

# Duty free no more?

## Panels imported to the US subject to a 2.5 percent tax – for now

**O**cean Yuan, CEO of Eugene, Oregon-based Grape Solar, ran into a tricky situation last June, when he was preparing to launch his company – whose business model is based entirely on the import of Chinese solar modules. His customs broker at James J. Boyle & Co. in Portland had researched his products and informed him of something that was, as far as he knew, unheard of in the industry: his imports would be subject to a 2.5 percent tariff. The broker faxed him a copy of an import ruling from January, which was based on the classification of a Trina Solar, Ltd. module reviewed by the New York customs office. Yuan says he called up a couple of Chinese companies with sales offices in the US – like Canadian Solar in southern California – and they said they knew nothing about the new tariff. At the time, Yuan saw it as an unfair disadvantage, but he paid it.

Now, Yuan considers himself lucky. On September 30, the New York Times wrote about the January customs decision. The article reported that other importers could be held accountable for unpaid duties and, if they were shown to have been negligent, could be fined.

There is still no definitive answer on whether fines will be issued, or even if the duty in fact applies to all solar modules. Lisa Whiles, the customs broker with James J. Boyle & Co. who has been working with Yuan, emphasizes that the ruling must be dealt with on a case-by-case basis.

Tariff law in the US is based partially on precedence, and entirely on the importer's initiative. It is the burden of the party who would be responsible for paying a tariff to keep an eye on any new customs rulings, which are available

to the public through US Customs and Border Protection. If there is any doubt about a product's classification, it is the importer's responsibility to submit a request for a ruling. Failing to notice a new ruling or submit a classification request could be considered negligence, and lead to fines. Customs law also holds that, as with any ruling in the US, the January 9<sup>th</sup> ruling that sparked concern throughout the industry is, technically, only binding for the company that requested it. The decision was based on the review of a Trina Solar module in December 2008. That review was requested by GES USA, but it is now up to other importers to determine whether it applies to their products as well.

Pay to pass: The new tariff may apply retroactively to any module imported since January 2009.

The letter from customs to GES asserted that, because the Trina panel contained bypass diodes, it did not fit under the duty free category that previously applied to all imported panels. The letter referred to the Harmonized System Explanatory Notes – the World Customs Organization's tome of clarifying notes to the international harmonized tariff system – in stating that elements that control the direction of the current exclude solar panels from the tariff classification under which they were previously imported – that is tariff code 85.41. Bypass diodes in the Trina Solar module classify the product as a DC generator – tariff code 85.01.

That's the same tariff code that applies to small generators and some other solar products, like garden lights. This is cause for alarm for module importers, since most modules manufactured today contain bypass diodes.

SEIA, while opposed to the ruling, has not challenged it yet. According to Monique Hanis, SEIA's director of communications, the organization has designated a board-level working group to evaluate the legal implications of the ruling, and to decipher what exactly the classification means on a technical level.

Sean Murray, a partner at Miller & Company, P.C. – a law firm specializing in international trade and customs –





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says there are three possible actions the industry could take in response to the ruling (aside from just paying the tariff, of course). First, the importer could take the case to US Customs Headquarters for review. Or, importers can also challenge customs rulings at the US Court of International Trade. A third and truly international option would be the World Customs Organization, which manages the international Tariff Harmonization System by which goods are classified. In order for an importer to bring their case to this agency, it must be able to show that the same product is classified under different tariff codes in two countries, and a government must agree to sponsor the case.

This latter option is, in fact, not entirely out of the question in the case of Trina Solar modules, or any other module that would be classified this way in the future. In 2005, the exact same question regarding bypass diodes arose

in Germany, when a couple of regional customs offices (Oberfinanzdirektionen) began classifying solar modules under the 85.01 category. Ultimately, in June of 2005, the German customs office explicitly stated that bypass diodes were a safety measure, and therefore solar modules would remain tariff free in Germany.

If the new tariff does stick, it could be a windfall for US companies looking for a competitive advantage. The response from importers and domestic companies alike, however, has been guarded.

Paul Israel, CEO of Sunlight Solar Energy Inc., a Bend, Oregon-based installer with branches in four other states, buys some of his panels from Grape Solar. While the current tariff is unlikely to affect his balance sheet this year, Israel says it is a »ridiculous« idea. »Tariffs are a throwback to the depression era mentality,« he says.

Grape Solar's Yuan underscores that this isn't the first sign of protectionism he's noticed as an importer in the US. The American Recovery and Reinvestment Act is designed to benefit domestic companies, and its »Buy American« clause means any construction work for federal agencies has to favor US-made goods. The act's protectionist inclination is a tone that crops up in policy regionally as well: for example, the state of Washington has a feed-in tariff that only applies to in-state goods, which is also similar to the new feed-in-tariff established in Ontario, Canada.

Ultimately, the goal of the local production rules, like import tariffs, is to stimulate local manufacturing. Yuan, for one, is considering the construction of a US factory where he could import partially completed panels duty-free, and then finish their production on-site. His inquiry on this topic is pending with US customs. The new tariff exempts imports from NAFTA members Mexico and Canada, as well as other favored US trading partners.

While this tariff doesn't differ from those applied to other electronics entering the US under the same category, US importers have concerns on two levels: First, importers who failed to pay the tariff in 2009 could be penalized with double fees. Second, at a time when Chinese modules are flowing into the US market, and there's talk in Europe of limiting imports, this decision touches on deeper concerns. Acts of protectionism, after all, can trigger repercussions from US trade partners. Yuan, for one, is nervous about the direction of US policy: »I think it's fair, a single-digit import duty,« he says, »but I don't think it's fair to pay 35 or 50 percent, like the tire industry is facing.« He's concerned that US solar import policies may move in that direction. »When we go to meetings, industry meetings, people talk about it,« says Yuan, »and there is a real possibility, I believe. And that's the thing – the industry needs to be prepared.« Either they need to be prepared, or they need to make a very good case to US customs.

Melissa Bosworth