Barcode:4162843-01 C-570-980 CIRC - Anti Circumvention Inquiry - from Thailand

wiley

September 22, 2021

DOC Case Nos. A-570-979/C-570-980
Total Pages: 26
Anti-Circumvention Inquiry (from Malaysia/from Thailand/from Vietnam)
AD/CVD Operations
PUBLIC DOCUMENT

The Honorable Gina M. Raimondo
Secretary of Commerce
International Trade Administration
Attn: Enforcement and Compliance
APO/Dockets Unit, Room 18022
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

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

Dear Secretary Raimondo:

On behalf of the American Solar Manufacturers Against Chinese Circumvention ("A-SMACC"), we hereby submit this filing to the U.S. Department of Commerce (the "Department") in response to the September 15, 2021 request from NextEra Energy Constructors, LLC and Florida Power & Light Co. (collectively, "NextEra") that the Department reject the anti-circumvention ruling requests filed by A-SMACC and decline to initiate anti-circumvention inquiries.[1]

[1] *See* Letter from Akin Gump Strauss Hauer & Feld LLP to Sec'y Commerce, 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* (Sept. 15, 2021) ("NextEra Request"); *see also* Letter from Wiley Rein LLP to Sec'y Commerce, re: *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Request for Circumvention Ruling Pursuant to Section 781(b) of the Tariff Act of 1930* (Aug. 16, 2021) ("Circumvention Ruling Request").

Filed By: tbrightbill@wiley.law, Filed Date: 9/22/21 12:48 PM, Submission Status: Approved

Barcode:4162843-01 C-570-980 CIRC - Anti Circumvention Inquiry - from Thailand

As discussed below, NextEra misunderstands the Department's authority to conduct anti-circumvention inquiries pursuant to Section 781(b) of the Tariff Act of 1930, *as amended* (the "Act").[2] NextEra's claims are largely unsubstantiated, irrelevant to the inquiry at hand, and are an inappropriate basis for declining to investigate these anti-circumvention inquiries. Contrary to NextEra's assertions, A-SMACC provided substantial evidence demonstrating that certain Chinese producers are completing the production of crystalline silicon photovoltaic cells ("CSPV") and/or modules in the third countries and circumventing the antidumping ("AD") and countervailing duty ("CVD") orders on imports of CSPV cells, whether or not assembled into modules, from the People's Republic of China ("China") (collectively, the "Orders"),[3] exactly as contemplated by the statute, based on an assessment of each of the statutory factors considered by the Department. Indeed, NextEra cannot refute the fundamental premise of the circumvention request: that certain Chinese companies have made the bare minimum investment outside of China in order to avoid AD/CVD duties, while the vast majority of the solar supply chain, investments, and expenditures remain in China. Accordingly, the Department should initiate these anti-circumvention inquiries as requested by A-SMACC, pursuant to its statutory authority to prevent circumvention of the agency's antidumping and countervailing duty orders.[4]

---

[2] *See* 19 U.S.C. § 1677j(b).

[3] *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 77 Fed. Reg. 73,018 (Dep't Commerce Dec. 7, 2012) (amended final deter. of sales at less than fair value, and antidumping duty order) ("AD Order"); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 77 Fed. Reg. 73,017 (Dep't Commerce Dec. 7, 2012) (countervailing duty order) ("CVD Order").

[4] *See* 19 U.S.C. § 1677j.

Filed By: tbrightbill@wiley.law, Filed Date: 9/22/21 12:48 PM, Submission Status: Approved

Barcode:4162843-01 C-570-980 CIRC - Anti Circumvention Inquiry - from Thailand

I. NEXTERA MISUNDERSTANDS THE DEPARTMENT'S AUTHORITY TO CONDUCT ANTI-CIRCUMVENTION INQUIRIES AND THE FUNDAMENTAL FACTS OF A-SMACC'S CIRCUMVENTION RULING REQUESTS

A. Anti-Circumvention Inquiries and Scope Inquiries Are Distinct Proceedings

NextEra provides a lengthy discussion asserting that polysilicon ingots and wafers are not the same as CSPV cells and that the production processes for cells and modules are different from the production processes for ingots and wafers,[5] noting for instance that CSPV cells are significantly advanced beyond their upstream inputs because CSPV cells are able to produce electricity from sunlight while ingots and wafers cannot.[6] NextEra then states that a critical step in the cell production process is the addition of the positive/negative junction (or "p/n" junction), and that in *Solar I*, the Department explained that imports of CSPV cells and modules from third countries are not subject to the Orders when they incorporate wafers from China without p/n junctions.[7] NextEra also references certain scope rulings under the Orders, which A-SMACC already addressed in its circumvention ruling requests. Specifically, NextEra claims that in the *SunSpark Scope Ruling*, the Department found that CSPV cells and modules from Vietnam were not subject to the Orders where the wafers had been partially doped in China, but the p/n junction was not created until another process (diffusion) took place in Vietnam.[8] In contrast, NextEra claims that in the *ET Solar Scope Ruling*, the Department found that CSPV cells and modules produced in Vietnam with wafers from China were within the scope of the Orders because the

[5] *See* NextEra Request at 10.

[6] *See id.*

[7] *Id.* at 11.

[8] *Id.* at 12.

Filed By: tbrightbill@wiley.law, Filed Date: 9/22/21 12:48 PM, Submission Status: Approved

Barcode:4162843-01 C-570-980 CIRC - Anti Circumvention Inquiry - from Thailand

PUBLIC DOCUMENT

wafers already had a p/n junction when exported from China.[9] NextEra's claims are flawed and irrelevant, for the reasons discussed below.

