RETROACTIVE SOLAR DUTY EXPOSURE REMAINS UNRESOLVED AS FEDERAL CIRCUIT APPEAL PROCEEDS

Date: 2 September 2026

US Litigation and Dispute Resolution Alert

By: Thomas G. Allen, Nathaniel B. Bolin, John C. Crossley, William H. Holmes

KEY TAKEAWAYS

A year ago, the firm warned that litigation brought by Auxin Solar could expose importers and project participants to substantial retroactive antidumping and countervailing duty liability. Since then, the US Court of International Trade (CIT) has ruled that the Biden administration's two-year suspension of tariff collection was unlawful, creating the possibility that duties may ultimately be imposed on certain solar products imported from Southeast Asia between 2022 and 2024. Although collection of duties remains stayed pending appeal, the legal risk has evolved from a theoretical concern into a concrete contingent liability that is increasingly relevant to project acquisitions, financings, construction disputes, and contractual risk allocation.

The Federal Circuit appeal remains active notwithstanding the federal government's February 2026 decision to withdraw from the appeal. Industry associations, developers, manufacturers, and other private parties continue to pursue appellate review. Until the appeal is resolved, market participants face continued uncertainty regarding the ultimate allocation of potentially significant tariff liabilities.

THE LITIGATION HAS SHIFTED FROM A TRADE ISSUE TO A COMMERCIAL RISK ALLOCATION ISSUE

When the CIT issued its decision in 2025, much of the industry's attention focused on the magnitude of potential retroactive duties. Today, many market participants are asking a different question: assuming liability ultimately materializes, who pays?

For many utility-scale projects, the modules at issue have already been delivered, installed, financed, or incorporated into operating assets. As a result, any future assessment of duties may trigger disputes among importers, developers, Engineering, Procurement, and Construction (EPC) contractors, suppliers, owners, sponsors, lenders, and insurers regarding contractual responsibility for unexpected costs.

The most significant consequences of the Auxin litigation may therefore be felt not only in customs proceedings, but also in contract enforcement actions, indemnity claims, purchase price adjustment disputes, and project-level litigation.

©2005-2026 K&L Gates LLP. All Rights Reserved.

M&A TRANSACTIONS FACE HEIGHTENED DUE DILIGENCE CONCERNS

The pending appeal raises particular concerns for buyers and investors evaluating solar portfolios that utilized modules imported during the challenged period. Transaction parties should consider:

- Whether any project companies imported modules directly;
- Whether suppliers maintain potential exposure arising from entries during the moratorium period;
- Whether project-level representations regarding compliance with applicable trade laws remain accurate;
- Whether indemnity provisions adequately address unforeseen tariff liabilities; and
- Whether contingent liabilities should be reflected in valuation, escrows, holdbacks, or purchase price adjustments.

For acquisitions that closed before the CIT decision, parties may also examine whether existing indemnification regimes encompass subsequently arising customs liabilities tied to preclosing imports.

EPC CONTRACTORS MAY FACE RENEWED SCRUTINY

The litigation also highlights the importance of EPC contract provisions that allocate responsibility for changes in project cost arising from governmental action. Tariff-related risks may be addressed through:

- Change-in-law provisions;
- Force majeure clauses;
- Material cost escalation provisions;
- Owner-furnished equipment provisions;
- Customs compliance representations; and
- Supplier indemnification clauses.

Parties should not assume that a retroactive duty obligation automatically determines the ultimate economic allocation among project participants. Depending on the contractual language, parties may seek to shift liability through indemnity, reimbursement, change-order, or other risk-allocation provisions. The outcome will likely depend on project-specific contract language, procurement structures, the identity of the importer of record, and supply-chain arrangements.

FINANCING AND PORTFOLIO-LEVEL CONSIDERATIONS

Lenders and tax equity investors may likewise view the pending appeal through a risk-management lens. Where projects relied on economics established during the moratorium period, material retroactive duties could create unexpected obligations affecting:

- Project cash flow projections;
- Debt service coverage assumptions;

©2005-2026 K&L Gates LLP. All Rights Reserved.

- Reserve requirements;
- Sponsor support obligations; and
- Portfolio valuation metrics.

Although collection remains stayed pending entry of a final and conclusive judgment and the conclusion of applicable appeals, stakeholders may nevertheless evaluate whether portfolio companies possess sufficient liquidity to address an adverse outcome if the CIT decision is affirmed.

THE FEDERAL CIRCUIT APPEAL REMAINS THE PRIMARY BATTLEGROUND

The appeal remains pending before the US Court of Appeals for the Federal Circuit as *Auxin Solar Inc. v. United States*, No. 25-2120. Industry participants continue to challenge the CIT's decision after the federal government's February 2026 dismissal of its own appeal. Collection of duties remains suspended while appellate proceedings continue.

Accordingly, the immediate issue for most market participants is not whether duties are being collected today but whether current transactions, project agreements, and financing arrangements properly account for potential exposure if the remaining appellants are unsuccessful.

PRACTICAL TAKEAWAYS

The pending appeal provides temporary breathing room, but it does not eliminate the underlying risk. Project sponsors, developers, investors, lenders, suppliers, and EPC contractors should consider evaluating:

- Historical imports during the affected period;
- Contractual provisions allocating responsibility for tariff-related liabilities;
- Existing indemnification rights and obligations;
- M&A representations and warranties relating to customs compliance;
- Financing documents that could be affected by contingent liabilities; and
- Reserves, contingencies, and disclosure obligations associated with potential retroactive duties.

As the litigation proceeds, the most consequential disputes may concern not the trade ruling itself, but which market participant ultimately bears the cost of any duties that may be imposed.

©2005-2026 K&L Gates LLP. All Rights Reserved.

KEY CONTACTS



THOMAS G. ALLEN
PARTNER

WASHINGTON, DC
+1.202.778.9188
THOMAS.ALLEN@KLGATES.COM



NATHANIEL B. BOLIN
PARTNER

WASHINGTON, DC
+1.202.778.9181
NATE.BOLIN@KLGATES.COM



JOHN C. CROSSLEY
PRACTICE AREA LEADER - CORPORATE

KANSAS CITY
+1.816.627.3002
JOHN.CROSSLEY@KLGATES.COM



WILLIAM H. HOLMES
OF COUNSEL

PORTLAND
+1.503.226.5767
BILL.HOLMES@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.