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October 9, 2012

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China

SUMMARY:

We have analyzed the case briefs, and rebuttal briefs, submitted by interested parties in the AD duty investigation of solar cells from the PRC. As a result of our analysis, we have made changes to the *Preliminary Determination.*

We recommend that you approve the positions described in the "Discussion of the Issues" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this AD investigation for which we received comments.

Case Issues:

General Issues

Comment 12: Application of *Sigma*
Comment 13: Double Remedies and Concurrent AD and CVD Investigations
Comment 14: Collection of Antidumping Duties
Comment 15: Surrogate Value for Quartz Crucibles
Comment 16: Surrogate Value for Aluminum Frames
Comment 17: Surrogate Value for Tin Ribbon
Comment 18: Surrogate Value for Glass Plate for Wafer Slicing

Issues Relating To Trina

Comment 19: Unreported FOPs by Cell Suppliers and Tollers
Comment 20: Ocean Freight Expenses
Comment 21: Errors Identified at Trina U.S.'s Verification
Comment 22: Source for Barge Freight
Comment 23: Whether to Apply NME Freight Charges to All of Trina's Sales
Comment 24: Surrogate Value for Polysilicon
Comment 25: Surrogate Value for Suspension
Comment 26: Surrogate Value for Trina's Back Sheet

Issues Relating To Wuxi Suntech

Comment 27: Whether Partial AFA Should be Used in Place of Unreported FOPs for Modules Assembled Under Back-to-Back Agreements
Comment 28: Whether Suntech America's Product Recall Expenses Should be Included In Indirect Selling Expenses
Comment 29: Exclusion of South Korean MEP Data
Comment 30: Acceptance of Minor Corrections Submitted at Verification
Comment 31: Exclusion of Sample Sales from the Margin Calculation
Comment 32: Valuing Inputs from NME Suppliers When the Inputs Were Used in Further Manufacturing
Comment 33: Whether Partial AFA Should be Applied to Value Labor and Energy for Tolled Modules
Comment 34: Whether the ISE Rate Should be Applied to Gross Unit Price Less Billing Adjustments and Early Payment Discounts
Comment 35: Suntech Arizona Financial Expense Rate
Comment 36: Whether Suntech America's Bad Debt Expense Should be Included
Comment 37: Verification Findings
Comment 38: Whether Certain Reported Market Economy Purchases Were Purchased from a Market Economy Supplier
Comment 39: Surrogate Value for PEG
Comment 40: Surrogate Value for Silica Purge of Liquid (IPA)
Comment 41: Surrogate Value for Hydrochloric Acid
Comment 42: Diamond Wire Saw Blade Surrogate Value
Comment 43: Whether Back-to-Back Arrangements Should be Considered Purchases or Tolling

Issues Relating to Other Respondents

Comment 44: Voluntary Respondent Treatment of Yingli
Comment 45: Treatment of Jiasheng's Separate Rate Application
Comment 46: Treatment of Chaori's Separate Rate Application

Background:

The Department published its preliminary determination of sales at LTFV, postponement of final determination, and affirmative preliminary determination of critical circumstances on May 25, 2012.[1] On May 22 and 25, 2012, Delsolar Co., Ltd./DelSolar (Wujiang) Ltd. and JinkoSolar International Limited, respectively submitted requests that the Department correct errors in their company names that appeared in the *Preliminary Determination*.[2] The Department made the requested corrections and published its *Preliminary Determination Correction* notice on June 25, 2012.[3]

Between May 28, 2012 and June 25, 2012, the Department conducted verifications of the mandatory respondents Wuxi Suntech, Trina, and certain of their affiliates.[4]

Between July 9, 2012, and July 26, 2012, Wuxi Suntech, Trina, and Petitioner submitted SV and rebuttal SV comments.

On July 24, 2012, and July 23, 2012, respectively, Wuxi Suntech and Trina submitted revised U.S. sales and FOP databases per the Department's request to provide updated databases reflecting the results of verification.

On July 30, 2012, Wuxi Suntech, Trina, Petitioner, Yingli, Jiasheng, Chaori, and the GOC submitted case briefs. On July 31, 2012, Small Steps Solar, Ltd. submitted a case brief, which the Department rejected because it was untimely filed.[5] Subsequently, the Department rejected Yingli's case brief because it contained certain new factual information.[6] Yingli resubmitted its redacted case brief on August 3, 2012.[7] On August 6, 2012, Wuxi Suntech, Trina, Petitioner,

[1] *See Preliminary Determination*.
[2] *See* Letter from JinkoSolar International Limited to the Department regarding, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China; Ministerial Error in Preliminary Determination," dated May 25, 2012. *See also* Letter from DelSolar Co., Ltd. and DelSolar (Wujiang) Ltd. to the Department regarding, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Request for Correction," dated May 22, 2012.
[3] *See Preliminary Determination Correction*.
[4] *See* the "Verification" section below.
[5] *See* Letter from the Department to Small Steps Solar, Ltd., regarding "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Small Steps Solar, Ltd.'s July 31, 2012, Submission," dated August 3, 2012.
[6] *See* Letter from the Department to Yingli, regarding "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: July 30, 2012 Case Brief of Yingli Green Energy Holding Company Limited and Yingli Green Energy Americas, Inc.," dated August 2, 2012.
[7] *See* Letter from Yingli to the Department, regarding "Crystalline Silicon Photovoltaic Celis, Whether or Not Assembled into Modules, from the People's Republic of China: Resubmission of Yingli's Case Brief," dated August 3, 2012.

tenKsolar, SunPower, and Sumec Hardware *et al.*[8] submitted rebuttal briefs. Further, Wuxi Suntech, Trina, and Yingli jointly submitted a rebuttal brief on August 6, 2012.

On June 25, 2012, Wuxi Suntech, Trina, Petitioner, and Yingli requested a hearing. Based on these hearing requests, on August 14, 2012, the Department held a public hearing limited to issues raised in the case briefs and the rebuttal briefs.

On September 7, 2012, Petitioner requested that the Department re-open the record to consider new recently available public information which indicates that Wuxi Suntech submitted potentially fraudulent financial statements to the Department.[9] On September 11, 2012, the Department reopened the record for parties to comment on Petitioner's allegation of fraud. On September 14, 2012 and September 18, 2012, Wuxi Suntech and Petitioner filed comments and rebuttal comments, respectively, regarding the fraud issue raised by Petitioner.

DISCUSSION OF THE ISSUES[10]

GENERAL ISSUES

Comment 1: Scope of the Investigation

Petitioner

- All modules assembled in the PRC, regardless of the country in which the solar cell was manufactured, should be included in the scope of the investigation because, *inter alia*: (1) the Department is legally required to give effect to the intent of the petition which was to cover modules from the PRC; (2) doing so will facilitate effective enforcement by CBP and prevent circumvention; (3) all PRC modules, regardless of the origin of the cells, are dumped into the United States; (4) the PRC module industry benefits from subsidies; (5) circumvention will be prevented and; (6) competition, and, consequently, price setting, occurs primarily in the module distribution channel.
- The Department's preliminary substantial transformation analysis is flawed. First, it was based on a two-stage production process (cell and module production) when there are actually three production stages (wafer, cell, and module production). When wafer production is viewed as a separate process from cell production, cell production becomes the least costly of the three stages. Second, the Department considered the cell as the essential active component of the module but both cells and modules are essential active components of the finished product. Third, the Department should not conduct a linear

[8] The following separate rate companies jointly submitted a rebuttal brief: Sumec Hardware & Tools Co., Ltd., Ningbo Etdz Holdings Ltd., LDK Solar Hi-Tech (Nanchang) Co., Ltd., LDK Solar Hi-Tech (Suzhou) Co., Ltd., Ningbo Qixin Solar Electrical Appliance Co., Ltd., Ningbo Komaes Solar Technology Co., Ltd., Zhejiang Jiutai New Energy Co., Ltd., ET Solar Industry Limited, JingAo Solar Co., Ltd., Dongfang Electric (Yixing) MAGI Solar Power Technology Co., Ltd., Shanghai JA Solar Technology Co., Ltd., Jiangsu Sunlink PV Technology Co., Ltd., and JA Solar Technology Yangzhou Co., Ltd.

[9] *See* Letter from Petitioner to the Department, regarding "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Request to Reopen the Records to New Factual Information," dated September 7, 2012.

[10] A list of abbreviations, acronyms, and full cites to documents is at the end of this memorandum.

substantial transformation analysis but refine its substantial transformation test by focusing on the country where the aggregate of production occurs.

- Alternatively, the Department should clarify the scope to cover PRC modules containing wafers that were converted into solar cells in third countries in order to prevent PRC exporters from avoiding dumping duties by producing wafers in the PRC, sending them to a third country to be processed into solar cells, and assembling those solar cells into modules in the PRC before exporting them to the United States.

Respondents Canadian Solar et al.,[11] *Sumec Hardware et al.*[12]*, TenKsolar and SunPower*

- The Department should maintain the scope of the investigation as defined in the *Preliminary Determination* by continuing to exclude modules, laminates, and panels produced in the PRC from solar cells produced in a third country because: (1) the substantial transformation analysis used to clarify the scope is accurate, and properly avoids creating conflicting country of origin findings for a single product; (2) Petitioner's proposed alternative substantial transformation test is not supported by law or precedent; (3) the Department is not legally required to accept Petitioner's scope revision when there is an overarching reason to modify it; (4) circumvention concerns were addressed in the Department's scope clarification and the clarified scope can be administered effectively; and (5) at this late stage of the proceeding, the Department is not permitted to expand the scope to cover PRC modules containing wafers that were converted into solar cells in third countries.

Department's Position: We continue to find that modules assembled in the PRC from solar cells produced in third countries are not covered by the scope of this investigation. Although generally the Department will exercise its authority to define or clarify the scope of an investigation in a manner that reflects the intent of the petition and provides the relief requested by the petitioning industry, it cannot merely accept a scope proposed by the industry when the agency's ability to administer any resulting order requires that it modify the proposed scope, which is the case here.[13] The scope of an AD or CVD order is limited to merchandise that is produced in the country covered by the order.[14] Thus, Petitioner's proposal that modules assembled in the PRC using solar cells produced in third countries be covered by the scope could only be accepted to the extent that it covers products determined to be of PRC origin. In determining the country-of-origin of a product, the Department's practice has been to conduct a

[11] On August 6, 2012, the following respondents filed a joint rebuttal brief regarding the scope of the investigation: Canadian Solar, Inc.; Trina and its affiliate Trina U.S.; Wuxi Suntech and its affiliates, Suntech America and Suntech Arizona; and Yingli Green Energy Holding and its affiliate, Yingli Green Energy Americas.

[12] On August 6, 2012, the following respondents filed a joint rebuttal brief regarding, *inter alia*, the scope of the investigation: Sumec Hardware & Tools Co., Ltd.; Ningbo Etdz Holdings Ltd.; LDK Solar Hi-Tech (Nanchang) Co., Ltd.; LDK Solar Hi-Tech (Suzhou) Co., Ltd.; Ningbo Qixin Solar Electrical Appliance Co., Ltd.; Ningbo Komaes Solar Technology Co., Ltd.; Zhejiang Jiutai New Energy Co., Ltd.; ET Solar Industry Limited; JingAo Solar Co., Ltd.; Dongfang Electric (Yixing) MAGI Solar Power Technology Co., Ltd.; Shanghai JA Solar Technology Co., Ltd.; Jiangsu Sunlink PV Technology Co., Ltd.; and JA Solar Technology Yangzhou Co., Ltd. (collectively, "Sumec Hardware *et al.*").

[13] *See Ribbons from Taiwan Prelim*, 75 FR 7236, 7247 (February 18, 2010) (unchanged in *Ribbons from Taiwan Final*, 75 FR 41804 (July 19, 2010); *see also Lumber from Canada*, and accompanying Issues and Decision Memorandum at section entitled, "Scope Issues," which follows Comment 49.

[14] *See SSPC from Belgium*, and accompanying Issues and Decision Memorandum at Comment 4.

substantial transformation analysis.[15] The CIT has upheld the Department's "substantial transformation" test as a means to carry out its country-of-origin analysis.[16] Hence, this is the analysis that was conducted early in the investigation which we affirm in this final determination. In its substantial transformation analysis, the Department found that solar cells are the "essential active component" that define the module/panel and that stringing third-country solar cells together and assembling them with other components into a module in the PRC does not constitute substantial transformation such that the assembled module could be considered a product of the PRC. Contrary to Petitioner's claim, for the reasons explained below, the substantial transformation analysis performed by the Department was not flawed.

First, record evidence supports the Department's finding that the solar cell is the essential active component of the solar module. Petitioner argues that certain physical qualities of the solar cell are changed when it is incorporated into a module, and, consequently, "both the solar cell and the components of the assembled module are essential active components of the finished product."[17] In support of this argument, Petitioner states, *inter alia*, that an individual solar cell cannot generate a commercially significant amount of electricity until it is joined together with other cells during the module assembly process. Petitioner further states that the processes of soldering individual solar cells together and laminating them, which occur during module assembly, changes the physical characteristics of the solar cell. Petitioner, however, apparently misinterprets the essential component criterion of the Department's substantial transformation analysis. Under this criterion, the Department considers whether processing in the exporting country changes the *important qualities or use of the component*.[18] Thus, the Department's essential component analysis focused on the third-country solar cells shipped into, and processed in, the exporting country (the PRC) and the *significance* of the changes in physical qualities or use of the component that occurred as a result of the processing. Evidence of a change or changes to the physical qualities of a component as a result of further processing does not inevitably lead to the conclusion that further processing substantially transformed the component. In the instant investigation, the Department found that the essential component of solar modules/panels is the solar cell since the purpose of solar modules/panels is to convert sunlight into electricity and this process occurs in the solar cells.[19] Accordingly, the Department considered whether the processing of solar cells into solar modules changes the nature or use of the solar cells.[20] As stated in the Scope Clarification Memorandum, the Department found that a number of the *significant* physical characteristics of the solar cell were not changed during the module assembly process.[21] As the ITC stated, "the physical characteristics and functions of

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[15] *See, e.g., Glycine from India*, and accompanying Issues and Decision Memorandum at Comment 5; *see also SSPC from Belgium*, and accompanying Issues and Decision Memorandum at Comment 4.
[16] *See E.I. DuPont De Nemours & Company. v. United States*, 8 F. Supp. 2d 854, 858 (CIT 1998).
[17] *See* Petitioner's Case Brief at 7.
[18] *See also EPROMs*, 51 FR 39680, 39691-39692 (October 30, 1986). Emphasis added.
[19] *See* Scope Clarification Memorandum at 6 (citing the Petition at Exhibit II-19 at 3).
[20] *See* Scope Clarification Memorandum at 6.
[21] *See* Scope Clarification Memorandum at 6-7 which states, *inter alia*, the following:
Module/panel assembly does not change the important qualities, *i.e.*, the physical or chemical characteristics, of the solar cell itself. As stated in the original petition, solar cells are made from crystalline silicon wafers. A dopant, which is a trace impurity element diffused into a thin layer of the wafers' surface to impart an opposite electrical orientation to the cell surface, creates the positive/negative junction that is needed for the conversion of sunlight into electricity, which is the purpose of solar cells. Solar cells are normally coated with silicon nitride to increase light

cells and solar modules essentially are the same."[22] Moreover, the Department noted that its finding that solar module assembly connects cells into their final end-use form but does not change the "essential active component," the solar cell, which defines the module/panel, is consistent with the Department's precedent.[23] Accordingly, based on a consideration of record evidence and Department's precedent, the Department continues to find that the solar cell is the essential active component of the module.

Second, we disagree with Petitioner's contention that the extent of processing criterion does not support the Department's substantial transformation finding. Petitioner believes the Department erred because it assumed modules are produced in two steps (cell production and module assembly) rather than three (wafer production, cell production, and module assembly) and alleges that out of these three steps, cell production is the least cost-intensive step.[24] However, when considering the "extent of processing" criterion used in the substantial transformation analysis, the Department only needed to examine whether the assembly of solar cells into modules was substantial and/or significant.[25] The Department did not need to identify each step undertaken in producing and assembling module components and then determine where the aggregate of production occurred to determine the country of origin of the module. Petitioner's contention does not reject how the Department applies the substantial transformation test.[26] The Department has explicitly acknowledged that solar module producers have identified more than two production stages.[27]

However, identifying the number of production stages and determining where most of these stages occur was not the issue in the Department's "extent of processing" analysis. Rather, the Department examined the extent of processing at the module assembly stage in relation to the prior production stages and the nature of the processing at the module assembly stage to determine whether module assembly substantially transformed the solar cells such that the final product could be considered a product of the PRC. [28] The Department concluded that the module assembly stage of production is principally an assembly process, which consists of stringing together solar cells, laminating them, and fitting them in a glass-covered aluminum frame for protection.[29] For the reasons explained in the Scope Clarification Memorandum, the Department continues to find that the module assembly stage of production is a comparatively less sophisticated process than cell conversion or the production stages that precede it, and thus it does not substantially transform the solar cell. We note that none of the evidence cited by

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absorption (this results in a blue-purple color) and undergo a screening process where conductive metal is printed into the cell. Metal conduits or busbars channel electricity generated by the cell into electricity collection points. Citations omitted.

[22] *See* Scope Clarification Memorandum at 6 (citing *ITC Preliminary Determination* at 10).

[23] *See* Scope Clarification Memorandum at 6 (citing *EPROMs*).

[24] *See* Petitioner's Case Brief at 6.

[25] *See* Scope Clarification Memorandum at 7 (citing *Ribbons from Korea*, 69 FR 17645, 17647 (April 5, 2004).

[26] *See, e.g., EPROMs*.

[27] *See* Scope Clarification Memorandum at 7-8, states the following: Numerous interested parties, aside from Petitioner, argued that solar module/panel assembly is relatively insubstantial in terms of number of steps, inputs, research and development required, and time. Consistent with these arguments, *Trina identified six stages of production when manufacturing solar modules/panels, five of which were dedicated to solar cell production and only one pertained to solar module/panel assembly*. Emphasis added. Citations omitted.

[28] *See* Scope Clarification Memorandum at 7-8.

[29] *See* Scope Clarification Memorandum at 7.

Petitioner contradicts this finding.[30] Additionally, because the Department finds that the application of its substantial transformation test is an appropriate means to resolve country-of-origin issues like the one presented in the instant investigation, the Department has not adopted Petitioner's suggestion to modify the test.

Furthermore, Petitioner's other arguments for why modules that are assembled in the PRC using third-country solar cells should be covered by the scope are not persuasive. The Department agrees with Petitioner that the scope of these investigations always included modules from the PRC; however, as noted above, using a substantial transformation analysis the Department has determined that modules from the PRC are those that have been assembled in the PRC using solar cells produced in the PRC. Additionally, the Department has determined that modules assembled in third countries using solar cells produced in the PRC are also PRC products covered by the scope. While the Department will exercise its authority to define or clarify the scope of an investigation in a manner which reflects the intent of the petition and provides the relief requested by the petitioning industry, it may not accept a proposed scope that covers merchandise that originates from a third country not covered by the investigation. As noted above, the scope of an AD or CVD order is limited to subject merchandise that originates in the country covered by the investigation.[31] Petitioner argues that all modules assembled in the PRC must be covered by the scope, regardless of the origin of the solar cells, because they are benefitting from subsidies and being dumped in the United States and competition occurs in the module channel of distribution, but these concerns do not address the main issue. The main issue is that an investigation covering modules from the PRC cannot at the same time cover modules whose country of origin is not the PRC. Determining that all modules assembled in the PRC are covered by the scope of the investigation, no matter where the solar cells in the module were produced, would either necessitate making inconsistent country-of-origin determinations for a single product,[32] or require ignoring the country-of-origin when considering whether merchandise entering the United States is covered by the scope of the investigation. Petitioner has not explained how its proposed scope could be adopted without such a result. Moreover, even if the substantial transformation test focused on the country where the aggregate of production occurs, as suggested by Petitioner, Petitioner has not explained how such an analysis would support its request that the scope cover all modules assembled in the PRC, even when all of the other production steps occurred in a third country. Lastly, Petitioner has the option of bringing additional petitions to address any dumping concerns it has regarding solar modules/panels assembled from solar cells produced in a third country.

With respect to Petitioner's contention that all modules assembled in the PRC must be included in the scope of the investigation in order for CBP to effectively enforce any order imposed and to prevent widespread circumvention, we note that the Department, working in conjunction with CBP, has taken additional measures to ensure that the scope of any order imposed as a result of the investigation will be enforced. Specifically, the Department has informed CBP that

[30] *See* Petitioner's Case Brief at 9-11.
[31] *See SSPC from Belgium*, and accompanying Issues and Decision Memorandum at Comment 4.
[32] Namely, finding that module assembly in the PRC using solar cells produced in a third country constitutes substantial transformation and thus the country of origin of the module is the PRC while also finding that module assembly outside the PRC using PRC produced solar cells does not constitute substantial transformation and thus the country of origin of the module is the country where the solar cells were produced, the PRC.

importers claiming that the solar panels/modules they import do not contain solar cells that were produced in the PRC are required to maintain importer certifications and documentation to that effect. Additionally, the Department has notified CBP that both the importer and exporter are required to maintain exporter certifications if the exporter of the panels/modules which the importer claims contain no PRC-produced solar cells is located in the PRC. These certifications and documents must be presented to CBP officials on request. As noted in the *Preliminary Determination*, if the certification or documentation is not provided, the Department has instructed CBP to suspend all unliquidated entries for which the certification or documentation were not provided and require the posting of a cash deposit or bond on those entries equal to the PRC-wide rate in effect at the time of the entry.[33] If a solar panel/module contains some solar cells produced in the PRC, but the importer is unable or unwilling to identify the total value of the panel/module that is subject merchandise, the Department has instructed CBP to require the posting of a cash deposit or bond on the total entered value of the panel/module equal to the PRC-wide rate in effect at the time of the entry. Thus, the Department has taken additional steps to ensure that efforts to evade enforcement of any order imposed as a result of this investigation will be identified and thwarted. If an importer is declaring the wrong country-of-origin for imported merchandise, this is a matter appropriately dealt with by CBP, and thus the Department will work closely with CBP in this regard.

Furthermore, the Department does not agree with the Petitioner's alternative request to clarify the scope of this investigation to include modules/panels produced in the PRC from solar cells produced in a third country when the wafer production process has occurred in the PRC. In the context of this investigation the Department is not deciding whether wafers produced in the PRC and converted into cells in a third country are a product of the third country. The Department also notes that unlike solar cells, wafers are not identified in the scope of this investigation. For the foregoing reasons, the Department has made no revisions to the scope of the investigation to implement Petitioner's proposals.

Comment 2: Selection of Surrogate Financial Statements

In the *Preliminary Determination*, the Department valued SG&A expenses, OH and profit, using the audited financial statements for the fiscal year ending December 31, 2011, from the following companies: Team Precision, Hana, and KCE, which are all Thai producers of merchandise comparable to the merchandise under consideration that earned a before tax profit in 2011. While the Department found that all of these companies had received countervailable subsidies, there were no usable financial statements on the record for the *Preliminary Determination* for companies that did not receive countervailable subsidies.

After the *Preliminary Determination*, parties placed on the record new financial statements that the Department has considered below. Petitioner submitted financial statements for the following companies: Rohm, NEC Tokin, and Starck. In addition, the respondents submitted the financial statements of Styromatic. Interested parties have made arguments on which financial statements should be selected for the calculation of the financial ratios in the final determination. We have addressed each argument below.

[33] For a full discussion of the Department's certification requirements, see the *Preliminary Determination*.

A. Indian Financial Statements

Respondents

- Financial ratios should be based on the financial statements submitted for the Indian producers of identical merchandise regardless of whether Thailand remains the surrogate country as they are the only producers of identical merchandise that meet the Department's criteria for surrogate financial statements. Furthermore, not only was India used by the Department as the preferred surrogate country in PRC cases for years, it was the surrogate country used to initiate this investigation.

Petitioner

- Since there are available financial statements for producers of comparable merchandise within the designated surrogate country, the Indian statements should not be used for the financial ratios. Furthermore, the Indian financial statements are unusable because there is evidence that the companies received countervailable subsidies.

Department's Position: Given that the Department continues to consider Thailand to be the appropriate primary surrogate country (see Comment 4) and there are suitable financial statements from the primary surrogate country (see below) the Department has not considered the Indian financial statements in the calculations of the financial ratios for the final determination. It is the Department's well-established practice to value all FOPs with data from the primary surrogate country, whenever possible, and to only resort to an alternative surrogate country if data from the primary surrogate country are unavailable or unreliable.[34] While the Department agrees with respondents that its preference is to calculate financial ratios using data from surrogate companies that produce merchandise identical or most comparable to merchandise under consideration, Wuxi Suntech's reliance on *Tapered Roller Bearings* and *Folding Metal Chairs* are unavailing as they speak to selections between companies located in the primary surrogate country rather than to abandonment of available financial statements from the primary surrogate country in favor of financial statements from an alternative surrogate country.[35] Finally, as the Department finds no reason to resort to the use of the Indian financial statements, we have not addressed arguments regarding the merits of the specific Indian financial statements.

B. Thai Financial Statements

a) Financial Statements Used in the *Preliminary Determination*: Team Precision, Hana, and KCE

Petitioner

- Team Precision's financial statements should be rejected since the company is merely an assembler of circuit boards whose activities would cover but one stage of the

[34] *See Frozen Fish Fillets from Vietnam*, and accompanying Issues and Decision Memorandum at Comment IV.A.

[35] *See Tapered Roller Bearings from Romania*, 62 FR 37194, 37197 (July 11, 1997) and *Folding Metal Tables from the PRC*, 74 FR 32118, 32123 (July 7, 2009).

respondents' highly integrated production process and as a result they vastly understate the financial ratios.
- The Department should continue to rely on Hana and KCE's financial statements because, contrary to respondents' assertions, these companies' non-consolidated operations were not significantly impacted by the flooding which occurred in Thailand during the fourth quarter of 2011.

Respondents
- If the Department continues to rely on Thai financial statements, Wuxi Suntech argues that Hana and KCE's financial statements should be rejected since they do not reflect the production of merchandise comparable or even similar to the merchandise under consideration and they show evidence that the companies received subsidies. Further, both mandatory respondents argue that these statements should be rejected since they include distorted financial results due to the impact of the 2011 floods on the companies' operations.
- On the other hand, if Thai financial statements are used, Team Precision's financial statements should be selected for the calculation of financial ratios because they meet all of the Department's criteria.

b) Financial Statements Rejected at the *Preliminary Determination*: Solartron

Trina
- If the Department continues to rely on Thai financial statements, the financial ratios should be based on the results of Solartron, the only Thai producer of the merchandise under consideration whose financial statements are on the record.

Petitioner
- Solartron's financial statements should continue to be rejected as they lack sufficient detail to perform the calculations, indicate the company is heavily involved in providing services rather than manufacturing, and show evidence that the company received countervailable subsidies.

c) Financial Statements Submitted After the *Preliminary Determination*: Rohm, NEC Tokin, Starck, and Styromatic

Petitioner
- Rohm's, NEC Tokin's, and Starck's financial statements should be selected as surrogates in order for the surrogate financial ratios to reflect all stages of the production process. In particular, the Department should include in its calculations the financial statements of Starck, a manufacturer of metal products used in the electronics industry, in order to remedy the lack of any surrogate companies with operations that resemble the wafer stage of the respondents' production process.
- Styromatic's financial statements should be rejected since it is unclear what the company produces and there is evidence that the company received countervailable subsidies.

Respondents

- Rohm, NEC Tonkin, and Starck's financial statements should be rejected for various reasons, most significantly, because they are not for a period contemporaneous with the POI, exhibit inconsistent reporting periods within the body of, and the notes to, the financials, and do not reflect the operations of a producer of comparable merchandise, respectively.
- If the Department continues to rely on Thai financial statements, Styromatic's financial statements meet all of the Department's criteria and should be selected for the calculation of financial ratios.

Department's Position: The Department has relied on the financial statements of Team Precision, Hana, KCE, and Styromatic for purposes of calculating financial ratios. As described below, the Department finds that these companies are producers of comparable merchandise in the primary surrogate country, and the companies' publicly available financial statements are audited, complete, contemporaneous with the POI, and sufficiently detailed to allow the Department to calculate financial ratios. While all four of these surrogate financial statements exhibit evidence of having received countervailable subsidies, all usable financial statements on the record were for companies that received countervailable subsidies. The Department's practice is not to rely on financial statements where there is evidence that the company received countervailable subsidies and there are other more reliable and representative data on the record for purposes of calculating the surrogate financial ratios.[36] In this case, we do not have more reliable data on the record; therefore, for the reasons enumerated below, we find that the financial statements of Team Precision, Hana, KCE, and Styromatic provide the best available information on the record for purposes of calculating financial ratios.

Consistent with the *Preliminary Determination*, the Department continues to find Team Precision, Hana, and KCE's financial statements to be suitable surrogates for purposes of determining financial ratios. While both Petitioner and the respondents separately argue that one or more of these financial statements fail to reflect the operations of producers of comparable merchandise, the Department disagrees. 19 CFR 351.408(c)(4) directs the Department to value financial ratios using "non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country." While the statute does not define "comparable merchandise," in selecting surrogate financial statements the Department has considered whether the products have similar production processes, end-uses, and physical characteristics.[37] Although the Department may consider how closely the surrogate producers approximate the NME producers' experience, the Courts have held that the Department is not required to "duplicate the exact production experience of the Chinese manufacturers."[38]

During the course of this investigation, both Petitioner and the respondents have submitted the financial statements of printed circuit board producers as producers of comparable

[36] *See, e.g., Multilayered Wood Flooring from the PRC,* and accompanying Issues and Decision Memorandum at Comment 1.
[37] *See Chlorinated Isocyanurates from the PRC,* and accompanying Issues and Decision Memorandum at Comment 2.
[38] *See Nation Ford*, 166 F.3d 1373 (CAFC 1999) at 1377.

merchandise.[39] In their annual reports and financial statements, the principal activities of Team Precision, KCE, Hana, and Styromatic are described as "producing and assembling printed circuit and electronics circuit boards," "manufacturing and distribution of printed circuit board products," "manufacutur{ing} and trading of electronic components" including "printed circuit board assemblies," and, "manufacture {of} electric circute {sic} and electronic equipment," respectively.[40] Petitioner suggests that Team Precision is merely an assembler of circuit boards, thus its activities cover only one of the three major production steps for the merchandise under consideration. Consequently, Petitioner believes the company lacks sufficient integration to be an appropriate surrogate. We are not persuaded by this argument. Specifically, we disagree that the use of the term "assembling" in the description of Team Precision's activities confers that the company is not also a producer of circuit boards. In fact, as noted above, the financial statements describe Team Precision as both a producer and assembler.

Additionally, Petitioner's claim that financial ratios based on Team Precision would be vastly understated due to its assumed lack of capital equipment also fails. As noted in previous cases, an assertion that a ratio is "high" or "low" does not necessarily indicate that the ratio is unreliable absent specific evidence supporting such a finding.[41] Furthermore, as noted above, Team Precision's financial statements identify the company as a producer and assembler of printed and electronic circuit boards. In addition, the notes to Team Precision's financial statements identify that depreciation has been recognized on machinery. Based on the foregoing, the Department finds Petitioner's arguments with regard to excluding Team Precision to be unsupported. As such, the Team Precision financial statements have been included in the calculation of the financial ratios for the final determination.

The Department also finds that, contrary to the respondent's assertions, the principal activities of Hana and KCE involve the production of comparable merchandise. As noted above, in selecting comparable merchandise the Department has considered whether the products have similar production processes, end-uses, and physical characteristics.[42] Printed circuit boards and the merchandise under consideration are both manufactured by high technology industries and involve putting together a variety of sensitive components onto a single base or board using both robotics and manual labor in clean room environments.[43] Moreover, there are similar inputs in the two production processes such as the use of silicon base materials, various types of joining parts that are soldered on the base material to facilitate the flow of electricity, and the use of etchants and chemicals to prepare the base surfaces.[44]

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[39] *See, e.g.*, Petitioner's April 23, 2012, submission of KCE's financial statements, Trina's April 19, 2012, submission of Team Precision's financial statements, and Wuxi Suntech's July 9, 2012, submission of Styromatic's financial statements.

[40] *See, e.g.*, Team Precision Annual Report 2011 at 44, exhibit 10 of Trina's April 19, 2012, submission; KCE Annual Report 2011 at 194, exhibit 1 of Petitioner's April 23, 2012 submission; Hana Annual Report 2011 at 13 and 59, exhibit 1 of Petitioner's April 25, 2012 submission; and, Styromatic 2011 audited financial statements at note 1, exhibit 7 of Wuxi Suntech's July 9, 2012, submission.

[41] *See, e.g., Wooden Bedroom Furniture from the PRC 2011,* and accompanying Issues and Decision Memorandum at Comment 1*9; Tapered Roller Bearings from the PRC,* and accompanying Issues and Decision Memorandum at Comment 6.

[42] *See Chlorinated Isocyanurates from the PRC,* and accompanying Issues and Decision Memorandum at Comment 2.

[43] *See, e.g.*, Petitioner's April 12, 2012, submission at 7-10.

[44] *See id.*

While acknowledging that Team Precision's production of printed circuit boards is most comparable to the production of the merchandise under consideration, the respondents describe the activities of Hana and KCE, companies which manufacture printed circuit boards and electronic components, as not comparable or even similar to the merchandise under consideration. In fact, in support of their respective preferred Thai financial statements, both Petitioner and the respondents have proffered that manufacturers of printed circuit boards, while possibly lacking the level of integration of the respondents' own operations, would serve as the most suitable Thai surrogates for the merchandise under consideration.[45] Upon consideration of the financial statements of the Thai printed circuit board producers, the Department finds no evidence to suggest that these companies' activities vary in a manner meaningful enough to favor one company's results over another's. Consequently, while not identical merchandise, the Department finds that all of the Thai printed circuit board producers whose financial statements have been submitted on the record could be considered producers of comparable merchandise.

With regard to the claims that Hana and KCE's financial statements should be rejected because their results reflect significant distortions related to the 2011 Thai flood losses, we disagree with respondents. Although both Hana and KCE's consolidated results were affected by the floods, each company's financial statements clearly show that the factories shut down as a result of the floods belonged to subsidiaries.[46] Because the Department has relied on the non-consolidated "separate" financial statements of the parent companies in calculating financial ratios, the results for these subsidiaries have not been included in the calculation of the financial ratios.

With regard to Wuxi Suntech's argument that Hana and KCE's financial statements show evidence of having received countervailable subsides, we noted above that there are no usable Thai financial statements for companies whom have not received such subsidies. While respondents contend that Team Precision's and Styromatic's financial statements demonstrate no evidence of either company receiving Thai subsidies, the Department disagrees. Specifically, Team Precision's and Styromatic's financial statements indicate that the companies were granted "promotional privileges" by the Thai government under the IPA.[47] The Department has found that the IPA is not *per se* countervailable; instead the program has been found countervailable when it was determined that the approval of promotional privileges was based upon an export commitment or the company's location in a regional investment zone.[48] The financial statements of Team Precision provides evidence that the company was granted IPA promotional privileges such as income tax exemptions based on its exported goods , while additional record evidence demonstrates that Styromatic received incentives based on the fact that it is located in a regional investment zone.[49] Therefore, the Department finds that information on the record indicates that

[45] *See, e.g.*, Wuxi Suntech's Brief at 41-42, Trina's Rebuttal Brief at 49-50, and Petitioner's Rebuttal Brief at 15-18.
[46] *See* Hana's 2011 Annual Report at 6, Petitioner's April 25, 2012 submission, exhibit 1, KCE's 2011 Annual Report at 234, and Petitioner's April 23, 2012 submission, exhibit 1.
[47] *See* Team Precision Annual Report 2011 at financial statement notes 21 and 27, exhibit 10 of Trina's April 19, 2012, submission; and, Styromatic 2011 audited financial statements at note 15, exhibit 7 of Wuxi Suntech's July 9, 2012, submission.
[48] *See PET Resin From Thailand (CVD Final)*, and accompanying Issues and Decision Memorandum at II.D, Comment 3.
[49] *See* Team Precision Annual Report 2011 at financial statement notes 21 and 27, exhibit 10 of Trina's April 19, 2012, submission, and Petitioner's July 26, 2012 submission at exhibit 4.

Team Precision and Styromatic received countervailable subsidies during the relevant period, from a program previously investigated by the Department. Accordingly, we find that there are no usable Thai financial statements for companies whom have not received such subsidies.

Also consistent with our *Preliminary Determination,* the Department continues to find that Solartron's financial statements lack sufficient detail to enable the Department to calculate the financial ratios without making significant and potentially distortive assumptions. Specifically, the Department is able to classify only 10 percent of the company's costs as items that would be reported as FOPs (*i.e.*, raw materials or labor) versus items that would be considered OH.[50] Because the use of these financial statements would require the Department to make assumptions about whether to classify 90 percent of the company's manufacturing costs as part of the numerator or as part of the denominator to the overhead ratio, Solartron is not a suitable surrogate regardless of what industry the company may represent.

With regard to the Thai financial statements placed on the record after the *Preliminary Determination,* we find that Rohm, NEC Token, and Starck's financial statements fail to meet the Department's criteria for selecting surrogate financial statements. Section 773(c)(1) of the Act states that "the valuation of the factors of production shall be based on the best available information regarding the values of such factors...." In choosing surrogate financial ratios, it is the Department's practice to use data from surrogate companies based on the "specificity, contemporaneity, and quality of the data."[51] We have not used Rohm financial statements because they are not contemporaneous with the POI (they reflect the year ended March 31, 2011, *i.e.*, prior to the POI which extends from April 1, 2011 to September 30, 2011). We have not used NEC Token's financial statements because they have conflicting information, in particular information regarding the period covered. Most significantly, NEC Token's balance sheet, income statement, and auditor's letter reference as the reporting period the year ended December 31, 2011, while the notes to the financial statements reference the year ended March 31, 2011. Lastly, we did not select Starck's financial statements because we find that a refined metals producer does not represent a producer of merchandise comparable to the merchandise under consideration. Moreover, these financial statements are not preferable to the ones selected when subsidies are considered because all of the Thai financial statements under evaluation reveal evidence that the companies received countervailable subsidies.

With respect to Starck, Petitioner has argued for the use of its financial statements to ensure that the Department's financial ratios reflect a basket of companies that represent each major production stage potentially employed by the respondents. In particular, Petitioner proposes that the Starck financial statements would be appropriate because they reflect production akin to the first stage of producing the merchandise under consideration, *i.e.*, the production of the intermediate inputs, ingots and wafers. As an initial matter, it is questionable whether the producer of a claimed comparable *intermediate input* should be considered as a surrogate when the Department is directed to rely on information from producers of identical or comparable

[50] *See* Trina's April 19, 2012, submission, at exhibit 8, Solartron's 2011 financial statements, note 30, total classification of expenses by nature of expense taken as a percentage of the cost of sales from the income statement.
[51] *See, e.g., Diamond Sawblades Final Determination,* and accompanying Issues and Decision Memorandum at Comment 1.

merchandise.[52] Assuming *arguendo* that a surrogate company producing an allegedly comparable intermediate input could be considered for use in the financial ratios, it is unclear that Starck's operations reasonably reflect the wafer production process. While Petitioner's arguments may suggest some similarity in the fundamental objectives of certain processing steps, *e.g.*, melting, doping, there is insufficient evidence to suggest that the capital investment and manufacturing costs for producing refined metals would in any way resemble the capital investment and manufacturing costs for producing silicon wafers, the stage of solar cell/module production that Petitioner attempts to replicate with the inclusion of Starck's financial statements. Moreover, it is not necessary for the selected surrogate companies to reflect every production process performed by the respondents. The Courts have stated that the Department is not required to "duplicate the exact production experience of the Chinese manufacturers."[53] As such, the Department has not used Starck financial statements as a surrogate in calculating financial ratios.

