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Remand Redetermination
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SunPower Corp. v. United States
Consol. Court No. 15-00067, Slip Op. 16-56 (June 8, 2016)
FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT ORDER

I. SUMMARY

The U.S. Department of Commerce (the Department) prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (the Court or CIT) in *SunPower Corp.*[1] This litigation pertains to certain issues in the antidumping duty (AD) and countervailing duty (CVD) investigations of certain crystalline silicon photovoltaic products (solar products)[2] from the People's Republic of China (PRC).[3]

The CIT remanded to the Department certain scope-related issues from the *Solar II PRC AD Final Determination* and *Solar II PRC CVD Final Determination*. Specifically, the CIT held that the Department did not provide a sufficient explanation for: 1) applying two different rules of origin to products within the same class or kind of merchandise, contrary to its practice of

[1] *See SunPower Corp. v. United States*, Consol. Court No. 15-00067, Slip Op. 16-56 (June 8, 2016) (*SunPower Corp.*).
[2] "Solar products" includes modules, laminates and/or panels. In this remand redetermination, the Department uses the terms modules and panels interchangeably. *See Petitions for the Imposition of Antidumping Duties on Imports of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China and Taiwan*, dated December 31, 2013 (Petitions) at 1 n. 3 (explaining that the "terms 'module' and 'panel' are used interchangeably {in the Petitions}."
[3] The AD and CVD investigations of solar products from the PRC at issue in this litigation are referred to, collectively, as "Solar II PRC" or the "Solar II PRC AD and CVD investigations." *See Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 79 FR 76970 (December 23, 2014) (*Solar II PRC AD Final Determination*); *see also Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 79 FR 76962 (December 23, 2014) (*Solar II PRC CVD Final Determination*), as amended by *Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China: Antidumping Duty Order; and Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 80 FR 8592 (February 18, 2015) (*Solar II PRC Orders*).

applying a single "country-of-origin determinative rule to products within the same class or kind of merchandise"[4]; 2) disregarding its prior finding in the *Solar I PRC AD and CVD Final Determinations*[5] that the essential production step (solar cell production), rather than the less significant production step of assembling the solar cells into solar panels, dictates the country-of-origin, with the result that similarly-situated products are treated differently for origin purposes depending on where the panel is assembled; and 3) imposing duties on the entire value of solar panels assembled in the PRC, when: a) only an insignificant production step (panel assembly) occurs in the PRC and b) the Department's analysis normally primarily focuses on where the actual manufacturing is occurring. In light of these findings, the Court directed the Department to reconsider its scope determinations in the *Solar II PRC AD Final Determination* and *Solar II PRC CVD Final Determination* in accordance with the Court's opinion.[6]

For this final remand redetermination, the Department has provided additional explanation and clarification regarding the issues described above.

II. BACKGROUND

In general, the *Solar I PRC Orders* cover crystalline silicon photovoltaic cells (solar cells) from the PRC, as well as solar modules, regardless of where they are assembled, that consist of Chinese-origin solar cells.[7] Specifically, the class or kind of merchandise covered by

[4] *See SunPower Corp.*, Slip Op. at 28.
[5] The AD and CVD investigations of crystalline silicon photovoltaic cells, whether or not assembled into modules (solar cells) from the PRC are referred to, collectively, as "Solar I" or the "Solar I PRC AD and CVD investigations." *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, and Affirmative Final Determination of Critical Circumstances, in Part*, 77 FR 63791 (October 17, 2012) (*Solar I PRC AD Final Determination*); *see also Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 77 FR 63788 (October 17, 2012) (*Solar I PRC CVD Final Determination*) (collectively, *Solar I PRC AD and CVD Final Determinations*).
[6] *See SunPower Corp.*, Slip Op. at 49.
[7] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China; Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order*, 77 FR 73018 (December 7, 2012); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From*

the *Solar I PRC Orders* is as follows:

> ***The Solar I PRC Orders***
> The merchandise covered by this order is crystalline silicon photovoltaic cells, and modules, laminates, and panels, consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including, but not limited to, modules, laminates, panels and building integrated materials.
>
> This order covers 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.
>
> Merchandise under consideration may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, modules, laminates, panels, building-integrated modules, building-integrated panels, or other finished goods kits. Such parts that otherwise meet the definition of merchandise under consideration are included in the scope of this order.
>
> Excluded from the scope of this order are thin film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS).
>
> Also excluded from the scope of this order 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 cell. 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.
>
> Modules, laminates, and panels produced in a third-country from cells produced in the PRC are covered by this order; however, modules, laminates, and panels produced in the PRC from cells produced in a third-country are not covered by this order.
>
> Merchandise covered by this order is currently classified in the Harmonized Tariff System of the United States (HTSUS) under subheadings 8501.61.0000, 8507.20.80, 8541.40.6020, 8541.40.6030, and 8501.31.8000. Although these HTSUS subheadings are provided for convenience and customs purposes; the

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the People's Republic of China; Countervailing Duty Order, 77 FR 73017 (December 7, 2012) (collectively, *Solar I PRC Orders*).

written description of the scope of this order is dispositive.[8]

When merchandise is produced in more than one country, the Department must determine the country-of-origin for that merchandise.[9] The substantial transformation test is the Department's usual "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."[10] Applying that test in the Solar I PRC AD and CVD investigations, the Department determined that for purposes of those investigations, generally, solar cells from the PRC and modules, laminates and panels made from Chinese solar cells were within the same class or kind of merchandise, and that module assembly in a third country did not substantially alter the essential nature of the Chinese solar cells, nor did it constitute significant processing such that it changed the country-of-origin of the solar cell.[11] Thus, in the Solar I PRC AD and CVD investigations, the Department found that the country-of-origin for the solar modules is the country in which the solar cells are produced,[12] and that determination is reflected in the scope of the *Solar I PRC Orders*.

In the Solar II PRC AD and CVD investigations, the Petitions alleged that Chinese solar panel manufacturers were avoiding the disciplines of the *Solar I PRC Orders* by sourcing solar cells from other countries, manufacturing solar panels, which were also subsidized, in the PRC,

[8] *See Solar I PRC Orders*.
[9] *See SunPower Corp.*, Slip Op. at 25 (recognizing that "for merchandise to be subject to an order it must meet" two parameters – "product type and country-of-origin," which "involves two separate inquiries" (internal quotation marks and citations omitted)).
[10] *See E.I. DuPont de Nemours & Co. v. United States*, 8 F. Supp. 2d 854, 858 (CIT 1998) (quotation marks and citation omitted).
[11] *See Solar I PRC AD Final Determination*, and accompanying Issues and Decision Memorandum at cmt. 1; *Solar I PRC CVD Final Determination*, and accompanying Issues and Decision Memorandum at cmt. 32.
[12] *See* Memorandum to the File, "Other Proceeding Documents Cited in Issues and Decision Memo," dated December 18, 2014, at Attachment 1, containing the March 19, 2012 memorandum entitled, "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."

and dumping them in the United States.[13] The Petitions therefore proposed a scope which covered solar modules, laminates, and/or panels assembled in the PRC from solar cells completed or partially manufactured outside the PRC, using ingots, wafers, or partially completed cells manufactured in the PRC (referred to by parties as the "two-out-of-three" scope).[14]

Unlike the facts in the Solar I PRC AD and CVD investigations, however, in the Solar II PRC AD and CVD investigations, the product at issue was not Chinese solar cells, or Chinese products made from Chinese solar cells. Instead, the products alleged to be injuring the domestic industry in the Petitions were solar modules, laminates, and/or panels assembled in the PRC from solar cells completed or partially manufactured outside the PRC, using ingots, wafers, or partially completed cells manufactured in the PRC.[15] Given this situation, the Department determined to conduct an alternative country-of-origin analysis for a number of reasons. The Department recognized that its standard substantial transformation analysis would be insufficient for determining the country-of-origin of this specific product because "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."[16] Thus, "a rote application of a substantial transformation analysis would not allow the Department to address unfair pricing decisions and/or unfair

[13] *See* Petitions, at Vol. I, 3-6, 21-23, 37.
[14] *See Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China and Taiwan: Initiation of Antidumping Duty Investigations*, 79 FR 4661 (January 29, 2014); *Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China: Initiation of Countervailing Duty Investigation*, 79 FR 4667 (January 29, 2014).
[15] *See Solar II PRC AD Final Determination*, and accompanying Issues and Decision Memorandum at 13; *Solar II PRC CVD Final Determination*, and accompanying Issues and Decision Memorandum at 38.
[16] *See Solar II PRC AD Final Determination*, and accompanying Issues and Decision Memorandum at 15; *Solar II PRC CVD Final Determination*, and accompanying Issues and Decision Memorandum at 41.

subsidization concerning the modules that {are} taking place in the country of export."[17] Furthermore, Chinese companies were evading the disciplines of the *Solar I PRC Orders* by sourcing solar cells from other countries, as alleged in the Petitions and substantiated by the respondents' various statements and books and records in the Solar II PRC and Taiwan Solar[18] investigations. The Department, therefore, determined to conduct an alternative country-of-origin analysis.[19]

The Department's determination to go beyond its traditional substantial transformation analysis was based on several considerations, including (1) the unique nature of the solar products industry in light of the readily adaptable supply chain and record evidence of a shift in trade flows following the implementation of the *Solar I PRC Orders*; (2) the Department's concerns that the scope language in the Petitions would be neither administrable nor enforceable, and could invite further evasion of any resulting order; and (3) the fact that the Department needed a mechanism to address the alleged injury to the domestic industry, which stemmed, in relevant part, from modules assembled in the PRC using third-country solar cells, and which would not be captured by a traditional substantial transformation analysis.[20]

As a result of the description in the Petitions of the product allegedly injuring the domestic industry, as well as the application of the Department's alternative country-of-origin analysis, the Department determined that the class or kind of merchandise covered by the *Solar II PRC Orders* is as follows:

> ***The Solar II PRC Orders***
> The merchandise covered by these orders are modules, laminates and/or panels

[17] *Id.*
[18] The AD investigation of solar products from Taiwan is referred to throughout as "Taiwan Solar."
[19] *See Solar II PRC AD Final Determination*, and accompanying Issues and Decision Memorandum at 15; *Solar II PRC CVD Final Determination*, and accompanying Issues and Decision Memorandum at 41.
[20] *See Solar II PRC AD Final Determination*, and accompanying Issues and Decision Memorandum at 13-15; *Solar II PRC CVD Final Determination*, and accompanying Issues and Decision Memorandum at 39-41.

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

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

Excluded from the scope of these orders 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 these orders are modules, laminates and/or panels assembled in the PRC, consisting of crystalline silicon photovoltaic cells, not exceeding 10,000 mm^2 in surface area, that are permanently integrated into a consumer good whose function is other than power generation and that consumes the electricity generated by the integrated crystalline silicon photovoltaic cells. Where more than one module, laminate and/or panel is permanently integrated into a consumer good, the surface area for purposes of this exclusion shall be the total combined surface area of all modules, laminates and/or panels that are integrated into the consumer good. Further, also excluded from the scope of these orders are any products covered by the existing antidumping and countervailing duty orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, laminates and/or panels, from the PRC.[4]

Merchandise covered by these orders 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 these orders is dispositive. [21]

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

One of the countries that provided solar cells to the PRC for panel production in the PRC

[21] *See Solar II PRC Orders*, 80 FR at 8593.

was Taiwan, and the Petitions also alleged that Taiwan was exporting solar cells and solar modules, laminates and panels made from Taiwanese solar cells for less than fair value to the United States.[22] In the *Taiwan Solar Final Determination*,[23] as it had similarly done in the *Solar I PRC AD and CVD Final Determinations*, the Department determined that for purposes of that investigation, generally, solar cells from Taiwan and modules, laminates and panels made from Taiwanese solar cells were within the same class of merchandise, and that module assembly does not substantially alter the essential nature of solar cells, nor does it constitute significant processing such that it changes the country-of-origin of the solar cell.[24]

The class or kind of merchandise covered by the *Taiwan Solar Order*[25] is as follows:

> ***The Taiwan Solar Order***
>
> The merchandise covered by this order 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 order. However, modules, laminates, and panels produced in Taiwan from cells produced in a third-country are not covered by this order.
>
> Excluded from the scope of this order are thin film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS). Also excluded from the scope of this order are

[22] *See* Petitions, at Vol. I, 4-6, 17-18, 21-23, 37-38.
[23] *See Certain Crystalline Silicon Photovoltaic Products From Taiwan: Final Determination of Sales at Less Than Fair Value*, 79 FR 76966 (December 23, 2014) (*Taiwan Solar Final Determination*).
[24] *See Taiwan Final Determination*, and accompanying Issues and Decision Memorandum at 18-21.
[25] *See Certain Crystalline Silicon Photovoltaic Products From Taiwan: Antidumping Duty Order*, 89 FR 8596 (February 18, 2015) (*Taiwan Solar Order*).

crystalline silicon photovoltaic cells, not exceeding 10,000 mm^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 order 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).[3] Also excluded from the scope of this order 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 order is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 8501.61.0000, 8507.20.8030, 8507.20.8040, 8507.20.8060, 8507.20.8090, 8541.40.6020, 8541.40.6030 and 8501.31.8000. These HTSUS subheadings are provided for convenience and customs purposes; the written description of the scope of this order is dispositive.

