

# Biden Pauses New Duties on Solar Imports From Southeast Asia, Takes Action To Bolster Domestic Industry

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On June 6, 2022, President Joe Biden issued a [declaration of emergency](#) (the Declaration) that paves the way for a 24-month moratorium on new duties on solar imports. The Declaration was a direct response to the turmoil in solar markets caused by an ongoing investigation (the Investigation) into possible tariff circumvention by solar producers in Cambodia, Malaysia, Thailand and Vietnam (the Four Countries). President Biden sought to reassure solar developers, utilities and consumers that solar products from the Four Countries — which accounted for approximately 75% of all solar imports in 2020 — could continue to be imported free of the threat of prohibitive tariffs, at least in the short term.

On the same day, President Biden issued five presidential memoranda (the Memoranda) that laid the foundation for potentially far-reaching use of presidential authority under the Defense Production Act (DPA) to foster domestic production of solar parts and equipment.<sup>1</sup> [The president also announced](#) that the government would develop procurement tools to further support domestic producers.

President Biden's actions were welcomed by many in the U.S. solar industry. The Declaration provides a respite from the uncertainty caused by the Investigation, which reportedly stalled a substantial number of solar projects in the United States. At the same time, the president relied on a rarely used statutory provision to do so and has been criticized for effectively interfering in an ongoing quasi-judicial proceeding. The petitioner in the Investigation has been particularly vocal in its criticism of these steps, and it is unclear whether the president's invocation of the DPA and announcements concerning possible procurement measures will yield tangible benefits to U.S. solar producers.

## Emergency Declaration

The Declaration relied on a statutory authority that has only been invoked a handful of times in the last century: Section 318(a) of the Tariff Act of 1930. Section 318(a) empowers the president, after declaring a state of emergency, to:

- extend the prescribed time for performing a specified act (such as paying trade duties); and
- authorize the Department of Commerce (Commerce) to permit duty-free importation of supplies for “emergency relief work.”

Historically, U.S. presidents have invoked the provision only in wartime or times of severe, nationwide need. For instance, President Harry Truman used Section 318(a) to allow duty-free imports of lumber for home construction, to alleviate an acute shortage of housing for veterans immediately after the end of World War II. He also suspended duties on copper imports during the Korean War. More recently, in 2020, President Donald Trump used Section 318(a) to allow importers to postpone payment of import duties amid the COVID-19 pandemic.

<sup>1</sup> [Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as amended, on Insulation](#) (June 6, 2022); [Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as amended, on Electric Heat Pumps](#) (June 6, 2022); [Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as amended, on Transformers and Electric Power Grid Components](#) (June 6, 2022); [Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as amended, on Photovoltaic Modules and Module Components](#) (June 6, 2022); [Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as amended, on Electrolyzers, Fuel Cells and Platinum Group Metals](#) (June 6, 2022).

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Here, the Declaration emphasizes concerns about the sufficiency of U.S. electricity generation capacity to meet nationwide needs, citing climate change and recent energy market disruption as factors. The Declaration acknowledges an increased U.S. dependence on solar energy and seeks to counter rising energy prices and the solar resource shortage, noting the impact of Russia's invasion of Ukraine.

Based on these concerns, the Declaration authorizes Commerce to “consider taking appropriate action” to permit imports of solar modules and cells from Cambodia, Malaysia, Thailand and Vietnam without imposing any new anti-dumping (AD) duties, countervailing duties (CVDs), or anti-circumvention duties over the next two years. The stated objective of this pause in duties is “to ensure the U.S. has access to a sufficient supply of solar modules to meet electricity generation needs while domestic manufacturing scales up.”<sup>2</sup>

Although the Declaration does not refer to the Investigation expressly, the Declaration is squarely directed at alleviating the market disruption caused by it. Commerce initiated the Investigation on April 1, 2022, in response to a petition filed by Auxin Solar. According to the petitioner, producers in the Four Countries were circumventing AD duties and CVDs imposed on imports of Chinese cells and modules. The duties on Chinese imports were initially imposed following a determination by Commerce in 2012. Since that decision, duties in excess of 250% generally apply to imports of these Chinese products, rendering their export to the U.S. prohibitively expensive in most cases.

