

Commerce Tariff Memo Helps Dispel Clouds For US Solar Cos.

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On March 25, pursuant to allegations made by Auxin Solar Inc., the U.S. Department of Commerce initiated a circumvention inquiry into whether imports of crystalline silicon photovoltaic cells, or CSPVs, from Cambodia, Malaysia, Thailand or Vietnam are circumventing anti-dumping duty and countervailing duty orders issued for CSPVs from China.[1]

This circumvention proceeding could profoundly affect the companies that import or rely on imported CSPVs in the U.S.[2]

On May 2, Commerce released a memorandum detailing three important aspects of its ongoing inquiry, should it preliminarily or ultimately determine that CSPVs from the target countries are circumventing the orders.[3] In addition, the department invited interested parties to provide comments and relevant factual information on these potential certification requirements by 5 p.m. EDT on May 19.

We discuss each of the above points in more detail below.

Key Takeaways

Commerce's May 2 memorandum clarified the scope of the circumvention inquiry, noting that CSPVs incorporating wafers produced outside of China from China-sourced polysilicon are outside the scope of the inquiry.

The memorandum also stated that, in the event of affirmative circumvention findings, the department intends to establish certification procedures that would allow exporters and importers of CSPVs to demonstrate that particular entries do not incorporate key components or processes from China, and should therefore be excluded from the orders altogether.

The memorandum further indicated that the certification process could be used to establish the appropriate company-specific rate for those entries that are included in the scope of the circumvention inquiry. Specifically, it proposed that exporters can certify the identity or identities of the Chinese producer(s) that supplied the inputs.



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Finally, the memorandum invited interested parties to provide comments and relevant factual information on these potential certification requirements.

What the May 2 Memorandum Means for the Solar Industry and Its Stakeholders

There are a number of practical effects of Commerce's May 2 certification memorandum.

It is unusual for the department to propose a certification process so early in a circumvention proceeding. The fact that Commerce is taking such a step appears to be a recognition of the tremendous disruption that initiation of this circumvention inquiry has caused in the industry, and the need to provide a bit more guidance to the industry, so that companies can make more reasoned decisions as to how to react to this circumvention proceeding.

Most importantly, the memorandum invites interested parties to provide comments and relevant factual information on these potential certification requirements. Assuming Commerce makes an affirmative circumvention determination, these certification processes will provide the only ability for exporters from the target countries to either eliminate or reduce their individual risks from the circumvention proceeding.

As a result, it is critical that these certifications be workable. This comment process provides the solar industry the opportunity to ensure that is the case.

Where entries are subject to an affirmative circumvention finding, this proposed certification process would allow solar developers to indicate the specific Chinese supplier involved in production, and so provide more clarity as to the appropriate cash deposit rates to apply on such entries. This designation is particularly important in a case such as this where the rates vary widely.

Commerce's proposed approach will thus allow certain developers to better assess whether to move ahead in their projects, as opposed to sitting on the sidelines.

The clarification of the scope of the circumvention inquiry was also very important. Before the clarification, most developers had assumed that any wafer produced inside or outside of China, so long as it contained polysilicon sourced from China, was subject to the inquiry. The vast majority of the global module supply chain would therefore be subject to a circumvention determination.

This clarification has allowed developers to narrow their analysis of their module suppliers and their supply chain, and to continue to pivot to other module suppliers with more confidence, now that developers know at least one point where the line is drawn in the supply chain — wafers produced outside of China, even from Chinese polysilicon, will be outside of the scope of the inquiry.

The comment period also provides the solar industry with another opportunity to argue against the investigation as a whole, and to provide valuable information to Commerce on the unique aspects of the global solar module supply chain and its importance to the U.S. solar industry, U.S. jobs and the Biden administration's green agenda.

Additional Background

Stepping back, it is worth revisiting the context under which the May 2 memorandum was issued. As noted, the issue in the circumvention inquiry is whether CSPVs that are processed or assembled in the

target countries prior to export to the U.S. are circumventing Commerce's initial anti-dumping and countervailing duty orders on CSPVs from China.

To make an affirmative circumvention determination, Commerce must first find that: (1) the imports at issue are of the same class or kind of merchandise as the merchandise covered under the orders; (2) the imports at issue were completed or assembled in the target countries from merchandise that is subject to the orders or produced in China; and (3) the process of assembly or completion in the target countries was minor or insignificant.[4]

The statute further provides various criteria for assessing whether the processing in the target country is minor or insignificant, or not.

Commerce has indicated that it intends to apply an affirmative circumvention determination on a countrywide basis. This means that it would apply to all exports of CSPVs from a target country — unless exporters and importers can prove through certifications that particular entries do not include the key Chinese inputs or processes that the department determines are necessary to consider CSPVs to be products of China, for purposes of the orders.

Analysis

Clarification of the Scope of the Circumvention Inquiry

Commerce acknowledged that this inquiry differs from prior circumvention proceedings, as it involves numerous inputs and multiple third countries. In addition, various steps of the production process — e.g., refining polysilicon, forming it into ingots, cutting wafers, doping wafers and assembling modules — can happen in different countries.

Importantly, the department clarified that "[w]afers produced outside of China with polysilicon sourced from China are not subject to these circumvention inquiries." [5]

This is a significant clarification, because previously, most developers had assumed that any wafer produced inside or outside of China, so long as it contained polysilicon sourced from China, was subject to the circumvention inquiry — and therefore, the vast majority of the global module supply chain was potentially tainted.

