On July 1, 2022, the US Department of Commerce (Commerce) published a proposed rule to pause the collection of any antidumping (AD) or countervailing (CVD) duties under its pending circumvention inquiries on crystalline silicon photovoltaic cells (CSPVs).
and modules (CSPVs) from four southeast Asian countries.\[1\] Commerce’s proposed rule, if enacted, would provide more certainty as to AD/CVD duty liability for importers and purchasers of CSPVs from these countries for the period of time that this “pause” is in effect (likely until June 6, 2024). Comments on this proposed rule are due by August 1, 2022.\[2\]

**IN DEPTH**

**SUMMARY OF COMMERCE’S PROPOSED REGULATION**

Commerce’s proposed rule implements US President Joe Biden’s Proclamation 10414, issued June 6, 2022,\[3\] which declared an emergency under Section 318 of the Tariff Act of 1930\[4\] concerning the electricity generation capabilities of the United States. This Proclamation announced various steps to address the emergency, including authorizing Commerce to allow the importation of CSPVs from Cambodia, Malaysia, Thailand and Vietnam (target countries) without collecting estimated AD or CVD duties that relate to the pending circumvention proceedings until June 6, 2024, or the date the emergency described in Proclamation 10414 has been terminated—whichever occurs first (Date of Termination). The Proclamation, as implemented by Commerce’s proposed regulations, will provide temporary relief from cash deposits or import duties that could be assessed as a result of the ongoing inquiry as to whether imported CSPVs from the target countries are circumventing AD and CVD orders on CSPVs from the People’s Republic of China.\[5\]

**ANALYSIS**

Commerce’s proposed rule, which it intends to codify at 19 C.F.R. § 364, would provide much needed certainty and additional clarity as to the process of importing CSPVs from the target countries during the period which the assessment of duties or cash deposits is suspended. The proposed rule states that Commerce will not direct US Customs and Border Protection (CBP) to suspend liquidation or collect cash deposits of estimated duties that could result from an affirmative circumvention determination for any CSPVs entered into the United States before the Date of Termination.\[6\] Additionally, Commerce will instruct CBP to discontinue the suspension of liquidation and refund any cash deposits for entries of CSPVs for which CBP suspended liquidation and required cash deposits upon Commerce’s initiation of the inquiries.\[7\] In other words, CSPVs from the target countries, if entered prior to the Date of Termination, will not be assessed any cash deposits or duties regardless of whether Commerce has made affirmative circumvention determinations in the meantime.\[8\] For entries of CSPVs on or after the Date of Termination, and in the event of affirmative final circumvention determinations, Commerce will instruct CBP to suspend liquidation and collect AD and CVD cash deposits on that merchandise.\[9\]

The proposal contains three noteworthy caveats:

1. Commerce specifically noted that certain CSPVs that have already been found to be “in-scope” of certain AD/CVD orders covering imports of CSPVs from China or
Taiwan (independent of the ongoing circumvention inquiries) will not be considered covered by the proposed rule and will not be able to be entered into the United States duty-free.\[10\]

2. Commerce noted that its instructions to CBP to allow the entry of CSPVs from the target countries duty-free will not restrict CBP’s authority to independently make country-of-origin determinations for entered merchandise. Thus, CBP may determine that CSPVs are subject to those Chinese or Taiwanese AD/CVD orders and are not eligible for duty-free treatment.

3. The proposed rule explicitly notes that it shall not constrain Commerce’s authority to require certifications of CSPV imports in the event of an affirmative circumvention determination.\[11\] Commerce has already requested comments from interested parties regarding certifications in the event of an affirmative determination,\[12\] so importers and purchasers of CSPVs from the target countries need to be conscious that, even if they import CSPVs free of duties, both they and their suppliers may need to comply with any certification regime Commerce may impose. It is not clear what action Commerce would take if the requisite certifications are not provided for entries during the temporary relief period.

This temporary pause on duties is intended to allow for the United States to develop domestic CSPV manufacturing capacity.\[13\] While Proclamation 10414 and the Date of Termination (as defined in Commerce’s proposed regulations) leave open the possibility that the US electricity generation capacity emergency could be resolved prior to June 6, 2024, it appears unlikely given the significant time required to develop CSPV manufacturing capability. It remains to be seen what other government initiatives, including the president’s proposed use of the Defense Production Act,\[14\] will be used to buttress demand for, and the production of, US-manufactured cells and modules.

**FOOTNOTES**


[3] Id.


[6] Id. at 39, 428.

[7] Id. See generally 19 C.F.R. § 351.226(l)(1) (providing that Commerce will notice CBP “of the initiation [of a circumvention inquiry] and direct [CBP] to continue the suspension of liquidation of entries of products subject to the circumvention inquiry that were already subject to the suspension of liquidation, and to apply the cash deposit rate that would be applicable if the product were determined to be covered by the scope of the order”).


[9] For details on certification procedures that will potentially apply to entries of CSPVs made on or after June 6, 2024, which could materially affect the estimated duties and so cash deposit rates, see our prior On the Subject here: https://www.mwe.com/insights/commerce-clarifies-scope-of-cspv-circumvention-inquiry-and-provides-opportunity-to-comment-on-proposed-certification-process/.

[10] NPRM at 39,427 n.3.


© 2022 McDermott Will & Emery

National Law Review, Volume XII, Number 188

Source URL: https://www.natlawreview.com/article/commerce-proposes-new-rule-to-pause-collection-antidumping-or-countervailing-duties