According to the petitioner, Chinese companies began opening up production facilities in the Four Countries to avoid having to incur the duties. Yet the petitioner alleges that the lion's share of the inputs that go into the cells and modules made in the Four Countries come from China, and that the bulk of the work takes place in China. If Commerce finds that these or other facts warrant a finding that circumvention is occurring, it could include cells and modules from the Four Countries within the scope of the existing AD and CVD orders imposed on Chinese solar products. This could trigger application of duties in excess of 250% to solar products from the Four Countries.

Auxin Solar has argued that the Declaration may be illegal and that it interferes with the Investigation, a quasi-judicial proceeding led by career staff.<sup>3</sup> The Declaration means that certain actions

<sup>2</sup> Fact Sheet: President Biden Takes Bold Executive Action To Spur Domestic Clean Energy Manufacturing (June 6, 2022) (WH Fact Sheet).

<sup>3</sup> See, e.g., Kelsey Tamborrino, Politico, “Biden Moves To Ease Trade Turmoil Threatening His Solar Energy Ambitions” (June 6, 2022).

that normally accompany an investigation — such as requiring payment of cash deposits immediately following a preliminary affirmative determination — could not take place.

But the Declaration does not purport to interfere in the overall process, timing or substance of the Investigation, as opposed to the timing of remedies imposed in connection with that investigation. Indeed, Commerce issued a statement affirming that, despite the 24-month pause on new duties, the “anti-circumvention proceeding continues uninterrupted, and whatever conclusion Commerce reaches when the investigation concludes will apply once this short-term emergency period is over.”<sup>4</sup> As this statement indicates, the Declaration should have no bearing on the merits of Commerce's determination (*i.e.*, whether circumvention is occurring). A White House fact sheet on the Declaration further emphasizes the president's “commitment to safeguarding the integrity and independence of all ongoing trade investigations by career officials at the Department of Commerce.”<sup>5</sup>

If Auxin Solar nonetheless decides to challenge the Declaration in court — *e.g.*, on the grounds that the Declaration exceeds the president's authority under Section 318(a) — this move could undercut the benefit of the 24-month pause in duties. U.S. solar developers and utilities may be concerned that a successful legal challenge would effectively nullify or terminate the Declaration, triggering payment of circumvention duties *before* the end of the 24-month period.

Regardless, it is clear that the Declaration provides only short-term relief for solar developers and utilities. If Commerce finds that circumvention is occurring, duties would begin to accrue promptly after conclusion of the 24-month period.<sup>6</sup> As a result, uncertainty over tariffs will continue with respect to supply agreements that contemplate module shipments from the Four Countries *after* the 24-month period expires.

Commerce is required to issue its preliminary determination in the Investigation by the end of August 2022. Although preliminary, this decision likely will be a strong indicator of how

<sup>4</sup> Department of Commerce Statement on President Biden's Proclamation on Solar Cells and Modules (June 6, 2022) (Commerce Statement).

<sup>5</sup> WH Fact Sheet.

<sup>6</sup> In its recent statement, Commerce clarified that “[p]ursuant to the President's Proclamation, the Department of Commerce will issue regulations to temporarily permit for up to 24 months *duty-free* access to solar cells and modules from Cambodia, Malaysia, Thailand, and Vietnam.” Commerce Statement (emphasis supplied). This language indicates that duties will not accrue during the 24-month period and will only begin to accrue after its expiration. Indeed, if duties accrued throughout this period, the only benefit of the Declaration would be to postpone payment of these duties. The specter of having to pay two years of prohibitive tariffs at the end of the waiting period would have a substantial chilling effect on solar projects, undercutting the Declaration's objective.

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Commerce will find in its final determination. This, in turn, will reduce uncertainty over the ultimate course of the Investigation, and help companies plan and allocate risk accordingly.

## Presidential Memoranda

On the same day that President Biden issued the Declaration, he also signed five Memoranda that invoked the DPA. In these documents, the president determined, pursuant to Section 303 of the DPA (Section 303), that domestic solar parts and components (*i.e.*, insulation, heat pumps, transformers and electric power grid components, modules and module components, electrolyzers, fuel cells and platinum group metals) and their domestic production are essential to U.S. national defense. The president further determined that these elements are critical to securing the robust, resilient and sustainable domestic industrial base needed to supply a clean energy economy and resilient energy sector, and to preserve critical infrastructure.