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

III. REMANDED ISSUES

In *SunPower Corp*., the Court found that the Department's departure in the Solar II PRC AD and CVD investigations from its prior country-of-origin analysis from the *Solar I PRC AD and CVD Final Determinations* was "unprecedented," in light of the prior findings by the Department "that a single class or kind of merchandise . . . cannot be subject to multiple different and potentially conflicting country-of-origin tests."[26] As examples of the Department's prior practice, the Court cited *DRAMs from Korea*,[27] *EPROMs from Japan*,[28] and the Department's

[26] *See SunPower Corp.*, Slip Op. at 30 (quotation marks and citation omitted).
[27] *Id.*, at 28-29 (citing *Notice of Initiation of Countervailing Duty Investigation: Dynamic Random Access Memory*

findings in the *Solar I PRC AD and CVD Final Determinations*.[29] The Court also found that the country-of-origin rule established in Solar II PRC AD and CVD investigations results in the disparate treatment of "similarly-situated products within the same class or kind of merchandise" depending on the country in which the solar panels are assembled (*e.g.*, the PRC or anywhere else).[30]

The Court determined that the Department failed to reconcile its findings in the *Solar II PRC AD Final Determination* and *CVD Final Determination* with this past precedent.[31] In so finding, the Court found insufficient the Department's expressed reasons for applying a different country-of-origin rule in the *Solar II PRC AD* and *CVD investigations* than it did in the *Solar I PRC* and *Taiwan Solar Investigations*. First, the Court found that addressing evasion of the *Solar I PRC Orders* did not provide a sufficient justification for disregarding the Department's prior factual finding "regarding the relative insignificance of panel assembly in determining country-of-origin."[32] The Court questioned how the Department's concerns regarding shifting cell-production were not appropriately addressed by issuing orders covering imports from countries to which cell production has shifted, as it did with Taiwan.[33] Second, regarding the concern that the Department would be unable to capture the allegedly unfair pricing behavior of, and/or subsidies provided to, producers of solar panels, modules and/or laminates, with a substantial transformation analysis, the Court observed that in other cases, the Department "established a single consistent country-of-origin rule for the class/kind of merchandise, even

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Semiconductors from the Republic of Korea, 67 FR 70927, 70927-28 (November 27, 2002), unchanged in final (*DRAMs from Korea*)).

[28] *Id.*, at 28 n.76 (citing *Erasable Programmable Read Only Memories (EPROMs) from Japan; Final Determination of Sales at Less Than Fair Value*, 51 FR 39680, 39692 (October 30, 1986) (*EPROMs from Japan*).

[29] *Id.*, at 28-32.

[30] *Id.*, at 35-38.

[31] *See generally id.*, at 28-38.

[32] *Id.*, at 39-40.

[33] *Id.*, at 41-42.

though . . . doing so necessarily limits the AD/CVD analysis to the pricing behavior and subsidies occurring in the country where most of the essential production takes place."[34] The Court found that the Department did not explain why in this particular instance it was necessary to "impose{} AD/CVD liability based on an analysis that excludes consideration of the majority of actual essential production, contrary to the reasoning consistently employed in prior precedents."[35]

The Court also determined that the Department failed to address the fact that the *Solar II PRC Orders* impose AD/CVD liability on the entire value of solar modules by analyzing conditions in the Chinese (surrogate) market when the PRC is not the market where most of the cost of manufacture and essential production occurs, but is the market where only assembly takes place.[36] The Court found that this is inconsistent with the Department's statements in other proceedings that it is "primarily concerned with where the actual manufacturing is occurring" and that products can only have one country-of-origin.[37] The Court further found that in the case of the *Solar II PRC AD Order*, the Department did not explain how it achieved a "fair comparison" between normal value (NV) and U.S. export price (USP) when: (1) it determined NV using a comparison market where the majority of the production is not actually occurring; and (2) the calculation of the foreign like product's NV is not susceptible to subdivision.[38] The Court also noted that the same reasoning might not apply for purposes of CVD law.[39] Accordingly, in *SunPower Corp.* the Court ordered the Department to "address this important

[34] *See SunPower Corp.*, Slip Op. at 31-32
[35] *Id.*, at 45-46 ("Commerce does not address or explain how this case is different from the agency's consistent prior position that products can only have one origin, which is determined by a consistent origin rule for all products within a given class/kind of merchandise, and which should generally result in a country-of-origin and comparison market where most of the essential or cost-intensive production takes place.").
[36] *Id.*, at 42-46.
[37] *Id.*, at 42-43.
[38] *Id.*, at 43, 47-48.
[39] *Id.*, at 48-49.

aspect of the problem, and either provide additional explanation or modify its decision, as necessary."[40]

Consistent with the Court's ruling, on remand we have provided additional analysis and explanation below.

A. There Is a Different Class or Kind of Merchandise for the Solar I, Solar II PRC and Taiwan Solar Investigations

In *SunPower Corp*., the Court recognized that the Department has a longstanding practice of recognizing that "for merchandise to be subject to an order it must meet" at least two parameters – "product type and country-of-origin," which "involves two separate inquiries." [41] Section 771(25) of the Tariff Act of 1930, as amended (the Act), defines "subject merchandise" as "the class or kind of merchandise that is within the scope of *an investigation*, a review, a suspension agreement, *an order* under this subtitle or section 1303 of this title, or a finding under the Antidumping Act, 1921" (emphasis added). However, the class or kind of merchandise defined in a petition may not be exactly the same class or kind of merchandise ultimately subject to a countervailing or antidumping duty order. There are several reasons that the Department might initiate an investigation on the basis of one defined class or kind of merchandise, but then the ultimate class or kind of merchandise covered by the scope of the resulting order might be different.

For example, under section 735(a) of the Act, the Department is directed to issue a final determination, of "whether the subject merchandise is being, or is likely to be, sold in the United States at less than its fair value." The International Trade Commission (ITC) is then directed to make an injury determination under section 735(b) of the Act. Only then, after both agencies have issued affirmative determinations, is the Department tasked with issuing an antidumping

[40] *See SunPower Corp*., Slip Op. at 46.
[41] *Id.*, at 25 (internal quotation marks and citations omitted).

duty order in accordance with section 736(a)(2) which "includes a description of the subject merchandise, in such detail as the administering authority deems necessary." This is all consistent with the mandate of section 731(1) of the Act, which states that if "the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value . . . then there shall be imposed upon such merchandise an antidumping duty . . . ."[42] If the class or kind of merchandise determined in the investigation by the Department is determined to be causing (or threatening to cause) material injury by the ITC, then the class or kind of merchandise covered by the order can mirror that of the investigation. However, as in *Badger-Powhatan v. United States*,[43] if the ITC determines that some products subject to the antidumping investigation have not caused injury, then the class or kind of merchandise covered by the antidumping order will be different. In *Badger-Powhatan*, the Court held that the merchandise covered by an order is "merchandise which is both in a class of merchandise being sold at {less than fair value} *and* which is causing material injury to the domestic industry." [44]

There are also several reasons the Department on its own might determine as a result of the investigation that the class or kind of merchandise ultimately covered by an order should differ from the class or kind of merchandise upon which the Department initiated an investigation. Ultimately, the Court of Appeals for the Federal Circuit (Federal Circuit) has held that the Department is tasked by statute with the "responsibility to determine the proper scope" of an "investigation and of the antidumping order."[45] As the Federal Circuit has explained, an

[42] Parallel statutory provisions relating to countervailing duty proceedings exist. *See* section 705(a) of the Act (final determination by the Department); section 705(b) of the Act (final determination by the ITC); 706 of the Act (issuance of countervailing duty order); section 701(a) of the Act (imposition of a countervailing duty).
[43] *See Badger-Powhatan v. United States*, 633 F. Supp. 1364 (CIT 1986).
[44] *Id.* at 1370 (citing to *Badger-Powhatan v. United States*, 608 F. Supp. 653, 656 (CIT 1985)).
[45] *See Mitsubishi Electric Corporation v. United States*, 898 F. 2d 1577, 1582 (Fed. Cir. 1990) (*Mitsubishi II*).

"antidumping investigation is typically initiated by a petition filed by a domestic industry requesting that {the Department} conduct an investigation into possible dumping" and the "petition initially determines the scope of the investigation," but the Department "has the inherent power to establish the parameters of the investigation so that it would not be tied to an initial scope definition that . . . may not make sense in light of the information available to {the Department} or subsequently obtained in the investigation."[46] This is because the "purpose of the petition is to propose an investigation," while "{a} purpose of the investigation is to determine what merchandise should be included in the final order." [47]

The Department "establish{es} the parameters of the investigation," and determines the ultimate class or kind of merchandise covered by a potential antidumping or countervailing duty order, in part, through a general description of the merchandise covered by the scope of an investigation and/or order, as well as a description of the specific products expressly excluded from coverage by the investigation and/or order. In other words, the products described as excluded from the scope of an investigation and/or order are just as much part of the description of the scope as those general products described as included in the universe of products covered by an investigation and/or order. For example, "modules, laminates and/or panels assembled in the PRC, consisting of crystalline silicon photovoltaic cells, not exceeding 10,000 mm^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" are expressly excluded from the universe of products covered by the scope of the *Solar II PRC Orders*. Accordingly, the class or kind of merchandise covered by the scope of

[46] *See Duferco Steel, Inc. v. United States*, 296 F. 3d 1087, 1089 (Fed. Cir. 2002).

[47] *Id.*, 296 F.3d at 1096-1097 (citing to sections 702(b)(1), 732(b)(1), 705(a)(1) and 735(a)(1) of the Act); *see also Tak Fat Trading Company v. United States*, 396 F.3d 1378, 1382-83 (Fed. Cir. 2005) and *Walgreen Co. v. United States*, 620 F.3d 1350, 1355-56 (Fed. Cir. 2010) (citing to *Duferco* for the concept that "it is the responsibility of the agency, not those who initiated the proceedings, to determine the scope of the final orders").

those orders simply *does not include those products*, but instead covers only the universe of products generally described in the scope and not expressly excluded in the scope of those orders.

As the Court acknowledges, another component of the Department's establishment of the parameters of an investigation, and determination of the ultimate class or kind of merchandise covered by a potential antidumping or countervailing duty order, can be a country-of-origin analysis.[48]

In reviewing the Court's description of the Department's country-of-origin analysis in the Solar II PRC AD and CVD investigations and analysis of the classes or kinds of merchandise covered by the *Solar I*, *Solar II PRC* and *Taiwan Solar Orders*, we have determined that further analysis and explanation of the term "class or kind of merchandise" is warranted on remand, and in particular, further explanation of the "class or kind of merchandise" covered by each of these Orders.[49] Specifically, in *SunPower Corp.* the Court stated that "it is unprecedented for {the Department} to apply more than one country-of-origin determinative rule to products within the same class or kind of merchandise."[50] Furthermore, the Court stated that between the Solar I PRC AD and CVD investigations and the Solar II PRC AD and CVD investigations, the Department "applied two different {country-of-origin} rules to similarly situated products within the same class or kind of merchandise."[51]

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[48] *See SunPower Corp.*, Slip Op. at 25.

[49] We note that in its response brief filed with the Court in *SunPower Corp.*, the Government used language indicating that the merchandise at issue in the Solar II PRC AD and CVD investigations was the same "class or kind" as that at issue in the Solar I PRC investigation. *See* Gov't Resp. Br. at 25 ("Although a different country-of-origin analysis may apply to merchandise falling within the same class or kind (i.e., solar cells and solar modules), depending on where the solar cell is produced, no one single product can have two countries of origin."), 27 (referring to a "segment of the same class or kind" covered by the Solar I PRC orders); 28 (same). We understand that these statements may have caused confusion. Therefore, we are taking this opportunity to more fully flesh out the Department's interpretation of "class or kind" above.

[50] *See SunPower Corp.*, Slip Op. at 28.

