



A-570-010
Investigation
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DATE: December 15, 2014

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

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

SUBJECT: Certain Crystalline Silicon Photovoltaic Products from the
People's Republic of China: Issues and Decision Memorandum for
the Final Determination of Sales at Less Than Fair Value

I. SUMMARY

The Department finds that certain solar products from the PRC are being, or are likely to be, sold in the United States at LTFV, as provided in section 735 of the Act. The POI is April 1, 2013, through September 30, 2013.

After analyzing the comments submitted by interested parties, and based on our findings at verification, we made certain changes to the margin calculations for the two mandatory respondents, which also results in a change to the weighted-average dumping margin calculations for the separate-rate companies that were not selected for individual examination. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues for which we received comments:

Case Issues:

- Comment 1: Scope of the Investigation
- Comment 2: Whether to Select South Africa or Thailand as the Primary Surrogate Country
- Comment 3: Whether to Offset the Cash Deposit Rate for Export Subsidies
- Comment 4: Whether the Department Should Investigate the Effects of the GOC's Alleged Cyberhacking on this Investigation
- Comment 5: Ultimate Ownership of Separate Rate Applicants
- Comment 6: Separate Rate Applicants with Managers or Board Members with Ties to the Chinese Government



Comment 7: Separate Rate Status of Lianyungang Shenzhou New Energy Co., Ltd.
Comment 8: Separate Rate Status of Sumec Hardware & Tools Co., Ltd.
Comment 9: The Appropriate Surrogate Value for Aluminum Frames
Comment 10: The Appropriate Surrogate Value for Scrap Solar Cells
Comment 11: Unpaid Sales
Comment 12: Quality Insurance
Comment 13: Warranty Costs
Comment 14: Incorrect Allocation of Indirect Material, Labor and Electricity Consumption
Comment 15: Whether to Base Renesola/Jinko's Dumping Margin on Partial AFA
Comment 16: Whether to Collapse Jinko and Renesola
Comment 17: Whether to Use Market-Economy Purchase Prices to Value all of Renesola/Jinko's Solar Cells
Comment 18: Whether to Adjust Renesola/Jinko's Cash Deposit Rate by the Full Amount of Domestic Subsidies
Comment 19: Separate Rate Application of tenKsolar

II. BACKGROUND

The following events have taken place since the Department published the *Preliminary Determination* in this investigation on July 31, 2014.¹ In August, 2014, the Department verified the information provided by the mandatory respondents Trina Solar and Renesola/Jinko.

On October 3, 2014, in response to interested parties' comments on the scope of this investigation, the Department announced that it was considering the possibility of a scope clarification, described the possible clarification, and provided interested parties with an opportunity to submit comments on the potential clarification.

On October 16, 2014, Trina Solar, Renesola/Jinko, Petitioner, the Government of the PRC, a U.S. importer, Suniva Inc., and certain separate rate applicants submitted case briefs.² From

¹ See *Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 79 FR 44399 (July 31, 2014) ("Preliminary Determination").

October 22, 2014 to October 27, 2014 Trina Solar, Renesola/Jinko, Petitioner, and certain separate rate applicants submitted rebuttal briefs.³

Although certain parties requested that a hearing be held, on October 24, 2014, all hearing requests were subsequently withdrawn. Thus, the Department did not hold a hearing with respect to this investigation.

III. SCOPE OF THE INVESTIGATION

² See Letter from fourteen separate rate applicants, “Re: Antidumping and Countervailing Duty Investigations of Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China, and Antidumping Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from Taiwan: Respondents’ Case Brief,” dated October 16, 2014; Letter from the PRC Government, “Re: Government of China’s Case Brief: Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China,” dated October 16, 2014; Letter from Asun Energy Co., Ltd. (a/k/a Suzhou Asun Energy Co., Ltd.), “Re: Administrative Case Brief: Antidumping Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China (A-570-010),” dated October 16, 2014; Letter from Trina Solar, “Re: Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China; Case Brief of Changzhou Trina Solar Energy Co., Ltd.,” dated October 16, 2014; Letter from Renesola, “Re: Certain Crystalline Silicon Photovoltaic Products from China; Case Brief,” dated October 16, 2014; Letter from Junco, “Re: Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China: Case Brief,” dated October 16, 2014; Letter from Hanwha QCELLS USA, Inc., “Re: Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China,” dated October 16, 2014; Letter from Suniva, Inc., “Re: Case Brief on Scope Issues Certain Crystalline Silicon Photovoltaic Products from China and Taiwan,” dated October 16, 2014; Letter from tenKsolar (Shanghai) Co., Ltd., “Re: Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China and Taiwan– Case Brief,” dated October 16, 2014; Letter from SNJ Enterprises LLC dba Zamp Solar and Quebec Inc. dba RDK Products, “Re: Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China: Case Brief,” dated October 16, 2014; Letter from Petitioner, “Re: Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China: Case Brief of Solar World Americas, Inc.,” dated October 16, 2014.

³ See Letter from Hanwha SolarOne (Qidong) Co., Ltd. and Hanwha SolarOne Hong Kong Limited, “Re: Rebuttal Brief: Antidumping Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China (A-570-010),” dated October 22, 2014; Letter from Asun Energy Co., Ltd. (a/k/a Suzhou Asun Energy Co., Ltd.), “Re: Rebuttal Brief: Antidumping/Countervailing Duty Investigations of Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China,” dated October 22, 2014; Letter from Shangluo BYD Industrial Co., Ltd. and Shanghai BYD Co., Ltd. “Re: Crystalline Silicon Photovoltaic Products from the People’s Republic of China and Taiwan: Rebuttal Brief,” dated October 22, 2014; Letter from Changzhou Almaden Co., Ltd., “Re: Crystalline Silicon Photovoltaic Products from P.R. China: Rebuttal Brief,” dated October 22, 2014; Letter from Renesola “Re: Certain Crystalline Silicon Photovoltaic Products from China; Rebuttal Brief,” dated October 22, 2014; Letter from Petitioner, “Re: Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China: Rebuttal Brief of Solar World Americas, Inc.,” dated October 22, 2014; Letter from Trina Solar, “Re: Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China: Rebuttal Brief of Changzhou Trina Solar Energy Co., Ltd.,” dated October 22, 2014; *see also* Letter from fourteen separate rate applicants, “Re: Antidumping and Countervailing Duty Investigations of Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China, and Antidumping Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from Taiwan: Respondents’ Rebuttal Brief,” dated October 27, 2014; Letter from Hanwha QCELLS USA, Inc. “Re: Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China,” dated October 27, 2014; Letter from SNJ Enterprises LLC dba Zamp Solar LLC and Quebec Inc. dba RDK Products, “Re: Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China: Rebuttal Brief,” dated October 27, 2014; Letter from Petitioner, “Re: Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China: SolarWorld’s Rebuttal Brief on Scope,” dated October 27, 2014.

The merchandise covered by this investigation is modules, laminates and/or panels consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including building integrated materials. For purposes of this investigation, subject merchandise includes modules, laminates and/or panels assembled in the PRC consisting of crystalline silicon photovoltaic cells produced in a customs territory other than the PRC.

Subject merchandise includes modules, laminates and/or panels assembled in the PRC consisting of crystalline silicon photovoltaic cells of thickness equal to or greater than 20 micrometers, having a p/n junction formed by any means, whether or not the cell has undergone other processing, including, but not limited to, cleaning, etching, coating, and/or addition of materials (including, but not limited to, metallization and conductor patterns) to collect and forward the electricity that is generated by the cell.

Excluded from the scope of this investigation are thin film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS). Also excluded from the scope of this investigation are modules, laminates and/or panels assembled in the PRC, consisting of crystalline silicon photovoltaic cells, not exceeding 10,000mm² in surface area, that are permanently integrated into a consumer good whose function is other than power generation and that consumes the electricity generated by the integrated crystalline silicon photovoltaic cells. Where more than one module, laminate and/or panel is permanently integrated into a consumer good, the surface area for purposes of this exclusion shall be the total combined surface area of all modules, laminates and/or panels that are integrated into the consumer good. Further, also excluded from the scope of this investigation are any products covered by the existing antidumping and countervailing duty orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, laminates and/or panels, from the PRC.⁴

Merchandise covered by this investigation is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 8501.61.0000, 8507.20.8030, 8507.20.8040, 8507.20.8060, 8507.20.8090, 8541.40.6020, 8541.40.6030 and 8501.31.8000. These HTSUS subheadings are provided for convenience and customs purposes; the written description of the scope of this investigation is dispositive.

IV. SEPARATE RATE COMPANIES

In proceedings involving NME countries, the Department holds a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assessed a single AD rate. It is the Department's policy to assign all exporters of the subject merchandise in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.

⁴ See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order, 77 FR 73018 (December 7, 2012); Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Countervailing Duty Order, 77 FR 73017 (December 7, 2012).

In the instant investigation, the Department received timely-filed separate rate applications from 52 companies. In the *Preliminary Determination*, the Department granted 44 of the applicants (Separate Rate Applicants) separate rates. Interested parties submitted a number of comments regarding some of the companies applying for separate rate status. After considering the comments, with the exception of tenKsolar (Shanghai) Co., Ltd., the Department has not changed its position from the *Preliminary Determination* with respect to the companies seeking separate rate status. See Comment1 and Comments 5 through 8 below.

The Department continues to find that the evidence placed on the record of this investigation by the Separate Rate Applicants that were granted separate rate status in the *Preliminary Determination* demonstrates both *de jure* and *de facto* absence of government control with respect to each company's respective exports of the merchandise under investigation. Further, the Department continues to deny certain companies separate rate status.

The rate assigned to companies granted separate rate status that were not individually examined is normally determined based on the weighted-average of the estimated dumping margins calculated for exporters and producers individually investigated, excluding zero and *de minimis* margins or margins based entirely on FA.⁵ In this investigation, we calculated above *de minimis* estimated weighted-average dumping margins that are not based on total FA for the two mandatory respondents, Trina Solar and Renesola/Jinko. Because we individually examined two companies in this investigation, basing the estimated dumping margin for the companies not individually examined on a weighted-average of the dumping margins for the two individually examined companies risks disclosure of BPI. Therefore, we calculated both a weighted-average of the dumping margins calculated for the two mandatory respondents using public values for their sales of subject merchandise and a simple average of these two dumping margins, and selected, as the separate rate, the average that provides a more accurate proxy for the weighted-average margin of both companies calculated using BPI.⁶

V. USE OF ADVERSE FACTS AVAILABLE

In the *Preliminary Determination*, we determined that 35 companies were part of the PRC-wide entity because these companies failed to respond the Department's questionnaires and, therefore,

⁵ See section 735(c)(5)(A) of the Act.

⁶ See the December 15, 2014, memorandum from Jeff Pedersen to the File entitled "Calculation of the Final Margin for Separate Rate Recipients." ("Trina Final Analysis Memorandum").

failed to qualify for a separate rate.⁷ Further, we found that the PRC-wide entity withheld necessary information within the meaning of section 776(a) of the Act, and failed to cooperate by acting to the best of its ability to comply with the Department's requests for information within the meaning of section 776(b) of the Act. Specifically, the Department did not receive responses to its Q&V questionnaire from 35 PRC exporters and/or producers of merchandise under consideration that were named in the Petition and for which the Department received confirmation that its issued Q&V questionnaire was delivered. As necessary information is not available on the record, and the PRC-wide entity withheld necessary information requested by the Department, failed to provide information by the established deadlines, and significantly impeded this proceeding by not submitting the requested quantity and value information, pursuant to sections 776(a)(1) and (a)(2)(A)-(C) of the Act, the Department is applying facts otherwise available. Furthermore, due to the PRC-wide entity's failure to provide information that was in its possession, the Department determined that the PRC-wide entity failed to cooperate and, thus, found it appropriate to base the PRC-wide rate on AFA. As AFA, we assigned the PRC-wide entity the petition margin of 165.04 percent.⁸

We received no comments on our *Preliminary Determination* with respect to the PRC-wide entity. Therefore, we have continued to assign to the PRC-wide entity an AD margin equal to the Petition margin of 165.04 percent. While we made certain changes to the margin calculations for Trina Solar and Renesola/Jinko since the *Preliminary Determination*, as outlined in the Issues and Decision Memorandum, these changes did not alter our preliminary corroboration analysis, which we continue to apply for purposes of this final determination.⁹

VI. DISCUSSION OF THE ISSUES

Comment 1: Scope of the Investigation

⁷ See *Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China and Taiwan: Initiation of Antidumping Duty Investigations*, 79 FR 4661 (January 29, 2014) ("The Department requires that PRC producers/exporters submit a response to both the Q&V questionnaire and the separate rate application by their respective deadlines in order to receive consideration for separate rate status). Those companies are: Beijing Hope Industry, China Sunergy, CNPV, EGing, ENN Solar Energy, Era Solar, Goldpoly (Quanzhou), Himin Holdings, Jetion, Jia Yi Energy Technology, Jiasheng Photovoltaic Tech., Jiutai Energy, Komaes Solar, Leye Photovoltaic Science Tech., Magi Solar Technology, Perfectenergy, Polar Photovoltaics, Qiangsheng (QS Solar), Refine Solar, Risun Solar (JiangXi Ruijing Solar Power Co., Ltd.), Shanghai Chaori Solar Energy, Shangpin Solar, Shanshan Ulica, Shenglong PV-Tech, Shenzhen Global Solar Energy Tech., Shuqimeng Energy Tech, Skybasesolar, Solargiga Energy Holdings Ltd., Sopray Solar, Sunlink PV, Tianjin Jinneng Solar Cell, Topsolar, Trony, Weihai China Glass Solar, and Yuhan Sinosola. For an additional 12 PRC exporters and/or producers of merchandise that were named in "Petition for the Imposition of Antidumping and Countervailing Duties on Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China and Taiwan," dated December 31, 2013 ("Petition"), the Department issued a questionnaire, but did not receive confirmation of delivery. Those companies are: Aiko Solar, Best Solar Hi-tech, Dai Hwa Industrial, Eoply New Energy, Golden Partner development, Innovosolar, Jiangxi Green Power Co. Ltd., Sanjing Silicon, Sunflower, Sunvim Solar Technology, Yunnan Tianda, and Yunnan Zhuoye Energy. See Memorandum to the file from Erin Kearney, International Trade Analyst, Office 4, AD/CVD Operations on the subject "Delivery of Quantity and Value Questionnaires" dated March 12, 2014.

⁸ See *Preliminary Determination* and accompanying Preliminary Decision Memorandum at Topic h.

⁹ *Id.* at pages 16-17; Memorandum to the File, from Thomas Martin, International Trade Compliance Analyst, Office VI, AD/CVD Operations, "Antidumping Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Renesola Jiangsu Ltd., and Jinko Solar Import and Export Co., Ltd. Analysis Memorandum for the Final Determination.

On October 3, 2014, the Department issued a letter to all interested parties inviting parties to include in their case briefs comments concerning a possible clarification to the scope of the AD/CVD investigations that the Department was considering.¹⁰ The Department stated that the scope clarification under consideration contemplated the following:

- For the PRC investigations, subject merchandise would include all modules, laminates and/or panels assembled in the PRC that contain crystalline silicon photovoltaic cells produced in a customs territory other than the PRC.
- For the Taiwan investigation, subject merchandise would include all modules, laminates and/or panels assembled in Taiwan consisting of crystalline silicon photovoltaic cells produced in Taiwan or a customs territory other than Taiwan and would continue to exclude any products covered by the existing AD and CVD orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, from the PRC. In addition, subject merchandise would include modules, laminates, and panels assembled in a third-country, other than the PRC, consisting of crystalline silicon photovoltaic cells produced in Taiwan.

Parties have commented on the scope clarification in this letter and made other scope comments addressed below. Generally, Respondents oppose adopting the proposed scope clarification in the October 3rd Letter, while Petitioner argues that the Department should adopt the scopes proposed in the October 3rd Letter because they most effectively apply Petitioner's intent, would best effectuate the U.S. trade laws and provide effective relief to the injured domestic industry, and would be easily administrable and enforceable by the agencies involved. After considering comments, we have determined to clarify the scopes of the PRC AD and CVD investigations consistent with the October 3rd Letter. We address party comments in detail below.

Due to this clarification in the scope, we are not requiring exporter and importer certifications. The revocation of the certification requirements previously established in this investigation does not change or rescind the certification requirements established in connection with the existing orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, from the PRC.

¹⁰ See October 3, 2014 letter from Howard Smith, Program Manager, Office IV, AD/CVD Operations, Enforcement and Compliance, to All Interested Parties, re: *Antidumping and Countervailing Duty Investigations of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China and the Antidumping Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from Taiwan: Opportunity to Submit Scope Comments* (October 3, 2014) ("October 3rd Letter").

A. Consistency with *Solar I*¹¹ and Court Decisions

Respondents:

- The Department’s proposed scope clarification is arbitrary because it is inconsistent with the product coverage decisions made by the Department in *Solar I* and also ignores country of origin decisions made by the CIT and CAFC, as well as country of origin criteria stated in the Act. Such arbitrary decisions are unlawful because, as the courts have noted, the Department has an obligation to be consistent in its decisions.
 - In *Solar I*, the Department made numerous decisions that directly ruled against establishing a scope that would find solar modules assembled in China but not containing Chinese solar cells subject to the order. The Department’s determinations in *Solar I* were made on the following bases:
 - A product can only have one country of origin,¹²
 - AD and CVD investigations only cover products with a country of origin of the country under investigation,¹³ and
 - The Department relies on the substantial transformation test to determine the country of origin of a product.¹⁴
 - In applying this substantial transformation test in *Solar I*, the Department determined that “module assembly does not substantially alter the essential nature of solar cells nor does it constitute significant processing such that it changes the country of origin of the cell.”¹⁵ The Department found that the solar cell imparts the essential character of a solar module, and, therefore, the origin of the solar cell is determinative of the country of origin of the class or kind of merchandise at issue here. Therefore, “where solar cell production occurs in a different country from solar module assembly, the country of origin of the solar modules/panels is the country in which the solar cell was produced.”¹⁶
 - If the approach in *Solar I* described above were applied to these investigations the conclusion would be that the scope of an AD order must be limited to subject merchandise “produced” and “originating” in the country covered by the order, which here is China and Taiwan. Merchandise produced or originating in a country other than the country

¹¹ See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 77 FR 63788 (October 17, 2012) (“*Solar I* CVD Final Determination”) and *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, and Affirmative Final Determination of Critical Circumstances, in Part*, 77 FR 63791 (October 17, 2012) (“*Solar I* AD Final Determination”) (these two investigations are referred to generally as “*Solar I*”).

¹² See *Solar I* AD Final Determination and accompanying Issues and Decision Memorandum (“*Solar I* IDM”) at Comment 1, page 8.

¹³ *Id.*

¹⁴ *Id.* at 5-6.

¹⁵ See March 19, 2012 Memorandum from Jeff Pedersen to Chris Marsh “Scope Clarification: Antidumping and Countervailing Duty Investigations of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China (“*Solar I* Substantial Transformation Memorandum”) (placed on the record of this proceeding on December 15, 2014).

¹⁶ *Id.*

covered by an order, which based on the previous substantial transformation decision, includes solar modules assembled in China or Taiwan from solar cells produced in countries other than China or Taiwan, have a different country of origin than China or Taiwan, and thus may not be included in the scope of these investigations.

- o Decisions by the CIT and the CAFC, as well as sections of the Act support finding that products under an investigation can only have one country of origin and that the basis for determining this is the substantial transformation test.
 - Applying the country of origin determination implied in the scope as proposed in the October 3rd Letter, as well as the criteria applied in *Solar I*, would result in a solar module assembled in one country containing another country's cell to have two countries of origin. CIT decisions¹⁷ have stated that a product can only have a single country of origin for AD and CVD purposes.
 - The scope as proposed in the October 3rd Letter is also contrary to the statutory language at Section 731 of the Act, which provides for the imposition of antidumping duties on "subject merchandise," defined as "the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, {or} an order...."¹⁸ This provision requires the Department to make a finding of dumping for a class or kind of merchandise from a particular country.¹⁹
 - The scope as proposed in the October 3rd Letter ignores the established criteria for determining the country of origin, which is the substantial transformation analysis.
 - The CIT has determined that the "substantial transformation" analysis provides a means for the Department to carry out its country of origin examination and properly guards against circumvention of existing antidumping orders.²⁰
- o The Department is prevented from contradicting these decisions in *Solar I* because the Department is obliged to be consistent in its decision-making across its investigations.
 - The CIT has explained that although an agency is not strictly bound to its precedent, "{i}t is a principle of administrative law that an 'agency must either conform to its prior norms and decisions or explain the reason for its departure from such precedent.'"²¹ The CAFC has similarly stated that the Department cannot ignore its own precedent absent some legitimate reason for departing from it.²²

¹⁷ See *Ugine & ALZ Belgium, N.V. v. United States*, 517 F. Supp. 2d 1333, 1345 (CIT 2007) ("*Ugine I*"), *aff'd*, 551 F.3d 1339 ("*Ugine III*") (Fed. Cir. 2009).

¹⁸ *Id.*; Section 771(25) of the Act.

¹⁹ See *E.I. DuPont de Nemours & Co. v. United States*, 8 F. Supp. 2d 854, 859 (CIT 1998) ("*Du Pont*"); see also *Ugine I*, 517 F. Supp. 2d at 1345.

²⁰ See *Du Pont*, 8 F. Supp. 2d at 857 (emphasis added).

²¹ See *Torrington Co. v. United States*, 745 F. Supp. 718, 727 (CIT 1990) (quoting *Mississippi Valley Gas Co. v. Federal Energy Regulatory Comm'n*, 659 F.2d 488, 506 (5th Cir. 1981)); *Neenah Foundry Co. v. United States*, 142 F. Supp. 2d 1008, 1022 (CIT 2001); *Hussey Copper Ltd., v. United States*, 834 F. Supp. 413, 418 (CIT 1993).

²² See *Ugine III*, 551 F.3d at 1349.

- The Department has not articulated reasons for diverging from these decisions. Instead, the Department stated in these investigations, that it is informed “by the product coverage decisions that it made” in *Solar I*.²³

Petitioner:

- In the preliminary determination, the Department stated that it was continuing to analyze interested parties’ scope comments, including comments on whether it is appropriate to apply a traditional substantial transformation or other analysis in determining the country of origin of certain solar modules described in the scope of the investigation.
- Petitioner supports the proposed scope clarification in the Department’s October 3rd Letter, and requests that the Department adopt it for purposes of its final determination and any resulting AD order.
- The Department’s proposed scope clarification is fully consistent with the Petitioner’s intent. It has been clear since the start of the first solar AD/CVD investigations, and throughout the current investigations, that Petitioner’s intent has always been to cover all cells from the PRC and all modules from the PRC and, now, all cells from Taiwan and all modules from Taiwan.²⁴
- The Department’s proposed scope clarification would best effectuate the U.S. trade laws and provide effective relief to the injured domestic industry, and would be easily administrable and enforceable by the agencies.
- The remedial purposes of the AD/CVD laws are best served by the proposed scope clarification. The Department has determined that both cells and modules from the PRC and Taiwan are being dumped, and both Chinese cells and modules are subsidized. As such, the law obligates Commerce to impose duties on these products.
- Clarifying the scope language in the manner proposed by the Department would result in AD/CVD orders that are administrable and enforceable by the Department and CBP. Solar cells are not required to contain country of origin markings. It can be extremely difficult for CBP to determine the origin of various inputs in a solar module upon importation. On the other hand, all solar modules are clearly marked with country-of-origin and other identifying information. Covering all cells and modules from both the PRC and Taiwan, as described in the October 3rd Letter proposed scope clarification, would therefore significantly improve the enforceability of any future AD/CVD orders.
- To the extent that the Department’s proposed scope clarification can be considered a departure from its prior country-of-origin determination, the agency is, of course, permitted to depart from its prior determinations.²⁵
- Respondents’ argument that the scope clarification results in a single product having two countries of origin is unfounded. Because the country-of-origin rules in the proposed scope clarifications provide a supplemental country-of-origin rule for those products not covered by the initial solar investigations, no product would at any time have two countries of origin. As an example, Trina Solar claims that modules assembled in China with cells produced in Taiwan would result in identical products having two different countries of origin under the previous analysis and the proposed scope clarification.

²³ See *Certain Crystalline Silicon Photovoltaic Products From the People’s Republic of China and Taiwan: Initiation of Antidumping Duty Investigations*, 79 FR 4661 (January 29, 2014) (“*Solar Products Initiation Notice*”).

²⁴ See, e.g., *Solar I* IDM at Comment 1.

²⁵ See *Torrington*, 745 F. Supp. at 727.

- The proposed scope would also be consistent with international precedent. The recent EU AD/CVD investigations of Chinese solar products included “imports of crystalline silicon photovoltaic modules and key components (*i.e.*, cells and wafers) originating in or consigned from the People’s Republic of China,”²⁶ recognizing that all cells and all modules from the subject country, in addition to other key components, must be covered.
- In the alternative, should the Department decide not to make its proposed clarification to the scope, these investigations should continue with the scope proposed by Petitioner and accepted by the Department for purposes of initiation and its preliminary determination.

