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CIRC – Anti-Circumvention Inquiry
(Malaysia, Thailand, and Vietnam)
ITA/E&C/AD/CVD Operations

PUBLIC DOCUMENT

VIA ELECTRONIC FILING

The Honorable Gina M. Raimondo
Secretary of Commerce
International Trade Administration
Enforcement & Compliance
APO/Dockets Unit, Room 18022
14th Street & Constitution Avenue, NW
Washington, D.C. 20230

Re: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Request to Reject Anti-Circumvention Ruling Requests and to Decline Initiation

Dear Secretary Raimondo:

On behalf of NextEra Energy Constructors, LLC and Florida Power & Light Co. (collectively, “NextEra Energy, Inc.” or “NextEra”),¹ we respectfully request that the U.S. Department of Commerce (“Commerce”) reject the anti-circumvention ruling requests by the American Solar Manufacturers Against Chinese Circumvention (“A-SMACC”) and decline to initiate anti-circumvention inquiries.

¹ NextEra Energy Constructors and Florida Power & Light Co. are subsidiaries of NextEra Energy, Inc.

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A-SMACC asks Commerce to expand dramatically the scope of the antidumping and countervailing duty (“AD/CVD”) orders on crystalline silicon photovoltaic (“CSPV”) cells, whether or not assembled into modules, from the People’s Republic of China (the “*Solar I Orders*”). The requests are not supported by Commerce’s previous determinations, are factually deficient in several key respects, and mischaracterize the solar supply chain. Accordingly, Commerce should exercise its discretion under the statute and decline to initiate the anti-circumvention inquiries with respect to CSPV cells and modules from China.

I. Introduction and Summary

While A-SMACC continues to insist on proprietary treatment for the identities of its members (and therefore, the precise nature of these entities’ operations is not publicly known), it is important to recognize that *there is no pure domestic production of solar cells and modules*. As A-SMACC itself concedes, and as discussed in further detail below, at least 95 percent of global wafer supply comes from China. Thus, all U.S. “domestic manufacturers” of CSPV cells or modules must rely on Chinese wafers to produce solar cells and modules in the United States—the same activities that A-SMACC alleges result in “circumvention” of the *Solar I Orders*.

The hypocrisy of A-SMACC’s position is not only repugnant; it is also extremely harmful to the U.S. solar industry. Even if one were to ignore that U.S. “domestic manufacturing” also relies on Chinese solar wafers, the domestic industry’s production capabilities account for only about 25 percent of total current U.S. demand, and a significantly

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lower percentage of total U.S. demand required to meet the Biden Administration's recently announced Blueprint for Solar Energy goals. This means that imposing substantial AD/CVD duties on imports from Southeast Asia would only drive up the cost of solar projects in the United States dramatically, threatening an industry that is already heavily reliant on stable supplies from Malaysia, Vietnam, and Thailand, and must depend on imports even more so in the future in order to meet the Biden Administration's ambitious goals for expanded solar deployment in the United States. Due to the retroactive nature of any duty imposed, even an investigation could have a significant chilling effect on deliveries of solar modules resulting from suppliers' inability to predict the ultimate cost of delivered modules.

What is even more concerning is that A-SMACC seeks to contort Commerce's legitimate anti-circumvention authority, using it as a way to avoid the scrutiny of fully-fledged investigation and to *reverse* Commerce's prior rulings that the origin of the polysilicon wafer does not impart the core characteristics of a solar cell or module, and that it is precisely the type of processing that occurs in countries like Malaysia, Vietnam, and Thailand that determines the origin of a CSPV product. A-SMACC seeks to create an alternative set of facts that are contrary to Commerce's prior decisions by distorting the data to make cell and module production facility investments in these countries appear less valuable than they are in reality. As demonstrated below, a proper comparison of the data submitted by A-SMACC shows that investments in Malaysia, Vietnam, and Thailand actually *exceed* investments in China. Surely, Commerce's

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anti-circumvention authority was not intended to allow petitioning companies to circumvent proper application and enforcement of U.S. AD and CVD laws.

In short, initiation of the requested anti-circumvention investigations would be highly inappropriate in light of the legal deficiencies as well as the inevitable economic and social harm that would result from such actions. Accordingly, we respectfully request that Commerce decline to initiate anti-circumvention investigations on CSPV products imported from Malaysia, Vietnam, and Thailand.

II. Commerce Should Exercise Its Discretion to Not Initiate Anti-Circumvention Inquiries

Under the statute, Commerce retains the discretion to decline to expand the scope of an order where the Secretary does not consider expansion of the scope to be “appropriate.” *See* 19 U.S.C. § 1677j(b)(1) (providing that Commerce “may include such imported merchandise within the scope of the order” and including a prerequisite that Commerce “determine{} that action is *appropriate* under {the anti-circumvention provision} to prevent evasion”) (emphases added).² Action is *not* appropriate in this case. In addition to the factors discussed elsewhere in this submission, two related considerations should lead Commerce to decline to initiate anti-circumvention inquiries under its discretionary authority.³

² Section 1677j(b)(1)(E) requires Commerce to determine that action is “*appropriate*” before including a product within the scope of an order. This provision is unique to cases involving completion or assembly of products in third countries.

