



AUGUST 28, 2023 • NO. 3

Commerce's Final Circumvention Determination Concerning Solar Cells and Modules from China

The U.S. Department of Commerce (“Commerce”) recently issued its final determination in its circumvention investigation concerning whether crystalline silicon photovoltaic (“CSPV”) cells and modules from Cambodia, Malaysia, Thailand, and Vietnam (the “target countries”) are circumventing antidumping duty and countervailing duty orders (the “Orders”) on CSPV cells and modules from the People’s Republic of China (“China” or “PRC”).¹ Commerce continued to find that circumvention is occurring in each of the target countries.

Overall, the *Final Determination* did not significantly change Commerce’s *Preliminary Determination*:² all producers and exporters of CSPV cells and modules in the target countries can avoid the imposition of antidumping and countervailing duties or cash deposits only if they can comply with the applicable certification processes.

Below, we provide the key takeaways from the August 17, 2023, *Final Determination*, followed by an in-depth analysis and background.

KEY TAKE AWAYS

- Commerce’s *Final Determination* made only minor changes to its *Preliminary Determination* and continues its affirmative country-wide circumvention determinations with respect to all four target countries;
- Commerce determined that four companies in the target countries were not circumventing the *Orders* and that 23 companies did not cooperate in the circumvention inquiry;
- Commerce continued to make country-wide circumvention determinations, meaning that even exporters and producers from the target countries that were not specifically examined (“non-examined exporters and producers”) are covered by the *Final Determination* unless importers and exporters can provide appropriate certifications demonstrating that their entries should not be covered (discussed below);

- As in the *Preliminary Determination*, all importers from the targeted countries (including the non-cooperative companies) can avoid the imposition of antidumping and countervailing duties or cash deposits on their CSPV entries through June 6, 2024, or the date the emergency described in Presidential Proclamation 10414³ has been terminated, whichever occurs first (“Termination Date”). However, importers can only demonstrate that their entries qualify for this Tariff Moratorium if they are able to meet the necessary certification requirements, including demonstrating that the CSPV cells and modules have been “utilized” in the United States by 180 days after the Termination Date (the “Utilization Expiration Date”). The *Final Determination* provides important clarifications about the meaning of “utilization”; and
- The *Final Determination* maintains the additional certification provisions in place that will allow both non-circumventing and non-examined exporters/producers from the target countries (and their importers) to demonstrate that their CSPV cells and modules should not be covered by the *Final Determination* even *after* the Termination Date of the Tariff Moratorium. However, the non-cooperative companies are precluded from submitting such certifications until such a time as they are able to demonstrate that they are not circumventing the *Orders* in the context of an administrative review.

SCOPE OF THE CIRCUMVENTION DETERMINATION

The circumvention inquiry covers:

(A) [CSPV] cells that meet the physical description of [CSPV] cells in the scope of the *Orders*, subject to the exclusions therein, whether or not partially or fully assembled into other products, that were produced in [a target country] from wafers produced in China; and

(B) modules, laminates, and panels consisting of CSPV cells, subject to the exclusions for certain panels in the scope of the *Orders*, whether or not partially or fully assembled into other products, that were produced in [a target country] from wafers produced in China and where more than two of the following components in the module/laminate/panel were produced in China:

- (1) silver paste;
- (2) aluminum frames;

- (3) glass;
- (4) backsheets;
- (5) ethylene vinyl acetate sheets; and
- (6) junction boxes.

If modules, laminates, and panels consisting of [CSPV] cells do not meet both of the conditions in item (B) above, then this circumvention inquiry does not cover the modules, laminates, and panels, or the [CSPV] cells within the modules, laminates, and panels, even if those [CSPV] cells were produced in [a target country] from wafers produced in China. Wafers produced outside of China with polysilicon sourced from China are not considered to be wafers produced in China for purposes of this circumvention inquiry.⁴

Commerce has clarified that CSPV cells or modules “further assembled in” a non-target country are not subject to the circumvention.⁵

CERTIFICATION PROVISIONS

Commerce established three certification regimes by which importers may avoid the collection of cash deposits or the collection of duties in connection with the circumvention investigation. Each regime requires that the exporter and importer of record for the entries certify certain information.

1. Tariff Moratorium Certifications

The first certification regime implements the Tariff Moratorium established by *Proclamation 10414* and 19 C.F.R. Pt. 362 (“Tariff Moratorium Certifications”). This requires the importer and exporter to certify that the merchandise was produced in one of the target countries and exported to the United States.⁶ The importer must also certify that: (i) the merchandise was withdrawn from a U.S. Customs and Border Protection (“Customs”) warehouse before June 6, 2024 (or before the date when the emergency described in *Proclamation 10414* is terminated, if it is terminated early); and (ii) that, for merchandise withdrawn from a Customs warehouse after November 15, 2022, the merchandise (cell or module) will be utilized in the “United States by no later than 180 days after the earlier of [June 6, 2024], or the date the emergency described in Presidential Proclamation 10414 is terminated.”⁷ Claims made in this certification “are subject to verification by [Customs] and/or Commerce.”