Finally, the Department agrees with the respondents that Styromatic's financial statements are suitable for use in calculating financial ratios. Although Petitioner alleges uncertainty with regard to the company's operations, the Department finds that information on the record supports concluding that the company is engaged in the production of electric circuits which is further described as printed circuit board assemblies.[54] Specifically, the company's financial statement notes that its main business is to "manufacture electric circuit {sic} and electronic equipment."[55] As the Department has outlined above, we found such producers to be involved in the production of comparable merchandise. As such, the Department finds that Styromatic is a producer of comparable merchandise in the primary surrogate country. Furthermore, the company's publicly available financial statements are audited, complete, contemporaneous with the POI, and are sufficiently detailed for the Department's calculations. While the financial statements indicate that the company received countervailable subsidies, as noted above, all of the Thai financial statements under evaluation reveal evidence that the companies received countervailable subsidies.

Based on the foregoing, the Department has calculated the financial ratios for the final determination based on the financial statements of Team Precision, Hana, KCE, and Styromatic.

Comment 3: Date of Sale

Petitioner

- For both respondents' contract sales, the material terms of sale were either reflected in the original contract or an amended contract. Therefore, the contract or amended contract dates should be used as the date of sale for both respondents' contract sales because contract date best reflects the date on which each respondent's material terms of sale were established. Further, Trina acknowledges that the material terms of sale did not change with respect to its short term contracts issued during the POI. Alternatively, if the

[52] *See* 19 CFR 351.408(c)(4).
[53] *See Nation Ford*, 166 F.3d 1373 (CAFC 1999) at 1377.
[54] *See* Trina's July 9, 2012, submission, at exhibit 16.
[55] *See* Styromatic 2011 audited financial statements at note 1, exhibit 7 of Wuxi Suntech's July 9, 2012, submission.

Department does not base the date of sale for contract sales on the date of the contract, it should base it on purchase order date.

- For sales based exclusively on purchase orders rather than contracts, the purchase order date should be used as the date of sale.
- While the record contains at least one instance where delivery terms changed after issuance of a sales invoice, material terms of sale include, price, quantity, and payment terms but not delivery terms.

Wuxi Suntech and Trina

- The Department has a preference for using invoice date as the date of sale. Moreover, the Department, as upheld by the courts, defines the date of sale as the date when parties agree to the material terms of sale. These material terms consist of the price, quantity, and, contrary to Petitioner's assertion, delivery and payment terms. There are numerous examples on the record showing that Trina's material terms of sale, including price, delivery terms, and payment terms, have changed after the contract date and up to the issuance of the invoice.
- Record evidence,[56] and the Department's regulatory presumption[57] that invoice date is the appropriate date of sale, supports a conclusion that invoice date is the correct date of sale for Wuxi Suntech.

Department's Position: We have continued to base the date of sale on the earlier of invoice date or shipment date. Both Wuxi Suntech and Trina have provided examples of changes in material terms of contracts and purchase orders up until issuance of the commercial invoice.[58] Although new terms of sale for contract sales may be memorialized in a new or amended contract, the fact that both respondents reported that sales terms in contracts could change and both respondents provided actual examples of the terms of contract sales changing[59] demonstrates that the terms of sale in contracts are not final. Where renegotiation is common, a preliminary agreement, even if reduced to writing, does not provide a reliable indication that the terms of sale were truly established.[60]

While Petitioner is correct that the record contains no examples of changes to the sales terms of short-term contracts, we believe that the absence of changes in the terms of short term contracts does not overturn our analysis of the general contracting behavior of both respondents, which is based on changes in the long term contracts. Most contracts are long-term contracts and thus the respondents' practices with respect to long-term contracts are indicative of the contracting

[56] *See, e.g.*, Wuxi Suntech's March 19, 2012 submission at Exhibits 3-X and 3-Y, which contains sales documents for sales made pursuant to long-term contracts with related purchase orders, and sales made pursuant to purchase orders alone (*i.e.*, without a related long-term contract).
[57] *See AD/CVD Duties Part II*, 62 FR 27296 (May 19, 1997).
[58] *See* Trina's February 13, 2012 submission at Exhibits SA-2 and SA-7; *see also* Trina's April 2, 2012 submission at Exhibit 2SC-3, and Wuxi Suntech's March 21, 2012 submission at 8-11 and Exhibits 3-X and 3-Y.
[59] *See* Wuxi Suntech CEP Verification Report at 6-7.
[60] In *Circular Welded Carbon Steel Pipes and Tubes From Taiwan*, and accompanying Issues and Decision Memorandum at Comment 1 the Department stated that "regardless of whether . . . contracts were later amended after the final reported contract date, these changes, along with those to quantity, demonstrate that use of the final reported contract date as date of sale would be inappropriate. The existence of formal order confirmations and written contracts did not prevent subsequent changes to material terms of sale."

behavior of both respondents. Trina and Wuxi Suntech's have stated that the terms of sale could change up until the invoice date. Moreover, the Department has previously stated that it would be impractical to have different dates of sale for each sale.[61] Therefore, in keeping with the Department's current practice of using a uniform date of sale, and the record information regarding changes in the material terms of long term contracts, we have not resorted to using a different date of sale for each individual sale despite the lack of examples of changes in the terms of short-term and spot contracts.[62]

We have not based the date of sale on purchase orders because Trina provided examples of the terms of purchase orders changing and Wuxi Suntech provided an example of the terms of a purchase order changing.[63] While Petitioner claims that Trina only presented a few instances of the terms of a purchase order changing, the Department determined that this is sufficient to demonstrate that the material terms of sale could change after issuance of the purchase order. The CIT has stated that "the existence of ... one sale beyond contractual tolerance levels suggests sufficient possibility of changes in material terms of sale so as to render Commerce's date of sale determination {use of invoice date} supported by substantial evidence."[64] As noted above, both respondents stated that the terms of sale could change up until the invoice date and thus the terms of sale in purchase orders were subject to change.

Finally, in *Allied Tube & Conduit Corp. v. United States*, the CIT noted that a "party seeking to establish a date of sale other than invoice date bears the burden of producing sufficient evidence to 'satisfy' the Department that 'a different date better reflects the date on which the exporter or producer establishes the material terms of sale.'"[65] Here, the Department has determined that there is insufficient evidence demonstrating that a date other than invoice date better reflects that date on which the material terms of sale were established. Therefore, the Department has relied upon the earlier of commercial invoice date, or shipment date as the date of sale.

Comment 4: Surrogate Country

Trina and Wuxi Suntech

- India should have been selected as the appropriate surrogate country rather than Thailand.
- The size of India's solar cell industry and population most closely approximates the solar cell industry and population in the PRC.
- The record contains reliable and specific Indian SVs for all inputs in this investigation as well as financial ratios of Indian solar cell manufacturers.
- The Department should place greater emphasis on the suitability of SVs in a potential surrogate country with respect to the PRC's solar cell industry, rather than the similarity between GNI of the potential surrogate country and the GNI of the PRC.

[61] *See Large Power Transformers*, and accompanying Issues and Decision Memorandum at Comment 1.
[62] *See AD/CVD Duties Final Rule* 62 FR 27296, 27348 (May 19, 1997) ("{W}e have retained the preference for using a single date of sale for each respondent, rather than a different date of sale for each sale" because, *inter alia*, "by simplifying the reporting and verification of information, the use of a uniform date of sale makes more efficient use of the Department's resources and enhances the predictability of outcomes."
[63] *See* Suntech America CEP Verification Report at 6-7.
[64] *See Allied Tube and Conduit Corp. v. United States*, 132 F. Supp. 2d 1087, 1091 (January 18, 2001).
[65] *See id., at* 1090.

- Thai data is deficient for wafers and polysilicon, which are the most important inputs in making solar cells. Moreover, the record contains no financial statements of a Thai producer of identical merchandise.

Trina

- The Department and the CIT have recognized that the Department may give significant weight to data quality, in particular to input specificity, in determining an appropriate surrogate country.[66] Further, while the Department's regulations specify that per-capita income is a prominent factor in selecting a surrogate country, neither the statute nor the regulations limit the Department to basing its decision on this single criterion.
- In *PET Film from the PRC*, the Department stated that the difference in GNI per capita between India and the PRC is not so significant that the two countries are no longer economically comparable.[67] In addition, the CIT stated that "the law does not require the ITA to choose the most comparable economy, but rather a comparable economy"[68] when it comes to selecting a surrogate country.

Petitioner

- The Department should continue to select Thailand as the surrogate country because Thailand is at a level of economic development comparable to the PRC, and there is a significant level of production of identical and comparable merchandise in Thailand.
- India is not at a level of economic development comparable to that of the PRC. Since approximately mid-2011, the Department has consistently moved away from the use of India as a surrogate country for all cases in which the respondent is located in the PRC. Further, *PET Film from the PRC* covered a POR beginning approximately one and a half years prior to this POI.
- Even if the Department were to choose India as the surrogate country, the Department cannot utilize any Indian import data provided by the respondents, as their proffered data do not cover the entire POI.

Department's Position: We have continued to use Thailand as the surrogate country. Section 773(c)(4) of the Act states that in valuing the FOPs, the Department shall utilize, to the extent possible, the prices or costs of FOPs in one or more ME countries that are: (1) at a level of economic development comparable to that of the NME country; and (2) significant producers of comparable merchandise. In its Surrogate Country Memorandum, the Department identified Colombia, Indonesia, Peru, the Philippines, South Africa, Thailand, and Ukraine as being equally comparable to the PRC in terms of economic development.[69] The Department did not identify India as being economically comparable to the PRC, nor has it included India in a surrogate country list since May 2011 (as noted by Petitioner, the cite Trina relied upon to argue that India

[66] *See Globe Metallurgical, Inc. v. United States*, Slip Op. 08-105, 2008 WL 4417187,*3-4, (CIT Oct. 1, 2008) ("the Department acted reasonably in selecting a surrogate country based on its superior quality of available data relative to other comparable market economies"); *See also High Pressure Steel Cylinders from the People's Republic of China*, and accompanying Issues and Decision Memorandum at Comment 1 (where the Department stated that its "surrogate country decision in this case is based on which country provides the best source for valuing the primary steel inputs.").

[67] *See PET Film from the PRC*, and accompanying Issues and Decision Memorandum at Comment 1.

[68] *See Technoimportexport and Peer Bearing Co. v. United States*, 766 F. Supp. 1169, 1175 (CIT 1991).

[69] *See* Surrogate Country Memorandum.

remains economically comparable to the PRC was from a review with a POR that began approximately one and a half years prior to this POI). [70] Further, the Department stated in the *Preliminary Determination*, that "unless we find that all of the countries determined to be equally economically comparable are not significant producers of comparable merchandise, do not provide a reliable source of publicly available surrogate data or are unsuitable for use for other reasons, we will rely on data from one of these countries." [71] Record evidence indicates that Thailand has four producers of merchandise under consideration.[72] Moreover, GTA statistics identify exports of merchandise under consideration from Thailand of over $5,000,000 for the first eight months of 2011.[73] While respondents claim that India's solar cell industry is larger than that of Thailand, the statutory requirement for selecting a surrogate country is that the country be a significant producer of comparable merchandise and the record demonstrates that Thailand is a significant producer of comparable merchandise.

Moreover, Thailand provides a reliable source of publicly available surrogate data. We were able to obtain Thai SVs for almost all of the inputs used to make subject merchandise, which amounted to approximately 100 different SVs.[74] We were also able to obtain Thai SVs for energy, labor, and transportation services.[75] Further, the record provides sufficient data from multiple Thai producers of comparable merchandise to calculate surrogate financial ratios.[76] While we used international market prices to value polysilicon, rather than data from Thailand, for the reasons stated *infra*, we did so because of the specificity of the international data, a level of specificity also not found in Indian import data. We also note that not all of the Indian import statistics cited by Trina in its April 18, 2012, submission cover all six months of the POI.[77] Given the foregoing, and the absence of any reasons why Thailand is not a suitable surrogate country, we continued to find Thailand to be the appropriate surrogate country in this investigation.

Comment 5: Labor Rate

Respondents

- The 2005 manufacturing-wide chapter 6A data reported by Thailand to the ILO are not the best available information for valuing labor because they are not industry-specific, not contemporaneous with the POI and, result in an aberrational value.
- Thai wage data from three sources demonstrate that the actual average hourly total remuneration for labor in Thailand is less than half of the 140.76 baht per hour rate calculated by the Department in the *Preliminary Determination.* According to Wuxi Suntech, the CIT has required the Department to examine data when there is a "colorable claim" that the data are aberrational and explain why the data it selects are "reliable and

[70] *See PET Film from the PRC*, and accompanying Issues and Decision Memorandum at Comment 1.
[71] *See Certain Steel Wheels Prelim Determination*, 76 FR 67703, 67708 (November 2, 2011), unchanged in *Certain Steel Wheels Final Determination.*
[72] *See* Petitioner's February 21, 2012 submission at 10 and Exhibit 2; *see also* Petitioner's April 12, 2012 submission at 3.
[73] *See* Petitioner's October 25, 2011 supplement to its petition at Exhibit AD-Supp-3.
[74] *See* Preliminary Determination Surrogate Value Memorandum.
[75] *See id.*
[76] *See id.*
[77] *See* Trina's April 18, 2012 submission at Exhibits 5 and 6.

non-distortive."[78] Here, the alternative three average wage rates submitted by respondents differ by less than one baht, adjusted for inflation, and show that the Chapter 6A data from the ILO are aberrational. Trina notes that Indonesian and Ukrainian wage data also demonstrate that the chapter 6A Thai data used by the Department are aberrational.

- The rebuttable presumption that Chapter 6A data reflect all costs related to labor must be balanced against the Department's statutory obligation to base the surrogate labor value on the best available information, which in this case, is not Chapter 6A data. The presumption has been rebutted because the other data on the record show that the Chapter 6A Thai manufacturing sector wages in 2005 are grossly overstated.
- The Department should value labor using one of the sources placed on the record by respondents. In particular, the 2007 Thai Industrial Census data provide total remuneration like Chapter 6A data, are more contemporaneous with the POI, and are industry-specific.
- Specifically, Trina recommends valuing labor using data in subcategory 32, group 321 "Manufacture of electronic valves and tubes and other electronic components" from the Thai 2007 Industrial Census instead of ISIC subcategory 31 "Manufacture of Machinery and Equipment NEC," which the Department stated was the appropriate category for the solar cell industry in the *Preliminary Determination*. The United Nations classified solar cells in subcategory 32, group 321 in both ISIC Revision 3 and Revision 3.1. Further, the record indicates that two Thai solar cell manufacturers classify themselves under subcategory 32.

Petitioner

- The Department should continue to value labor using data from ILO Chapter 6A subcategory 31 "Manufacture of Machinery and Equipment NEC" because the ILO data are sourced from a known entity and the Department has a thorough understanding of precisely what is included in the total labor cost.
- Respondents' proposed labor data, by contrast, are from unknown sources, are largely incomprehensible, and fail to provide a break-out of labor rates that are as specific in terms of industrial classification.
- Although Trina argues that the Department should use data for subcategory 32 to value labor, subcategory 32 is for the manufacture of radio, television and communication equipment while the title for subcategory 31, "Manufacture of Electrical Machinery and Apparatus NEC," makes clear that it is the correct classification for solar cell and module labor. Further, the evidence that two Thai solar cell manufacturers classified themselves in subcategory 32 consists of a third-party website which also shows a number of other companies under this category which have nothing to do with the types of manufacturers that should be classified under subcategory 32. Thus this website is unreliable.

Department's Position: We have continued to value labor using manufacturing wage data for 2005 reported by Thailand to the ILO in Chapter 6A of the ILO Yearbook and as indicated below, we inflated the labor rate to be contemporaneous with the POI. We have not found the Thai SVs proposed by respondents to be better information for valuing labor than Chapter 6A

[78] Wuxi citing *Mittal Steel Galati S.A.v. United States*, 502 F. Supp.2d 1295, 1309 (CIT 2007).

ILO data reported by Thailand because: (1) the record does not show that these data sources include all of the indirect and direct labor costs included in Chapter 6A data; (2) the record does not support respondents' claims that the Thai Chapter 6 A data are aberrational; and (3) the data sources do not cover a period that is contemporaneous with the POI. Each of these points is discussed in detail below.

First, the record does not show that the labor SVs proposed by respondents include all of the indirect and direct labor costs included in Chapter 6A data. In *Labor Methodologies*,[79] the Department explained that the preferred methodology to value labor is to use industry-specific labor rates from the primary surrogate country.[80] Additionally, the Department determined that the best data source for industry-specific labor rates is Chapter 6A from the ILO Yearbook based on the rebuttable presumption that Chapter 6A data better accounts for all direct and indirect labor costs.[81] Specifically, in *Labor Methodologies Request for Comments*, the Department noted that ILO defines Chapter 6A labor data to include "remuneration for work performed, payments in respect of time paid for but not worked, bonuses and gratuities, the cost of food, drink and other payments in kind, cost of workers' housing borne by employers, employers' social security expenditures, cost to the employer for vocational training, welfare services and miscellaneous items, such as transport of workers, work clothes and recruitment, together with taxes regarded as labor cost."[82]

Wuxi Suntech and Trina argue that the Department should value labor using data from one of the following sources: (1) 2006 Thai manufacturing sector data from the 2007 Industrial Census for Thailand prepared by the NSO; (2) 2005-2010 monthly wages for the Thai manufacturing sector prepared by the NSO and the BOT; or (3) 2005 average monthly wages specific to Thai "plant and machine operators and assemblers" prepared by the NSO and the BOT.[83] However, the 2005-2010 Thai labor data for the manufacturing sector and the 2005 Thai labor data for "plant and machine operators and assemblers" do not fully account for all direct and indirect labor costs. Specifically, notes to both data sources indicate that wages exclude "payments for overtime, bonuses and other welfare payments."[84] While the 2007 Thai Industrial Census data include labor costs in addition to wages and salaries (*e.g.*, overtime bonus *etc*., medical care, other fringe benefits, and employer's contribution), neither Trina nor Wuxi Suntech have demonstrated that all of the labor costs accounted for in Chapter 6A are captured in the 2007 Thai Industrial Census data. Therefore, we have found that the alternative Thai labor data placed on the record by respondents do not rebut the presumption that Chapter 6A data better account for all direct and indirect labor costs.

Second, the record does not support respondents' claims that the Thai Chapter 6A data are aberrational. Wuxi Suntech and Trina claim that the Thai Chapter 6A data are aberrational because they are more than twice the Thai wage rates they placed on the record and significantly more than wage rates in Indonesia and Ukraine. However, for the following reasons, we have

[79] *See Labor Methodologies*.
[80] *See Labor Methodologies*, 76 FR at 36093; *see also Preliminary Determination*, 77 FR at 31321.
[81] *See Labor Methodologies*, 76 FR at 36093-94; *see also Preliminary Determination*, 77 FR at 31321.
[82] *See Labor Methodologies Request for Comments*.
[83] *See* Trina's July 9, 2012 SV submission at Exhibit 13.
[84] *See id*.

not found these to be valid comparisons which support finding the Chapter 6A data to be aberrational. As noted above, the 2005-2010 Thai labor data for the manufacturing sector and the 2005 Thai labor data for "plant and machine operators and assemblers" explicitly exclude certain labor costs included in Chapter 6A data. Further, record information does not demonstrate that all of the costs covered by Chapter 6A data are also included in the 2007 Thai Industrial Census data. Therefore, the comparisons that respondents relied upon to demonstrate that the Chapter 6A data are aberrational (too high) are not necessarily valid.

Furthermore, the Department disagrees with Trina's argument that the wage data for Indonesia and Ukraine, countries economically comparable to the PRC, show that the wage data reported by Thailand to the ILO in Chapter 6A of the Yearbook are aberrational. While there is a strong global relationship between wage rates and GNI, significant variation exists among the wage rates of comparable market economies. There are many socio-economic, political and institutional factors, such as labor laws and policies unrelated to the size or strength of an economy, that cause significant variances in wage levels between countries. For these reasons, and because labor is not traded internationally as other commodities are, the variability in labor rates that exists among otherwise economically comparable countries is a characteristic unique to the labor input. Therefore, the Department does not find that wage data from other countries are necessarily appropriate benchmarks with which to compare Thai wage data as there are other variables that affect the labor rates across countries.

Third, although the Chapter 6A data are not contemporaneous with the POI, neither are the Thai data provided by respondents. While the respondents argued that the Thai data they provided are more contemporaneous with the POI than the Chapter 6A data, we have not found that this attribute of respondents' data outweighs the fact that Chapter 6A data better account for all direct and indirect labor costs.

For the reasons explained above, the Department finds that the data reported by Thailand to the ILO in Chapter 6A of the Yearbook are the best information for valuing labor in the final determination. Consistent with Department practice,[85] we inflated the labor rate to be contemporaneous with the POI. As for the comments advocating use of particular subcategories of labor data, we have used manufacturing-wide data from Chapter 6A rather than data from industry-specific subcategories. We used manufacturing-wide data rather than industry-specific data because Thailand has not reported industry-specific data since 2000, but has reported total manufacturing wage data in 2005.

[85] *See, e.g., Chlorinated Isocyanurates Final Results,* and accompanying Issues and Decision Memorandum at Comment 2; and *Certain Cased Pencils Final Results,* and accompanying Issues and Decision Memorandum at Comment 1.

Comment 6: Separate Rates

A. Separate Rate Applicants Ultimately Owned by SASAC

Petitioner

- The Department erroneously gave separate rate status to Sumec Hardware, Tianwei, Ningbo Etdz, and Dongfang.[86] These companies are ultimately owned by the PRC government through SASAC and they failed to demonstrate *de jure* independence from PRC government control.
- Chinese law and regulations provide SASAC with control over its holdings.
    - The PRC government, through the actions of SASAC, wields all the rights and powers of an investor over SOEs, including the administering of assets and hiring and firing personnel, receiving and disposing of profits, and directing and approving investments, mergers, spin-offs, *etc*.[87] Chinese regulations regarding SOEs specifically charge SASAC with (1) appointing and removing the directors and managers of state-owned enterprises; (2) "improv{ing} the controlling power ... of the State" over state-owned assets; and (3) approving and directing SOEs' articles of association, as well as their mergers, stock offers, asset sales."[88]
    - Because SASAC is the investor, it is entitled to the rights of investors identified under Chinese Company Law such as having the power to (1) decide on a company's business policy and investment plans; (2) elect and recall directors and supervisors; (3) examine and approve directors' reports, budgets, financial plans and distributions; (4) adopt resolutions regarding a company's registered capital, the issuance of bonds, the assignment of capital contributions, and/or mergers, liquidations, and acquisitions; and (5) amend the articles of association of the company.[89]
    - Even where the PRC government cedes some or all of its power in SASAC-controlled companies to labor unions, these unions are under the control of the CPC.[90]
- While these four companies are not directly owned by SASAC, the PRC government does not relinquish its control over an SOE when a directly owned company forms multiple subsidiaries, joint ventures, or holding companies. State Council Decree 378 applies not only to the "supervision and management of State-owned assets of State owned enterprises," but also to "State-owned holding enterprises and enterprises with State owned equity."[91]

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[86] Because Jiawei Wuhan did not sell merchandise under consideration to the United States we did not grant this company a separate rate and we have not considered Petitioner's comments opposing granting Jiawei Wuhan a separate rate.

[87] *See* Petitioner's March 29, 2012 submission at Exhibit 3 containing China's Interim Regulations on Supervision and Management of State-owned Assets of Enterprises (Decree of the State Public Council of the People's Republic of China No. 378).

[88] *See* Petitioner's March 29, 2012 submission at Exhibit 4, Article 38. This exhibit contains the Company Law of the People's Republic of China (revised 2005) (Order of the President of the People's Public Republic of China No. 42).

[89] *See id.*

[90] *See* Petitioner's March 16, 2012 submission at Exhibit 10.

[91] *See* Petitioner's March 29, 2012 submission at Exhibit 3, Article 2.

- In the *Preliminary Determination* and in a recent analysis of public bodies in the PRC,[92] the Department has acknowledged that SASAC has the authority to ensure that an individual company's investment and business plans are in line with the PRC's industrial policy objectives, and, therefore, could reallocate the assets it holds in individual companies to other individual companies.[93] Accordingly, the Chinese Company Law does not separate SASAC owned or invested companies from the government because SASAC has the authority and power to manipulate the flow of exports."[94]
- In the *Preliminary Determination* the Department stated that "SASAC plays a role in approving the development of certain investment and business plans to ensure that these plans are in line with the PRC's industrial policy objectives as well in the appointment of the board and certain key senior management positions." By this statement the Department has admitted that Articles 7 and 10 of China's Interim Regulations have no force (these regulations state that companies operating under SASAC enjoy their autonomy and indicate that SASAC will not interfere with their production and operation activities).
- While the Department has stated that government ownership in itself does not preclude a company from demonstrating that it is free from *de jure* control, the Department must still start with, and apply the presumption of, government control over these companies. In light of this presumption, when two equally competing provisions within a law conflict, the Department should weigh the evidence in favor of the presumption.
- Several separate rate respondents' articles of association explicitly note that they comply with Chinese law, which includes China's Interim Regulations.
- In the *Preliminary Determination*, the Department failed to make individual substantive determinations as to whether SASAC owned companies could control the separate rate respondents. Furthermore, the Department failed to acknowledge the critical provisions in the Chinese Company Law that authorize a majority shareholder of a company, such as SASAC, to control the selection of personnel and/or management of a company.

Separate Rate Coalition

- The separate rates test applies only to exporters of subject merchandise, not producers or other entities. Therefore, the separate rate analysis should only focus on the SRA, rather than its owners.
- In general, the Department has found that the Chinese Company Law permits the private operation of exporters who are owned either directly or indirectly by state entities and that exporters were eligible for a separate rate so long as they demonstrated the absence of *de jure* and *de facto* control.
- No new facts have been raised that would cause the Department to reverse its *Preliminary Determination* to grant separate rates.

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[92] *See* Memorandum from Shuana Biby, Christopher Cassel, and Timothy Hruby to Paul Piquado, regarding "Section 129 Determination of the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe; Light-Walled Rectangular Pipe and Tube; Laminated Woven Sacks; and Off-the-Road Tires from the People's Republic of China: An Analysis of Public Bodies in the People's Republic of China in Accordance with the WTO Appellate Body's Findings in WTO DS379," dated May 18, 2012.

[93] *See* Petitioner's March 29, 2012 submission at Exhibits 3 and 4.

[94] *See* Petitioner's June 14, 2012 Resubmission of Comments on Chint Solar's Rebuttal Separate Rate Response at footnote 6.

Department's Position: The Department has recognized, over time, that within the NME entity, companies exist which are independent from government control to such an extent that they can independently conduct export activities.[95] In order for the Department to conclude that a company operates independently with respect to export activities, the exporter must submit evidence on the record to demonstrate an absence of government control over such activities both in law (*de jure*) and in fact (*de facto*).[96]

Evidence supporting, though not requiring, a finding of *de jure* absence of such particular government control includes: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; or (3) any other formal measures by the government decentralizing control of companies.[97] The existence of government ownership does not necessarily indicate *de jure* control over export pricing decisions; in fact, the Department has previously granted separate rate status to both wholly state-owned producers, and to producers whose stock was partially owned by a government state assets management company.[98] The Department's separate rates practice has been consistently affirmed by the CAFC and the CIT.[99]

Here, Petitioner believes that four of the separate rate respondents, who are not directly owned by SASAC, but rather are owned by SASAC-owned companies or for whom SASAC appears at some point in the chain of ownership, have not established an absence of *de jure* control over their export pricing activities.[100] As an initial matter we note that these companies are not directly owned by SASAC. In addition, as discussed in the *Preliminary Determination*, the Department has analyzed the information on the record and found that these companies demonstrated *de jure* independence from the PRC government with respect to their export activities.[101] Consistent with our practice, we found information provided by these companies demonstrated an absence of *de jure* government control over such activities through the absence of restrictive stipulations associated with the companies' business licenses and export certificates of approval, and by virtue of pertinent legislative enactments that protect the operational and legal independence of companies incorporated in the PRC.

The Department also noted in the *Preliminary Determination* that Article 7 of China's Interim Regulations provides for the "separation of government functions from enterprise management and separation of ownership from management." Further, Article 10 of those regulations states that those companies operating under SASAC "enjoy autonomy in their operation" and that

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[95] *See Separate-Rates Practice.*
[96] *See Policy Bulletin 5.1* (April 5, 2005).
[97] *See Sparklers* 56 FR at 20589.
[98] *See Lightweight Thermal Paper*, and accompanying Issues and Decision Memorandum at Comment 7.
[99] *See Sigma Corp. v. United States, 117 F.3d 1401* (Fed. Cir. 1997); *Transcom, Inc. v. United States, 294 F.3d 1371 (Fed. Cir. 2002); Peer Bearing Co.-Changshan v. United States*, 587 F. Supp. 2d 1319 (CIT 2008); *Tianjin Mach. Import & Export Corp. v. United States*, 806 F. Supp. 1008 (CIT 1992).
[100] Petitioner expressed concerns over SASAC ownership of Tianwei, Ningbo Etdz, Sumec Hardware, Jiawei Wuhan, and Dongfang. However, because Jiawei Wuhan did not make any sales of merchandise under consideration during the investigation, we have not considered comments concerning this company.
[101] This decision did not consider Jiangsu Jiasheng Photovoltaic Technology Co., Ltd., Jiangyin Hareon Power Co., Ltd., and Wuxi Taichen Machinery & Equipment Co., Ltd., companies found in the *Preliminary Determination* to have failed to file either timely SRAs or Q&V submissions.

SASAC "shall support the independent operation of enterprises according to law, and shall not interfere in their production and operation activities…" While Chinese law may provide SASAC a role with overseeing the overall regulation, development and structure of a state-owned sector, and also provide SASAC with the rights of an investor, there is nothing on the record to indicate that SASAC's reach extended as a matter of law to such day-to-day activities as export pricing of the companies in question.

Petitioner also states that the Chinese Company Law provides SASAC with certain rights and powers over its holdings. However, the Department has recognized that the government's legal control of the relevant day-to-day activities devolves to other parties either when it sets these companies up as "owned by all the people" entities or, as is the case here, distributed this ownership to individual parties, as long as the government does not directly exercise its rights to vote on ownership boards.[102] All of the separate rate respondents at issue reported that neither SASAC nor the government was involved in the activities of the board of directors.[103] Sumec Hardware provided board of directors' resolutions regarding the establishment of overseas subsidiaries, and managers meeting minutes, demonstrating that two of its owners, neither of which are SASAC or otherwise the government of the PRC, were involved in Sumec Hardware's board decisions.[104] Tianwei reported that SASAC was not involved in selecting its board and provided as support the appointment letter of its board.[105] Dongfang reported that to its knowledge neither its board members, nor those of its majority owner(s), have any significant relationship with SASAC or the PRC government. Further, Dongfang reported that its board members "carry out their role as members of {Dongfang's} board of directors considering the interests of {Dongfang} itself."[106] Ningbo Etdz's board is chosen by its shareholders; however for reasons explained in the BPI Memorandum the record evidence does not demonstrate that SASAC or the PRC government was directly involved in board activities.[107] Therefore, there is no evidence that, even where there is indirect government ownership of one of the respondents at issue, the PRC government was involved in decisions of the board of directors of the company related to export activities. Moreover, the Company Law of the People's Republic of China

[102] In *Certain Cased Pencils Final Determination*, as part of the *de jure* test, we further analyzed possible governmental control through "voting its shares."[102] The analysis was applied to two companies that were previously "owned by all the people," but had since become shareholding companies with the PRC government directly owning a percentage of the shares.[102] In determining government control over these two companies that had restructured into a shareholding corporate structure, the Department examined whether the government was voting the shares that it owned directly.[102] Thus, in order to be eligible for a separate rate, the two respondents needed to further demonstrate that the PRC government was not extending *de jure* control through the voting of its shares. None of the companies under investigation here are "owned by all the people," but instead ownership is in the form of shares.

[103] Tianwei, Ningbo Etdz, Sumec Hardware, and Dongfang certified in their separate rate responses that they have autonomy from all levels of the government (national, provincial, local) and from any government entities in making decisions regarding the selection of management; they do not have to submit any of their candidates for managerial positions within the firm for approval to any government entity at any level (national, provincial, local); and that all managers and board of director members did not work in or have any significant relationship with any level of the government and/or they selected management independent of the government agency during the past three years.

[104] *See* Sumec Hardware's May 7, 2012 supplemental questionnaire response at 2 and Exhibits 2 and 3.

[105] *See* Tianwei's April 23, 2012 supplemental questionnaire response at 2 and Exhibit 11.

[106] *See* Dongfang's May 7, 2012 supplemental questionnaire response at 2 and 7.

[107] *See* Note 1 of October 9, 2012 memorandum from Jeff Pedersen to the file entitled "Proprietary Information Relating to Issues Involving Changzhou Trina Solar Energy Co., Ltd. in the October 9, 2012 Issues and Decision Memorandum" for a summary of the ownership of Ningbo Etdz and the owners' role in choosing board members.

states that a company is an enterprise legal person, that shareholders shall assume liability towards the company to the extent of their shareholdings, and that the company shall be liable for its debts to the extent of all its assets.[108]

In *Steel Beams*, the Department determined that a respondent that was majority-owned by a shareholding company that was financed by the provincial government was eligible for a separate rate, so long as the respondent demonstrated the absence of *de jure* and *de facto* control over export activities.[109] The respondent in that case presented the same laws and additional information demonstrating an absence of such *de jure* control as respondents provided in this investigation. The petitioners in *Steel Beams* argued that the respondent was not eligible for a separate rate due to the possibility of government control over the relevant activities resulting from the relationship between its majority owner and the provincial government. However, the Department determined that information provided by the respondent demonstrated an absence of such *de jure* control, and without specific evidence pointing to *de facto* control over export activities, the Department found the respondent eligible for a separate rate.[110] A parallel determination was made in *Foundry Coke* where the Department determined that the respondent was eligible for a separate rate despite being majority-owned by a company that was financed by the government.[111] As explained in the next section, the four separate rate respondents in question here provided information demonstrating an absence of *de facto* government control over their export activities. Thus, as was the case in *Steel Beams* and *Foundry Coke*, despite any relationship between the owners of these four companies and the government and/or SASAC these companies demonstrated an absence of *de jure* and *de facto* government control over their export activities.

B. Identification of Ownership and the *de facto* Implications of SOE Ownership

Petitioner

- The Department should follow precedent where it denied separate rate status to companies for which it was unable to determine the respondent's actual owners or could not verify information regarding respondent's corporate ownership.[112]

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[108] *See Freshwater Crawfish Tail Meat Preliminary Results* (unchanged in *Freshwater Crawfish Tail Meat Final Results*).

[109] *See Steel Beams Prelim*, 66 FR 67199 (unchanged in *Steel Beams Final*).

[110] *See id.*

[111] *See Foundry Coke Preliminary Determination*, 66 FR 13886-13887 (unchanged in *Foundry Coke Final Determination*).

[112] Petitioner cited *Warmwater New Shipper Shrimp Preliminary Results*, which it identified as a final results notice and *POS Cookware*, and accompanying Issues and Decision Memorandum at Comment 1. No final results concerning shrimp were published on the date for Petitioner's cite; however, preliminary results discussing the ownership of an SRA were published on this date. *See Warmwater New Shipper Shrimp Preliminary Results.* The Department notes that the reason for denying the separate rate in *Warmwater New Shipper Shrimp Preliminary Results*, which were unchanged in the final (*see Warmwater New Shipper Shrimp Final Results*, and accompanying Issues and Decision Memorandum at Comment 1) and *POS Cookware* was not solely or even specifically due to a failure to identify the ultimate owners, but rather because of deficiencies in both applicants responses and the information discovered at verification. The Department was unable to verify information concerning their formation and ownership. Further, the Department denied separate rates in both proceedings due to other reasons, including in both cases failures to demonstrate the accuracy of submitted information at verification and failures to identify affiliates, among other reasons. The Department has identified no evidence of such failures by the SRAs in question in this investigation.

- A majority of the separate rate respondents held by a legal company or limited liability ownership failed to disclose their ownership. In many cases, the undisclosed ultimate shareholders represent more than 51 percent of the equity interest of each company, which is equivalent to majority control of the company. Other separate rate respondents only identified their immediate owners, rather than their ultimate owners. Companies failing to identify their ultimate shareholders were
    - Trina
    - Chint Solar (Zhejiang) Co., Ltd.
    - Shanghai BYD Company Limited
    - Hanwha Solarone (Qidong) Co., Ltd.
    - Hanwha Solarone Hong Kong Limited
    - Motech (Suzhou) Renewable Energy Co., Ltd.
    - tenKsolar (Shanghai) Co., Ltd.
    - Zhejiang Jiutai New Energy Co., Ltd.
    - CEEG (Shanghai) Solar Science Technology Co., Ltd.
    - Jetison Solar (China) Co., Ltd.
    - CSG PV Tech Co., Ltd.
    - CEEG Nanjing Renewable Energy Co., Ltd.
    - Ningbo Komaes Solar Technology Co., Ltd.
    - China Sunergy (Nanjing) Co., Ltd.
- When the Department requested information concerning Sumec Hardware's ultimate shareholders, it uncovered evidence of indirect government ownership. This demonstrates that other companies that did not identify their ultimate shareholders may have similarly been under government control. Further, the Department begins with a presumption that a company is under government control.
- The fact that Sumec Hardware's managers and board members currently or previously have been managers of, or served on the boards of, Sumec Hardware's affiliates or the SOE parent company itself demonstrates that Sumec Hardware does not have independence in selecting management or in disposing of profits.
- Tianwei's managers and board members currently or previously have been managers of, or served on the boards of, Tianwei's affiliates or the SOE parent company, which demonstrates that Tianwei does not independently select management. Since Tianwei remits its profits to its owners, and it is ultimately owned by the PRC government, it does not have autonomy in the disposal of its profits.
- Ningbo Etdz's managers and board members have currently or previously served on the boards of, or been managers of, Ningbo Etdz's affiliates or the SOE parent itself. Further, the SOE shareholder nominated the chairman of Ningbo Etdz's Board of Directors and its Chief Financial Officer. This demonstrates that Ningbo Etdz does not independently select its management or have autonomy in the disposal of its profits.
- The fact that Dongfang's managers and board members currently or previously have been managers of, or served on boards of, Dongfang's affiliates or the SOE parent demonstrates that Dongfang does not have independence in selecting management. Its own articles of association state that its affiliates appoint some of Dongfang's board members. Further, Dongfang articles of association provide its SOE owners control over its profits.

Separate Rate Coalition

- The separate rates test applies only to exporters of subject merchandise, not producers or other entities. Therefore, the separate rate analysis should only focus on the SRA, rather than its owners.

