

**THE “SOLAR COASTER” – THE IMPACT
COUNTERVAILING DUTY ORDER
IMPLEMENTATION HAS ON THE SOLAR ENERGY
INDUSTRY IN THE UNITED STATES**

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I. INTRODUCTION

Riding a roller coaster elicits excitement and jitters as you feel yourself getting higher and higher into the sky. But at a moment’s notice, and before you know it, down you go. The renewable energy industry, and in this case specifically solar energy, has seen its fair share of roller coaster rides in its short life span.¹ For periods of time, the industry is on a rise, taking substantial strides in production and deployment. But just at a moment’s notice. . . .

Several years ago, the United States Department of Commerce (USDOC) launched an investigation into whether Canadian Solar, an importer of Chinese solar panels selling into the United States, had received unlawful subsidies from

1. The use of photovoltaic cells began in 1955 with Bell Laboratories, when researchers created a 6%-efficiency PV cell that can be used for everyday equipment. OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, SOLAR ACHIEVEMENTS TIMEINE, <https://www.energy.gov/eere/solar/solar-achievements-timeline> (last visited Apr. 25, 2024).

China. Finding that it had, USDOC imposed “countervailing duties” on the company; its countervailing duty order (CVD) subsequently upheld by the Court of International Trade (CIT). Following an appeal by Canadian Solar, the United States Court of Appeals for the Federal Circuit (the court) rendered its opinion on January 28, 2022, affirming the CIT’s decision.² The court in *Canadian Solar* held that the USDOC could draw adverse inferences from China’s failure to respond to USDOC’s inquires for information, and that USDOC’s adverse inferences constituted substantial evidence that Canadian Solar had received regionally specific countervailable subsidies that warranted CVDs.³ Of pertinence, in determining the size of the subsidy, USDOC measured the subsidy as “the difference between what Canadian Solar is paying and the highest tariff set for any province.”⁴ While the court found that this measure was reasonable given China’s refusal to provide requested information, it nonetheless drastically increased the duties applied to its U.S. sales.⁵

The court’s judgment, upholding USDOC’s decision to impose substantial duties on Canadian Solar in reliance on negative inferences, followed well-trodden ground.⁶ This note, however, examines the application of negative inferences, and whether USDOC has become over reliant on its use, and how such use affects the solar energy industry.

Over the past decade, the push to expand solar energy sources gained significant traction with the purpose to fight global emissions and diversify energy sources to combat the worldwide energy crisis.⁷ Therefore, unless and until the U.S. strengthens its domestic manufacturing of crystalline photovoltaic cells, imported solar materials will still be needed to assist the solar energy industry’s growth in deployment and manufacturing.⁸ And if the recent history of subsidy investigations is any guide,⁹ there will be more instances in which negative inferences will form the basis for steep countervailing duties that will curtail imports. Indeed, commentators have already noted the sharp increase of the use of adverse

2. *Canadian Solar, Inc. v. United States*, 23 F. 4th 1372 (Ct. App. Fed. Cir. 2022) (hereinafter *Canadian Solar*).

3. *Id.* at 1378, 1380-81.

4. *Id.* at 1381.

5. *Id.* at 1380-81.

6. *Canadian Solar*, 23 F. 4th at 1378-81.

7. *Renewable power’s growth is being turbocharged as countries seek to strengthen energy security*, INT’L ENERGY AGENCY (Dec. 6, 2022) <https://www.iea.org/news/renewable-power-s-growth-is-being-turbocharged-as-countries-seek-to-strengthen-energy-security>.

8. *See generally*, Garrett Hering & Anna Duquiatan, ‘Extreme dependence’: US solar panel imports boom to record 54 GW in 2023, S&P GLOBAL (Feb. 23, 2024), [https://reglobal.org/us-solar-market-is-strong-yet-overreliant-on-imported-goods/](https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/extreme-dependence-us-solar-panel-imports-boom-to-record-54-gw-in-2023-80448513#:~:text=23%20Feb%2C%202024-,’Extreme%20dependence’%3A%20US%20solar%20panel%20imports%20boom,record%2054%20GW%20in%202023&text=An%20unprecedented%20wave%20of%20imported,on%20America’s%20solar%20manufacturing%20renaissance; see also REGLOBAL, US SOLAR MARKET REMAINS HEAVILY RELIANT ON IMPORTED GOODS (Apr. 8, 2024), <a href=).

