

## Global Project Finance Alert

### U.S. Department of Commerce Imposes Preliminary Tariffs on Chinese Solar Cells

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On May 17, 2012, the U.S. Department of Commerce announced its preliminary determination in the antidumping (“AD”) investigation of Chinese-origin crystalline silicon photovoltaic (“PV”) cells, whether or not assembled into modules. Commerce has calculated preliminary AD tariffs of approximately 31 percent. This is in addition to the approximately 3-5 percent tariffs announced by Commerce on March 20, 2012 in its companion countervailing tariff (“CVD”) investigation.

As a result of these preliminary determinations, U.S. importers of Chinese-origin PV cells will now be required to post cash deposits or bonds in amounts of the preliminary tariffs for all imports which enter the U.S. starting up to 90 days prior to the date of publication of the preliminary determinations (which should occur in the *Federal Register* later this week).

Commerce is scheduled to issue final determinations as to AD and CVD tariffs in early October, 2012. However, tariffs may only be imposed if the U.S. International Trade Commission (“ITC”) separately determines the Chinese PV cells are causing material injury, or threatening material injury, to U.S. PV cell producers. The ITC injury investigation will begin soon, and many buyers of both U.S. and Chinese PV cells will receive questionnaires from the ITC. The responses to these questionnaires, and other participation in the ITC investigation by purchasers of PV cells, will be very important in the ITC’s injury assessment and the final outcome of the case.

Commerce is conducting these investigations as a result of petitions filed in October 2011 by the U.S. affiliate of German SolarWorld AG alleging that Chinese PV cells are sold in the U.S. at unfairly low prices (“dumped”) and that the Chinese government subsidizes the production of PV cells.

Importantly, the preliminary scope of the AD/CVD investigations covers modules, laminates, and panels produced in third countries from Chinese-produced PV cells, **but excludes** modules, laminates, and panels produced in China using PV cells produced in third countries. This is a change from the original scope of the case, which did not cover third-country modules using Chinese origin cells. There will continue to be argument over the appropriate scope of the case and any final tariffs, so this is an issue to watch carefully.

Commerce determined preliminary AD rates of 31.22 percent for Wuxi Suntech Power Co., Ltd., and certain affiliated companies, 31.14 percent for Changzhou Trina Solar Energy Co., Ltd. and certain affiliated companies, 31.18 percent for a list of 59 other companies, and 249.96 percent for all other Chinese companies. These preliminary AD tariffs are in addition to Commerce’s preliminary CVD tariffs of 2.90 percent for Wuxi Suntech Power Co., Ltd., 4.73 percent for Changzhou Trina Solar Energy Co., Ltd., and 3.61 percent for all other Chinese companies. **These rates may change significantly in the final determination, and are subject to annual reviews and annual changes. These tariffs will impact every producer and exporter of the covered Chinese PV cells.**



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The preliminary AD/CVD determinations have all the hallmarks of an early stage trade war. Indeed, many experts believe the Chinese government will impose tariffs on the import of U.S. - sourced silicon into China. The final results of the AD/CVD investigations and the response from China will be closely watched.

In the short run, the preliminary tariffs created by the determinations will likely increase the levelized cost of energy on crystalline photovoltaic modules being sold in the U.S. Consequently the preliminary tariffs will be seen as positive developments for solar equipment manufacturers that do not use Chinese sourced cells, be they domestic crystalline PV, thin film PV or solar thermal vendors. On the other hand, the tariffs will be seen as a blow to developers seeking the lowest cost modules for their projects.

Commerce's preliminary AD/CVD determinations will have implications for existing and prospective supply contracts. As a matter of law, the importer of record is responsible for posting any AD or CVD tariffs that are imposed. The importer may not be reimbursed by the exporter. Therefore, if equipment has been purchased directly from a Chinese exporter (and not imported more than 90 days prior to publication of Commerce's initial determinations), the U.S. importer of record will find itself responsible for posting cash deposits or bonds. Many major PV vendors have set up captive U.S. distribution companies and U.S. customers which purchase product from those domestic import entities should not be considered an "importer." That said, change of law, force majeure and similar provisions in existing supply contracts remain extremely important in determining who is ultimately responsible for the AD/CVD tariffs.

Prospective contracts will be impacted most obviously by pricing. The allocation of responsibility for the AD/CVD tariffs will have a significant impact on how equipment is priced in any particular transaction. Purchasers should take care to avoid acting as an importer. Given that the supplier usually takes responsibility for import of equipment into the U.S. and delivery of equipment to the project site, this may not be of concern in most transactions, but care must be taken to ensure that risk associated with AD/CVD tariffs is properly allocated in all contracts. It should also be recognized the actual, final tariffs that are owed on Chinese PV cells will not be known until long after the cells have been imported.

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