Trina

- TSL, which owns 100 percent of Trina, is listed on the NYSE, and none of its top institutional shareholders are located in the PRC. Further, its institutional shareholders are not required to disclose all individuals who make investments in them. As a result of being listed on the NYSE, TSL's ownership changes periodically. As such, an additional separate rate analysis is not necessary to determine whether Trina's export activities are independent from government control.
- Nevertheless, the information provided on the record by Trina demonstrates that it has complete autonomy from the PRC government in setting prices, negotiating and signing agreements, selecting its management, and deciding how to dispose of profits.

Sumec Hardware

- There is no reasonable basis to Petitioner's claim that Sumec Hardware failed to identify its ultimate shareholders because it identified and provided each party's percentage ownership in the company.
- Although ultimately owned, at least in part, by an SOE, there is no record evidence demonstrating that the SOE shareholders control Sumec Hardware's daily activities or the decisions of the board of directors. The export activities and pricing are determined by Sumec Hardware's board of directors which are governed by the articles of association and Chinese Company Law. These articles of association provide that the responsibilities of the shareholders' meeting include ratifying profit distribution. However, the record contains documentation of the board of directors choosing management and approving the profit distribution plan.[113]
- The affiliated entity that selected Sumec Hardware's board members is composed of individual shareholders, and there is no record evidence indicating that this entity or Sumec Hardware is controlled or influenced by its SASAC or SOE owners.

Ningbo Etdz

- Although owned, at least in part, by a state-owned company, there is no record evidence demonstrating that the SOE shareholders control its daily operations. The board of directors, which are governed by the articles of association and Chinese Company Law, determine export activities and pricing.
- While its SOE shareholder may have nominated members of the board, Ningbo Etdz's board of directors chose its chairman and chief financial officer.
- Article 38.7 of its articles of association provides that the responsibilities of the shareholders' meeting include "ratify the profit distribution plan…", and Article 90.5 provides that the responsibilities of the board of directors include "establish the profit distribution plan…." Therefore, record evidence indicates that Ningbo Etdz makes its own decisions regarding its profit distribution.

[113] *See* Sumec Hardware's January 14, 2012, Separate Rate Application at Exhibit 25.

Ningbo Komaes

- As it reported in its SRA, Ningbo Komaes was wholly owned by Knight (Hong Kong) International Co., Limited registered in Hong Kong.

Zheiiang Jiutai New Energy Co., Ltd

- The Department did not identify any deficiencies with regard to ownership in its supplemental questionnaire. The Department may not lawfully penalize the company with an adverse inference with respect to information that was not requested or where notification of a deficiency was not provided.

Department's Position: In order for the Department to conclude that an exporter operates its export activities independently of government control, it requires the exporter to submit evidence to demonstrate an absence of such government control both in law (*de jure*) and in fact (*de facto*).[114] In determining whether there is an absence of the relevant *de jure* control the Department examines, among other things, an absence of restrictive stipulations associated with business and export licenses and measures by the government decentralizing control of companies. The factors examined when evaluating whether a respondent is subject to *de facto* government control of its export functions are: (1) whether export prices are set by, or are subject to the approval of, a government agency; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding the disposition of profits or financing of losses. Petitioner is essentially arguing that separate rate status should not be granted to certain respondents that are owned by corporations/limited liability companies but who failed to report the ultimate owner(s) of their parent company because the ultimate ownership of the company could point to relevant government control. However, the absence of government control over export related activities is established based on the *de jure* and *de facto* criteria listed above and the existence of government ownership is not one of those criteria. Even if one of the separate rate respondents had identified the government among one of the layers of its ownership, the mere existence of government-owned shares in a company is not a basis for denying separate rate status. In fact, the Department has previously granted separate rate status to both wholly state-owned companies and companies whose stock was partially owned by a government state assets management company.[115] The Department's analysis in these cases focused on the *de jure* and *de facto* criteria. As noted in the *Preliminary Determination*, the companies whom Petitioner identified as not providing ultimate ownership information have provided information demonstrating an absence of *de facto* control of their export activities. Furthermore, all respondents placed on the record laws, regulations, business licenses, export licenses, and other documents demonstrating *de jure* independence from the government on the relevant issues.[116] Petitioner has not cited evidence of specific government direction and control of the respondents with respect to their export activities. Absent evidence of *de facto* control over a company's export activities, even if

[114] *See Policy Bulletin 5.1* (April 5, 2005).
[115] *See Circular Welded Pipe from the PRC*, and accompanying Issues and Decision Memorandum at Comment 11 (where the Department granted a separate rate to a company owned by the State-owned Assets Supervision and Administration Commission of the State Council of the government of the PRC).
[116] *See Preliminary Determination*, 77 FR at 31317.

one of the respondents in question had identified the government among one of its ultimate owners, government ownership alone would not have warranted denying the company separate rate status.

Petitioner contends that in *Warmwater Shrimp Preliminary Results* and *POS Cookware,* the Department denied separate rate status to companies where the Department was unable to determine who the respondents' actual owners were or could not verify information regarding the respondents' corporate ownership. However, in both cases the reason for not granting separate rate status was not a failure by respondents to identify their ultimate owners, but rather was based on the fact that respondents' statements, including those concerning ownership, could not be verified.[117] This is not the case for the separate rate respondents in question in this investigation.

Also, Petitioner contends that current and former positions held by managers or board members of certain separate rate respondents in the SOE that directly or indirectly owns the respondent, or current or former positions held in affiliates of that SOE indicate that the respondent does not have independence in selecting management. However, these separate rate respondents certified that they have autonomy from all levels of the government (national, provincial, and local), and from any government entities in making decisions regarding the selection of management. These respondents also stated that all managers and members of their board of directors did not have any significant relationship with any level of the government.[118] The Department issued supplemental questionnaires to numerous separate rate respondents and reviewed the respondents' SRAs and supplemental questionnaire responses and found no evidence of direct government involvement in the decisions of the board members, the selection of management, or in the operations of any respondents granted a separate rate in the *Preliminary Determination.* Moreover, Petitioner has not submitted any specific evidence of *de facto* control by the government over export related activities. Although Petitioner contends that in pursuing the ultimate owners of Sumec Hardware the Department uncovered evidence of indirect government ownership, this fact, by itself, did not demonstrate direct government involvement in the activities of the board members or in the day to day operations of the company.

The fact pattern described by Petitioner involving Sumec Hardware, Tianwei, Ningbo Etdz, and Dongfang's managers or board members currently or previously serving as managers or board

[117] In *Warmwater New Shipper Shrimp Preliminary Results,* the Department stated that critical information submitted on the record of this proceeding by the respondent could not be verified. The respondent also failed to provide the Department with a complete and official version of the capital verification report of one of its claimed parent companies. Further, the respondent withheld specifically requested information concerning the existence of an affiliated company. In addition, the respondent's source of its incorporating capital and the financial interests of various owners were found to be inaccurate at verification. *See Warmwater New Shipper Shrimp Preliminary Results*, unchanged in *Warmwater New Shipper Shrimp Final Results*, and accompanying Issues and Decision Memorandum at Comment 1. In *POS Cookware*, the Department stated that the respondent was unable to demonstrate that it: (1) sets its own export prices independent of the government and without the approval of a government authority; (2) has authority to negotiate and sign contracts, and other agreements; (3) has autonomy from the government in making decisions regarding the selection of its management; and (4) retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses. *See POS Cookware*, and accompanying Issues and Decision Memorandum at Comment 1.

[118] *See Preliminary Determination*, 77 FR at 31317.

members of an SOE parent has been faced by the Department before. In *Steel Beams*, the Department stated:

> The petitioners in this case argue that, because Maanshan is 63 percent owned by a holding company which is, in turn, wholly owned by the Anhui provincial government, and because certain managers of the holding company also serve on the board of directors of Maanshan, the respondent is ineligible for a separate rate due to potential government control. However, the petitioners have not submitted any specific evidence indicating that the conditions for *de facto* control exist. As stated in the *Silicon Carbide*, 59 FR at 22587, ownership of the company by a state-owned enterprise does not require the application of a single rate. Therefore, based on the information provided, we preliminarily determine that there is an absence of *de facto* governmental control of Maanshan's export functions. Consequently, we preliminarily determine that the respondent has met the criteria for the application of a separate rate.[119]

Likewise, here, Petitioner has not submitted specific evidence indicating *de facto* control exists with respect to selecting management or disposing of profits. Although Petitioner contends that Ningbo Etdz does not independently select management or have autonomy with respect to the disposition of profits because its SOE shareholder nominated the chairman of its Board of Directors and its Chief Financial Officer, Ningbo Etdz's board of directors actually selected its chairman and the company's Chief Financial Officer. Although Petitioner was concerned because some of Dongfang's affiliates, which are associated with the government, appointed Dongfang's own board members, Dongfang has reported that its board members "carry out their role as members of {Dongfang's} board of directors considering the interests of {Dongfang} itself."[120]

We disagree with Petitioner's allegation that because Tianwei and Dongfang distribute their profits to their shareholders, which are at least partially and indirectly owned by the PRC government, they have ceded control over the distribution of profits to the PRC government. Tianwei's profit disposition plan is prepared by its executive director, and ratified by its shareholder.[121] Dongfang's board determines its profit distribution.[122] Meanwhile, we did not find the fact that Tianwei and Dongfang's shareholders received profits or are entitled to profits to be evidence of government control of the companies' profits but rather the normal actions of companies distributing their profits to the owners of the companies (*i.e.*, Tianwei and Dongfang's shareholders). Both parties have stated that they retain their export revenues and Petitioner has not cited any evidence to the contrary.

[119] *See Steel Beams Prelim* (unchanged in *Steel Beams Final*). *See also Silicon Carbide from the PRC* at 22587.
[120] *See* Dongfang's May 7, 2012 supplemental questionnaire response at 2 and 7.
[121] *See* Tianwei's Articles of Association at Exhibit 8 of its January 17, 2012 Separate Rate Application and Chinese Company Law at Exhibit 2 of its April 23, 2012 submission.
[122] *See* Dongfang's May 7, 2012 supplemental response at 7-8.

C. Companies with Managers or Board Members who are also Members of the CPC, NPC or the CPPCC

Petitioner

- PRC producers with senior managers who are members of the CPC, the NPC, or the CPPCC have failed to establish *de facto* independence from the PRC government. The Department should consider the PRC government's influence over senior managers through organizations controlled by the government.
- The Chinese Constitution states that the NPC is the highest organ of state power. NPC members cast votes for the president, can propose and vote on laws, and even vote on the industrial plan for the PRC's planned economy.
- Although the CPPCC functions as a political consulting organization and is not an official body of the PRC government, the Preamble to the Constitution of the PRC states that the CPPCC has "played a significant historical role and will continue to do so in the political and social life of the country."
- Because the CPC appoints the CPPCC's members, the CPPCC essentially remains under the leadership of the CPC. Many of the PRC's highest ranking government officials at both the national and provincial levels are members of the CPPCC.
- The CPPCC's responsibilities include "implementation of major policies formulated by the CPC Central Committee and state organs," and "implementation of the national economic and social development plans and financial budget."
- Even if a person is not a member of the CPC, CPPCC members are expected to uphold the CPC's leadership. For example, both the CPPCC and the NPC voted to approve the 12th Five-Year Plan, which specifically emphasized growth in the solar photovoltaic industry. Several companies benefited and increased their production and exports of solar cells and modules when their respective senior managers or board members were also CPPCC members charged with implementing the 12th Five-Year Plan.
- Through his membership in the Changzhou Local Council, Trina's CEO, Mr. Gao Jinfan is a government official. Further, one member of Trina's board of directors, Mr. Li Junfeng, was previously a high-ranking government official active in creating solar cell policy. While Trina claims that he was not highly active during the POI, he only submitted his resignation letter after the POI.
- With respect to JA Solar Technology Yangzhou Co., Ltd., Shanghai JA Solar Technology Co., Ltd., and JingAo Solar Co., Ltd, because one of the ultimate owners of these respondents is a Congressman in the 11th NPC and the Vice Chairman of the Eleventh CPPCC of Ningjin, the PRC government controls these respondents. Therefore, they are unable to independently select management or dispose of profits.
- Because one of Ningbo Qixin's ultimate owners is a Congressman in the NPC, the PRC government controls Ningbo Qixin through this individual. Therefore, Ningbo Qixin is unable to independently select management or dispose of profits.
- One manager at one respondent[123] is a university professor at an institution under the control of the Chinese Ministry of Education.

[123] The person, respondent, and institution were all treated as proprietary information. See the discussion of separate rates in Petitioner's case brief.

- Other companies with senior managers and other senior employees in the CPPCC were listed on 115-116 of Petitioner's case brief.

Trina

- Mr. Gao Jinfan is the only PRC national who is a top executive of Trina Solar. The remaining board members and top executives of Trina Solar are non-PRC nationals, whose decisions are independent of any government control. As explained on the record and at verification, Mr. Gao does not have a leadership role in the local council or any influence over the other council members. Further, he is neither paid by the local council nor does he have any duties in the council.
- At verification, the Department noted that it "found no evidence that the local council was involved in directing Trina Solar's business."
- Petitioner's portrayal of Mr. Li Junfeng as a "high-ranking government official" is an exaggeration, and regardless, there is no evidence on the record that Mr. Li Junfeng was in any way involved with the activities of Trina Solar or that his position as one of seven members of the Board of Directors of TSL affected the commercial decisions of Trina.

LDK Solar Co., Ltd

- The CCPCC is not a part of the PRC government or an authority; rather it is a conference and a kind of forum.
- Membership in the CPPCC only confers a right to speak before the CPPCC. It does not mean that the CPPCC controls or influences every member's business or individual members' business affiliations.

JA Solar Technology Yangzhou Co., Ltd., Shanghai JA Solar Technology Co., Ltd., and JingAo Solar Co., Ltd.

- The Department has already reviewed the same facts raised by Petitioner in the *Preliminary Determination* and granted these respondents separate rates status. No change in this decision is justified for the final determination.

Ningbo Qixin

- While a shareholder of Ningbo Qixin became a Congressman of the 14th Ningbo People's Congress, this only occurred six months after the end of the POI.
- Ningbo Qixin has proven through its SRA, and the supplemental questionnaire response, that its day-to-day activities, such as selection of management and pricing, are absent of *de facto* control from the PRC government.

Department's Position: We continue to determine that the record supports finding an absence of *de facto* government control over export activities with respect to the companies with senior managers or board directors whom Petitioner claims are members of the CPC, CPPCC, NPC, the local Changzhou council, or are educators in entities administered by the PRC Ministry of Education. The record does not show that the membership or position of senior managers or board directors of certain SRAs in these organizations resulted in a lack of autonomy on the part of the respondent to set prices, negotiate and sign agreements, select management, or decide how to dispose of profits or financing of losses. Petitioner has argued that in addition to its traditional test of *de facto* independence, the Department should consider the PRC government's influence

over senior executives through organizations controlled by the government. However, there is no record evidence of PRC government direction with respect to the day-to-day export related operations of any of the companies with senior board members or managers in the CPC, CPPCC, NPC, the Changzhou local council, or with educators in institutions administered by the PRC Ministry of Education. We further found no example of government involvement with respect to export activities in any of these companies. We examined these issues when we verified Trina. Specifically, we looked for evidence of government involvement in the company's operations and we examined Mr. Gao's role with the local council. We found "no evidence that the PRC government was involved in the selection of Trina Solar's management" and "found no evidence that the local council was involved in directing Trina Solar's business." We further note that the record demonstrates that Mr. Gao Jifan had no leadership role in the Changzhou local council, but only that he was one of 390 members of this council, and that the council met only once a year.[124] Thus, we have not denied these companies separate rate status based on Petitioner's claims regarding managers' memberships or positions in certain organizations.

Comment 7: Overhead Items

Wuxi Suntech

- The following items should be treated as overhead, not FOPs, since they are not physically incorporated into the merchandise, not listed on the bill of materials, are treated as overhead rather than direct materials by the company and the industry, and/or are of insignificant value: glass plate; colophony plate; adhesives A and B; cooling fluid; cutting saw blades; diamond saw blades; graphite plate; filter bag; foaming agent; ordinary glue; heat-resisting adhesive; and, lactic acid.

Trina

- The Department's decision in the *Preliminary Determination* to include virtually all of Trina's OH items in its NV calculation results in double-counting. None of the inputs identified in Trina's March 9, 2012, submission at Exhibit 1 should be considered as a direct material input when calculating NV.
- In determining whether to treat an item as part of OH or as a direct input, the Department looks principally to four factors: "1) whether the material is physically incorporated into the product; 2) the material's contribution to the production process and finished product; 3) the relative cost of the input and the replacement frequency/quantity of use; and 4) classification by the company and/or industry as an overhead expense or direct input."[125]
- None of the items in Trina's March 9, 2012, submission at Exhibit 1 were physically incorporated into the product. In a decision with respect to whether water should be considered a direct input in making windshields, the CIT determined that finding water to be a direct input would violate the Department's past practice because "the water at issue is used for cleaning purposes, and is not incorporated into the finished product or specially treated."[126] Several of Trina's chemicals that do not become part of the subject merchandise are used for cleaning purposes. For example, detergent, hydrochloric acid,

[124] *See* Trina's China Verification Report at 15, 17 and Exhibit 24.
[125] *See Pneumatic Off-the-Road Tires Final Results*, and accompanying Issues and Decision Memorandum at Comment 3.
[126] *See Fuyao Glass Industry Group Co. v. United States*, 29 C.I.T. 109 (2005) at 125-126.

detergent-lactic acid, sodium hydroxide, sulfuric acid, *etc*., are used for cleaning purposes.[127]

- The calculation of NV demonstrates that many of the OH inputs are insignificant in value and incidental to the production process.

Petitioner

- The Department's position, as well as standard accounting practice, is clear: only **"**minor" material inputs are to be treated as OH.[128]
- The Department has repeatedly held that an input need not be included in the final product to be considered a direct material input.[129] In *Diamond Sawblades Final Determination*, the Department valued molds, which served as the vessel in which diamond powder and other ingredients were combined and shaped into a usable form, as an FOP.[130] In that case, the Department specifically found that "given the short usage life of a graphite mold, we determine that it is replaced so regularly as to constitute a direct input that is consumed in the production process." The Department's decision in *Diamond Sawblades Final Determination* is especially relevant here because items such as crucibles and cutting wire used to make polysilicon ingots can be used only once in production**.** Inputs with a short usage life are to be considered direct inputs.
- Trina focuses on only one of the elements that the Department considers in assessing whether an input is a material input or truly overhead - whether the input becomes part of the subject merchandise. However, the Department will treat an item as a material input if it fits any one of five different criteria: if it is 1) consumed continuously with each unit of production, 2) required for a particular segment of the production process, 3) essential for production, 4) not used for "incidental purposes," or 5) otherwise a "significant input into the manufacturing process rather than miscellaneous or occasionally used materials."[131] Only one of these conditions needs to be satisfied to classify an input as a direct material input. Each of the aforementioned elements was derived from separate Departmental proceedings involving different issues.[132]

[127] *See, e.g.*, Trina's February 6, 2012 response at Exhibit D-1 and Trina's March 9, 2012 response at Exhibit SD-1.
[128] *See, e.g., Steel Concrete Reinforcing Bars*.
[129] *See Malleable Iron Pipe Fittings*, and accompanying Issues and Decision Memorandum at Comment 18 (the Department valued water because it was used in "{c}ooling and cleaning of fittings {and} is essential to the production process, and significant amounts of water are used in the production of subject merchandise"); *see also Brake Rotors*, and accompanying Issues and Decision Memorandum at Comment 7 (inputs valued as direct materials because they were continuously used).
[130] *See Diamond Sawblades Final Determination*, and accompanying Issues and Decision Memorandum at Comment at 11.
[131] *See* Wuxi Suntech's case brief at 16-17, citing *Seamless Carbon*, and accompanying Issues and Decision Memorandum at 7.
[132] For example, the Department's first element -- namely, that the input be "consumed continuously with each unit of production" -- was derived from the Department's determination in *Retail Carrier Bags*, and accompanying Issues and Decision Memorandum at Comment 3. The remaining elements were derived from the Department's determination in *Pneumatic Off-the-Road Tires Final Determination*, and accompanying Issues and Decision Memorandum at Comment 27, which, in turn, were derived from different proceedings involving different issues.

- Contrary to Trina's assertion, the Department routinely treats processing or auxiliary materials as direct inputs even though they are not physically included in the final, finished merchandise.[133]
- Trina has inaccurately described as "cleaning" items detergent, hydrochloric acid, detergent-lactic acid, sodium hydroxide, sulfuric acid, and other chemicals. These highly caustic/corrosive chemicals do not necessarily clean, but instead literally dissolve the glue from the faces and the edges of the sliced wafer so as to ensure that the wafer is free of contaminants before its conversion into a cell. These chemicals are completely different from soap and water that the Department often considers to be OH.
- Additionally, the types of consumables that Wuxi Suntech claims as OH are regularly treated as FOPs by the Department because they are normally treated as materials, and not OH, in the surrogate financial ratios.
- Based on the foregoing, the following items used by Wuxi Suntech are required and integral to the production process, are continuously used, and are replaced so frequently that they constitute direct inputs consumed in the production process: glass plate; colophony plate; adhesives A and B; cooling fluid; cutting saw blades; diamond saw blades; heat-resisting adhesive; and, lactic acid.

Department's Position: The Department has over time developed several criteria for assessing whether inputs should be classified as direct materials or OH. These considerations include: "1) whether the input is physically incorporated into the final product; 2) the input's contribution to the production process and finished product; 3) the relative cost of the input; and, 4) the way the cost of the input is typically treated in the industry."[134] As pointed out by both Petitioner and Wuxi Suntech, the Department has also classified inputs as direct materials if they were found to be: "1) consumed continuously with each unit of production; 2) required for a particular segment of the production process; 3) essential for production; 4) not used for incidental purposes; or, 5) otherwise a significant input to the manufacturing process rather than a miscellaneous or occasionally used material."[135] Also of consideration has been whether the input was so regularly replaced as to represent a direct material rather than an OH item.[136] As demonstrated by the variety of considerations, there is no conclusive test for reaching the appropriate classification of inputs that are not easily distinguished on their face as direct materials or OH. Further, contrary to the Petitioner's assertion that meeting any one of these criteria demonstrates that an input is a direct material, the Department instead finds that it is the preponderance of the evidence that must guide its decision in each case. In fact, in the case cited by Petitioner, the input in question did happen to meet all of the listed criteria.[137]

Nonetheless, due to the particular circumstances in this case, the Department finds that it is not necessary to evaluate the inputs in question using the above criteria. Central to this decision is the fact that the surrogate Thai financial statements relied on for calculating the surrogate financial ratios in this investigation combine raw materials and consumables into a single

[133] *See Steel Nails Final Determination,* and accompanying Issues and Decision Memorandum at Comment 17; *see also Citric Acid Final Results,* and accompanying Issues and Decision Memorandum at Comment 12.
[134] *See, e.g., Citric Acid Final Results,* and accompanying Issues and Decision Memorandum at Comment 18.
[135] *See Copper Pipe and Tube,* and accompanying Issues and Decision Memorandum at Comment 7.
[136] *See, e.g., Citric Acid Final Results,* and accompanying Issues and Decision Memorandum at Comment 18.
[137] *See Copper Pipe and Tube,* and accompanying Issues and Decision Memorandum at Comment 7.

financial statement line item. As the Department has frequently pointed out, it is unable to go behind a surrogate's financial statements; thus, the Department is unable to parse out the raw material and consumables line items on the surrogate financial statements and must include both in the denominator of the overhead ratio calculation. Consequently, the Department finds it is appropriate to account for the items that would be considered consumables regularly used in production as FOPs to ensure that these items have been included in the calculation of the respondent's NV.

The only items that we did not treat as consumables are three inputs used by Trina, and filter bags and glue (which was a minor item incidental to production) used by Wuxi Suntech. In the *Preliminary Determination,* we determined that Trina's three inputs were not regularly used in production, and we did not include them among the FOPs that we valued.[138] We have continued to exclude these inputs from the FOPs as they are minor items not routinely used in production. Since these items are not similar to consumables, they may have been accounted for elsewhere in the surrogate financial statements. With respect to Wuxi Suntech, at verification the Department found that the filter bag was replaced in the normal upkeep and maintenance of machinery. We believe this input is more consistent with repairs and maintenance expenses than consumables. The surrogate financial statements already separately capture repairs and maintenance expenses. In addition, as noted above, the glue used by Wuxi Suntech is a minor item incidental to production. Because all of the other inputs in question are always used in production and regularly replaced, we believe they would be considered consumables, which are not accounted for in the surrogate overhead expenses; thus we have valued these inputs as FOPs.

Because the Department is unable to dissect the surrogate financial statements, such adaptations of the FOP calculations have been necessary in other proceedings as well in order to maintain consistency with the broad categories presented in surrogate financial statements. For example, in certain cases it was not possible to distinguish energy costs from the costs included in the numerator to the OH ratio calculation; thus, in such cases, the Department has excluded the reported energy FOPs from the NV calculations (*i.e.*, energy costs were accounted for via the application of the OH ratio).[139] Both the CIT and the CAFC have affirmed that the Department has broad discretion when valuing factory OH.[140] Nonetheless, whether such adaptations are necessary, or are even feasible, are dependent on the available surrogate financial statements and should be determined on a case-by-case basis.

[138] *See* Trina's Preliminary Analysis Memorandum at 4 (noting the absence of these items from the bill of materials and the fact that these items were either used on an experimental basis or only used as part of quality assurance efforts).
[139] *See, e.g.*, *Citric Acid Final Determination,* and accompanying Issues and Decision Memorandum at Comment 2; *see also 2012 Warmwater Shrimp,* and accompanying Issues and Decision Memorandum at Comment 12.
[140] *See Magnesium Corp* (CAFC 1999) where the Court affirmed the CIT's decision and stated that factory overhead is composed of many elements and, in valuing the FOPs, section 773 of the Act provides the Department broad discretion to decide how to calculate factory overhead**.**

Comment 8: Exclusion of Import Data with Values but Quantities of Zero

Wuxi Suntech

- The Department should exclude from its SV calculations the import value into Thailand from countries where the total import quantity was listed as zero. Such instances are aberrational and increase the total value of imports (*i.e.* numerator) for all countries without a comparable increase in the total quantity of imports (*i.e.* denominator).
- The Department should use monthly import data, rather than POI average import data, to calculate SVs to ensure that all import data with values but associated quantities of zero are properly excluded from the SV calculation.

No other interested party commented on this issue.

Department's Position: We disagree with Wuxi Suntech because we believe that the individual line items showing imports with a precise value but a stated quantity of zero are not aberrational data but instances of imports of less than 0.5 units of measure that have been rounded to zero. Of the approximately 5,000 line items of individual country import data on the record, there are approximately 100 instances where the value of imports was a positive figure but the quantity was stated as zero. If such instances involve aberrational data (*e.g.*, situations caused by data collection or data input errors), they should occur at random. Instead, all of the import values where the stated quantity is zero are instances of relatively low import values that are typically in the range of import values from other countries where the imported quantity is very small.[141] Given the low import values for the zero quantity imports, the fact that these values are generally consistent with low volume imports, and given that Thai import quantities collected by GTA are all rounded to the nearest whole number,[142] these instances appear to involve rounding import quantities to zero.

With respect to Wuxi Suntech's argument that that these instances are aberrational because they result in an increase in the total value of imports without a comparable increase in the total quantity of imports, we note that rounding has both an upward and downward impact on AUVs. For example, while the impact of rounding in instances where GTA rounds a quantity of 0.4 to the next lower whole number increases the AUV, instances where GTA rounds a quantity of 0.6 to the next higher whole number lowers the AUV. Additionally, because of the insignificant value and very small quantity of imports where the reported quantity is zero, the impact of including zero quantities attributable to rounding is negligible and therefore does not distort the overall AUV for the HTS category. Lastly, because we have not found the zero quantity imports to be aberrational, we have not addressed Wuxi Suntech's request that we use monthly import data, rather than POI average import data, to calculate SVs to ensure that all import data with values but associated quantities of zero are properly excluded from the SV calculation.

[141] *See* Thai import statistics in Attachment I of the Preliminary Determination Surrogate Value Memorandum.
[142] *See* Thai import statistics in Attachment I of the Preliminary Determination Surrogate Value Memorandum where the quantity of all line items is a whole number. *See also* GTA data in whole numbers in *Silicon Metal from the PRC*, and accompanying Issues and Decision Memorandum at Comment 4.

Comment 9: Surrogate Value for Wafers

Trina and Wuxi Suntech

- The Department should rely on Indian HTS category 3818.00.10 (undefused silicon wafers) to value wafers because it is specific to undiffused silicon wafers used by respondents.
- The Department should not value wafers using Thai HTS category 3818.00 (chemical elements doped for use in electronics, in the form of discs, wafers or similar forms; chemical compounds doped for use in electronics). This is a broad category covering all types of doped chemical elements for use in electronics, without a specific breakout for undiffused silicon wafers.
- The surrogate value from Thai HTS category 3818.00 is not representative of silicon wafer prices because the value is largely derived from Thai imports from Germany during one month of the POI. In addition, Thai imports were less than $1 million, which is only 2.5 percent of Indian imports of undiffused silicon wafers. When choosing surrogate values, the Department has a preference for broad-based data points from many sources with which to calculate AUVs.[143] The Thai data clearly does not meet that test.

Trina

- If the Department does not use Indian HTS category 3818.00.10 to value NME purchases of silicon wafers, it should value key inputs consistently. The Department relied on third-party sources for international prices to value polysilicon in the *Preliminary Determination*. Since third-party international prices are on the record for silicon wafers, the Department should use these prices to value silicon wafers.
- The average international silicon wafer prices from Bloomberg Energy ($245/kg) and Energy Trend ($228/kg) are similar to the Indian surrogate value of $246/kg, and significantly less than the Thai surrogate value of $341/kg used in the *Preliminary Determination*.
- Indian import data indicate that the AUV from HTS 3818.00.90, which contains doped chemical elements other than undiffused silicon wafers, is 70 percent greater than the price for undiffused silicon wafers.[144]

Petitioner

- The purported aberrational import prices under Thai HTS category 3818.00 exceed international prices by less than 50 percent whereas the Department normally only considers prices aberrational where there are differences of 500 or 1000 percent. Therefore, the Department should continue to rely on Thai HTS category 3818.00 to value wafers.
- Both respondents purchased wafers at prices similar to imports under Thai HTS category 3818.00.
- While the Thai import volume is small in comparison to India's and the majority of the volume originated from Germany, the remaining usable Thai import data *(i.e.,* data not

[143] *See Seventh Review of Fish Fillets from Vietnam* and accompanying Issues and Decision Memorandum at Comment 1.
[144] *See* Trina's April 10 Additional Surrogate Value Submission at Exhibit 6.

from China or from other NMEs) do not vary substantially from the AUVs of German import data.

- While the Thai HTS category may include doped wafers of materials other than silicon, respondents have provided no evidence of this, and there is also no evidence that the existence of such imports has materially skewed the AUV.

Department's Position: We disagree with respondents and have continued to value wafers using Thai HTS category 3818. Respondents' concerns seem to center on their claims that Thai HTS category 3818 is too broad in terms of product coverage compared to other potential surrogate values but not broad enough when it comes to data points because most of the imports during the POI were from Germany. As an initial matter, we note that Thai HTS category 3818 specifically covers chemical elements doped for use in electronics, in the form of discs, wafers or similar forms; thus it clearly covers the doped silicon wafers consumed by respondents. Moreover, both mandatory respondents admitted that this HTS category would contain silicon wafers.[145] While the category covers other products as well, the Department has previously noted that "{t}he fact that import statistics may contain imports of materials other than the material that is being valued does not necessarily render those statistics inappropriate surrogate values."[146] Rather, the Department evaluates potential surrogate values based on a well established set of criteria which include a strong preference for valuing all FOPs in the primary surrogate country, as well as a preference for prices which are period-wide, representative of a broad market average,[147] specific to the input in question, net of taxes and import duties, contemporaneous with the period under consideration, and publicly available.[148] The Thai surrogate value is from the primary surrogate country, based on POI prices covering all Thai imports under the HTS category, from an HTS category that includes the product being valued, net of taxes and duties, and publically available. Although respondents contend that other potential surrogates on the record are more specific to wafers, the Thai HTS category covers silicon wafers and record information does not indicate that the value is aberrational or unrepresentative (*e.g.*, evidence indicating that a majority of imports under the category are of products other than the input being valued). Specifically, proprietary information on the record supports finding that the AUV calculated from Thai HTS category 3818 is representative of the prices for the types of wafers consumed by manufacturers of solar cells.[149]

Moreover, unlike the other surrogate values advocated by respondents, the Thai surrogate value is from the primary surrogate country. The Department's practice is to "value all FOPs utilizing data from the primary surrogate country and to consider alternative sources only when a suitable

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[145] *See* Trina's January 17, 2012 submission at Exhibit 1 and Wuxi Suntech's February 21, 2012 response and April 25, 2012 response.

[146] *See Tapered Roller Bearings from the PRC* and accompanying Issues and Decision Memorandum at Comment 6.

[147] *See First Review of Fish Fillets from Vietnam* and accompanying Issues and Decision Memorandum at Comment 3.

[148] *See* NME Surrogate Selection Policy Bulletin, (http://ia.ita.doc.gov/policy/index.html) at page 4 of the website version.

[149] *See* Preliminary Determination Surrogate Value Memorandum at Attachment 1 for import prices; *see also* Petitioner's February 29, 2012 submission at Exhibits 4 and 5; Trina's July 9th submission at Exhibits 5 and 6; and Note 2 of the October 9, 2012 memorandum from Jeff Pedersen to the file entitled "Proprietary Information Relating to Issues Involving Changzhou Trina Solar Energy Co., Ltd. in the October 9, 2012 Issues and Decision Memorandum" for further information regarding this input that cannot be disclosed publically.

value from the primary surrogate country does not exist on the record."[150] For the reasons noted above, a suitable surrogate for valuing wafers from the primary surrogate country is on the record. While respondents argue that Indian import data are more specific to the input being valued, in this case the Department has identified Thailand as more economically comparable to the PRC, and Thailand has reliable data to value wafers. Thus there is no need to consider surrogate data from India.

As an alternative, respondents suggest using international prices to value wafers, noting that the Department used international prices to value polysilicon in this investigation. However, the facts that led us to value polysilicon using international prices are not present with respect to wafers. Import statistics on the record for polysilicon are for HTS category 2804.61 (Silicon Containing by Weight not less than 99.99% of Silicon). This category covers silicon with a purity level starting at 99.99%, but solar grade polysilicon requires purity levels as high as 99.999999% and electronics grade silicon requires even higher purity levels. Thus, imports under HTS category 2804.61 could vary greatly in terms of purity levels. For this product, differences in purity levels translate into significant price differences. Numerous articles have been placed on the record testifying to the large costs of refining polysilicon resulting in dramatic price differences between different purities of silicon.[151] This is borne out by the significant differences between the AUVs for this HTS category. AUVs for this category differed within a country by as much as 40,000 percent,[152] differed between countries by at times over 10,000 percent,[153] and fluctuated from year to year by as much as 4,000 percent.[154] These wide swings in AUVs indicate that imports may at times primarily consist of lower purity silicon, possibly not of a solar grade, or extremely high purity electronics grade polysilicon, neither of which is the input we are valuing. In fact, Petitioner placed information on the record demonstrating the imports under HTS category 2804.61 at times consisted of items such as silicon metal that appear to be primarily for aluminum production and silicon with purities as low as 98.4 percent.[155] Thus there is substantial record evidence leading the Department to question whether the import prices are representative of the price of solar grade polysilicon during the POI. Therefore, while the Department's practice and preference is to value FOPs in the primary surrogate country, in this limited instance, based on these particular facts, the Department used international prices to value polysilicon.

In contrast, the record does not indicate that the surrogate value derived from Thai HTS category 3818.00 is unrepresentative of the prices paid for the types of wafers used by respondents. As noted above, HTS category 3818.00 covers chemical elements doped for use in electronics, in

[150] *See 2012 Warmwater Shrimp* and accompanying Issues and Decision Memorandum at Comment 2.
[151] *See, e.g.,* the Petitioner's October 25, 2011 supplement to its petition at Exhibit AD-Supp-1.
[152] Thai 2011 imports from the United States under HTS category 2804.61 through August 2011 were over $1,000 per kg, while its imports from all countries for the same period were only $2.50 per kilogram. *See* Petitioner's October 25, 2011 submission at Exhibit 4.
[153] Thai and Indian 2011 imports under HTS category 2804.61 through August 2011 were approximately $2.50 per kilogram, while South Africa's imports were $337 per kilogram for the same period. *See* Petitioner's October 25, 2011 submission at Exhibit 4.
[154] Indonesian 2010 and 2011 imports under HTS category 2804.61 through August were approximately $100 per kilogram, while its imports during 2008 and 2009 for the same months were approximately $3 per kilogram. *See* Petitioner's October 25, 2011 submission at Exhibit 4.
[155] *See* Petitioner's October 25, 2011 submission at Exhibit 4

the form of discs and wafers. The silicon wafers used by both respondents are chemically doped and used to generate electricity. Also, proprietary information on the record indicates that the AUV calculated from Thai HTS category 3818 is representative of the prices for the types of wafers consumed by manufacturers of solar cells.[156] Further, as respondents themselves acknowledge, Thai imports under HTS category 3818.00 are on average only approximately 35 percent higher than the world prices for wafers used for solar applications that they have placed on the record.

Additionally, the record does not show wide variations in the AUVs of wafers as was the case for polysilicon. Thai imports under HTS category 3818.00 are from five countries. For four of the countries, the AUVs of imports vary by 67 percent or less with the one outlier being imports of only 3 kg during the POI.[157] Further, as mention above Thai imports under HTS category 3818.00 are on average only approximately 35 percent higher than the world prices for wafers. Meanwhile, international prices of polysilicon placed on the record by Trina are approximately 2,500 percent higher than the AUV of imports under HTS 2804.61 by India, the surrogate country argued for by respondents who claim that India is a major producer of solar cells.[158] Thus, the variation in prices is far less than the difference of as much as 40,000 percent found in imports of silicon from individual countries. For the forgoing reasons, we have not used international prices to value wafers but continued to value wafers using Thai HTS category 3818.

Comment 10: Critical Circumstances

A. Early Knowledge

Wuxi Suntech

- To impute knowledge of likely AD/CVD proceedings, the evidence must be "sufficient to establish" the domestic industry was planning or preparing to file "imminent" petitions. Here, the Department did not apply the correct standard. Thus, use of a pre-petition comparison period is inappropriate.
- If the Department imputes knowledge of a proceeding as of September 28, 2011, October 2011 through May 2012 should be the appropriate, eight-month comparison period, and February through September 2011 should be the comparable base period.

Petitioner

- The Department should continue to find that critical circumstances exist.

[156] *See* Preliminary Determination Surrogate Value Memorandum at Attachment 1 for import prices; *see also* Petitioner's February 29, 2012 submission at Exhibits 4 and 5; Trina's July 9th submission at Exhibits 5 and 6; and Note 3 of the October 9, 2012 memorandum from Jeff Pedersen to the file entitled "Proprietary Information Relating to Issues Involving Changzhou Trina Solar Energy Co., Ltd. in the October 9, 2012 Issues and Decision Memorandum" for further information regarding this input that cannot be disclosed publically.