9. REGLOBAL, *supra* note 8.

inferences in the past fifteen or so years.¹⁰ The frequent use of negative inferences may well be supported by existing case law. But is it doing more harm than good – potentially making imports unaffordable when domestic production isn't sufficient to make up for the shortfall? Though courts don't intend for the application of adverse inferences to be punitive on its face, in certain circumstances the effects could be argued as having punitive effect. While the concept of negative inference is long settled in the law,¹¹ whether to draw a negative inference in an individual case is nonetheless generally within the discretion of the fact finder.¹² The importance of administrative review and its processes and effects will take a front row seat on the solar coaster.

II. BACKGROUND

A. *The Rise of the Solar Industry*

We exist in part because of the sun's energy, it warms our planet and sends rays of energy to earth constantly.¹³

1. The Importance of Photovoltaic Cells

Although the sun has been used to provide energy since the seventh century B.C. (in the use of magnifying glasses to start fires),¹⁴ solar energy has seen its greatest advancements in the development of solar panels and photovoltaic (PV) cells¹⁵ to produce electricity.¹⁶ The importance of PV cells rests in the technology's ability to enable manufacturing in large plants, and thus it "creates economics of scale" for use in not only utility power generation installations, but also deployment in more minute quantities for small-scale residential rooftop systems.¹⁷ In 2022, PV-generated power increased by 191 GW, and was therefore responsible for "almost all the increase in solar power" that year.¹⁸ New electric generating capacity increased in 2023 to add a record 33 GW of solar capacity.¹⁹

10. Final Rule, *Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws*, 86 Fed. Reg. 52300, 52305 (2021).

11. The principle underlying the use of adverse inferences is that if the evidence withheld would have done the party withholding it any good, that party would readily have produced it. *Int'l Union (UAW) v. NLRB*, 459 F.2d 1329, 1339 (D.C. Cir. 1972).

12. *Bray v. United States*, 306 F.2d 743, 747 (1962).

13. Jamie Smith & Catherine Lane, *The history of solar energy*, SOLARREVIEWS (Apr. 21, 2024), <https://www.solarreviews.com/blog/the-history-of-solar-energy-timeline>.

14. *Id.*

15. "A photovoltaic cell, is a nonmechanical device that converts sunlight directly into electricity." EIA, SOLAR EXPLAINED – PHOTOVOLTAICS AND ELECTRICITY (May 26, 2023), <https://www.eia.gov/energyexplained/solar/photovoltaics-and-electricity.php>.

16. Smith & Lane, *supra* note 13.

17. Piotr Bojek, *Solar PV*, IEA50 (July 11, 2023), <https://www.iea.org/energy-system/renewables/solar-pv>.

18. Press Release, IRENA, Record Growth in Renewables Achieved Despite Energy Crisis, (Mar 21, 2023), <https://www.irena.org/News/pressreleases/2023/Mar/Record-9-point-6-Percentage-Growth-in-Renewables-Achieved-Despite-Energy-Crisis>.

19. Press Release, SEIA, Solar Poised for Record-Setting 2023 while Economic Challenges Mount (Dec. 7, 2023), <https://www.seia.org/news/solar-poised-record-setting-2023-while-economic-challenges-mount>.

Additionally, “utility-scale solar PV is the least costly option for new electricity generation in a significant majority of countries worldwide.”²⁰

Though PV cells have revolutionized the solar energy industry, manufacturing these cells is dominated by Asian countries.²¹ While the U.S. has taken steps to encourage and support domestic manufacturing through legislation like the Inflation Reduction Act, achieving domestic manufacturing independence will not occur overnight.²² Therefore, because imports of PV cells will continue to grow in the interim (maybe years), so will administrative review of countervailing duty orders.²³