A-SMACC has never suggested that polysilicon, ingots, and wafers are the same products as CSPV cells or modules. Moreover, nothing in the statute prohibits a circumvention determination where the merchandise that is imported into the third country to be completed or assembled is different from the merchandise that is ultimately exported to the United States.[10] In fact, given the very nature of this type of circumvention proceeding, for "merchandise completed or assembled in other foreign countries," it is not surprising at all that in most inquiries under this provision, the merchandise that is ultimately exported from the third country differs from the merchandise imported into the third country from the country subject to the AD/CVD order. In addition, one of the statutory factors for determining whether merchandise completed or assembled in other foreign countries is circumventing an existing AD/CVD order is whether "before importation into the United States, such imported merchandise is completed or assembled in another foreign country from merchandise which – (i) is subject to such order or finding, or (ii) is produced in the foreign country with respect to which such order or finding applies."[11] Thus, while the merchandise imported into the third country may already be subject to the scope before completion or assembly , merchandise completed or assembled in the third country using merchandise produced in the country under order is also properly the subject of this type of anti-circumvention inquiry.

---

9 *Id.*

10 *See* 19 U.S.C. § 1677j(b).

11 *Id*. § 1677j(b)(1)(B).

Filed By: tbrightbill@wiley.law, Filed Date: 9/22/21 12:48 PM, Submission Status: Approved

Barcode:4162843-01 C-570-980 CIRC - Anti Circumvention Inquiry - from Thailand

In fact, every anti-circumvention inquiry necessarily covers merchandise that is not within the literal scope of an existing AD/CVD order.[12] That is the *precise* purpose of the circumvention statute. As the Department has previously explained:

> The Department conducts a scope inquiry to determine whether a product is within the scope of an order, relying on its regulations, 19 CFR 351.225(k)(1) and (2). As recognized by the courts, the Department conducts an anti-circumvention proceeding to determine whether it may lawfully include within the scope of an AD or CVD order merchandise which falls outside the literal scope of the order.[13]

Similarly, the Court of Appeals for the Federal Circuit ("Federal Circuit") has explained, that "{i}n order to effectively combat circumvention of antidumping duty orders, Commerce may determine that certain types of articles are within the scope of a duty order, even when the articles do not fall within the order's literal scope."[14]

Moreover, NextEra's focus on the Department's prior scope rulings based on the wafer's country of origin fails to recognize that A-SMACC's request is not based solely on wafers (or polysilicon or ingots) from China being finished in a third country. Rather, the request presented evidence that Chinese-affiliated companies in the third countries were conducting minor processing of solar cells and modules using various and substantial Chinese components, including polysilicon, ingots, wafers, silver paste, solar glass and aluminum extrusions, among others.

---

[12] A-SMACC submits that parties may nonetheless request, and the Department may conduct scope inquiries and anti-circumvention inquiries in the alternative.

[13] *See* Issues and Decision Memorandum accompanying *Aluminum Extrusions From the People's Republic of China*, 82 Fed. Reg. 4,630 (Dep't Commerce July 26, 2017) (affirm. final deter. of circumvention of the antidumping and countervailing duty orders and rescission of minor alterations anti-circumvention inquiry) at 8 (internal citations omitted).

[14] *See* Issues and Decision Memorandum accompanying *Certain Corrosion-Resistant Steel Products From Taiwan*, 86 Fed. Reg. 30,257 (Dep't Commerce June 7, 2021) (affirm. final deter. of circumvention involving Malaysia) at 23 (emphasis removed) (internal citations omitted).

Filed By: tbrightbill@wiley.law, Filed Date: 9/22/21 12:48 PM, Submission Status: Approved

Barcode:4162843-01 C-570-980 CIRC - Anti Circumvention Inquiry - from Thailand

Thus, NextEra's arguments about the differences between polysilicon, ingots and wafers, and CSPV cells and modules are simply irrelevant here.

B. The Department Has Not Previously Considered Whether the Process of Completing the CSPV Cells and Modules Subject to the Circumvention Ruling Requests in the Third Countries is Minor or Insignificant Within the Meaning of Section 781(b)(1)(B) of the Act

NextEra claims that the Department has determined that cell production is not minor processing, but this argument is inapplicable for the same reasons.[15] NextEra opines that in Solar I the Department 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 Orders – over the petitioner's claim that the resulting scope could be easily circumvented.[16] NextEra argues that the Department implicitly found that cell production from wafers or ingots is not minor processing, and thus that the Department cannot find that cell production in third countries from Chinese wafers is "minor or insignificant" assembly or completion as required by the statute.[17]

Clearly, the Department did not conduct an anti-circumvention inquiry pursuant to section 781(b) of the Act in determining the scope in the original investigation. While the Department noted that it "has on occasion explicitly addressed the possibility of circumvention as a consideration in determining the country-of-origin of merchandise under investigation, circumvention is not the sole or controlling factor relied upon in making a country-of-origin

---

15 *See* NextEra Request at 13.

16 *Id.* at 13-14.

17 *Id.*

Filed By: tbrightbill@wiley.law, Filed Date: 9/22/21 12:48 PM, Submission Status: Approved

Barcode:4162843-01 C-570-980 CIRC - Anti Circumvention Inquiry - from Thailand

determination."[18] A country-of-origin determination or a substantial transformation determination – like scope inquiries generally – are distinct from a circumvention determination. As A-SMACC explained in its circumvention ruling requests, the Department's practice for determining substantial transformation in country-of-origin determinations is distinct from its practice under Section 781 of the Act of determining whether merchandise being completed or assembled into a product in a third country is circumventing an AD/CVD order.[19] That does not mean that the Department cannot later act to stop circumvention of the order, once it has been presented with evidence that such circumvention is in fact occurring.

