C-570-011
Administrative Review
POR: 06/10/2014-12/31/2015
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September 5, 2017

MEMORANDUM TO: Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations,
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance

FROM: James Maeder
Senior Director
Performing the Duties of Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Decision Memorandum for Final Results and Partial Rescission of Countervailing Duty Administrative Review: Crystalline Silicon Photovoltaic Products from the People's Republic of China; 2014-2015

I. SUMMARY

The Department of Commerce (the Department) has completed this administrative review of the countervailing duty (CVD) order on crystalline silicon photovoltaic products (solar products) from the People's Republic of China (PRC), for the period of review (POR) January 1, 2014, through December 31, 2014. This administrative review was conducted in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). The mandatory company respondent is Changzhou Trina Solar Energy Co., Ltd. and its cross-owned affiliates (collectively, Trina Solar).[1] We find that the mandatory respondent received countervailable subsidies during the POR. As stated below, for the companies for which a review was requested

[1] Trina Solar's cross-owned affiliates include: Changzhou Trina Solar Energy Co., Ltd.; Trina Solar (Changzhou) Science & Technology Co., Ltd.; Yancheng Trina Solar Energy Technology Co., Ltd.; Changzhou Trina Solar Yabang Energy Co., Ltd.; Hubei Trina Solar Energy Co., Ltd.; Turpan Trina Solar Energy Co., Ltd.; and Changzhou Trina PV Ribbon Materials Co., Ltd. *See Crystalline Silicon Photovoltaic Products from the People's Republic of China: Preliminary Results of the Countervailing Duty Administrative Review and Preliminary Intent to Rescind, in Part; 2014-2015*, 82 FR 12562 (March 6, 2017) (*Solar Products PRC Preliminary*) and accompanying Preliminary Decision Memorandum (PDM) at 8-9.

but were not selected for individual examination, we are using the mandatory respondent's CVD rate to determine the rate applicable for these non-selected companies. We analyzed the case and rebuttal briefs submitted by interested parties following the *Preliminary Results*,[2] and address the issues raised in the "Analysis of Comments" section, below.

II. BACKGROUND

The Department published the *Preliminary Results* of this administrative review in the *Federal Register* on March 6, 2017,[3] and we invited comments from interested parties. On June 8, 2017, in accordance with section 751(a)(3)(A) of the Act, the Department extended the period for issuing the final results of this review by 60 days, to September 5, 2017.[4]

On June 8, 2017, we received timely case briefs from the following interested parties: SolarWorld Americas, Inc., the petitioner in this proceeding; the Government of China (GOC); BYD (Shangluo) Industrial Co., Ltd. (BYD); Trina Solar; and SNJ Enterprises, LLC, Dba Zamp Solar (SNJ).[5] On June 15, 2017, we received timely rebuttal comments from the petitioner, the GOC, and Trina Solar.[6]

III. LIST OF COMMENTS FROM INTERESTED PARTIES

Below is a complete list of the issues raised by interested parties in this administrative review. We analyzed these issues in the "Analysis of Comments" section, below.

Comment 1: The Scope of the Order is Unlawful
Comment 2: The Final Scope Determination Does Not Apply Retroactively
Comment 3: Rescission of the Review of BYD
Comment 4: Solar Glass Benchmark
Comment 5: Specificity of Glass for LTAR
Comment 6: Aluminum Extrusions Benchmark
Comment 7: Addition of Ocean Freight and Import Duties to LTAR Benchmarks

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[2] *See Solar Products PRC Preliminary* PDM.
[3] *Id*.
[4] *See* Memorandum, "Crystalline Silicon Photovoltaic Products from the People's Republic of China: Extension of the Deadline for Issuing the Final Results of the 2014-2015 Countervailing Duty Administrative Review," dated June 8, 2017.
[5] *See* Petitioner's Case Brief, "Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Case Brief of SolarWorld Americas, Inc.," dated June 8, 2017 (Petitioner Case Brief); *see also* GOC's Case Brief, "GOC's Case Brief: Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China," dated June 8, 2017 (GOC Case Brief); Trina Solar's Case Brief, "Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Case Brief," dated June 8, 2017 (Trina Solar Case Brief); BYD's Case Brief, "Crystalline Silicon Photovoltaic Products from the People's Republic of China: BYD's Case Brief," dated June 8, 2017 (BYD Case Brief); SNJ's Case Brief, "Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China," dated June 8, 2017 (SNJ Case Brief).
[6] *See* Petitioner's Rebuttal Brief, "Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Rebuttal Brief of SolarWorld Americas, Inc.," dated June 15, 2017 (Petitioner Rebuttal Brief); *see also* Trina Solar's Rebuttal Brief, "Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Rebuttal Brief," dated June 15, 2017 (Trina Solar Rebuttal Brief); GOC's Rebuttal Brief, "GOC's Rebuttal Brief: Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China," dated June 15, 2017 (GOC Rebuttal Brief).

Comment 8: Addition of Value Added Tax (VAT) to LTAR Benchmarks
Comment 9: Offsetting of Purchases above Benchmarks
Comment 10: Electricity for LTAR
Comment 11: Usage of Export Buyer's Credit Program
Comment 12: Selection of the Adverse Facts Available (AFA) Rate for Export Buyer's Credit Program

IV. SCOPE OF THE ORDER

The merchandise covered by the order 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 these orders, 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 the order 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 the order are modules, laminates and/or panels assembled in the PRC, consisting of crystalline silicon photovoltaic cells, not exceeding 10,000mm^2 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 the order 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.[7] Additionally, excluded from the scope of these orders are solar panels that are: (1) less than 300.000 mm^2 in surface area; (2) less than 27.1 watts in power; (3) coated across their entire surface with a polyurethane doming resin; and (4) joined to a battery charging and maintaining unit (which is an acrylonitrile butadiene styrene ("ABS") box that incorporates a light emitting diode ("LED")) by coated wires that include a connector to permit the incorporation of an extension cable. The battery charging and maintaining unit utilizes high-frequency triangular pulse waveforms designed to maintain and extend the life of batteries through the reduction of lead sulfate crystals. The above-described battery charging and maintaining unit is currently available under

[7] *See 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) (*Order*); *see also 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).

the registered trademark "SolarPulse."

Merchandise covered by the order 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 the order is dispositive.

V. CHANGES SINCE THE PRELIMINARY RESULTS

Based on case briefs, rebuttal briefs, and all supporting documentation, we made certain changes from the *Preliminary Results*, which are discussed in the "Analysis of Comments" section, below.

VI. PARTIAL RESCISSION OF ADMINISTRATIVE REVIEW

The Department is rescinding this administrative review in regard to the following companies: BYD; Wuxi Suntech Power Co., Ltd.; Canadian Solar International, Ltd., Canadian Solar Manufacturing (Changshu), Inc., and Canadian Solar Manufacturing (Luoyang), Inc. (collectively Canadian Solar); Yingli Green Energy Holding Company Ltd., Yingli Energy (China) Co., Ltd., Baoding Tianwei Yingli New Energy Resources Co., Ltd., Baoding Jiasheng Photovoltaic Technology Co., Ltd., Beijing Tianneng Yingli New Energy Resources Co. Ltd., Hainan Yingli New Energy Resources Co., Ltd., Hengshui Yingli New Energy Resources Co., Ltd., Lixian Yingli New Energy Resources Co., Ltd., Tianjin Yingli New Energy Resources Co., Ltd., Shenzhen Yingli New Energy Resources Co., Ltd., and Yingli Green Energy International Trading Company Limited (collectively Yingli); Jinko Solar Co., Ltd., Jinko Solar Import and Export Co., Ltd., Zhejiang Jinko Solar Co., Ltd. (collectively Jinko); Shanghai BYD Co., Ltd.; and Shenzhen Jiawei Photovoltaic Lighting Co., Ltd.[8]

VII. NON-SELECTED COMPANIES UNDER REVIEW

For the companies for which a review was requested that were not selected as mandatory company respondents, for which we did not receive a timely request for withdrawal of review, and for which we are not finding to be cross-owned with the mandatory company respondents, the subsidy rate is the rate calculated for Trina Solar, the only company subject to this review for which a rate was calculated. For a list of these companies, please see the Appendix I to this Decision Memorandum.

VIII. SUBSIDIES VALUATION INFORMATION

A. Allocation Period

The Department made no changes to the allocation period or the allocation methodology used in

[8] *See Solar Products Preliminary* PDM at 4-5. The rescission of this review regarding BYD is discussed in more detail in Comment 3 below.

the *Preliminary Results*.[9]

B. Attribution of Subsidies

The Department made no changes to the attribution methodologies used in the *Preliminary Results*.[10]

C. Denominators

The Department made no changes to the denominators used in the *Preliminary Results*.[11]

D. Creditworthiness

The examination of creditworthiness is an attempt to determine if the company in question could obtain long-term financing from conventional commercial sources. According to 19 CFR 351.505(a)(4)(i), the Department will generally consider a firm to be uncreditworthy if, based on information available at the time at issue, the firm could not have obtained long-term loans from conventional commercial sources.

In making this determination, according to 19 CFR 351.505(a)(4)(i)(A)-(D), the Department may examine, *inter alia*, the following four types of information: 1) receipt by the firm of comparable commercial long-term loans; 2) present and past indicators of the firm's financial health; 3) present and past indicators of the firm's ability to meet its costs and fixed financial obligations with its cash flow; and 4) evidence of the firm's future financial position. Under 19 CFR 351.505(a)(4)(i)(A), the Department looks to whether the company has received commercial long-term loans in assessing the company's creditworthiness. According to 19 CFR 351.505(a)(4)(ii), for companies not owned by the government, the Department normally considers a company's receipt of a long-term loan from a commercial source to be dispositive of its creditworthiness.

In the *Preliminary Results*, the Department found Trina Solar was uncreditworthy during 2012 through 2014.[12] After reviewing Trina Solar's response to the Department's creditworthiness questionnaire,[13] the Department finds that Trina Solar was uncreditworthy from 2012 to 2013 and creditworthy during 2014 and 2015.[14]

For 2012 and 2013, Trina Solar did not receive comparable commercial long-term loans. When analyzing a firm's past and present financial health and ability to meet costs and financial obligations, as reflected in various financial indicators, the Department looks at the firm's current and quick ratios relative to benchmark values of 2.0 and 1.0, respectively. When the

[9] *Id*. at 7.
[10] *Id*. at 7-10.
[11] *Id*. at 10.
[12] *Id*. at 13-16.
[13] *See* Trina Solar's Letter, "Crystalline Silicon Photovoltaic Products from the People's Republic of China: Creditworthiness Questionnaire Response," dated April 20, 2017 (Trina Solar April 20, 2017 CWQR).
[14] *See* Memorandum, "2014-2015 Countervailing Duty Administrative Review of Solar Products from the People's Republic of China: Trina Solar Calculation and Analysis," dated September 5, 2017.

current ratio drops below 2.0, or the quick ratio drops below 1.0, the Department generally considers the firm to be uncreditworthy. In 2012 and 2013, Trina Solar had quick ratios and current ratios below the benchmark values.[15] Also, in those years, there was no evidence that the firm's future financial position would improve. Accordingly, we find that Trina Solar was uncreditworthy in 2012 and 2013.

In 2014 and 2015, Trina Solar received long-term commercial loans from private banks.[16] These are dispositive evidence of creditworthiness. Accordingly, we find that Trina Solar was creditworthy in 2014 and 2015.