B. *An Icebreaker to Solar Energy Subsidies*

In the early 2000s, energy subsidies significantly influenced the economic and political agendas in many countries.²⁴ “In principle, any measure that keeps prices for consumers below market level or for energy producers above market levels, or that reduces costs for consumers or producers, may be considered a subsidy.”²⁵ Implementation of energy subsidies can enhance a multitude of policy goals, such as providing “affordable energy for low-income society, correct[ing] markets for unpriced externalities, induc[ing] technology learning and driv[ing] down costs of new technologies, reduc[ing] import dependence and enhance[ing] energy security, and creat[ing] new economic activity and jobs.”²⁶ The type of subsidy results in different effects on costs of production, increased prices that disfavor producers, and decreased prices for consumers, which thus emphasizes the importance of how energy subsidies are categorized and calculated.²⁷

But the same energy subsidies that can increase solar deployment may also run afoul of laws intended to protect domestic industries from subsidized imports. *Canadian Solar* deals specifically with U.S. trade laws authorizing countervailing subsidies, i.e., subsidies in the form of duties intended to offset, or countervail subsidies by the producing country.²⁸ For a subsidy to be countervailable, i.e., eligible to be offset, “a subsidy must involve a government financial contribution that confers a benefit that is specific to a certain enterprise, industry or region in

20. Bojek, *supra* note 17.

21. See INT’L ENERGY AGENCY, SPECIAL REPORT ON SOLAR PV GLOBAL SUPPLY CHAINS (Aug. 2022), <https://iea.blob.core.windows.net/assets/d2ee601d-6b1a-4cd2-a0e8-db02dc64332c/SpecialReportonSolarPVGlobalSupplyChains.pdf>.

22. Anne Fischer, *US solar industry calls for domestic content rules to support manufacturing*, PV MAG. (Mar. 29, 2024), <https://www.pv-magazine.com/2024/03/29/us-solar-industry-calls-for-domestic-content-rules-to-support-manufacturing/>.

23. OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, QUARTERLY SOLAR INDUSTRY UPDATE (Jan. 25, 2024), <https://www.energy.gov/eere/solar/quarterly-solar-industry-update>.

24. Trevor Morgan, *An Introduction to Energy Subsidies*, GLOB. SUBSIDIES INITIATIVE (Nov. 29, 2006), <https://www.iisd.org/gsi/commentary/introduction-energy-subsidies>.

25. *Id.*

26. Michael Taylor, *Energy Subsidies: Evolution of the Global Energy Transformation to 2050*, IRENA 14 (2020), https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2020/Apr/IRENA_Energy_subsidies_2020.pdf.

27. *Id.* at 21-24.

28. *Canadian Solar*, 23 F. 4th at 1375

that country or that is contingent upon export or the use of domestic goods over imported goods in production.”²⁹

C. *Law and Overreliance? – The Law on Countervailing Duty Orders*

Antidumping and countervailing duty laws have been in effect since the Fordney-McCumber Act of 1922, which “gave the president the power to impose antidumping duties on imports being sold at or below the price of American-made goods.”³⁰ Countervailing duties are imposed by the government to “protect domestic producers by countering the negative impact of import subsidies,” and thus, are an “import tax on the imported product by the importing country.”³¹ In turn, countervailing duties raise the imported products closer to market price and provide a more “level playing field for domestic products.”³² A subsidy is countervailable when it is “specific,” making it “limited to an enterprise or industry located within a designated geographical region within the jurisdiction of the authority providing the subsidy.”³³ This is referred to as a regionally specific subsidy.³⁴

1. Administrative Review of Countervailing Duty Orders

USDOC has the power of administrative review of CVD orders under section 751(a)(1) of the Tariff Act of 1930 (The Act) (as amended by 19 U.S.C. section 1675).³⁵ The Act states that United States “industries may petition the government for relief from imports that are sold in the United States at less than fair value or which benefit from subsidies provided through foreign government programs.”³⁶ There are four different avenues to request administrative review “each year during the anniversary month of the publication of an antidumping or countervailing duty order.”³⁷ For CVD order proceedings, administrative review “normally will

29. U.S. CUSTOMS & BORDER CONTROL, ANTIDUMPING AND COUNTERVAILING DUTIES (AD/CVD) FREQUENTLY ASKED QUESTIONS (Jan. 30, 2024), <https://www.cbp.gov/trade/priority-issues/adcvd/antidumping-and-countervailing-duties-adcvd-frequently-asked-questions>.

