



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

A-570-979
Administrative Review
05/25/2012 - 11/30/2013
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DATE: July 7, 2015

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

FROM: Edward Yang 
Senior Director, Office VII
Antidumping and Countervailing Duty Operations

SUBJECT: Decision Memorandum for the Final Results of the 2012-2013
Antidumping Duty Administrative Review of Crystalline Silicon
Photovoltaic Cells, Whether or Not Assembled into Modules,
From the People's Republic of China

SUMMARY

On January 8, 2015, the Department of Commerce (the "Department") published its *Preliminary Results* in the 2012-2013 administrative review of the antidumping duty order on crystalline silicon photovoltaic cells, whether or not assembled into modules ("solar cells") from the People's Republic of China ("PRC").¹ The period of review ("POR") is May 25, 2012, through November 30, 2013. This administrative review covers two mandatory respondents, Yingli Energy (China) Company Limited and Wuxi Suntech Power Co., Ltd. ("Wuxi Suntech"), which was found to be ineligible for a separate rate in the *Preliminary Results*. Based on our analysis of the comments received, we made certain changes to our margin calculations for Yingli Energy (China) Company Limited. Additionally, we now find that Wuxi Suntech is eligible for a separate rate, and have calculated a dumping margin for Wuxi Suntech. The final dumping margins for this review are listed in the "Final Results" section below.

¹ See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2012-2013*, 80 FR 1021 (January 8, 2015) ("*Preliminary Results*"), and Memorandum to Paul Piquado, Assistant Secretary for Enforcement and Compliance, from Gary Taverman, Associate Deputy Assistant Secretary for Antidumping and Countervailing Operations, "Decision Memorandum for the Preliminary Results of the 2012-2013 Antidumping Duty Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China" ("*Preliminary Decision Memorandum*"), dated December 31, 2014.



BACKGROUND

On January 8, 2015, the Department published its *Preliminary Results* in this review. On January 22, 2015, Petitioner² submitted comments regarding the preliminary margin calculation of Yingli Energy (China) Company Limited, one of the mandatory respondents, and the additional companies that comprise the Yingli Single Entity.³

On January 9, 2015, Wuxi Suntech submitted a hearing request.⁴ On February 9, 2015 Shanghai JA Solar Technology Co., Ltd., JA Solar Technology Yangzhou Co., Ltd. and JingAo Solar Co., Ltd. submitted a request to participate in any hearing held by the Department in this review.⁵ Petitioner submitted an untimely hearing request on February 9, 2015, which was rejected by the Department in accordance with 19 CFR 351.302(d).⁶ On February 25, 2015, Petitioner submitted an untimely request for additional time to submit a hearing request.⁷ The Department did not grant Petitioner's request.⁸ On May 18, 2015, Wuxi Suntech withdrew its request for a hearing.⁹ On June 1, 2015, the Department notified interested parties that it would not hold a hearing in this administrative review.¹⁰

² Petitioner in this proceeding is SolarWorld America, Inc.

³ See Letter to the Department from Petitioner, "Certain Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Comments on Ministerial Errors in the Preliminary Results," dated January 22, 2015. The Department determined, pursuant to 19 CFR 351.401(f), that the following affiliated companies should be treated as a single entity: Yingli Energy (China) Company Limited ; Baoding Tianwei Yingli New Energy Resources Co., Ltd. ("Tianwei Yingli"); Tianjin Yingli New Energy Resources Co., Ltd. ("Tianjin Yingli"); Hengshui Yingli New Energy Resources Co., Ltd. ("Hengshui Yingli"); Lixian Yingli New Energy Resources Co., Ltd. ("Lixian Yingli"); Baoding Jiasheng Photovoltaic Technology Co., Ltd. ("Jiasheng"); Beijing Tianneng Yingli New Energy Resources Co., Ltd. ("Beijing Tianneng"); Hainan Yingli New Energy Resources Co., Ltd. ("Hainan Yingli") (collectively, the "Yingli Single Entity"). See Memorandum to Abdelali Elouaradia, Director, AD/CVD Operations, Office IV, through Howard Smith, AD/CVD Operations, Office IV, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Affiliation and Single Entity Status," dated December 31, 2014.

⁴ See Letter to the Department from Wuxi Suntech, "Crystalline Silicon Photovoltaic Cells from the People's Republic of China: Request for Hearing- Wuxi Suntech Power Co., Ltd.," dated January 9, 2015.

⁵ See Letter to the Department from Shanghai JA Solar Technology Co., Ltd., JA Solar Technology Yangzhou Co., Ltd. and JingAo Solar Co., Ltd., "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Hearing," dated January 9, 2015.

⁶ See Letter to the File through Howard Smith, Program Manager, AD/CVD Operations, Office IV "Rejection and Removal from the Record of Untimely Filed Hearing Request," dated March 3, 2015.

⁷ See Letter to the Department from Petitioner, "Crystalline Silicon Photovoltaic Cells, Whether Or Not Assembled Into Modules, from the People's Republic of China: Request for Opportunity to Submit Hearing Requests," dated February 9, 2015.

⁸ See Letter to the Petitioner from the Department, "Antidumping Duty Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Rejection and Removal from the Record of Untimely Filed Hearing Request," dated March 3, 2015.

⁹ See Letter to the Department from Wuxi Suntech, "Crystalline Silicon Photovoltaic Cells, Whether Or Not Assembled into Modules, from the People's Republic of China: Withdraw of Request for Hearing — Wuxi Suntech Power Co., Ltd.," dated May 18, 2015.

¹⁰ See Memorandum to All Interested Parties, through Howard Smith, AD/CVD Operations, Office IV, Administrative Review of the Antidumping Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China; Withdrawal of Hearing Request, dated June 1, 2015.

Between January 2015 and March 2015, the Department issued supplemental questionnaires regarding separate rates to, and received timely responses from, the Wuxi Suntech Single Entity.¹¹ In March 2015, the Department conducted verification of the Wuxi Suntech Single Entity's separate rates information.

On March 23, 2015, the following interested parties submitted case briefs: (1) Petitioner; (2) Yingli Energy (China) Company Limited¹²; (3) Goal Zero, LLC; (4) LDK Solar Hi-Tech (Nanchang) Co. Ltd.; (5) Jiangsu Sunlink PV Technology Co., Ltd.; (6) Years Solar Co. Ltd.; (7) CSG PVTech Co., Ltd.; and (8) Shanghai JA Solar Technology Co. Ltd, JA Solar Technology Yangzhou Co., Ltd. and JingAo Solar Co., Ltd. On March 25, 2015, Yingli Energy (China) Company Limited alleged that Petitioner's March 23, 2015 case brief contained untimely filed new factual information,¹³ and on March 27, 2015, Petitioner rebutted these allegations.¹⁴ After considering Yingli Energy (China) Company Limited's allegation, the Department did not require Petitioner to redact its case brief. On March 30, 2015, the Department notified Yingli Energy (China) Company Limited that its March 23, 2015 case brief contained untimely filed new factual information. The Department subsequently rejected the case brief in accordance with 19 CFR 351.302(d)(1)(i) and 19 CFR 351.104(a)(2)(ii)(A) because it contained untimely filed new factual information but provided Yingli Energy (China) Company Limited the opportunity to resubmit its case brief with the new factual information redacted.¹⁵ On March 31, 2015, Yingli Energy (China) Company Limited submitted comments on the new factual information allegation, and resubmitted its redacted case brief.¹⁶ On March 30, 2015, the following interested parties submitted rebuttal briefs: (1) Petitioner; (2) Yingli Energy (China) Company Limited; and, (3) Wuxi Suntech. These case briefs and rebuttal briefs did not include comments regarding the separate-rate status of the Wuxi Suntech Single Entity, which was preliminarily found to include the following companies: (1) Wuxi Suntech, (2) Luoyang Suntech; (3) Shanghai Suntech; and (4) Wuxi Sunshine.¹⁷ Subsequently, on May 8, 2015, and

¹¹ In the *Preliminary Results*, the Department preliminarily found that the Wuxi Suntech Single Entity included the following companies: Wuxi Suntech; Luoyang Suntech Power Co., Ltd. ("Luoyang Suntech"); Suntech Power Co., Ltd. ("Shanghai Suntech"); and Wuxi Sunshine Power Co. Ltd ("Wuxi Sunshine"). See Memorandum to Abdelali Elouaradia, Director, AD/CVD Operations, Office IV, through Howard Smith, Program Manager, AD/CVD Operations, Office IV, "Affiliation and Single Entity Status of Wuxi Suntech Power Co., Ltd.; Luoyang Suntech Power Co., Ltd.; Suntech Power Co., Ltd.; and Wuxi Sunshine Power Co., Ltd.," dated December 31, 2014.

¹² Yingli Energy (China) Company Limited's case and rebuttal briefs were submitted on behalf of Yingli Green Energy Holding Company Limited and Yingli Green Energy Americas, Inc., and their affiliates, including Yingli Energy (China) Co., Ltd. and Baoding Tianwei Yingli New Energy Resources Co., Ltd.

¹³ See Letter to the Department from Yingli Energy (China) Company Limited, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People's Republic of China: Request that the Department Reject SolarWorld's Case Brief," dated May, 2015.

¹⁴ See Letter to the Department from Petitioner, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Response to Yingli's Request to Reject SolarWorld's Case Brief," dated May 27, 2015.

¹⁵ See Memorandum to The File through Howard Smith, Program Manager, AD/CVD Operations, Office IV, "Rejection from the Record of Untimely Filed New Factual Information," dated April 2, 2015.

¹⁶ See Letter from Yingli Energy (China) Company Limited to the Department, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules from the People's Republic of China: Resubmission of Yingli's Case Brief," dated March 31, 2015.

¹⁷ See Memorandum to The File through Jeffrey Pedersen, Acting Program Manager, AD/CVD Operations, Office IV, "Administrative Review of the Antidumping Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China; Briefing Schedule," dated February 27, 2015 (establishing a deadline for case briefs and rebuttal briefs concerning all issues except the separate-rate status of the

May 11, 2015, Wuxi Suntech and Petitioner, respectively, submitted case briefs regarding the separate-rate status of the Wuxi Suntech Single Entity. On May 13, 2015, the following parties submitted rebuttal comments related to the separate-rate status of the Wuxi Suntech Single Entity: (1) Petitioner; (2) Wuxi Suntech; (3) Shanghai BYD Co., Ltd. and Shangluo BYD Industrial Co., Ltd.; and (4) Changzhou Trina Solar Energy Co., Ltd.

On April 28, 2015, the Department extended the deadline for issuing these final results of review of review by 60 days, until July 7, 2015.¹⁸

SCOPE OF THE ORDER

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 10,000mm² in surface area, that are permanently integrated into a consumer good whose function is other than power generation and that consumes the electricity generated by the integrated crystalline silicon photovoltaic 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.

Wuxi Suntech Single Entity).

¹⁸ See Memorandum to Edward Yang, Senior Director, AD/CVD Operations, Office VII, through Howard Smith, Acting Director, AD/CVD Operations, Office IV, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Extension of Deadline for Final Results of Antidumping Duty Administrative Review," dated April 28, 2015.

Merchandise covered by this order is currently classified in the Harmonized Tariff Schedule of the United States (“HTSUS”) under subheadings 8501.61.0000, 8507.20.80, 8541.40.6020, 8541.40.6030, and 8501.31.8000. Although these HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

TREATMENT OF WUXI SUNTECH, LUOYANG SUNTECH, SHANGHAI SUNTECH, AND WUXI SUNSHINE

In the *Preliminary Results*, the Department collapsed Wuxi Suntech, Luoyang Suntech, Shanghai Suntech, and Wuxi Sunshine into a single entity pursuant to 19 CFR 351.401(f).¹⁹ However, the Department has reassessed the treatment of these four companies under 19 CFR 351.401(f) based on record evidence regarding the sale of Wuxi Suntech and its subsidiary Luoyang Suntech. To the extent that 19 CFR 351.401(f) does not conflict with the Department’s application of separate rates and the enforcement of the NME provision of section 773(c) of the Tariff Act of 1930, as amended (the “Act”), pursuant to 19 CFR 351.401(f), the Department “will treat two or more *affiliated* producers as a single entity” under certain circumstances (emphasis added). Thus, collapsing pertains to companies that are affiliated. However, record evidence demonstrates that Wuxi Suntech and its subsidiary Luoyang Suntech were sold.²⁰ Thus, while these two companies had been affiliated with Shanghai Suntech and Wuxi Sunshine when the POR started, pursuant to section 771(33)(F) of the Act, that affiliation ceased as a result of that sale. This situation was one of the factors that the Department considered in the first administrative review of floor-standing metal-top ironing tables and certain parts thereof (*Ironing Tables*) when examining whether to collapse two companies into a single entity where the companies had produced ironing tables and were affiliated during the POR, but were not affiliated at the time of the administrative review.²¹ In that case the Department noted that regardless of whether a significant potential for manipulation had existed, collapsing the two companies would have no effect for assessment purposes, as there were no POR entries of subject merchandise produced and exported by one of the two companies and collapsing the two companies would make no difference in terms of the factors of production used to calculate normal value for the entries

¹⁹ See Memorandum from Drew Jackson, International Trade Analyst, AD/CVD Operations Office IV to Abdelali Elouaradia, Director, Office IV, AD/CVD Operations regarding “Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China: Affiliation and Single Entity Status of Wuxi Suntech Power Co., Ltd.; Luoyang Suntech Power Co., Ltd.; Suntech Power Co., Ltd.; and Wuxi Sunshine Power Co., Ltd.” dated December 31, 2014, for a full discussion of the proprietary details of the Department’s analysis.

²⁰ See Wuxi Suntech’s April 18, 2014, Section A Response at 44; and see Wuxi Suntech’s September 18, 2014 supplemental questionnaire response at 13-14, and Exhibit 2SA-8. See also Memorandum to the File through Howard Smith, Program Manager, AD/CVD Operations, Office IV, Verification of the Separate Rates Questionnaire Responses of Wuxi Suntech Power Co., Ltd., dated April 28, 2015; Memorandum to the File through Howard Smith, Program Manager, AD/CVD Operations, Office IV, Verification of the Separate Rates Questionnaire Responses of Suntech Power Co., Ltd., dated April 28, 2015; and Memorandum to the File through Howard Smith, Program Manager, AD/CVD Operations, Office IV, Verification of the Separate Rates Questionnaire Responses of Wuxi Sunshine Power Co., Ltd., dated April 28, 2015.

²¹ See *Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People’s Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review*, 72 FR 13239 (March 21, 2007) and accompanying Issues and Decision Memorandum at Comment 8.

under review given the facts of that case.²² Furthermore, the Department noted that because the two companies were no longer affiliated, assigning a single cash deposit rate to both companies as a collapsed entity “would be contrary to the statute and regulations, *i.e.*, absent affiliation there can be no significant potential for manipulation of production or prices between the two entities, as provided for in 19 CFR 351.401(f).”²³

The Department finds that given the particular sale and production facts that are present in this case, collapsing Wuxi Suntech, Luoyang Suntech, Shanghai Suntech, and Wuxi Sunshine into a single entity would have no effect for assessment purposes and is not warranted for cash deposit purposes. Whether or not Wuxi Suntech is collapsed, or not collapsed, with some, or all, of the other three companies listed above, the reportable sales used to calculate dumping for assessment would not change because none of the other three companies made reportable sales or entries of subject merchandise during the POR. Nor would collapsing change the factors of production used to calculate normal value. Consistent with the Department’s NME methodology, we will use the factors of production of all four companies in calculating normal value whether or not we collapse Wuxi Suntech with some or all of the other three companies. Collapsing all four of these companies for cash deposit purposes is not warranted because Wuxi Suntech and its subsidiary Luoyang Suntech ceased being affiliated with Shanghai Suntech and Wuxi Sunshine. In addition to affiliation, another requirement for collapsing companies and treating them as one entity under 19 CFR 351.401(f) is a finding that there is a significant potential for manipulation of price or production. In the *Preamble* to the regulations, the Department explained that “a standard based on the potential for manipulation focuses on what may transpire in the future.”²⁴ Here we do not find a significant potential for manipulation of production or prices between the Wuxi Suntech/Luoyang Suntech entity and Shanghai Suntech and Wuxi Sunshine as provided for in 19 CFR 351.401(f) given that their affiliation ceased. Therefore, as in *Ironing Tables*, there is no basis for assigning a single cash deposit rate to all four of these companies as a collapsed entity. However, we find that the continued affiliation between Wuxi Suntech and its subsidiary Luoyang Suntech and our evaluation of the factors listed in 19 CFR 351.401(f) warrant collapsing these two companies in the final results of this administrative review, and thus we have continued to collapse these two companies.²⁵

DETERMINATION OF COMPARISON METHOD FOR WUXI SUNTECH²⁶

Wuxi Suntech

Pursuant to 19 CFR 351.414(c)(1), the Department calculates dumping margins by comparing weighted-average normal values to weighted-average export prices or constructed export prices (the average-to-average method) unless the Department determines that another method is appropriate in a particular situation. In recent investigations and reviews, the Department applied

²² *Id.*

²³ *Id.*

²⁴ See *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27295, 27346 (May 19, 1997) (“Preamble”).

²⁵ See Memorandum to Robert Bolling, Acting Director, AD/CVD Operations, Office IV, through Howard Smith, Program Manager, AD/CVD Operations, IV, “Affiliation and Single Entity Status of Wuxi Suntech Power Co., Ltd and Luoyang Suntech Power Co., Ltd., Final Results of Review,” dated concurrently with this memorandum.

²⁶ For a discussion of our differential pricing analysis with respect to the Yingli Single Entity, see Comment 32 of this memorandum.

a “differential pricing” analysis to determine whether application of average-to-transaction comparisons is appropriate in a particular situation pursuant to 19 CFR 351.414(c)(1) and consistent with section 777A(d)(1)(B) of the Act.²⁷

After applying a differential analysis²⁸ with respect to Wuxi Luoyang Single Entity,²⁹ the Department finds that between 33 and 66 percent of Wuxi Luoyang Single Entity’s export sales pass the Cohen’s *d* test, which confirms the existence of a pattern of prices for comparable merchandise that differ significantly among purchasers, regions, or time periods.³⁰ This result supports consideration of the application of an average-to-transaction method to those sales identified as passing the Cohen’s *d* test as an alternative to the average-to-average method, and application of the average-to-average method to those sales identified as not passing the Cohen’s *d* test. Further, the Department finds that the average-to-average method (“A-to-A method”) cannot appropriately account for such differences because there is a meaningful difference in the weighted-average dumping margins when calculated using the A-to-A method and an alternative method based on the mixed alternative method. Specifically, there is a 25 percent or greater relative change in the weighted average dumping margin between the A-A method and the appropriate alternative method where both rates are above the de minimis threshold.³¹ Accordingly, the Department has determined to use the mixed alternative comparison method for all of Wuxi Luoyang Single Entity’s U.S. sales to calculate its final weighted-average dumping margin.

ADJUSTMENT UNDER SECTION 777A(F) OF THE ACT FOR WUXI SUNTECH³²

In applying section 777A(f) of the Act in this review, the Department examined: (1) whether a countervailable subsidy (other than an export subsidy) has been provided with respect to a class or kind of merchandise, (2) whether such countervailable subsidy has been demonstrated to have

²⁷ See *Hardwood and Decorative Plywood From the People’s Republic of China: Antidumping Duty Investigation*, 78 FR 25946 (May 3, 2013), unchanged in *Hardwood and Decorative Plywood From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 58273 (September 23, 2013); see also *Certain Steel Threaded Rod From the People’s Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012*, FR 78 21101 (April 9, 2013), unchanged in *Certain Steel Threaded Rod From the People’s Republic of China: Final Results of Third Antidumping Duty Administrative Review; 2011-2012*, 78 FR 66330 (November 5, 2013); see also *Certain Lined Paper Products From the People’s Republic of China: Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 34640 (June 10, 2013) unchanged in *Certain Lined Paper Products From the People’s Republic of China: Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 65274 (October 31, 2013).

²⁸ See Preliminary Decision Memorandum at 24-26 (describing differential pricing methodology applied in the administrative review).

²⁹ For these final results of review, the Department finds, pursuant to 19 CFR 351.401(f), that Wuxi Suntech and Luoyang Suntech comprise a single entity (the “Wuxi Luoyang Single Entity”) See Memorandum to Robert Bolling, Acting Director, AD/CVD Operations, Office IV, through Howard Smith, Program Manager, AD/CVD Operations, IV, “Affiliation and Single Entity Status of Wuxi Suntech Power Co., Ltd and Luoyang Suntech Power Co., Ltd., Final Results of Review,” dated concurrently with this notice.

³⁰ See Memorandum to the File through Howard Smith, Program Manager, Office IV, “Analysis of the Final Results of Administrative Review Margin Calculation for Wuxi Suntech Power Co., Ltd.,” dated concurrently with this memorandum.

³¹ *Id.*

³² For a discussion of the adjustment under section 777A(f) of the Act with respect to the Yingli Single Entity, separate rate companies, and the PRC-wide entity, see the Preliminary Decision Memorandum at 34-36.

reduced the average price of imports of the class or kind of merchandise during the relevant period, and (3) whether the Department can reasonably estimate the extent to which that countervailable subsidy, in combination with the use of normal value determined pursuant to section 773(c) of the Act, has increased the weighted average dumping margin for the class or kind of merchandise.³³ For a subsidy meeting these criteria, the statute requires the Department to reduce the antidumping duty by the estimated amount of the increase in the weighted average dumping margin subject to a specified cap.³⁴

As noted in the *Preliminary Results*, with respect to whether a countervailable subsidy, other than an export subsidy, has been demonstrated to have reduced the average price of imports of the class or kind of merchandise during the relevant period, the Department examined the final determination issued by the U.S. International Trade Commission in this proceeding, which indicates that prices steadily decreased during January 2009 to June 2012, and that price decreases occurred in all of the examined product categories.³⁵ Based on this information, the Department finds that prices of imports of the class or kind of merchandise during the relevant period decreased.

Next, the Department examined whether the Wuxi Luoyang Single Entity demonstrated: (1) a subsidies-to-cost link, *e.g.*, subsidy impact on cost of manufacture (“COM”); and (2) a cost-to-price link, *e.g.*, respondent’s prices changed as a result of changes in the COM. Wuxi Suntech provided information that the Provision of Aluminum Extrusions for Less Than Adequate Remuneration (“LTAR”), Provision of Solar Glass for LTAR, and Provision of Electricity for LTAR subsidies impacted its COM during the POR, and that the other subsidy programs under investigation (*e.g.*, grant programs, tax programs, export credit subsidies, *etc.*) did not.³⁶ We determine that Wuxi Suntech’s DR Questionnaire Response indicates a subsidies-to-cost linkage for the subsidy programs it identified as affecting its COM. Wuxi Suntech also provided information indicating that the price at which it sells subject merchandise to its customers is impacted by the cost of raw materials and energy.³⁷ Thus, Wuxi Suntech’s DR Questionnaire Response indicates a cost-to-price linkage for the aluminum extrusions, solar glass, and electricity subsidy programs that impact COM. Based on the foregoing, we are making an adjustment to the Wuxi Luoyang Single Entity’s dumping margin under section 777A(f) of the Act.