E. Benchmarks and Discount Rates

Interested parties submitted several comments regarding the benchmarks used in the *Preliminary Results*. The Department has made no adjustments to the benchmarks as a result of these comments. A discussion of the comments and the Department's analysis of these issues are in the "Analysis of Comments" section, below.

IX. USE OF FACTS OTHERWISE AVAILABLE AND ADVERSE INFERENCES

The Department relied on "facts otherwise available," including adverse facts available (AFA), for several findings in the *Preliminary Results*. The Department has not made any changes to its use of facts otherwise available and AFA, as applied in the *Preliminary Results*.[17]

X. ANALYSIS OF PROGRAMS

A. Programs Determined to be Countervailable

Except where noted, the Department has made no changes to the methodology used to calculate the subsidy rates for the following programs, as used by Trina Solar, in its *Preliminary Results*. Additionally, except where noted, no issues were raised by interested parties in case briefs regarding these programs. The final program rates calculated for Trina Solar are as follows:

1. <u>Preferential Policy Lending to the Renewable Energy Industry</u>

   Trina Solar: 0.03 percent *ad valorem*

2. <u>Provision of Solar Grade Polysilicon for LTAR</u>

   Trina Solar: 0.26 percent *ad valorem*

3. <u>Provision of Solar Glass for LTAR</u>

[15] *See* Trina Solar April 20, 2017 CWQR at Exhibit 5. In 2012, Trina Solar had a current ratio of 1.19 and a quick ratio of 0.88. In 2013, Trina Solar had a current ratio of 0.99 and a quick ratio of 0.65.
[16] *Id.* at 3 and Exhibit 6.
[17] *Id.* at 20.

Trina Solar: 10.17 percent *ad valorem*

4. Provision of Electricity for LTAR

Trina Solar: 0.82 percent *ad valorem*

5. Provision of Land for LTAR

Trina Solar: 0.25 percent *ad valorem*

6. Enterprise Income Tax Law, Research and Development Program

Trina Solar: 0.06 percent *ad valorem*

7. Golden Sun Demonstration Program

Trina Solar: 0.03 percent *ad valorem*

8. Export Buyer's Credits

Trina Solar: 0.58 percent *ad valorem*

9. Other Subsidies

As explained in the *Preliminary Results*, the Department found that certain additional grant programs conferred a benefit during the POR.[18]

Trina Solar: 0.15 percent *ad valorem*

B. Programs Determined to be Not Countervailable During the POR

For these final results, we continue to find that the mandatory respondent did not benefit from the "Export Credit Insurance from SINOSURE" program during the POR.

C. Programs Determined to be Not Used or to Not Confer a Measurable Benefit During the POR

1. Tax Benefit Programs

- Two Free/Three Half Program for Foreign Investment Enterprises (FIEs)
- Income Tax Reductions for Export-Oriented Enterprises
- Income Tax Benefits for FIEs Based on Geographic Locations – Preferential

[18] *See Solar Products Preliminary* PDM at 44. For a list of programs that conferred a benefit, *see* Memorandum, "Countervailing Duty Administrative Review of Crystalline Silicon Photovoltaic Products from the People's Republic of China: Final Calculations Memorandum," dated concurrently with this memorandum (Final Calculations Memorandum).

Tax Programs for Western Development

- Local Income Tax Exemption and Reduction Programs for "Productive" FIEs
- Tax Refunds for Reinvestment of FIE Profits in Export-Oriented Enterprises
- Tax Reductions for High and New-Technology Enterprises Involved in Designated Projects
- Preferential Income Tax Policy for Enterprises in the Northeast Region
- Guangdong Province Tax Programs
- Preferential Tax Programs from High or New Technology Enterprises (HNTEs)
- VAT Rebates/Refunds for FIEs Purchasing Domestically-Produced Equipment

2. <u>Other Tax Programs</u>

- VAT and Tariff Exemptions for Purchases of Fixed Assets Under the Foreign Trade and Development Fund Program
- Over-Rebate of VAT Program
- Tax Reductions for FIE Purchases of Chinese-Made Equipment

XI. ANALYSIS OF COMMENTS

Comment 1: The Scope of the Order is Unlawful

SNJ's Case Brief

- The Department impermissibly departs from its prior substantial transformation test for determining the country of origin of solar panels and modules and does not account for the insignificant manufacturing performed in the PRC.
- The scope language is currently being challenged in the U.S. Court of International Trade (CIT), which remanded the Department's scope language.
- The Department applied different country-of-origin rules to *Solar Cells (Solar I)* and *Solar Products (Solar II)* proceedings. In *Solar I*, the Department determined that the country of origin for solar panels is the country of origin for the cells, whereas in *Solar II*, the Department determined that the country of origin of the panels is the country of assembly – namely, the PRC.
- In Solar I, the Department stated that a product can only have one country of origin for antidumping and countervailing purposes.
- The Department made its final scope determination in *Solar II* notwithstanding its determinations in both *Solar I* and *Solar II* that the most essential production step is the solar cell production, not the assembly of solar cells into solar panels.
- The Department's scope applied to this administrative review would impose duties on the entire value of non-Chinese solar cell panels that were assembled in the PRC despite the fact that the cost to produce the panel may be attributable to a non-Chinese cell.
- The Department adopted two separate and irreconcilable country-of-origin definitions for products within the same class or kind of merchandise.

- There are a number of examples where various stages of production for a product occur in different countries. It is reasonable and consistent with prior practice to focus on the country where "the more important stage of the production process" takes place.

BYD's Case Brief

- The scope language, as determined in the original investigation, is currently under appeal before the CIT.
- On June 8, 2016, the CIT remanded the Department's final scope determination. The CIT noted that Commerce's final scope determinations departed from the Department's prior rule for determining national origin for solar panels without adequate consideration or discussion of the continuing relevance of Commerce's prior factual finding that the assembly of imported solar cells into panels is insufficient to change the product's country of origin from the country of cell production to the country of panel assembly.
- The scope applied in this *Solar II* review is completely inconsistent and irreconcilable with the established substantial transformation concepts and therefore arbitrary and capricious.
- In *Solar I*, the Department covered all solar cells produced in the PRC and assembled into panels anywhere in the world, including the PRC, as merchandise from the PRC. In *Solar II*, the Department covered, also as merchandise from the PRC, all panels assembled in the PRC from cells produced anywhere in the world, other than the PRC.
- The Department established two different rules of origin for solar panels, depending on where they were assembled. For solar panels assembled anywhere other than the PRC, origin is the country of cell-production. For solar panels assembled in the PRC, origin is instead determined by the country of assembly, even though most of the production (*i.e.*, the making of the constituent cells) takes place in another country.
- It is not possible to reconcile the proposed scope in this administrative review with the judicially-endorsed concepts of country of origin and "substantial transformation" that have underpinned the Department's scope practice for decades.
- The country of origin of a product is the country in which the parts or components were "substantially transformed." Any modules or panels assembled in the PRC using solar cells produced outside of the PRC do not have a Chinese origin and cannot lawfully be subjected to antidumping measures on products from the PRC.
- The Department should issue a final determination rescinding this review and simultaneously terminating the order retrospectively to all unliquidated entries.

SolarWorld's Rebuttal Brief

- This administrative review is not the appropriate avenue to challenge the Department's final scope determination from the original investigation or the merchandise ultimately subject to the countervailing duty order.
- The Department's remand determination maintained the same scope language, which therefore remains valid for purposes of the order and this administrative review.
- Absent a judicially affirmed alteration to the scope, it would be inappropriate and unprecedented for the Department to alter the scope in this review.

- It is not uncommon for the Department to make alterations to scope language during the course of an investigation. The final scope, as determined by the Department, governs future administrative reviews.
- Throughout the original investigation, the Department specifically gave notice to all interested parties that it was evaluating the scope, which could change prior to the final determinations.

Department's Position:

The Department finds that it is appropriate to maintain the scope language determined in the *Solar Products Investigations*.[19] Accordingly, we are not rescinding this review and terminating this proceeding. The Department established the scope of the countervailing duty order on certain solar products from the PRC in the underlying investigation. The U.S. Court of Appeals for the Federal Circuit (CAFC) has recognized that "{t}he purpose of the petition is to propose an investigation. A purpose of the investigation is to determine what merchandise should be included in the final order."[20] Accordingly, the most appropriate time to have commented on the scope for a possible order, including any issues regarding country of origin and/or the substantial transformation test, was during the investigation segment of this proceeding, when the scope was being considered and determined, rather than now in the context of an administrative review, which follows the Department's final determination concerning scope. Indeed, in the underlying investigation, interested parties did comment on the scope of a possible future order. The Department considered those comments during the *Solar Products Investigations* and ultimately determined a final scope.[21] Subsequent to the *Solar Products Investigations*, the Department's determinations concerning scope were upheld by the CIT.[22] For the reasons explained in the *Solar Products Investigations*,[23] as supplemented in the final results of remand redetermination pursuant to the *Sunpower I*,[24] hereby incorporated by reference in these final results, we continue to find that the scope of this proceeding is appropriate.[25]

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[19] *See Countervailing Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 79 FR 76962 (December 23, 2014) (*Solar Products PRC Final)*, and accompanying Issues and Decision Memorandum (IDM) at Comment 1; *see also Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 79 FR 76970 (December 23, 2014), and accompanying IDM at Comment 1 (collectively, *Solar Products Investigations*).

[20] *See Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096 (CAFC 2002); *see also Sunpower v. United States*, CIT Slip Op. 17-89 (July 21, 2017) (*Sunpower II*) at 27 (finding that one of the purposes of an investigation is to define the scope of an order); *Kyocera v. United States*, CIT Slip Op. 17-90 (July 21, 2017) at 2-3.

[21] *See Solar Products Investigations*, at Comment 1.

[22] *See Sunpower Corp. v. United States*, 179 F. Supp. 3d 1286, 1288 (CIT 2016) (*Sunpower I*); *see also Sunpower II*, CIT Slip Op. 17-89, *18-21 (finding that the scope of this proceeding covered a different "class or kind" of merchandise than the scope of the *Solar I* proceeding and that, in applying a different country-of-origin analysis in this case, the Department was not applying two country-of-origin tests to the same "class or kind" of merchandise). Certain parties asserted that the scope of this proceeding was currently under review by the CIT. Since the submission of case and rebuttal briefs, however, the CIT issued its opinion in *Sunpower II*, thereby ending its consideration of the scope issues cited by the interested parties in this review.

[23] *See Solar Products Investigations* at Comment 1.

[24] *See* Final Results of Redetermination Pursuant to Court Order in *Sunpower Corp. v. United States* (June 8, 2016), *available at* http://ia.ita.doc.gov/remands/16-56.pdf.

[25] *Id.*, at Comment 2.

Comment 2: The Final Scope Determination Does Not Apply Retroactively

SNJ's Case Brief

- From the issuance of the Department's preliminary determination in the original investigation, the scope was what the Department termed to be the "two out of three" rule, in which solar modules assembled in the PRC were subject to CVD measures only if they did not contain Chinese-origin cells and where the solar cells incorporated in the modules were "completed or partially manufactured within a customs territory other than the subject country, using ingots that are manufactured in the subject country, wafers that are manufactured in the subject country, or cells where the manufacturing process begins in the subject country and is completed in a non-subject country."
- In its final determination, the Department expanded the scope to include solar panels assembled in the PRC including cells produced in a customs territory other than the PRC (*i.e.*, with cells produced anywhere in the world other than the PRC.)
- The Department should confirm in the instructions issued to CBP in this administrative review that entries made from June 10, 2014 through the expiration of the cash deposit period on October 7, 2014 (i.e., during the provisional measures period) are only subject to countervailing duties if merchandise falls within both the preliminary scope and the final scope—not *only* the final scope.

