

CIT Strikes Down Expansion Of Solar Safeguard Tariffs

By **Alyssa Aquino**

Law360 (November 16, 2021, 4:30 PM EST) -- The U.S. Court of International Trade struck down the Trump administration's third attempt to reinstate emergency tariffs on bifacial solar panel imports Tuesday, ruling that the law underpinning the effort can only be used to liberalize trade, not restrict it.

In his last effort to salvage the tariffs in October 2020, then-President Donald Trump invoked Section 204 of the Trade Act of 1974 to place safeguard tariffs on two-sided panels that had previously been given a reprieve from the levies. He also bumped up the duty from 15% to 18%.

But CIT Judge Gary Katzmman rebuked the gambit, saying that Congress gave "no indication" that the executive branch could easily impose harsher safeguards. In contrast, Congress gave "every indication" that Section 204 was an "escape hatch" from safeguard tariffs once foreign competition had eased, he said.

"204(b)(1)(B) must be read to authorize only trade-liberalizing modifications to safeguard measures, because interpreting the statute to permit trade-restricting modifications would undermine the broader statutory scheme," Judge Katzmman said.

He barred the expanded tariffs and ordered U.S. Customs and Border Protection to stop collecting the levy. It was unclear whether the Biden administration, which has defended the two-sided solar panel tariffs while it conducts a greater review of Trump-era trade policy, will appeal Judge Katzmman's order.

The Office of the U.S. Trade Representative enacted the safeguard tariffs in January 2018 during the Trump administration to address a temporary surge in solar cell imports. But solar panel importers and domestic solar panel producers have feuded on whether dual-sided solar panels should be excluded from the levies.

Judge Katzmman has twice barred the tariffs from applying to dual-sided solar panels. After CIT's reproach, Trump himself brought the duties back through an October 2020 executive order that invoked his Section 204 authority.

Section 204 lays out several conditions allowing the "reduction, modification or termination" of an existing safeguard, including that a majority of the domestic industry petition the president to take action.

In addition to challenging the president's authority to use Section 204 to restrict trade, the Solar Energy

Industries Association, Invenergy Renewables LLC, which is the company behind the prior litigation that secured the exemption, and other solar panel importers argued that Trump didn't meet the statute's procedural requirements.

The importers argued that a trio of letters from six domestic companies didn't amount to a petition to revoke the exemption and claimed that Trump violated requirements barring new safeguard duties for two years after a prior safeguard expires. The president had also sidestepped requirements that he assess the benefits of the tariffs, the importers added.

Judge Katzmann disagreed with every procedural claim, but struck down the expanded duties in light of the government's misreading of the law.

"While the government prevails on the questions of procedural compliance — the form, contents and timing of the petition, as well as the president's assessment of costs and benefits — Proclamation 10101 ultimately fails to comply with the substantive requirements of Section 204(b)(1)(B) of the Trade Act," he said.

In a statement to Law360, Solar Energy Industries Association President Abigail Ross Harper praised Judge Katzmann for reaching the "right conclusion."

"The decision ... to strike down an order by President Trump to change the step-down rate for the Section 201 tariffs and reverse the bifacial module exclusion was clearly the right conclusion. Both actions were an unlawful attempt to harshen the Section 201 tariffs," Harper said.

"We are pleased that the court recognized the unlawful nature of President Trump's re-imposition of tariffs on bifacial solar panels," said an attorney for Invenergy, Amanda Berman of Crowell & Moring LLP. "When the government acts to impose tariffs — or otherwise — it must stay within the bounds of the authority given to it by Congress."

Representatives for CBP didn't respond to a request for comment.

The solar panel importers are represented by Matthew R. Nicely, Daniel M. Witkowski, James E. Tysse, Devin S. Sikes and Julia K. Eppard of Akin Gump Strauss Hauer & Feld LLP, Amanda Shafer Berman, John Brew, Larry F. Eisenstat and Frances Hadfield of Crowell & Moring LLP and Christine M. Streatfeild and Kevin M. O'Brien of Baker & McKenzie LLP.

The U.S. is represented by Stephen Tosini, Brian Boynton, Jeanne Davidson, Tara Hogan and Joshua Kurland of the U.S. Department of Justice's Civil Division.

The case is Solar Energy Industries Association et al. v. U.S. et al., case number 20-03941, in the U.S. Court of International Trade.

--Editing by Jill Coffey.