

International Trade Alert

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U.S. Department of Commerce Soon to Launch Review of Duties on Chinese-Origin Solar Cells amidst Challenges to Scope of Coverage and Settlement Talks

December 2013 will mark the first “anniversary month” of the antidumping (AD) and countervailing duty (CVD) orders on Chinese-origin crystalline silicon photovoltaic (PV) cells, whether or not assembled into modules. The U.S. Department of Commerce (DOC) imposed the orders following AD/CVD investigations conducted as a result of petitions filed by SolarWorld Industries America Inc. (“SolarWorld”). During the anniversary month, interested parties will have the opportunity to request DOC to conduct administrative reviews of the AD/CVD orders to determine the actual duties to be collected on PV cells that have been imported under the order.

The AD/CVD orders are among the largest by value that the United States has ever imposed, covering billions of dollars’ worth of imports annually. The upcoming administrative reviews, coupled with significant disputes over the scope of products covered by the orders, are creating uncertainty for both foreign producers and exporters as well as for U.S. importers and purchasers of these products. This uncertainty is exacerbated by ongoing settlement discussions between the United States and China.

Upcoming Administrative Reviews

Under the U.S. AD/CVD system, DOC, in its initial investigations, calculates estimated rates and instructs U.S. Customs and Border Protection (CBP) to collect cash deposits from importers at those levels. CBP is currently collecting cash deposits from U.S. importers on products subject to the orders at the following levels:

<u>AD</u>		<u>CVD</u>	
Trina Solar and specified affiliated companies:	18.32%	Trina Solar and affiliated companies:	15.97%
Wuxi Suntech and specified affiliated companies:	29.14%	Wuxi Suntech and affiliated companies:	14.78%
Separate Rate for Qualifying Exporters and Producers:	24.48%		
PRC-Wide Rate:	249.96%	All Others Rate:	15.24%

The actual duties to be assessed on previously imported PV cells will be determined in the upcoming administrative reviews that will begin in December. The first administrative reviews that may be requested in December will cover U.S. imports of covered PV cells during the May 25, 2012 through November 30, 2013 period for the AD order and the March 26, 2012 through November 30, 2013 period for the CVD order.

Under U.S. law, DOC must review and determine final duty rates for any Chinese producers and exporters if a review is requested by a U.S. producer, the foreign producer or an importer. For both the

AD and CVD orders, based on any review requests filed during December 2013, DOC will select a limited number of “mandatory” respondents for which it will determine company-specific assessment rates. For the AD order only, as in the underlying investigation, DOC will establish separate rates for Chinese exporters able to demonstrate their independence from Chinese government control. AD/CVD assessment rates for all other entries will be based on the underlying cash deposit rates determined in the investigations. Foreign producers, exporters or importers who were subject to a deposit rate that may have the possibility of being reduced should familiarize themselves with the process and consider the risks and benefits of requesting a review.

DOC Respondent Selection Methodology

DOC’s administrative reviews of the AD/CVD orders on Chinese PV cells are poised to begin in the wake of DOC’s announcement of a fundamental change to its methodology for selecting mandatory respondents in AD reviews. Mandatory respondents are those foreign producers and exporters selected by DOC for company-specific investigation and the assignment of company-specific rates. In cases involving multiple producers and exporters (like Chinese PV cells), DOC’s longstanding practice has been to examine individually no more than a limited number of mandatory respondents—usually two—representing the largest percentage of exports to the United States of the covered product. DOC assigns rates to all other cooperating respondents based on a weighted average of the rates determined for the mandatory respondents.

Earlier this month, DOC announced that, for all AD proceedings for which the notice of opportunity to request administrative review publishes in the *Federal Register* on or after December 4, 2013, it will employ a sampling methodology, provided certain conditions are met, to select mandatory respondents. Under the sampling methodology, DOC will, in many cases, likely select as mandatory respondents smaller companies that would not likely have been selected under DOC’s current methodology. DOC’s new methodology will make it more difficult to predict in advance of administrative reviews which companies will be mandatory respondents.

It remains uncertain whether DOC’s new respondent selection methodology will apply to the first administrative reviews of the AD order on Chinese PV cells. While it is likely that the notice for December 2013 will publish prior to December 4, a later publication date cannot be ruled out at this time. Accordingly, foreign producers, exporters and importers should monitor DOC’s initiation for the potential application of its new respondent selection methodology.

Challenge to DOC Scope

The scope of the products covered by the AD/CVD orders remains controversial. In its petitions, SolarWorld requested DOC to include in the scope of its investigations all PV cells manufactured in China and all PV modules assembled in China, *regardless* of the country of origin of the PV cells incorporated into the modules. DOC, however, defined the scope to include *only* PV cells manufactured in China and modules assembled in China or third countries incorporating PV cells manufactured in China. Thus, contrary to SolarWorld’s request, DOC’s scope does *not* cover PV modules assembled in China that incorporate PV cells sourced from third countries, such as Taiwan. Early this year, SolarWorld challenged

DOC's scope determination before the U.S. Court of International Trade (CIT). The appeal will likely continue at least through much of 2014, and any final decision of the CIT is subject to further appeal.

In addition, as SolarWorld's appeal continues, DOC is taking unprecedented action to enforce the scope of the AD/CVD orders. In response to allegations from SolarWorld that Chinese producers and exporters of PV cells are falsely claiming non-Chinese origin for PV cells incorporated into modules assembled in China, DOC has issued multiple questionnaires to Chinese exporters and U.S. importers requiring them to document the source of PV cells exported to the United States. Because DOC is aggressively policing the scope of the orders, importers of merchandise claiming non-scope status should be prepared, upon request, to corroborate the country of origin of PV cells, whether or not they are incorporated into modules.

Possible Settlement?

As the administrative and judicial proceedings related to the DOC orders continue, so do settlement discussions between the United States and China. Two settlement models are currently under discussion. Under the first, the United States would revoke the AD/CVD orders on Chinese PV cells, replacing them with some combination of export quotas and minimum price levels. The second settlement model is one proposed by the Solar Energy Industry Association (SEIA). Rejecting the establishment of export quotas or minimum prices, SEIA has instead proposed revocation of the AD/CVD orders in exchange for the Chinese industry to establish a fund to promote the further development of the U.S. solar market. SEIA's proposal would include a safeguard mechanism to offset any potential surge of Chinese PV cells into the U.S. market.

As of this time, settlement negotiations are ongoing and the situation remains fluid, but achieving any settlement appears difficult. The United States has already issued AD/CVD orders on Chinese-origin PV cells, and there is no statutory or regulatory deadline under U.S. law that could compel conclusion of the talks. Also, such comprehensive settlements of existing AD/CVD orders and associated litigation are rare and difficult to achieve under U.S. law. A further complicating factor is the inclusion in the settlement talks of preliminary Chinese AD/CVD measures on U.S.-origin polysilicon, a key raw material for solar cells. Whatever the duration or direction of the settlement negotiations, the administrative and litigation proceedings under U.S. law will continue until and unless resolved by any comprehensive settlement. At any rate, interested parties should not rule out the possibility of a settlement agreement that may ultimately impose export quotas or minimum prices.

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