The Department's own precedent bears this out. For instance, in *Cold-Rolled from Korea*, the Department found that certain cold-rolled steel flat products ("CRS") produced in Vietnam using Korean carbon hot-rolled steel ("HRS") flat products were circumventing the AD/CVD orders on CRS from Korea. There, the respondents argued that the Department's previous findings that processing HRS into finished CRS constitutes substantial transformation undermined the finding that the further processing taking place in Vietnam is minor and insignificant for purposes of Section 781(b)(1)(C) of the Act. The Department disagreed, and explained that:

> {These} contentions ignore the distinct purposes of the two analyses, *i.e.*, the substantial transformation analysis and the factors established in the anti-circumvention statute, and the separate factors considered. In other words, substantial transformation is focused on whether the input product loses its identity

---

[18] NextEra Request at Attachment 13 (Memorandum from Jeff Pederson, through Abelali Elouaradia and Howard Smith, to Gary Taverman, re: *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* (Mar. 19, 2012) (PUBLIC VERSION), p. 9.

[19] Issues and Decision Memorandum accompanying *Certain Cold-Rolled Steel Flat Products From the Republic of Korea*, 84 Fed. Reg. 70,934 (Dep't Commerce Dec. 26, 2019) (affirm. final deter. of circumvention of the antidumping and countervailing duty orders) at cmt. 9 ("Cold-Rolled from Korea IDM"); *see also* Issues and Decision Memorandum accompanying *Diamond Sawblades and Parts Thereof From the People's Republic of China*, 84 Fed. Reg. 33,920 (Dep't Commerce July 16, 2019) (final deter. of anti-circumvention inquiry) at cmt. 4 ("Diamond Sawblades from China IDM").

Filed By: tbrightbill@wiley.law, Filed Date: 9/22/21 12:48 PM, Submission Status: Approved

Barcode:4162843-01 C-570-980 CIRC - Anti Circumvention Inquiry - from Thailand

> and is transformed into a new product having a new name, character and use, and thus a new country of origin. Conversely, section 781(b) of the Act focuses on the extent of processing applied to subject merchandise in a third country and whether such processing is minor or insignificant in comparison to the entire production process of the finished subject merchandise . . . . Thus, we find that there is nothing contradictory in finding an input substrate to be substantially transformed into a finished product, in terms of its physical characteristics and uses, while also finding the process of effecting that transformation to be minor vis-à-vis the manufacturing process of producing a finished product.[20]

The Department has also explained that the language provided in the Statement of Administrative Action reaffirms its prior determinations to not apply the substantial transformation test in third-country anti-circumvention proceedings. Congress and the Federal Circuit have recognized and upheld this approach:

> The Federal Circuit affirmed that "{t}he legislative history indicates that {section 781 of the Act} can capture merchandise that is substantially transformed in third countries, which further implies that {section 781 of the Act} and the substantial transformation analysis are not coextensive." When Congress passed the Omnibus and Trade Competitiveness Act in 1988, it explained that section 781 of the Act "addresses situations where 'parts and components . . . are sent from the country subject to the order to the third country for assembly and completion." Congress also stated that "{t}he third country assembly situation will typically involve the same class or kind of merchandise, where Commerce has found that the de facto country of origin of merchandise completed or assembled in a third country is the country subject to the antidumping or countervailing duty order." Thus, Congress contemplated that where Commerce had made an affirmative circumvention determination, the imported merchandise found to be circumventing would be within the AD or CVD order at issue and would be treated as having the same country of origin as the country subject to the order. Subsequently, when implementing the URAA in 1994, **Congress further recognized in the SAA the problem arising from foreign exporters attempting to "circumvent an {} order by purchasing as many parts as possible from a third country" and assembling them in a different country** . . . . Similarly, the SAA demonstrates that Congress was aware of Commerce's substantial transformation analysis and the potential interplay of such an analysis with a circumvention finding under section 781 of the Act. Further, as Commerce noted, "**outside of a situation involving circumvention of an antidumping duty order,** a substantial transformation of a good in an intermediate country would render the resulting merchandise a product of the intermediate country rather than the original country of production." In sum,

---

[20] Cold-Rolled from Korea IDM at 47.

Filed By: tbrightbill@wiley.law, Filed Date: 9/22/21 12:48 PM, Submission Status: Approved

Barcode:4162843-01 C-570-980 CIRC - Anti Circumvention Inquiry - from Thailand

> it is evident from the above that Congress anticipated that circumvention could result in a situation where, despite the merchandise undergoing some change that warranted a new country of origin pursuant to a substantial transformation analysis, the merchandise could still be considered to be within the AD or CVD order at issue, if, pursuant to section 781(b) of the Act, Commerce determined the existence of circumvention. **As such, Congress has already contemplated that substantial transformation did not preclude a finding of circumvention under the statute**.[21]

Similarly, in *Diamond Sawblades from China*, the Department found that imports of diamond sawblades comprised of cores and/or segments produced in China joined into diamond sawblades in Thailand were circumventing the AD order on diamond sawblades from China. Again, the Department rejected respondent's argument that the petitioner recognized that laser welding is more significant than any other production step, finding that the petitioner there recognized the importance of joining cores and segments into finished diamond sawblades in the context of the substantial transformation analysis, not in the circumvention context.[22] The Department concluded that its prior finding that laser welding imparts a substantial transformation does not undermine its finding that laser welding is minor or insignificant in the anti-circumvention context because of the distinct purposes of the two analyses and the separate factors considered.[23]

In short, the Department has already answered the question of whether a finding that merchandise is substantially transformed and no longer within the scope of an existing AD/CVD order prohibits the agency from determining that merchandise completed or assembled in a third country is circumventing the order in accordance with the statutory factors. The Department has repeatedly confirmed that it does not. The Federal Circuit has also affirmed this. For instance, the

---

21 Issues and Decision Memorandum accompanying *Certain Corrosion-Resistant Steel Products From Taiwan*, 86 Fed. Reg. 30,257 (Dep't Commerce June 7, 2021) (affirm. final deter. of circumvention involving Malaysia) at 23 (emphasis added).