[51] *Id.* at 36. We note that the Court expressed a similar concern in *SunEdison, Inc. v. United States*, Slip Op. 16-59

We agree with the Court that it is the Department's normal practice to apply a single country-of-origin determination to a *single* class or kind of merchandise covered by an investigation in determining the ultimate class or kind of merchandise covered by a potential antidumping duty or countervailing duty order. In *DRAMs from Korea*, for example, the Department declined to capture in an investigation all DRAMs fabricated and/or assembled in Korea, finding that doing so would necessitate "two potentially conflicting country-of-origin tests" for products in the same "class or kind of merchandise subject to investigation."[52] The Department based this conclusion on the fact that section 701(a)(1) of the Act provides for an investigation into alleged countervailable subsidies being provided with respect to "a" class or kind of merchandise, and establishing "{a} single definable class or kind of merchandise is linked inextricably to its country-of-origin."[53]

By contrast, here, the Department did not apply conflicting country-of-origin analyses to a "single" class or kind of merchandise. The Department initiated investigations (Solar I, Solar II PRC, and Taiwan Solar) into three different classes or kinds of merchandise, independently analyzed the country-of-origin of the products at issue in each, and ultimately issued final determinations as to three different classes or kinds of merchandise which, as is reflected in the Orders themselves, cover different products. Thus, the concerns expressed in *DRAMs from Korea* are inapplicable here, that is, when considering the scopes of multiple, different

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(CIT June 14, 2016) (*SunEdison, Inc.*), where the Court questioned why the Department had departed "from the agency's prior practice of establishing a single consistent origin rule for all products within a single class or kind of merchandise," and found that the Government's reliance on the scope in *Softwood Lumber from Canada* was not relevant because the issue allegedly in this case was that "some products within the class or kind of merchandise are treated using a different rule than that which is otherwise generally applicable to products within that overall class/kind." *SunEdison, Inc.*, Slip Op. at 24 and 25, n. 69 (referring to scope exclusions for lumber from entire geographic areas of Canada in *Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products From Canada*, 67 FR 15545 (April 2, 2002) (notice of final affirmative countervailing duty determination and final negative critical circumstances determination).

[52] *See DRAMs from Korea*, 67 FR 70927-28.

[53] *Id.*, at 70928.

proceedings,[54] and there is no inconsistency between those statements and the Department's analysis in the Solar I PRC AD and CVD, Solar II PRC AD and CVD, and Taiwan Solar investigations.

To be clear, the *Solar I PRC Orders* contain the same description of the same class or kind of merchandise. The *Solar II PRC Orders* contain a description of merchandise different from the merchandise covered by the *Solar I PRC Orders*, but the *Solar II PRC Orders* contain the same description of the same class or kind of merchandise. Finally, the class or kind of merchandise described in the *Taiwan Solar Order* is different from both that described in the *Solar I PRC Orders* and the *Solar II PRC Orders*. That is, the general description of products included, and the express products described as excluded, are not the same between the three scopes.

The descriptions of the different products covered by the *Solar I PRC* and *Solar II PRC Orders*, and the *Taiwan Solar Order*, and therefore the descriptions of the different classes or kinds of merchandise covered by these orders, are reasonable and address the particularized harm alleged in the Petitions and analyzed in the investigations.[55] The Federal Circuit has acknowledged that the Department is granted a "large" amount of discretion to determine "the applicable scope" of an "order that will be effective to remedy the dumping that the Administration has found."[56] In deferring to the Department's definition of the class or kind of merchandise covered by the scope of an order, the Federal Circuit has affirmed the Department's authority to expand the scope as proposed in the petition to cover additional products to "prevent

[54] An analysis of scopes of distinct, and different, proceedings is different from, for example, an analysis of the scope of a single proceeding.
[55] *See SunPower Corp.*, Slip Op. at 41 (agreeing that the *Solar II PRC Orders* "provide the product coverage sought by SolarWorld").
[56] *See Mitsubishi II*, 898 F.2d at 1583.

evasion" of the order.[57] As the CIT held in *Mitsubishi I*, the Department "has been vested with authority to administer the antidumping laws in accordance with the legislative intent. To this end, {the Department} has a certain amount of discretion to expand the language of a petition . . . with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty laws."[58]

Likewise, in *Torrington*, the CIT upheld the Department's determination to "narrow the scope" by finding the existence of five classes or kinds of merchandise, although the petition had alleged the existence of a single, larger class or kind of merchandise.[59] The Federal Circuit affirmed the CIT's decision, noting additionally that it would not "disturb" the Department's interpretation of the "involved sections of the antidumping duty laws" unless the Department's interpretation was "unreasonable."[60]

This interpretation of the term "class or kind of merchandise" is also consistent with the legislative history of that phrase, as well as the definition of "subject merchandise." The "class or kind" language dates back to the Antidumping Act of 1921. Section 201(a) of that Act provided that if the Secretary of the Treasury found that a U.S. industry was injured (or likely to be injured) by reason of imports of "a class or kind of foreign merchandise, and that merchandise of such class or kind is being sold in the United States or elsewhere at less than fair value," then the Secretary of the Treasury was to "make such finding public to the extent he deems necessary, together with a description of the class or kind of merchandise to which it applies in such detail

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[57] *Id.*, at 1582 and 1584, *affirming Mitsubishi Electric Corporation v. United States*, 700 F. Supp. 538 (Ct. Int'l Trade 1988) (*Mitsubishi I*).

[58] *See Mitsubishi I*, 700 F. Supp. at 555; *see also id.*, at 556 (explaining that the Department "has the authority to define and/or clarify what constitutes the subject merchandise to be investigated as set forth in the petition . . . taking into consideration such factors as . . . the known tactics of foreign industries attempting to avoid a countervailing duty order").

[59] *See Torrington v. United States*, 745 F. Supp. 718, 721 (Ct. Int'l Trade 1990), *aff'd* 938 F.2d 1276 (Fed. Cir. 1991).

[60] *Id.*, 938 F.2d at 1278 (citing *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44).

as may be necessary for the guidance of the appraising officers."[61] A parallel countervailing duty provision was incorporated into the Tariff Act of 1930, in which Congress provided for the imposition of countervailing duties with respect to "any article or merchandise manufactured or produced" in a country where the countervailable subsidies are occurring.[62] In the Trade Agreements Act of 1979, Congress changed the language from "article or merchandise" to "class or kind," to mirror the language in the Antidumping Act of 1921 and to explain that a party need not prove a subsidy has been provided on any individual entry of merchandise.[63] In implementing this change, Congress noted that "domestic petitioners and the administrators of the law have reasonable discretion to identify the most appropriate group of products for purposes of both the subsidy and injury investigations."[64]

Additionally, in the Uruguay Round Agreements Act of 1994, in modifying certain statutory provisions to parallel the language of the WTO Antidumping Agreement and Agreement on Subsidies and Countervailing Measures, Congress clarified that "subject merchandise" and the "class or kind of merchandise subject to an investigation or covered by an order" are synonymous, stating: "What formerly was referred to as the 'class or kind' of merchandise subject to investigation or covered by an order is now referred to simply as the 'subject merchandise.' No substantive changes to U.S. law are intended simply by virtue of such changes in nomenclature to conform U.S. law to the terminology of the {WTO} Agreements."[65] Collectively, this history reflects that the "class or kind" of merchandise covered by an order is defined by the agency and describes the ultimate universe of the merchandise explicitly covered by an investigation or an order.

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[61] *See* Antidumping Act of 1921, Pub. L. No. 67-10, 42 Stat. 11, at § 201(a).
[62] *See* Tariff Act of 1930, Pub. L. No. 71-361, 89 Stat. 26, at § 303.
[63] *See* H. Rep. No. 96-317, at 49 (1979).
[64] *See* S. Rep. No. 96-249, at 45 (1979).
[65] *See*, *e.g.*, H.R. Rep. 103-826, pt. 1, at 64 (1994).

In the investigations at issue in this litigation, the Solar II PRC AD and CVD investigations, the petitioner alleged that a "class or kind" of merchandise was harming the domestic industry that differed from the "class or kind" of merchandise subject to the *Solar I PRC Orders*. Indeed, following the imposition of the *Solar I PRC Orders*, the petitioner presented evidence that companies began sourcing solar cells from Taiwan and other countries that were assembled into modules in the PRC.[66] The Court in *SunPower Corp.* found that "as a factual matter, no party challenges" the existence of this shift in production or the "negative effect" that it had on the reach of the *Solar I PRC Orders*.[67] In other words, there is undisputed evidence that Chinese producers of solar modules shifted part of their production in a way that pulled merchandise that otherwise would be covered by the *Solar I PRC Orders* outside the remedy afforded by those orders. This "loophole" meant that the *Solar I PRC Orders*, and the country-of-origin rule established thereunder, were not fully accomplishing the purpose for which they were implemented.

Pursuant to section 701(a) of the Act, if the Department concludes that an authority is providing a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise, and the ITC finds that imports of such merchandise are causing or threatening to cause material injury to domestic producers, then a countervailing duty "shall be imposed." Similarly, pursuant to section 731(a) of the Act, if the Department finds that a class or kind of foreign merchandise is being or is likely to be sold in the United States at less than its fair value, and the ITC finds that imports of such merchandise are causing or threatening to cause

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[66] *See* the Petitions at 3, 5-6, 21, 34, 37, and 53; Letter from Solar World Americas, Inc. ("Petitioner"), "Re: Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Case Brief of Solar World Americas, Inc.," dated October 16, 2014 at 5-6; Letter from Petitioner to the Department, "Re: Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China and Taiwan: Rebuttal to Respondents' Scope Comments" (April 3, 2014) at 11-13.

[67] *See SunPower Corp.*, Slip Op. at 10-11.

material injury to domestic producers, then an antidumping duty "shall be imposed." In sum, the Department is *required* to provide a remedy for unfair pricing and subsidization.[68] The Department's definition of the class or kind of merchandise subject to the *Solar II PRC Orders* accomplishes this.

Further, in Taiwan Solar, the Department explicitly excluded from the scope of the *Taiwan Solar Order* modules, laminates, and panels produced in the PRC from Taiwanese solar cells, as that product description applied to products identified by the ITC as causing injury to the domestic industry that were already covered by the merchandise identified in the Solar II PRC AD and CVD investigations. A single product cannot be subject to two different antidumping duty orders that cover merchandise from two different countries. The Department therefore determined, within its statutory "responsibility to determine the proper scope" of an "investigation and of the antidumping order,"[69] that including the products causing injury to the domestic industry in the class or kind of merchandise covered by the *Solar II PRC Orders*, and excluding that merchandise from the class or kind of merchandise subject to the *Taiwan Solar Order*, was appropriate for the reasons it provided in the final determinations of those respective investigations.[70]

As this Court acknowledged in its holding in *SunPower Corp*., the *Solar I PRC Orders*, *Solar II PRC Orders*, and *Taiwan Solar Order* do not provide overlapping coverage.[71]

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

[69] *See Mitsubishi II*, 898 F. 2d at 1582.

[70] *See generally Solar II PRC AD Final Determination*, and accompanying Issues and Decision Memorandum at 11-16; *Solar II PRC CVD Final Determination*, and accompanying Issues and Decision Memorandum at 36-41; s*ee Taiwan Solar Final Determination*, and accompanying Issues and Decision Memorandum at 21-24.

[71] *See SunPower Corp.*, Slip Op. at 35 (noting that "use of multiple orders ensures that no individual product is simultaneously deemed to originate from two different countries.").

Furthermore, each of the Department's country-of-origin analyses and determinations were unique to the particular discrete class or kind of foreign merchandise defined in the investigations at issue. Accordingly, the Department did not apply "two different {country-of-origin} rules to similarly situated products within the same class or kind of merchandise,"[72] because the universe of products covered by each scope are different (*i.e.*, the scope of the *Solar I PRC Orders*, the scope of the *Solar II PRC Orders*, and the scope of the *Taiwan Solar Order*) and constitute separate classes or kinds of foreign merchandise.

B. The Department's Country-of-Origin Analysis in the Solar II PRC AD Final Determination and Solar II PRC CVD Final Determination

In determining the class or kind of merchandise covered by the *Solar II PRC Orders*, the Department conducted a country-of-origin analysis which the Court has remanded to the Department for further explanation. As noted, pursuant to sections 701(a) and 731(a) of the Act, the Department is required to provide a remedy for certain injurious and unfair trade practices. The harm alleged in the *Solar II PRC AD* and *CVD investigations* was attributable to Chinese pricing and subsidization of solar modules, panels and/or laminates that were not captured by the *Solar I PRC Orders*. The Department considered the history of evasion of the *Solar I PRC Orders* and reasonably determined, based on the facts and circumstances before it, that a different country-of-origin analysis was needed in the Solar II PRC AD and CVD investigations to provide a meaningful remedy for the unfairly traded imports that the ITC found were materially injuring the domestic industry.

