UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

A-583-853
Investigation
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DATE: December 15, 2014

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

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

SUBJECT: Certain Crystalline Silicon Photovoltaic Products from Taiwan: Issues and Decision Memorandum for the Final Determination of Sales at Less Than Fair Value

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I. SUMMARY

The Department of Commerce ("the Department") finds that certain crystalline silicon photovoltaic products ("certain solar products") from Taiwan are being, or are likely to be, sold in the United States at less than fair value ("LTFV"), as provided in section 735 of the Tariff Act of 1930, as amended ("the Act"). The period of investigation ("POI") is October 1, 2012, through September 30, 2013.

After analyzing the comments submitted by interested parties, and based on our findings at verification, we made certain changes to the margin calculations for the two mandatory respondents, Gintech Energy Corporation ("Gintech") and Motech Industries, Inc. ("Motech"). We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues for which we received comments:

General Issues

1. Scope Comments and Scope Clarification
   - A. Consistency with *Solar I* and Court Decisions
   - B. Extent of the Scope Clarification
   - C. Timeliness of a Potential Scope Clarification
   - D. Impact of a Scope Clarification on the ITC's Final Determination
   - E. Consistency of the Scope as Clarified in the October 3rd Letter with the United States' WTO Obligations
   - F. Administrability Concerns

G. Treatment of U.S. Solar Cells Assembled into Solar Modules in Taiwan
H. Comments Based on a Department Decision not to Adopt the Scope as stated in the October 3rd Letter
I. Solar Cells Assembled into Solar Modules in Mexico

2. Whether the Department Appropriately Applied the Cohen's *d* test
3. Whether the Department's Respondent Selection Process was Unlawful or Unsupported

Issues Involving Gintech

4. Whether to Include Reported "Indirect" Sales in the Calculation of U.S. Price
5. Whether to Base U.S. Price on a Small Sample of U.S. Sales
6. Whether to Exclude Home Market Sales Made in Small Quantities
7. Whether to Treat Further Processed Sales in a Third Country and Resold by Unaffiliated Parties as Indirect Sales
8. Whether to Exclude Sales of Cells to Chinese Manufacturers
9. Whether the Major Input Rule Should be Applied to Gintech's Purchases of Wafers from its Affiliate Utech (Major Input Rule)
10. Whether to Apply the Major Input Rule to Wafers that Utech Purchased and Resold to Gintech (Purchased Wafers)
11. Whether to Recalculate Gintech's Reported Paste Scrap Offset Based on a POI Average Value (Paste Scrap Offset)
12. Whether the Department Should Reallocate to Prime Products the Production Costs of Off-Grade Cells Reported to the Department as Non-Prime Products (Non-Prime Products)
13. Whether the Department Should Adjust the Affiliated Supplier's Cost of Wafers Before Testing Gintech's Transfer Prices with the Affiliated Wafer Supplier (Affiliated's COP)
14. Whether the Department Should Include Losses Related to Inventory Disposals in Gintech's G&A Expense Rate (Inventory Disposals)
15. Whether the Department Should Include LCM Adjustments in Gintech's Reported Costs (LCM Adjustments)
16. Whether the Department Should Account for the Differences between Gintech's Total Cost Accounting System Costs and its Total Reported Costs (Methodological Difference)
17. Whether the Department Should Adjust Gintech's Financial Expense Rate for Certain Items Identified at Verification (Financial Expense Rate)

Issues Involving Motech

18. Whether to Include Reported "Indirect" Sales in the Calculation of U.S. Price
19. Whether to Exclude Sales of Modules Produced by Motech's Affiliate in China
20. Whether U.S. Indirect Selling Expenses Should Not Include Expenses for R&D
21. Whether Motech's Short-Term Interest Rate Should be Used to Calculate U.S. Credit and Inventory Carrying Cost
22. Whether U.S. Warehousing Expense Calculation Should be Revised

23. Whether a Different Basis Should be Used for Certain Payment Dates
24. Whether a Downward Adjustment Should be Made to the Price for a Home Market Transaction
25. Whether Grade Z Cells Should Bear the Same Cost as Grades A and B Cells
26. Whether the Inventory Adjustment Ratio Should be Revised
27. Whether the Financial Expense Ratio Calculation Should Include the Gains on Foreign Currency Translation
28. Whether the Cost for One of Motech's Modules CONNUMs Should be Adjusted

II. BACKGROUND

The following events have taken place since the Department published the *Preliminary Determination* in this investigation on July 31, 2014.[1] In August and September 2014, the Department verified the information provided by the mandatory respondents Gintech and Motech.[2] On October 3, 2014, in response to interested parties' comments on the scope of this investigation, the Department announced that it was considering the possibility of a scope clarification, described the possible clarification, and provided interested parties with an opportunity to submit comments on the clarification.[3]

On October 16, 2014, Gintech,[4] Motech, SolarWorld Americas Inc. ("Petitioner") (formerly SolarWorld Industries America, Inc.), and several interested parties submitted case briefs, which

[1] *See CSPV from Taiwan Preliminary Determination.*
[2] *See* Memorandum to the File, from Charles Riggle and Magd Zalok, AD/CVD Operations, Office IV, through Robert Bolling, Program Manager, AD/CVD Operations, Office IV, regarding "Verification of Gintech Energy Corporation's responses in the Antidumping Duty Investigation of Certain Silicon Photovoltaic Products from Taiwan" (September 23, 2014); *see also* Memorandum to the File from Magd Zalok and Charles Riggle, AD/CVD Operations, Office IV, through Robert Bolling, Program Manager, AD/CVD Operations, Office IV, regarding "Verification of the Sales Responses of Motech Industries, Inc. in the Less-Than-Fair-Value Investigation of Certain Crystalline Silicon Photovoltaic Products from Taiwan" (September 30, 2014) ("Verification Reports").
[3] *See* Memorandum to All Interested Parties from the Department, regarding "Antidumping and Countervailing Duty Investigations of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China and the Antidumping Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from Taiwan: Opportunity to Submit Scope Comments" (October 3, 2014).
[4] On October 29, 2014, the Department rejected Gintech's case brief because it contained untimely new factual information. On October 31, 2014, Gintech re-submitted its case brief after redacting the untimely new factual information rejected by the Department.

included comments on the possible scope clarification.[5] On October 22, 2014, Gintech, Motech, and Petitioner submitted rebuttal briefs.[6] On October 27, 2014, Petitioner and several interested parties filed comments regarding the possible scope clarification.[7] Although Gintech, Motech and Petitioner requested that a hearing be held, all parties that had requested a hearing withdrew their hearing requests. Thus, the Department did not hold a hearing with respect to this investigation.

III. SCOPE OF THE INVESTIGATION

The merchandise covered by this investigation is crystalline silicon photovoltaic cells, and 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.

Subject merchandise includes 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

[5] *See* Letter from Canadian Solar Inc. and Canadian Solar (USA) Inc.; Changzhou Trina Solar Energy Co., Ltd.; China Sunergy (Nanjing) Co., Ltd.; ET Solar Industry Limited; Hanwha Solarone (Qidong) Co., Ltd.; Hengdian Group DMEGC Magnetics Co., Ltd.; LDK Solar Hi-Tech (Nanchang) Co., Ltd.; Shanghai BYD Co., Ltd. and Shangluo BYD Industrial Co., Ltd.; Shanghai JA Solar Technology Co., Ltd. and Hefei JA Solar Technology Co., Ltd.; Sumec Hardware & Tools Co., Ltd.; Wuxi Suntech Power Co., Ltd.; Wuxi Taichen Machinery & Equipment Co., Ltd.; Yingli Green Energy Holding Company Ltd. and Yingli Green Energy Americas, Inc.; and Zhejiang Heda Solar Technology Co., Ltd. ("Canadian Solar *et. al.*"), "Re: Antidumping and Countervailing Duty Investigations of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China, and Antidumping Duty Investigation of Certain Crystalline Silicon Photo Voltaic Products from Taiwan: Respondents' Case Brief," dated October 16, 2014; Letter from SunEdison, "Re: Certain Crystalline Silicon Photovoltaic Products from Taiwan: Case Brief," dated October 16, 2014; Letter from Kyocera Solar, Inc. and Kyocera Mexicana S.A. de C.V. ("collectively, Kyocera"), "Re: Re: Certain Crystalline Silicon Photovoltaic Products from Taiwan: Case Brief , Letter from Suniva, Inc., "Re: Case Brief on Scope Issues Certain Crystalline Silicon Photovoltaic Products from China and Taiwan," dated October 16, 2014, Letter from tenKsolar (Shanghai) Co., Ltd., "Re: Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China and Taiwan -- Case Brief," dated October 16, 2014, Letter from AU Optronics, "Re: Certain Crystalline Silicon Photovoltaic Products from Taiwan," dated October 16, 2014, the People's Republic of China (A-570-010)," dated October 16, 2014; Letter from Motech, "Re: Certain Crystalline Silicon Photovoltaic Products from Taiwan, Case No. A-583-853: Case Brief," dated October 16, 2014, of Changzhou Trina Solar Energy Co., Ltd.," dated October 16, 2014; Letter from Renesola, "Re: Certain Crystalline Silicon Photovoltaic Products from China; Case Brief," dated October 16, 2014; Letter from Petitioner, "Re: Certain Crystalline Silicon Photovoltaic Products from Taiwan: Case Brief of SolarWorld Americas, Inc.," dated October 16, 2014, and Letter from Gintech, "Re: Certain Crystalline Silicon Photovoltaic Products from Taiwan; Gintech Revised Case Brief," dated October 31, 2014.

[6] *See* Letter from Gintech, "Re: Certain Crystalline Silicon Photovoltaic Products from Taiwan; Gintech Rebuttal Brief," dated October 22, 2014, Letter from Motech, "Re: Certain Crystalline Silicon Photovoltaic Products from Taiwan. Case No. A-583-853: Rebuttal Brief," dated October 22, 2014, and Letter from Petitioner, "Re: Certain Crystalline Silicon Photovoltaic Products from Taiwan: Rebuttal Brief of SolarWorld Americas, Inc.," dated October 22, 2014.

[7] *See* Letter from Gintech, "Re: Certain Crystalline Silicon Photovoltaic Products from Taiwan; Gintech Rebuttal Brief on Scope," dated October 27, 2014, Letter from SunEdison, "Re: Certain Crystalline Silicon Photovoltaic Products from Taiwan; SunEdison Rebuttal Brief on Scope," dated October 27, 2014, Letter from Kyocera, "Re: Certain Crystalline Silicon Photovoltaic Products from Taiwan – Rebuttal Brief," dated October 27, 2014, Letter from Canadian Solar, *et. al.*, "Re: Antidumping and Countervailing Duty Investigations of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China, and Antidumping Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from Taiwan: Respondents' Rebuttal Brief," dated October 27, 2014, and Letter from Petitioner, "Re: Certain Crystalline Silicon Photovoltaic Products from Taiwan and the People's Republic of China: SolarWorld's Rebuttal Brief on Scope," dated October 27, 2014.

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.

Modules, laminates, and panels produced in a third-country from cells produced in Taiwan are covered by this investigation. However, modules, laminates, and panels produced in Taiwan from cells produced in a third-country are not covered by this investigation.

Excluded from the scope of this investigation are thin film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS). Also excluded from the scope of this investigation are 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 cell is permanently integrated into a consumer good, the surface area for purposes of this exclusion shall be the total combined surface area of all cells that are integrated into the consumer good.

Further, also excluded from the scope of this investigation are any products covered by the existing antidumping and countervailing duty orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China ("PRC").[8] Also excluded from the scope of this investigation are modules, laminates, and panels produced in the PRC from crystalline silicon photovoltaic cells produced in Taiwan that are covered by an existing proceeding on such modules, laminates, and panels from the PRC.

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

IV. DISCUSSION OF THE ISSUES

General Issues

Comment 1: Scope Comments and Scope Clarification

On October 3, 2014, the Department issued a letter to all interested parties inviting parties to include in their case briefs comments concerning a possible clarification to the scope of the AD/CVD investigations that the Department was considering.[9] The Department stated that the scope clarification under consideration contemplated the following:

[8] *See CSPV from China Final Determination*; *see also CSPV from China Order*.

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

- For the Taiwan investigation, subject merchandise would include all modules, laminates and/or panels assembled in Taiwan consisting of crystalline silicon photovoltaic cells (referred to under this comment as "solar modules") produced in Taiwan or a customs territory other than Taiwan and would continue to exclude any products covered by the existing AD and CVD orders on crystalline silicon photovoltaic cells, whether or not assembled into solar modules, from China. In addition, subject merchandise would include solar modules assembled in a third-country, other than China, consisting of crystalline silicon photovoltaic cells produced in Taiwan.

Parties have commented on the scope in this letter and made other scope comments addressed below. Generally, respondents oppose adopting the proposed scope clarification in the October 3rd Letter, while Petitioners argue that the Department should adopt the scopes proposed in the October 3rd Letter because it most effectively applies Petitioner's intent, would best effectuate the U.S. trade laws and provide effective relief to the injured domestic industry, and would be easily administrable and enforceable by the agencies involved. After considering comments, we have determined not to adopt the scope described in the October 3rd Letter in this investigation. We are, however, modifying the scope of this investigation from the scope adopted for the initiation and preliminary determination of this investigation, as discussed below. We address party comments in detail below.

In addition, consistent with our determination in this investigation, the Department has modified the language of the importer and exporter certifications.

A. Consistency with *Solar I* and Court Decisions

Respondent Comments

- The Department's proposed scope is arbitrary because it is inconsistent with the product coverage decisions made by the Department in *Solar I* and also ignores country of origin decisions made by the CIT and CAFC. Such arbitrary decisions are unlawful because, as the Court has noted, the Department has an obligation to be consistent in its decisions.
    - In *Solar I* the Department made numerous decisions that directly ruled against establishing a scope that would find solar modules assembled in China but not containing Chinese solar cells subject to the order. The bases for this decision were *Solar I* decisions stating that
        - A product can only have one country of origin,[10]
        - AD and CVD investigations only cover products with a country of origin of the country under investigation,[11] and
        - The Department relies on the substantial transformation test to determine the country of origin of a product.[12]
        - In applying this substantial transformation test in *Solar I*, the Department determined that "module assembly does not substantially alter the essential nature of solar cells nor does it constitute significant processing

[10] *See Solar I* and accompanying Issues and Decision Memorandum at Comment 1, page 8.
[11] *Id*.
[12] *Id*. at 5-6.

such that it changes the country of origin of the cell."[13] The Department found that the solar cell imparts the essential character of a solar module, and therefore the origin of the solar cell is determinative of the country of origin of the class or kind of merchandise at issue here. Therefore, "where solar cell production occurs in a different country from solar module assembly, the country of origin of the solar modules is the country in which the solar cell was produced."[14]

- If the approach in *Solar I* described above were applied to these investigations the conclusion would be that the scope of an AD order must be limited to subject merchandise "produced" and "originating" in the country covered by the order, which here is Taiwan. Merchandise produced or originating in a country other than the country covered by an order, which based on the previous substantial transformation decision, includes solar modules assembled in Taiwan from solar cells produced in countries other than Taiwan, have a different country of origin than Taiwan, and thus may not be included in the scope of these investigations.

- Decisions by the CIT and the CAFC support finding that products under an investigation can only have one country of origin and that the basis for determining this is the substantial transformation test.
  - Applying the country of origin determination implied in the scope as proposed in the October 3rd Letter, as well as the criteria applied in *Solar I*, would result in a solar module assembled in one country containing another country's cell to have two countries of origin. CIT decisions[15] have stated that a product can only have a single country of origin for AD and CVD purposes.
  - The scope as proposed in the October 3rd Letter is also contrary to the statutory language at Section 731 of the Act, which provides for the imposition of antidumping duties on "subject merchandise," defined as "the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, {or} an order...."[16] This provision requires the Department to make a finding of dumping for a class or kind of merchandise from a particular country.[17]
  - The scope as proposed in the October 3rd Letter ignores the established criteria for determining the country of origin, which is the substantial transformation analysis.
    - The Court has determined that the "substantial transformation" analysis provides a means for the Department to carry out its

[13] *See* March 19, 2012 Memorandum from Jeff Pedersen to Chris Marsh "Scope Clarification: Antidumping and Countervailing Duty Investigations of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China ("Solar I Substantial Transformation Memorandum"), included in the December 15, 2014 Documents from Solar I Memorandum as Attachment 1.
[14] *Id*.
[15] *See Ugine I* 517 F. Supp. 2d at 1345, *aff'd Ugine III* 551 F.3d 1339.
[16] *Id.*; *see also* section 771(25) of the Act.
[17] *See DuPont,* 8 F. Supp. 2d 854, 859; *see also Ugine* 517 F. Supp. 2d at 1345.

country of origin examination and properly guards against circumvention of existing antidumping orders.[18]

- The Department is prevented from contradicting these decisions in *Solar I* because the Department is obliged to be consistent in its decision-making across its investigations.
  - The CIT has explained that although an agency is not strictly bound to its precedent, "{i}t is a principle of administrative law that an 'agency must either conform to its prior norms and decisions or explain the reason for its departure from such precedent."[19]
  - The Department has not articulated reasons for diverging from these decisions. Instead, the Department stated in these investigations that it is informed "by the product coverage decisions that it made" in the prior Solar Investigations.[20]

Petitioner Comments

- In the preliminary determination the Department stated that it was continuing to analyze interested parties' scope comments, including comments on whether it is appropriate to apply a traditional substantial transformation or other analysis in determining the country of origin of certain solar modules described in the scope of the investigation.
- Petitioner supports the proposed scope clarification in the Department's October 3rd Letter, and requests that the Department adopt it for purposes of its final determination and any resulting AD order.
- The Department's proposed scope clarification is fully consistent with the Petitioner's intent. It has been clear since the start of the first solar AD/CVD investigations, and throughout the current investigations, that Petitioner's intent has always been to cover all cells from China and all modules from China and, now, all cells from Taiwan and all modules from Taiwan.[21]
- The Department's proposed scope clarification would best effectuate the U.S. trade laws and provide effective relief to the injured domestic industry, and would be easily administrable and enforceable by the agencies.
- The remedial purposes of the AD/CVD laws are best served by the proposed scope clarification. The Department has determined that both cells and modules from Taiwan are being dumped. As such, the law obligates Commerce to impose duties on these products.
- Clarifying the scope language proposed by the Department would result in AD/CVD orders that are administrable and enforceable by the Department and CBP. Solar cells are not required to contain country of origin markings. It can be extremely difficult for CBP to determine the origin of various inputs in a solar module upon importation. On the other hand, all solar modules are clearly marked with country-of-origin and other identifying information. Covering all cells and modules from Taiwan, as described in the

[18] *See DuPont*, 8 F. Supp. 2d at 857 (emphasis added).
[19] *See Torrington*, 745 F. Supp. 718, 727; *see also Neenah Foundry Co.*, 142 F. Supp. 2d 1008, 1022; *see also Hussey Copper, 834* F. Supp. 413,418.
[20] *See Solar Products Initiation Notice*.
[21] *See, e.g., Solar I* and accompanying Issues and Decision Memorandum at Comment 1.

October 3rd Letter proposed scope clarification, would therefore significantly improve the enforceability of any future AD/CVD orders.

- To the extent that the Department's proposed scope clarification can be considered a departure from its prior country-of-origin determination, the agency is, of course, permitted to depart from its prior determinations.[22]
- Respondents' argument that the scope clarification results in a single product having two countries of origin is unfounded. Because the country-of-origin rules in the proposed scope clarifications provide a supplemental country-of-origin rule for those products not covered by the initial solar investigations, no product would at any time have two countries of origin.
- The proposed scope would also be consistent with international precedent. The recent European Union AD/CVD investigations of Chinese solar products included "imports of crystalline silicon photovoltaic modules and key components (*i.e.* cells and wafers) originating in or consigned from the People's Republic of China,"[23] recognizing that all cells and all modules from the subject country, in addition to other key components, must be covered.