BYD's Case Brief

- The scope language covering modules/panels produced using cells from any country outside the PRC may only be applied prospectively to entries made on or after the date of publication of the Department's final determination on December 23, 2014.
- It was not until the final determination that the Department abandoned the two out of three rule and expanded the scope to include modules or panels assembled in the PRC from cells sourced anywhere in the world, other than the PRC.
- The revised scope cannot be applied retrospectively to entries made during the preliminary periods when importers relied upon the Department's scope as initiated and set forth in the preliminary determination.
- The Department cannot penalize importers for importing products during the 2014-2015 administrative review period that were clearly outside the scope of the investigation at time of entry.

SolarWorld's Rebuttal Brief

- It is not uncommon for the Department to make alterations to scope language during the course of an investigation.
- The Department specifically put all interested parties on notice throughout various stages of the proceeding that it was evaluating the scope, which could change prior to the final determinations.
- In the preliminary determination, 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 country of origin of certain solar modules described in the scope of the investigation. All manufacturers, exporters and/or importers of Chinese and Taiwanese cells and modules were on notice that the Department's country of origin determination, and the scope of the investigation, could change.

- Arguments that the assessment of duties can only occur from the date of the final determination should be rejected—all parties were on notice from the outset that their merchandise could be subject to the AD/CVD investigation.

Department's Position:

The Department has previously determined that, in general, merchandise that has entered the United States prior to the suspension of liquidation resulting from a preliminary determination in an investigation (and in the absence of an affirmative critical circumstance finding) is not subject merchandise within the meaning of section 771(25) of the Act.[26] By extension, the Department does not consider entries of merchandise covered by the scope of the final determination that were not covered and suspended under the scope of the preliminary determination as subject merchandise during the provisional measures period.

Contrary to the petitioner's argument, there is no statutory provision that permits the Department, during the provisional measures period, to suspend entries of merchandise that were not covered by the scope of the preliminary determination, even if those entries would have been covered by the expanded scope determined at the final determination. Simply put, these entries were not "subject merchandise" during the provisional measures period, because they were not covered by the scope at the time of the preliminary determination. This is because section 703(d) of the Act makes clear that only entries of merchandise subject to the preliminary determination are subject to suspension (and future assessment) during the provisional measures period.

Hence, with respect to the merchandise that is the subject of this comment, only merchandise entered into the United States on or after June 10, 2014, and through October 7, 2014, that should be suspended from liquidation under both the final scope *and* the preliminary scope of the underlying investigation are subject to countervailing duties pursuant to the *Order*, including the final duty liability determined in this administrative review. Despite the petitioner's contention, the Department does not find that this decision limits its ability to assess duties on appropriate goods entering during the provisional measures period. The Department does not find that clarifying language to CBP is necessary. Accordingly, for merchandise properly not suspended from liquidation during the provisional measures period of the underlying investigation, the Department will not instruct CBP to retroactively suspend such merchandise and assess duties.

Comment 3: Rescission of the Review of BYD

BYD's Case Brief

- The Department's decision to rescind the review with respect to BYD was erroneous.

[26] *See Certain Stainless Steel Wire Rods from France: Final Results of Antidumping Duty Administrative Review*, 61 FR 47874, 47875. (September 11, 1996).

- The Department does not and cannot dispute that BYD has certified from the beginning of the review that all entries at issue are currently suspended from liquidation under the CVD statute as “Entry Type 03” (AD/CVD) and have been extensively documented on the record of this review to be physically within the scope of the *Solar II* order as currently defined by the Department.
- There is nothing in the statute or regulations that invalidates an otherwise lawful suspension of liquidation under the AD/CVD laws because it references the wrong, or different, case number. The Department’s regulations make no reference to case numbers as essential for this purpose.
- There is indisputably a suspension of liquidation in effect for the entries at issue under the CVD laws, as each entry is suspended by CBP as an entry type “03” entry. That is all that is required to render these entries subject to review.
- The Department cannot rescind the review unless the merchandise is determined to be physically outside the scope of the order or of a different country of origin.
- BYD has submitted over 500 pages of detailed documentation and explanations establishing that the modules at issue were assembled in the PRC, but the origin of the cells contained in the entries at issue are not Chinese.
- There is no basis on the record to dispute that the merchandise is not physically within the scope of this review.
- The Department must assign a revised CVD margin to BYD for the review period and for prospective cash deposit purposes.

Department’s Position:

The Department disagrees with BYD’s assertion that there is no basis on the record to dispute that the merchandise at issue is physically within the scope of this review. CBP has determined – at least on a preliminary basis – that the product is properly suspended under the “solar cells” order (C-570-980), not the solar products order. While the Department has the authority to direct the suspension of liquidation and the collection of cash deposits for purposes of the AD/CVD statute, including the authority to direct CBP to “re-suspend” an entry under a different case number, the responsibility for determining the proper classification at the border on a day-to-day basis falls almost exclusively with CBP, as the administrator of the Department’s instructions. In this instance, CBP has determined BYD’s products are properly classified as solar cells from the PRC, not solar products from the PRC. CBP has the specialized experience for determining the country of origin and product characteristics of specific entries on a shipment-by-shipment basis (*e.g.*, its own laboratory and testing methods, auditing procedures, other inspection methods). Thus, despite the fact that BYD has provided purported evidence regarding the proper classification of its shipment under C-570-011, the fact that CBP has concluded otherwise is the evidentiary basis for continuing to find BYD had no reviewable shipments during the POR.

As we have stated previously:

> The Department’s scope and circumvention inquiries do not extend to the proper classification of entered merchandise, which is a responsibility of CBP. The Department understands, from the CIT’s opinions in *Globe Metallurgical* and *Kinetic Industries*, that the broader responsibility for investigation and

> enforcement of the classification of merchandise between subject and nonsubject merchandise lies primarily with CBP.[27] In *Globe Metallurgical*, the Court affirmed a decision by the Department not to conduct an administrative review of alleged transshipment because of the resources required to conduct such an investigation, and the possibility of a review in another type of proceeding. The Court acknowledged the Department's deferral of the investigation and enforcement of the mislabeling alleged in that situation (related to country of origin) to CBP: "Commerce's recognition of CBP's authority to investigate fraud, gross negligence, or negligence involving entries of merchandise, and that CBP is better positioned to address a standalone country-of-origin issue is also consistent with 19 U.S.C. § 1592."[28]

Likewise, we have stated that "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.[29] While there has been no suggestion in this review that BYD has attempted to mislead or intentionally provide inaccurate information regarding the proper classification of its products, the same issue arises: whether the Department or CBP is in a better position to determine the classification and origin of the particular cells, wafers, and ingots used for the BYD shipments when they enter the customs territory.

In this regard, we note that BYD has not suggested during this review that CBP's decision is based on a misunderstanding of the language of the scope and has not requested a scope ruling under 19 CFR 351.225 to clarify any type of ambiguity in the scope description. Rather, this issue appears to be a matter of how the scope language is applied to BYD's specific entries at the border, a matter for which CBP is better suited, as explained above.

Comment 4: Solar Glass Benchmark

GOC's Case Brief

- The Department should only use IHS data to calculate the solar glass benchmark.
- The Department has emphasized that it uses benchmark pricing data that corresponds to the *particular* product being purchased by the respondents. In *Magnesia Carbon Bricks*

[27] *See Certain Magnesia Carbon Bricks from the People's Republic of China: Final Results and Final Partial Rescission of the Antidumping Duty Administrative Review; 2012-2013*, 80 FR 19961 (April 14, 2015) and accompanying IDM at 6 (citing *Globe Metallurgical Inc., v. United States*, 722 F.Supp.2d 1372, 1381 (CIT 2010) (*Globe Metallurgical*)).

[28] *Id.*, at 6 (citing *Globe Metallurgical* (stating, *inter alia*, "Globe has not persuaded the court that Commerce, in addition to its statutory duty to calculate dumping margins for known entries of subject merchandise within an administrative review, must also, within the same administrative review, investigate an importer with no known entries of subject merchandise, that has certified it has no such entries (confirmed by CBP data), and that may be fraudulently evading an antidumping order by mislabeling entries of subject merchandise…Commerce's handling of Globe's transshipment allegation represents a permissible construction of the antidumping statute to which the court must defer") and *Kinetic Industries Inc. v. United States*, 800 F. Supp. 2d 1339 (CIT 2011) (*Kinetic Industries*)).

[29] *See Mid Continent Nail Corp. v. United States*, 949 F. Supp. 2d 1247, 1283 (CIT 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…").

PRC, the Department excluded pricing data from a basket HTS category when it had to calculate specific tier 2 benchmarks.[30] The Department found that only HTS codes that were exclusive to the specific inputs were comparable and appropriate for inclusion in the benchmark calculations.

- Of the three prices of solar glass on the record, only the IHS data, which specifically provides the market prices of photovoltaic glass, is specific to solar glass.
- The UN Comtrade data on the record includes two six-digit basket categories. The GTA data are also broad in terms of the HTS codes it covers.
- The GTA data set does not include HTS descriptions with any physical specifications. Solar glass has very specific physical properties, as the Department pointed out in its preliminary decision ("solar glass has a particular thickness of between three and four millimeters.")
- By averaging the GTA and IHS values, the Department distorted its benefit calculation for solar glass because it compared the respondent's purchases of solar glass with benchmark values that reflect pricing for solar glass and all types of non-solar glass.
- The Department's practice of using monthly benchmarks is not a hard-and-fast rule. The primary objective is to identify a comparable benchmark to ensure an accurate benefit calculation.
- The Department has used annual data to create benchmarks in previous proceedings, such as *Magnesia Carbon Bricks from the PRC* and *OTR Tires from the PRC*.[31]

Trina Solar's Case Brief

- The Department should only use IHS data to calculate the benchmark for solar glass.
- IHS world pricing information is the only data on the record that covers solar glass.
- In the *Solar I 2013 AR*, the Department noted that "the IHS data is limited to solar glass and the Department normally attempts to rely on data reflecting the narrowest category of products encompassing the input product, where possible."[32]
- Solar glass is of a relatively small range of thickness, as represented by the IHS data.
- The record demonstrates that Trina Solar did not purchase safety glass that would have been consistent with glass classified under different Harmonized Tariff Schedule (HTS) codes than solar glass.

SolarWorld's Case Brief

- The Department should disregard the IHS benchmark data.
- The IHS data are reported on an annual basis. The Department's practice is to rely upon monthly benchmarks when inputs are purchased repeatedly and continuously over the

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[30] *See Certain Magnesia Carbon Bricks from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 445472 (August 2, 2010) (*Magnesia Carbon Bricks PRC*).
[31] *See Certain Magnesia Carbon Bricks from the PRC*; *see also Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances*, 73 FR 40480 (July 15, 2008) (*OTR Tires from the PRC*).
[32] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2013*, 81 FR 46904 (July 19, 2016) (*Solar Cells PRC 2013 AR*).

course of a calendar year.