In reaching this determination, the Department found that the two-out-of-three scope language originally proposed by petitioner would not be administrable, given that certain parties reported that they did not track where the ingots, wafers, or partial cells used in third-country

[72] *Cf. SunPower Corp.*, Slip Op. at 36.

cells being assembled into modules in the PRC were produced, and that it would be "virtually impossible" for importers to have that information.[73] Additionally, in light of the history of evasion under the *Solar I PRC Orders* and the undisputed "complex and readily adaptable global supply chain," the Department found that the two-out-of-three scope language would permit further evasion and ultimately incomplete relief.[74]

The Court questioned why the Department could not address the source of the injury to the domestic industry by issuing individual orders covering cell-producing countries.[75] First, in response to this question, were the Department to follow this approach and apply its substantial transformation analysis (as it did in the Solar I PRC AD and CVD investigations), the country-of-origin of such merchandise would be the country of cell production. This would mean that the unfair pricing and the unfair subsidization of modules in the PRC (which was the source of the alleged harm in the Solar II PRC AD and CVD investigations) would not be captured. Separately, considering the Department's experience administering the *Solar I PRC Orders* and the undisputed adaptability of the global supply chain, this approach would likely provide costly,[76] temporary, and ultimately ineffective relief from unfairly traded imports because the Department's investigations would be unlikely to keep up with the shifting trade flows. For example, in the length of time that it would take to file a petition, and for the Department and the ITC to reach final determinations in any resulting investigations, trade flows would likely have already shifted to another country. This thwarts the remedial purpose of the AD/CVD laws.

In light of the foregoing, the Department's determination in the *Solar II PRC AD Final*

[73] *See Solar II PRC AD Final Determination*, and accompanying Issues and Decision Memorandum at 14 and n.45; *Solar II PRC CVD Final Determination*, and accompanying Issues and Decision Memorandum at 40 and n.215.
[74] *See Solar II PRC AD Final Determination*, and accompanying Issues and Decision Memorandum at 13-14; *Solar II PRC CVD Final Determination*, and accompanying Issues and Decision Memorandum at 38-39.
[75] *See SunPower Corp.*, Slip Op. at 41-42.
[76] This approach could prove costly because petitioners would have to research, compile, and submit petitions for multiple countries notwithstanding the common thread that the alleged unfair subsidization and pricing was occurring in/from the PRC.

Determination and *Solar II PRC CVD Final Determination* that it was necessary to use a different country-of-origin rule to capture dumping and subsidization of all modules, panels and/or laminates assembled in the PRC, from cells produced outside the PRC was reasonable.[77] In sum, the Department reasonably found based on the facts before it and the new circumstances that emerged following the *Solar I PRC Orders*, that a different country-of-origin rule was needed to "best effectuate the purpose of the antidumping {and countervailing duty} laws and the violation found."[78]

Although the Department acknowledged that it typically relies on a substantial transformation analysis to determine a single country-of-origin for merchandise partially manufactured or processed in more than one country,[79] the CIT agreed in the related *SunEdison* litigation concerning the *Taiwan Solar Final Determination* that the Department is not legally required to do so.[80] Rather, "{w}here the statutory language is sufficiently broad to permit a range of policy choices, the agency may change course from its prior practice and adopt a new approach within its statutory authority," provided that the Department has "explain{ed} how the new policy is consistent with the continued relevance (if any) of the factual findings on which the agency's prior policy was based."[81] The Department has complied with this requirement by explaining that the facts and circumstances present in the Solar II PRC AD and CVD investigations are distinct from those in the Solar I PRC AD and CVD investigations, and thus has explained why the substantial transformation analysis was not appropriate for determining

[77] *See Mitsubishi II*, 898 F.2d at 1582-83 (finding that the Department has ample discretion to determine a scope that will provide an effective remedy from injurious trade practice, and that "discretion must be exercised in light of all the facts before {the Department} and must reflect that agency's judgment regarding the scope and form of an order that will best effectuate the purpose of the antidumping laws and the violation found").
[78] *See Mitsubishi II*, 898 F.2d at 1582-83.
[79] *See Solar II PRC AD Final Determination*, and accompanying Issues and Decision Memorandum at 15; *Solar II PRC CVD Final Determination*, and accompanying Issues and Decision Memorandum at 41.
[80] *See SunEdison, Inc.*, Slip Op. at 21-23.
[81] *See SunPower Corp.*, Slip Op. at 19.

the country-of-origin in the investigations at issue.

The Court suggests that, in establishing this country-of-origin rule in the Solar II PRC AD and CVD investigations, the Department disregarded its prior factual findings regarding the relative insignificance of panel assembly in the production process.[82] We respectfully disagree. The Department recognized its findings from the Solar I PRC AD and CVD investigations, but also recognized that the harm alleged in the Solar II PRC AD and CVD Petitions was connected with the activities in the PRC.[83] Further, the Department took into account the *Solar I PRC Orders*, and the nature of solar cell and panel/module/laminate production and shifts in trade flows, as well as other considerations.[84] Based on those factors, the Department found that a new approach was needed to accomplish the remedy mandated by statute.[85] Indeed, as the Court observes, where the Department had not yet been provided with evidence of shifting trade patterns away from Taiwanese cell production, the Department continued to rely upon those prior findings with respect to Taiwan. This was because Taiwan did not involve the same facts, given that unlike in the Solar II PRC AD and CVD investigations, "no substantial transformation analysis ha{d} been conducted of the same or similar merchandise in Taiwan prior to this investigation" and the scope at issue in Taiwan Solar was "similar to the scope proposed by the Petitioner in the *Solar I PRC* investigations."[86] Further, unlike the Solar II PRC AD and CVD investigations, the petitioner did not provide any evidence of evasion related to solar modules assembled in Taiwan using third-country cells.[87] In the absence of this history, the Department followed its "usual starting point" in examining country-of-origin (*i.e.*, a substantial

[82] *Id.*, at 39.
[83] *See Solar II PRC AD Final Determination*, and accompanying Issues and Decision Memorandum at 13, 15.
[84] *Id.*, at 13-16.
[85] *Id.*; *see also Solar II PRC CVD Final Determination*, and accompanying Issues and Decision Memorandum at 38-41.
[86] *See Taiwan Solar Final Determination*, and accompanying Issues and Decision Memorandum at 18-19.
[87] *Id.*, at 23.

transformation analysis).[88]

Finally, as explained above, the Department's determination was not inconsistent with its prior refusal to "have a class or kind of merchandise subject to investigation that would require two different potentially conflicting country-of-origin tests."[89] As explained above, the Department employed different country-of-origin tests for different classes or kinds of merchandise depending on the circumstances underlying the proceedings. Moreover, to the extent that the Court believes that the agency's analysis in *DRAMs from Korea* (and in other cases, such as Solar I) is still inconsistent with our analysis in the *Solar II PRC AD and CVD Final Determinations*, we note that those investigations did not involve a similar fact pattern where undisputed evasion occurred following imposition of an order, and a petitioner sought a remedy from the continued injury flowing from that evasion. To the contrary, the Department in *DRAMs from Korea* stated that it was carrying forward the substantial transformation analysis that it had conducted in earlier investigations "absent compelling information that new criteria are appropriate"[90]; the Solar II PRC AD and CVD investigations presented such compelling circumstances.

C. The Department's Treatment of "Similarly-Situated" Products

The Court also concluded that the Department normally finds that: (1) only one country's comparison market can serve as the basis of AD/CVD liability, and (2) flowing from that, the focus should be on the pricing behavior and subsidies in the country where the "more important" or most "essential" production occurs (even where this means that certain merchandise is excluded from the Department's consideration).[91] The Court found that the

[88] *Id.*, at 18-19.
[89] *See SunPower Corp.*, Slip Op. at 29 (quoting *DRAMs from Korea*, 67 FR at 70927-28).
[90] *See DRAMs from Korea*, 67 FR at 70928.
[91] *See SunPower Corp.*, Slip Op. at 32-33.

Department deviated from this practice in the Solar II PRC AD and CVD investigations, with the result that "similarly-situated" products are treated differently.[92] The Court found that the Department did not explain why, only with respect to solar panels assembled in the PRC, it would be inappropriate to analyze pricing and subsidization in the location of the majority of production (*e.g.*, Taiwan).[93]

As explained above, in the Solar II PRC AD and CVD investigations, the pricing behavior and subsidization activities that were being investigated and served as the basis for our determination that the application of AD and CVD duties was warranted involved modules assembled in the PRC from third-country solar cells. In light of the facts before the Department, the Department reasonably found that maintaining consistency with the substantial transformation analysis used in the Solar I PRC AD and CVD investigations, without additional analysis, would provide an inadequate remedy for the evasion occurring after the *Solar I PRC Orders*.

The unique facts and evasion observed with respect to the solar cells and modules produced in the PRC, specifically, explain why the Department needed to analyze modules assembled in the PRC from third-country cells differently. For example, the Court cites the fact that Taiwanese solar cells assembled into panels in any country other than the PRC are Taiwanese in origin (and AD/CVD liability is assessed on pricing and subsidies within that market), but those same cells when assembled into panels in the PRC are then treated as Chinese in origin.[94] The circumstances surrounding the *Taiwan Solar Order* are not analogous to those surrounding the *Solar II PRC Orders*, and the Department explained the basis for this disparate

[92] *Id.*, at 35-36.
[93] *Id.*, at 41.

[94] *See SunPower Corp.*, Slip Op. at 36, 40-41.

treatment with respect to Taiwan.[95] As the Department explained, for Taiwan, there was no similar history of a substantial transformation analysis being conducted in a prior investigation, followed by subsequent evasion of the resulting order.[96] Furthermore, the evidence of production shifts following the *Solar I PRC Orders* related to "modules, laminates and panels using Taiwanese solar cells and not solar modules assembled in Taiwan using third country cells."[97] In sum, considering the disparate history of each of the three sets of solar Orders, the products covered by the three sets of Orders are not, in fact, "similarly-situated."[98]

D. The Department's Imposition of AD/CVD Liability Based On Market Conditions in the Country of Panel Assembly

The Court also found that the Department did not "consider or explain" why it was appropriate to impose AD/CVD liability based on conditions in the market where a relatively insignificant production step (*i.e.*, panel assembly) occurs.[99] The Court stated that this approach appeared to conflict with the Department's prior statement that "we are primarily concerned with where the actual manufacturing is occurring."[100] The Court further concluded that, in the case of the *Solar II PRC AD Order*, the Department failed to consider or explain how it achieved a "fair comparison" between USP and NV, as required by section 773 of the Act, by basing NV on costs in a country where insignificant production activities are occurring.[101]

For the Solar II PRC AD and CVD investigations, the Department conducted additional analysis beyond a substantial transformation analysis to determine country-of-origin, with the result that the Department found the country-of-origin for panels assembled in the PRC from non-Chinese cells to be the PRC. As explained above, the Petitions alleged purported

[95] *See Taiwan Solar Final Determination*, and accompanying Issues and Decision Memorandum at 23.
[96] *Id.*, at 18-19.
[97] *Id.*, at 23.
[98] *Cf. SunPower Corp.*, Slip Op. at 35-36.
[99] *Id.*, at 42.
[100] *Id.*, at 42-43.
[101] *Id.*, at 43, 46-47.

subsidization within, and injurious dumping from, the PRC. Accordingly, the Department's investigations looked at pricing from, and subsidization in, the PRC. In this respect, the PRC activities with respect to injurious dumping and countervailable subsidization were not minor or insignificant, qualitatively speaking. Indeed, the Department ultimately found that modules assembled in the PRC using third-country cells benefited from countervailable subsidies in the PRC and that these products were dumped into the United States by Chinese companies.

For these reasons, the PRC is the proper "market" for the merchandise covered by the *Solar II PRC Orders*. Further, the Solar II PRC AD and CVD Petitions and our AD and CVD calculations focused on Chinese production activities and Chinese pricing and subsidization for solar panels from the PRC that were not covered by the *Solar I PRC Orders*. Our approach to defining the scopes of the *Solar II PRC Orders* fully captured these issues, and we explained above why it was reasonable to conduct additional analysis beyond a substantial transformation analysis to establish the scopes of the *Solar II PRC Orders*.

Additionally, for the Solar II PRC CVD investigation, it is reasonable to impose duties to offset countervailable subsidies in the PRC without regard to an assessment of the location of the "majority" of production. The Department determines *ad valorem* CVD rates based on a numerator of the amount of the benefit from the subsidies received and a denominator of the relevant sales value, as set forth in 19 CFR 351.525(a).[102] This means that a subsidy or CVD rate is not calculated based on a particular value-added stage of production (such as assembly). Thus, the subsidization rates determined in the Solar II PRC CVD investigation reflect a percentage of the respondent's relevant sales values, regardless of the degree of production or value added that occurred in the PRC.

[102] 19 CFR 351.525(a) ("The Secretary will calculate an *ad valorem* subsidy rate by dividing the amount of the benefit allocated to the period of investigation or review by the sales value during the same period of the product or products to which the Secretary attributes the subsidy under paragraph (b) of this section.").

For the Solar II PRC AD investigation, it is also reasonable to impose duties to offset the dumping of solar panels from the PRC made from cells produced outside of the PRC, without regard to where the majority of production may have taken place. The focus of the Solar II PRC AD investigation was the PRC's alleged unfair pricing, and we determined the extent of that unfair pricing by comparing the NV of the finished, assembled panel to the USP for a finished, assembled panel from the PRC. With this focus in mind, the Department appropriately does not necessarily focus on the cost to the cell producer outside of the PRC, because the relevant consideration here was the NV of the finished, assembled panel produced by the Chinese company.