[157] See Preliminary Determination Surrogate Value Memorandum at Attachment 1.

[158] The AUV of Indian imports under HTS category 2804.61 was approximately $2.50 per kilogram in 2010 and early 2011, while international prices placed on the record by Trina were nearly $60 per kilogram. *See* Petitioner's October 25, 2011 submission at Exhibit 4 for Indian imports under HTS category 2804.61 and the Final Determination Surrogate Value Memorandum at Attachment II for international prices of polysilicon placed on the record by Trina.

- The Department correctly imputed knowledge to importers, exporters, and producers during September 2011, when the Bloomberg article was published, which mentions the rough conditions facing the solar industry due to subsidized low-priced imports from the PRC, and which states that AD and CVD cases should be filed against imports of solar cells.

Department's Position: The Department continues to find that early knowledge of impending proceedings is properly imputed to importers, exporters, and producers. Citing four cases from 1999 through 2004 Wuxi Suntech correctly claims that the Department does not impute early knowledge when the evidence merely establishes the possibility of future proceedings. As required by 19 CFR 351.206(i), we look to see whether the evidence indicates that importers, exporters, or producers had reason to believe that a proceeding was "likely." While there is no exact formula for determining when the prospect of future proceedings crosses the line from "possible" to "likely" (or, to use the term preferred by Wuxi Suntech, "imminent"), in our preliminary critical circumstances determination we focused on when the first explicit public references (accessible to importers, exporters, or producers) to impending proceedings appeared, September 2011. By contrast, we did not consider early knowledge to be imputed by public facts that might give rise to future proceedings, such as the known provision of GOC subsidies to PRC solar cell producers and exporters or the closing of U.S. manufacturers. We believe this distinction provides a reasonable basis for determining when proceedings are likely. In this case, a September Bloomberg.com article provided by Petitioner stated that the U.S. industry, including Petitioner, was already preparing the petitions to be filed with the Department and the ITC. At the beginning of that same month, a U.S. senator known to be advocating on behalf of Petitioner, a company located within his state, had noted publicly the urgent need for these proceedings to be initiated. Thus, the Department continues to determine parties had reason to believe in September that proceedings were likely. In the *Preliminary Determination*, we found that our determination with regard to "massive imports" would be the same regardless of whether we included September data in the base or comparison period. This fact continues to hold in our calculations of massive imports for the final determination.

B. Other Factors Contributing to Import Surges

Wuxi Suntech, Trina, and Yingli

- Any increase in imports during the comparison period was in response to incentive programs in the United States, not the pending AD/CVD investigations.

Trina

- The Department should make an adjustment in its analysis for the incentive programs.
- Besides the incentive programs, seasonality played a role in the increase in shipments. The increase in Trina's imports reflects normal business patterns.
- The ITC found U.S. demand for solar cells grew at a pace consistent with increased demand for solar energy.

Petitioner

- The Act and the Department's regulations do not provide for the consideration of incentive programs or U.S. demand in determining whether massive imports have taken place.
- Increased demand resulting from the expiration of incentive programs cannot be characterized as "seasonal demand."

Department's Position: We find that the increase in imports from the base period to the comparison period is not explained by seasonal trends or other factors. Wuxi Suntech and Trina argue we should look at comparable end-of-year surges in 2009 and 2010 as evidence that the 2011 surge is explained by seasonality. However, two years of data in 2009 and 2010 are not indicative of seasonality and do not indicate that a 2011 end-of-year surge was a foregone conclusion. Moreover, there appear to have been many months or periods of exceptionally high growth over the three-year period from 2009 through 2011. In fact, the variations are so great that small changes in how increases are calculated produce significantly different results. For example, for shipments by one respondent, comparing the five-month periods May through September 2009 with October 2009 through February 2010 results in a large increase, while comparing the four-month periods May through August 2009 with September through December 2009 results in a large decrease.[159]

This type of sporadic variation is not the type of predictable fluctuation associated with seasonal trends. Seasonal trends, such as those affecting shipments of agricultural products, are the result of conditions known to repeat themselves each year (*e.g.*, a harvest at the end of each summer, or a surge in consumer shopping during the Christmas season). It is possible to subtract the effects of such predictable, measurable, cyclical patterns from import surges and then determine if what remains constitutes a "massive increase." There is no convincing explanation as to what might be the theoretical condition that causes an end-of-year increase in solar cell shipments. Both of the respondents argue that incentive programs had something to do with shipment increases, but these were in place throughout the year in each year of the three-year period (*i.e.*, winter, spring, summer, or fall). Thus, there is no reason they should have caused a seasonal surge in the fall of each year. Therefore we see no evidence of a "solar cells season" resulting from incentive programs or other factors.

We note also the ITC's preliminary finding:

> {PRC solar cell} imports increased dramatically in the U.S. market throughout the period of investigation. The value of subject imports increased by 411.7 percent from 2008 to 2010, far outpacing the *** percent increase in apparent U.S. consumption for the same period. . . . A significant share of the increase in market penetration by subject imports from 2008 to 2010 came at the expense of the domestic industry. While subject imports' share of apparent U.S. consumption increased substantially, the domestic industry's market share *** percentage points on a value basis despite the tremendous growth in U.S. demand.[160] The domestic industry's market share was *** percentage points lower in interim 2011 than in interim 2010. Nonsubject import share of apparent U.S.

[159] May 2009 is the earliest month for which either respondent supplied data.
[160] ITC Preliminary Report at 25.

consumption also *** percentage points on a value basis from 2008 to 2010 and was *** percent lower in interim 2011 than in 2010.

Because one would expect the incentive programs and increased U.S. demand to affect all producers equally, the fact that the PRC's shipments increased at a rate greater than that of U.S. producers indicates there were other reasons for the PRC's growth. Thus, the record does not support Wuxi Suntech's and Trina's assertions regarding the role of the incentives in the import surges at the end of 2011. Finally, while the Department is not required to examine the intent behind a producer who contributes to an import surge,[161] we note the statement of Trina's chief commercial officer (CCO), provided by Petitioner. Made in response to a question about Trina's duty liability as an importer of record, the CCO explains that Trina had "pre-loaded" some orders in anticipation of when it expected AD and CVD "events" to occur.[162] This appears to be a clear reference to increasing shipments before duties are put in place.

C. The Length of the Base and Comparison Periods

Wuxi Suntech

- If the Department imputes knowledge of a proceeding as of September 28, 2011, October 2011 through May 2012 will thus be the appropriate, eight-month comparison period, and February through September 2011 will be the comparable base period.

Petitioner

- The Department properly used a comparison period ending in March 2012. Wuxi Suntech's argument about extending the comparison period until May 2012 is without merit. The Department's practice is to use all available information up until the earlier of the date of the AD or CVD preliminary determination. Since the Department published the preliminary CVD determination on March 20, 2012, it should not use information after March 2012 in the comparison period because record evidence shows that the preliminary CVD determination in March 2012 had a distortive impact on Wuxi Suntech's import volume.

Department's Position: We disagree with Petitioner's claim that the comparison period should end in March 2012 rather than May 2012. The Department's long-standing practice in critical circumstances determinations is to examine the longest period for which information is available up to the date of the preliminary determination.[163] In this case, because the preliminary determination, including the Department's affirmative preliminary determination of critical circumstances, was published on May 25, 2012, we have included May 2012 shipment data in the comparison period that we used for determining whether there are critical circumstances in this case.

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[161] As Petitioner notes, the regulations require the Department to consider seasonality and the share of domestic consumption accounted for by imports. Neither the Act nor the regulations appear to require that the Department dismiss every conceivable explanation for an import surge greater than 15 percent other than an attempt to avoid duties.

[162] *See* Petitioner's March 12, 2012 submission at Exhibit 1. The statement is made during a phone conference in February 2012 discussing recent quarterly earnings. Exhibit 1 is the transcript of the phone conference.

[163] *See e.g., Certain Steel Wheels Final Determination*, and accompanying Issues and Decision Memorandum at Comment 6.

D. Knowledge of Sales at Less Than Fair Value

Chaori

- The Department's preliminary finding that importers "knew or should have known" that sales of subject merchandise were being made at less than fair value was based on a "25%/15%" test of margins that is unreasonable, not condoned by the statute, and not supported by legislative history. Specifically, use of the rigid "25%/15%" test is not reasonable because importers could not possibly be aware of the margins that will be calculated in an antidumping case, particularly in an NME case where it is not possible to predict which surrogate values will be used. The "25%/15%" test is simply a policy and this policy has never been upheld in court.[164]
- The Department must decide whether importers "knew or should have known" that sales of subject merchandise were being made at less than fair value on a case-by-case basis. There is no valid basis for imputing such knowledge in this case; thus the Department must reverse its finding of critical circumstances.

Petitioner

- The "25%/15%" test is reasonable, has been used by the Department for many years, and should continue to be used in this case.
- Both Wuxi Suntech's and Trina's preliminary dumping margins are well over 15%; thus it was reasonable for the Department to impute knowledge of sales at less than fair value to importers.
- Even if knowledge of sales at less than fair value is considered on a case-by-case basis, the record in this case shows that importers should have known that Chinese producers were dumping subject merchandise because there were low-priced Chinese imports. The ITC noted that "{s}ubject imports undersold the domestic like product in 18 of the 19 quarterly price comparisons …."

Department's Position: We disagree with Chaori's claim that the Department's use of the "25%/15%" test is unreasonable and unrelated to whether importers knew or should have known that subject merchandise was being sold at less than fair value. When determining whether critical circumstances exist, the statute includes a requirement that the Department determine whether the "person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value …." Thus, despite Chaori's claim that the test is unfair because importers could not possible know the fair value (normal value) that will be calculated for imports, the test plainly considers the fair value of the merchandise and whether the merchandise was sold at less than fair value. The CAFC addressed the same issue that was raised by Chaori by stating:

> While the uncertainty of not knowing which country will be chosen by the ITA as the surrogate country is seemingly unfair to an importer of goods

[164] *See, e.g., Zhejiang Native Produce & Animal by-Products Imp. & Exp. Corp. v. United States*, 432 F.3d 1363 (Fed. Cir. 2005) (*Zhejiang Native Produce*).

> from NME countries, this is but one criticism of the statute and is not enough to exempt the importers from the reach of the statute.[165]

The Department's "25%/15%" test comports with the statutory requirement noted above because it establishes whether or not sales were being made at less than fair value, which is the starting point for determining whether there was knowledge of such sales. Moreover, the test establishes whether sales were made at less than fair value using a fair value (normal value) determined according to the statute. Furthermore, the test is reasonable because the Department does not use it to attribute knowledge based simply on the existence of dumping, rather the test considers the magnitude of the dumping margins and the types of importers involved in determining whether there is a reasonable basis for attributing knowledge. This can be seen in the Department's explanation for having different threshold margins when it stated that "{w}e require a lower margin for imputing knowledge on ESP {the predecessor to CEP} sales to account for the greater probability that a U.S. importer has knowledge of dumping if it is related to the foreign producer than if it is unrelated."[166] Hence the test is relevant to the issue of knowledge and it takes into account specific aspects of sales (*i.e.*, the magnitude of dumping and sale types) which provide indicators as to whether parties knew or should have known that the sales were being made at less than fair value. Moreover, Chaori's reliance on *Zhejiang Native Produce* is not on point. In that case the CAFC found that knowledge could not be imputed to importers even though dumping margins were above 25% because import prices conformed to the terms of a suspension agreement. Consequently, we have continued to apply the "25%/15%" test in the final determination.

Comment 11: Allegations of Fraud

Petitioner

- Publicly available information demonstrates that Wuxi Suntech fraudulently inflated the value of its sales to a European affiliate majority-owned by Wuxi Suntech and that the same affiliate fraudulently used worthless or non-existent bonds to obtain loans from the GOC.
- These fraud allegations call into question Wuxi Suntech's sales figures used as the denominator in calculating countervailable subsidy rates, Wuxi Suntech's creditworthiness, and the overall integrity of its financial statements.

Wuxi Suntech

- There is no evidence that the sales values reported to the Department were inconsistent with rules for pricing affiliated transactions.
- The bonds in question were used by the European affiliate to obtain Wuxi Suntech's guarantee of the loans obtained from the GOC. Thus, Wuxi Suntech was the victim of the fraudulent bonds, not the perpetrator of the fraud.

- Wuxi Suntech disclosed the fraudulent bonds itself during a due diligence review of the European affiliate

[165] *See ICC Industries, Inc. ICD Group Inc. v. United States*, 812 F. 2d 694, 698 (CAFC 1987).
[166] *See Hot-Rolled Carbon Steel Flat Products from Korea*.

- All information submitted by Petitioner either refers to preliminary allegations or stems from less than authoritative sources (e.g., bloggers). Much of this information was available in early August and should have been submitted by Petitioner earlier.
- Petitioner included new information in its September 18, 2012 submission. The Department clearly limited submissions due on September 18 to arguments regarding this issue.

Department's Position:

The Department takes all allegations of fraud very seriously. As such, upon receipt of Petitioner's allegations, we took the extraordinary step of reopening the record less than 30 days prior to our final determination of this investigation in order to evaluate those allegations. We provided all parties the opportunity to submit information regarding this issue, and three days thereafter to submit rebuttal comments. The information submitted by Petitioner involves preliminary proceedings underway in civil court among private parties, as well as an ongoing investigation by a European authority. Wuxi Suntech has publicly denied these allegations, and in the various articles submitted, which are independent of this AD investigation, Wuxi Suntech officials state that they are the "victim" of the fraud. The aforementioned court cases and investigations have not yet resulted in conclusions that would warrant invalidating the findings reached throughout this investigation. If this investigation results in an order, Petitioner may request an administrative review or a changed circumstances review in which the Department may further examine any alleged fraud, assuming sufficient evidence is presented. Finally, we do not find that Petitioner included new information in its September 18, 2012 submission. In the Department's view, Petitioner's submission was limited to arguments regarding its original fraud allegations and there is no need to reject the submission.

Comment 12: Application of *Sigma*

Petitioner

- If the Department continues to value certain inputs using surrogate values that are not based on import prices, it should not apply the *Sigma* cap to the respective supplier distances for those inputs. The Department's practice in such situations is to instead utilize the actual distances reported by a respondent in its questionnaire responses.[167]

No other parties commented on this issue.

Department's Position: We agree with Petitioner. The Department's current practice is to apply the *Sigma* cap only to import prices because in *Sigma* the Department stated that it would apply the distance cap to import statistics.[168] Therefore, we will not apply the *Sigma* cap to inputs valued with purchase prices in the final determination.

[167] *See Lined Paper Products From the PRC*, and accompanying Issues and Decisions Memorandum at Comment 2.
[168] *See, e.g., Saccharin Investigation Final*, and accompanying Issues and Decision Memorandum at Comment 4, *Color Television Receivers from the PRC*, 68 FR 66800, 66807-08 (November 28, 2003), and *Diamond Sawblades Preliminary Determination* unchanged at *Diamond Sawblades Final Determination.*

Comment 13: Double Remedies and Concurrent AD and CVD Investigations

Wuxi Suntech

- As argued by the GOC, the Department cannot apply its current NME methodology in the final determination when it is conducting a concurrent CVD case. The Department's decision to concurrently apply AD and CVD law to Wuxi Suntech was inconsistent with the CAFC's interpretation of the Congressional intent with respect to applying CVD law to NME countries, was unlawful as it imposed double jeopardy on Wuxi Suntech, and provided a double remedy for the domestic industry.
- The Department consistently refused to apply CVD law to NME countries before November 2006. This position was supported by the CAFC in its 1985 *Georgetown Steel*[169] decision. Moreover, the CAFC recently clarified that, "in amending and reenacting the trade laws in 1988 and 1994, Congress adopted the position that CVD law does not apply to NME countries."[170]
- The lawfulness of the Department's decision to apply both AD and CVD law to Wuxi Suntech should be judged by the law as it stood at the time the decision was made. The retroactive aspect of H.R. 4105[171] creates an unlawful double remedy for the domestic industry and jeopardizes Wuxi Suntech's due process rights.[172]
- By allowing for adjustments to dumping margins to account for subsidies in H.R. 4105 and by including a provision in the Act allowing for adjustments to AD rates when the Department also countervailed export subsidies, Congress recognized that AD and CVD remedies are two parts of one legal mechanism to remedy unfair trade practices. Thus, these two laws should be administered in concert and double remedies avoided.
- The CIT confirmed the Department's obligation to avoid double remedy in H.R. 4105, but in this investigation, the Department made no attempt to avoid a double remedy.[173] If the Department cannot reasonably avoid double remedies then, as directed by the CIT, it should not also apply the CVD law.[174]

GOC

- The Department cannot apply its current NME methodology in the final determination because it is unsupported by substantial evidence, inconsistent with U.S. law, and a violation of the United States' obligations pursuant to the WTO agreements[175]

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[169] See *Georgetown Steel Corp. v. United States*, 801 F.2d at 1310 (CAFC 1986).
[170] Wuxi Suntech cites *GPX International Tire Corp. v. United States*, Nos. 2011-1107, -1108, -1109 (CAFC 2011) ("CAFC's GPX Opinion").
[171] Wuxi Suntech cites *An Act to Apply the Countervailing Duty Provisions of the Tariff Act of 1930 to Nonmarket Economy Countries, and for Other Purpose*, Public Law No. 112-99, 126 Stat 265 (March 13, 2012) ("H.R. 4105").
[172] *See id.*
[173] *See GPX Int'l Tire Corp., v. United States*, No. 08-00285, slip op. 09-103, at 19 (CIT 2009) ("*GPX 2009*").
[174] *See GPX Int'l Tire Corp., v. United States*, No. 08-00285, slip op. 10-84, at 11 (CIT 2010) ("*GPX 2010*").
[175] *See* WTO Appellate Body Report, *United States – Definitive Antidumping and Countervailing Duties on Certain Products from China*, WT/DS/379/AB para. 582 (March 11, 2011) ("Appellate Body Report (WTO 2011)") ("{t}he amount of countervailing duty cannot be 'appropriate' in situations where that duty represents the full amount of the subsidy, and where antidumping duties, calculated at least to some extent on the basis of the same subsidization, are imposed concurrently to remove the same injury to the domestic industry.").

- Instead, the Department should: (1) make its final AD solar cells determination using its normal ME methodology, or (2) make a negative final determination in the solar cells CVD investigation.
- Applying the NME AD methodology in this investigation while conducting a parallel CVD investigation unconstitutionally creates what is a "special rule" due to the different effective dates in H.R. 4105 regarding countervailing duty application to NMEs. As the appellees in *GPX CAFC*[176] have argued, the new legislation creates a situation for a group of cases in which both AD and CVD may be imposed without providing a mechanism for double counting.
- A solar cell producer cannot both benefit from a subsidy that reduces its production costs and be held to an NV calculation that does not reflect that cost reduction. Specifically, in the concurrent CVD investigation, the Department found that the polysilicon input was purchased by producers of solar cells for less than adequate remuneration, which lowers the solar cell producer's production costs. However, the Department did not take account of this when it applied its NME methodology in the concurrent AD case.

Trina

- The Department should revisit its calculation and ensure that its AD and CVD remedies do not overlap and do not impose an unlawful remedy.
- The Appellate Body Report (WTO 2011) found that the imposition of both AD and CVD duties is contrary to the U.S.'s obligations under the Agreement on Subsidies and Countervailing Measures. Also, H.R. 4105 included a provision addressing concurrent imposition of AD and CVD measures. However, the Department did not address this in its *Preliminary Determination*.
- Although the CAFC recently concluded that the statute prior to H.R. 4105 did not impose a restriction on the Department's imposition of CVD on imports from NME countries to account for double counting, it upheld a challenge to the constitutionality of the prospective application of the section of the new legislation providing for an adjustment to AD duties to prevent a double remedy and remanded the case to the CIT.[177]

Petitioner

- The Department should reject the respondents' arguments concerning double remedies and continue to assess the full amount of both CVD and AD duties on subject merchandise as required by Congress' statutory mandate.
- Because the PRC government is subsidizing solar cells and PRC producers are dumping solar cells in the United States, the Department correctly followed its statutory mandate and applied both the CVD and AD laws to remedy these unfair trade practices.
- While the legislation permits the Department to adjust the dumping margin if it can reasonably estimate whether a subsidy increased the dumping margin, Congress clearly states that the Department may use this provision only in proceedings that were initiated after H.R. 4105 was enacted. Because the AD and CVD solar cell investigations were initiated before H.R. 4105 was enacted, the Department correctly did not adjust the dumping margin for double remedies.

[176] *See GPX Int'l Tire Corp., v United States*, 678 F. 3d 1308 (CAFC 2012).
[177] *See GPX Int'l Tire Corp., v United States*, 678 F. 3d 1308 (CAFC 2012).

Department's Position: The Department has continued to apply the AD NME methodology in this investigation while applying CVD law to subsidized imports of solar cells in the companion CVD investigation. We disagree with Wuxi Suntech's characterization of the Department's previous practice with respect to NME countries and *Georgetown Steel*.[178] Specifically, it is not the case that the Department determined, in *Georgetown Steel*, not to apply CVD law concurrently with the AD NME methodology because of distortions. In fact, the Department declined to apply the CVD law to the Soviet Bloc countries in the mid-1980s because of the difficulties involved in identifying and measuring subsidies in the context of those command-and-control economies, at that time. In the underlying *Georgetown Steel* proceedings, the Department determined that the concept of a subsidy had no meaning in an economy that had no markets and in which activity was controlled according to central plans.[179] The CAFC noted the broad discretion due the Department in determining what constituted a subsidy, then called a "bounty" or "grant" by the statute, and held that:

> We cannot say that the administrations' conclusion that the benefits the Soviet Union and the German Democratic Republic provided for the export of potash to the United States were not bounties or grants under section 303 was unreasonable, not in accordance with law, or an abuse of discretion.[180]

As the CAFC stated, even if one were to label these incentives as a subsidy, in the most liberal sense of the term, the governments of these NMEs would in effect be subsidizing themselves.[181] Thus, *Georgetown Steel* did not hold that the CVD law could never be applied to exports from an NME country. It simply upheld the Department's determination that it could not identify a "bounty or grant" in the conditions of the Soviet Bloc that were before it. Because the Department's prior practice of not applying the CVD law to NME countries was not based on the theory that the NME AD methodology already remedied any domestic subsidies in NME countries, the Department's current practice of applying the CVD law to exports from the PRC remains consistent with our earlier practice.

With respect to the CIT's decision in *GPX 2009*,[182] which was relied upon by Wuxi Suntech, this decision has since been vacated by the CAFC, thereby depriving it of any legal authority.[183] More importantly, on March 13, 2012, President Obama signed into law Public Law 112-99, "To apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries, and for other purposes." Public Law 112-99 amended the Act, among other purposes, to confirm that, barring an exception not applicable here, the Department must apply the CVD law to subsidized imports from countries designated as NMEs for AD purposes.[184] Because Congress acted to clarify the law before the CAFC's GPX Opinion could become final, that decision holding that the Department cannot apply the CVD law to imports from NMEs, such as

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[178] *See Georgetown Steel.*
[179] *See id.*
[180] *See id.*, 801 F.2d at 1318.
[181] *See id.*, 801 F.2d at 1316.
[182] *See GPX 2009* at 1240
[183] *See GPX Int'l Tire Corp., v United States*, No. 2011-1107, -1108, -1109 (Fed. Cir. June 4, 2012) (order correcting mandate and vacating CIT decision). In vacating *GPX 2009*, the CAFC acknowledged, "The new legislation makes clear that {the CIT's} theory {in *GPX 2009*} was not correct." *GPX CAFC*, 678 F.3d at 1312 n.8.
[184] *See* section 701(f)(1) of the Act; Public Law 112-99, 126 Stat. 265 § 1(a).

the PRC, never attained the force of law.[185] Instead, the enacted legislation unambiguously requires the Department to apply the CVD law to NME countries. This requirement in the new law applies to proceedings initiated on or after November 20, 2006.[186] Thus, the requirement to apply CVD law in NME cases applies to this investigation.

Although Wuxi Suntech argues that the application of CVD law in this case unlawfully subjected it to double jeopardy and jeopardized its due process rights, and, thus, the decisions in this case should have been based on the Act as it stood before the new law, we disagree. Public Law 112-99 simply reaffirmed the Department's obligation to impose CVDs on merchandise from countries designated as NME countries. This clarification did not change the law. Any suggestion by Wuxi Suntech that it was unaware that its product may be simultaneously subject to ADs and CVDs is belied by the Department's application of the CVD law to subsidized imports from the PRC since 2006.

Even if Public Law 112-99 constitutes legislation with retroactive effect, it nevertheless is constitutional. According to the Supreme Court, "{i}t is now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way."[187] The Supreme Court has been "clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations."[188] "This is true even though the effect of the legislation is to impose a new duty or liability based on past acts."[189]

The only constitutional requirement for a retroactive statute is that there be "a legitimate legislative purpose furthered by rational means."[190] Public Law 112-99 has a legitimate legislative purpose, which is, among other aims, to reaffirm the Department's authority to apply the CVD law to NME countries. The means chosen by Congress are rational because Congress wanted to ensure that, among other things, domestic producers and consumers would be free to obtain relief from unfairly subsidized goods from NME countries.[191] The Supreme Court regularly has sustained retroactive laws against due process challenges.[192]

As for the suggestion that Public Law 112-99 created some sort of "special rule" because of the different effective dates in the legislation, such concerns are unfounded. First, Trina's assertion that the CAFC upheld a challenge to the constitutionality of Public Law 112-99 is incorrect. In vacating *GPX 2009* and its own earlier decision, the CAFC merely recognized that this particular

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[185] *See GPX CAFC*, 678 F.3d at 1311.
[186] *See* Public Law 112-99, 126 Stat. 265 § 1(b).
[187] *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).
[188] *See id.*, 428 U.S. at 16.
[189] *See id.*
[190] *See General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (*General Motors*) (citing *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (*Pension Benefit*)).
[191] *See, e.g.*, 158 Cong. Rec. H1167 (daily ed. March 6, 2012) (statement of Rep. Camp).
[192] *See General Motors*, 503 U.S. at 191-92 (finding that the retroactive statute met the standard of "a legitimate legislative purpose furthered by rational means"); *Pension Benefit*, 467 U.S. at 729 (upholding the retroactive statute against due process challenge and explaining that "{p}rovided that the retroactive application of a statue is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches").

constitutional issue raised by the parties was a matter of first impression that should first be considered by the CIT.[193] For that reason, the CAFC remanded without considering the merits of the issue.[194] Second, the Supreme Court "has long held that a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."[195] That requirement is satisfied here. As evidenced by the legislative history, the provision of Public Law 112-99 addressing overlapping remedies was adopted, in part, to bring the United States into compliance with its WTO obligations.[196] Given the statutory scheme for implementation of adverse WTO decisions,[197] it was entirely reasonable for Congress to decline to upset the finality of already-completed administrative determinations or to impose new obligations in administrative proceedings already in progress by requiring the Department to make adjustments not necessary to bring the United States into compliance with its WTO obligations. Therefore, we disagree with Wuxi Suntech and the GOC that Public Law 112-99 suffers from constitutional infirmities.

Further, the Department disagrees with respondents and the GOC that concurrent application of AD and CVD NME methodologies necessarily results in a double-remedy. *GPX 2009* did not find a double remedy necessarily occurs through concurrent application of the CVD law and AD NME methodology. Rather, *GPX 2009* held that the "potential" for such double-counting may exist. The finding of a "potential" for double-counting in the *GPX 2009* decision does not mean that the Department must make an adjustment to its dumping calculations in this AD investigation. The SAA places the burden on the respondent to demonstrate the appropriateness of any adjustment that benefits the respondent.[198] In this case, the GOC makes a failed attempt to demonstrate that there is an actual double remedy for the solar cells input, polysilicon, when the Department preliminarily determined that polysilicon was provided on a less-than-adequate-remuneration basis in the companion CVD investigation. The GOC does not provide any actual costs or prices but instead makes general theoretical arguments about the impact of this subsidy. Therefore, the GOC has not provided any evidence demonstrating how the CVD the Department found on polysilicon in the companion CVD case lowered NV in this AD investigation and, thus, has not met the burden to demonstrate the appropriateness of adjusting for overlapping remedies.

Although Public Law 112-99 instructs the Department to, where possible, reduce the AD calculated in an AD proceeding by the estimated extent to which a countervailable, non-export subsidy exists and is demonstrated to reduce the average price of imports, this provision applies to investigations initiated on or after March 13, 2012, which is not the case with this investigation.[199] AD and CVD law are separate regimes that provide separate remedies for distinct unfair trade practices. The CVD law provides for the imposition of duties to offset

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[193] *See GPX CAFC*, 678 F.3d at 1312-13.
[194] *See id.*, 678 F.3d at 1313.
[195] *See Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012) (internal quotes and citations omitted).
[196] *See, e.g.*, 158 Cong. Rec. at H1167–68, H1171 (daily ed. March 6, 2012) (statements of Representatives Camp, Brady, and Jackson Lee).
[197] *See* 19 U.S.C. 3533, 3538.
[198] *See SAA* at 829; 19 CFR 351. 401(b)(1) ("The interested party that is in possession of relevant information has the burden of establishing to the satisfaction of the Secretary the amount and nature of a particular adjustment."); *Fujitsu General Limited v. United States*, 88 F. 3d at 1034 (CAFC 1996) (explaining that a party seeking an adjustment bears the burden of proving the entitlement to the adjustment).
[199] *See* Public Law 112-99, 126 Stat. 266.

foreign government subsidies. Such subsidies may be countervailable regardless of whether they have any effect on the price of either the merchandise sold in the home market or the merchandise exported to the United States. AD duties are imposed to offset the extent to which foreign merchandise is sold in the United States at prices below its fair value. Prior to enactment of Public Law 112-99, the only point at which the Act requires the Department to reconcile these separate remedies as far as this case is concerned is in the adjustment of AD duties to offset export subsidies. Because neither AD nor CVD duties are concerned with economic distortion, as such, but are simply remedial duties calculated according to the detailed specifications of the Act, it follows that no overall economic distortion cap for concurrent proceedings can be distilled from the Act. As stated by the CAFC in GPX CAFC, "We conclude that the statute prior to the enactment of the new legislation did not impose a restriction on Commerce's imposition of countervailing duties on goods imported by NME countries to account for double counting."[200] Thus, for this case, with the exception of section 772(c)(1)(C) of the Act, AD duties are calculated the same way regardless of whether there is a parallel CVD proceeding.

The GOC and Trina also mistakenly rely on the Appellate Body Report (WTO 2011) as support that the WTO has determined that the application of CVDs to the PRC while using NME methodology is contrary to the United States' WTO obligations. As an initial matter, the CAFC has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the URAA.[201] Congress adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports.[202] As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute.[203] Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports.[204] For this reason, the Appellate Body Report (WTO 2011) does not establish whether the Department's application of AD NME methodology and CVDs in concurrent investigations results in an application of double remedies, or whether such methodology is consistent with U.S. law. Moreover, the Appellate Body Report (WTO 2011) only found that "double remedies would likely result from the concurrent application of anti-dumping duties calculated on the basis of an NME methodology and countervailing duties" and stated that it was "not convinced that double remedies necessarily result in every instance of such concurrent application of duties."[205] In numerous prior determinations, including those subject to the WTO DS 379 dispute, the Department has similarly questioned the notion that concurrent application

[200] *See* GPX CAFC, 678 F.3d at 1312.
[201] *See* URAA at 4809 affirmed in *Coms Staal BV v. United States*, 395 F. 3d at 1347-49.
[202] *See* 19 USC 3538. Pursuant to this statutory scheme, the Department has taken the appropriate steps to comply with the Appellate Body Report (WTO 2011) in the limited sets of investigations at issue in that dispute. *See Section 129 Implementation in Several Cases*, 77 FR 52683 (August 30, 2012).
[203] *See* 19 USC 3538(b)(4) (implementation of WTO reports is discretionary).
[204] *See* 19 USC 3533(g); see *also, e.g.*, Antidumping Proceedings (December 27, 2006). With respect to respondent's argument that the Department's actions are inconsistent with Article 19. 3 of the SCM Agreement, the Department disagrees for the reasons discussed above and further notes that a purported inconsistency with the SCM Agreement is not a permitted basis on which to challenge the Department's actions under US law. *See* 19 USC 3512(c)(1).
[205] *See* Appellate Body Report United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB/R (adopted March 11, 2011), at para 599.

of NME ADs and CVDs automatically results in a 100 percent overlap of the two remedies, particularly in the absence of supporting evidence.[206]

We disagree with the GOC's argument that the NME methodology for calculating NV does not take into account the lowered production costs resulting from domestic subsidies. First, put simply, while NME subsidies may not directly reduce the factor values used to calculate NV in an NME proceeding, such subsidies may easily affect the quantity of factors consumed by the NME producer in manufacturing the product under investigation. The simplest example would be where a domestic subsidy in an NME country enables an investigated producer to purchase more efficient equipment, lowering its consumption of labor, raw materials, or energy. When the surrogate factor values are multiplied by the NME producer's lower factor quantities, they result in lower NV and, hence, lower dumping margins. Any reduction in factor usage by NME producers would reduce normal value in a second manner, because the final factor values are also used to calculate the amounts to be added to normal value for overhead, general and administrative expenses, and profit.

Second, the GOC's economic theory rests upon the mistaken presumption that normal value calculated under the NME AD methodology reflects subsidy-free surrogate values. Although Congress instructed the Department to avoid using as surrogate values "any prices which it has reason to believe or suspect may be dumped or subsidized prices," Congress specifically cautioned that "the conferees do not intend for Commerce to conduct a formal investigation to ensure that such prices are not dumped or subsidized, but rather intend that Commerce base its decision on information generally available to it at that time."[207] Accordingly, the Department conducts no formal investigation and, consequently, makes no determination that the factor values to be used are not subsidized. Rather, the Department relies upon generally available information, such as existing countervailing duty orders, to determine whether factor values from certain countries are appropriate.[208]

Third, in determining normal value in NME cases, the Department does not exclusively use factor quantities in the NME countries, valued in the surrogate, market economy country. Factor values may also be based on the prices of inputs imported into the PRC from market economy countries.[209] Given that the input suppliers in these countries are often competing with PRC suppliers of those same inputs, it is by no means safe to assume that those prices are not lower as the result of competing with subsidized products in the PRC.

Lastly, in at least some cases, the NME exports of the product under investigation will account for a large enough share of the world market to influence prices in world markets. In such cases, particularly where the industry is export-oriented or has excess capacity, subsidies could increase output and exports from the PRC, which, in turn, would reduce the prices of the good in question

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[206] *See* Final Determinations: Section 129 Proceedings Pursuant to the WTO Appellate Body's Findings in WTO DS 379 Regarding the Antidumping and Countervailing Duty Investigations of Certain New Pneumatic Off-the-Road Tires from the People's Republic of China, p. 16.

[207] *See* Omnibus Trade and Competitiveness Act of 1988, House Conference Report No. 100-576, 1988 U.S.C.C.A.N. 1547, 1623 (emphasis added).

[208] *See, e.g., OTR Tires from the PRC Preliminary Determination*, unchanged in *OTR Tires from the PRC Final Determination*

[209] *See, e.g., id*., at 9288, unchanged in OTR Tires/PRC Final Determination (July 15, 2008).

in world markets. These lower prices would reduce profits for producers selling in these markets, which, in turn, would reduce the profit rates the Department derives from their financial statements to add to normal value.

Even assuming for the sake of argument that normal values, by themselves, could create a double remedy, the GOC's theory about NME normal values – that they necessarily are high enough to cover the full value of any subsidies provided within the PRC – is unsound. The GOC's argument amounts to the assertion that NME normal value necessarily equals at least the sum of: (1) the cost of production that the PRC producers would have had, if the PRC had been a market economy country at the time of the investigation; plus (2) the amount by which those costs would have been lowered by the subsidies to those producers. The theory that NME normal value necessarily offsets the amount by which normal value in a "market economy China" would have been lowered by subsidies is based on the assumption that NME normal values are completely unaffected by subsidies. This is simply not true.

Comment 14: Collection of Antidumping Duties

Yingli

- The Department should clearly instruct CBP that, where the value of solar cells in an imported module may be separately ascertained, duties should be collected only on the value of those cells, and not on the value of the entire module.[210] In its substantial transformation analysis, the Department stated that solar cells are the essential component of solar modules/panels and that assembly into modules does not transform solar cells such that it changes the country of origin.[211]

- CBP regulations[212] and supporting case law[213] allow for the application of different duty rates to commingled merchandise if the constituent sources can be readily ascertained.

Petitioner

- The Department should make clear in its instructions to CBP that duties are to be collected on both solar cells and modules from the PRC. The current scope of the investigation is not limited to cells. *DRAMS from Taiwan* illustrates that it is the Department's practice to impose duties on the entire product rather than components or subcomponents contained therein.[214]

Department's Position: As noted in Comment 1, *supra*, the Department has found that modules, laminates, and panels produced in a third country from solar cells produced in the PRC are covered by this investigation and the companion CVD investigation. The Department reached this conclusion based on its country-of-origin analysis, which found that the solar cell

[210] *See* Yingli's July 30 2012, Case Brief at 24-25 for Yingli's proposed CBP instruction language.
[211] *See* Scope Clarification Memorandum at 6-8.
[212] *See* 19 CFR 152.13(b).
[213] *See U.S. Industrial Chemicals v. United States*, 29 Cust. Ct. 131, 151 (Cust. Ct. 1952). *See also Coastal Marketing, Inc. v. United States*, 646 F. Supp 255, 260 (CIT 1986).
[214] *See* Taiwan DRAMS cash deposit instructions (July 8, 1999), *available at* http://addcvd.cbp.gov/detail.asp?dociD=918911l&ac=pr.

defines the module/panel.[215] Accordingly, because the Department has determined that modules containing solar cells produced in the PRC are products of the PRC, regardless of where the module assembly process occurs, the module in its entirety is subject to the scope of these investigations. For this reason, the Department has not instructed CBP to limit its assessment of AD duties to the value of solar cells within the subject modules.

Comment 15: Surrogate Value for Quartz Crucibles

Petitioner

- The Department should value quartz crucibles using HTS 8514.90.90000 ("Other" under "Parts For Industrial Or Laboratory Electric Furnaces And Ovens; Parts For Industrial Or Laboratory Induction Or Dielectric Heating Equipment, Nesoi"). Manufacturer data submitted by Trina confirms that crucibles are used in high temperature environments for melting materials and crystal growth. The suggested HTS subheading, 8514.90.90000, covers crucibles and containers used in ovens for melting materials at high temperatures, which describes the production process used in melting polysilicon crystals. The far broader HTS subheading 6903.90 ("Refractory Nonconstructional Ceramic Goods (Retorts, Muffles, Nozzles, Plugs, Etc.), Nesoi") which was used in the *Preliminary Determination* to value both respondents' crucibles covers a wide range of goods regardless of use.[216]
- CBP rulings (N167595 and J82760) indicate that crucibles used in melting and growing crystals and boules, and a crucible used in a furnace where a molten ingredient is "pulled from the melt", are classified under HTS 8514.90.[217]
- There is no authoritative weight behind trade data services such as Zepol which Trina submitted to support the HTS subcategory that it advocates using as an SV. Multiple companies can identify the same crucible under different HTS categories. Trade data services generally repeat information that was listed on a ship's bill of lading, and there is no requirement that the data be accurate, that the listed tariff classification be correct, or for verification of the data.[218]
- Wuxi Suntech did not explain why the HTS category that was used to value its mono and multi-silicon crucibles in the *Preliminary Determination* was inappropriate; therefore, the Department should reject its unsubstantiated argument for valuing its crucibles using the same HTS category that was used to value Trina's crucibles.