Section 303 authorizes the president to take certain actions to create, maintain, protect, expand or restore domestic industrial base capabilities that are essential for national defense. The president must find that:

- The industrial resource is “essential to national defense”;
- Without action, the U.S. industry cannot reasonably be expected to provide the capability in a “timely manner”; and
- The use of this authority is the “most cost effective, expedient, and practical alternative” for meeting the need.

Upon making these findings, the president is authorized to purchase critical items for the U.S. government’s use and to develop production capabilities at established ceiling prices or at the current domestic market price for such commodities. Congressional action is required if aggregate purchases made under this authority are expected to exceed \$50 million, unless the president also determines that action is necessary to avert severe impairment of the national defense capability. These purchases can be made for up to 10 years, subject to certain price adjustments and authorities governing the use of subsidies.

We expect that the Biden administration will use Section 303 powers to accelerate domestic solar energy production, likely through spending and investment in the solar supply chain. But the Memoranda provide little insight into how this would be achieved or what the impact of these measures might be. The White House fact sheet accompanying the Memoranda states only that the White House and the Department of Energy “will

convene relevant industry, labor, environmental justice, and other key stakeholders as we maximize the impact of the DPA tools made available by President Biden’s actions.”<sup>7</sup>

## Federal Procurement Initiatives

In addition to using DPA authorities, President Biden has announced that his administration will develop and use two procurement tools to accelerate domestic clean energy production:

- **Master supply agreements** will be available to domestic solar companies to increase efficient sales of solar components to the U.S. government; and
- **“Super preferences”** will apply domestic content standards for federal procurement of solar systems to incentivize production of U.S.-made solar photovoltaic components, consistent with the Buy American Act.

The White House noted that it will partner with state and local governments and municipal utilities with respect to these procurement measures.

As with the Memoranda, we have little information on what these procurement tools will look like or how they will affect the U.S. industry. It is possible that the “master supply agreements” will resemble blanket purchase agreements (BPAs), which provide uniformity throughout multiple agreements. While technically not contracts, BPAs set forth the purchase terms for underlying orders between suppliers and the U.S. government. In some circumstances, the BPA guarantees purchases upfront so that the U.S. government takes on liability, whereas in others, the supplier must guarantee the terms upfront and the U.S. government later determines what to purchase. Depending on how they are constructed, BPAs in the solar manufacturing context — whether or not styled as master supply agreements — could result in potential benefits to domestic solar companies such as reduced procurement lead time, streamlined ordering procedures and lower administrative costs.

Likewise, there is little information on how the White House’s “super preferences” will function. But they dovetail with several other administration initiatives to enhance U.S. manufacturing, including in the clean energy context. For instance, the Biden administration recently issued a new final rule for Buy American requirements set out in the Federal Acquisition Regulations (FAR). The new FAR rule will gradually increase the percentage of U.S.-made parts required in final products bought with U.S.

<sup>7</sup> WH Fact Sheet.

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taxpayer dollars, from 55% to 60% in October 2022. That percentage will increase to 65% in January 2024 and to 75% in January 2029.<sup>8</sup> The rule also applies enhanced price preferences for critical products, which adds a percentage to foreign contractors' offers for determination of the lowest price. It remains to be seen how the combination of these procurement efforts will impact U.S. solar developers and manufacturers, especially those that may now need to increasingly rely on U.S. sources for items to be provided to the U.S. government.

In this context, we note that the FAR Council is due to report on June 15, 2022, regarding proposed rules for implementing two other executive orders addressing climate-related financial

risk<sup>9</sup> and federal sustainability through clean energy industries.<sup>10</sup> The FAR Council will consider amending the FAR to establish procurement preferences for suppliers with a lower "social cost" of greenhouse gas emissions in major federal agency procurements, and to prioritize procurement of sustainable and energy-efficient products identified or recommended by the Environmental Protection Agency. If implemented in the FAR, these developments are expected to favor environmentally sustainable product manufacturers and producers of renewable energy equipment such as solar modules.

<sup>8</sup> [Federal Acquisition Regulation: Amendments to the FAR Buy American Act Requirements](#), 87 Fed. Reg. 12780 (Mar. 7, 2022).

<sup>9</sup> [Executive Order 14030](#) § 5(b)(ii), 86 Fed. Reg. 27967 (May 20, 2021).

<sup>10</sup> [Executive Order 14057](#) § 208 (December 8, 2021).

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