

Navigating The Uncertain Landscape Of Solar Tariffs

By **Carl Valenstein, Casey Weaver and Katelyn Hilferty** (August 29, 2024)

The dynamic environment affecting solar cell and module manufacturers, exporters, and importers remains in flux as U.S. and non-U.S. manufacturers take their challenges to the courts.

In December 2023, Auxin Solar, a U.S. solar producer, and Concept Clean Energy, a U.S. designer of solar structures, filed a complaint in the U.S. Court of International Trade, appealing the final determinations published by the U.S. Department of Commerce in its inquiries into the circumvention of antidumping and countervailing duty orders on certain crystalline silicon photovoltaic cells and modules.

In October 2023, Trina Solar (Vietnam) Science & Technology Co. Ltd. contested the Commerce Department's underlying determination in the antidumping and countervailing duty circumvention proceeding, arguing that the Commerce Department improperly failed to consider the processing of silicon wafers into solar cells capable of electricity conversation, otherwise known as the formation of the positive-negative junction.

In May, the plaintiffs in Auxin Solar survived the government's motion to dismiss for lack of subject jurisdiction. In July, Auxin Solar submitted a motion for judgment on the agency record, requesting that the court vacate the moratorium and order reliquidation of modules with the applicable antidumping and countervailing duty imposed.

As these legal battles unfold, the implications for importers and the broader solar industry are becoming increasingly complex. Potential outcomes could impose significant additional duties on imported solar modules, disrupt sourcing strategies, and necessitate careful consideration of supply chain and certification practices.

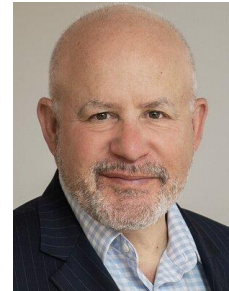
With litigation occurring on multiple fronts and potential policy shifts, understanding the allocation of risk, the responsibilities associated with importation, and the importance of having a comprehensive certification process are becoming ever more critical for industry stakeholders.

Circumvention Inquiries and Executive Action

Antidumping and countervailing duty orders have been in place against Chinese-origin crystalline silicon photovoltaic, or CSPV, cells and modules since 2012.

In the decade following the initial imposition of those duties, companies adjusted their manufacturing operations, relocating significant operations to Southeast Asia.

In February 2022, California-based Auxin Solar filed a petition alleging that Chinese solar



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manufacturers were circumventing antidumping and countervailing duty orders on certain CSPV cells and modules by producing portions of solar panels in facilities in Cambodia, Malaysia, Thailand and Vietnam.

These countries accounted for approximately 80% of the supply in the U.S. when the circumvention inquiry was initiated, and the market ground to a halt with uncertainty.

President Joe Biden issued Proclamation 10414 on June 6, 2022, declaring an emergency under Title 19 of the U.S. Code, Section 1318(a) with respect to U.S. electricity generation capacity, stating that immediate action was needed to ensure access to a sufficient supply of solar cells and modules to help meet electricity generation needs in the U.S.[1]

In September 2022, the Commerce Department implemented the proclamation in a final rule, which included a waiver for CSPV cells and modules completed in the inquiry countries if entered or withdrawn from warehouses for consumption in the U.S. prior to June 6, 2024.[2]

On Aug. 18, 2023, the Commerce Department issued a final determination in the circumvention inquiry, finding countrywide circumvention of the orders in all four of the inquiry countries — Cambodia, Malaysia, Thailand and Vietnam.

This final decision was a continuation of the Commerce Department's certification process, the broadest of which was the applicable-entry certification, which allowed entry free of antidumping and countervailing duties through June 6, 2024.

All producers and exporters — even those against which the Commerce Department found adverse facts available — could take advantage of the applicable-entry certification.

The Commerce Department also included a requirement that the cells and modules benefiting from the duty waiver be utilized in the U.S. within 180 days of the waiver's termination date — meaning on or before Dec. 3.

