May 20, 2022

Case No. A-570-979, C-570-980
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Circumvention Inquiries
ITA/E&C/OVII

Public Document

VIA ACCESS

The Honorable Gina M. Raimondo
U.S. Department of Commerce
International Trade Administration
Enforcement & Compliance
APO/Dockets Unit, Room 18022
1401 Constitution Ave., N.W.
Washington, D.C. 20230

Re: Request to Rescind Circumvention Inquiry on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People’s Republic of China:

Dear Secretary Raimondo:

The American Council on Renewable Energy (ACORE) urges the U.S. Department of Commerce (“Commerce”) to immediately rescind the above-mentioned circumvention inquiry on solar panels, based on troubling new information published on May 18, 2022 which calls the petition on which Commerce relied to initiate this investigation into serious doubt. As detailed below you have clear legal authority to take this action and the facts warrant such immediate action.

New information demonstrates that Commerce should not have initiated this circumvention inquiry. The petition requesting this circumvention inquiry relies heavily on Auxin Solar’s characterization of research from BloombergNEF, a respected clean energy analysis firm. Commerce, in turn, relied heavily on these characterizations in determining to initiate the inquiry. Yet on May 18, 2022, an article was published in which BloombergNEF stated publicly that its research was mischaracterized in the petition, with two BloombergNEF solar analysts stating that:
We do not think Auxin’s use of our data accurately reflects our research and certainly does not reflect our house view. See Att. 1 to this letter. The article goes on to state that BloombergNEF’s research was “misused” in the Petition. Id.

Commerce has express legal authority to rescind this inquiry immediately. First, nothing in the statute requires Commerce to make a determination in a circumvention inquiry. Unlike antidumping investigations where the law explicitly requires Commerce to make preliminary and final determinations, no such language exists in Section 781 of the Tariff Act of 1930, as amended (“the Act”). To the contrary, the law is permissive and predicated upon discretion.

Second, Commerce’s regulations confirm that the agency may rescind a circumvention inquiry without making a determination. Section 351.226(f)(6) of Commerce’s regulations provides that:

If the Secretary determines it is appropriate to do so, the Secretary may rescind...a circumvention inquiry.

In promulgating this regulation, Commerce made clear that it would not limit this provision to enumerated circumstances, but instead maintains discretion to determine when it would be appropriate to invoke this provision and rescind an inquiry.

Third, the courts have confirmed that Commerce, like any administrative agency, possesses the inherent authority to protect the integrity of its administrative process. Where

2 See Sec. 733(b)(1) of the Act (19 USC § 1673b(b)(1)); Sec. 735(a) of the Act (19 USC § 1673d(a)).
4 See, e.g., Section 781(b) of the Act (19 U.S.C. § 1677j(b)) (Commerce “may include” imported merchandise if it finds circumvention); Lopez v. Diaz, 531 U.S. 230 (2001) (use of “may” connotes agency policymaking discretion); see also Rastelli v. Warden, Metro. Correctional Center, 782 F.2d 17, 23 (2d Cir. 1986) (“The use of a permissive verb—‘may review’ instead of ‘shall review’—suggests a discretionary rather than mandatory review process.”).
5 19 C.F.R. § 351.226(f)(6) (emphasis added).
6 Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws, Final Rule, 86 Fed. Reg. 52,300, 52,341 (Sept. 20, 2021) (stating that the enumerated instances in the regulation of situations warranting rescission are not limiting, but instead “that the list provided in the proposed regulations is not exhaustive, but merely contains examples of situations in which rescission might be warranted”).
7 Alberta Gas Chems., Ltd. v. Celanese Corp., 650 F.2d 9, 12 (2d Cir. 1981) (discussing “the inherent power of any administrative agency to protect the integrity of its own proceedings”); (continued...)
evidence is mischaracterized and misused to propel the agency into action, it is incumbent on the agency to stop such action as soon as the problem with the evidence comes to light. Thus, now that Commerce is aware that Auxin’s petition mischaracterized and misused BloombergNEF research, it is crucial that Commerce immediately rescind the circumvention inquiry to protect its administrative process. Otherwise, the agency is essentially inviting parties to misuse its process with impunity.

For the foregoing reasons, ACORE urges Commerce to immediately rescind the ongoing circumvention inquiry.

Sincerely,

[Signature]

Gregory Wetstone
President & CEO
American Council on Renewable Energy (ACORE)

Attachment.

_Tokyo Kikai Seisakusho, Ltd. v. United States_, 529 F.3d 1352, 1360–61 (Fed. Cir. 2008) (“The power to reconsider is inherent in the power to decide.” (internal citations omitted)); _cf. Home Prod. Int’l, Inc. v. United States_, 633 F.3d 1369, 1377 (Fed. Cir. 2011) (Commerce has inherent authority to reopen a case to consider new evidence that its proceedings were tainted, even after the close of an administrative review).
ATTACHMENT 1
BNEF says Auxin misinterpreted its research in calling for solar tariffs

Researchers from BloombergNEF say Auxin Solar used data inaccurately in petitioning the Commerce Department to consider new tariffs on imported solar panels.

18 May 2022

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18 May 2022

The tariff circumvention inquiry that has brought US solar installations to a shuddering halt is predicated at least in part on a misinterpretation of data, Canary Media has learned.

U.S. solar-panel manufacturer Auxin Solar relied heavily on research by BloombergNEF, a respected clean energy analysis firm, when it successfully petitioned the U.S. Commerce Department earlier this year to investigate potential circumvention of tariffs on solar cells and modules. Auxin cited BNEF solar-manufacturing research as it attempted to build a case that Chinese manufacturers are funneling components through factories in four Southeast Asian countries to get around U.S. solar import tariffs. It mentioned BNEF 38 times in its petition.

And the Commerce Department, in its March memo initiating the inquiry, repeatedly noted Auxin’s use of BNEF research to build the case for the inquiry. The memo mentions BNEF 19 times.

The problem: The authors of that research say Auxin misinterpreted it.

“We do not think Auxin’s use of our data accurately reflects our research and certainly does not reflect our house view,” BNEF solar analysts Jenny Chase and Pol Lezcano told Canary Media in an email Tuesday.

“It still costs a lot of upfront capex to build a new factory, regardless of where you site it,” Chase and Lezcano noted.

In other words, the value of raw ingredients and components produced in China does not change the fact that manufacturers imported...
significant capital to build factories in the four other Asian countries. Those factories take materials that are incapable of turning sunlight into electricity and transform them into finished products that are capable of doing so.

In order for the Commerce Department to determine that circumvention of tariffs is happening, it must find, among other things, that work taking place in a third-party country be only “minor or insignificant.” Auxin used BNEF’s research to try to make that point. But with BNEF stating that its research does not support that conclusion, Auxin’s case looks weaker. Still, Auxin did succeed in kicking off the inquiry, and now it’s up to the Commerce Department to decide if it finds the company’s theory persuasive.

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Read more of Canary Media’s coverage of the Auxin solar tariff case.