³ *See, e.g.*, Commerce Memorandum, “Certain Hardwood Plywood Products from the People’s Republic of China: Minor Alterations Anti-Circumvention Inquiry Request” (April 2, 2018) (A-570-051, C-570-052) (declining to initiate an anti-circumvention inquiry when the issue had already been decided during the original investigation) (**Attachment 1**); Commerce Memorandum, “Antidumping and Countervailing Duty Orders on Certain Passenger

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First, action is not appropriate because the U.S. domestic industry itself relies—and must rely—on solar cells produced with Chinese wafers. A-SMACC alleges that the *Solar I* orders are being circumvented because the production of the polysilicon wafers that occurs in China supposedly is the key step in the production of CSPV cells and modules, while the steps of actually converting those wafers into cells and modules in Malaysia, Thailand, and Vietnam constitute minor assembly. Yet, as A-SMACC itself notes, 95 percent of the solar wafer capacity is located in China and zero percent is in the United States.⁴ Given that essentially all wafers are produced in China, and none are produced in the United States, any CSPV cells or modules produced in the United States—or really anywhere else in the world—are likely using Chinese wafers.

Thus, the domestic industry and/or their cell suppliers, regardless of where those suppliers are located, are engaging in the same type of processing of Chinese polysilicon wafers that A-SMACC alleges is circumventing the *Solar I* orders. Moreover, U.S. CSPV producers, or their affiliates, are also sourcing cells and modules from the three countries specifically listed in the circumvention ruling requests. For example, Hanwha Q CELLS USA, which claims to have

Vehicle and Light Truck Tires from the People’s Republic of China: Declining to Initiate an Anti-Circumvention Inquiry” (A-570-016, C-570-017) (June 13, 2016) (same) (**Attachment 2**); Commerce Memorandum, “Certain Uncoated Paper from Portugal: Declining to Initiate on the Anti-Circumvention Inquiry” (A-471-807) (Oct. 11, 2019) (declining to initiate when petitioners had not provided “sufficient evidence to support their claim”) (**Attachment 3**).

⁴ Request for Circumvention Ruling: Malaysia at 4; Request for Circumvention Ruling: Thailand at 4; Request for Circumvention Ruling: Vietnam at 5.

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the largest solar panel manufacturing factory in the Western Hemisphere,⁵ has affiliates with production operations in its home country Korea, as well as China and Malaysia.⁶ In addition, LG Electronics produces photovoltaic cells in Korea with production capacity between 1.8 GW to 3 GW.⁷ To the extent that Hanwha and LG import cells and modules from Korea or Malaysia that are produced from Chinese wafers, these domestic module producers would be “circumventing” the orders just as much as the companies named in the circumvention ruling requests.

There is no legitimate basis for determining that only the cells and modules made in Malaysia, Thailand, and Vietnam by the companies named in the circumvention ruling requests are circumventing the *Solar I* orders under A-SMACC’s theory of the case. A-SMACC’s argument that the production of solar cells and modules in third countries are circumventing the *Solar I* orders because they use Chinese polysilicon wafers would open the door to a circumvention ruling against many, if not all, U.S. CSPV producers, their affiliates, and/or their suppliers. The disingenuous nature of A-SMACC’s circumvention allegations is an additional reason why initiation of an anti-circumvention inquiry is not appropriate.

⁵ Hanwha, “Grand Opening of Hanwha Q CELLS in Georgia Spotlights Western Hemisphere’s Largest Solar Panel Manufacturing Facility, Responsible for 650 Jobs and a Daily Output of 12,000 Solar Modules” (Oct. 2, 2019) (**Attachment 4**).

⁶ Q CELLS, “Our Location” (**Attachment 5**).

⁷ LG Electronics Press Release, “LG Electronics Invests Additional USD 435 Million in Solar Cell Production” (Jan. 20, 2016) (**Attachment 6**).

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Second, the value and volume of trade at issue is so substantial that it would not be appropriate to apply AD/CVD duties to these imports through an anti-circumvention proceeding. According to the import data submitted by A-SMACC, in 2020, imports from Malaysia, Thailand, and Vietnam accounted for \$5.4 billion, or more than 70 percent of all CSPV imports. Even though some imports from Malaysia, Thailand, and Vietnam are not covered by A-SMACC's circumvention ruling requests, the value of trade at issue is still several billion dollars. That would place this case as among the largest cases in terms of value of trade that Commerce has ever conducted.