B. Extent of the Scope Clarification

Respondent Comments

- The scope as proposed in the October 3rd Letter is not a clarification, but an unlawful expansion and alteration of the scope.
    - The scope as proposed in the October 3rd Letter eliminates entirely the "two out of three" principle incorporated into the scope of these investigations, adds to the scope solar modules made from solar cells from countries outside Taiwan, and thereby crafts a scope of the investigation that was never contemplated in the petition or in any other submission or determination before or after the initiation of these investigations.
    - Petitioner has not requested the expanded scope proposed by the Department, and nothing in the petition or in Petitioner's subsequent submissions to the Department or the ITC indicates otherwise.
    - There are numerous Court decisions demonstrating that a significant expansion and alteration of the scope as outlined in the scope as proposed in the October 3rd Letter goes far beyond what the Court decisions have found permissible.[24]

Petitioner Comments

- Department's clarification of the scope at this final phase in the proceedings is fair and reasonable, and would not be unlawful. The CIT has specifically stated that the Department has the discretion to clarify the scope, even in a way that "expand{s} the

[22] *See Torrington*, 745 F. Supp. at 727.
[23] See Council Implementing Regulation (EU) No 1238/2013 of 2, Official Journal of the European Union (Dec. 2013).
[24] *See Minebea*, 782 F. Supp. at 120; *see also Allegheny Bradford*, 342 F. Supp. 2d at 1172; *Smith Corona Corp.*, 796 F. Supp. 1532.

language of a petition," in the course of an AD/CVD investigation.[25] This decision was upheld by the CAFC.[26]

- The respondents themselves cite to the Court in *Allegheny Bradford:* "{t}here is no clear point during the course of an antidumping investigation at which {the Department} loses the ability to adjust the scope."[27]
- The scope as proposed in the October 3rd Letter is fully consistent with Petitioner's intent.
    - As demonstrated by its comments to *Solar I*, Petitioner's intent has always been to cover all cells from China and all modules from China.[28] In fact Petitioner filed the instant investigations specifically in order to close the loophole created as a result of the Department's scope determination in the first solar cases and to cover all cells and modules from China, as well as to expand the investigations to Taiwan to address unfair trade practices that were exacerbated as a result of that scope determination.
- Moreover, in this case, the Department is even more justified than under other circumstances in adjusting the scope at this stage in these proceedings, as the Department has been very clear throughout these investigations that it is continuing to evaluate the scope, and that its country of origin determinations of related subject merchandise could change.[29]

C. Timeliness of a Potential Scope Clarification

Respondent Comments

- Even if the Department had the authority to expand the scope, it cannot do so this late in the investigation because it would result in the Department's final determination not being based on substantial evidence, would prevent finalizing the record and issuing a final decision, and would deny parties due process.
    - Essentially, at this stage in the proceeding, the Department has already completed its investigation of the factual record and thus is unable to supplement the record with additional sales. Thus, an expansion of the scope at this time to include products not already covered would mean that the AD margins calculated by the Department will be based on data that are not consistent with the sales that would be subject to the final expanded scope of these investigations.
    - The change in scope under consideration is also not allowable under the Act because it would result in the calculations of the final determination being based on only a subset of subject merchandise. Any antidumping margin contained in an AD order must be based on analysis of the entirety of the subject merchandise.[30] More specifically, an AD order may only be imposed if the agency determines that "a class or kind of foreign merchandise is being, or is

[25] *See Mitsubishi I*, 700 F. Supp. at 555.
[26] *See Mitsubishi II*, 898 F.2d at 1577.
[27] *See Allegheny Bradford*, 342 F. Supp. 2d 1172, 1187.
[28] *See Solar I* and accompanying Issues and Decision Memorandum at Comment 1.
[29] *See, e.g., CSPV from Taiwan Preliminary Determination* and accompanying Preliminary Decision Memorandum at 5.
[30] *See* Section 771(25) and (35)(A)-(B) of the Act.

likely to be, sold in the United States at less than its fair value."[31] The term "class or kind of foreign merchandise" is synonymous with the term "subject merchandise"[32] and necessarily includes all products within the scope of the AD investigation, rather than a subset of these products.

- The Court has stated that the Department's "discretion to define and clarify the scope of an investigation is limited in part by concerns for the finality of administrative action, which caution against including a product that was understood to be excluded at the time the investigation began."[33] Thus, by including products that were not included in the petition and were never the subject of the Department's investigation inquiries, the Department risks undermining the factual basis for its determination and raises concerns about the finality of its administrative actions.
- The Court has noted that the Department's decision to change scope language at a late stage in a proceeding can undermine the entire investigatory process.[34]
- Because the scope change would occur at such a late stage in the proceeding, it denies due process for parties, especially parties that were not covered under the scope in effect during the *Preliminary Determination*. Those Taiwanese companies and U.S. importers that are not presently part of the proceeding have no opportunity to participate in the hearing or "to be heard" and cannot participate meaningfully in this investigation because the factual record is closed.

Petitioner Comments

- The majority of modules being shipped from Taiwan that would be subject to the scope under the Department's proposed scope clarification were also subject to the scope as it existed at the time data were collected from respondents and the *Preliminary Determination* was issued. Thus, the data bases on which the Department will calculate final subsidy and dumping margins are largely consistent with the scope as stated in the Department's proposed scope clarification.
- The proposed scope clarification does not implicate due process concerns as the Department has made clear throughout these investigations that the scope of the investigations is subject to continuing evaluation, and that the country-of-origin determinations related to the subject merchandise could change for the final determination.
    - Specifically, in the initiation notice, the Department invited comments on the scope of these investigations, clearly indicating to the public that the scope was subject to modification.[35]
    - The Department again noted its ongoing evaluation of the scope in the *Preliminary Determination*, in which, after adopting Petitioner's proposed scope, the Department explained that it was continuing to analyze interested parties' scope comments, including comments on whether it is appropriate to apply a

[31] *See* Section 731 of the Act.
[32] *See* Section 771(25) of the Act.
[33] *See Allegheny Bradford*, 342 F. Supp. 2d at 1187-1188, citing *Mitsubishi Heavy Indus., Ltd. v. United States*, 986 F. Supp. 1428, 1433 (CIT 1997).
[34] *See Smith Corona Corp.*, 796 F. Supp. at 1535.
[35] *See Solar Products Initiation Notice*, 79 FR at 4661.

traditional substantial transformation or other analysis in determining the applicability of the investigation to certain solar modules described in the petition.[36]

- Further, Respondents have repeatedly claimed that it is nearly impossible for importers to know and to trace the origin of the ingots and wafers in cells that are assembled into modules when the module manufacturers purchase the cells from third parties in other countries. While Petitioner disputes this claim, if true, Respondents and others would not have known for certain whether or not their products were subject to these investigations. Given this potential uncertainty, all exporters of potential subject merchandise should have filed quantity and value submissions and separate rate applications with the Department.
- Respondents' citations to *Allegheny Bradford* for support are inapposite to this investigation because as stated by the CIT, the issue in *Allegheny Bradford* was "whether Commerce may construe an antidumping order to cover products which bear a characteristic that cannot be reconciled with the language of the order."[37] These aspects of *Allegheny Bradford* are therefore inapplicable to the current circumstances, in which Commerce is still formulating the final scope language, which will ultimately be included in any orders that are issued.

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

Respondent Comments

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

Petitioner Comments

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

[36] *See China AD Prelim* and accompanying Issues and Decision Memorandum at 5; *see also CSPV from Taiwan Preliminary Determination* at 5; *China CVD Prelim* and accompanying Issues and Decision Memorandum at 4.
[37] *See Allegheny Bradford*, 342 F. Supp. 2d at 1188.

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

Respondent Comments

- The WTO Agreement on Rules of Origin imposes an obligation on Members to ensure that "rules of origin shall not in themselves create restrictive, distortive, or disruptive effects on international trade" and "shall not discriminate between other Members."[38] The scope clarification proposed in the October 3rd Letter, if adopted, would have precisely such a distortive and discriminatory effect on trade between WTO members because it would subject imports of modules made with any third country cells to AD/CVD duties calculated for Chinese or Taiwanese products.
- The scope clarification proposed in the October 3rd Letter treats a module assembled in China using cells produced in Taiwan as a Chinese origin product subject to the current PRC investigations, while it treats a solar module assembled in Malaysia using cells produced in Taiwan as a Taiwanese-origin product subject to the current Taiwan investigation. Thus, the solar module originating in China containing Taiwanese cells would be deprived of the advantage of market economy treatment provided to the like module originating in Malaysia containing Taiwanese cells. Therefore, it violates the United States' obligations under GATT to provide parties to GATT with most-favored nation treatment.[39]

Petitioner Comments

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

[38] *See* Articles 1.2, 2(c), and 2(d) of the WTO Agreement on Rules of Origin.

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

Taiwan's status as an ME country, cells originating in Taiwan (other than those destined for module-assembly in China), as well as solar modules assembled in Taiwan, would appropriately be subject to duties calculated based on an ME methodology.

F. Administrability Concerns

Respondents Comments

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

Petitioner Comments

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

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

Respondent Comments

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

Petitioner did not comment on this issue.

H. Comments Based on a Department Decision not to Adopt the Scope as stated in the October 3rd Letter

Respondent Comments

- The Department should modify the scope of these investigations by simply deleting the second sentence of the current scope definition and apply its substantial transformation test to determine country of origin.
- The Department already applied its substantial transformation test in the previous investigations and determined that the country of origin of a solar module, for AD/CVD purposes, is the country of origin of the solar cells used in that module.

Petitioner Comments

- Should the Department decide not to make its proposed clarification to the scope, these investigations should continue with the scope proposed by Petitioner and accepted by the Department for purposes of initiation and its preliminary determination.
- The Department must define the scope of an AD/CVD investigation in accordance with the petitioner's intent.
- The "two out of three" is an essential aspect of the scope of the petition it filed for this case. Any revision of the scope that would delete or modify the "two out of three" rule (and that would not otherwise ensure coverage of the relevant merchandise, such through as the October 3 proposed scope clarification) would eviscerate the Petitioner's intended scope.
- The current scope of the investigations, including the "two out of three" rule, is essential to prevent the creation of another loophole that would allow for widespread evasion of the AD/CVD orders. While even the "two out of three" rule would not be as effective a means of preventing evasion as the Department's proposed scope clarification discussed above, the current scope language largely addresses the evasion by subject solar producers and exporters of the duties imposed by the AD/CVD orders in the initial solar cases by closing the loophole in that scope.

I. Solar Cells Assembled into Solar Modules in Mexico

Kyocera Solar, Inc. ("Kyocera") Comments

- The Department may not define the scope to include merchandise completed or assembled in a third country in the absence of a finding of circumvention.
- Kyocera produces modules from cells in Mexico, with some of the cells that it uses imported from Taiwan. It believes its modules should be determined to be a product from Mexico and not Taiwan as its solar cells are substantially transformed when incorporated into solar modules produced in Mexico by Kyocera.
- Solar modules, laminates and/or panels produced in a third country should be excluded if the module producer is not affiliated with a cell or module producer in China or Taiwan and local value added is at least 35 percent of the value of the module exported to the United States.

Petitioner did not comment on this issue.

Department Position: After considering the Petition, parties' comments on product coverage, and the record of this investigation, we have determined that the scope of this antidumping duty investigation is as follows:

The merchandise covered by this investigation is crystalline silicon photovoltaic cells, and 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.

Subject merchandise includes 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.

Modules, laminates, and panels produced in a third-country from cells produced in Taiwan are covered by this investigation. However, modules, laminates, and panels produced in Taiwan from cells produced in a third-country are not covered by this investigation.

Excluded from the scope of this investigation are thin film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS). Also excluded from the scope of this investigation are 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 cell is permanently integrated into a consumer good, the surface area for purposes of this exclusion shall be the total combined surface area of all cells that are integrated into the consumer good.

Further, also excluded from the scope of this investigation are any products covered by the existing antidumping and countervailing duty orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, from the PRC.[40] Also excluded from the scope of this investigation are modules, laminates, and panels produced in the PRC from crystalline silicon photovoltaic cells produced in Taiwan that are covered by an existing proceeding on such modules, laminates, and panels from the PRC.

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

To the extent parties comments opposed adopting the scope in the October 3rd Letter, because we have not adopted this scope, we have not addressed such comments here.

Upon initiation of this investigation, the Department set aside a period for interested parties to raise issues relating to product coverage, *i.e.*, scope.[41] Interested parties submitted comments and rebuttal comments regarding product coverage.[42] In the *Preliminary Determination* published on July 31, 2014, we announced that we were continuing to analyze the scope

[40] *See CSPV from China Final Determination*; *see also CSPV from China Order*.
[41] *See Solar Products Initiation Notice*; *see also Solar Products CVD Initiation Notice*
[42] *See* scope comment submissions, dated February 18, 2014, from Gintech; Motech; NextEra Energy, Inc.; SunEdison, Inc.; Suniva, Inc.; Solartech Energy Corp.; and Yingli Green Energy Holding Company Limited, Yingli Green Energy Americas, Inc., Canadian Solar Inc., Changzhou Trina Solar Energy Co., Ltd., Wuxi Suntech Power Co., Ltd., Shanghai JA Solar Technology Co., Ltd., Hefei JA Solar Technology Co., Ltd., and Jinko Solar Co., Ltd.; *see also* rebuttal scope comment submissions, dated April 3, 2014, from Petitioner, and dated April 21, 2014, from Yingli Green Energy Americas, Inc., Canadian Solar Inc., Changzhou Trina Solar Energy Co., Ltd., Wuxi Suntech Power Co., Ltd., Shanghai JA Solar Technology Co., Ltd., Hefei JA Solar Technology Co., Ltd., and Jinko Solar Co., Ltd.

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 this investigation. In response to interested parties' comments on the scope of this investigation (and prior to the deadlines for the submission of case and rebuttal briefs), in its October 3rd Letter, the Department announced that it was considering the possibility of a scope clarification, described the possible clarification, and invited interested parties to submit comments on the clarification. After analyzing and considering the numerous comments and arguments on the record, as well as the Petition and all other record data, we have determined that the language provided above constitutes the scope of this investigation.

The Petition

On December 31, 2013, Petitioner filed the Petition alleging that "Chinese and Taiwanese c-Si PV industries have made a deliberate and concerted effort to push large and growing volumes of subject imports into the U.S. market using dumped and subsidized pricing, causing material injury to the domestic industry."[43] Petitioner claimed that the Chinese and Taiwanese solar producers "changed their production models slightly in order to exploit a loophole in the scope of the AD/CVD orders, evade the duties, and continue pushing dumped and subsidized product into the U.S. market."[44] The Petition claimed that Chinese solar producers were "using cells fully or partially manufactured in Taiwan in the modules they assembled for export to the United States," which allowed the Chinese solar producers to "export those modules, duty-free, to the U.S. market."[45] It claimed that the domestic industry was being harmed by Chinese producers that were using, or claiming to use, "Taiwanese and other non-Chinese cells in their module production."[46] The Petition claimed that Taiwanese cell and module imports increased by 85 percent, in large part as a result of this alleged loophole.[47]

In subsequent submissions, the Petitioner further clarified the concerns which led to its filing the Petition in these investigations. Petitioner explained that it wished to close a "loophole" which arose following the Department's scope determination in *Solar I*, and that it wished to "expand the investigations to Taiwan to address unfair trade practices that were exacerbated as a result of that scope determination."[48] Petitioner explained that "the majority of solar panels exported by China during the period of investigation consisted of solar panels consisting of cells made in Taiwan, either with or without Chinese-made-inputs"[49] and that the purpose of this investigation, as well as the AD and CVD investigations of the PRC, was to "close the loophole."[50] The Petitioner also stressed the importance of a scope which would help "prevent significant and widespread avoidance, evasion and circumvention of the orders."[51]

[43] *See* "Petition for the Imposition of Antidumping and Countervailing Duties on Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China and Taiwan," dated December 31, 2013 ("Petitions on China and Taiwan") at 2.
[44] *Id.* at 3.
[45] *Id.* at 4.
[46] *Id.*
[47] *Id.* at 6.
[48] *See* Petitioner's Brief at 7; Petitioner's Rebuttal Brief at 6.
[49] *See* Petitioner's Rebuttal Brief at 4-5.
[50] *Id.* at 8.
[51] *Id.*

The Substantial Transformation Analysis

Petitioner included in its petition a scope that would cover cells, and modules, laminates and/or panels consisting of cells, as well as certain modules assembled in Taiwan consisting of cells completed or partially manufactured in a third country ("Two Out Of Three"). In determining the scope of the investigation, the Department must not only address the concerns expressed by the Petitioner and, in particular, the products intended to be covered by the scope, but also determine the country-of-origin of the solar products at issue. The scope of this investigation and the International Trade Commission final determination will determine the scope of any resulting AD order. Because AD and CVD orders apply to merchandise from particular countries, determining the country of origin of the merchandise under investigation is fundamental to proper administration and enforcement of the AD and CVD statute. The Department has explained in past investigations that the scope of an antidumping duty order is "defined by the type of merchandise and the country-of-origin," so in evaluating the proposed scope, the Department considered the issue of country-of-origin.[52] In determining the country-of-origin of a product, the Department's usual practice has been to conduct a substantial transformation analysis.[53] The CIT has upheld the Department's "substantial transformation" test as a means to carry out its country-of-origin analysis.[54] The CIT stated that "{t}he 'substantial transformation' rule provides a yardstick for determining whether the processes performed on merchandise in a country are of such significance as to require that the resulting merchandise be considered the product of the country in which the transformation occurred."[55]

Thus, our usual starting point in examining country-of-origin in this investigation is considering whether a substantial transformation analysis would be appropriate. Because the Petitioner's proposed scope language addresses both solar modules assembled, and cells produced, in a third country, we have determined that it is appropriate in this investigation to use a substantial transformation analysis to determine whether one or both of the scenarios described by Petitioner should be covered by the scope of this investigation.

There are two reasons it is appropriate in this investigation to apply a substantial transformation analysis. First, unlike in the concurrent AD and CVD investigations of certain solar products from the PRC, which followed the implementation of the Department's analysis of crystalline silicon photovoltaic cells in *Solar I*, no substantial transformation analysis has been conducted of the same or similar merchandise in Taiwan prior to this investigation. Second, the concurrent investigations on solar products from the PRC do not cover solar cells from the PRC, which are

[52] *See, e.g., Certain Cold-Rolled Carbon Steel Flat Products from Argentina*, 58 FR at 37065, where the Department explained that "{t}he scope of an antidumping or countervailing duty order is defined by the type of merchandise and by the country of origin (e.g., widgets from Ruritania)." *See also SSPC from Belgium* and the accompanying Issues and Decision Memorandum at Comment 4.
[53] *See, e.g., Glycine from India* and accompanying Issues and Decision Memorandum at Comment 5; *see also SSPC from Belgium*, and accompanying Issues and Decision Memorandum at Comment 4.
[54] *See DuPont*, 8 F. Supp. 2d 854, 858.
[55] *See id.* (referencing *Smith Corona Corp. v. United States*, 811 F. Supp. 692, 695 (CIT 1993) as "noting that in determining if merchandise exported from an intermediate country is covered by an antidumping order, Commerce identified the country of origin by considering whether the essential component is substantially transformed in the country of exportation").

explicitly excluded from the scope of those investigations.[56] That is, the scope of the concurrent investigations on solar products from the PRC, unlike the scope Petitioners proposed for this investigation, covers only modules, and not cells.[57] Because this investigation covers cells, Petitioner's scope for this investigation is similar to the scope proposed by the Petitioner in the *Solar I* investigations. Accordingly, consistent with the Department's analysis in *Solar I*, we find it appropriate in this investigation to first determine whether substantial transformation occurs, thereby changing a product's country-of-origin. Then, following such an analysis, we also believe it is important to analyze the concerns addressed in the concurrent investigations on solar products from the PRC to determine if the same concerns exist in this investigation.

We have conducted our substantial transformation analysis based on the following factors: 1) whether the processed downstream product falls into a different class or kind of product when compared to the upstream product; 2) whether the essential component of the merchandise is substantially transformed in the country of exportation; or 3) the extent of processing.[58] We have examined these factors in conducting our analysis.

