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EDITOR'S NOTE: STANDARD OF CARE

Victoria Prussen Spears

REASONABLY PRUDENT OPERATOR OR GOOD AND WORKMANLIKE MANNER: DOES YOUR CONTRACT HAVE THE RIGHT STANDARD OF CARE?

Parker A. Lee, Ming Lei and Dominique J. Torsiello

NEW LEASE AREAS, RECORD-BREAKING \$4.37 BILLION LEASE SALE SHOWCASE BIG BET ON THE U.S. OFFSHORE WIND SECTOR. WHAT COMES NEXT?

Brooksany Barrowes, Robert Eberhardt, Robert S. Fleishman, Sophia Han, Jonathan E. Kidwell, Michael J. Masri, P.C., Emily Tabak, Raya B. Treiser, Andrew A. Eberle and Alex Noll

IS THE NUCLEAR ENERGY (FINANCING) ACT 2022 AN ANSWER TO THE UNITED KINGDOM'S ENERGY SECURITY?

Kiran Arora, Adam Dann, Mark Richards and Rajesh Chavda

POLICIES AT CROSS-PURPOSES: U.S. TRADE POLICY CREATES CLOUDY PICTURE FOR RAPID DEPLOYMENT OF SOLAR ENERGY

Matthew R. Nicely, Daniel M. Witkowski, Julia K. Eppard, Sarah Sprinkle and Sydney Stringer

U.S. DEPARTMENT OF COMMERCE INITIATES CIRCUMVENTION INQUIRIES AGAINST SOLAR CELLS AND MODULES FROM CAMBODIA, MALAYSIA, THAILAND AND VIETNAM

Vanessa Richelle Wilson, Nate Bolin, Martin Schaefermeier and Karla Cure

Pratt's Energy Law Report

VOLUME 22

NUMBER 7

July–August 2022

Editor's Note: Standard of Care

Victoria Prussen Spears

225

**Reasonably Prudent Operator or Good and Workmanlike Manner:
Does Your Contract Have the Right Standard of Care?**

Parker A. Lee, Ming Lei and Dominique J. Torsiello

227

**New Lease Areas, Record-Breaking \$4.37 Billion Lease Sale Showcase
Big Bet on the U.S. Offshore Wind Sector. What Comes Next?**

Brooksany Barrowes, Robert Eberhardt, Robert S. Fleishman,
Sophia Han, Jonathan E. Kidwell, Michael J. Masri, P.C., Emily Tabak,
Raya B. Treiser, Andrew A. Eberle and Alex Noll

236

**Is the Nuclear Energy (Financing) Act 2022 an Answer to the United
Kingdom's Energy Security?**

Kiran Arora, Adam Dann, Mark Richards and Rajesh Chavda

245

**Policies at Cross-Purposes: U.S. Trade Policy Creates Cloudy Picture
for Rapid Deployment of Solar Energy**

Matthew R. Nicely, Daniel M. Witkowski, Julia K. Eppard,
Sarah Sprinkle and Sydney Stringer

249

**U.S. Department of Commerce Initiates Circumvention Inquiries Against
Solar Cells and Modules from Cambodia, Malaysia, Thailand and
Vietnam**

Vanessa Richelle Wilson, Nate Bolin, Martin Schaefermeier and Karla Cure

259

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Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
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U.S. Department of Commerce Initiates Circumvention Inquiries Against Solar Cells and Modules from Cambodia, Malaysia, Thailand and Vietnam

*By Vanessa Richelle Wilson, Nate Bolin, Martin Schaefermeier and Karla Cure**

Here, the authors examine the recent action of the U.S. Department of Commerce initiating country-wide inquiries to determine whether imports of solar cells and modules from three countries are circumventing certain antidumping and countervailing duty orders.

International trade issues continue to materially impact solar development in the United States. Most recently, the U.S. Department of Commerce (“DOC”) published a notice on April 1, 2022¹ initiating country-wide inquiries to determine whether imports of solar cells and modules from Cambodia, Malaysia, Thailand, and Vietnam are circumventing antidumping and countervailing duty (“AD/CVD”) orders on Chinese crystalline silicon photovoltaic (“CSPV”) cells and modules.²

Auxin Solar Inc. filed a petition in February alleging that certain Chinese CSPV producers are circumventing the AD/CVD orders on CSPV cells and modules from China by producing and assembling them, using Chinese-made components, in Cambodia, Malaysia, Thailand, and Vietnam.

If successful, the petition could lead to the imposition of additional duties on imports from those countries or other restrictions. Such duties could be applied

* Vanessa Richelle Wilson, a partner in DLA Piper, is U.S. co-chair of the firm’s Energy and Natural Resources Sector. Nate Bolin, a partner in the firm, advises on U.S. trade remedies, export controls, economic sanctions, the Committee on Foreign Investment in the United States (“CFIUS”) and related areas of national security and international trade laws. Martin Schaefermeier, of counsel to the firm, practices international trade law with a focus on import relief actions, subsequent litigation of such actions and related import/export matters. Karla Cure, an associate at the firm, focuses her practice in the area of U.S. international trade. The authors may be contacted at vanessa.wilson@dlapiper.com, nate.bolin@dlapiper.com, martin.schaefermeier@dlapiper.com and karla.cure@dlapiper.com, respectively.