Regarding the volume of trade, over 17 gigawatts ("GW") of CSPV modules were imported from Malaysia, Thailand, and Vietnam, accounting for approximately 75 percent of the 22.8 GW of imports of CSPV modules from all sources during 2020.⁸ The solar industry installed 19.2 GW of solar capacity in that year alone.⁹ By contrast, the entire U.S. CSPV manufacturing industry has a total production capacity of 5.5 GW.¹⁰ Moreover, only a couple of U.S. CSPV producers are even capable of supplying utility-scale projects, because of the volume of modules that those projects require from their suppliers during a short period of time.¹¹ The utility-scale segment, however, is responsible for a large majority of solar deployment in the

⁸ ITC Dataweb (**Attachment 7**).

⁹ Solar Energy Industries Association & Wood Mackenzie Power & Renewables, "Solar Market Insight Report: 2020 Year in Review" (Mar. 16, 2021) (**Attachment 8**).

¹⁰ David Feldman & Robert Margolis, National Renewable Energy Laboratory, "H2 2020 Solar Industry Update" at 43 (April 6, 2021) (**Attachment 9**). Actual U.S. production of CSPV modules is lower.

¹¹ *Crystalline Silicon Photovoltaic Cells (Whether or not Partially or Fully Assembled into Other Products)*, Inv. No. TA-201-75 (Monitoring), USITC Pub. 5021 at II-12 n.26 (Feb. 2020).

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United States and plays a critical role in reducing carbon emissions.¹² Thus, the broader U.S. solar industry, and the utility-scale segment in particular, depend heavily on imports from Malaysia, Thailand, and Vietnam.

Given that imports from these three countries represent about three quarters of all imports, it would not be surprising if the circumvention ruling requests cover at least half of all CSPV imports into the United States. Applying AD/CVD duties from the China *Solar I* orders—which are over 250 percent for the combined China-wide AD rate and the all others CVD rate¹³—to that amount of CSPV cells and modules would have significant adverse economic and environmental effects. The broader solar industry employs roughly 230,000 U.S. workers;¹⁴ the domestic industry that produces CSPV modules collectively employs perhaps a couple thousand. Many of the 230,000 U.S. solar jobs would be put at risk if a significant percentage of the CSPV module supply were suddenly subjected to steep tariffs.

Finally, A-SMACC’s circumvention ruling requests seek to avoid an investigation into whether the CSPV cells and modules produced in Malaysia, Thailand, and Vietnam are actually subsidized or sold to the United States at less than fair value. The ruling requests also ask

¹² See David Feldman & Robert Margolis, National Renewable Energy Laboratory, “H2 2020 Solar Industry Update” at 2 (April 6, 2021) (**Attachment 9**); Solar Energy Industries Association & Wood Mackenzie Power & Renewables, “Solar Market Insight Report: 2020 Year in Review” (Mar. 16, 2021) (**Attachment 8**).

¹³ *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2012-2013*, 80 Fed. Reg. 40,998, 41,002 (July 14, 2015) (establishing the China-wide AD rate at 238.95 percent); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 77 Fed. Reg. 63,788, 63,789 (Oct. 17, 2012) (establishing the CVD all others rate at 15.24 percent).

¹⁴ National Solar Jobs Census 2020 (May 2021) (**Attachment 10**).

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Commerce to extend the China *Solar I* orders without a formal investigation by the International Trade Commission to determine whether those imports have caused material injury, or threaten material injury, to the domestic industry. Expansion of the *Solar I* duties in this manner is not appropriate given the potential impact on billions of dollars in trade, collateral damage to hundreds of thousands of jobs, and lost opportunity to fight against climate change. Commerce should not extend the duties on China to Malaysia, Thailand, and Vietnam on the basis of anti-circumvention requests made by a handful of companies seeking to obtain a quick competitive advantage for themselves, particularly when the domestic CSPV manufacturing industry has waited years to bring their allegations of circumvention and rely on Chinese wafers themselves.

III. Initiation Is Not Warranted Based on Well-Established Facts and Precedent from Prior CSPV Proceedings

A-SMACC in its requests asks Commerce to ignore its own previous determinations regarding the scope of the *Solar I* Orders, as well as fundamental facts with respect to the CSPV supply chain. Ultimately, A-SMACC asks Commerce to expand the scope of the *Solar I* Orders by ignoring its own findings regarding the distinction between the production of upstream inputs (*i.e.*, ingots and wafers) and the manufacturing of downstream finished products (*i.e.*, cell and modules).

A. Facts and Findings from Prior Proceedings Demonstrate that Ingots and Wafers Alone Do Not Bring a Product within the *Solar I* Orders

Polysilicon ingots and wafers are not the same as CSPV cells, which are at the base product at the heart of these proceedings. Simply put, ingots and wafers are pure silicon. Ingots are merely heat-treated polysilicon crystals, and wafers are merely squared off slices of ingots.