Class or Kind

The Department "has generally found that substantial transformation has taken place when the upstream and downstream products fall within two different 'classes or kinds' of merchandise…. Conversely, the Department almost invariably determines substantial transformation has not taken place when both products are within the same 'class or kind' of merchandise."[59] The merchandise subject to an investigation, *i.e.*, the class or kind of merchandise to be investigated, is described in the scope. The scope of this investigation covers both solar cells and solar modules. Thus, solar cells and solar modules are within the same "class or kind" of product.

Essential Component

In examining whether the essential component of the merchandise is substantially transformed in the country of exportation, the Department considers whether processing in the exporting country changes the important qualities or use of the component.[60] The essential component of solar modules is the solar cell since the purpose of solar modules is to convert sunlight into electricity and this process occurs in the solar cells.[61] Thus, in this case, the Department is considering whether the processing of solar cells into solar modules changes the nature or use of the solar cells.

Solar module assembly does not change the important qualities, i.e., the physical or chemical characteristics, of the solar cell itself. As described in the Petition, solar cells are made from crystalline silicon wafers. A dopant, which is a trace impurity element diffused into a thin layer

[56] *See* concurrent Final Determination of the Antidumping and Countervailing Duty Investigations of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China and the Issues and Decision Memorandum at Comment 1.
[57] For further discussion of the differences between the concurrent PRC AD and CVD investigations and this investigation, *see infra*., pages 21-25.
[58] *See, e.g., Glycine from India* and accompanying Issues and Decision Memorandum at Comment 5.
[59] *See, e.g., Wax Ribbons from France.*
[60] *See EPROMs from Japan.*
[61] *See* Petitions on China and Taiwan at Exhibit II-19 at 3.

of the wafer's surface to impart an opposite electrical orientation to the cell surface, creates the positive/negative junction that is needed for the conversion of sunlight into electricity. Solar cells are normally coated with silicon nitride to increase light absorption (this results in a blue-purple color) and undergo a screening process where conductive metal is printed into the cell. Metal conduits or busbars channel electricity generated by the cell into electricity collection points.[62] None of these characteristics are changed during solar module assembly. Petitioner describes module assembly as stringing together 60 or 72 solar cells, laminating them, and fitting them in a glass-covered aluminum frame. [63] These processes do not change the basic nature of a solar cell. Moreover, the function of a solar cell is not changed when assembled into solar modules; the cell still functions to convert sunlight into electricity. In *Solar I* the ITC also noted that "the physical characteristics and functions of cells and solar modules essentially are the same."[64] The purpose of both solar cells and solar modules is to convert sunlight into electricity. Thus, neither the physical qualities nor the function of solar cells are changed when they are assembled into modules.

Extent of Processing

When considering the extent of processing, we examine whether the processing was substantial and/or sophisticated.[65] As noted above, solar module assembly consists of stringing together solar cells, laminating them, and fitting them in a glass-covered aluminum frame for protection. Thus, this stage of production is principally an assembly process.

In *Solar I*, the Department conducted a detailed analysis of the processing of cells into solar modules. The Department explained the following:

> Numerous interested parties, aside from Petitioner, argued that solar module/panel assembly is relatively insubstantial in terms of number of steps, inputs, research and development required, and time. Consistent with these arguments, Trina Solar identified six stages of production when manufacturing solar modules/panels, five of which were dedicated to solar cell production and only one pertained to solar module/panel assembly. Petitioner and the ITC also indicated that solar module assembly is one stage of production. Petitioner and Trina Solar also reported consuming many more types of inputs in cell production compared with module assembly. Accordingly, the assembly of solar cells into solar modules does not rise to the level of changing the country-of-origin of the subject merchandise.[66]

In light of our analysis of the foregoing factors, consistent with our determination in *Solar I*, we find that solar module assembly does not change a solar module's country-of-origin pursuant to a substantial transformation analysis.

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[62] *See id.* at Volume I, 11-16.
[63] *See id.* at 16.
[64] *See ITC Solar Cells and Modules Prelim* at 10 (included in the December 15, 2014 Documents from *Solar I* Memorandum as Attachment 2).
[65] *See, e.g., Wax Ribbons from Korea.*
[66] *See Solar I* Substantial Transformation Memorandum at 7-8 (included in the December 15, 2014 Documents from *Solar I* Memorandum as Attachment 1).

Accordingly, for purposes of solar cells produced in Taiwan and used in the manufacturing of solar modules in Taiwan or third countries other than the PRC, we believe that the Department's analysis in *Solar I* is equally applicable to this investigation. The essential active component of the solar modules are the solar cells and there is no information which the Petitioner, or any of the other parties, has placed on the record that calls into question this substantial transformation analysis.

Observed Avoidance of the *Solar I* Orders By Chinese Solar Module Manufacturers

Nonetheless, as noted above, the Petition and other information on this record indicates that following the Department's scope determinations in the *Solar I* investigations, solar module producers who exported merchandise subject to the *Solar I* investigations increased exports to the United States of modules assembled in the PRC from non-PRC cells with the express purpose of avoiding the reach of the *Solar I* AD and CVD orders. For example, the record demonstrates that the solar products industry involves a complex and readily adaptable global supply chain which allows producers to modify their production chains easily and quickly. Petitioner has cited statements by five large Chinese solar module producers and one U.S. importer of solar modules noting the ease with which they were able to modify their production chain to avoid paying the AD and CVDs imposed by *Solar I*.[67]

Further, following the implementation of the AD and CVD orders on related merchandise (*i.e.*, solar cells and modules containing solar cells) from the PRC, *Solar I*, there has been a measureable shift in trade flows that has resulted in increased imports of non-subject modules produced in China.[68] Accordingly, having already conducted a substantial transformation analysis in *Solar I*, and having evidence of modified trade patterns that avoid the *Solar I* orders, the Department concluded in the concurrent PRC AD and CVD investigations that relying on the substantial transformation analysis alone in those investigations could result in failure to provide AD and CVD relief to the domestic industry for alleged injury caused by dumped or unfairly subsidized imports of Chinese solar module producers.[69] Specifically, the Department determined in those concurrent investigations that in light of the observed shifts of production of cells to third countries to evade the *Solar I* orders, the application of the substantial transformation analysis, alone, was sufficient to reach unfair pricing decisions and/or unfair subsidization concerning the modules taking place in the PRC.[70]

As part of its analysis in the concurrent PRC AD and CVD investigations, the Department highlighted the need to prevent evasion of its existing AD and CVD orders, provide relief from injurious dumped and subsidized goods, and administer and enforce the scope resulting from its current investigations:

> The Department has also taken into account considerations regarding administrability, enforceability, and potential evasion. If these investigations result in an AD and/or CVD order, as relevant, the scope clarification adopted in this final determination will make the

[67] *See* the Petitions on China and Taiwan, Volume 1, at 4-5.
[68] *See id.* at 3, 5-6, 21, 34, 37, and 53.
[69] *See* the concurrent Final Determination of the Antidumping and Countervailing Duty Investigations of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China and the Issues and Decision Memorandum at Comment 1.
[70] *Id.*

> resulting order(s) substantially easier to administer and enforce (for both the Department and CBP), by helping to prevent significant and widespread evasion similar to the evasion that we have seen result from parties that exploit the substantial transformation analysis conducted in *Solar I*. As indicated in the Petition, although "imports of modules from China consisted largely of modules assembled with Chinese cells" from 2010 through early 2012, "{s}ince that time, imports of modules from China have consisted almost entirely of modules assembled in China from solar cells completed or partially manufactured in Taiwan or other countries (*i.e.*, cells manufactured in Taiwan from Taiwanese inputs, or cells manufactured in Taiwan or other countries from Chinese inputs, including wafers)."[71] The scope, which was proposed in the Petition and on which we initiated the investigations, may result in the evasion of duties and thus ineffective relief to the Petitioner, due to the complex and adaptable global supply chain that allows production processes for solar cells and modules to be easily moved across borders. With this scope clarification it is the Department's intent to reduce as much as possible additional opportunities for evasion like those that resulted after the imposition of AD and CVD cash deposits in *Solar I*.[72]

Accordingly, in the concurrent PRC AD and CVD investigations, to address the facts specific to PRC manufacturers of modules, laminates and panels, the Department determined to apply a methodology other than its standard substantial transformation analysis:

> Although the Department routinely has found a substantial transformation analysis to be an appropriate means to determine the country of origin of merchandise under investigation, in the circumstances presented by these investigations and discussed above, the Department has determined that it needs to conduct additional analysis. Thus, contrary to certain parties' arguments, our adoption of the scope described in the October 3rd Letter is not arbitrary. Rather, it addresses the specific and special circumstances of these proceedings, as described above. Relying on the substantial transformation analysis alone could result in failure to provide relief to the domestic industry for alleged injury caused by a finished product produced in the subject country but which would be deemed to originate from a third country for AD/CVD purposes if the traditional substantial transformation analysis were applied. In these particular proceedings, a rote application of a substantial transformation analysis may not allow the Department to reach unfair pricing decisions and/or unfair subsidization concerning the modules that is taking place in the country of export. Consistent with sections 701 and 731 of the Act, the Department must be able to address such circumstances, and where appropriate, address unfair pricing decisions or unfair subsidization that is taking place in the exporting country where further manufacturing, such as assembly, occurs, notwithstanding that such activities may not necessarily result in a substantial transformation of merchandise.[73]

[71] *See* the Petitions on China and Taiwan, Volume 1, at 5-6; *see also id.* at 21.
[72] *See* the concurrent Final Determination of the Antidumping and Countervailing Duty Investigations of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China and the Issues and Decision Memorandum at Comment 1.
[73] *Id.*

The facts in the PRC AD and CVD concurrent investigations, and concerns about evasion, are related to the concerns expressed by the Petitioners in this investigation, but are nonetheless factually different. By the Petitioner's own expressed reasoning, the Petition was filed to address the use of third country solar cells, including Taiwanese cells, in the assembly of solar modules in the PRC as a means to evade the reach of the *Solar I* orders, in part because there was no existing AD order on Taiwanese solar products. In fact, Petitioner in the concurrent PRC investigations pointed to an actual shift in trade flows that resulted in increased exports of non-subject modules produced in China after imposition of *Solar I*.[74] On the other hand, although Petitioner has claimed that it wishes Taiwanese modules to be covered by the scope of this investigation, all facts it alleged with respect to the modification of the exporters' commercial activity to avoid the payment of duties under the *Solar I* orders pertained to modules, laminates and panels using Taiwanese solar cells and not solar modules assembled in Taiwan using third country cells. Furthermore, it did not provide evidence on the record that indicates that Taiwanese modules produced using third country cells are being dumped or used to evade the application of any existing AD or CVD order. In fact, nearly all U.S. sales reported by the Taiwanese mandatory respondents were sales of solar cells, not sales of solar modules, and thus the vast majority of reported sales used in our calculations remains unchanged from that used in our *Preliminary Determination*.[75] Therefore, in light of our determination that the module assembly in Taiwan does not constitute substantial transformation, we have determined that the substantial evidence on the record does not support the inclusion of solar modules assembled in Taiwan using third country cells in the scope of this investigation.

Nonetheless, to address the concerns expressed in the Petition, *i.e.*, to prevent evasion of the *Solar I* Orders and to close the "loophole" alleged by the Petitioners, and in light of the Department's scope determination in the concurrent PRC AD and CVD investigations, we have determined that an exclusion should exist in the scope of this investigation for Taiwanese solar cells assembled into solar modules in the PRC. Neither Taiwanese cells used to assemble solar modules in the PRC nor those solar modules are covered by the scope of this investigation. Rather, solar modules assembled in the PRC using Taiwanese cells are within the scope of, and therefore subject to, the concurrent PRC AD and CVD investigations as Chinese modules assembled from third-country cells.

This is in contrast to cells from Taiwan which are used in the assembly of solar modules in other countries for which no pre-existing AD or CVD orders, or ongoing AD/CVD investigations, on solar products exist. In those countries, the country of origin of the solar modules assembled using Taiwanese cells will not change through the assembly of those solar modules.

Accordingly, consistent with this determination, the solar modules produced by Kyocera in Mexico using Taiwanese cells are considered Taiwanese in origin, and are within the scope of this investigation.[76] Kyocera explained that it uses some cells produced in Taiwan that are shipped to Los Angeles and transferred in bond to Mexico. The Taiwan-origin cells are used to

[74] *See* the December 31, 2013 AD Petitions on China and Taiwan, Volume 1, at 3, 5-6, 21, 34, 37, and 53.
[75] *See* Gintech's April 25, 2014 submission at 2 and Motech's April 25, 2014 submission at 9, 25, and the July 29, 2014 Motech Preliminary Analysis Memorandum at Attachment I.
[76] On September 15, 2014, Kyocera requested that the Department issue a scope ruling that solar panels produced by Kyocera in Mexico are outside the scope of this investigation. Kyocera Scope Request, dated September 15, 2014 ("Kyocera Request").

produce modules which Kyocera sells to multiple countries, including the United States.[77] Kyocera argues that when it receives cells from Taiwan, it does not know which cells will be incorporated into modules exported to the United States.[78] Kyocera argues further that the Department cannot include merchandise assembled or completed in a non-subject country except in conformity with the anti-circumvention provisions of the law, and any Taiwanese cells incorporated by Kyocera into modules produced in Mexico cannot be treated as products of Taiwan.[79]

However, given the Department's decision regarding the scope of this investigation, Kyocera's knowledge of its inventory is not relevant to the Department's substantial transformation test. Kyocera is producing modules in Mexico using cells from Taiwan. Under the final scope in this investigation, that merchandise would therefore be considered Taiwanese in origin and subject to this investigation.[80]

The Two Out of Three Language From the *Initiation Notice* and *Preliminary Determination*

In determining the final scope of this investigation, we have not adopted the "two out of three" language contained in the scopes proposed in the petitions and adopted in the *Initiation Notice* and the *Preliminary Determination*. As we noted above, in this investigation we have applied a substantial transformation analysis, pursuant to which the solar cell determines the country of origin, unless manufactured into a module, laminate or panel in the PRC.

We have determined that the enforcement of the "two out of three" language could be difficult and complicated. For example, it is unclear how importers might demonstrate to the satisfaction of Customs and Border Protection ("CBP") that a solar module is, or is not, covered by the Taiwan investigation under the "two out of three" language. Importers might have to: 1) provide evidence that the ingot, wafer, or solar cell was/was not processed in Taiwan; 2) provide evidence that the cell was then subsequently processed in a third country; and then 3) provide evidence that it was subsequently assembled into a solar module in Taiwan. Given that different, unaffiliated parties might be responsible for each of these steps of production, and that additional parties might provide additional steps of subassembly in the production process of a solar product, the evidentiary burden on importers could be complicated, and likewise the burden on CBP to confirm the validity and reliability of such evidence could also be difficult.

Further complicating this task is the fact that respondents have been nearly unanimous in claiming that they are unable to track where the wafer contained in a solar cell was

[77] *See id.* at 3 – 4.
[78] *See id.* at 10.
[79] *See* Kyocera's case brief at 2.
[80] Similarly, with regard to tenKsolar (Shanghai) Co., Ltd.'s argument that the Department should take into consideration the processing done in the country that produces the cell and the country that produces the module, laminate or panel, and then only apply AD duties to the portion of the processing that was done in Taiwan, we disagree. See tenKsolar (Shanghai) Co., Ltd.'s October 16, 2014 case brief. Solar modules assembled in third-countries using Taiwanese solar cells are covered by the scope of the investigation, no matter the amount of processing done in the third country. Thus the full value of these solar modules are subject to antidumping cash deposits and, if an order is issued, applicable antidumping duties.

manufactured,[81] which would be a necessary prerequisite to demonstrate that a solar module assembled in Taiwan is covered, or not covered, by the scope of the investigation.

We have therefore concluded that to the extent that the Petition expresses concern that Taiwanese cells are being used in the production of Chinese solar modules in evasion of the *Solar I* orders, as explained above, we believe we have addressed those concerns in this final determination.

Finally, to the extent parties' comments otherwise opposed adopting the "two out of three" language, because we have not adopted this language into the final scope, we have not addressed such comments here.

The October 3rd Letter

Finally, with respect to the Department's October 3rd Letter, Petitioner has stated that it would prefer the scope language as clarified in the October 3rd Letter to the "two out of three" scope language. We have adopted the scope clarification for the concurrent PRC AD and CVD investigations, thereby covering in those investigations solar modules assembled in the PRC using Taiwanese solar cells. In addition, we have excluded from the scope of this investigation solar modules assembled in the PRC using Taiwanese cells as well as the Taiwanese cells used in those solar modules. Petitioner has stated multiple times throughout this investigation on the record, both in the Petition and in subsequent submissions, that its concern was capturing dumping and unfair subsidization in China, and that Taiwanese cells assembled into PRC solar modules were a part of the means of evading the *Solar I* orders. As explained above, we have concluded that we have addressed those concerns in this final determination, and accordingly have not adopted the language from the Department's October 3rd letter.

Finally, to the extent parties' comments opposed adopting the scope language in the October 3rd Letter, because we have not adopted this scope language, we have not addressed such comments here.

Certification Requirements

If an importer imports solar panels/modules that it claims do not contain solar cells that were produced in Taiwan, the importer is required to maintain the importer certification in Appendix II. These clarification requirements are different from and replace the certification requirements introduced in the Preliminary Determination. The importer and exporter are also required to maintain the exporter certification in Appendix II if the exporter of the panels/modules for which the importer is making the claim is located in Taiwan. The importer certification must be completed, signed, and dated at the time of the entry of the panels/modules. The exporter certification must be completed, signed, and dated at the time of shipment of the relevant

[81] A group of large solar product producers stated that it is virtually impossible for importers to know and to trace the origin of the ingots and wafers in cells that are assembled into modules when the module manufacturers purchase the cells from third parties in other countries, or to distinguish between the value of modules with cells that meet Petitioner's "two-out-of-three" test and those that do not. *See* the February 18, 2014 Scope Comments Letter submitted by of Yingli Green Energy Holding Company Limited, Yingli Green Energy Americas, Inc., Canadian Solar Inc., Changzhou Trina Solar Energy Co., Ltd., Wuxi Suntech Power Co., Ltd., Shanghai JA Solar Technology Co., Ltd., Hefei JA Solar Technology, Co., Ltd., and Jinko Solar Co., Ltd.

panels/modules. The importer and Taiwan exporter are required to maintain sufficient documentation to support their certifications. While importers and Taiwan exporters are required to maintain the aforementioned certifications and documentation, they will not have to provide this information to CBP as part of the entry documents, unless CBP specifically requests that they provide the certification and/or documentation.

If it is determined that the certification or documentation requirements noted in the certification have not been met, CBP is instructed to suspend all unliquidated entries for which the requirements were not met and require the posting of an antidumping duty cash deposit on those entries equal to the exporter specific rate in effect at the time of the entry.

If a solar panel/module contains some solar cells produced in Taiwan but the importer is unable, or unwilling, to identify the total value of the panel/module subject to provisional measures, CBP is instructed to suspend all unliquidated entries for which the importer has failed to supply this information and require the posting of an antidumping duty cash deposit on the total entered value of the panel/module equal to the exporter specific rate in effect at the time of the entry.

The Department will provide guidance, through a Federal Register notice, regarding any changes to the certification structure or future electronic filing relating to these certifications and accompanying documentation with CBP once the Department is integrated into the International Trade Data System/Automated Commercial Environment, the import and export data system being built by CBP to replace its legacy systems.

Comment 2: Whether the Department appropriately applied the Cohen's *d* test

Gintech Comments

- The Cohen's *d* test as applied by the Department improperly treats U.S. sales with relatively higher prices as evidence of a pattern of prices that differ significantly (*e.g.*, "targeted dumping").
- The Cohen's *d* test does not measure significance.
- The Department incorrectly excluded the test sales from the base sales in the Cohen's *d* test. However, the premise of the test is to determine whether including the test group in the average-to-average method masks dumping by virtue of its *inclusion* in the average-to-average method.
- The Department improperly aggregated the separate results of its Cohen's *d* test. That is, the Department's analysis aggregates the results of the three different Cohen's *d* tests by purchaser, region, and time period.
- Zeroing is unlawful when used in any alternative comparison method. There is no lawful justification for the Department to use "zeroing" -- a discredited methodology that the Department long ago abandoned in original AD investigations.