In the *Final Determination*, Commerce provided additional explanation of the “utilization” requirement of the Tariff Moratorium. “Utilization” means that a CSPV cell or module is “used” or “installed.”⁸ A CSPV cell or module is “used” if it is “in operation or functioning in the United States by the Utilization Expiration Date.”⁹ A cell or module is “installed” if it has “been affixed to the structure or in the system in the United States,” even if the cell or module is not in operation.¹⁰ However, “[t]he mere sale of solar modules to a party for a specific project, incorporating solar cells into a solar module in the United States, dedicating solar cells or solar modules to a particular project, or delivering solar cells or solar modules to a project site do not constitute being ‘used’ or ‘installed.’”¹¹

Additionally, if an importer is reselling cells or modules and submits a Tariff Moratorium certification, the importer must support representations that the CSPV cells or modules will be utilized in the United States within the applicable time-frame through “knowledge of, and documentation supporting” this fact.¹² This requirement may introduce risks for an importer that has resold the CSPV cells or modules and no longer has control over when they are actually utilized. Further, Commerce did not identify or list the specific type of documentation it would consider as “supporting documentation.”

2. Non-Circumvention Certifications

The second certification regime (“Non-Circumvention Certification”) is only available for entries produced and exported by the four companies found not to be circumventing.¹³ These certifications require the importer and exporter to identify the producer and exporter of the entries as one of the companies found to be not circumventing. As part of the certification process, importers and exporters are required to identify the name of their wafer exporter, though they may treat this information as business proprietary. Commerce indicated that the reason for this requirement is that Commerce is permitting parties to certify shipments as not circumventing only if the shipment utilizes the supply chain examined in the circumvention inquiry.¹⁴ If these non-circumventing companies decide to use new wafer suppliers for future shipments, they can use the Chinese Components Certification instead. (Discussed below).

3. Chinese Component Certifications

The third certification regime allows importers and exporters to certify that the entries do not contain the relevant components to be in-scope of the circumvention investigation (or the “Chinese Component Certifications”). This certification process imposes different requirements depending on whether the entries were CSPV cells or modules. In particular, to avoid the application of the circumvention determination, importers and exporters must be able to certify:

For CSPV Cells

If the imported merchandise is a CSPV cell that is not incorporated into a CSPV module, or product that contains solar cells that are not in a solar module, then they must certify that the wafers were not supplied from a Chinese company.¹⁵

For CSPV Modules

If the merchandise is or contains a CSPV module, then they must certify either that:

- The wafers were not supplied by a Chinese company; or
- The wafers were supplied by a Chinese company, but **no more than two** of the following inputs (which were used to manufacture the CSPV module) were produced in China:
 - silver paste;
 - aluminum frames;
 - glass;
 - backsheets;
 - ethylene-vinyl acetate; and
 - junction boxes¹⁶

NON-COOPERATING COMPANIES

In the *Final Determination*, Commerce found that 23 companies did not cooperate in its circumvention inquiry.¹⁷

Importers and exporters of entries produced or exported by companies who were deemed uncooperative cannot participate in the Chinese Component Certificate process, and because they were not one of the companies found not to be circumventing, they cannot participate in the Non-Circumvention Certification process.¹⁸

Those companies can, however, participate in the Tariff Moratorium Certification process.¹⁹

Commerce also clarified that these non-cooperating companies retain the right to participate in a future review of the underlying *Orders* on CSPV cells and modules from the PRC, and thus remedy their uncooperative status and “potentially gain the opportunity to participate in” the Chinese Component Certification or Non-Circumvention Certification processes.²⁰

POTENTIAL ANTIDUMPING AND COUNTERVAILING DUTY RATES

If importers and exporters do not complete any of the three certifications for entries subject to the circumvention investigation, then Commerce will determine the rate for the entries based on:

(i) the rate assigned to the Chinese affiliates of the producer/exporter in the target country in the underlying antidumping and countervailing duty proceedings on the *Orders*;

(ii) the rate of the Chinese wafer supplier that exported the wafers used in producing the CSPV cell or module as determined in the antidumping and countervailing duty proceedings on the *Orders*; or

(iii) if there is no Chinese affiliate or wafer supplier with its own rate (i.e., (i) and (ii) do not apply), then Commerce will use the China-wide rate in the underlying antidumping duty proceeding (238.95 percent) and the all-others rate from the countervailing proceedings (15.24 percent), for a total rate of up to 254.19 percent.²¹ Notably, a company that is barred from certifying that its exports contain no Chinese wafers or module components may still receive a company-specific rate if it already has such a rate under the *Orders* or if its Chinese wafer exporter has its own rate under the *Orders*.²²

This method for determining antidumping and countervailing duty rates is unchanged from the *Preliminary Determination*.

CONCLUSION

In summary, the *Final Determination* is largely consistent with the *Preliminary Determination* in that it keeps the certificate regimes intact.

An important clarification in the *Final Determination* is Commerce’s explanation of the “utilization” requirement of the Tariff Moratorium Certification process. However, questions remain as to what documentation an importer must provide to Customs or Commerce to satisfy a representation that entries will be “utilized.” Further, it is still not clear how Customs or Commerce will verify the representations by importers concerning the utilization requirement.