22 Diamond Sawblades from China IDM at 10.

23 *Id.*

Filed By: tbrightbill@wiley.law, Filed Date: 9/22/21 12:48 PM, Submission Status: Approved

Barcode:4162843-01 C-570-980 CIRC - Anti Circumvention Inquiry - from Thailand

PUBLIC DOCUMENT

Federal Circuit has explained that if the Department "applies the substantial transformation test and concludes that the imported article has a country of origin different from the country identified in an AD or CVD order, then {the Department} can include such merchandise within the scope of an AD and CVD order only if it finds circumvention under {section 781(b) of the Act}."[24] Similarly, the Federal Circuit has explained that "even if a product assumed a new identity, the process of 'assembly or completion' may still be minor or insignificant, and undertaken for the purpose of evading an AD/CVD order."[25]

Based on the above, acceptance of NextEra's argument to preclude an anti-circumvention inquiry here would be contradictory to the plain language of the statute and Congress's intent (as confirmed by the Federal Circuit) and a complete departure from the Department's prior practice. Further, NextEra is misleading in asserting that the Department has declined to initiate anti-circumvention inquiries where the issue had been decided in prior segments of the proceeding or the petitioner failed to provide adequate factual support for its allegations.[26] Specifically, NextEra cites the Department's decisions not to initiate minor alterations anti-circumvention inquiries pursuant to Section 781(c) of the Act (*i.e.*, a different type of circumvention proceeding) in *Hardwood Plywood from China*[27] and in *Passenger Vehicle and Light Truck Tires from China*.[28]

---

[24] Cold-Rolled from Korea IDM at 47 (citing *Bell Supply Co. v. United States*, 888 F.3d 1222, 1230 (Fed. Cir. 2018)).

[25] *Id.*

[26] NextEra Request at 14.

[27] *See id.* at 14, Attachment 1 (Memorandum from Amanda Brings, through James Doyle, to James Maeder, re: *Certain Hardwood Plywood Products from the People's Republic of China: Minor Alterations Anti-Circumvention Inquiry Request* (Apr. 2, 2018) ("HWPW from China IDM")).

[28] *See id.* at 14, Attachment 2 (Memorandum from Emily Halle, through Edward Yang, to Christian Marsh, re: *Antidumping and Countervailing Duty Orders on Certain Passenger Vehicle and Light Trucks from the People's Republic of China: Declining to Initiate an Anti-Circumvention Inquiry*) (June 13, 2016) ("Passenger Vehicle and Light Trucks from China IDM").

Filed By: tbrightbill@wiley.law, Filed Date: 9/22/21 12:48 PM, Submission Status: Approved

The core issue in both of these proceedings was specific to the requirements for minor alterations anti-circumvention inquiries, and the Department declined to initiate both inquiries based on its conclusions that the minor alterations provision does not apply to a product specifically excluded from the scope of an order.[29] Clearly, these cases are distinguishable from these proceedings, including because there is no explicit scope exclusion that applies to the relevant merchandise.

NextEra also cites the Department's decision not to initiate an anti-circumvention inquiry in *Certain Uncoated Paper from Portugal*, to determine whether imports of uncoated paper rolls ("sheeter rolls") from Portugal were being cut into individual sheets of paper in the United States in circumvention of the order at issue.[30] However, this decision was based on the Department's conclusion that there was insufficient evidence in support of the circumvention ruling request.[31] For instance, the Department found that there was insufficient evidence demonstrating that sheeter rolls from Portugal specifically were being exported to the United States for conversion into sheets or that U.S. imports of sheeter rolls from Portugal were being converted into and sold as sheets.[32] Here, A-SMACC provided an overwhelming amount of evidence indicating both that substantial Chinese-origin components are being exported to the third country and are being completed into CSPV cells and/or modules prior to exportation to the United States.

NextEra does not claim that companies subject to A-SMACC's circumvention ruling requests are not importing Chinese-origin components or are not completing such components into

---

29 *See* HWPW from China IDM at 13-14; Passenger Vehicle and Light Trucks from China IDM at 7.

30 *See* NextEra Request at 15, Attachment 3 (Memorandum from Genevieve Coen to The File, re: *Certain Uncoated Paper from Portugal: Declining to Initiate on the Anti-Circumvention Inquiry* (Oct. 11, 2019) ("Uncoated Paper from Portugal Memo")).

31 Uncoated Paper from Portugal Memo.

32 *Id.*

Barcode:4162843-01 C-570-980 CIRC - Anti Circumvention Inquiry - from Thailand

CSPV cells and/or modules in the third country before exporting to the United States.[33] Rather, with respect to the facts of A-SMACC's request, NextEra's main challenge appears to be with respect to the level of investment factor,[34] one of five factors that the Department is to consider in determining whether the process of assembly or completion is minor or insignificant, which in turn is one of numerous additional factors that the Department is to consider in determining whether to include the inquiry merchandise within the scope.[35] As discussed below, A-SMACC provided an overwhelming amount of evidence demonstrating that the level of investment in the third country is minimal compared to the level of investment in China, and the evidence that A-SMACC provided with respect to this and all of the other statutory factors supports initiation of anti-circumvention inquiries. Finally, in determining whether or not the process of assembly or completion in a third country is minor or insignificant under section 781(b)(1)(C) of the Act, the Department has repeatedly confirmed that "no single factor, by itself, controls {the Department's} determination of whether the process of assembly or completion in a third country is minor or insignificant. Accordingly, it is {the Department's} practice to evaluate each of these five factors as they exist in the third country, depending on the totality of the circumstances of the particular anti-circumvention inquiry."[36]

C. <u>The Department Will Consider Any Advice from the Commission at the Appropriate Time After Initiation, In Accordance With the Statute</u>

NextEra also argues that A-SMACC's circumvention ruling requests seek to avoid an investigation into whether the CSPV cells and/or modules from the third countries are actually

---

33 *See* NextEra Request at 15-20.