Petitioner Comments

- The Cohen's *d* test does not improperly treat U.S. sales with relatively higher prices as evidence of a pattern of prices that differ significantly (*e.g.*, "targeted dumping").
- The Cohen's *d* test appropriately measures significance.

- In applying its Cohen's *d* test, the Department properly excluded the test sales from the base sales.
- The Department properly aggregated the results of the Cohen's *d* test.
- The Department's use of zeroing in an alternative comparison method is lawful.

Department's Position: As we found in the preliminary determination, we find that when comparing the weighted-average dumping margin calculated using the standard average-to-average comparison method and the weighted-average dumping margin calculated using the appropriate alternative method, there is not a meaningful difference in the results. Accordingly, the Department continues to find for the final determination that it is appropriate to calculate the weighted-average dumping margins for Gintech and Motech using the standard average-to-average method. Therefore, because the Department continues to apply the standard comparison method for the final determination, the arguments relating to the Department's differential pricing analysis are moot.

Comment 3: Whether the Department's Respondent Selection Process was Unlawful or Unsupported

AU Optronics ("AUO") Comments

- Due to the Department's post-preliminary determination proposing a possible modification to the scope, and the decision made regarding indirect sales by the mandatory respondents, AUO should have been selected as a mandatory respondent, based on the quantity and value ("Q&V") of its U.S. sales.
- The Department has not demonstrated that the two mandatory respondents selected are the largest exporters or representative of the industry. Additionally, limiting the selection to two mandatory respondents fails to satisfy the statutory requirement to accurately calculate dumping margins for the "all-others" rate.
- Given the changing circumstances of this investigation, the Department should issue an affirmative dumping determination, if warranted, for the "all-others" rate, but not impose cash deposits, pending the first administrative review results.
- At a minimum, the Department should only apply Motech's dumping margin to AUO, due to the fact that Gintech did not export any modules to the United States from Taiwan.

Department's Position: We disagree with AUO that the Department should refrain from requiring cash deposits for entries of merchandise exported by the "all-others" companies. The Department is permitted by statute to limit the number of respondents, and is provided the discretion to limit our examination to a reasonable number of companies. This selection process is intended for the Department to examine a reasonable number of exporters or producers based on information available at the time the analysis is conducted, rather than information that becomes available during the course of a proceeding.

As stated in our respondent selection memorandum, section 777A(c)(2) of the Act grants the Department the discretion to limit our examination to a reasonable number of companies when it is not practicable to establish individual weighted-average dumping margins for all exporters and

producers because of the large number of exporters or producers.[82] At the time of selection, the Department had issued Q&V questionnaires to 21 companies that were identified in the Petition as potential exporters and/or producers of solar products from Taiwan. In total, the Department received Q&V questionnaire responses from 24 companies, a large number of companies. To examine all of these companies would not be practicable given the Department's available resources.[83]

Therefore, we limited our individual examination to a reasonable number of companies that represented the largest exporters or producers based on the quantity of subject merchandise sales to the United States during the POI, which is permissible under section 777A(c)(2)(B) of the Act. At the time of respondent selection, the two mandatory respondents, Gintech and Motech, represented the largest exporters or producers of subject merchandise to the United States during the POI, based on the volume of sales reported in the Q&V questionnaire responses.

As AUO recognizes, over the course of the investigation, the Department made certain determinations that decreased the volume of sales by Gintech and Motech that were subject to individual examination. For example, the Department determined that Gintech and Motech's sales of cells to the PRC should not be included in those companies' calculations as "indirect" United States sales because those companies did not have actual or constructive knowledge that the ultimate destination of those cells was the United States.[84] As a result of these determinations, the volume of sales of subject merchandise for both Gintech and Motech is smaller than the quantities upon which we based our selection of mandatory respondents. AUO therefore argues that, compared to its own Q&V response, had the Department known then what it knows now, AUO should have been chosen as a mandatory respondent, based on its volume of sales.

A respondent selection determination must be based on information that is known and available at the time of selection. At the time of respondent selection, the Department was not aware that Gintech and Motech were reporting sales of cells to the PRC as U.S. sales when they did not have actual or constructive knowledge of the ultimate destination. The matter only became certain to the Department after the mandatory respondents submitted their questionnaire responses, the Department was able to evaluate the evidence associated with their claims, ask supplemental questions, and ultimately verify the information on the record. Due to the statutory deadlines involved in this investigation, the Department is unable to conduct a new respondent selection process. Further, AOU did not provide evidence that would substantiate its selection as a mandatory respondent if its U.S. sales were to be subject to the same sort of analysis as the mandatory respondents. The same holds true with respect to AOU's assertion about the need for revisiting respondent selection in light of the Department's clarifications to the scope of subject merchandise.[85]

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[82] *See* Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, from Abdelali Elouaradia, Director, Office IV, Antidumping and Countervailing Duty, regarding "Antidumping Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from Taiwan: Respondent Selection" (March 21, 2014) ("Respondent Selection Memo").
[83] *Id.*
[84] *See* Comments 4 and 18 of this memorandum.
[85] *See Certain MCBs from China*, and accompanying Issues and Decision Memorandum at Comment 1.

AUO also claims that following the Department's selection of Gintech and Motech as mandatory respondents, Department officials notified AUO that AUO would not be selected as a voluntary respondent, irrespective of what AUO did, due to lack of resources and staff at the Department. However, the Department is unaware of any of the communications between AUO and Department officials as described by AUO. Furthermore, AUO provided no evidence of such communications, and the record does not reflect that such communications took place. Section 782 of the Act requires that if an entity wishes to be treated as a voluntary respondent, it must respond to the Department's AD questionnaire. AUO did not follow this statutory requirement, so the Department never considered it to be a voluntary respondent. AUO defends its decision to not submit a voluntary response by arguing that fully answering the questionnaire would have been an exercise in futility, but the Court of International Trade ("CIT") found in *Asahi Seiko* that the fact of not being selected as a mandatory respondent does not make it impossible or futile for a respondent to obtain its own AD margin as a voluntary respondent.[86] If AUO wished to be treated as a voluntary respondent, it was required to abide by the requirements of section 782(a) of the Act, which it did not do. As stated in the respondent selection memo, if the Department received voluntary responses that were submitted in accordance with section 782(a) of the Act and 19 CFR 351.204(d), the Department recommended evaluating the circumstances over the course of the investigation to determine whether one or more such voluntary respondents, in addition to the two mandatory respondents, may be examined.[87] Accordingly, there is no basis for AUO to now argue that the respondent selection process was unlawful or unsupported.[88]

AUO states that the Department cannot credibly require AD cash deposits for the non-individually examined respondents that are based on the dumping margins calculated for the individually examined mandatory respondents, due to the number of sales that have been excluded over the course of this proceeding. AUO's arguments, however, are based on an incorrect premise. In fact, the Department selected mandatory respondents consistent with its statutory obligations, pursuant to section 777A(c)(2) of the Act. Furthermore, the Department conducted its investigation of Gintech and Motech also consistent with its statutory and regulatory obligations, including verifying both companies consistent with section 782(i) of the Act.[89] That the result of the investigation is based on a smaller amount of reviewed export transactions than initially believed to exist by the Department is an outcome of the investigation, nothing more. AUO alleges that the remaining sales are not representative of the industry as a whole, or should not be used in the calculation of an "all-others" rate, but provides no evidence to substantiate such a claim.

Section 735(c)(5)(A) of the Act stipulates that the estimated all-others rate shall be an amount equal to the weighted-average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins and any margins determined entirely by using facts available. We are following section 735(c)(5)(A) of the Act in this investigation by basing the all-others rate on the margins of the two individually investigated respondents. Further, with respect to "all-others" companies,

[86] *See Asahi Seiko.*
[87] *See* Respondent Selection Memo.
[88] *Id.*
[89] *See* Verification Reports.

section 735(c)(1)(B)(ii) of the Act stipulates that, with the issuance of an affirmative final determination, the Department shall order the collection of cash deposits, bonds, or other security, for each entry of the subject merchandise in an amount equal to the "estimated all-others rate." We are acting consistent with this provision in requiring cash deposits for the "all-others" companies. We note that the Act only requires an "estimate" of an "all-others" rate, contrary to AUO's arguments that exact precision is required. Pursuant to the plain language of section 735 of the Act, basing the "all-others" rate on the experience of the individually investigated respondents is a reasonable means for estimating that rate.

Furthermore, the Department disagrees with AUO that we should only apply Motech's weighted-average dumping margin to AUO, because Gintech did not export modules to the United States from Taiwan. Both Gintech and Motech made sales of subject merchandise to the United States; therefore, the rate assigned to the non-individually examined respondents is an average of the rates calculated for Gintech and Motech.

Thus, the Department's determination of the "all-others" rate in this investigation is reasonable and fully consistent with the Act. Consistent with section 735(c) of the Act, the Department may order the collection of cash deposits for all entries of "all other" exporters.

Mandatory Respondent Specific Issues

Gintech

Comment 4: Whether to Include Reported "Indirect" Sales in the calculation of U.S. Price

Gintech Comments

- Gintech knew or had reason to know that its reported third-country sales were destined for the United States.
- Sworn statements, documentary evidence, e-mails, meeting minutes, sales reports, and personal interviews conducted with employees by the Department at verification showed that Gintech knew or had reason to know its sales were destined for the United States.
- Even prior to the POI, Gintech's third-country customers publicly stated they planned to purchase Gintech's crystalline silicon photovoltaic ("CSPV") sales for the purpose of shipping product to customers in the United States.
- Gintech's customers told Gintech sales personnel, repeatedly – in person, by telephone, by e-mail – that the CSPV cells they were purchasing from Gintech were destined for the U.S. market, as shown by meeting minutes and e-mail records.
- Sales to Gintech's third-country customers (in particular the PRC) rose sharply after preliminary duties were imposed on the PRC in the first CSPV cells AD and CVD investigations, and sales rose even further after the Department's final determination and orders in the previous PRC case.
- Gintech's third-country customers required that Gintech provide country-of-origin ("COO") certificates, with regard to each individual shipment, which the customers advised Gintech were necessary to prove to U.S. Customs and Border Protection ("CBP") that the merchandise entering the United States originated in Taiwan rather than the PRC. Gintech can tie certain transactions in its U.S. sales database to

correspondence showing Gintech was told merchandise was destined for the United States.

- The efficiency of cells sold to third-country customers tended to be higher than Gintech's home market sales, consistent with customer requests that cells for the U.S. market be of those efficiencies.
- The preliminary determination was contrary to the Department's longstanding practice to include sales where a respondent knew or had reason to know its sales were destined for the United States.
- If a "substantial portion" of a company's sales to a third-country customer went to the United States, the CIT held in *LG Semicon* that the Department may conclude a company knows or has reason to know the destination of the sales.
- If third-country processing does not result in substantial transformation, the Department has used those third-country sales in its dumping margins. Modules and cells are in the same class or kind of merchandise. Thus, the use of Taiwanese cells in producing modules in the PRC does not change the class or kind of the merchandise and therefore the product is not substantially transformed.
- The Department unlawfully excluded information from Gintech's customer and officials that corroborates that Gintech knew or had reason to know its sales were destined for the United States.

SunEdison Comments

- Department precedent and the record evidence require including Gintech's and Motech's indirect U.S. sales in the margin calculation for each company.

Petitioner Comments

- The Department should continue to reject Gintech's arguments to include exports of cells to third countries in the pool of U.S. sales used for the AD margin calculations.
- Neither respondent provided purchaser certificates, contracts, labeling or shipping documents which identified the United States as the ultimate destination.
- Other countries and organizations also request a certificate of origin of the cells from Chinese exporters, including Canada, India and more recently, the European Union.
- If the Department chooses to treat sales to unaffiliated third-country processors as indirect sales, such classification should be limited to cases where the further processing is limited to repackaging or further minor operations.

Department's Position: After considering all factual information on the record of this investigation, including the information reviewed in our verification of Gintech, we continue to find that Gintech failed to demonstrate that it either knew or should have known, at the time of sale, that the merchandise sold to third-country customers was destined for export to the United States.

Under section 772(a) of the Act, the basis for export price is the price at which the first party in the chain of distribution which has knowledge of the U.S. destination of the merchandise sells the subject merchandise, either directly to a U.S. purchaser or to an intermediary such as a trading company. The party making such a sale, with knowledge of the destination, is the

appropriate party to be investigated. To effectuate section 772(a) of the Act, the Department over the years has established what is known as the "knowledge test."

The Department's standard for the "knowledge test" is well-established.[90] The Department's practice is to consider documentary or physical evidence that the producer knew or should have known its goods were destined for the United States, because this type of evidence is more probative, reliable, and verifiable than unsubstantiated statements or declarations.[91] As the Petitioner notes, it is important for the Department to be cautious in determining the universe of indirect sales that it permits to be reported as U.S. sales. Absent such evidence as to actual or constructive knowledge of the ultimate destination at the time of a sale, a respondent could manipulate the pool of transactions it reports to the agency depending on the predicted outcome.

The Department will nonetheless also consider other evidence when conducting its analysis. For instance, an admission by the producer or a representative of the producer to the Department that it knew of the ultimate U.S. destination also may be relevant to whether there was knowledge.[92] In prior cases, the Department considered whether the relevant party prepared or signed any certificates, shipping documents, contracts, or other such documents stating that the merchandise was destined for the United States.[93] The Department also considered whether the relevant party used any packaging or labeling stating that the merchandise was destined for the United States.[94] Additionally, in prior cases, the Department examined whether the features, brands, or specifications of the merchandise indicated that it was destined for the United States.[95]

All of these factors considered in prior knowledge determinations were relied upon by the Department in order to determine whether the producer had constructive knowledge (*i.e.*, should have known) that the goods were destined for the United States.[96] In each case, the Department was able to determine whether or not a producer should have known that its merchandise was destined for export to the United States by examining record evidence demonstrating that the producer or relevant party used packaging or labeling materials unique to U.S. sales of the merchandise under investigation or review, or signed documentation stating the ultimate U.S. destination.

Gintech submits that the record contains overwhelming evidence, with respect to virtually all of the factors normally considered by the Department, that it had knowledge of the ultimate destination. We disagree. As discussed below, the Department's standard factors indicative of knowledge are not present in the instant case. Accordingly, because the record is devoid of any substantial evidence supporting such a claim, we continue to find that the record does not support a determination that Gintech either knew or should have known at the time of the sale that any

[90] *See Pistachios from Iran*, and accompanying Issues and Decisions Memorandum at Comment 1.
[91] *See, e.g., Wonderful Chemical*, 259 F. Supp. 2d at n. 4.
[92] In *DRAMS from Korea 1999*, 64 FR at 69696, the individual who had been the world-wide sales manager for the relevant company during the POR told the Department that he knew that the merchandise was destined for the United States. CBP entry information corroborated the admissions of this individual.
[93] *See Synthetic Indigo*, 64 FR at 69727.
[94] *See Pasta from Italy*.
[95] *See, e.g., GSA, S.R.L.*, 77 F. Supp. 2d at 1355.
[96] *See Wonderful Chemical*, at 1279.

specific sale of the cells it sold to third-country customers was destined for the United States. Our responses to SunEdison's comments are incorporated in our responses to Gintech.

The evidence does not support Gintech's claims

First, Gintech claims that it provided documentary or physical evidence in the form of correspondence with customers showing that the customers told Gintech that its cells were destined for the U.S. market, and that the requested COO certificates were necessary to prove origin to CBP. Gintech also points to internal meeting minutes and correspondence as evidence that "Gintech officials believed the sales were destined for the United States."[97]

Notwithstanding Gintech's arguments to the contrary, the Department's preliminary determination to exclude all of Gintech's reported "indirect" sales was consistent with the Department's past practice. To the extent that some of these documents, such as the e-mail records and minutes from face-to-face meetings with customers, were dated, drafted and prepared during the POI, they did not refer to specific transactions, but were general in scope. The speculation of a producer that the goods using Gintech's cells might ultimately be incorporated into a module, laminate and/or panel produced in a third country that might later be shipped to the United States is insufficient for the Department's knowledge determination. Furthermore, the belief of Gintech's employees that the modules, laminates or panels would eventually be destined for the United States is also not a satisfactory basis to impute knowledge for purposes of classifying Gintech's exports to be indirect sales to the United States. Rather, the standard for making a knowledge determination is that the producer must have reason to know *at the time of the sale* that the *specific sale* of subject merchandise was destined for the United States.[98] The e-mails and meeting minutes do not satisfy that knowledge test.

To the extent that some of the submissions to which Gintech refers were more specific to certain transactions, those submissions are sworn statements and communications of Gintech employees with the Department's verifiers. These statements and communications were made well after the sales at issue had occurred, and the Department's knowledge test is measured on what the company knew at the time of sale.[99] *See* Gintech Analysis Memo for a more detailed discussion. Furthermore, as explained above, it is the Department's practice to give greater consideration to physical evidence and documentation prepared at the time of a transaction than to unsubstantiated statements or declarations that may be in the best interest of the investigated company sourcing those statements. As noted by the Petitioner, and described further below, the record evidence indicates that Gintech's customers ship to many markets, and COO certifications were requested for shipment to several countries.[100] In addition, Gintech provided no documentation on the record, prepared during the POI, such as purchaser certificates, contracts, labeling or shipping documents, which indicated that certain Taiwanese cells were being shipped

[97] *See* Gintech case brief at 55.
[98] *See Pistachios from Iran*, and accompanying Issues and Decision Memorandum at Comment 1*; see also Pure Magnesium 2001,* and accompanying Issues and Decision Memorandum at Comment 3.
[99] *See Pure Magnesium 1995*, 60 FR at 16445 ("Although SMV . . . did eventually learn of some of its merchandise's sale to U.S. customers, this knowledge always came after SMV had sold the merchandise").
[100] *See* Gintech's June 20, 2014 supplemental questionnaire response at exhibit S-11; *see also* Gintech's July 3, 2014 supplemental questionnaire response at page 3, listing several additional countries for which the customer requested a country-of-origin certificate.

to third countries for the express purpose of being incorporated into a module, laminate and/or panel that was ultimately destined for the United States. Thus, we determine that the sworn statements and communications with Department officials at verification do not satisfy the Department's knowledge test.

Accordingly, evidence on the record does not reflect that Gintech and its employees knew at the time of sale that sales of particular cells to third-country customers were going to be incorporated into modules, laminates and/or panels destined for the United States. Due to the proprietary nature of this issue, for a full discussion of this information discussed here, *see* Gintech Analysis Memo.

Producer "admissions" and "beliefs" alone are not sufficient evidence of knowledge of destination

Second, Gintech states that company officials have repeatedly told the Department that the company knew or had reason to know sales reported in its U.S. sales database were destined for the U.S. market, and Gintech asserts that the Department previously found that an admission by the producer or representative of the producer is evidence of knowledge. In support of its argument, Gintech cites *Polyester Staple Fiber,* and accompanying Issues and Decision Memorandum at Comment 14.

Gintech's reliance on *Polyester Staple Fiber* is inapposite. The factual question of whether the respondent had knowledge that the merchandise was destined for the United States was not at issue in that case. In *Polyester Staple Fiber,* the respondent made certain sales to unaffiliated trading companies, but reported the sales because it knew they were destined for the United States. The company asked that the Department exclude such sales from its margin calculation because section 735(a)(1) of the Act requires the Department to determine "whether the subject merchandise is being, or is likely to be, sold to the United States at less than its fair value."[101] The respondent, Cixi Jiangnan, argued that because the unaffiliated trading company was responsible for setting the price to the United States, the sales should not be part of Cixi Jiangnan's dumping margin calculation. In other words, the respondent in *Polyester Staple Fiber* was attacking the validity of the knowledge test itself as a tool for determining export price under section 772 of the Act and the dumping margin under section 735 of the Act. The factual question of Cixi Jiangnan's knowledge was never in doubt, as the company claimed to have "shipped the merchandise to the United States at the direction of the trading companies."[102] This is different than the case here. It is well-established that the knowledge test is necessary for determining the appropriate party setting the export price under section 772 of the Act. The only question here is whether Gintech had knowledge, based on the evidence on the record.