As explained in Comment 28 below, the Department is basing any subsidy offsets on the subsidies calculated in the investigation of the companion CVD investigation.³⁸ In the final determination of the investigation in the companion countervailing duty (“CVD”) proceeding, the Department determined a program-specific rate for subsidized electricity for Wuxi Suntech. However, the Department found a zero percent rate for Wuxi Suntech for the subsidy program relating to solar glass and did not investigate the subsidy program relating to aluminum

³³ See Sections 777A(f)(1)(A)-(C) of the Act.

³⁴ See Sections 777A(f)(1)-(2) of the Act.

³⁵ See *Crystalline Silicon Photovoltaic Cells and Modules from China*, Investigation Nos. 701-TA-481 and 731-TA-1190 (Final), Publication 4360 (November 2012).

³⁶ See Submission from Wuxi Suntech, “Remainder of Supplemental Section D Questionnaire Response – Wuxi Suntech Power Co., Ltd.,” dated August 4, 2014 (“DR Questionnaire Response”).

³⁷ See *Id.*

³⁸ See Wuxi Suntech Final Analysis Memorandum.

extrusions.³⁹ Therefore, we have not made any adjustment for these two programs. Because the record indicates that factors other than the cost of aluminum extrusions, solar glass, and electricity impact Wuxi Suntech's prices to customers,⁴⁰ the Department is applying a documented ratio of cost-price changes for the Chinese manufacturing sector as a whole, which is based on data provided by Bloomberg, as the estimate of the extent of subsidy pass-through.⁴¹

DISCUSSION OF THE ISSUES

Comment 1: Rescission of the Reviews of JingAo Solar Co., Ltd. and Shanghai JA Solar PV Technology Co., Ltd.

On July 28, 2014 the Department announced its rescission of the review with respect to JingAo Solar Co., Ltd. and Shanghai JA Solar PV Technology Co., Ltd., among other companies.⁴²

JA Solar

- In addition to Petitioner's review requests, Star Power International Limited ("Star Power"), a Chinese exporter made timely review requests of Star Power's entries of merchandise which incorporate solar cells produced by JingAo Solar Co., Ltd. and Shanghai JA Solar PV Technology Co., Ltd. While Petitioner withdrew its review requests of JingAo Solar Co., Ltd. and Shanghai JA Solar PV Technology Co., Ltd., Star Power never withdrew its review request. Therefore, the Department improperly rescinded the antidumping review with respect to JingAo Solar Co., Ltd. and Shanghai JA Solar PV Technology Co., Ltd.

Petitioner

- The Department's rescission of the administrative review with regard to JingAo Solar Co., Ltd. and Shanghai JA Solar PV Technology Co., Ltd. was proper. Star Power requested a review of only its own entries of subject merchandise. Petitioner was the only party that requested a review of the entries of JingAo Solar Co., Ltd. and Shanghai JA Solar PV Technology Co., Ltd., and those requests were timely withdrawn.

Department's Position:

There is no outstanding review request for JingAo Solar Co., Ltd. and Shanghai JA Solar PV Technology Co., Ltd. and so the Department's rescission of its review of these two companies was proper. In requesting a review, Star Power, a Chinese exporter subject to this review,⁴³ stated:

³⁹ *Id.*

⁴⁰ See Wuxi Suntech Double Remedies Response.

⁴¹ See Wuxi Suntech Final Analysis Memorandum.

⁴² See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules From the People's Republic of China: Amended Partial Rescission of Antidumping Duty Administrative Review*, 79 FR 43713 (July 28, 2014) ("Rescission Notice").

⁴³ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 79 FR 6147 (February 3, 2014) ("Initiation Notice").

“On behalf of Star Power International Limited (“Star Power”), we hereby request an administrative review of Star Power’s U.S. entries of merchandise which incorporate photovoltaic cells produced by JA Solar (*i.e.*, JingAo Solar Co., Ltd. and Shanghai JA Solar PV Technology Co., Ltd.)⁴⁴ and other manufacturers
”⁴⁴

While Star Power noted that its entries incorporated subject merchandise produced by JingAo Solar Co., Ltd. and Shanghai JA Solar PV Technology Co., Ltd., among others, Star Power never requested a review of exports by JingAo Solar Co., Ltd. and Shanghai JA Solar PV Technology Co., Ltd. Petitioner was the only party to request reviews of JingAo Solar Co., Ltd. and Shanghai JA Solar PV Technology Co., Ltd., which it withdrew in a timely manner.⁴⁵ Therefore, the Department’s rescission of the review with respect to JingAo Solar Co., Ltd. and Shanghai JA Solar PV Technology Co., Ltd. was proper.

We further note that as a foreign exporter covered by this order Star Power may only request a review of itself pursuant to 19 CFR 351.213(b)(2). This section of the Department’s regulations specifically states that “an exporter or producer covered by an order ... may request in writing that {the Department} conduct an administrative request of only that person.”⁴⁶ Thus, even if Star Power had requested a review of JingAo Solar Co., Ltd. and Shanghai JA Solar PV Technology Co., Ltd., which it did not, its review request with respect to these two companies would be invalid.

Comment 2: Treatment of ERA Solar Co., Ltd.

Goal Zero LLC (“Goal Zero”)

- Despite its failure to submit a separate rate certification, the Department should grant ERA Solar Co., Ltd. (“ERA”) a separate rate in this review.
- The Department only sent quantity and value questionnaires to the 23 companies with the largest shipment quantities, based on U.S. Customs and Border Protection (“CBP”) data. Because ERA was not among these companies, it did not receive a quantity and value questionnaire. Further, because it was not among the mandatory quantity and value respondents, ERA’s failure to submit a separate rate certification did not distort the pool of potential respondents and had no effect on the selection of mandatory respondents in this review.
- Goal Zero acknowledges that, in most cases, the *Federal Register* notice has been found to be sufficient notice of the requirement to submit a separate rate certification. However, in this case, actual notice to ERA from the Department would have been appropriate and would have provided ERA with sufficient notice of the separate rate certification process and deadline. No counsel made an appearance on ERA’s behalf in this proceeding, ERA has no experience with the administrative review process, and the Department had actual knowledge of ERA, including its contact information and addresses, which imposed upon the Department a duty to provide actual notice to ERA of the requirements and deadlines for ERA to maintain its separate rate.

⁴⁴ See December 31, 2013 review request by Star Power.

⁴⁵ See Petitioner’s May 5, 2015 withdrawal of review requests.

⁴⁶ See 19 CFR 351.213(b)(2).

- ERA's failure to meet the separate rate certification deadline is in the nature of a ministerial error. Its excusable failure causes no prejudice to any interested party and does not impede or negatively affect the Department's conduct of the administrative review because ERA proved that it was eligible for a separate rate in the original investigation.

Petitioner

- Goal Zero's argument that ERA's failure to submit a separate rate response did not distort the pool of potential respondents and had no effect on the selection of mandatory respondents in this review is irrelevant to whether ERA should receive a separate rate. The *Initiation Notice* clearly stated that all firms listed therein that wish to qualify for separate rate status must complete, as appropriate, either a separate rate application or certification. ERA failed to follow these clear instructions and therefore does not qualify for a separate rate.
- Goal Zero acknowledges that the Court of International Trade ("CIT") has previously held that publication of an initiation notice is sufficient to put companies on notice of all information, including deadlines, contained within that notice. Goal Zero has not cited any precedent that supports its claim that the Department should have provided actual notice to ERA, and the Department was under no obligation to do so.
- ERA's failure to file a separate rate certificate does not, as Goal Zero argues, constitute a ministerial error and is not excusable.
- Whether or not ERA has counsel in this proceeding is beside the point and has no bearing on the Department's obligations in this regard.

Department's Position:

We continue to find that it was appropriate to deny ERA a separate rate due to its failure to submit any separate rate information, and thus consider ERA to be part of the PRC-Wide Entity. The Department stated in the *Initiation Notice* that "{a}ll firms listed below that wish to qualify for separate rate status in the administrative reviews involving NME countries must complete, as appropriate, either a separate rate application or certification."⁴⁷ The Department further stated that all exporters of solar cells subject to this review who "did not qualify for a separate rate are deemed to be covered by this review as part of the single PRC entity."⁴⁸ Because ERA failed to submit any separate rate information in this administrative review, the company did not qualify for a separate rate. Accordingly, the Department deemed ERA to be covered by this review as part of the PRC-Wide Entity.

Goal Zero cites the purported absence of notice through a quantity and value questionnaire and inexperience with U.S. antidumping procedures as reasons for which the Department should excuse ERA's failure to submit separate rate information. However, in this case, ERA received notice that Petitioner had requested a review of it, and thus knew or should have known to monitor the *Initiation Notice* covering solar cells to determine whether the Department initiated the review. Petitioner's December 31, 2013 request for administrative review lists ERA as one

⁴⁷ See *Initiation Notice*, 79 FR at 6148; *id.* at 6150 (listing ERA as subject to this review).

⁴⁸ *Id.* at 79 FR at 6156 n.6.

of the companies for which it requested a review, and stated that Petitioner would serve a copy of the review request by personal service or first class mail on each exporter or producer (or their counsel) identified in its request, consistent with 19 CFR 351.303(f)(3)(ii).⁴⁹ Petitioner also filed a certification attesting that a copy of its review request was served on various parties, including ERA.⁵⁰ There is no evidence or argument on the record of this review indicating that ERA did not receive the copy of Petitioner's request for review.

Further, ERA had notice that the Department had initiated an administrative review of the company. The *Initiation Notice* clearly stated that ERA was subject to this administrative review and also provided detailed instructions for ERA to follow in the event it wanted to participate in the review process and maintain its separate rate.⁵¹

The CIT and Court of Appeals for the Federal Circuit ("CAFC") have found that a notice of initiation in the *Federal Register* constitutes sufficient notification. In *Huaiyang Hongda*⁵² the court found that "prior involvement in antidumping duty proceedings concerning the same subject merchandise gives rise, *a fortiori*, to an interest in monitoring for publication of the annual notice of opportunity to request review." Therefore, ERA clearly knew, or should have known, to monitor the *Initiation Notice* covering solar cells to determine whether a request for review of ERA had been made for this period of review ("POR"). Further, in *Huaiyang Hongda*, it was found that "publication in the *Federal Register* is sufficient to give notice of the contents of the document to a person subject to or affected by it."⁵³

Similarly, in *Suntec*, the CIT explained that "Congress has directly spoken to the precise question {of notice} and unambiguously provided the mechanism of constructive notice through publication in the *Federal Register* to notify an interested party a review is being initiated."⁵⁴ Thus, when the Department complies with the requirement of section 751(a) of the Act to provide notice of the initiation of the review through publication in the *Federal Register*, as it did here, the Department provides "sufficient constructive notice to {the respondent} that its entries may be affected by the { } administrative review, and {the respondent} cannot choose to disclaim such constructive notice provided through publication."⁵⁵

In *Goldhofer*,⁵⁶ the CAFC concluded that a bulletin notice of liquidation alone satisfied minimum constitutional standards for due process because: 1) the form of notice did not rely on chance alone to attract the attention of the interested party; 2) the form of notice was designed to attract the attention of the interested party; and 3) the means of notice was reliable. Similar to

⁴⁹ See Letter from Solar World, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Request for Administrative Review, December 31, 2013, at 3 and 6.

⁵⁰ *Id.* at 10.

⁵¹ See *Initiation Notice*.

⁵² See *Huaiyang Hongda Dehydrated Vegetable Co. v. United States*, 28 C.I.T. 1944, 1949 (CIT 2004) ("*Huaiyang Hongda*").

⁵³ *Id.*

⁵⁴ *Suntec Industries Co., Ltd. v. United States*, 951 F. Supp. 2d 1341, 1350-51 (CIT 2013) (quotations omitted) (citing section 751(a) of the Act, and *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)).

⁵⁵ *Id.* at 1351.

⁵⁶ See *Goldhofer Fahrzeugwerk GmbH & Co. v. United States*, 885 F.2d 858 (Fed. Cir. 1989) ("*Goldhofer*").

the facts in *Goldhofer*, the Department's publication of its *Initiation Notice* demonstrates that it: 1) did not rely on chance alone to attract the attention of ERA; 2) specifically listed ERA and was, therefore, designed to attract the attention of ERA and all other interested parties; and 3) was a reliable means of providing notice to ERA of the Department's initiation of a review of ERA. The CAFC further held that because in *Goldhofer's* case posting of a bulletin notice alone "was as certain to ensure actual notice" as mail notice, "mail notice was not constitutionally required."⁵⁷ Therefore, the *Initiation Notice* was sufficient notice to ERA. We further note that ERA has some experience with the Department's antidumping duty proceedings; it participated and received a separate rate in the investigation of this proceeding and that this is the first review after that investigation. These facts further demonstrate the reasonableness of the Department's view that its announcement in the *Initiation Notice* of the review of ERA and the procedures to follow to maintain a separate rate was sufficient notice to ERA.

We disagree with Goal Zero's argument that ERA's failure to submit any separate rate information is "in the nature" of a ministerial error. The failure to provide a separate rate certification is not ministerial error, but rather, a failure to comply with the Department's well established separate rate methodology. The Department has explained that a party's separate rate status must be established in each segment of the proceeding in which the party is involved because a company's corporate structure, ownership, or relationship with the government can change from one segment of a proceeding to the next.⁵⁸ Thus, the Department cannot rely on a party's separate rate eligibility in a prior segment of the proceeding as evidence of its eligibility in subsequent segments.

Goal Zero also notes that ERA had no legal counsel during this review. All respondents must comply with antidumping law, regardless of whether they decide to obtain legal counsel. As stated above, under the antidumping law, ERA has failed to qualify for a separate rate.

Comment 3: PRC-Wide Entity Rate

Goal Zero

- Imposition of retroactive duties on a U.S. importer, such as Goal Zero, is punitive. The rate imposed on ERA, and its importers such as Goal Zero, should be neutral, not adverse. The Department should assign ERA a rate based on the rates calculated for the separate rate companies in this review.
- The Department has failed to corroborate the 249.96 percent rate assigned as adverse facts available ("AFA") to ERA and also to the PRC-Wide Entity because it has not related it to the market realities of this POR. Instead it is based on information from the underlying investigation. Because it represents secondary information, the PRC-Wide Entity rate must be corroborated.
- While the statute requires the Department to corroborate secondary information "to the

⁵⁷ *Id.* at 863.

⁵⁸ See, e.g., *Wooden Bedroom Furniture From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011*, 78 FR 35249 (June 12, 2013) and accompanying Issues and Decision Memorandum at Comment 1; see also *Sigma Corp. v. United States*, 117 F.3d 1401, 1405-06 (Fed. Cir. 1997) (affirming the Department's presumption of State control over exporters in non-market economy cases).

extent possible,” that language does not grant the Department the ability to ignore accurate record information in favor of information that is adverse to the respondents.

- Unlike other proceedings where the Department does not have useable data for the period of review to calculate or corroborate a margin, the record of this proceeding includes complete sales and factors of production data of both Yingli and Wuxi Suntech.
- The CAFC has made it clear that the AFA rate must reflect “commercial reality” and thus, be “a reasonably accurate estimate” of actual dumping rates.⁵⁹ In particular, the CAFC stated that “Commerce may not use the petition rate to establish the dumping margin when its own investigation revealed that the petition rate was not credible.”⁶⁰ The central holding of *Gallant* is that the Department may not rely on a rate that does not “represent commercial reality” and that it cannot establish a margin using information that the Department’s own investigation revealed as not credible.⁶¹ Since the rate calculated in this review for Yingli and the separate rate respondents is 1.82 percent, a rate of 249.96 percent cannot represent commercial reality and serve as an AFA rate.
- The AFA rate of 249 percent is punitive. With respect to the use of AFA, the CAFC has stated that while the Department has broad discretion in dealing with uncooperative respondents under these provisions, “{the Department}’s discretion in these matters . . . is not unbounded.”⁶² Even when application of AFA is warranted, the Department is still constrained by “commercial reality.”⁶³ The Department’s use of a punitive AFA rate, without even considering or discussing any other rates on the record is contrary to law.

Petitioner

- The 249.96 percent rate was corroborated by the Department during the original investigation, and court precedent supports the Department’s use of this margin in the current review. Moreover, because the AFA rate was calculated consistent with the antidumping duty laws, the rate is not punitive.
- Contrary to Goal Zero’s claim, the Department did not simply assume that the 249.96 percent rate was corroborated because it was based on the highest rate alleged in the petition, but compared the margin to the margins calculated for the individually examined respondents, and determined that it had probative value. Goal Zero’s citation to cases in which the CIT remanded uncorroborated AFA rates to the Department are inapposite.
- Goal Zero cites no precedent requiring that information be corroborated by reference to data specific to the period of review. In fact, in *Shandong*⁶⁴ the CIT affirmed the Department’s use of a previously calculated antidumping duty margin as adverse facts available, despite a lack of POR-specific corroborating data, on the basis that the information had been corroborated previously and no party had come forth with any data suggesting that it was no longer reliable or relevant. In *KYD*, the CAFC affirmed the use of a rate derived from the petition, despite a lack of POR-specific corroborating data.⁶⁵

⁵⁹ See *Gallant Ocean (Thai.) Co. v. United States*, 602 F.3d 1319, 1324 (Fed. Cir. 2010) (“*Gallant Ocean*”).

⁶⁰ See *Gallant Ocean*, 602 F.3d at 1323.

⁶¹ *Id.*

⁶² See *F.lli de Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d at 1032 (Fed. Cir. 2000).

⁶³ See *Gallant Ocean*, 602 F. 3d at 1323-1324.

⁶⁴ See *Shandong Mach. Imp. & Exp. Co. v. United States* CIT Slip Op. 2009-64 (June 24, 2009) at 14-17.

⁶⁵ See, *KYD, Inc. v. United States*, 607 F.3d 760, 767 (Fed. Cir. 2010).

- No party has provided evidence calling into question the reliability of the PRC-wide petition rate for purposes of the 2012-2013 review.
- The PRC-wide rate is not punitive because it was corroborated and determined in accordance with statutory requirements.

Department's Position:

We continue to find the PRC-Wide Entity rate to be an appropriate rate for ERA because, as discussed in Comment 2, it failed to demonstrate its eligibility for a separate rate and, thus, is part of the PRC-Wide Entity. The 249.96 percent rate applied to the PRC-Wide Entity in this review was corroborated during the investigation, the most recent segment of this proceeding, in accordance with section 776(c) of the Act.⁶⁶ Because no party provided any information on the record of this review to call into question the reliability or relevance of the 249.96 percent rate with respect to the entity, we have continued to apply this rate to the PRC-Wide Entity, of which ERA is a part.

We find that Goal Zero's arguments regarding the 249.96 percent rate reflecting ERA's market realities are not applicable in this situation. The Department did not assign the 249.96 percent rate to ERA as a separate rate based on AFA. Rather, the Department assigned ERA, like the multiple exporters that have not established their eligibility for a separate rate and are part of the PRC-Wide Entity, the PRC-Wide Entity rate of 249.96 percent.

In the *Preliminary Results* we explained that the use of AFA to determine a rate for the PRC-Wide Entity was appropriate because PRC exporters and/or producers of subject merchandise during the POR that are part of the entity did not respond to the Department's quantity and value questionnaires.⁶⁷ The Department's practice is to select an AFA rate that is sufficiently adverse "as to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner"⁶⁸ and that ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."⁶⁹ Accordingly, the Department's practice in selecting a total AFA rate in administrative reviews is to use the highest rate on the record of the proceeding which, to the extent practicable, can be corroborated (if the rate is based on secondary information).⁷⁰ The CIT and the CAFC

⁶⁶ See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination and Affirmative Preliminary Determination of Critical Circumstances*, 77 FR 31309, 31318 (May 25, 2012) (*LTFV Preliminary Determination*), unchanged in *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).

⁶⁷ See PDM at 17.

⁶⁸ See *Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan*, 63 FR 8909, 8911 (February 23, 1998).

⁶⁹ See *Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review*, 70 FR 69937, 69939 (November 18, 2005) and the Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316, at 838, 870 (1994).

⁷⁰ See *Glycine from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 74 FR 15930, 15934 (April 8, 2009), unchanged in the final results, 74 FR 41121; see also *Fujian Lianfu Forestry Co., Ltd. v. United States*, 638 F. Supp. 2d 1325, 1336 (Ct. Int'l Trade 2009) ("Commerce may, of course,

have affirmed decisions to select the highest margin from any prior segment of the proceeding as the AFA rate on numerous occasions.⁷¹

Goal Zero argues that the AFA rate was never corroborated. This is incorrect. In the investigation of this proceeding, the Department compared the petition margins to the margins calculated for the individually examined respondents to determine their probative value for use as and AFA rate for the PRC-Wide Entity and stated that⁷² “{b}ased on this analysis, we determined that the price and normal value used to derive the highest margin contained in the petition are within the range of the U.S. prices and normal values for the respondents in this investigation.”⁷³ Thus, we corroborated the petition margin to the extent practicable within the meaning of section 776(c) of the Act in the investigation. In this review, the Department determined, because no party had provided any information calling into question the reliability or relevance of this rate, that the 249.49 percent rate continued to have probative value for use as an AFA rate for the PRC-Wide Entity.⁷⁴

Goal Zero argues that PRC-Wide Entity Rate is not reflective of ERA’s commercial reality and that the Department should corroborate the 249.96 percent rate using sales information on the record of this review. As an initial matter, Goal Zero has not cited to one example of where the courts have required the Department to do so. Further, the issue of whether the assigned rate is reflective of “commercial reality” applies only when the Department selects a separate AFA rate for a respondent, which the Department did not do here with regard to ERA.⁷⁵ Additionally, the CIT has held that when the Department finds a respondent to be part of the PRC-wide entity, it “need not corroborate the PRC-wide rate with respect to information specific to that respondent because there is ‘no requirement that the PRC-Wide Entity rate based on AFA relate specifically to the individual company.’”⁷⁶ Thus, the Department does not need to determine whether the 249.96 percent rate is reliable and relevant with respect to ERA. Further, the CIT has held that

begin its total AFA selection process by defaulting to the highest rate in any segment of the proceeding, but that selection must then be corroborated, to the extent practicable.”)