Wuxi Suntech and Trina

- Thai HTS heading 6903 specifically covers crucibles ("crucible" is included in the heading) and the explanatory notes to this heading state that in many cases these products are not permanent fixtures.[219] Wuxi Suntech's crucibles are consumed and destroyed

[215] *See* Scope Clarification Memorandum at 7.
[216] The Department valued Wuxi Suntech's crucibles based on HTS category 6903.90. Trina's crucibles were valued using HTS category 6903.20.
[217] *See* Letter from Petitioner to the Department, regarding "Crystalline Silicon Photovoltaic Cells, Whether Or Not Assembled Into Modules, from the People's Republic of China: Submission of Publicly Available Information to Value Factors of Production for the Final Determination," dated July 9, 2012, at Exhibit 2.
[218] The Zepol data identifies ceramic crucibles under HTS category 6903.90. *See* Trina's July 26, 2012, Rebuttal Surrogate Value submission at Exhibit 4.
[219] *See id.*, at Exhibit 2.

after one melt, and Trina's quartz crucible cannot be reused; thus they are not "parts of industrial furnaces and ovens" which is the description for HTS 8514.90, the HTS category advocated by Petitioner.

- The CBP rulings provided by Petitioner cover crucibles made from iridium and molybdenum which are very different from quartz/ceramic crucibles. However, CBP ruling 866527 classified "ceramic evaporation boats" under HTSUS 6903.90.00 which, based on a picture provided by Wuxi Suntech, appear to be very similar to Wuxi Suntech's crucibles.
- The Department should value Wuxi Suntech's crucibles using Thai HTS 6903.20, which is the category used to value Trina's crucibles, because it is more accurate than HTS 6903.90.
- While Zepol data, which identify crucibles under HTS category 6903.90, are not definitive; Petitioner has not provided evidence indicating that disposable crucibles should be classified under HTS 8514.90.9000.

Department's Position: We have valued the respondents' crucibles using imports under HTS category 6903 because this category is more specific to the inputs than HTS category 8514.90.90000.[220] Both respondents describe the inputs in question as crucibles and state that the inputs are capable of withstanding high temperatures, and thus they are refractory items.[221] HTS category 6903 explicitly covers refractory items and crucibles. In addition, Trina reported that its quartz crucible primarily consists of SiO2 with some alumina.[222] Wuxi Suntech reported that it uses poly- and mono-crucibles, which are made of silica materials.[223] HTS category 6903 covers ceramic goods, which would include the silica-based crucibles used by both respondents because ceramic goods are made from non-metallic material such as silica. Additionally, the explanatory notes to HTS category 6903 state that in many cases, the refractory products are not permanent fixtures. Both respondents have stated that their crucibles are used only once.[224]

Petitioner and respondents have placed on the record CBP rulings and additional customs information indicating that respondents' crucibles could be classified under either HTS category 6903 or HTS category 8514. The explanatory notes for HTS category 8514.90 state that this category covers parts for industrial or laboratory electric furnaces and ovens and lists examples including armatures, doors, inspection holes, panels, domes, electrode holders and metal electrodes. Because respondents' crucibles are not like many of these items which are used in a furnace but are specifically identified under HTS category 6903, we find that HTS category 6903 is the more appropriate surrogate source with which to value crucibles.

In the *Preliminary Determination*, we valued Trina's quartz crucible using imports under HTS category 6903.20 ("Containing By Weight More Than 50% Of Alumina (Ai2O3) Or Of A

[220] We note that interested party comments regarding the appropriate SV for this material input are limited to specificity. That is, parties have not commented on contemporaneity, the inclusion or exclusion of taxes and import duties, public availability, *etc*. For an explanation of the Department's practice regarding SV selection, *see* Comment 39: Surrogate Value for PEG, *infra*.
[221] *See* Trina's April 18, 2012 submission at Exhibit 3SD-32; *see also* See Wuxi Suntech's April 20, 2012 submission at 2SD-28.
[222] *See* Trina's April 18, 2012 submission at 8.
[223] See Wuxi Suntech's April 20, 2012 submission at 2SD-28.
[224] *See* Trina China Verification Report at 72.

Mixture Or Compound Of Alumina And Of Silica (Sio2)"), while we valued Wuxi Suntech's crucibles using imports under HTS category 6903.90. The difference between the two categories is that HTS category 6903.20 covers items which consist of alumina. Because Wuxi Suntech has not indicated that its crucibles contain alumina, we have continued to value Wuxi Suntech's crucibles under HTS category 6903.90. Trina reported that its crucibles contain alumina; thus we have continued to value its crucible using HTS category 6903.20.

Comment 16: Surrogate Value for Aluminum Frames

Petitioner

- The Department should value finished aluminum frames using Thai HTS category 7616.99 rather than Thai HTS category 7610.10 because: (1) imports under Thai HTS category 7616.99 are in commercial quantities at prices that are commercially reasonable, and constitute the best information on the record for valuing frames; (2) Wuxi Suntech obtained a CBP ruling only three months prior to the POI for the aluminum frames that it imported into the United States for use in solar modules in which CBP found that the frames should be classified under HTS category 7616.99;[225] and (3) HTS category 7610.10 covers many items unrelated to aluminum frames; items that are not used by respondents.
- The Department should reject claims that Thai import prices under HTS category 7616.99 are aberrationally high[226] because the Department's test of whether a value is aberrational is not limited to the AUV. In *Barium Carbonate from the PRC*, the Department did not reject data based on a high AUV but rejected it because the quantity was insignificantly small.[227]
- Respondents' descriptions of their aluminum inputs and recommendations of HTS categories changed numerous times during the course of the investigation in an effort to manipulate the Department into using a low SV.
- Not only are the CBP rulings concerning HTS category 7604 (which were provided by Trina) less specific to the inputs used by the respondents than the CBP ruling supporting using HTS category 7616.99 (the ruling for Wuxi Suntech), but these CBP rulings also demonstrate that HTS category 7604 consists of only unfinished aluminum frames, while the frames used by respondents are finished.[228]

Trina

- Trina's aluminum frames consist of alloyed aluminum profiles, and thus these frames should be classified under Thai HTS category 7604.29.90001, which covers aluminum alloy profiles (not hollows). Thai HTS category 7610.10 should not be used to value aluminum frames because this category covers specific items related to doors and windows, rather than the type of aluminum used in solar panel frames.

[225] *See* Petitioner's Case Brief at Exhibit 4.
[226] *See* Letter from Wuxi Suntech to the Department, regarding "Aluminum Frame Letter," dated April 25, 2012.
[227] *See Barium Carbonate from the PRC* at *68 FR* 12668 (March 17, 2003). Petitioner also cites *Prestressed Concrete Steel Wire Strand From the PRC*, and accompanying Issues and Decision Memorandum at Comment 1B, in which the Department stated that "the existence of higher prices alone does not necessarily indicate that price data are distorted or misrepresented."
[228] *See* Trina's July 9, 2012, Surrogate Value submission at Exhibit 3.

- CBP rulings have classified aluminum rails which are extruded, anodized and cut to length under HTS category 7604.29. The verification report covering Trina describes its aluminum frames as extruded, anodized and cut to length.[229]
- HTS category 7616.99 is a basket category covering ferrules for use in the manufacture of pencils, round slugs, bobbins, spools, reels and similar supports for textile yarn, spouts and cups for latex collection, and other similar aluminum articles, which are not comparable with aluminum frames used to make solar modules. While this category may also cover aluminum profiles not elsewhere specified, a CIT ruling states that the "[c]lassification of imported merchandise in a 'basket' provision is appropriate only when there is no tariff category that covers the merchandise more specifically."[230] Because aluminum alloyed profiles are specified under HTS category 7604.29.90001, they should not be included under HTS category 7616.99.
- The AUV of for Thai HTS category 7616.99 argued for by Petitioner of approximately $27 per kg is aberrational. Wuxi Suntech's U.S. affiliate's purchases of this item were between $4.342 and $4.567 per kg shortly after the POI.

Wuxi Suntech

- The Department should consider whether Thai import data for HTS 7610.10 are aberrational. In its initiation of *Barium Carbonate from the PRC*, the Department accepted alternative SV data when a party claimed that import data values were aberrationally high.[231] Record evidence of import prices paid by Wuxi Suntech's U.S. affiliate for aluminum frames of between $4.342 and $4.567 per kg shortly after the POI should be considered as an accurate ME benchmark in selecting an appropriate SV for the final determination.[232]

Department's Position: We have valued Trina's and Wuxi Suntech's aluminum frames using Thai HTS categories covering alloyed aluminum profiles.[233] Trina described its aluminum frames as an "aluminum profile made frame,"[234] but its "aluminum frames do not consist of hollow profiles."[235] At verification, Trina identified its aluminum frame as being made from aluminum alloy.[236] The description for HTS category 7604.29.90001 ("aluminum alloy . . . profiles, other than hollow profiles . . . other profiles") is consistent with Trina's description of its aluminum frames. Wuxi Suntech described its aluminum frames as hollow profiles made of alloyed steel.[237] The description for HTS category 7604.21 ("aluminum alloy hollow profiles") is consistent with Wuxi Suntech's description of its aluminum frames. Although Petitioner claims respondents' descriptions of their frames and recommended HTS categories for valuing

[229] *See* Trina China Verification Report at 69 and Exhibit 74.
[230] *See Apex Universal, Inc. v. United States*, 22 CIT 465, 471, 1998 WL 272980, *6 (CIT 1998).
[231] *See Barium Carbonate From the PRC Initiation*, 67 FR 65534, 65536 (October 25, 2002).
[232] *See* Wuxi Suntech's April 25, 2012 submission at Exhibit 1.
[233] We note that interested party comments regarding the appropriate SV for this material input are limited to specificity. That is, parties have not commented on contemporaneity, the inclusion or exclusion of taxes and import duties, public availability, *etc*. For an explanation of the Department's practice regarding SV selection, *see* Comment 39: Surrogate Value for PEG, *infra*.
[234] *See* Trina's April 18, 2012 submission at Exhibit 3SD-1.
[235] *See* Trina's April 18, 2012 submission at its response to question 2.
[236] *See* Trina China Verification Report at Exhibit 74.
[237] *See* Wuxi Suntech's April 25, 2012 submission at its responses to questions 35-36.

the frames changed numerous times, both respondents have consistently described their aluminum frames as alloyed aluminum profiles. Petitioner has not raised anything, and the Department did not find anything on the record or during verification to call into question the accuracy of both respondents' descriptions of their aluminum frames. Therefore, we have valued Trina's alloyed aluminum non-hollow profiles using HTS category 7604.29.90001, and valued Wuxi Suntech's alloyed aluminum hollow profiles with HTS category 7604.21. While HTS categories 7604.21 and 7604.29.90001 are basket categories covering alloyed aluminum profiles not specified elsewhere in the HTS, the types of aluminum that Trina and Wuxi Suntech use to assemble aluminum frames are not specified elsewhere in the Thai HTS and, thus, the items are properly classified under these basket categories. We agree that HTS category 7610.10 ("aluminum doors, windows and their frames and thresholds for doors") does not specify the types of aluminum frames used in solar cell modules.

Although parties submitted CBP rulings to support their positions, the Department is not bound by rulings for U.S. imports when selecting import values from surrogate countries, but instead must select a value using the best available information. Although CBP ruled that Wuxi Suntech's frames should be classified under HTS category 7616.99 (Articles Of Aluminum, N.E.S.O.I.), this HTS category is an "other" category which would only contain other articles of aluminum not already identified elsewhere. As stated above, alloyed aluminum profiles are identified under HTS category 7604. Further, HTS category 7616 covers a number of inputs, such as ferrules used in pencils, slugs, bobbins, spools, reels, spouts, cups, handles for travelling bags, cigarette cases or boxes, and blinds, which are dissimilar to the aluminum frames used by respondents. Additionally, there was no explanation in the CBP ruling obtained by Wuxi Suntech as to why the frames should be classified under HTS category 7616.99. Without such an explanation, we were not able to weigh the ruling against record evidence supporting the use of a HTS category different from the one identified in the ruling. Finally, Petitioner's assertion that respondents' aluminum frames are finished articles is not relevant to our decision. While CBP rulings on the record supporting the use of HTS category 7604 concern unfinished aluminum articles, this does not necessarily mean that HTS category 7604 would only contain unfinished aluminum profiles. While other HTS categories identify whether they contain finished or unfinished items, HTS category 7604 does not specify whether it contains finished or unfinished aluminum profiles.

Comment 17: Surrogate Value for Tin Ribbon

Petitioner

- The Department should value respondents' tin ribbons using imports under HTS category 7409.19.00000 ("Other," under "Plates, Sheets And Strip Of Refined Copper, Over 0.15 Mm Thick, …") rather than imports under HTS category 7408 ("Copper Wire") because the tin ribbons are flat strips of tinned copper several times wider than they are thick.
- Both respondents describe their inputs as copper ribbons. Trina states that its tin ribbon is not a "wire or cable"[238] and a photograph of the input is consistent with it being a ribbon rather than a wire.[239] Wuxi Suntech stated that its copper tin ribbon has a width of

[238] *See* Trina's March 28, 2012 submission at 4.
[239] *See id.* at Exhibit SV-6.

1.8 mm and a thickness of 0.20 mm.[240] Additionally, Wuxi Suntech described its tinned copper ribbons as having "oxygen-free copper," and "tin-lead-silver alloy."[241] If the Department continues to deem this input as a "wire," it should value Wuxi Suntech's input as an alloyed, rather than a refined, copper item.

Wuxi Suntech and Trina

- The HTS category used to value Trina's tin ribbons in the *Preliminary Determination* (*i.e.*, HTS category 7408.11 "Wire Of Refined Copper, With A Maximum Cross Sectional Dimension Over 6 Mm (.23 In.)") accurately describes the input and is consistent with information found during verification. A specification sheet from Trina's largest tin ribbon supplier refers to the input as a "wire", and indicates that its thickness ranged from 0.04 mm to 0.60 mm with the bottom end of this range less than the minimum thickness for HTS 7409 (*i.e.*, 0.15 mm).[242]
- The Department used HTS category 7408.29 ("Wire Of Copper Alloys, Nesoi") to value Wuxi Suntech's tinned copper ribbons in the *Preliminary Determination*. The HTS category used to value Trina's tin ribbon, HTS category 7408.11, in the *Preliminary Determination* better describes Wuxi Suntech's tinned copper ribbon.

Department's Position: We have determined that the best available information for valuing both respondents' tin ribbon is Thai HTS category 7409.19 ("Other," under "Plates, Sheets And Strip Of Refined Copper, Over 0.15 Mm Thick, …") because both respondents described the input as a ribbon that is wider than it is thick which is consistent with copper strips rather than copper wire.[243] Although one of Trina's specification sheets referred to the tin ribbon as a wire, the dimensions in the specification sheet and the bill of materials indicated that the ribbon was several times wider than it was thick which is more consistent with the description of a strip. Both Trina's and Wuxi Suntech's bills of material for solar modules indicate that their tin ribbons are several times wider than they are thick, and thus would be correctly classified under HTS category 7409.[244] Moreover, Trina stated that its tin ribbon is a flat copper ribbon covered with tin, and that it is neither a wire nor a cable.[245] At verification, we confirmed that Trina's tin ribbons consist of refined copper.[246] Wuxi Suntech stated that the cross section of its tin ribbon is 1.8 mm in width and 0.2 mm in thickness. Wuxi Suntech also noted that its tin ribbon is not a tin alloy but rather a copper ribbon galvanized with tin alloy.[247] Wuxi Suntech never described its tin ribbon as a wire, and the record does not clearly indicate whether its tinned copper ribbon is made of refined copper. We note, however, that the first characteristic used in Thailand's HTS

[240] *See* Wuxi Suntech's April 25, 2012 submission at 15.
[241] *See* Letter from Wuxi Suntech to the Department, regarding, "Crystalline Silicon Photovoltaic ("CSPV") Cells from the People's Republic of China: 2nd Supplemental Section D Questionnaire Response (Question 1) – Wuxi Suntech Power Co., Ltd.," dated March 19, 2012, at Exhibit 1.
[242] *See* Trina China Verification Report at Exhibit 71.
[243] We note that interested party comments regarding the appropriate SV for this material input are limited to specificity. That is, parties have not commented on contemporaneity, the inclusion or exclusion of taxes and import duties, public availability, *etc*. For an explanation of the Department's practice regarding SV selection, *see* Comment 39: Surrogate Value for PEG, *infra*.
[244] *See* Trina China Verification Report at Exhibit 79. *See also* Wuxi Suntech PRC Verification Report at Exhibit 5 and Wuxi Suntech FMG Verification Report at Exhibit 13.
[245] *See* Trina's March 28, 2012 submission at 4.
[246] *See* Trina China Verification Report at 68.
[247] *See* Wuxi Suntech's April 25, 2012 submission at 15.

hierarchy to classify copper items is its shape (*i.e.*, wire or strip). Because both Trina's and Wuxi Suntech's tin ribbons are strips rather than wires, and the only potential Thai data on the record for valuing this input are HTS categories 7409.19 (which covers strips), and two subcategories under 7408, (which cover wires), 7408.11, and 7408.29, we have determined that HTS category 7409.19, which covers copper strips, is the best available information for valuing both respondents' tin ribbons.

Comment 18: Surrogate Value for Glass Plate for Wafer Slicing

Trina

- The Department incorrectly valued glass plate for wafer slicing using HTS 7020.00.90-000, which covers "other articles of glass" and describes finished products such as articles of husbandry, vacuum flasks, and door knobs. Instead, the Department should classify Trina's glass plate under HTS 7005.29.90-090, which covers float glass. Trina's glass plate is essentially a very basic float glass, not complicated in nature but the most basic type of glass.

Wuxi Suntech

- The Department should value glass plate using the Thai HTS category for "Toughened (Tempered) Safety Glass, Not Suitable For Incorporation In Vehicles, Aircraft, Spacecraft Or Vessels, Other" (HTS 7007.19.9000) rather than HTS 7020.00.90-000.
- The Department verified that the glass plate used by Wuxi Suntech is "normal ground glass" cut into a rectangular shape, and is not a formed article.[248]
- Explanatory Notes for HTS heading 7020 indicate that the category covers specifically shaped items of glass, such as pots and knobs.[249]

No other interested party commented on this issue.

Department's Position: We agree with Trina. Trina described the glass at issue as "Glass plate for wafer slicing, containing silicon dioxide with purity of 50%."[250] Although Trina initially recommended valuing its glass plate using Indian HTS categories 7020.0019 or 7020.0090 ("Other Articles of Glass, Nesoi") it subsequently suggested using Thai HTS 7005.29.90090 ("Other" under "Float Glass and Surface Ground or Polished Glass, In Nonwired Sheets, Nesoi").[251] At verification, the Department found that Trina's glass plate was "flat, rectangular, and translucent in appearance," and ranged from 6 inches by 6 inches, to 2.5 feet by 6 inches in size.[252] The Department verified that Trina's glass plate had a rough texture, like ground glass, and that it was in sheet form, not worked into other shapes. Based on email correspondence provided at verification, Trina's glass plate is also referred to as "normal" glass.[253] Thai HTS category 7005 covers "Float Glass and Surface Ground or Polished Glass, in Sheets, Whether or

[248] *See* Wuxi Suntech PRC Verification Report Reitech Verification Exhibit 4.
[249] *See* Trina's July 9, 2012, submission.
[250] *See* Trina's April 18, 2012, submission at Exhibit 3SD-1.
[251] *See* Letter from Trina to the Department, regarding "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China; Comments Regarding The Use of India or Thailand As Potential Surrogate Countries," dated April 19, 2012, at Exhibit 5.
[252] *See* Trina China Verification Report at 68.
[253] *See id.*, at 67.

not Having an Absorbent, Reflecting or Non-reflecting Layer, but not Otherwise Worked." Because, most flat glass, such as Trina's, is considered simple float glass, which is explicitly included in HTS category 7005, and because Trina's glass is surface ground and is a glass plate, and is not wired, we have determined that Thai HTS category 7005.29.90090 is the best information on the record for valuing Trina's glass plate because it is the most specific value on the record to the input used by Trina, and it satisfies our other criteria for selecting SVs (*i.e.*, country-wide price average, contemporaneous with the POI, net of taxes and import duties, and based on publicly available data from the primary surrogate country).

On the other hand, we disagree with Wuxi Suntech's suggested value for its glass plate. Records examined at verification indicate that Wuxi Suntech's glass plate is "ground glass" that is rectangular in shape. [254] While Wuxi Suntech argues that the Department should value this input using a Thai HTS classification for tempered glass, it cites no record evidence, nor has the Department found any record evidence, indicating that the glass plate is tempered glass. Since the record indicates that Wuxi Suntech's glass plate is ground glass and Thai HTS category 7005.29.90090 ("Float Glass and Surface Ground or Polished Glass, In Non-wired Sheets, Nesoi") covers ground glass, we have used this HTS category to value Wuxi Suntech's glass plates. Moreover, this SV satisfies our other criteria for selecting SVs (*i.e.*, country-wide price average, contemporaneous with the POI, net of taxes and import duties, and based on publicly available data from the primary surrogate country).[255]

ISSUES RELATING TO TRINA

Comment 19: Unreported FOPs by Cell Suppliers and Tollers

Petitioner

- The Department should apply partial AFA with respect to Trina's failure to cooperate to the best of its ability in supplying the FOPs of its unaffiliated solar cell suppliers and the FOPs for certain tollers.
- Solar cells are both subject merchandise and a significant input in the manufacture of solar panels. Thus, the FOPs of Trina's unaffiliated solar cell suppliers are necessary in order for the Department to satisfy its statutory mandate of calculating the most accurate dumping margins possible. The actual FOPs of tollers are also necessary to calculate an accurate margin.
- In *Certain Steel Nails from the PRC,* the Department recently applied partial AFA with respect to a respondent's failure to provide requested FOP data from its unaffiliated suppliers of nails - subject merchandise.[256] In its decision the Department explained, "it is crucial for suppliers of subject merchandise to provide their own FOP data because suppliers actually provide finished merchandise independently subject to the Order..."[257]

[254] *See* Wuxi Suntech PRC Verification Report at Exhibit ZE4.
[255] We note that interested party comments regarding the appropriate SV for this material input are limited to specificity. That is, parties have not commented on contemporaneity, the inclusion or exclusion of taxes and import duties, public availability, *etc*. For an explanation of the Department's practice regarding SV selection, *see* Comment 39: Surrogate Value for PEG, *infra*.
[256] *See Certain Steel Nails from the PRC,* and accompanying Issues and Decision Memorandum at Comment 12.
[257] *See id.*

Additionally, the Department applied AFA to suppliers failing to report FOPs in *Investigation of Activated Carbon from the PRC*[258] and *Creatine Monohydrate from the PRC.*[259]

- Respondents should report the *actual* factors and consumption rates for materials used to produce subject merchandise, rather than selectively choose what to report based on whether the submission of FOP data is beneficial. Respondents who fail to supply the FOP data of unaffiliated suppliers and tollers will have no incentive to provide this information where use of facts available, rather than AFA, produces a more advantageous result than if the data had been reported.

Trina

- The Department should not apply AFA with respect to the missing FOPs of the unaffiliated solar cell suppliers and the missing FOPs of certain tollers. The quantity of the purchased solar cells and the amount of tolling services provided for which FOPs are missing are not significant. The solar cells provided by suppliers have the same characteristics as Trina's self-produced solar cells.[260] Additionally, the processing performed by the tollers who failed to supply FOPs was also performed by Trina and other tollers. Hence, there are FOPs on the record that could be used in place of the missing FOPs.
- Trina expended significant effort to obtain FOP data from the unaffiliated parties[261] and was able to provide the FOPs of the unaffiliated cell supplier accounting for the largest portion of purchased solar cells.[262]
- Binding legal precedent allows the Department to use facts available here, including using Trina's own FOPs for the missing FOP data. A respondent's inability to provide the information requested by the Department does not automatically trigger an adverse inference if the respondent tried to obtain the information requested, albeit unsuccessfully.[263] In *SKF USA INC.*, the CIT overturned the Department's application of adverse inferences as a result of an unaffiliated supplier's lack of cooperation in providing cost of production data. Specifically, the CIT stated that it "…cannot accept a construction of 19 U.S.C. § 1677e (b) under which the party who suffers the effect of the adverse inference is not the party who failed to cooperate."[264]

Department's Position: We disagree with Petitioner and have continued to use, as facts available, FOP data on the record in place of the unreported FOPs. As we stated in the *Preliminary Determination*, the Department recognizes that it is important for suppliers of subject merchandise to provide their FOP data because these suppliers provide merchandise that is subject to the investigation or order. However, where a respondent has a large number of suppliers, the Department has excused the respondent from reporting FOPs from some of its

[258] *See Investigation of Activated Carbon from the PRC*, and accompanying Issues and Decision Memorandum at Comment 20.
[259] *See Creatine Monohydrate from the PRC.*
[260] *See* Trina's April 10, 2012 submission at 2-4.
[261] *See* Trina's March 9, 2012 submission at Exhibit SD-4.
[262] *See* Trina's April 30, 2012 submission at 1-2.
[263] *See SKF USA INC. at* 1264, 1268 (CIT 2009). *See also Nippon Steel Corp. v. United States*, 337 F.3d 1373 (Fed. Cir. 2003).
[264] *See SKF USA INC.* at 1275, 1277 (CIT 2009).

suppliers. In *Activated Carbon AR1 Prelim*,[265] due to the large number of suppliers, the Department excused the respondent from reporting FOP data for its smallest suppliers. Additionally, the Department has excused a respondent from reporting FOPs from a supplier where the FOP data are of limited quantity and the respondent reports that it produces comparable products.[266] Here, Trina had a number of suppliers and tollers, the impact of the unreported solar cell FOPs and toller FOPs is relatively small,[267] and Trina produced nearly an identical input or performed an identical process.[268] Thus, in the *Preliminary Determination* the Department found it appropriate to apply facts available with respect to the missing FOPs using Trina's FOPs and FOPs reported for the same processing as that performed by non-reporting tollers.[269]

The cases which Petitioner cited to support its position are not on point. In *Certain Steel Nails From the PRC*, the Department noted "that there are no FOP data on the record for the masonry nails produced by Jinchi's unaffiliated supplier."[270] However, as noted above, Trina produced the same solar cells as those supplied by parties not reporting FOPs. In *Investigation of Activated Carbon from the PRC* the respondent failed to identify its suppliers in a timely manner, and only identified some of its suppliers days prior to the preliminary determination.[271] In *Creatine Monohydrate from the PRC* parties were unable to demonstrate that they attempted to contact suppliers or even that the supplier refused to provide the FOP data.[272] The actions of respondents in those cases are not parallel to those of Trina because Trina identified all of its suppliers and tollers in its section A response.[273] Further, Trina informed the Department early in the investigation of its difficulties in obtaining certain FOPs, and identified these non-reporting parties to the Department. Specifically, in its section D response, Trina reported that it requested FOP information from the unaffiliated solar cell suppliers and the toll processors but was unable to obtain FOPs from any of the solar cell suppliers or from some of the tollers.[274] Additionally, Trina documented its ongoing efforts to obtain FOPs from its solar cell suppliers and tollers. Trina reported that it telephoned and sent two letters to each company in which it

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[265] *See Activated Carbon AR1 Prelim*, 74 FR 21317, 21320-21321 (May 7, 2009), unchanged in *Activated Carbon AR1 Final*.
[266] *See id*.
[267] *See* Trina's January 10, 2012 submission at 40-41 and Exhibits A-3 and D-3. *See also* Trina's March 9 submission at 3-4.
[268] *See* Memorandum from Rebecca Pandolph to Chris Marsh regarding, "Unreported Factors of Production" dated May 16, 2012 at 6-7; *see also* Trina's April 18, 2012 "Cell Proxy" submission
[269] *See* Trina's April 18, 2012 submission at 27-28, 30-31.
[270] *See Certain Steel Nails From the PRC*, and accompanying Issues and Decision Memorandum at Comment 12.
[271] *See Investigation of Activated Carbon from the PRC*, and accompanying Issues and Decision Memorandum at Comment 20.
[272] In *Creatine Monohydrate from the PRC*, 64 FR 71104, 71108-71109 (December 20, 1999), the Department stated that "Freemen {the respondent} claims that it made repeated demands for this information on one supplier, and that this supplier responded that it would not participate in the investigation. However, Freemen provided no documentation confirming its efforts, or the supplier's refusals. Similarly, Blue Science claims that its supplier only produced the subject merchandise on a trial basis. This is not an adequate explanation, as the mere cessation of production of a particular product does not mean that relevant records are no longer available. We also emphasize that neither Freemen nor Blue Science provided any additional information regarding their efforts to obtain the requested information upon our application of adverse facts available for these sales in the preliminary determination."
[273] *See* Trina's January 10, 2012 submission at 3-4; *see also* Trina's April 30, 2012 submission at 1-2.
[274] *See* Trina's February 6, 2012 submission at 3-4; *see also* Trina's April 30, 2012 submission at 1-2.

requested their FOP information, and discussed the critical need for each company to fully cooperate.[275] Subsequently, on April 30, 2012, Trina submitted FOP information from one of its unaffiliated solar cell suppliers.[276] Thus, contrary to Petitioner assertions, the record does not demonstrate that Trina failed to act to the best of its ability to obtain FOPs from its tollers and cell suppliers. Petitioner has raised nothing to cause the Department to change its *Preliminary Determination* with regard to the FOPs of Trina's cell suppliers and tollers. Therefore, the Department has continued to apply facts available with respect to the missing FOPs.

Comment 20: Ocean Freight Expenses

Trina

- The Department should value ocean freight using the ME prices paid for the service. All ocean freight services supplied by ME carriers were paid for in U.S. dollars. Also, Trina linked freight expenses incurred for individual shipments to the ME ocean carrier.
- At verification, the Department examined bills of lading which: (1) demonstrated that payments for ocean freight services were made in U.S. dollars, and (2) confirmed the link between each shipment invoiced and the ME carrier that provided the freight service.
- Should the Department choose a surrogate to value ocean freight expenses, it should rely on data from the Descartes Carrier Rate Retrieval Database ("Descartes"), available at www.descartes.com, instead of the APX data used in the *Preliminary Determination*.
- Based on the Department's decisions in *Certain Steel Wheels* and *Diamond Sawblades Preliminary Results*,[277] Descartes is a reliable source. Further, Descartes data on the record for this investigation are contemporaneous, and are for shipments of merchandise either identical or comparable to subject merchandise. The APX data used in the *Preliminary Determination* were in effect outside the POI.

Petitioner

- The Department should continue to use APX data to value ocean freight. Based on the Surrogate Value Memorandum from the *Preliminary Determination* in this investigation, every reason Trina relies upon to recommend Descartes data also applies to APX data.
- The APX data reflect daily pricing from a wide range of carriers. APX prices should not be materially different from Descartes data, given that there have not been significant changes in the prices of ocean freight services.

Department's Position: For the final determination, we have valued ocean freight expenses for U.S. sales using Descartes data. Although Trina paid for certain ocean freight expenses in U.S. dollars, at verification we found that the payments were made to a Chinese freight forwarder and Trina was unable to trace the payment from the Chinese freight forwarder to the ME ocean freight provider.[278] It is the Department's practice to require a respondent to be able to trace

[275] *See* Trina's February 6, 2012 submission at 4 and Exhibit D-2; *see also* Trina's March 9, 2012 submission at 6 and Exhibit SD-4.
[276] *See* Trina's April 30 2012 submission.
[277] *See Certain Steel Wheels Prelim Determination*, 76 FR 67703, 67713 (November 2, 2011); *see also Diamond Sawblades Preliminary Results*, 76 FR 76135, 76140 (December 6, 2011).
[278] *See* Trina China Verification Report at 35-36.

payments made to the ME carrier's PRC agent through to the ME ocean freight carrier.[279] Our practice of requiring adequate evidence of an ME purchase, in particular for ocean freight, has been upheld by the CIT.[280] While Trina may have demonstrated that the payment it made to the Chinese freight forwarder was for the shipment specified in the bill of lading, it did not link the payment to the ME ocean freight provider.[281] This link is necessary to demonstrate that the price paid to the Chinese freight forwarder was set by the ME service provider, rather than by the Chinese freight forwarder or some other NME middleman between the Chinese freight forwarder and the ME ocean freight provider. Accordingly, we have applied an SV to all of Trina's ocean freight costs.

We examined the ocean freight SVs on the record and found that Descartes data and APX data are both publically available, product-specific, and cover a wide range of shipping rates that are reported on a daily basis and which correspond to routes used by respondents. However, the Descartes data are contemporaneous with the POI. The CIT has repeatedly recognized that the Department's practice is to use SVs from a period contemporaneous with the POI.[282] While the Department has relied on Descartes data as an SV for ocean freight in a number of cases;[283] we were unable to access the Descartes website in order to use the data in the *Preliminary Determination*. Because the Descartes data are now on the record and are contemporaneous with the POI, we have used the Descartes data to value ocean freight expenses for U.S. sales.

Comment 21: Errors Identified at Trina U.S.'s Verification

Petitioner

- The Department should correct the denominators used in calculating amounts reported in Trina's inland freight (INLFPWU) and warranty expense (WARRU) fields to account for errors discovered while verifying Trina's U.S. affiliate.

Trina

- It is not necessary to correct the INLFPWU field because Trina submitted an updated U.S. sales database in which it revised the INLFPWU field consistent with the Department's verification findings.[284] Regarding other corrections requested by Petitioner, the Department is under no obligation to correct every single minor error found at verification, and Petitioner has not referenced any statutory or regulatory authority requiring the Department to do so.

Department's Position: In the post-verification U.S. sales database submitted to the Department on July 23, 2012, Trina revised the INLFPWU field to reflect verification findings; thus, it is not necessary to make the correction requested by Petitioner.[285] Moreover, the

[279] *See Wire Decking from the PRC*, and accompanying Issues and Decision Memorandum at Comment 6.
[280] *See e.g., Luoyang Bearing (CIT 2004) Luoyang Bearing Corp. v. United States*, 347 F. Supp. 2d 1326, 1349-50 (CIT 2004).
[281] *See* Trina China Verification Report at 35-36.
[282] *See Hangzhou Spring Washer Co. v. United States, 387 F. Supp. 2d 1236, 2005 Ct. Intl. Trade LEXIS 82* (CIT July 6, 2005).
[283] *See e.g., Utility Scale Wind Towers.*
[284] *See* Trina CEP Verification Report at 20.
[285] *See* Trina CEP Verification Report at 21 and 23.

adjustment to WARRU based on the results of verification did not change the WARRU expense in the dataset which was reported at the fourth decimal place. Additionally, the post-verification sales database used to calculate Trina's margin in the final determination incorporates other minor corrections that we specifically asked Trina to make in its database. Those corrections include corrections to payment dates, supplier distances, packing FOPs, and the reported mode of transportation for one transaction.[286]

Comment 22: Source for Barge Freight

Trina

- The Department should value barge freight using either the Thai or the India barge freight data that Trina placed on the record.

Petitioner

- The Department has already determined that there is a reasonable value for Thai barge freight on the record; thus there is no need to use data from India, a country which is less economically comparable to China.
- Trina's submission regarding Thai barge transportation omitted a page which apparently contains the barge price data. Hence this information is not on the record and thus the Department should reject Trina's argument. Moreover, any citation to the Thai price would represent new factual information and should be stricken from the record.
- Trina's Thai barge information apparently involved a single data point from an undetermined source, involving undetermined parameters, from an undetermined time period. The Department has found media articles providing only a single data point and no description of the methodology used to be inadequate SV sources. In *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam* and *Multilayered Wood Flooring from the PRC*, the Department rejected the proffer of a price quote or SV from sources for which the Department was unaware of the conditions under which the quote or SV originated.[287]

Department's Position: We disagree with Trina. In the *Preliminary Determination* we noted that we were unable to identify an SV explicitly for inland water freight in Thailand or in any other country on the surrogate country list. Thus, we valued inland water freight using the same SV used to value truck freight. The record still lacks Thai inland water freight information because Trina's submission regarding Thai barge transportation does not provide any pricing information for shipments by barge.[288] Furthermore, as in the *Preliminary Determination*, we continue to find that it is inappropriate to value barge freight using an Indian value. India was not among the countries that the Department identified as being economically comparable to the PRC in this investigation (which is one of the requirements for selection as a surrogate country)

[286] *See id.*
[287] *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, and accompanying Issues and Decision Memorandum at Comment II.D; *see also Multilayered Wood Flooring from the PRC*, and accompanying Issues and Decision Memorandum at Comment 24.
[288] *See* Letter from Trina to the Department, regarding "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China; Additional Surrogate Information," dated July 9, 2012 at Exhibit 12.

and the Department has continued to find that Thailand is the appropriate surrogate country for the final determination. The Department has previously used truck freight rates to value barge transportation when it found no acceptable barge rates on the record.[289] Accordingly, we have continued to value barge transportation using the Thai surrogate inland truck rate.

Comment 23: Whether to Apply NME Freight Charges to All of Trina's Sales

Petitioner

- Because the Department discovered at verification that Trina failed to report its use of a domestic barge to transport merchandise for one of its sales, the Department should apply NME freight charges to all sales in Trina's U.S. database where NME freight charges were not reported.

Trina

- There is no unreported inland freight. In its post-verification U.S. sales database, Trina updated the distance information and mode of transportation for the sole sale referenced by Petitioner so that it accurately reflects inland freight. Also, the U.S. sales database accurately reflects inland transportation for all other sales observations.

Department's Position: Trina has corrected the distance and the mode of transportation for the sale in question and we have calculated domestic freight costs for all shipments based on SVs.[290] The Department noted no other discrepancies at verification with respect to Trina's reported domestic inland freight.

Comment 24: Surrogate Value for Polysilicon

Petitioner

- The Department should value polysilicon using international spot prices during the POI from Photon Consulting and Energy Trend. International contract prices should not be used. Photon Consulting contract prices reported during the POI are for sales that will only ship after the POI. Moreover, contract prices established during the POI do not accurately capture the volatile pricing prevalent during the POI. International polysilicon prices were rapidly falling before and during the POI and many buyers were amending or breaking long-term polysilicon contracts.
- To the extent that contract pricing is used at all, the surrogate value for polysilicon should be based on pricing agreed upon prior to the POI because those pre-POI contracts contain the sales terms governing POI shipments. Purchasers of polysilicon unable to exit long-term contracts were paying much higher than market prices during the POI because they signed contracts prior to the POI when prices were significantly higher.
- Contrary to Trina's claim, the selection of an SV for polysilicon should not depend upon the SV selected for wafers. The Department's statutory mandate is to calculate dumping margins as accurately as possible. Thus the Department must select SVs that, to the extent possible, reflect the pricing for solar grade polysilicon regardless of its choice of an SV for silicon wafers.