Citing *Pistachios from Iran*, Gintech also claims that the Department has found that statements of knowledge by company personnel are sufficient to find that a respondent knew or had reason to know that sales were destined for the United States. This is not a correct assessment of the Department's past consideration of personnel statements. In such cases, such statements by a former employee were merely the trigger that led the Department to investigate the claims. For

[101] *See Polyester Staple Fiber*, and accompanying Issues and Decision Memorandum at Comment 14.
[102] *Id*.

example, in *DRAMS from Korea 1999*, there was customs entry information that corroborated the admissions of the individual, and based on this information, including the statements of admission, the Department found knowledge.[103] The CIT recognized this fact in upholding the Department's finding, stating "The Court finds Commerce's reliance on this corroborating evidence reasonable."[104] In other words, the Department's decision, upheld by the CIT, was based not on the statement of admission alone, but on evidence corroborating the statements. In the instant investigation, there is no corroborating documentary evidence on the record prepared during the POI to support Gintech's statements that Gintech knew or had reason to know at the time of sale that specific reported sales of cells to third countries were ultimately destined for the United States. In any event, what gave the admission in *DRAMS from Korea 1999* weight was the fact that it was an admission against the party's own interest. In the instant case, Gintech's statements are not "admissions" at all, but rather are statements made in Gintech's own interest.

Furthermore, as we've explained, regardless of whether Gintech's employees believed certain sales were destined for the United States, the record evidence does not support a determination that Gintech knew or had reason to know at the time of sale that any of its specific sales to third-country customers were destined for the United States. "The test employed by Commerce is not whether, in theory, the merchandise could have arrived in the United States,"[105] but whether Gintech knew or had reason to know that the United States was the destination.

The certificates of origin are not evidence of knowledge of destination

Third, Gintech states that it has provided numerous COO certifications on the record which indicate that it knew or had reason to know that its merchandise was destined for the United States. According to Gintech, the Department has previously found COO certifications to be probative and compelling evidence to establish that the respondent knew or had reason to know the product was for the U.S. market, citing *Wonderful Chemical*, 259 F. Supp. 2d at 1280. Gintech claims that the fact that its customers requested COO certification is relevant when combined with the fact that its customers advised Gintech that the merchandise was destined for the United States and that the certifications were for purposes of proving country of origin to CBP as a result of the AD and CVD investigations on the PRC.

As Gintech acknowledges in its case brief (at page 56) none of its COO certifications "explicitly" states that the merchandise was destined for the United States. In fact, the COO certifications explicitly indicate the destination of the merchandise, and in no case do they show the destination is the United States. This is in contrast to the facts at issue in the administrative proceeding challenged in *Wonderful Chemical*, where the CIT found that the Department "acted reasonably in determining that Tianjin Hongfa knew or should have known that its products were bound for the United States. Tianjin Hongfa prepared, signed, and certified two documents, the Certificates of Origin and Fumigation, which explicitly stated that the exports were destined for the United States."[106] In *Wonderful Chemical*, the CIT upheld the Department's determination that Tianjin Hongfa had knowledge precisely because the certifications at issue indicated that the

[103] *See DRAMS from Korea 1999*, 64 FR at 69696; *see also Hyundai Electronics.*
[104] *See Hyundai Electronics*, 342 F. Supp. 2d at 1149.
[105] *See Timken*, 166 F. Supp. 2d at 634.
[106] *See Wonderful Chemical*, 259 F. Supp. 2d at 1280.

United States was the ultimate destination. That key element is missing in all of the COO certifications placed on the record by Gintech.
In addition, the record evidence does not indicate that the COO certifications were used solely to ship merchandise to the United States. In fact, as the Petitioner notes and Gintech itself acknowledges,[107] Canada, India, the European Union and other countries request a COO certification. Indeed, communications between Gintech and its customers refer to markets other than the United States. We agree with Petitioner that any Chinese producer purchasing Taiwanese cells might request a COO certificate as a matter of course, in the event that it ships particular cells to any of the several countries identified by Gintech that require a COO. Because the Department's knowledge test is dependent on sale-specific knowledge of destination, rather than a company's general export practice, the mere fact that a COO is requested is therefore not sufficient evidence to prove that particular merchandise is ultimately destined for the United States.[108]

The airway bill citation is not sufficient evidence to show knowledge of destination

Fourth, Gintech states that although there is no evidence of particular packaging that marked the United States as the ultimate destination of Gintech's cells, airway bills for transactions with a particular customer included consent to inspection clauses and a citation to the U.S. Code of Federal Regulations. Gintech argues that this reference on the airway bills is a clear indication that the cells were subject to U.S. inspection and thus destined for the U.S. market. Gintech argues that at verification the Department found that the citation to the U.S. Code of Federal Regulations was consistently placed on airway bills for shipments to this particular customer.

We disagree with Gintech's suggestion that the consent to inspection clause on some of its airway bills is evidence that the merchandise will always be destined for the United States. No sales-related documentation shows any evidence that the merchandise was destined for the United States.[109] Moreover, if the consent to inspection clause is evidence that merchandise is destined for the United States, as suggested by Gintech, the overwhelming majority of Gintech's sales are lacking such evidence. Of all the documents examined at verification, the Department noted the referenced consent to inspection clause only on airway bills issued by the same agent for sales to the same customer, suggesting it is more likely that the citation to the U.S. Code of Regulations is routinely included on airway bills issued by this agent, independent of the shipping destination. With respect to the airway bill itself, the Department finds that rather than being evidence that the merchandise is destined specifically for the United States, the consent to inspection clause is merely a general statement that allows for inspection of the cargo at any airport through which it transits. Due to its proprietary nature, for a more detailed discussion of this issue see the Gintech Analysis Memo.

[107] *See* Gintech's July 2, 2014 supplemental questionnaire response (at 3), where Gintech provided a list of several other countries that require a COO certification.
[108] *See Pure Magnesium 2001*, and accompanying Issues and Decision Memorandum at Comment 3. ("The reseller in question sells to many countries and regions throughout the world, including Europe, India, the Middle East, and the United States. Therefore, it would be inappropriate for Avisa or the Department to conclude that all sales to this reseller were destined for the United States.")
[109] *See* Gintech Verification Report Exhibit IX.

Gintech's comparison of cells between the U.S. and Taiwan markets does not indicate knowledge of destination

Fifth, Gintech argues that specific features or specifications indicate that the merchandise was destined for the United States. Specifically, Gintech asserts that the efficiencies of cells sold to third-country customers that were destined for the United States indicate that the merchandise was destined for the U.S. market because those efficiencies tended to be higher than Gintech's home market sales and were consistent with customer requests that cells for the U.S. market be of those efficiencies. Gintech argues that a comparison of the average efficiency of cells between home market and U.S. market sales shows higher efficiencies for cells going to the U.S. market.

Gintech compares the efficiencies of sales reported as "indirect" U.S. sales to the efficiencies of home market sales. However, no issue has been raised with regard to whether the sales to third-country customers were home market sales; documents examined at verification showed that the sales were exported. For example, the Department reviewed export declaration forms, shipping documentation and other sales-related documents leaving no doubt that the sales in question were for export. Accordingly, the fact that the sales were distinguishable from home market sales is not in dispute.

Gintech is incorrect, however, when it argues that the ability to distinguish export sales from home market sales automatically leads to a conclusion that the export sales are destined for the United States. The proper test is whether Gintech can distinguish merchandise shipped to the United States from merchandise shipped to other markets.[110] Moreover, the CIT has held that absent additional evidence, merchandise marked with the name of a U.S. company is not sufficient evidence to impute knowledge that the merchandise was destined for the United States: "Just because a factory produces a piece of merchandise with the mark 'Peer,' it does not necessarily mean, unless there is additional evidence, that such merchandise is destined for the United States."[111]

In circumstances remarkably similar to the facts of this case, the Department recently found, in *Aluminum Extrusions*, no record evidence to support a determination that a company supplying a second company with merchandise knew or should have known at the time of sale that specific sales were destined for the United States.[112] In the instant case, Gintech supplied companies in other countries with cells, and all of the sales-related documentation reviewed by the

[110] *See, e.g., GSA, S.R.L* 77 F. Supp. 2d at 1355. The Court upheld the Department's finding that Company A knew the merchandise at issue was destined for the United States because Company A prepared the P-1 certificate, required for entry into the United States and which had imprinted at the top "For Certificate IPR Exports of Pasta to the USA;" Company A manufactured the labeling and packaging for the merchandise with the imprint: "Imported by Racconto, Melrose Park, IL 60160;" different package sizes were used for sale to the United States versus sales to Europe; and different brands were sold in the United States from those sold in Canada.

[111] *See Timken,* 166 F. Supp. 2d 608 at 633.

[112] *See Aluminum Extrusions*, and accompanying Issues and Decision Memorandum at Comment 2. The Department explained that "the sales trace documents on the record, including packing lists, commercial invoices, bills of lading, and payment documentation, only indicate that sales were destined for Kromet's factories in either Canada or Mexico. Further, there were no unique features of the merchandise, such as product specifications, that would otherwise indicate that it was destined for the United States."

Department, including COO certifications, indicated that the merchandise was shipped to countries other than the United States. Even if a COO certification was issued at the time of sale, no COO certification related to any of the reported "indirect" sales indicated that the merchandise was destined for the United States. The COO certifications, therefore, cannot be considered evidence of a sale to the United States. Thus, Gintech failed to provide any evidence that it knew or had reason to know at the time of sale that any of the reported "indirect" sales were destined for the United States.

The CIT's decision in *LG Semicon* does not apply to these facts

Sixth, Gintech claims that where a substantial portion of a customer's downstream products are shipped to the United States the Department has consistently found that the producer knew or had reason to know sales to that customer were destined for the United States. Because it claims an overwhelming amount of its cells were sold to the PRC, and because it knew a substantial amount of modules, panels and laminates produced in the PRC are ultimately shipped to the United States, Gintech argues that the Department should infer that a substantial portion of its shipments were ultimately destined for the United States.

We disagree with Gintech that this is a correct description of the facts considered by the Department in the cases it cites. In *DRAMS from Korea 1998*, the Department explained that the record showed "that LG sold an enormous amount of DRAMs to a very small company and turned the merchandise over to a customer in the United States. Consequently . . . LG knew for certain that it was shipping DRAMs into the United States."[113] As explained above, with respect to Gintech's reported "indirect" U.S. sales, there is no evidence that Gintech "turned the merchandise over to a customer in the United States," or that it "knew for certain that it was shipping {cells} into the United States."

In the review of the same AD order preceding *DRAMS from Korea 1999*, the Department conducted a similar analysis, which was upheld by the CIT in *LG Semicon.*[114] The CIT affirmed the Department's finding of knowledge, stating "The administrative record demonstrates that a substantial number of LG Semicon's DRAMs were exported by the foreign business to the United States."[115] In doing so, the Court found that the Department has consistently applied the knowledge test in prior determinations.

The facts in *DRAMS from Korea 1998* and *LG Semicon* are quite different from those in this investigation. The record in this investigation does not contain evidence that the vast majority of Gintech's merchandise was exported by its third-country customers to the United States. Accordingly, our determination to exclude Gintech's reported "indirect" U.S. sales is consistent with our prior determinations, and the CIT's decision in *LG Semicon* does not apply in this case.

[113] *See DRAMS from Korea 1999*, 64 FR at 69713.
[114] *See DRAMs from Korea 1998.*
[115] *See LG Semicon,* at 20.

Petitioner's and Gintech's arguments about substantial transformation are not persuasive

Petitioner argues that even if we accept that a respondent knew or had reason to know that merchandise sold to an unaffiliated third-country customer was destined for the United States, such classification should be limited to cases where the further processing is insignificant. According to Petitioner, it is unreasonable to find that the price of the cells being sold to unaffiliated module producers in third countries reflects their value as they enter the United States as modules because the transformation of Taiwanese cells into modules substantially changes the nature and the commercial value of the product. Petitioner also urges the Department to exclude sales of cells to Chinese manufacturers because they are extremely distortive.

Gintech responds to this argument noting that the Department found in Solar I that module assembly does not result in a different class or kind of merchandise that is outside of the investigation. Furthermore, Gintech argues that where third-country processing does not result in a substantial transformation, the Department will normally use third-country sales ultimately destined for the United States in calculating dumping margins. Citing to *TRBs from China*, Gintech explains that in that review, the Department examined whether bearings from the PRC that were further processed in Thailand were substantially transformed into Thai merchandise, and concluded that they were not and should be considered U.S. sales for purposes of calculating the Chinese respondent's dumping margin.[116] Likewise, Gintech argues that the Department should consider its sales to be U.S. sales because no substantial transformation takes place in the PRC.

Based on our scope decision in the Taiwan investigation, cells that are produced in Taiwan and made into modules in the PRC are covered by the concurrent AD and CVD investigations of certain solar products from the PRC. Additionally, any cells produced in Taiwan and made into modules in a third country other than the PRC, are covered by the Taiwan investigation. Consequently, because we continue to find that Gintech did not have knowledge or reason to know at the time of sale that specific sales were destined for the United States, Petitioner's arguments regarding further processing or whether Gintech's cell sales are distortive are moot.

The Department correctly rejected new factual information at verification

Finally, we disagree with Gintech's argument that the Department unlawfully rejected certain relevant and corroborating information provided by Gintech at its sales verification. Gintech recognizes that the Department's verification agenda makes clear that the Department's does not permit the introduction of new factual information at verification.[117] Gintech argues that the information should be permitted because it would have corroborated and supported information already on the record. Gintech also submits that it was never made aware that it needed to

[116] *See TRBs from China 2011*, and accompanying Issues and Decision Memorandum at Comment 6; *see also TRBs from China 2010*, and accompanying Issues and Decision Memorandum at Comment 1.
[117] *See* letter from the Department to Gintech: "Certain Crystalline Silicon Photovoltaic Products from Taiwan: Verification Outline" dated August 1, 2014. ("New information will be accepted at verification only when: (1) the need for that information was not evident previously; (2) the information makes minor corrections to information already on the record; or (3) the information corroborates, supports, or clarifies information already on the record.")

provide information from its customers until it was faulted for not doing so in the preliminary determination. Gintech further states that even though the information was created just prior to verification, it was still relevant because information created after a sale can provide evidence of what the company knew at the time of sale. In addition, Gintech argues that absent from the Department's questionnaires to Gintech were any inquiries relating to whether Gintech knew or had reason to know its sales were destined for the United States, and that it was never made aware that it needed to provide information from its customers until it was faulted for not doing so in the preliminary determination.

We disagree with Gintech's claim that it was prevented from providing information that was meant to corroborate the accuracy of its reported Q&V of subject merchandise. The June 6, 2014, addendum to the Department's June 5, 2014, supplemental questionnaire requested (at 2) that Gintech "provide a complete package of documents and worksheets demonstrating how you identified the sales you reported to the Department and reconciling the reported sales to the total sales listed in your general ledger." Gintech submitted approximately 80 pages in response to this single question.[118] Gintech's submission at exhibit S-11 is replete with communication from Gintech's customers, as well as employee affidavits, all of it purportedly to support Gintech's claim that it had knowledge that the reported "indirect" sales were destined for the United States.

Accordingly, given the voluminous response to this single question, we find Gintech's arguments that the Department prevented Gintech from providing information in support of the knowledge issue unsupported by the evidence on the record. Further, Gintech is incorrect that the Department "unlawfully" denied it the opportunity to provide new factual information at verification. As a matter of fact, sales verification exhibit IV.B is flush with information obtained from interviews the Department conducted at verification with Gintech employees, and contains abundant information from Gintech employee correspondence files. Indeed, Gintech refers extensively to this information throughout its case brief. Moreover, the Department's knowledge test is well known and well established and has been used in many past investigations and reviews. It derives directly from section 772 of the Act. It is not something derived for the first time in this investigation. Interested parties in our proceedings can be presumed to be aware of the legal requirements for establishing U.S sales under section 772 of the Act. Accordingly, the Department finds no basis for Gintech's arguments that it was in any way denied an opportunity to provide information to support its claim that it had knowledge or reason to know the destination of its reported "indirect" sales.

The Department also finds that it is appropriate to continue to exclude sales to one domestic trading company that Gintech also reported as "indirect" U.S. sales. The sales to this company were resold to a third-country customer, and record evidence does not indicate that Gintech knew or had reason to know that sales to this third-country customer were destined for the United States. Due to its proprietary nature, for a more detailed discussion of this issue see Gintech Analysis Memo.

Consequently, for the reasons described above, the Department continues to find that Gintech neither knew nor should have known, at the time of sale, that the merchandise reported as

[118] *See* Gintech's June 19, 2014 Supplemental Sections B & C Questionnaire Response, exhibit S-11 (parts 2 and 3 of Gintech's response, consisting of 41 and 40 pages, respectively).

"indirect" U.S. sales was destined for export to the United States. Therefore, for the final determination, the Department continues to follow our preliminary determination methodology and will continue to exclude these claimed "indirect" sales from our margin calculation.

Comment 5: Whether to Base U.S. Price on a Small Sample of U.S. Sales

Gintech Comments

- In the preliminary determination, the Department excluded 99 percent of Gintech's U.S. sales, resulting in an impermissibly small volume of sales to be examined.

Petitioner Comments

- Gintech's direct U.S. sales transactions are an adequate basis with which to determine Gintech's dumping margin. The 99 percent number is based on Gintech's own reported misrepresentations from the beginning of the investigation and is not the actual number the Department should be using in its calculations.

Department's Position: Gintech's characterization of the facts is misleading, as it is Gintech, and not the Department, that reported the database upon which Gintech's argument is premised. The Department did not, in fact, exclude 99 percent of Gintech's U.S. sales. Rather, the Department based its calculations on 100 percent of Gintech's U.S. sales, and excluded all reported sales for which Gintech was unable to provide sufficient evidence that it knew or had reason to know at the time of sale that the merchandise was destined for the United States.

The Department selected Gintech early in the investigation as a mandatory respondent based on Gintech's reported Q&V of its U.S. sales, including "indirect" sales for which Gintech claimed that it had knowledge or reason to know that the merchandise was destined for the United States. Because the Department subsequently determined that there was no evidence that Gintech knew or had reason to know at the time of sale that specific sales were destined for the United States, the Department excluded those reported sales when calculating Gintech's dumping margin.

Gintech's actual U.S. sales are an adequate basis on which to estimate Gintech's dumping margin because they represent the universe of Gintech's U.S. sales during the POI. Therefore, for the final determination, we continue to calculate Gintech's weighted-average dumping margin based on our preliminary determination methodology. Due to the proprietary nature of this issue, for more detailed discussion *see* Gintech's Analysis Memo.

Comment 6: Whether to Exclude Home Market Sales Made in Small Quantities

Gintech Comments

- A large percentage of Gintech's U.S. sales were compared to a single home market sale of 90 cells.
- Sales of cells at quantities less than 100 are extraordinary and do not constitute a commercial quantity.
- The Department should remove the two invoices relied on in the preliminary determination as potential home market comparisons and resort to the next most comparable products actually sold in commercial quantities.

Petitioner Comments

- The record demonstrates that sales of fewer than 100 cells are common.
- The sale in question is the identical or most similar product to a number of U.S. sales.
- It is the Department's longstanding policy not to exclude home market sales simply because they are of small volume or a type not frequently sold in the home market.

Department's Position: We agree that Gintech's U.S. sales are being compared in our calculations to a limited number of home market sales, in large part as a consequence of the results of the sales below cost test. Further, we disagree with Gintech's assertion that we should rely on different home market sales for the margin calculations.

Based on a timely allegation by Petitioner, the Department determined that it had reasonable grounds to believe or suspect that Gintech made home market sales at less than the cost of production. Accordingly, pursuant to section 773(b)(1) of the Act, the Department initiated a sales below cost investigation with respect to Gintech.[119] Whenever the Department determines that sales made at less than the cost of production have been made within an extended period of time in substantial quantities and were not at prices which permit recovery of all costs within a reasonable period of time, such sales may be disregarded for purposes of calculating normal value.[120] The Act provides that "{w}henever such sales are disregarded, normal value shall be based on the remaining sales of the foreign like product in the ordinary course of trade."[121]

The summary of the results of the sales-below-cost test in this investigation for Gintech shows the number of Gintech's above-cost home market sales as well as the number of below-cost home market sales.[122] In accordance with section 773(b)(1) of the Act, below-cost home market sales were considered to be outside the normal course of trade and were excluded from the normal value calculation.