⁷¹ See, e.g., *NSK Ltd. v. United States*, 346 F. Supp. 2d 1312, 1335 (Ct. Int’l Trade 2004) (affirming a 73.55 percent total AFA rate, the highest available dumping margin from a different respondent in the investigation); *Kompass Food Trading Int’l v. United States*, 24 CIT 678, 683-84 (2000) (affirming a 51.16 percent total AFA rate, the highest available dumping margin from a different, fully cooperative respondent); and *Shanghai Taoen Int’l Trading Co., Ltd. v. United States*, 360 F. Supp. 2d 1339, 1348 (Ct. Int’l Trade 2005) (affirming a 223.01 percent total AFA rate, the highest available dumping margin from a different respondent in a previous administrative review).

⁷² See *LTFV Preliminary Determination*, 77 FR at 31318.

⁷³ 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, 63795 (October 17, 2012).

⁷⁴ See PDM at 18.

⁷⁵ See *Watanabe Group v. United States*, Ct. No 09-00520, Slip Op. 10-139 at 10 (CIT December 22, 2010) (“*Watanabe*”) (“Here, *Gallant* does not apply in the manner asserted by *Watanabe* because Commerce has determined *Watanabe* to be part of the PRC-Wide Entity and therefore *Watanabe* has not received a separate AFA rate.”).

⁷⁶ See *Watanabe*, Slip Op. 10-139 at 9 (quoting *Peer Bearing Co. – Changshan v. United States*, 587 F. Supp. 2d 1319, 1327 (CIT 2008) (“*Peer Bearing*”)); *id.* (stating that when a respondent is part of the PRC-Wide Entity, inquiring into its “separate sales behavior ceases to be meaningful”); see also *Peer Bearing*, 587 F. Supp. 2d at 1327-28 (holding that there is no requirement that the Department corroborate a PRC-wide rate based on AFA, pursuant to section 776(c) of the Act, with respect to a mandatory respondent that does not qualify for a separate rate).

in situations such as this the PRC-wide “rate must only be generally corroborated as to the PRC-Wide Entity.”⁷⁷ As noted above, the 249.96 percent rate was corroborated as to the PRC-Wide Entity in the investigation that is the period immediately prior to this POR. In the absence of record evidence specific to this review calling into question the probative value of this rate, the Department “may rely on the corroborated rate from an earlier segment of the proceeding because doing so is based on a reasonable influence from the current record.”⁷⁸

Moreover, while the Department is not required to corroborate an AFA rate applied to the PRC-Wide Entity in the absence of data calling into question the probative value of the rate, we note that the 249.96 percent rate applied to the PRC-Wide Entity falls within the range of Wuxi Suntech’s calculated weighted average dumping margins from this review (Wuxi Suntech is one of two mandatory respondents to this review).⁷⁹ Several margins calculated on Wuxi Suntech’s sales are significantly above 249.96 percent and many more are at a level similar to 249.96 percent. Accordingly, contrary to Goal Zero’s claims, the PRC-Wide Entity rate is within commercial reality in this review because it is reflective of transactions that occurred during the POR.

With regard to Goal Zero’s accusation that the PRC-Wide Entity rate is punitive, the Department disagrees and notes that the CIT has required that an AFA rate must be a “reasonably accurate estimate of the respondent’s actual rate, albeit with some built-in increase intended as a deterrent to noncompliance.”⁸⁰ Because the PRC-Wide Entity rate was corroborated in the investigation based on information on that record, and continues to have probative value for purposes of this review, we find it to be a reasonably accurate estimate of the PRC-Wide Entity’s actual rate with some built-in increase intended as a deterrent to noncompliance.

Comment 4: Assessment of Entries Made Prior to the International Trade Commission’s Final Determination

Goal Zero

- Pursuant to 19 CFR 351.212(d), any Goal Zero entries before the date of publication of the International Trade Commission’s notice of an affirmative final injury determination should be assessed at the lower of the cash deposit paid or final results in the first administrative review.

Department’s Position:

We agree with Goal Zero. Consistent with section 737(a) of the Act and 19 CFR 351.212(d), the Department will assess antidumping duty margins of any entries before the date of publication of the International Trade Commission’s notice of an affirmative final injury determination at the lower of the cash deposit paid or final results in the first administrative review.

Comment 5: Treatment of Jiangsu Sunlink PV Technology Co., Ltd.

⁷⁷ See *Peer Bearing*, 587 F. Supp. 2d at 1327.

⁷⁸ See *Watanabe*, Slip Op. 10-139 at 11.

⁷⁹ See Wuxi Suntech’s Final Analysis Memorandum.

⁸⁰ See *Fujian Lianfu Forestry Co. v. United States*, 2010 Ct. Intl. Trade LEXIS 33, 3-4 (CIT 2010).

Based on CBP data, the Department determined in the *Preliminary Results* that, despite claiming no shipments, Jiangsu Sunlink PV Technology Co., Ltd. (“Sunlink”) made shipments of subject merchandise during the POR.⁸¹

Sunlink

- The Department should accept Sunlink’s no shipment certification or take other measures, such as issuing a supplemental questionnaire, to allow Sunlink to explain any discrepancies that the Department might perceive and cure any deficiencies by any reasonable means, such as filing a separate rate certification.
- Due to its proprietary nature, counsel for Sunlink is unable in any meaningful way to explain the details of CBP to Sunlink and therefore unable to elicit enough information from Sunlink to allow the submission of additional factual data to explain or rebut the CBP data put on the record of this case. The Department’s release of the CBP data through ACCESS described the document only in general terms without a specific reference to any of the implicated exporters and manufacturers.
- The Department was aware of the potential discrepancies between the CBP data and the no shipments certification, and so had a legal obligation to issue a questionnaire directly to Sunlink and provide the company with an opportunity to clarify the discrepancy between the no shipment certifications and CBP data that the Department placed on the record of this proceeding.⁸²
- The Department is obligated in this review to seek and consider the additional record information directly from the company regarding the company’s sales and eligibility for a separate rate.⁸³ The interests of accuracy and fairness outweigh any burden placed on the Department for considering Sunlink’s information and on finality.
- If the Department believes Sunlink had sales, shipments, or entries during the POR, it is very unlikely that they were in sufficient quantities such that it would have altered respondent selection. If true, the errors in Sunlink’s original no shipments certification were essentially harmless.
- AFA is not warranted because the Department did not issue a supplemental questionnaire directly to the company, so Sunlink did not have the ability to fully cooperate with a Department request before failing to cooperate to the best of its ability.
- There is no basis to assign Sunlink the PRC-Wide Entity rate in this review because there is no evidence on the record that Sunlink was controlled by the PRC-Wide Entity in this review. Rather, if the Department concludes that Sunlink made sales that were entered in the POR, it should request clarification and/or provide Sunlink with the opportunity to file a separate rate certification. If the Department then believes that Sunlink had POR sales, it should assign Sunlink the separate rate resulting from this review. If the Department concludes there were no sales, it should rescind the review.

Petitioner

⁸¹ See December 31, 2014 Memorandum from Patrick O’Connor to Abdelali Elouaradia, Re: Analysis of No Sales/Shipments Claims Made by Certain Companies (“Memorandum Concerning No Shipment Claims”) at 8-9.

⁸² See section 782(d) of the Act.

⁸³ See *Fine Furniture (Shanghai) Ltd. v. United States*, 865 F. Supp. 2d 1254 (CIT 2012) (“*Fine Furniture*”).

- The Department should continue to find that Sunlink had entries of subject merchandise during the POR.
- The Department requested additional information in its October 14, 2014 memorandum identifying the parties claiming no shipments but for whom CBP data indicated potential entries and requesting that those parties explain any discrepancies.⁸⁴ Despite being provided this opportunity, Sunlink failed to provide any explanation regarding the discrepancies between its no shipment certification and the CBP data.
- Sunlink’s reliance on *Fine Furniture* is misplaced. That case involved two companies’ failure to respond to quantity and value questionnaires, resulting in use of AFA. The CIT held that the Department’s failure to take into account evidence that it had requested was an abuse of discretion. The holding in *Fine Furniture* is not relevant to this case. The Department explicitly solicited information from Sunlink, but the company failed to clarify the discrepancy between the no shipment certifications and the CBP data. The Department did not ignore information it had solicited; rather it made its determination based on the record before it.
- The Department stated in its preliminary determination that it maintains a rebuttable presumption that all companies within the PRC are subject to government control and, thus, should be assessed a single weighted-average dumping margin. Sunlink failed to submit any evidence to rebut that presumption.

Department’s Position:

We disagree with Sunlink. We continue to find, as we did in the memorandum accompanying the *Preliminary Results* concerning no shipment claims,⁸⁵ that the weight of the evidence (*i.e.*, entry documents we obtained concerning its sales) supports a determination that Sunlink had entries of subject merchandise during the POR.

Sunlink’s argument that the Department was obligated to seek and consider the additional record information directly from the company in the form of a supplemental questionnaire ignores that the Department requested additional explanation from certain parties claiming they had no shipments during the POR, including Sunlink. Indeed, on October 14, 2014 the Department placed on the record entry documents and data from CBP and stated that “[p]arties who continue to claim that their subject merchandise was not entered into, exported to, or sold to the United States during the instant period of review should explain in detail why they believe the attachments to {the} memorandum do not call into question their claim.”⁸⁶ This request for additional explanation alerted Sunlink to a deficiency in its no shipments claim, *i.e.*, that record evidence called into question the no shipments claim, and provided Sunlink with an opportunity to remedy or explain the deficiency, consistent with section 782(d) of the Act. Indeed, on Sunlink’s behalf its counsel responded to the Department’s request for additional explanation,

⁸⁴ See Memorandum from Drew Jackson to the File, Re: “Release of U.S. Customs and Border Protection Information Relating to No Shipment Claims Made in the 2012-2013 Administrative Review of Crystalline Silicon Photovoltaic Cells from the People’s Republic of China,” dated October 14, 2014 (“CBP Entry Documentation Memo”).

⁸⁵ See December 31, 2014 Memorandum from Patrick O’Connor to Abdelali Elouaradia, Re: Analysis of No Sales/Shipments Claims Made by Certain Companies (“Memorandum Concerning No Shipment Claims”).

⁸⁶ See CBP Entry Documentation Memo at 2.

and argued that documents in the Department's October 14, 2014 memorandum did not contradict the company's no shipment claims.⁸⁷ Thus, contrary to Sunlink's claims, the Department did solicit comments on CBP data and Sunlink commented on this evidence.

Moreover, we agree with Petitioner that Sunlink's reliance on *Fine Furniture* is misplaced. In that case, the Department sought additional evidence from certain respondents in response to their ministerial error allegations, but did not take the evidence provided by the respondents in response into consideration for its final determination.⁸⁸ In contrast, in this administrative review the Department not only solicited additional information from Sunlink, but also considered Sunlink's comments on the CBP data in reaching its preliminary finding.⁸⁹ That Sunlink failed to provide sufficient explanation or evidence to rebut the CBP data on the record does not mean that the company is entitled to an additional opportunity to rebut the evidence in the form of a supplemental questionnaire response.

In arguing that its counsel was unable to meaningfully explain the details of CBP data to Sunlink due to the data's proprietary nature and that the Department released this data "without a specific reference to any of the implicated exporters and manufacturers," Sunlink contends that it did not have notice of the discrepancy between the CBP data and its no shipment certification and thus could not rebut the CBP data. Although the company names and CBP data were treated as business proprietary information ("BPI") in the Department's October 14, 2014 memorandum, Sunlink's counsel – who has represented Sunlink in this administrative review as of March 6, 2014,⁹⁰ and has access to BPI under the administrative protective order ("APO") for this segment of the proceeding – received notice of the Department's release of the memorandum and CBP data. The Department's CBP Entry Documentation Memo explicitly named Sunlink on the front page, identified its case number, and stated that attached were CBP documents related to its no shipment claim. In its October 27, 2014 Submission, Sunlink's counsel submitted comments concerning the CBP Entry Documentation Memorandum. Sunlink is similarly situated as every other interested party participating in the review in that the company may only have access to its own BPI. Data obtained from CBP is considered BPI in its entirety, and can only be released to counsel under an APO. Because a party has access to BPI on the record through its counsel, we have previously rejected claims that a party is unable to rebut CBP data solely because the party cannot itself see the BPI data.⁹¹ Here, too, we find that Sunlink was provided an opportunity to rebut the CBP information through its counsel.

With regard to Sunlink's argument that there is no evidence on the record that it is controlled by the PRC-Wide Entity and thus there exists no basis to assign it the PRC-Wide Entity rate, the

⁸⁷ See Letter from Sunlink to the Department, Re: "Crystalline Silicon Photovoltaic Cells from P.R. China: Pre-Preliminary Comments," dated October 27, 2014 ("October 27, 2014 Submission").

⁸⁸ See *Fine Furniture*, 865 F. Supp. 2d at 1267-69.

⁸⁹ See Memorandum Concerning No Shipment Claims at 8-9.

⁹⁰ See Entry of Appearance on Behalf of Sunlink, dated March 6, 2014.

⁹¹ See *Wooden Bedroom Furniture From the People's Republic of China: Final Results and Final Rescission in Part*, 76 FR 49729 (August 11, 2011) and accompanying Issues and Decision Memorandum at Comment 14 ("Nantong Yangzi's claim that it was not able to rebut the CBP information due to its proprietary nature is also without merit. Counsel for Nantong Yangzi received the entry records in question pursuant to the terms of the administrative protective order, and thus Nantong Yangzi was provided an opportunity to rebut the CBP information through its counsel.").

Department explained in its preliminary decision its long-held practice that it “maintains a rebuttable presumption that all companies within the PRC are subject to government control and, thus, should be assessed a single weighted-average dumping margin.”⁹² As stated above, the Department has concluded based on record evidence that Sunlink made shipments of subject merchandise. Accordingly, to rebut the presumption that it is subject to government control, Sunlink should have submitted a separate rate certification (if there were no changes since the investigation), or a separate rate application (if there were changes). As a result of its failure to do so, the Department’s presumption applies and Sunlink is treated as part of the PRC-wide Entity. This rate is not the result of use of AFA. While Sunlink notes that any shipments that the Department finds it made would have been in such small quantities as to have no impact on respondent selection, the quantity of unreported sales is irrelevant; because Sunlink made entries during the POR, it was required to submit separate rate application or certification in order to be eligible for a separate rate.

Comment 6: Treatment of CSG PVTech Co., Ltd.

Based on CBP data, the Department determined that, despite claiming no shipments, CSG PVTech Co., Ltd. (“CSG”) made shipments of subject merchandise during the POR.

CSG

- The CGS merchandise in question was not a sale of subject merchandise to the United States.
- Due to its proprietary nature, counsel for CSG is unable in any meaningful way to explain the details of the CBP data to CSG and therefore unable to elicit enough information from CSG to allow the submission of additional factual data to explain or rebut the CBP data put on the record of this case. The Department’s release of the CBP data through ACCESS described the document only in general terms without a specific reference to any of the implicated exporters and manufacturers.
- The Department was aware of the potential discrepancies between the CBP data and the no shipments certification, and so had a legal obligation to issue a questionnaire directly to CSG and provide the company with an opportunity to clarify the discrepancy between the no shipment certifications and CBP data that the Department placed on the record of this proceeding.⁹³
- The Department is obligated in this review to seek and consider the additional record information directly from the company regarding the company’s sales and eligibility for a separate rate.⁹⁴ The interests of accuracy and fairness outweigh any burden placed on the Department for considering CSG’s information and on finality.
- If the Department believes CSG had sales, shipments, or entries during the POR, it very unlikely that they were in sufficient quantities such that it would have altered respondent selection. If true, the errors in CSG’s original no shipments certification were essentially harmless.

⁹² See PDM at 9.

⁹³ See section 782(d) of the Act.

⁹⁴ See *Fine Furniture*, 865 F. Supp. 2d at 1254.

- AFA is not warranted because the Department did not issue a supplemental questionnaire directly to the company, so CSG did not have the ability to fully cooperate with a Department request before failing to cooperate to the best of its ability.
- There is no basis to assign CSG the PRC-Wide Entity rate in this review because there is no evidence on the record that CSG was controlled by the PRC-Wide Entity in this review. Rather, if the Department concludes that CSG made sales that were entered in the POR, it should request clarification and/or provide CSG with the opportunity to file and separate rate certification. If the Department then believes that CSG had POR sales, it should assign CSG the separate rate resulting from this review. If the Department concludes there were no sales, it should rescind the review.

Petitioner

- The Department should continue to find that CSG had entries of subject merchandise during the period of review.
- The Department requested additional information in its October 14, 2014 memorandum identifying the parties claiming no shipments but for whom CBP data indicated potential entries explain any discrepancies.⁹⁵ Despite being provided this opportunity, CSG failed to provide any explanation regarding the discrepancies between its no shipment certification and the CBP data.
- CSG's reliance on *Fine Furniture* is misplaced. That case involved two companies' failure to respond to quantity and value questionnaires, resulting in use of AFA. The CIT held that the Department's failure to take into account evidence that it had requested was an abuse of discretion. The holding in *Fine Furniture* is not relevant to this case. The Department explicitly solicited information from CSG, but the company failed to clarify the discrepancy between the no shipment certifications and the CBP data. The Department did not ignore information it had solicited; rather it made its determination based on the record before it.
- The Department stated in the *Preliminary Results* that it maintains a rebuttable presumption that all companies within the PRC are subject to government control and, thus, should be assessed a single weighted-average dumping margin. CSG failed to submit any evidence to rebut that presumption.

Department's Position:

We disagree with CSG. We continue to find, as we did in the memorandum accompanying the *Preliminary Results* concerning no shipment claims,⁹⁶ that the weight of the evidence (*i.e.*, entry documents we obtained concerning its sales) supports a determination that CSG had entries of subject merchandise during the POR.⁹⁷

CSG's argument that the Department was obligated to seek and consider the additional record information directly from the company in the form of a supplemental questionnaire ignores that the Department requested additional explanation from certain parties claiming they had no shipments during the POR, including CSG. Indeed, on October 14, 2014 the Department placed

⁹⁵ See CBP Entry Documentation Memo.

⁹⁶ See Memorandum Concerning No Shipment Claims at 4-5.

⁹⁷ See July 7, 2015 BPI Memorandum concerning CSG's case brief claim that it made no shipments.

on the record entry documents and data from CBP and stated that “[p]arties who continue to claim that their subject merchandise was not entered into, exported to, or sold to the United States during the instant period of review should explain in detail why they believe the attachments to {the} memorandum do not call into question their claim.”⁹⁸ This request for additional explanation alerted CSG to a deficiency in its no shipments claim, *i.e.*, that record evidence called into question the no shipments claim, and provided CSG with an opportunity to remedy or explain the deficiency, consistent with section 782(d) of the Act. Indeed, on CSG’s behalf its counsel responded to the Department’s request for additional explanation, and argued that documents in the Department’s October 14, 2014 memorandum did not contradict the company’s no shipment claims.⁹⁹ Thus, contrary to CSG’s claims, the Department did solicit comments on CBP data and CSG commented on this evidence.

Moreover, we agree with Petitioner that CSG’s reliance on *Fine Furniture* is misplaced. In that case, the Department sought additional evidence from certain respondents in response to their ministerial error allegations, but did not take the evidence provided by the respondents in response into consideration for its final determination.¹⁰⁰ In contrast, in this administrative review the Department not only solicited additional information from CSG, but also considered CSG’s comments on the CBP data in reaching its preliminary finding.¹⁰¹ That CSG failed to provide sufficient explanation or evidence to rebut the CBP data on the record does not mean that the company is entitled to an additional opportunity to rebut the evidence in the form of a supplemental questionnaire response.

In arguing that its counsel was unable to meaningfully explain the details of CBP data to CSG due to the data’s proprietary nature and that Department released this data “without a specific reference to any of the implicated exporters and manufacturers,” CSG contends that it did not have notice of the discrepancy between the CBP data and its no shipment certification and thus could not rebut the CBP data. Although the company names and CBP data were treated as BPI in the Department’s October 14, 2014 memorandum, as demonstrated by its timely response that addressed BPI in the October 14, 2014 memorandum,¹⁰² CSG’s counsel has access to BPI under the APO for this segment of the proceeding – received notice of the Department’s release of the memorandum and CBP data. The Department’s CBP Entry Documentation Memo explicitly named CSG on the front page, identified its case number, and stated that attached were CBP documents related to its no shipment claim. In its October 27, 2014 Submission, CSG’s counsel submitted comments concerning the CBP Entry Documentation Memorandum. CSG is similarly situated as every other interested party participating in the review in that the company may only have access to its own BPI. Data obtained from CBP is considered BPI in its entirety, and can only be released to counsel under an APO. Because a party has access to BPI on the record through its counsel, we have previously rejected claims that a party is unable to rebut CBP data

⁹⁸ See CBP Entry Documentation Memo at 2.

⁹⁹ See Letter from CSG to the Department, Re: “Crystalline Silicon Photovoltaic Cells from P.R. China: Pre-Preliminary Comments,” dated October 27, 2014 (“October 27, 2014 Submission”).

¹⁰⁰ See *Fine Furniture*, 865 F. Supp. 2d at 1267-69.

¹⁰¹ See Memorandum Concerning No Shipment Claims at 8-9.

¹⁰² See CSG’s October 27, 2014 Submission.

solely because the party cannot itself see the BPI data.¹⁰³ Here, too, we find that CSG was provided an opportunity to rebut the CBP information through its counsel.

With regard to CSG's argument that there is no evidence on the record that it is controlled by the PRC-Wide Entity and thus there exists no basis to assign it the PRC-Wide Entity rate, the Department explained in its preliminary decision its long-held practice that it "maintains a rebuttable presumption that all companies within the PRC are subject to government control and, thus, should be assessed a single weighted-average dumping margin."¹⁰⁴ As stated above, the Department has concluded based on record evidence that CSG made shipments of subject merchandise. Accordingly, to rebut the presumption that it is subject to government control, CSG should have submitted a separate rate certification (if there were no changes since the investigation), or a separate rate application (if there were changes). As a result of its failure to do so, the Department's presumption applies and CSG is treated as part of the PRC-wide Entity. This rate is not the result of use of AFA. While CSG contends that any shipments that the Department finds it made would have been in such small quantities as to have no impact on respondent selection, the quantity of unreported sales is irrelevant; because CSG made entries during the POR, it was required to submit separate rate information application or certification in order to be eligible for a separate rate.

Comment 7: Treatment of Leye Photovoltaic Science & Technology Co. Ltd.

Years Solar Co., Ltd.