30. *Id.* Anti-dumping laws are implemented to prevent dumping, which occurs when “foreign producers sell a product in the United States at a price that is below that producer’s sales price in the country of origin, or at a price that is lower than the cost of production.” *Antidumping and Countervailing Duty FAQs*, INT’L TRADE ADMIN., <https://www.trade.gov/antidumping-and-countervailing-duty-frequently-asked-questions> (last visited Apr. 25, 2024).

31. *What is Countervailing Duty*, BUS. STANDARD, <https://www.business-standard.com/about/what-is-countervailing-duty> (last accessed Apr. 25, 2024); “Commerce is required to impose a countervailing duty on imported merchandise when it ‘determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy.’” *Canadian Solar*, 23 F.4th at 1372 (citing 19 U.S.C.A. § 1671(a)(1)).

32. *Id.*

33. 19 U.S.C.A. §§ 1677(5)(A), 1677(5(A)(D)(iv).

34. *Id.*

35. Tariff Act of 1930 (Hawley-Smoot Tariff Act) 19 U.S.C.A. § 1654.

36. *Understanding Antidumping & Countervailing Duty Investigations*, U.S. INT’L TRADE COMM’N https://www.usitc.gov/press_room/usad.htm; 19 U.S.C.A. § 1654; 19 U.S.C.A. § 1671; *see also* 19 C.F.R. § 351.213 for details of requests, deferrals, rescissions, period of review, antidumping and countervailing duty proceedings, and time limits for administrative review of orders under § 751(a)(1) of the Act.

37. 19 C.F.R. § 351.213(b)(1-4).

cover entries or exports of the subject merchandise during the most recently completed calendar year,” or if “requests are received during the first anniversary month after publication of an order or suspension of investigation, an administrative review will cover entries or exports . . . during the period from the date of suspension of liquidation . . . to the end of the most recently completed calendar or fiscal year. . . .”³⁸

Once a petition has been made for administrative review of a CVD order, USDOC then concludes if a subsidy exists and if so, the amount of the existing subsidy.³⁹ Once the existence and amount of subsidy are determined, the United States International Trade Commission (USITC) will determine if there is a material injury/threat of material injury and if said material injury/threat of material injury is occurring to the domestic industry due to the subsidized imports.⁴⁰ USITC oversees both the preliminary phase and final phase of the injury investigation.⁴¹

The preliminary phase of a subsidized imports injury investigation generally must be completed within forty-five days of receiving a petition for investigation.⁴² USITC then determines, with the information best available at the time of the investigation, “(1) whether there is a ‘reasonable indication’ that an industry is materially injured or is threatened with material injury, or (2) whether the establishment of an industry is materially [less advanced], by reason of imports under investigation by [USDOC] that are allegedly sold at less than fair value in the United States or subsidized.”⁴³ USITC must answer both questions in the affirmative for USDOC to continue its investigation.⁴⁴

After USDOC completes its preliminary affirmative determination, USITC moves onto its final investigation of injury, which usually must be completed within 120 days after USDOC concludes its preliminary affirmative determination.⁴⁵ USITC then determines “(1) whether an industry in the United States is materially injured or threatened with material injury, or (2) whether the establishment of an industry in the United States is materially [less advanced], by reasons of imports that [USDOC] has determined to be sold in the United States at less than fair value or subsidized.”⁴⁶ If USITC finds in the affirmative, it issues a CVD

38. *Id.*

39. U.S. INT’L TRADE COMM’N, *supra* note 36.

40. *Id.*

41. *Id.*

42. *Id.*

43. U.S. INT’L TRADE COMM’N, *supra* note 36.

44. *Id.*; Let it be noted there are exceptions to this rule. *Id.*

45. *Id.*

46. U.S. INT’L TRADE COMM’N, *supra* note 36.

order which is subsequently enforced by the U.S. Customs Service.⁴⁷ If an interested party⁴⁸ wishes to appeal, the party may appeal to the United States Court of International Trade.⁴⁹