Department’s Position:

After considering the facts and circumstances presented by the PRC AD and CVD investigations, as well as the parties’ comments on the October 3rd Letter, for this final determination the Department has clarified the scope language of the PRC AD and CVD investigations such that subject merchandise includes all modules, laminates and/or panels assembled in the PRC that contain crystalline silicon photovoltaic cells produced in a customs territory other than the PRC. For a complete description of the scope of the investigation for this final determination, *see* section III above.

Upon initiation of these investigations, the Department set aside a period for interested parties to raise issues relating to product coverage, *i.e.*, scope.²⁷ Interested parties submitted affirmative comments and rebuttal comments regarding product coverage.²⁸ In the *Preliminary Determination* published on July 31, 2014, we announced that the Department was continuing to analyze the scope comments, including comments on whether it was appropriate to apply a traditional substantial transformation or other analysis in determining the country of origin of certain solar modules described in the scope of this investigation.²⁹ Further, with respect to administering the PRC investigations, we explained that the scope of these investigations explicitly excludes any products covered by the existing AD and CVD orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, from the PRC.³⁰ In response to interested parties’ comments on the scope of this investigation (and prior to the deadlines for the submission of case and rebuttal briefs), in the October 3rd Letter the Department announced that it was considering the possibility of a scope clarification, described the possible clarification, and invited interested parties to submit comments on the clarification. For the reasons discussed

²⁶ See Council Implementing Regulation (EU) No 1238/2013 of 2, Official Journal of the European Union (Dec. 2013).

²⁷ See *Solar Products Initiation Notice*, 79 FR at 4661; *see also Certain Crystalline Silicon Photovoltaic Products From the People’s Republic of China: Initiation of Countervailing Duty Investigation*, 79 FR4667 (January 29, 2014).

²⁸ See scope comment submissions, dated February 18, 2014, from Gintech; Motech; Neo Solar Power Corporation; NextEra Energy, Inc.; SunEdison, Inc.; Suniva, Inc.; Solartech Energy Corp.; and Yingli Green Energy Holding Company Limited, Yingli Green Energy Americas, Inc., Canadian Solar Inc., Changzhou Trina Solar Energy Co., Ltd., Wuxi Suntech Power Co., Ltd., Shanghai JA Solar Technology Co., Ltd., Hefei JA Solar Technology Co., Ltd., and Jinko Solar Co., Ltd.; *see also* rebuttal scope comment submissions, dated April 3, 2014, from Petitioner, and dated April 21, 2014, from Yingli Green Energy Americas, Inc., Canadian Solar Inc., Changzhou Trina Solar Energy Co., Ltd., Wuxi Suntech Power Co., Ltd., Shanghai JA Solar Technology Co., Ltd., Hefei JA Solar Technology Co., Ltd., and Jinko Solar Co., Ltd.

²⁹ See AD PDM at 5; *see also* CVD PDM at 4.

³⁰ See *id.*

below, the Department determines that there are significant reasons for clarifying and modifying the scope of this investigation.

As a threshold matter, the Department has final authority to clarify and modify the scope in this proceeding in order to fulfill its statutory mandate. The CAFC has explained that “the purpose of the petition is to propose an investigation,” and the “purpose of the investigation is to determine what merchandise should be included in the final order.”³¹ Therefore, the Department must be able to determine what merchandise should be covered by any final order. Additionally, the purpose of the AD and CVD law is to provide a remedy, if appropriate, for alleged injury to the domestic industry that is caused by specified merchandise alleged to be dumped or unfairly subsidized.³² Accordingly, the Department’s “practice is to provide ample deference to the Petitioner with respect to the definition of the product for which it seeks relief under the AD and CVD laws.”³³

The CIT has likewise stated that the Department “retains broad discretion to define and clarify the scope of an antidumping investigation in a manner which reflects the intent of the petition.”³⁴ Indeed, the CIT has confirmed that any scope clarifications made by the Department *should* be made in a manner which reflects the intent of the Petition, and that is what the scope clarification accomplishes here.³⁵ The Petition³⁶ and Petitioner’s comments in this investigation demonstrate that the Petitioner’s intent is a scope that covers all solar modules assembled in the PRC using third-country solar cells. In its Petition to this investigation, the Petitioner stated its intent to include all of these modules in the scope, citing the “loophole” that resulted when, following the application of Department’s substantial transformation analysis in the *Solar I* investigations, producers subject to the *Solar I* investigations increased exports to the United States of modules assembled in the PRC with non-PRC cells with the result of avoiding the reach of the *Solar I* AD and CVD orders.³⁷ Indeed, in the Petition for this investigation, Petitioner noted that it had argued for a scope almost identical to the scope in the October 3rd Letter in Solar I and stated

³¹ See *Duferco Steel Inc. v. United States*, 296 F.3d 1087, 1096-97 (Fed. Cir. 2002) (“*Duferco*”).

³² See sections 731 and 701 of the Act; see also *United States v. American Home Assur. Co.*, 964 F. Supp. 2d 1342, 1352-53 (“Antidumping duties serve the distinct purpose of remedying the effect of unfair trade practices resulting in actual or threatened injury to domestic like-product producers.” (citing *Canadian Wheat Bd. v. United States*, 641 F.3d 1344, 1351 (Fed. Cir. 2011))); *Wolff Shoe Co. v. United States*, 141 F.3d 1116, 1117 (Fed. Cir. 1998) (Countervailing duties “are levied on subsidized imports to offset the unfair competitive advantages created by foreign subsidies.”).

³³ See *Large Residential Washers From the Republic of Korea*, 77 FR 46391, 46392 (August 3, 2012) and accompanying Issues and Decision Memorandum at Comment 2. See also *Kern Liebers USA, Inc. v. United States*, 881 F. Supp. 618, 621 (CIT 1995) (“The agency generally exercises {its} broad discretion to define and clarify the scope of an antidumping investigation in a manner which reflects the intent of the petition”).

³⁴ See *Minebea Co. v. United States*, 782 F. Supp. 117, 120 (CIT 1992).

³⁵ See *AMS Assocs. v. United States*, 881 F. Supp. 2d 1374, 1380 (CIT 2012) (explaining that “Commerce retains broad discretion to define and clarify the scope of an antidumping investigation in a manner which reflects the intent of the petition”) (citation and quotation marks omitted), *aff’d*, 737 F.3d 1338 (Fed. Cir. 2013); *Kern Liebers USA, Inc. v. United States*, 881 F. Supp. 618, 621 (CIT 1995) (citing *Minebea*, 782 F. Supp. at 120).

³⁶ See “Petition for the Imposition of Antidumping and Countervailing Duties on Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China and Taiwan,” dated December 31, 2013 (“Petitions on China and Taiwan”).

³⁷ See the Petition at 3, 5-6, 21, 34, 37, and 53; Letter from Petitioner, “Re: Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China: Case Brief of Solar World Americas, Inc.,” dated October 16, 2014 at 5-6; Letter from Petitioner to the Department, “Re: Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China and Taiwan: Rebuttal to Respondents’ Scope Comments” (Apr. 3, 2014) at 11-13.

that the Department's refusal to cover Chinese solar modules assembled from non-Chinese solar cells allowed Chinese companies to continue to ship solar modules to the United States duty free.³⁸ In these investigations, the alleged injury to the domestic industry stems from certain solar modules that are assembled in the PRC using cells produced in third countries, modules which are not covered by the scope of *Solar I* and, thereby, exceed the reach of the remedy afforded by the *Solar I* AD and CVD orders. In addition, taking the instant PRC investigations together with *Solar I*, the Petitioner has alleged that the domestic industry is being injured as a result of the unfair pricing of cells produced in the PRC, modules containing such cells, and modules assembled in the PRC with third-country cells, as well as unfair subsidization in the PRC of both cells and modules.

Beyond the Petitioner's intent, there are other facts and factors that the Department has found to be significant in considering the scope of these investigations. For example, the record demonstrates that the solar products industry involves a complex and readily adaptable global supply chain which allows producers to modify their production chains easily and quickly. Petitioner has cited statements by five large Chinese solar module producers and one U.S. importer of solar modules noting the ease with which they were able to modify their production chain to avoid paying the AD and CVDs imposed by *Solar I*.³⁹ Further, there exist prior AD and CVD orders on related merchandise (i.e., solar cells and modules) from the PRC – *Solar I* – and following the initiation of the *Solar I* investigations and the imposition of those orders, there has been a shift in trade flows that has resulted in increased imports of non-subject modules produced in China.⁴⁰ Such imports – if they are dumped and/or unfairly subsidized and injurious – should not be beyond the reach of the AD and CVD laws.

The Department has also taken into account considerations regarding administrability, enforceability, and potential evasion. If these investigations result in an AD and/or CVD order, as relevant, the scope clarification adopted in this final determination will make the resulting order(s) substantially easier to administer and enforce (for both the Department and CBP), by helping to prevent significant and widespread evasion similar to the evasion that has resulted due to parties that have exploited the substantial transformation analysis conducted in *Solar I*. As indicated in the Petition, although “imports of modules from China consisted largely of modules assembled with Chinese cells” from 2010 through early 2012, “{s}ince that time, imports of modules from China have consisted almost entirely of modules assembled in China from solar cells completed or partially manufactured in Taiwan or other countries (i.e., cells manufactured in Taiwan from Taiwanese inputs, or cells manufactured in Taiwan or other countries from Chinese inputs, including wafers).”⁴¹ The scope which was proposed in the Petition and on which we initiated investigations may result in the evasion of duties and, thus, ineffective relief to the Petitioner due to the complex and adaptable global supply chain that allows production processes for solar cells and modules to be easily moved across borders. With this scope clarification, it is the Department's intent to reduce as much as possible additional opportunities for evasion like those that resulted after the imposition of AD and CVD cash

³⁸ See the Petitions on China and Taiwan, Volume 1 at 3-4.

³⁹ See *Id.* at 4-5.

⁴⁰ See *Id.* at 3, 5-6, 21, 34, 37, and 53.

⁴¹ See *Id.* at 5-6; see also *Id.* at 21.

deposits in *Solar I*. The Department has a long-standing practice of taking potential circumvention concerns into consideration when defining the scope.⁴² This practice has been upheld by the CIT and the CAFC.⁴³ Indeed, the Courts have recognized that the Department has “inherent power to establish the parameters of the investigation so as to carry out its mandate to administer the law effectively and in accordance with its intent.”⁴⁴

Furthermore, certain interested parties commented that they did not track their merchandise in a manner that would allow them to definitively report only that merchandise falling within the “two-out-of-three” scope proposed in the Petition.⁴⁵ The scope being adopted in these investigations resolves interested parties’ concerns in this respect, by covering *all* modules assembled in the PRC from third-country cells. Under the scope being adopted for these final determinations, producers and exporters would not need to track for purposes of these proceedings the ingots, wafers, or partial cells that are being used in the third-country cells being assembled into modules in China.

⁴² See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Germany*, 61 FR 38166, 38169 (July 23, 1996) (“We agree with the petitioner that incomplete merchandise by necessity must be included in the scope of these investigations. Given the very large size of {large newspaper printing presses and components thereof} and the complex importation process, complicated by the further manufacturing and/or installation activities performed in the United States by the respondents, it was the Department’s intent to use the language at issue to avoid creating loopholes for circumvention, including those arising from differing degrees of completeness of the imported merchandise. The Department is concerned that, because of the great number of parts involved, there is the potential that a party may attempt to exclude its merchandise from the scope of these investigations on the basis of a lack of completion.”); *Cellular Mobile Telephones and Subassemblies from Japan; Final Determination of Sales at Less Than Fair Value*, 50 FR 45447, 45448 (October 31, 1985) (“The determination to include subassemblies within the scope of the investigation was based on the need to prevent circumvention of any antidumping order on {cellular mobile telephones (“CMTs”)} through the importation of major CMT subassemblies, and the Department’s broader conclusion that the investigation properly should include subassemblies.”).

⁴³ See *Mitsubishi Elec. Corp. v. United States*, 700 F. Supp. 538, 555 (CIT 1988) (“*Mitsubishi I*”) (“{the Department} has a certain amount of discretion to expand the language of a petition to encompass the literal intent of the petition, ... with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law.”), *aff’d*, 898 F.2d 1577 (Fed. Cir. 1990); see also *Tung Mung Dev. Co. v. United States*, 26 CIT 969, 979 (CIT 2002) (citing *Mitsubishi I*, 700 F. Supp. at 555), *aff’d*, 354 F.3d 1371 (Fed. Cir. 2004).

⁴⁴ See *Torrington*, 745 F. Supp. at 728; see also *Mitsubishi Elec. Co. v. United States*, 898 F.2d 1577, 1582 (Fed. Cir. 1990) (“*Mitsubishi II*”) (“The determination of the applicable scope of an antidumping order that will be effective to remedy the dumping that the {Department} has found lies largely in the {Department’s} discretion”).

⁴⁵ A group of some of the largest Chinese solar product producers stated that it is virtually impossible for importers to know and to trace the origin of the ingots and wafers in cells that are assembled into modules when the module manufacturers purchase the cells from third parties in other countries, or to distinguish between the value of modules with cells that meet Petitioner’s “two-out-of-three” test and those that do not. See the February 18, 2014 Scope Comments Letter submitted by of Yingli Green Energy Holding Company Limited, Yingli Green Energy Americas, Inc., Canadian Solar Inc., Changzhou Trina Solar Energy Co., Ltd., Wuxi Suntech Power Co., Ltd., Shanghai JA Solar Technology Co., Ltd., Hefei JA Solar Technology, Co., Ltd., and Jinko Solar Co., Ltd. Further demonstrating this, the mandatory respondent Trina Solar stated that it does not know what country produced the wafers contained in its purchases of solar cells. See Trina Solar’s April 22, 2014 response at Attachment A-1. Similarly, Yingli Green Energy Holding Company and Yingli Green Energy Americas, Inc. and Canadian Solar Inc. noted that their respective company records do not specifically identify the origin of the wafers used to produce the cells Yingli purchased from non-Chinese suppliers. See both companies’ February 14, 2014 quantity and value responses.

Based on these considerations, and in order to evaluate whether there is unfair pricing and/or subsidization of modules assembled in the PRC using third-country cells, the Department finds it is appropriate to determine for purposes of these investigations that the country of origin of such modules is the PRC.

In determining the country-of-origin of a product, the Department's usual practice has been to conduct a substantial transformation analysis.⁴⁶ Consistent with its practice, the Department considered in *Solar I* whether it should apply its substantial transformation analysis and found that "the application of its substantial transformation test {was} an appropriate means to resolve country-of-origin issues like the one presented in {that} investigation"⁴⁷ Based on this analysis and the facts in that proceeding, the Department determined in *Solar I* that the solar cell was the essential active component of the module, that assembly of cells into modules did not constitute substantial transformation such that the assembled module could be considered a product of the country of assembly, and consequently, that modules assembled in the PRC from solar cells produced in third countries were not covered by the scope of that investigation.⁴⁸

Although the Department routinely has found a substantial transformation analysis to be an appropriate means to determine the country of origin of merchandise under investigation, in the circumstances presented by these investigations and discussed above, the Department has determined that it needs to conduct additional analysis. Thus, contrary to certain parties' arguments, our adoption of the scope described in the October 3rd Letter is not arbitrary. Rather, it addresses the specific and special circumstances of these proceedings, as described above. Relying on the substantial transformation analysis alone could result in failure to provide relief to the domestic industry for alleged injury caused by a finished product produced in the subject country but which would be deemed to originate from a third-country for AD/CVD purposes if the traditional substantial transformation analysis were applied. In these particular proceedings, a rote application of a substantial transformation analysis would not allow the Department to address unfair pricing decisions and/or unfair subsidization concerning the modules that is taking place in the country of export. Consistent with sections 701 and 731 of the Act, the Department must be able to address such circumstances, and where appropriate, address unfair pricing decisions or unfair subsidization that is taking place in the exporting country where further manufacturing, such as assembly, occurs, notwithstanding that such activities may not necessarily result in a substantial transformation of merchandise. While the Department intends that a substantial transformation analysis will continue to be the primary manner in which it will evaluate country of origin in AD/CVD proceedings, given the facts presented by these investigations (and in light of the *Solar I* orders already in place, under which country of origin was already based on a substantial transformation analysis), the Department finds that its additional analysis is appropriate. We do not agree that our analysis is inconsistent with *Solar I*. Rather, in these investigations we are building upon our decisions in *Solar I* and finding, given

⁴⁶ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Glycine from India*, 73 FR 16640 (March 28, 2008) and accompanying Issues and Decision Memorandum at Comment 5; see also *Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review*, 69 FR 74495 (December 14, 2004) and accompanying Issues and Decision Memorandum at Comment 4.

⁴⁷ See *Solar I* IDM at Comment 1, page 8 (emphasis added).

⁴⁸ *Id.* at Comment 1, page 5-7.

the circumstances before us, that it is appropriate to go beyond our decision concerning country of origin from *Solar I* to address merchandise exported from China that is not subject to the *Solar I* orders and that is alleged to injure the domestic industry through unfair pricing and/or subsidization.

With regard to respondents' assertion that the scope clarification results in a single product having two countries of origin, we disagree. No product would at any time have two countries of origin for AD/CVD purposes. The country of origin of these modules, for AD/CVD purposes, is only the PRC. If an AD and/or CVD order results from these investigations, these modules would be subject to AD and/or CVD duties under the relevant order and not another solar-related order (*i.e.*, not *Solar I* or an order covering solar products from Taiwan, should that investigation result in an AD order). We also disagree with the Petitioner's assertion that Taiwanese cells assembled into a module in the PRC would result in a module of Taiwanese origin. With the scope clarification we have adopted for the PRC investigation, the PRC is the country of origin of all modules, laminates and/or panels assembled in the PRC that contain crystalline silicon photovoltaic cells produced in a customs territory other than the PRC.

B. Extent of the Scope Clarification

Respondents:

- The scope as proposed in the October 3rd Letter is not a clarification, but an unlawful expansion and alteration of the scope.
 - The scope as proposed in the October 3rd Letter eliminates entirely the “two out of three” principle incorporated into the scope of these investigations, adds to the scope solar modules made from solar cells from countries outside China and Taiwan, and thereby crafts a scope of the investigation that was never contemplated in the Petitions or in any other submission or determination before or after the initiation of these investigations.
 - Petitioner has not requested the expanded scope proposed by the Department, and nothing in the Petition or in Petitioner's subsequent submissions to the Department or the ITC indicates otherwise.
 - There are numerous CIT decisions demonstrating that a significant expansion and alteration of the scope as outlined in the October 3rd Letter goes far beyond what the CIT decisions have found permissible.⁴⁹
 - The Department stated in *Softwood Lumber from Canada* that while it has the authority to define or clarify the scope of an investigation and must exercise this authority in a manner which reflects the intent of the Petition, the Department generally should not use its authority to define the scope of an investigation in a manner that would thwart the statutory mandate to provide the relief requested in the Petition. As a result, absent an “overarching reason to modify the scope in the Petition, the Department accepts it.”⁵⁰

⁴⁹ See *Minebea*, 782 F. Supp. at 120; see also *Allegheny Bradford Corp. v. United States*, 342 F. Supp. 2d 1172 (CIT 2004); *Smith Corona Corp. v. United States*, 796 F. Supp. 1532 (CIT 1992).

⁵⁰ *Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada*, 67 FR 15539, 15542 (April 2, 2002) (“*Softwood Lumber from Canada*”).

Petitioner:

- The Department’s clarification of the scope at this final phase in the proceedings is fair and reasonable, and would not be unlawful. The CIT has specifically stated that the Department has the discretion to clarify the scope, even in a way that “expand{s} the language of a petition,” in the course of an AD/CVD investigation.⁵¹ This decision was upheld by the CAFC.⁵²
- The respondents themselves cite *Allegheny Bradford*, in which the CIT held that “{t}here is no clear point during the course of an antidumping investigation at which {the Department} loses the ability to adjust the scope.”⁵³
- The scope as proposed in the October 3rd Letter is fully consistent with Petitioner’s intent.
 - As demonstrated by its comments to *Solar I*, Petitioner’s intent has always been to cover all cells from the PRC and all modules from the PRC.⁵⁴ In fact, Petitioner filed the instant investigations specifically to close the loophole created as a result of the Department’s scope determination in the first solar cases and to cover all cells and modules from the PRC, as well as address unfair trade practices in Taiwan that were exacerbated as a result of that scope determination.
- Moreover, in this case, the Department is even more justified than under other circumstances in adjusting the scope at this stage in these proceedings, as the Department has been very clear throughout these investigations that it is continuing to evaluate the scope, and that its country of origin determinations of related subject merchandise could change.⁵⁵

Department’s Position:

We disagree with Respondents’ contention that the proposed clarification of the scope in the October 3rd Letter, which we have adopted in these final determinations, does not reflect Petitioner’s intent. The record of this investigation demonstrates that Petitioner’s intent would be reflected by a scope that covers all solar modules assembled in China using third-country cells. Petitioner’s stated motivation for filing its Petition is to close a “loophole” that resulted when producers subject to the *Solar I* investigations, following the Department’s application of a substantial transformation analysis to fix the scope of that proceeding, increased imports of modules assembled in the PRC with non-PRC cells so as to avoid the reach of the *Solar I* orders.⁵⁶ For instance, Petitioner stated that “imports of modules from China consisted largely of modules assembled with Chinese cells” from 2010 through early 2012, but that “{s}ince that time, imports of modules from China have consisted almost entirely of modules assembled in China from solar cells completed or partially manufactured in Taiwan or other countries (*i.e.*,

⁵¹ See *Mitsubishi I*, 700 F. Supp. at 555.

⁵² See *Mitsubishi II*, 898 F.2d at 1577.

⁵³ See *Allegheny Bradford*, 342 F. Supp. 2d at 1187.

⁵⁴ See *Solar I* IDM at Comment 1.

⁵⁵ See *e.g.*, *Certain Crystalline Silicon Photovoltaic Products from Taiwan: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 79 FR 44395 (July 31, 2014) and accompanying Preliminary Decision Memorandum at 5.

⁵⁶ See the December 31, 2013 AD Petitions on China and Taiwan, Volume 1, at 3, 21, and 53, and the December 31, 2013 CVD Petition on China at 3, 21, and 53.

cells manufactured in Taiwan from Taiwanese inputs, or cells manufactured in Taiwan or other countries from Chinese inputs, including wafers).⁵⁷ Petitioner also stated that “imports of Taiwanese {solar} cells and modules and Chinese modules assembled from non-Chinese cells continued to swamp the U.S. marketplace in the first nine months of 2013,” despite the relief provided by the *Solar I* orders.⁵⁸ Further, Petitioner contended that the Petition showed “that many Chinese solar producers ceased using Chinese-manufactured cells and began using third-country manufactured cells in their solar modules” as a result of the *Solar I* investigations.⁵⁹ In addition, Petitioner cited reports confirming that “Chinese solar producers continue to use third-country cells, largely manufactured in Taiwan, to assemble into solar modules in China and export to the United States.”⁶⁰

The scope language of the Petition for these investigations is an expression of the Petitioner’s intent, as noted above, to cover solar modules made in China using solar cells produced in third countries. However, as discussed in Comment 1.A., the Department is taking into considerations concern about potential evasion of AD and/or CVD measures, as relevant. The scope which was proposed in the Petition and on which we initiated the investigations, may itself result in the evasion of duties and, thus, ineffective relief to the Petitioner, due to the complex and readily adaptable global supply chain that allows producers to modify their production chains easily and quickly. Specifically, producers could simply have sourced their wafers from a country other than the subject country in order to avoid the “two out of three” language in the second sentence of that scope. As a result, the Department explored whether modified scope language could more effectively implement Petitioner’s intent while also mitigating evasion concerns and alleged complications in parties’ ability to properly report subject merchandise to the Department in the context of its administrative proceeding and/or to CBP, and ultimately proposed the clarification in its October 3rd Letter.

Furthermore, in the parallel Taiwan AD investigation, the respondent companies have reported to the Department that following the implementation of the orders in *Solar I*, numerous Chinese companies began to contract with Taiwanese cell producers to manufacture cells for the purpose of exporting those cells to China for use in the production of panels, modules and laminates, and then to export those panels, modules and laminates to the United States.⁶¹ This series of transactions was allegedly implemented, at least for many transactions, to evade the order in *Solar I*, and there are emails and communications referenced in the Taiwan IDM which discuss this series of transactions and the reasoning behind those transactions.⁶² These communications substantiate the concerns expressed by the Petitioners in the Petition that the orders in *Solar I* have not adequately addressed the issues of Chinese dumping and unfair subsidization of solar panels, modules and laminates, and that a scope which specifically includes that merchandise in this investigation is necessary to address such concerns.

⁵⁷ See the December 31, 2013 AD Petitions on China and Taiwan, Volume 1, at 5-6; see also *id.* at 21.

⁵⁸ *Id.* at 34.

⁵⁹ *Id.* at 37.

⁶⁰ *Id.*

⁶¹ See the Issues and Decision Memorandum accompanying the to the final determination of the Antidumping and Countervailing Duty Investigations of Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China and the Antidumping Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from Taiwan at Comment 4.