The Court explained that to achieve a "fair comparison" between NV and USP, "most production of subject merchandise must occur in the subject country (or, put another way, the country-of-origin of a product subject to AD/CVD duties will ordinarily be the country where most of the production occurs)."[103] However, the statute does not compel this result.

Pursuant to section 773(a) of the Act, to determine "whether subject merchandise is being, or is likely to be sold, at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value." The method for calculating NV, and thus achieving this "fair comparison," is set forth in the statute, particularly in section 773 of the Act.[104] The Department followed section 773(c) of the Act in determining NV for the *Solar II PRC AD Final Determination*, which instructs the Department to determine NV based on the value of the "factors of production utilized in producing the merchandise" plus "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses."[105]

[103] *See SunPower Corp.*, Slip Op. at 43.
[104] *See* section 773(a) of the Act ("In order to achieve a fair comparison with the export price or constructed export product, normal value shall be determined as follows . . . .").
[105] *See* section 773(c)(1)(B) of the Act.

The Department's "build-up" of the NV from Chinese factors of production and surrogate country values provided the full NV of the solar panels subject to the *Solar II PRC AD Order* (including the cost of the cells in those panels), and the Department compared that NV to USP in accordance with section 773(a) of the Act. That was the "fair comparison" required by statute.

IV. SUMMARY AND ANALYSIS OF THE PARTIES' COMMENTS

The Department issued the draft results of redetermination on August 19, 2016.[106] On August 31, 2016, Petitioner, SunPower,[107] Shanghai BYD,[108] Suniva,[109] Yingli,[110] and Canadian Solar *et. al*.[111] submitted comments on the draft results.[112] These comments are addressed, below. After considering the parties' comments, we have continued to reach the same conclusions from that of our Draft Redetermination in the final results of redetermination.

Interested Party Comments

Comment 1: Whether or not there is a different class or kind of merchandise for the *Solar I PRC Orders, Solar II PRC Orders* and *Taiwan Solar Orders*.

Petitioner Comments:

- In the Solar II PRC petition, SolarWorld alleged that a "class or kind" of merchandise was harming the domestic industry that differed from the "class or kind" of merchandise subject to the *Solar I PRC Orders*. The scope definitions that the Court is comparing in its opinion

[106] *See* Draft Results of Redetermination Pursuant to Court Order: *SunPower Corp. v. United States*, Consol. Court No. 15-00067, Slip Op. 16-56 (June 8, 2016)) ("Draft Results").
[107] SunPower Corporation and SunPower Corporation Systems.
[108] Shanghai BYD Co., Ltd. and BYD (Shangluo) Industrial Co., Ltd.
[109] Suniva, Inc.
[110] Yingli Green Energy Holding Co., Ltd. and Yingli Green Energy Americas, Inc.
[111] Canadian Solar Inc.; Changzhou Trina Solar Energy Co., Ltd.; China Sunergy (Nanjing) Co., Ltd.; Chint Solar (Zhejiang) Co., Ltd.; ET Solar Industry Ltd.; Hefei JA Solar Technology Co., Ltd.; Jinko Solar Co., Ltd.; LDK Solar Hi-Tech (Nanchang) Co., Ltd.; Perlight Solar Co., Ltd.; Shanghai JA Solar Technology Co., Ltd.; Shenzhen Sacred Industry Co., Ltd.; Shenzhen Sungold Solar Co., Ltd.; Sumec Hardware & Tools Co., Ltd.; Wuhan FYY Technology Co., Ltd.; Wuxi Suntech Power Co., Ltd.; Zhongli Talesun Solar Co., Ltd.; and Znshine PV-Tech Co., Ltd.
[112] *See* Submission from Petitioner, "Comments on Draft Results of Redetermination Pursuant to Court Order," dated August 31, 2016; Submission from SunPower, "Comments by SunPower Corporation and SunPower Corporation, Systems on Draft Results of Redetermination Pursuant to Court Order," dated August 31, 2016; Submission from Shanghai BYD, "Comments on the Draft Results of Redetermination Pursuant to Court Order," dated August 31, 2016; Submission from Suniva, "Comments on Draft Results of Redetermination," dated August 31, 2016; Submission from Yingli, "Yingli's Comments on Draft Remand Results," dated August 31, 2016; Submission from Canadian Solar, *et. al*., "Plaintiffs' Comments on Draft Results of Redetermination Pursuant to Court Order," dated August 31, 2016.

are the scopes of multiple, different proceedings, and these scopes are each different.

- There is nothing in the legislative history of the statutory provision that would suggest that products subject to completely separate proceedings should be considered to constitute one single "class or kind of merchandise," even if the scope descriptions in the proceedings may share certain elements in common. Rather, it appears that the "class or kind" language was largely intended only to explain that a party need not prove that a subsidy has been provided on every single individual entry of merchandise to which an AD or CVD would be applied.

Respondent Comments:

- The Department's new claim for three separate classes/kinds of merchandise for the three scopes of the orders is factually incorrect and not responsive to the Court. The Department has not explained how the solar panels subject to the three orders actually differ (*i.e.*, they are identical products).
- The Department's approach in the Draft Redetermination does not address the problem of applying more than one country-of-origin determinative rule to the same class or kind of merchandise. It also contradicts the position taken by the Department throughout the underlying proceeding. Further, this view contradicts the legal statements made by the Government in its briefs to the Court.
- The Department's claim that the products are not similarly situated because of the history of the three proceedings is not a reasonable explanation for treating identical products differently and is, therefore, arbitrary and capricious.
- The Department erroneously conflates the terms "class/kind of merchandise," "subject merchandise," and "scope of an investigation." "Class/kind of merchandise" is broader than "subject merchandise," and "subject merchandise" is defined in the statute as the "class/kind of merchandise" from the country under investigation.
- The Department's interpretation of "class or kind of foreign merchandise" is inconsistent with the use of that term in section 781(b)(1)(A) of the Act (the anti-circumvention provision) and the definition of foreign like product, found at section 771(16) of the Act, as applied in the below-cost test, under section 781(b)(1)(A) of the Act.
- The Department fails to acknowledge that in determining under 19 CFR 351.225(d) if a "product is included within the scope of an order," section 19 CFR 351.225(k)(2) provides factors which the Department will consider, otherwise known as the *Diversified Products* criteria, in determining whether or not products are within the same class or kind. The products under the three orders are not only the same class or kind under these criteria, they are identical in all relevant respects.
- Even accepting the Department's claim that the *Taiwan Solar*, *Solar I PRC* and *Solar II PRC* investigations have separate classes or kinds of merchandise, the Department applied two rules of origin to the same class or kind of merchandise in the Taiwan investigation for solar modules containing Taiwanese-origin solar cells, based on the country of module assembly, and two rules of origin for the same class or kind of merchandise in the *Solar II PRC AD* and *CVD Investigations* because there is an exclusion in that scope for merchandise covered by the *Solar I PRC AD* and *CVD Orders*. This is precisely the inconsistent treatment of the same product that caused the Court to remand the scope determinations.
- Concerns with alleged evasion of an AD or CVD order have "no relevant bearing on the definition of the 'class or kind' that is at issue" in this case.

Department Position:

After reviewing and considering all of the parties' arguments, the Department continues to determine that the classes or kinds of merchandise for the *Solar I PRC, Solar II PRC,* and *Taiwan Solar Orders* are distinctive from each other, and therefore that the Department did not break from its prior practice of applying a single country-of-origin determination to a single class or kind of merchandise in the underlying investigations.

Section 701(a) of the Act provides that in a CVD investigation the Department may determine that "***a*** class or kind of merchandise imported or sold (or likely to be sold) for importation in the United States" is being subsidized and section 731 of the Act indicates that in an AD investigation the Department may determine if "***a*** class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value." As the Court pointed out in *SunPower Corp*.,[113] the Department has concluded that "a single definable class or kind of merchandise is linked inextricably to its country-of-origin."[114] Accordingly, we are in agreement with the parties' contentions that for every investigated class or kind of foreign merchandise, there can be only one country-of-origin.

As we explained above, section 771(25) of the Act defines "subject merchandise" as "***the class or kind of merchandise*** that is within the scope of ***an investigation***, a review, a suspension agreement, ***an order*** under this subtitle or section 1303 of this title, ***or*** a finding under the Antidumping Act, 1921." Put another way, in an investigation, the merchandise which is "subject" to that investigation is the "class or kind of merchandise that is within the scope of {the} investigation," while when an order is put in place, the "subject merchandise" is the "class or kind of merchandise that is within the scope of an . . . order." This is an important distinction,

[113] *SunPower Corp.*, Slip Op. at 28-30
[114] *DRAMS from Korea*, 67 FR at 70928.

because from the submissions it appears that certain parties do not distinguish between the "class or kind" of an investigation and the "class or kind" of an order. In fact, the two need not be, and sometimes are not, identical.

We do not disagree with the statements in the submissions that defining the scope of merchandise covered by an AD or CVD order is a multi-step process. First, the Department must determine, as a result of the investigation, the universe of physical products it believes should be specifically covered by the ensuing order, if any. As we have explained, the universe of physical products on which the Department initiates an investigation may change throughout the investigation based upon the evidence on the record, the interested parties' comments, and the Department's analysis and determinations, so that the universe of physical products subject to the investigation, *i.e.*, the class or kind of merchandise within the scope of the investigation, might differ from the universe of physical products ultimately subject to an AD or CVD order, *i.e.*, the class or kind of merchandise covered by the order.

Second, along with a class or kind analysis, a country of origin analysis might also be appropriate. The Department may clarify or refine the class or kind of an investigation during the investigation such that the class or kind of merchandise described in the final determination of an investigation is not identical to that upon which the Department initiated the investigation. Furthermore, following a final determination in an investigation, the class or kind of merchandise might be further refined as a result of an ITC determination.[115] As the Federal Circuit has explained, a "purpose of the investigation is to determine what merchandise should be included in the final order."[116]

Even then, however, the class or kind of merchandise determined by the Department in a

[115] *See, e.g., Badger-Powhatan*.
[116] *Duferco Steel, Inc.*, 296 F. 3d. at 1089.

final determination may not be the ultimate class or kind of merchandise covered by the AD or CVD order. This is because, as we have explained, the ITC might find that some merchandise covered by the Department's final determination has not caused injury. If that occurs, then the resulting "class or kind of merchandise that is within the order," and thus subject merchandise under section 771(25) of the Act, will necessarily differ from that determined by the Department in its final determination.

One of the issues from the Draft Redetermination which might be a source of confusion originates with the reference to the URAA House Report in which Congress explained that as a result of the URAA, certain changes were enacted in the statute: "What formally was referred to as the 'class or kind' of merchandise subject to investigation or covered by an order is now referred to simply as the 'subject merchandise.'"[117] We do not read the House Report to reflect some intention by Congress to read out the possibility of a country-of-origin analysis – in fact, as we have explained, the country-of-origin analysis can be an integral part of the Department's ultimate determination of the class or kind of merchandise subject to an AD or CVD order.

However, we disagree with the claim that the class or kind of merchandise is either "separate from" the scope, or that it should be considered "broader" than the merchandise covered by the scope of the AD and CVD orders – *i.e.*, that the class or kind of merchandise is actually a general "type of product," not restricted by the merchandise specifically described as within, and limited by, the scope of the AD and CVD orders. No party cites support from the statute or regulations, or anything in the legislative history, court precedent, or the Department's practice to substantiate such a claim.

As explained above, the class or kind of merchandise covered by the *Solar I PRC AD Order* is the same as the class or kind of merchandise covered by the *Solar I PRC CVD Order*.

[117] H.R. Rep. 103-826, pt. 1, at 64 (1994) (cited by Draft Remand at 20).

In other words, the general description of products included in the scope of those orders, and the specific description of products excluded from the scope of those orders, is exactly the same in both orders. The class or kind of merchandise covered by the *Solar II PRC AD Order* and *Solar II PRC CVD Order* is also the same between those two specific Orders.

What is *not* the same is the description of the universe of products covered by the *Solar I PRC Orders* and the *Solar II PRC Orders*. Put another way, in accordance with section 701(a) of the Act, the "class or kind of foreign merchandise" that the Department determined to be subsidized in the *Solar I PRC CVD Order* was not the same "class or kind of foreign merchandise" that the Department determined to be subsidized in the *Solar II PRC CVD Order*. Likewise, the "class or kind of foreign merchandise" which the Department concluded was being sold at less than fair value in the *Taiwan Solar AD Order* pursuant to section 731 of the Act covered a different universe of specific products than that of the *Solar I PRC AD Order*, and both of those classes or kinds differed from the class or kind of merchandise specifically covered by the *Solar II PRC AD Order*.