The Commerce Department is determining compliance with applicable-entry certifications by issuing questionnaires with targeted requests for information and documentation supporting utilization by the mandated date.[3]

The agency is also undertaking maneuvers that affect domestic production and imported merchandise, including the initiation of direct antidumping and countervailing duty investigations into CSPV cells and modules from the Southeast Asian countries.[4]

Auxin Solar's Court of International Trade Proceeding

In late 2023, Auxin Solar and Concept Clean Energy, or CCE, filed a lawsuit in the Court of International Trade asserting that the government did not collect all fees and credits due in light of the affirmative antidumping and countervailing duty findings on imported solar cells and modules from Southeast Asia.

The companies say they have standing because each is adversely affected by agency action — Auxin Solar cannot make cells and panels that compete with imported merchandise and CCE cannot make solar structures that satisfy the domestic content requirements if domestic importers are stymied.

Auxin Solar's Complaint

The complaint focuses on the fact that the Commerce Department did not direct U.S. Customs and Border Protection to suspend the liquidation of and require cash deposits on imported merchandise within the moratorium period under Proclamation 10414.

The parties assert in their complaint that this period "has precipitated a lawless CSPV cell and module marketplace characterized by a massive and sustained wave of cheap CSPV cells and modules from Malaysia, Thailand, Vietnam, and Cambodia that are made from components originating in the People's Republic of China."

The complaint argues that the Commerce Department is legally bound to direct CBP to suspend liquidation and require cash deposits of estimated duties for each import upon an affirmative determination of an antidumping and countervailing duty application.

Instead, it asserts, Commerce promulgated new regulations to comply with Proclamation 10414's moratorium period when it was neither "practically nor legally required" to do so.

Auxin Solar and CCE allege that by taking such action, Commerce and CBP have deprived them of their right to relief from subsidized and dumped imports.

Auxin Solar challenges three aspects of Commerce's final determinations in the circumvention inquiries that, if successful, could significantly expand affected merchandise.

First, Auxin Solar challenges the Commerce Department's definition of "inquiry merchandise" as unreasonable, unsupported and unlawful.

Second, Auxin Solar challenges the Commerce Department's certification scheme to exclude certain merchandise due to production using noncircumventing material.

Third, Auxin Solar argues that the Commerce Department's analysis of the statutory factors of minor or insignificant production were unsupported and in conflict with the agency's prior practice.

If these arguments are successful, Auxin Solar could challenge the definition of "inquiry merchandise," undermine the certification regime and challenge its application to certain individual respondents.

Defendants' Motion to Dismiss

In January, the U.S. filed its motion to dismiss the proceeding for lack of subject-matter jurisdiction, arguing that reliance on the Court of International Trade's residual jurisdiction statute was improper, and that the appeal should have been asserted under Section 1581(c), which allows challenges to the Commerce Department's final determinations in duty circumvention inquiries.[5]

The court denied the government's motion to dismiss, finding that Auxin Solar's appeal falls squarely within the court's residual jurisdiction, as it does not challenge the agency's final determination in the circumvention inquiry, but instead challenges its duty suspension rule implementing the presidential moratorium.

In addition, the court found, more broadly, that the appeal fell within its residual jurisdiction because it relates to the administration and enforcement of the Commerce Department's circumvention determinations, rather than the determinations themselves.

If the court determines that the Department of Commerce's instructions did not align with the final determination, the court may order reliquidation, which is reconsideration of the (1) final appraisement, (2) classification, and (3) duty rate on imported merchandise after entry.

This could, in turn, result in antidumping and countervailing duties being applied to all applicable entries that entered during the moratorium, regardless of the submission of applicable-entry certifications and utilization by the relevant date.

Joint Stipulation

The availability of reliquidation as a remedial power is further emphasized in the parties' joint stipulation that the court has the authority to "direct the United States to reliquidate entries 'for which liquidation was not suspended and cash deposits were not collected,'" pursuant to the moratorium.

While the joint stipulation has no immediate effect, it signals the understanding that duties may be owed on moratorium entries should Auxin Solar prevail.

Motion for Judgment on Agency Record

On July 22, Auxin Solar and CCE filed a motion for judgment on the agency record, arguing broadly that implementation of the moratorium violated Title 19 of the U.S. Code, Section 1318(a), which does not authorize duty-free importation of CSPV cells and modules because such products are not imported for use in emergency relief work.

