

Inching Toward A Possible US-China Trade Settlement

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As if the U.S. trading relationship with China was not already complicated enough — with more than 50 ongoing U.S. anti-dumping and countervailing duty cases against China and a number of pending high-profile World Trade Organization disputes — the two governments and their industries are exploring possible novel mechanisms for settling a cluster of ongoing cases on solar products. The cases, which affect billions of dollars of trade annually and a myriad of commercial actors ranging from manufacturers to solar project developers, include:

- AD/CVD orders on Chinese-origin solar cells, imposed by the U.S. Department of Commerce in 2012, and now subject to ongoing DOC administrative reviews. The DOC reviews will determine the final duty liability for U.S. import entries made since the preliminary duties took effect in 2012. These AD/CVD orders, arising from petitions filed by the U.S. subsidiary of Germany-based SolarWorld AG, currently require U.S. importers to post AD cash deposits ranging from 18.32 to 249.96 percent, and CVD cash deposits ranging from 14.78 to 15.97 percent. These are often referred to as the “Solar I” cases.
- Ongoing AD/CVD investigations of Chinese-origin solar products — and a parallel AD investigation of Taiwanese-origin solar products — in which DOC recently issued preliminary determinations. DOC is conducting these investigations based on petitions filed at the end of December 2013, which SolarWorld claimed were needed to address alleged circumvention by Chinese manufacturers that shifted cell conversion operations to countries outside of China to avoid duties imposed under the Solar I cases. DOC recently announced its preliminary determinations in these investigations. On July 25, 2014, DOC announced preliminary AD duties ranging from 27.59 to 44.18 percent for Chinese companies, and 27.59 to 44.18 percent for Taiwanese companies. The Chinese AD duties are in addition to preliminary CVD duties announced by DOC in June 2014, which range from 18.56 to 35.21 percent. Final determinations in these investigations are scheduled for December 2014. These are often referred to as the “Solar II” cases.



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- AD/CVD orders that China imposed early this year on U.S.-origin polysilicon, a key raw material for solar cell production. Chinese importers of U.S.-origin polysilicon must pay AD duties ranging from 53.3 to 57 percent, and CVD duties ranging from 0 to 2.1 percent.

The global context for these solar cases — and thus the business climate in which impacted companies must manage global supply chains and international projects — is also complicated and difficult to navigate. This context includes AD/CVD investigations conducted by the EU against Chinese-origin solar panels, which are now subject to an agreement establishing a price floor governing subject imports into the EU. Also, China has imposed AD/CVD measures against imports of EU-origin polysilicon. India also recently initiated an AD investigation of solar panels imported from the U.S., China, Taiwan and Malaysia.

The context is further complicated by a number of related administrative enforcement actions and judicial proceedings. These include ongoing efforts by DOC to clarify the product scope of the Solar I and Solar II cases, which most recently have resulted in DOC's imposition of certification requirements for U.S. importers that are intended to clarify the country of origin of solar cells incorporated into panels. It is reportedly very difficult for many U.S. importers of solar products — particularly those unaffiliated with foreign manufacturers — to reliably trace the origin of cells incorporated into downstream products. Further, the U.S. petitioner in the Solar I and Solar II cases, SolarWorld, recently requested that DOC account in its ongoing administrative proceedings for U.S. Department of Justice cyber-espionage charges against certain Chinese nationals who are claimed to have stolen trade secrets belonging to U.S. manufacturers, including SolarWorld, for the benefit of their Chinese competitors. Various judicial appeals of the Solar I determinations are pending with the U.S. Court of International Trade, and are also subject to WTO dispute settlement proceedings initiated by China.

The immediate question that international trade lawyers and impacted companies are following is whether the Chinese government, as permitted by U.S. law, will propose a “suspension agreement” in the ongoing Solar II AD investigation. China recently indicated in a preliminary submission to DOC that it is evaluating whether to propose such an agreement.

Under U.S. law, foreign governments, in CVD investigations or AD investigations involving countries deemed by DOC to be nonmarket economies such as China's, are permitted to propose settlement agreements that would take the place of any final AD or CVD duties that would otherwise be imposed. Such agreements are termed “suspension agreements” and typically enact pricing floors on imports of the subject merchandise or, less frequently, import quantity restrictions. In effect, while the agreement is in place, the AD/CVD proceedings are on hold — although DOC normally continues its investigations so there are AD/CVD orders in place as a backstop if the agreement unwinds. (The U.S. International Trade Commission, charged with examining whether the imports at issue are injuring — or threaten to injure — the U.S. industry, also continues its investigation.) Although suspension agreements are usually viewed as an exception and few are currently in place, they have been adopted with some success in a number of cases in recent years.

Under DOC's regulations, the foreign government subject to the investigation must submit any proposed suspension agreement no later than 15 days following DOC's preliminary determination. DOC then must disclose the terms of the proposal and seek public comments on the proposed agreement prior to signing and accepting it. Notably, while suspension agreements are agreements between the respondents and the U.S. government, petitioners in AD/CVD proceedings have a seat at the negotiating table, and DOC would be unlikely to sign a suspension agreement over objections from the petitioner.