34 *See id.*

35 19 U.S.C. § 1677j(b).

36 *See, e.g.*, Cold-Rolled from Korea IDM at 8.

Filed By: tbrightbill@wiley.law, Filed Date: 9/22/21 12:48 PM, Submission Status: Approved

Barcode:4162843-01 C-570-980 CIRC - Anti Circumvention Inquiry - from Thailand

subsidized or dumped into the United States, and to avoid a formal investigation by the U.S. International Trade Commission ("Commission") to determine whether those imports have injured the domestic industry.[37]

Again, NextEra ignores the fact that through the circumvention statute, Congress granted the Department the ability to lawfully include within the scope of an AD/CVD order merchandise that falls outside the literal scope of the order, if certain statutory factors are met. The statute does not require a separate finding of subsidization or dumping by the Department, or a separate injury finding by the Commission. Pursuant to the statute, however, the Commission will have the opportunity to provide any advice to the Department, after initiation of the anti-circumvention inquiries. Specifically, with respect to merchandise completed or assembled in other foreign countries, the statute provides that before making a determination, the Department shall notify the Commission of the proposed inclusion of such merchandise in the existing AD/CVD order.[38] The Commission may then request consultations with the Department regarding the inclusion of such merchandise.[39] After any such consultation, if the Commission believes that a significant injury issue is presented by the proposed inclusion, the Commission may provide written advice to the Department as to whether the inclusion would be inconsistent with the affirmative determination of the Commission on which the AD/CVD order is based.[40] In sum, the Commission will have the opportunity to advise the Department with respect to any injury concerns and the Department will

---

[37] NextEra Request at 8.

[38] *See* 19 U.S.C. § 1677j(e)(1).

[39] *See id.* § 1677j(e)(2).

[40] *See id.* § 1677j(e)(3).

Filed By: tbrightbill@wiley.law, Filed Date: 9/22/21 12:48 PM, Submission Status: Approved

Barcode:4162843-01 C-570-980 CIRC - Anti Circumvention Inquiry - from Thailand

take into consideration any such advice at the appropriate time, after initiation. Thus, NextEra's claims in this regard are not a proper basis for declining to initiating an inquiry.

NextEra also adds that expansion of the Orders in this manner is not appropriate because of 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.[41] As an initial matter, NextEra fails to substantiate these broad generalizations,[42] which are not true. There are large and growing amounts of Tier One solar module capacity, estimated at 30 GW or more, that is either non-Chinese or not subject to these circumvention inquiries. Moreover, similar claims of alleged harm were raised and rejected in the course of the original investigation a decade ago, and the circumstances alleged in those claims never materialized. These same claims were raised in the Section 201 Mid-term review in 2019-2020 and were rejected by the Commission[43] – where such arguments are normally made. Ultimately, these are not factors that Congress directed the Department to assess in determining whether merchandise completed or assembled in other foreign countries are circumventing AD/CVD orders, which were granted to provide the domestic industry with relief from unfairly traded imports, and NextEra attempts to improperly deter the Department from lawfully investigating circumvention.

---

41 NextEra Request at 9.

42 *See id.*

43 *See, e.g.*, *Crystalline Silicon Photovoltaic Cells, Whether or Not Partially or Fully Assembled Into Other Products: Monitoring Developments in the Domestic Industry*, Inv. No. TA-201-075, USITC Pub. 5021 (Feb 2002) (Monitoring).

Filed By: tbrightbill@wiley.law, Filed Date: 9/22/21 12:48 PM, Submission Status: Approved

Barcode:4162843-01 C-570-980 CIRC - Anti Circumvention Inquiry - from Thailand

D. NextEra's Claims Regarding the Domestic Industry's Production Are Irrelevant to Anti-Circumvention Inquiries

NextEra argues that the domestic industry's production capabilities account for only about 25 percent of total current U.S. demand, and a lower percentage of total expected future U.S. demand.[44] This allegation was made without citation. NextEra then jumps to the conclusion that imposing AD/CVD duties on imports from certain producers in certain countries in Southeast Asia would drive up the cost of solar projects in the United States.[45] Again, these are not factors that the Department is directed to consider pursuant to the statute, and NextEra again improperly attempts to deter the Department from lawfully investigating circumvention.[46]

Moreover, NextEra ignores that it is Chinese producers' circumvention of the Orders – by moving the end of the production process for CSPV products to a third country, while retaining as much of the subsidized supply chain and labor as possible in China – that is harming the domestic industry's production, undermining the relief granted to the domestic industry through the imposition of the Orders. While domestic solar producers are expanding and increasing production, relief from continued unfairly traded imports is needed to allow this U.S. renewable energy industry to fully prosper.

NextEra also misguidedly argues that it would be inappropriate for the Department to initiate anti-circumvention inquiries because there is no pure domestic production of solar cells and modules and U.S. producers likely use Chinese wafers.[47] Beyond lacking adequate detail or any reliable factual support, these claims are inapposite.

---

44 NextEra Request at 2-3.

45 *Id.* at 3.

46 In any case, a significant amount of world capacity is not impacted by these proceedings, including producers in countries such as Korea, Malaysia, Singapore, and India.

47 NextEra Request at 2, 5.

Filed By: tbrightbill@wiley.law, Filed Date: 9/22/21 12:48 PM, Submission Status: Approved

Barcode:4162843-01 C-570-980 CIRC - Anti Circumvention Inquiry - from Thailand

As an initial matter, NextEra appears to misunderstand the fundamental facts in A-SMACC's requests for a circumvention ruling. First, A-SMACC's circumvention ruling requests do not cover companies that simply use Chinese-origin wafers, as NextEra suggests. A-SMACC clearly explained in its requests that specific Chinese-affiliated producers are completing the production of CSPV cells in third countries using wafers manufactured in China from Chinese polysilicon as well as additional Chinese-origin components and then exporting the cells to the United States or assembling such cells into modules again with additional Chinese-origin components before exporting to the United States.[48] In other words, the evidence indicates that the CSPV cells/modules covered by the requests are being completed in the third countries with substantial Chinese-origin components – including wafers as well as substantial other raw material inputs – for both the cell conversion and module assembly stages.[49] The situation of domestic solar producers investing heavily in the United States in order to expand American renewable energy production is not equivalent to Chinese producers setting up shops in third countries with the specific intention of avoiding lawfully imposed U.S. trade remedy orders. Thus, NextEra's arguments based on its incorrect assumption should be disregarded.