⁶² *Id.*

Even had Petitioner not expressly intended to include all solar modules assembled in China using third-country cells, the Department has the authority to identify such products in the scope of these investigations anticipating such configurations and thus serving to place parties on notice regarding how the Department might treat Chinese modules made from third-country cells if subsequent scope questions arise.⁶³ In Comment 1.A above we discussed such reasons including, and beyond, Petitioner's intent. One focus of the Department's analysis related to potential evasion. Information on the record indicates that parties have been able to evade the reach of the *Solar I* orders. Thus, even while the investigations focused on merchandise covered by the "two out of three" language rather than "third country cells," the Department anticipated that evasion concerns would likely arise for the original proposed scope. Through its modification of the scope of these investigations, the Department has developed a mechanism to prevent such scenarios.⁶⁴

We also do not agree that this clarification is an impermissible expansion of the scope. As an initial matter, we note that Department's "practice is to provide ample deference to the Petitioner with respect to the definition of the product for which it seeks relief under the AD and CVD laws."⁶⁵ As noted above, the question of scope coverage has been a recurrent issue raised by interested parties and the Department throughout this proceeding. The clarification also addresses concerns (expressed by respondent parties and shared by the Department) regarding the administrability of the "two out of three" scope language that was originally proposed. Further, applying the scope clarification proposed in the October 3, 2014, Letter results in no change to Trina Solar and Renesola/Jinko's reported database.⁶⁶ This clarification will not require the Department to collect any additional information from parties because necessary information is already on the record. At the same time, by more clearly expressing Petitioner's intent of covering solar modules assembled in China using third-country solar cells, the scope as proposed in the October 3rd Letter will more effectively cover the solar modules from which Petitioner has been seeking relief. Moreover, the scope clarification results in a scope that, should this investigation result in an order, will be more administrable than the scope that was originally proposed.

C. Timeliness of a Potential Scope Clarification

⁶³ See *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1300-1301, 1305-06 (Fed. Cir. 2013) (for the proposition that if the Department anticipates the need for addressing foreseeable areas of dispute, it should do so prior to the order so as to put parties on notice of what conduct will be regulated by the order and what factors will be considered in regulating that conduct). Although the Department cannot anticipate every possible permutation of solar products, as explained above, the Petition identified a shift in trade flows that resulted in increased imports of non-subject modules produced in China, and significant and widespread avoidance of the reach of *Solar I*. Based on this information, the Department finds that it is appropriate for the scope of the final determination to address all third country modules, not just those that fall within the "two out of three" scope language proposed by the Petitioner, because doing so will put parties on notice, provide greater certainty for those subject to the order, and preserves resources for all of the parties involved, including the Department.

⁶⁴ See *id.* at 725 F.3d 1295, 1305-06.

⁶⁵ See *Large Residential Washers From the Republic of Korea*, 77 FR 46391, 46392 (August 3, 2012) and accompanying Issues and Decision Memorandum at Comment 2. See also *Kern Liebers*, 881 F. Supp. at 621.

⁶⁶ The Chinese mandatory respondents reported all U.S. sales containing third-country solar cells. See Trina Solar's May 13, 2014 submission at 1, Renesola's April 24, 2014 submission at 25, and Jinko's February 13, 2014 submission at 2.

Respondents:

- Even if the Department had the authority to expand the scope, it cannot do so this late in the investigation because it would result in the Department's final determination not being based on substantial evidence, would prevent finalizing the record and issuing a final decision, and would deny parties due process.
 - Essentially, at this stage in the proceeding, the Department has already completed its investigation of the factual record and thus is unable to supplement the record with additional sales. Thus, an expansion of the scope at this time to include products not already covered would mean that the dumping margins and subsidy rates calculated by the Department will be based on data that are not consistent with the sales that would be subject to the final expanded scope of these investigations.
 - The change in scope under consideration is also not allowable under the Act because it would result in the calculations of the final determination being based on only a subset of subject merchandise. Any dumping margin contained in an AD order must be based on analysis of the entirety of the subject merchandise.⁶⁷ More specifically, an AD order may only be imposed if the agency determines that "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value."⁶⁸ The term "class or kind of foreign merchandise" is synonymous with the term "subject merchandise"⁶⁹ and necessarily includes all products within the scope of the AD investigation, rather than a subset of these products.
 - The CIT has stated that the Department's "discretion to define and clarify the scope of an investigation is limited in part by concerns for the finality of administrative action, which caution against including a product that was understood to be excluded at the time the investigation began."⁷⁰ Thus, by including products that were not included in the Petition and were never the subject of the Department's investigation inquiries, the Department risks undermining the factual basis for its determination and raises concerns about the finality of its administrative actions.
 - The CIT has noted that the Department's decision to change scope language at a late stage in a proceeding can undermine the entire investigatory process.⁷¹
 - Reflecting these concerns, the Department denied a late request for scope clarification in the investigation of Coated Free Sheet from the PRC stating: "Moreover, we note that granting such a clarification would mean that a significant number of sales in the investigations would not be included in the margin calculations, raising a potential procedural safeguards concern."⁷²
 - The Department has even gone so far as to say that it lacks the ability to change the scope after a preliminary determination, in part, because "{a}mending the scope language . . . would, in effect, serve to expand the current scope of subject

⁶⁷ See Section 771(25) and (35)(A)-(B) of the Act.

⁶⁸ See Section 731 of the Act.

⁶⁹ See Section 771(25) of the Act.

⁷⁰ See *Allegheny Bradford*, 342 F. Supp. 2d at 1187-1188, citing *Mitsubishi Heavy Indus., Ltd. v. United States*, 986 F. Supp. 1428, 1433 (CIT 1997).

⁷¹ See *Smith Corona*, 796 F. Supp. at 1535.

⁷² *Id.*

merchandise that was subject to th{e} investigation at too late a stage in this proceeding.”⁷³

- o Because the scope change would occur at such a late stage in the proceeding, it denies due process for parties, especially parties that were not covered under the scope in effect during the *Preliminary Determination*. These Chinese companies and U.S. importers that are not presently part of the proceeding have no opportunity to participate in the hearing or “to be heard” and cannot participate meaningfully in this investigation because the factual record is closed.
 - The CAFC held in *Transcom v. United States* that by not listing exporters in the initiation notice there was deficient notice to the affected parties. In that case, the CAFC stated that importers have the right to complain about procedural flaws in the administrative proceeding, including the Department’s failure to provide adequate notice. The CAFC went on to state that the Department’s determination had to be overturned because the importer and its Chinese exporters had no notice of a change in the Department’s non-market economy practice and, therefore, no opportunity to submit evidence to demonstrate the exporters’ independence from the state-controlled entity.⁷⁴

Petitioner:

- The majority of modules being shipped from the PRC and Taiwan that would be subject to the scope under the Department’s proposed scope clarification were also subject to the scope as it existed at the time data were collected from respondents and the *Preliminary Determination* was issued. Thus, the databases on which the Department will calculate final subsidy and dumping margins are largely consistent with the scope as stated in the Department’s proposed scope clarification.
- The proposed scope clarification does not implicate due process concerns as the Department has made clear throughout these investigations that the scope of the investigations is subject to continuing evaluation, and that the country-of-origin determinations related to subject merchandise could change for the final determination.
 - o Specifically, in the initiation notice, the Department invited comments on the scope of these investigations, clearly indicating to the public that the scope was potentially subject to modification.⁷⁵
 - o The Department again noted its ongoing evaluation of the scope in the *Preliminary Determination*, in which, after adopting Petitioner’s proposed scope, the Department explained that it was continuing to analyze interested parties’ scope comments, including comments on whether it is appropriate to apply a traditional substantial transformation or other analysis in determining the

⁷³ See *Final Determination of Sale at Less Than Fair Value: Sodium Hexametaphosphate from the People’s Republic of China*, 73 Fed. Reg. 6479 (Feb. 4, 2008) (“*Sodium Hexametaphosphate from the PRC*”), and accompanying Issues and Decision Memorandum at Comment 1; see also *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Certain Orange Juice from Brazil*, 71 Fed. Reg. 2183 (Jan. 13, 2006) (“*Certain Orange Juice from Brazil*”), and accompanying Issues and Decision Memorandum at Comment 2.

⁷⁴ See *Transcom, Inc. v. United States*, 182 F.3d 876, 880-84 (Fed. Cir. 1999).

⁷⁵ See *Solar Products Initiation Notice*, 79 FR at 4661.

applicability of the investigation to certain solar modules described in the Petition.⁷⁶

- Further, Respondents have repeatedly claimed that it is nearly impossible for importers to know and to trace the origin of the ingots and wafers in cells that are assembled into modules when the module manufacturers purchase the cells from third parties in other countries. While Petitioner disputes this claim, if true, Respondents and others would not have known for certain whether or not their products were subject to these investigations. Given this potential uncertainty, all exporters of potential subject merchandise should have filed quantity and value submissions and separate rate applications with the Department.
- Respondents' citations to *Allegheny Bradford* for support are inapposite to this investigation because as stated by the CIT, the issue in *Allegheny Bradford* was "whether Commerce may construe an antidumping order to cover products which bear a characteristic that cannot be reconciled with the language of the order."⁷⁷ These aspects of *Allegheny Bradford* are, therefore, inapplicable to the current circumstances, in which Commerce is still formulating the final scope language, which will ultimately be included in any orders that are issued.

Department's Position:

We disagree with Respondents. As the CAFC explained, "the purpose of the petition is to propose an investigation," and the "purpose of the investigation is to determine what merchandise should be included in the final order."⁷⁸ Ultimately, therefore, it is the Department's responsibility to define the scope of the investigation and ensuing order.⁷⁹ The Department "retains broad discretion to define and clarify the scope of an antidumping investigation in a manner which reflects the intent of the petition"⁸⁰ and has the authority to modify or clarify the scope at any time. As the CAFC has recognized, the Department has "inherent power to establish the parameters of the investigation, so that it {is} not ... tied to an initial scope definition that . . . may not make sense in light of the information available to {the Department} or subsequently obtained in the investigation."⁸¹ Similarly, the CIT has stated that the Department has a "certain amount of discretion to expand the language of a petition to encompass the literal intent of the petition, ... with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law."⁸² As even respondents

⁷⁶ See *Preliminary Determination and Accompanying Issues and Decision Memorandum* ("China AD Prelim I&D Memo") at 5; *Certain Crystalline Silicon Photovoltaic Products From Taiwan: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 79 FR 44395 (July 31, 2014) and accompanying Issues and Decision Memorandum ("Taiwan AD Prelim I&D Memo") at 5; *Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 79 FR 33174 (June 10, 2014) and accompanying Issues and Decision Memorandum ("China CVD Prelim I&D Memo") at 4.

⁷⁷ See *Allegheny Bradford*, 342 F. Supp. 2d at 1188.

⁷⁸ See *Duferco*, 296 F.3d at 1096-97.

⁷⁹ *Id.* at 1097; *accord Mitsubishi II*, 898 F.2d at 1582; see also *King Supply Co. v. United States*, 674 F.3d 1343, 1345, 1348 (Fed. Cir. 2012).

⁸⁰ See *Minebea*, 782 F. Supp. at 120.

⁸¹ See *Duferco*, 296 F.3d at 1089 (citation and quotation marks omitted); see also *Save Domestic Oil, Inc. v. United States*, 240 F. Supp. 2d 1342, 1351 (CIT 2002).

⁸² See *Mitsubishi I*, 700 F. Supp. at 555.

themselves recognize, “{t}here is no clear point during the course of an antidumping investigation at which {the Department} loses the ability to adjust the scope....”⁸³ Thus, the Department “may depart from the scope as proposed by a petition if it determines that petition to be overly broad, or insufficiently specific to allow proper investigation, or in any other way defective.”⁸⁴

Further, the scope modification adopted for the PRC AD and CVD final determinations was no impact on the data required from and submitted by the parties. As noted above, application of the scope clarification proposed in the October 3rd Letter will result in no change in the reported sales of the mandatory respondents. We further note that no interested parties have provided specific arguments about what changes would occur in the mandatory respondents’ U.S. sales databases if the Department modified the scope as proposed in the October 3rd Letter.

Further mitigating the impact of applying the proposed scope clarification is the fact that most, if not all, parties reported in their Quantity and Value questionnaires all solar modules containing solar cells from third countries because they claim that they did not know the source of the wafer contained in the solar cells they purchased from third countries.⁸⁵ While Respondents have stated that there *may* be U.S. imports that were not covered by the scope of the *Preliminary Determination* that would be covered by the proposed scope clarification, they have not identified any such shipments.

The Department also disagrees with the Respondents’ claim that a scope clarification at this point in the investigation would deny due process to parties. The Department has made clear throughout these investigations that the scope of the investigations was subject to continuing evaluation, and that the country of origin determinations related to the subject merchandise could change for the final determination. Specifically, in the initiation notice, the Department invited comments on the scope of these investigations and numerous parties submitted comments.⁸⁶ The Department again noted in the *Preliminary Determination* that it was continuing to analyze interested parties’ scope comments.⁸⁷ The very circumstances of these investigations, filed in response to the *Solar I* orders, and in which the Department explicitly stated that the *Solar II* investigations excluded merchandise covered by the *Solar I* orders, placed parties on notice that imports of solar products from China beyond those covered by the *Solar I* orders were

⁸³ See *Allegheny Bradford*, 342 F. Supp. 2d at 1187.

⁸⁴ *Ad Hoc Shrimp Trade Action Comm. v. United States*, 637 F. Supp. 2d 1166, 1175 (CIT 2009) (citation and quotation marks omitted); see also *Allegheny Bradford*, 342 F. Supp. 2d at 1188.

⁸⁵ See, e.g., the February 13, 2014 quantity and value submission by Jinko, the February 14, 2014 quantity and value responses of Yingli Green Energy Holding Company and Yingli Green Energy Americas, Inc., and Canadian Solar Inc. and April 22, 2014 response by Trina Solar at Attachment A-1.

⁸⁶ See scope comment submissions, dated February 18, 2014, from Gintech; Motech; Neo Solar Power Corporation; NextEra Energy, Inc.; SunEdison, Inc.; Suniva, Inc.; Solartech Energy Corp.; and Yingli Green Energy Holding Company Limited, Yingli Green Energy Americas, Inc., Canadian Solar Inc., Changzhou Trina Solar Energy Co., Ltd., WuxiSuntech Power Co., Ltd., Shanghai JA Solar Technology Co., Ltd., Hefei JA Solar Technology Co., Ltd., and Jinko Solar Co., Ltd.; see also rebuttal scope comment submissions, dated April 3, 2014, from Petitioner, and dated April 21, 2014, from Yingli Green Energy Americas, Inc., Canadian Solar Inc., Changzhou Trina Solar Energy Co., Ltd., Wuxi Suntech Power Co., Ltd., Shanghai JA Solar Technology Co., Ltd., Hefei JA Solar Technology Co., Ltd., and Jinko Solar Co., Ltd.

⁸⁷ See *China AD Prelim I&D Memo* at 5; *Taiwan AD Prelim I&D Memo* at 5; *China CVD Prelim I&D Memo* at 4.

potentially subject to the investigation. Thus, we find that our notifications that we were considering changes to the scope provided parties with adequate due process with regard to this scope clarification. In fact, the only citation by interested parties to an actual change to the *Preliminary Determination* that would result from a clarification of the scope as proposed in the October 3rd Letter concerns a situation where a party did in fact heed the Department's notice that product coverage was being reconsidered: One separate rate applicant, tenKsolar, reported to the Department that it had no shipments subject to the scope as stated in the *Preliminary Determination*⁸⁸ but, as a precautionary measure, it filed a separate rate application in the China investigation, which, as we note below, we have granted for this final determination.⁸⁹ The action by tenKsolar indicates that our notice of potential scope clarifications did, in fact, provide parties with adequate notification and due process. We also note that exporters of subject merchandise may still apply for review of their sales in the first administrative review should these investigations result in the imposition of an AD and/or CVD order, as relevant.

We note that Respondents' reliance on *Sodium Hexametaphosphate from the PRC* and *Certain Orange Juice from Brazil* is misplaced. In both of these cases, the Department declined to modify the scope of the investigation because the modification requested by Petitioners was not a mere clarification, but rather would have been an expansion of the scope, and thus should have been proposed as an amendment to the petition prior to the initiation of the investigation.⁹⁰ In contrast, the Petitioner in this case did not request the clarification proposed in the October 3rd Letter. Instead, the Department proposed the clarification, in response to and taking account of interested parties' comments on the scope of these investigations. Further, we find that the modification adopted for the purpose of the final determination in the PRC AD and CVD investigations is not an expansion of the scope because the Petition expresses the Petitioner's intent to cover modules assembled in China using third-country solar cells. As noted above, the Petitioner stated its intent to include all of these modules in the scope in its Petition to this investigation, citing the "loophole" that resulted when, following the Department's substantial transformation analysis in the *Solar I* investigations, producers subject to the *Solar I* investigations increased imports of modules assembled in the PRC with non-PRC cells with the result of avoiding the reach of the *Solar I* AD and CVD orders.⁹¹ Petitioner also stated that since early 2012 "imports of modules from China have consisted almost entirely of modules assembled in China from solar cells completed or partially manufactured in Taiwan or other countries"⁹²

⁸⁸ See tenKsolar's February 12, 2014 quantity and value submission at Attachment I to the China investigation, where it reported no EP or CEP sales, but noted that it sold solar modules to the United States during the POI that it assembled with solar cells fabricated in Taiwan from Taiwan-origin wafers.

⁸⁹ See tenKsolar's March 31, 2014 submission.

⁹⁰ See *Sodium Hexametaphosphate from the PRC* at Comment 1; see also *Certain Orange Juice from Brazil*, at Comment 2.

⁹¹ See the December 31, 2013 AD Petitions on China and Taiwan, Volume 1, at 3, 5-6, 21, 34, 37, and 53; Solar World Case Brief at 5-6; Letter from Petitioner to the Department, "Re: Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China and Taiwan: Rebuttal to Respondents' Scope Comments" (Apr. 3, 2014) at 11-13.

⁹² See the December 31, 2013 AD Petitions on China and Taiwan, Volume 1, at 5-6 (emphasis added); see also *id.* at 21.

Similarly, the Respondents' reliance on *Transcom* is also misplaced. In *Transcom*, the CAFC held that the Department did not provide sufficient notice to an importer that the antidumping duties on its exporters' products could be affected by an administrative review because the exporters were not named in the initiation notice and the Department had not announced a change in its non-market economy practice at the time it initiated the review.⁹³ However, *Transcom* is distinguishable from the instant case because it involved an administrative review, not an antidumping investigation, and a change in practice without notice rather than a modification or clarification to the scope of an investigation. Further, the Court explained that the statutory and regulatory notice provisions only require that "any reasonably informed party should be able to determine, from the published notice of initiation read in light of announced Department policy, whether particular entries in which it has an interest may be affected by the administrative review."⁹⁴ Here, the Department met its obligation to notify possible interested parties repeatedly and throughout the investigations, as explained above.

D. Impact of a Scope Clarification on the ITC's Final Determination

Respondents:

- A substantial change in scope such as the one contained in the October 3rd Letter would undermine the ITC injury determination.
 - The ITC this late in the proceeding cannot send questionnaires to U.S. solar module producers, foreign producers of solar modules and U.S. importers of solar modules containing third-country solar cells. Thus, the ITC's injury determination will not cover the new products in question, which means that any antidumping and countervailing duty orders issued will be for products which the ITC has not determined injure the U.S. industry.

Petitioner:

- The majority of modules being shipped from the PRC and Taiwan that would be subject to the scope under the Department's proposed scope clarification, were also subject to the scope as it existed at the time data was collected from respondents and the *Preliminary Determination* was issued. Thus, the data bases on which the ITC will calculate final subsidy and dumping margins would likely be consistent with the data that would be included under the scope as stated in the Department's proposed scope clarification.
- While the ITC never has perfect import coverage in its investigations, the data the ITC will collect in the final phase of the investigation will be largely consistent with the scope as stated in the proposed scope clarification.

Department's Position: While respondents make arguments about the potential implications of the Department's scope clarification on the investigation underway at the ITC, the Department cannot speculate about what potential effect, if any, the Department's scope decision in these investigations may have on the ITC's investigation. With respect to the Department's China AD and CVD investigations, as we noted above, the scope clarification proposed in the October 3rd

⁹³ *Transcom*, 185 F.3d at 881-883.

⁹⁴ *Id.* at 882-883.

Letter and adopted for purposes of this final determination will result in no change to the reported sales of the mandatory respondents.

E. Consistency of the Scope as Clarified in the October 3rd Letter be Consistent with the United States' WTO Obligations

Respondents:

- The WTO Agreement on Rules of Origin imposes an obligation on Members to ensure that “rules of origin shall not in themselves create restrictive, distortive, or disruptive effects on international trade” and “shall not discriminate between other Members.”⁹⁵ The scope clarification proposed in the October 3rd Letter, if adopted, would have precisely such a distortive and discriminatory effect on trade between WTO Members because it would subject imports of modules made with any third-country cells to AD/CVD duties calculated for Chinese or Taiwanese products.
- The scope clarification proposed in the October 3rd Letter treats a module assembled in the PRC using cells produced in Taiwan as a Chinese origin product subject to the current PRC investigations, while it treats a solar module assembled in Malaysia using cells produced in Taiwan as a Taiwanese-origin product subject to the current Taiwan investigation. Thus, the solar module originating in China containing Taiwanese cells would be deprived of the advantage of market economy treatment provided to the like module originating in Malaysia containing Taiwanese cells. Therefore, it violates the United States' obligations under GATT to provide parties to GATT with most-favored nation treatment.⁹⁶

Petitioner:

- Any “distortion” in international trade is the result of the unfair trade practices being engaged in by Chinese and Taiwanese solar manufacturers that these investigations are attempting to redress.
- The scope clarification also does not discriminate between the United States' treatment of imports from the PRC and Taiwan on the one hand, and imports from other WTO Members on the other hand, by bringing additional products from the PRC and Taiwan within the scope of any eventual AD/CVD orders that would otherwise not fall within that scope. Any solar cells and/or modules that fall within the scope clarification will be subject to equal treatment. And, contrary to Respondent assertions, it would not subject “any third country cells” to AD/CVD duties; rather, it would subject imports of modules from the PRC and Taiwan – which have been determined to be dumped and subsidized – to lawfully calculated duties.
- Under the scope clarification proposed in the October 3rd Letter, the NME methodology would, appropriately, only be applied to cells originating in the PRC, as well as modules

⁹⁵ See Articles 1.2, 2(c), and 2(d) of the WTO Agreement on Rules of Origin.

⁹⁶ Respondents cite to Article I of GATT 1994, which requires that: “with respect to customs duties and charges of any kind imposed on or in connection with importation or exportation ... , and with respect to all rules and formalities in connection with importation and exportation, ... any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.” Respondents claim that subjecting solar cells from market economies to NME treatment because they are included in Chinese solar modules violates this GATT article.

assembled in the PRC. Contrary to Respondents' claims, cells and modules originating in the PRC, an NME country, are not entitled to ME treatment. On the other hand, given Taiwan's status as an ME country, cells originating in Taiwan (other than those destined for module-assembly in the PRC), as well as modules, laminates, and/or panels assembled in Taiwan, would appropriately be subject to duties calculated based on an ME methodology.

Department's Position:

We disagree with Respondents' claim regarding obligations under the WTO Agreement on Rules of Origin. The Department's determination here is consistent with U.S. law, which in turn is consistent with U.S. WTO obligations.

We also disagree that any orders will unfairly impact the trade of solar modules made with any third-country cells. As noted by Petitioner, the scope proposed in the October 3rd Letter and adopted in the final determinations would not subject third-country cells to AD/CVD duties. Instead, the scope covers imports of modules that the Department has determined to have a country of origin of the PRC for purposes of these investigations – and in the event of AD and CVD orders, provides a remedy for the unfair pricing practices involving, and subsidization of, such merchandise by imposing AD and CVD duties. Thus, any alleged distortions or disruptive effects on international trade are the result of the unfair trade practices being engaged in by parties involved in the sale and manufacture of such products, not the result of the Department providing redress for these unfair trade practices.

We also disagree that the scope adopted in the PRC investigations unfairly subjects third-country solar cells assembled into solar modules in China to our NME methodology for calculating dumping margins. As explained above, the Department has determined that modules assembled in China using third-country solar cells, including Taiwanese solar cells, have a country of origin of China. This determination is consistent with the Petitioner's intent. In the Petition, Petitioner alleged that the unfair pricing of modules assembled in China is causing injury to the domestic industry. Although Petitioner also alleged that the unfair pricing of solar cells manufactured in Taiwan is causing injury to the domestic industry, the Petition indicates that Petitioner intended for injury resulting from the unfair pricing of a panel assembled in China to take precedence over the injury resulting from the unfair pricing of a Taiwanese solar cell. Therefore, we find that it is appropriate to focus on the alleged injurious unfair pricing and subsidization of these modules that are assembled in China, and, accordingly, that it is appropriate to apply the NME methodology in determining whether such panels are dumped. In contrast, panels assembled in Malaysia using Taiwanese cells involve no production of either cells or modules in an NME country. Moreover, the fact that there happens to be, in this instance, a concurrent investigation involving solar products from Taiwan has no relevance to what the appropriate methodology is for examining dumping of panels that are assembled in China in the separate investigation of modules from China. It would be appropriate to apply the NME methodology to modules assembled in China in this investigation even if there were no concurrent Taiwan investigation.

