

International Trade Alert

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President Biden Allows Duty-Free Importation of Solar Panels from Southeast Asia and Funding for Domestic Manufacturing

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On June 6, 2022, President Biden issued a [Proclamation](#), citing Tariff Act section 318(a), [19 U.S.C. § 1318\(a\)](#), to temporarily allow the importation of crystalline silicon photovoltaic (CSPV) cells and modules from Cambodia, Malaysia, Thailand and Vietnam free from collection of antidumping and countervailing (AD/CVD) duties or estimated duties. The Proclamation refers specifically to the circumvention provision ([19 U.S.C. § 1677j](#)), new investigations ([19 U.S.C. §§ 1671, 1673](#)) and administrative reviews ([19 U.S.C. § 1675](#)), and paves the way for imports of CSPV cells and modules free of AD/CVD duties for 24 months, or until June 6, 2024.

The President issued the Proclamation as the U.S. Department of Commerce (Commerce) investigated whether to impose AD/CVD duties on imports of solar cells and modules from Southeast Asia. The duties—that could be over 250 percent—originally targeted imports from China, but one module assembler in the United States (Auxin Solar) petitioned for expansion of the China duties, alleging that Chinese companies set up production in Southeast Asia to circumvent the AD/CVD duties by producing cells and modules with Chinese inputs.

The China duties were imposed in 2012, but since then supply chains have shifted, resulting in approximately 80 percent of imports originating from Cambodia, Malaysia, Thailand and Vietnam, totaling over \$5 billion in trade annually. At the same time, U.S. cell production has shut down and only solar modules are assembled domestically. As the U.S. module industry has grown, they remain reliant on imported cells, leading domestic producers to openly oppose the circumvention inquiries that threaten their supply of a key component.

The reprieve from additional tariffs aligns with the Biden-Harris administration's clean energy agenda. When President Biden took office in January 2021, one of his first actions as president was to enact an [executive order](#) “to supercharge our . . . [ambitious plan to confront the existential threat of climate change](#).” The U.S. Department of Energy issued the [Solar Futures Study](#), setting a goal for solar to power 40 percent of the nation's electricity by 2035. To reach the new U.S. decarbonization targets, annual solar deployment must **double** during the early 2020s and **quadruple**

Contact Information

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during the late 2020s and beyond. Market-prohibitive tariffs would jeopardize those goals, putting solar out of reach for many developers and consumers.

Statutory Authority

When the President proclaims an emergency, section 318(a) of the Tariff Act of 1930 authorizes the issuance of regulations to allow the duty-free importation of “food, clothing, and medical, surgical, and other supplies for use in emergency relief work.” Section 318(a) has been rarely used and there is little legislative history to guide interpretation. Yet, the provision has been successfully invoked (without legal challenge to the President’s authority) to allow duty-free imports (e.g., of lumber to address the emergency shortage of housing in 1946) or extension of time to pay duties, taxes or fees (e.g., during the COVID-19 pandemic in 2020).

Consistent with the statute, the President proclaimed an emergency **“with respect to the threats to the availability of sufficient electricity generation capacity to meet expected customer demand.”** As factual support, the Proclamation refers to a reliable electric power system as a “basic human necessity” and “critical to national security and national defense”; and the “catastrophic health and economic consequences” of supply interruptions related to Russia’s invasion of Ukraine and climate change.

The Proclamation connects duty-free imports to the emergency by citing the heavy reliance on imports for “new solar installations to ensure that there are sufficient resources on the grid to maintain reliable service” and the inadequate domestic production of cells and modules to satisfy demand. The Proclamation expressly triggered the “emergency relief work” provision of section 318(a). Specifically, the President granted the Commerce Secretary authority to issue regulations to temporarily permit imports of CSPV cells and modules from the four Southeast Asian countries free of AD/CVD duties **“[t]o provide relief from the emergency.”**

Next Steps

Immediately following release of the President’s Proclamation, Commerce issued a [press release](#), clarifying that it will continue the circumvention inquiries. Currently, foreign producers/exporters are in the process of providing information and data relevant to Commerce’s analysis of the statutory factors in the circumvention provision of the statute. (Tariff Act section 781(b), [19 U.S.C. § 1677j\(b\)](#).) Following opportunities for interested parties to submit comments, preliminary determinations are due August 29, 2022. Final determinations are due January 26, 2023, but may be extended to April 3, 2023.

In the meantime, Commerce is preparing regulations to implement the President’s action. The administration has not indicated when the regulations will be issued, but it is reasonable to expect the regulations to go into effect before Commerce’s preliminary determinations, when suspension of liquidation and AD/CVD cash deposits on entries of CSPV cells and modules could begin under existing regulations.

However, time may be needed to comply with the Administrative Procedure Act. Typically, new regulations are subject to notice and comment. For example, in 2006, Commerce requested public comments on new regulations implementing section 318(a). However, there are exceptions to notice-and-comment rulemaking for “good cause.” The circumstances surrounding the emergency declared by President Biden

might themselves justify a “good cause” exception. There has been no official announcement about how the regulations will be implemented, but Commerce is expected to provide some opportunity for comment.

Regardless, the Proclamation expressly applies to entries that are not already subject to an AD/CVD order as of the date of the proclamation, including all entries of CSPV cells and modules from Cambodia, Malaysia, Thailand and Vietnam dating back to before initiation of the inquiries. No AD/CVD duties, or estimated duties, will be collected until 24 months after issuance of the Proclamation or until the emergency declared has terminated, whichever occurs first. The 24-month period is within President Biden’s term in office. Given his commitment to clean energy (as one of his first initiatives), and development of solar in particular, early termination of the emergency is unlikely.

Defense Production Act

Concurrent with the Proclamation authorizing the importation of CSPV cells and modules from Southeast Asia free of AD/CVD duties and cash deposits, President Biden also **invoked** Section 303 of the Defense Production Act of 1950, **50 U.S.C. § 4533**, to accelerate domestic manufacturing of clean energy technologies. Specifically, President Biden issued memoranda authorizing the Department of Energy to use the Defense Production Act to boost American manufacturing of five technologies: **solar modules and module components; electrolyzers, fuel cells and platinum group metals; transformers and electric power grid components; electric heat pumps; and insulation.** The Defense Production Act authorizes the President to make provision for purchases or purchases commitments by the government and for the development of production capabilities, among other actions.

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