Second, NextEra alleges that imports from Malaysia, Vietnam, and Thailand were 17 GW in 2020.[50] But that figure represents *all* imports from the three countries. But A-SMACC did not make a blanket request for a circumvention ruling covering all producers of CSPV cells/modules. A significant amount of production in these three countries is not impacted by these proceedings. A-SMACC obtained evidence that *certain* named companies are circumventing the Orders by

---

[48] *See, e.g.*, Circumvention Ruling Request at 2.

[49] *See, e.g.*, *id.* at 22.

[50] NextEra Request at 7.

Filed By: tbrightbill@wiley.law, Filed Date: 9/22/21 12:48 PM, Submission Status: Approved

Barcode:4162843-01 C-570-980 CIRC - Anti Circumvention Inquiry - from Thailand

completing the production of CSPV cells and/or modules in the third countries with substantial Chinese-origin components,[51] and it is these companies for which A-SMACC requests a circumvention ruling. Specifically, certain Chinese producers have established affiliated operations in the third countries and moved the end of the production process for CSPV products to such affiliated operations, while retaining as much of the subsidized supply chain, labor, R&D, and investment as possible in China, to circumvent the Orders.[52] Whether there may be other producers of CSPV products that use some Chinese-origin components is inapposite. A-SMACC provided compelling evidence indicating that the specific companies covered in its requests are circumventing the Orders, based on an assessment of all of the statutory factors. NextEra's claims regarding other producers have no bearing on the question of whether the third-country producers here are circumventing the Orders.

For the reasons discussed above, NextEra's broad and unsupported generalizations are both inaccurate and irrelevant.[53] The argument that the Department should not initiate an anti-circumvention inquiry based on the unsubstantiated claim that other companies may also be circumventing AD/CVD duties is unreasonable and has no basis in law.

E. NextEra's Argument that the Department Should Decline Initiation of the Anti-Circumvention Inquiries Because the Value and Volume of Trade at Issue is Substantial Has No Basis in Law

NextEra's assertion that the Department should not initiate an anti-circumvention inquiry because the value and volume of trade at issue is substantial is also unreasonable and has no basis

[51] *See* 19 U.S.C. § 1677j(b).

[52] *See, e.g.*, Circumvention Ruling Request at 54.

[53] *See* NextEra Request at 5.

Filed By: tbrightbill@wiley.law, Filed Date: 9/22/21 12:48 PM, Submission Status: Approved

in law.[54] NextEra points to no authority permitting the Department to refuse to investigate the circumvention of AD/CVD duties if the volume and value of trade at issue is substantial. To the contrary, such facts make such an anti-circumvention inquiry even more important. That such a substantial volume of imports of CSPV cells and/or modules from the third countries may include merchandise circumventing the Orders only further demonstrates how imperative it is that the Department investigate this circumvention. Again, NextEra's arguments about the number of employees in the solar industry and the jobs that would be at risk if duties were imposed are speculation, which has proven untrue in the past, and an improper attempt to deter the Department from lawfully investigation circumvention of its orders.

F. NextEra's Claim that A-SMACC's Circumvention Ruling Requests are Untimely Has No Basis in Law

Like its other arguments, NextEra's suggestion that A-SMACC's circumvention ruling requests are untimely has no basis in law and is yet another improper attempt to deter the Department from lawfully conducting an anti-circumvention inquiry.[55] Citing no relevant statutory or regulatory deadlines, NextEra speculates that the domestic industry waited too long to file its anti-circumvention inquiry requests.[56] Contrary to NextEra's suggestion, imports from Malaysia, Thailand, and Vietnam have also increased exponentially in 2020 and 2021 compared to prior years.[57] The Department should note that the original main petitioner was SolarWorld, which along with other domestic producers, were harmed by years and years of unfairly traded imports, despite two successful trade cases on China and Taiwan. If merchandise is circumventing the Orders

---

[54] *Id.* at 7.

[55] *See id.* at 20.

[56] *Id.* at 20-21.

[57] *See, e.g.*, Circumvention Ruling Request at Exhibit 11 (Malaysia), at Exhibit 10 (Thailand), at Exhibit 17 (Vietnam).

Barcode:4162843-01 C-570-980 CIRC - Anti Circumvention Inquiry - from Thailand

within the meaning of the statute, such merchandise is the proper subject of an anti-circumvention inquiry. That subject producers have developed a sophisticated circumvention scheme and have avoided AD/CVD duties thus far does not mean that such circumventing merchandise should continue to improperly avoid assessment of AD/CVD duties.

II. SUBSTANTIAL EVIDENCE DEMONSTRATES THAT CSPV CELLS AND MODULES FROM CHINA COMPLETED IN THE THIRD COUNTRIES ARE CIRCUMVENTING THE ORDERS AS CONTEMPLATED BY THE STATUTE

The main factual challenge that NextEra raises with respect to A-SMACC's circumvention ruling requests is with respect to the level of investment factor.[58] NextEra advances several arguments in response to A-SMACC's analysis demonstrating that the level of investment in the third countries for cell and/or module production facilities is minimal compared to the investment required for integrated production facilities in China that engage in the upstream production processes.[59] First, NexEra asserts that A-SMACC's claim is false and disingenuous because it compares the value of investments without regard to production scale, *i.e.*, capacity.[60] NextEra opines that Chinese polysilicon, ingot, and wafer plants are very large because they serve substantial market demand in China along with market demand throughout the world.[61] NextEra

---

58 NextEra Request at 15-19.

59 *See id.*

60 *See id.* at 16.