F. Administrability Concerns

Respondents:

- The scope as proposed in the October 3rd Letter cannot be administered or applied due to the numerous contradictions and overlaps with the PRC and Taiwan investigations and also with the *Solar I* order.
 - For the same solar module,
 - At times the country of origin would be based on substantial transformation, or where the solar cell is manufactured, such as in *Solar I* and partially in the ongoing investigation on Taiwan, but
 - At other times the country of origin would be determined by where the solar module assembly took place, such as in the ongoing investigation of the PRC and partially in the ongoing investigation of Taiwan.

Petitioner:

- While the country of origin analyses from the *Solar I* investigation and that proposed by the scope clarification may differ, they are not necessarily inconsistent, nor unclear.
- The proposed scope clarification specifically exempts products subject to the existing solar AD/CVD orders from these investigations.
- The country of origin rules in the proposed scope clarifications (providing a supplemental country of origin rule for those products not covered by the initial solar investigations) prevent any product from at any time having two countries of origin.

Department's Position:

We disagree with Respondents and find the scope as clarified in the October 3rd Letter to be administrable. As noted by Respondents, the country of origin criteria in *Solar I*, applicable to solar modules, differ from these investigations. However, we determine that the scope of *Solar I* is very clear as it states that the country of origin of a solar module is determined by where the solar cell was produced.⁹⁷ Not only is the scope and country of origin determination of *Solar I* clear, but the scopes adopted in the final determinations of the current investigations emphasize that they do not alter, revise, or overlap the scope of *Solar I*. Specifically, the scopes of the current China and Taiwan investigations each state that “excluded from the scope of this investigation are any products covered by the existing antidumping and countervailing duty orders on {*Solar I*}.”⁹⁸ Further, any possible overlaps between the current China and Taiwan investigations are eliminated by the scope language stating that solar cells assembled in China using solar cells manufactured in Taiwan are subject to the current China investigation and not the Taiwan investigation.⁹⁹ Thus, we have eliminated any overlap of solar products subject to any of these investigations and those subject to *Solar I*.

Meanwhile, the modifications to the scope language of the *Preliminary Determination* proposed in the October 3rd Letter and adopted in these determinations result in single change: that the

⁹⁷ See e.g., *Solar I* where the scope explicitly states that it covers “Modules, laminates, and panels produced in a third-country from cells produced in the PRC are covered by this investigation; however, modules, laminates, and panels produced in the PRC from cells produced in a third-country are not covered by this investigation.” Further, *Solar I* included certifications in Appendix II, which require exporters and imports of solar modules “to substantiate the claim that the panels/modules do not contain solar cells produced in the People's Republic of China.”

⁹⁸ See the Attachment to the October 3rd Letter.

⁹⁹ *Id.*

country of origin of a solar module assembled in the PRC is the PRC. We find this country of origin language likewise clear and easily applied. Thus, while the country of origin criteria of *Solar I* and the country of origin analysis stated in the proposed clarification in the October 3rd Letter may differ, with the latter building upon the former, we find the approaches to be complementary and that identifying the proceeding to which a given solar module may be subject, based on these analyses, will be straightforward. Further, any potential overlap in coverage that may have arisen due to the different country of origin criteria have been eliminated by the modified language provided in the October 3rd proposed clarification and adopted in the final determinations.

G. Treatment of U.S. Solar Cells Assembled into Solar Modules in China and Taiwan

Respondents:

- The Department must include a scope exemption for solar products assembled from cells of U.S. origin. The Department has already determined that the country of origin of a solar panel is the country in which the solar cell was produced. U.S. law prohibits application of AD/CVD duties to U.S. origin goods.

Petitioner did not comment on this issue.

Department's Position:

We disagree with Respondents. As noted above, contrary to Respondents' assertions, we have only applied AD and CVD measures to products determined to have a country of origin of China. We have not applied such measures to products determined to have a country of origin of the United States.

H. Comments Concerning the Scope of the Preliminary Determination

Parties have submitted comments concerning the scope of the investigation as defined in the *Preliminary Determination*. Because we have clarified the scope consistent with the October 3rd Letter, we have not addressed comments that were only relevant to the scope of the investigation as defined in the *Preliminary Determination* and not relevant to the scope of this final determination.

Comment 2: Whether to Select South Africa or Thailand as the Primary Surrogate Country

Petitioner

- The record does not demonstrate that South Africa was a “significant producer” of merchandise identical or comparable to solar products during the POI, making South Africa unsuitable as a source of surrogate values. The Department must give appropriate meaning to the language “significant producer” by comparing each country’s exports or production capacity to world production.¹⁰⁰ The value of exports from the next closest country to Thailand on the Department’s list – Indonesia – was barely one-fourth of the

¹⁰⁰ See Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process (March 1, 2004) (“Policy Bulletin 04.1”) available at <http://enforcement.trade.gov/policy/index.html>.

total value of Thailand's exports, and South Africa's total exports were less than five percent of the value of comparable merchandise exported from Thailand. Trina Solar's contentions that South Africa is a significant producer of comparable merchandise are not supported by the South African company websites that Trina Solar submitted to the record. In contrast, Thailand is home to multiple producers of photovoltaic products. The record contains financial statements for at least two viable Thai sources of financial ratios. The volume of trade in subject merchandise and related comparable merchandise in Thailand is far greater than that for South Africa – or any other potential surrogate country.

- Trina Solar's claims that certain South African HTS categories are more specific than Thai HTS categories with respect to inputs, such as backsheets, junction boxes, coated glass and EVA, are inaccurate. For backsheets and junction boxes, the categories in the South African tariff schedule are not more specific than those of the Thai tariff schedule, in terms of the specificity of the industrial uses of the input, in relation to the respondents' production. For coated glass and EVA, the Thai tariff schedule has more specific subheadings than the South African tariff schedule. The Department has previously declined to use South Africa as a surrogate country due to the lack of specificity in its tariff schedule compared to other potential surrogate countries.
- The Department mistakenly asserted that Thai surrogate values for labor, rail freight, and inland water freight were absent from the record, when in fact the record does contain these Thai surrogate values.
- The Department applied an incorrect standard in assessing whether the South African company used for surrogate financial ratios, Mustek, was a suitable source, and ignored significant record evidence with respect to alternate Thai companies, as well as its own findings in a prior investigation. Mustek is not a producer of subject merchandise, but rather is a computer assembler. In the previous investigation of solar cells and modules products from the People's Republic of China, the Department found that the production of printed circuit boards is comparable to the production of solar products. Computer assembly is not as similar to subject merchandise production as is printed circuit board production because both printed circuit board production and subject merchandise production require a clean room environment. While Mustek's computers may be technology goods, they bear no relation to subject merchandise in terms of comparability and Mustek's particular production process is similar to solar modules only to the extent that both of them envision products that involve electricity. Further, Mustek's financial statements cover only two months of the POI, while the Thai financial statements of Hana and KCE are fully contemporaneous with the POI. Also, Mustek's financial statements do not contain sufficient specificity with regard to its selling, general, and administrative expenses for the Department to distinguish them from direct or overhead expenses.
- South Africa is a protected market, and due to local content requirements for solar projects in that country, the pricing of goods imported for solar production is likely to be skewed. Electricity generation in South Africa is largely controlled by a single state-

owned entity, Eskom. The South African government provides permits to distributors of “green” energy, allowing them to build facilities that produce “green” energy and allowing the electricity generated by these facilities to feed into the utility grid and then be purchased by Eskom. To obtain such a permit, a company must guarantee that any solar installation has a percentage of local content that reached 60 percent during the POI. The existence of these minimum local content and other requirements creates structural impediments that result in discrimination against imported goods, discouragement of foreign investment, and distortions to the pricing of certain material inputs. This necessarily results in distortions in the normal value for subject merchandise, as the unit pricing for most surrogate values is based upon import data.

Trina Solar

- The statute does not require the Department to define significant production by comparing Thailand’s solar production with South Africa’s production, as Petitioner argues. Petitioner’s allegations regarding the unfairness of the South African solar products market only support the conclusion that the South African solar products industry is significant. Petitioner admits that there are several solar products producers in South Africa.
- Regarding the surrogate values for backsheets, junction boxes, coated glass, and EVA sheets, the Department has a preference for specificity based on the physical characteristics of the input, not end use. Moreover, none of the Thai surrogate values for these four inputs have end-uses specific to solar cell/panel industry.
- Contrary to Petitioner’s statement, there are no surrogate values on the record for inland water freight in Thailand.
- South African data for financial ratios are superior to Thai data because: (1) all of the Thai financial statements show evidence of the receipt of countervailable subsidies; (2) the Department does not consider a greater time overlap of a company’s fiscal year with the POI to be a measure of superiority; (3) Mustek’s computer assembly is similar to the assembly of panels from finished cells that are covered by the scope (panels from “self-produced cells” are not covered by the scope); and (4) there is no evidence of operating expenses distorting the selling, general, and administrative expenses ratio calculated by the Department. These expenses would still be fully captured even if reclassified.
- Petitioner offers no proof that laws favoring South Africa components, equipment and raw materials depress and distort the price of imported goods. Petitioner cites only one case involving India as support. Most solar markets, including the United States, have government involvement that impacts market pricing.

Department’s Position:

Based upon all of the information on the administrative record, and our analysis of the comments received, the Department determines that South Africa is the appropriate primary surrogate country in this investigation because: (1) it is at the level of economic development of the PRC;

(2) it is a significant producer of comparable merchandise, pursuant to section 773(c)(4) of the Act; and (3) we have reliable data from South Africa that we can use to value the FOPs.

In the *Preliminary Determination*, the Department identified Bulgaria, Colombia, Ecuador, Indonesia, South Africa, and Thailand as countries at the level of economic development of the PRC.¹⁰¹ Pursuant to section 773(c)(4) of the Act, the Department then examined whether these countries are significant producers of comparable merchandise. The record does not contain information regarding the production quantities of comparable merchandise for each of these potential surrogate countries, nor does it contain world production data. Thus, in order to identify which of these countries are significant producers of comparable merchandise, interested parties sought evidence of production of solar products in the form of export data, as has been done in prior proceedings.

Petitioner submitted export data from Global Trade Atlas for Bulgaria, Colombia, Ecuador, Indonesia, South Africa, and Thailand for the six-digit HTS number listed in the description of the scope of this proceeding, *i.e.*, 8541.40 (“Photosensitive semiconductor devices, including photovoltaic cells whether or not assembled in modules or made up into panels; light-emitting diodes”). Because the export data from each of these countries are for the six-digit HTS number that covers solar panels, all merchandise on which we based our analysis, using this methodology, is comparable merchandise. The export data show that, of the six potential surrogate countries, Colombia, Indonesia, South Africa, and Thailand were exporters of products under the relevant HTS number.¹⁰² Thus, in the *Preliminary Determination*, the Department determined that Colombia, Indonesia, South Africa, and Thailand are significant producers of merchandise comparable to the merchandise under consideration.

Petitioner contends that when evaluated on the basis of export data for all countries, South Africa is not a significant producer of comparable merchandise, but Thailand is. The 2013 export data for solar products under HTS number 8541.40 (submitted by Petitioner) show that Thailand exported 3,815,136,314 units valued at \$196,824,252, and South Africa exported over 184,656 units valued at \$9,702,645.¹⁰³ Petitioner argues that if there are many countries that produce comparable merchandise, a country is not a significant producer if it is not one of the top producers, citing the Department’s Policy Bulletin 04.1. Although the export data alone indicates that South Africa exports less than Thailand, South Africa’s ranking among other producers of comparable merchandise based on export data does not preclude the Department from determining that it is a significant producer within the specific context of this proceeding. While Policy Bulletin 04.1 offers guidance on how the Department could potentially interpret the term “significant producer” within the context of a proceeding (*i.e.*, “if there are ten large producers and a variety of small producers, ‘significant producer’ could be interpreted to mean one of the top ten”), it also states that “{b}ecause the meaning of ‘significant producer’ can differ significantly from case to case, fixed standards... have not been adopted.” Moreover,

¹⁰¹ See *Preliminary Determination*, and accompanying preliminary decision memorandum under the “Surrogate Country” section.

¹⁰² Letter from Petitioner to The Honorable Penny S. Pritzker, “Re: Crystalline Silicon Photovoltaic Products From the People’s Republic of China: Comments on Surrogate Country and Surrogate Values,” dated May 23, 2014 at Exhibit 3 (“Petitioner SC Submission”).

¹⁰³ See Petitioner SC Submission at Exhibit 3.

with regard to Petitioner's argument that South Africa's production is insignificant when compared to other countries on the Department's list of countries economically comparable to the PRC, the Policy Bulletin addresses such an analysis by stating that "{t}he extent to which a country is a significant producer should not be judged against the NME country's production level or the comparative production of the five or six countries on {the Office of Policy}'s surrogate country list." Based on the above, we find that South Africa is a significant producer of merchandise comparable to the merchandise under consideration, as we did in the *Preliminary Determination*.

In addition, we believe other record information supports this finding. To the extent that Policy Bulletin 04.1 suggests guidelines for identifying "significant" producers, it assumes the availability of world production data, which, as noted above, is not on the record. While the legislative history of the Act supports our use of export data as a means of identifying significant producers of comparable merchandise,¹⁰⁴ Policy Bulletin 04.1 states that, "given that the decision as to what constitutes 'significant production' in a particular case depends on available (often scarce) data, the specific criteria and supporting factual information used to determine whether a potential surrogate country is a significant producer is left to the discretion of the operations team." In this case, additional record evidence, in the form of financial statements of comparable merchandise producers, exists that suggest there is significant production of comparable merchandise in South Africa.¹⁰⁵ Thus, absent production data, we find that it is also appropriate to look for other indications of production of comparable merchandise, such as the financial statements of Mustek.¹⁰⁶

According to Mustek's financial statements, the company produced and sold ZAR 2,578,954,000 (\$281,005,407) of computer products and peripherals in 2013.¹⁰⁷ Mustek's reported production and sales of computer products and peripherals is higher, in value terms, than the exports of any potential surrogate country in 2013, which supports our determination that significant production of comparable merchandise occurs in South Africa. Petitioner submitted to the record only South African export data for HTS number 8541.40, which covers solar cells and panels.¹⁰⁸ Because section 773(c)(4)(B) of the Act refers to significant producers of comparable merchandise, the Department could have considered data from a broader export category of reasonably comparable merchandise, such as Mustek's computer products and peripherals. However, such export data are not on the record of the proceeding. Rather, there is evidence on the record that South Africa's production of other comparable merchandise is consumed domestically because, for example, in 2013, over 90 percent of Mustek's sales were to South African customers.¹⁰⁹

¹⁰⁴ See Omnibus Trade and Competitiveness Act of 1988, Conf. Report to Accompany H.R. 3, H.R. Rep. No. 576, 100th Cong., 2nd Sess. (1988) ("Omnibus Trade and Competitiveness Act of 1988") at 590.

¹⁰⁵ See Letter from Trina to the Honorable Penny S. Pritzker, "Re: Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China; Comments on Surrogate Country and Surrogate Values," dated May 23, 2014, at Exhibit 10, "Mustek Integrated Annual Report 2013" ("Mustek 2013 AR").

¹⁰⁶ See *Dorbest Ltd. v. United States*, 30 C.I.T. 1671, 1683-1684 (CIT 2006), *rev'd on other grounds*, 604 F.3d 1363 (Fed. Cir. 2010) ("*Dorbest 2006*") (upholding the Department's selection of India as a surrogate country using the financial statements of Indian companies).

¹⁰⁷ See Mustek 2013 AR, page 100.

¹⁰⁸ See Petitioner SC Submission at Exhibit 3.

¹⁰⁹ See Mustek 2013 AR at page 144.

The Department has evaluated all of the information on the administrative record to determine whether any of the countries at the level of economic development of the PRC can be considered significant producers of merchandise comparable to the solar products covered by the scope of this investigation. Based upon export data for goods comparable to the subject merchandise, and information regarding production of comparable merchandise contained in Mustek's financial statements, the Department continues to find that Colombia, Indonesia, South Africa, and Thailand are significant producers of merchandise comparable to the merchandise under consideration.¹¹⁰

The Department next examined whether it has reliable data from any of these countries with which to value FOPs. Petitioner submitted Thai surrogate value information for valuing respondents' FOPs. Respondents submitted South African surrogate value information for valuing their FOPs. We do not have complete data on the record from the other potential surrogate countries for valuing FOPs. Pursuant to section 773(c)(1) of the Act, the Department uses the best available information to value FOPs. To do so, the Department considers several factors, including the quality, specificity, and contemporaneity of the source information.¹¹¹

The Department reviewed the surrogate value data on the record for key inputs and finds that, with the exception of data for surrogate financial ratios, there are available and adequate surrogate data on the record from both countries with which to value FOPs. We considered all key surrogate values, including the financial ratios data, and the surrogate values for backsheets, junction boxes, coated glass, and EVA sheets, in the process of evaluating data availability and quality for our surrogate country selection process. With respect to data availability, while Petitioner is correct that the record contains Thai surrogate values for labor and rail freight, it does not contain a Thai surrogate value for inland water freight. With respect to data quality, we do not find Thailand to be clearly superior in terms of the specificity and contemporaneity of its surrogate values for key inputs. The Department favors one country over another on the basis of surrogate value specificity, where a surrogate value from one country representing a significant portion of normal value is more specific to a respondent's input.¹¹² We find that the specificity offered by either the Thai import data (with respect to junction boxes, coated glass and EVA uses) or the South African import data (with respect to sheet thickness and junction box voltage), for the key inputs has no apparent significance for valuing solar panel production.

¹¹⁰ See *Certain Activated Carbon From the People's Republic of China; 2010-2011; Final Results of Antidumping Duty Administrative Review*, 77 FR 67337 (November 9, 2012) and the accompanying Issues and Decision Memorandum at Comment 1.

¹¹¹ See, e.g., *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) and accompanying Issues and Decision Memorandum at Comment 1.

¹¹² See *Utility Scale Wind Towers From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 77 FR 75992 (December 26, 2012) ("*Wind Towers from PRC*") and the accompanying Issues and Decision Memorandum at Comment 1, ("The Department has also found that Thai import data allows the Department to value each respondent's steel plate, which accounts for a significant portion of each company's normal value, more accurately than either the South African or Ukrainian data because the Thai data is most specific to the size and chemistry of the respondents' steel plate. Specifically, the Thai tariff schedule classifies imports into four carbon content ranges and three width ranges. In contrast, the South African and Ukrainian tariff schedules do not classify steel plate imports by levels of carbon content and the South African tariff schedule provides only a single tariff item for non-alloy steel plate in excess of 10 mm.").

Regarding contemporaneity, the Department finds that, in general, the Thai surrogate value data and the South African surrogate value data are comparable because most of the data are contemporaneous import values. In addition, the time periods covered by the Thai and South African financial statements overlap the POI (*i.e.*, fiscal year 2013). The Department considers a source to be contemporaneous where there is overlap between the period covered by the source and the relevant period covered by the proceeding.¹¹³

Regarding Petitioner's contention that South Africa is a protected market, and the pricing for goods imported for solar production in South Africa is likely to be skewed, the Department agrees with Trina Solar. As explained in the legislative history of the Omnibus Trade and Competitiveness Act of 1988, the Department has a long-standing practice of disregarding surrogate values if it has a reason to believe or suspect the source data may be distorted by subsidies.¹¹⁴ However, it is also our practice, in accordance with the legislative history, not to conduct a formal investigation to ensure that such prices are distorted; rather, we examine the information on the record. The Department finds no factual information on the record to support the claim that the South African surrogate value data are distorted. Petitioner states that "the distortions can be both downward in price – due to depressed levels of demand in goods, or upwards in price – due to a reduction in import volume and rendering the average unit value susceptible to being affected by imports of specialized goods." In other words, Petitioner itself cannot state with certainty what impact the South African law that it cites would have on the surrogate value data. "Speculation, however, is not support for a finding," and "this type of conjecture is exactly the type of reasoning the substantial evidence standard aims to prevent."¹¹⁵ The Department's determination must be based on substantial record evidence.

Finally, with regard to the quality of the data for surrogate financial ratios, we find the surrogate financial statements on the record for a South African company to be superior to all of the financial statements for Thai companies that are on the record (*i.e.*, the financial statements of Hana, KCE, SIIX, Stars Microelectronics and Team Precision),¹¹⁶ due to evidence that the Thai financial statements may be distorted by subsidies found by the Department to be countervailable. It is the Department's practice to reject the financial statements of a company that it has reason to believe or suspect may have benefited from countervailable subsidies, particularly when other sufficient, reliable, and representative data are available for calculating

¹¹³ See *Multilayered Wood Flooring From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*; 2011-2012, 79 FR 26712 (May 9, 2014) and the accompanying Issues and Decision Memorandum at Comment 2.

¹¹⁴ See Omnibus Trade and Competitiveness Act of 1988, at 590.

¹¹⁵ See *Asociacion Colombiana De Exportadores v. United States*, 40 F. Supp. 2d 466, 472 (CIT 1999).

¹¹⁶ For Hana, see Petitioner's May 23, 2014 Comments on Surrogate Country and Surrogate Values at Exhibit 11, page 34; for KCE, see Petitioner's June 24, 2014 Submission of Surrogate Values at Exhibit 12 at 329. For Stars, see Trina's June 24, 2014 submission at Exhibit 1, page 34. For SIIX, see Trina's June 24, 2014 submission at Exhibit 2, note 20. For Team Precision, see Trina's May 30, 2014 submission at Exhibit 6 at 76.

surrogate financial ratios.¹¹⁷ This is also explained in the legislative history of the Omnibus Trade and Competitiveness Act of 1988.¹¹⁸ All of the Thai financial statements indicate that the companies received IPA subsidies.¹¹⁹ In the past, the Department found that the IPA program was not *per se* countervailable and was countervailable only when approval of promotional privileges was based upon an explicit export commitment, the company's location in a regional investment zone, or an express government promotion of the industry.¹²⁰ Therefore, in order to determine whether a company that used IPA benefits received a countervailable subsidy, the Department required information regarding the basis upon which the IPA promotion privileges were approved.¹²¹ However, in *Warmwater Shrimp*,¹²² the Department determined the IPA to be a *per se* countervailable subsidy under sections 771(5A)(A) and (B) of the Act. In the instant proceeding, as noted above, we find that the financial statements for Hana, KCE, SIIX, Stars Microelectronics, and Team Precision contain evidence that they received IPA subsidies. The financial statements for the South African company, Mustek, do not contain evidence of countervailable subsidies. Thus, in this respect, the South African surrogate value data on the record is superior to the Thai surrogate value data on the record.

Petitioner contends that Mustek did not manufacture or sell comparable merchandise during the POI, because the assembly of computers by Mustek is not as similar to the production of the merchandise under investigation as Hana and KCE's production of printed circuit boards. Specifically, Petitioner claims that printed circuit board production is more similar because both printed circuit board production and the production of the merchandise under investigation require a clean room environment. While solar cell production is similar to printed circuit board production, the merchandise under consideration is manufactured in an assembly operation, using solar cells manufactured elsewhere. As the Department noted in the *Preliminary Determination*, "the panel assembly stage of manufacturing, which involves assembling cells, wires, junction boxes and other parts into panels, is more comparable to the assembly of

¹¹⁷ See *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), and accompanying Issues and Decision Memorandum at Comment 17A; see also *Certain Frozen Warmwater Shrimp From the People's Republic of China: Notice of Final Results and Rescission, in Part, of 2004/2006 Antidumping Duty Administrative Review and New Shipper Reviews*, 72 FR 52049 (September 12, 2007) and accompanying Issues and Decision Memorandum at Comment 2, citing *Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results And Rescission, In Part, of 2004/2005 Antidumping Duty Administrative and New Shipper Reviews*, 72 FR 19174 (April 17, 2007), and accompanying Issues and Decision Memorandum at Comment 1; See also H.R. Conf. Rep. No. 576, 2d Sess., Vol. 4, 590 (1988) ("Omnibus Trade and Competitiveness Act of 1988") ("Commerce shall avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices").

¹¹⁸ See Omnibus Trade and Competitiveness Act of 1988 at 590; see also *Kerr-McGee Chemical Corp. v. United States*, 985 F. Supp. 1166, 1177 (CIT 1997).

¹¹⁹ See *supra* n. 31.

¹²⁰ See, e.g., *Certain Stilbenic Optical Brightening Agents From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 77 FR 17436 (March 26, 2012) and the accompanying Issues and Decision Memorandum at Issue 2.

¹²¹ *Id.*

¹²² See *Frozen Warmwater Shrimp From Thailand: Final Negative Countervailing Duty Determination*, 78 FR 50379 (August 19, 2013) ("*Warmwater Shrimp*"), and the accompanying Issues and Decision Memorandum at Comment 2.

computers,¹²³ which involves assembling circuit boards, wires, junction boxes and other parts into a computer, than it is to circuit board manufacturing, which involves attaching and connecting electronic components and etching conductive tracks, pads and other features from copper sheets and laminating them onto a non-conductive substrate.”¹²⁴ The merchandise under investigation consists of certain panels assembled in the subject country, and we do not find that circuit board production is necessarily more similar to panel assembly than is computer assembly.

