November 7, 2017 | Energy, Renewables & Regulated Industries, Insights

# ITC Recommendation Condemned By Solar Industry

By: Rich May, Eric J. Krathwohl

**The U.S. International Trade Commission ("ITC") recently made recommendations to the President regarding the importation of crystalline silicon photovoltaic (CSPV) cells, used in solar panels.**

The four-members of the ITC all found injury to U.S. CSPV cell manufacturers and recommended that the President enact a safeguard measure. The proposed ITC tariff would increase cost by an estimated $0.13 per watt on CSPV modules – potentially doubling the price of solar panels available to U.S. consumers.

Before the ITC's recommendation is considered by the President, interested parties are invited to comment. Those in favor of the recommendations argue that tariffs are necessary to protect American manufacturing jobs, while critics argue tariffs will simply bailout inefficient companies while raising costs for consumers and reducing the availability of green-technology. The key legal issues are summarized below:

## WHO ARE THE PLAYERS?

- The ITC was created by Congress in 1974 as a successor to the U.S. Tariff Commission . It is made up of six Commissioners, who are appointed by the President with the advice and consent of the Senate for nine year terms. It is a bi-partisan body; no more than three Commissioners can be of one political party. The ITC currently has four Commissioners (two Republicans and two Democrats), with two vacancies. The Commission investigates and reports to the President and the Office of the United States Trade Representative ("USTR") on matters including "any barrier to (or other distortion of) international trade on domestic workers, industries or sectors, purchasers, prices and quantities of articles in the United States."
- Two U.S.-based manufacturers, Suniva and SolarWorld Americas,

### Related Services

Commercial Real Estate

### Related Attorneys

Eric J. Krathwohl

petitioned the ITC claiming financial harm due to imported products. Suniva had filed for Chapter 11 bankruptcy and SolarWorld Americas had laid off workers. The petitioners sought a determination from the ITC that CSPV cells are "being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing [cells] like or directly competitive with the imported [cells]."
- The President has Congressional authority to modify duties under existing trade agreements with foreign countries when he determines "any existing duties or other import restrictions of any foreign country or the United States are unduly burdening and restricting the foreign trade of the United States." In particular, when the ITC determines an injury to domestic industry, the President has broad power to act.
- Any Presidential action would be implemented by the USTR. The implementation process for a Presidential action in response to an ITC-determination involves a notice and comment period as well as a public hearing, discussed further below.
Why does this matter?

In response to the petition, the ITC found that the increased quantity of imports of CSPV cells threatens or causes serious injury to domestic production of similar cells. Because of this direct competition between imports and domestic products, the ITC recommended that the President apply a safeguard measure:

- The proposed safeguard would impact only those entities that import CSPV cells with an aggregate capacity of over 1 gigawatt per year.
- The safeguard would place a 30% tariff on any importation of CSPV cells aggregating more than 1 gigawatt. After one year, the tariff would decline by 5% — and continues to decline over the next three years.
- Because the ITC found serious injury, it is required to evaluate trade partners under U.S. agreements such as the North American Free Trade Agreement ("NAFTA") and the U.S.-Dominican Republic-Central America Free Trade Agreement ("CAFTA-DR"). The ITC found that Mexico and South Korea's imports under these trade agreements contribute to domestic serious injury. However, imports from Australia, several countries in Central and South America, Jordan, and Singapore were found not to cause harm. As written, the ITC recommendation would exempt a major foreign manufacturer, REC Solar, because it is based in Singapore.
- Though the ITC recommends a tariff, the proposed safeguard is much

> less stringent than the tariff requested by petitioners Suniva and SolarWorld Americas. The proposal's impact is estimated to raise prices around $0.13 per watt on CSPV modules, much less that the petitioners' initial $0.32 cent per watt request. Still, that could result in as much as a 50% increase in solar panel prices.

This proposal was supported by two commissioners. The other two commissioners split: one supported a more stringent tariff, while one supported a more relaxed tariff.

The Solar Energy Industries Association strongly opposed imposing new tariffs due to the damage raising prices will have on domestic consumers and installers. In a Huffington Post article, SunPower President & CEO Tom Warner called out the ITC for making the wrong decision. The Energy Trade Action Coalition's statement highlighted "opposition from virtually every corner of the solar industry—utilities, large-scale commercial users, solar manufacturers, installers, contractors and others." These commenters pointed out tariffs may ultimately raise the cost not just of CSPV cells but the cost of solar panels overall – making electricity more expensive, harming consumers, workers, and the economy generally, and stifling the acceleration of green technology.

## HOW CAN YOU RESPOND?

The ITC-proposed safeguard measure could dramatically increase the price of CSPV cells available on the market. Accordingly, domestic producers, importers, exporters, and other interested parties can submit comments to the USTR prior to any implementation of Presidential action as recommended by the ITC. In particular, the USTR seeks comments on:

- the appropriateness of the ITC-proposed safeguard, and how the tariff is (or is not) in the public interest;
- the short- and long-term effects of the proposed tariff, including on the domestic CSPV industry, other domestic industries, and downstream consumers; and,
- the short- and long-term effects that not implementing the proposed tariff will have on the domestic CSPV industry, its workers, and other domestic industries.

Those who wish to comment on the "Potential Action: CSPV Cells" can do so online. Written comments are due November 20, 2017 at midnight. Those interested can also respond to the comments submitted at the same site. Responses to the initial comments are due November 29, 2017. The USTR's Trade Policy Staff Committee will hold a public hearing in Washington, D.C. on December 6, 2017.

## WHAT WILL HAPPEN AFTER THE COMMENT PERIOD CLOSES?

The ITC will officially file its proposal with the President on November 13, 2017. The President then has sixty days to take action. That action could be an order, or the President could ask the ITC for additional information. If the President chooses to order tariffs as recommended by the ITC, they would take effect within 15 days. Industry-stakeholders should continue to monitor further potential trade agreement negotiations through at least the middle of February, 2018.

Anyone with questions on the ITC's proposed tariff or on the broader regulatory framework for renewable energy can contact Rich May, P.C. attorney Eric Krathwohl or Jennifer Lang (admission to Massachusetts bar pending).



Disclaimer: This summary is provided for educational and informational purposes only and is not legal advice. Any specific questions about these topics should be directed to attorney Eric Krathwohl or Jennifer Lang (admission to Massachusetts bar pending).