- In *Citric Acid from the PRC*, the Department declined to use a single-point annual benchmark value for calcium carbonate, explaining, "it is the Department's practice to calculate monthly benchmark prices."[33]
- IHS does not identify whether the pricing is tax-inclusive or tax exclusive, whether the pricing reflects domestic pricing, export pricing or import pricing, or whether the pricing takes into account the distortive effects of Chinese domination of the solar glass market.

GOC's Rebuttal Brief

- Monthly benchmark values are not a hard-and-fast rule. The Department has discretion to develop benchmarks on a case-by-case basis depending on the circumstances of the particular case.
- The priority should be to pick a benchmark particular to the specific input in question.
- IHS states that the benchmarks are exclusive of taxes.
- Chinese distortion of the solar glass market is mere speculation, and the Department has previously used IHS data.

Trina Solar's Rebuttal Brief

- The Department used annual IHS data in *Solar I 2013 AR* despite similar arguments regarding it as an annual benchmark.
- The specificity of the benchmark selected far outweighs concerns regarding relative contemporaneity.
- In *Solar I 2013 AR*, the Department relied on IHS data, in part, for its solar glass benchmark, finding that "the IHS data is limited to solar glass and the Department normally attempts to rely on data reflecting the narrowest category of products encompassing the input product, where possible."
- Global Trade Atlas (GTA) and United Nations Comtrade data are not specific to solar glass.
- The data relied on by the Department are demonstrably dissimilar to solar glass purchased by Trina Solar.

SolarWorld's Rebuttal Brief

- HTS heading 7007 specifically pertains to rolled glass products, which encompass nearly all categories of glass used in photovoltaic applications.
- Solar glass is a type of "toughened" or "tempered" glass – just like those encompassed by HTS 7007.19 and 7007.29.
- HTS headings 7007.19 and 7007.29 may encompass items other than toughened solar glass; there is no question that they also encompass solar glass and similar glass.
- The Department's practice is to use monthly data when available when purchases are

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[33] *See Citric Acid and Certain Citrate Sales from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2011*, 79 FR 108 (January 2, 2014) (*Citric Acid from the PRC*) and accompanying IDM at section VII.I.A.

made continuously and repeatedly.

- Although the Department has used annual benchmarks in the past in specific circumstances, it is not the Department's preference. In *Amorphous Silica Fabric from the PRC*, the Department used annual benchmarks because they "established a comparable analysis" to the respondent's purchases (also on an annual basis). That is not the case in this review.[34]

Department's Position:

In this review, the Department determined that the PRC's solar glass market is distorted and that it is necessary to rely on a "tier two" benchmark for solar glass.[35] For world market prices for solar glass, the petitioner provided Comtrade data that provide the monthly prices of tempered glass, which is a broader category of glass including solar glass, while Trina Solar submitted annual prices compiled by IHS that are specifically for solar glass.[36] As discussed in the *Preliminary Results*, the monthly Comtrade data cover a broader category of glass products (that includes solar glass), while the annual IHS prices would allow the Department to rely on data reflecting the narrowest category of products that encompass the input product. The GOC argues that the Department excluded data from its benchmark construction in *Magnesia Carbon Bricks PRC* when that data set was from countries that used overly broad "basket" HTS codes. In this case, there is no information on the record that would allow the Department to pick and choose specific data points from the Comtrade data to include or exclude to make the data set more precise. Therefore, we find that both the Comtrade data set and the IHS data set both contain strengths and flaws, but neither contains flaws or deficiencies so serious that the data sets should be entirely rejected for purposes of constructing the solar glass benchmark.

In its comments, the petitioner argues that the IHS data should be rejected because it does not identify whether the prices are tax-inclusive or tax-exclusive, whether the prices reflect domestic, export, or import prices, or whether the prices take into effect the distortive effects of the PRC's domination of the solar glass market. However, record information leads us to conclude that the IHS data is tax-exclusive. Due to the proprietary nature of the information on which we based our analysis, *see* the Department's discussion of this issue in the Final Calculations Memorandum. Furthermore, because we have found that the GOC's intervention in the PRC's solar glass market leads to price distortions, we will continue to remove PRC imports from the IHS solar glass prices to eliminate any such distortive effects of the PRC's domination of the solar glass market.[37]

In this instance, we find that world market prices for tempered glass in the Comtrade data are suitable to use in the solar glass benchmark because these prices include prices for solar glass.

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[34] *See Countervailing Duty Investigation of Certain Amorphous Silica Fabric from the People's Republic of China: Final Affirmative Determination*, 82 FR 8405 (January 25, 2017) (*Amorphous Silica Fabric from the PRC*), and accompanying IDM at Comment 8.
[35] *See Solar Products PRC Preliminary* PDM at 17-18.
[36] *See* Petitioner's Letter, "Crystalline Silicon Photovoltaic Products from the People's Republic of China: Submission of Benchmark Information," (January 17, 2017) (Petitioner Benchmark Submission) at Exhibit 7; *see also* Trina Solar's Letter, "Crystalline Silicon Photovoltaic Products from the People's Republic of China: Benchmark Submission," (January 17, 2017) (Trina Solar's Benchmark Submission) at Exhibit 5.
[37] *See Solar Products PRC Preliminary* PDM at 17-18 and 25-27.

This is consistent with the Department's approach in other proceedings where we constructed a benchmark for solar glass based on an average of the annual solar glass prices compiled by IHS and the monthly prices for tempered glass compiled by the Global Trade Atlas.[38] Thus, based on the information on the record of this review, we are relying on the simple average of the solar glass prices provided by Comtrade (adjusted to only include prices from solar glass producing countries) and IHS (adjusted to remove PRC-related prices), pursuant to 19 CFR 351.511(a)(2)(ii), to construct the benchmark for the provision of solar glass.

Comment 5: Specificity of Glass for LTAR

Trina Solar's Case Brief

- The Department cannot recognize the particular and unique characteristics of solar glass to reach its determination that the provision of solar glass is specific, but then ignore those unique characteristics when selecting appropriate benchmarks for measuring whether such goods were provided for LTAR.
- If the Department regards the basket categories for glass under HTS heading 7007 to be sufficiently specific to solar glass for benchmarking purposes, then it must also reassess its specificity determination and find that the provision of glass is not specific because the Department would have no reason to believe that any of the factors necessary to find that a subsidy is specific exist for the provision of glass.

SolarWorld's rebuttal brief

- The Department should continue to find the provision of solar glass specific regardless of the benchmark used to measure the benefit.
- The Department has the discretion in determining the best available match for benchmarks, as there may not be a precise match.
- Matching the domestic purchases to world prices to measure the benefit has nothing to do with whether a specific financial contribution was provided.

Department's Position:

In its comments, Trina Solar contends that the Department contradicts itself by declining to use the GOC's data for the PRC tempered glass industry because it is not specific to solar glass when making its specificity determination, but then relying on tempered glass data when constructing its solar glass benchmark to determine the adequacy of remuneration. We disagree with Trina Solar. The Department examines the specificity of a subsidy based on section 771(5A)(A)-(D) of the Act, and it examines whether goods or services have been provided by the government for LTAR under section 771(5)(E) of the Act and 19 CFR 351.511(a)(2). Thus, the Department relies on different methodologies and procedures to determine whether a subsidy is specific and for determining whether a subsidy provides a benefit. Neither the Act, nor the Department's regulations, require that the Department rely on data that covers identical products when making these determinations, as argued by the respondent.

[38] *See, e.g., Solar Cells PRC 2013 AR* IDM at Comment 6.

All else being equal, the Department would prefer a data set that is most specific to the solar glass industry in both contexts. However, as explained in response to the comment above, the data provided for benchmarking purposes, while specific to the solar glass industry, does not account for price variations over time, and parties have not referenced any evidence on the record indicating that accounting for such variations is not important in this review or in this industry. The GOC merely notes that the Department's practice of calculating monthly benchmark values is not a hard-and-fast rule. However, the GOC has not explained why such an exception to the rule is warranted in this case. Thus, we determine that the best data for benchmarking purposes is an average of the specific IHS data and the monthly GTA data. In contrast, there is no reason to consider the broad data provided by the GOC for specificity purposes, given the other information specific to the solar glass industry cited by the Department in the *Preliminary Results*.

Comment 6: Aluminum Extrusions Benchmark

Trina Solar's Case Brief

- The Department should only use IHS data for the aluminum extrusions benchmark, excluding the UN Comtrade data.
- The Comtrade data set is not specific to Trina Solar's aluminum frames. There are no descriptions of the HTS codes included in the Comtrade data or any evidence that they are specific to the aluminum frames purchased by Trina Solar.
- The IHS data set is specific to aluminum extruded frames for solar modules—the exact good purchased by Trina Solar and alleged in the LTAR allegation.
- UN Comtrade data cannot be used because they are over-inclusive basket HTS classifications.
- The Department has already found that a "basket" category is not specific enough to value aluminum frame components of solar cells in an antidumping context.[39] The CIT reviewed the Department's decision with respect to surrogate values for aluminum frames and confirmed that a broad HTS code was inherently problematic because it covers an array of merchandise that is not specific.[40]
- If the Comtrade data set is included, the Department must recalculate the Comtrade benchmark.
- The Department included Comtrade dollar values even where the entry reports no corresponding quantity.
- The Department (if it decides to continue using Comtrade data) must not include Comtrade transactions where the quantity is not specified or is marked zero.

SolarWorld's Rebuttal Brief

- The Department should continue to use UN Comtrade data for the aluminum extrusions

[39] *See Solar Cells PRC AD Investigation* IDM at 63.
[40] *See Jiangsu Jiasheng Photovoltaic Tech. Co., Ltd. v. United States*, 28 F. Supp. 3d 1317, 1333-38 (Ct. Int'l Trade 2014)

benchmark.

- The selection of a world price benchmark for subsidies is inherently different than the selection of surrogate values for dumping margins.
- The Department first examines whether a specific financial contribution was provided, then measures the benefit conferred. If there are no market prices for actual transactions in the country under review, the Department uses world market prices to measure the benefit.
- There may not be an exact match available between goods traded on the world market compared to the domestic purchases.
- The Department has in the past used GTA export data (similar to the UN Comtrade data) under various HTS headings to measure the subsidy including in *Solar I*. In *Solar I*, the Department relied upon the entire universe of GTA data and should continue to do so in the final results.

Department's Position:

As discussed in the *Preliminary Results*, the Department determined that the PRC's aluminum extrusions market is distorted and that it is necessary to rely on "tier two" world market price data for the benchmark for the provision of aluminum extrusions for LTAR.[41] In this case, we received two possible sets of world market price data: (1) monthly Comtrade data covering merchandise classified under the HTS classifications, 7604.21, 7604.29, and 7610.10, and (2) IHS data for annual prices for aluminum frames.[42] Because we determined that the PRC's aluminum extrusions market is distorted, we evaluated the Comtrade and IHS world price data that parties contend we should consider for the selection of the aluminum extrusions benchmark. Trina Solar argues that the Department relied on the Comtrade data based on an assertion that this data set relates to aluminum extrusions, but that there is no evidence that the Comtrade data set relates to the specific aluminum frames used by the respondent. However, the Department is familiar with the merchandise that is classified under the above-referenced HTS classifications, and we have relied upon these HTS classifications in prior cases when measuring the remuneration for the provision of aluminum extrusions in cases, such as *Aluminum Extrusions from the PRC 2013 AR*.[43]

Based on the descriptions of the merchandise described under the HTS classifications, 7604.21, 7604.29, and 7610.10, we find that the world market prices listed in the Comtrade data set are suitable for use in constructing the benchmark price for the respondents' purchases of aluminum extrusions. With respect to the IHS data set for aluminum frames, the Department is also familiar with this data set, as it was used in constructing the benchmark price for aluminum extrusions in other proceedings.[44] As a result of our examination of the IHS data, we find that

[41] *See Solar Products PRC Preliminary* PDM at 18-19.