Petitioner also argues that Mustek’s financial statements do not contain sufficient specificity with regard to its selling, general, and administrative expenses to allow the Department to distinguish them from direct or overhead expenses, so as to provide the detail necessary for calculating accurate financial ratios. Petitioner contends that the term “distribution” could equally refer to selling expenses or to overhead expenses, and that “other operating expenses” could also refer to selling expenses, to direct operating costs, or to overhead expenses. We disagree. The term “distribution” is used elsewhere in the Mustek financial statement in conjunction with customer service and support of resellers, and thus is a selling expense.¹²⁵ “Operating expenses,” particularly in the context of this line item, refers to non-manufacturing expenses not directly related to production.

Given the foregoing, we continue to find that South Africa is the appropriate primary surrogate country. Therefore, the Department calculated NV using South Africa as the primary surrogate country.

Comment 3: Whether to Offset the Cash Deposit Rate for Export Subsidies

Petitioner

- The statute does not require the Department to offset AD cash deposit rates by the *ad valorem* rate of any export subsidies calculated in a companion CVD proceeding.
- The Department should not offset the AD cash deposit rate for export subsidies in this case because the Department based the export subsidy rate in the companion solar products CVD investigation on an AFA rate as a consequence of the PRC government’s repeated refusal to allow the Department to verify usage of the “EX-IM Buyer’s Credit” subsidy program. Offsetting this AFA rate allows the PRC government to continue to refuse to cooperate by neutralizing the adverse impact on the respondents.
- Further, the statute requires the Department to offset U.S. price by the subsidy amount, but the Department does not have the subsidy amount because of the PRC government’s refusal to provide the information.

¹²³ See Trina Solar’s May 23, 2014 submission at Exhibit 10 where Mustek Limited, a computer assembler, describes and provides pictures of its computer assembly operations, its computerized and automated assembly, and its research and development efforts at page 30 and the last five pages of Exhibit 10.

¹²⁴ See Petitioner’s June 24, 2014 Submission of Surrogate Values at Exhibit 12 at 40, included the financial statements of KCE Electronics Public Company Limited, a printed circuit board manufacturer. These statements describe its production processes.

¹²⁵ See Trina Solar’s May 23, 2014 submission at Exhibit 10 (Mustek financial statements at pages 16, 33).

- Deducting an export subsidy rate from an AD duty rate is mathematically correct as long as the two rates are calculated on the same basis. However, in this instance, AD rates are based on CEP, while the CVD rates are based on the foreign producer's sales values, or AFA.

Trina Solar and BYD

- The statute requires the Department to adjust the U.S. Price calculation by the amount of CVDs in both investigations and administrative reviews, and to avoid imposing duties twice to compensate for export subsidies.
- When a CVD order has not yet been issued prior to the final AD determination, the Department can adjust the AD cash deposit rate to avoid a double remedy. This methodology has been affirmed by the CIT.
- The Department has a consistent practice of adjusting AD cash deposit rates to offset any CVD export subsidies, regardless of whether the CVD export subsidy rate was calculated using AFA or not. This does not have the effect of neutralizing the adverse inference.

Department's Position:

It is the Department's practice, in AD investigations, to initially calculate a dumping margin and then to offset that figure by any export subsidy cash deposit rate calculated in the concurrent CVD investigation in the cash deposit instructions sent to CBP.¹²⁶ Section 772(c)(1)(C) of the Act directs the Department to increase EP or CEP by the amount of the countervailing duty "imposed" on the subject merchandise "to offset an export subsidy." The basic theory underlying this provision is that in parallel AD and CVD investigations, if the Department finds that a respondent received the benefits of an export subsidy program, it is presumed the subsidy contributed to lower-priced sales of subject merchandise in the United States market. Thus, the subsidy and dumping are presumed to be related, and the imposition of duties against both would in effect be "double-application" – or imposing two duties against the same situation. Section 772(c)(1)(C) of the Act therefore requires that the Department factor the affirmative export subsidy determination into the AD calculations to prevent this "double-application" of duties.

The Department has interpreted the term "imposed" to mean "assessment" in past investigations, and the CIT has affirmed this interpretation.¹²⁷ The Department also has recognized, however, that cash deposit rates are estimates of the AD duties which may ultimately be assessed, and are applied in investigations to provide the United States with security for the collection of AD duties, if appropriate, at some future point. Cash deposit rates become final assessment rates when administrative reviews are not requested,¹²⁸ are subject to modification, and, as noted

¹²⁶ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value, and Negative Determination of Critical Circumstances: Certain Lined Paper Products from India*, 71 FR 45012 (August 8, 2006), and accompanying Issues and Decision Memorandum at Comment 1.

¹²⁷ See *Notice of Final Determination of Sales at Less Than Fair Value: Honey from Argentina*, 66 FR 50612, 50613 (October 4, 2001); see also *Serampore Industries v. United States*, 675 F. Supp. 1354, 1360 (CIT 1987).

¹²⁸ See 19 CFR 351.212(c).

above, serve a different purpose than assessment rates. However, they are calculated on the basis of all of the information on the record and, in most respects, are calculated in the same manner as assessment rates determined in reviews. Therefore, the Department has recognized that although Congress is silent as to the application of export subsidy offsets during an investigation in the statute, the same underlying theory of “double-application” which applies to the imposition of duties also applies to the Department’s calculation of a cash deposit rate.¹²⁹ Thus, the Department’s longstanding practice in an investigation is to offset the AD cash deposit rate by the export subsidy cash deposit rate.¹³⁰

The Department is continuing to follow that practice here, where there are concurrent AD and CVD investigations of the merchandise under consideration, pursuant to section 772(c)(1)(C) of the Act. The Department adheres to this practice regardless of whether the export subsidy rate is based on AFA.¹³¹ Moreover, contrary to Petitioner’s claim, offsetting the AD cash deposit rate by an export subsidy rate that is based on AFA will not have the effect of neutralizing the adverse inference applied to the respondents. Rather, such an offset ensures that the adverse inference used to calculate the export subsidy rate is applied to the respondents only once (*i.e.*, as a CVD and not through potentially higher AD duties).

While Petitioner argues against applying an offset for export subsidies, noting that the AD and CVD rates are calculated using different bases, both rates are applied to the entered value of the merchandise in the United States. Despite differences in the methodologies used to derive AD and CVD rates, since both rates are being applied to entered value, we believe it is appropriate to deduct the export subsidy rate from an AD duty rate. Therefore, for the final determination, the Department will offset the AD cash deposit rate by the export subsidy rate calculated in the concurrent CVD investigation.

Comment 4. Whether the Department Should Investigate the Effects of the GOC’s Alleged Cyberhacking on this Investigation

Petitioner’s Comments:

- The U.S. Department of Justice charged members of the People’s Liberation Army (the military of the PRC) with cyber espionage against U.S. corporations for commercial advantage. SolarWorld was among the U.S. corporations that were targeted.
- As the information allegedly stolen includes information related to SolarWorld’s financial status, manufacturing metrics, and privileged attorney-client communications regarding

¹²⁹ See *Wind Towers from PRC*, and accompanying Issues and Decision Memorandum at Comment 5.

¹³⁰ See *Galvanized Steel Wire From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 77 FR 17430 (March 26, 2012), and accompanying Issues and Decision Memorandum at Comment 5 (stating that the Act “requires a full adjustment of AD duties for CVDs based on export subsidies in all AD proceedings”).

¹³¹ See, e.g., *Pre-Stressed Concrete Steel Wire Strand From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 28560, 28563 (May 21, 2010); *Pre-Stressed Concrete Steel Wire Strand from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 28557 (May 21, 2010), and accompanying Issues and Decision Memorandum at “Grant Programs Treated as Export Subsidies Pursuant to AFA”; *Solar I AD Final Determination*, 77 FR 63791, 63796 (October 17, 2012); *Solar I CVD Final Determination*, and accompanying Issues and Decision Memorandum at Comment 18.

trade litigation, the Department should investigate how this alleged cyberhacking may have affected the AD and CVD investigations.

Department's Position:

As the agency charged with administering the antidumping and countervailing duty laws, the Department has the inherent authority to protect the integrity of its proceedings. For example, the Court of Appeals for the Federal Circuit has recognized the Department's authority to ensure that our proceedings are not undermined by fraud.¹³² Similarly, the law apportions responsibility for justice across the spectrum of administrative agencies, each according to its legislative mandate. For example, "it is Customs, not Commerce, that is charged with responsibility for enforcement of the laws prohibiting material false statements and omissions in customs entry documentation" under 19 U.S.C. § 1592.¹³³

Here, based on our analysis of the questionnaire responses, verification reports, and further examination of information on the record, we have concluded that, apart from the specific instances detailed in this final determination, the data and records provided by respondents are reliable for the purposes of determining antidumping and countervailing duties and that nothing in the circumstances underlying Petitioner's allegations constitutes a failure of the respondents to cooperate in this investigation. Thus, while we recognize the seriousness of Petitioner's allegation, our examination of Petitioner's claims leads us to conclude that they do not contain allegations actionable within the context of either the AD or CVD investigation. Though grave, the claims do not suggest that information submitted to the Department by the GOC or the company respondents was inaccurate as a result of the alleged cyberhacking or that such alleged hacking has otherwise led to the possibility of determinations being based on inaccurate information.

We note, however, that the Federal Circuit has also made clear that the Department's authority to protect the integrity of its proceedings does not end simply because the Department reaches a final determination in the proceeding. Thus, even after a proceeding has closed, where allegations of fraud have led the Department to reopen and reconsider a previously-conducted administrative review, the Federal Circuit has held that Commerce has the "inherent authority" to act when evidence of misconduct calls into question the integrity of the determination.¹³⁴

Comment 5. Ultimate Ownership of Separate Rate Applicants

Petitioner

¹³² See, e.g., *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1360-62 (Fed. Cir. 2008).

¹³³ *Mid Continent Nail Corp. v. United States*, 949 F. Supp. 2d 1247, 1283 (Ct. Int'l Trade 2013) ("As such, even assuming that violations such as those alleged by {petitioner} may have occurred, the investigation of any such potential violations would fall squarely within Customs' domain. Commerce here thus acted properly in referring to Customs the issue of whether certain companies may have acted negligently or fraudulently . . .").

¹³⁴ See *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1360-62 (Fed. Cir. 2008)); cf. *Sahaviriya Steel Indus. Pub. Co. v. United States*, 649 F.3d 1371, 1379-1380 (Fed. Cir. 2011).

- Ownership structure may be a determinative, or at the very least, relevant factor in determining a respondent's eligibility for a separate rate. Thus, the Department acted unreasonably in granting separate rates to companies that did not provide it with ultimate ownership information.
- The Department should deny separate rates to the following respondents that have failed to provide information regarding their ultimate ownership:
 - o Chint Solar
 - o BYD
 - o Hanwha Qidong
 - o Hanwha HK
 - o Zhejiang
 - o CEEG Shanghai
 - o CEEG Nanjing
 - o Ningbo
 - o Sunergy
- The companies identified above reported that they were held by a legal entity, such as a holding company or limited partnership. However, some of these companies failed to disclose the controlling shareholders of such legal entities. For many of the companies, the undisclosed ultimate shareholders represent more than 51 percent of the equity interest in the company.

BYD

- Contrary to Petitioner's claims, BYD submitted information on ownership of its ultimate parent. This information demonstrates that it is a company listed on the Hong Kong Stock Exchange. BYD also submitted information identifying each of the company's top ten shareholders.¹³⁵ None of the owners are a Chinese state-run enterprise.
- Petitioner has not cited any information in BYD's separate rate application, or any evidence pertaining to BYD itself or its owners, to support its argument.

Department's Position:

We disagree with Petitioner. Consistent with the Department's practice, in order to determine whether these companies operated their export activities independently of government control, we obtained evidence from them to demonstrate an absence of such government control both in

¹³⁵ See BYD's March 31, 2014 submission at Exhibit 6.

law (*de jure*) and in fact (*de facto*).¹³⁶ Here, the record contains laws, regulations, business licenses, export licenses, and other documents demonstrating *de jure* independence from the government.¹³⁷ The companies at issue also provided information demonstrating an absence of *de facto* control of their export activities.¹³⁸ Petitioner has not cited any evidence of specific government direction and control of the respondents with respect to their export activities that would impugn the evidence provided by the respondents that serves as the basis of the Department's separate rate determinations.

Although Petitioner questions the Department's examination of the ultimate ownership of these companies, the Department has requested and obtained extensive evidence from these companies throughout the investigation sufficient to rebut the presumption of control. For example, in the Separate Rate Application, the Department requests that companies applying for a separate rate identify whether the 10 individuals owning the largest percentage of the intermediate and *ultimate* owners of the applicant held office at any level of the PRC government. The Separate Rate Application also contains a request that the applicant identify whether the 10 shareholders owning the largest percentage of the applicant (individuals and entities), and all of *their* entity shareholders (which covers ultimate owners) had any relationship with the Chinese government. All nine of the companies at issue here answered these questions. These companies did not identify any Chinese government ownership or any relationship to the Chinese government.¹³⁹

Additionally, based in part on Petitioner comments regarding ultimate ownership submitted prior to the *Preliminary Determination*, we issued supplemental questionnaires to nearly half of the 31 Chinese-owned separate rate respondents, including Chint Solar,¹⁴⁰ one of the nine companies at

¹³⁶ See *Policy Bulletin 5.1* (April 5, 2005). 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. See *Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China*, 56 FR 20588, 20589 (May 6, 1991). 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. See *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China*, 59 FR 22585, 22586-87 (May 2, 1994); *Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From the People's Republic of China*, 60 FR 22544, 22545 (May 8, 1995).

¹³⁷ See *Preliminary Determination*, and accompanying Decision Memorandum at 12; see also the March 31, 2014 responses by Chint Solar, BYD, Hanwha Qidong, Hanwha HK, Zhejiang, CEEG Shanghai, CEEG Nanjing, Ningbo, and Sunergy.

¹³⁸ See *Preliminary Determination*, and accompanying Decision Memorandum at 12-13; see also the March 31, 2014 responses by Chint Solar, BYD, Hanwha Qidong, Hanwha HK, Zhejiang, CEEG Shanghai, CEEG Nanjing, Ningbo, and Sunergy.

¹³⁹ See the March 31, 2014 responses by Chint Solar, BYD, Hanwha Qidong, Hanwha HK, Zhejiang, CEEG Shanghai, CEEG Nanjing, Ningbo, and Sunergy.

¹⁴⁰ See the July 2, 2014 responses by Chint Solar.

issue, requesting further information regarding their ultimate owners. After analyzing the responses to our supplemental questionnaires, we found no unreported government ownership.¹⁴¹

Thus, all of the companies at issue were asked in the Separate Rate Application about Chinese government involvement in their operations and whether there was any significant government ownership, directly or indirectly, in their company. All of the companies reported that there was none. Further, contrary to Petitioner's claims, some of the companies at issue did identify their ultimate owners and addressed whether there were any relations between these owners and the Chinese government. For example, BYD reported in its Separate Rate Application that it was listed on the Hong Kong Stock exchange, a market economy stock exchange, and it identified its largest 10 stockholders.¹⁴² Chint Solar also identified its largest stockholders.¹⁴³ There is no evidence that these stockholders are Chinese government entities or have ties to the Chinese government.

To test the veracity of the separate rate applicant's responses regarding whether their ultimate owners included the Chinese government, the Department requested further information on ultimate ownership from a sample of the separate rate applicants, including Chint Solar. The Department found no evidence of Chinese government ownership¹⁴⁴ and Petitioner cited no examples of unreported Chinese government ownership.

Under similar circumstances, the CIT affirmed the Department's exercise of discretion in determining the extent of evidence required to rebut the presumption of government control.¹⁴⁵ In *Jiangsu Jiasheng Photovoltaic Tech., Co. v. United States*, where we took similar steps to ensure the validity of respondents' separate rate claims, the CIT held that the Department "reasonably exercised its responsibility for investigating, questioning, and verifying the respondents' submitted data and evidence, as well as for determining the appropriate treatment for producers and exporters from NME countries," and that because the Department "possesses both expertise and relevant first-hand knowledge – sending follow-up questionnaires and conducting on-sight verification as needed – the court will not reweigh the evidence before the agency."¹⁴⁶ Here, we have conducted a similarly thorough inquiry and Petitioner has not cited

¹⁴¹ See the July 2, 2014 responses by Chint Solar, Hefei JA Solar Technology Co., Ltd., Shanghai JA Solar Technology Co., Ltd., Canadian Solar International, Ltd., Canadian Solar Manufacturing (Changshu), Inc., and Canadian Solar Manufacturing (Luoyang), Inc., LDK Solar Hi-Tech (Nancheng) Co., Ltd., Motech (Suzhou) Renewable Energy Co. Ltd.'s July 2, 2014, Upsolar Global Co., Ltd. and Upsolar Group, Co., Ltd., Ningbo Qixin Solar Electrical Appliance Co., Ltd., Baoding Tianwei Yingli New Energy Resources Co., Ltd., Changzhou Almaden Co., Ltd., the July 7, 2014 response by Hengdian Group DMEGC Magnetics Co., Ltd., the May 22, 2014 response by Changzhou Trina Solar Energy Co., Ltd. at 8.

¹⁴² See BYD's March 31, 2014 submission at Exhibit 6.

¹⁴³ See the July 2, 2014 responses by Chint Solar at 1.

¹⁴⁴ *Id.*, Hefei JA Solar Technology Co., Ltd., Shanghai JA Solar Technology Co., Ltd., Canadian Solar International, Ltd., Canadian Solar Manufacturing (Changshu), Inc., and Canadian Solar Manufacturing (Luoyang), Inc., LDK Solar Hi-Tech (Nancheng) Co., Ltd., Motech (Suzhou) Renewable Energy Co. Ltd.'s July 2, 2014, Upsolar Global Co., Ltd. and Upsolar Group, Co., Ltd., Ningbo Qixin Solar Electrical Appliance Co., Ltd., Baoding Tianwei Yingli New Energy Resources Co., Ltd., Changzhou Almaden Co., Ltd., the July 7, 2014 response by Hengdian Group DMEGC Magnetics Co., Ltd., the May 22, 2014 response by Changzhou Trina Solar Energy Co., Ltd. at 8.

¹⁴⁵ See *Jiangsu Jiasheng Photovoltaic Tech., Co. v. United States*, No. 13-00012, Slip Op. 14-134 at 59-61, 63-66 (CIT November 20, 2014) (decision not final; voluntary remand granted on another issue).

¹⁴⁶ *Id.*, at 66-67 (citations omitted).

any specific evidence to discredit the relevant responses that serve as the basis for the Department's separate rate determinations.

Comment 6. Separate Rate Applicants with Managers or Board Members with Ties to the Chinese Government

Petitioner

- Evidence on the record indicates that the following separate rate applicants have board members and/or senior managers who are/were members of the Chinese government and thus they should not be granted separate rates status:
 - Chint Solar's Chairman and CEO is a member of the National People's Congress of China.
 - An important official of Ningbo appears to be a member of the Ningbo City People's Congress.
 - DMEGC appears to be administered and owned by a government entity.
 - While Petitioner included Changzhou Almaden in the group of companies with board members or senior managers who were members of the Chinese government, the only specific mention of Changzhou Almaden is that it is owned at least in part by a government entity.
 - An important official of Shanghai JA is a member of the National People's Congress of China.
 - While Petitioner included Asun and Hanwha HK as companies with employees with ties to the Chinese government, it made no specific allegations concerning such ties in its case brief or anywhere on the record.

Asun and Hanwha HK

- Petitioner has cited no evidence that Asun or Hanwha HK's board or management have any ties with the Chinese government or that the Chinese government otherwise controls Asun or Hanwha HK's operations.
- There is no basis for denying Asun or Hanwha HK a separate rate.

Changzhou Almaden

- Petitioner fails to provide any evidence that any board member or senior manager of Almaden might be, or might have been, a member of the Chinese government. Petitioners' argument relates to a minority shareholder of Almaden.
- Almaden fully responded to all questions from the Department concerning this matter. No new evidence has been placed on the record since the Department preliminarily granted Almaden a separate rate that could change the Department's preliminary finding.

Department's Position:

We disagree with Petitioner. As discussed above, we continue to determine that the record supports finding an absence of *de facto* government control over the export activities of the companies at issue. The record does not show that the companies' senior managers or directors' membership or position in certain political organizations or government bodies resulted in overcoming the record evidence of autonomy on the part of the company to set prices, negotiate

and sign agreements, select management, or decide how to dispose of profits or finance losses.¹⁴⁷ Under similar circumstances, the CIT rejected the same kind of arguments Petitioner makes here, holding that “{b}eyond emphasizing the legal and practical *possibility* that the company officials who are also in some capacity government officials *could* have influenced these companies’ export sales negotiations,” SolarWorld had “not pointed to any specific evidence that, in influencing the companies’ operations pursuant to their duties as company officials . . . these persons were directing the companies’ export pricing decisions based on the will of the PRC government.”¹⁴⁸ In that case, the CIT affirmed the Department’s determination that “despite the systemic cross-contamination of personnel between the government and the commercial sector within the PRC, these companies exhibited sufficient localized control over their own export activities during the POI to warrant individualized rates.”¹⁴⁹ Here, an examination of record evidence warrants a similar outcome.

Specifically, the record indicates the following. Chint Solar reported that the employee cited by Petitioner was no longer a member of the NPC.¹⁵⁰ Ningbo reported that one important Ningbo official was a member of a local government body,¹⁵¹ but that local government body did not meet during the POI and no government entity, including the local government body, had any role in Ningbo’s operations.¹⁵² While Petitioner states that the Chinese government owns and administers DMEGC, we asked numerous questions concerning the ownership and administration of DMEGC, which DMEGC fully answered. DMEGC placed on the record documents that supported its answers and demonstrated no Chinese government ownership or involvement in the administration or operations of DMEGC.¹⁵³ The Department issued questions concerning the ownership and operations of Changzhou Almaden, which it fully answered. Changzhou Almaden placed on the record documents that supported its responses and showed no significant direct or indirect Chinese government ownership or involvement in Changzhou Almaden’s operations.¹⁵⁴ Shanghai JA reported that a shareholder owning 8.68 percent of its shares, while a member of the NPC during the POI, did not attend any of its functions during the POI and that the NPC had no role in its operations.¹⁵⁵ The Department considered the above information and determines that it does not support a finding that the presumption of government control applies in light of the other evidence available on the record,

¹⁴⁷ See the March 31, 2014 and July 2, 2014 responses by Chint Solar, Ningbo, Changzhou Almaden, Shanghai JA, and the March 31, 2014 and July 7, 2014 response by DMEGC.

¹⁴⁸ See *Jiangsu Jiasheng Photovoltaic Tech.*, Slip Op. 14-134 at 68 (citations omitted); see also *id.* at 68-69, n.159 (“SolarWorld argues that requiring it to produce such evidence in challenging Commerce’s grant of separate-rate applications would impermissibly shift the burden of proof to the domestic industry, when the burden is properly on the respondents to rebut the presumption against their autonomy. . . . But, as previously mentioned . . . the submission of relevant credible evidence (i.e., evidence that is both relevant to the presumed fact and not subsequently discredited) disposes of the presumption, which is not evidence and only operates in the absence of relevant credible evidence.”).

¹⁴⁹ *Id.* at 67-68 (citations omitted).

¹⁵⁰ See Chint Solar’s July 2, 2014 submission at 2.

¹⁵¹ The identity and position of this person in Ningbo and in the local government body is stated in the business proprietary version of Ningbo’s July 2, 2014 submission.

¹⁵² See Ningbo’s July 2, 2014 submission.

¹⁵³ See DMEGC’s July 2, 2014 submission.

¹⁵⁴ See Changzhou Almaden’s March 31, 2014 submission generally and its July 2, 2014 submission at 1-2.

¹⁵⁵ See Shanghai JA’s July 2, 2014 submission at 3.

which these companies provided, demonstrating *de facto* independence from government control over export activities.

Despite Petitioner's claims regarding Asun and Hanwha HK, Petitioner did not point to any specific evidence to support its claims that either of these companies have board members and/or senior managers who were or are members of the Chinese government.¹⁵⁶ Moreover, we found that the evidence showed neither Asun nor Hanwha HK had any identifiable ties to the Chinese government.¹⁵⁷ Consistent with our *Preliminary Determination*, we continue to grant separate rate status to Asun, Hanwha HK, and the other five companies discussed above.

Comment 7. Separate Rate Status of Lianyungang Shenzhou New Energy Co., Ltd.

Petitioner

- While the Department denied Lianyungang a separate rate because it found that the company did not ship subject merchandise to the United States during the POI, evidence also indicates that Lianyungang is not eligible for a separate rate because it is 100 percent owned by Shanghai Aerospace Automobile Electromechanical Co., Ltd., which is a Chinese government-owned entity.

No other parties commented on this issue.