Gintech seems to suggest that the small quantities associated with the remaining sales that formed the basis for normal value render them outside the ordinary course of trade as well. We disagree. A review of Gintech's home market sales database shows that the quantities of the sales used in the margin calculation are not unusual.[123] Therefore, the Department has not excluded these sales from the normal value calculation for the final determination. Due to the proprietary nature of this issue, for more detailed discussion *see* Gintech Analysis Memo.

[119] *See* letter to Gintech from the Department: "Certain Crystalline Photovoltaic Products from Taiwan: Request for Response to Section D Questionnaire," dated June 12, 2014.
[120] *See* section 773(b)(1) of the Act.
[121] *Id*.
[122] *See* Comparison Market Program Output, dated July 29, 2014 (at 8).
[123] *See* Gintech's October 7, 2014 revised home market sales database.

Comment 7: Whether to Treat Further Processed Sales in a Third Country and Resold by Unaffiliated Parties as Indirect Sales

Petitioner Comments

- Gintech's reported indirect sales were not sold as cells in the United States, but were instead incorporated into, and priced as, modules that were produced in a third country.
- The price at which the third-country module producer purchases the cells from Taiwan bears little relation to its U.S. sales price of modules.
- Where subject merchandise is further processed in a third country prior to being sold to the United States, a finding of an indirect U.S. sale should be limited to cases where the further processing is insignificant.

Department's Position: For the final determination, the Department continues to find that Gintech failed to demonstrate it either knew or should have known that the merchandise reported as "indirect" U.S. sales was destined for export to the United States. Accordingly, for the final determination, the Department continues to exclude Gintech's reported "indirect" sales from the calculation of U.S. price. Therefore, this issue is moot.

Comment 8: Whether to Exclude Sales of Cells to Chinese Manufacturers

Petitioner Comments

- The loophole in the scope of the existing orders on solar products from the PRC created a robust market in the PRC for Taiwan-origin solar cells.
- Chinese suppliers would be willing to pay more to obtain non-Chinese cells to avoid duties. Thus, the market conditions for Taiwanese solar cells in the PRC created by the U.S. and European Union orders are in no way reflective of the actual market conditions for Taiwan origin solar products in the United States.

Department's Position: For the final determination, the Department continues to find that Gintech failed to demonstrate that it either knew or should have known that the merchandise reported as "indirect" U.S. sales was destined for export to the United States. Accordingly, for the final determination, the Department continues to exclude Gintech's reported "indirect" sales from the calculation of U.S. price. Therefore, this issue is moot.

Comment 9: Whether the Major Input Rule Should be Applied to Gintech's Purchases of Wafers from its Affiliate Utech (Major Input Rule)

Gintech Comments:

- The Department should not apply the major input rule to the transactions between Gintech and its affiliated wafer producer Utech.

- The application of the major input rule is discretionary; thus, applying it under the facts of the instant case would be inappropriate and contravene Congressional intent which is to "address diversionary input dumping."[124]
- The wafers supplied by Utech to Gintech are not a major input; therefore, consistent with prior decisions, the Department should find that the "ability for respondents to engage in 'diversionary input dumping' is negated" because the portion of the total cost of production accounted for by the affiliated transactions is minimal.[125]
- A comparison of the affiliated and unaffiliated wafer prices demonstrates that Utech's sales to Gintech were not dumped, but rather reflect market values.

Petitioner (rebuttal):

- The Department should follow its practice of comparing all three elements of the major input rule as it has done in numerous cases similar to the current one.[126]
- The Department is required to use an affiliated producer's COP information for its major input rule analysis.[127]
- Wafer costs in total undoubtedly constitute a major input into Gintech's cost of manufacturing since the Department's definition of a major input does not refer to the portion of the input that has been supplied by the affiliated party.
- Gintech's attempt at applying the term "dumped sales" in the context of the major input rule is frivolous.

Department's Position: We disagree with Gintech that the major input rule should not be applied to the affiliated transactions at issue. For affiliated party transactions, the Department tests the arm's-length nature of affiliated transactions in accordance with sections 773(f)(2) and (3) of the Act.[128] This section of the Act states that transactions "between affiliated persons may be disregarded" if they do not reflect market values or, if in the case of a major input obtained from an affiliated producer, they do not recover the affiliate's cost of producing the input. While we agree with Gintech's assertion that the application of the major input rule may be considered discretionary, in the instant case we have chosen to exercise that discretion and apply it.

Gintech also contends that its affiliated wafer purchases are not a major input into the production of the merchandise under consideration and argues that its affiliated transactions should be tested under section 773(f)(2) of the Act (*i.e.*, "the minor input rule" whereby the affiliated transactions are compared to market prices only). We disagree. The Department considers both the percentage of the input that is procured from the affiliated party, as well as what percentage the input represents of the total cost of manufacturing, to determine if an affiliate-supplied input is

[124] Statement of Administrative Action, Uruguay Rounds Agreement Act, H. Rep. 103-316 at 838, (December 8, 1994)("SAA").
[125] Gintech cites *Structural Steel Beams from Korea* and accompanying Issues and Decision Memorandum at Comment 2.
[126] Petitioner cites, *e.g.*, *Purified Carboxymethycellulose from the Netherlands*, 76 FR at 36521-22.
[127] Petitioner cites *Cold-Rolled Steel from Turkey*, and accompanying Issues and Decision Memorandum at Comment 2; and *NTN Bearing Corp* 1369, at 1375-1376.
[128] *See, e.g., Chlorinated Isocyanurates from Japan*, and accompanying Issues and Decision Memorandum at Comment 3; *CTL Steel Plate from Korea*, and accompanying Issues and Decision Memorandum at Comment 6; and, *OCTG from Ukraine*, and accompanying Issues and Decision Memorandum at Comment 6.

major.[129] After examining both of these percentages in the instant case, we continue to find that Gintech's affiliated wafer inputs comprise a significant portion of the total cost of manufacturing for the merchandise under consideration.[130] Consequently, for the final determination, we considered Gintech's affiliated wafer purchases to be a major input.

Finally, we also disagree with Gintech that the major input rule is not appropriate since the market prices on the record demonstrate that the affiliated wafers were not "dumped." Here, Gintech suggests that the "diversionary input dumping" addressed by sections 773(f)(2) and (3) of the Act merely seeks to ensure that the affiliated inputs reflect market values. However, a more complete reading of the referenced citation provides the following commentary, "section 773(f)(3) of the Act was added "to address diversionary input dumping by authorizing Commerce to inquire whether the transfer between 'related' persons (*i.e.*, 'affiliated' persons under section 773(f)(3)) of such an input *is at a price below the input's production cost*" (emphasis added).[131] Thus, where an affiliated supplier is also the producer of the input, the statute seeks to ensure the full production costs of the affiliate-supplied input are accounted for in the buildup of production costs for the merchandise under consideration. As such, the Department continues to apply section 773(f)(3) of the Act to the wafers produced and supplied by Utech to Gintech.

Comment 10: Whether to Apply the Major Input Rule to Wafers that Utech Purchased and Resold to Gintech (Purchased Wafers)

Gintech Comments

- Section 773(f)(3) of the Act is applicable to a supplier's own production only; therefore, if the Department continues to apply the major input rule to the transactions between Gintech and Utech, the comparison should only be applied to the wafers that Utech produced.
- The Department should not adjust the cost of the wafers that Utech purchased and re-sold to Gintech since the transfer prices approximate the market prices.

Petitioner (rebuttal)

- The emphasis of section 773(f)(3) of the Act is that the affiliated supplier is involved in the production of the major input, thus a cost of production is available for comparison regardless of whether the input was produced or simply resold by the affiliate.
- Simple logic supports that a supplier would not set two prices for the same good that is both produced and purchased, but rather the supplier's cost of production would dictate pricing.

Department's Position: We agree with Gintech that section 773(f)(3) of the Act pertains to affiliate-supplied inputs that were produced by the affiliated supplier. The statute clearly introduces an affiliate's COP as the third prong of the arm's-length comparisons, "in the case of a transaction between affiliated persons involving the production by one of such persons of a major input to the merchandise. . . ." In fact, the Department has in prior cases involving an

[129] *See, e.g., Shrimp from Ecuador*, and accompanying Issues and Decision Memorandum at Comment 28.
[130] *See* Cost Verification Exhibit ("CVE") 19.
[131] *See* SAA, at 838.

affiliate-supplied major input applied only section 773(f)(2) of the Act where the affiliate simply acted in the role of a reseller.[132] In the instant case, Gintech's affiliate demonstrated that it both produced and purchased the major inputs that were supplied to Gintech. Therefore, we consider it reasonable to test the arm's-length nature of the inputs that were produced by the affiliate under section 773(f)(3) of the Act, while testing the inputs that were purchased by the affiliate under section 773(f)(2) of the Act.

Comment 11: Whether to Recalculate Gintech's Reported Paste Scrap Offset Based on a POI Average Value (Paste Scrap Offset)

Gintech:

- The Department should revise Gintech's reported paste scrap offset to value the scrap quantities generated at the POI-wide average scrap sales price rather than at the June 2013 sales price.
- The use of a POI-wide average scrap price would be consistent with how Gintech valued paste inputs.
- As noted in the Department's verification report, the current methodology understates the scrap paste offset.

Petitioner (rebuttal):

- The Department's practice is to use actual values where possible; therefore, it would be inappropriate to revise Gintech's current offset which reflects the actual sale-specific prices when the scrap was actually sold.[133]
- The Department's use of the word "understate" with regard to the paste scrap offset is merely to point out that the value is lower than it would have been otherwise.

Department's Position: We agree with Gintech that we should revise its reported paste scrap offset. In its normal books and records, Gintech does not reduce manufacturing costs by the value of scrap generated. Rather, the company only recognizes scrap values in its financial accounting system at the time of the sale (*i.e.*, scrap values are not an offset to per-unit product costs). Therefore, for reporting purposes, Gintech submitted a calculation methodology for paste scrap offsets that reflects the total quantities generated during the POI, valued at the prices received when the scrap was actually sold. Hence, the paste scrap offsets reported by Gintech reflect two price points, June 2013 and June 2014, *i.e.*, the dates of the actual sales of the scrap that was generated during the POI.[134] The Department normally tests a respondent's reported scrap offset values to ensure that they reflect market prices contemporaneous with the POI.[135] This is typically accomplished by comparing the POI average per-unit scrap offset to the corresponding POI average per-unit scrap sales revenue.[136] In the instant case, we found that Gintech's reported paste scrap offset was lower, or understated, when compared to the POI scrap

[132] *See PRCB from Thailand*, and accompanying Issues and Decision Memorandum at Comment 6.
[133] Petitioner cites *Live Cattle from Canada*, 64 FR at 56754.
[134] *See* Memorandum from Heidi K. Schriefer to Neal M. Halper, "Verification of the Cost Response of Gintech Energy Corporation in the Antidumping Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from Taiwan" dated September 30, 2014, ("CVR") at 19, and CVE 17 at 12-15.
[135] *See OCTG from Korea*, and accompanying Issues and Decision Memorandum at Comment 33.
[136] *Id.*

sales price by a significant amount.[137] Because the reported paste scrap offset does not approximate contemporaneous values, we have revised Gintech's paste scrap offset to reflect the POI average sales revenues received for paste scrap.[138]

Comment 12: Whether the Department Should Reallocate to Prime Products the Production Costs of Off-Grade Cells Reported to the Department as Non-Prime Products (Non-Prime Products)

Petitioner Comments

- Because the cell grades reported as non-prime cannot be used in the same applications as the prime cells, the Department should revise Gintech's reported costs to treat non-prime cell grades as scrap rather than as non-prime products that have been allocated actual production costs. The Department should then increase Gintech's reported costs for prime cell grades accordingly.
- Alternatively, if the Department continues to treat the off-grade cells as non-prime reportable products, the Department should reduce their reported costs to reflect the average POI sales value for non-prime cell grades.

Gintech (rebuttal)

- Off-grade cells incur the same production costs as prime cells, can be sold for the same general applications as prime cells, and are within the scope of this investigation.
- Allocating costs among prime and non-prime cells as suggested by Petitioner is contrary to the Department's normal practice of assigning the same costs to prime and non-prime products and would have the Department rely on a value-based methodology that the CAFC has previously rejected as circular.[139]

Department's Position: We agree with Petitioner that for certain non-prime cell grades reported by Gintech it is necessary to reallocate the reported costs. We found that Gintech allocated full production costs to all cells produced regardless of grade designation both in its normal books and in reporting to the Department. When considering whether products are appropriately classified as non-prime products that should be allocated full production costs, the Department considers whether the products can still be used in the same applications as the prime merchandise.[140] If a downgraded product has been impaired to the point that it can no longer be marketed for its intended use, its market value is also significantly impaired, often to the point that its full production cost cannot be recovered. Thus, rather than attempting to evaluate the relative values and qualities among product grades, the Department has adopted the

[137] *See* CVR at 19.
[138] *See* Memorandum to Neal M. Halper, Director, Office Accounting: "Cost of Production and Constructed Value Calculation Adjustments for the Final determination – Gintech Energy Corporation," dated December 15, 2014 ("Gintech Final Cost Memo").
[139] Gintech cites *Ipsco*, 965 F.2d at 1060, and, *e.g.*, *Cold-Rolled Carbon Steel from Taiwan*, and accompanying Issues and Decision Memorandum at Comment 6; and *PTF from Korea*, and accompanying Issues and Decision Memorandum at Comment 1.
[140] *See, e.g.*, *PC Tie Wire from Thailand*, and accompanying Issues and Decision Memorandum at Comment 3; and, *Rebar from Turkey*, and accompanying Issues and Decision Memorandum at Comment 15.

reasonable practice of examining whether the downgraded products can still be used in the same applications as their prime counterparts.[141]

With this distinction in mind, we reviewed the evidence on the record regarding Gintech's off-grade cells. We found that only one of the reported off-grade cell grades was sold for modular-type constructions, *i.e.*, for the same type of applications as its prime counterparts.[142] Conversely, Gintech's other off-grade cell grades were found to be so significantly impaired such that they could not be sold for the same applications.

We determined that Gintech's residual off-grade cell grades are so significantly impaired that they cannot be used for prime applications; thus, they are more appropriately treated akin to scrap or byproducts. Therefore, for the final determination, we have revised Gintech's reported costs to treat only the one off-grade cell grade that could be used in module construction as a product with fully allocated production costs. For the residual off-grade cell grades, we have reallocated their production costs to Gintech's prime and non-prime production. In doing so, we have granted a scrap offset for the market value of the reclassified off-grade cells produced during the POI.[143]

Comment 13: Whether the Department Should Adjust the Affiliated Supplier's Cost of Wafers Before Testing Gintech's Transfer Prices with the Affiliated Wafer Supplier (Affiliated's COP)

Petitioner Comments

- The Department should test Gintech's affiliated wafer purchases in accordance with the major input rule to determine whether they reflect arm's length values.
- In doing so, the Department should adjust the affiliated wafer supplier's reported cost of production to include the manufacturing costs related to idle capacity, the lower cost of market ("LCM") adjustments, and the recycled material adjustments as these items are included in Gintech's normal cost of sales.
- The government incentives related to new products should be excluded from the wafer producer's selling, general & administrative expense rate while net unrealized foreign exchange losses should be included in the wafer producer's financial expense rate.

Gintech (rebuttal)

- The Department should reject the proposed adjustments to the affiliated wafer producer's costs.
- The exclusion of manufacturing costs related to idle plant capacity is appropriate as the affiliated wafer producer was in startup mode during the POI.

[141] *See, e.g., OCTG from India*, and accompanying Issues and Decision Memorandum at Comment 8; and, *OCTG from Korea*, and accompanying Issues and Decision Memorandum at Comment 18.
[142] *See* CVE 4.
[143] *See* Gintech Final Cost Memo.

- The exclusion of the LCM and recycled material revaluations is in accordance with Department practice where a company's cost accounting system reflects the actual rather than revalued product costs.[144]
- The Department's normal practice is to rely on a company's actual costs without restatement to exclude government subsidies regardless of the purpose of the subsidy.[145]
- The Department's practice is to exclude unrealized foreign exchange gains or losses in the calculation of the financial expense rate.[146]

Department's Position: We agree with Petitioner, in part. As noted above, the Department determines that it is appropriate to test, in accordance with section 773(f)(3) of the Act, the arm's-length values of the affiliate-supplied inputs that were produced by Utech. As such, we compared the transfer price, market price, and Utech's cost of producing the self-produced inputs supplied to Gintech. In doing so, we have adjusted Utech's reported cost of producing the inputs as follows: 1) adjusted Utech's cost of manufacturing to include the idle capacity costs; 2) adjusted Utech's general & administrative ("G&A") expenses to exclude income related to excluded expenses; and, 3) adjusted Utech's financial expenses to include unrealized foreign exchange gains and losses.[147] We have not adjusted Utech's cost of production for the LCM and recycled material revaluations, as we found that the company's cost accounting system, which is the relied upon source for the reported costs, reflects historical costs. *See* Comment 14 where we discussed the Department's practice with regard to gains and losses related to the revaluation of inventory balances.

We adjusted Utech's cost of producing wafers to include the idle capacity costs. First, we note that these costs consist of depreciation expenses on production equipment that was underutilized during the POI. In its normal books, these expenses were recorded directly to Utech's cost of goods sold, rather than included in the inventoried product costs.[148] Also for reporting purposes, Utech excluded certain product-specific fixed overhead costs, asserting that they likewise related to the underutilization of its factory. It is the Department's normal practice to include idle capacity costs in the calculation of the cost of production.[149] Where they have been characterized as extraordinary costs on a company's financial statement, we considered the idle capacity costs to be period expenses that should be included in the G&A expense rate calculation.[150] In the instant case, the idle capacity costs related to the underutilization of Utech's factory were recorded as either product costs or recorded directly to Utech's cost of goods sold.[151] Therefore, consistent with Utech's normal books and records, we find it appropriate to likewise include the idle capacity costs in the cost of manufacturing rather than as period costs. Regarding Gintech's contention that the idle capacity costs should be excluded

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[144] Gintech cites *Welded SS Pipe from Korea I,* and accompanying Issues and Decision Memorandum at Comment 2, and *CWP from Korea,* and accompanying Issues and Decision Memorandum at Comment 2.
[145] Gintech cites *SS Bar from Brazil,* and accompanying Issues and Decision Memorandum at Comment 3, and *Solid Urea from Germany*.
[146] Gintech cites *SSSS in Coils from Taiwan Prelim.*
[147] *See* Gintech Final Cost Memo.
[148] *See* CVR at 22.
[149] *See, e.g., SS Wire Rod from Taiwan,* and accompanying Issues and Decision Memorandum at Comment 13; and, *Silicomanganese from Brazil.*
[150] *Id*.
[151] *See* CVR at 22.

because Utech was in a startup mode, we disagree. The Department's standard questionnaire provides an avenue for a respondent to request startup adjustments.[152] However, in its submissions to the Department, Gintech neither requested a startup adjustment for its affiliated supplier nor described any of its calculations as a startup adjustment. Thus, Gintech provided no evidentiary basis for making such an adjustment.[153] As such, we included the idle capacity costs in Utech's cost of producing wafers for the final determination.[154]

Next, we find Gintech's proffered argument regarding government subsidies off point. At issue is whether income related to expenses that Utech excluded from its cost of production calculations should likewise be excluded, not the source of the income. Specifically, in reporting to the Department, Utech characterized a certain grouping of expenses as unrelated to the inputs supplied to Gintech and excluded said expenses from the reported cost of producing the affiliated inputs.[155] However, at verification, we discovered that Utech included income associated with these same expenses.[156] Because Utech excluded the expenses from its cost of production, we find it reasonable to likewise exclude the associated income. Thus, the source of the income was not relevant to our rationale for excluding the item.

We also adjusted Utech's reported costs to include in the company's financial expense rate calculation unrealized exchange gains and losses from its financial statements.[157] As noted at Comment 17, the Department's practice is to include in financial expenses all foreign exchange gains and losses reported on a company's audited income statement. *See* Comment 17 for additional discussion of the issue.