[42] *See* Petitioner Benchmark Submission at Exhibit 5; *see also* Trina Solar Benchmark Submission at Exhibit 9.

[43] *See Aluminum Extrusions from the People's Republic of China: Final Results, and Partial Rescission of Countervailing Duty Administrative Review; 2013*, 80 FR 77325 (December 14, 2015) (*Aluminum Extrusions 2013 AR*) and accompanying IDM at Comment 12.

[44] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review; 2013; and Partial Rescission of Countervailing Duty Administrative Review*, 81 FR 908 (January 8, 2016), and accompanying Preliminary Decision Memorandum at 16 (unchanged in *Solar Cells PRC 2013 AR*).

the world market prices in this data set are also suitable for constructing the aluminum extrusions benchmark.

In this case, the Comtrade data are reported on a monthly basis, which the Department has found to be preferable because the data reflect price fluctuations over the course of the POR.[45] The IHS data are imperfect in this regard, because the data are presented on an annual basis, which limits the Department's ability to take price changes over the POR into account when calculating a benefit. However, the IHS data are limited to aluminum frames, while the Comtrade data represent a broader category of aluminum products. The Department normally attempts to rely on data reflecting the narrowest category of products encompassing the input product, where possible.[46] Accordingly, the IHS data reflects this preference better than the Comtrade data. Both the Comtrade and IHS data contain strengths and flaws, and although neither data set is ideal, considering the facts and circumstances of this proceeding, neither data set contains flaws or deficiencies so serious that either should be rejected in their entirety for the purpose of creating a more robust global benchmark. The factors relied upon by the Department when determining appropriate benchmark(s) for valuing an input depend on the facts surrounding the data/information placed on the record of a proceeding, and, therefore, must be evaluated on a case-by-case basis.[47] Therefore, and in accordance with 19 CFR 351.511(a)(2)(ii), in this case we find that it is appropriate to calculate an average of the Comtrade and IHS data sets when constructing the benchmark for measuring the remuneration of the respondent's purchases of aluminum extrusions. This is consistent with the Department's past practice when the record contains benchmark prices on a monthly basis for a broad category of input items, as well as annual prices covering a narrower category of input items. This method is consistent with the direction of the regulation to average prices to the extent practicable, and allows the Department to incorporate both data sets when neither set is ideal but neither set contains flaws or deficiencies so serious that it should not be incorporated.[48] We note that because we have determined that the GOC's involvement in the PRC's aluminum extrusions industry distorts the market, we have excluded any PRC imports from these data sets when constructing the benchmark.

Finally, Trina Solar argues that the Comtrade data should be disregarded when constructing the benchmark because, in the context of AD proceedings, the Department has found that a basket category is not specific enough to value aluminum frames.[49] We note that the AD and CVD laws and regulations establish different methodologies and procedures for determining surrogate values in non-market economy (NME) AD proceedings (*see* section 773(c)(4) of the Act and 19

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[45] *See, e.g., Steel Concrete Reinforcing Bar from the Republic of Turkey: Final Affirmative Countervailing Duty Determination; Final Affirmative Critical Circumstances Determination*, 79 FR 54963 (September 15, 2014), and accompanying IDM at 11; *see also Solar Cells PRC 2013 AR* IDM at Comment 6.
[46] *See, e.g., Certain Uncoated Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 81 FR 3110 (January 2, 2016), and accompanying IDM at 25-26; *see also Solar Cells PRC 2013 AR* and accompanying IDM at Comment 6.
[47] *See Solar Cells PRC 2013 AR* IDM at Comment 6.
[48] *Id*.
[49] *See* Trina Solar's Case Brief at 14 citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules 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 Cells PRC AD Investigation*) and accompanying IDM at 63.

CFR 351.408) and benchmarks in CVD proceedings (*see* section 771(5)(E)(iv) of the Act and 19 CFR 351.511(a)(2)). Because AD and CVD reviews are different proceedings operating under different provisions of the statute and the Department's regulations, it is not unusual or inconsistent that different values would be used as a surrogate value in an AD proceeding and as a benchmark in a CVD proceeding.[50] To create CVD benchmark values for LTAR benefit calculations, the Department must weigh the importance of monthly changes in the benchmark values with the specificity of the data. In AD NME surrogate value construction, by contrast, the Department seeks to use annual POR values.

Finally, contrary to Trina Solar's claim, the Department did not include Comtrade data in its preliminary benchmark calculations where there was a dollar value with no corresponding quantity. The Department has continued to exclude such values from its aluminum extrusion benchmark calculations in these final results.

Comment 7: Addition of Ocean Freight and Import Duties to LTAR Benchmarks

GOC's Case Brief

- Adjustments to a benchmark to account for items such as ocean freight and import duties should not be made where such adjustments are contrary to "prevailing market conditions."
- The statute explicitly directs the Department to consider such in-country conditions as availability and transportation, both of which are relevant to whether ocean freight or import duty adjustments are appropriate.
- The prominence of domestic supply in the market relative to import supply is an important consideration when determining the generally applicable delivery charges for the good in question in the country of provision.
- The fact that some import purchases happen, or that imports occur in a market, does not justify the wholesale application of ocean freight and import duty adjustments to the benchmark since that does not reflect the market generally.
- For its construction of benchmarks, the Department must take into account prevailing transportation costs that are generally applicable to all purchasers in the PRC.
- Imports of tempered glass made up less than 1 percent of the PRC's domestic consumption of tempered glass in 2015, so it is inappropriate to add ocean freight and import duties on the benchmark.
- Ocean freight and import duties must be limited to reflect the prevailing market conditions in the PRC for the specific good in question.
- One approach would be to apply a domestic/import supply ratio to the duty or freight adjustment.

SolarWorld's Rebuttal Brief

- The Department should continue to calculate freight and import duties on input purchases

[50] *See Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Results of Countervailing Duty Administrative Review*, 76 FR 77206 (December 12, 2011), and accompanying IDM at Comment 1.

as it did in the preliminary results.

- There are no "prevailing market conditions" for the goods in the PRC. Because there are no prevailing market conditions for the goods, the Department necessarily resorted to a "tier two" benchmark methodology and utilized a "world market price" because "such price would be available to purchasers in the country in question."
- The Department's longstanding practice is to include international freight and import duties in tier two benchmarks.
- In *Creswell Trading Co. v. United States*, the Court of Appels for the Federal Circuit noted: "A castings manufacturer procuring pig iron on the world market would have to pay the f.o.b. price for the pig iron itself, plus the cost of shipping that iron to India. Accordingly, the world market price must include the cost of shipping."[51]
- The GOC's case reference was not applicable in this case, because if there were significant levels of imports, the Department would have used a "first tier" benchmark.

Department's Position:

For these final results, the Department is continuing to incorporate international freight values and import duties in its external benchmark prices. According to 19 CFR 351.511(a)(2)(iv), world market prices must be adjusted to include delivery charges and import duties in order to arrive at a delivered price "to reflect the price that a firm actually paid or would pay if it imported the product."[52] The courts have upheld our application of these adjustments as lawful and in compliance with our regulations.[53] The Department determined that it was appropriate to use world market prices as the benchmarks for the company respondents' purchases of these inputs and, therefore, we must adjust such prices as required by our regulations. We are calculating a delivered price that includes freight and import duties, which is the price that a company would pay if it imported the inputs in question. Whether the company respondent actually imported the inputs and paid international freight and/or import duties is not relevant for purposes of determining an appropriate benchmark.[54] However, consistent with section 771(5)(E) of the Act, the Department does consider the prevailing conditions of the country in question in this analysis. Accordingly, we have used an average of the Maersk and Xeneta ocean freight charges, actual inland freight charges as reported by the company respondent, and actual PRC import duties for the specific inputs we are examining to compute benchmark prices. Thus, these charges reflect prices and rates in the PRC market, and, therefore, directly relate to prevailing market conditions in the PRC.[55] Accordingly, the Department finds that it is appropriate to continue incorporating international freight values and import duties in the external benchmark prices used in this administrative review.

Comment 8: Addition of VAT to LTAR Benchmarks

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[51] *See Creswell Trading Co. v. United States*, 141 F.3d 1471, 1478 (CAFC 1998) (*Creswell Trading*).
[52] *See* 19 CFR 351.511(a)(2)(iv).
[53] *See Beijing Tiahai Indus. Co. v. United States*, 52 F. Supp. 3d 1351, 1372-75 (CIT 2015); *see also Zhaoqing New Zhongya Aluminum Co., Ltd. v. United States*, 929 F. Supp. 2d 1324, 1327 (CIT 2013) and *Creswell Trading*, 141 F.3d at 1478.
[54] *See, e.g., Countervailing Duty Investigation of Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 80 FR 34888 (June 18, 2015), and accompanying IDM at Comment 3.
[55] *Id*.

Trina Solar's Case Brief

- In the *Preliminary Results*, the Department used tier two benchmarks, adjusted to include delivery charges, import duties, and VAT, to value polysilicon, aluminum extrusions, and solar glass. The Department must remove VAT from its benchmark prices and from Trina Solar's purchase prices in the final results.
- The Department acted contrary to the statute and its regulations by including VAT in the benchmark prices, as VAT is not explicitly listed as an allowable adjustment under section 771(5)(E)(iv) of the Act.
- VATs may not be construed as allowable delivery charges or import duty benchmark adjustment items under 19 CFR 351.511(a)(2)(iv). It is defined as an indirect tax under 19 CFR 351.102(b)(28).
- VAT is paid upon the purchase of a production input, but it is either later recouped when the taxpayer re-sells the good domestically with value added or it is refunded when the good is exported.
- By adding VAT to the benchmark, Commerce's position is that the only relevant price is the price paid at the moment of delivery and ignores the actual net price paid for the production input. This position directly contradicts the language that the benchmark comparison prices reflect "the price that a firm actually paid or would pay" under 19 CFR 351.511(a)(2)(iv).
- Adding the VAT to both benchmark prices and purchase prices inflates the benefit rate by the amount of the VAT, leading to a distorted analysis.

SolarWorld's Rebuttal Brief

- The Department should continue to use VAT adjustments on benchmarks.
- The intent of the Department's benchmarking is to use a benchmark that "a firm actually paid or would pay."
- In *Steel Cylinders from the PRC*, the Department refused to exclude VAT, even when the respondent did not pay a VAT.[56]
- The Department explained that, "domestic inputs purchased by BTIC (respondent) are delivered prices which include all delivery charges and VAT. Therefore, in order to ensure an 'apples-to-apples' comparison between these domestic input purchases and the world-market benchmark, our regulations require the use of delivered prices, which include import duties and VAT."
- The Department should reject the argument that Trina Solar would have the VAT it pays on inputs later recouped or refunded when it sells the finished product. It should make an apples-to-apples comparison between the benchmark and the respondent's actual purchases.
- In *Melamine from Trinidad and Tobago* a similar argument was made. The Department declined to make any adjustment to the benefit calculation, finding "that respondents have not sufficiently demonstrated that {they} would have received a VAT rebate for the

[56] *See High Pressure Steel Cylinders from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 26738 (May 7, 2012) (*Steel Cylinders from the PRC*), and accompanying IDM at Comment 9.