[289] *See CTL from Romania*, and accompanying Issues and Decision Memorandum at Comment 14.
[290] *See* Trina's July 23, 2012, submission at Exhibit 1; *see also* Trina China Verification Report at 36.

- The Department should not consider only pricing data from Energy Trend but instead rely on pricing from both Photon Consulting and Energy Trend. By including all prices, the Department will minimize distortions that may be inherent in any one of the surveys.

Trina

- If the Department continues to value polysilicon using international prices, to be consistent and objective it should also value silicon wafers using international prices. Conversely, if the Department continues to value silicon wafers using import statistics, it should value polysilicon using import data from Ukraine, one of the countries listed in the Department's Surrogate Country Memorandum.
- Contrary to Petitioner's assertions, the Department confirmed at verification that shipments of polysilicon received during the POI were pursuant to long-term contracts as well as sales through the spot market. Even Petitioner noted that Photon contract pricing information "indicates that the prices as published on any given date represent the prices that are being negotiated for long-term contracts that are being entered into as of that date."[291]
- If the Department calculates the SV for polysilicon based on international prices, the Department should segregate the prices by data source and type of price (*i.e.*, contract or spot) and then either (1) average together the average Energy Trend spot prices and the average Photon Consulting contract prices, while discarding Photon Consulting spot prices as they are less numerous and therefore less accurate than Energy Trend spot prices or (2) average together the average Photon Consulting spot prices and the average Photon Consulting contract prices, thereby discarding the Energy Trend spot prices

Department's Position: We have continued to value polysilicon using international prices. Although the Department's long-standing practice is to "value all FOPs utilizing data from the primary surrogate country" it will consider alternative sources when a suitable value from the primary surrogate country does not exist on the record.[292] Normally in those instances, the alternative sources of data considered are from other potential surrogate countries. International prices could be considered as an alternative source of surrogate values but only in limited circumstances based on the specific facts of the given proceeding. The Department has noted in the past that "international markets should only be used {to value FOPs} when data from primary and/or secondary surrogate countries were not found to be appropriate, and not as the first choice."[293] As explained in the *Preliminary Determination*,[294] and reiterated in Comment 9 addressing the surrogate value for wafers, there is substantial evidence on the record leading the Department to question whether the import prices are representative of the price of polysilicon. The purity level required for polysilicon used in manufacturing solar cells is very precise. The import data from the potential surrogate countries are from an HTS category that covers silicon products with various levels of purity. Moreover, record evidence indicates that there are

[291] *See* Petitioner's General Issues Case Brief at 25, citing its April 12, 2012 submission at Exhibit 11, which contains the Photon Consulting, Silicon Price Index for March 2009, at 3, stating that "The March 2009 reference contract price reports the average levelized price of the contracts signed and offered from February through mid-March."
[292] *See 2012 Warmwater Shrimp* and accompanying Issues and Decision Memorandum at Comment 2.
[293] *See Circular Welded Pipe from Romania* at 61 FR 24279, and accompanying Issues and Decision Memorandum at Comment 2.
[294] *See* Preliminary Determination Surrogate Value Memorandum at 5.

dramatic price differences between silicon with different purity levels. Also, there are extreme variations in the AUVs for the applicable HTS category both between and within potential surrogate countries indicating that that imports may at times primarily consist of lower purity silicon, possibly not of a solar grade, or extremely high purity electronics grade polysilicon, neither of which is the input being valued. Hence, due to the particular facts presented in this investigation, the Department found in the *Preliminary Determination* that international prices are the best available information on the record for valuing polysilicon used by the solar industry.[295] Trina has not provided any reasons why international market prices are not the best available information on the record for valuing polysilicon, aside from arguing that the Department should choose an SV for polysilicon that is contingent on the SV chosen for silicon wafers. Such an approach to selecting an SV would be inconsistent with the Department's practice of choosing SVs based on the best information available for valuing a particular input. A determination of what is the best information available for valuing an input is dependent upon the SVs and facts on the record with respect to the input and not a decision as to how to value another input which is based on another set of facts. Thus we have separately examined the potential SVs for polysilicon and silicon wafers including considering the specificity of the values on the record.

Furthermore, we have not disregarded contract prices in valuing polysilicon. Petitioner has not provided any evidence to support its claim that the international contract prices for polysilicon that are dated during the POI were not the prices covering POI deliveries. In fact, polysilicon contracts signed during the POI and placed on the record by Trina covered a substantial quantity of its polysilicon shipments received during the POI.[296]

In the *Preliminary Determination*, we calculated the SV of polysilicon by calculating one overall simple average of approximately 20 Energy Trend spot prices, six Photon Consulting spot prices, and six Photon Consulting contract prices.[297] For the final determination, we have continued to weight all prices equally, rather than separately averaging the prices by the type of transaction or firm providing the data. Although Trina proposed several calculation methodologies that equally weight and exclude data based on the type of transaction or the firm providing the data, it has not demonstrated why these methodologies are more accurate than weighting each price equally. Additionally, while Trina argues for the exclusive use of Energy Trend prices when calculating spot prices because there are more data points for Energy Trend, the record lacks any information demonstrating that any one of the prices sourced from Energy Trend or Photo Consulting is more significant in terms of the amount of sales represented. Thus, the Department's approach is to weight all prices equally. Hence, for the final determination, the Department has considered the widest range of data available and weighted all data points equally because we believe this is the most appropriate methodology for calculating the SV for polysilicon.

[295] We note that interested party comments regarding the appropriate SV for this material input are limited to specificity. That is, parties have not commented on contemporaneity, the inclusion or exclusion of taxes and import duties, public availability, *etc*. For an explanation of the Department's practice regarding SV selection, *see* Comment 39: Surrogate Value for PEG, *infra*.
[296] *See* Trina's March 9, 2012 submission at Exhibit 21.
[297] *See* Preliminary Determination Surrogate Value Memorandum at Attachment XII.

Comment 25: Surrogate Value for Suspension[298]

Trina

- The Department should have valued suspension using HTS category 3907.20.00.090, rather than HTS category 3804.90.90090, because HTS 3907.20.00.090 covers "other polyethers," which includes polyethyelene glycol and the Department verified that Trina's suspension consists primarily of polyethylene glycol.[299] Further, records provided during verification indicate that the price of suspension is significantly lower than the SV used to value suspension in the *Preliminary Determination*.
- A CBP ruling states that the HTS category for a product containing polyethylene glycol is HTS 3907.20.[300]

No other interested party commented on this issue.

Department's Position: We agree with Trina that HTS category 3907.20.00.090 should be used to determine the SV for suspension. During verification, we reviewed specification sheets from two of Trina's suspension suppliers. The documentation examined indicates that suspension consists of either 90 percent or 96 percent polyethylene glycol.[301] It is also informative that the CBP ruling cited by Trina states that polyethylene glycol is categorized under HTS 3907.20. Thai HTS category 3907.20.00090 ("Other," under "Polyethers Nesoi, In Primary Forms") covers polyethers not elsewhere specified and Trina's polyethylene glycol is not elsewhere specified under the Thai HTS on the record. Thus, we find that Thai HTS category 3907.20.00090 is the best information on the record for valuing suspension because it covers the input used by Trina and satisfies our other criteria for selecting SVs (*i.e.*, country-wide price average, contemporaneous with the POI, net of taxes and import duties, and based on publicly available data from the primary surrogate country).[302]

Comment 26: Surrogate Value for Trina's Back Sheet

Trina

- The Department should value Trina's back sheet based on the material which comprises the back sheet. Petitioner has not provided data for the HTS category that it recommends using to value Trina's PET back sheet material.

Petitioner

- The thickness of Trina's PET back sheet material indicates that it should be classified as a "film", rather than a sheet. Therefore, the Department should value Trina's PET film

[298] Both respondents' suspension contains sand in a liquid medium or slurry and is used in cutting ingots into wafers.
[299] *See* Trina China Verification Report at 68-69.
[300] *See* Letter from Trina to the Department, regarding "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China; Additional Surrogate Information," dated July 9, 2012 at Exhibit 9.
[301] *See* Trina China Verification Report at Exhibit 73.
[302] We note that interested party comments regarding the appropriate SV for this material input are limited to specificity. That is, parties have not commented on contemporaneity, the inclusion or exclusion of taxes and import duties, public availability, *etc*. For an explanation of the Department's practice regarding SV selection, *see* Comment 39: Surrogate Value for PEG, *infra*.

used in back sheets using Thai HTS category 3920.62.10090 ("Plates, Sheets, Film, Foil And Strip Of Plastics, Not Self-Adhesive, Non-Cellular, Not Reinforced Etc., Of Polyethylene Terephthalate: Film"), rather than HTS category 3920.62.90 ("Other", under "Plates, Sheets, Film, Foil And Strip Of Plastics, Not Self-Adhesive, Non-Cellular, Not Reinforced Etc., Of Polyethylene Terephthalate").

- As noted by Trina, the Department should classify Trina's back sheet according to the type of back sheet that Trina consumed.
- Data concerning HTS category 3920.62.10090 were included in Petitioner's April 20, 2012, submission at Exhibit 4.

Department's Position: We agree with Petitioner and have valued Trina's back sheet in which the primary component consists of PET using HTS category 3920.62.10090 based on proprietary information on the record.[303]

ISSUES RELATING TO WUXI SUNTECH

Comment 27: Whether Partial AFA Should be Used in Place of Unreported FOPs for Modules Assembled Under Back-to-Back Agreements

Petitioner

- Wuxi Suntech's failure to provide the FOPs for modules assembled under back-to-back agreements was a deliberate and self-serving omission that warrants the application of partial AFA. As partial AFA, the Department should assign the highest calculated NV to the portion of each of the two CONNUMs attributable to the unreported FOPs.

Wuxi Suntech

- The omissions are not significant as they impact two CONNUMs and represent 0.67 percent of the company's total POI production of these CONNUMs. Wuxi Suntech's own FOP consumption rates for assembling modules are comparable to its outside assemblers' rates.

Department's Position: We disagree with Petitioner that partial AFA is warranted in this circumstance. Section 776(a)(2) of the Act provides that, if an interested party (A) withholds information that has been requested by the Department, (B) fails to provide such information in a timely manner or in the form or manner requested, subject to subsections 782(c)(1) and (e) of the Act, (C) significantly impedes a proceeding under the AD statute, or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department will so inform the party submitting the response and will, to the extent practicable, provide that party the opportunity to remedy or explain the deficiency. If the party fails to remedy or satisfactorily explain the

[303] *See* Note 3 of the October 9, 2012 Memorandum from Jeff Pedersen to the file entitled "Proprietary Information Relating to Issues Involving Changzhou Trina Solar Energy Co., Ltd. in the October 9, 2012 Issues and Decision Memorandum" for further information regarding this input that cannot be disclosed publically.

deficiency within the applicable time limits, subject to section 782(e) of the Act, the Department may disregard all or part of the original and subsequent responses, as appropriate.

Furthermore, section 776(b) of the Act provides that, in selecting from among the facts otherwise available, the Department may employ an inference that is adverse to a party if the party failed to cooperate by not acting to the best of its ability to comply with requests for information.

At verification, the Department noted that Wuxi Suntech did not report in its FOP file the consumption quantities and FOPs for certain modules that were assembled by an unaffiliated party under back-to-back contracts.[304] While not included in the FOP buildups, the fact that these modules were assembled by an unaffiliated party was previously identified in Wuxi Suntech's submissions to the Department.[305] Additionally, Wuxi Suntech provided evidence in this investigation that it attempted to obtain the FOPs from its third-party processors and assemblers of wafers, cells, and modules, including the third-party assembler of the modules in question.[306] Where the company was unable to obtain the third parties' FOPs, Wuxi Suntech alerted the Department that it had relied on its own experience for reporting the third-party FOPs.[307]

In the *Preliminary Determination,* the Department recognized the absence of the third-party FOP data from the record and determined that it was appropriate to rely on Wuxi Suntech's own experience as facts otherwise available with respect to the missing FOPs. In reaching this decision, the Department noted that in cases where a respondent has a number of tollers, it has identified its tollers in a timely manner, documented its unsuccessful attempts to obtain FOPs from its tollers, the non-reporting tollers account for only a small portion of FOPs, and there is usable FOP information from other suppliers that could serve as a substitute for the missing FOPs, it has not required the unreported FOPs but used facts available in place of the missing information.[308]

Here, Wuxi Suntech identified its third-party module assembler in a timely manner and documented its attempts to obtain FOP data from the third party. Furthermore, Wuxi Suntech produced modules falling under the same two CONNUMs as the modules for which the third party did not provide FOPs; thus FOPs have been reported for the two CONNUMs under which these modules fall. Further, the quantity of the modules with unreported FOPs is very small, *i.e.*, 0.67 percent of the total quantities reported for these two CONNUMs.[309] Hence, the non-reported production quantities account for a small portion of the FOPs.

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[304] *See* Wuxi Suntech PRC Verification Report at 20-21.
[305] *See* Wuxi Suntech's March 15, 2012, submission at exhibit SD-36.
[306] *See e.g.,* Wuxi Suntech's February 7, 2012, submission at exhibit D-23 and D-24 where the company placed copies of the letters to the third parties and fax confirmations on the record.
[307] *See* Wuxi Suntech's March 5, 2012, submission at 5.
[308] *See* Unreported FOP Memorandum at 7 citing to *Service Valves from the PRC,* and accompanying Issues and Decision Memorandum at Comment 12 and *Graphite Electrodes from the PRC,* and accompanying Issue and Decision Memorandum at Comment 9.
[309] *See* Wuxi Suntech PRC Verification Report at 20, where the Department calculated that the missing FOPs account for 0.02 and 0.65 percent of the production of the two CONNUMs. These percentages were made public in Wuxi Suntech's August 6, 2012 Rebuttal Brief at 6.

As discussed above, pursuant to section 776(b) of the Act, the Department uses facts otherwise available with an adverse inference when a party fails to cooperate by not acting to the best of its ability to comply with a request for information. However, the Department has not found that Wuxi Suntech failed to cooperate with respect to the unaffiliated module assemblers' data and, accordingly, does not find it appropriate to use an adverse inference in applying the facts otherwise available to Wuxi Suntech for the unreported FOP data. As noted above, Wuxi Suntech identified the module assembler in question and documented its unsuccessful attempts to obtain FOPs from the unaffiliated assembler. Moreover, in the *Preliminary Determination* the Department considered the absence of the third-party FOP data from the record, including FOP data from the module assemblers, and determined that it was appropriate to rely on Wuxi Suntech's own experience as facts otherwise available with respect to the missing FOPs.[310] Consequently, consistent with the Department's decision in the *Preliminary Determination*, the Department is using Wuxi Suntech's FOP data in place of the missing FOPs from the unaffiliated module assembler.

Comment 28: Whether Suntech America's Product Recall Expenses Should be Included In Indirect Selling Expenses

Wuxi Suntech

- Product recall expenses should be excluded from indirect selling expenses because they: (1) relate to non-subject products sold prior to the POI; (2) are general expenses, not selling expenses (they do not meet the statutory definition of a selling expense) and general expenses are already accounted for in surrogate financial ratios, and (3) are unusual and infrequent (extraordinary).
- If the D**e**partment continues to include product recall expenses in indirect selling expenses it could: 1) amortize the fiscal year 2011 expense over Wuxi Suntech's 25 year warranty period; 2) allocate the fiscal year 2011 expense over the company's historical revenues through December 2011; or, 3) allocate the fiscal year 2011 actual product recall cash outlays over fiscal year 2011 revenues.

Petitioner

- Product recall expenses are related to sales of subject merchandise and are appropriately classified not as general or extraordinary, but rather as indirect selling expenses.

Department's Position: In the *Preliminary Determination,* the Department included product recall expenses incurred by Suntech America in the indirect selling expense ratio. After examining the information on the record related to these expenses, the Department has determined that the product recall expenses are not indirect in nature, but rather are analogous to expenses normally treated as direct warranty expenses.[311] According to the documents examined at verification, the product recall expenses can be traced to specific sales of building integrated photovoltaic products, *i.e.*, in-scope products, and represent the cost of remedial actions needed to restore the products to their intended and guaranteed functionality.[312] Warranty expenses are

[310] *See* Unreported FOP Memorandum at 7, 9.
[311] *See Washers from Korea*, 77 FR 46391, 46396 (August 3, 2012), where under similar circumstances the Department preliminarily determined that POI expenses incurred as a result of an "event" affecting pre-POI sales were neither extraordinary nor indirect selling expenses, but rather direct warranty expenses.
[312] *See* Wuxi Suntech CEP Verification Report at exhibit 10.

expenses associated with a commitment to repair or replace a product. Thus the product recall expenses are warranty expenses. Moreover, when classifying selling expenses, the Department has clarified that direct selling expenses are generally both variable (*i.e.*, in the absence of a sale these expenses would not be incurred) and traceable in a company's financial records to sales of the merchandise under investigation or review.[313] Conversely, indirect expenses are those that would be incurred regardless of whether the particular sales in question were made.[314] Had the sales of products for which there was a recall not been made, Wuxi Suntech would not have been faced with the cost of repairing the products. Thus, the product recall expenses are not indirect in nature.

Although Wuxi Suntech argues that the product recall expenses are general expenses rather than selling expenses, section 772(d)(1)(B) of the Act identifies direct warranty expenses as one type of expense incurred in selling subject merchandise (the Act directs the Department to deduct from U.S. price "expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and *warranties* …" (emphasis added)). Thus these expenses are not general expenses but selling expenses.

Neither does the Department find that the product recall expenses are extraordinary in nature. While Wuxi Suntech proffers that the root cause of the recall expense, *i.e.*, a fire in one module due to improper installation, was a highly unusual and infrequent event based on the company's history, the Department finds this is insufficient evidence to demonstrate that a product failure is so unusual and infrequent that it would not reasonably be expected to recur in the foreseeable future for a manufacturing enterprise. Rather, occasional product failures are expected occurrences for manufacturing entities as evidenced by the offering of warranties. Further, although the event may have been noteworthy to Wuxi Suntech, it does not rise to the level of the events that the Department has deemed extraordinary in past cases, such as losses caused by a severe hurricane or, as in the *Floral Trade* case cited by respondent, the complete collapse of a water table and emergence of a previously unknown viral infection, events that are "unrelated or incidentally related to the ordinary and typical activities of the entity, in light of the entity's environment."[315] Accordingly, the Department has not excluded the product recall expenses from warranty expenses.

We also find Wuxi Suntech's argument that the product recall expenses are related to non-subject merchandise to be unpersuasive. Respondent's argument is premised on a narrow interpretation of the term "merchandise under investigation" whereby Wuxi Suntech has considered all products sold outside of the POI timeframe to be non-subject merchandise. However, section 771 (25) of the Act defines subject merchandise as "the class or kind of merchandise that is within the scope of an investigation …." The products for which there was a recall are building integrated photovoltaic products which were sold to customers in the United States. The scope of the investigation includes, among other things, crystalline silicon

[313] *See Transformers from Korea*, and accompanying Issues and Decision at Comment 11.
[314] *See id.*
[315] *See, e.g., Pasta From Italy*, and accompanying Issues and Decision Memorandum at Comment 9; *Investigation of Activated Carbon from the PRC*, and accompanying Issues and Decision Memorandum at Comment 25; *Shrimp from Brazil*, and accompanying Issues and Decision Memorandum at Comment 1; and, *Floral Trade*, 16 CIT 1014, 1016 (CIT 1992).

photovoltaic cells and modules whether or not partially or fully assembled into other products, including building integrated materials. Thus, the products in question are subject merchandise. Wuxi Suntech appears to acknowledge as much when it notes that had the products in question been sold during the POI they would have had different CONNUMs from any of the other modules sold.[316]

Further, the timing of the underlying sale is not relevant in the Department's determination of POI warranty expenses. Warranties typically extend over a period of time that is longer than the POI and in this case Wuxi Suntech warrants its products for a period of 25 years.[317] Thus, the total actual amount of warranty expenses is unknown at the time of the sale. As a result, the Department has developed a practice of relying on a company's POI, or, if found distortive, its three-year historical warranty expenses regardless of the particular periods in which the related sales took place.[318] Thus, even if the POI warranty expenses relate to pre-POI sales they should not be excluded from POI warranty costs. As noted above, the Department's practice is to rely on a company's three-year average of warranty expenses in its calculations in place of the POI warranty expenses if there is evidence that the POI expenses are not representative of a respondent's historical experience, thereby mitigating the impact of warranty claims that may by nature occur at irregular intervals.[319] Given the considerable variation in the warranty expense ratio during the most recent three-year period (*i.e.*, fiscal years 2009, 2010, and 2011), the fact that warranty expenses pertaining to sales during one period may be incurred after that period, and the evidence on the record indicating that the warranty expense ratio reported for the POI is not in line with the company's historical experience, the Department has determined that a three-year average warranty expense ratio would be more representative of Suntech America's experience than the six month period that covers the POI. Therefore, for the final determination the Department has relied on a three-year average of warranty expenses in calculating the net U.S. price for CEP sales. Because the Department has found the product recall expenses to be direct warranty expenses and used a three-year average warranty expense ratio in the final determination, in accordance with normal practice, we have not addressed the arguments submitted regarding alternative product recall expense calculations.

Comment 29: Exclusion of South Korean MEP Data

Petitioner

- In calculating MEPs for Wuxi Suntech, the Department should exclude all purchases of polysilicon from South Korean suppliers.[320] It is the Department's practice to exclude all MEPs paid for a material input to suppliers located in South Korea.[321]

[316] *See* Wuxi Suntech's Brief at 5 where Wuxi Suntech states that "if sold during the POI, {the recalled products} would have had a different CONNUM from any of the other modules sold by Suntech America or Wuxi Suntech during the POI." Hence, confirming that the products would have been reportable merchandise.
[317] *See* Wuxi Suntech's January 27, 2012, submission at exhibit 14.
[318] *See, e.g., Welded Pipe and Tubes from India*, and accompanying Issues and Decision Memorandum at Comment 4; and, *Chlorinated Isocyanurates from Spain*, and accompanying Issues and Decision Memorandum at Comment 4.
[319] *See, e.g., Wooden Bedroom Furniture from the PRC 2011*, and accompanying Issues and Decision Memorandum at Comment 3; and, *Chlorinated Isocyanurates from Spain*, and accompanying Issues and Decision at Comment 4.
[320] Petitioner has treated the fact that Wuxi Suntech reported purchases of polysilicon from South Korea as business proprietary information by placing brackets around the name of the country. Wuxi Suntech, however, has publically

- The exclusion of the MEP data at issue would result in finding that Wuxi Suntech purchased less than 33 percent of its polysilicon from ME suppliers.

Wuxi Suntech

- The Department should exclude South Korean purchases but doing so does not result in a finding that Wuxi Suntech purchased less than 33 percent of its polysilicon from ME suppliers.[322]
- Wuxi Suntech also reported purchases of steel wire saws from South Korea as MEPs.

Department's Position: The Department has excluded all purchases from suppliers located in South Korea from its calculation of Wuxi Suntech's weighted-average MEP prices. In the *Preliminary Determination*, the Department inadvertently included Wuxi Suntech's purchases of certain inputs sourced from South Korean suppliers in its calculation of the weighted-average MEP price. In *Certain Coated Paper from the PRC*, the Department recognized its "long-standing practice of disregarding surrogate values if it has a reason to believe or suspect the source data may be subsidized."[323] In this regard, the Department has previously found that it is appropriate to disregard such prices from South Korea because it has determined that South Korea is among the countries that maintain broadly available, non-industry specific export subsidies.[324] Based on the existence of these subsidy programs that were generally available to all exporters and producers in these countries at the time of the POI, the Department finds that it is reasonable to infer that all exporters from South Korea may have benefitted from these subsidies. This is consistent with past practice, where the Department has rejected MEPs from South Korea.[325] Accordingly, the Department finds that it is appropriate to disregard Wuxi Suntech's reported MEPs of both steel wire saws and polysilicon purchased from South Korea.

However, the Department finds that disregarding the quantity of Wuxi Suntech's purchases of polysilicon from South Korea does not reduce the percentage of MEP purchases of this input below 33 percent of total purchases of the input. Accordingly, the Department has continued to value Wuxi Suntech's polysilicon using a weighted-average MEP price.

Comment 30: Acceptance of Minor Corrections Submitted at Verification

Wuxi Suntech

- The Department should accept the minor corrections presented on the first day of the on-site verifications of Wuxi Suntech, Suntech America, and Suntech Arizona and use the databases that reflect these corrections, which were submitted at the Department's request, to calculate a margin in the final determination.

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disclosed the fact that it sourced material inputs from South Korea in its case brief and rebuttal brief. Accordingly, the Department has treated this fact as public information.

[321] *See Certain Coated Paper from the PRC*, and accompanying Issues and Decision Memorandum at Comment 17.

[322] *See WBF Review I*, and accompanying Issues and Decision Memorandum at Comment 32.

[323] *See Certain Coated Paper from the PRC*, and accompanying Issues and Decision Memorandum at Comment 17 (citing the legislative history of the Omnibus Trade and Competitiveness Act of 1988, Conf. Report to Accompany H.R. 3, H.R. Rep. No. 576, 100th Cong., 2nd Sess. (1988) at 590).

[324] *See id.*

[325] *See CFS Preliminary Determination*, 72 FR 30758, 30763 (June 4, 2007) (unchanged in *CFS Final Determination*.

No other interested party commented on this issue.

Department's Position: The Department has accepted the minor corrections submitted by Wuxi Suntech and has calculated its final margin using the revised sales and FOP databases that reflect these minor corrections. During verification of Wuxi Suntech's sales and FOP responses, company officials presented minor corrections in accordance with the Department's verification requirements. On a test basis, Department officials verified the accuracy of the minor corrections using standard verification procedures.[326] Wuxi Suntech submitted in a timely manner requested revised sales and FOP databases which reflect the minor corrections.[327] For the foregoing reasons, the Department has accepted Wuxi Suntech's minor corrections and has used this information to calculate its dumping margin for the final determination.[328]

Comment 31: Exclusion of Sample Sales from the Margin Calculation

Wuxi Suntech

- Consistent with the Department's practice, the Department should exclude all of Wuxi Suntech's reported sample sales of subject merchandise from the final margin calculation.[329]
- Wuxi Suntech did not receive consideration for any of its reported samples sales.

Petitioner

- The sales at issue are not sample sales, and, accordingly, should be included in the Department's margin calculation.
- The CIT has upheld the Department's requirement that respondents demonstrate that reported sample sales were made outside of the ordinary course of trade and that no consideration was given before excluding them from the margin calculation.[330]
- Wuxi Suntech has not demonstrated that ownership of the merchandise under consideration did not transfer or that consideration was not received for the sales at issue.

Department's Position: The Department has excluded from its margin calculations all transactions identified as sample sales by Wuxi Suntech, some of which were inadvertently included in the margin calculations for the *Preliminary Determination*. As noted by the Department in *Tapered Roller Bearings from Japan*, the CAFC has held that the term "sale" entails both a transfer of ownership to an unrelated party and consideration.[331] In light of the CAFC's opinion, the Department announced that it would revise its policy with respect to samples.[332] Specifically, the Department explained that it would exclude from its AD margin

[326] *See* the Wuxi Suntech PRC Verification Report and Wuxi Suntech CEP Verification Report.
[327] *See* Wuxi Suntech's July 24, 2012 submission to the Department.
[328] *See* Memorandum regarding: Analysis of the Final Determination Margin Calculation for Wuxi Suntech Power Co., Ltd., dated concurrently with this memorandum.
[329] *See Tapered Roller Bearings from Japan*, 63 FR 63860, 63872 (November 17, 1998).
[330] *See Tapered Roller Bearings from Japan*, (citing *NTN Bearing Corp. of Am. v. United States*, 186 F. Supp. 2d 1257, 1293 (CIT 2002)).
[331] *See NSK Ltd. v. United States*, 115 F.3d 965, 975 (Fed. Cir.1997).
[332] *See Tapered Roller Bearings from Japan*.

calculations sample transactions for which a respondent has established that there is either no transfer of ownership or no consideration.[333]

Although the record indicates the title to some, but not all, of the merchandise reported as samples transferred from Wuxi Suntech to the recipient of the goods, evidence shows that Wuxi Suntech received no consideration for its reported sample sales. As noted above, a sale requires both the transfer of ownership and consideration. In response to a supplemental questionnaire issued by the Department, Wuxi Suntech confirmed that it received no consideration for any of the transactions identified as sample sales in its U.S. sales database.[334] At verification, the Department tested the accuracy of Wuxi Suntech's claim that it received no consideration for sample sales. Specifically, the Department selected for further examination one of the transactions identified as a sample sale by Wuxi Suntech. Department verifiers reviewed sales documentation relating to this reported sample sale. As discussed in detail in a proprietary memorandum, the evidence examined at verification supports the Department's finding that Wuxi Suntech has met its burden to demonstrate that it received no consideration for its reported sample transactions. [335] Further, because the transactions at issue do not constitute "sales," within the meaning of the Act, it is not necessary to determine whether the transactions at issue reflect sales made outside of the ordinary course of trade. For the foregoing reasons, the Department has excluded Wuxi Suntech's sample transactions from its final margin calculations.

Comment 32: Valuing Inputs from NME Suppliers When the Inputs Were Used in Further Manufacturing

Wuxi Suntech

- Valuing inputs from PRC suppliers with SVs where those inputs were used in further manufacturing subject merchandise in the United States is inconsistent with Department practice because it treats the U.S. further manufacturer as an NME entity. The inputs should have been valued using the company's "reported cost of materials" to derive the cost of further manufacturing.[336]
- The Department will only use SVs to value a ME entity's inputs when the costs recorded in the company's books and records are not in conformity with GAAP or those costs do not reasonably reflect the costs associated with the production and sale of subject merchandise.[337] The record does not support such an approach here.
- Any ME company involved in an AD proceeding may source material inputs from an NME supplier, and the rejection of an ME company's purchase data solely because the

[333] *See Tapered Roller Bearings from Japan*.
[334] *See* Wuxi Suntech's March 26, 2012 submission at 10.
[335] *See* Memorandum regarding: Proprietary Information Considered in the Final Determination for Wuxi Suntech Power Co., Ltd., dated concurrently with this memorandum.
[336] *See Polyethylene Retail Carrier Bags From the PRC*, 73 FR 52282, 52298 (September 9, 2008) (unchanged in *Carrier Bags from the PRC Final)*.
[337] *See Diamond Sawblades from the Republic of Korea*, and accompanying Issues and Decision Memorandum at Comment 12 (after a careful consideration, the Department "determined not to make an adjustment to the {Korean} respondents' reported costs for inputs received from their unaffiliated NME-based suppliers."); *see also Certain Color Television Receivers from Malaysia*, and accompanying Issues and Decision Memorandum at Comment 20, (the Department rejected the argument that "PRC production, by definition, does not reflect the value realized in market economy countries.").

purchases were made from NME suppliers would make the SV methodology applicable to all producers. Such a revision to the Department's methodology would be untenable.
- Alternatively, the Department should limit its application of SVs in calculating the cost of further manufacturing to junction boxes (*i.e.*, the single input acquired from a PRC affiliate during the POI) rather than all inputs sourced from PRC suppliers.

Petitioner
- Use of surrogates to value inputs used in further manufacturing was in accordance with the Act and Department practice. The Department will generally not rely on prices for goods produced in NMEs for the purposes of a price based analysis[338] because prices and costs in these countries are inherently suspect.[339]
- Section 773(f)(1) of the Act grants the Department the discretion to calculate the COP using some other reasonable means.
- Case precedent cited by Wuxi Suntech does not support its argument because each of the cited cases may be distinguished based on a consideration of the facts.[340] In *Polyethylene Retail Carrier Bags from the PRC*, there was no evidence that the affiliate that performed further manufacturing acquired inputs from NME suppliers, and the Department valued many expenses using SVs. In *Diamond Sawblades from the Republic of Korea*, the Department used actual costs to value inputs sourced from NMEs only because it found these inputs were minor and would cause no distortion to NV. In *Certain Color TV Receivers from Malaysia*, respondent demonstrated that it purchased the same parts from both ME and NME suppliers at the same prices, and the cost of the inputs were relatively minor.

Department's Position: The Department disagrees with Wuxi Suntech and has continued to apply SVs to inputs consumed by the affiliated U.S. further manufacturer, Suntech Arizona, in calculating the cost of further manufacturing. When conducting proceedings involving imports from an NME country, section 773(c)(1) of the Act directs the Department to base NV, in most cases, on the NME producer's FOPs, valued in a surrogate ME country considered appropriate by the Department. In accordance with section 773(c)(4) of the Act, the Department will value FOPs using "to the extent possible, the prices or costs of the FOPs in one or more market-economy countries that are: (A) at a level of economic development comparable to that of the NME country, and (B) significant producers of comparable merchandise." In this AD investigation, respondent Wuxi Suntech shifted a portion its production to its U.S. affiliate. Wuxi Suntech supplied its U.S. affiliate with inputs from the PRC, and the U.S. affiliate purchased additional inputs from PRC suppliers. In accordance with section 773(c)(4) of the Act, the Department valued Wuxi Suntech/Suntech America's inputs sourced from PRC suppliers using SVs from Thailand.

The Department disagrees with Wuxi Suntech's assertion that the use of SVs to calculate the cost of further manufacturing is inappropriate in the instant investigation. The material inputs in question were produced in an NME country and the prices paid by Suntech Arizona were set by

[338] *See Diamond Sawblades from the Republic of Korea*, and accompanying Issues and Decision Memorandum at Comment 12.
[339] *See Certain Cased Pencils from the PRC*, and accompanying Issues and Decision Memorandum at Comment 12.
[340] *See* Petitioner's Rebuttal Brief at 18-20.

NME entities. While prices paid for PRC-produced inputs may be used in certain cost calculations for ME companies in ME proceedings, we note that this is an NME proceeding. The purpose of this proceeding is to determine the dumping margin of a PRC producer, which has shifted a portion of its production to its U.S. affiliate. In order to calculate an accurate margin, the Department must calculate an accurate U.S. net price for these subject solar cells by deducting, *inter alia*, the cost of PRC inputs consumed in the further manufacturing process, pursuant to section 772(d)(2) of the Act. While section 772(d)(2) of the Act directs the Department to deduct the cost of further manufacture or assembly from U.S. price, it does not specify a particular methodology that must be used, nor does it state that in an investigation involving an NME country the Department may not use SVs to determine the cost of inputs sourced from NME suppliers. Section 773(c)(1) of the Act, which applies to NME countries, directs the Department to determine the NV of subject merchandise using FOPs. Although the Department deducts the cost of further manufacturing from U.S. price, we find that in proceedings involving NME countries it is appropriate to calculate the cost of inputs sourced from NME suppliers using SVs. We further note in past proceedings involving NME countries, the Department has used SVs to adjust U.S. prices.[341] Thus, an analysis of Wuxi Suntech/Suntech Arizona's input costs falls directly and explicitly under the purview of the Department's NME methodology. The Department finds that it is not appropriate to use NME prices to value these costs.

Wuxi Suntech's reliance on the AD cases that it cited is misplaced. In *Polyethylene Retail Carrier Bags from the PRC*, the issue of valuing inputs sourced from NME suppliers was not discussed in the *Federal Register* notices cited by Wuxi Suntech. Thus, this case does not describe the Department's practice regarding this issue. The Department further notes that the other cases cited by Wuxi Suntech involve investigations or reviews of ME countries, rather than NME countries. Therefore, in accordance with the Department's NME methodology, the Department has continued to use SVs to value inputs sourced from NME countries in calculating the cost of further manufacturing.

Comment 33: Whether Partial AFA Should be Applied to Value Labor and Energy for Tolled Modules

Petitioner

- Wuxi Suntech's use of its own labor and energy consumption rates for tolled modules and laminates rather than obtaining its module and laminate tollers' actual consumption rates warrants the application of partial AFA.

Wuxi Suntech

- Partial AFA is unwarranted because: 1) Wuxi Suntech has cooperated to the best of its ability in attempting to collect the data in question from its various unaffiliated module tollers; 2) the tolled modules do not represent a significant quantity of total reported production; 3) the Department was made fully aware of Wuxi Suntech's reliance on its own experience as a surrogate for the tolled modules prior to the *Preliminary Determination;* and,

[341] *See, e.g., CTGS Prelim*, 77 FR 34013, 34017 (June 8, 2012) (surrogate value applied to NME ocean freight costs, which were deducted in the calculation of U.S. net price); *see also Wire Decking from the PRC*, and accompanying Issues and Decision Memorandum at Comment 6.

4) the Department normally excuses the reporting of unaffiliated toller data when a respondent is unsuccessful in obtaining the data.

Department's Position: The Department disagrees with Petitioner's position. Wuxi Suntech's reliance on its own experience for purposes of reporting the labor and energy factors for modules and laminates that were assembled by tollers does not warrant the application of partial AFA. While section 776(b) of the Act allows for the application of adverse inferences in cases where an interested party has "failed to cooperate by not acting to the best of its ability to comply with a request for information," such is not the situation in the instant case. Rather, Wuxi Suntech's attempts to obtain the requested information from its unaffiliated tollers are documented on the record and there is nothing indicating that Wuxi Suntech failed to act to the best of its ability to obtain the information.[342]

Furthermore, where a respondent has a number of tollers which it identified in a timely manner, the respondent documented its unsuccessful attempts to obtain FOPs from its tollers, the non-reporting tollers account for only a small portion of FOPs, and there is usable FOP information from other suppliers that could serve as a substitute for the missing FOPs, the Department has not required the unreported FOPs but used facts available in place of the missing information.[343] Wuxi Suntech had a number of tollers which it identified for the Department. The only FOP figures that Wuxi Suntech was unable to obtain from the tollers were the tollers' labor and energy consumption. Since Wuxi Suntech supplies the raw materials for the modules and laminates assembled by the tollers, it was able use its own warehouse records to report the raw material FOPs for the modules that were toll assembled.[344] As a substitute for the labor and energy consumption figures that could not be obtained, Wuxi Suntech notified the Department that it had reported its own labor and energy consumption experience in its module assembly production department (lamination is one stage in module assembly).[345] Because Wuxi Suntech assembled modules, its data could substitute for the module FOPs that the tollers did not provide. Further mitigating the lack of toller specific data is the fact that two of the four surrogate Thai financial statements do not segregate energy expense from other overhead items; thus, the Department has included energy expense in the surrogate manufacturing overhead expense ratio. Consequently, the Department is not relying on FOPs reported for energy.[346] Hence, with regard to tolled modules and laminates a substitute FOP was only used for labor. Based on the foregoing, the Department has determined that it is appropriate to use FA, rather than AFA, with respect to the missing toller FOPs.

[342] *See e.g.*, Wuxi Suntech's February 6, 2012 submission at exhibits 23-24 and Wuxi Suntech's March 2, 2012 submission at exhibit 6.
[343] *See e.g., Service Valves from the PRC*, and accompanying Issues and Decision Memorandum at Comment 12; *see also Graphite Electrodes from the PRC*, and accompanying Issue and Decision Memorandum at Comment 9.
[344] *See e.g.*, Wuxi Suntech's March 2, 2012 submission at 5.
[345] *See* Wuxi Suntech's March 2, 2012 submission at 4-6.
[346] This is consistent with the Department's practice when unable to segregate, and therefore, exclude energy costs from the calculation of surrogate financial ratios. *See e.g., Citric Acid Final Determination*, 74 FR 16838, 16839 (April 13, 2009), and accompanying Issues and Decision Memorandum at Comment 2; and, *Frozen Shrimp from the PRC*, and accompanying Issues and Decision Memorandum at Comment 12.