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In *Solar II*,¹⁵ SolarWorld (the original petitioner in both *Solar I* and *Solar II*, which was represented by the same law firm that represents A-SMACC in this case) presented substantial evidence that CSPV cells are significantly advanced beyond their upstream inputs. SolarWorld explained that this is fundamentally because CSPV cells are able to produce electricity from sunlight, whereas ingots and wafers cannot. SolarWorld submitted a production brochure to the Commission that explained as follows:

*{A} wafer is no more capable of producing electricity than a sliver of river-rock. The wafer is the main building block of a PV cell, but so far its only notable characteristics are its crystal structure and positive potential orientation. All of that changes in the third, multistep, cell-production phase of PV manufacturing.*¹⁶

According to that same production brochure, it is not until the final “{p}rinting” step that “{a} functioning cell is born—only sunshine is {then} needed to produce electricity.”

The production processes for CSPV solar cells and modules and for ingots and wafers are also significantly different. As the Commission found in the *Solar I* investigations (quoting the petitioner):

*The monocrystalline and polycrystalline wafers, which are 180 to 200 micrometers thick, are next processed into cells. This step of the process is the “most capital intensive part of the manufacturing process.” It is “a highly automated, capital intensive, and technologically sophisticated process, requiring skilled technicians and employees with advanced degrees.”*¹⁷

¹⁵ The scope of the *Solar II* orders covers modules, laminates, and/or panels consisting of CSPV cells, whether or not partially or fully assembled in China into other products, including building integrated materials.

¹⁶ SolarWorld Production Brochure at 12 (emphasis added) (**Attachment 11**).

¹⁷ *Crystalline Silicon Photovoltaic Cells and Modules From China*, Inv. Nos. 701-TA-481 and 731-TA-1190 (Final), USITC Pub. No. 4360 at I-18 (Nov. 2012) (quoting Conference Transcript at 42 (Brinsler) and Petition at 20).

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A critical step in that cell production process is the addition of the positive/negative junction (or “p/n” junction). A-SMACC describes this process as follows:

CSPV cells use crystalline silicon to convert sunlight to electricity, and have a positive layer, a negative layer, and a positive-negative junction (“p/n junction”). Electricity is generated when sunlight strikes the CSPV cell, knocking electrons loose that flow onto thin metal “fingers” that run across the CSPV cell and conduct electricity to the busbars.¹⁸

The p/n junction is the component of a solar cell that allows electrons to flow from the negative layer to the positive layer, creating a flow of electricity.¹⁹ Commerce explained in a *Solar I* scope clarification memorandum: “A dopant, which is a trace impurity element diffused into a thin layer of the wafers’ surface to impart an opposite electrical orientation to the cell surface, creates the positive/negative junction that is needed for the conversion of sunlight into electricity, which is the purpose of solar cells.”²⁰

In *Solar I*, Commerce also addressed the legal significance of the p/n junction. That is, Commerce explained that imports of CSPV cells and modules from third countries are *not* subject to the China Orders when they incorporate wafers from China without p/n junctions. In

¹⁸ Request for Circumvention Ruling: Malaysia at 9; Request for Circumvention Ruling: Thailand at 9; Request for Circumvention Ruling: Thailand at 10.

¹⁹ American Chemical Society, “How a Solar Cell Works” (“When sunlight strikes a solar cell, electrons in the silicon are ejected, which results in the formation of “holes”—the vacancies left behind by the escaping electrons. If this happens in the electric field, the field will move electrons to the n-type layer and holes to the p-type layer. If you connect the n-type and p-type layers with a metallic wire, the electrons will travel from the n-type layer to the p-type layer by crossing the depletion zone and then go through the external wire back of the n-type layer, creating a flow of electricity.”) (**Attachment 12**).

²⁰ Commerce Memorandum, “Scope Clarification: Antidumping and Countervailing Duty Investigations of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China” (A-570-979, C-570-980) (Mar. 19, 2012) at 6 (**Attachment 13**).

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fact, in its recent SunSpark Scope Ruling, Commerce found that CSPV cells and modules from Vietnam were not subject to the Orders. The wafers had already been partially doped in China, but the p/n junction was not created until another process (diffusion) took place in Vietnam.²¹

Commerce observed:

In sum, the raw material purchased from China by Irex, partially processed solar wafers, does not fall within this scope because there is not yet a p/n junction. Since there is not yet a p/n junction, the raw material is not a photovoltaic cell from China within the meaning of the scope of the Orders.²²

In contrast, in the ET Solar Scope Ruling, Commerce found that CSPV cells and modules produced in Vietnam with wafers from China were within the scope of the *Solar I* Orders because the wafers already had a p/n junction when exported from China.²³ Commerce observed that “the process of imbuing silicon wafers with a p/n junction results in the creation of solar cells—albeit unfished solar cells—capable of converting sunlight into electricity via the photovoltaic effect.”²⁴ “{T}he p/n junction is responsible for creating the conditions that induce the photovoltaic effect that ultimately generates electricity, and that the metallic grids and contacts are only responsible for channeling this electricity out of the cell.”²⁵

²¹ Commerce Memorandum, “Antidumping and Countervailing Duty Orders on Crystalline Silicon Photovoltaic Cells from the People’s Republic of China: SunSpark Technology Inc. Scope Ruling” (A-570-979, C-570-980) (Oct. 23, 2020) at 6 (**Attachment 14**).