> imported equipment upon the exportation of finished products."

Department's Position: Pursuant to 19 CFR 351.511(a)(2)(iv), the Department will adjust benchmark prices to reflect the price a firm actually paid or would pay if it imported the product, while also making adjustments for delivery charges and import duties. The Department adds freight, import duties, and VAT to the world prices in order to estimate what a firm would have paid if it imported the product. As long as VAT is reflective of what an importer would have paid, then VAT is appropriate to include in the benchmark. Accordingly, we find that our regulations require us to consider all adjustments necessary to make a proper comparison and are not limited to delivery charges and import duties. The CIT has affirmed our inclusion of VAT in measuring the benefit from goods provided for LTAR.[57] As such, and consistent with past practice, the Department has not excluded VAT from its benchmark prices for the final results.[58]

With respect to the company respondents' arguments that VAT is not listed in the Department's regulations as an allowable adjustment like delivery charges and import duties and that the Department acted contrary to the statute and its own regulations by including VAT in the benchmark prices for LTAR programs regarding solar glass, polysilicon, and aluminum extrusions, 19 CFR 351.511(a)(2)(i) states that the Department will:

> . . . normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question. Such a price could include prices stemming from actual transactions between private parties, actual imports, or, in certain circumstances, actual sales from competitively run government auctions. In choosing such transaction or sales, the Secretary will consider product similarity; quantities sold, imported, or auctioned; and other factors affecting comparability.[59]

As we have stated before, this is the governing principle when the Department conducts the benefit analysis for an LTAR program.[60] Therefore, where an import price is used, 19 CFR 351.511(a)(2)(iv) establishes that the Department will adjust the benchmark price to reflect the price a firm actually paid or would pay while also stating that the adjustment will include delivery charges and import duties. Trina Solar contends that the second part of this regulation limits allowable adjustments to delivery charges and import duties, thereby prohibiting adjustments for VAT. Trina Solar misunderstands the benchmark price and comparison price being constructed by the Department.

The Department is relying on world price data as the basis for our benchmarks for solar grade polysilicon, solar glass, and aluminum extrusion purchases during the POR. Therefore, the Department adds freight, import duties, and VAT to the world prices in order to estimate what a firm would have paid if it imported the product. As long as VAT is reflective of what an importer would have paid, the VAT is appropriate to include in the benchmark. Trina Solar

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[57] *See Beijing Tiahai Indus. Co. v. United States*, 52 F. Supp. 3d 1351, 1372-75 (CIT 2015).
[58] *See Amorphous Silica Fabric PRC* IDM at Comment 10.
[59] *See* 19 CFR 351.511(a)(2)(i).
[60] *See Solar Cells PRC 2013 AR* IDM at Comment 8.

argues that we should remove the VAT payments from its domestic purchases. This is incorrect because, as noted above, the Department's regulations require that we ensure the benchmark price reflects the price a firm actually paid or would pay. The assessment of VAT on these goods is standard practice and is what a firm would normally pay.[61] The GOC confirmed this by reporting the VAT assessment rates that apply to each of these inputs.[62] Accordingly, the Department finds that our regulations require us to consider all adjustments necessary to ensure an accurate comparison and are not limited to delivery charges and import duties, as argued by the company respondent. To exclude VAT and/or to adjust the reported purchases by removing VAT would result in a less accurate comparison and, therefore, would be inconsistent with the Department's regulations. As such, the Department has made no changes to the benchmark prices used in the *Preliminary Results* with respect to VAT.

Trina Solar also contends that, because the goods are later resold or exported, the company recoups any VAT that is paid and, therefore, that VAT should be excluded from the benchmarks and the domestic purchases of inputs. The Department has considered and rejected this argument before.[63] This argument fails to consider the Department's obligation to conduct a comparison between a market price and the price paid by the respondent. Section 351.511(a)(2) of the Department's regulations does not contemplate future reimbursements for refunds or taxes, but instead requires us to evaluate the purchases in the form in which they are made. Whether a firm recovers VAT after delivery of the input is immaterial to the delivered price that the Department must use as the comparison price under 19 CFR 351.511(a)(2)(iv).[64]

Comment 9: Offsetting of Purchases above Benchmarks

GOC's Case Brief

- The Department did not include purchases of solar glass, aluminum extrusions, or polysilicon that were above the benchmark price in its benefit calculations.
- Zeroing the transactions that were priced higher than the benchmark prevents an accurate calculation of the overall benefits actually received by the respondents, and the Department should avoid zeroing in its final calculations.

SolarWorld's Rebuttal Brief

- The Department should continue to calculate the benefit for the LTAR programs as it did in the preliminary results.
- By definition, a benefit cannot be a negative value. The benefit only occurs when the recipient received something.

Department's Position:

The LTAR benefit methodology applied in the *Preliminary Results*, which is to compare the

[61] *Id*.
[62] *See* the GOC October 11, 2016 IQR at 38, 60, and 82.
[63] *See Solar Cells PRC 2013 AR* IDM at Comment 8.
[64] *Id*.

actual input purchases made by the respondent to a world market price, is consistent with the regulations and is the Department's practice.[65] In a subsidy analysis, a benefit is either conferred or not conferred, and a positive benefit from certain transactions cannot be masked by "negative benefits" from other transactions. There is no offsetting credit for transactions that did not provide a subsidy benefit. Such an adjustment is not contemplated under the statute and is inconsistent with the Department's practice.[66] Therefore, we have made no modifications to the final results calculations regarding alleged "negative" benefits.

Comment 10: Electricity for LTAR

Trina Solar's Case Brief

- The Department should not countervail the provision of electricity, or it should recalculate the benchmark.
- The Department made an inferred determination that the provision of electricity in the PRC is a regional or geographic subsidy, but the preliminary results do not indicate that there is any missing information requested from the GOC regarding the reason for differences in electricity rates between provinces. Therefore, there is no basis for picking and choosing among different rate categories.
- The provision of electricity is, by definition, a domestic subsidy because electricity cannot be exported or imported. However, the Department did not make any of the necessary findings for classifying a domestic subsidy as specific or cite to any facts that would support the proposition that electricity rates differ for users or industries within the regions.
- The solar industry does not fall into any of the special categories that the GOC reported as having lower electricity rates.
- The Department did not apply AFA or find that the GOC's list of rates was flawed, incomplete, or otherwise unverified, so there is no basis to assume that the solar products industry benefits from preferential electricity rates.
- The Department's *de facto* regional subsidy finding conflicts with Article 2.2 of the Agreement on Subsidies and Countervailing Measures.
- Electricity tariff rates provided by the GOC "are equally applied to all end users. No specificity exists with regard to the electricity prices."
- Even under AFA, selecting the worst possible rates in the PRC is nonsensical because it imputes electricity rates from provinces in which Trina Solar has no facilities.

SolarWorld's Rebuttal Brief

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[65] *See* 19 CFR 351.511(a)(2)(ii); *see also, e.g., Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products from the People's Republic of China: Preliminary Affirmative Determination*, 80 FR 68843 (November 6, 2015), and accompanying PDM at 33-34 (unchanged in the Final Determination, 81 FR 35308 (June 2, 2016))

[66] *See Final Results of Countervailing Duty New Shipper Review: Certain Softwood Lumber Products From Canada*, 70 FR 56640 (September 28, 2005) and accompanying IDM at Comment 6; *see also Drill Pipe from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2011*, 78 FR 47275 (August 5, 2013), and accompanying IDM at Comment 3; *see also Certain Oil Country Tubular Goods from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Negative Critical Circumstances Determination*, 74 FR 64045 (December 7, 2009), and accompanying IDM at Comment 14.

- Trina Solar's entire argument about regional specificity is irrelevant given that the GOC refused to allow the Department to fully examine the relevant information.
- It is fully reasonable to presume as AFA that Trina Solar paid the highest provincial rates in China, even if a Trina Solar facility was not located in the province where the rate applies because including only certain provinces and not others would constitute only the application of neutral facts available.
- The Department should continue to select the "highest electricity rates on the record for the applicable rate and user categories" as the benchmark rates for the final results.

Department's Position: The Department disagrees with Trina Solar's arguments. As noted in the *Preliminary Results*, the GOC did not provide all of the requested information. Therefore, we found that the GOC did not act to the best of its ability to comply with our requests for information.[67] As a result of the GOC's unwillingness to cooperate, the Department was unable to determine whether the electricity rates included in the electricity schedules submitted by the GOC were calculated based on market principles. As a result, the Department applied facts available with an adverse inference to the determination of the appropriate benchmark. Specifically, because the GOC provided the provincial electrical tariff schedules, the Department relied on this information as facts available and, in order to make an adverse inference, used the highest rates amongst these schedules for each reported electrical category as the benchmarks in the benefit calculations for this program.

As the selected highest electricity rates for each category are spread across electricity schedules from different provinces, Trina Solar argues that the Department has made an inference that the provision of the electricity for LTAR is a regional or geographical-specific program. Trina Solar misconstrues our reliance on the highest electrical rate from any of the provincial schedules as a determination on program specificity. Indeed, the selection of electricity benchmark rates is based on the GOC's failure to cooperate, which resulted in the Department's need to identify electricity benchmarks based on facts available with an adverse inference. The Department's determination to use regional rates for the provision of electricity for LTAR does not reflect a determination by the Department that the program is regionally or geographically specific; rather, the GOC's failure to cooperate means that both our specificity determination and our benchmark determination must rely on the facts available on the record, with appropriate adverse inferences.[68] The Department attempted to obtain information on how PRC provincial schedules are calculated and why they differ,[69] which could have contributed to the Department's analysis of an appropriate benchmark for the benefit calculation in this program. The GOC's failure to respond to our questions on how electrical tariff schedules are established in the PRC is precisely the reason why the Department is applying AFA in this case with respect to the selection of an electricity benchmark. Therefore, the Department has not made a determination, inferred or otherwise, related to this program being a regional or geographical-specific program. The fact that the GOC refused to answer questions related to regional electrical differences, including differences between industries, means that the Department is unable to carry out this analysis.

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[67] *See Solar Products PRC Preliminary* PDM at 27-28.
[68] *Id*.
[69] *Id*.; *see also* the GOC October 11, 2016 IQR at 99.

Finally, with respect to Trina Solar's argument that the Department should select the highest electricity rates from the provinces in which the company's facilities are located in order to calculate a benefit, we agree with the petitioner that such a calculation would be equivalent to the application of facts otherwise available rather than the application of facts available with an adverse inference. A benchmark of this kind fails to take into account the fact that the GOC refused to act to the best of its ability in complying with our request for information on this program and does little to incentivize the GOC to cooperate with regard to this program in future proceedings. Furthermore, without sufficient record information regarding how the different electricity rates were determined, the Department considers it plausible that a respondent in the PRC could have been subject to the highest rates in the PRC, regardless of its location. Accordingly, based on the record of this review, it is appropriate that the Department continue to select electricity benchmarks based on the highest rate for each category across all PRC electricity schedules. The Department's determination here is consistent with U.S. law, which is in turn consistent with the Agreement on Subsidies and Countervailing Measures.

