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Federal Circuit Rules Broad Discretion for Commerce in Country of Origin of AD/CVD Imports

By William R. Isasi*

The U.S. Court of Appeals for the Federal Circuit recently affirmed the U.S. Department of Commerce's determination that solar panels assembled in China from non-Chinese cells were subject to antidumping and countervailing duties. The author of this article discusses the decision and its implications.

The U.S. Court of Appeals for the Federal Circuit recently affirmed the U.S. Department of Commerce's ("Commerce") determination that solar panels assembled in China from non-Chinese cells were subject to antidumping ("AD") and countervailing duties ("CVD").[1] In doing so, the Federal Circuit found that Commerce had discretion to depart from its long-standing practice of using a substantial transformation test to determine country of origin and instead the agency may fashion different tests for different AD/CVD orders. The discretion recognized in this ruling creates greater uncertainty for importers with respect to the country of origin of imports covered by AD/CVD orders, making customs compliance more difficult.

BACKGROUND

Customs and Border Protection ("CBP") determines the country of origin of imports for purposes of normal customs duties while Commerce may make its own country of origin determination for purposes of AD/CVD duties. Historically, both agencies used the same country of origin analysis, referred to as the "substantial transformation test," which focuses on, for example, the manufacturing activities in a country. Commerce's long-standing position is that it can reach different country of origin determinations from CBP even though the agencies are nominally applying the same test. For example, Commerce could use the substantial transformation test and find that, for purposes of AD/CVD duties, the country of origin of an import is China, while CBP could apply the same test and determine for purposes of regular customs duties it is an import from Taiwan. Needless to say, having to claim multiple

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[1] *See Canadian Solar, Inc. v. United States*, *available at* http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/17-2577.Opinion.3-12-2019.pdf.

countries of origin for a single import would complicate a U.S. importer's customs compliance procedures. However, until recently, importers were at least able to rely on both agencies' established practice of applying the substantial transformation test to determine what country of origin to claim.

In the solar panels from China AD and CVD proceedings, Commerce announced that it would *not* apply the substantial transformation test to determine country of origin. Instead it applied a new test, the "country of assembly test" in which the country of origin for AD/CVD purposes was the country in which the solar panel was assembled. Commerce developed and applied this test notwithstanding the fact that in two other AD/CVD orders on solar cells from China, Commerce determined country of origin based on the substantial transformation test.

THE FEDERAL CIRCUIT'S DECISION

The Federal Circuit upheld Commerce's use of the country of assembly test finding that the agency has broad discretion to develop different country of origin tests for different AD/CVD orders. Although the Federal Circuit recognized that Commerce was using different country of origin tests for orders involving solar products, the court found that Commerce had provided a reasoned explanation supported by adequate evidence for its departure from the substantial transformation test and its adoption of the country of assembly test.

The court affirmed Commerce's principal rationale for departing from its past practice—that the solar panel orders were intended to address injury to the domestic industry from solar panels assembled in China from non-Chinese cells and application of the country of assembly test would allow Commerce to fashion an order that addresses the very imports found to cause injury. Commerce found that the substantial transformation test, in contrast, would allow producers in China to evade the discipline of the various AD/CVD orders on Chinese solar products simply by producing solar panels from cells not made in China. The Federal Circuit found that the record evidence substantiated Commerce's concern that Chinese producers were evading existing AD/CVD duties by producing solar panels in China made with non-Chinese cells.

IMPLICATIONS

Long before the *Canadian Solar* decision, Commerce established the principle that it may come to a different country of origin determination than CBP for the same import and, as a result, importers may have to claim different countries of origin for AD/CVD duties and regular customs duties. However, this decision goes one step further and puts importers on notice that the substantial transformation test may not resolve country of origin for AD/CVD duties because Commerce may fashion different country of origin tests for

different AD/CVD orders. This makes it more important that importers have a thorough understanding of the scope determinations Commerce has made under each AD/CVD order and that importers incorporate those determinations into their customs compliance procedures. Some of the best ways an importer can stay abreast of scope determinations is to review Commerce's *Federal Register* notices and confirm that they are on the "scope service list" for any AD/CVD orders that pertain to their imports when possible. Parties that have participated in an AD/CVD proceeding are eligible to be on the scope service list for that proceeding and they are directly notified of important scope determinations.[2]

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[2] *See generally* 19 C.F.R. § 351.225(n) & (o), *available at* https://www.govinfo.gov/content/pkg/CFR-2005-title19-vol3/xml/CFR-2005-title19-vol3-sec351-225.xml.