During administrative review, if USDOC finds “(a) necessary information is not available on the record, or (b) ‘an interested party or any other person . . . withholds information that has been requested by [USDOC],’” or does not provide the information before set deadlines, “‘in the manner requested,’ [and/or] ‘provides such information but the information cannot be verified,’ [USDOC] must use ‘facts otherwise available.’”⁵⁰ In addition, if an interested party does not comply with USDOC’s requests for information “to the best of its ability,” USDOC then “*may* use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available,” using information “from the petition, a final determination in the investigation, prior administrative reviews, or ‘any other information placed on the record.’”⁵¹

This process, described in more detail below, led to USDOC’s imposition of countervailing duties on the solar panels Canadian Solar sells in the U.S., and to Canadian Solar’s appeal to the Federal Circuit of the CIT decision to uphold USDOC’s CVD order.

III. ANALYSIS

Canadian Solar’s appeal centered on one issue: did USDOC lack “substantial evidence” to uphold its finding that Canadian Solar had benefitted from a “regionally specific subsidy”?⁵² As noted earlier, the Federal Circuit’s decision in *Canadian Solar Inc.* rejected Canadian Solar’s appeal, finding that the agency’s decision was, in fact, supported by substantial evidence.

More specifically, the court rejected Canadian Solar’s argument that USDOC had “failed to identify a single geographic region receiving the subsidy.”⁵³ USDOC, the court found, could reasonably infer such a subsidy relying on the negative inference from China’s refusal to provide the more detailed information it had sought.⁵⁴

47. *Id.*

48. “Interested party” is defined as follows: (1) a manufacturer, producer, or wholesaler in the United States of a domestic like product; (2) a certified or recognized union or group of workers that is representative of the industry; (3) a trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product; (4) a coalition of firms, unions, or trade associations as described above; and (5) in cases involving processed agricultural products, a coalition or trade association representative of processors, or processors and producers, or processors and growers. *Id.*

49. *Id.*

50. *Canadian Solar*, 23 4th at 1375-76; 19 U.S.C.A. § 1677e(a).

51. *Canadian Solar*, 23 4th at 1376 (citing 19 U.S.C.A. §§ 1677e(b) 1677e(b)(2)); *see also* 19 C.F.R. § 351.308(c); *Gallant Ocean Co. v. United States*, 602 F.3d 1319, 1321 (Fed. Cir. 2010) (emphasis added).

52. *Canadian Solar, Inc.*, 23 4th at 1377-78.

53. *Id.* at 1377.

54. *Id.* at 1378 (“Commerce sufficiently and reasonably explained that it lacked key information because the government of China failed to cooperate by not acting to the best of its ability to comply with requests for information. As a result, Commerce was forced to fill informational gaps and properly relied on adverse inferences to find that Canadian Solar received a regionally specific electricity subsidy that must be countervailed.”).

When the agency relies on the withholding of pertinent information to draw an adverse inference, its decision can move the needle toward domestic producers to the detriment of consumers who resultingly pay higher prices.⁵⁵ That, in itself, is not a bad thing – the whole point of countervailing duties is to level the playing field for domestic manufacturers facing unfair competition from subsidized foreign competitors. But the danger in overreliance on the negative inference is that it may result in erroneous determinations that subsidies exist.

In the typical case, it is the party in possession of the evidence being withheld that is penalized by the negative inference.⁵⁶ However, in *Canadian Solar*'s case, it is the Chinese government, not *Canadian Solar*, that possesses the information.⁵⁷ The agency's "substantial evidence" burden is relatively low – to have its findings sustained, it must only show its reliance on evidence a reasonable mind would find as ample to support a conclusion.⁵⁸ Because a negative inference can itself constitute substantial evidence that a subsidy has been provided by a foreign government,⁵⁹ parties like *Canadian Solar* are put in the predicament of relying on the Chinese government to produce the relevant information or face the substantial consequence of a negative inference being used to impose hefty countervailing duties.

