On May 17, 2022, Carl Fleming, Lynn Kamarck, and Tyler Kimberly from McDermott’s Energy and Project Finance and International Trade teams hosted Solar Energy Industry Association (SEIA) General Counsel and Vice President of Market Strategy John Smirnow for a roundtable discussion that provided substantive arguments, best practices and other advocacy strategies for US solar developers who are preparing to submit collective and individual responses to the US Department of
Commerce (Commerce) this week following Auxin Solar Inc.'s petition and Commerce’s subsequent memorandum.

Below are key takeaways from the discussion:

1. To reach an affirmative circumvention determination, Commerce must confirm that the processing occurring in the target countries (i.e., Cambodia, Malaysia, Thailand and Vietnam) is “minor or insignificant.” While Commerce’s precedent establishes that the processing required to make a wafer into a module (including cell production) is not “minor or insignificant,” it has suggested the opposite during this circumvention inquiry.

2. Commerce could terminate the circumvention proceeding on the basis that including cells or modules completed in the target countries within the scope of the existing Chinese orders would not be “appropriate.” However, there is no clear indication as to what “appropriate” means.

3. What developers need the most right now is certainty. Because of the uncertainty surrounding the amounts of cash deposits and the final assessment of import duties, some developers are unable to make key business decisions. While Commerce tried to provide some of this certainty in its May 2 proposal, it did not accomplish that goal.

4. Developers can share their views regarding the investigation by submitting comments to Commerce by 5:00 pm EDT on May 19, 2022. Comments can include discussion of any difficulties complying with Commerce’s proposed certifications and whether such certificates would be useful to the company, the treatment of cells or modules manufactured in non-targeted countries and inconsistencies between prior Commerce decisions and the investigation at hand.
5. SEIA is calling for a Public Interest Requirement in anti-circumvention investigations to prevent similar petitions from being filed and moving forward in the future.

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National Law Review, Volume XII, Number 138

Source URL: https://www.natlawreview.com/article/key-takeaways-update-solar-circumvention-proceeding-and-discussion-possible-comments