

Chinese Solar Cells May Face US Import Duties

by Keith Martin and Samuel R. Kwon, in Washington

Anti-dumping or countervailing duties could be imposed on photovoltaic cells imported from China starting this fall at the earliest, but more likely after a date in the spring or summer 2012, under a trade complaint that SolarWorld and six other US solar panel manufacturers filed against Chinese panel makers charging that Chinese solar cells are being dumped in the US market and are benefiting from illegal export subsidies.

The complaint only applies to crystalline solar cells. It does not apply to thin film or other solar equipment.

A table included as an exhibit lists the dumping margins, or the discount at which Chinese panels are allegedly being sold below “normal value” expressed as a percentage of the actual sales price. Examples are 159% for Trina panels, 184% for Suntech and 233% for Yingli. The pattern in such cases is to allege very high margins that get reduced during the investigation.

A separate table lists all the US customers who have been identified by the petitioners as buying Chinese panels.

The US panel makers petitioned US trade authorities for relief on October 19.

The Commerce Department has 20 days to decide whether to investigate. This can be extended by another 20 days if the case is viewed as complicated. Once an investigation starts, the Commerce Department has 65 days to decide whether there are grounds for imposing countervailing duties and 140 days to decide whether to impose anti-dumping duties. These deadlines can be extended to as long as 250 days for countervailing duties and 310 days for anti-dumping duties for cases that are extraordinarily complicated and involve upstream subsidies of components that take time to trace.

At that point, the Commerce Department makes a preliminary decision on duties.

Countervailing duties are supposed to match the subsidies from which Chinese panel manufacturers benefit. If anti-dumping duties are imposed, they are the difference between the “normal value” of the panels and the price at which the

panels are being sold in the US market. The law is unclear currently whether both types of duties can be imposed on products shipped from a non-market economy. The issue is before the federal courts.

Duties are imposed on the importer of record. Thus, in cases where a Chinese solar panel company sells its product in the United States through a US subsidiary, the US subsidiary must pay the duty.

Once a preliminary decision is made to impose duties, then importers must post a bond or other security. Duties would normally apply to solar cells imported after the preliminary decision. However, they can be imposed up to 90 days earlier if there is a “critical circumstance.” It would be unusual to have such a retroactive imposition. An example of a critical circumstance is where there is evidence that Chinese solar panel manufacturers are accelerating exports to the United States in anticipation of an adverse decision. The fact that US solar developers are rushing to start construction of projects this year to qualify for Treasury cash grants could complicate the issue.

The US government must find two things to impose duties. One is injury to a US industry. The International Trade Commission makes a decision on injury. The other is evidence of dumping or illegal export subsidies. This is a Commerce decision. The two agencies work on parallel tracks. The ITC must make a preliminary determination on harm within 45 days after the petition is filed.

Commerce has another 75 days after its preliminary decision to make a final judgment. The ITC has another 45 days after Commerce acts to make a final decision on injury.

After the ITC final decision, then bonds and other security are liquidated and duties collected.

Cases frequently land on appeal in the US Court of International Trade. There is no suspension of duties during an appeal. It is more common to see the amount of duties appealed than the decision about industry harm, since small changes in amount can add up to large dollars.

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The seller cannot reimburse the buyer for the duty. Any such reimbursement must be paid to the US government as an additional import charge.

It does not matter at what prices competing solar panels are being sold by US manufacturers. Thus, for example, if a US solar developer can buy panels from China at \$1 a watt and from US suppliers for \$1.25, but Commerce decides the “normal value” is \$1.50, then an anti-dumping duty of 50¢ would be imposed on the Chinese panels. The normal value is normally determined by looking at the price at which the foreign manufacturer sells the panels in its domestic market. However, in the case of a non-market economy like China, the normal value is determined by looking at panel prices in a third country. The petitioners in the case propose using India.

Many Chinese companies sell their products through US subsidiaries. In such cases, the “export price” on which the duty is collected is the resale price to the ultimate US customer less certain statutory reductions. The price is reduced by the cost to move the panels from the factory in China to the United States, by any normal Customs duty (but not the anti-dumping or countervailing duties) and by certain other

costs of the US subsidiary to make the sale. Thus, for example, if the resale price is \$1 a watt, the normal value is \$1.50 and it costs the US subsidiary 15¢ to make the sale, then the anti-dumping duty would be $\$1.50 - (\$1 - 15¢) = 65¢$. If the Chinese parent reimburses the subsidiary for the anti-dumping duty, then that reimbursement would have to be paid to the US government.

US customers would continue to pay \$1 a watt in theory, but in practice the Chinese panel maker would lose money on such sales.

It could escape duties by supplying solar cells from a factory in the United States or a third country. However, enough value would have to be added in the US or the third country for the cells to be considered a local product.

The law is designed to allow no real political influence in decisions, although industry groups sometimes meet with government officials during the proceedings. Both Commerce and the International Trade Commission decide cases on the facts. The president does not have the option to set aside a decision. ☺

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