In the Solar II investigations, proposed suspension agreements were due no later than Aug. 8, 2014. Shortly before the expiration of the deadline, however, DOC granted the Chinese government a one-week extension to propose a suspension agreement in the China AD case. To date, there has been no similar movement in the Taiwan AD or China CVD Solar II cases. Nor is there a clearly defined mechanism under U.S. to apply a suspension agreement to the existing Solar I AD/CVD orders. Indeed, to do so would be inconsistent with the notion of “suspending” ongoing investigations, as the Solar II investigations were completed in 2012.

Whether China ultimately proposes a suspension agreement remains to be seen. Nonetheless, the fact that China has requested an extension of the deadline is a notable development for several reasons.

First, although not unprecedented, suspension agreements between China and the U.S. have been exceedingly rare, particularly in recent years. For example, China and DOC did implement suspension agreements covering U.S. imports of honey in 1995 and cut-to-length carbon steel plate in 1997. However, both of these agreements have long since been terminated, and DOC and China have not publicly announced any suspension agreement discussions in a number of years, notwithstanding a recent massive escalation in the number of U.S. AD/CVD proceedings against China. Those earlier suspension agreements also occurred in a far less complicated context than the current solar cases. There is thus little recent precedent suggesting that the two governments will be able to easily and quickly agree on suspension agreement terms.

Second, even if the suspension negotiations fail, the fact that China may propose a suspension agreement could kick start broader settlement discussions. While a suspension agreement covering the current China AD investigation would have no direct impact on the existing Solar I AD/CVD orders or the on-going Solar II China CVD or Taiwan AD investigations, a suspension agreement in one case may lay some groundwork for a broader settlement of the other cases. Simply putting an offer on the table may move the two sides incrementally closer to a more comprehensive agreement by demonstrating the existence of some mutually acceptable middle ground.

However, even if a suspension agreement in the Solar II AD investigation is within reach, a number of daunting obstacles to a broader settlement of all ongoing Solar I and II litigation proceedings remain:

- The U.S. legal framework for suspension agreements is quite clearly defined, and there is some precedent to help set expectations for negotiations. In contrast, the U.S. legal framework for possible settlement of all Solar I and Solar II cases other than the Solar II AD investigation is murky. There is some limited precedent for comparable settlements, including bilateral trade accords reached years ago governing U.S. softwood lumber imports from Canada and U.S. imports of cement from Mexico. The solar cases, however, exist in a more complicated global web of proceedings, including China’s AD/CVD measures on U.S.-origin polysilicon. The earlier settlement agreements are thus instructive, but do not provide a directly applicable roadmap for a comprehensive settlement of the solar cases.
- The EU-China suspension agreement has recently come under significant strain due to allegations of price floor circumvention filed in Brussels by the EU solar panel producers association, which includes Germany’s SolarWorld AG. According to these allegations, Chinese exporters and EU importers have evaded the minimum price dictated by the suspension agreement through refund schemes that effectively permit lower pricing. These allegations, combined with SolarWorld’s repeatedly expressed concerns about circumvention of the Solar I

AD/CVD orders, suggest that SolarWorld will attempt to veto any deal that does not provide robust and novel enforcement mechanisms.

- As noted, SolarWorld recently requested DOC to account in its evaluation of China’s alleged unfair trading practices for recent cyber-espionage charges filed by the DOJ against China. There is no precedent for DOC to account for analogous criminal charges in trade remedy cases or in settlement agreements. It is therefore far from clear if a comprehensive settlement of the solar cases would — or even could, as a matter of U.S. trade law and policy — in any way address this complicating dimension of the solar cases.
- Finally, the solar cases exist in a particularly charged and troubled political environment. Not only are these cases a significant irritant in the bilateral trading relationship, but they complicate both countries’ ongoing efforts to promote renewable energy. For many U.S. importers and installers of solar systems reliant on imported systems, the imposition of duties seems fundamentally at odds with federal and state incentives to promote renewables. These political tensions have recently come to the fore in a spirited public exchange of letters about the cases between SolarWorld and the U.S. Solar Energy Industry Association. The letters underscore the wide current divergence in views regarding the possible terms of a comprehensive settlement deal.

For all of these reasons, strong political leadership and will are needed if progress is to be made toward a comprehensive settlement. Already, Vice President Biden has weighed in with public exhortations to find a mutually agreeable solution, but actually finding terms on which all major stakeholders in the ongoing solar cases can agree is another matter entirely. In the meantime, indications that China may propose terms for a suspension agreement in one of the ongoing solar cases must be understood in their broader context — as a small step on a journey that promises to be difficult and long.

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Disclaimer: Akin Gump Strauss Hauer & Feld LLP represents several U.S. importers and other interested parties in the ongoing solar proceedings.