²² *Id.*

²³ Commerce Memorandum, “Final Scope Ruling on the Antidumping and Countervailing Duty Orders on Crystalline Silicon Photovoltaic Cells from the People’s Republic of China: ET Solar Inc.” (A-570-979, C-570-980) (June 15, 2021) (**Attachment 15**).

²⁴ *Id.* at 7.

²⁵ *Id.* at 9. The Solaria Scope Ruling reached the same conclusion as ET Solar. See Commerce Memorandum, “Antidumping and Countervailing Duty Orders on Crystalline Silicon Photovoltaic Cells from the People’s Republic

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B. Commerce Has Already Determined that Cell Production Is Not Minor Processing

A-SMACC attempts to subvert these well-known facts. A-SMACC claims that “Chinese producers have developed a circumvention scheme that involves moving the end of the production process for CSPV products, which entails only minor processing, to a third country for the express purpose of avoiding AD/CVD duties.”²⁶ Contrary to the lengthy records developed in *Solar I* and *Solar II*, A-SMACC asserts that “to the extent that Chinese wafers that do not yet contain a p/n junction and/or other Chinese inputs are being used in the production processes {of CSPV cells and modules in Malaysia, Thailand, and Vietnam}, such merchandise is circumventing the Orders.”²⁷

Such arguments are disingenuous to say the least. The manufacture of CSPV cell is not possible without an ingot or wafer, but an ingot or wafer is unable to produce electricity without substantially more processing to convert them into cells. Indeed, in *Solar I*, Commerce specifically declined to adopt the petitioner’s proposed scope language—which would have included cells manufactured in third countries from Chinese wafers or ingots in the scope of the *Solar I* Orders covering Chinese cells—over the petitioner’s claim that the resulting scope could

of China, and Certain Crystalline Silicon Photovoltaic Products from Taiwan: The Solaria Corporation Scope Ruling” (A-570-979, C-570-980) (April 8, 2021) at 10-11 (“{O}nce a wafer is doped and an opposite electrical orientation is imparted on the surface, it results in the creation of a p/n junction (**Attachment 16**). (“When sunlight strikes the cell, the positive and negative charge carriers are released, causing electrical current to flow. It is at this point that the cell is capable of generating electricity from sunlight.”).

²⁶ Request for Circumvention Ruling: Malaysia at 3; Request for Circumvention Ruling: Thailand at 3; Request for Circumvention Ruling: Vietnam at 4.

²⁷ Request for Circumvention Ruling: Malaysia at 15 n.55; Request for Circumvention Ruling: Thailand at 14 n.56; Request for Circumvention Ruling: Vietnam at 15 n.60.

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be easily circumvented.²⁸ Commerce noted that its determination that country of cell manufacture determines country of origin already takes into account concerns that “moving minor processing outside of the country covered by the order” could cause circumvention.²⁹ Thus, by adopting a scope that declined to include cells manufactured in third countries from Chinese wafers or ingots—and instead including only modules produced in third countries that incorporate Chinese cells—Commerce implicitly found that cell production is not “minor processing.” Given that Commerce has already found that cell production from wafer or ingot is not “minor processing,” Commerce cannot possibly find that production of solar cells in third countries from Chinese wafers is “minor or insignificant” assembly or completion, as required by 19 U.S.C. § 1677j(b)(1)(D) to find circumvention of the *Solar I* Orders. In fact, Commerce has declined to initiate anti-circumvention investigations in cases where the issue had been decided in prior segments of the proceeding or the petitioner failed to provide adequate factual support for its circumvention allegations.³⁰

²⁸ Commerce Memorandum, “Scope Clarification: Antidumping and Countervailing Duty Investigations of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China” (A-570-979, C-570-980) (Mar. 19, 2012) at 9 (**Attachment 13**).

²⁹ *Id.* (“{W}hether explicitly stated or not, the factors we consider for making country-of-origin determinations inherently reflect the agency’s concern that the relief afforded by AD/CVD orders not be eviscerated by moving minor processing outside of the country covered by the order. Thus, circumvention concerns are reflected in the country-of-origin determination.”).

³⁰ *See, e.g.*, Commerce Memorandum, “Certain Hardwood Plywood Products from the People’s Republic of China: Minor Alterations Anti-Circumvention Inquiry Request” (April 2, 2020) (A-570-051, C-570-052) (declining to initiate an anti-circumvention inquiry when the issue had already been decided during the original investigation) (**Attachment 1**); Commerce Memorandum, “Antidumping and Countervailing Duty Orders on Certain Passenger Vehicle and Light Truck Tires from the People’s Republic of China: Declining to Initiate an Anti-Circumvention Inquiry” (A-570-016, C-570-017) (June 13, 2016) (same) (**Attachment 2**); Commerce Memorandum, “Certain Uncoated Paper from Portugal: Declining to Initiate on the Anti-Circumvention Inquiry”

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In sum, the ruling requests are nothing more than an end-run around Commerce's longstanding administration of the *Solar I* Orders. The requests are factually and legally deficient. A-SMACC asks Commerce to initiate anti-circumvention inquiries where the agency may not properly do so. Accordingly, Commerce should exercise its authority to decline the initiation of these anti-circumvention inquiries.

