

International Trade Alert

July 29, 2014

U.S. Department of Commerce Imposes Preliminary Antidumping Duties on Chinese Solar Products

On July 25, 2014, the U.S. Department of Commerce (DOC) announced its preliminary determinations in the antidumping duty (AD) investigations of crystalline silicon photovoltaic products (“solar products”) from China and Taiwan. DOC preliminarily found AD margins ranging from 26.33 to 165.04 percent for Chinese companies and margins ranging from 27.59 to 44.18 percent for Taiwanese companies. The AD duties with respect to China are in addition to duties of 18.56 to 35.21 percent assigned by DOC in its June 2014 preliminary countervailing duty (CVD) determination.

DOC’s preliminary determinations will be enforced by U.S. Customs and Border Protection (CBP) through the collection of AD cash deposits in the applicable amount from U.S. importers of record. The cash deposit requirement will become effective on the date of publication of DOC’s preliminary determination in the *Federal Register*, expected on or around August 1, 2014.

DOC’s final determinations are currently scheduled for December 15, 2014.

DOC’s ongoing AD and CVD investigations are based on petitions filed last December by SolarWorld Industries America, Inc. (“SolarWorld”), the U.S. subsidiary of Germany-based SolarWorld AG. DOC’s preliminary AD determinations are the latest in a series of trade cases involving solar products from China. DOC issued AD and CVD orders on certain solar cells exported from China in 2012, and the European Union (EU) recently entered into a settlement agreement with Chinese exporters of solar products.

Products Covered by DOC’s Current Investigations

The products covered by DOC’s current AD and CVD investigations are solar cells and modules, laminates and/or panels consisting of cells, whether or not assembled into other products. These investigations also cover modules, laminates and/or panels assembled in China from solar cells produced in third countries, but using ingots or wafers produced in China. DOC’s current investigations, however, specifically exclude solar cells, whether or not assembled into modules, that are covered by the existing AD and CVD orders on China.

The relationship between the scope of the current investigations and the existing orders has been a source of considerable confusion for foreign exporters and U.S. importers, who are not always able to trace the steps of the cell production process. According to SolarWorld, the scope of the current investigations is intended to address circumvention of the existing 2012 orders, which SolarWorld alleges occurred when Chinese solar cell manufacturers shifted cell conversion operations to countries outside of China to avoid duties imposed by the initial solar cells case.

In the preliminary AD determinations issued on July 25, 2014, DOC instituted a certification requirement for all imports of solar modules or panels assembled in China or Taiwan that are not subject to these investigations. DOC has not yet announced which facts importers will be required to certify with each entry of nonsubject modules or panels; however, it will make the certification form public, along with its instructions to CBP, in the coming days. The purpose of the certification requirement will be to ensure that entries that importers claim to be outside the scope of these investigations are appropriately identified and documented.

Further, DOC's preliminary determinations do not address a number of scope comments filed by interested parties claiming that the current scope is flawed or unenforceable. Many of these comments pertain to the confusion about the dividing line between the scopes of the existing AD and CVD orders on solar cells from China and the new proceedings. These comments also address concerns over the difficulty in identifying the country of origin of solar ingots and wafers that are further manufactured into solar cells and modules in third countries. DOC's preliminary determinations thus leave open a number of scope-related issues. U.S. importers and foreign manufacturers of solar cells and modules should therefore continue to monitor these cases and evaluate their supply chains and possible exposure to AD and CVD liability.

WTO Ruling

On July 14, 2014, a World Trade Organization (WTO) dispute settlement panel found that the United States acted inconsistently with a number of provisions of the WTO Agreement on Subsidies and Countervailing Measures in several recent U.S. CVD cases. Among the cases covered by the ruling is DOC's 2012 solar cells case. In that case, the WTO panel found inter alia that the United States impermissibly determined that state-owned enterprises provided inputs at less than adequate remuneration to the companies under investigation and treated the provision of such inputs as a countervailable subsidy. While this WTO panel ruling may alter aspects of DOC's CVD methodology with respect to China, the United States can appeal the ruling, and it remains to be seen how the United States will implement any methodological changes. Importantly, this adverse ruling has no immediate impact on the ongoing solar products investigations.

Settlement

As DOC's investigations continue, some industry representatives and politicians, including Vice President Biden, have been advocating for a comprehensive settlement of the various ongoing solar cases. While China and the EU were able to reach a negotiated settlement in similar cases, calls by the Solar Energy Industries Association and members of Congress for resolution of the U.S. cases have, to date, failed to advance beyond the preliminary stage.

While there is no indication that a comprehensive settlement is on the immediate horizon, last week's AD rulings may accelerate this process, since U.S. regulations call on exporters/producers or the foreign government to propose any "suspension" agreement within 15 days of DOC's preliminary determination. DOC's decision to enter into negotiations for a suspension agreement or to sign an agreement is discretionary.

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