Department's Position:

In the *Preliminary Determination*, the Department did not grant Lianyungang a separate rate because it made no U.S. sales of the merchandise under consideration. No party challenged the Department's *Preliminary Determination*. Therefore, the Department continues to deny Lianyungang separate rate status. Given that the Department is denying Lianyungang a separate rate, we have not addressed Petitioner's additional reasons for denying the company a separate rate.

Comment 8. Separate Rate Status of Sumec Hardware & Tools Co., Ltd.

In its *Preliminary Determination*, the Department found that Sumec Hardware was not entitled to a separate rate because the Chinese government was in a position to exercise control over the company's operations.

Sumec Hardware

- The Department's findings and conclusions are incorrect because the record of this case shows that Sumec Hardware itself controls its own day-to-day operations and export activities, not the Chinese Government nor any Chinese Government entity. Because of the extensive proprietary information in Sumec Hardware's comments, they cannot be

¹⁵⁶ While Petitioner references its June 19, 2014 submission in its case brief, there is no information in that submission regarding managers or board members of Asun or Hanwha HK with ties to the Chinese government or regarding any relationship between Asun or Hanwha HK and the Chinese government.

¹⁵⁷ See Asun and Hanwha HK's March 31, 2014 submissions.

summarized in this memorandum. For a detailed summarization of Sumec Hardware's comments, see the Separate Rate Status of Sumec Hardware Memorandum.¹⁵⁸

Petitioner

- Because of the extensive proprietary information in Petitioner's comments, they cannot be summarized in this memorandum. For a detailed summarization of Petitioner's comments, see the Separate Rate Status of Sumec Hardware Memorandum.

Department's Position:

For the reasons explained in the business proprietary memorandum regarding the Separate Rate Status of Sumec Hardware, the Department has continued to find that Sumec Hardware is not entitled to a separate rate. See the Separate Rate Status of Sumec Hardware Memorandum.

Comment 9. The Appropriate Surrogate Value for Aluminum Frames

Petitioner

- Aluminum frames are finished products in that they require no further fabrication before their final fitting into a solar module. Thus, they should be classified under Thai HTS subheading 7616.99, which covers finished articles of aluminum, rather than South African HTS subheading 7604.29.65, which applies to alloyed aluminum profiles.
- The CBP issued a binding tariff classification ruling to a Chinese producer of subject merchandise in which it found that finished aluminum frames that are imported into the United States and assembled together with corner keys to fit around a solar laminate are properly classified under subheading 7616.99 of the U.S. HTS.
- Recent CBP rulings have determined that aluminum frames that are ready for assembly and incorporated into finished photovoltaic modules are not classifiable under U.S. HTS subheading 7604, as such products are finished goods that do not need to undergo further processing in the United States.¹⁵⁹
- The explanatory notes to U.S. HTS Chapter 76 define profiles (HTS subheading 7604 applies to aluminum bars, rods, and profiles) as having a uniform cross section along their whole length. Thus, it is inappropriate to value respondents' aluminum frames and corners using HTS subheading 7604 because their frames are bent and therefore not uniform throughout their length.
- Aluminum corner keys are produced from cast aluminum and are not aluminum profiles products, which the Department grouped them with in the *Preliminary Determination*, and hence should be classified under HTS subheading 7616.99.

Trina Solar

¹⁵⁸ See memorandum from Christian Marsh Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations to Paul Piquado Assistant Secretary for Enforcement and Compliance regarding "Certain Crystalline Photovoltaic Products from the People's Republic of China: Whether Sumec Hardware & Tools Co., Ltd. is entitled to a Separate Rate," dated concurrently with this memorandum ("Separate Rate Status of Sumec Hardware Memorandum").

¹⁵⁹ See Petitioner's June 24 SV Submission at Exhibit 14.

- The Department disagreed with similar arguments made by Petitioner in the investigation of *Solar Cells from the PRC*.¹⁶⁰ In that investigation, the Department determined that the HTS classification proffered by Petitioner does not describe the aluminum products used by Trina Solar to make aluminum frames.
- Petitioner's central argument for valuing aluminum frames under HTS subheading 7616.99 continues to be CBP ruling N139353. This ruling only contains a tersely worded conclusory statement and no explanation of CBP's analysis.
- The other CBP ruling cited by Petitioner, CBP ruling N238208, relates to solar frame sets and CBP classified the sets under HTS subheading 8541.90.0000 -- "Diodes, transistors...: photovoltaic cells whether or not assembled in modules or made into panels...: Parts." This decision essentially finds them to be "parts" of solar modules, which is a very general classification relative to HTS subheading 7604.29.65, which is specific to alloyed aluminum non-hollow profiles.
- While the explanatory notes to HTS Chapter 76 define profiles as being uniform in length, the Department is not bound by these explanatory notes. Also, the South African HTS subheading describing the aluminum frames does not require a uniform width.

Department's Position:

We disagree with Petitioner. In *Jiangsu Jiasheng Photovoltaic Tech.*, the CIT sustained the Department's determination that the best available information regarding the value of respondents' aluminum frames is provided by import values for Thai HTS category 7604 (aluminum bars, rods, and profiles) rather than Thai HTS category 7616.99 (articles of aluminum not otherwise specified or indicated: other).¹⁶¹ Under similar circumstances, the respondents in the underlying investigation of *Jiangsu Jiasheng Photovoltaic Tech.* consistently described their aluminum frames as alloyed aluminum profiles and argued for valuing the frames using HTS category 7604 because "category 7604 specifically covers alloyed aluminum profiles¹⁶², whereas category 7616.99 is a catch-all category that covers many diverse aluminum products¹⁶³ – such as reels, cups, bag handles, and cigarette cases – whose value is not reasonably comparable." Similarly, we find here that South African HTS subheading 7604.29.65 (aluminum alloy bars, rods and profiles, other than hollow profiles of a maximum cross-sectional dimension not exceeding 370 mm)¹⁶⁴ is the best available information for valuing aluminum profiles with a cross section not exceeding 370 mm. First, Trina Solar and Renesola/Jinko described their aluminum frames as an aluminum alloy made frame that is an aluminum profile having a cross section of less than 370mm.¹⁶⁵ Petitioner has not raised anything, and the Department did not

¹⁶⁰ See *Solar Cells*, and accompanying Issues and Decision Memorandum at Comment 16.

¹⁶¹ See *Jiangsu Jiasheng Photovoltaic Tech.*, Slip Op. 14-134 at 40-41.

¹⁶² See Trina Solar's May 23, 2014 submission at Exhibit 3.

¹⁶³ See Petitioner's May 23, 2014 submission at Exhibit 4.

¹⁶⁴ See Trina Solar's May 23, 2014 submission at Exhibit 3.

¹⁶⁵ See Trina Solar's May 15, 2014 submission at Exhibit D-6, D-11 and its June 20, 2014 submission at 20; see Renesola's June 19, 2014 submission at Exhibit 24; see Jinko Solar's July 8, 2014 submission at page SD-6 and Exhibit SD-4.

find anything on the record, or during verification, to call into question the accuracy of both respondents' descriptions of their aluminum frames. Second, we continue to find that the South African HTS category 7604.29.65 covers all aluminum alloyed aluminum profiles, whereas Thai HTS category 7616.99 is a catch-all category that covers many diverse aluminum products – such as reels, cups, bag handles, and cigarette cases – whose value is not reasonably comparable. Therefore, we valued Trina Solar's and Renesola/Jinko's alloyed aluminum non-hollow profiles using South African HTS subheading 7604.29.65.

Although Petitioner submitted CBP rulings to support its position, the Department is not bound by such customs rulings for U.S. imports when selecting import values from surrogate countries. Rather, the Department must select a value using the best available information. In doing so, the Department weighs available information with respect to each input value and makes a product-specific and case-specific decision as to what is the "best available information" for a surrogate value for each input.¹⁶⁶ Although CBP ruled that the aluminum frames exported to the United States by a Chinese producer of subject merchandise should be classified under HTS subheading 7616.99, this HTS subheading is an "other" category which would only contain other articles of aluminum not identified in another HTS subheading. As stated above, alloyed aluminum profiles are identified under HTS subheading 7604.29.65. Further, as we noted in *Solar I*, 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.¹⁶⁷ Additionally, there was no explanation in the CBP ruling as to why the frames should be classified under HTS subheading 7616.99. Without such an explanation, we are not able to weigh the ruling against record evidence supporting the use of a HTS subheading 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 there are CBP rulings on the record which support the use of HTS subheading 7604 and these rulings relate to unfinished aluminum articles, this does not necessarily mean that HTS subheading 7604 would only apply to unfinished aluminum profiles. In fact, the ITC definition of aluminum profiles cited by Petitioner indicates that profiles may be worked after production.¹⁶⁸ While other HTS categories identify whether they pertain to finished or unfinished items, HTS subheading 7604 does not specify whether it covers finished or unfinished aluminum profiles.

Petitioner also argues that because the aluminum frames used by respondents are not straight, but contain corners, they should not be valued using HTS subheading 7604 which applies to profiles with a uniform cross section. Alternatively, Petitioner states that the Department should value the aluminum corners separately because it claims that the corners are produced from cast aluminum and are not extruded aluminum products. We disagree. Just because certain aluminum frames purchased by respondents contain corners, we do not believe this would necessarily change their classification as aluminum profiles. As noted above, the ITC definition

¹⁶⁶ See *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 41808 (July 19, 2010) and accompanying Issues and Decision Memorandum at Comment 2; *Certain New Pneumatic Off-the-Road Tires from China*, 78 FR 22513 (April 16, 2013), and accompanying Issues and Decision Memorandum at Comment 5.A.

¹⁶⁷ See *Solar Cells*, and accompanying IDM at Comment 16; see also the ITC website at <http://ITC.gov/publications/docs/tata/hts/bychapter/1401C76.pdf> at the definition of profiles.

¹⁶⁸ See the ITC website at <http://ITC.gov/publications/docs/tata/hts/bychapter/1401C76.pdf> at the definition of profiles.

of aluminum profiles cited by Petitioner indicates that profiles may be cast, sintered, and worked after production.¹⁶⁹

We further note that Trina Solar and Renesola/Jinko did not report using the corner keys referenced by Petitioner.¹⁷⁰ At verification, the Department's analysts photographed the aluminum frames used by Trina Solar.¹⁷¹ These pictures do not show the corner keys referenced in the CBP ruling cited by Petitioner.¹⁷² With regard to Petitioner's claim that if the corners were cast, they would not be classified as aluminum profiles, as stated above, the ITC's definition of aluminum profiles cited by Petitioner indicates that profiles may be cast.¹⁷³ Even if the corners of the aluminum frames did consist of some special aluminum form not covered by South African HTS subheading 7604.29.65, as demonstrated by the photographs of corners obtained during the verification of Trina Solar,¹⁷⁴ these four corners are only a small part of the aluminum frames used to build solar modules. For the reasons discussed above, we continue to find that the most appropriate surrogate value with which to value respondents' aluminum frames, including corners, is the average value of South African imports under HTS subheading 7604.29.65.

Comment 10. The Appropriate Surrogate Value for Scrap Solar Cells

Petitioner

- The Department inappropriately valued both respondents' scrap solar cells using South African imports under HTS subheading 8548.10, which covers "waste and scrap of primary cells, primary batteries and accumulators; spent primary cells, spent primary batteries, and spent electrical accumulators." HTS heading 8548 does not relate to photovoltaic cells but relates to lead-acid battery cells, nickel-cadmium, nickel metal-hydride or other batteries that contain an electrolytic paste or medium as well as a storage capacity for electricity. These are not solar cells.
- The Department should value scrap solar cells using Thai HTS subheading 2804.69 which covers polysilicon of less than 99.9 percent purity.

Trina Solar

¹⁶⁹ *Id.*

¹⁷⁰ See Petitioner's June 4, 2014 submission at Exhibit 4; see also Trina Solar's May 15, 2014 submission at Exhibit D-6, D-11 and its June 20, 2014 submission at 20; see Renesola's June 19, 2014 submission at Exhibit 24; see Jinko Solar's July 8, 2014 submission at page SD-6 and Exhibit SD-4 and the June 24, 2014 Memorandum to the File, from Jeff Pedersen, "Antidumping Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Preliminary Analysis Memorandum for Changzhou Trina Solar Energy Co., Ltd.," and the June 24, 2014 Memorandum to the File, from Thomas Martin, "Antidumping Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Preliminary Analysis Memorandum for Renesola Jiangsu Ltd., and Jinko Solar Import and Export Co., Ltd."

¹⁷¹ See Memorandum to the File, from Erin Kearney, Patrick O'Connor, and Jeff Pedersen, International Trade Compliance Analysts, AD/CVD Operations, Office VI, "Verification of the Sales and Factors of Production Information Submitted by Changzhou Trina Solar Energy Co., Ltd. in the Antidumping Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China ("PRC")," dated September 26, 2014 ("Trina FOP Verification Report") at Exhibit 29.

¹⁷² See Petitioner's June 4, 2014 submission at Exhibit 4.

¹⁷³ See the ITC website at <http://ITC.gov/publications/docs/tata/hts/bychapter/1401C76.pdf> at the definition of profiles.

¹⁷⁴ See the Trina FOP Verification Report at Exhibit 29.

- Petitioner’s argument fails because scrap solar cells clearly contain more raw materials than just polysilicon.

Department’s Position:

Petitioner’s argument rests entirely on an unsupported statement that scrap solar cells would not be contained under HTS subheading 8548.10 (waste and scrap of primary cells, primary batteries and electric storage batteries; spent primary cells, spent primary and electric storage batteries). Petitioner provided no evidence or basis for finding that imports under HTS subheading 8548.10 would not include scrap solar cells. We are trying to value scrapped solar cells and HTS subheading 8548.10 contains only scrapped materials, including scrapped cells.

Petitioner’s argument that the Department should value scrap solar cells based on the value of polysilicon ignores the fact that solar cells consist of many more raw materials than polysilicon. Petitioner’s own brochure supports this fact.¹⁷⁵ We find that the description of the HTS category for primary cells (HTS subheading 8548.10) is more similar to solar cells than the HTS category for polysilicon (HTS subheading 2804.69), which is only specific to one raw material contained in the solar cell – polysilicon – and is also not specific to scrap materials. Therefore, we continue to find that South African import data under HTS subheading 8548.10 provides the best available information with which to value scrap solar cells.

Comment 11. Unpaid Sales

Petitioner

- The Department should treat the still-unpaid sales of Trina Solar’s U.S. affiliate, Trina U.S., as zero-price sales. Trina U.S.’ documents relating to how it classifies debt, which were examined at verification, support this finding. Trina U.S. provided no documents related to collection efforts for these sales.

Trina Solar

- The Department should treat these unpaid U.S. sales as normal sales rather than zero-price sales. There is no factual basis to support Petitioner’s claim that Trina U.S. will never receive payment for these sales.
- Where no date of payment is reported, the Department’s practice is to assign, as the date of payment, the latest possible date that the respondent could have submitted information regarding the date that payment was made.¹⁷⁶

Department’s Position:

¹⁷⁵ See the December 31, 2013 Petition, Volume 1, at Exhibit I-8.

¹⁷⁶ See *Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod From Mexico*, 70 FR 25809, 25811 (May 16, 2005); *Certain Frozen Warmwater Shrimp From India: Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission of Review, and Preliminary No Shipment Determination*, 76 FR 12025, 12030 (March 4, 2011); see also *Certain Frozen Warmwater Shrimp From India: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 40492 (July 15, 2008) and accompanying Issues and Decision Memorandum at Comment 5.

We disagree with Petitioner. Consistent with section 773(b) and 773(f)(1)(A) of the Act, the Department's practice is to rely on a company's normal books and records if such records are kept in accordance with Generally Accepted Accounting Principles and reasonably reflect the costs associated with the production and sale of the merchandise.¹⁷⁷ Based on BPI obtained at verification, we conclude that the record does not support Petitioner's claim that Trina U.S. will not receive payment for the sales in question.¹⁷⁸ Consistent with Department practice, we treated the date of the last day of verification (August 14, 2014) as the payment date for the two sales in question.¹⁷⁹

Comment 12. Quality Insurance

At verification Trina Solar disclosed that it incurred costs for quality insurance policies covering Trina U.S.' sales of solar panels during the POI that were in addition to the costs of meeting the warranties provided to solar panel customers.¹⁸⁰ One quality insurance policy covered the earlier portion of the POI and the other the later portion of the POI.

Petitioner

- The Department should reduce the reported U.S. sales prices by Trina U.S.'s payments for two quality insurance policies (these insurance policies are different from and in addition to the warranty costs).
- Because Trina U.S. failed to provide the quality insurance policy in effect during the earlier part of the POI, the Department should base the cost of this policy on the cost of the quality insurance policy covering the later part of the POI.

Trina Solar

- Trina U.S. made only one of the two payments for quality insurance during the POI. Trina Solar (as opposed to Trina U.S.) made the other payment.
- The Department's regulations at 19 CFR 351.402(b) state that "the Secretary will make adjustments for expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser." Because the portion of the quality insurance expenses paid by Trina Solar was incurred outside of the United States, the Department should not include this amount in its U.S. sales price adjustment.

¹⁷⁷ See *Certain Circular Welded Carbon Steel Pipes and Tubes From Taiwan: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 71563 (November 29, 2013) and accompanying Issues and Decision Memorandum at Issue 2.

¹⁷⁸ See Note 1 of the December 15, 2014 memorandum from Jeff Pedersen to the File entitled "Proprietary Information Relating to the December 15, 2014 Issues and Decision Memorandum"; see also Memorandum to the File, from Patrick O'Connor and Jeff Pedersen, International Trade Compliance Analysts, AD/CVD Operations, Office VI, "Verification of Trina Solar (U.S.) Inc. in the Antidumping Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China ("PRC")," dated September 26, 2014 ("Trina CEP Verification Report") at 5 and Exhibits 4 and 5.

¹⁷⁹ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel from Germany*, 67 FR 55802 (August 30, 2002), and accompanying Issues and Decision Memorandum at Comment 4 (using the date of the last day of verification).

¹⁸⁰ Some information concerning the nature of the quality insurance policies is business proprietary. For a full explanation of the quality insurance policies, see the Trina CEP Verification Report at 25.

- If the Department decides to include these quality insurance expenses in its U.S. sales price adjustment, it should use the verified expenses and not Petitioner’s suggested facts available.

Department’s Position:

At the Department’s verification of Trina U.S., company officials stated that they did not report to the Department the pro-rated portion of quality insurance expenses related to the POI. Company officials provided this expense at verification as a minor correction. However, the Department’s verifiers noted that the quality insurance expenses provided were only for coverage during the latter part of the POI; thus the verifiers questioned company officials regarding whether Trina U.S. had a similar type of insurance coverage for the first part of the POI. Company officials provided the Department’s verifiers with information on quality insurance coverage, including the cost of that coverage, for the entire POI.¹⁸¹ As noted at verification, Trina U.S. directly paid for the quality insurance policy covering the latter part of the POI, while other Trina companies (as opposed to Trina U.S.) paid for the quality insurance policy covering the earlier part of the POI.¹⁸²

Trina Solar’s comment that the Department should only deduct from U.S. prices the cost of the quality insurance policy paid by Trina U.S. was only raised in its rebuttal brief. However, we note that 19 CFR 351.402(b) states that the Department will adjust the price of U.S. sales by “expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser, no matter where or when paid.” While a company or companies outside of the United States may have obtained, and paid for, part of Trina U.S.’ quality insurance during the POI, the insurance covered Trina U.S.’ sales.¹⁸³ Thus, the payment outside of the United States was associated with commercial activities in the United States relating to sales to unaffiliated purchasers.¹⁸⁴ Therefore, the adjustment to U.S. prices for quality insurance expenses should not be limited to only those insurance payments made by Trina U.S.¹⁸⁵

However, we disagree with Petitioner’s position that we should base part of the adjustment to U.S. prices for quality insurance expenses on fact available. The actual expenses for quality insurance covering the entire POI are on the record and were verified by the Department.¹⁸⁶ Therefore, there is no reason to resort to facts available pursuant to section 776(a) of the Act.

¹⁸¹ See the Trina CEP Verification Report at 24.

¹⁸² *Id.* at Exhibit 15.

¹⁸³ *Id.* at 1, 24, and Exhibit 15.

¹⁸⁴ *Id.* at Exhibit 15.

¹⁸⁵ See *Stainless Steel Plate in Coils From Belgium; Final Results of Antidumping Duty Administrative*, 67 FR 64352, (October 18, 2002) and accompanying Issues and Decision Memorandum at Comment 3 (In establishing constructed export price under section 772(d) of the Act, the Secretary will make adjustments for expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser, no matter where or when paid. ... In addition, the phrase “no matter where or when paid” is intended to indicate that if commercial activities occur in the United States and relate to the sale to an unaffiliated purchaser, expenses associated with those activities will be deducted from CEP even if, for example, the foreign parent of the affiliated U.S. importer pays those expenses).

¹⁸⁶ *Id.* at Exhibits 1 and 15.

The Department is using the verified actual quality insurance expenses reported by Trina Solar in calculating the POI cost of quality insurance.¹⁸⁷

Comment 13. Warranty Costs

Petitioner

- At verification, the Department attempted to ascertain whether Trina U.S. bases its accrual for module warranty expenses on a certain percentage¹⁸⁸ of the value of Trina Solar's sales of modules to Trina U.S., or on a certain percentage of the value of Trina U.S.' sales of modules to its unaffiliated customers. Trina Solar and Trina U.S., however, were unable to demonstrate which of the two sales values were used in the accrual calculation. Therefore, the Department should apply the accrual rate to Trina U.S.' gross U.S. price.

Trina Solar

- Trina U.S. reported that it accrues warranty expenses for Trina U.S.' sales and it identified the amount of this accrual. Therefore, there is no information missing from the record concerning warranty expenses. Thus, to the extent that Petitioner is arguing that the Department should base Trina U.S.' warranty expenses on facts available, there is no basis for doing so.

Department's Position:

As we noted in the *Preliminary Determination*,¹⁸⁹ Trina Solar reported that it accrued warranty expenses based upon a percentage of the sales price charged by Trina U.S. to its customers.¹⁹⁰ In the *Preliminary Determination*, we calculated warranty expenses by multiplying this percentage by the gross unit price charged by Trina U.S. to its customers to which we added the cost of movement expenses related to warranties that were reported by Trina U.S.¹⁹¹ There is no evidence gathered at verification, or otherwise placed on the record since the *Preliminary Determination*, that would warrant a change to this calculation.

Comment 14. Incorrect Allocation of Indirect Material, Labor and Electricity Consumption

In reporting the per-unit consumption quantities of FOPs to the Department, Trina Solar allocated the consumption quantities of indirect materials, labor, and electricity to solar panels based on the surface area of the solar panels that it produced. At verification, the Department found that Trina Solar used an incorrect surface area in its allocation.¹⁹²

Petitioner

¹⁸⁷ See the Trina Final Analysis Memorandum.

¹⁸⁸ The percentage amount of the accrual for warranty expenses is proprietary and is identified in Trina Solar's July 16, 2014 submission at 3.

¹⁸⁹ See the July 29, 2014 Preliminary Analysis Memorandum of Trina at 5.

¹⁹⁰ See Trina's July 16, 2014 submission at 3-4.

¹⁹¹ See the July 29, 2014 Preliminary Analysis Memorandum of Trina at Attachment I.

¹⁹² See the Trina FOP Verification Report at 45-46.

- The Department should increase Trina Solar's reported FOPs to account for the overstated surface area, which resulted in a significantly inflated denominator in the allocation ratio.

Trina Solar

- The Department requested, and Trina Solar provided, updated consumption quantities that are no longer based on an over-reported surface area.¹⁹³ The Department should use these updated quantities in calculating Trina Solar's final dumping margin.

Department's Position:

At verification, the Department determined that in allocating the consumption quantities of indirect materials, labor, and electricity to products, Trina Solar divided the total consumption quantities of these inputs by an incorrectly inflated surface area for the solar modules produced.¹⁹⁴ Trina Solar corrected this calculation at verification and the Department verified the corrected consumption quantities.¹⁹⁵ Therefore, the adjustments requested by Petitioner are already on the record. The Department is using the revised and verified consumption quantities in calculating Trina Solar's final dumping margin.¹⁹⁶

Comment 15. Whether to Base Renesola/Jinko's Dumping Margin on Partial AFA

Petitioner

- The Department should apply partial AFA to Renesola's NV, due to the following errors and omissions discovered by the Department at verification: (1) unreported FOPs for inverters and other accessories;¹⁹⁷ (2) unreported yield losses for wafers and cells for which Renesola claimed by-product offsets; (3) unreported indirect labor, and reported direct and indirect labor that could not be verified; and (4) market economy purchases of backsheets and EVA inputs that could not be verified, and which were assessed VAT.
- The Department should assign to each CONNUM the highest consumption quantity reported for each FOP out of all of the CONNUMs or the consumption quantities for FOPs that were used to calculate the dumping margin in the Petition. Alternatively, the Department could adjust all U.S. sales transactions which have a gross unit price that includes modules, inverters and other accessories by deducting the difference between the average reported gross unit prices and the lowest reported gross unit prices for the same CONNUMs that were sold without inverters and accessories. The Department could also adjust cell consumption by the yield loss rate calculated by the Department at verification, deny Renesola's scrap cell offset, and deny Renesola's claimed MEPS.

