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EDITOR'S NOTE: FINANCING

Victoria Prussen Spears

FINANCING NUCLEAR PROJECTS IN THE UNITED STATES - CONSIDERATIONS IN THE CURRENT MARKET ENVIRONMENT

Eric Pogue, S. Kris Agarwal, Norman C. Bay, Archie Fallon, Dale Smith, Andrew Thomison, Niko Letsos and Jacob Bell

INTERNATIONAL TRADE COMMISSION ALLOWS PETITION SEEKING DUTIES ON SOLAR CELLS FROM CAMBODIA, MALAYSIA, THAILAND AND VIETNAM TO PROCEED

Anand R. Viswanathan, Arie T. Feltman-Frank, and Kathryn E. Abendroth

U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT VACATES NEW PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION RULES RELATED TO NATURAL GAS PIPELINES

Timothy J. Furdyna, Stuart B. Robbins and David L. Wochner

ENERGY CHAIRMAN MANCHIN'S PERMITTING BILL MOVES THROUGH COMMITTEE IN CAREFUL BALANCING ACT

Elizabeth Leoty Craddock, Elizabeth M. Noll and Beth A. Viola

INVESTOR-STATE ARBITRATION AND THE ENERGY TRANSITION

Ian Meredith and Theo Hall

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Editor's Note: Financing

Victoria Prussen Spears 335

Financing Nuclear Projects in the United States – Considerations in the Current Market Environment

Eric Pogue, S. Kris Agarwal, Norman C. Bay, Archie Fallon, Dale Smith, Andrew Thomison, Niko Letsos and Jacob Bell 337

International Trade Commission Allows Petition Seeking Duties on Solar Cells from Cambodia, Malaysia, Thailand and Vietnam to Proceed

Anand R. Viswanathan, Arie T. Feltman-Frank, and Kathryn E. Abendroth 343

U.S. Court of Appeals for the District of Columbia Circuit Vacates New Pipeline and Hazardous Materials Safety Administration Rules Related to Natural Gas Pipelines

Timothy J. Furdyna, Stuart B. Robbins and David L. Wochner 348

Energy Chairman Manchin's Permitting Bill Moves Through Committee in Careful Balancing Act

Elizabeth Leoty Craddock, Elizabeth M. Noll and Beth A. Viola 353

Investor-State Arbitration and the Energy Transition

Ian Meredith and Theo Hall 358

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International Trade Commission Allows Petition Seeking Duties on Solar Cells from Cambodia, Malaysia, Thailand and Vietnam to Proceed

*By Anand R. Viswanathan, Arie T. Feltman-Frank and
Kathryn E. Abendroth**

In this article, the authors discuss recent trade actions that are intended to protect the U.S. government's significant investments designed to bolster clean energy development while at the same time boosting domestic manufacturing capabilities and the purchase of domestically produced goods.

On June 7, 2024, the U.S. International Trade Commission (USITC or Commission) made a preliminary affirmative determination¹ that there is a reasonable indication that the U.S. domestic industry that produces crystalline silicon photovoltaic cells (c-Si solar cells) and modules is materially injured by imports of these cells from Cambodia, Malaysia, Thailand and Vietnam subsidized by the latter three governments and sold in the United States at less than their fair value. The USITC further determined that there is a reasonable indication that U.S. domestic industry is threatened with material injury by c-Si solar cells from Cambodia allegedly subsidized by the government of Cambodia.

This investigation (Investigation No. 701-722)² was launched in April after the American Alliance for Solar Manufacturing Trade Committee (American Alliance) filed a petition with the U.S. Department of Commerce (Commerce) and the USITC for the imposition of antidumping and countervailing (AD/CVD) duties on imports of c-Si solar cells from these Southeast Asian countries. The petition explained that the U.S. government is investing billions of dollars in the energy transition, fostering the proliferation of numerous new solar manufacturing facilities. The petition also alleged that the unfair trade practices by Chinese companies in Southeast Asia are compromising these critically important investments.

As a result of the Commission's affirmative determinations, Commerce will continue its investigation of c-Si solar cell imports from Cambodia, Malaysia, Thailand, and Vietnam with its preliminary determinations on countervailing

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¹ https://www.usitc.gov/press_room/news_release/2024/er0607_65269.htm.

² <https://ids.usitc.gov/case/8195/investigation/8558>.

duties due on or about July 18, and on antidumping duties due on or about October 1. The investigation could result in the imposition of significant duties on imports of c-Si solar cells from these Southeast Asian countries. On October 1, Commerce announced³ its preliminary affirmative determinations on countervailing duties.