- In January 2011, prior to the period of investigation, Zhejiang Leye Photovoltaic Science & Technology Co., Ltd. ("Zhejiang Leye") changed its name to Leye Photovoltaic Co., Ltd. ("Leye"). In June 2012, Leye changed its name to Years Solar Co., Ltd. ("Years Solar"). In October 2012, Leye was granted a separate rate as a producer and exporter of subject merchandise in the final determination of the antidumping duty investigation.¹⁰⁵
- Pursuant to Petitioner's request, the Department initiated a review of "Leye Photovoltaic Science Tech." and Zhejiang Leye.¹⁰⁶ Years Solar submitted a quantity and value questionnaire response, but the Department rejected this submission. Years Solar then submitted a separate rate response in which it demonstrated that the official English name of Leye was changed to Years Solar Co. Ltd. in June 2012.¹⁰⁷
- Because Petitioner withdrew its request for review of Zhejiang Leye only the fictional "Leye Photovoltaic Science Tech." was left in this review. Because no party requested a

¹⁰³ See *Wooden Bedroom Furniture From the People's Republic of China: Final Results and Final Rescission in Part*, 76 FR 49729 (August 11, 2011) and accompanying Issues and Decision Memorandum at Comment 14 ("Nantong Yangzi's claim that it was not able to rebut the CBP information due to its proprietary nature is also without merit. Counsel for Nantong Yangzi received the entry records in question pursuant to the terms of the administrative protective order, and thus Nantong Yangzi was provided an opportunity to rebut the CBP information through its counsel.").

¹⁰⁴ See PDM at 9.

¹⁰⁵ *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, 63796 (October 17, 2012), and *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, 73020 (December 7, 2012).

¹⁰⁶ See *Initiation Notice*, 79 FR at 6150, 6151.

¹⁰⁷ See Years Solar Co., Ltd.'s April 4, 2014 separate rate application.

review of Leye, the Department should find in its final results that Leye retained its separate rate from the investigation of 24.48 percent.

- As in *Fine Furniture*, the interests of accuracy and fairness outweigh any burden placed on the Department for considering Year Solar's information and on finality.
- The Department should either (1) find that no review was requested of Leye and that the company therefore has kept its separate rate granted in the investigation, or (2) determine that Leye submitted a separate rate application under its new name of Years Solar and grant Years Solar a separate rate for this administrative review. The Department should also delete any reference to Zhejiang Leye because this company no longer exists.

Petitioner

- The Department correctly rejected Years Solar's quantity and value questionnaire response because no entity had requested a review of Years Solar. Nowhere in the response did Years Solar indicate that Years Solar was the new firm name for Leye. Years Solar made no attempt on the record to object to the rejection of the quantity and value questionnaire response.
- The separate rate application submitted by Years Solar fails to demonstrate that it and Leye are in fact, the same entity.
- To qualify for a separate rate, Years Solar/Leye was required to submit a quantity and value response. However, because of Years Solar's failure to object to the Department's rejection of its quantity and value questionnaire response, the record does not contain such a response from Years Solar.

Department's Position:

Years Solar claims that its name was originally Zhejiang Leye Photovoltaic Science & Technology Co., Ltd., which was then changed to Leye Photovoltaic Co., Ltd. and later changed to its current name, Years Solar Co., Ltd.¹⁰⁸ Years Solar contends that the Department should find that Leye should keep its separate rate because no review was requested of that company, or in the alternative, find that Years Solar is the same entity as Leye and entitled to Leye's separate rate.

No interested party requested a review of Leye or Years Solar, and Petitioner was the only party to request a review of Zhejiang Leye.¹⁰⁹ On February 3, 2014, the Department initiated a review of Zhejiang Leye, but not of Leye or Years Solar.¹¹⁰ On May 5, 2014, Petitioner timely withdrew its review request for Zhejiang Leye.¹¹¹ Therefore, there are no outstanding review requests for companies identified as Zhejiang Leye Photovoltaic Science & Technology Co., Ltd., Leye Photovoltaic Co., Ltd. or Years Solar Co., Ltd.

¹⁰⁸ See Years Solar Co., Ltd.'s April 4, 2014 separate rate application at 2 and Exhibit 3 and its March 23, 2015 case brief at 2-3.

¹⁰⁹ See Letter from SolarWorld, Re: "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Request for Administrative Review," dated December 31, 2013.

¹¹⁰ See *Initiation Notice*, 79 FR at 6150-52.

¹¹¹ See Letter from SolarWorld, "Certain Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Withdrawal of Requests for Administrative Review," dated May 5, 2014.

The Department agrees that Leye retains its combination rate, *i.e.* a separate rate for merchandise produced by and exported by Leye, because Leye was not subject to this administrative review. With respect to the information submitted by Years Solar, the Department has determined that it is not appropriate to consider such information because the Department did not initiate a review of Years Solar specifically and Zhejiang Leye is not individually under review. The Department stated that it would consider the separate rate applications or certification of those firms that were listed in the *Initiation Notice*.¹¹² As stated above, there is no outstanding review request for Zhejiang Leye and the Department did not initiate an administrative review of Years Solar specifically.¹¹³ As such, the Department has not considered Years Solar's separate rate application. Nevertheless, we note that Years Solar may request a changed circumstances review if it still seeks a determination as to whether it is the successor-in-interest to Leye.¹¹⁴

Comment 8: Rescission of Review of LDK Solar Hi-Tech (Nanchang) Co., Ltd.

In this administrative review, the Department received requests for review of “LDK **Solar** Hi-Tech (Nanchang) Co., Ltd.” (from Petitioner) and “LDK Hi-Tech (**Nanchang** Co., Ltd.” (from the company). Because of the differences above in the names (emphasized in bold and underlined), the Department initiated a review of both named entities.¹¹⁵ Petitioner timely withdrew its review request for LDK Solar Hi-Tech (Nanchang) Co., Ltd. and so the Department rescinded the review with respect to LDK Solar Hi-Tech (Nanchang) Co., Ltd. and instructed CBP to liquidate the entries exported by this company.¹¹⁶ LDK Hi-Tech (Nanchang Co., Ltd. remains under review.

LDK Solar Hi-Tech (Nanchang) Co., Ltd.

- Counsel entered an appearance for LDK Solar Hi-Tech (Nanchang) Co., Ltd. and was granted access to the APO for this segment of the proceeding solely for this company. LDK Solar Hi-Tech (Nanchang) Co., Ltd. timely filed its required quantity and value questionnaire response.
- The Department rescinded the review of LDK Solar Hi-Tech (Nanchang) Co., Ltd. in its *Rescission Notice*, but assigned it a separate rate in the preliminary results, indicating that the Department had examined the company's separate rate certification and concluded that it merited a separate rate in this review.

¹¹² See *Initiation Notice*, 79 FR at 6148 (stating that “{a}ll firms listed below that wish to qualify for separate rate status in the administrative reviews involving NME countries must complete, as appropriate, either a separate rate application or certification.”).

¹¹³ Years Solar could have requested a review of itself for the Department to consider whether the company was entitled to a separate-rate and, if it was so entitled, assign a separate rate. However, Years Solar did not request a review and no other party requested a review of Years Solar.

¹¹⁴ See, *e.g.*, *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Initiation and Preliminary Results of Changed Circumstances Review*, 79 FR 1824 (January 10, 2014) (initiating a changed circumstances review based on a company's name change and restructuring).

¹¹⁵ See *Initiation Notice*, 79 FR at 6150.

¹¹⁶ See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules From the People's Republic of China: Amended Partial Rescission of Antidumping Duty Administrative Review*, 79 FR 43713, 43714 (July 28, 2014) (“*Rescission Notice*”); see CBP message number 4231310, dated August 19, 2014 (barcode 3223084-01). This message is also available at: <http://adcvd.cbp.dhs.gov/adcvdweb/>.

- The totality of the circumstances indicates that LDK Solar Hi-Tech (Nanchang) Co., Ltd. thought it had requested a review of itself and proceeded over the course of the review on that basis.
- The Department has a legal obligation to investigate discrepancies and advise parties of deficiencies in their submissions and issue supplemental questionnaires to ascertain the nature of a company's review request and its ownership and affiliations. In *China Kingdom*,¹¹⁷ the CIT ruled that if the Department is unaware of a deficiency, it does not absolve the Department from its investigatory duty to correct them. The Department's practice is to ask for clarifications on the record and accept them, as the Department often corrects minor errors in company names at the final results of review and in draft customs instructions. The Department should have issued a supplemental questionnaire inquiring as to whether there was some inadvertent error and what intentions were regarding the misnamed non-entity.
- The Department abused its discretion in rescinding the review for LDK Solar Hi-Tech (Nanchang) Co., Ltd. after Petitioner withdrew its request of the company, because the Department ignored LDK Solar Hi-Tech (Nanchang) Co., Ltd.'s outstanding review request for itself. The typographical error in LDK Solar Hi-Tech (Nanchang) Co., Ltd.'s review request was a harmless error, and now that the error has been clarified.
- LDK Solar Hi-Tech (Nanchang) Co., Ltd. did not alert the Department to the error when the Department rescinded the review on it, because it did not expect to see its name in the *Rescission Notice*. The Department itself was apparently not aware of the rescission of LDK Solar Hi-Tech (Nanchang) Co., Ltd. based on the fact that in the *Preliminary Results* the Department determined that LDK Solar Hi-Tech (Nanchang) Co., Ltd. was eligible for separate rate status.
- Although its entries have been liquidated as the result of the *Rescission Notice*, the Department should continue to review LDK Solar Hi-Tech (Nanchang) Co., Ltd. for the final results and grant it an updated cash deposit rate based on the rate granted all separate rate respondents.
- Citing *Fine Furniture*,¹¹⁸ LDK Solar Hi-Tech (Nanchang) Co., Ltd. argues that the Department is abusing its discretion because it is refusing to consider untimely "corrective" information.

Petitioner:

- The Department's rescission of LDK Solar Hi-Tech (Nanchang) Co., Ltd. is appropriate.
- The Department was not required to issue a supplemental questionnaire to LDK Hi-Tech (Nanchang Co., Ltd. with respect to its review request.
- The Department reasonably assumed that LDK Hi-Tech (Nanchang Co., Ltd. would accurately include its own name in its request for an administrative review, and because the Department had no reason to believe there was any error in its review request, it appropriately initiated the review for both LDK Solar Hi-Tech (Nanchang) Co., Ltd. and LDK Hi-Tech (Nanchang Co., Ltd.

¹¹⁷ See *China Kingdom Imp. & Exp. Co. v. United States*, 507 F. Supp 2d 1337, 1346-1353 (CIT 2007) ("*China Kingdom*").

¹¹⁸ See *Fine Furniture (Shanghai) Ltd. v. United States*, 685 F. Supp 2d 1254 (CIT 2012) ("*Fine Furniture*").

- LDK Solar Hi-Tech (Nanchang) Co., Ltd. incorrectly requested its own review and failed to timely inform the Department of this error. LDK Solar Hi-Tech (Nanchang) Co., Ltd. was put on notice of this error as early as February 3, 2014 with the publication of the *Initiation Notice*. Further, the Department specifically addressed LDK Solar Hi-Tech (Nanchang) Co., Ltd.’s status in the *Rescission Notice* when it stated “in the version of the partial rescission notice signed on June 24, 2014, the Department inadvertently... did not rescind the review of LDK Solar Hi-Tech (Nanchang) Co., Ltd. for which all review requests were timely withdrawn.”¹¹⁹
- LDK Solar Hi-Tech (Nanchang) Co., Ltd.’s reliance on *China Kingdom* and *Fine Furniture* is misplaced. Unlike *China Kingdom*, this is not a case where the respondent submitted corrective information to the Department, which the Department failed to consider. Unlike *Fine Furniture*, this is not a case where companies the Department failed to take into account evidence that it had requested of the respondent.
- In *Yamaha Motor*,¹²⁰ that the CIT held that it is the respondent’s obligation to supply the Department with accurate information, and that the Department is not required to correct a respondent’s errors when erroneous data is reported and not timely corrected. Here it was not until more than five months after the *Rescission Notice* that LDK Solar Hi-Tech (Nanchang) Co., Ltd. informed the Department of its error. LDK Solar Hi-Tech (Nanchang) Co., Ltd. therefore failed to submit accurate information to the Department and failed to timely correct that information.

Department’s Position:

We have not changed our decision to rescind the review of LDK Solar Hi-Tech (Nanchang) Co., Ltd. for two reasons.

First, when a company requests an administrative review of itself, it bears the burden of identifying itself correctly.¹²¹ On December 31, 2013, the Department received a review request from Petitioner for LDK Solar Hi-Tech (Nanchang),¹²² and a self-request from a company identifying itself as “LDK Hi-Tech (Nanchang Co. Ltd.”¹²³ Given the differences in these names and the fact that “LDK Hi-Tech (Nanchang Co., Ltd.” requested a review of itself, the Department treated LDK Hi-Tech (Nanchang Co., Ltd. and LDK Solar Hi-Tech (Nanchang) Co.,

¹¹⁹ See *Rescission Notice*, 79 FR at 43713 n.1”).

¹²⁰ See *Yamaha Motor Co., Ltd. v. United States*, 910 F. Supp 679, 687 (CIT 1995) (“*Yamaha Motor*”).

¹²¹ See *Floral Trade Council v. United States*, 888 F.2d 1366 (CAFC 1989) (affirming the CIT’s conclusion that the Department “is not required to accept clarifications of unclear, ambiguous or otherwise inadequate requests for administrative review after the deadline for submitting requests for administrative review has passed.”); *Floral Trade Council v. United States*, 17 C.I.T. 1417 (CIT 1993) (“{T}he burdens on the requester are those caused by the mechanics of triggering the review that is actually desired. In practical terms, these burdens should be minimal.”).

¹²² See Letter from Petitioner to the Department, Re: “Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People’s Republic of China: Request for Administrative Review,” dated December 31, 2013 (barcode 3171415-01).

¹²³ See Letter from LDK Hi-Tech (Nanchang Co. Ltd. to the Department, Re: “Crystalline Silicon Photovoltaic Cells from the People’s Republic of China Request for Administrative Review,” dated December 31, 2013 (barcode 3171337-01) (“*LDK Self Request*”). See also Letter from Petitioner to the Department, Re: “Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People’s Republic of China: Request for Administrative Review,” dated December 31, 2013 (barcode 3171415-01).

Ltd., as separate companies for the purposes of initiating the review.¹²⁴ Subsequently, Petitioner withdrew its review request for LDK Solar Hi-Tech (Nanchang).¹²⁵ Because the only review request for LDK Solar Hi-Tech (Nanchang) Co., Ltd. was withdrawn within 90 days of the publication of the *Initiation Notice*, the Department rescinded the review with respect to LDK Solar Hi-Tech (Nanchang) Co., Ltd. in July 2014 and instructed CBP to liquidate LDK Solar Hi-Tech (Nanchang) Co., Ltd.'s POR entries.¹²⁶

The Department's finding that LDK Hi-Tech (Nanchang Co., Ltd. and LDK Solar Hi-Tech (Nanchang) Co., Ltd. are different companies was based on the fact that the respective review requests have significant material differences in their names. In particular, one named company includes the name "Solar" and one does not. In this proceeding, the Department received review requests for approximately 150 companies, many with similarly-spelled names.¹²⁷ Because many PRC exporters have names that are similar, the Department is often unable to determine when a spelling difference is material, especially at the time of initiation.

Second, LDK Solar Hi-Tech (Nanchang) Co., Ltd. failed to timely alert the Department of the typographical error in its request for review or timely challenge the Department's rescission of its review. In order to successfully administer a review involving over a hundred respondents, the Department must first finalize the pool of respondents that are subject to the review by rescinding the reviews of the companies for which review requests have been withdrawn. Finalizing the pool of respondents is integral to administering a review involving approximately 150 respondents as this initial rescission allows the Department to focus on companies for which review requests remain outstanding. The *Rescission Notice* informed LDK Solar Hi-Tech (Nanchang) Co., Ltd. that the Department had rescinded the review of the company and would instruct CBP to liquidate POR entries of its subject merchandise. Specifically, in the *Rescission Notice*, the Department stated that it intended to issue appropriate assessment instructions to CBP 15 days after publication of the notice of rescission in the *Federal Register* for those companies for which it rescinded the review and which had a separate rate granted in the most recently completed segment of this proceeding in which they were under review.¹²⁸ Consistent with this notification, in August 2014, the Department instructed CBP to liquidate LDK Solar Hi-Tech (Nanchang) Co., Ltd.'s entries during the instant POR at the cash deposit rate required at the time of entry.¹²⁹ Because the *Rescission Notice* informed interested parties of the Department's final determination with respect to the universe of respondents subject to the review, timely notice of this issue would have occurred *prior* to rescission of the reviews. At the very latest, LDK Solar Hi-Tech (Nanchang) Co., Ltd. should have notified the Department prior to issuance

¹²⁴ See *Initiation Notice*.

¹²⁵ See Letter from Petitioner to the Department, Re: "Certain Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Withdrawal of Requests for Administrative Review," dated May 5, 2014 (barcode 3199754-01).

¹²⁶ See *Rescission Notice*; see also CBP message number 4231310, dated August 19, 2014 (barcode 3223084-01). This message is also available at: <http://adcvd.cbp.dhs.gov/adcvdweb/>.

¹²⁷ The following list identifies some of the companies where the names of the companies differ by one word: Wuxi Suntech Power Co., Ltd. and Wuxi Sunshine Power Co., Ltd. ET Solar Energy Limited and ET Solar Industry Limited, Canadian Solar Manufacturing (Luoyang) Inc. and Canadian Solar Manufacturing (Changshu) Inc. Jiawei Solarchina (Shenzhen) Co., Ltd. and Jiawei Solarchina Co., Ltd. Changzhou NESL Solartech Co., Ltd. is a company unrelated to Changzhou Trina Solar Energy Co., Ltd.

¹²⁸ See *Rescission Notice*, 79 at 43714.

¹²⁹ See CBP message number 4231310, dated August 19, 2014 (barcode 3223084-01).

of the liquidation instructions on August 19, 2014, which was over one month after publication of the notice.

We disagree with LDK Solar Hi-Tech (Nanchang) Co., Ltd.'s contention that the CIT's decision in *Fine Furniture* is relevant to this review. Unlike *Fine Furniture*, where the companies seeking to provide corrective information after the preliminary determination remained under review, here, LDK Solar Hi-Tech (Nanchang) Co., Ltd. attempted to clarify the record well after its review was rescinded and approximately five months after the Department ordered liquidation of its entries.

While LDK Solar Hi-Tech (Nanchang) Co., Ltd. argues that the Department has a legal obligation to issue supplemental questionnaires to correct the record, at the time of the rescission the Department was unaware of the typographical error made by LDK Solar Hi-Tech (Nanchang) Co., Ltd. Further, the *Initiation Notice* and *Rescission Notice* provided ample notification to LDK Solar Hi-Tech (Nanchang) Co., Ltd. of any name discrepancy. Both notices stated the fact that the Department was treating LDK Hi-Tech (Nanchang Co., Ltd. and LDK Solar Hi-Tech (Nanchang) Co., Ltd. as separate and distinct entities. LDK Solar Hi-Tech (Nanchang) Co., Ltd.'s reliance on *China Kingdom* is misguided as it involves an instance in which a respondent notified the Department of errors in the database used to calculate normal value and the respondent attempted to submit data to the Department prior to verification, which the Department subsequently rejected as untimely. In that instance, the CIT ruled that the Department was required to accept the respondent's data which the Department had requested. In contrast, in this instance, LDK Solar Hi-Tech (Nanchang) Co., Ltd. requests that the Department continue to review it although its review has already been rescinded and the Department has instructed CBP to liquidate its POR entries.

LDK Solar Hi-Tech (Nanchang) Co., Ltd.'s claim that the Department reviewed its separate rate certification and made a determination concerning it is incorrect. In the *Preliminary Results* of the review, which were issued in December 2014, the Department *inadvertently* listed LDK Solar Hi-Tech (Nanchang) Co., Ltd. as a separate rate company that was not individually examined and which is entitled to a separate rate.¹³⁰ However, as noted above, the review was rescinded with respect to LDK Solar Hi-Tech (Nanchang) Co., Ltd. in July 2014, well before the Department issued the *Preliminary Results* of the instant review. The Department noted this when asked by LDK Solar Hi-Tech (Nanchang) Co., Ltd.¹³¹

In addition, we note that because the review request for LDK Hi-Tech (Nanchang Co., Ltd. has not been withdrawn, LDK Hi-Tech (Nanchang Co., Ltd. remains under review. LDK Hi-Tech (Nanchang Co., Ltd. has not provided the Department with information regarding its eligibility for separate rate status. Therefore, we intend to treat LDK Hi-Tech (Nanchang Co., Ltd. as part of the PRC-Wide Entity.

¹³⁰ See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2012-2013*, 80 FR 1021, 1023 (January 8, 2015) (*Preliminary Results*).

¹³¹ See Letter from the Department to LDK Solar Hi-Tech (Nanchang) Co., Ltd. dated March 12, 2015.

Comment 9: Whether to Apply Adverse Facts Available (“AFA”) to Two Unreported Yingli Sales

Yingli

- In the *Preliminary Results*, the Department erred by applying AFA to the two previously unreported U.S. sales which were provided by Yingli as minor corrections¹³² at the beginning of its U.S. verification because: 1) the Department failed to adhere to its practice of accepting new information when the information makes minor corrections to information already on the record; 2) the Department may not apply AFA in disregard of information on the record that is not missing or otherwise deficient; 3) Yingli cooperated to the best of its ability with the Department’s requests for information; and 4) the Department may not decline to consider the U.S. sales reported at verification because this information meets the criteria enumerated in section 782(e) of the Act. Therefore, the Department should accept these two U.S. sales reported by Yingli at verification as minor corrections and use them in the calculation of Yingli’s margin for the final results.¹³³
- While preparing for the U.S. sales verification, Yingli Green Energy Americas, Inc. (“YGEA”) discovered that two U.S. sales were not included in the U.S. sales database already on the record and presented Department officials with all of the information necessary to include these sales in the Department’s margin calculations, including a complete U.S. sales database for these sales, updated total quantity and value data, an updated sales reconciliation, and related sales documentation.¹³⁴ The verification agenda indicates that the Department will accept new information at verification when: 1) the need for that information was not evident previously; 2) the information makes minor corrections to information already on the record; and 3) the information corroborates, supports, or clarifies information already on the record.¹³⁵ The Department has regularly considered the addition of a small number of previously-unreported sales to be a minor correction to the U.S. sales database already on the record.¹³⁶

¹³² See Submission of Yingli, “Re: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People’s Republic of China: Verification Minor Corrections,” dated November 7, 2014 (public version).