Comment 14: Whether the Department Should Include Losses Related to Inventory Disposals in Gintech's G&A Expense Rate (Inventory Disposals)

Petitioner Comments

- The Department should increase Gintech's G&A expenses to include the inventory disposal losses associated with raw materials and supplies since these items were related to the production of MUC.

Gintech Comments

- The Department should not include the inventory disposal losses because they are insignificant within the meaning of 19 CFR 315.413 (less than 0.33 percent *ad valorem*).

Department's Position: We agree with Petitioner and have increased Gintech's G&A expenses to account for the disposal losses related to raw materials and supplies. These expenses were recognized on Gintech's audited income statement, are related to the company's overall, general activities, and have not been accounted for in the reported costs.[158] Accordingly, the Department

[152] *See* the Department's standard section D questionnaire at II.D.
[153] *See* Gintech's July 2, 2014 section D questionnaire response at 16-17.
[154] *See* Gintech Final Cost Memo.
[155] *See* CVR at 22.
[156] *Id.*
[157] *See* Gintech Final Cost Memo.
[158] *See* CVR at 9.

finds it is appropriate to incorporate these period expenses in Gintech's G&A expense rate calculation.[159]

Comment 15: Whether the Department Should Include LCM Adjustments in Gintech's Reported Costs (LCM Adjustments)

Petitioner Comments

- The Department should increase Gintech's reported costs to include the LCM adjustment.
- Contrary to the Department's assertions in the cost verification report, Gintech's overall cost reconciliation demonstrates that the LCM adjustment was recorded in the company's financial accounting system but not in the company's cost accounting system or in the reported per-unit costs.

Gintech Comments

- The LCM adjustment is recorded to a contra-inventory account in the financial accounting system so that the end-of-period inventory values on the financial statements reflect the lower values.
- The LCM adjustment does not flow through to the cost accounting system; thus, the inventory values used to calculate production costs are the actual amounts paid for the direct materials.
- The Department's consistent approach is to exclude LCM adjustments where the historical inventoried raw material cost rather than the written-down raw material cost is used to calculate production costs.[160]

Department's Position: We disagree with Petitioner that Gintech's reported costs should be revised to include these LCM adjustments. At verification, the Department confirmed that Gintech records its LCM adjustments to a contra-inventory account whereby the actual adjustments do not flow through to the product costing level. Hence, in its normal cost accounting system, Gintech values the raw materials consumed in production at historical cost, *i.e.*, based on the full purchase cost.[161] Because Gintech relied on its cost accounting system for reporting to the Department, the reported costs also reflect the historical costs of the raw materials consumed in production. Having established these facts, we note that the Department's practice is to exclude LCM adjustments from the cost of production where the individual raw material costs continue to be recognized at historical cost.[162] Conversely, where the individual raw material costs are written down and flow through to product costing at the lower adjusted value, the Department includes the LCM adjustment in the cost of production.[163] Because Gintech did not directly write down its inventory values and continued to use its actual inventoried historical costs in calculating production costs, we find that Gintech's reported costs

[159] *See* Gintech Final Cost Memo.
[160] Gintech cites *Welded SS Pipe from Korea I*, and accompanying Issues and Decision Memorandum at Comment 2; and, *CWP from Korea*, and accompanying Issues and Decision Memorandum at Comment 2.
[161] *See* CVR at 5.
[162] *See, e.g.*, *Welded SS Pipe from Korea I*, and accompanying Issues and Decision Memorandum at Comment 2; *CWP from Korea*, and accompanying Issues and Decision Memorandum at Comment 2; and, *CWP from Thailand*, and accompanying Issues and Decision Memorandum at Comment 4.
[163] *Id.*

reasonably reflect the cost of producing and selling the merchandise under consideration. Consequently, we have not revised Gintech's reported costs to include the LCM adjustment for the final determination.

While Petitioner suggests that the overall cost reconciliation demonstrates that Gintech's reported costs have been understated by the LCM adjustment, we disagree. Petitioner's argument hinges on the fact that Gintech's total financial accounting system costs must be decreased by the LCM adjustment in order to tie to the total accounting system costs (and the total reported costs). As articulated above, we verified that Gintech's cost accounting system reflects the historical costs of the raw materials consumed in production. These per-unit costs also flow through to the inventory and cost of goods sold accounts in the company's financial accounting system. However, for financial statement presentation purposes, Gintech evaluates its ending inventory balances to assess whether the current market values are lower than the historical values.[164] Gintech then recognizes any consequent LCM loss as a credit to a contra-inventory account on the balance sheet and a debit to the cost of goods sold account on the income statement. Hence, the cost of goods sold on the company's financial statement includes an additional loss that is related to the revaluation of the overall ending inventory balance reported on the balance sheet.

This LCM loss is expressed on a global basis and does not change the recorded values of the individual inventoried items.[165] Thus, the per-unit costs of current and future production continue to reflect the historical rather than current market values of the raw materials consumed. As such, the LCM adjustment with regard to raw materials simply reflects a timing difference between Gintech's financial and cost accounting systems (*i.e.*, the financial accounting system immediately recognizes the loss in raw material inventory values, while the cost accounting system recognizes the loss at the time raw materials are consumed). Consequently, recognizing both the total production costs from the cost accounting system and the LCM adjustment from the financial accounting system would double-count the losses recognized on the written-down raw materials.

Comment 16: Whether the Department Should Account for the Differences between Gintech's Total Cost Accounting System Costs and its Total Reported Costs (Methodological Difference)

Petitioner Comments

- The Department should increase Gintech's reported costs for the difference between the total costs from the accounting system which are based on POI monthly weighted-average product costs and the total costs from the cost database which are based on POI annual weighted-average product costs.

[164] *See* CVR at 5.
[165] *See* CVR at 10-11.

Gintech Comments

- The use of POI rather than monthly weighted-average direct material and variable overhead costs is consistent with the Department's practice and express request in the instant case.[166]

Department's Position: We agree with Petitioner that Gintech's reported costs should be adjusted to account for the difference between the total costs from Gintech's accounting system and the total costs reported to the Department. At verification, Gintech explained that this cost difference was a result of the modifications that were made to its normal cost allocation methodologies in order to report to the Department (*e.g.*, using POI averages versus monthly averages to calculate raw material costs).[167] While we have no issue with the per-unit cost allocation methodologies relied on by Gintech, we determine that Gintech's total reported costs should agree with the company's total accounting system costs. Therefore, for the final determination, we adjusted Gintech's reported per-unit costs to include the cost difference generated by the variations in Gintech's normal and reported cost allocation methodologies.[168]

Comment 17: Whether the Department Should Adjust Gintech's Financial Expense Rate for Certain Items Identified at Verification (Financial Expense Rate)

Petitioner Comments

- Because the activities were recognized in Gintech's audited income statement, the net unrealized foreign exchange losses should be included in the financial expense rate.
- In accordance with its normal practice with regard to investment related activities, the Department should exclude the net gains on financial instruments (forward and swap transactions).[169]

Gintech Comments

- The Department's practice is to exclude unrealized foreign exchange translation gains and losses from the financial expense rate.[170]
- The record demonstrates that these are forward exchange and cross-currency swap contracts intended to manage exposure to foreign currency interest rate risk.
- The Department's practice is to include the gains and losses on such financial instruments as they relate to the company's overall cash management activities.[171]

Department's Position: We agree with Petitioner in part. Specifically, for the final determination, we have included both the unrealized foreign exchange losses and the forward and swap transaction net gains in the financial expense rate calculation. It is the Department's practice to include all foreign exchange gains and losses reported on an entity's income

[166] Gintech cites, *e.g.*, *Nails from the UAE,* and accompanying Issues and Decision Memorandum at Comment 9; and, *Rebar from Turkey,* and accompanying Issues and Decision Memorandum at Comment 1.
[167] *See* CVR, at 12-14.
[168] *See* Gintech Final Cost Memo.
[169] Petitioner cites *Swine from Canada* and accompanying Issues and Decision Memorandum at Comment 68.
[170] Gintech cites *SSSS in Coils from Taiwan Prelim.*
[171] Gintech cites, *e.g.*, *CORE from Korea,* and accompanying Issues and Decision Memorandum at Comment 19; and, *Shrimp from Thailand,* and accompanying Issues and Decision Memorandum at Comment 5.

statement in the financial expense rate calculation.[172] Moreover, the Department also includes currency and interest contract transactions gains and losses because these items relate to a company's overall cash management.[173] The Department explained previously that forward contracts are part of a consolidated entity's management of its foreign currency exposure in any one currency; thus, they are linked and directly associated with cash management.[174] Similarly, interest swap contracts, currency swaps, and currency future swaps are hedging vehicles used by entities to manage interest-rate and foreign exchange exposure. Accordingly, we included all foreign exchange, forward transaction, and swap transaction gains and losses presented on Gintech's consolidated income statement in the calculation of the company's financial expense rate.

While Gintech provides as evidence of Departmental practice a single instance where unrealized exchange gains and losses were excluded,[175] we note that this 2001 case predates our change in policy with regard to foreign exchange gains and losses. The new policy which was outlined in *Mushrooms from India* (2002) states that we will include in the financial expense rate all foreign exchange gains and losses reported on an entity's income statement.[176] Furthermore, while Gintech has characterized them as such, the company's audited financial statements do not distinguish the exchange gains and losses at question as unrealized. Rather, the exchange gains and losses segregated as realized and unrealized in the company's detail records were simply reported as single line items described as foreign exchange gains and foreign exchange losses.[177] Therefore, for the final determination, we have included in the financial expense rate the total foreign exchange gains and losses that were presented on Gintech's audited financial statements.[178]

Motech

Comment 18: Whether to Include Reported "Indirect" Sales in the Calculation of U.S. Price

Motech Comments

- Motech maintains that it had knowledge that its sales of cells to unaffiliated Chinese customers were destined for export to the United States. As such, it argues that, if the Department continues to apply the scope language used in the *Preliminary Determination* and in the first AD investigation of solar products from the PRC, then these indirect sales should be treated as U.S. export price sales and should be included in the Department's margin calculation for the final determination.
- Motech states that its knowledge is based on the following factors: (l) there was a significant spike in sales to Chinese customers in March 2012 after the imposition of U.S. AD/CVDs on imported solar cells from the PRC; (2) the Chinese customers purchasing

[172] *See Mushrooms from India*.
[173] *See, e.g., CORE from Korea*, and accompanying Issues and Decision Memorandum at Comment 19; and, *Welded SS Pipe from Korea II*, and accompanying Issues and Decision Memorandum at Comment 3.
[174] *Id*.
[175] *See SSSS in Coils from Taiwan Prelim*, unchanged in *SSSS in Coils from Taiwan Final*.
[176] *See Mushrooms from India*.
[177] *See* Gintech's April 24, 2014 section A questionnaire response at A-11.
[178] *See* Gintech Final Cost Memo.

the cells that Motech reported as indirect sales have their own cell production lines and can produce cells at lower costs than purchasing cells from Motech; and (3) Motech only included as indirect sales those sales for which the Chinese customer had requested a COO certificate for purchased cells.

- Motech notes that, while certain sales fit the above-referenced factors, it did not report them for various reasons, because it knew they were not destined for the United States.
- Motech further notes that the Department consistently applies its "knew or had reason to know" destination test in instances where the merchandise is subjected to further processing in third countries, but remains within the scope of the case, before being shipped to the United States.[179] In support of its argument, Motech also cites *Mushrooms From Chile*, and accompanying Issues and Decisions Memorandum at Comment 1.
- Motech notes that, in *Mushrooms from Chile*, the Department held that the Chilean producer, Nature's Farm Products (Chile) S.A. ("NFC"), "knew or should have known" at the time of the sale of the products to the Colombian processor, Evasadora del Atlantico ("CEA"), who retorted and repackaged mushrooms prior to selling them to the U.S. customer, that the ultimate destination of the merchandise was the United States.[180] Accordingly, the Department in that case concluded that the sale was NFC's sale and that NFC's rate should be applied to the transaction.
- Motech maintains that, similar to *Mushrooms from Chile*, it shipped subject cells to Chinese producers, which assembled the cells into modules - that remained subject merchandise - and sold them to U.S. customers. Accordingly, Motech asserts that its sales to unaffiliated Chinese customers are properly reported as U.S. sales.
- Motech further argues that it would be ironic if the Department were now to disregard Motech's referenced sales, because of lack of knowledge, when such sales were the basis for the petition and the selection of mandatory respondents.

Petitioner Comments

- Petitioner argues that the Department should continue to reject respondents' arguments to include exports of cells to third countries in the pool of U.S. sales used for the dumping margin calculations, because such sales bear no relationship to the price of Taiwanese solar products in the United States.
- Petitioner maintains that, under the Department's October 3 proposed scope clarification, any Taiwan-origin cells incorporated into modules assembled in the PRC and exported to the United States would be considered Chinese-origin sales and would be covered by the new AD and CVD orders on imports from the PRC.
- Petitioner further argues that, regardless of this proposed scope clarification, the Department should continue to exclude Motech's "indirect" U.S. sales from its dumping calculations, for several reasons. First, there is no record evidence demonstrating that Motech had actual knowledge that the shipments at issue were ultimately destined for the U.S. market. Second, as demonstrated at the Department's verifications, Motech did not have definitive constructive knowledge that the relevant shipments were destined for the United States. Third, as a matter of law and policy, the Department should decline to classify as indirect U.S. sales those sales in which the merchandise is further processed in

[179] *See, e.g., Aluminum Extrusions* and accompanying Issues and Decision Memorandum at Comment 2.
[180] *See Mushrooms from Chile*.

a third country by an unaffiliated third party and then subsequently sold by the third party, in its new form, to customers in the United States. Fourth, even if it is appropriate in certain cases to classify sales to an unaffiliated third party in a third country as indirect U.S. sales, the circumstances present in this case do not support such classification.

- Petitioner contends that the Department, in this case, should not consider the sales price of Taiwan cells charged to a third country further processor to be equivalent to the sales price of Taiwan origin solar products in the U.S. market given: 1) the magnitude of the value added in the third country; 2) the fact that third country processing alters the product significantly; and 3) the fact that many (if not all) of the shipments of Taiwan cells to the PRC were part of a "workaround" scheme intended to avoid the existing AD and CVD orders on solar products from the PRC that created substantially different market conditions for Taiwan origin cells exported to the PRC compared to those exported to the United States.

Department's Position: As discussed in Comment 1: Scope Comments and Scope Clarification section above, the clarified scope language in this investigation no longer includes cells produced in Taiwan that are ultimately used to produce modules, panels or laminates in the PRC. Therefore, the matter of whether to include Motech's sales of cells to unaffiliated Chinese customers in our analysis is a moot issue for purposes of the final determination. Nevertheless, we are addressing Motech's knowledge claim that the referenced sales were destined for export to the United States.

After considering the factual information on the record of this investigation, including the information reviewed in our verification of Motech, we continue to find that Motech failed to demonstrate that it either knew or should have known, at the time of sale, that the merchandise sold to third-country customers was destined for export to the United States. The Department's standard for the "knowledge test" is well established. *See* Comment 4: Whether to Include Reported "Indirect" Sales in the calculation of US. Price, for a full discussion of this standard.

As noted above, Motech argues that it knew or had reason to know that the referenced sales were destined for export to the United States based on: 1) the spike in purchased cells by Chinese customers after the imposition of U.S. AD/CVDs on imported solar cells from the PRC, 2) its knowledge that the Chinese customers purchasing the cells have their own cell production lines and can produce cells at lower costs than the cells purchased from Motech, and 3) because Chinese customers requested COO certificates. However, these factors cited by Motech amount to nothing more than a generalized belief, or speculation, that Motech's cells might ultimately be exported to the United States. The standard for making a knowledge determination is that the producer must have reason to know *at the time of the sale* that the *specific sale* of subject merchandise was destined for the United States.[181] There is no evidence on the record indicating that this standard has been met. Motech's claim of knowledge is not supported by any documentary or physical evidence, such as, shipping documents, selling documents, contracts or other such documents that would indicate that the cells sold to unaffiliated Chinese customers were actually destined for export to the United States. In the absence of such evidence, we find Motech's argument to be speculative at best, because the record does not support a finding that

[181] *See Pistachios from Iran,* and accompanying Issues and Decision Memorandum at Comment 1*; see also Pure Magnesium 2001,* and accompanying Issues and Decision Memorandum at Comment 3.

Motech either knew or should have known at the time of the sale that its sales of cells to unaffiliated Chinese customers were ultimately destined for the United States.

Additionally, we disagree with Motech that the facts in *Mushrooms from Chile* are sufficiently analogous to the facts in this case to warrant treating Motech's sales to Chinese customers as indirect U.S. sales. In *Mushrooms from Chile*, the Department treated the U.S. sales reported by CEA, a food processor located in Colombia, who purchased brined mushrooms in bulk containers from the Chilean producer, NFC, to be NFC's sales, because the Department found that NFC was affiliated with the U.S. customer. Specifically, the Department found that at the time of NFC's sales of brined mushrooms to CEA, NFC was affiliated with the U.S. customer, and therefore that NFC knew or should have known that the ultimate destination of its sale of brined mushrooms to CEA was the United States.[182] However, in the instant case, there is no record evidence indicating that Motech was affiliated with any U.S. customers purchasing modules, laminates or panels from Motech's unaffiliated Chinese customers. Accordingly, the circumstances under which the Department treated indirect sales as U.S. sales in *Mushrooms from Chile* are not present in this case.

Motech contends that its reporting of certain sales to Chinese customers as U.S. sales was proper and objective because it set criteria for establishing knowledge of U.S. destination, as evidenced by the fact that it did not report some other sales, which did not meet these criteria, as U.S. sales. However, record evidence does not support Motech's claim that the method it followed for reporting or not reporting sales of cells to unaffiliated Chinese customers as U.S. sales was consistent with the Department's knowledge test. As noted in the Department's verification report, Motech claimed that it reported sales to unaffiliated Chinese customers as indirect U.S. sales only if certain criteria were met, such as: whether there was a request by the Chinese customer for a COO certificate; whether the sale involved grade A cells, as grade A cells are typically purchased by U.S. customers; whether the sale involved cells that are not used for research and development purposes; and whether the sale involved cells that were not low efficiency or phased out cells. Motech also excluded sales if the customer in the PRC was a Japanese customer and the ultimate destination was presumed to be Japan.[183] Furthermore, Motech excluded sales to new Chinese customers who infrequently purchased cells from Motech.[184] Nevertheless, during Motech's verification, we noted that the methodology Motech used for reporting sales to Chinese customers was not consistently followed. For instance, while certain sales were not reported, in part, because the customer did not request COO certificates, Motech reported other sales to Chinese customers who did not request COO certificates for all or part of their sales.[185] Moreover, during Motech's verification, we noted that, while Motech did not report certain sales of low efficiency cells, phased out cells, or cells used for research and development, Motech did report other such types of sales as U.S. indirect sales.[186] Despite the inherent inconsistency of Motech's method of reporting sales to unaffiliated Chinese customers, there is no evidence to suggest that Motech actually knew or should have known that the reported sales to unaffiliated Chinese customers were destined for export to the United States.

[182] *See Mushrooms from Chile*, and accompanying Issues and Decisions Memorandum at Comments 1 and 2.
[183] *See* Motech Verification Report at 10-11.
[184] *Id.*
[185] *Id.*
[186] *Id.*

For the reasons stated above, the Department determines that there is no evidence on the record that indicates that Motech knew or should have known, at the time of sale, that its sales of cells to unaffiliated Chinese customers were ultimately destined for export to the United States. Accordingly, regardless of the change made to the scope of this investigation, absent any documentary or physical evidence to support Motech's claim, we would have continued to exclude Motech's sales of cells to unaffiliated Chinese customer from our analysis for purposes of the final determination.

Comment 19: Whether to Exclude Sales of Modules Produced by Motech's Affiliate in the PRC

Motech Comments

- Motech argues that, if the Department revises the scope of the investigation in the final determination, as proposed in the Department's October 3, 2014 letter,[187] then Motech's channel 3 and 4 constructed export price ("CEP") sales (*i.e.*, the sales of modules produced by Motech's Chinese subsidiary, Motech (Suzhou) Renewable Energy Co., Ltd. ("SNE")), should be removed from its U.S. sales database, because these transactions involve Taiwanese cells incorporated into modules made in the PRC, and such sales would be subject to the scope in the concurrent Chinese case and not the scope of solar products from Taiwan.