61 *See id.*

Filed By: tbrightbill@wiley.law, Filed Date: 9/22/21 12:48 PM, Submission Status: Approved

Barcode:4162843-01 C-570-980 CIRC - Anti Circumvention Inquiry - from Thailand

then offers one alternative per-megawatt figure for input production combined in China and for cell and module production in the third countries.[62]

Of course, how to measure and compare solar supply chain investment will be an important issue for the Department to consider – **after** the initiation of the investigation. While a per-unit analysis of investment levels may be informative, in order for the Department to evaluate this factor as required by the statute, and given the nature of this industry, the agency must consider the absolute levels of investment actually made by companies. A-SMACC provided overwhelming evidence demonstrating that the investment required for the upstream production processes through the wafer stage is much more significant than the investment required for the final cell and module finishing stages.[63] For instance, A-SMACC provided numerous examples of the actual investments made by various Chinese producers for facilities to produce polysilicon, ingots, and wafers, as well as of the actual investments made for cell and/or module production facilities (including examples in China and in the third countries by some of the companies specifically covered by the circumvention ruling requests).[64] This information shows that the absolute investment levels actually made by companies for the polysilicon, ingot, and wafer production stages are generally larger than the investment levels for cell and module production stages. Even the limited information tabulated by NextEra confirms this. The investment levels

---

62 *See id.* at 15-19. A-SMACC notes that that NextEra's analysis is flawed to begin with in that it derived one average investment figure for polysilicon, ingot, and wafer combined and one figure for cell and module production combined. For instance, polysilicon, ingot, and wafer are not alternative inputs for the production of CSPV cells, and the investment required for each production stage must be taken into account. NextEra also notes that it did not include in its analysis projects identified by A-SMACC that did not include both the value of the investment and production volume. NextEra Request at 17 n.36.

63 *See* Circumvention Ruling Request at 32-39.

64 Information regarding the exact investments made by some companies covered by the circumvention ruling requests were not reasonably available to A-SMACC.

Filed By: tbrightbill@wiley.law, Filed Date: 9/22/21 12:48 PM, Submission Status: Approved

Barcode:4162843-01 C-570-980 CIRC - Anti Circumvention Inquiry - from Thailand

PUBLIC DOCUMENT

for actual Chinese facilities for polysilicon, ingots, and/or wafers range between $155 million and $2.1 billion, with all but one of the sample facilities having investment levels of over $500 million.[65] In contrast, the investment levels for actual facilities in Malaysia, Thailand, and Vietnam for cells and/or modules range between $70 million and $253 million.[66]

The statute directs the Department to consider "the level of investment in the foreign country."[67] The Department will do so in its investigation. A-SMACC submits that an appropriate analysis is to consider the actual levels of investment – on an absolute basis – by the companies in the third countries. A derived per-unit analysis alone would not fully capture the "level of investment in the foreign country." In fact, the Department has already addressed this precise question in a prior circumvention proceeding. Specifically, in *CORE from China*, respondents similarly argued that in determining whether CORE produced in Vietnam using HRS or CRS manufactured in China are circumventing the AD/CVD orders on CORE from China, the Department should compare the levels of investment of Vietnamese CORE producers to those of Chinese Steel producers on the basis of investment per unit of production or capacity.[68] In response, the Department explained that:

> We find that **absolute (as opposed to per-unit) level of investment is a proper and relevant analysis for identifying "the level of investment in the third country" under the Act and that the proposed alternatives of adjusting for per-unit production or capacity are inappropriate in this instance**. Comparing per-unit investment overlooks the relative requirements of establishing integrated steel production facilities in China, as compared with CORE processing facilities in Vietnam, as they dilute the large necessary initial investments required by the volume of the facilities. Chinese integrated steel facilities have high capacities

[65] *See* NextEra Request at 17.

[66] *See id.* at 17-18.

[67] 19 U.S.C. § 1677j(b)(2)(A).

[68] Issues and Memorandum accompanying *Certain Corrosion-Resistant Steel Products From the People's Republic of China*, 83 Fed. Reg. 23,895 (Dep't Commerce May 23, 2018) (affirm. final deter. of circumvention of the antidumping duty and countervailing duty orders) at cmt. 5.

Filed By: tbrightbill@wiley.law, Filed Date: 9/22/21 12:48 PM, Submission Status: Approved

Barcode:4162843-01 C-570-980 CIRC - Anti Circumvention Inquiry - from Thailand

> (ranging from 1.5 million MT to over nine million MT, annually, as evidenced by data provided by the domestic parties. Also, they require high threshold levels of initial investment (ranging from $250 million to over $10 billion for Chinese integrated facilities, as evidenced by data provided by the domestic parties). In contrast, record information regarding cold rolling mills and corrosion-resistant facilities in Vietnam demonstrates that they can be built on a much smaller scale (with record evidence showing investments as comparatively low as $70 million in a cold-rolling steel mill and CORE factory). While record evidence shows that cold rolling and corrosion-resistant facilities can be scaled up to several times this small capacity (for example, simply by adding additional production lines), they do not require the initial threshold level of investment and scale of integrated facilities and on average, investments in CORE production facilities in Vietnam are much less than those of Chinese integrated steel production facilities. Accounting for the threshold level of investment in the Chinese integrated facilities, therefore, captures the investment in the production process that would otherwise be ignored if we were to compare per-unit investment in the production process that would otherwise be ignored if we were to compare per-unit investment or that would otherwise not be representative if we adjusted for capacity. Thus, the absolute level of investment of the finishing process relative to the production process of the Chinese integrated facility is the appropriate comparison.[69]

The same concerns exist here. Ignoring the actual investments made by companies would overlook the relative requirements of establishing the upstream and/or integrated CSPV production facilities in China, as compared with the facilities in the third countries to convert the Chinese-origin components to CSPV cells and/or modules, as they dilute the large necessary initial investments required by the volume of the facilities. The evidence on the record consistently demonstrates that Chinese facilities for polysilicon, ingot, and/or wafers are built on a much larger scale, with high levels of initial investment. In contrast, the record evidence demonstrates that facilities in the third countries for CSPV cells and/or modules are built on a much smaller scale. NextEra itself admits that Chinese polysilicon, ingot, and wafer plants are very large.[70] Thus, an analysis of the "level of investment" factor that ignores the absolute investments actually made by

---

[69] *Id.* at 34-35 (emphasis added).