¹³³ See Letter from Yingli to the Secretary of Commerce, “Re: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules from the People’s Republic of China: Yingli’s Case Brief,” dated March 23, 2015 (“Yingli Case Brief”) at 11.

¹³⁴ See Yingli Case Brief at 11-12; *see also*, Letter from Yingli to the Secretary of Commerce, “Re: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People’s Republic of China: Verification Minor Corrections,” dated November 6, 2014, at 1, and Exhibits A and B (“U.S. verification minor corrections”); “Verification of the Sales Information Provided by Yingli Green Energy Americas, Inc. (“YGEA”) in the Antidumping Duty Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or not Assembled Into Modules, (“solar cells”), from the People’s Republic of China,” dated December 31, 2014 (“YGEA verification report”) at 11-13, 19-22, Exhibits 6, 7, and 20.

¹³⁵ See Yingli Case Brief at 13.

¹³⁶ *Id.* at 13-15, citing *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People’s Republic of China*, 71 FR 29303 (May 22, 2006) (“*Diamond Sawblades from China*”), and accompanying Issues and Decision Memorandum at Comment 19; *Light-Walled Rectangular Pipe and Tube From Mexico: Notice of Final Determination of Sales at Less Than Fair Value*, 69 FR 53677 (September 2, 2004) (“*Pipe and Tube from Mexico*”), and accompanying Issues and Decision Memorandum at Comment 4; *Notice of Final Determination of Sales at Less Than Fair Value: Certain Large Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe From Mexico*, 65 FR 39358 (June 26, 2000) (“*Seamless Standard, Line and Pressure Pipe From Mexico*”) and accompanying Issues and Decision Memorandum Comment 7; *Notice of Final Determination of Sales at Less Than*

- In the *Preliminary Results* the Department relied upon *SSSS in Coils from Germany*¹³⁷ (which in turn relied upon *CTL Plate from South Africa*¹³⁸ and *Lock Washers from China*¹³⁹) as support for the application of partial AFA to Yingli. These cases are different from the facts for this administrative review: 1) there were a larger quantity of unreported U.S. sales than Yingli's two sales; 2) unlike *CTL Plate from South Africa* and *SSSS in Coils from Germany*, Yingli provided all of the information necessary to include these sales in the Department's margin calculations and so the record contains such information; and 3) unlike *SSSS in Coils from Germany*, Department officials found no major errors or omissions at verification.¹⁴⁰
- The Department can only apply partial AFA if there are gaps in the record, and there are no gaps of missing or otherwise deficient information for these two U.S. sales because this information is now on the record and was verified to the same extent as the other U.S. sales information used in the *Preliminary Results*.¹⁴¹ The Department verified the updated total quantity and value data, which included these previously-unreported sales, and reconciled these data with YGEA's financial statements.¹⁴² Also, the Department verified that sale SEQU A¹⁴³ for invoice B,¹⁴⁴ which represented a significant number (*i.e.*, approximately 90 percent (about 600,000 watts)¹⁴⁵ of the total quantity of previously-unreported sales, and contained subject merchandise that should be included in the U.S. sales database, by doing the following: Department officials accessed Yingli's flash test database ("FTDB") by entering the customer name and purchase order number from the invoice into the computer system, then confirmed that the cell type codes from the FTDB indicated Chinese origin cells and tied the internal shipment numbers from third party logistics companies' invoices to information from the FTDB and that YGEA reported the entries as subject merchandise and paid AD/CVD cash deposits upon entry.¹⁴⁶ The Department used these exact same tests to verify that sale SEQU C for invoice D, which had been reported as a sale of subject merchandise and identified as a minor correction at the same time as SEQU A,¹⁴⁷ did not contain subject merchandise and therefore should be excluded from the U.S. sales database.¹⁴⁸ The Department has no basis to treat these two sales differently.
- Yingli cooperated to the best of its ability with the Department's requests for U.S. sales

Fair Value: Certain Cut-To-Length Carbon-Quality Steel Plate Products from Japan, 64 FR 73215, 73234 (December 29, 1999) ("*CTL Carbon Steel Plate from Japan*"); *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From the Republic of Korea*, 64 FR 30664 (June 8, 1999) ("*SSSS in Coils from Korea*") and accompanying Issues and Decision Memorandum Comment 7.

¹³⁷ See *Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Germany*, 64 FR 30710, 30731-32 (June 8, 1999) ("*SSSS in Coils from Germany*") r.

¹³⁸ See *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From South Africa*, 62 FR 61731 (November 19, 1997) ("*CTL Plate from South Africa*").

¹³⁹ See *Final Determination of Sales at Less Than Fair Value: Certain Helical Spring Lock Washers From the People's Republic of China*, 58 FR 48833 (September 20, 1993) ("*Lock Washers from China*").

¹⁴⁰ See Yingli Case Brief at 16-18.

¹⁴¹ *Id.* at 19-23.

¹⁴² *Id.* at 20-21.

¹⁴³ See Issues and Decision Memorandum for Yingli (business proprietary version) ("*Yingli IDM*"), dated July 7, 2015.

¹⁴⁴ See *Yingli IDM*.

¹⁴⁵ See Yingli Case Brief (public version) at 21, using publicly ranged numbers.

¹⁴⁶ See Yingli Case Brief at 21.

¹⁴⁷ See *Yingli IDM*.

¹⁴⁸ See Yingli Case Brief at 21-22.

information yet the Department expected perfection, despite the Department's reliance on *Nippon Steel*¹⁴⁹ in the *Preliminary Results*.¹⁵⁰ Yingli properly classified, as either subject or non-subject merchandise during the POR, the "vast majority"¹⁵¹ of its total modules sold.¹⁵² This is evidence of the "maximum efforts" put forth by Yingli, especially considering that the collection of the information was complicated by several factors: 1) because of the unusual origin rules in the scope of the AD order, Yingli had to implement a system to track the origin of the cell in each imported module in order to determine whether merchandise was subject to this proceeding; 2) it was necessary for Yingli to link each importation of merchandise to the corresponding unaffiliated party sale by YGEA; 3) many sales consisted of thousands of modules of multiple cell origins (not just Chinese origin cells) that had to be traced manually; 4) Yingli had three channels of trade for its U.S. module sales and each channel required a different approach to identify the subject sales.¹⁵³ In *SSPC from Belgium*,¹⁵⁴ the Department decided not to apply an adverse inference in choosing from the facts available when it found that there is a mitigating factor.¹⁵⁵

- The Department did not apply AFA to respondents in *Hot-Rolled Carbon Steel from India*¹⁵⁶ and *Shrimp from Thailand*,¹⁵⁷ although these respondents cooperated to a lesser degree than Yingli, but instead used neutral facts available by applying the weighted-average margin calculated for reported sales.¹⁵⁸
- The Department may not decline to consider the sales reported at verification because this information meets the criteria enumerated in section 782(e) of the Act.¹⁵⁹ The Department has previously accepted sales reported at verification under this provision when those sales meet the statutory criteria.¹⁶⁰ The CIT has affirmed the use of this provision as a basis to accept sales reported as minor corrections at verification.¹⁶¹

Petitioner

- Yingli failed to timely report two U.S. sales during the POR and the Department properly

¹⁴⁹ See *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (CAFC 2003) ("*Nippon Steel*").

¹⁵⁰ See Yingli Case Brief at 23-27.

¹⁵¹ *Id.* at 26.

¹⁵² *Id.* at 24.

¹⁵³ *Id.* at 25-26.

¹⁵⁴ See *Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review*, 70 FR 72789 (December 7, 2005) ("*SSPC from Belgium*") and accompanying Issues and Decision Memorandum at Comment 9.

¹⁵⁵ See Yingli Case Brief at 25-26.

¹⁵⁶ See *Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from India*, 66 FR 50406 (October 3, 2001) ("*Hot-Rolled Carbon Steel from India*") and accompanying Issues and Decision Memorandum at Comment 10.

¹⁵⁷ See *Certain Frozen Warmwater Shrimp From Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 50933 (August 29, 2008) ("*Shrimp from Thailand*") and accompanying Issues and Decision Memorandum at Comments 13 and 14.

¹⁵⁸ See Yingli Case Brief at 27.

¹⁵⁹ *Id.* at 27-28.

¹⁶⁰ *Id.* at 28, citing *Diamond Sawblades from China; Polyethylene Retail Carrier Bags from Indonesia: Final Determination of Sales at Less Than Fair Value*, 75 FR 16431 (April 1, 2010) ("*PE Bags from Indonesia*") and accompanying Issues and Decision Memorandum at Comment 8.

¹⁶¹ See Yingli Case Brief at 28-29, citing *Maui Pineapple Co. Ltd. v. United States*, 264 F. Supp. 2d at 1244, 1256-60 (CIT 2003) ("*Maui Pineapple*").

applied partial AFA in the *Preliminary Results*.¹⁶² The application of partial AFA was consistent with the Department's established practice.¹⁶³

- The cases cited by Yingli in support of its assertion that the Department should accept its two unreported sales as minor corrections to its U.S. sales database are inapposite.¹⁶⁴ For example, in *Diamond Sawblades from China*, the respondent did not timely report a number of sales because these sales were misclassified in the accounting system of the respondent's affiliated reseller in the United States. Yingli had no similar excuse for its failure to timely report its sales. To the contrary, Yingli acknowledges that the sales appeared as subject merchandise in its FTDB.¹⁶⁵
- Yingli errs in arguing that the Department may not apply facts available. Yingli did not submit the information regarding the relevant sales in a timely manner. Yingli also failed to act to the best of its ability by omitting information requested from the Department from its responses and therefore did not put forth its maximum effort to investigate and obtain full and complete answers to the Department's inquiries. As explained by the CAFC in *Nippon Steel*, the "best of its ability" standard does not allow for "inattentiveness, carelessness, or inadequate record keeping."¹⁶⁶ Yingli had numerous opportunities to correct its U.S. sales database prior to verification and made substantial changes to its reported U.S. sales database in its June 27, 2014, supplemental Section C questionnaire response and, on October 1, 2014, just two weeks prior to verification, submitted another revised U.S. sales database in its Section D supplemental questionnaire response. Yingli had ample time to collect and prepare comprehensive and accurate sales data and to eliminate any mistakes or omissions in such data. Yingli had sales documentation to demonstrate that these two sales should be reported to the Department but failed to cooperate to the best of its ability and the application of partial AFA is warranted.¹⁶⁷
- Yingli's citation to section 782(e) of the Act as support for accepting Yingli's two previously

¹⁶² See Letter from SolarWorld Americas, Inc. ("Petitioner") to the Secretary of Commerce, "Re: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Rebuttal Brief of SolarWorld Americas, Inc.," dated March 30, 2015 ("Petitioner Rebuttal Brief") at 5.

¹⁶³ See Petitioner Rebuttal Brief at 6, citing *Final Determination of Sales at Less Than Fair Value: Silica Bricks and Shapes From the People's Republic of China*, 78 FR 70918, 70919 (November 27, 2013) ("*Silica bricks from China*") and Issues and Decision Memorandum at Comment 7; *Wooden Bedroom Furniture From the People's Republic of China: Final Results and Final Rescission in Part*, 76 FR 49729, 49732 (August 11, 2011) ("*Furniture from China 2011*") and accompanying Issues and Decision Memorandum at Comment 1; *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Critical Circumstances, in Part*, 75 FR 57449 (September 21, 2010) ("*Seamless Pipe from China*") and accompanying Issues and Decision Memorandum at Comment 17; *Wooden Bedroom Furniture From the People's Republic of China: Final Results and Final Rescission in Part*, 75 FR 50992, 50996 (August 18, 2010) ("*Furniture from China 2010*") and accompanying Issues and Decision Memorandum at Comment 31; *Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping*, 75 FR 20335, 20339 (April 19, 2010) ("*OCTG from China*") and accompanying Issues and Decision Memorandum at Comment 9; and *Polyethylene Retail Carrier Bags from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 2511, 2512-13 (January 15, 2009) ("*PE Bags from Thailand*") and accompanying Issues and Decision Memorandum at Comment 2; *SSSS in Coils from Germany; CTL Plate from South Africa; and Lock Washers from China*.

¹⁶⁴ See Petitioner Rebuttal Brief at 6.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 7, citing *Nippon Steel*, 337 F.3d at 1382.

¹⁶⁷ *Id.* at 7-9.

unreported sales fails because, according to the statute, the information must be submitted by the deadline established for its submission and Yingli's two sales were not submitted by the deadline. The Department is clear that it does not accept new factual information at verification.¹⁶⁸

Department's Position:

We agree with Petitioners and continue to find that the use of partial AFA is appropriate with respect to Yingli's two unreported sales. Pursuant to section 776(a)(2)(D) of the Act, the Department may apply facts available if an interested party provides information requested by the Department but the information cannot be verified. Further, section 782(e) of the Act states that the Department shall not decline to consider submitted information if all of the following requirements are met: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Section 776(b) of the Act provides that the Department may use AFA if it finds that an interested party failed to cooperate by not acting to the best of its ability to comply with a request for information. In addition, the Statement of Administrative Action accompanying the Uruguay Round Agreements Act explains that the Department may use AFA "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."¹⁶⁹

The use of facts available is warranted here because the missing sales that officials presented during the verification of Yingli's U.S. affiliate, YGEA, were not verified.¹⁷⁰ At verification, YGEA officials reported, as "minor corrections," that: 1) two additional sales of solar modules should be included in the U.S. sales database because the modules incorporated Chinese solar cells (referred to herein as the unreported U.S. sales); 2) two U.S. sales of modules were erroneously included in the U.S. sales database because further research revealed that these modules do not contain Chinese solar cells and thus these two sales should be deleted from the U.S. sales database; and, 3) two reported U.S. sales require an adjustment to the reported quantity because the reported quantity includes modules with non-Chinese solar cells.¹⁷¹

While verifying Yingli in China, the Department conducted a number of tests of Yingli's bar code system for tracing solar cells in its modules back to the correct country of manufacture, including examining the database that Yingli developed for tracking the country of manufacture for solar cells, and tracing entries in that database to source documents.¹⁷² During that portion of

¹⁶⁸ *Id.* at 9.

¹⁶⁹ See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316, at 870 (1994) ("SAA"); see also *Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Bar from India*, 70 FR 54023, 54025-26 (September 13, 2005).

¹⁷⁰ See *YGEA verification report* at 3, where the Department explained that YGEA's officials were informed that we would collect the information that was provided regarding these minor corrections but the fact that we were collecting this information did not mean that the Department had made a decision to accept these changes or that it had made a decision with respect to whether it was appropriate to make these changes to the U.S. sales database.

¹⁷¹ See *YGEA verification report* at 2-3.

¹⁷² See "Verification of the sales and factors responses of Yingli Energy (China) Co., Ltd. and Baoding Tianwei

the verification, Yingli officials did not identify these misreported or unreported sales. It was not until the Department completed its verification in China, and began its verification of YGEA in the United States, that company officials identified these “minor corrections” resulting from misidentification of the country of manufacture of solar cells. However, because the source documents related to the country of manufacture of the solar cells used by Yingli were in China, not the United States, the verifiers could not test, while in the United States, whether Yingli’s *source documents* supported the modifications.¹⁷³ As a result, with the exception of one modification for which additional supporting documentation was provided, which we believe sufficiently supports the claimed modification, we find the sales modifications to be unverified.

Yingli contends that the Department should accept at least one of the unreported sales because the Department verified the same supporting documentation for both the modification, which it accepted, and one unreported U.S. sale, which it did not accept. We disagree that these two situations are analogous. The modification that was accepted involves removing a sale of non-subject merchandise from the U.S. sales database. The Department was able to verify that the sale should not have been reported as subject merchandise because the modules in the sale were made from third country solar cells, and once the cell origin was confirmed, we accepted the modification because no additional verification of other data was necessary, such as price, control number, and payment information. In contrast, we were not able to verify the price or quantity of the unreported sales because we could not trace the sales invoice amounts to the company’s accounting or payment records, nor were we able to verify any of the specific sales adjustments, such as movement expenses. Thus, even if we could consider the country of manufacture of the solar cells in the modules of the unreported sales as verified, necessary information related to the sale is unverified, *i.e.*, the sales amounts and adjustments. Therefore, apart from removing one sale of non-subject merchandise, the Department has not made the modifications to the U.S. sales database requested by Yingli, and as in the *Preliminary Results*,¹⁷⁴ we have relied upon facts available with respect to these sales in the final results of review.

Moreover, although Yingli characterized the modifications as “minor” and cited instances when the Department accepted, as minor corrections, a small number of previously-unreported sales, the situation here is distinguishable from those cases because the sales quantities involved are not minor.¹⁷⁵ Although Yingli focuses on its unreported sales, in total, the six adjustments requested

Yingli New Energy Resources Co., Ltd. in the antidumping duty administrative review of crystalline silicon photovoltaic cells, whether or not assembled into modules (“solar cells” or “modules”), from the People’s Republic of China,” (“*Yingli verification report*”), dated December 31, 2014, at 16-17, and 19-20.

¹⁷³ At YGEA’s verification, Department verifiers were only able to test Yingli’s FTDB in the United States as confirmation of Yingli’s country of origin for the solar cells in its modules for certain sales based on the U.S. customer and purchase order number. Yingli has a bar code system in China which contained detailed information about the module, such as the country of origin of the solar cells contained in each module produced in China. Yingli explained that it developed the FTDB so that it would be able to identify the country of origin of the solar cells, either Chinese or third country, incorporated into the modules sold in the United States during the POR. Yingli explained that certain information was sent from Yingli in China to YGEA, including the cell type code which is used to determine the country of origin of the solar cells. *See YGEA verification report* at 16-22.

¹⁷⁴ *See* “Decision Memorandum for the Preliminary Results of the 2012-2013 Antidumping Duty Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People’s Republic of China,” (“*PDM*”), dated December 31, 2014, at 21.

¹⁷⁵ *Cf. Diamond Sawblades from China* at Comment 19 (“{As} the information presented at verification demonstrate

by Yingli amount to significant changes to the U.S. sales database representing substantial percentages of the total reported quantity and value (E percent and F percent,¹⁷⁶ respectively).¹⁷⁷ Thus, with the exception noted above, we do not find it appropriate to deem the adjustments to be “minor” corrections or adjust the U.S. sales database to reflect the corrections presented at verification.

As noted above, where the Department determines that the use of facts available is warranted, section 776(b) of the Act permits the Department to apply an adverse inference if it makes the additional finding that “an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information.” The CAFC, in *Nippon Steel*, provided an explanation of the “failure to act to the best of its ability” standard, noting that it requires a respondent to “put forth its maximum effort to provide {the Department} with full and complete answers to all inquiries in an investigation. While the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness or inadequate record keeping.”¹⁷⁸ It assumes that respondents “are familiar with the rules and regulations that apply to the import activities undertaken” and, in order to avoid an adverse inference, it requires them to, among other things, “conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of” their ability to do so.¹⁷⁹ The CAFC noted that the statute does not require the Department to show that a respondent made more than a simple mistake in order to apply an adverse inference, nor is an excuse that the respondent “did not think through inadvertence” sufficient; rather “[i]nadequate inquiries may suffice. The statutory trigger for {the Department’s} consideration of an adverse inference is simply a failure to cooperate to the best of respondent’s ability, regardless of motivation or intent.”¹⁸⁰

Compliance with the “best of the ability” standard is determined by assessing whether a respondent has put forth its maximum effort to provide the Department with full and complete answers to all inquiries in an investigation or review. The record indicates that Yingli did not provide complete U.S. sales information throughout the course of the review. After reporting the quantity and value of its U.S. sales in response to a quantity and value questionnaire and reporting the same U.S. sales quantity and value in its section A questionnaire response,¹⁸¹

that these sales were *extremely small* in comparison to {the respondent’s} other sales of subject merchandise, the Department was able to verify this information and accept it onto the record as an appropriate minor correction.” (emphasis added); *Pipe and Tube from Mexico* at Comment 4 (finding the unreported sales “constituted a *very minor percentage* of total U.S. sales” (emphasis added)); *Seamless Standard, Line and Pressure Pipe From Mexico* at Comment 7 (“the information related to {the two} sales that was presented to the Department as a clerical error at verification constitutes a minor correction to information already on the record”); *CTL Carbon Steel Plate from Japan* at Comment 13 (finding that the “disclosed sales constitute minor corrections to information already on the record”); *SSSS in Coils from Korea* at Comment 7 (explaining that the U.S. sale that respondent inadvertently excluded from the sales database was accepted by the Department as a minor correction).

¹⁷⁶ See *Yingli IDM*.

¹⁷⁷ See *YGEA verification report* at 3.

¹⁷⁸ See *Nippon Steel* at 1382.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ See Submission of Yingli, “Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China: Yingli’s Response to the Department’s Section A Questionnaire, Including Appendix X,” dated April 18, 2014.

Yingli then made substantial increases to the reported figures in its section C questionnaire response,¹⁸² increased the figures again by a material amount in a supplemental questionnaire response,¹⁸³ and again increased the figures by a material amount in response to another supplemental questionnaire.¹⁸⁴ As noted above, at verification Yingli then identified additional unreported sales that it wanted to add to the U.S. sales database, in addition to the changes already described. By failing to report these additional sales prior to verification (the purpose of which is to confirm information already submitted), Yingli demonstrated inattentiveness or carelessness in responding to the Department's requests for information that resulted in the company failing to reply accurately and completely to the Department's requests. In preparing responses to inquiries from the Department, it is presumed that respondents are familiar with their own records. Yet Yingli failed to accurately report U.S. sales from its records. In fact, some of Yingli's adjustments to the U.S. sales quantity and value came about, in part, through the Department's detailed and very specific supplemental questionnaires, which were aimed at U.S. sales completeness. In light of the above, we conclude that Yingli did not put forth its maximum effort to provide the Department with complete U.S. sales information and thus it has not cooperated to the best of its ability with respect to the sales information at issue.

Further, we find the cases that Yingli cited to support its argument unpersuasive.¹⁸⁵ These cases are not applicable because they involve situations where the Department was able to verify the sales data related to the unreported sales reported by the respondent as minor corrections or discovered by Department officials at verification). As explained above, with one exception, we did not verify the sales information provided by Yingli, including the sales information related to the two previously unreported U.S. sales. In addition, as noted above, the percentages of the total reported U.S. sales quantity represented by the corrections presented at verification are not minor.

Also, Yingli contends that there were mitigating factors, as in *SSPC from Belgium*, which the Department should consider and then determine not to apply partial AFA. According to Yingli, those factors include: unusual origin rules in the scope of the AD order which made Yingli implement a system to track the origin of the solar cells and then link each specific importation

¹⁸² See Submission of Yingli, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Yingli's Response to the Department's Section C Questionnaire, Including Appendices V and XI," dated May 5, 2014, at C-2 and Appendix A-44, where Yingli noted that the data in its February 19, 2014, quantity and value questionnaire response were based in part on estimates due to the complex process needed to identify sales of subject merchandise in this POR.