Petitioner Comments

- Petitioner agrees that under the revised scope language, the referenced CEP sales transactions under channels 3 and 4 would be covered by the scope of the concurrent AD investigation of solar products from the PRC, and thus should be excluded from the Taiwan AD margin calculations. However, Petitioner argues that the Department should request that Motech place on the record of the concurrent PRC AD investigation the information needed to calculate the AD margin for SNE's sales transactions.
- Petitioner notes that the referenced information has been fully verified, and argues that, for cash deposit purposes, it would be more accurate to calculate a Motech PRC AD margin, using Motech's own data, rather than assign the PRC-wide rate to Motech's PRC-origin products.

Department's Position: We agree with both Motech and Petitioner that, under the clarified scope, Motech's reported sales of modules produced by SNE in the PRC should be removed from Motech's U.S. sales database, because these modules are now considered to be of Chinese origin; and not of Taiwan origin. For further details on the clarified scope language, *see* Comment 1: Scope Comments and Scope Clarification above. Motech's reported sales of modules produced by SNE in the PRC are now covered by the scope of the concurrent AD investigation on solar products from the PRC. Therefore, for the final determination, we

[187] *See* Letter from Howard Smith, Program Manager, Office IV, AD/CVD Operations, to All Interested Parties, re: "Antidumping and Countervailing Duty Investigations of Certain Crystalline Silicon Photovoltaic Products from the People's Republic China and the Antidumping Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from Taiwan: Opportunity to Submit Scope Comments" (October 3, 2014) at 1-2.

excluded Motech's reported sales of modules produced by SNE in the PRC from Motech's reported U.S. sales database when calculating Motech's dumping margin.[188]

Further, we disagree with Petitioner's argument that the data involving the sales transactions of modules produced by SNE in the PRC should be placed on the record of the concurrent AD investigation of solar products from the PRC, because such transactions are now considered Chinese sales and are subject to the non-market economy reporting methodology.

Comment 20: Whether U.S. Indirect Selling Expenses Should Not Include Expenses for R&D

Motech Comments

- Motech argues that, for the final determination, the Department should use the revised U.S. indirect selling expense ("ISE") ratio that it presented as a minor correction at the outset of MA's verification.
- Motech maintains that, initially, it included a portion of the expenses related to research and development ("R&D") in the calculation of the U.S. ISE ratio. However, in preparing for MA's verification, Motech discovered that the R&D department was responsible solely for further manufacturing, testing, and certification. Accordingly, Motech contends that the U.S. ISE ratio calculation should be based on its revised calculation, which excludes all R&D expenses from the ISE used to calculate the ISE ratio.

Petitioner Comments

- Petitioner argues that the Department should continue to include the R&D expenses in the calculation of U.S. ISE, noting that, during MA's verification, the Department found that the division that incurs R&D expenses also issues "certification for testing modules sold globally by all of Motech's divisions, including modules produced by Motech (Suzhou) Renewable Energy Co., Ltd. ("SNE"), Motech's subsidiary in China, and sold in the United States, and is also involved in warranty related activities." Accordingly, Petitioner asserts that, at minimum, a portion of the R&D expenses relates to U.S. sales and should be included in the U.S. ISE.

Department's Position: We disagree with Motech's assertion that the portion of R&D expenses, initially included in Motech's U.S. ISE ratio calculation, should be excluded. While we agree that MA's R&D department performed activities related to the further-manufactured modules in the United States, we do not agree that all activities performed by the R&D department are related solely to further manufacturing. As noted in MA's verification report, the Department found that MA's R&D department performed activities related to sales, such as assuming the responsibility for warranty-related matters involving MA's sales of modules in the United States, as well as the testing and certification of the modules MA sold in the United

[188] *See* Motech's Analysis Memorandum for the Final Determination.

States.[189] We also note that Motech's initial calculation of the U.S. ISEs included only a portion, not all, of the expenses incurred by MA's R&D department.[190] Specifically, Motech allocated R&D expenses to the U.S. ISE based on the ratio of the salaries paid to the staff involved in sales, in relationship to the salaries paid to the staff involved in further manufacturing. Given the fact that the R&D department was partially involved in activities relating to the U.S. sales of finished modules, and that only a portion of the R&D expenses is allocated to the reported U.S. ISE, we determined that Motech's initial calculation is appropriate, and that Motech's subsequent revision to the ISE ratio calculation presented during MA's verification is unwarranted. Accordingly, for the final determination, we have determined to continue using Motech's original calculation of the reported U.S. ISEs for all CEP sales. For further details, *see* Motech's Analysis Memorandum for the Final Determination, issued concurrently with this memorandum.

Comment 21: Whether Motech's Short-Term Interest Rate Should be Used to Calculate U.S. Credit and Inventory Carrying Cost

Motech Comments

- Motech notes that, during the Department's verification in Taiwan, it presented a revision to its short-term interest rate for short-term loans denominated in U.S. dollars. Motech argues that, for the final determination, the Department should use the revised short-term interest rate to calculate imputed credit and inventory carrying cost for Motech's home market sales, denominated in U.S. dollars, and all U.S. sales.
- While Motech acknowledges that, during MA's verification, the Department found that MA also incurred short-term interest expenses that Motech did not report, it argues that it did not report MA's interest expenses, because the loans on which MA paid interest were guaranteed by Motech.
- Alternatively, Motech notes that the Department verified the short-term interest expenses incurred by MA during the POI and has the necessary information to separately calculate the U.S. credit expenses for CEP sales and the U.S. inventory carrying costs ("ICC") for CEP sales, using MA's short-term interest rate calculated during MA's verification. For direct export price ("EP") and home market sales, denominated in U.S. dollars, Motech argues that the Department should use the revised short-term interest rate relating to the short-term loans obtained by Motech in Taiwan to calculate imputed credit and inventory carrying costs for these sales.

Petitioner Comments

- Petitioner argues that the Department should use MA's short-term U.S. dollar borrowing rate to calculate the U.S. imputed credit and the U.S. ICC, because MA is the entity financing the sale.

Department's Position: We agree with Petitioner. During its verification of MA, the Department found that MA received short-term loans in U.S. dollars and paid interest on such

[189] *See* Memorandum from Magd Zalok and James Martinelli to the File: "Verification of the Sales Response of Motech America LLC in the Less-Than Fair-Value Investigation of Certain Crystalline Silicon Photovoltaic Products From Taiwan" ("MA's Verification Report"), issued on October 3, 2014 at page 5.
[190] *See* Exhibit C-47 of Motech's June 27, 2014 submission.

loans during the POI.[191] However, the short-term interest cost on such loans was not factored in Motech's calculation of the short-term interest rate used to calculate the U.S. imputed credit and U.S. ICC.[192] Accordingly, since MA's unreported short-term interest expenses were related to MA's CEP sales, for the final determination, we have used MA's short-term interest rate to calculate the U.S. imputed credit for all CEP sales, and the U.S. ICC for CEP sales of the merchandise that entered MA's inventory during the POI. For Motech's remaining direct EP sales and home market sales denominated in U.S. dollars, for the final determination, we have used Motech's revised interest rate on loans received in Taiwan to calculate the imputed credit relating to such sales. *See* Motech's Analysis Memorandum for the Final Determination, issued concurrently with this memorandum.

In our questionnaire to Motech, we requested that Motech report the unit cost of credit, computed at the actual cost of short-term debt incurred by Motech, using a rate paid on short-term borrowing in U.S. dollars.[193] Accordingly, Motech's justification for not reporting MA's short-term interest expenses, on the grounds that the loans for which MA paid interest were guaranteed by Motech, is not a sufficient reason for not reporting such interest costs. Therefore, Motech should have reported MA's cost of short-term debts when calculating the U.S. imputed credit and ICC.

Comment 22: Whether U.S. Warehousing Expense Calculation Should be Revised

Motech Comments

- For the final determination, the Department should use Motech's revised calculation for U.S. warehousing expenses, presented as a minor correction at the outset of Motech's U.S. subsidiary's verification, Motech America LLC ("MA"). Motech maintains that the revised warehousing expense amount is based on MA's actual records and corrects errors in the U.S. warehousing expense amount reported initially in Motech's database.

Department's Position: We agree with Motech. Motech's revised calculation of the U.S. warehousing expenses corrects errors in Motech's initial calculation. This revised calculation is also based on MA's books and records, which were examined by the Department, and reflects the relevant warehousing expenses for each department within MA's manufacturing facility. Moreover, Motech's revised U.S. warehousing expense calculation excludes rent expenses already included in the reported ISE calculation. Accordingly, we used Motech's revised calculation for U.S. warehousing expenses for the final determination. For further details, *see* Motech's Analysis Memorandum for the Final Determination, issued concurrently with this memorandum.

[191] *See* MA's Verification report, issued on October 3, 2014.
[192] *See* Motech's May 15, 2014 submission at C-41 – C42 and Exhibit C-20.
[193] *See* the Department's March 24, 2014 questionnaire to Motech at C-28.

Comment 23: Whether a Different Basis Should be Used for Certain Payment Dates

Petitioner Comments

- For the final determination, the Department should use a different basis for the payment date for certain Motech sales.

Motech Comments

- Motech argues that Petitioner's request has no basis, and is inconsistent with the Department's past practices.

Department's Position: For the final determination, we determine to use the last day of verification (September 17, 2014) as the payment date for the referenced sales. Due to the proprietary nature of the information relating to this issue, this issue is being discussed in Motech's Analysis Memorandum for the Final Determination, issued concurrently with this memorandum.

Comment 24: Whether a Downward Adjustment Should be Made to the Price for a Home Market Transaction

Motech Comments

- Motech states that, during the Department's verification, it presented, as a minor correction, information indicating that the reported gross unit price for a module sales transaction reflects a markup for services, such as, drawings and design for the installation of the module and inverters that are not generally provided by Motech on standard sales. Accordingly, Motech argues that the reported price for the sale at issue should be reduced by an estimated markup ratio for such services. Otherwise, the Department should exclude this sale from its analysis for the final determination.
- In support of its argument, Motech maintains that: (a) the selling price of the module at issue is higher than the selling price of any of the other sold modules; (b) minutes from a meeting at Motech involving the sale indicate that the cost for layout, filing, inspection, and traveling expenses connected with the sale at issue should be controlled at a certain level; (c) Motech prepared technical drawings of the system, including installation, only for this sale; and (d) Motech provided instructions for items to be checked to ensure that the system installation met the original design and safety guidelines.

Department's Position: We disagree with Motech that the information presented during the Department's verification of Motech's responses is sufficient to warrant either a downward adjustment to the price reported for the sales transaction at issue, or exclusion of such a sale from the home market database. First, there is no evidence on the record that would indicate that the difference in the unit price of the sales transaction at issue, compared to the unit prices of other sales, is necessarily attributable to additional services performed by Motech that are not typically provided for other sales. The information that Motech presented simply indicates that certain technical assistance, involving drawings, layout, and inspections, was provided in connection with the sale at issue. Second, in its questionnaire responses, Motech had acknowledged that it provided engineering advice and technical assistance as part of its selling functions involving

home market sales;[194] and there is no evidence to suggest that the services provided by Motech with respect to such a sale are unique, because such services are typically part of the engineering and technical assistance activities that Motech performed with respect to all home market sales. Accordingly, for the final determination, absent any specific record evidence that would warrant a downward adjustment to the unit price of the referenced sale or sufficient reasons that would lead us to exclude such a sale, we have continued to include the referenced home market sales transaction in our calculation.

Comment 25: Whether Grade Z Cells Should Bear the Same Cost as Grades A and B Cells

Motech Comments

- The weighted-average cost of production should include all grades of solar cells produced during the POI, including both grade B and grade Z.
- The cost verification report is correct in suggesting that grade A and grade B products should have the same cost,[195] but the weighted-average cost of production should also include grade Z products.
- The Department verified that all cell grades undergo the same production process, which is one of the key factors found by the Court of Appeals in *IPSCO* to warrant equal costing of prime and secondary grades of steel.[196]
- Under the *IPSCO* rule, grade Z products would have the same material and fabrication costs as prime cells and thus must be priced the same as prime cells regardless of how they are treated in the normal course of business.

Department's Position: While we agree with Motech that grade B solar cells should have the same cost as prime grade A cells, we disagree that grade Z cells should bear the same cost.

While Motech relies on the argument that all grades undergo the same production process and should therefore be costed equally, the issue at hand here is whether the downgraded solar cells (*i.e.*, grade B and grade Z cells) can still be used in the same applications as the prime subject merchandise. The downgrading of a product from one grade to another will vary from case to case. Sometimes the downgrading is minor and the product remains within a product group, while at other times the downgraded product differs significantly and it no longer belongs to the same group and cannot be used for the same applications. In the latter case, the product's market value is often significantly impaired, sometimes to a point where its full production cost cannot be recovered. Instead of attempting to judge the relative values and qualities between grades, however, the Department adopted the reasonable practice of examining whether the downgraded product can still be used in the same applications as its prime counterparts.[197]

[194] *See* Exhibit 39 of Motech's July 9, 2014 submission.
[195] *See* Memorandum from Robert B. Greger to the File re: Verification of Motech Industries, Inc. in the Antidumping Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from Taiwan, dated October 1, 2014 ("Cost Verification Report") at 2.
[196] *See Ipsco*, 965 F.2d at 1060-61.
[197] *See, e.g., Steel Bar From Turkey*, and accompanying Issues and Decision Memorandum at Comment 15; *see also OCTG from India*, and accompanying Issues and Decision Memorandum at Comment 8.

In this case, the record evidence indicates that grade B solar cells are in fact useable in the same end-use applications as the prime grade A cells (*i.e.*, the construction of solar modules for power generation).[198] Accordingly, since grade A and grade B cells are used in the same general applications, we find it unreasonable not to allocate the full production costs equally to both grades. However, because the record evidence also indicates that grade Z cells are not used or sold for use as primary cells used in the construction of modules, but rather are used only in the manufacturing of consumer electronics[199], we find it reasonable to continue to allocate costs to them based on their historical sales values in accordance with the methodology followed in Motech's normal books and records[200]. Therefore, for the final determination, we recalculated Motech's reported costs to reflect grades A and B solar cells at full cost, while we have continued to accept Motech's valuation of grade Z products at a reduced cost.

With regard to Motech's reliance on *IPSCO* to support its assertion that grade Z products should have the same costs as grade A, we note that the facts in that proceeding are different from those on the current record. Specifically, in *IPSCO*, the downgraded products in question were still useable for the same end use applications as the prime products,[201] while in this case the record evidence indicates that the grade Z products cannot be used in the same applications.

Comment 26: Whether the Inventory Adjustment Ratio Should be Revised

Motech Comments

- The inventory adjustment should be corrected to reflect the verified information.
- The Department's verifiers examined each element of the calculation and found three errors that should be taken into account.
- Specifically, the Department found that one of the amounts had already been included at an earlier step, that an amount related to zero production was mistakenly excluded, and that Motech should have excluded scrap revenue from the denominator of the calculation.[202]
- Motech agrees with each of these findings and submits that the revised calculation noted in the Cost Verification Report should be used in the final determination.

Department's Position: We agree with Motech that the Department should revise the inventory adjustment ratio at the final determination in accordance with its verification findings. Specifically, we agree with the first two revisions cited by Motech, *i.e.*, that we should exclude the amount found at verification to be already included in Motech's cost of manufacturing prior to the inventory adjustment (*i.e.*, the unit cost adjustment for aberrational costs) and that we should include the amount related to zero production that had been mistakenly excluded from Motech's costs. With regard to the third revision noted by Motech, we note that the verification report states that scrap revenue should be excluded from the numerator of the ratio calculation,[203] not the denominator as Motech states in its case brief. We made each of these revisions for the final determination.

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[198] *See* the Cost Verification Report at 7.
[199] *Id.*
[200] *Id.*, at 8.
[201] *See Ipsco*, 965 F.2d at 1061.
[202] *See* the Cost Verification Report at 2.
[203] *Id.*

Comment 27: Whether the Financial Expense Ratio Calculation Should Include the Gains on Foreign Currency Translation

Motech Comments

- The Department should use the revised financial expense ratio submitted at the cost verification.
- The foreign exchange translation gains from Motech's consolidated financial statements should be included in the ratio calculation.

Department's Position: We agree with Motech that the financial expense ratio calculation should include the gains on foreign currency translation reflected in Motech's consolidated income statement. Prior to verification, Motech had neglected to include these gains in the numerator of its financial expense ratio. Our established practice, however, is to include in the financial expense ratio calculation the total net foreign exchange gains and losses reported in the audited income statement of the same entity used to compute a respondent's net interest expense.[204] Accordingly, in accordance with this practice, we have revised Motech's financial expense ratio calculation to include the total gains on foreign currency translation in its 2013 audited income statement for the final determination.

Comment 28: Whether the Cost for One of Motech's Modules CONNUMs Should be Adjusted

Motech Comments

- The Department should adjust the cost for one of Motech's module CONNUMs to correct the errors discovered at the cost verification.
- During verification, Motech explained that an error in the calculation of the material costs in a specific job order resulted in aberrational costs for the specified module in that month.
- The Department verified the correct cost as part of its testing procedures.

Department's Position: We agree with Motech. At the cost verification, the Department's verifiers discovered an error in the calculation of the total cost of manufacturing for the module CONNUM in question.[205] Accordingly, the verifiers requested a revised calculation for the specified CONNUM that corrects for this error, and we are using the total cost of manufacturing based on this revised calculation for the final determination.

[204] *See, e.g., Magnesium Metal from Russia,* and accompanying Issues and Decision Memorandum at Comment 12.
[205] *See* Cost Verification Exhibit 16.

V. RECOMMENDATION

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

✓
Agree

_____
Disagree

Paul Piquado
Assistant Secretary
for Enforcement and Compliance

15 DECEMBER 2014
Date

Litigation Cite Table

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Asahi Seiko	*Asahi Seiko Co., Ltd. v. United States, 751 F. Supp. 2d 1335, 1342-1344 (CIT 2010)*
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China AD Prelim	*Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 79 FR 44399 (July 31, 2014)
China CVD Prelim	*Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 79 FR 33174 (June 10, 2014)

Chlorinated Isocyanurates from Japan	*Chlorinated Isocyanurates from Japan: Final Determination of Sales at Less Than Fair Value*, 79 FR 56059, (September 18, 2014)
Cold-Rolled Steel from Argentina	*Certain Cold-Rolled Carbon Steel Flat Products from Argentina*, 58 FR at 37065
Cold-Rolled Steel from Turkey	*Notice of Final Determination of Sale At Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from Turkey*, 65 FR 15123 (March 21, 2000)
Cold-Rolled Steel from Taiwan	*Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Quality Steel Products from Taiwan*, 65 FR 34658 (May 31, 2000)
CORE from Korea	*Certain Corrosion-Resistant Carbon Steel Flat Products from Korea: Notice of Final Results of the Sixteenth Administrative Review*, 76 FR 15291 (March 21, 2011)
CSPV from Taiwan Preliminary Determination	*Certain Crystalline Silicon Photovoltaic Products From Taiwan: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 79 FR 44395 (July 31, 2014)
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CSPV from China Order	*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).
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OCTG from Korea	*Certain Oil Country Tubular Goods from the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances*, 79 FR 41983 (July 18, 2014)
OCTG from Ukraine	*Certain Oil Country Tubular Goods from Ukraine: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 79 FR 41969 (July 18, 2014)
Pasta from Italy	*See Certain Pasta from Italy: Termination of New Shipper Antidumping Duty Administrative Review*, 62 FR 66602 (December 19, 1997)
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Pistachios from Iran	*Final Results of Antidumping Duty Administrative Review*: *Certain In-Shell Raw Pistachios from Iran*, 70 FR 7470 (February 14, 2005)
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PRCB from Thailand	*Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags From Thailand*, 69 FR 34122 (June 18, 2004)
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SS Wire Rod from Taiwan	*Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Taiwan*, 63 FR 40461 (July 29, 1998)
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