Thus, while much more clarity on the reach of the circumvention inquiry is needed, this is a useful first step. It should be noted, however, that this clarification reinforces Commerce's apparent willingness to move from its prior position that "the essential component of the solar cell is the p/n junction," [6] and that if the p/n junction was not formed in China, CSPVs were not subject to the orders. [7]

Proposed Certification Procedures That Will Allow for the Application of Company-Specific Rates on Chinese Manufacturers

Typically, after making an affirmative circumvention finding, whether preliminary or final, Commerce establishes certification procedures to allow importers and exporters to certify the source of materials used in the allegedly circumventing products, and establish that such products are not subject to the underlying anti-dumping or countervailing duty orders. [8]

The department's memorandum indicates that, in the event of an affirmative circumvention

determination in this proceeding, it intends to establish a similar certification process. But the memorandum does not provide details as to which specific Chinese inputs or products will be considered key to bringing a product within the scope of the underlying orders.

Where an exporter or importer can provide a certification that specific entries of CSPVs do not include key Chinese components, as defined by Commerce, they will not be subject to the scope of the circumvention determination, and will not be subject to any anti-dumping or countervailing duties. Where they cannot, they will be subject to the circumvention finding, and the importer will be required to post anti-dumping and countervailing duty cash deposits on such entries.

Commerce's proposed structure for certifications differs from the structure of certifications in past circumvention cases, in that it includes a process to allow importers and exporters to certify the identity or identities of the Chinese producer or producers that supplied the inputs.[9] This information would then be used to determine the applicable anti-dumping and countervailing duty company-specific cash deposit rates.

As the memorandum notes:

[I]f Chinese-origin wafers are used in the completion of solar cells or modules in Vietnam, Thailand, Cambodia and/or Malaysia and were supplied by a Chinese manufacturer with a company-specific rate, for such imports, Commerce intends, in the event of an affirmative preliminary or final determination, that the cash deposit rate for the relevant imports from the third country will be equal to that Chinese manufacturer's and/or exporter's company-specific rate(s).[10]

Practically speaking, where entries are subject to the circumvention finding, this proposed certification process would allow interested parties to indicate the appropriate cash deposit rates to apply on such entries — which is particularly important in a case such as this, where the rates vary widely. Accordingly, the establishment and use of this aspect of the certification process could allow solar developers to lower their tariff exposure risk to more manageable levels based on their choice of manufacturer.

While historic anti-dumping or countervailing duty rates of particular manufacturers are no guarantee of future rates, these historic rates do help predict best, moderate and worst outcome scenarios. Commerce's proposed certification — and this type of analysis — will allow certain solar developers to move ahead in their projects, instead of sitting on the sidelines, or throwing caution to the wind with a guesswork approach.

As the memorandum notes, however, in prior circumvention inquiries, the department has excluded companies from the certification process if it determines that such companies did not cooperate to the best of their ability in the inquiry, or if companies were unable to trace the inputs from the subject country to actual merchandise imported into the U.S.

Companies that are not eligible to participate in the certification process would have no ability to establish that their entries should be excluded from any circumvention finding, or to establish the applicable cash deposit rate. Such entries would presumably be entered at the China-wide rate in the anti-dumping proceeding, and at the all-others rate from the countervailing duty administrative review, which is currently 256.05%.

Conclusion

While the initiation of the circumvention investigation introduced numerous material uncertainties as to duty increases and the impact thereof upon suppliers and projects, Commerce's May 2 memorandum begins to provide some needed clarification.

As we noted at the start, interested parties currently have until 5 p.m. EDT on May 19 to submit comments and factual information to the department regarding these proposed certification requirements.

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[1] See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order, 77 Fed. Reg. 73,018 (Dec. 7, 2012); Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Countervailing Duty Order, 77 Fed. Reg. 73,017 (Dec. 7, 2012) (collectively, the orders).

[2] See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People's Republic of China: Initiation of Circumvention Inquiries, from James Maeder to Lisa Wang, A-570-979, C-570-980 (Mar. 25, 2022); Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Initiation of Circumvention Inquiry on the Antidumping Duty and Countervailing Duty Orders, 87 Fed. Reg. 19,071 (Dept. of Commerce, April 1, 2022).

[3] Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People's Republic of China: Circumvention Inquiries With Respect to Cambodia, Malaysia, Thailand, and Vietnam – Potential Certification Requirements, from Jose Rivera and Peter Shaw to All Interested Parties (May 2, 2022) (Certification Memorandum).

[4] See 19 U.S.C. § 1677j(a)(1).

[5] *Id.* at 2.

[6] Final Scope Ruling on the Antidumping and Countervailing Duty Orders on Crystalline Silicon Photovoltaic Cells from the People's Republic of China: ET Solar Inc., from Lauren Caserta to James Maeder (June 15, 2021) at 9.

[7] See Commerce Final Scope Ruling on the Antidumping and Countervailing Duty Orders on Crystalline Silicon Photovoltaic Cells from the People's Republic of China: SunSpark Technology Inc. Scope Ruling, from Daniel Alexander to James Maeder at 5–6 (Oct. 23, 2020) (taking the position that solar cells produced in Vietnam from raw wafers imported from China are not subject to the scope of the order

because the raw wafers from China did not include a p/n junction).

[8] Certification Memorandum at 2.

[9] Id. at 3.

[10] Id. at 2.