¹⁸³ See Submission of Yingli, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Yingli's Response to the Department's Supplemental Section C Questionnaire," dated June 30, 2014, at revised Exhibit A-44 (public version).

¹⁸⁴ See Submission of Yingli, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Yingli's Response to the Department's Fourth Section D Supplemental Questionnaire," dated October 1, 2014, at revised Exhibit A-44 (public version).

¹⁸⁵ See *Diamond Sawblades from China* at comment 19 (where the Department was able to verify {the information related to the unreported sales} and accept it onto the record as an appropriate minor correction"); *Pipe and Tube from Mexico* at Comment 4 (where the Department verified two previously unreported sales); *Seamless Standard, Line and Pressure Pipe From Mexico* at Comment 7 (where the Department verified two previously unreported sales as a minor correction); *CTL Carbon Steel Plate from Japan* at Comment 13 (where the Department verified three previously unreported sales as a minor correction); *SSSS in Coils from Korea* at Comment 7 (where the Department verified a sale as a minor correction).

to the corresponding sale by YGEA; multiple channels of trade in the U.S. market; and many sales which consisted of thousands of modules of multiple cell origins (not just Chinese origin cells) that had to be traced manually. First, the facts in the *SSPC from Belgium* case are distinguishable from the facts in the instant case. In *SSPC from Belgium*, the Department determined that it was not appropriate to apply partial AFA, despite that the respondent did not report a subset of subject merchandise that the Department specifically requested be reported, because the respondent had not reported that particular subset of subject merchandise in two prior reviews and the Department had previously accepted the respondent's exclusion of the subset.¹⁸⁶ In the instant case, no such mitigating factor exists. Yingli was aware of the scope of the AD order from the investigation, where Yingli was a separate rate respondent and reported its sales and quantity data, and Yingli is now a mandatory respondent in the first administrative review of this order. Additionally, we do not believe multiple channels of trade or significant sales volume provide a legitimate basis for underreporting or misreporting U.S. sales. As noted above, the Department accepted the repeated significant changes to the quantity and value of reported U.S. sales that Yingli submitted before verification. However, the Department was not required to accept the material changes to the quantity and value of the reported U.S. sales that Yingli presented at the U.S. sales verification, particularly as Yingli's source documentation in China was no longer available for inspection. The record demonstrates that Yingli failed to put forth its maximum effort to accurately report its U.S. sales and thus adverse inferences are warranted.

For all of the above reasons, the Department continues to find that Yingli failed to cooperate by not acting to the best of its ability and therefore, the use of partial adverse facts available is appropriate in selection of FA pursuant to section 776(b) of the Act.

Comment 10: Unreported FOPs by Suppliers and Tollers

Petitioner

- The Department should reject Wuxi Suntech's inappropriate substitution of its own data for the missing FOP data of toll processors, and should instead use as a substitute the highest FOP data reported by toll processors that have provided data in this review.¹⁸⁷
- Accepting Wuxi Suntech's substitution of its own FOP data in place of the missing toll processors' FOP data would ignore meaningful differences in the actual production experience of the processors at issue, and would allow respondents to pick and choose the toll processor data that they report to the Department.
- The inaccuracies and potential data manipulation that would result from allowing respondents to substitute their own production experience for that of their toll processors would hinder the Department's ability to calculate accurate margins.
- Applying the highest FOP data reported by tollers that have provided data in this review, as facts available, is consistent with Department practice and is supported by the Department's precedent in *Certain Steel Nails from the PRC*.¹⁸⁸

¹⁸⁶ *SSPC from Belgium* at Comment 9.

¹⁸⁷ Petitioner Case Brief at 36-38.

¹⁸⁸ *Id.* (citing *Certain Steel Nails from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review; 2012-2013*, 79 FR 58744 (September 30, 2014) ("*Certain Steel Nails from the PRC*"), and the accompanying Preliminary Decision Memorandum).

Wuxi Suntech

- Wuxi Suntech cooperated to the best of its ability to obtain and report FOP data from its tollers, and as such, the Department should not make any changes to its reported data.¹⁸⁹
- Wuxi Suntech provided detailed information about its tolling operations, and its efforts to obtain FOP data from all of its unaffiliated tollers.
- Wuxi Suntech's tollers were only responsible for providing energy and labor inputs, and, thus, there is no basis for concluding Wuxi Suntech manipulated its FOP reporting.
- The amount of production represented by uncooperative tollers is insignificant.¹⁹⁰
- The Department will normally excuse a respondent's non-reporting of its unaffiliated toller's FOP data when the respondent requested, but despite its best efforts, was unable to obtain the data from the unaffiliated tollers.¹⁹¹
- When the respondent also performs the same production processes as the tollers, the Department will use the respondent's own FOP data as facts available.¹⁹²

Department's Position:

We disagree with Petitioner that using the highest FOP data reported by toll processors that have provided data in this review in place of missing FOP data for tollers is appropriate. Section 776(a) of the Act provides that, subject to section 782(d) of the Act, the Department shall apply "facts otherwise available" if: (1) necessary information is not on the record, or (2) an interested party or any other person: (A) withholds information that has been requested, (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act, (C) significantly impedes a proceeding under the AD statute, or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

Wuxi Suntech was unable to provide the requested FOP information for certain unaffiliated tollers. Because that information is not on the record, we find that the application of facts available is appropriate. However, we find that the record supports accepting, as facts available, the FOP data that Wuxi Suntech used in place of the missing tollers' FOPs. Where a respondent has a number of tollers, it identified its tollers in a timely manner, documented its unsuccessful attempts to obtain FOPs from its tollers, the non-reporting tollers account for only a small

¹⁸⁹ Wuxi Suntech's March 30, 2015 Rebuttal Brief at 11-14.

¹⁹⁰ *Id.* at Exhibit 1.

¹⁹¹ See Wuxi Suntech's March 30, 2015 Rebuttal Brief at 13 (citing, *Small Diameter Graphite Electrodes from the People's Republic of China: Final Results of the First Administrative Review of the Antidumping Duty Order and Final Rescission of the Administrative Review, in Part*, 76 FR 56397 (September 13, 2011) and accompanying Issues and Decision Memorandum at Comment 9; *Drill Pipe From the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Critical Circumstances*, 76 FR 1966 (January 11, 2011) and accompanying Issues and Decision Memorandum at Comment 14; and *Wire Decking from the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 75 FR 1597 (January 12, 2010) unchanged in *Wire Decking from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 32905 (June 10, 2010)).

¹⁹² *Id.* at 13-14 (citing *Certain Steel Nails from the People's Republic of China: Preliminary Results and Preliminary Rescission, in Part, of the Antidumping Duty Administrative Review and Preliminary Intent To Rescind New Shipper Review*, 76 FR 56147 (September 12, 2011)).

portion of FOPs, and there is usable FOP information from other suppliers that could serve as a substitute for the missing FOPs, the Department has not required the unreported FOPs but used facts available in place of the missing information.¹⁹³ In this proceeding, the record shows that Wuxi Suntech had a large number of tollers, it identified its tollers and documented its unsuccessful attempts to obtain FOPs from the tollers, the quantity of inputs supplied by the non-reporting tollers account for only a small portion of the total FOPs used during the POR, and there are usable FOP data on the record that can serve as a substitute for the missing FOP information.¹⁹⁴ As such, we are using the FOP data of the reporting tollers submitted by Wuxi Suntech as a substitute for the missing tollers' FOPs in accordance with section 776(a) of the Act.

We are not adopting Petitioner's suggestion to use the highest consumption quantities reported by any toller for each relevant input for several reasons. First, Petitioner argues to use the highest FOP consumption quantities from the reporting tollers because it claims that it is not appropriate to accept Wuxi Suntech's own FOP data in place of the missing FOP data. However, with the exception of modules/laminates, Wuxi Suntech did not use its own FOP data as a substitute for the missing FOP data; rather Wuxi Suntech used the FOP data of the reporting tollers as a substitute. Second, using the highest FOP consumption quantities reported by any toller for each relevant input would be using an adverse inference. Thus, Petitioner is essentially arguing for the application of partial adverse facts available. We do not find that the criteria for using an adverse inference apply in this instance. Pursuant to section 776(b) of the Act, the Department uses facts otherwise available with an adverse inference when a party fails to cooperate by not acting to the best of its ability to comply with a request for information. However, the record shows that Wuxi Suntech made multiple attempts to obtain FOP data from its unaffiliated tollers based on the Department's request for information.¹⁹⁵ Based on this fact, we find that Wuxi Suntech cooperated to the best of its ability. Thus use of the highest consumption quantities reported by tollers is not supported by the record.

¹⁹³ See, e.g., *Frontseating Service Valves From the People's Republic of China: Final Results of the 2008-2010 Antidumping Duty Administrative Review of the Antidumping Duty Order*, 76 FR 70706 (November 15, 2011) and accompanying Issues and Decision Memorandum at Comment 12. See also *Small Diameter Graphite Electrodes from the People's Republic of China: Final Results of the First Administrative Review of the Antidumping Duty Order and Final Rescission of the Administrative Review*, 76 FR 56397 (September 13, 2011) and accompanying Issue and Decision Memorandum at Comment 9. In addition, even in the case of suppliers, where a respondent has a large number of suppliers, the Department has excused the respondent from reporting the FOPs from some of its suppliers. For example, in *Activated Carbon ARI*, due to the large number of suppliers, the Department excused the respondent from reporting FOP data for its smallest suppliers. See *Certain Activated Carbon From the People's Republic of China: Notice of Preliminary Results of the Antidumping Duty Administrative Review and Extension of Time Limits for the Final Results*, 74 FR 21317,21320-21321 (May 7, 2009) ("*Activated Carbon AR I*"), unchanged in *First Administrative Review of Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 57995 (November 10, 2009) ("*Activated Carbon AR I Final*"). Additionally, the Department has excused a respondent from reporting FOPs from a supplier where the FOP data are of limited quantity and the respondent reports that it produces comparable products. See *Activated Carbon AR I*, 74 FR at 21321, unchanged in *Activated Carbon ARI Final*.

¹⁹⁴ See Memorandum to Robert Bolling, Acting Director, AD/CVD Operations, Office IV, through Howard Smith, Program Manager, AD/CVD Operations, Office IV, concerning, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Unreported Factors of Production," dated concurrently with this memorandum.

¹⁹⁵ *Id.*

Comment 11: Surrogate Value for Cutting Wire¹⁹⁶*Yingli*

- The appropriate HTS category for valuing “wire for ingot cutting” is Thai HTS category 7217.3039. This HTS category should be used to value wire used in all three production stages, including ingot, block, and wafer production, because the same input is used in each stage.¹⁹⁷
- Thai HTS category 7217.2099, which the Department used to value the input at the block and wafer stages, covers wire of iron or non-alloy steel, plated or coated with zinc.¹⁹⁸ Yingli did not consume wire coated with zinc.

Petitioner

- Yingli’s argument that it consumes steel wire with a certain coating is incorrect.¹⁹⁹ The certification presented to support Yingli’s claim²⁰⁰ does not in fact support its claim.
- The term coated or clad does not appear anywhere in the certification provided by Yingli’s wire supplier. Every reference deals with the content of steel, therefore the certification does not provide any evidence of the type of coating on the wire.
- Yingli failed to accurately report the characteristics of certain of its wires. Because there is ample record evidence to demonstrate that Yingli has, purposely or otherwise, failed to report these characteristics of its wire, and failed to support its claims regarding the wire characteristics that it did report, the Department should use the Thai HTS category consistent with wire having the characteristics that Yingli failed to report to value Yingli’s cutting wires.

Department’s Position:

We have valued cutting wires used by Yingli in all three production stages (*i.e.*, the ingot, block, and wafer stages of production) using the *weighted* average value of Thai imports of HTS category 7217.3039 (Wire Of Iron Or Nonalloy Steel, Plated Or Coated With Base Metal Other Than Zinc, Other) and another HTS category related to the wire used (information regarding this wire is proprietary).

Record evidence indicates that Yingli used a type of coated steel wire,²⁰¹ which corresponds to the description of Thai imports of HTS category 7217.3039. Specifically, Yingli’s production records from its eight factories which identify inputs used in producing ingots, blocks, and wafers refer to the consumption of the type of coated steel wire Yingli reported to the

¹⁹⁶ A significant amount of factual information pertaining to this issue may not be publically disclosed. For a discussion of the property information relied on by the Department in analyzing the issue *see*, Memorandum to Edward Yang, Senior Director, Office VII, AD/CVD Operations, Office IV, from Robert Bolling, Acting Director, AD/CVD Operations, Office IV, “Comments in the Issues and Decision Memorandum Containing Business Proprietary Information,” dated concurrently with this notice.

¹⁹⁷ *See* Yingli Case Brief at 39-40; *also see* Yingli’s October 1, 2014, Supplemental Response at Exhibit D-18 and Yingli’s November 10, 2014, Additional Surrogate Values Submission at Exhibit 1

¹⁹⁸ *See* Yingli’s October 1, 2014, Supplemental Response at Exhibit 4.

¹⁹⁹ *See* Petitioner Rebuttal Brief at 15-17.

²⁰⁰ *See* Yingli’s October 1, 2014, Supplemental Response at Exhibit D-30.

²⁰¹ *See* Yingli’s October 1, 2014, Supplemental Section D Response at 22.

Department.²⁰² We also note that these production records make no mention of any consumption of another type of coated steel wire that Petitioner alleges Yingli used. Furthermore, the specification sheet Yingli provided from a wire supplier identified the wire it supplied as consisting of base metals, which supports its description of the cutting wire.²⁰³ While Petitioner claims that this specification sheet only describes the internal chemistry of the wire itself, not the coating that is affixed to the surface of the wire, the specification sheet does not support Petitioner's claim. The specification sheet identifies the elements that compose the material, but does not specify whether the elements are contained in the wire or coating. Petitioner provides no support for its claim that the product does not include the wire coating, and we find no record evidence that supports such a conclusion. Moreover, Yingli's production worksheets frequently refer to its consumption of a type of wire that is consistent with what it reported. While Petitioner notes that Yingli's production sheets indicate the wires consumed by Yingli may vary in certain respects, the full HTS descriptions of the two Thai HTS categories used as surrogate values in these final results cover all types of wire described.

However, as noted by Petitioner, one of Yingli's factories, Lixian Yingli, reported consuming a another type of wire (the nature of this wire is proprietary). None of the other seven factories reported any consumption of the input reported by Lixian.²⁰⁴ Therefore, the Department will value the consumption of the two types of cutting wires consumed by Yingli by weight averaging the corresponding surrogate values based on the consumption of each type of wire identified in Yingli's production records.²⁰⁵ While these production records only refer to the production of one CONNUM, the production records constitute the best available information on the record for weight averaging the two surrogate values. Thus, the Department will use the *weighted* average because it reflects Yingli's actual production experience.

Finally, we disagree with Yingli's contention that the HTS category that we are using to value the wire consumed by Lixian Yingli does not in fact reflect imports of such a product. Proprietary information on the record indicates that this category does would cover imports of that product.²⁰⁶

Comment 12: Surrogate Value for Aluminum-Silver Paste²⁰⁷

Petitioner

- Rather than base the surrogate value of aluminum-silver paste on the simple average of Thai HTS category 3824.90.99090 (chemical products and preparations of the chemical or allied industries, {not elsewhere specified}); residual products of the chemical or allied industries, {not elsewhere specified}; Other; Other) and Thai HTS category 7115.90.10

²⁰² See Yingli's July 24, 2014 Supplemental Section D response at Exhibit D-17.

²⁰³ See Yingli's October 1, 2014, Supplemental Response at Exhibit D-30.

²⁰⁴ See *id.*

²⁰⁵ See *id.*

²⁰⁶ See Wuxi Suntech's May 13, 2014 Section D response at Exhibit 4.

²⁰⁷ A significant amount of factual information pertaining to this issue may not be publically disclosed. For a discussion of the property information relied on by the Department in analyzing the issue *see*, Memorandum to Edward Yang, Senior Director, Office VII, AD/CVD Operations, Office IV, from Robert Bolling, Acting Director, AD/CVD Operations, Office IV, "Comments in the Issues and Decision Memorandum Containing Business Proprietary Information," dated concurrently with this notice.

(Articles {not elsewhere specified} of precious metal or of metal clad with precious metal; Of gold or silver), as the Department did in the *Preliminary Results*, the Department should value aluminum-silver paste using only Thai HTS category 7115.90.10.²⁰⁸

- In CBP Ruling N026989, CBP determined a screen printing silver paste was properly classified under Harmonized Tariff Schedule of the United States (“HTSUS”) category 7115.90 because it contained 40 to 85 percent silver.²⁰⁹ Further, the explanatory notes of Chapter 71 of the HTSUS states that a good will be classified as an alloy of a precious metal if the alloy content of the precious metal exceeds 2 percent of the total content.²¹⁰
- Record evidence indicates that the silver content in Yingli’s aluminum-silver paste would support valuing it using Thai HTS category 7115.90.10.²¹¹

Yingli

- The Department should not value Yingli’s aluminum-silver paste using Thai HTS category 7115.90.10 because this HTS category does not represent the value of Yingli’s aluminum-silver paste. This Thai HTS category includes articles of precious metal or of metal clad with a precious metal of silver or gold. Thus, Thai HTS category 7115.90.10 represents a basket category of goods that includes items that are significantly more expensive than silver and thus distorts the surrogate value.²¹²
- The Department should value Yingli’s aluminum-silver paste using Thai HTS category 3824.90.99090 because aluminum-silver paste is a chemical compound, not a precious metal. Yingli’s Chinese Customs Import Declaration form demonstrates that the aluminum-silver paste it uses in production of subject merchandise was entered into China under the same harmonized six digit HTS code (*i.e.* 3824.90) as Thai HTS category 3824.90.99090.²¹³
- The Department should not rely on Yingli’s market economy purchase prices for aluminum-silver paste as a benchmark for assessing the validity of a surrogate value because of their non-public nature and the many unknowns associated with companies’ market economy purchases. In *Cased Pencils*, the Department noted that “it is not appropriate to use these data {including market economy purchase prices} as benchmarks to determine whether a surrogate value is aberrational.”²¹⁴

Department’s Position:

We agree with Petitioner and have valued Yingli’s aluminum-silver paste using the AUV of Thai imports under HTS category 7115.90.10. Record evidence regarding the composition of Yingli’s aluminum-silver paste (this information is proprietary) supports using this HTS category

²⁰⁸ See Petitioner Case Brief at 21-23.

²⁰⁹ See Petitioner’s November 10, 2014 Submission at Exhibit 3.

²¹⁰ See *id.*

²¹¹ See Yingli’s Verification Exhibit at Exhibit 18 in which it describes aluminum silver paste purchased from a certain supplier.

²¹² See Yingli Rebuttal Brief at 20-21.

²¹³ See Yingli’s October 1, 2014 Section D Supplemental at Exhibit 30.

²¹⁴ See *Certain Cased Pencils from the People’s Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 71 FR 38366 (July 6, 2006) (*Cased Pencils*) and the accompanying Issues and Decision Memorandum at Comment 1.

to value the input. As noted by Petitioner, one of Yingli's suppliers identified Yingli's aluminum-silver paste using a certain description (which is proprietary) which further supports using HTS category 7115.90.10 to value the input.²¹⁵ Further, other proprietary information on the record also indicates that the aluminum-silver paste should be valued using the AUV of Thai imports under HTS category 7115.90.10.

Also persuasive in selecting HTS category 7115.90.10 to value this input is a CBP ruling that classifies silver paste with a silver content of between 40 and 85 percent under HTS category 7115.90.²¹⁶ Also, Petitioner cited the explanatory notes of Chapter 71 of the HTSUS, which states that silver imports with a silver content greater than 2 percent should be classified under HTS category 7115.90.²¹⁷

While Yingli provided import documentation indicating that it imported at least some of its aluminum-silver paste into China under HTS category 3824.90, we do not find this fact persuasive. This HTS category is not more specific to Yingli's aluminum-silver paste because this category contains chemical binders including lead oxide, refrigerants, dental plasters, deodorants, and anti-rust products, among other items.²¹⁸ Such binders are very different from Yingli's input. Further, there is no mention of any items described under HTS category 3824.90 containing silver. As noted above, record evidence regarding the composition of Yingli's aluminum-silver paste indicates HTS category 7115.90.10 is a more appropriate category for valuing the input than HTS category 3824.90. Moreover, although Yingli argues that HTS category 7115.90.10 is inappropriate because it covers gold and other items more expensive than aluminum-silver paste, we believe that while this may be a basket category, the fact that it covers articles with silver and HTS category 3824.90 does not appear to cover silver items means that HTS category 7115.90.10 is a more appropriate surrogate source for valuing aluminum-silver paste. Lastly, Yingli argues that its aluminum-silver paste is a chemical compound and thus would not be classified under HTS category 7115.90. However, such an argument is directly contradicted by the customs ruling cited above stating that silver paste of a silver content of 40 to 85 percent is classified under HTS category 7115.90.

We further note that in response to repeated requests by the Department to describe this input, Yingli failed to provide detailed information about the physical characteristics of its aluminum-silver paste that would support the selection of its preferred Thai HTS category. When asked by the Department to “{p}rovide an explanation that is sufficiently detailed for the Department to classify the input under the appropriate HTS sub-heading,” Yingli responded by describing its aluminum-silver paste as “aluminum-silver paste for printing solar cells” and provided little further information. Yingli responded in this manner three times.²¹⁹ Yingli did not provide information that supports its claim that aluminum-silver paste should be classified under HTS category 3824.90.99090. Thus, for the reasons noted above, we have determined that the best

²¹⁵ See Petitioner's November 10, 2014 Submission at 12-13 and Exhibit 26; see also Yingli's Verification Exhibit at Exhibit 18.

²¹⁶ See Petitioner's November 10, 2014 Submission at Exhibit 3 containing a CBP ruling that screen printing silver pastes which contain 40 percent to 85 percent silver are properly classified under HTS category 7115.90.

²¹⁷ See Petitioner's November 10, 2014 Submission at Exhibit 3.

²¹⁸ See Yingli's October 1, 2014 Section D Supplemental Response, at 24.

²¹⁹ See Yingli's June 24, 2014 Submission at Exhibit 1, Yingli's August 4, 2014 Submission at Exhibit 1, Yingli's November 10, 2014 Submission at Exhibit 1.

available information on the record for valuing Yingli's aluminum-silver paste is the AUV of imports under HTS category 7115.90.10.