Comment 11: Usage of Export Buyer's Credit Program

Trina Solar's Case Brief

- The Department should find that the China Ex-Im Bank Buyer's Credit program was not used by Trina Solar or its customers.
- The record demonstrates that none of Trina Solar's POR exports benefited from the Ex-Im Bank's Export Buyer's Credit Program.
- The customers of Trina Solar's US affiliate, Trina Solar US, Inc. (TUS), are not eligible for the Ex-Im Export Buyer's Credit Program.
- TUS certified that it did not use the program and that none of its customers used this program. Furthermore, TUS requested that each of its customers sign a statement confirming whether they have used the program. Every response by TUS's customers certified non-use of the program.
- The existence of a 2013 amendment to the program cannot have any bearing on whether the certifications of non-use by Trina Solar's US customers are verifiable or reliable.
- The Department could issue supplemental questionnaires or conduct verification to confirm the certificates of non-use.
- The Department should not ignore the certificates of non-use for the final determination.

SolarWorld's Case Brief

- The GOC has been uncooperative, and the Department should continue to apply total AFA with respect to the Ex-Im Bank Export Buyer's Credit program in the final results of this review.

GOC's Rebuttal Brief

- The evidentiary record before the Department demonstrates unequivocally that the GOC and Trina Solar asserted and submitted information demonstrating non-use of the Export Buyer's Credit program. Whatever deficiencies the petitioner and the Department may perceive in terms of the GOC's responsiveness concerning aspects of the program, the record is perfectly clear as to the question of use.

- Trina Solar's certification of non-use of the program is an adequate basis for determining non-use. The CIT has held that "{w}hen Commerce can independently fill in the gaps, without the requested information…adverse inferences are not appropriate."[70] The Department cannot limit itself to one means of determining non-use of a program.

Trina Solar's Rebuttal Brief

- The Department should find that the Ex-Im Bank Buyer's Credit program was not used by Trina Solar or its customers.
- The record demonstrates that none of Trina Solar's POR exports benefited from the Ex-Im Bank's Export Buyer's Credit Program.
- TUS's customers are not eligible for the Ex-Im Export Buyer's Credit Program.
- TUS certified that it did not use the program and that none of its customers used this program. Furthermore, TUS requested that each of its customers sign a statement confirming whether they have used the program. Every response by TUS's customers certified non-use of the program.
- The existence of a 2013 amendment to the program cannot have any bearing on whether the certifications of non-use by Trina Solar's US customers are verifiable or reliable.
- The Department could issue supplemental questionnaires or conduct verification to confirm the certificates of non-use.
- The Department should not ignore the certificates of non-use for the final determination.
- While the Department may have unanswered questions regarding certain aspects of the program, this missing information does not negate the information that is on the record regarding its non-use.
- The Department has an obligation to consider whether record evidence establishes non-use of this program in this case, regardless of information that may be missing from the record that is not relevant to the issue of non-use.

SolarWorld's Rebuttal Brief

- The Department should continue to reject the certificates of non-use by Trina Solar's US customers.
- The GOC has refused to provide critical information on this program and has impeded the review to the extent that the use of AFA is warranted.
- The GOC refused to answer questions regarding the program, and instead replied that "none of the U.S. customers of the respondent used the Export Buyer's Credit…this question is not applicable." This represents non-compliance on the part of the GOC.
- In 2013, the GOC eliminated the minimum requirement of contract amounts of $2 million U.S. dollars, despite the GOC's response to the Department's initial questionnaire.
- The China Ex-Im Bank may disburse export buyer's credits directly or through third-

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[70] *See Fine Furniture (Shanghai) Ltd. v. United States*, 865 F. Supp. 2d 1254, 1260 (CIT 2012) (citing *Zhejiang Dunan Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011); *Gerber Food (Yunnan) Co. v. United States*, 387 F. Supp. 2d 1270, 1283 (Ct. Int'l Trade 2005)).

party partners and/or correspondent banks. When the Department asked the GOC a series of questions concerning the disbursement of the funds, the GOC stated, "Since none of the U.S. customers of the respondent used the Export Buyer's Credit from the {Ex-Im Bank} during the POI, this question is not applicable."

- The fact pattern is exactly the same as in *Solar I*, where the Department rejected Trina's certificates of non-use.

Department's Position:

Consistent with the *Preliminary Results*, we continue to find that the record of the instant case does not support a finding of non-use regarding the Export Buyer's Credit Program,[71] and we disagree with the arguments made by the GOC and Trina Solar. In prior examinations of this program, we have found that the China Ex-Im Bank, as the lender, is the primary entity that possesses the supporting information and documentation that are necessary for the Department to fully understand the operation of this program, which is a prerequisite to the Department's ability to verify the accuracy of the respondents' claimed non-use of the program.[72] As we discussed in the *Preliminary Results*, the GOC did not provide requested information and documentation necessary for the Department to develop a complete understanding of this program (*i.e.*, information regarding whether the China Ex-Im Bank uses third-party banks to disburse/settle export buyer's credits, and information on the size of the business contracts for which export buyer's credits are applicable)[73] As we stated in the *Preliminary Results*, this information is critical for the Department to understand how export buyer's credits flow to and from foreign buyers and the China Ex-Im Bank. Absent the requested information, the GOC's claims that the respondent company did not use this program are not reliable. Moreover, without a full and complete understanding of the involvement of third-party banks, the respondent company's (and its customers') claims are also not reliable because the Department cannot be confident in its ability to verify those claims.

We disagree with the GOC's argument that the information on the record of this review is identical to the information submitted in *Solar I 2013 AR*. In this review, we have information on the record regarding the 2013 revisions to the program and the involvement of third-party banks, which was not present on the record in *Solar I 2013 AR*.[74] Moreover, in *Solar I 2013 AR*, we specifically stated that, even though we found the record there supported a conclusion of non-use, we intended to continue requesting the GOC's cooperation regarding this program in future proceedings, and we would base subsequent evaluations of this program on the record for each respective proceeding.[75] By not responding to our requests for additional information regarding

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[71] *See Solar Products PRC Preliminary* PDM at 30-32.
[72] *See, e.g., Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products from the People's Republic of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 81 FR 35308 (June 2, 2016), and accompanying IDM at Comment 6; *see also Chlorinated Isocyanurates from the People's Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2014*, 82 FR 27466 (June 15, 2017) (*Chlorinated Isos PRC*), and accompanying IDM at Comment 2 (concluding that "without the GOC's necessary information, the information provided by the respondent companies is incomplete for reaching a determination of non-use").
[73] *See Solar Products PRC Preliminary* PDM at 30-32.
[74] *See* Memorandum, "Placing Information on the Record," October 21, 2016.
[75] *See Solar Cells PRC 2013 AR* IDM at Comment 1.

the operation of this program, the GOC was uncooperative in the instant proceeding. Without this additional information, the Department determines that the information provided by the GOC and our understanding of this program is incomplete and unreliable. As such, we recognize that we cannot rely on information about this program provided by parties other than the GOC (*i.e.*, the respondent company's customers' certifications of non-use).[76]

With respect to arguments that AFA should not be applied for this program, we continue to find that the GOC withheld necessary information that was requested and significantly impeded the proceeding and, thus, that the Department must rely on facts otherwise available in issuing these final results, pursuant to sections 776(a)(2)(A) and 776(a)(2)(C) of the Act. Moreover, we determine that the GOC failed to cooperate by not acting to the best of its ability to comply with our request for information. Specifically, the GOC withheld information that we requested that was reasonably available to it. Consequently, we find that an adverse inference is warranted in the application of facts available, pursuant to section 776(b) of the Act. As AFA, we determine that this program provides a financial contribution, is specific, and provides a benefit to the company respondents within the meaning of sections 771(5)(D), 771(5A), and 771(5)(E), respectively, of the Act. This finding is identical to the application of AFA in prior proceedings (*e.g.*, *Chlorinated Isos from the PRC*).[77] In both proceedings, the Department requested operational program information from the GOC on this program, noting that there were substantial changes to the program in 2013, which the GOC declined to provide. This information is necessary to the analysis of this program.

Furthermore, we disagree with the GOC and respondent parties' arguments that non-use of the program is verifiable and cannot be found otherwise because the Department decided not to verify the customers' certifications of non-use. The Department is not finding the mandatory respondent's customers' certifications of non-use to be unreliable because it declined to verify them. Rather, the Department finds the mandatory respondent's customers' certifications of non-use to be unreliable because, without a complete understanding of the operation of the program, which could only be achieved through a complete response by the GOC to Department's questionnaires, verification of the respondent's customers' certifications of non-use would be meaningless.

The Department considered all of the information on the record of this proceeding, including the statements of non-use provided by the company respondent. However, as explained above and in the *Preliminary Results*, we are unable to rely on the information provided by the company respondent due to the Department's lack of a complete and reliable understanding of the program.[78] The GOC argues that, while it may not have provided specific information regarding the mechanics of the Export Buyer's Credit program, the information that it did not provide only goes to the countervailability of this program. We disagree with the GOC. The Department's complete understanding of the operation of this program is a prerequisite to our reliance on the information provided by the company respondent regarding non-use.[79] Thus, without the necessary information that we requested from the GOC, the information provided by the

[76] *See Solar Products PRC Preliminary* PDM at 31.
[77] *See Chlorinated Isos PRC* IDM at Comment 2.
[78] *Id*.
[79] *Id*.

company respondent is incomplete for reaching a determination of non-use.[80]

In this case, the GOC argues that the relevant information that exists on the record consists of the declarations from the company respondent's U.S. customers certifying that they did not use the GOC's Export Buyer's Credit Program.[81] The GOC's Ex-Im Bank, however, is the primary entity that possesses the supporting records that the Department needs to understand the post-2013 changes to the program and to verify the accuracy of the claimed non-use of the program, because it is the lender. Accordingly, information regarding the operation of this program and the respondent's usage of it would come from the GOC.

The CAFC has previously affirmed that certain information comes from the government and that the Department can take an action that adversely affects a respondent if the government fails to provide requested information:

> Fine Furniture is a company within the Country of China, benefitting directly from subsidies the {GOC} may be providing, even if not intending to use such subsidy for anticompetitive purposes. Therefore, a remedy that collaterally reaches Fine Furniture has the potential to encourage the {GOC} to cooperate so as not to hurt its overall industry. Unlike in *SKF*, Commerce in this case did not choose the adverse rate to punish the cooperating plaintiff, but rather to provide a remedy for the {GOC's} failure to cooperate.[82]

Additionally, the CAFC held that:

> {T}he purpose of {section 776}(b), according to the {*SAA*}, which 'shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the URAA,' 19 U.S.C. 3512(d), is to encourage future cooperation by 'ensur{ing} that the party does not obtain a more favorable result by failing to provide a reasonable estimate base on the best facts available, accompanied by a reasonable adverse inference used in place of missing information, this statute provides a mechanism for remedying sales at less than fair value to aid in the protection of U.S. industry . . .[83]

Therefore, in making our determination that the company respondent used the Export Buyer's Credit Program, we find that it would be inappropriate to rely on the certifications of claimed non-usage submitted by the company respondents because the GOC declined to provide all of the requested information that would enable the Department to understand the operation of the program after the 2013 amendments. Instead, we continue to determine usage of this program on the basis of AFA.

