

## Trade Court Keeps Solar Tariff Expansion Challenge Alive

By Hailey Konnath

*Law360 (May 27, 2020, 10:10 PM EDT)* -- The U.S. Court of International Trade refused Wednesday to toss a lawsuit challenging the Trump administration's decision to place duties on double-sided solar panels that had previously been exempt, ruling that the government's recent move to issue a fresh determination on the exemption doesn't kill the case.

Invenergy Renewables LLC, a Chicago-based renewable energy company, said the Office of the U.S. Trade Representative's October 2019 unwinding of its exclusion means a price increase for the double-sided panels and that it would lose profits and business opportunities. And in December, CIT Judge Gary S. Katzmann issued a preliminary injunction blocking the agency from moving forward with the duties, finding that Invenergy had shown a fair likelihood of success in proving the agency violated notice and comment requirements under the Administrative Procedure Act.

But in April, the USTR issued a new determination to withdraw the exclusion that purportedly complied with the APA. And since then, the agency has argued the case should be tossed and the preliminary injunction dissolved because the USTR "cured the sole reason for which the injunctive relief was granted."

Judge Katzmann on Wednesday sided with Invenergy, permitting the company to supplement its complaint to address the latest determination and finding that "a live controversy regarding the legality of the April withdrawal is now before the court." The judge also shot down USTR's arguments that he should forego judgment on its October withdrawal, saying the government hadn't met its burden of establishing a legal basis on which the court could grant such a motion.

"The government has not confessed error, requested remand or indicated that its position regarding the October withdrawal has changed in any way," Judge Katzmann said, adding that there are still questions as to whether the publication of the April withdrawal in the Federal Register marked the completion of a new determination.

"Thus, to the extent the government argues the April withdrawal legally supersedes the October withdrawal, it must also demonstrate that the new determination is complete," the judge said.

Finally, Judge Katzmann refused to dissolve his preliminary injunction, saying the USTR hasn't shown changed circumstances and resulting inequity.

President Donald Trump approved new tariffs on imports of solar panels in January 2018, the first time the U.S. had imposed safeguard restrictions since 2001. Trump also left it up to the USTR to exclude products from the duties, according to the suit.

The duties followed industry petitions under Section 201 of the 1974 Trade Act, which permits the government to impose across-the-board safeguard restrictions to counter a flood of imports. The solar panel duties would last four years. The USTR initially decided to exclude double-sided panels from the duties, but it reversed course in October 2019.

The public had less than 20 days' notice of the agency's withdrawal of the exclusion, and affected or interested parties didn't have a chance to comment, according to Invenergy.

Consumers, purchasers and importers of double-sided solar panels have challenged the withdrawal, arguing the imports don't harm domestic producers because these producers don't make double-sided solar panels, Judge Katzmman noted in his December decision.

Meanwhile, U.S. producers have argued that solar project developers can choose to use single- or double-sided solar panels and that duties are needed to protect domestic production, the judge said at the time.

The USTR issued a rare response to the CIT's latest order Wednesday, saying that it "strongly disagrees" with Judge Katzmman's analysis.

"The solar industry and the jobs it represents are important to this country, and USTR will take all necessary and appropriate steps to ensure that its safeguard relief is effective," the office said.

An Invenergy representative didn't immediately return a request for comment late Wednesday.

Invenergy is represented by Amanda Shafer Berman, John Brew, Kathryn L. Clune, Amanda Shafer Berman, Frances Hadfield and Larry Eisenstat of Crowell & Moring LLP.

The government is represented by Joseph H. Hunt, Jeanne E. Davidson, Tara K. Hogan and Stephen C. Tosini of the U.S. Department of Justice's Civil Division.

The case is Invenergy Renewables LLC et al. v. U.S. et al., case number 1:19-cv-00192, in the U.S. Court of International Trade.

--Additional reporting by Alex Lawson and Kaitlyn Burton. Editing by Breda Lund.