Comment 13: Surrogate Value for Silver Paste²²⁰

Yingli

- The Department should not value Yingli's silver paste using Thai HTS category 7115.90.10 because this HTS category covers articles of precious metal or of metal clad with precious metal of silver or gold which are significantly more expensive than silver.²²¹
- The Department should value Yingli's silver paste using Thai HTS category 3824.90 because of the nature of the silver paste (which is proprietary) and Yingli's experience with silver paste (which involves proprietary information).

Petitioner

- Thai HTS category 7115.90.10 is the appropriate surrogate to value Yingli's silver paste because Yingli stated that its silver paste has a certain composition (which is proprietary).²²² The explanatory notes of the HTSUS state that an alloy containing a precious metal is to be treated as such if any one precious metal constitutes as much as 2 percent, by weight, of the alloy.²²³ Also, a CBP ruling states that silver pastes with a certain silver purity level should be classified under HTS category 7115.90.²²⁴
- Yingli's transaction involving silver paste (the specific details of which are proprietary) also argue against using Thai HTS category 3824.90.99090, Yingli's proposed surrogate source, to value the input.²²⁵

Department's Position:

We agree with Petitioner and have continued to value Yingli's silver paste using the AUV of Thai imports under HTS category 7115.90.10. Yingli's suppliers identify the input as "silver paste",²²⁶ not some other type of paste. HTS category 7115.90.10 is the only surrogate source on the record that reflects imports of items containing silver. Moreover, there are CBP rulings which explicitly state that silver pastes should be classified under HTS category 7115.90.²²⁷

²²⁰ A significant amount of factual information pertaining to this issue may not be publically disclosed. For a discussion of the property information relied on by the Department in analyzing the issue *see*, Memorandum to Edward Yang, Senior Director, Office VII, AD/CVD Operations, Office IV, from Robert Bolling, Acting Director, AD/CVD Operations, Office IV, "Comments in the Issues and Decision Memorandum Containing Business Proprietary Information," dated concurrently with this notice.

²²¹ *See* Yingli Case Brief at 43-44.

²²² *See* Petitioner Rebuttal Brief at 18-20.

²²³ *See* Petitioner November 10, 2014 Submission at Exhibit 3.

²²⁴ *See* Petitioner November 10, 2014 Submission at Exhibit 3 containing a CBP ruling that screen printing silver pastes which contain 40 percent to 85 percent silver are properly classified under HTS category 7115.90 and Yingli's October 1, 2014 Section D Supplemental, at 23 and Exhibit 30 demonstrating that the silver content of its aluminum silver paste falls within this stated criteria and.

²²⁵ *See* the December 31, 2014 Preliminary Results Analysis Memorandum at Attachment III.

²²⁶ *See* Petitioner's November 10, 2014 Submission at 12-13 and Exhibit 26; *see also* Yingli's Verification Exhibit at Exhibit 18.

²²⁷ *See* Petitioner's November 10, 2014 Submission at Exhibit 3 containing a CBP ruling that screen printing silver

Further, the explanatory notes of Chapter 71 of the HTSUS, which covers, among other things, precious metals, state that except where the context otherwise requires, reference in the tariff schedule to precious metal or to any particular precious metal includes a reference to alloys treated as alloys of precious metal. The notes also state that a good will be classified as an alloy of precious metal if any one precious metal constitutes as much as 2 percent, by weight, of the alloy.²²⁸

While Yingli has provided certain information (which is proprietary) regarding its transactions indicating HTS category 3824.90 may be an appropriate category to value the input, imports under this HTS category are not specific to Yingli's silver paste because this category reflects imports of chemical binders including lead oxide, refrigerants, dental plasters, deodorants, and anti-rust products, among other items,²²⁹ which are very different from Yingli's silver paste. As noted above, Yingli provided documents which support using HTS category 7115.90.10 to value the input. There is no mention of any items under HTS category 3824.90 which contain silver and Yingli has not identified any such item listed under HTS category 3824.90. When the Department requested that Yingli "{p}rovide an explanation that is sufficiently detailed for the Department to classify the input under the appropriate HTS sub-heading," Yingli responded by describing its silver paste as "silver paste, used for solar cells" and provided no further information. Yingli responded in this manner three times.²³⁰ We do not believe this description supports use of Yingli's proposed surrogate source.

Moreover, although Yingli argues that HTS category 7115.90.10 is inappropriate because it covers gold and other items more expensive than aluminum-silver paste, we believe that while this may be a basket category, the fact that it covers articles with silver and HTS category 3824.90 does not appear to cover silver items means that HTS category 7115.90.10 is a more appropriate surrogate source for valuing aluminum-silver paste. For the foregoing reasons, the Department finds that Thai HTS category 7115.90.10 is more specific to Yingli's silver paste, and has continued to value Yingli's silver paste using this HTS category 7115.90.10 for these final results of review.

Comment 14: Surrogate Value for Unclassified Stores

Yingli

- The Department should value Yingli's polysilicon input, "unclassified stores," using Thai imports of HTS category 2804.61 (Hydrogen, rare gases and other non-metals Containing by Weight not less than 99.99 percent of Silicon), rather than the international prices of solar-grade polysilicon, USD \$18.19 per kg, which was used to value both this input and Yingli's polysilicon input "feedstock" in the *Preliminary Results*.²³¹

pastes which contain 40 percent to 85 percent silver are properly classified under HTS category 7115.90 and Yingli's October 1, 2014 Section D Supplemental, at 23 and Exhibit 30 demonstrating that the silver content of its aluminum silver paste falls within this stated criteria.

²²⁸ See Petitioner's November 10, 2014 Submission at Exhibit 3.

²²⁹ See Yingli's October 1, 2014 Section D Supplemental Response, at 24.

²³⁰ See Yingli's June 24, 2014 Submission at Exhibit 1, Yingli's August 4, 2014 Submission at Exhibit 1, Yingli's November 10, 2014 Submission at Exhibit 1.

²³¹ See Yingli's March 30, 2015 Case Brief at 45-46.

- The “unclassified store” polysilicon input consumed by Yingli in the production of solar cells does not have the same purity levels as the “feedstock” polysilicon consumed by Yingli.

Petitioner

- Yingli does not cite any evidence in support of its claim that “unclassified stores” should be valued using Thai HTS category 2804.61.²³²
- Yingli’s argument that the Department should treat “unclassified stores” as a lesser grade of polysilicon, while arguing that the Department should value contaminated polysilicon scrap and waste with the same surrogate used to value clean and virgin polysilicon, should be rejected. Valuing “unclassified stores” using Thai import statistics while valuing byproduct polysilicon with the same surrogate used to value clean polysilicon would result in a net negative material expense for polysilicon and as such, would be “unreasonable.”²³³

Department’s Position:

We disagree with Yingli and have continued to value the silicon input identified as “unclassified stores” using international prices for solar-grade polysilicon from Bloomberg New Energy Finance and GTM Research. Yingli has not cited any record evidence in support of its claim that “unclassified stores” should be valued using HTS category 2804.61. The silicon input identified as “unclassified stores” is used in crystal and ingot production along with feedstock polysilicon which the Department valued using international prices for solar-grade polysilicon. Yingli has not provided any evidence that its feedstock and unclassified silicon inputs are of different silicon quality. When asked by the Department to “{p}rovide an explanation that is sufficiently detailed for the Department to classify the input under the appropriate HTS sub-heading,” Yingli responded by identifying the input in question as “unclassified stores” and provided no further information. Yingli responded in this manner three times.²³⁴ Silicon ingots are the only input used to make solar wafers, which require high-purity silicon.²³⁵ This is further indication that Yingli’s “unclassified stores” likewise consist of solar-grade polysilicon.

As noted in the Preliminary SV Memorandum, in the underlying investigation the Department determined that solar-grade polysilicon must have purity levels as high as 99.999999 percent.²³⁶

²³² See Petitioner Rebuttal Brief at 21-22.

²³³ See *Steel Wire Garment Hangers from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 FR 47587 (August 14, 2008), and accompanying Issues and Decision Memorandum at Comment 7 (finding that reliance upon a scrap value that is higher than the primary input used to produce the material that was scrapped “will produce an unreasonable result.”).

²³⁴ See Yingli’s June 24, 2014 Submission at Exhibit 1, Yingli’s August 4, 2014 Submission at Exhibit 1, Yingli’s November 10, 2014 Submission at Exhibit 1.

²³⁵ See December 31, 2014 Memorandum from Jeff Pedersen and Brandon Farlander to the File entitled, “Factor Valuation Memorandum” at 3 (“Preliminary SV Memorandum”), citing *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) and accompanying Issued and Decision Memorandum at Comment 9.

²³⁶ See Preliminary SV Memorandum at 3 citing *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) and

This contrasts with Yingli's recommended surrogate value of Thai HTS category 2804.61 covering silicon with a purity level as low as 99.99 percent. Numerous articles indicate that the high costs associated with refining different grades of polysilicon result in dramatic price differences between different purities of silicon.²³⁷ Thus, we valued wafers and the polysilicon used to make the ingots from which wafers are cut using international prices of solar-grade polysilicon rather than the value of imports under HTS category 2804.61.²³⁸ At verification, Yingli demonstrated that "unclassified stores" were used to produce silicon ingots and that the only direct material input used to make silicon ingots was silicon.²³⁹ Yingli further demonstrated that the only direct material input used to produce solar wafers were the silicon ingots.²⁴⁰ As noted above, this suggests that the forms of silicon used in production would be of a higher quality than the imports in HTS category 2804.61, which covers lower purity silicon. Accordingly, the Department has continued to value Yingli's "unclassified stores" using international prices of solar-grade polysilicon rather than the value of imports under HTS category 2804.61.

Comment 15: Ocean Freight

Yingli

- In valuing ocean freight, the Department relied on documentation from Maersk Line, which included line item charges (*i.e.*, equipment management service, export service, terminal handling service-origin, port additional/port dues-export, and documentation fee-origin) originally denominated in Chinese currency that should be ineligible for use as surrogate values.²⁴¹
- Certain line item charges in the Maersk Line documentation (*i.e.*, terminal handling service-destination, equipment management service, terminal handling service-origin, port additional/port dues-export, submission of cargo declaration-import, documentation fee-origin, and port security service-import) are already explicitly or implicitly included in the brokerage and handling costs calculated by the Department. Therefore, including these items in the surrogate value for ocean freight double counts these costs. The Department should therefore exclude these costs from its final margin calculations.

Petitioner

- The Maersk Line prices are all denominated in U.S. dollars and purchasing the quoted services would involve a single payment at a fixed price, denominated in U.S. dollars, to Maersk Line.²⁴²
- Yingli provides little explanation for why it finds certain listed items implicitly or explicitly included in brokerage and handling expenses. For example, terminal handling expenses – either at the port of exportation or at the port of arrival – may relate to fees charged by stevedores and crane operators. This has no relation to brokerage and

accompanying Issued and Decision Memorandum at Comment 9.

²³⁷ See Preliminary SV Memorandum at 3 and Attachment VI.

²³⁸ *Id.*

²³⁹ See *Yingli verification report* at 36-37.

²⁴⁰ *Id.*

²⁴¹ See *Yingli Case Brief* at 48-50.

²⁴² See *Petitioner Rebuttal Brief* at 26-29.

handling expenses because the fees arise out of the expenses incurred during the direct movement of a container within the confines of a sea port as well as from an oceangoing vessel and dockside quays.

Department's Position:

We disagree with Yingli that certain fees that make up the total ocean freight charge in the Maersk Line quote²⁴³ should be excluded from the surrogate value based on the fact that they are listed in the quote in both Chinese Renminbi (RMB) and U.S. dollars. The total ocean freight quote is only listed in U.S. dollars,²⁴⁴ a market-economy currency. Moreover, the Department has found Maersk Line data to be appropriate surrogate value information from a market-service provider in other cases.²⁴⁵

However, we agree with Yingli that certain fees which are already included in the surrogate value for brokerage and handling should not be included in the surrogate value for ocean freight. We used the brokerage and handling surrogate to value domestic (PRC) brokerage and handling expenses for U.S. sales (*i.e.*, brokerage and handling expenses related to exporting).²⁴⁶ The brokerage and handling surrogate value is composed of three fees, document preparation, customs clearance and technical control, and ports and terminal handling. Similar charges appear in the ocean freight quote. Those charges are document fee-origin, port additional/port dues-export, and terminal handling service-origin. Therefore, in order to avoid possible double-counting of certain charges included in the surrogate value for brokerage and handling, we excluded these three items (*i.e.*, document fee-origin, port additional/port dues-export, and terminal handling service-origin) from the surrogate value for ocean freight for the final results. Also, because Yingli has already reported its U.S. brokerage and handling fees in field USDUTY, we are therefore excluding fees from the ocean freight surrogate value which appear to relate to importation (*i.e.*, terminal handling service-destination, submission of cargo declaration-import, and, where applicable, port security service-import) because these expenses are already being deducted from Yingli's U.S. price. However, we also did not exclude the equipment management service fee from ocean freight surrogate value because we have no basis for concluding that this fee relates to the document preparation, customs clearance and technical control, and ports and terminal handling fees included in the brokerage and handling surrogate value.²⁴⁷

While Petitioner argues that the terminal handling expenses in the ocean freight surrogate value and the brokerage and handling surrogate value may be charges for different types of handling, there is no evidence supporting this position. Both surrogate values include charges specifically identified as terminal handling. Given that both charges are identified as terminal handling and there is no evidence showing these are different types of terminal handling fees, we believe it is

²⁴³ See Petitioner's June 24, 2014 submission at Exhibits 10 and 11.

²⁴⁴ *Id.*

²⁴⁵ See *53-Foot Domestic Dry Containers From the People's Republic of China: Final Determination of Sales at Less Than Fair Value; Final Negative Determination of Critical Circumstances*, 80 FR 21203 (April 17, 2015) and accompanying Issues and Decision Memorandum at Comment 2.

²⁴⁶ See the December 1, 2014 Preliminary Results Surrogate Value Memorandum at 6; Petitioner's July 24, 2014 Surrogate Value submission at Exhibit 7, and Yingli's May 5, 2014 Section C Submission.

²⁴⁷ See Petitioner's July 24, 2014 Surrogate Value submission at Exhibit 7.

appropriate to remove such charges from the ocean freight surrogate value to avoid possible double counting.²⁴⁸

Comment 16: Brokerage and Handling

Yingli

- The Department should not use the World Bank’s *Doing Business in Thailand* report to value brokerage and handling because the brokerage and handling costs reported in that publication do not represent the brokerage and handling experience of a large company such as Yingli.²⁴⁹ The information provided in the *Doing Business in Thailand* report is more representative of small- and medium-sized companies that operate on a much smaller scale.
- The *Doing Business in Thailand* report states that “the indicators presented and analyzed in *Doing Business* measure business regulation and the protection of property rights and their effect on businesses, *especially small and medium-size domestic firms*.”²⁵⁰
- The brokerage and handling experience of Pakfood Public Company Limited,²⁵¹ which is a large Thai company, is more representative of the brokerage and handling costs incurred by a large company such as Yingli.
- If the Department continues to use data from the *Doing Business in Thailand* report to value brokerage and handling, it must exclude letters of credit fees that were not incurred by Yingli in exporting the merchandise under review, but were included in the brokerage and handling expense identified in *Doing Business in Thailand*.

Petitioner

- There is no evidence that the *Doing Business* series collects data from only small companies.²⁵² The text from the World Bank’s *Doing Business* series cited by Yingli indicates the survey seeks to collect data that has an effect on the operations of companies, including small- and medium-sized companies.²⁵³ This is completely different from what Yingli wants the Department to believe - that the data were collected from small- and medium-sized companies.
- The Department has already addressed the issue of whether the *Doing Business* series is somehow skewed by the purported weighting of small- and medium-sized businesses, and found it is not skewed. For example, in *Circular Welded Carbon-Quality Steel Pipe from the Socialist Republic of Vietnam*, the Department found that the *Doing Business in Thailand* series presented “broad market average{s}” as they pertain to brokerage and handling expenses and that the *Doing Business* series has been utilized repeatedly in prior proceedings.²⁵⁴

²⁴⁸ See Petitioner’s June 24, 2014 submission at Exhibits 10 and 11; *see also*, Preliminary SV Memorandum at 6.

²⁴⁹ See Yingli’s March 30, 2015 Case Brief at 46-47.

²⁵⁰ See Yingli’s July 3, 2014, Surrogate Countries and Values Rebuttal at Exhibit 3.

²⁵¹ See Yingli’s June 24, 2014, Surrogate Countries and Values Submission at Exhibit 10.

²⁵² See Petitioner Rebuttal Brief at 22-25.

²⁵³ See Yingli’s July 3, 2014, Surrogate Countries and Values Rebuttal at Exhibit 3.

²⁵⁴ See Petitioner’s Rebuttal Brief at 23-24 (citing *Circular Welded Carbon-Quality Steel Pipe from the Socialist Republic of Vietnam*, 77 FR 64483 (October 22, 2012) and accompanying Issues and Decision Memorandum at Comment 6 (“Circular Welded IDM”)).

- The Department properly prefers broad-market averages over public version questionnaire data such as that proposed by Yingli when selecting surrogate values. With only two surrogate sources for brokerage and handling on the record- one of which relates to a single producer of frozen shrimp and the other representing market data collected from hundreds of companies by the World Bank- it is clear that the Department's choice of the World Bank's *Doing Business* report for a brokerage and handling surrogate value was correct.
- Yingli's contention that letter of credit fees are included in the brokerage and handling expense of the *Doing Business in Thailand* report is based on a 2011 email from a law firm to an employee at the World Bank and relates to the 2011 edition of the *Doing Business in Thailand* report. The 2011 edition of the report was not used in this administrative review.
- The Department has addressed the issue of letter of credit fees associated with the *Doing Business* publications and has found no reason to exclude this fee. Specifically, in *Certain Steel Threaded Rod from the People's Republic of China*, the Department refused to exclude letter of credit fees based on speculative assumptions made by a respondent where evidence regarding the *Doing Business* methodology could not be tied to the report actually used during the course of the administrative proceeding.²⁵⁵ As there is no information regarding this matter for the actual version of the *Doing Business* report used in this review (the 2014 edition), the Department should not revise its calculation in this proceeding.

Department's Position:

We agree with Petitioner and have continued to base the surrogate value for brokerage and handling expenses on the World Bank's *Doing Business in Thailand* report. First, Yingli cited no evidence demonstrating that the size of the business has any effect on the brokerage and handling expenses associated with shipping a container. Second, the *Doing Business* reports do not define small, medium or large businesses; therefore there is no basis for the Department to conclude that the *Doing Business* data do not include data from businesses that are the same size as Yingli. In fact, the assumptions identified in the *Doing Business in Thailand* report include that the firm has "60 employees or more."²⁵⁶

Further, the Department's practice, to the extent practicable, is to select surrogate values which are representative of a broad market average.²⁵⁷ The Department has previously found that the World Bank's *Doing Business* report is representative of a broad market average.²⁵⁸ In situations

²⁵⁵ *Id.* at 24 (citing *Certain Steel Threaded Rod from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 71743 (December 3, 2014) and accompanying Issues and Decision Memorandum at Comment 4 ("Threaded Rod IDM")).

²⁵⁶ See Petitioner's July 24, 2014 Surrogate Value submission at Exhibit 7.

²⁵⁷ See *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the Eleventh Administrative Review and New Shipper Reviews*, 72 FR 34438 (June 22, 2007) and accompanying Issues and Decision Memorandum at Comment 2A.

²⁵⁸ See, e.g., *Circular Welded IDM at Comment 6; see also Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 76 FR 15297 (March 21, 2011) and accompanying Issues and Decision Memorandum ("Ironing Tables IDM") at Comment 3.

like the present case, where the potential surrogate values are the World Bank's *Doing Business* report and a single firm's brokerage and handling costs (*i.e.*, the ranged public version data of a single Thai shrimp exporter²⁵⁹) the Department's choice has been the World Bank data. For example, in *PSF*, the Department stated that "for {brokerage and handling} costs, the World Bank study is a more broad-based survey of costs in the Indian market and, thus, constitutes a more credible and representative source, than the data that are limited to the experiences of individual Indian companies."²⁶⁰

Finally, the Department's practice is to exclude the cost of obtaining letters of credit from the total brokerage and handling cost in *Doing Business* reports when record evidence supporting the exclusion can be linked to the specific report used as a surrogate.²⁶¹ In this review, the record evidence regarding the letter of credit costs is specific to the 2011 edition of the *Doing Business* report,²⁶² not the *Doing Business in Thailand 2014* edition which is being used to value brokerage and handling expenses here. Accordingly, for the final results, we have not adjusted the surrogate brokerage and handling costs for letter of credit expenses.

Comment 17: Labor Calculation

Petitioner

- In calculating the labor rate, the Department erroneously excluded overtime costs.²⁶³ This runs contrary to the Department's policy and practice to include all components of compensation and benefits in the labor rate.²⁶⁴ In the past the Department relied upon Thai National Statistical Office ("NSO") data because it accounted for overtime labor.²⁶⁵ As such, the Department should include overtime costs in the calculation of the overall labor rate for the final results.

Yingli

- The Department properly excluded overtime pay from the calculation of the labor rate because the data did not contain any hours associated with overtime pay.²⁶⁶ If the Department includes the additional overtime expense in the numerator of its labor rate

²⁵⁹ See Yingli's June 24 Surrogate Values submission at Exhibit 10.

²⁶⁰ See *Certain Polyester Staple Fiber From the People's Republic of China: Final Results and Partial Rescission of Second Antidumping Duty Administrative Review*, 76 FR 2886 (January 18, 2011) ("*PSF*") and accompanying Issues and Decision Memorandum at 10-11. See also *Circular Welded IDM* at Comment 6; see also *Ironing Tables IDM* at Comment 3.

²⁶¹ See, e.g., *Threaded Rod IDM* at Comment 4.

²⁶² See Yingli's July 3, 2014 Surrogate Value Rebuttal submission at Exhibit 3.

²⁶³ See Prelim SV Memo at 4.

²⁶⁴ See Petitioner Case Brief at 30-31 (citing to *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 FR 36092, 36093 (June 21, 2011) ("*Antidumping Methodologies*")).

²⁶⁵ *Id.* (citing *Drawn Stainless Steel Sinks From the People's Republic of China: Investigation, Final Determination*, 78 FR 13019 (February 26, 2013), and accompanying Issues and Decision Memorandum, at Comment 3 ("*Sinks*") and *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, and Affirmative Final Determination of Critical Circumstances, in Part*, 77 FR 63791 (October 17, 2012) and accompanying Issues and Decision Memorandum at Comment 5 ("*Solar Cells Investigation*")).