With respect to the information that was withheld by the GOC on this program, the Department

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[80] *Id*.
[81] *See* GOC Case Brief at 3-6.
[82] *See Fine Furniture (Shanghai) Limited v. United States*, 748 F.3d 1365, 1373 (Fed. Cir. 2014)
[83] *Id.; see also Biaxial Geogrid Products from the PRC* IDM at Comment 1.

does not consider section 782(d) of the Act to be applicable here.[84] In responding to our questions to aid in our understanding on determining the usage of this program, the GOC repeatedly stated that such questions were "not relevant and were unnecessary to determine usage."[85] This statement is the equivalent of a refusal to respond, rather than an attempt to respond that was deficient in its response. If the Department had to treat such intentional "non-responses" as deficiencies and provide a second chance to submit withheld information, parties would essentially be able to grant themselves an extension to any deadline, simply by not responding, knowing that they would be provided additional time to "remedy" the "deficiency" under section 782(d) of the Act after the Department issued a supplemental questionnaire.[86] Therefore, the Department finds that, in light of the GOC's refusal to substantively respond to the Department's questions on this issue, it was not necessary to provide the GOC with an additional opportunity to provide the information that it willfully withheld during its first opportunity to respond.

Comment 12: Selection of the AFA Rate for Export Buyer's Credit Program

SolarWorld's Case Brief

- The GOC has been uncooperative and unresponsive in the Department's investigation of the Ex-Im Bank Export Buyer's Credit program, and the Department should thus apply AFA in its final results.
- The Department's assignment of a 0.58 percent rate (the loan rate during the original investigation of this proceeding) is *de minimis* and by definition not an adverse inference. The same program was assigned a rate of 5.46 percent in *Solar I*.
- Assigning two separate subsidy rates to Trina in the two proceedings, therefore, is inherently unreasonable.
- The Department should choose AFA rates that are sufficiently adverse so as to induce respondents to provide the Department with complete and accurate information.
- The history of the GOC's non-compliance in this program has shown that the rate selected by the Department has not been "sufficiently adverse" to "induce respondents to provide the Department with complete and accurate information."
- The Department should calculate the benefit using Trina's own information and make adverse assumptions in the calculations where information is missing from the record.
    - The Department should presume as AFA that all of Trina's sales were financed through the Ex-Im Bank Export Buyer's Credit program.
    - The Department should presume as AFA that China Ex-Im Bank provided interest-free export credits to Trina Solar's customers.
    - The Department should assume that Trina Solar's customers were uncreditworthy.
    - Using a two-year uncreditworthy dollar loan as the benchmark, the rate would be 30.48 percent.

[84] Section 782(d) of the Act provides that if the Department determines that a response to a request for information is deficient, the Department shall provide the party with an opportunity to remedy or explain the deficiency.
[85] *See* the GOC's November 4, 2016 Supplemental Questionnaire Response at 1-2.
[86] *See Countervailing Duty Investigation of Stainless Steel Sheet and Strip from the People's Republic of China; Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 82 FR 9714 (February 8, 2017) and accompanying IDM at Comment 11.

- As an alternative, the Department should pick a different rate for a similar program from another proceeding, namely the 11.83 percent given to respondent Starbright for a debt forgiveness subsidy in *OTR Tires from the PRC*.

GOC's Rebuttal Brief

- The Department should continue to apply the AFA rate of 0.58 percent from the *Preliminary Determination.*
- The *de minimis* threshold is 0.5 percent in the context of the Department's AFA hierarchy. Thus, the 0.58 percent rate qualifies as an AFA rate and is otherwise consistent with the hierarchy.
- The petitioner is incorrect that the sole purpose of the AFA statute is to apply a rate that is sufficiently high so as to induce respondents to comply with request for information. Congress intended the adverse facts available rate "to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.

Trina's Rebuttal Brief

- If it does continue to find AFA, neither of the Petitioner's choices for AFA are supported by the record, the law, or the Department's practices.
- Knowledge of the program is not needed to make the separate and independent legal and factual determinations of whether the program was actually used.
- Each of the three facts in the proposal to calculate a rate of 30.48 percent are contradicted by record evidence or not supported by record evidence, and all three are completely unrelated to the purported missing information from the GOC.
- Regarding the petitioner's presumption that all of Trina Solar's sales were financed through the program, all of the information on the record indicates that none of Trina Solar's sales were supported by the program. Any presumption that *all* of Trina Solar's sales benefitted lacks in substantial evidence.
- Regarding the petitioner's presumption that the Ex-Im Bank provided interest-free credits to Trina Solar's customers, there is no evidence in the record that any credits were provided, let alone interest-free credits.
- Regarding the petitioner's presumption that Trina Solar's customers were uncreditworthy, nothing on the record indicates this, and this is completely unrelated to the purported lack of cooperation by the GOC.
- Neither proposal follows the Department's hierarchical method for selecting AFA rates. This proceeding includes a calculated rate for a program similar to the Ex-Im Buyer's Credit program, and the Department correctly relied on that rate.

Department's Position:

We have reviewed the comments from interested parties, and have made no change to the AFA rate selected in the *Preliminary Results* for this program.[87] As a result, we continue to apply the

[87] *See Solar Products PRC Preliminary* PDM at 31-32.

rate of 0.58 percent *ad valorem* to the Export Buyer's Credit Program. In these final results, as in the *Preliminary Results*, the Department has applied its CVD AFA hierarchy to determine an AFA rate for the Export Buyer's Credit program. Under the first step of the Department's CVD AFA hierarchy for administrative reviews, the Department applies the highest non-*de minimis* rate calculated for a cooperating respondent for the identical program in any segment of the same proceeding. If there is no identical program match within the same proceeding, or if the rate is *de-minimis*, under step two of the hierarchy, the Department applies the highest non-*de minimis* rate calculated for a cooperating company for a similar program within any segment of the same proceeding. If there is no non-*de minimis* rate calculated for a similar program within the same proceeding, under step three of the hierarchy, the Department applies the highest non-*de minimis* rate calculated for an identical or similar program in another CVD proceeding involving the same country. Finally, if there is no non-*de minimis* rate calculated for an identical or same program in another CVD proceeding involving the same country, under step four, the Department applies the highest calculated rate for a cooperating company for any program from the same country that the industry subject to the investigation could have used.[88]

Our examination of the results of all the segments of this proceeding leads us to conclude that there are no calculated rates for this program in this proceeding—and thus no rates are available under step one of the CVD AFA hierarchy. Because we have not calculated a rate for an identical program in this proceeding, we then determine, under step two of the hierarchy, if there is a calculated rate for a similar/comparable program (based on the treatment of the benefit) in the same proceeding, excluding *de minimis* rates. In the instant review, the GOC reported that the Ex-Im Buyer's Credit Program provides loan support through export buyer's credits.[89] Based on the description of the Ex-Im Buyer's Credit Program as provided by the GOC, we find that the "Preferential Loans and Directed Credit" program, as examined in the underlying CVD investigation, and the Ex-Im Buyer's Credit Program are similar/comparable programs because both programs provide access to loans. In examining the results of the segments of this proceeding, we find that the highest calculated rate for a cooperating respondent is 0.58 percent *ad valorem*, as calculated in the *Final Determination* for Trina Solar.[90] Because we find that the rate of 0.58 percent from the Preferential Loans and Directed Credit Program is the highest non-*de minimis* rate calculated for a similar/comparable program within the same proceeding, as specified under step two of our hierarchy, it is not necessary to proceed further through the Department's CVD AFA hierarchy methodology to determine whether to select an AFA rate from outside of this proceeding.

Regarding the petitioner's arguments that the GOC is a "repeat offender" by failing to provide requested information about this program and, furthermore, that the Department should apply a different rate for a similar program from another proceeding (*i.e.*, the *Solar Cells* proceeding), we disagree. The CIT recently evaluated and sustained the Department's application of the CVD AFA review hierarchy, rather than the CVD AFA investigation hierarchy, which would have

[88] *See* section 776(d) of the Act; *see also SolarWorld Americas, Inc. v. United States*, CIT Slip Op. 17-67 (*SolarWorld*, Slip Op. 17-67) (sustaining the Department's CVD AFA hierarchy and selection of AFA rate for CVD reviews).
[89] *See* GOC October 11, 2016 IQR at 104-106.
[90] *See Solar Products PRC Final*, and accompanying IDM at 24-25.

resulted in a higher AFA rate.[91] The Court noted that, in developing and applying its hierarchies, the Department seeks a rate that serves its "dual goals" of relevancy and inducing cooperation from respondents, and that the Department seeks to achieve relevancy by attempting to select an AFA rate that "best approximates how the non-cooperating respondent likely used the subsidy program."[92] Importantly, the Court sustained the Department's determination not to deviate from its hierarchy by applying AFA rates on a case-by-case basis, notwithstanding petitioners' arguments in that segment that the relevant AFA rate was insufficient to induce the GOC's cooperation, and thus a higher rate should be applied.[93] The Department continues to decline to deviate from its CVD AFA review hierarchy in this segment. Accepting the petitioner's argument and selecting a different rate from another proceeding in this segment would upset the balance between relevancy and inducement that the Department seeks when it applies its CVD AFA hierarchy to non-cooperating respondents; furthermore, consistently applying our CVD AFA hierarchy provides predictability and administrative transparency to parties involved in administrative proceedings before the Department. Accordingly, we decline to depart from our CVD AFA review hierarchy in this proceeding.

The Department also disagrees with the petitioner's argument that it should construct an AFA rate based on the respondents' own information with the assumption that all the company respondents' customers were uncreditworthy. In addition to the Department's practice of and reasons for following its CVD AFA review hierarchy discussed immediately above and by the Court, the record does not support "constructing" an AFA rate for non-cooperative respondents, and there is no information on the record indicating that all of the company respondent's customers were uncreditworthy.

The petitioner also argues that the Department should apply, as AFA for the Export Buyer's Credit program, the 11.83 percent rate calculated for a debt forgiveness subsidy in *OTR Tires PRC*.[94] However, because this rate is from a different proceeding, rather than a different segment of this same proceeding, it could only be applied under step three of our CVD AFA review hierarchy. As discussed above, the Department finds that there is no reason to depart from our hierarchy in this proceeding and, because there is a suitable rate that can be applied under step two of our hierarchy (*i.e.*, the 0.58 percent Preferential Lending and Directed Credit rate from a prior segment of this proceeding), there is no reason for the Department to continue to step three of its hierarchy.[95]

In accordance with section 776(c)(2) of the Act, we do not need to corroborate the 0.58 percent rate applied as AFA in this review because it was calculated in a separate segment of this proceeding.

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[91] *See SolarWorld*, CIT Slip Op. 17-67 at 2.
[92] *Id*. at 9-10.
[93] *Id.* at 15-17.
[94] *Certain Pneumatic Off-the-Road Tires from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances*, 73 FR 40480 (July 15, 2008) (*OTR Tires PRC)* and accompanying IDM at 18-20.
[95] Because the Department does not proceed to step three of our hierarchy, we do not determine whether the debt forgiveness subsidy in *OTR Tires from the PRC* is a similar program to the Export Buyer's Credit program such that it could be eligible to be applied as an AFA rate for the Export Buyer's Credit program under step three of the hierarchy.

XII. CONCLUSION

We recommend approving all the above positions and adjusting all related countervailable subsidy rates accordingly. If these Department positions are accepted, we will publish the final results in the *Federal Register*.

☒ ☐

Agree Disagree

9/5/2017

X

Signed by: GARY TAVERMAN

Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations,
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance