to 20 cents per Watt to the cost of imported CSPV modules.

Increased costs are likely to have a disproportionate effect on non-RPS utility-scale solar installations, as they are most impacted by any loss of their slim cost advantages near grid parity with new natural gas-fired power plants. More costly residential and distributed commercial and industrial solar power facilities may be less affected, as their costs are already higher and they rely on other non-cost factors to be competitive.

If new solar power installations indeed become more expensive as a result of protectionist trade measures, the political battle is likely to shift to mitigation strategies such as a renewed emphasis on federal or state tax incentives (some of which are coincidentally threatened by current federal income tax reform proposals) and state renewable portfolio standards.

Adding costs for solar power could slow the US transition from fossil fuels toward cleaner power generation sources. Expect answers from the White House by mid-January 2018.



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