Products specifically excluded from an AD or CVD order are not considered part of the "class or kind of foreign merchandise" found to be dumped or subsidized under sections 701(a) and 731 of the Act. They might be physically similar to the "class or kind of foreign merchandise" subject to an order, and, therefore, might be part of some broader group of merchandise that share some common characteristics, however, by virtue of the fact that the items are expressly excluded from an order, they are not part of the "class or kind" of merchandise covered by that order, Merely because excluded products may have certain physical characteristics similar to those of subject merchandise does not transform that merchandise into part of the "class or kind of foreign merchandise" determined to be dumped or

subsidized by the Department. To be clear, in accordance with the text of sections 701(a) and 731 of the Act, "the class or kind of foreign merchandise" subject to an AD or CVD order encompasses the physical products from a given country which the Department has found to be dumped or subsidized in its final determination and which the ITC has determined to have injured a domestic industry. Accordingly, there is no merit to the claim that the term "class or kind of foreign merchandise" in the statute means something broader than the products explicitly covered by an AD or CVD order.

Likewise, there is no support for the claim that the classes or kinds of merchandise covered by *Solar I PRC, Solar II PRC,* and *Taiwan Solar Orders* are "identical." By their very description in the text of the various orders, the physical products covered by the different Orders are distinct. By definition, a solar panel manufactured in the PRC from solar cells from outside the PRC is distinct from solar panels manufactured in, for example, Canada, from solar cells manufactured in Taiwan. They may have similar physical characteristics, but they are not one and the same.

In addition, we disagree with the claim that the Department's scope regulations, 19 CFR 351.225, undermine our interpretation of the statute, legislative history, Department practice and court precedent in defining the scope of the *Solar II PRC*, and *Taiwan Solar Orders*. It is well established that the Department's scope regulations only apply after an order has been issued. Because this litigation pertains to investigations, where the Department is considering what the scope of an order, if any, eventually may be, and not scope rulings interpreting the scope of an order that has already been issued, the Department's scope regulations—including 19 CFR 351.225(k)(2), are therefore inapposite to our decision making process on this point.

In addition, we disagree with the claim that the Department's inclusion of certain

products, and exclusion of other products, from the class or kind of merchandise covered by the *Solar II PRC Orders* and *Taiwan Solar Order* conflicts with the anti-circumvention provision, section 781(b)(1)(A) of the Act, or the definition of foreign like product, found at section 771(16) of the Act. As we have explained, the classes or kinds of foreign merchandise covered by those orders are distinct from each other. Accordingly, if an allegation of circumvention concerning merchandise completed or assembled in other foreign countries under section 781(b)(1)(A) of the Act were made with respect to, for example, the "same class or kind" of merchandise subject to the *Taiwan Solar Order*, for example, then the physical description of merchandise contained in the scope of the *Taiwan Solar Order*, would be relevant for purposes of a circumvention analysis. Likewise, in conducting an analysis under section 773(b)(1) of the Act, when the Department considers whether sales of the foreign like product have been made below the cost of production, the foreign like product will be the "general class or kind as the subject merchandise," *i.e.*, not necessarily the identical product within the class or kind. Furthermore, section 771(16) of the Act explains that the foreign like product goes beyond a product identical to the subject merchandise. That provision explains that the term foreign like product also encompasses products of the same "general" class or kind as merchandise that is subject to the investigation.[118] Accordingly, we disagree with the claim that the Department's scope in the *Solar II PRC* and *Taiwan Solar* AD investigations "upset" some "statutory scheme" for purposes of determining antidumping margins. We see no conflict between our analysis of the classes or kinds of merchandise covered by these orders and the provisions of the Act cited by the respondents as support for this claim.[119]

[118] *See* sections 771(16)(A) and (C).

[119] We note that no party argued in the *SunEdison, Inc.* litigation that there was a mismatch between the foreign like products compared to the subject merchandise in the Taiwan Solar final determination.
It is well-established that the scope of a remand order includes only the issues remanded, and not claims raised for

Furthermore, we disagree with the claims that the Department "expressly" took an interpretation of the class or kind of merchandise covered by the *Solar I PRC, Solar II PRC,* and *Taiwan Solar Orders* during the Solar II PRC AD and CVD investigations and the Taiwan Solar investigation "completely at odds" with the statutory interpretation of "class or kind" that we have explained on remand. Although the Department initiated and issued preliminary determinations on similar descriptions of the class or kind of merchandise in those investigations, the Department applied a different country-of-origin analyses in the Solar II PRC AD and CVD investigations and the Taiwan Solar investigation, and the very description of the products included and excluded from the *Solar II PRC Orders* and the *Taiwan Solar Order* are different. On this, the relevant issues and decision memoranda are detailed as to the reasons the Department conducted different country-of-origin analyses and incorporated different exclusions. Accordingly, we find the claim that we took positions different from this interpretation in the underlying investigations to be meritless. The United States Government did state in its brief to the Court that there could be "segments" of "classes or kinds," and suggested that there could be different country-of-origin analyses "falling within the same class or kind," but this analysis and argument was inconsistent with the Department's practice, as highlighted by the Court, and there is no language in the final determinations in which the Department made such a claim.[120]

Likewise, just as we disagree that the Department concluded in its final determinations that there was one class or kind among these investigations, we dispute the claim that the Court

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the first time on remand. *See Geneva Steel v. United States*, 937 F. Supp. 946, 952 (CIT 1996) (where the Court found that the Department properly confined its remand determination to the redemption and not the issuance of preferred shares) (*Geneva Steel)*; *see also Independent Radionic Workers of America v. United States*, 19 CIT 375, 375 (CIT 1995) (where the Court rejected all challenges to the Department's determination that were beyond the Court's remand instructions) (*Independent Workers*).

[120] *See, supra.,* fn. 49.

has already ruled on this issue in *SunPower Corp.* or in *SunEdison, Inc.* The Court specifically requested that the Department explain why it was applying "multiple different and potentially conflicting country-of-origin tests" to what it believed to be one, "single class or kind of merchandise," given the Department's practice, as described in *DRAMS from Korea* and *EPROMS from Japan*."[121] As we have explained in this document, the Department has not applied different country-of-origin tests to a single class or kind of merchandise, but instead applied one country-of-origin test to the class or kind of merchandise subject to the Solar II PRC AD and CVD investigations, and a different country-of-origin test to the different class or kind of merchandise subject to the Taiwan Solar investigation – fully consistent with its stated statutory interpretation and practice in *DRAMS from Korea* and *EPROMS from Japan*. Thus, we have not "disregarded the Court's holdings," as claimed by some of the respondents, but provided a thorough and complete analysis of our legal and factual understanding of the different classes or kinds of merchandise at issue in *SunPower Corp.* and *SunEdison, Inc.*

Next, we find no merit to the claim that the Department has "incorporated" two "contradictory origin rules" into the *Solar II PRC Orders* and the *Taiwan Solar Order*. To address this specific claim, it is important to describe in detail the respondents' arguments. In the *Solar II PRC Orders*, the subject merchandise is generally described as "modules, laminates and/or panels assembled in the PRC consisting of crystalline silicon photovoltaic cells produced in a customs territory other than the PRC." In determining that this was the merchandise subject to the *Solar II PRC Orders*, the Department applied a country-of-origin analysis which is described in detail above. The scope of the *Solar II PRC Orders* further excludes merchandise subject to the *Solar I PRC Orders*, which respondents argue "incorporates the origin rule of *Solar I*."

[121] *See SunPower Corp.*, Slip Op. at 30.

Likewise, in the *Taiwan Solar Order*, the subject merchandise is generally described as "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," a scope definition determined in part using the Department's substantial transformation test to determine the country-of-origin. The scope excludes, however, "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" – in other words, merchandise covered by the *Solar II PRC Orders* made from Taiwanese cells.

The respondents argue that because, based in part on a different country-of-origin analysis, those specifically excluded products were determined in their individual cases to be merchandise subject to the Solar I PRC investigations or Solar II PRC investigations, and because those investigations allegedly cover the "same class or kind" of merchandise, the Department "incorporated" two different origin rules into the *Solar II PRC* and *Taiwan Solar Orders*. This assessment of the Department's analysis is incorrect. First, as we have already explained, the classes or kinds of merchandise covered by the different orders are different. Second, Congress entrusted the Department by statute to administer and enforce the AD and CVD laws, and in administering and enforcing those laws, the Department is cognizant that a single product cannot simultaneously be subject to two different AD orders, or two different CVD orders, covering merchandise from two different countries. Thus, the scopes of the Department's *Solar II PRC AD and CVD Orders* and the *Taiwan Solar Order* did not "incorporate" two different country of origin analyses into a single scope for purposes of determining subject merchandise; rather, the scopes included exclusions for merchandise already

covered by existing proceedings. Had the Department not excluded such merchandise from the scopes at issue, the result could have been the double application of, for example, antidumping duties to merchandise, treating certain products as simultaneously subject to two orders covering two different countries. The scopes of the *Solar II PRC AD and CVD Orders* and the *Taiwan Solar Order*, however, prevent such a scenario from occurring.

Furthermore, these arguments appear to go towards challenging decisions in a proceeding not before the Court in this litigation. Specifically, parties arguing about the exclusion contained in the *Solar II PRC AD* and *CVD Orders* for merchandise covered by the *Solar I PRC AD and CVD Orders* appear to be inviting the Court to consider the merits of the country of origin analysis in *Solar I* whereas parties arguing about the exclusions contained in the *Taiwan Solar Order* appear to be inviting the Court to consider the merits of the country-of-origin analysis in both the *Solar I PRC AD Order* and *Solar II PRC AD Order*. But, the appropriateness of the scope of the *Solar I PRC AD* and *CVD Order* is not before the Court in the instant litigation. Thus, the Department's definition of the class or kind of merchandise covered by the scope of the *Solar II PRC AD* and *CVD Orders* and the *Taiwan Solar Order*, including the merchandise identified as excluded from the class or kind of merchandise covered by the scope of the Orders, is supported by the evidence on the record. In this case, the record reflects that the merchandise described as covered by the scopes addressed the alleged harm and allowed the Department to effectuate and administer the *Solar II PRC AD* and *CVD Orders* and the *Taiwan Solar Order*.

Finally, we find no support in the unsubstantiated claim that the "evasion" of the *Solar I PRC Orders* has "no relevant bearing on the definition of the 'class or kind' that is at issue" in this case. The Federal Circuit held in *Mitsubishi II* that in defining the scope of merchandise

covered by an order, the Department has the authority to "prevent evasion" of the order.[122] The Federal Circuit has recognized that the Department is granted a large amount of discretion to determine an "applicable scope" that "will be effective to remedy the dumping that the Administration has found."[123] The scope of an AD or CVD order involves at least two elements – a class or kind of foreign merchandise component and a country-of-origin component, which sets certain parameters for determining the ultimate subject merchandise. Both of these components contribute to the Department's ability to "define and/or clarify what constitutes the subject merchandise."[124]

As the CIT has held, the "known tactics of foreign industries attempting" to "avoid" or evade the antidumping laws is a factor the Department may consider in defining the scope of an order.[125] In the Solar II PRC AD and CVD and Taiwan Solar investigations, the Petition contained information that foreign businesses had shifted solar cell production to third countries, such as Taiwan, yet continued to manufacture solar panels in the PRC, thereby avoiding the liability of duties under the *Solar I PRC Orders*. Taking that into consideration when defining the scope of the *Solar II PRC AD and CVD* Orders is consistent with *Mitsubishi I*. Accordingly, in determining the "class or kind" of merchandise subject to the investigation, as well as the appropriate country-of-origin test to apply, the Department appropriately considered the existence of such evasion in defining the scope of the *Solar II PRC Orders*.

Accordingly, for all of the reasons provided, we continue to find that the Department correctly determined that there are different classes or kinds of merchandise covered by the *Solar I PRC, Solar II PRC,* and *Taiwan Solar Orders*.

[122] *Mitsubishi II*, 898 F.2d 1582 and 1584, *affirming Mitsubishi I*, 700 F. Supp. at 538.
[123] *Id.* at 1583.
[124] *Mitsubishi I*, 700 F. Supp. at 556.
[125] *Id.* at 555.