IV. Commerce Should Decline to Initiate Because A-SMACC's Ruling Requests Are Factually Deficient – Pertinent Facts Do Not Support a Finding of Circumvention

The ruling requests also fail to allege sufficient facts warranting initiation, resting instead on unfounded allegations of circumvention by certain foreign producers in Malaysia, Thailand, and Vietnam that export CSPV cells and modules to the United States, using inputs from China, specifically ingots and wafers. Such claims are meritless and do not give rise to initiation of anti-circumvention inquiries, based on facts presented in A-SMACC's own ruling requests. The facts contained in A-SMACC's own submission show that the requirements for finding circumvention are not, and cannot be met.

In particular, A-SMACC attempts to justify the ruling requests by comparing the level of investment in input production in China (for polysilicon, wafers, and ingots) to the level of investment in cell and module production in Malaysia, Thailand, and Vietnam. According to A-SMACC, "the Chinese companies have made a minimal investment in the third country"³¹ and

(A-471-807) (Oct. 11, 2019) (declining to initiate when petitioners had not provided "sufficient evidence to support their claim") (**Attachment 3**).

³¹ Request for Circumvention Ruling: Malaysia at 39; Request for Circumvention Ruling: Thailand at 40; Request for Circumvention Ruling: Vietnam at 50.

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“{t}he actual investments in Malaysia by the companies subject to this circumvention petition confirm the much smaller investment levels for cell and/or module production facilities compared to the investment required for integrated production facilities in China that engage in the upstream production processes.”³² The same claim is made with respect to Thailand and Vietnam.³³ This claim is baseless and suffers from several flaws.

First, the claim is false and disingenuous because it compares the value of investments without regard to production scale—*i.e.*, capacity. Chinese polysilicon, ingot, and wafer plants are very large because they serve substantial home market demand in China along with market demand throughout the world (A-SMACC itself acknowledges that the entire world (including A-SMACC members) relies on China for wafers).³⁴ Taking scale into account, A-SMACC’s own facts demonstrate that cell and module investments in Malaysia, Thailand, and Vietnam are significantly larger on a per-megawatt basis than upstream investment in China. As shown below, based on the actual investments cited by A-SMACC in the ruling requests, the average investment in Malaysia and Thailand *far exceeds* the average upstream investment in China; and Vietnam is comparable. The average investment in input production in China was **\$40,171/MW**. By comparison, the average investment in cell and module production was **\$125,672/MW** in Malaysia, **\$135,706/MW** in Thailand, and **\$36,020/MW** in Vietnam.

³² Request for Circumvention Ruling: Malaysia at 38.

³³ Request for Circumvention Ruling: Thailand at 38; Request for Circumvention Ruling: Vietnam at 47,

³⁴ Request for Circumvention Ruling: Malaysia at 4; Request for Circumvention Ruling: Thailand at 4; Request for Circumvention Ruling: Vietnam at 5.

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Country of Investment	Company	Product	Investment (\$)	Production Quantity (tons) ³⁵	Production Quantity (MW)	Average Investment (\$/MW)
China	Daqo New Energy	Polysilicon	\$502,000,000	35,000	11,667	\$43,029
China	Tongwei Group	Polysilicon	\$563,000,000	40,000	13,333	\$42,225
China	Xinte Energy Co Ltd	Polysilicon	\$1,360,000,000	100,000	33,333	\$40,800
China	GCL-Poly	Polysilicon	\$826,000,000	60,000	20,000	\$41,300
China	Tongwei	Polysilicon	\$2,100,000,000	200,000	66,667	\$31,500
China	LONGi Group	Ingot/Wafer	\$643,000,000	--	15,000	\$42,867
China	JA Solar	Ingot/Wafer	\$857,000,000	--	20,000	\$42,850
China	GCL-Poly	Ingot	\$1,430,000,000	--	20,000	\$71,500
China	Canadian Solar	Wafer	\$155,000,000	--	10,000	\$15,500
Average Investment for Input Production in China³⁶						\$40,171

Country of Investment	Company	Product	Investment (\$)	Production Quantity (tons) ³⁷	Production Quantity (MW)	Average Investment (\$/MW)
Malaysia	Jinko Solar	Cell/Module	\$100,000,000	--	950	\$105,263
Malaysia	LONGi	Cell/Module	\$125,500,000	--	1,000	\$125,500
Malaysia	JA Solar	Cell	\$70,000,000	--	400	\$175,000
Average Investment for Cell and Module Production in Malaysia³⁸						\$125,672

³⁵ Production quantities reported in tons were converted to megawatts using A-SMACC's calculation: "This assumes 30,000 tons of polysilicon required for 10 GW of wafers using the assumptions as detailed in the NREL PV Manufacturing Report. This equates to a 60,000 ton polysilicon facility meeting the supply requirements 20 GW ingot/wafer facility." Or 30,000 tons/10 GW = 3 tons/MW. See Request for Circumvention Ruling: Malaysia at 33 n.135; Request for Circumvention Ruling: Thailand at 33 n.136; Request for Circumvention Ruling: Vietnam at 42 n.188.