¹⁹³ See Trina Solar's Post-Verification October 6, 2014 Supplemental Response at 4 and Exhibits 4 and 5.

¹⁹⁴ See the Trina FOP Verification Report at 45-46.

¹⁹⁵ *Id.* at Exhibit 33, which was updated in Trina Solar's Post-Verification October 6, 2014 Supplemental Response at 4 and Exhibits 4 and 5.

¹⁹⁶ See the Trina Final Analysis Memorandum.

¹⁹⁷ At verification, the Department found that Renesola's U.S. affiliate, RAI, sold modules, inverters, and other accessories to certain U.S. customers in a single transaction and at a single price (*i.e.*, it did not separately price each item). Renesola did not report FOPs for the inverters or accessories.

Renesola Jiangsu

- Petitioner ignores the standard set forth in the statute, and the Department's past practice, for applying AFA. The record contains no evidence whatsoever that Renesola failed to provide requested information, purposefully withheld information, or impeded the investigation with respect to its reported FOPs and MEPs, or otherwise did not cooperate to the best of its ability in reporting any of these data. Renesola is a totally cooperative respondent that acted to the best of its ability by responding to all questionnaires from the Department and submitting to verification.
- In past situations in which the Department discovered minor errors or discrepancies with respect to a respondent's reported data, the Department weighed the record evidence to determine what type of change, if any, would be most probative of the issue under consideration. There is no record evidence whatsoever of improper accounting or evasion on Renesola's part. The record demonstrates that the errors at issue penalized Renesola as often as it benefited from them. Moreover, the Department was able to verify the correct information. None of the errors that were discovered during verification substantially undermine the validity of any aspect of Renesola's responses.
- The Department should incorporate any and all adjustments it deems necessary to Renesola's FOPs as a result of errors discovered at verification, and calculate NV on this basis. Regarding U.S. sales involving inverters, the Department should deduct the value of the inverters from the reported gross unit price (in watts). Regarding yield losses for wafers and cells, the Department should increase the consumption of cells per watt by the additional yield loss found at verification. Regarding labor, because labor was over-reported in some instances, and under-reported in others, the Department should make any corrections in accordance with its verification findings, rather than reject the reported amounts or adjust them upwards. Regarding reported MEPs, because the Department substantially verified the market economy origin of, and price paid for, cells, backsheet, and EVA, the Department should reject Petitioner's argument.

Department's Position:

We disagree with Petitioner's position that the Department should, as AFA, assign the highest consumption quantities to each FOP for all CONNUMs. Sections 776(a)(1) and (2) of the Act provide, among other things, that, if necessary information is not available on the record, or if an interested party withholds information requested by the Department or provides such information but the information cannot be verified, then the Department shall use, subject to section 782(d) of the Act, facts otherwise available in reaching the applicable determination (section 782(d) of the Act relates to notifying respondents of, and providing an opportunity to correct, deficiencies in responses). Further, section 782(e) of the Act states that the Department shall not decline to consider submitted information if all of the following requirements are met: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties. With the exception of solar cell yield loss, inverters/accessories, and labor hours, the record contains verified consumption quantities

for all of Renesola's FOPs. Therefore, there is no basis for replacing these verified FOPs with consumption quantities based on facts available or AFA.

Regarding the unreported yield loss for solar cells for which Renesola claimed a by-product offset, the Department finds that it calculated the correct yield loss. The Department verified all of the necessary information regarding the solar cell yield loss and accepted Renesola's explanations for the incorrect yield loss. Specifically, the additional solar cell yield loss pertained to cells transferred to the research and development lab for testing and further development.¹⁹⁸ In addition, we note that Renesola did not use wafer losses in its FOP calculations because it purchased, rather than self-produced, the solar cells that it used to manufacture subject modules.¹⁹⁹ Because the Department's yield loss calculation is based on verified information, the Department finds that applying facts available or AFA in this instance, or denying a by-product offset (as argued by Petitioner) is not warranted. Thus, for the final dumping margin calculations, the Department increased the reported per-unit consumption of solar cells by the percentage of the additional yield loss that the Department calculated at verification.

Moreover, we disagree with Petitioner's claim that the MEPs of backsheets and EVA inputs could not be verified. The Department found no discrepancies between the purchases and sales documentation obtained at verification, and the information reported by Renesola in its questionnaire responses. Petitioner's contention that the MEPs of backsheets and EVA inputs could not be verified is not supported by the Department's finding at verification. Regarding the inclusion of VAT in Renesola's MEPs, Renesola reported the terms of sale of all MEPs, and those terms of sale indicate that the reported prices were exclusive of taxes in the PRC.²⁰⁰ With respect to the backsheet purchases, we note that Renesola's purchase contract required a specific backsheet that demonstrated that it was an MEP. Furthermore, the Department found the supporting documents for the backsheet purchases to be consistent with what was reported in the company's responses.²⁰¹ Thus, for the final determination, the Department will continue to use Renesola's MEPs of backsheets and EVA in the calculation of NV, in the same manner that the Department did in the *Preliminary Determination*.

However, as explained below, we agree with Petitioner that an AFA adjustment is appropriate with respect to inverters/accessories, and labor hours. We also believe that an AFA adjustment is appropriate with respect to U.S. inland freight expenses from warehouse to customer deducted from U.S. sales prices.

At the verification of Renesola's U.S. affiliate, RAI, the Department's verifiers noted that RAI sold modules that included inverters but Renesola did not produce inverters or attach them to the modules that it produced.²⁰² Company officials confirmed that Renesola does not produce

¹⁹⁸ See Renesola EP and FOP Verification Report at 18-19.

¹⁹⁹ *Id.* at 18.

²⁰⁰ See Memorandum from Thomas Martin to the File, "Antidumping Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Preliminary Analysis Memorandum for Renesola Jiangsu Ltd., and Jinko Solar Import and Export Co., Ltd., dated July 24, 2014, ("Renesola/Jinko Preliminary Analysis Memorandum") at Attachment III.

²⁰¹ See Renesola EP and FOP Verification Report at 25.

²⁰² See Renesola CEP Verification Report, at 8.

inverters, but RAI buys micro-inverters from other Chinese suppliers and sells them as a kit. The customer attaches the inverter to the module during installation. Company officials explained that the inverters are usually listed as a separate line item on the invoice. However, the verifiers found that, in some instances, the inverters were not listed as a separate line item on the invoice but were included with the module and other accessories (*e.g.*, endcaps, connectors, and gateway) in one line item at one unit price. Renesola reported inverters that were sold with modules (even if not attached to the module) as subject merchandise. Whether or not a module has an inverter is one of the CONNUM characteristics for modules. Renesola used the inverter CONNUM field to report that it did not produce or sell modules that had inverters. However, as discovered at verification, in a limited number of instances, RAI sold modules along with inverters in the same transaction and the sales prices reported to the Department reflect the inclusion of inverters, as well as, in some cases, other accessories. The Department finds that it is not appropriate to compare adjusted U.S. prices that include the value of inverters and other accessories to NVs that do not include FOPs for inverters or accessories. However, the record does not contain FOPs for inverters or accessories, nor do we have the actual sales prices for the inverters, accessories, or modules that RAI booked for each item, for each U.S. sales observation. Accordingly, pursuant to section 776(a) of the Act, we are relying upon facts otherwise available to make an appropriate comparison for these sales.

The Department finds that an adjustment is also required with respect to labor hours because Renesola understated the degree of its failures in reporting direct, indirect, and packing labor hours. At verification, every labor hour figure that the Department tested was wrong.²⁰³ Given that each “spot check” found errors, we find it reasonable to conclude that the reported labor hours are incorrect.²⁰⁴ While there was a mixture of results, with some workshop hours underreported and some over reported, all were incorrect. Whether or not the sampled labor hours were determined to be under-reported or over-reported, the errors that were discovered during verification substantially undermine the validity of Renesola’s responses with respect to the labor FOP. The end result was that Renesola was unable to support any of the per-unit labor hours reported for its CONNUMs. Because the labor information provided by Renesola could not be verified and cannot serve as a reliable basis for reaching a determination in this investigation, consistent with section 782(e) of the Act, the Department is not using Renesola’s reported labor FOPs in our calculation. Given the extent of the failures with respect to the direct, indirect, and packing labor FOPs, the Department is relying upon facts otherwise available to determine labor, pursuant to section 776(a) of the Act.

The Department was also unable to verify Renesola’s reported expense for U.S inland freight from the warehouse to the unaffiliated customer.²⁰⁵ At the beginning of the verification of RAI, RAI officials corrected the reported U.S inland freight expense incurred to transport merchandise from the warehouse to the unaffiliated customer for four of the seven U.S. sales pre-selected for examination. Company officials characterized the errors as purely clerical in nature. Because of

²⁰³ See Renesola EP and FOP Verification Report at 27-28.

²⁰⁴ “(V)erification is a spot check and is not intended to be an exhaustive examination of the respondent’s business. (Commerce) has considerable latitude in picking and choosing which items it will examine in detail.” See *F.Ili De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000); see also *NTN Bearing Corp. of Am. v. United States*, 186 F. Supp. 2d 1257, 1296 (CIT 2002).

²⁰⁵ See Renesola CEP Verification Report, at 15-16.

these errors, the Department's verifiers sampled additional U.S. sales observations, specifically to test U.S. inland freight expenses from warehouse to customer. The verifiers found incorrectly reported these U.S. inland freight expenses for seven of the 10 sales observations tested.

Because "verification is a spot check and is not intended to be an exhaustive examination of the respondent's business"²⁰⁶ the Department must rely on samples to draw conclusions regarding the accuracy and reliability of a response. Given that Renesola incorrectly reported these U.S. inland freight expenses for four of the seven pre-selected U.S. sales and seven of the 10 sales observations selected during the verification for examination, we find that these U.S. inland freight expenses could not be verified. Accordingly, consistent with section 782(e) of the Act, the Department is not using Renesola's reported expense for U.S inland freight from warehouse to customer in our calculation, and pursuant to section 776(a) of the Act, we are relying upon facts otherwise available to determine U.S. inland freight expenses from warehouse to customer.

Section 776(b) of the Act provides that, if the Department finds that an interested party failed to cooperate by not acting to the best of its ability to comply with a request for information, the Department may use an inference adverse to the interests of that party in selecting the facts otherwise available. In addition, the Statement of Administrative Action accompanying the SAA²⁰⁷ explains that the Department may employ an adverse inference "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."²⁰⁸

In *Nippon Steel*, the CAFC noted that while the statute does not provide an express definition of the "failure to act to the best of its ability" standard, the ordinary meaning of "best" is "ones maximum effort."²⁰⁹ Thus, according to the CAFC, the statutory mandate that a respondent act to the "best of its ability" requires the respondent to do the maximum it is able to do. The CAFC indicated that inadequate responses to an agency's inquiries would suffice to find that a respondent did not act to the best of its ability. While the CAFC noted that the "best of its ability" standard does not require perfection, it does not condone inattentiveness, carelessness, or inadequate record keeping.

Here, we find with respect to inverters/accessories, labor, and U.S. inland freight expenses from warehouse to customer, that Renesola failed to put forth its maximum efforts to investigate and obtain the necessary information from its own records.²¹⁰ With respect to correctly accounting for the sales of modules with inverters and accessories, we find it reasonable to expect that a more forthcoming response should have been made. It was clear from RAI's records that some of its reported sales prices for modules include the value of inverters, and, at times, the value of other accessories; yet the CONNUM characteristics that Renesola reported in the section C database for the modules sold in these transactions indicate that inverters were not included. Renesola never advised the Department that it was unsure as to how to report these sales, nor did

²⁰⁶ *Id.*

²⁰⁷ See SAA, H.R. Rep. No. 103-316, Vol. 1 (1994).

²⁰⁸ See *Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Bar from India*, 70 FR 54023, 54025-26 (September 13, 2005); see also *Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 67 FR 55792, 55794-96 (August 30, 2002); see also 19 CFR 351.308.

²⁰⁹ See *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382-83 (Fed. Cir. 2003) ("*Nippon Steel*").

²¹⁰ *Id.*

it inform the Department that it was having difficulties with respect to reporting FOPs for sales of modules with inverters.

Furthermore, the results of verification demonstrate that Renesola had access to the information that it needed in order to accurately report labor hours and U.S. inland freight expenses from warehouse to customer; however it failed to accurately report these items. While the “best of its ability” standard recognizes that mistakes sometimes occur, it requires a respondent to, among other things, “have familiarity with all of the records it maintains,” and “conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of” its ability to do so.²¹¹ Renesola appears not to have conducted such an investigation with respect to labor and U.S. inland freight expenses from warehouse to customer, given the extensive number of errors found in the tests conducted by the Department’s verifiers and the fact that the correct figures were readily available in Renesola’s records.

Therefore, the Department finds that with respect to inverters/accessories, labor, and U.S. inland freight from warehouse to customer, Renesola failed to cooperate by not acting to the best of its ability and, accordingly, the application of AFA is appropriate with respect to inverters/accessories, labor, and U.S. inland freight expenses from warehouse to customer. With respect to inverters/accessories, as partial AFA, the Department assigned the sales of modules with inverters and/or accessories the lowest gross unit price reported for any module sale by Renesola. Furthermore, as partial AFA, the Department increased the reported per-unit direct, indirect and packing labor hours by the highest percentage of underreported direct, indirect and packing labor hours, respectively, that were discovered at verification.²¹² Lastly, as partial AFA, the Department assigned the highest percentage of underreported U.S. inland freight from warehouse to customer discovered at verification among the commercial invoices examined, to each U.S sales observation.²¹³

Comment 16. Whether to Collapse Jinko and Renesola

Renesola Jiangsu

- Renesola and Jinko do not meet the Department’s collapsing criteria. Renesola is a significant producer of wafers and relies on an extensive network of domestic and foreign original equipment manufacturers for its production, while Jinko is a vertically integrated producer with a fully integrated and balanced capacity for the production of wafers, cells, and modules.
- There is minimal potential for the manipulation of price or production between Renesola and Jinko because: (1) the top shareholders of each company are different natural persons; (2) no managers or directors of Renesola serve on the management team or board of Jinko, and vice versa; and (3) the Department confirmed at verification that Renesola and Jinko’s respective operations are independent of each other.

²¹¹ *Id.* 337 F.3d at 1382.

²¹² For details regarding the adjustment to the impacted U.S. prices, see Renesola/Jinko Final Analysis Memorandum.

²¹³ See the calculation memorandum for Renesola/Jinko for the precise adjustments made by the Department, which constitute proprietary information.

- Renesola and Jinko Solar are companies listed on the New York Stock Exchange and are subject to the legal and operational obligations imposed by both the New York Stock Exchange and the U.S. Securities and Exchange Commission. Neither Renesola nor Jinko actually has the power to control one another under the foregoing regulatory circumstances. Renesola and Jinko are ultimately independent and separately responsible to all of their respective shareholders, and not to any one group of shareholders or to a “family grouping” that the Department chooses to define.
- Renesola and Jinko are considered two distinct legal entities, and the financial performance of one company is not consolidated with the other. The record demonstrates that the financial results of Renesola are not included in the consolidated financial statements of Jinko, and vice versa. Renesola and Jinko are active competitors on a worldwide basis.
- The European Commission, in its own solar panel trade remedy proceedings, carefully considered the relationship of Renesola and Jinko and concluded they are not related companies.

JinkoSolar and Jinko Solar I&E

- The Department considers that members of the same family will act in concert out of common interest, but the Department did not undertake any analysis, nor identify any other record evidence, supporting the potential for Renesola and Jinko to act in concert or share control. A family relationship alone is not tantamount to control. In order to “act in concert,” Li family members would effectively have to conspire together to manipulate the activities of their companies in which they independently hold shares. There is no evidence supporting the implication that Jinko and Renesola, through these shareholders, would share sales information, become involved in each other’s production or pricing decisions, or overlap or share facilities or employees.
- Per the regulatory criteria, the Department must also consider corporate groupings, franchise or joint venture agreements, debt financing, customer relationships, and close supplier relationships, in its collapsing analysis, which it has not done.
- Messrs. Li Xiande, Li Xianhua and Chen Kangping have ownership interests only in Jinko, and Mr. Li Xianshou has ownership interests in only Renesola. There is nothing on the record that supports the potential for these individuals to act in concert as a family grouping. The companies report separate financial statements. The transactions between the companies were negligible, and were negotiated at arm’s length. Jinko submitted information at verification supporting the fact that each of Jinko’s sales transactions are heavily negotiated, factoring in current market conditions, costs of production and competing offers. There is no evidence that Jinko and Renesola acted in concert during such negotiations.

Petitioner

- The Department may find affiliation between Jinko and Renesola based only on a familial relationship, which is not in dispute; it does not need to also find that there is a potential to impact production and pricing decisions in order to find affiliation, as Jinko seems to argue. Nonetheless, the facts show that there is a potential to impact decisions concerning the production, pricing, or cost of the subject merchandise, or foreign like product, and thus Jinko and Renesola should be collapsed.
- Both companies manufacture the merchandise under consideration, and neither company has claimed that substantial retooling would be required to restructure either company's manufacturing priorities.
- Because the Department's practice is to consider a family grouping to be a single person, the lack of overlapping individual board members or managers is not relevant to the analysis. The fact that the Li family holds positions as board members and managers in both companies warrants collapsing the companies into a single entity.
- The fiscal year 2012 financial statements of each company show a significant amount of transactions between the two corporate groups, reflecting that their operations are intertwined.
- The fact that Jinko Solar and Renesola are separately listed on the stock market and were not collapsed by the European Commission is not relevant to the analysis.

Department's Position:

The Department agrees with Petitioner. The Department is continuing to collapse Renesola Jiangsu, Renesola Zhejiang, as well as Jinko Solar and Jinko Solar I&E for this final determination. In the *Preliminary Determination*, the Department concluded that record evidence supported collapsing Renesola Jiangsu, Renesola Zhejiang, Jinko Solar and Jinko Solar I&E.²¹⁴

Section 771(33) of the Act provides that "members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants" and "two or more persons directly or indirectly controlling, controlled by, or under common control with, any person" shall be considered to be "affiliated" or "affiliated persons."²¹⁵ Section 771(33) of the Act also states that a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person. "Person" is defined to include "any interested party as well as any other individual, enterprise, or entity, as appropriate."²¹⁶ The courts have upheld the Department's interpretation of "any person" in

²¹⁴ See *Preliminary Determination*, and the accompanying Preliminary Decision Memorandum at Topic I, "Single Entity Treatment;" see also Memorandum from Thomas Martin, International Trade Analyst, AD/CVD Operations, Office IV, to Abdelali Elouaradia Director, AD/CVD Operations, Office IV, regarding "Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Affiliation and Single Entity Status" dated June 6, 2014. ("Renesola Jinko Single Entity Memo").

²¹⁵ See section 771(33)(A) and (E) of the Act.

²¹⁶ See 19 CFR 351.102(b).

section 771(33)(F) of the Act as encompassing “family,” and the position that “family” is not limited to the roles enumerated in section 771(33)(A) of the Act, but rather is subject to the Department’s interpretation.²¹⁷ The Department may interpret the definition of “family” in section 771(33)(A) of the Act in a reasonable manner.²¹⁸ The Department has previously considered in-laws in its analysis of family relationships pursuant to section 771(33)(A) of the Act.²¹⁹ Thus, if members of a certain family control two companies, then these companies are affiliated under section 771(33)(F) of the Act because of the family’s control of the two companies.²²⁰

No party disputes the essential facts that the CEO of Renesola Jiangsu and Renesola Zhejiang, Mr. Li Xianshou, and Mr. Li Xiande, Mr. Li Xianhua, and Mr. Chen Kangping, who are the Chairman, Vice General Manager and CEO, respectively, of Jinko Solar and Jinko Solar I&E, are members of the same family. Mr. Li Xianshou, Mr. Li Xiande, and Mr. Li Xianhua are brothers.²²¹ Mr. Chen Kangping is a brother-in-law of Mr. Li Xianshou.²²² Thus, we continue to find Mr. Li Xianshou, Mr. Li Xiande, Mr. Li Xianhua, and Mr. Chen Kangping to be members of the same family group (“the Li family grouping”), pursuant to section 771(33)(A) of the Act.²²³

Under section 771(33)(F) of the Act “two or more persons directly or indirectly controlling, controlled by, or under common control with, any person” are affiliated. The Department determined that Renesola Jiangsu, Renesola Zhejiang, Jinko Solar I&E, and Jinko Solar are affiliated within the meaning of section 771(33)(F) of the Act because all of these companies were under the common control of the Li family grouping during the POI.²²⁴ Based on the role of the family grouping, described above, there exists a significant potential for the family to act in concert out of common interests with respect to manipulating pricing or production. A central argument of both Renesola Jiangsu and Jinko is that the Department should not find affiliation

²¹⁷ See *Ferro Union Inc. v. United States*, 44 F. Supp. 2d 1310, 1325-1326 (CIT 1999) (“Ferro Union”) (“The intent of {section 771(33) of the Act} was to identify control exercised through ‘corporate’ or ‘family’ groupings. . . . By interpreting ‘family’ as a control person {the Department} was giving effect to that intent.”); see also *Dongkuk Steel Mill Co., v. United States*, 29 C.I.T. 724, 731 (June 22, 2005) (“Dongkuk Steel”).

²¹⁸ See *Ferro Union*, 44 F. Supp. 2d 1310, at 1325 (“The word ‘including’ in section (A) of 19 U.S.C. § 1677(33) is an indication that Congress did not intend to limit the definition of ‘family’ to the members listed in this section. Had Congress intended this list to be definitive, it would have chosen different wording. The wording it did choose evinces an illustrative intent. Commerce’s interpretation of this section is reasonable and therefore not subject to reversal by the court.”).

²¹⁹ See *New World Pasta Co. v. United States*, 28 C.I.T. 290, 295-296 (CIT 2004) (explaining that “Commerce will consider persons . . . affiliated where there is a family relationship between them,” and noting that “{b}ecause Amato’s major shareholders include a sister and a sister-in-law of Garofalo’s majority shareholder, Commerce found that the two companies were affiliated under 19 U.S.C. § 1677 (33) (A).”); see also *Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review*, 63 FR 55578 (October 16, 1998) and accompanying Issues and Decision Memorandum at Comment 2 (“Where members of the same family hold interests and management positions in several companies in the same industry, it is reasonable to examine the interests of the family as a whole for purposes of determining where common control exists. See *Queen’s Flowers*, 981 F. Supp. at 626.”).

²²⁰ See *Ferro Union*, 44 F. Supp. 2d at 1326 and *Dongkuk Steel*, 29 CIT at 732.

²²¹ See Letter from Jinko Solar to The Honorable Penny Pritzker, “Re: Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China - Separate Rate Application,” dated March 28, 2014 (“Jinko Solar SRA”) at 14-15.

²²² *Id.*

²²³ See *Ferro Union Inc. v. Wheatland Tube Co.*, 44 F. Supp. 2d 1310, 1325-1326 (CIT 1999).

²²⁴ See Renesola Jinko Single Entity Memo at 8.

between them because each operates independently of the other, and that the companies do not share sales information, become involved in each other's production or pricing decisions, or overlap or share facilities or employees. However, in finding that companies are affiliated because they are under the common control of a family grouping, the Department is not required to find that a group acted in concert. Rather, the Department is concerned with the potential of a group to act in concert out of common interest.²²⁵ Moreover, the issue is not whether Renesola Jiangsu, Renesola Zhejiang and Jinko control one another, but whether they are under common control. The evidence here demonstrates that such potential exists. The facts demonstrate that the Li family is in a unique position to exercise restraint or direction over the Renesola and Jinko companies.

Jinko argues that the Department has failed to consider the lack of evidence of franchise or joint venture agreements, debt financing, or close supplier relationships shared by the two companies. The SAA accompanying the Uruguay Round Agreement Act lists these as possible mechanisms for a company to exercise restraint or direction over another in the absence of an equity relationship.²²⁶ While any of these may be such a mechanism, a family grouping is one mechanism contemplated in the SAA.²²⁷ Consistent with this guidance and the Department's practice, the Department has found that the companies are affiliated because the Li family grouping is able to exercise restraint or direction over the companies. As support for its determination, the Department relies upon record evidence of the Li family grouping's control of these companies through their management positions, and indirectly, through ownership.

The Department's regulations at 19 CFR 351.401(f)(1) provide that it will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Department concludes that there is a significant potential for the manipulation of price or production. The Department's regulations at 19 CFR 351.401(f)(2) provide that, in identifying a significant potential for the manipulation of price or production, the factors it may consider include: (i) the level of common ownership; (ii) the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and (iii) whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

Contrary to Renesola Jiangsu's claim that there is minimal potential for manipulation, we believe that there is a significant potential for manipulating pricing or production decisions given the comparative ownership levels of the Li family grouping and the leadership roles of the family in these companies.²²⁸ With respect to 19 CFR 351.402(f)(2)(i), common ownership, the Li family grouping owns 30.75 percent of Renesola Ltd., which wholly owns Renesola Zhejiang which in turn wholly owns Renesola Jiangsu. The Li family grouping also owns 36 percent of Jinko

²²⁵ See *Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea: Final Results and Rescission in Part of Antidumping Duty Administrative Review*, 69 FR 26361 (May 12, 2004) ("CTL Plate Korea"), and accompanying Issues and Decision Memorandum at Comment 1.