Comment 2: The Lawfulness of the Country of Origin Analysis Applied in the Solar II PRC AD and CVD Investigations

Petitioner Comments:

- The Department determined to conduct an alternative country-of-origin analysis in the Solar II PRC investigations because: (1) the unique nature of the solar products industry in light of the readily adaptable supply chain and record evidence of a shift in trade flows following the implementation of the *Solar I PRC Orders*, as noted above; (2) concerns regarding administrability, enforceability and the need to prevent further evasion; and (3) the need for a mechanism to address the injury to the domestic industry, which stemmed, in relevant part, from modules that would not be captured by a traditional substantial transformation analysis.
- The Department cannot address the source of the injury to the domestic industry by issuing individual orders covering cell-producing countries because: (1) the country-of-origin would be the country of cell production, leaving unaddressed the unfair pricing and unfair subsidization applicable to modules in China (the source of the injury alleged in the Solar II PRC AD and CVD investigations); and (2) the global supply chain for solar products is adaptable, and ever-shifting trade flows could mean that this approach would be costly, temporary, and ultimately ineffective.
- The Department correctly notes that it is not legally required to use the substantial transformation analysis to determine a single country-of-origin for merchandise partially manufactured or processed in more than one country, where undisputed evasion occurred following imposition of an order, and a petitioner sought a remedy from the continued injury flowing from that evasion. The Department even recognized in *DRAMs from Korea* that it may be appropriate not to carry forward a substantial transformation analysis if there was compelling information that new criteria are appropriate.
- In applying the substantial transformation test in the Solar I PRC investigations, the Department has considered all steps in the production process leading up to and through cell production to be part of the cell production process, and thus found cell production to be a more significant step in production than module assembly. However, the solar production process is not binary. The additional steps in the solar production process took on added importance after the issuance of the *Solar I PRC Orders*, once there was widespread evidence that the various stages in the production processes had begun to be performed more widely in different countries. Thus, the Department did not "disregard" its factual findings in the Solar II PRC AD and CVD investigations, but rather accounted for significant changes in the production process and shifts in trade flows.

Respondent Comments:

- The Department failed to provide a proper justification for applying a different country-of-origin rule in the Solar II PRC AD and CVD investigations, pointing primarily to circumvention and enforcement concerns, which the Court already found insufficient. The evasion argument does not justify application of inconsistent rules of origin for the same products.
- The evasion/circumvention explanation is results-oriented and includes speculation that the relief provided by new orders on additional countries would be ineffective.
- The Solar I PRC investigations country-of-origin determination did not create a loophole or result in evasion. A product being excluded from the order because it lacks the country-of-

origin to which the order applies is not circumvention, but rather the lawful application of an order on specific merchandise from a specific country.

- The Department's substantial transformation test already guards against possible circumvention, and the Department is not justified in departing from this origin test.
- Even if remedying the alleged evasion would provide the relief sought by SolarWorld, the Department lacks authority to apply a remedy to products not under investigation. The *Solar I PRC Orders* and the *Solar II PRC Orders* apply only to products of PRC origin; therefore, the Department cannot extend the measures to imports that are not of PRC origin simply by declaring that merchandise to be a product of the PRC.
- Importing products that are not subject to an order should not be assumed to be a form of evasion or circumvention. The Solar I PRC investigations' loophole is simply the rule of origin deemed appropriate by the Department at the time.
- If the Department is concerned about evasion, it has lawful remedies to address such concerns (anticircumvention proceedings or new investigations covering solar cells from other countries).
- The Department never explained its country-of-origin analysis in the Solar II PRC investigations, and there is no indication that it did a substantial transformation analysis, in addition to its "additional analysis" to determine country-of-origin. The "additional analysis" only consists of Petitioner's intent, the nature of the solar industry, and concerns about administrability, enforcement, and evasion. There were no factual findings or record evidence to support the "additional analysis."

Department Position:

The purpose of the Department's analysis in the Solar II PRC investigations was to determine if the products alleged to be harming the domestic industry in the Petitions were actually being dumped and/or subsidized, and if so, to address that dumping and subsidization as appropriate. As explained above, the investigations satisfied that purpose, and the resulting AD and CVD orders addressed the unfair trade practices determined to exist in those investigations. It is illogical to claim that the Department cannot address dumping or subsidization of products which the ITC has determined are harming the United States industry, merely because production building up to the product determined to constitute subject merchandise took place in more than one country. There is nothing in the statute dictating how the Department must determine the country of origin for antidumping and countervailing duty purposes, let alone some requirement that the Department determine country of origin the same way for every

product subject to an antidumping or countervailing duty investigation irrespective of specific characteristics or circumstances that may distinguish or differentiate one product from another. .

As the Court held, the Department's "substantial transformation" test is not mandated by statute and the Department can "change course from its prior practice and adopt a new approach within its statutory authority," provided that the Department has "explain{ed} how the new policy is consistent with the continued relevance (if any) of the factual findings on which the agency's prior policy was based."[126] This is exactly what the Department has done on remand. The Department determined that a different country-of-origin analysis was appropriate in the Solar II PRC AD and CVD investigations to provide a meaningful remedy for the unfairly traded imports of the different class or kind of merchandise, which the Department found to be dumped and subsidized, and which the ITC found were materially injuring the domestic industry. The Department recognized that its standard substantial transformation analysis could be insufficient for determining the country-of-origin of this specific product because "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."[127] The Department explained that "a rote application of a substantial transformation analysis would not allow the Department to address unfair pricing decisions and/or unfair subsidization concerning the modules that {are} taking place in the country of export."[128]

The Department's response to this particular set of facts was to determine a scope that

[126] *See SunPower Corp.*, Slip Op. at 19.
[127] *See Solar II PRC AD Final Determination*, and accompanying Issues and Decision Memorandum at 15; *Solar II PRC CVD Final Determination*, and accompanying Issues and Decision Memorandum at 41.
[128] *See Solar II PRC AD Final Determination*, and accompanying Issues and Decision Memorandum at 15; *Solar II PRC CVD Final Determination*, and accompanying Issues and Decision Memorandum at 41.

would allow the Department to investigate and eventually provide a remedy for, if appropriate, the merchandise which the Petitions alleged was causing injury. In the {AD and CVD Issues and Decision Memorandum} as expanded on in the Draft Redetermination and above, the Department has explained that its decision to go beyond its traditional substantial transformation analysis was based on several considerations, including (1) the particular nature of the solar products industry in light of the readily adaptable supply chain and record evidence of a shift in trade flows following the implementation of the *Solar I PRC Orders*; (2) the Department's concerns that the scope language in the Petitions would be neither administrable nor enforceable, and could invite further evasion of any resulting order; and (3) the fact that the Department needed a mechanism to address the alleged injury to the domestic industry, which stemmed, in relevant part, from modules assembled in the PRC using third-country solar cells, and which would not be captured by a traditional substantial transformation analysis.[129]

While parties argue that an alternative "remedy" to providing relief for the dumping and subsidization of such solar panels would have been to require domestic parties to bring costly petitions against other countries from which China imports solar cells, such an option is unreasonable and unnecessary, as under such a "remedy," the unfair pricing and the unfair subsidization of modules, panels and laminates in the PRC (which was alleged to be the source of the alleged harm) would not be addressed. Indeed, the Solar II AD and CVD petitions did not allege that the cells from third countries were being dumped or subsidized. Rather, these petitions alleged that the modules, panels, and laminates from the PRC incorporating cells from outside the PRC were being dumped or subsidized in the PRC. Further, under this alternative, unfair pricing and unfair subsidization of modules, panels and laminates in the PRC could

[129] *See Solar II PRC AD Final Determination*, and accompanying Issues and Decision Memorandum at 13-15; *Solar II PRC CVD Final Determination*, and accompanying Issues and Decision Memorandum at 39-41.

continue so long as producers in the PRC could shift their sourcing of solar cells to third countries not covered by an AD or CVD proceeding.

Furthermore, in consideration of the Department's experience administering the *Solar I PRC Orders* and the undisputed adaptability of the global supply chain, this approach would likely provide costly,[130] temporary, and ultimately ineffective relief from unfairly traded imports because the Department's investigations would be unlikely able to keep up with the shifting trade flows. For example, in the length of time that it would take to file a petition, for the Department to initiate and conduct an investigation, for the ITC to conduct its own investigation and reach a final determination, eventual publication of an antidumping and/or countervailing duty order if both the Department's and the ITC's final determinations were affirmative, and thereafter, for the Department, a year later, to conduct an administrative review, trade flows likely could have already shifted to another country. This thwarts the remedial purpose of the AD/CVD laws, given the record evidence that panel producers have previously capitalized on their ability to source solar cells form alternative third countries, thereby avoiding the discipline of the *Solar I PRC Orders*. Thus, the particular facts present in the Solar II PRC AD and CVD investigations supported the Department's analysis beyond its traditional substantial transformation test.

Parties have also argued that the scope of the *Solar II PRC Orders* is an impermissible attempt to prevent evasion and circumvention of the *Solar I PRC Orders*, or plug loopholes created by the *Solar I PRC Orders*. Some parties have challenged the claim that evasion, circumvention, or a loophole around the *Solar I PRC Orders* even exists, and argued that in fact, the movement of cell production was a foreseeable and logical commercial response to the *Solar I PRC Orders* which the Department did not have the authority to address in its investigations.

[130] This approach could prove costly because petitioners would have to research, compile, and submit petitions for multiple countries notwithstanding the common thread that the alleged unfair subsidization and pricing was occurring in/from the PRC.

Such arguments ignore the harm alleged by the Solar II PRC Petitions, the purpose behind the Solar II PRC AD and CVD investigations, and the determinations by both the Department and the ITC in those proceedings.

The records of these investigations reveal that businesses shifted their cell manufacturing, and/or sourcing, to Taiwan and other third countries to avoid paying the AD and CVDs imposed by *Solar I PRC Orders*.[131] Whether or not the reasoning behind those business decisions was logical from the perspective of the Chinese module, laminate and panel manufacturers is irrelevant for purposes of the Solar II PRC AD and CVD investigations. Chinese module, laminate and panel manufacturers were able to avoid antidumping and countervailing duties by shifting their cell production and/or sourcing to other third countries. The resulting Chinese panels were found by the Department and the ITC to be dumped and subsidized and causing injury to the United States industry. Accordingly, no matter the motivations of the Chinese module, laminate and panel manufacturers, the antidumping and countervailing duty orders resulting from the Department's *Solar II PRC AD* and *CVD Investigations* were put in place to address the dumping and subsidization determined to have occurred. .

Nonetheless, it is important to point out, as explained above, that the Federal Circuit has held that the "known tactics of foreign industries attempting" to "avoid" or evade the trade remedy laws is a factor the Department may consider in defining the scope of an order.[132] Accordingly, to the extent the Department analyses the class or kind of the investigation and the

[131] *See Solar II AD Final Determination*, and accompanying Issues and Decision Memorandum at 13-15 ("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*."); *Id.* at 18;; *Solar II CVD Final Determination*, and accompanying Issues and Decision Memorandum at 39-41. See also for China *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 at 3-6, 21, 34, 37, and 53 where numerous instances of companies producing solar modules in China containing non-Chinese solar cells are identified. For Taiwan *see* Motech's Section A Questionnaire Response, dated April 24, 2014, at 16

[132] *Mitsubishi II*, 898 F.2d at 1583.

country of origin in defining the class or kind of an eventual order, the Federal Circuit has held that the Department may consider the potential for avoidance or evasion of duties as part of that analysis.

The facts on the record reflect that foreign businesses shifted production and/or sourcing of solar cells to countries outside of China, while retaining module, laminate and panel assembly in China, thereby avoiding the discipline of the *Solar I AD and CVD Orders*. Furthermore, the Department concluded that if the Department were to limit the scope to cover only modules, laminates and panels made from Taiwanese cells, and not consider the possibility of avoidance/evasion through future shifts of cell production to other countries, the known avoidance/evasion of duties which had already occurred[133] supported a conclusion that such avoidance/evasion would likely continue unless the Department addressed the problem appropriately in its definition of the scope of the *Solar II PRC Orders*. Thus, in accordance with *Mitsubishi II*, we disagree with the claims of the respondents that the Department did not have the authority to consider existing avoidance of duties, (*i.e*., the existence of evasion), and the possibility of future evasion in defining the scope of the *Solar II PRC Orders*, which includes its determination of the appropriate country-of-origin analysis to apply in those investigations.

Comment 3: Whether Commerce Adequately Addressed the Court's Concerns With Margin/Subsidy Calculations Based on a Country with "Insignificant Production"

Respondent Comments:

- Although the significant majority of manufacturing of solar panels is performed in the country where the cell is manufactured, the Department stated that the PRC activities with respect to injurious dumping and subsidization were not minor or insignificant.
- AD/CVD laws do not permit extending the scope to products from countries that are not under investigation, regardless of the Department's argument that its origin determination

[133] S*ee* "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 at 3-6, 21, 34, 37, and 53 where numerous instances of companies producing solar modules in China containing non-Chinese solar cells are identified.

should be accepted to allow the Department to expediently remedy these subsidies and dumping.