Additionally, it is possible that there will be a court challenge to the *Final Determination* and/or the Tariff Moratorium, established by *Proclamation 10414*, which will add to the uncertainty associated with this determination.

For further information or assistance, contact Lynn G. Kamarck, Tyler J. Kimberly or another member of Blank Rome’s Trade Remedies, Trade Litigation & Trade Negotiations team.

Lynn G. Kamarck
202.420.3150
lynn.kamarck@blankrome.com

Tyler J. Kimberly
202.420.2687
tyler.kimberly@blankrome.com

1. See *Antidumping and Countervailing Duty Orders on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Scope Determination and Final Affirmative Determinations of Circumvention With Respect to Cambodia, Malaysia, Thailand, and Vietnam*, 88 Fed. Reg. 57,419 (Dep't Commerce Aug. 23, 2023) ("Final Determination"), and accompanying Issues and Decision Memoranda for each of the target countries; see generally *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 (Dep't Commerce Apr. 1, 2022); *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).
2. See *Antidumping and Countervailing Duty Orders on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Preliminary Affirmative Determinations of Circumvention With Respect to Cambodia, Malaysia, Thailand, and Vietnam*, 87 Fed. Reg. 75,221 (Dep't Commerce Dec. 8, 2022) ("Preliminary Determination"), and accompanying Preliminary Decision Memoranda for each of the target countries.
3. See *Presidential Proclamation 10414 of June 6, 2022*, 87 Fed. Reg. 35,067 (June 9, 2022) ("Proclamation 10414"); 19 C.F.R. Pt. 362; *Commerce's Procedures Covering Suspension of Liquidation, Duties and Estimated Duties in Accordance with Presidential Proclamation 10414*, 87 Fed. Reg. 56,868 (Dep't Commerce Sept. 16, 2022).
4. Issues and Decision Memorandum for the Circumvention Inquiry With Respect to the Kingdom of Cambodia, from James Maeder to Lisa W. Wang (Aug. 17, 2023) ("Cambodia I&D Memo") 8–9; Issues and Decision Memorandum for the Circumvention Inquiry With Respect to the [sic] Malaysia, from James Maeder to Lisa W. Wang (Aug. 17, 2023) ("Malaysia I&D Memo") at 5; Issues and Decision Memorandum for the Circumvention Inquiry With Respect to the Kingdom of Thailand, from James Maeder to Lisa W. Wang (Aug. 17, 2023) ("Thailand I&D Memo") at 5–6; Issues and Decision Memorandum for the Circumvention Inquiry With Respect to the Socialist Republic of Vietnam, from James Maeder to Lisa W. Wang (Aug. 17, 2023) ("Vietnam I&D Memo") 6.
5. See Memorandum Circumvention Inquiry With Respect to the Antidumping and Countervailing Duty Orders on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Clarification of Product Coverage, from Jeff Pedersen to All Interested Parties (Dec. 19, 2022); see also *Final Determination*, 88 Fed. Reg. at 57,420 (providing that the circumvention investigation covers CSPV cells and modules "completed in [a target country] using components from China...that are subsequently exported from [a target country] to the United States").
6. *Final Determination*, 88 Fed. Reg. at 57,425–27 (Appendix IV).
7. *Final Determination*, 88 Fed. Reg. at 57,425–27 (Appendix IV); see also 19 C.F.R. § 362.102
8. 19 C.F.R. § 362.102.
9. Cambodia I&D Memo at 101; Malaysia I&D Memo at 93; Thailand I&D Memo at 101; Vietnam I&D Memo at 99.
10. Cambodia I&D Memo at 101; Malaysia I&D Memo at 93; Thailand I&D Memo at 101; Vietnam I&D Memo at 99.
11. Cambodia I&D Memo at 101; Malaysia I&D Memo at 93; Thailand I&D Memo at 101; Vietnam I&D Memo at 99.
12. Cambodia I&D Memo at 102; Malaysia I&D Memo at 93; Thailand I&D Memo at 102; Vietnam I&D Memo at 100.
13. *Final Determination*, 88 Fed. Reg. at 57,427–31 (Appendix V)
14. Cambodia I&D Memo at 92; Malaysia I&D Memo at 83–84; Thailand I&D Memo at 92; Vietnam I&D Memo at 90.
15. *Final Determination*, 88 Fed. Reg. at 57,431–33 (Appendix VI).
16. *Final Determination*, 88 Fed. Reg. at 57,431–33 (Appendix VI).
17. *Final Determination*, 88 Fed. Reg. at 57,425 (Appendix II).
18. *Final Determination*, 88 Fed. Reg. at 57,422.
19. *Final Determination*, 88 Fed. Reg. at 57,422–23.
20. Cambodia I&D Memo at 79; Malaysia I&D Memo at 71; Thailand I&D Memo at 80; Vietnam I&D Memo at 76.
21. *Final Determination*, 88 Fed. Reg. at 57,422.
22. Cambodia I&D Memo at 125; Malaysia I&D Memo at 117; Thailand I&D Memo at 126; Vietnam I&D Memo at 123.