³⁶ Request for Circumvention Ruling: Malaysia at 34-36; Request for Circumvention Ruling: Thailand at 34-37; Request for Circumvention Ruling: Vietnam at 43-45. Projects identified by A-SMACC that did not include both the value of the investment and production volume are not included in these tables.

³⁷ Production quantities reported in tons were converted to megawatts using A-SMACC's calculation. See Request for Circumvention Ruling: Malaysia at 33 n.135; Request for Circumvention Ruling: Thailand at 33 n.136; Request for Circumvention Ruling: Vietnam at 42 n.188.

³⁸ Request for Circumvention Ruling: Malaysia at 35-36.

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Country of Investment	Company	Product	Investment (\$)	Production Quantity (tons) ³⁷	Production Quantity (MW)	Average Investment (\$/MW)
Thailand	Trina Solar	Cell/Module	\$160,000,000	--	1,200	\$133,333
Thailand	Talesun	Cell/Module	\$70,700,000	--	500	\$141,400
Average Investment for Cell and Module Production in Thailand³⁹						\$135,706
Vietnam	Trina Solar	Cell/Module	\$100,000,000	--	800	\$125,000
Vietnam	LONGi	Cell/Module	\$253,000,000	--	9,000	\$28,111
Average Investment for Cell and Module Production in Vietnam⁴⁰						\$36,020

Second, A-SMACC’s own estimates of investments do not hold up—some figures are inflated while others are understated. A-SMACC asserts that “{f} or an integrated supplier covering polysilicon to ingot/wafer, the required capital investment would likely exceed \$1.7 billion for a 20 GW supply of polysilicon, ingot, and wafers.”⁴¹ That equates to \$85,000/MW. Yet, as shown above, the average investment from A-SMACC’s own examples of actual investments in input production in China is only \$41,171/MW. Also, according to BloombergNEF (cited by A-SMACC): “{T}he cost of building a new factory in China for polysilicon manufacturing is estimated to be about \$15 million per thousand tons, or \$39 million/GW.”⁴² These data yield \$39,000/MW, which is consistent with the average investment of the projects listed above.

³⁹ Request for Circumvention Ruling: Thailand at 38-39.

⁴⁰ Request for Circumvention Ruling: Vietnam at 47-49. A-SMACC listed LONGi’s \$253 million acquisition of Vina Solar’s cell and module production facility in Vietnam, but the total investment may be more because A-SMACC did not include the amount of Vina Solar’s initial investment. *Id.* at 48-49.

⁴¹ Request for Circumvention Ruling: Malaysia at 33; Request for Circumvention Ruling: Thailand at 33; Request for Circumvention Ruling: Vietnam at 42.

⁴² Request for Circumvention Ruling: Malaysia at 37; Request for Circumvention Ruling: Thailand at 37; Request for Circumvention Ruling: Vietnam at 46.

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Then, A-SMACC claims the following for all three targeted countries:

By comparison, the level of investment required in Malaysia to simply finalize the CSPV cells and assemble the cells with other Chinese-origin components into modules is much lower. For instance, the capital costs are in the range of \$40 million to \$50 million per GW of production capacity for cell manufacturing facilities, and recent announcements of new module production facilities indicate capital costs in the range of \$20 million to \$30 million for module-only factories, making this the least capital-intensive step in the supply chain.⁴³

A-SMACC's estimate equates to \$40,000-\$50,000/MW for investment in cell production and \$20,000-\$30,000/MW for investment in module production. These estimates are nowhere close to the actual investments in Malaysia, Thailand, and Vietnam acknowledged by A-SMACC. Such unsupported, self-serving estimates should be disregarded entirely.

Similarly, A-SMACC ignores scale and fails to explain how the comparison of physical size of production facilities in China and the other countries is a meaningful indication of the relative level of processing. For example, A-SMACC compares the area of Jinko's cell and module production facilities in Malaysia (8,191 square meters and 12,679 square meters, respectively) to the area of ingot and wafer plants in China (68,397 square meters and 165,337 square meters).⁴⁴ Yet, as A-SMACC notes, China has 95 percent of the world's wafer production

⁴³ Request for Circumvention Ruling: Malaysia at 37; Request for Circumvention Ruling: Thailand at 38; Request for Circumvention Ruling: Vietnam at 46-47.