Comment 34: Whether the ISE Rate Should be Applied to Gross Unit Price Less Billing Adjustments and Early Payment Discounts

Wuxi Suntech

- The Department erroneously applied the ISE rate to gross unit price rather than to gross unit price less billing and early payment adjustments.

No other interested party commented on this issue.

Department's Position: We agree with Wuxi Suntech. The ISE rate was calculated by dividing Suntech America's indirect selling expenses by its sales revenue net of billing adjustments and early payment discounts. Since this ratio expresses indirect selling expenses as a percentage of net revenue after billing adjustments and discounts it should be applied to sales prices net of these items. Accordingly, for the final determination, we have applied the ISE rate to sales prices net of billing adjustments and early payment discounts.

Comment 35: Suntech Arizona Financial Expense Rate

Wuxi Suntech

- The Department should not have used Suntech Arizona's (the U.S. further manufacturer) financial statements to calculate its financial expense rate because its interest expenses were generated on loans with affiliated parties and their use does not reflect the Department's normal practice of relying on the highest level of consolidated financial expenses. The Department should base the financial expense rate on a combination of Suntech Arizona's own experience and the LIBOR rate.

Petitioner

- The Department should reject Wuxi Suntech's alternative financial expense rate calculation since the Department does not rely on imputed financial expenses. If the Department does not use Suntech Arizona's own borrowing rate to calculate its financial expenses, it should use the financial statements of the Suntech group's highest consolidated parent, Suntech Power Holdings Co., Ltd., to calculate the financial expense rate in accordance with the Department's normal practice.

Department's Position: The Department continues to find Suntech Arizona's own financial statements to be the best available information for purposes of calculating the financial expenses incurred on the company's U.S. further manufacturing activities. As both parties acknowledge, the Department's normal practice for calculating the financial expense rate is to rely on the highest level of consolidated financial statements that include the results of the producer, or, in this case, the further manufacturer.[347] However, here the highest consolidated financial statements of Suntech Power Holding Co., Ltd. include the activities of the Chinese respondent and the Department does not rely on prices in an NME.

[347] *See e.g., Greenhouse Tomatoes from Canada*, and accompanying Issues and Decision Memorandum at Comment 12.

Because the Department found at verification that Suntech Arizona's financing arrangements were originated with its Swiss affiliate, Solar Power International,[348] we have tested the arm's length nature of these transactions, pursuant to section 773(f)(2) of the Act, before using Suntech Arizona's financial expenses in our calculations. Specifically, the Department compared the terms of Suntech Arizona's affiliated loans with the terms of financing arrangements originated by Suntech America, Wuxi Suntech's U.S.-based selling arm, with unaffiliated parties.[349] Based on this comparison, Suntech Arizona's affiliated financing arrangements reflect arm's length transactions.

While Wuxi Suntech proffers an alternative financial expense rate that incorporates the use of Suntech Arizona's own experience and the POI LIBOR rate, the Department finds it is not necessary to consider an imputed rate when Suntech Arizona's own experience has been found to reflect market rates. Thus, the Department has relied on Suntech Arizona's financial statements as the best available information for calculating financial expenses related to its further manufacturing activities.

Comment 36: Whether Suntech America's Bad Debt Expense Should be Included in ISE

Petitioner

- To avoid calculating an inaccurately low AD margin, bad debt expense must be included in the ISE rate to reflect the company's normal books and records which were relied on by Wuxi Suntech in making its pricing decisions.

Wuxi Suntech

- In accordance with the Department's practice, the company's bad debt expense should be based on its historical rather than unusually high POI experience. If the Department departs from its normal practice of using a company's historical bad debt experience, the Department should take into account post-POI collections of previously recorded bad debt.

Department's Position: The Department has continued to include Suntech America's POI bad debt expense, rather than historical bad debt expenses, in the calculation of its ISE rate. At verification, the Department ascertained that Suntech America relied on an allowance methodology to establish its bad debt expense. This bad debt allowance (*i.e.*, the amount by which accounts receivable recorded on the balance sheet is offset for amounts that are estimated to be uncollectible), was calculated each month based on the aging of accounts receivable and based on specific identification of potentially uncollectable amounts.[350] As the name implies, the aging of accounts receivable uses the age of outstanding amounts as the basis for estimating their collectability. For example, using past experience, a company may estimate that 10 percent of all accounts over 90 days old may be uncollectible. In addition to the bad debt allowance estimated by the aging of its receivables, Suntech America expanded its uncollectible estimate to include any specific customer accounts for which it enlisted the assistance of collection agencies.

[348] *See* Wuxi Suntech FMG Verification Report at 16-17.
[349] *See id.*
[350] *See* Wuxi Suntech CEP Verification Report at 24.

Thus, Suntech America's monthly bad debt allowance account balance is based on these two types of estimates.

In using a bad debt allowance account, as opposed to writing off accounts receivable directly to bad debt expense as accounts are deemed uncollectible, companies will periodically (monthly in the case of Suntech America) adjust the allowance for bad debt account balance (a balance sheet account) to reflect the new estimate of the allowance account and the offsetting entry is made to the bad debt expense account (an account in the income statement). When a specific amount is determined to be uncollectible, the receivable will be written off the balance sheet. Thus, when a company establishes a bad debt allowance account, the bad debt expense is estimated and recognized on the income statement prior to the actual write-off of the account, and since the expense has already been recognized, the eventual write-off of a receivable does not impact the income statement under the allowance methodology. Moreover, because an allowance was used rather than the direct write-off methodology, the eventual recovery of accounts receivable which may have been included among the bad debt allowance estimate would typically not impact the income statement. On the other hand, under the direct write-off methodology, if such written off accounts receivable are subsequently collected, the collection would be recognized as a gain or other income on the income statement.

In Suntech America's case, Wuxi Suntech first argues that the POI reflects an unusually large bad debt expense as a result of the specifically identified uncollectable accounts receivables that were included in its bad debt allowance account estimate. While Wuxi Suntech submits that *SSSSC from Mexico*[351] stands for a Departmental practice to base bad debt expense on a company's historical rather than POI experience, the Department disagrees. Instead, the Department's reliance in that particular case on the company's historical bad debt experience was due to a customer's "unanticipated" declaration of bankruptcy and the consequent direct write-off of the customer's receivables account that was not previously part of the company's bad debt estimate, a fact pattern that was characterized at the time as unforeseen and extraordinary.

Hence, the use of a company's historical rather than POI bad debt expense is not a standard Department practice. These facts were clearly articulated in a subsequent review of *SSSSC from Mexico* where the Department clarified that "{i}n past reviews, Mexinox had incurred specific bankruptcy-related bad debt that the Department found to be extraordinary in nature. The Department excluded such extraordinary bad debt and based Mexinox USA's historical bad debt experience on a five-year period average prior to the POR."[352] After making this distinction, the Department found that in the current review of the case there were no grounds for diverting from its normal practice of using a company's POI bad debt experience.[353]

Likewise, the Department does not find that Wuxi Suntech's POI bad debt experience can be characterized as unforeseen or extraordinary, thus warranting a departure from the Department's normal practice of relying on POI bad debt expense. Nor does the Department agree with Wuxi Suntech's secondary argument that the post-POI collections should be considered in the

[351] *See SSSS from Mexico*, and accompanying Issues and Decision Memorandum at Comment 6.
[352] *See SSSSC from Mexico*, and accompanying Issues and Decision Memorandum at Comment 3.
[353] *See id.*

determination of the POI bad debt expense. As noted above, the allowance for bad debt account (a balance sheet account) merely reflects the company's estimate of what portion of its accounts receivables may go uncollected and is not a write-off or write-down of specific customer accounts. Thus, collections on a company's accounts receivables should not be an offset to the reported cost since under an allowance methodology for recording bad debt expense the collections had no impact on the income statement. Rather, any collections would merely impact future bad debt estimates. Consequently, for the final determination the Department has not reduced the POI bad debt expense by the post-POI collections on the specifically identified accounts receivable that were included in the bad debt allowance estimate as potentially uncollectible.

Comment 37: Verification Findings

Petitioner

- The Department should adjust the reported FOPs for the verification findings with regard to overall module and wafer reconciliation differences, differences between reported and inventory cell consumption, cell shortages, and broken wafer offsets.

Wuxi Suntech

- The requested adjustments should be disregarded because they are very small and would result in complex and error prone calculations.

Department's Position: For the final determination the Department has made adjustments for the verification findings with regard to cell shortages, 156M cell consumption, and broken wafer offsets. Specifically, the Department has adjusted the reported FOPs to account for the cell shortages discovered at the module stage of production and for the difference between the 156M cell consumption per inventory records and the 156M cell consumption reported to the Department. In addition, the Department agrees with Petitioner that an offset should not be granted for the broken wafers for which Wuxi Suntech was unable to provide evidence of commercial value. However, the Department disagrees with Petitioner that adjustments should be made for the module and wafer reconciliation differences.

In the standard section D questionnaire, the Department requires all respondents to provide an overall reconciliation of its financial statements to the FOPs reported to the Department.[354] This exercise is intended as a reasonableness test to ensure that, on an overall basis, the financial records support the reported FOPs. Material differences in reconciliations suggest that the reported FOPs may have been misreported or that FOPs may have gone unreported. The module and wafer reconciliation differences referenced by Petitioner are the result of reconciling the total costs from Wuxi Suntech's and its affiliated wafer producer's respective financial statements to the total value of the FOPs reported to the Department by each company. In testing these overall reconciliations at verification, the Department uncovered no unreported FOPs.[355] Although, as Petitioner pointed out, there were extremely small un-reconciled differences between the total costs per the financial statements and the total value of the reported FOPs, these differences were not significant enough to conclude that the reported FOPs did not tie to

[354] *See* the Department's standard NME section D questionnaire at Appendix V.
[355] *See* Wuxi Suntech PRC Verification Report at 21 and 48.

the underlying financial statements or that they were not supported by those statements. Consequently, the Department finds that the overall reconciliations do not provide evidence to suggest that the companies' FOPs were misreported. As such, the Department has not adjusted the reported FOPs based on the module and wafer reconciliations.

With regard to the broken wafer offset, the Department agrees that an adjustment to the claimed offset is warranted. Wuxi Suntech's affiliated wafer manufacturer was unable to substantiate that it actually consumed the broken wafers reportedly reintroduced into wafer production; therefore, the Department is denying the byproduct offset claimed for these broken wafers. In determining whether to grant a byproduct or scrap offset, the Department considers whether the byproduct or scrap was generated during the POI production of the merchandise under consideration and whether it has commercial value.[356] One way that commercial value can be demonstrated is through the reuse of the byproduct or scrap. At verification, the Department confirmed that the broken wafers were generated in the production of the merchandise under consideration during the POI.[357] However, Wuxi Suntech was unable to demonstrate that the broken wafers transferred to its affiliated wafer manufacturers were reintroduced into production.[358] Therefore, because Wuxi Suntech was unable to document that the broken wafers generated during the POI and reportedly reused in production were indeed recyclable, *i.e.*, that they had commercial value, the Department has denied the byproduct offset claimed with respect to the broken wafers that were reported as reintroduced into production.

Comment 38: Whether Certain Reported Market Economy Purchases Were Purchased from a Market Economy Supplier

Petitioner

- Wuxi Suntech's purchases of polysilicon from Company A,[359] which were reported to the Department as MEPs, should not be considered as MEPs for the final determination.
- At verification, Wuxi Suntech failed to support certain claims made regarding the purchases at issue. Record evidence indicates that Company A is a state-owned PRC enterprise.

Wuxi Suntech

- Purchases of polysilicon from Company A reported to the Department are MEPs.
- The record supports Wuxi Suntech's statements regarding the purchases at issue. There is no evidence that the PRC government or non-market considerations affected the purchase price of the raw materials at issue.

Department's Position: The Department has continued to treat Wuxi Suntech's purchases of polysilicon from Company A as MEPs. As an initial matter, the record shows that these

[356] *See, e.g., Silicon Metal from the PRC Final Results 2012,* and accompanying Issues and Decision Memorandum at Comment 3; and, *Multilayered Wood Flooring from the PRC*, and accompanying Issues and Decision Memorandum at Comment 23.
[357] *See* Wuxi Suntech PRC Verification Report at 40-41.
[358] *See id.*
[359] The identity of this company is business proprietary information of Wuxi Suntech, which cannot be disclosed to the public. *See* Memorandum regarding: Proprietary Information Considered in the Final Determination for Wuxi Suntech Power Co., Ltd., dated concurrently with this memorandum.

purchases meet the regulatory criteria for determining whether to use the price paid to value an input. Specifically, pursuant to 19 CFR 351.408(c)(1), the starting point for deciding whether to use a purchase price to value an input is to determine whether the input was purchased from an ME supplier and paid for in an ME currency. Moreover, as discussed in further detail in a proprietary memorandum,[360] there is insufficient record evidence to conclude that non-market considerations affected the purchase price of the transactions at issue. For the foregoing reasons, the Department continues to find that the purchases in question are MEPs, and has not excluded them from its calculation of Wuxi Suntech's weighted-average MEP price used to value polysilicon.[361]

Comment 39: Surrogate Value for PEG

Wuxi Suntech

- Use the Thai HTS category for {Polyethers Nesoi, In Primary Forms},[362] Other (HTS 3907.20.00090) to value PEG. The record indicates that PEG is polyethylene glycol which is "used as a coolant and lubricant in the production process."[363] This HTS category is more specific to PEG than the Thai category used in the *Preliminary Determination* (*i.e.*, {Polyethers Nesoi, In Primary Forms}, Polytetramethylene, Ether Glycol, HTS 3907.20.00001).

No other parties commented on this issue.

Department's Position: The Department agrees with Wuxi Suntech that Thai HTS category HTS 3907.20.00090 is a more appropriate HTS category to value PEG than HTS category 3907.20.00001. Section 773(c)(1) of the Act states that "the valuation of the factors of production shall be based on the best available information regarding the values of such factors." It is the Department's stated practice to choose a surrogate value that represents country-wide price averages specific to the input, which are contemporaneous with the period under consideration, net of taxes and import duties, and based on publicly available, non-aberrational, data from a single surrogate ME country.[364] If a surrogate value meets these criteria, the Department finds that it represents a reliable and appropriate price for valuing an individual input. Further, in interpreting the Department's *Policy Bulletin 04.1*, the CIT stated that, generally, "'product specificity' logically must be the primary consideration in determining

[360] *See id.*

[361] For a further discussion of this issue, *see* October 9, 2012 memorandum from Christian Marsh Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations to Paul Piquado Assistant Secretary for Import Administration entitled "Proprietary Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China."

[362] Wuxi Suntech's suggested HTS classification is a subcategory that falls under the same six-digit HTS category as the one used to value this input in the *Preliminary Determination*. For clarity, the Department has added the description of the six-digit HTS classification that Wuxi Suntech's suggested eleven-digit HTS classification falls under.

[363] *See* Wuxi Suntech PRC Verification Report at Zhenjiang Rietech Exhibit 4.

[364] *See Chlorinated Isocyanurates Final Results*, and accompanying Issues and Decision Memorandum at Comment 1; *see also Hot-Rolled Carbon Steel Flat Products from Romania*, and accompanying Issues and Decision Memorandum at Comment 2.

{the} 'best available information'" to value a particular input.[365] Wuxi Suntech has consistently described this input as polyethylene glycol, rather than polytetramethylene or ether glycol.[366]

Additionally, the Department has not found any HTS category on the record that is specific to polyethylene glycol; thus the "basket" category proposed by Wuxi Suntech, which contains various types of polyether goods and satisfies our other criteria for selecting surrogate values (*i.e.*, country-wide price average, as specific to the input as possible, contemporaneous with the POI, net of taxes and import duties, and based on publicly available data from the primary surrogate country) is the best available information for valuing this input.[367] Accordingly, for the final determination, the Department has valued Wuxi Suntech's reported PEG input using Thai HTS category HTS 3907.20.00090.

Comment 40: Surrogate Value for Silica Purge of Liquid (IPA)

Wuxi Suntech

- Value silica purge of liquid (IPA) using the Thai HTS classification for "Propan-2-Ol (Isopropyl Alcohol)" (HTS 2905.12.00002). IPA stands for "isopropanol" meaning the suggested HTS classification is more specific to the factor being valued than the Thai HTS category for "supported catalysts, NESOI" (HTS 3815.19) which was used to value this input in the *Preliminary Determination*.

Petitioner

- Do not revise the HTS classification used to value this input. Wuxi Suntech failed to clarify what the acronym "IPA" stood for before it filed its case brief. Wuxi Suntech reported a separate FOP for isopropyl alcohol and proposed that the Department value isopropyl alcohol and silica purge of liquid (IPA) using two distinct HTS classifications. Also, Wuxi Suntech reported vastly different descriptions for isopropyl alcohol and silica purge of liquid (IPA), which contains surfactants and other ingredients in addition to "propyl alcohol."

Department's Position: The Department is continuing to value Wuxi Suntech's silica purge of liquid (IPA) using the Thai HTS classification for "supported catalysts, NESOI" (*i.e.*, HTS 381519) that was used to value this input in the *Preliminary Determination*. In response to the Department's request that Wuxi Suntech describe each FOP reported to the Department, Wuxi Suntech provided the following description of silica purge of liquid (IPA): "It's a mixed chemical, *used as a catalyst* in texturing of monocrystalline silicon. Ingredients: Propyl Alcohol,

[365] *See Taian Ziyang Food Company, Ltd. v. United States*, Slip Op. 11-88 (CIT 2011) at 62.
[366] *See* Wuxi Suntech's April 20, 2012 supplemental questionnaire response at Exhibit SD-28, and Wuxi Suntech PRC Verification Report at Zhenjiang Rietech Exhibit 4. Wuxi Suntech filed the verification exhibits separately on June 28, 2012.
[367] We note that interested party comments regarding the appropriate SV for this material input are limited to the specificity of the input. That is, parties have not commented on contemporaneity, the inclusion or exclusion of taxes and import duties, public availability, *etc*. For an explanation of the Department's practice regarding SV selection, *see* Comment 39: Surrogate Value for PEG, *supra*.

water and surfactant and so on."[368] Wuxi Suntech also initially suggested that the Department value this input using the HTS classification 3815.90.[369]

Subsequently, the Department issued a supplemental questionnaire requesting Wuxi Suntech to support its suggested HTS classification or suggest one more specific to the input. In response to this request, Wuxi Suntech explained that it lacked knowledge of the precise chemical composition of its silica purge of liquid (IPA), and revised its initial suggested HTS classification while continuing to assert that it was best valued as a type of catalyst. Specifically, Wuxi Suntech reported the following:

> Wuxi Suntech does not know the exact chemical composition of this input, as the supplier treated this information as a trade secret and did not disclose it to Wuxi Suntech. We therefore classified this input based on its function as "catalytic preparations" under 3815.19 for both Thailand and India.[370]

In the *Preliminary Determination*, the Department valued Wuxi Suntech's silica purge of liquid (IPA) using the Thai HTS classification suggested by Wuxi Suntech based on its claim that the input was a catalyst with a chemical composition that was unknown to Wuxi Suntech because of the proprietary nature of the product's chemical properties.

Wuxi Suntech's assertion made in its case brief that IPA is an acronym for "isopropanol" is not an adequate basis to conclude that its silica purge of liquid (IPA) is best valued using an HTS classification for isopropyl alcohol. Wuxi Suntech cites no other record evidence to support its claim that its proposed HTS category is more specific to the input. Moreover, the record lacks information regarding the concentration of water, surfactants, and other ingredients in Wuxi Suntech's silica purge of liquid (IPA) and, therefore, there is no basis to conclude that the input is best categorized under an HTS classification for isopropyl alcohol rather than an HTS classification for catalysts. While propyl alcohol may be one of the ingredients in silica purge of liquid (IPA) it is not the sole ingredient; rather silica purge of liquid (IPA) is a mixture of chemicals which results in a product that Wuxi Suntech described as a catalyst. Accordingly, the Department finds that the HTS category for catalysts that was used in the *Preliminary Determination* best matches the record description of silica purge of liquid (IPA). In addition, this HTS category satisfies our other criteria for selecting SVs (*i.e.*, country-wide price average, contemporaneous with the POI, net of taxes and import duties, and based on publicly available data from the primary surrogate country).

For the foregoing reasons, the Department finds that Wuxi Suntech has not met its burden to demonstrate that the SV it now proposes is more specific to the input than the SV it proposed prior to the *Preliminary Determination*.[371] Accordingly, for the final determination, the

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[368] *See* Wuxi Suntech's April 25, 2012 submission at Exhibit 1. Emphasis added. The Department notes that Wuxi Suntech has referred to this input as "silicic" purge of liquid (IPA) in several submissions.
[369] *See* Wuxi Suntech's January 18, 2012 submission at Exhibit 1.
[370] *See* Wuxi Suntech's April 25, 2012 submission at 6-7.
[371] We note that interested party comments regarding the appropriate SV for this material input are limited to specificity. That is, parties have not commented on contemporaneity, the inclusion or exclusion of taxes and import

Department has continued to value Wuxi Suntech's reported silica purge of liquid (IPA) using the same HTS category that was used in the *Preliminary Determination.*

Comment 41: Surrogate Value for Hydrochloric Acid

Wuxi Suntech

- Value hydrochloric acid using the Thai HTS category for "Hydrochloric Acid More Than 36% W/W" (HTS 2806.10.00103) because the Department used this category to value Trina's hydrochloric acid and it is a more accurate category than the one used in the *Preliminary Determination* to value Wuxi Suntech's hydrochloric acid (*i.e.*, "Hydrochloric Acid 15% W/W To 36% W/W" HTS 2806.10.00102).

No other parties commented on this issue.

Department's Position: For the final determination, the Department has valued Wuxi Suntech's hydrochloric acid using the Thai HTS classification for hydrochloric acid solutions with concentrations that exceed 36 percent. Prior to the *Preliminary Determination*, in response to the Department's request that Wuxi Suntech describe each FOP reported to the Department, Wuxi Suntech provided the following description of hydrochloric acid: "Ingredients: HCL; *Concentration 37%....*"[372] Accordingly, we find that Wuxi Suntech's assertion that its input should be valued using an HTS classification for hydrochloric acid with a concentration exceeding 36 percent is supported by record evidence. For the foregoing reasons, the Department finds that Wuxi Suntech has demonstrated that the SV it now proposes is more specific to the input than the SV used in the *Preliminary Determination.* In addition, this value satisfies our other criteria for selecting SVs (*i.e.*, country-wide price average, contemporaneous with the POI, net of taxes and import duties, and based on publicly available data from the primary surrogate country).[373] Accordingly, for the final determination, the Department has valued Wuxi Suntech's reported hydrochloric acid using the Thai HTS classification for hydrochloric acid solutions with concentrations that exceed 36 percent.

Comment 42: Diamond Wire Saw Blade Surrogate Value

Petitioner

- Value Wuxi Suntech's diamond saw blade input using the Thai subheading for "Saw Blades Nesoi, And Parts Of Saw Blades Nesoi, Of Base Metal, Other" (HTS 8202.99.90000) rather than HTS 7217.30.9000 "wire of iron or non-alloy steel, plated or coated with base metal other than zinc," because it more specific to the diamond coated saw blade used by Wuxi Suntech.

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duties, public availability, *etc*. For an explanation of the Department's practice regarding SV selection, *see* Comment 39: Surrogate Value for PEG, *supra*.

[372] *See* Wuxi Suntech's March 19, 2012 submission at Exhibit 1. Emphasis added.

[373] We note that interested party comments regarding the appropriate SV for this material input are limited to specificity. That is, parties have not commented on contemporaneity, the inclusion or exclusion of taxes and import duties, public availability, *etc*. For an explanation of the Department's practice regarding SV selection, *see* Comment 39: Surrogate Value for PEG, *supra*.

- The HTS classification used to value this input in the *Preliminary Determination* covers ordinary metal wires; however, Wuxi Suntech's diamond coated saw blade is uniquely suited for cutting materials.
- Any cutting device where the working part is predominantly diamonds necessitates the classification of the input under HTS heading 8202 because that heading covers handsaws and metal parts thereof and blades for saws of all kinds (including slitting, slotting, or toothless saw blades), and base metal parts thereof. A CBP ruling regarding diamond encrusted steel wire supports the proposed HTS classification.[374]

Wuxi Suntech

- The cutting implement in question is an overhead item which should not be valued as a direct material input.[375]
- If it is valued as a direct material input, the Department should continue to value it using the HTS classification that was used in the *Preliminary Determination*. In the *Preliminary Determination*, the Department made no distinction between this input and the non-diamond coated wire that was also reported as an FOP; the Department valued both inputs using the same HTS classification. Although the description of this input was corrected at verification from wire saw to metal saw blade, the Department valued this input and a non-diamond coated steel wire saw using the same HTS classification in the *Preliminary Determination* and there is no reason to use two different HTS categories to value these two inputs.
- The Department is not bound by CBP rulings when determining the appropriate HTS classification for SVs. The CBP ruling covers diamond wire saws, rather than diamond saw blades.

Department's Position: The Department agrees with Petitioner that the Thai HTS category HTS 8202.99.90000, "Saw Blades Nesoi, And Parts Of Saw Blades Nesoi, Of Base Metal, Other" is more specific to Wuxi Suntech's diamond saw blade input than HTS category 7217.30.9000.[376] Prior to the *Preliminary Determination*, Wuxi Suntech described this input in a manner that supported the HTS classification used to value this cutting implement in the *Preliminary Determination*.[377] At verification, however, Wuxi Suntech explained that it incorrectly identified the input as a diamond wire saw, and that the input was, in fact, a diamond saw blade.[378] Department verifiers examined source documents that confirmed the accuracy of Wuxi Suntech's correction.[379] Thus, the record indicates that the input at issue is a diamond saw blade, rather than a diamond wire saw. Accordingly, the Thai HTS classification for various types of wire, which was used to value this input in the *Preliminary Determination*, is less specific to the input than the Thai HTS category for saw blades suggested by Petitioner. Furthermore, the HTS category for saw blades satisfies our other criteria for selecting SVs (*i.e.*, country-wide price average, contemporaneous with the POI, net of taxes and import duties, and

[374] *See* Petitioner's July 9, 2012 submission at Exhibit 2, which contains CBP Ruling HQ 876359.
[375] *See* Comment 7 for a discussion of overhead items.
[376] For a discussion of the Department's decision to value this item as a direct material input, *see* Comment 7, *supra*.
[377] *See* Memorandum regarding: Proprietary Information Considered in the Final Determination for Wuxi Suntech Power Co., Ltd., dated concurrently with this memorandum.
[378] *See* Wuxi Suntech PRC Verification Report at 43, and Exhibit VE 1.
[379] *See* Wuxi Suntech PRC Verification Report at 55, and Exhibit ZR-VE 6.

based on publicly available data from the primary surrogate country). Because a comparison of the two proposed HTS category descriptions alone provides an adequate basis for selecting the appropriate SV, the Department does not consider the CBP ruling cited by Petitioner to be dispositive of the issue of the appropriate SV. The Department further notes that the CPB ruling cited by Petitioner covers diamond coated wire, rather than saw blades, and is, therefore, not specific to the input at issue. Accordingly, the Department has valued Wuxi Suntech's reported diamond saw blade using Thai HTS category 8202.99.90000.

Comment 43: Whether Back-to-Back Arrangements Should be Considered Purchases or Tolling

Petitioner

- The Back-to-Back arrangements under which Wuxi Suntech obtained wafers should be treated as purchases of wafers because title to the raw materials transferred to the wafer manufacturer.

Wuxi Suntech

- Continue to treat the Back-to-Back agreements for wafers as tolling based on the Department's *Preliminary Determination* rationale and because the company proved at verification that the polysilicon and wafer contracts under each agreement along with their eventual monetary fulfillment were linked.

Department's Position: The Department agrees with Petitioner that the wafers obtained under the Back-to-Back arrangements should be treated as purchases. During the POI, Wuxi Suntech obtained wafers, the key intermediate input used in producing solar cells, from affiliated and unaffiliated parties under the following two types of agreements, both of which Wuxi Suntech characterized and reported as tolling: one contract arrangements and two contract arrangements ("Back-to-Back"). Under the one contract arrangement Wuxi Suntech supplies polysilicon, the key raw material input, to the wafer producer and pays a tolling fee for the processing services. Under the Back-to-Back arrangements, two contracts are negotiated whereby Wuxi Suntech sells polysilicon to the wafer manufacturer under one contract and then purchases the processed wafer from the wafer manufacturer under the second contract.

In the *Preliminary Determination*, we considered both types of arrangements to be tolling based on Wuxi Suntech's assertions that it treats both arrangements as tolling and the fact that Wuxi Suntech continued to control the terms of the agreements, namely the wafer production planning, and the final disposition of the finished product (*i.e.*, the wafer manufacturers do not have the right to sell the wafers produced with the polysilicon purchased from Wuxi Suntech to third parties).[380] However, after further consideration of the issue, the Department finds that the Back-to-Back arrangements exhibit characteristics of purchases, such as the transfer of title to the raw material and the fact that the wafer producers "are unable to track silicon consumption to the wafers produced."[381]

[380] *See* Wuxi Suntech Analysis Memo at 28-29.

[381] *See* Wuxi Suntech PRC Verification Report at 50, where the Department noted that the affiliated wafer producers are "unable to track the consumption of silicon to specific wafers produced."

While the Department has, in a number of cases, typically considered arrangements where title of the raw material does not transfer (*i.e.*, the raw material was not sold to the producer/toller) as tolling,[382] the Department has not specifically addressed whether arrangements structured as Wuxi Suntech's Back-to-Back contracts should be treated as purchases (*i.e.*, use the FOP for the intermediate input) or tolling (*i.e.*, use the FOPs of the wafer inputs). At verification, the Department clarified its understanding of the two types of arrangements at issue. As discussed in further detail in a proprietary memorandum, the characteristics of these transactions, including the fact that title to the raw material transferred and the fact that the wafer producers "are unable to track silicon consumption to the wafers produced"[383] support the Department's finding that they are not mere tolling activities performed on items owned by Wuxi Suntech.[384] Rather, the Department finds that the Back-to-Back arrangements represent wafer purchases.

Therefore, for the final determination, the Department is considering all wafers obtained under Back-to-Back arrangements to be purchases. As such, the wafer purchases should be valued with the FOP of the intermediate input, *i.e.*, the wafer, rather than the FOPs used to produce the wafers. However, while information is available on the record to distribute the quantity of wafers obtained from affiliated tollers between purchased quantities and tolled quantities, the record lacks enough detail to make the same allocation for wafers obtained from unaffiliated tollers. Consequently, for the final determination the Department has adjusted the reported FOPs to reflect the SV of the intermediate input (*i.e.*, the wafer) for the wafer consumption quantities obtained under affiliated Back-to-Back contracts (contracts related to information examined at verification) and, as facts otherwise available, the Department has continued to value the wafer consumption quantities obtained under unaffiliated Back-to-Back contracts (contracts for which detailed information is not on the record) based on the upstream FOPs of the unaffiliated wafer producers.[385]

ISSUES RELATING TO OTHER REPSONDENTS

Comment 44: Voluntary Respondent Treatment of Yingli

Yingli

- While the Department justifiably limited the number of respondents examined in this investigation, given that 80 companies responded to the Q&V questionnaire, it should have select Yingli as a mandatory respondent because it is one of the largest exporters of solar cells and the record shows that its dumping experience is far different from that of

[382] *See, e.g., Certain Steel Nails from the PRC*, and accompanying Issues and Decision Memorandum at Comment 5, where the Department noted that in a tolling arrangement the respondent "maintained ownership of the wire rod" input; and, *Pneumatic Off-the-Road Tires Final Determination*, and accompanying Issues and Decision Memorandum at Comment 43, where the Department considered the third party processor to be a toller because the respondent "purchases the major inputs necessary for producing semi-finished rubber and retains title to those inputs and the resulting semi-finished rubber."

[383] *See* Wuxi Suntech PRC Verification Report at 50, where the Department noted that the affiliated wafer producers are "unable to track the consumption of silicon to specific wafers produced."

[384] *See* Memorandum regarding: Proprietary Information Considered in the Final Determination for Wuxi Suntech Power Co., Ltd., dated concurrently with this memorandum.

[385] Some of the information concerning this issue cannot be disclosed to the public. For a full discussion *see* Memorandum regarding: Proprietary Information Considered in the Final Determination for Wuxi Suntech Power Co., Ltd., dated concurrently with this memorandum.

the two selected mandatory respondents. The statutory authority to limit the number of respondents that the Department will examine individually is a "narrow exception."

- Even if the Department limits the number of companies individually examined, it is still required by law to examine Yingli as a voluntary respondent because Yingli requested voluntary treatment, submitted timely responses to questionnaires, and the number of exporters or producers who submitted such information is not so large that it would be unduly burdensome or inhibit the timely completion of the investigation to examine them. Thus, the Department should have calculated an individual weighted-average dumping margin for Yingli.
- The threshold for declining to examine voluntary respondents is higher than that for limiting the examination of individual respondents. As required by the CIT in *Grobest*,[386] the Department must separately consider whether examining voluntary respondents, including Yingli, would be unduly burdensome or inhibit the timely completion of the investigation. Despite claims to the contrary in its voluntary respondent selection memorandum, the Department did not take such considerations into account with regard to Yingli's request.
- Although the Department allegedly considered whether to examine voluntary respondents, it used the same reasoning (current case load and the resultant burden on the office's resources), to limit the number of respondents as it did to explain why it was not examining Yingli as a voluntary respondent. The only additional analysis performed was to elaborate on the resources needed for the two mandatory respondents, which is not an independent determination that satisfies the required "higher threshold of agency burden" when considering whether to examine voluntary respondents.

No other parties commented on this issue.

Department's Position: We disagree with Yingli. First, the Department did not err by not selecting Yingli as a mandatory respondent. When faced with a large number of exporters/producers, section 777A(c)(2) of the Act provides the Department with the discretion to limit its examination to a reasonable number of companies if it is not practicable to examine all companies due to the large number of exporters or producers involved in the investigation. Because the Department was faced with a large number of exporters involved in this investigation (*i.e.*, 80 companies), it was "not practicable to make individual weighted-average dumping margin determinations" for each company.[387] Thus, as acknowledged by Yingli, the requirement for invoking the exception provided in section 777A(c)(2) of the Act was satisfied and, therefore, the Department permissibly limited individual examination in this investigation to a reasonable number of exporters.[388]

Where it is not practicable to individually examine all known exporters of subject merchandise sections 777A(c)(2)(A) and (B) of the Act permit the Department to limit its examination using either of the following methodologies: (1) a sample of exporters, producers, or types of products that is statistically valid based on the information available at the time of selection; or (2) exporters and producers accounting for the largest volume of the subject merchandise that can

[386] Yingli cites *Grobest*, 815 F. Supp. 2d at 1361-1364 (CIT 2012).
[387] *See* section 777A(c)(2) of the Act.
[388] *See* Respondent Selection Memorandum.

reasonably be examined. In deciding to limit individual examination to a reasonable number of exporters, the Department carefully considered its resources, including its current and anticipated workload and deadlines coinciding with this investigation. As explained in detail in the respondent selection memorandum, after carefully considering its resources, the Department determined that it would not be practicable to examine more than two respondents. The Department selected as mandatory respondents the two exporters accounting for the largest volume of subject merchandise that could be reasonably examined. Since the Department selected exporters accounting for the largest volume of exports as mandatory respondents, Yingli believes it should have been selected because it was one of the largest exporters. Yet this argument ignores the qualifier in the statutory provision, namely that the Department may limit the number of respondents examined to those accounting for the largest volume of the subject merchandise *that can reasonably be examined*. As noted above, the Department determined that it could only reasonably examine two respondents and it selected as mandatory respondents the two respondents accounting for the largest volume of shipments of subject merchandise. Thus, the Department properly followed the statutory provisions in selecting mandatory respondents in this investigation. Therefore, despite Yingli's claims regarding the volume of its exports or the uniqueness of its dumping experience, there is no basis for concluding that the Department improperly failed to select Yingli as a mandatory respondent.

Next, we turn to Yingli's claim that it should have been selected as a voluntary respondent. When the Department limits the number of exporters examined in an investigation, section 782(a) of the Act directs the Department to calculate individual weighted average dumping margins for companies not initially selected for examination who voluntarily provide information if the information is submitted by the due date specified for exporters initially selected for examination and the number of such companies voluntarily providing information is not so large that individual examination of them would be unduly burdensome and would inhibit timely completion of the investigation. In its voluntary respondent memorandum,[389] the Department provided reasons why selecting even one voluntary respondent in this case would be unduly burdensome and why it would inhibit the timely completion of the investigation. Specifically, the Department explained, among other things, that: (1) the selected mandatory respondents have complex corporate structures and production systems involving multiple entities which require additional resources and time to analyze; (2) the production process for subject merchandise is complex and involves numerous FOPs; and (3) there were a significant number of SRAs that needed to be examined. Moreover, we noted that the process required to adequately analyze the complex and voluminous data and information submitted in this case has necessitated extending the deadline for the preliminary determination. Examining yet another respondent would take additional time and, therefore, inhibit the timely completion of the preliminary determination and, consequently, the final determination in this investigation.

We disagree with Yingli's claim that the reasons provided for not selecting a voluntary respondent are the same reasons provided for limiting the number of mandatory respondents. In the respondent selection memorandum, the Department noted that it was limiting the number of mandatory respondents examined based on current case load and the constraints on its administrative resources. In the voluntary respondent selection memorandum the Department went further by enumerating unique aspects of the case that show why the burden of examining

[389] *See* Voluntary Respondent Selection Memorandum.

even one voluntary respondent was an undue burden. The degree of complexity of the corporate structures, production systems, and production processes of the mandatory respondents, and the large number of SRAs are significant aspects of this case that weighed on our respondent selection. These details constitute more than mere elaboration upon the reasoning as to why only two mandatory respondents were chosen pursuant to section 777 A(c) of the Act.

The increased administrative burdens of examining respondents employing a complex production process in multiple locations and selling through U.S. affiliates should not be readily dismissed when considering whether it is unduly burdensome to examine a voluntary respondent. The mandatory respondents were not typical companies to investigate because their subject merchandise was produced by numerous producers, suppliers, and/or tollers. What is more, one of the mandatory respondents used a further manufacturer in the United States which is not common in NME cases. All of this meant the Department had to analyze FOPs from the respondents, their affiliated companies, and certain unaffiliated companies, just as though these were additional separate producing respondents. Each of these companies has its own set of books and records, to which its data must be reconciled. Adding to the above burdens, Yingli noted that two entities were responsible for manufacturing the subject merchandise that it sold to the United States. If the Department had individually examined Yingli as a voluntary respondent as well as the two mandatory respondents it would have been undertaking an investigation of 12 production facilities, including those of certain unaffiliated wafer producers and a U.S. further manufacturer. This would have certainly been atypical and extremely burdensome given the complex production processes and the large number of FOPs. Not only would the burden of analyzing the FOPs have been atypical, but further complicating the examination of the mandatory respondents and Yingli, if it had been examined, is the fact that some of their U.S. sales were made through U.S. affiliates, necessitating a CEP analysis, and involving yet another company's set of data and reconciliations. None of this even considers the undue burden of verifying so many respondents with multiple manufacturing facilities. Setting aside the additional burdens of verifying Yingli's multiple facilities, the resources required simply to verify the mandatory respondents were significant. The Department spent over three weeks verifying Wuxi Suntech, its affiliated producers and its U.S. affiliates at three locations and spent two weeks verifying Trina, its producers and its U.S. affiliates at two locations. Thus, already with the submission of Wuxi Suntech's and Trina's Section A responses, in which their company structures were reported, the Department knew that examination of these companies would be far more complex and time consuming than examining a single exporting producer selling directly to unaffiliated customers (EP sales) in the United States. In fact, given the complexity of this case, the Department found it was necessary to issue 14 supplemental questionnaires to Wuxi Suntech and nine supplemental questionnaires to Trina. Even without the burden of taking on an additional company as a voluntary respondent, the Department had to fully extend the *Preliminary Determination* due to the extraordinarily complicated nature of this investigation. This demonstrates that examining yet another respondent would certainly have inhibited the timely completion of the investigation.

