

Commerce Reaches Final Affirmative Circumvention Findings for Solar Products from Cambodia, Malaysia, Thailand and Vietnam

By [Julia Eppard](#), [Yujin McNamara](#), [Matthew Nicely](#), [Sydney Stringer](#) and [Dan Witkowski](#)

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Summary

On August 23, 2023, the U.S. Department of Commerce (“Commerce”) **published** its final affirmative circumvention determinations for solar products exported from Cambodia, Malaysia, Thailand and Vietnam. Commerce’s determinations largely remain unchanged from its preliminary determinations issued in December 2022. As a result of these determinations, Commerce will treat certain solar products from these four countries as Chinese-origin and subject to the existing antidumping (AD) and countervailing duty (CVD) orders on *Crystalline Silicon Photovoltaic Cells (CSPV) (Whether or Not Assembled into Modules) from China* (the “China Orders”). The determinations also maintained certification procedures through which importers and exporters can certify that their products (a) are eligible for duty waiver under President Biden’s June 6, 2022, Presidential Proclamation, (b) are not required to pay duties because the exporter has been deemed not to circumvent the China Orders, or (c) do not meet the definition of circumventing merchandise, each of which will allow those products to enter the United States AD and CVD duty-free. The companies Commerce deemed not to circumvent are Hanwha Q Cells Malaysia Sdn. Bhd. (“Hanwha”), Jinko Solar Technology Sdn. Bhd./Jinko Solar (Malaysia) Sdn. Bhd. (“Jinko”) and Boviet Solar Technology Co., Ltd. (“Boviet”).

The duty waiver certification available pursuant to President Biden’s June 6, 2022, Presidential Proclamation is in effect until June 6, 2024, when the waiver expires. Thereafter, importers and exporters will either have to pay AD and CVD duties or meet the requirements of the other certifications.

Background

On April 1, 2022, Commerce **initiated** a circumvention inquiry at the request of Auxin Solar Inc. (“Auxin”), the purpose of which was to determine whether solar cells and modules manufactured in Cambodia, Malaysia, Vietnam and Cambodia using inputs manufactured in China were circumventing the China Orders. Specifically, during its investigation, Commerce conducted an analysis of whether the cell and module manufacturing process in the four inquiry countries was “minor or insignificant” compared with the solar manufacturing in China. Commerce selected two “mandatory respondents” for each country, from which it collected extensive information about the production processes, investments, research and development, and production equipment used in production.

In response to the inquiries, on June 6, 2022, President Biden **issued** a Presidential Proclamation authorizing Commerce to waive AD and CVD duties on all CSPV cells and modules from the four countries for two years, regardless of whether Commerce issued affirmative circumvention rulings in the meantime. Commerce published regulations in September 2022 implementing the waiver.

Commerce **published** the affirmative preliminary determinations on December 8, 2022, which made affirmative countrywide findings of circumvention for all four countries, though it made negative company-specific findings

for four companies: Hanwha, Jinko, Boviet and NewEast Solar Energy (Cambodia) Co., Ltd. (“NE Solar”). After verifying the information submitted by mandatory respondents in early 2023, numerous interested parties submitted extensive briefing both criticizing and supporting the findings within Commerce’s preliminary determinations, and many of the same interested parties participated in a public hearing held by Commerce on July 18, 2023.

Commerce announced the final determinations on August 18, 2023, and published the determination in the *Federal Register* on August 23, 2023. The final determinations were largely unchanged from the preliminary determinations, although Commerce reversed its negative company-specific finding for NE Solar because it was unable to verify NE Solar’s submissions during the course of the inquiry.

Implications

As explained above, the effect of the circumvention determinations is to subject CSPV cells and modules exported from Cambodia, Malaysia, Thailand and Vietnam to the China Orders. Although the determinations apply countrywide, Commerce did find that certain companies were not circumventing and thus are not subject to the rulings: Jinko and Hanwha in Malaysia, and Boviet in Vietnam. Commerce defined circumventing merchandise as (a) solar cells produced in Cambodia, Malaysia, Thailand and Vietnam using wafers produced in China; and (b) modules, laminates and panels that (i) use cells produced in Cambodia, Malaysia, Thailand and Vietnam from wafers manufactured in China, and (ii) contain more than two of the following components produced in China: silver paste, aluminum frames, glass, backsheets, ethylene vinyl acetate sheets and junction boxes.

Commerce also maintained a “certification process” that allows solar cells and modules from the four countries to enter the United States AD and CVD duty-free if the importer and exporter can certify that they do not meet this definition of circumventing merchandise. Commerce clarified that “non-Chinese wafers” are any wafers that are sliced outside of China. Commerce also found that certain companies from Cambodia, Malaysia, Thailand and Vietnam did not cooperate and are thus circumventing the China Orders, and Commerce prohibited those companies from participating in the no-circumvention certification process even if the merchandise does not technically meet the definition of circumventing merchandise. Those companies appear in Appendix II of the *Federal Register* notice.

Even these companies may, however, take advantage of the duty waiver certification process, which exempts even circumventing product from AD and CVD duty liability if entered before June 6, 2024, based on Proclamation 10414 issued by President Biden in June 2022. That Proclamation exempted any AD/CVD cash deposit and duty requirements for a period of two years, so long as the merchandise is utilized or installed within 180 days after June 6, 2024. Commerce clarified in its final determinations that “utilized” or “installed” means that the solar modules must be either operational or affixed to an existing structure. Commerce created a separate certification procedure for products that fall under the waiver, which is available for all imports of CSPV cells and modules from the four countries, including product from producers listed in Appendix II.

The applicable rates from the preliminary determinations remain unchanged. Once the waiver expires on June 6, 2024, importers can pay company-specific AD/CVD cash deposit rates if the cell or module exporter has individual rates under the China Orders, or the company-specific AD/CVD rate of the Chinese wafer exporter that supplied the Southeast Asian cell or module producer. If neither of these scenarios applies, then the China-wide AD and all others’ CVD cash deposit rates apply. For products produced by companies that are ineligible for certification because of Commerce’s application of adverse facts available (AFA), nothing in Commerce’s final determinations prevents importers from paying the lower company-specific cash deposit rates, if applicable.

If you have questions about this client alert, please contact any Akin lawyer or advisor below:

Julia K. Eppard
jeppard@akingump.com
+1 202.887.4359

Yujin Kim McNamara
ymcnamara@akingump.com
+1 202.887.4347

Matthew R. Nicely
mnicely@akingump.com
+1 202.887.4046

Sydney Stringer
sstringer@akingump.com
+1 202.887.4060

Daniel M. Witkowski
dwitkowski@akingump.com
+1 202.887.4048