¹ <https://www.govinfo.gov/content/pkg/FR-2022-04-01/pdf/2022-06827.pdf>.

² On June 6, 2022, President Biden announced that the United States would allow “the importation, free of the collection of duties and estimated duties . . . of certain solar cells and modules” from Cambodia, Malaysia, Thailand, and Vietnam that were not already subject to AD/CVD. Proclamation 10414, 87 Fed. Reg. 35,067 (June 9, 2022), <https://www.govinfo.gov/content/pkg/FR-2022-06-09/pdf/2022-12578.pdf>.

retroactively to entries before April 1, 2022 and, based on past rates, could be as much as or in excess of 250 percent of the price of the applicable CSPV cells and modules.

As a result of these issues, developers are reviewing available supply options, delaying projects in development and seeking to negotiate relief in key agreements from the additional costs and delays that may result from the existing and potential duties.

SCOPE OF THE CIRCUMVENTION INQUIRIES

The merchandise covered by the circumvention inquiries includes certain CSPV cells and modules produced or assembled in Cambodia, Malaysia, Thailand, and Vietnam with components which originate in China. The petition names specific manufacturers in each of those locations.

In 2021, the DOC rejected allegations that certain Chinese-origin CSPV cells and modules were circumventing AD/CVD by being shipped through or further processed in Vietnam, Thailand and Malaysia. The earlier petition was filed anonymously. This latest petition was initiated by an identified U.S. manufacturer, and Cambodia was also added to the list of relevant jurisdictions in which circumvention has been alleged.

In assessing the allegations, the DOC will be making a determination as to whether the statutory requirements are met, including whether the activities in the named countries as to the manufacture or completion of relevant CSPV cells and modules are “minor or insignificant.”³

ESTIMATED SCHEDULE OF THE PRELIMINARY AND FINAL DETERMINATIONS

Under the time schedule for circumvention inquiries, the DOC must issue its preliminary determination within 150 days (August 29, 2022) and final determination within 300 days (January 26, 2023; unless extended by 65 days) from the publication date of the initiation notice.

POTENTIAL CERTIFICATION REQUIREMENTS

In circumstances where the DOC reaches an affirmative determination in circumvention inquiries, the agency often implements a certification program for U.S. importers. If the DOC were to reach affirmative determinations in these inquiries, the agency would likely require certifications allowing U.S. importers to demonstrate that CSPV cells and modules from Cambodia, Malaysia, Thailand, or Vietnam were not manufactured with Chinese-origin

³ 19 U.S.C. § 1677j(a)(2).

components. The entries that satisfy the certification requirements would not be subject to AD/CVD resulting from the affirmative decisions in the circumvention inquiries.

While the certification requirements are not complex, importers need to have evidence supporting that the CSPV cells and modules were not manufactured in the subject countries using components originating from China.

CONSEQUENCES FOR U.S. IMPORTERS OF SUBJECT MERCHANDISE

If the DOC reaches affirmative determinations, imports of CSPV cells and modules from Cambodia, Malaysia, Thailand, and Vietnam manufactured with Chinese-origin components will be presumed to be subject to the China CSPV AD/CVD orders and the corresponding cash deposit rates.

Specifically, the DOC will direct U.S. Customs and Border Protection (“CBP”) to continue suspension of liquidation of previously suspended entries and apply the relevant cash deposit rate. In addition, the DOC will direct CBP to begin suspension of liquidation and require the applicable cash deposit rate for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the notice of initiation. In the proceedings related to the China CSPV AD/CVD orders, the DOC has assessed rates well in excess of 250 percent of the price of the equipment.

In certain circumstances, such duties can be applied retroactively to entries before the publication of the initiation notice. Specifically, the DOC has discretion to apply AD/CVD retroactively before the date of publication of the initiation notice if an interested party has filed a timely request and provided sufficient evidence that warrants such a decision. Here, Auxin requested retroactive application of AD/CVD on March 21, 2022. DOC will make a determination on this request in its preliminary and/or final determinations.

We note that, as to the existing AD/CVD orders and related duties, certain manufacturers have obtained separate rates through administrative reviews as low as 0 percent for AD and 19.28 percent for CVD. These rates are subject to administrative reviews if requested. In such reviews, the manufacturers/exporters would need to demonstrate entitlement to such lower rates.

GOING FORWARD

U.S. importers of CSPV cells and modules from Cambodia, Malaysia, Thailand, and Vietnam should closely monitor these circumvention inquiries. Among other things, interested parties—including solar developers, and U.S.

and foreign producers—should develop a strategy for addressing the possible outcomes of the circumvention inquiries and navigating the existing landscape of existing panel tariffs and duties.