A. Challenger: Canadian Solar, Victor: CIT.

Canadian Solar, a solar photovoltaic products and energy solutions provider, exporter, and manufacturer, exported crystalline silicon photovoltaic cells from China.⁶⁰ In December 2012, following USITC's affirmative final determination that domestic manufacturers had been materially injured by imported solar panels subsidized by China, USDOC implemented a CVD order directed at those imports.⁶¹ On February 13, 2017, USDOC began its fourth review of this CVD order (covering the period from January 1, 2015 to December 31, 2015)⁶² and selected *Canadian Solar* as one of its mandatory respondents.⁶³ There, USDOC sought to determine whether *Canadian Solar* "benefited from receiving electricity for less than adequate remuneration ('LATR')."⁶⁴

55. Ragan Updegraff, Note, *Striking a Balance between Necessity and Fairness: The Use of Adverse Facts Available in Dumping and Subsidies Investigations*, 49 GEO. L. REV. 709, 718-30 (2018) <https://www.law.georgetown.edu/international-law-journal/wp-content/uploads/sites/21/2018/08/GT-GJIL180024.pdf>; Simon Lester & Scott Lincicome, *Some New Data on U.S. Anti-Dumping Abuse*, CATO INSTITUTE (Apr. 9, 2021) <https://www.cato.org/blog/some-data-us-anti-dumping-abuse>.

56. See Hon. Shira A. Scheindlin & Natalie M. Orr, *The Adverse Inference Instruction After Revised Rule 37(E): An Evidence-Based Proposal*, 83 FORDHAM L. REV. 1299 (2014); see Stephen A. Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CAL. L. REV. 1011 (1978).

57. See generally, *Canadian Solar, Inc.*, 23 4th at 1372-81.

58. *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

59. That, in fact, is the essence of the Federal Circuit's ruling in *Canadian Solar*.

60. *Canadian Solar, Inc., v. United States*, No. 18-00184 U.S. Ct. Int'l Trade (Feb. 25, 2020).

61. *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Countervailing Duty Order*, 77 FR-73017-01 (Dec. 7, 2012).

62. *Canadian Solar*, slip op. at *1.

63. *Canadian Solar*, 23 4th at 1376.

64. *Id.*

At the beginning of its inquiry, USDOC sent China questionnaires requesting information on “provincial price proposals, descriptions of how the National Development and Reform Commission (‘NDRC’) is involved in electricity price-setting, and an explanation of how electricity pricing is responsive to market variables” and in establishing local provincial level electricity prices.⁶⁵ When China then failed to provide the requested information, USDOC drew the adverse inference that “Canadian Solar received a countervailable subsidy through below-market electricity prices.”⁶⁶ Canadian Solar then filed suit in CIT, challenging multiple aspects of the ruling, including the finding that Canadian Solar received a countervailable electricity subsidy.⁶⁷

USDOC revised its determination on remand, stating instead that “Canadian Solar received a regionally specific subsidy,”⁶⁸ a finding that nonetheless supported the imposition of countervailing duties on Canadian Solar. USDOC explained that because China failed to provide USDOC with the requested information in reference to the “electricity price variation across the provinces, [USDOC] was unable to ‘confirm that market and commercial principles explain the variation in electricity prices on the record.’”⁶⁹

USDOC gave three reasons for its finding: (1) China failed to produce “‘provincial price proposals for each of the relevant provinces’” that would assist USDOC in determining why electricity prices vary by province and identify “‘market or cost-based reasons underlying the variation;’”⁷⁰ (2) “China’s response lacked ‘a detailed description of the cost elements and price adjustments that were discussed between the provinces and the NDRC’ and that would have helped USDOC ascertain why prices varied by province;”⁷¹ and (3) lastly, “China’s response was devoid of any ‘province-specific explanations’ for price variation, such as how costs inform provincial electricity prices.”⁷²

Subsequently, USDOC applied the adverse inference principle and determined “the provision of electricity is a countervailable subsidy program whereby the central Chinese government, through the NDRC in Beijing, sets different prices in different regions under its authority (i.e., the provinces) without any commercial or market considerations, but instead for development purposes.”⁷³ As such, USDOC applied the “highest electricity prices from the province-by-province price list” for Canadian Solar’s benchmark in calculating its duty rate.⁷⁴

Canadian Solar then filed another suit before CIT challenging USDOC’s finding that Canadian Solar received countervailable electricity subsidies, but CIT

65. *Id.*

66. *Id.*

67. *Canadian Solar*, 23 4th at 1377

68. *Id.*; see 19 U.S.C.A. § 1677(5A)(D)(iv).

69. *Canadian Solar*, 23 4th at 1377.