²²⁶ See SAA, H.R. Doc. No. 316, 103rd Congress, 2d Session (1994) at 838.

²²⁷ *Id.*

²²⁸ See 19 CFR 351.401(f)(2)(i)-(ii).

Holding, which wholly owns Jinko Solar Technology Ltd., which wholly owns Jinko Solar which in turn wholly owns Jinko Solar I&E. These percentages represent the largest ownership “block” in either company.²²⁹ Although different family members may hold these ownership percentages, the Li family grouping constitutes a single person for purposes of our analysis and thus these ownership percentages are attributed to this person.²³⁰ There is no need to show that one single individual in the Li family owns significant portions of both companies. While the Li family grouping’s share in these entities is not a majority share, in relation to other owners of these companies it is a high level of ownership, which we believe, together with the Li family’s management positions (discussed below), places the Li family in a unique position and provides a significant potential for the family to act in concert out of common interests and manipulate price or production.

With respect to 19 CFR 351.401(f)(2)(ii), there is a significant potential for manipulating pricing or production decisions through management positions. As noted above Mr. Li Xianshou is the CEO of Renesola Jiangsu and Renesola Zhejiang, and Mr. Li Xiande, Mr. Li Xianhua, and Mr. Chen Kangping, are the Chairman, Vice General Manager and CEO, respectively, of Jinko Solar and Jinko Solar I&E. In addition, the Department found at verification that Mr. Li Xianshou had ultimate authority with respect to all key corporate decisions for Renesola Jiangsu, and Renesola Zhejiang²³¹ and Mr. Li Xiande had final authority regarding a binding sales contract with respect to Jinko Solar I&E.²³² The extensive leadership role of the Li family in Renesola companies and Jinko companies is also manifest by record evidence indicating that: (1) Mr. Li Xianshou is the Chairman of the boards of Renesola Jiangsu, Renesola Zhejiang, Renesola America Inc., and all Renesola companies except for the ultimate parent company, Renesola Ltd., for which he acted as the CEO;²³³ and (2) Mr. Li Xiande, Mr. Li Xianhua, and Mr. Chen Kangping, sit on the corporate boards of Jinko Solar I&E and Jinko Solar, among other Jinko Solar companies.²³⁴ These facts demonstrate the prominent role that the Li family plays in the management of various Renesola and Jinko companies. While Renesola argues that the companies at issue do not share individual managers or directors and do not control each other, there is no need to show that the same individual serves as a manager or on the board of directors of two or more collapsed companies. The family grouping is the “person” that we examine to determine whether this “person” serves in a management position or on the boards of directors of the companies at issue. Here, the evidence demonstrates that the Li family serves as a manager or board member of Renesola Jiangsu, Renesola Zhejiang, Jinko Solar I&E, and Jinko Solar and plays a significant management role in these companies.

²²⁹ For Renesola Ltd., see Section A Response Exhibit A.13. For Jinko Solar, see Jinko Solar SRA at Exhibit 6 (showing Mr. Li Xianshou, Mr. Li Xianhua, and Mr. Chen Kangping owning 36 percent of Jinko Solar) and Exhibit 7 (showing no other investors with a comparable ownership share).

²³⁰ See *CTL Plate Korea*, and accompanying Issues and Decision Memorandum at Comment 1 (“Additionally, in past cases involving control through corporate or family groupings, the Department has noted that the control factors of individual members of the group (e.g., stock ownership, management positions, board membership) are considered in the aggregate.”).

²³¹ See Renesola EP and FOP Verification Report, at 5.

²³² See Jinko Sales Verification Report, at 3; Renesola EP and FOP Verification Report, at 5 (supporting that Li family members have ultimate authority over key business decisions).

²³³ Renesola EP and FOP Verification Report, at 3.

²³⁴ Jinko Sales Verification Report, at 3.

Moreover, no information provided since the *Preliminary Determination* contradicts the Department's findings that the companies have intertwined operations within the meaning of 19 CFR 351.401(f)(2)(iii). Renesola Jiangsu and Jinko highlight that the financial performance of one company is not consolidated with the other, and the financial results of Renesola Jiangsu are not included in the consolidated financial statements of Jinko, and vice versa. However, the transactions between them are disclosed in their consolidated financial statements as related party transactions. The fiscal year 2012 and 2013 Renesola Ltd. financial statements reported significant raw material purchases and accounts receivable from Jinko Solar and its affiliates.²³⁵ The fiscal year 2012 Jinko Holding financial statement reported significant sales and accounts payable to, and raw material purchases and accounts receivable from, Renesola Ltd. and its affiliates.²³⁶ Based on the above information, the Department finds, pursuant to 19 CFR 351.401(f)(2)(iii), that Renesola Jiangsu, Renesola Zhejiang, Jinko Solar I&E, and Jinko Solar, have intertwined operations.

Regarding Renesola Jiangsu's argument that Renesola Jiangsu and Jinko Solar should not be collapsed because they are fundamentally different companies in terms of their production strategies, the Department disagrees. Whether or not Renesola Jiangsu currently relies on a different supply chain strategy has no bearing on the Department's analysis regarding Renesola Jiangsu's ability to act in concert with Jinko Solar, and Renesola Jiangsu has not stated how such differing production strategies would either promote or interfere with the companies' potential to manipulate price and/or production. Although Renesola Jiangsu argues that it is a significant producer of wafers and relied on other companies for production of solar modules,²³⁷ the record indicates that Renesola Jiangsu produces and sells both solar cells *and* solar modules.²³⁸ Similarly, the record indicates that Jinko Solar produces and sells wafers, solar cells and modules, among other intermediary products used in the production of solar cells and modules.²³⁹ Moreover, the Department found nothing at verification to support Renesola Jiangsu's contention about its production. The Department observed a balanced production of solar cells and modules.²⁴⁰ Thus, because both Renesola Jiangsu and Jinko Solar produce solar cells and modules, the Department finds it reasonable to conclude that there is a potential for the two companies to manipulate price and/or production.

Renesola Jiangsu also argues that it and Jinko Solar should not be collapsed because (1) they do not have the power to control one another under the legal and operational obligations imposed by both the New York Stock Exchange (where both companies are listed) and the U.S. Securities and Exchange Commission and (2) the European Commission concluded that they are not related

²³⁵ See Renesola Section A Questionnaire Response at Exhibit A.11 (Notes to 2012 Renesola Ltd. consolidated financial statement at page F-34); Renesola CEP Verification Report at Exhibit II-2 (Notes to 2013 Renesola Ltd. consolidated financial statement at page F-36).

²³⁶ See Jinko Solar SRA at Exhibit 5, Jinko Holding consolidated financial statement) at F-33, F-34.

²³⁷ See Renesola Jiangsu case brief at 3.

²³⁸ See Renesola Jinko Single Entity Memo at 8, citing Letter from Renesola to the Honorable Penny Pritzker, Secretary of Commerce, regarding, "Certain Crystalline Silicon Photovoltaic Products from China: Section A Response," dated April 24, 2013 at 14.

²³⁹ See Renesola Jinko Single Entity Memo at 8, citing Letter from Jinko Solar to The Honorable Penny Pritzker, "Re: Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China- Separate Rate Application," dated March 28, 2014 at Exhibit 3.

²⁴⁰ See Renesola EP and FOP Verification Report, at 10-11.

parties in its own solar panel trade remedy proceedings. Obligations imposed, or rulings made, by these institutions are not controlling or binding in determining whether certain companies are affiliated pursuant to section 771(33) of the Act and or should be treated as a single entity pursuant to 19 CFR 351.401(f). As we explained in *Small Diameter Graphite Electrodes*, “rulings from other agencies (whether a European{Binding Origin Information} or {CBP} ruling) are not legally binding for the purposes of antidumping proceedings in the United States, as we make these decisions for different reasons, including circumvention and whether the merchandise is subject to the antidumping order.”²⁴¹

In light of the above, the Department continues to find that Renesola Jiangsu, Renesola Zhejiang, Jinko Solar I&E, and Jinko Solar are affiliated within the meaning of section 771(33)(F) of the Act. The Department also finds that there exists a significant potential for manipulation of price or production among the four companies within the meaning of 19 CFR 351.401(f)(2). Thus, the Department continues to collapse these companies and treat them as a single entity for the final determination.

Comment 17. Whether to Use Market-Economy Purchase Prices to Value all of Renesola/Jinko’s Solar Cells

Renesola

- If the Department continues to consider Renesola and Jinko to be a single entity in the final determination, the Department should value their solar cells using only Renesola and Jinko’s reported MEPs rather than surrogate values.
- An examination of the countries from which Renesola and Jinko purchased solar cells supports using MEPs to value all of their solar cells.
- Nonetheless, given the Department’s practice to disregard MEPs from certain countries by virtue of their generally available subsidies, Renesola and Jinko excluded certain solar cell purchases when calculating the ratio of the MEP quantity of solar cells to the overall purchase quantity of solar cells.
- The Department arbitrarily extended the number of decimal places in Renesola/Jinko’s MEP ratio calculation, rather than accepting the rounded percentage. It is both arbitrary and manifestly unfair for the Department to make decimal-level adjustments to what Renesola/Jinko reported and then place undue weight on this adjusted percentage to disqualify entirely Renesola and Jinko’s reported MEP prices for solar cells.

²⁴¹ See *Small Diameter Graphite Electrodes From the People’s Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order and Extension of Final Determination*, 77 FR 33405, 33410 (June 6, 2012), unchanged in *Small Diameter Graphite Electrodes From the People’s Republic of China: Affirmative Final Determination of Circumvention of the Antidumping, Duty Order*, 77 FR 47596 (August 8, 2012), and accompanying Issues and Decision Memorandum at Comment 1, affirmed *U.K. Carbon and Graphite Co., Ltd. v. United States*, 931 F. Supp. 2d 1322, 1333 (CIT 2013) (finding that Commerce provided “ample reasoned explanation” for its decision to not rely on the classification rulings on the record).

No parties rebutted this comment.

Department's Position:

The Department disagrees with Renesola regarding the rounding of the MEP percentage, as submitted by Renesola. The threshold set forth in 19 CFR 351.408(c)(1) is the point at which the Department considers that the market economy input purchases represent substantially all of the total purchases of that input by a respondent, such that the Department may use the purchase price paid to value the entire relevant FOP.²⁴² Renesola/Jinko's qualifying market economy purchase volume does not reach the threshold.

Nonetheless, the Department did not "disqualify entirely Renesola and Jinko's reported MEP prices for solar cells," as argued by Renesola. The Department followed its practice, as indicated by the plain language of 19 CFR 351.408(c)(1), by valuing solar cells using the weighted-average of Renesola/Jinko's MEP prices for solar cells and the surrogate value for solar cells.²⁴³ In other words, the Department used Renesola/Jinko's qualifying MEP prices for solar cells in determining the great majority of the value of the solar cells used by them in producing subject modules. There is nothing arbitrary about not rounding up and, instead, applying Renesola and Jinko's actual reported percentage of MEPs in a weighted-average valuation of the companies' solar cell inputs. To the extent that the Department applied a surrogate value to a portion of the companies' solar cell inputs, Renesola has made no argument against the surrogate value selected by the Department.

Regarding Renesola/Jinko's comment about the countries from which they purchased solar cells, we note that the Department expressly stated during its rulemaking process for 19 CFR 351.408(c)(1) that it would exclude from its MEP percentage calculation, purchases from countries that it has found to maintain broadly available, non-industry-specific, export subsidies.²⁴⁴ The Department has a long-standing practice of disregarding values if it has a reason to believe or suspect they are affected by subsidies.²⁴⁵ Because the purpose of the regulation is to obtain a price with which to value a respondent's inputs, the numerator of the calculation must only include prices that the Department can use to value a respondent's inputs.

²⁴² See *Use of Market Economy Input Prices in Nonmarket Economy Proceedings*, 78 FR 46799, 46800 (August 2, 2013) ("MEP Final Rule").

²⁴³ See Renesola/Jinko Preliminary Analysis Memorandum at 7.

²⁴⁴ See *MEP Final Rule*, 78 FR at 46802 at Comment 5. We have found that Indonesia, India, South Korea, and Thailand maintain broadly available, non-industry-specific export subsidies. See, e.g., *Steel Threaded Rod From India: Final Affirmative Countervailing Duty Determination and Partial Final Affirmative Determination of Critical Circumstances*, 79 FR 40712 (July 14, 2014); *Certain Frozen Warmwater Shrimp From the Republic of Indonesia: Final Negative Countervailing Duty Determination*, 78 FR 50383 (August 19, 2013); *Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review*; 2011, 78 FR 55241 (September 10, 2013), unchanged in final *Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review*; 2011, 79 FR 5378 (January 31, 2014); *Large Residential Washers From the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 FR 75975 (December 26, 2012); *Bottom Mount Combination Refrigerator-Freezers From the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 FR 17410 (March 26, 2012); *Warmwater Shrimp*.

²⁴⁵ See Omnibus Trade and Competitiveness Act of 1988 at 590.

Further, the denominator of the MEP percentage calculation, as set forth by the Department, is the respondent's total purchase volume of an input.²⁴⁶

Renesola/Jinko's qualifying purchase volume of MEPs does not reach the threshold required by 19 CFR 351.408(c)(1) for valuing all solar cells using MEP prices. Thus, the Department will make no change to the methodology that it applied in the *Preliminary Determination* to value the solar cells used by Renesola/Jinko in producing subject modules.

Comment 18. Whether to Adjust Renesola/Jinko's Cash Deposit Rate by the Full Amount of Domestic Subsidies

In the *Preliminary Determination*, the Department found that Jinko met the requirements under section 777A(f) of the Act for making a domestic subsidy offset to its AD cash deposit rate, relating to each of the three relevant programs (i.e., the provision of aluminum extrusions for LTAR, the provision of electricity for LTAR, and the provision of solar glass for LTAR), but that Renesola did not. Thus, the Department reduced the domestic subsidy offset applied to Renesola/Jinko's AD cash deposit rate.

Renesola

- The Department's decision to reduce the offset to Renesola/Jinko's AD cash deposit rate for domestic subsidies rests on a misreading of Renesola's double remedies questionnaire response.
- In response to question 10 of the double remedy questionnaire, Renesola reported purchases of solar glass and aluminum extrusions, and its electricity rates, that were provided at LTAR. This information was provided precisely because subsidy programs affecting these inputs (their provision at LTAR) impacted Renesola's cost of manufacturing.
- By providing this information, Renesola was claiming that these programs affected its cost of manufacturing.
- While the Department's decision implies that it conducted some sort of analysis regarding the subsidies and costs experienced by Renesola during the POI, there is no record evidence of such an analysis. Rather, it appears that the Department did nothing with the information provided in response to question 10 of the double remedies questionnaire.

Petitioner

- Renesola did not list any LTAR programs investigated in the companion CVD proceeding in its July 15, 2014 double remedy questionnaire response. By doing so, Renesola failed to provide the necessary link between the subsidy program and the impact on its cost.

²⁴⁶ See *MEP Final Rule*, 77 FR at 46799.

- The Department was correct to make no adjustment to account for any alleged double remedies.

Department's Position:

The Department agrees with Petitioner. In the *Preliminary Determination*, the Department reduced the domestic subsidy offset applied to Renesola/Jinko's AD cash deposit rate because it found that Renesola did not indicate a subsidy-to-cost linkage. The issue raised by Renesola revolves around interpreting its response to the Department's double remedy questionnaire. Therefore a review of the Department's double remedy questionnaire, and Renesola's response thereto, is in order.

The relevant part of the double remedy questionnaire, for purposes of this issue, starts with the list in the questionnaire of all of the subsidy programs under investigation in the concurrent solar products CVD investigation. Question 8 of the double remedy questionnaire requests that respondents report, for each subsidy program listed above, whether the program impacted their cost of manufacturing as reflected in their books and records. In response to this question, Renesola listed three programs, export credit subsidies, interest expense subsidies on fixed asset investments, and special funds for equipment investment of the industrial enterprises in Yixing City. Renesola reported that each of these programs *did not* impact its cost of manufacturing as reflected in its books and records.²⁴⁷ In response to question 8, Renesola also stated “{r}egarding the other programs listed above, Renesola *did not* participate in the program and/or the program *did not* impact the cost of manufacturing.”²⁴⁸ Renesola's statement regarding the other programs listed above, refers to the list appearing before question 8 which identifies all of the subsidy programs under investigation in the concurrent solar products CVD investigation. This list specifically includes the provision of aluminum extrusions for LTAR program, the provision of electricity for LTAR program, and the provision of solar glass for LTAR program. Question 9 of the double remedy questionnaire asks for information regarding cost changes related to each of the subsidy programs which were identified as impacting manufacturing costs in response to question 8. Renesola reported that it “*does not have* such documentation.”²⁴⁹ Thus, in the *Preliminary Determination*, we multiplied the domestic subsidy rate applicable to Renesola/Jinko by 15.33 percent, Jinko's publicly-ranged percentage of Renesola/Jinko's total POI sales of the merchandise under investigation.

Renesola's argument rests upon its response to question 10 of the double remedy questionnaire. Question 10 of the double remedy questionnaire requests information regarding each subsidy program identified in response to question 8 for which the respondent identified an impact to its cost of manufacturing. Specifically, question 10 requests the monthly electricity rates paid by the respondent during the POI, monthly volume and value data for material input purchases, and information on other subsidy programs, including the cost element impacted by the program. In response to question 10, Renesola provided monthly electricity, float glass, and aluminum frames purchase data. Renesola reported that the request for information on other subsidy programs does not apply. Renesola claims it provided the electricity, float glass, and aluminum

²⁴⁷ See Renesola's double remedy questionnaire response, dated July 15, 2014 at 4.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 5.

frames purchase data because subsidy programs affecting these inputs (i.e., their provision at LTAR) impacted its cost of manufacturing. Thus, Renesola argues that the Department's finding that Renesola did not indicate a subsidy-to-cost linkage is incorrect.

While the information submitted by Renesola, and obtained at verification,²⁵⁰ regarding its purchases of aluminum extrusions, electricity, and solar glass, indicates Renesola purchased these inputs, Renesola specifically reported, with respect to the "other programs," (including the LTAR programs for electricity, aluminum extrusions, and solar glass) that it "*did not* participate in the program and/or the program *did not* impact the cost of manufacturing."²⁵¹ In exhibit DR-6 of its response to the double remedy questionnaire, Renesola provided accounting entries related to subsidy programs. None of the entries relate to the LTAR programs. Thus, in the context of the double remedy questionnaire, Renesola explicitly stated that it did not participate in a number of programs, including the programs at issue, and it stated that the programs did not impact its cost of manufacturing. We have relied upon this explicit statement for the final determination. In light of this, and based upon the plain meaning of Renesola's responses to questions 8 and 9 of the double remedy questionnaire, for the final determination, we will continue to reduce the domestic subsidy rate applied to Renesola/Jinko's cash deposit rate. Specifically, we will multiply the domestic subsidy rate applicable to Renesola/Jinko by 15.33 percent, Jinko's publicly-ranged percentage of Renesola/Jinko's total POI sales of the merchandise under investigation, as we did in the *Preliminary Determination*.

Comment 19. Separate Rate Application of tenKsolar

tenKsolar:

In the *Preliminary Determination*, the Department did not grant tenKsolar a separate rate because tenKsolar stated that none of its solar module exports from China to the United States contained solar cells or wafers made in China.²⁵² Based on this description and explanation, the Department concluded that tenKsolar did not have any sales during the period of investigation that were subject to the China investigation, and tenKsolar was not granted a separate rate. However, tenKsolar subsequently submitted both a quantity and value letter and a separate rate application. If the Department changes the scope of the investigation to the scope in the October 3rd Letter, then tenKsolar should be granted a separate rate.

No other interested party commented on this issue.

Department's Position:

We agree with tenKsolar and have granted it a separate rate. Its separate rate application²⁵³ demonstrated that it had sales that are within the scope as clarified in the October 3rd Letter.²⁵⁴ Further, its separate rate application demonstrated that it is wholly foreign-owned, and thus,

²⁵⁰ See Renesola EP and FOP Verification Report, at 23, 26.

²⁵¹ *Id.*

²⁵² See tenKsolar's July 24, 2014 submission at 3.

²⁵³ See tenKsolar's March 31, 2014 submission at 3-4.

²⁵⁴ See tenKsolar's July 24, 2014 submission at 3.

consistent with the Department's practice, a separate rate analysis is not necessary to determine whether it is independent from government control.²⁵⁵

VII. RECOMMENDATION

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



Agree

Disagree



Paul Piquado
Assistant Secretary
for Enforcement and Compliance

15 DECEMBER 2017

Date

²⁵⁵ See tenKsolar's March 31, 2014 submission at 10 and Exhibit 4.

Abbreviations and Acronyms

Act	Tariff Act of 1930, as amended
AD	Antidumping
AFA	Adverse Facts Available
APO	Administrative Protective Order
Asun	Asun Energy Co., Ltd.
BPI	Business Proprietary Information
BYD	Shanghai BYD Company Limited
CAFC	U.S. Court of Appeals for the Federal Circuit
CBP	U.S. Customs and Border Protection
CEEG Nanjing	CEEG Nanjing Renewable Energy Co., Ltd.
CEEG Shanghai	CEEG (Shanghai) Solar Science Technology Co., Ltd.
CEO	Chief Executive Officer
CEP	Constructed Export Price
CFR	Code of Federal Regulations
Changzhou Almaden	Changzhou Almaden Co., Ltd.
Chint Solar	Chint Solar (Zhejiang) Co., Ltd.
CIT	U.S. Court of International Trade
COM	Cost of Manufacture
CONNUM	Control Number
COP	Cost of Production
CVD	Countervailing Duty
Department	U.S. Department of Commerce
DMEGC	Hengdian Group DMEGC Magnetics Co., Ltd.
EP	Export Price
EU	European Union
EVA	Ethylene-vinyl acetate
FA	Facts Available
FOP(s)	Factor(s) of production
FR	Federal Register
GOC	Government of China
Hana	Hana Microelectronics
Hanwha HK	Hanwha Solarone Hong Kong Limited
Hanwha Qidong	Hanwha Solarone (Qidong) Co., Ltd.
HTS	Harmonized Tariff Schedule
IPA	Investment Promotion Act
ITA	International Trade Administration
ITC	U.S. International Trade Commission

Jinko	Jinko Solar Co. Ltd., and Jinko Solar Import and Export Co., Ltd.
Jinko Holding	Jinko Holding Co., Ltd.
Jinko Solar	Jinko Solar Co. Ltd.
Jinko Solar I&E	Jinko Solar Import and Export Co., Ltd.
KCE	KCE Electronics Public Company Limited
Lianyungang	Lianyungang Shenzhou New Energy Co., Ltd.
LTAR	Less than adequate remuneration
LTFV	Less than Fair Value
ME	Market economy
MEP	Market economy purchase
Ningbo	Ningbo Komaes Solar Technology Co., Ltd.
Ningbo	Ningbo Qixin Solar Electrical Appliance Co., Ltd.
NME	Nonmarket economy
NPC	National People's Congress
NPC	National People's Congress of China
NV	Normal value
NYSE	New York Stock Exchange
OH	Overhead
Petitioner	SolarWorld Americas Inc. (formerly SolarWorld Industries America, Inc.)
POI	Period of Investigation
POR	Period of Review
PRC	People's Republic of China
Q&V	Quantity and Value
RAI	Renesola America Inc.
Renesola	Renesola Zhejiang Ltd. and Renesola Jiangsu Ltd.
Renesola Jiangsu	Renesola Jiangsu Ltd.
Renesola Zhejiang	Renesola Zhejiang Ltd.
Renesola/Jinko	Renesola Zhejiang Ltd., Jinko Solar Co. Ltd., and Jinko Solar Import and Export Co., Ltd.
SAA	Uruguay Round Agreements Act
SASAC	State-owned Assets Supervision and Administration Commission
SG&A	Selling, general and administrative expenses
Shanghai JA	Shanghai JA Solar Technology Co., Ltd.
SIIX	SIIX EMS (Thailand) Co. Ltd (“
SOE	State-owned enterprise
Solar Cells	Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules,

Solar Products	Crystalline silicon photovoltaic products
SRA	Separate Rate Applicant/Application
Stars	Stars Microelectronics (Thailand) Public Company Limited
Sumec Hardware	Sumec Hardware & Tools Co., Ltd.
Sunergy	China Sunergy (Nanjing) Co., Ltd.
SV	Surrogate Value
Team Precision	Team Precision Public Company Limited
tenKsolar	tenKsolar (Shanghai) Co. Ltd.
Trina S&T	Trina Solar (Changzhou) Science & Technology Co., Ltd.
Trina Solar	The respondent consisting of Changzhou Trina Solar Energy Co., Ltd. and 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
VAT	Value added tax
WTO	World Trade Organization
Yingli	Yingli Green Energy Holding Company Limited and Yingli Green Energy Americas, Inc.
Zhejiang	Zhejiang Jiutai New Energy Co., Ltd.