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Solar Energy Caught in Crosshairs of New Legislation

The solar power industry seems to be caught in the crosshairs of competing legislative agendas. The U.S. Inflation Reduction Act (IRA) created incentives to increase solar capacity via tax credits, but the Uyghur Forced Labor Prevention Act (UFLPA) limits the effectiveness of those credits by restricting the importation of any goods that were mined, produced, or manufactured in the Xinjiang Uyghur Autonomous Region (XUAR) because of forced labor concerns.

More than 90% of the world's polysilicon-based ingots and wafers (key raw materials for manufacturing solar cells) are produced in China, and 80% of solar panels going into both residential and commercial projects in the U.S. come from abroad. While the U.S. federal government is pushing for more solar capacity, supply chain-based trade restrictions are serving as a roadblock to those goals.

Forced Labor Legislation

Trade restrictions around materials that may have been produced by forced labor have been in place since the late 1800s with restrictions on convict-produced goods. Section 307 of the Tariff Act of 1930 (19 USC § 1307) expanded the restriction to merchandise mined, produced, or manufactured by forced labor, which is subject to seizure and may be the subject of criminal investigation and prosecution. While not the only country under this microscope, imports from China have been a target of Section 307 enforcement since the 1990s, with renewed emphasis beginning in 2016. The Chinese government strongly opposes and categorically denies the XUAR forced labor accusations and has vowed to respond strongly to the enforcement of the UFLPA, which took effect in June 2022.

Eliminating forced labor in the solar supply chain has been a critical focus for the industry as led by the Solar Energy Industry Association, or SEIA. The solar industry has proactively implemented tracing protocols to keep forced labor out of the supply chain, and it is now seemingly the first industry to feel the effects of enforcement of the UFLPA.

According to a January 2023 Axios report, U.S. Custom and Border Protection officials have seized about $1.3 billion worth of imports since the UFLPA went into effect in June 2022, the majority of which were solar panels. The president of SEIA said in a statement that many of the IRA's intended benefits are being undermined by legislation on forced labor and other trade issues. A SEIA report co-authored with Wood Mackenzie states that the United States saw a 17% decrease in additional solar capacity from the same quarter in 2021. The report attributes the decrease to trade barriers and ongoing supply chain constraints.

Complicating Trade Issues

An additional trade issue that impacted the solar industry in 2022 was the U.S. Department of Commerce (Commerce) investigation into whether suppliers from four countries in Southeast Asia, some of which are using Chinese wafers, are circumventing antidumping and countervailing duty (AD/CVD) Orders A-570-979 and C-570-980 (the "Orders") on certain Chinese-origin crystalline silicon photovoltaic (CSPV) cells and goods like modules and panels containing such CSPV cells.

U.S. solar panel manufacturer Auxin Solar petitioned Commerce in February 2022, alleging that manufacturers in Cambodia, Malaysia, Thailand, and Vietnam are circumventing the Orders. Commerce initiated a country-wide circumvention investigation on April 1, 2022. At the same time, the U.S. has been enacting various trade measures to support increased renewable energy efforts, including by expanding and unburdening importation of solar panels and modules.

On Dec. 8, 2022, Commerce issued its preliminary determination that imports of certain CSPV cells exported from Cambodia, Malaysia, Thailand, or Vietnam using parts and components produced in China are circumventing the AD/CVD orders on solar cells and modules from China. That ruling applies to CSPV cells and certain modules, laminates, and panels consisting of CSPV cells that are produced in Cambodia, Malaysia, Thailand, or Vietnam and contain wafers produced in China.

Commerce has since clarified that exports from third-party countries such as India and Korea are not covered in the anti-circumvention inquiry or under the Orders even if they include Chinese parts. Commerce has now directed CBP to suspend liquidation and collect cash deposits on AD/CVD imports if they are not used for consumption in the U.S. before the Date of Termination (currently June 6, 2024) and on imports that entered after Nov. 15, 2022, and are used or installed in the U.S. by the Utilization Expiration Date (currently Dec. 3, 2024). The deadline for use in the U.S. is intended to prevent stockpiling of imported solar cells and modules.

To avoid an import being subject to suspension of liquidation and collection of cash deposits, both the importer and exporter must complete certain certifications (forms of which are included in the preliminary determination). Commerce's final determination is scheduled to be issued May 1, 2023.

What to Watch

While we expect to see oversight hearings and other forms of scrutiny in 2023 to explore the effectiveness of the enforcement of the UFLPA, the issue of forced labor prevention continues to have bipartisan support.

Solar purchasers and developers should conduct due diligence on their foreign supply chains, but they could face significant challenges with tracing the supply of polysilicon within China. Consequently, many foreign suppliers are trying to allocate or share risk with purchasers/developers through a set of internationally recognized trade rules, specific contractual import responsibilities, and the ability to adjust purchase order pricing based on trade developments and final determination.

Developers and lenders will see forced labor provisions in supply contracts as well as power purchase agreements trying to allocate risk among the parties. Lenders will see similar provisions in business transactions, including a push for representations that imported merchandise has not been procured by forced labor.

Commerce's final determination will have implications for solar panels imported from Cambodia, Malaysia, Thailand, or Vietnam, particularly after expiration of the moratorium, expected in June 2024. In the interim, importers and exporters must file the required certifications or be subject to the suspension of liquidation and collection of cash deposits on imports of subject merchandise.

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