

Locke Lord QuickStudy: Commerce Department Issues Preliminary Determination Regarding Solar Panel Manufacturers Circumventing U.S. Tariffs

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On December 2, 2022, the U.S. Department of Commerce released the highly-anticipated preliminary findings of its investigation into alleged tariff circumvention efforts by Chinese and Southeast Asian manufacturers of solar panels. In its preliminary findings, the Department of Commerce determined that certain solar panel manufacturers violated U.S. trade law by passing products through entities in Cambodia, Malaysia, Thailand and Vietnam, to export Chinese-origin solar panels to the U.S., thereby attempting to circumvent U.S. duties on Chinese products. These preliminary findings demonstrate the need for U.S. importers of solar panels to evaluate the supply chain of imported products for compliance with U.S. trade laws.

Background and Investigation

In 2012, a Department of Commerce investigation concluded that the Chinese government was unfairly subsidizing Chinese solar energy component exports. In response, the U.S. enacted antidumping and countervailing duties (“AD/CV duties”) on imports of certain Chinese solar panels. The AD/CV duties apply only to imports of solar panels that were primarily manufactured in the People’s Republic of China; therefore, solar panels that were primarily manufactured in other nations are not subject to the duties. Consequently, Chinese solar manufacturers subject to the AD/CV duties have increasingly relied on partner entities in Southeast Asia to export solar products to the U.S.

In March 2022, the Department of Commerce announced its investigation into claims that Chinese solar manufacturers were partnering with Southeast Asia manufacturers to circumvent the AD/CV duties. The investigatory team selected two major solar panel manufacturers from each of Cambodia, Malaysia, Thailand and Vietnam as the focus of the investigation. The team also requested compliance information from other major manufacturers in the region.

Preliminary Findings

The U.S. Department of Commerce released its preliminary findings in a report on December 2, 2022, wherein it concluded that certain Chinese solar panel manufacturers were indeed attempting to bypass the AD/CV duties via

transport through these investigated Southeast Asian partners. The Chinese manufacturers are suspected of using their Southeast Asian partners for minor processing before re-exporting the panels to the U.S. Per the preliminary findings, such products should be classified as Chinese-origin and should be subject to the AD/CV duties.

In connection with the investigation, the Department of Commerce also announced a preliminary “country-wide” circumvention finding for Cambodia, Malaysia, Thailand and Vietnam. Approximately 80% of U.S. solar panels are imported from these four Southeast Asian countries. This preliminary finding, if finalized as originally presented, would create a rebuttable presumption that all solar panels purported to be manufactured in those countries would be subject to AD/CV duties. Thus, products manufactured in the designated countries would be subject to the additional tariffs unless they can certify that the panels are not of Chinese origin. The burden of demonstrating compliance would fall on the manufacturer to demonstrate substantial transformation of the product at its facilities outside of China.

What’s Next??

These findings are preliminary. In the coming weeks, the Department of Commerce will audit and verify its findings, with the final determination expected in May 2023.

If the preliminary findings are finalized, U.S. solar energy product importers will have at least a year to evaluate their supply chains and ensure that their foreign suppliers are in compliance with U.S. trade law. This follows a June 2022 Biden administration proclamation that waived all AD/CV duties on solar panel imports from Cambodia, Malaysia, Thailand and Vietnam until June 2024. Solar panels from suppliers who are unable to certify compliance with the AD/CV duties may be subject to tariff rates of up to 254% commencing in June 2024.

More Legal Considerations for the U.S. Solar Industry

U.S. solar panel importers, including project developers, should evaluate their supply chains for (i) compliance with AD/CV duties and (ii) for compliance with the U.S. Uyghur Forced Labor Protection Act (“UFLPA”). The UFLPA establishes a rebuttable presumption that the importation of any goods mined, produced or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region of the People’s Republic of China (“XUAR”) are made with forced labor and are therefore prohibited from entering the U.S. The XUAR is home to a majority of the world’s polysilicon supply chain, the primary component in solar cells. Solar energy product importers are required to prove by “clear and convincing evidence” that no raw material or component in their supply chains were produced in the XUAR. In the four months following the UFLPA’s enactment in June 2022, 1,000 shipments of solar panels were seized at U.S. ports by U.S. Customs and Border Patrol. According to the American Clean Power Association trade group, solar installations in the U.S. declined by 23% in the third quarter of 2022, due largely to the difficulty of importing solar energy components and associated delays. See our prior related QuickStudies: “Not So(lar) Fast My Friends – Uyghur Forced Labor Prevention Act Takes Effect June 21, 2022?”, “FLETF Strategy Guidance to Comply With the Uyghur Forced Labor Prevention Act?”, “Between a Rock and a Hard Place: Conflicting Legal Obligations”, and “UK Enacts Sanctions Legislation for the Protection of Uyghur Muslim Community in Xinjiang Province, People’s Republic of China (“PRC”)?”

Conclusion

This paper is intended as a guide only and is not a substitute for specific legal or tax advice. Please reach out to the authors for any specific questions. We expect to continue to monitor the topics addressed in this paper and provide future client updates when useful.

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