- In the Solar II PRC AD investigation, the Department stated that its AD methodology was reasonable because the buildup of NV based on PRC FOPs and SVs accounts for the cell values as well, but did not address the underlying arbitrariness of basing NV on a country where minor processing takes place.
- The Court found that the Department's decision to deviate from the normal practice of focusing on pricing behavior/subsidies in the country where the more important production occurs resulted in similarly situated products being treated differently. For example, AD/CVD duties on a module where the majority of production steps (cell production) occurred outside of China are calculated based on FOPs and subsidization in China.
- The Department did not address the resulting distortion in the AD/CVD duty calculations that would not have occurred if the AD/CVD orders covered the countries where the origin-determinative production (solar cell production) occurred.
- By referencing "Chinese pricing and subsidization," the Department appears to be suggesting that AD/CVD laws may be legitimately aimed at exporters of a specific nationality (*e.g.*, China). The scopes of orders are not defined by the citizenship, nationality, or location of the exporters, but by the type of merchandise and country-of-origin.
- Subsidies on modules were already captured in the Solar I PRC CVD PRC investigation, because subsidies and CVD rates are not calculated based on a particular value-added stage of production (*i.e.*, assembly).

Department Position:

As explained above, for the Solar II PRC AD and CVD investigations, the Department conducted additional analysis beyond a substantial transformation analysis to determine country-of-origin, finding that the country-of-origin for modules, laminates and panels assembled in the PRC from non-Chinese cells is the PRC. Because the Petitions alleged purported injurious dumping from, and subsidization within, the PRC, the Department's investigations looked at exactly that -- pricing from, and subsidization within, the PRC. Accordingly, as explained above, the PRC activities with respect to injurious dumping and countervailable subsidization were not qualitatively minor or insignificant, in that the Department found that modules assembled in the PRC using third-country cells benefited from countervailable subsidies in the PRC, and that these products were sold for less than fair value to the United States by companies in the PRC.

For the reasons explained in the Department's Draft Redetermination, we continue to find that the PRC is the proper "market" for the merchandise covered by the *Solar II PRC Orders*, as the Solar II PRC AD and CVD Petitions and our AD and CVD calculations focused on production activities in the PRC, and pricing and subsidization for solar panels from the PRC that were not covered by the *Solar I PRC Orders*. As we stated above, it is reasonable to impose duties to offset countervailable subsidies in the PRC, and to impose duties to offset the dumping of solar panels from the PRC made from cells produced outside of the PRC, without regard to where the majority of production may have taken place.

With respect to the Solar II PRC CVD investigation, because a subsidy or CVD rate is not calculated based on a particular value-added stage of production (such as assembly), the subsidization rates determined in the Solar II PRC CVD investigation reflect a percentage of the respondent's relevant sales values, regardless of the degree of production or value added that occurred in the PRC. Further, in the CVD investigation the Department examined subsidy programs in China and determined that the government of the PRC was providing countervailable subsidies for the products under consideration. These subsidy programs would not have been examined in an investigation covering a country other than the PRC.

With respect to the Solar II PRC AD investigation, the focus of the investigation was the PRC's alleged unfair pricing, and we determined the extent of that unfair pricing by comparing the NV of the finished, assembled module, laminate or panel to the United States price for a finished, assembled module, laminate or panel exported from the PRC. We disagree with the contention of certain parties that basing NV on prices from a country where "minor processing" takes place was arbitrary, as the Department's NV calculation was based on the production experience of the party setting the alleged unfair pricing, i.e., the PRC producers/exporters, as

described in detail above. Additionally, in examining modules, panels, laminates under consideration, consistent with section 773(c) of the Act, we used an FOP methodology in determining NV. That section of the statute directs us to build up NV using factors of production, which includes solar cells obtained by the Chinese producers.

Certain parties' argument that the AD/CVD laws do not permit the Department to extend the scope of covered products to merchandise ignores our determination in this investigation that solar modules assembled in China from third-country solar cells are Chinese solar modules. As stated above, the "petition initially determines the scope of the investigation," but the Department "has the inherent power to establish the parameters of the investigation so that it would not be tied to an initial scope definition that . . . may not make sense in light of the information available to {the Department} or subsequently obtained in the investigation."[134] The Department properly investigated products which it determined to be within the scope of the investigations and did not impermissibly expand the scope of the investigations. Indeed, with respect to the Taiwan Solar investigation specifically, the Court in *SunEdison, Inc.* already held that the Department reasonably concluded that solar modules, laminates and panels assembled in Mexico from Taiwanese-origin cells were covered by the *Taiwan Solar Order*, in accordance with the Department's longstanding substantial transformation test.[135]

Certain parties argued that the Department did not address the distortion in the AD/CVD duty calculations which occurred as a result of calculating duties on a product for which the majority of production steps and costs occurred in a market economy outside of China using factors of production and subsidization in China. Those parties argue that this distortion would not have occurred if the AD/CVD orders were on the countries where the origin-determinative

[134] *See Duferco Steel*, 296 F. 3d at 1089.
[135] *SunEdison, Inc.*, Slip Op. 21-31.

production (solar cell production) occurred. However, the type of "distortion" alleged to have occurred in the Department's calculations is not clear from the parties' arguments and parties fail to demonstrate the alleged distortion. The Department explained above that the subsidization rates determined in the Solar II PRC CVD investigation were calculated based on percentage of the respondent's relevant sales values, regardless of the degree of production or value added that occurred in the PRC. The Department also explained above that the "build-up" of the NV from Chinese factors of production and surrogate country values provided the full NV of the solar modules, laminates and panels subject to the *Solar II PRC AD Order* (including the cost of the solar cells in those panels), while the "fair comparison" required by section 773(a) of the Act was made through the Department's comparison of that NV to the price for a same or similar product sold to an unaffiliated customer in the United States. As a result, and in the absence of respondents specifically identifying the alleged distortion, we find that there is no evidence of the "distortion" claimed by certain respondent parties.

Certain parties also argued that by referencing "Chinese pricing and subsidization," the Department appears to be suggesting that AD/CVD laws may be legitimately aimed at exporters of a specific nationality (*e.g.*, China). We agree with those parties that the scopes of orders are not defined by the citizenship, nationality, or location of the exporters, but by the type of merchandise and country-of-origin. Consistent with this definition, as explained above, the Department defined the scope of each order to cover a specific class or kind of merchandise with a specific determined country-of-origin. In the Solar II PRC AD and CVD investigations, the Petitions alleged that Chinese solar modules, laminates and panel manufacturers were avoiding the disciplines of the *Solar I PRC Orders* by manufacturing subsidized solar modules, laminates and panels in the PRC, but sourcing the solar cell inputs from other countries, and then selling

those solar modules, laminates and panels to the United States for less than fair value.[136] The Department recognized that its standard substantial transformation analysis would be insufficient for determining the country-of-origin of this specific product because "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,"[137] and therefore applied a different country of origin analysis in the Solar II PRC AD and CVD investigations.

Finally, we disagree with the claim that because subsidies on certain modules are already captured pursuant to the Solar I PRC CVD investigation, and subsidies are not calculated on a particular value-added stage of production, applying a remedy pursuant to both the *Solar I and Solar II PRC CVD orders* is somehow incorrect. There is no no overlap between the merchandise covered by the *Solar I CVD Order* and the *Solar II CVD Order* and therefore application of countervailing duties to merchandise covered by the *Solar I PRC CVD Order* does not remedy the subsidization of merchandise subject to the Solar II PRC CVD proceeding.

Thus, even in situations where the Department countervailed the same subsidy program in the Solar I PRC and Solar II PRC proceedings, there was, and is, no risk of applying countervailing duties to the same merchandise twice.

Comment 4: Procedural Concerns

Respondent Comments:

- If the Court upholds the Department's country-of-origin analysis, the new scope should only be applied prospectively, to entries made on or after the date of the final determinations.

Department Position:

[136] *See* Petitions, at Vol. I, 3-6, 21-23, 37.

[137] *See Solar II PRC AD Final Determination*, and accompanying Issues and Decision Memorandum at 15; *Solar II PRC CVD Final Determination*, and accompanying Issues and Decision Memorandum at 41.

It is well-established that the scope of a remand order includes only the issues remanded.[138] The Court did not issue a remand order regarding claims of procedural unfairness due to the changes in the scope language at the *Final Determination*. As Suniva itself notes, the Court explicitly did not remand to the Department the issue of prospective scope application. [139] Moreover, the Court stated in both *SunPower* and *SunEdison* that because remand of the Department's final determinations was warranted on other grounds, and because the parties would therefore have ample opportunity to address the scope issues on remand, "Plaintiffs' due process challenges to the final scope determination are moot." [140] Thus, it is not within the scope of the remand for the Department to consider Suniva's and SunEdison's claims of procedural unfairness.

Comment 5: Modules Assembled in the PRC from U.S.-Origin Cells

Respondent Comments:

- Because the draft remand results claim the reason for deviating from the substantial transformation analysis, applied in the Solar I PRC AD and CVD investigations, in the Solar II PRC AD and CVD investigations is to address the harm from modules, laminates and panels assembled from cells originating in Taiwan and other countries, there is no basis for this deviation with respect to modules assembled from U.S. cells, as it overrides the differentiated treatment provided in U.S. law for domestic products over foreign products.
- Cells produced in the U.S. are domestic products, and the Department's mandate is to protect domestic production and levy duties only on foreign products. The Department found in the Solar I PRC AD and CVD investigations that modules, laminates and panels assembled from U.S.-origin cells do not lose their U.S. country-of-origin.
- In creating a new country-of-origin analysis for the Solar II PRC AD and CVD investigations, the Department must differentiate between domestic and foreign production.
- The Department has identified no "particularized harm" related to modules, laminates and panels assembled from U.S. cells, nor any evidence that modules assembled from U.S.-origin cells constituted merchandise that would have otherwise been covered by the *Solar I PRC Orders*. The Department's deviation from its standard substantial transformation test over-

[138] *See Geneva Steel v. United States*, 937 F. Supp. 946, 952 (CIT 1996) (*Geneva Steel*) (where the Court found that the Department properly confined it remand determination to the redemption and not the issuance of preferred shares); *see also Independent Radionic Workers of America v. United States*, 19 CIT 375 (1995) (*Independent Workers*) (where the Court rejected all challenges to the Department's determination that were beyond the Court's remand instructions).
[139] *See SunPower* at 63.
[140] *See SunEdison* at 15; *see also SunPower* at 24.

captured domestic products which the petitioners did not intend to be covered by the AD and CVD orders.

Department Position:

The Court did not order the Department to expressly reconsider U.S.-sourced solar cells used in the manufacturing of PRC modules, laminates or panels. The Court directed the Department to reconsider its scope determinations in the *Solar II PRC AD Final Determination* and *Solar II PRC CVD Final Determination* in accordance with the Court's opinion,[141] which noted, *inter alia*, that the Department had not explained "why all panels that are assembled from U.S.-made cells anywhere in the world, other than China, are treated as domestic merchandise, and therefore not subject to AD/CVD liability, but when those same U.S. cells are assembled into panels in China, the fact that most of the panel's production occurred in the U.S. is no longer relevant."[142] As explained above, the harm alleged in the Solar II PRC AD and CVD investigations was attributable to subsidized manufacturing of solar modules, panels and/or laminates in China using solar cell inputs produced in and/or sourced from third countries and then sold to the United States for less than fair value.[143] We also explained that our standard substantial transformation analysis would be insufficient for determining the country-of-origin of this specific product because "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,"[144] and that for this reason we applied a different country of origin analysis in the Solar

[141] *See SunPower Corp.*, Slip Op. at 49.
[142] *See SunPower Corp.*, Slip Op. at 41.
[143] *See* Petitions, at Vol. I, 3-6, 21-23, 37.
[144] *See Solar II PRC AD Final Determination*, and accompanying Issues and Decision Memorandum at 15; *Solar II PRC CVD Final Determination*, and accompanying Issues and Decision Memorandum at 41.

II PRC AD and CVD investigations. By operation of the Department's determination of the scope in these investigations, and the ensuing *Solar II PRC Orders*, solar modules assembled in the PRC and consisting of third-country cells, including those solar cells produced in the United States, are products of the PRC for AD and CVD purposes.

Suniva's argument that modules assembled from U.S.-origin cells should be treated as domestic merchandise disregards the Department's rationale for applying a different country of origin analysis in the Solar II PRC AD and CVD investigations, and, in essence, is a claim that the Department should not provide, or should be precluded from, providing a remedy for the unfair subsidization and pricing of modules assembled in the PRC simply because the solar cell input is of U.S.-origin. Suniva ignores that the domestic industry is injured by Chinese subsidization of module assembly, and pricing of modules from the PRC sold to the United States, regardless of the fact that the solar cell is manufactured outside the PRC. Further, Suniva has not identified any authority that would allow the Department to not provide a remedy for the injury experienced by the domestic industry as a result of solar modules assembled in the PRC, including those assembled using U.S.-origin cells. In the absence of such authority, and based on the rationale that we have explained in detail above, the Department finds no basis to modify its scope determination with respect to U.S. origin cells.

Ronald K. Lorentzen

Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

October 4, 2016

Date