

New China Duty Case Exposes US Solar Industry Civil War

By **Keith Goldberg**

Law360, New York (January 13, 2014, 2:59 PM ET) -- The U.S. International Trade Commission's latest dumping probe of Chinese solar products has stirred up not only a long-simmering trade fight between two economic superpowers but also a high-stakes battle within the U.S. solar industry that could make the solar trade dispute tough to settle.

In Dec. 31 petitions lodged with the ITC and U.S. Department of Commerce, the American unit of SolarWorld AG claims that Chinese solar panel makers are skirting U.S. duties by using solar cells manufactured in a third country, Taiwan. The petition urges the government to put in place a new set of anti-dumping and countervailing duties.

Despite anti-dumping and countervailing duties that had already been levied on Chinese solar cell imports in response to previous SolarWorld complaints, Chinese companies continue to benefit from government subsidies and to sell solar panels into the U.S. market at unfairly low prices, the company claims.

The ITC announced Jan. 3 that it was launching a preliminary investigation into SolarWorld's latest complaint, which experts say looks well beyond the scope of the current duties by seeking to close the alleged loophole as well as to extend them to consumer products that contain the disputed solar materials.

"Many importers, including those whose products are really on the margins, are going to face uncertainty," said Bernd Janzen, an Akin Gump Strauss Hauer & Feld LLP international trade partner. "When you add the scope of the two cases together, the only way to escape liability altogether is to have both the underlying cells, modules and panels made outside of China. Basically the entire chain of production would have to occur outside of China."

That could drive up the cost of business for major segments of the U.S. solar industry that need solar components, such as utility-scale solar project developers, rooftop solar companies and public utilities, experts say. It's no wonder the Solar Energy Industries Association isn't thrilled with this latest case, calling it an "escalation of the U.S.-China solar trade conflict," and referring to trade litigation as "a blunt instrument."

"There's really a gulf in the industry," said Harry Clark, who chairs Orrick Herrington & Sutcliffe LLP's international trade and compliance group. "It depends on whether your business is to manufacture panels in the U.S. or consume them."

Although SolarWorld argues the new duties are needed to protect a growing U.S. solar manufacturing sector, experts say the duties could cripple the end user portion of the solar industry, which is far larger.

"There are about 10 installation and service jobs for every production job in the U.S.," said Dorsey & Whitney LLP partner William Perry, who has represented U.S. solar importers and end users. "The downstream impact is enormous. We're not just talking about the [product] distributors here."

Experts say the downstream market could dry up because the additional duties could derail the industry's efforts to achieve so-called grid parity, where the price for solar power is comparable to that for traditional-source power. This is challenging enough, given that the recent U.S. oil and gas boom has led to rock-bottom gas prices.

"As a result of fracking, you have plummeting costs for traditional sources of energy. That's making it harder for green technologies to compete," said Elliot Feldman, who leads BakerHostetler's international trade practice. "In principle, if you're being driven by jobs, you'd want as many cheap solar cells as you can get."

A setback on the grid parity front could also throw a wrench into public policy efforts to get more solar power on the grid, through programs such as state renewable portfolio standards, which require utilities to draw a certain percentage of their power from renewable sources.

"Many of the government incentives are with the intention of getting solar up to grid parity," Janzen said. "You have this feeling out there of the federal government sending mixed signals, of some federal entities encouraging more use of solar power and other entities making imports of these products more expensive."

The Solar Energy Industries Association and some members of Congress have called for a settlement of the solar trade dispute. The SEIA, for its part, released a proposal in September that it said would end the tussle between the U.S. and China and benefit both countries' solar sectors. The proposed deal, which would remain in effect for five years, calls for duties in both countries to be revoked and for all pending investigations and lawsuits related to the trade cases to be dropped.

But SolarWorld has expressed skepticism over the deal, and experts say current U.S. trade law ties regulators' hands when it comes to brokering a settlement if industry doesn't climb aboard.

"It's very difficult for the government, or anyone else, to force SolarWorld to drop these cases," Clark said. "[Consideration of the effect on the end user is] not something that's written into the law, and that's before you even get into the politics."

This latest case may further dim the prospects of a settlement, although Janzen argues that the overlapping U.S. cases could also provide an impetus to get a broad-based deal done that would restore some certainty and stability to the solar market.

"I think that this case is one of those that is crying out for a big settlement push, just because the volume of trade is huge, there are so many commercial actors that are impacted by this and there are mixed policy signals," Janzen said.

--Additional reporting by Scott Flaherty. Editing by Kat Laskowski and Jeremy Barker.