The latest escalation in the U.S.-China solar trade war could truly damage the U.S. solar market. On Dec. 31, 2013, SolarWorld filed another anti-dumping and countervailing duty petition aimed at imports of solar products to close the third-country loophole against China and Taiwan. Specifically, the new solar products petition covers solar cells, modules and panels from China and Taiwan.

By way of full disclosure, I am not an impartial analyst of these cases. However, I do have first-hand experience of how these cases play out. As an international trade partner at Dorsey & Whitney, I am currently representing Upsolar, a Chinese exporter/U.S. importer, and several other U.S. importers in the solar cells and the new solar products cases. From 1980 to 1987, I worked in the Office of General Counsel at the U.S. International Trade Commission (ITC) and the Office of Chief Counsel and Office Antidumping Investigations at the U.S. Department of Commerce.

The first shot in the solar trade war was fired when SolarWorld, a U.S. producer, filed its first anti-dumping and countervailing duty petition on Oct. 19, 2011, against $4 billion in solar cells imported from China. This petition resulted in anti-dumping and countervailing duty orders in December 2012.

But this case opened up a third-country loophole because the petition covered only the solar cells themselves. The jurisdiction in anti-dumping and countervailing duty cases is "in rem" - which means the jurisdiction is over the products being imported into the U.S. Therefore, the description of the product in the petition is critical. Because the first petition only covered the solar cells themselves, Chinese companies and U.S. importers could purchase solar cells from third countries, such as Taiwan, and put those solar cells into modules and panels in China. One estimate is that the difference in prices between Taiwan and Chinese solar cells was two to three cents.

Meanwhile, solar cell cases were brought in the European Commission (EC) against solar cells, modules and panels from China, which resulted in a government-to-government agreement limiting imports and setting a floor price. In addition, the Chinese government brought its own anti-dumping and countervailing duty cases targeting $2 billion in U.S.-produced polysilicon that goes into the Chinese solar cells coming...
back to the U.S. The Chinese government has now issued a final anti-dumping rate of 57% on U.S. polysilicon - in effect, shutting polysilicon out of the Chinese market. REC Silicon, the largest U.S. polysilicon producer, reportedly has deferred a $1 billion investment into Moses Lake Washington. Dow Corning has cut production workers at its U.S. polysilicon plant by over 100 people. Now comes the new Dec. 31 solar products case. There are now four investigations against Chinese solar products. The first two anti-dumping and countervailing duty investigations cover imports of Chinese solar cells - that is, modules and panels from China with Chinese solar cells in them. The second two anti-dumping and countervailing duty investigations cover Chinese modules and panels - that is, modules and panels produced in China with foreign (e.g., Taiwanese) solar cells in them.

Principles in anti-dumping cases
To win an anti-dumping and countervailing duty case, Commerce must find dumping and/or subsidization benefits to Chinese manufacturers from the Chinese government. Also, the ITC must find that the dumped and/or subsidized imports cause material injury or threat of material injury to the U.S. industry. With regards to these two anti-dumping and countervailing duty investigations against Chinese solar cells and solar products, there are four common principles that have to be kept in mind, which are as follows:

1. **Commerce does not use actual prices to determine dumping.** From the U.S.' perspective, dumping is generally defined as selling products in the country at lower prices than in the home market or below the foreign company's fully allocated cost of production. Even under its normal methodology, Commerce finds dumping in over 90% of the cases. Pursuant to Commerce's methodology, it will find dumping and subsidization in 100% of the cases against China. Commerce will look at only two to four companies individually and calculate individual rates for those companies. Only those two to four companies get to prove that they are not dumping or receiving subsidies. The rest of the Chinese companies get the average of the individual selected companies, but if all the individually selected companies get 0% rates, the rest of the Chinese companies get a positive rate selected by Commerce, which can be very high.

2. **U.S. importers are liable for duties retroactively.** U.S. importers pay anti-dumping and countervailing duty tariffs, not Chinese companies. U.S. importers are retroactively liable for the difference plus interest if anti-dumping and/or countervailing duty rates go higher in annual review investigations. When a U.S. importer imports products under an anti-dumping or countervailing duty order, it posts an anti-dumping or countervailing duty cash deposit. The actual anti-dumping rate or countervailing duty tariffs are determined during the annual review investigation. If the rate goes down in
the review investigation, the U.S. importer gets back the difference plus interest. But if the rate goes up, the U.S. importer owes the difference plus interest.

In the solar cells case, rates can go from 0% to over 250%, and U.S. importers can find themselves liable for millions of dollars in retroactive liability. Anti-dumping and countervailing duty orders can stay in place for five to 30 years.