The Department recognizes that section 782(a) of the Act establishes a separate standard from section 777A(c) of the Act for the treatment of voluntary respondents. However, the determination of whether examining voluntary respondents creates an undue burden and inhibits timely completion of the case is made after the Department has limited its examination to a

reasonable number of mandatory respondents under section 777A(c) of the Act. Thus, the determination must be made in that context. The Department's analysis of voluntary respondents under section 782(a) of the Act did not simply mirror the analysis conducted in selecting mandatory respondents under 777A(c) of the Act. The distinction is that under 777A(c) of the Act the Department found it was not practicable to select beyond two mandatory respondents even if the examination of three respondents only involved the same burdens that would occur in every case. On the other hand, in considering requests to be voluntary respondents under section 782(a) of the Act the Department identified the unique facts in this case that made examining a voluntary respondent unduly burdensome. The question of whether to accept one or more voluntary respondents must necessarily be considered in light of the challenges presented by the company(ies) to which the Department already limited its examination under section 777A(c)(2) of the Act, in addition to any other particular circumstances in the case and the Department's resources. When the cumulative effect of the administrative requirements of this case are considered, including, among other things, the complexities noted above, the large number of SRAs and the significant number of issues associated with them, and a significant scope issue which arose early in the investigation and led the Department to work closely with CBP, it is clear that taking on a voluntary respondent in this case would tax the Department's resources to the point that it would be unduly burdensome.

Based on the above, examining Yingli's questionnaire responses, issuing supplemental questionnaires, analyzing its particular circumstances (including any affiliations), verifying the submitted information, and calculating an additional individual margin rate would have unduly burdened the Department and inhibited the timely completion of this investigation; within the meaning of section 782(a) of the Act.

Comment 45: Treatment of Jiasheng's Separate Rate Application

Jiasheng

- The Department incorrectly and unjustifiably rejected Jiasheng's Q&V response and SRA. Although it did not receive the Q&V questionnaire mailed by the Department, Jiasheng nonetheless submitted a Q&V questionnaire response although it was approximately five hours late. It was submitted on 9:59 pm via e-mail on the day of the deadline for submitting such responses (November 29, 2011).
- The Department failed to notify Jiasheng that its Q&V questionnaire response was improperly filed as it did for nine other companies that improperly filed Q&V questionnaire responses and it gave these nine companies until December 14, 2011, to properly file their Q&V responses.
- Jiasheng properly resubmitted its Q&V questionnaire response on December 12, 2011. However, the Department rejected Jiasheng's Q&V questionnaire response on January 6, 2012, based on untimeliness, and made no mention of the November 29, 2011 submission.
- By extending the deadline for these nine other respondents, it was quite obvious that the Department had no immediate need for, or concerns about, the Q&V questionnaire response filings of Jiasheng or the nine other respondents whose initial Q&V questionnaire responses were improperly filed.

- In *Grobest* the CIT found that the Department abused its discretion when it unjustifiably rejected a respondent's untimely filed separate rate certificate, filed 95 days after the deadline, because 1) there was a "stark contrast" between the Vietnam-wide rate and the separate rate, 2) every indication suggested that the burden of reviewing the separate rate certificate would not be great, and 3) there was no evidence supporting a conclusion that "the burden on Commerce would be sufficient to outweigh the interests in fairness and accuracy."[390]
- The factors considered by the CIT in *Grobest* clearly favor acceptance of Jiasheng's Q&V response because Jiasheng only filed five hours late on the day of the deadline for submitting such responses. Also, there is no indication that the burden of reviewing Jiasheng's Q&V questionnaire response would be great, or that accepting this response would have placed a procedural burden on the Department. Further, the interest in fairness and accuracy clearly outweigh the burden of reviewing Jiasheng's Q&V questionnaire response in this case. In particular, there is an undeniably "stark contrast" between the current separate rate 31.18 percent and the adverse 249.96 percent PRC-wide rate assigned to Jiasheng.
- The Department's decision in this instance is punitive. The fact that the Department arbitrarily rejected Jiasheng's SRA because it rejected the Q&V questionnaire response is punitive.

Petitioner

- Jiasheng admits that it did not file its Q&V questionnaire response by the deadline established in the *Initiation Notice* or file it in the manner prescribed by the Department.
- The Department's Respondent Selection Memorandum contains an attachment that lists all of the companies from which it received Q&V questionnaire responses. Jiasheng's name does not appear anywhere in the document which suggests that the Department never received its Q&V questionnaire response.

Department's Position: We disagree with Jiasheng. First, Jiasheng did not officially file its Q&V questionnaire response five hours late on the day it was due.[391] Jiasheng never officially filed its Q&V questionnaire response through IA ACCESS until 13 days after it was due. The Department explicitly stated in its Q&V questionnaire that all submissions must be made electronically using the Department's IA ACCESS website at http://iaaccess.trade.gov. While Jiasheng argues that it should have been notified that its Q&V questionnaire response was improperly filed because nine other respondents' were notified of filing deficiencies in their Q&V questionnaire responses, these nine respondents submitted timely Q&V questionnaire responses through IA ACCESS, albeit each of their submissions had certain filing deficiencies. Jiasheng failed to officially file a Q&V questionnaire response on the record of the case by the deadline for doing so; thus there was nothing on the record for the Department to examine for filing deficiencies.

[390] *See Grobest.*

[391] Also, although Jiasheng states that it never received the Q&V questionnaire, record evidence indicates that the questionnaire was delivered. *See* the December 8, 2011, memorandum concerning "Issuance of Quantity and Value Questionnaires."

Second, we disagree with Jiasheng that the court's decision in *Grobest* requires the Department to accept its Q&V questionnaire response. Jiasheng argues that accepting its Q&V questionnaire response would not have placed a procedural burden on the Department nor would any burden resulting from reviewing the response outweigh the interest of fairness and accuracy. Specifically, Jiasheng argues that it would not have been a great procedural burden on the Department to review its Q&V questionnaire response. However the procedural burden at issue here does not necessarily come from reviewing a Q&V questionnaire response but stems from accepting untimely Q&V questionnaire responses. It is important for the Department to receive Q&V questionnaire responses in a timely fashion so that it can adhere to a schedule that allows it to meet the statutory deadlines for completing the investigation. The information in Q&V questionnaire responses is used by the Department to select mandatory respondents. Hence, the examination of the mandatory respondents, which is the main focus of the investigation, cannot begin until the Q&V questionnaire responses are received and analyzed. The importance of receiving Q&V questionnaire responses in a timely fashion as early as possible in the investigation is evident by the fact that the Department issues the Q&V questionnaire on the day of initiation, and then issues a memorandum in which it selects mandatory respondents within 10 days of receiving the Q&V questionnaire responses.[392] This prompt turnaround is necessary in order for the Department to meet the statutory deadline for issuing a preliminary determination. The fully extended deadline for issuing the preliminary determination is less than six months from the due date for Q&V questionnaire responses. During this period the Department must choose mandatory respondents, analyze questionnaire responses, issue and analyze supplemental questionnaire responses, calculate dumping margins for the respondents, and in this case, analyze nearly 70 SRAs and a significant amount of comments on various issues including scope, separate rates and critical circumstances. Jiasheng officially filed its Q&V questionnaire response almost two weeks after the due date for such responses. If the Department were to allow parties to file Q&V questionnaire responses at various points after the due date for such responses it would continually be restarting the respondent selection process and would delay the start of the investigatory process as outlined above. Given the significant amount of work that needs to take place in an investigation in the relatively short amount of time before a preliminary determination must be issued it would place a significant procedural burden on the Department if it were not to enforce its Q&V questionnaire deadline.

Further, the interests of fairness are best served by uniformly enforcing the deadline for filing a response to the Q&V questionnaire. Enforcing the deadline ensures that mandatory respondents are chosen in a fair and transparent manner. If the Department were to subjectively accept untimely Q&V questionnaire responses it would provide the respondents filing late responses with additional time to prepare their responses that other companies were not provided and an opportunity to examine other Q&V questionnaire responses prior to submitting their own response. In order to avoid providing late-filing companies with such advantages the Department strictly enforces the Q&V questionnaire response deadline and explicitly notifies respondents in its initiation notice that it will not consider SRAs made by parties that fail to timely respond to the Q&V questionnaire.

[392] *See* Respondent Selection Memorandum.

Additionally, the fact that the Department provided nine companies additional time to correct filing deficiencies in their Q&V questionnaire responses does not demonstrate that there was no immediate need for those responses or for the Q&V response from Jiasheng. The immediate need was for these companies to file a Q&V questionnaire response by the deadline so the Department could begin its respondent selection process. The nine companies referenced by Jiasheng met the filing deadline. Jiasheng did not. If the Department were to accept late-filed Q&V questionnaire responses such as Jiasheng's, the Department's process of identifying filing deficiencies in such Q&V questionnaire responses would be ongoing, detracting from its focus on the investigatory process of those entities that were timely in their responses.

The Department stated in the *Initiation Notice* that it "requires that respondents submit a response to both the quantity and value questionnaire and the separate rate-application by the respective deadlines in order to receive consideration for separate-rate status."[393] Additionally, in the Q&V questionnaire sent to Jiasheng the Department, stated that it "will not give consideration to any separate-rate status application made by parties that fail to timely respond to the quantity and value questionnaire . . ."[394] Because Jiasheng failed to timely file a Q&V questionnaire response the Department did not consider its SRA and has continued to treat the company as part of the PRC-wide entity.

Comment 46: Treatment of Chaori's Separate Rate Application

Chaori

- The Q&V questionnaire sent by the Department "made no mention of the requirement to submit a SRA." The Department had a legal obligation to notify Chaori by mail regarding the need to file an SRA. Notification of the need to file an SRA in the *Federal Register* was not sufficient because (a) the record shows that the Department was aware of Chaori's address and (b) there were clear adverse consequences if Chaori failed to take timely action.
- The error caused by insufficient notice of the submission requirements was compounded by the Department's decision to mail Chaori only the Q&V questionnaire, and not an SRA. Lacking experience in AD investigation procedures, Chaori was reasonably confused about the requirements and did not understand the additional need to file the SRA.
- The AD statute requires the Department to notify parties of deficient responses and (wherever practical) provide parties an opportunity to remedy any deficiencies. However, the Department failed to satisfy this statutory obligation when it did not notify Chaori that the absence of an SRA would cause it to be subjected to the PRC-wide rate. Moreover, the Department's refusal to consider the SRA Chaori filed on its own accord violated this statutory obligation and was contrary to the fundamental goal of establishing fair and accurate AD margins.

[393] *See Initiation Notice*, 76 FR at 70964.

[394] *See* Quantity and Value Questionnaire for Crystalline Silicon Photovoltaic Cells, Whether Or Not Assembled Into Modules ("Solar Cells") from the People's Republic of China ("PRC"), dated November 9, 2011 and placed on the record in a December 8, 2011 memorandum from Rebecca Pandolph to the file entitled "Issuance of Quantity and Value Questionnaires." A copy of the Q&V questionnaire that was sent to Jiasheng was also placed on the Department's website at http://ia.ita.doc.gov/ia-news-2011.html.

Petitioner

- Chaori failed to submit its SRA in a timely manner - missing the deadline by over 150 days. The Department correctly denied Chaori a separate rate in accordance with its stated policy.
- The CIT has found that "due process, by itself, does not require the Department to provide notice to every party so long as Commerce follows its clearly stated rules on where and when it will provide notice." In its *Initiation Notice*, the Department explained that respondents must file both an SRA and a Q&V questionnaire response in order to be considered for a separate rate.

Department's Position: We disagree with Chaori. Although Chaori claims that the Q&V questionnaire that it received did not mention the requirement to file an SRA and that it was not notified that the absence of an SRA would cause it to be subjected to the PRC-wide rate, this is not the case. In the Q&V questionnaire that Chaori received, the Department stated the following:

> The Department is also requiring all firms that wish to qualify for separate-rate status in this investigation to complete a separate-rate status application as described in the *Notice of Initiation*. In other words, the Department will not give consideration to any separate-rate status application made by parties that fail to timely respond to the Quantity and Value Questionnaire or fail to timely submit the requisite separate-rate status application . . .[395]

While Chaori claims that it was confused about the separate rate requirements and did not understand that there was an additional requirement to file an SRA because the Department only mailed it a Q&V questionnaire and not an SRA, as noted above the Department explicitly stated in the Q&V questionnaire that in addition to filing a response to the Q&V questionnaire, parties must file an SRA to receive separate-rate status.[396] Also, the Department explicitly stated in the Q&V questionnaire "that receipt of this letter {(the cover letter to the Q&V questionnaire)} does not guarantee separate rate status."[397] Further, the cover letter to the Q&V questionnaire listed the address for the Department's website where copies of the Q&V and SRA questionnaires could be found, and provided contact information for the Department officials in charge of this case should Chaori have any questions.[398]

Moreover, the Department stated in the *Initiation Notice* for this investigation that "{i}n order to obtain separate-rate status in {non-market economy} investigations, exporters and producers must submit a separate-rate status application. . . . The separate-rate application will be due 60 days after publication of this initiation notice." Additionally, the Department stated that it

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[395] *See* Quantity and Value Questionnaire for Crystalline Silicon Photovoltaic Cells, Whether Or Not Assembled Into Modules ("Solar Cells") from the People's Republic of China ("PRC"), dated November 9, 2011 and placed on the record in a December 8, 2011 memorandum from Rebecca Pandolph to the file entitled "Issuance of Quantity and Value Questionnaires." A copy of the Q&V questionnaire that was sent to Chaori was also placed on the Department's website at http://ia.ita.doc.gov/ia-news-2011.html.
[396] *See id*.
[397] *See id*.
[398] *See id*.

"requires that respondents submit . . . the separate rate application by the respective deadline {} in order to receive consideration for separate-rate status." The *Initiation Notice* also listed the website where the SRA could be found.[399] The Department considers this notice alone to be sufficient notice of the need to file an SRA in order to receive separate-rate status. Nonetheless, as noted above, Chaori received further notice through the Q&V questionnaire that it received.

Furthermore, Chaori's reliance on the statutory requirement that the Department provide parties with the opportunity to remedy deficiencies in their responses is misplaced. This statute applies to deficient responses to requests for information. Chaori never filed an SRA; thus, there was no response to examine for deficiencies. Nonetheless, as noted above, Chaori was notified in several ways that it needed to file an SRA in order to be considered for separate rate status. What is more, Chaori selectively relied on this statute while ignoring the fact that it filed its SRA approximately six months after the due date for filing SRAs, a month and a half after the regulatory deadline for submitting new factual information, a month and a half after the *Preliminary Determination* had been published, over a week after all verifications had been completed, and less than a month before case briefs were due.

While Chaori argues that the Department's rejection of its SRA was contrary to the goal of calculating fair margins, determining fair and accurate AD margins requires the Department to set time limits for parties to submit information in order to move the case forward under the statutory deadlines. The process of administering AD cases starts with initial information gathering through questionnaires and then moves to the analysis of questionnaire responses and further refinement of the information through supplemental questionnaires. Ignoring deadlines and allowing parties to continually restart the process at the first step of information gathering creates an administrative burden that would inhibit timely completion of the investigation and impede the fair and accurate determination of margins. Thus we have not accepted Chaori's untimely filed SRA. Since Chaori did not demonstrate that it was eligible for separate rate status, it is part of the PRC-wide entity.

[399] *See Initiation Notice* at 70964.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish the final results of this investigation and the final weighted-average dumping margins in the *Federal Register*.

AGREE ✓ DISAGREE _____

Paul Piquado
Assistant Secretary
for Import Administration

9 OCTOBER 2012
Date

Table of Abbreviations and Acronyms

Act	Tariff Act of 1930, as amended
AD	Antidumping
AFA	Adverse Facts Available
APO	Administrative Protective Order
APX	APX Ocean Freight Forwarder
AUV	Average Unit Value
BOT	Bank of Thailand
BPI	Business Proprietary Information
CAFC	U.S. Court of Appeals for the Federal Circuit
CBP	U.S. Customs and Border Protection
CEO	Chief Executive Officer
CEP	Constructed Export Price
CFR	Code of Federal Regulations
Chaori	Shanghai Chaori Solar Energy Science & Technology Co., Ltd. and Shanghai Chaori International Trading Corporation Ltd.
CIT	U.S. Court of International Trade
COM	Cost of Manufacture
CONNUM	Control Number
COP	Cost of Production
CPC	Communist Party of China
CPPCC	Chinese People's Political Consultative Conference
CVD	Countervailing Duty
Department	U.S. Department of Commerce
Dongfang	Dongfang Electric (Yixing) MAGI Solar Power Technology
EP	Export Price
EPE sheet	Expanded polyethylene sheet
FA	Facts Available
FOP(s)	Factor(s) of production
FR	Federal Register
G&A	General and Administrative
GNI	Gross National Income
GOC	Government of China
GTA	Global Trade Atlas® Online

Hana	Hana Microelectronics Public Company Limited
HTS	Harmonized Tariff Schedule
ILO	International Labor Organization
in	inches
ISE	Indirect Selling Expense
ITA	International Trade Administration
ITC	U.S. International Trade Commission
Jiasheng	Jiangsu Jiasheng Photovoltaic Technology Co., Ltd.
Jiawei Wuhan	Jiawei Solarchina (Wuhan) Co., Ltd.
KCE	KCE Electronics Public Company Limited
KGS	Kilograms
LIBOR	London Interbank Offered Rate
LTFV	Less than Fair Value
M3	Cubic Meter
ME	Market economy
MEP	Market economy purchase
ML&E	Materials, labor and energy
mm	millimeter
MT(s)	Metric ton(s)
NEC Tokin	NEC Tokin Electronics (Thailand) Co., Ltd.
Ningbo Etdz	Ningbo Etdz Holdings Ltd.
Ningbo Komaes	Ningbo Komaes Solar Technolorn Co., Ltd
Ningbo Qixin	Ningbo Qixin Solar Electrical Appliance Co., Ltd
NME	Nonmarket economy
NPC	National People's Congress
NSO	National Statistic Office of Thailand
NV	Normal value
NYSE	New York Stock Exchange
OH	Overhead
POI	Period of Investigation
POR	Period of Review
PRC	People's Republic of China
Q&V	Quantity and Value
Rohm	Rohm Integrated Systems (Thailand) Co., Ltd.
SASAC	State-owned Assets Supervision and Administration Commission

Separate Rate Coalition	Sumec Hardware & Tools Co., Ltd., Ningbo Etdz Holdings Ltd., LDK Solar Hi-Tech (Nanchang) Co., Ltd., LDK Solar Hi-Tech (Suzhou) Co., Ltd., Ningbo Qixin Solar Electrical Appliance Co., Ltd., Ningbo Komaes Solar Technology Co., Ltd., Zhejiang Jiutai New Energy Co., Ltd., ET Solar Industry Limited, JingAo Solar Co., Ltd., Dongfang Electric (Yixing) MAGI Solar Power Technology Co., Ltd., Shanghai JA Solar Technology Co., Ltd., Jiangsu Sunlink PV Technology Co., Ltd., and JA Solar Technology Yangzhou Co., Ltd.
SG&A	Selling, general and administrative expenses
Shanghai Suntech	Suntech Power Co., Ltd.
SOE	State-owned enterprise
Solar Cells	Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules,
SRA	Separate Rate Applicant/Application
Starck	H.C. Starck Co., Ltd
Styromatic	Styromatic (Thailand) Co., Ltd
Sumec Hardware	Sumec Hardware & Tools Co., Ltd.
SunPower	SunPower Corporation
Suntech America	Suntech America Inc.
Suntech Arizona	Suntech Arizona Inc.
SV	Surrogate Value
Team Precision	Team Precision Public Company Limited
tenKsolar	tenKsolar (Shanghai) Co. Ltd.
Tianwei	Tianwei New Energy (Chengdu) PV Module Co., Ltd.
Trina	The respondent consisting of Changzhou Trina Solar Energy Co., Ltd. and Trina Solar (Changzhou) Science & Technology Co., Ltd.
Trina S&T	Trina Solar (Changzhou) Science & Technology Co., Ltd.
Trina Solar	Changzhou Trina Solar Energy Co., Ltd.
Trina U.S.	Trina Solar (U.S.) Inc.
TSL	Trina Solar Limited
WTO	World Trade Organization
Wuxi Suntech	Wuxi Suntech Power Co., Ltd.
Yingli	Yingli Green Energy Holding Company Limited and Yingli Green Energy Americas, Inc.

Yearbook	ILO Yearbook of Labor Statistics
Zhejiang Jiutai	Zheiiang Jiutai New Energy Co., Ltd
Zhenjiang Rietech	Zhenjiang Rietech New Energy Science and Technology Co., Ltd.

Table of Shortened Citations

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Activated Carbon AR1 Prelim	*Certain Activated Carbon From the People's Republic of China: Notice of Preliminary Results of the Antidumping Duty Administrative Review and Extension of Time Limits for the Final Results*, 74 FR 21317 (May 7, 2009)
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AD/CVD Duties Part II	*Antidumping Duties; Countervailing Duties*, Part II, 62 FR 27296 (May 19, 1997)
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Barium Carbonate from the PRC	*Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Barium Carbonate From the People's Republic of China*, 68 FR 12664 (March 17, 2003)
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Certain Cased Pencils Final Results	*Certain Cased Pencils From the People's Republic of China: Final Results of the Antidumping Duty Administrative Review*, 75 FR 38980 (July 7, 2010)
Certain Cased Pencils from the PRC	*Certain Cased Pencils from the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 48612 (July 25, 2002)
Certain Coated Paper from the PRC	*Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 59217 (September 27, 2010)
Certain Color Television Receivers From Malaysia	*Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers From Malaysia*, 69 FR 20592 (April 16, 2004).
Certain Frozen Fish Fillets from the Socialist Republic of Vietnam	*Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the New Shipper Review*, 77 FR 27435 (May 10, 2012)
Certain Steel Nails from the PRC	*Final Results and Final Partial Rescission of the Second Administrative Antidumping Duty Adminsistrative Review Certain Steel Nails from the People's Republic of China*, 77 FR 12556 (March 1, 2012)
Certain Steel Wheels Final Determination	*Certain Steel Wheels From the People's Republic of China: Notice of Final Determination of Sales at Less Than Fair Value and Partial Affirmative Final Determination of Critical Circumstances*, 77 FR 17021 (March 23, 2012)
Certain Steel Wheels Prelim Determination	*Certain Steel Wheels From the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value, Partial Affirmative Preliminary Determination of Critical Circumstances, and Postponement of Final Determination*, 76 FR 67703 (November 2, 2011)
CFS Final Determination	*Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People's Republic of China*, 72 FR 60632 (October 25, 2007)
CFS Preliminary Determination	*Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Coated Free Sheet Paper from the People's Republic of China*, 72 FR 30758 (June 4, 2007)

Chlorinated Isocyanurates Final Results	*Chlorinated Isocyanurates From the People's Republic of China: Final Results of 2008-2009 Antidumping Duty Administrative Review*, 75 FR 70212 (November 17, 2010)
Chlorinated Isocyanurates from Spain	*Chlorinated Isocyanurates from Spain: Final Results of Antidumping Duty Administrative Review*, 74 FR 50774 (October 1, 2009)
Chlorinated Isocyanurates from the PRC	*Notice of Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates from the People's Republic of China*, 70 FR 24502 (May 10, 2005)
Circular Welded Carbon Steel Pipes and Tubes from Taiwan	*Circular Welded Carbon Steel Pipes and Tubes From Taiwan: Final Results of Antidumping Duty Administrative Review*, 76 FR 63902 (October 14, 2011)
Circular Welded Pipe from Romania	*Final Determination of Sales at Less than Fair Value: Circular Welded Non-Alloy Steel Pipe from Romania*, 61 FR 24274 (May 14, 1996)
Circular Welded Pipe from the PRC	*Certain Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 74 FR 14514 (March 31, 2009)
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Citric Acid Final Results	*Final Results of the First Administrative Review of the Antidumping Duty Order: Citric Acid and Certain Citrate Salts from the People's Republic of China*, 76 FR 77772 (December 14, 2011)
Color Television Receivers from the PRC	*Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China*, 68 FR 66800 (November 28, 2003).
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Copper Pipe and Tube	*Seamless Refined Copper Pipe and Tube From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 60725 (October 1, 2010)
Creatine Monohydrate from the PRC	*Notice of Final Determination of Sales at Less Than Fair Value: Creatine Monohydrate From the People's Republic of China*, 64 FR 71104 (December 20, 1999)
CTGS Prelim	*Certain Oil Country Tubular Goods From the People's Republic of China: Preliminary Results of the First Antidumping Duty Administrative Review, Rescission in Part and Intent To Rescind in Part*, 77 FR 34013, 34017 (June 8, 2012)
CTL from Romania	*Certain Cut-To-Length Carbon Steel Plate from Romania: Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review,* 70 FR 12651 (March 15, 2005)
Diamond Sawblades Final Determination	*Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China,* 71 FR 29303 (May 22, 2006)
Diamond Sawblades from the Republic of Korea	*Notice of Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea,* 71 FR 29310 (May 22, 2006)
Diamond Sawblades Preliminary Determination	*Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Preliminary Partial Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China,* 70 FR 77121 (December 29, 2005)
Diamond Sawblades Preliminary Results	*Diamond Sawblades and Parts Thereof From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Intent To Rescind Review in Part,* 76 FR 76135 (December 6, 2011)
EPROMs	*Erasable Programmable Read Only Memories (EPROMs) From Japan; Final Determination of Sales at Less Than Fair Value*, 51 FR 39680 (October 30, 1986)
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Folding Metal Tables from the PRC	*Folding Metal Tables and Chairs from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, 74 FR 32118 (July 7, 2009)*
Foundry Coke Final Determination	*Final Determination of Sales at Less Than Fair Value: Foundry Coke Products From The People's Republic of China*, 66 FR 39487 (July 31, 2001)
Foundry Coke Preliminary Determination	*Notice of Preliminary Determination of Sales at Less Than Fair Value: Foundry Coke From the People's Republic of China*, 66 FR 13885 (March 8, 2001)
Freshwater Crawfish Tail Meat Final Results	*Freshwater Crawfish Tail Meat from the People's Republic of China: Final Results and Partial Rescission of the 2005-2006 Antidumping Duty Administrative Review and Rescission of 2005-2006 New Shipper Reviews*, 73 FR 20249 (April 15, 2008)
Freshwater Crawfish Tail Meat Preliminary Results	*Freshwater Crawfish Tail Meat from the People's Republic of China: Preliminary Results and Partial Rescission of the 2005-2006 Antidumping Duty Administrative Review and Preliminary Intent to Rescind 2005-2006 New Shipper Reviews*, 72 FR 57288 (October 9, 2007)
Frozen Fish Fillets from Vietnam	*Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review*, 76 FR 15941 (March 22, 2011)
Glycine from India	*Notice of Final Determination of Sales at Less Than Fair Value: Glycine from India*, 73 FR 16640 (March 28, 2008)
GPX Int'l Tire (CAFC 2010)	*GPX Int'l Tire Corp. v. United States*, 678 F.3d 1308 (CAFC 2012)
GPX Int'l Tire (CIT 2010)	*GPX International Tire Corp. v. United States*, No. 08-00285 slip op. 10-84, at 11 (CIT 2010)
Graphite Electrodes from the PRC	*Small Diameter Graphite Electrodes from the People's Republic of China: Final Results of the First Administrative Review of the Antidumping Duty Order and Final Rescission of the Administrative Review*, 76 FR 56397 (September 13, 2011)
Greenhouse Tomatoes from Canada	*Final Determination of Sales at Less Than Fair Value: Greenhouse Tomatoes From Canada*, 67 FR 8781 (February 26, 2002)
Grobest	*Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, 815 F. Supp. 2d 1342 (CIT 2012)

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Hot-Rolled Carbon Steel Flat Products from Romania	*Certain Hot-Rolled Carbon Steel Flat Products From Romania: Final Results of Antidumping Duty Administrative Review*, 70 FR 34448 (June 14, 2005)
Huaiyang Hongda	*Huaiyang Hongda Dehydrated Vegetable Co. v. United States*, 28 C.I.T. 1944
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Investigation of Activated Carbon from the PRC	*Final Determination of Sales at Less Than Fair Value: Certain Activated Carbon from the People's Republic of China*, 72 FR 9508 (March 2, 2007)
ITC Preliminary Determination	*Crystalline Silicon Photovoltaic Cells and Modules from China*, Inv. Nos. 701-TA-481 and 731-TA-1190, USITC Pub. No. 4295 at 11 (December 2011)
Labor Methodologies	*Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 FR 36092 (June 21, 2011)
Labor Methodologies Request for Comments	*Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor; Request for Comment*, 76 FR 9544, 9544 (February 18, 2011)
Large Power Transformers	*Large Power Transformers From the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 77 FR 40857 (July 11, 2012)
Lightweight Thermal Paper	*Lightweight Thermal Paper From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 FR 57329 (October 2, 2008)

Lined Paper Products From the PRC	*Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China, 71 FR 53079 (September 8, 2006)*
Lumber from Canada	*Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada*, 67 FR 15539 (April 2, 2002)
Malleable Iron Pipe Fitting	*Malleable Iron Pipe Fittings From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 71 FR 37051 (June 29, 2006)
Multilayered Wood Flooring from the PRC	*Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value* 76 FR 64318 (October 18, 2011)
OTR Tires from the PRC Final Determination	*Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 40485 (July 15, 2008)
OTR Tires from the PRC Preliminary Determination	*Certain New Pneumatic Off-The-Road Tires From the People's Republic of China; Preliminary Determination of Sales at Less Than Fair Value and Postponement*, 73 FR 9278 (February 20, 2008).
Pasta From Italy	*Certain Pasta from Italy: Notice of Final Results of the Twelfth Administrative Review*, 75 FR 6352 (February 9, 2010)
PET Film from the PRC	*Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China*, 77 FR 14493 (March 12, 2012)
PET Resin From Thailand (CVD Final)	*Final Negative Countervailing Duty Determination: Bottle-Grade Polyethylene Terephthalate (PET) Resin from Thailand*, 70 FR 13462 (March 21, 2005)

Petition	Petition for the Imposition of Antidumping and Countervailing Duties: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China dated October 19, 2011
Pneumatic Off-the-Road Tires Final Determination	*Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances,* 73 FR 40485 (July 15, 2008)
Pneumatic Off-the-Road Tires Final Results	*Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of the 2009–2010 Antidumping Duty Administrative Review and Final Rescission, in Part,* 77 FR 14495 (March 12, 2012)
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Polyethylene Retail Carrier Bags From the PRC	*Polyethylene Retail Carrier Bags From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 52282 (September 9, 2008)
POS Cookware	*Porcelain-on-Steel Cooking Ware from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review*, 71 FR 24641 (April 26, 2006)
Preliminary Determination	*Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination and Affirmative Preliminary Determination of Critical Circumstances*, 77 FR 31309 (May 25, 2012)
Preliminary Determination Correction	*Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Preliminary Determination Correction,* 77 FR 37877 (June 25, 2012)
Prestressed Concrete Steel Wire Strand From the PRC	*Prestressed Concrete Steel Wire Strand From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 28560 (May 21, 2010).

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Retail Carrier Bags	*Polyethylene Retail Carrier Bags from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 72 FR 12762 (March 19, 2007)
Ribbons from Korea	*Notice of Final Determination of Sales at Not Less Than Fair Value: Wax and Wax/Resin Thermal Transfer Ribbon from the Republic of Korea*, 69 FR 17645 (April 5, 2004)
Ribbons from Taiwan Final	*Notice of Final Determination of Sales at Less Than Fair Value: Narrow Woven Ribbons with Woven Selvedge from Taiwan*, 75 FR 41804 (July 19, 2010)
Ribbons from Taiwan Prelim	*Narrow Woven Ribbons with Woven Selvedge from Taiwan: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 75 FR 7236 (February 18, 2010)
SAA	*Uruguay Round Agreements Act, Statement of Administrative Action*, H. R. Doc. No. 103-316, vol. 1 (1994) at 829; 19 CFR 351. 401(b)(1)
Saccharin Investigation Final	*Notice of Final Determination of Sales at Less Than Fair Value: Saccharin From the People's Republic of China*, 68 FR 27530 (May 20, 2003)
Scope Clarification Memorandum	Memorandum regarding: Scope Clarification: Antidumping and Countervailing Duty Investigations of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the Peoples Republic of China, dated March 19, 2012
Scope Exclusion Request Memorandum	Memorandum regarding "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules from the People's Republic of China; Scope," dated May 16, 2012
Seamless Carbon	*Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Critical Circumstances, in Part*, 75 FR 57449 (September 21, 2010)

Section 129 Implementation in Several Cases	*Implementation of Determinations Under Section 129 of the Uruguay Round Agreements Act: Certain New Pneumatic Off-the-Road Tires; Circular Welded Carbon Quality Steel Pipe; Laminated Woven Sacks; and Light-Walled Rectangular Pipe and Tube From the People's Republic of China*, 77 FR 52683 (August 30, 2012)
Separate-Rates Practice	*Separate-Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries*, 69 FR 77722 (December 28, 2004)
Service Valves from the PRC	*Frontseating Service Valves From the People's Republic of China: Final Results of the 2008-2010 Antidumping Duty Administrative Review of the Antidumping Duty Order*, 76 FR 70706 (November 15, 2011)
Seventh Review of Fish Fillets from Vietnam	*Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review*, 77 FR 15039 (March 14, 2012)
Shrimp from Brazil	*Certain Frozen Warmwater Shrimp from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 72 FR 52061 (September 12, 2007)
Silicon Carbide from the PRC	Notice of Final Determination of Sales at less Than Fair Value: Silicon Carbide From the People's Republic of China, 59 FR 22585 (May 2, 1994)
Silicon Metal from the PRC	*Silicon Metal From the People's Republic of China: Final Results and Partial Rescission of the 2008-2009 Administrative Review of the Antidumping Duty Order*, 76 FR 3084 (January 19, 2011)
Silicon Metal from the PRC Final Results 2012	*Silicon Metal from the People's Republic of China: Final Results of Antidumping Duty Administrative Review* , 77 FR 54563 (September 5, 2012)
Sparklers	*Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China*, 56 FR 20588 (May 6, 1991)
SSPC from Belgium	*Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review*, 69 FR 74495 (December 14, 2004)
SSSS from Mexico	*Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review*, 69 FR 6259 (February 10, 2004)

SSSSC from Mexico	*Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review*, 70 FR 73444 (December 12, 2005)
Steel Beams Final	*Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams From the People's Republic of China*, 67 FR 35479 (May 20, 2002)
Steel Beams Prelim	*Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Structural Steel Beams From The People's Republic of China*, 66 FR 67197 (December 28, 2001)
Steel Concrete Reinforcing Bars	*Notice of Final Determination of Sales at Less than Fair Value: Steel Concrete Reinforcing Bars from the People's Republic of China*, 66 FR 33522 (June 22, 2001)
Steel Nails Final Determination	*Final Determination of Sales at Less than Fair Value and Partial Affirmative Determination of Critical Circumstance: Certain Steel Nails From the People's Republic of China*, 73 FR 33977 (June 16, 2008)
Surrogate Country Memorandum	Memorandum entitled, "Request for a List of Surrogate Countries for an Antidumping Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules ("Solar Cells"), from the People's Republic of China ("China")," dated January 6, 2012
Tapered Roller Bearings From Japan	*Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan: Final Results of Antidumping Duty Administrative Reviews*, 63 FR 63860 (November 17, 1998)
Tapered Roller Bearings from Romania	*Tapered Roller Bearings from Romania*, 62 FR 37194 (July 11, 1997)
Tapered Roller Bearings from the PRC	*Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 3987 (January 22, 2009)
Transformers from Korea	*Transformers from Korea*, 77 FR 40857 (July 11, 2012)
Trina CEP Verification Report	Memorandum entitled, "Verification ofTrina Solar (U.S.) Inc. in the Antidumping Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China ("PRC")," July 19, 2012

Trina China Verification Report	Memorandum entitled, "Verification of the Sales and Factors of Production Information Submitted by Changzhou Trina Solar Energy Co., Ltd. in the Antidumping Duty Investigation Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China," dated July 19, 2012
Trina Final Determination Analysis Memorandum	Memorandum entitled, "Analysis of the Preliminary Determination Margin Calculation for Changzhou Trina Solar Energy Co., Ltd,." dated October 9, 2012
URAA	*Uruguay Round Agreements Act*, Pub L. No. 103-465, 108 Stat. at 4809 (1994)
Utility Scale Wind Towers	*Utility Scale Wind Towers From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 77 FR 46034 (August 2, 2012)
Voluntary Respondent Selection Memorandum	Memorandum entitled, "Antidumping Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China; Voluntary Respondents," dated March 8, 2012
Warmwater New Shipper Shrimp Final Results	*Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Rescission of Antidumping Duty New Shipper Review*, 72 FR 72668 (December 21, 2007)
Warmwater New Shipper Shrimp Preliminary Results	*Certain Frozen Warmwater Shrimp from the People's Republic of China: Preliminary Notice of Intent to Rescind Antidumping Duty New Shipper Review*, 72 FR 41058 (July 26, 2007)
Washers from Korea	*Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Large Residential Washers from the Republic of Korea*, 77 FR 46391 (August 3, 2012)
WBF Review I	*Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review*, 73 FR 49162 (August 20, 2008)
Welded Pipe and Tubes from India	*Certain Welded Carbon Steel Standard Pipes and Tubes From India: Final Results of Antidumping Duty Administrative Review* 72 FR 69626 (November 15, 2010)
Wire Decking from the PRC	*Wire Decking from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 32905 (June 10, 2010)

Wooden Bedroom Furniture from the PRC 2011	*Wooden Bedroom Furniture From the People's Republic of China: Final Results and Final Rescission in Part* ,76 FR 49729 (August 11, 2011)
Wuxi Suntech CEP Verification Report	Memorandum regarding: Verification of Suntech America Inc. in the Antidumping Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China, dated July 19, 2012
Wuxi Suntech FMG Verification Report	Memorandum regarding: Verification of the Section E Response of Suntech Arizona Inc. in the Antidumping Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China , dated July 19, 2012
Wuxi Suntech PRC Verification Report	Memorandum regarding: Verification of Wuxi Suntech Power Co., Ltd., Zhenjiang Rietech New Energy Science and Technology Co., Ltd., and Suntech Power Co., Ltd.'s responses in the Antidumping Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China, dated July 19, 2012