This AD/CVD investigation is distinguishable from the final determination of “circumvention” made by Commerce in August 2023.⁴ Commerce concluded that imports of certain c-Si solar cells (from Cambodia, Malaysia, Thailand, and Vietnam), with components produced in China, were circumventing AD/CVD duties on Chinese imports.

The Biden administration’s two-year moratorium⁵ on duties that applied to these imports (known as the solar bridge), meant to facilitate imports while the domestic manufacturing base ramped up, expired on June 6, subjecting the imports to AD/CVD duties. However, according to the American Alliance petition, almost immediately upon Commerce’s initiation of the circumvention inquiries, importers began rapidly shifting their supply chains out of China. As a result, imports from these companies may not be covered by Commerce’s final determination of circumvention. The American Alliance petition seeks to ensure that imports of c-Si solar cells from Southeast Asia are appropriately subject to AD/CVD duties.

Meanwhile, companies that have imported c-Si solar cells duty-free pursuant to the solar bridge must install the cells by December 3 to avoid paying associated duties. Notably, on May 9, the U.S. Court of International Trade (CIT) denied the federal government’s motion to dismiss a challenge to Commerce’s final rule⁶ implementing the solar bridge (the Duty Suspension Rule).⁷ Should the CIT declare the Duty Suspension Rule unlawful, these companies, many of which made business decisions in reliance on the Duty Suspension Rule, may be subject to retroactive duties on what they assumed were duty-free imports.

In addition to the Southeast Asia AD/CVD investigation, other recent trade actions that may impact solar development include the removal of the bifacial

³ <https://www.trade.gov/commerce-preliminary-countervailing-duty-investigation-crystalline-photovoltaic-cells-cambodia>.

⁴ <https://www.federalregister.gov/documents/2023/08/23/2023-18161/antidumping-and-countervailing-duty-orders-on-crystalline-silicon-photovoltaic-cells-whether-or-not>.

⁵ <https://www.govinfo.gov/content/pkg/FR-2022-06-09/pdf/2022-12578.pdf>.

⁶ <https://www.federalregister.gov/documents/2022/09/16/2022-19953/procedures-covering-suspension-of-liquidation-duties-and-estimated-duties-in-accord-with>.

⁷ See *Auxin Solar, Inc. v. United States*, No. 23-00274 (Ct. Int’l Trade May 9, 2024).

solar panel exclusion to safeguard duties under Section 201 of the Trade Act of 1974, as amended (Trade Act), expansion of the tariff-rate quota for c-Si solar cell imports from 5 gigawatts to 12.5 gigawatts, and increased duties under Section 301 of the Trade Act.

REMOVAL OF BIFACIAL SOLAR PANEL EXCLUSION TO SAFEGUARD DUTIES

On May 12, the Biden administration announced that it plans to remove the bifacial solar panel exclusion to safeguard duties on c-Si solar cells under Section 201 of the Trade Act. Safeguard duties seek to protect U.S. companies from imports that are or may become a “substantial cause of serious injury” to domestic industry.

Safeguard duties were originally put into place by former President Trump in January 2018 via Proclamation 9693,⁸ and the bifacial solar exclusion was originally granted⁹ by the U.S. Trade Representative (USTR) in June 2019. Soon after, the USTR attempted to remove the exclusion. However, the CIT enjoined these efforts after successful procedural challenges under the Administrative Procedure Act. These challenges arose from disagreements between certain consumers, purchasers, and importers of bifacial solar panels and domestic producers of solar panels. The plaintiffs – renewable energy companies – argued that the importation of bifacial solar panels did not harm domestic producers because domestic producers did not produce utility-scale bifacial solar panels. The domestic producers, on the other hand, contended that safeguard duties on the bifacial solar panels were necessary to protect domestic production because developers can use either monofacial or bifacial solar panels.

Former President Trump then attempted to remove the exclusion via Proclamation 10101,¹⁰ dated October 25, 2020. But the CIT¹¹ enjoined the Proclamation on the basis that it exceeded the former president’s delegated authority under Section 204(b)(1)(B) of the Trade Act, which provides that safeguards may be reduced, modified, or terminated by the President under certain circumstances.¹²

⁸ <https://www.govinfo.gov/content/pkg/FR-2018-01-25/pdf/2018-01592.pdf>.