70. *Id.*

71. *Id.*

72. *Id.*; Note there was 7 arguments total in the redetermination.

73. *Canadian Solar*, 23 4th at 1377.

74. *Id.*

sustained USDOC's findings.⁷⁵ Canadian Solar then appealed CIT's determination, arguing, "USDOC's application of adverse facts available to determine that the electricity program was a regionally specific subsidy was not supported by substantial evidence because USDOC allegedly ignored the provincial price schedules and failed to identify a single geographical region receiving subsidies."⁷⁶

B. *The Implications of Reliance on Adverse Inferences*

1. Canadian Solar, this is Customary.

Unfortunately for exporting corporations like Canadian Solar, the practice of reliance on adverse inferences is essentially universal in common law systems.⁷⁷ In fact, USDOC has even granted a 386.45% CVD rate for a foreign producer and stated it is not unlawful nor punitively high when based on substantial evidence in the record, including adverse inferences.⁷⁸ The courts have consistently stated that the use of adverse inferences is to promote cooperation and not elicit punitive sanctions.⁷⁹ And because the rates at which adverse inferences are applied in administrative review have skyrocketed in determinations made between 2009-2020s,⁸⁰ it is important to examine why this is happening, and its effect.

2. Adverse Inferences: The Good, and the Ugly

As the application of the adverse inferences principle increased throughout the past decade, views started to diverge on its application.⁸¹ The argument "for" contends that using adverse inferences enhances efficiency to reach determinations, instead of expending potentially extensive time to procure information from the non-responsive party.⁸² Supporters also argue for the value of incentives; that parties involved in countervailing duty order cases should willingly provide the information requested.⁸³ Additionally, proponents assert that without the possibility of USDOC having discretion to apply adverse inferences, information submitted, if any at all, would not be an accurate representation of the subsidies or dumping levels.⁸⁴

On the other hand, opponents of the application of adverse inferences argue its use is discretionary and that overuse can lead to abuses of discretion and disproportionate favoring of petitioners claiming that imports are being subsidized.⁸⁵

75. *Id.*

76. *Id.*; The United States Court of Appeals for the Federal Circuit has jurisdiction to hear this claim pursuant to 28 U.S.C.A. § 1295(a)(5). *Canadian Solar*, 23 4th at 1377.

77. *Trans Texas Tire, LLC v. United States*, 519 F. Supp. 3d 1289 (U.S. Ct. Int'l Trade 2021).

78. *Id.* at 1306.

79. *Id.* (citing *BMW of N. Am., LLC v. United States*, 926 F.3d 1291, 1297 (Fed. Cir. 2019)).

80. *Id.*

81. Updegraff, *supra* note 55 at 718-30.

82. *Id.* at 719-20.

83. *Id.* 720-21.

84. *Id.*

85. Updegraff, *supra* note 55 at 725.

For example, those subject to countervailing duties will perceive that they are disproportionately disfavored when they face percentage rate increases of over 300% resting solely on the exporting country's failure to provide information.⁸⁶ Opponents further argue unfair hindrances in instances where respondents to the government's information requests have fewer resources and only weeks to file responses compared to petitioners who have several weeks if not months to gather information to prepare their petitions.⁸⁷ For smaller, less sophisticated exporters and producers, these tight deadlines and costs to obtain the needed information to answer extensive and detailed questionnaires can become incredibly burdensome.⁸⁸ Because of the multiple sources from which information needs to be gathered, the sheer amount of information to be obtained, and the rigorous deadlines, mistakes are bound to be made, and as a result, USDOC will resort to relying on adverse inferences.⁸⁹ Even if small errors are made, or there is only a piece of information in evidence that is in question, USDOC will throw out all of the information already obtained by respondents and then apply an adverse inference to conclude that the seller has been subsidized.⁹⁰ Essentially, all the work and resources put into obtaining and producing such information would be for naught. Critics of overbroad use of the adverse inference principal reason that there should be greater procedural safeguards in order to avoid overuse of the adverse inference as a substitute for more rigorous fact-finding.⁹¹