⁴⁴ Request for Circumvention Ruling: Malaysia at 45; *see also id.* at 46 (comparing JA Solar's 19,357 square meter facility in Malaysia to 38,157-559,973 square meter facilities in China); Request for Circumvention Ruling: Thailand at 45-46 (comparing Canadian Solar's 18,100-19,139 square meter cell production facilities and 15,460-29,723 module production facilities in Thailand to a 75,527 square meter module, ingot, and wafer facility in China). A-SMACC's comparison of asset values of facilities in China and Vietnam is also facially inaccurate because it fails to account for scale. *See* Request for Circumvention Ruling: Vietnam at 57 (listing LONGi's ingot and wafer factories in China with over \$1 billion in assets to cell and module production facilities in Vietnam with approximately \$280-\$330 million in assets).

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capacity, serving the massive demand in China and around the world.⁴⁵ Scale alone explains why production facilities in China are larger. Therefore, based on facts presented by A-SMACC, Commerce cannot infer from a superficial comparison of plant sizes that production of cells and modules in Malaysia, Thailand, and Vietnam constitutes minor processing.

For the foregoing reasons, A-SMACC is obscuring the pertinent facts. A-SMACC'S failure to muster credible facts means that the ruling requests should be dismissed. Commerce should not initiate anti-circumvention inquiries on such baseless allegations.

V. Commerce Should Consider the Timeliness of A-SMACC's Inquiries In Determining Whether Action is Appropriate

In determining whether extension of the *Solar I* AD/CVD duties is appropriate under the statute, Commerce should also consider the timeliness of A-SMACC's requests. The domestic industry has known for years about the lawful reorientation of supply chains to Southeast Asia for cells and modules.⁴⁶ The domestic industry did not allege circumvention during the initial period when capacity was being added in Southeast Asia, leading to increased imports. On the contrary, the domestic industry filed only an AD/CVD case against CSPV products from Taiwan in 2013, after CSPV imports had already increased from Malaysia. The shift of CSPV cell and module production to Southeast Asia took place years ago without any contemporaneous reaction by the domestic CSPV industry under the *Solar I* orders.

⁴⁵ Request for Circumvention Ruling: Malaysia at 4; Request for Circumvention Ruling: Thailand at 4; Request for Circumvention Ruling: Vietnam at 5.

⁴⁶ See *Crystalline Silicon Photovoltaic Cells (Whether or not Partially or Fully Assembled into Other Products)*, Inv. No. TA-201-75 (Safeguard), USITC Pub. 4379, Vol. I at 21 (Nov. 2017).

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According to the import statistics provided by A-SMACC,⁴⁷ Malaysia has been the largest supplier of imported CSPV products since 2016, and has accounted for 30 percent or more of CSPV imports since 2012 – before the *Solar II* petition was even filed in 2013.⁴⁸ Thus, the change in trade patterns for Malaysia occurred roughly nine years ago. The import data also shows noticeable increases of imports from Vietnam and Thailand starting in 2016. That was five years ago. The International Trade Commission’s November 2017 report in the global safeguard investigation also noted that Chinese firms added capacity in Malaysia, Thailand, and Vietnam and that imports had increased from those countries.⁴⁹ That report was published nearly four years ago. Yet, despite clearly knowing about these sources, the domestic industry waited for years while imports from these countries became increasingly important to the U.S. solar industry, including U.S. CSPV module assemblers that rely on cells from those countries, as well as U.S. producers of module racking systems and trackers, and U.S. distributors, installers, developers, and utilities. Now, the domestic industry seeks to pull the rug out from underneath these companies, and their workers, that rely on imports from these sources as a key part of their established solar supply chains. Under the circumstances, initiation of anti-circumvention inquiries based on belated requests is not appropriate.

⁴⁷ Request for Circumvention Ruling: Malaysia at Exhibit 11; Request for Circumvention Ruling: Thailand at Exhibit 10; Request for Circumvention Ruling: Vietnam at Exhibit 17.

⁴⁸ *Certain Crystalline Silicon Photovoltaic Products From the People’s Republic of China and Taiwan: Initiation of Antidumping Duty Investigations*, 79 Fed. Reg. 4661, 4661 (Jan. 29, 2014).

⁴⁹ *Crystalline Silicon Photovoltaic Cells (Whether or not Partially or Fully Assembled into Other Products)*, Inv. No. TA-201-75 (Safeguard), USITC Pub. 4379, Vol. I at 40, 44-45, 93 (Nov. 2017).



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Pursuant to Commerce's regulations at 19 C.F.R. § 351.303(f)(1), we are filing this submission electronically via ACCESS at <http://access.trade.gov> and serving copies today on parties as indicated in the attached certificate of service. If Commerce has any questions regarding this submission or requires additional information, please do not hesitate to contact the undersigned.

Respectfully submitted,

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