⁹ <https://www.federalregister.gov/documents/2019/06/13/2019-12476/exclusion-of-particular-products-from-the-solar-products-safeguard-measure>.

¹⁰ <https://www.federalregister.gov/documents/2020/10/16/2020-23108/to-further-facilitate-positive-adjustment-to-competition-from-imports-of-certain-crystalline-silicon>.

¹¹ *Solar Energy Indus. Ass’n v. United States*, No. 20-03941 (Ct. Int’l Trade 2021).

¹² See 19 U.S.C. § 2254(b)(1)(B).

While the appeal was pending, President Biden extended the safeguard duties for an additional four years in February 2022; however, bifacial panels were excluded from this extension. Then, in November 2023, the Federal Circuit reversed and remanded the CIT injunction, holding that former President Trump did not exceed his delegated authority and that Proclamation 10101 was not invalid.¹³ The effect of the court's decision was the removal of the exclusion for bifacial panels that were imported into the United States after October 25, 2020, and before February 7, 2022. The Biden administration's recently announced plan to remove the exclusion would apply to future imports of bifacial solar panels.

EXPANSION OF TARIFF-RATE QUOTA FROM 5 GIGAWATTS TO 12.5 GIGAWATTS

On August 12, President Biden expanded¹⁴ the tariff-rate quota for c-Si solar cell imports, increasing the amount of c-Si solar cells that can enter the country free from safeguard duties to 12.5 gigawatts from the previous tariff-rate quota of 5 gigawatts. President Biden explained that “the domestic industry has been making and is continuing to make a positive adjustment to import competition, shown by increased actual and planned module production; various announcements of planned domestic cell production; and improvements in several of the domestic industry's financial, trade, and employment indicators.”

INCREASED SECTION 301 DUTIES

On May 14, President Biden directed¹⁵ the USTR to increase duties under Section 301 of the Trade Act on certain imports from China, including solar cells (rate to increase from 25% to 50% in 2024). On May 28, the USTR issued a request for comments¹⁶ concerning its proposed modifications to the Section 301 duties, exclusion process for machinery used in domestic manufacturing, and temporary exclusions for certain solar manufacturing equipment. Comments were due by June 28. On October 15, 2024, and October 17, 2024,

¹³ See *Solar Energy Indus. Ass'n v. United States*, 86 F.4th 885, 902 (Fed. Cir. 2023).

¹⁴ <https://www.whitehouse.gov/briefing-room/presidential-actions/2024/08/12/a-proclamation-to-further-facilitate-positive-adjustment-to-competition-from-imports-of-certain-crystalline-silicon-photovoltaic-cells-whether-or-not-partially-or-fully-assembled-into-other-products-2/>.

¹⁵ <https://www.whitehouse.gov/briefing-room/statements-releases/2024/05/14/fact-sheet-president-biden-takes-action-to-protect-american-workers-and-businesses-from-chinas-unfair-trade-practices/>.

¹⁶ <https://www.federalregister.gov/documents/2024/05/28/2024-11634/request-for-comments-on-proposed-modifications-and-machinery-exclusion-process-in-four-year-review>.

the USTR established¹⁷ an electronic portal and procedures¹⁸ for making exclusion requests.

TAKEAWAYS

The recent trade actions are intended to protect the government's significant investments designed to bolster clean energy development while at the same time boosting domestic manufacturing capabilities and the purchase of domestically produced goods.

However, the effect of these actions on the solar project backlog is uncertain. While the backlog is better than it was last year, delays in bringing projects online are still more common than they were from 2018 to 2021, according to the U.S. Energy Information Administration,¹⁹ which identified supply chain as one of the key factors influencing the delay.

Purchasers, importers, and exporters of solar panels, domestic manufacturers, and others with a stake in the energy transition should be closely following these developments and ensure that their interests are adequately represented and that their projects can move forward in a cost-effective manner and with minimal delay.

¹⁷ [https://ustr.gov/sites/default/files/Section%20301%20FRN%20for%20Exclusion%20Process%20\(Final\).pdf](https://ustr.gov/sites/default/files/Section%20301%20FRN%20for%20Exclusion%20Process%20(Final).pdf).

¹⁸ <https://www.federalregister.gov/documents/2024/10/17/2024-23880/procedures-for-requests-to-exclude-certain-machinery-used-in-domestic-manufacturing-from-actions>.

¹⁹ <https://www.eia.gov/todayinenergy/detail.php?id=62003>.