3. There is no public interest test in anti-dumping cases. In contrast to the EC, Canada, China and many other countries, there is no public interest test in U.S. anti-dumping and countervailing duty cases. In the EC, Canada and China, the government may take into consideration the national interest before imposing anti-dumping and countervailing duties on imports, such as the impact on downstream industries or the impact on the solar market.

In the EC, this is known as the community interest test. If the majority of countries in the EC oppose the imposition of anti-dumping and countervailing tariffs because it is not in their national interest, no duties will be imposed.

In the U.S., however, there is no public interest test, and thus, it makes it more difficult for the U.S. government to pressure a U.S. industry into accepting a settlement/suspension agreement in U.S. anti-dumping and countervailing duty cases.

4. End users have no standing. In contrast to many other countries, end users (e.g., the downstream developers of solar power) have no standing in U.S. anti-dumping and countervailing duty cases. Thus, it is much more difficult to make the argument that anti-dumping and countervailing duty orders will injure downstream producers or developers in the case.

Solar cells review investigation


U.S. producers filed a request covering over a hundred Chinese solar exporters/producers. As stated above, in review investigations, Commerce determines the actual anti-dumping and countervailing duty for Chinese export companies and how much individual import companies actually owe for imports that came in during the review investigation. If the rate goes up, the U.S. importer owes the difference plus interest.

Presently, certain Chinese exporters/producers in the solar cells case have anti-dumping rates ranging from 18.32% to 29%, with the average rate for most Chinese companies being 24.48%. The rest of the Chinese companies that do not have a specific rate are covered by a China-wide anti-dumping rate of 250%. To keep their current rates, Chinese exporters/producers must submit a response to a quantity and value questionnaire and then either a separate rates application or separate rates certification by April 4 - 60 days after the publication of the review notice in the Federal Register.

If a Chinese company does not file a response to these questionnaires by the due dates, its rate will go from 24% to 250%, and the U.S. importers that imported from that company will be retroactively liable for the difference plus interest.

Solar products initial investigation

In response to the Dec. 31 solar products petition, Commerce and the ITC have started new anti-dumping and countervailing duty solar products initial investigations. These new cases cover imports of Chinese modules and panels with solar cells in them from any country.
On Jan. 22 of this year, the ITC held a preliminary injury conference. On Feb. 14, the commission made a preliminary injury determination, finding that there was a reasonable indication of material injury or threat of material injury to the U.S. solar products industry, including SolarWorld. As a result of the decision, Commerce will continue its investigations on imports of these products, with its preliminary countervailing duty determination expected on May 30, and its anti-dumping duty determinations expected July 29.

Commerce has reduced the “all others/facts available” rate in the China case from 298% to 165% but raised the anti-dumping rate for Taiwan from 39% to 75.68%.

The trade volume is large. According to Commerce, imports of the subject merchandise from China and Taiwan were valued at $2.1 billion and $513.5 million, respectively.

Prepare for fallout

When the products covered in the past solar cells case are combined with the solar products covered in the present case, the only way for U.S. importers to escape liability is to have the underlying solar cells, modules and panels all made outside of China and Taiwan. With these determinations in place, the cost of doing business in 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—will increase substantially.

The Solar Energy Industries Association (SEIA) has announced that it is opposed to the case, calling it an “escalation” of the U.S.-China solar trade conflict. Experts also stated that the duties could cripple the end-user portion of the solar sector, which is far larger than the domestic production industry.

The market pressure driving solar prices downward is not caused by dumping, but the industry’s efforts to achieve so-called grid parity, where the price for solar power is comparable to that for traditional-source power. But prices for U.S. oil and natural gas are falling fast. With falling costs for traditional forms of energy, it is very difficult for solar energy to be competitive.

Meanwhile, on Jan. 26, China’s Ministry of Commerce announced that it was delaying anti-dumping and countervailing duty tariffs on U.S.-produced polysilicon, hoping for a negotiated settlement. Although SEIA and certain members of Congress have called for a settlement of the solar trade dispute, to date, SolarWorld has expressed skepticism about such a deal, making it more difficult to conclude a government-to-government settlement in the case. On Feb. 5, SolarWorld announced that it was “open to any prospective resolution that promises to hold China accountable to trade agreements and laws that enable fair trade.”

On Feb. 6, SEIA President Rhone Resch stated, “Without a negotiated settlement, we’re facing a double whammy this year: Significant job losses across the entire U.S. solar supply chain and higher prices to American consumers.”

In conclusion, the solar cells and solar products case will move forward. U.S. importers of solar products must pay close attention to both cases if they are importing Chinese solar cells and Chinese solar modules and panels with cells from Taiwan in them. Because of retroactive liability, these cases could easily expose U.S. importers to enormous duties, which could bankrupt their companies.