The motion cites the U.S. Supreme Court's recent landmark decision in *Loper Bright v. Raimondo*, overturning the long-standing *Chevron* doctrine, for the proposition that Commerce's interpretation of the statute be given no deference.

The plaintiffs assert that Section 1318(a) authorizes duty-free treatment of five types of goods — food, clothing, and medical, surgical and other supplies — for use in emergency relief work, none of which would be "commonly understood as extending to imported merchandise intended to be used to produce electricity from the sun."

Even if the CSPV products could be considered these types of supplies, the plaintiffs argue, Commerce unlawfully afforded them duty-free treatment. The plaintiffs request that the court vacate the moratorium in its entirety and order reliquidation of any entries that entered duty-free pursuant to the moratorium.

Trina Solar Proceeding

Non-U.S. manufacturers are challenging the Commerce Department's determinations from an alternative perspective.

On June 26, Trina filed a brief contesting the Commerce Department's scope-ruling determination that expanded the antidumping and countervailing duty orders to include Vietnamese products made with Chinese-origin silicon wafers.

Trina claims that the determination ignores a critical step in the solar cell production process, the formation of the positive-negative junction, that occurs in Vietnam.

Trina asserts that "the formation of the [positive-negative] junction has long been considered the transformative step in the production process of a solar cell," which the solar industry has relied on for over a decade in "guiding significant investment and development decisions."

The brief asserts that ignorance of the formation of the positive-negative junction resulted in the Commerce Department's improper determination that the process of assembly or completion of the CSPV cells and modules in Vietnam was minor or insignificant. Taking into consideration the formation of the positive-negative junction in Commerce's broader evaluation of the production process "compels a negative finding of circumvention."

Trina also contests the agency's countrywide circumvention determination in Vietnam based on one noncooperative respondent, despite the cooperation of other respondents, including the other mandatory respondent. The consequence of this determination, Trina asserts, is that nonexamined, cooperative respondents like Trina are adversely affected by the agency's affirmative finding of circumvention.

The government's responsive briefing is currently scheduled to be filed by Oct. 21.

Looking Forward

While U.S. producers continue to increase domestic production and capacity, the industry is very much dependent on imported modules to meet the demand for U.S. installation. If the Auxin Solar court rules in the plaintiffs' favor, significant additional duties may be owed on entries for which importers expected duty-free treatment.

Notably, this would apply to entries for which only the applicable-entry certification was claimed. In its final determination, the Commerce Department allowed for other potential certifications that would permit duty-free entry, including the component-content certification.

Importers should ensure that all relevant certifications were prepared and submitted with their entries to avoid owing duties in the event that the duty-free entry pursuant to the moratorium is ruled to be unlawful.

The landscape for imported solar cells and modules, and costs that may be imposed on importers, remains in flux.

Between the ongoing litigation related to the anticircumvention proceeding and the additional direct antidumping and countervailing duty case against imported CSPV cells and modules from Southeast Asia, solar importers are facing multiple challenges.

The U.S. trade representative's proposed increase in Section 301 tariffs on Chinese-origin products in strategic sectors, including solar cells and modules, to 50% over the next three years adds to these challenges.

Additionally, the removal of the bifacial module exclusion under the Section 201 tariff program further complicates sourcing and valuation propositions for ongoing projects, as well as near-term and future planning

It is increasingly important that parties understand the allocation of risk and responsibility when it comes to importing merchandise, as well as the accompanying obligation to complete and submit relevant certifications, and to pay duties on imported goods.

Parties should engage in more detailed discussions regarding downstream supply chains for solar cells and modules to ensure that all applicable component certifications can be claimed, and to better understand the potential impacts of ongoing litigation, and antidumping and countervailing duty proceedings.

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[1] See Proclamation 10414, Declaration of Emergency and Authorization for Temporary Extensions of Time and Duty-Free Importation of Solar Cells and Modules From Southeast Asia.

[2] See Federal Register: Procedures Covering Suspension of Liquidation, Duties and Estimated Duties in Accord With Presidential Proclamation 10414.

[3] See Best Practices For Responding To CBP's Solar Questionnaire - Law360.

[4] See 5 Tips For Solar Cos. Navigating Big Shifts In U.S. Trade Policy - Law360.

[5] 28 U.S.C § 1581(i).