C. An Overreliance on the Use of Adverse Inferences to Justify Countervailing Duties has Unnecessarily Hurt Consumers

1. Uncertainty? From the Industry POV

The intent behind CVDs is to protect US solar-related manufacturing against unfairly lower-priced imports "and/or subsidies by other countries' governments."⁹² But an erroneous determination both as to the existence of a subsidy and the size of the subsidy, can also cause harm. An excessive countervailing duty unnecessarily increases costs of imports and thus affects sections of the solar industry, such as developers and installers, who "benefit from having access to imported [products] at the lowest possible cost."⁹³

Over the course of a CVD investigation and until a decision is made, the solar industry resides in a state of limbo because of the uncertainty, and "developers will find it very difficult to move ahead with projects unless they have a source of [solar-related materials] that they can be sure will not be affected."⁹⁴ If solar-related materials have already been ordered, packed, and on the seas, a new order

86. *Id.*

87. *Id.* at 725-26.

88. *Id.* at 725-26.

89. Updegraff, *supra* note 55 at 726-27.

90. Lester & Lincicome, *supra* note 55.

91. *Id.*

92. *Id.*

93. *Id.*

94. Lester & Lincicome, *supra* note 55.

could retroactively impact the cost of said materials, rendering even more problems for importers and their contracting deals.⁹⁵ For instance, Wood Mackenzie's global head of solar research, Xiaojing Sun, stated that these investigations are an "example of how policy uncertainty can have devastating impact on an industry," and "neither buyers nor sellers are willing to bear the tariff risk."⁹⁶

In the present case, USDOC infers the size of China's subsidy to be the difference between what Canadian Solar is paying and the highest electric tariff rate set for any province.⁹⁷ Because of this, Canadian Solar's sales are subject to much higher duties than it originally contemplated when it began exporting photovoltaic cells from China.⁹⁸ This can create uncertainties between products providers like Canadian Solar and its clients with projects already in the works.⁹⁹ For example, if the agency orders higher CVDs importers may not have sufficient funds to cover the increased prices, and thus, their projects slow down, or may even be canceled.¹⁰⁰ This then prevents shipping due to "negative sentiment" in the market, and could effectively lead to a reduction in investments in the industry.¹⁰¹

95. *Id.*

96. Ed Crooks, *Anti-dumping threat throws US solar industry into turmoil*, WOOD MACKENZIE (May 6, 2022), [https://www.woodmac.com/news/opinion/anti-dumping-threat-throws-us-solar-industry-into-turmoil/#:~:text=In%20March%2C%20the%20US%20Department,duties%20on%20imports%20from%20China;Wood Mackenzie is a global energy research company and provides data, analytics, and insights to strengthen the power of the natural resources industry.](https://www.woodmac.com/news/opinion/anti-dumping-threat-throws-us-solar-industry-into-turmoil/#:~:text=In%20March%2C%20the%20US%20Department,duties%20on%20imports%20from%20China;Wood%20Mackenzie%20is%20a%20global%20energy%20research%20company%20and%20provides%20data%20analytics%20and%20insights%20to%20strengthen%20the%20power%20of%20the%20natural%20resources%20industry.) *Id.*

97. *Id.*

98. *Id.*

99. Crooks, *supra* note 96.

100. Iulia Gheorghiu, *Senators press for quicker solar anti-dumping investigation amid reports of sector's 'rapid degeneration'*, UTIL. DIVE (May 3, 2022) <https://www.utilitydive.com/news/senators-press-for-quicker-solar-anti-dumping-investigation-amid-reports-of/621654/>.

101. *Id.*

IV. CONCLUSION

Although countervailing duty orders are intended to protect U.S. manufacturers, the dramatic increase in the agency's use of negative inferences to support the imposition of countervailing duties increases the risk that the agency will erroneously find the presence of foreign subsidies, errors that will needlessly increase costs to consumers. Consumers, importers, and the general public would benefit from the agency's more judicious use of its discretionary authority to draw negative inferences from a country's non-production of information, particularly where affected exporters to the U.S. have no independent ability to secure that information themselves. Erroneous subsidy findings can translate into unnecessary price increases for consumers and, particularly in the case of our nation's ambitious carbon reduction goals, result in barriers to meeting those goals through still necessary imports. Until then, "solar coaster" will keep on its ups and downs.

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