[70] NextEra Request at 16.

Filed By: tbrightbill@wiley.law, Filed Date: 9/22/21 12:48 PM, Submission Status: Approved

Barcode:4162843-01 C-570-980 CIRC - Anti Circumvention Inquiry - from Thailand

PUBLIC DOCUMENT

companies and solely relies on derived per-unit investment levels for the production of 1 MW of polysilicon, ingots, wafers, cells, or modules would be distortive and incomplete.

Indeed, the companies subject to these circumvention requests are taking advantage of the large operations for polysilicon, ingot, and wafers in China to circumvent the Orders – by retaining as much of the subsidized supply chain and labor as possible in China and moving just the end of the production process to the third countries. This is circumvention, as contemplated by the statute.[71] For the reasons discussed above, the Department should reject NextEra's request to ignore the absolute levels of investment actually made by companies in evaluating the "level of investment" factor.[72] The substantial evidence in A-SMACC's requests demonstrating that the levels of investment in the third countries are minimal compared to the investments in China for the upstream production processes supports initiation of these anti-circumvention inquiries.

The only other statutory factor that NextEra discusses is the relative extent of production facilities.[73] NextEra criticizes A-SMACC for providing information regarding the relative physical size of production facilities in China and the third countries for this factor.[74] However, the fact remains that the production facilities in China for the upstream and/or integrated processes are larger, and the circumventing companies are relying on inputs from larger production facilities in China to complete the production of CSPV cells and/or modules in the third countries. In fact,

---

71 *See id.*

72 NextEra also challenges certain example investment figures that A-SMACC provided. *See* NextEra Request at 18, 19. The main reason for NextEra's challenges appears to be simply that the calculated figures are different from the per-unit average investment figures that it derived based on select information on investments made by certain companies and fail to pass muster.

73 *See* NextEra Request at 19; *see also* 19 U.S.C. § 1677j(b)(2)(D).

74 NextEra asserts that A-SMACC 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. A-SMACC understands NextEra's arguments in this regard to be with respect to the factor of "the extent of production facilities in the foreign country" in determining whether the process of assembly or completion is minor or insignificant.

Filed By: tbrightbill@wiley.law, Filed Date: 9/22/21 12:48 PM, Submission Status: Approved

Barcode:4162843-01 C-570-980 CIRC - Anti Circumvention Inquiry - from Thailand

PUBLIC DOCUMENT

NextEra's admission that the Chinese facilities are larger due to scale proves the point exactly. The statute directs the Department to consider "the extent of production facilities in the foreign country" in determining whether the process of assembly or completion is minor or insignificant. That the facilities in China for the upstream production processes are larger than the cell and module facilities in the third countries supports a conclusion that the completion in the third countries is minor and insignificant.

Ultimately, NextEra's arguments with respect to the level of investment or extent of production facilities are an inappropriate basis on which to decline initiation of these anti-circumvention inquiries.[75] The Department should initiate these inquiries and collect relevant information from the parties and make a determination, based on substantial evidence, as to whether merchandise completed or assembled in the third countries are circumventing the Orders, taking into consideration all of the required statutory factors. In light of the large volume of evidence that A-SMACC provided, demonstrating that an assessment of each of the required statutory factors would support an affirmative finding of circumvention, it would be unreasonable for the Department to decline to initiate anti-circumvention inquiries to further investigate this circumvention.

---

[75] Again, A-SMACC notes that NextEra contest only two of the five factors that the Department evaluates in determining whether the process of assembly or completion is minor or insignificant, which itself is one of numerous additional factors that the Department considers in determining whether the inquiry merchandise is circumventing the Orders and should be included within the scope.

Filed By: tbrightbill@wiley.law, Filed Date: 9/22/21 12:48 PM, Submission Status: Approved

Barcode:4162843-01 C-570-980 CIRC - Anti Circumvention Inquiry - from Thailand

PUBLIC DOCUMENT

If you have any questions regarding this submission, please do not hesitate to contact us.

Respectfully submitted,

/s/ Timothy C. Brightbill

Timothy C. Brightbill, Esq.
Laura El-Sabaawi, Esq.
Elizabeth S. Lee, Esq.

Counsel to American Solar Manufacturers Against Chinese Circumvention

Filed By: tbrightbill@wiley.law, Filed Date: 9/22/21 12:48 PM, Submission Status: Approved

CERTIFICATE OF SERVICE

PUBLIC SERVICE

Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China
A-570-979 & C-570-980
Anti-Circumvention Inquiry (from Thailand)

I certify that a copy of this public submission was served on the following parties, via electronic service, on September 22, 2021.

/s/ Elizabeth S. Lee

Matthew R. Nicely, Esq.
Akin Gump Strauss Hauer & Feld LLP
2001 K Street, NW
Washington, DC 20006

Jonathan Thomas Stoel, Esq.
Hogan Lovells US LLP
555 Thirteenth Street, NW
Washington, DC 20004

Jonathan M. Freed, Esq.
Trade Pacific PLLC
700 Pennsylvania Avenue, SE
Suite 500
Washington, DC 20003