²⁶⁶ Yingli Rebuttal Brief at 29-30.

calculation without adding hours in the denominator, the resulting labor rate will be inflated.

Department's Position:

We agree with Petitioner. The Department's practice is to include all components of labor, such as benefits, housing, training, bonuses, and gratuities in surrogate labor costs. The Department previously noted that it prefers "earnings" data from the International Labor Organization ("ILO"), when available, rather than wage rate data from the ILO, which excludes overtime, because it more accurately reflects the full remuneration received by workers.²⁶⁷ The Department also stated in *Antidumping Methodologies* that it will use Chapter 6A of the ILO for a source of labor rate, because it includes additional labor items as compared to Chapter 5B of the ILO.²⁶⁸ Lastly the Department's labor rates represent "fully-loaded" wages (*i.e.*, inclusive of all bonuses, overtime, etc.).²⁶⁹

With respect to Yingli's argument not to include overtime compensation in the numerator of the labor rate calculation because the denominator does not include overtime hours, we note that our calculation assumed 5.5 working days a week.²⁷⁰ Therefore, we do not believe it is unreasonable to include overtime compensation in the numerator of the calculation. For the final results, we have included overtime costs in the calculation of labor.

Comment 18: Surrogate Value for Natural Gas

Yingli

- The Department should value Yingli's natural gas using Thai imports of HTS category 2711.21,²⁷¹ which include natural gas in a gaseous state, because Yingli only consumed natural gas in a gaseous state.²⁷²
- The Department erred in valuing Yingli's natural gas using Thai HTS category 2711.11, which includes only liquefied natural gas.

No other interested party commented on this issue.

Department's Position:

We agree with Yingli. Verification documents indicate that the natural gas Yingli consumed was in a gaseous form rather than liquid form.²⁷³ Accordingly, Thai HTS category 2711.21 is more

²⁶⁷ See *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor; Request for Comment*, 76 FR 9544, 9545 (February 18, 2011).

²⁶⁸ See *Antidumping Methodologies*.

²⁶⁹ See *Sinks* and accompanying Issues and Decision Memorandum at Comment 3; *Solar Cells Investigation* and accompanying Issues and Decision Memorandum at Comment 5.

²⁷⁰ See Preliminary SV Memorandum.

²⁷¹ See Yingli's October I, 2014, Fourth Section D Supplemental Response at Revised Exhibit D-18; Yingli's November 10, 2014, Additional Surrogate Values Submission at Exhibit 1 and Exhibit 2.

²⁷² See Yingli Case Brief at 45.

²⁷³ See *Yingli verification report* at 3.

specific to the natural gas consumed by Yingli, and, as such, we are using this category to value natural gas for these final results.

Comment 19: Surrogate Value for Nitric Acid

Yingli

- The Department should value all of the nitric acid consumed by Yingli using the value of imports of Thai HTS category 2808.0000.1020 because this category is more specific to the nitric acid consumed by Yingli.
- Petitioner agrees that Thai HTS category 2808.0000.1020 is the appropriate HTS category with which to value nitric acid.
- The Department used Thai HTS category 2808.0000.1020 to value nitric acid in the investigation of this proceeding.

No other interested party commented on this issue.

Department's Position:

We agree with Yingli. The Department inadvertently used one Thai HTS category to value nitric acid used in polysilicon processing and a different Thai HTS category to value nitric acid used in cell production in the *Preliminary Results*. Both Petitioner and Yingli identified Thai imports of HTS category 2808.0000.1020 as the best available information with which to value both of Yingli's nitric acid inputs. The record contains no information that contradicts Petitioner's and Yingli's suggested surrogate and there is no evidence that Yingli uses more than one type of nitric acid. As such, for these final results, we are using Thai HTS category 2808.0000.1020 to value Yingli's nitric acid inputs.

Comment 20: Surrogate Value for Hydrofluoric Acid

Yingli

- Yingli reported the consumption of hydrofluoric acid used in polysilicon processing and cell production in three different fields in its FOP database and the Department incorrectly used three different Thai HTS categories to value this input. The Department should value hydrofluoric acid using one Thai HTS category, 2811.1100.1020;²⁷⁴ both Petitioner and Yingli agree on this category.²⁷⁵
- The Department used Thai HTS category 2811.1100.1020 to value hydrofluoric acid in the investigation of this proceeding.²⁷⁶
- Thai HTS category 2811.11, which is one of the categories used by the Department in the *Preliminary Results*, covers *all* imports of hydrofluoric acid and it is not specific to the

²⁷⁴ See Yingli Case Brief at 41.

²⁷⁵ See Yingli's June 24, 2014, Surrogate Countries and Values Submission at Exhibit 4; Yingli's October 1, 2014, Supplemental Response at 24-25, 28; Yingli's November 10, 2014, Additional Surrogate Values Submission at Exhibit 2; SolarWorld's June 24, 2014, Surrogate Values Submission at Exhibit 1.

²⁷⁶ See May 16, 2012 Memorandum entitled "Antidumping Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Factor Valuation Memorandum," submitted to this record in Petitioner's Case Brief at Attachment XIV.

type of hydrofluoric acid consumed by Yingli.²⁷⁷ Thai HTS category 2811.1100.1020, on the other hand, covers hydrofluoric acid with a purity level of more than 15 percent, which encompasses the hydrofluoric acid used by Yingli.²⁷⁸

No other interested party commented on this issue.

Department's Position:

We agree with Yingli. Thai HTS category 2811.1100.1020 covers hydrofluoric acid that has a purity level of greater than 15 percent, which corresponds to the purity level of the hydrofluoric acid used by Yingli in each production stage.²⁷⁹ Petitioner also suggested valuing hydrofluoric acid using Thai HTS category 2811.1100.102.²⁸⁰ Based on the foregoing, we valued Yingli's hydrofluoric acid using Thai HTS category 2811.1100.102 for these final results of review.

Comment 21: Application of Surrogate Marine Insurance Rate

Yingli

- The Department stated in its Preliminary SV Memorandum that it intended to apply the surrogate marine insurance rate to the "value of the shipment;" therefore, it should apply the surrogate marine insurance rate to entered value, which is the price from Yingli to Yingli Green Energy Americas, Inc. ("YGEA"), rather than gross unit price, which is the price charged by YGEA to its U.S. customers.²⁸¹ This approach is consistent with the Department's practice in *Windshields from the PRC*²⁸² and *Honey from the PRC*.²⁸³

No other interested parties commented on this issue.

Department's Position:

We agree with Yingli that it is appropriate, in this case, to apply the surrogate marine insurance rate to the entered value of the shipment, rather than to the gross unit price charged to the unaffiliated customer as we did in the *Preliminary Results*. We valued Yingli's marine insurance expenses using a rate offered by a market-economy provider of marine insurance, and the rate

²⁷⁷ See Yingli's June 24, 2014, Surrogate Countries and Values Submission at Exhibit 15.

²⁷⁸ See Yingli's June 24, 2014, Surrogate Countries and Values Submission at Exhibit 4; Yingli's October 1, 2014, Supplemental Response at 24-25, 28; and Yingli's November 10, 2014, Additional Surrogate Values Submission at Exhibit 2 in which it identifies the specific purity level of its hydrofluoric acid.

²⁷⁹ See Yingli's June 24, 2014, Surrogate Countries and Values Submission at Exhibit 4; Yingli's October 1, 2014, Supplemental Response at 24-25, 28; Yingli's November 10, 2014, Additional Surrogate Values Submission at Exhibit 2; SolarWorld's June 24, 2014, Surrogate Values Submission at Exhibit 1.

²⁸⁰ See SolarWorld's June 24, 2014, Surrogate Values Submission at Exhibit 1.

²⁸¹ See Yingli Case Brief at 54.

²⁸² *Id.* (citing *Final Determination of Sales at Less Than Fair Value: Certain Automotive Replacement Glass Windshields from the People's Republic of China*, 67 FR 6482 (February 12, 2002) ("*Windshields from the PRC*") and accompanying Issues and Decision Memorandum at Comment 13).

²⁸³ *Id.* (citing *Honey from the People's Republic of China; Notice of Final Results of Antidumping Duty New Shipper Reviews*, 70 FR 9271 (February 25, 2005) ("*Honey from the PRC*") and accompanying Issues and Decision Memorandum at Comment 4).

represents a percentage of the value of the shipment.²⁸⁴ We believe entered value better represents the “value of the shipment” for purposes of valuing marine insurance.²⁸⁵ Therefore, for the final, we have multiplied the entered value by the marine insurance rate.

Comment 22: Conversion Factor for Natural Gas

Yingli

- At the verification, Yingli corrected its conversion rate for natural gas from 0.72 kg per cubic meter to 0.656 kg per cubic meter²⁸⁶ but the Department incorrectly used the conversion factor of 0.72 kg per cubic meter in the *Preliminary Results*. The Department should correct this error.²⁸⁷

No other interested parties commented on this issue.

Department’s Position:

We agree with Yingli and have corrected the conversion factor for the final results of review.²⁸⁸

Comment 23: Movement Expenses for Yingli’s EP Sale

Yingli

- Yingli’s export price (“EP”) sale was made on an ex-works basis and, therefore the Department should not deduct movement expenses (including domestic inland freight, domestic brokerage and handling, domestic inland insurance, marine insurance, and ocean freight) when calculating the net price of this sale.²⁸⁹

Petitioner

- The Department did not incorrectly assign certain expenses to the EP sale, as shown in the Department’s preliminary margin calculation program.²⁹⁰

Department’s Position:

We agree with Yingli. Yingli consistently reported that its EP sale was made on an ex-works basis (*i.e.*, the buyer paid for all movements expenses from Yingli’s factory).²⁹¹ Therefore, for the final results, the Department has treated this sale as an ex-works sale and has removed all movement expenses from this sale.

²⁸⁴ See Memorandum to the File, “Antidumping Duty Administrative Review of Crystalline Silicon Photovoltaic Cells from the People’s Republic of China: Factor Valuation Memorandum,” dated December 31, 2014 (“Factor Valuation Memorandum”).

²⁸⁵ See, e.g., *Windshields from the PRC and Honey from the PRC*.

²⁸⁶ See *Yingli verification report*, at 3 and Exhibit VE-1 at 13-19.

²⁸⁷ See Yingli Case Brief at 55.

²⁸⁸ See Final Analysis Memo.

²⁸⁹ See Yingli Case Brief at 55.

²⁹⁰ See Petitioner Rebuttal Brief at 30.

²⁹¹ See Yingli’s May 5, 2014, Section C Response at C-17. See also Yingli’s Preliminary Margin Calculation Memo at Attachment I, SAS Log, lines 1263-1274.

Comment 24: Surrogate Value for Backsheet

Petitioner

- The Department erred in valuing Yingli's backsheet using Thai imports of HTS category 3920.62.00001 (Plates, Sheets, Film, Foil And Strip Of Plastics, Not Self-Adhesive, Non-Cellular, Not Reinforced Etc., Of Polyethylene Terephthlate; For Tape Used In The Manufacture Of Telephonic Or Electric Wire) because Yingli and Wuxi Suntech's backsheets are composed of several different types of plastic. Valuing Yingli's backsheets using HTS category 3920.62.00001 is an oversimplification of a highly technical and particularized set of goods.²⁹²
- Solar grade backsheets are engineered materials designed for long use, have protective and insulating properties, and contain several different layers of materials, including patented or trademarked materials, which are more expensive than the AUV the Department assigned to this input.²⁹³
- The market economy prices that Wuxi Suntech and Yingli paid for their backsheets are not comparable to the surrogate value that the Department used to value the backsheets; thus, the surrogate value is unrepresentative of respondents' input costs. The Department should value this input using a simple average of six Thai HTS categories covering an array of plastic films which correspond to the types of sheets that comprise Wuxi Suntech's and Yingli's backsheets.²⁹⁴
- In choosing the surrogate values, the Department should not use HTS category 3920.62.00001, because it contains plastics used in the manufacture of telephonic or electric wire, which is very different from the type of plastics used in photovoltaic applications.

Yingli

- Yingli's Chinese Customs Import Declaration form, which relates to imports of backsheets, demonstrates that HTS category 3920.62, excluding subcategories for plastics used to manufacture telephone or electric wire, should be used to value Yingli's backsheets.²⁹⁵
- The Department should not value Yingli's backsheet using a simple average of the values of several plastic materials because certain plastic inputs account for much more of the composition of Yingli's backsheet than others. The most predominant components of Yingli's backsheets are two types of plastic. While Yingli's backsheet contains a small amount of a trademarked material, it is not a highly engineered material as it consists predominantly of plain plastics and adhesives.
- If the Department determines to value Yingli's backsheets using more than one type of plastic value, the Department could average the import values of the HTS categories corresponding to the two most predominant plastics found in Yingli's backsheets.

²⁹² See Petitioner Case Brief at 26-29.

²⁹³ See Yingli's Section D Response at Exhibit D-5.

²⁹⁴ See Yingli's October 1 Supplemental Questionnaire Response at Exhibit D-30.

²⁹⁵ See Yingli's March 30, 2015 Rebuttal Brief at 25-27.

- The Department should not rely on the composition of Wuxi Suntech’s backsheet in selecting HTS categories to value Yingli’s backsheet because the HTS category selected should reflect Yingli’s experience.
- The Department should also not rely on Yingli’s market economy purchases to serve as a benchmark for assessing the validity of the HTS category used to value Yingli’s backsheet, because of their non-public nature and the many unknowns associated with companies’ market economy purchases. *Cased Pencils* indicates that “it is not appropriate to use these data {including market economy purchase prices} as benchmarks to determine whether a surrogate value is aberrational.”²⁹⁶

Department’s Position:

We agree with Petitioner, in part. We believe that, in this case, valuing Yingli’s backsheet using surrogate values for the different types of plastics contained therein would result in an overall value more specific to the input used by Yingli. Additionally, we agree with both Yingli and Petitioner that it is not appropriate to value Yingli’s backsheet using the Thai HTS category for plastic used in telephone or electric wire because this plastic is not specific to Yingli’s backsheet. Rather, for the final results, we are valuing Yingli’s backsheet using Thai HTS categories covering the types of plastic used in Yingli’s backsheet (the identity of these plastics is proprietary).²⁹⁷ We have not valued the backsheet using a simple average of the import values from the six HTS categories suggested by Petitioner because Yingli’s backsheet is only composed of three types of plastic. The record identifies the percentage content of the three plastics contained in Yingli’s backsheet and, based on these percentages, we have calculated a weighted-average of the Thai import AUVs from the selected HTS categories to value Yingli’s backsheet.

Comment 25: Calculation of Surrogate Financial Profit Ratio

Yingli

- In calculating the profit rate using PT Len Industri (Persero)’s (“PT Len”) financial statements,²⁹⁸ the Department failed to deduct “other income,” which it excluded from its surrogate financial ratio calculations, from the company’s profit.
- The Department’s practice is to adjust profit for line items it determines should not be included in the surrogate financial ratio calculations, such as non-period income or expenses and investment income or expense.²⁹⁹

Petitioner

- The “other income” line item is not non-period income or expenses nor is it investment income or expense as Yingli argues. There are no details as to what this “other income”

²⁹⁶ See *Certain Cased Pencils from the People’s Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 71 FR 38366 (July 6, 2006) (“*Cased Pencils*”).

²⁹⁷ See Yingli’s October 1 Supplemental Questionnaire Response at Exhibit D-30.

²⁹⁸ See Yingli Case Brief at 53.

²⁹⁹ See *1,1,1,2-Tetrafluorotethane from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 79 FR 62597 (October 20, 2014), and accompanying Issues and Decision Memorandum at Comment 17 (“*Tetrafluorotethane IDM*”).

line item is other than the fact that it is listed next to the company's sales figure in the income statement. It was prudent for the Department to assume that this line item was some type of other sales and not to use it in the financial ratio calculations.³⁰⁰

Department's Position:

The record shows that the "other income" line item in PT Len's financial statements, (*see* Note 32 of the financial statements on page 543) comprises foreign exchange, interest from bank, interest income, acceptance for inclusion, and other.³⁰¹ Consistent with Department practice, for these final results of review, we are deducting each of these "other income" line items (foreign exchange,³⁰² interest from bank, interest income,³⁰³ acceptance for inclusion and other (both of which we treated as miscellaneous income³⁰⁴) from selling, general and administrative ("SG&A") expenses in calculating the SG&A ratio. Moreover, based on record evidence, we have determined that the "other income" was used by PT Len in determining its profit before income tax and therefore, for the final results, we have used this amount in calculating the surrogate profit rate.

Comment 26: Gross Unit Price Adjustments

Yingli

- The Department incorrectly subtracted freight revenue and billing adjustments from the reported gross unit price.³⁰⁵ The Department should correct this error by adding these amounts to the gross unit price.³⁰⁶

No other interested parties commented on this issue.

Department's Position:

We agree with Yingli and have corrected this error for the final results of this review.

Comment 27: Surrogate Value for Wafers

³⁰⁰ See Petitioner Rebuttal Brief at 29-30.

³⁰¹ See Petitioner's November 10, 2014 submission at Exhibit 24, page 543.

³⁰² See *Chlorinated Isocyanurates From the People's Republic of China: Final Results of 2008-2009 Antidumping Duty Administrative Review*, 75 FR 70212 (November 17, 2010) and accompanying IDM at Comment 7 ("the Department's practice is to offset a surrogate company's SG&A expenses with foreign exchange gains or losses").

³⁰³ See, e.g., *Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture From the People's Republic of China*, 69 FR 67313 (November 17, 2004) and accompanying IDM at Comment 3 ("we have also offset the surrogate companies' SG&A expenses with short-term interest income and foreign exchange gains or losses, according to our standard methodology of including these items as offsets to the cost of production"). See also *Polyethylene Retail Carrier Bags from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 72 FR 12762, and accompanying IDM at Comment 3 ("we stated that it was our standard methodology to offset SG&A expenses with short-term interest income. Thus, for the final results, we offset {the}... SG&A expense with the amount of bank interest recorded on its financial statements").

³⁰⁴ See Tetrafluorotethane IDM at Comment 17.

³⁰⁵ See Yingli Case Brief at 50-51.

³⁰⁶ See Yingli's May 5, 2015 Section C response at C-22 – C-23.

Petitioner

- The Department should value Yingli's monocrystalline and multicrystalline wafers using international prices for wafers, rather than the value of polysilicon.³⁰⁷
- In the Preliminary SV Memorandum, the Department stated that it calculated separate surrogate values for wafers using international prices. Thus, it is clear that the Department erred in applying a value for polysilicon to wafers.

Yingli

- If the Department revises the surrogate value for monocrystalline and multicrystalline wafers, it should value each type of wafer using the price corresponding to the type of wafer rather than valuing both wafers using the monocrystalline wafer price.³⁰⁸
- The Department should apply the watts per piece and grams per piece conversion factors in its derivation of the monocrystalline wafer price.³⁰⁹

Department's Position:

We agree with Petitioner. We mistakenly valued Yingli's monocrystalline and multicrystalline wafers using the surrogate value for solar-grade polysilicon ore rather than the surrogate values that we calculated for each type of wafer from the world market prices reported by Bloomberg New Energy Finance and GTM Research. Such prices are more specific to these wafers than the price of solar-grade polysilicon ore. Accordingly, for the final results of review, we valued Yingli's monocrystalline and multicrystalline wafers using the international prices specific to each type of wafer, and applied the appropriate unit-of-measure conversion factors.

Comment 28: Export Subsidy Adjustment*Petitioner*

- The Department should not have based the export subsidy adjustment on the export subsidy rates from the companion CVD investigation since the Department found the mandatory respondents did not benefit from this export subsidy program in the preliminary results of companion CVD administrative review.³¹⁰
- If the Department continues to find that the mandatory respondents did not benefit from export subsidies in the final results of the companion CVD administrative review, it should not make an export subsidy adjustment in the final results of this review. However, if the Department finds that the mandatory respondents benefitted from export subsidies in the final results of the companion CVD review, then an offset to the dumping margins in this review may be appropriate.

Yingli

- The Department should follow its practice and adjust the dumping margins found in the final results of this review by the export subsidy rates found in the companion CVD

³⁰⁷ See Petitioner Case Brief at 13-14.

³⁰⁸ See Yingli Rebuttal Brief at 13-14.

³⁰⁹ See Yingli's October 1, 2014, fourth supplemental section D response, at revised Exhibit D-11.

³¹⁰ See Petitioner Case Brief at 32-34.

investigation, rather than by the export subsidy rates from the companion CVD administrative review.³¹¹

- In past cases, the Department has not based its subsidy offsets in an AD review on the rates calculated in the final results of a concurrent CVD administrative review, even though the AD and CVD final results were issued and published concurrently.³¹²

Department's Position:

We agree with Yingli. Pursuant to section 772(c)(1)(C) of the Act, the Department adjusts the price used to establish export price and constructed export price by “the amount of any countervailing duty imposed on the subject merchandise... to offset an export subsidy.” With regard to the method of adjusting AD margins to offset CVD export subsidies, the Department's practice is to rely on the export subsidy rates found in the most recently completed segment of the companion CVD proceeding (*i.e.*, the most recently published CVD final determination or final results of administrative review).³¹³

As noted by Yingli, in the Department's recent administrative reviews of aluminum extrusions from the PRC, it adjusted the respondents' AD margins to account for export subsidies using the export subsidy rates from the final results (or final determination) of the prior CVD segment, rather than the concurrent CVD segment.³¹⁴ For example, in *Aluminum Extrusions AD AR2*, the Department adjusted the AD margins using the CVD export subsidy rates found in the final results of *Aluminum Extrusions CVD AR1*, even though the final results of *Aluminum Extrusions CVD AR2* were issued on the same date as the final results of *Aluminum Extrusions AD AR2* (December 31, 2014).³¹⁵ Petitioner offered no support for its arguments that the Department improperly offset the respondents' dumping margins in the *Preliminary Results*, or that the Department should change its practice for the final results of this review to apply the export subsidy rates from the concurrent CVD review, rather than the export subsidy rates from the most recently completed segment of the CVD proceeding. Therefore, for the final results of this administrative review, we are continuing to offset the AD margins of the respondent companies using the export subsidy rates found in the final determination of the CVD investigation, which is the most recently completed segment of the CVD proceeding.

Comment 29: By-Product Offset for Broken Wafers

³¹¹ See Yingli Rebuttal Brief at 30-31 (citing *Aluminum Extrusions From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Rescission, in Part, 2010/12*, 79 FR 96 (January 2, 2014) (“*Aluminum Extrusions AD AR1*”) (in which the Department based its subsidy offsets on the rates calculated in the CVD investigation); and *Aluminum Extrusions From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 78784 (December 31, 2014) (“*Aluminum Extrusions AD AR2*”), and accompanying Issues and Decision Memorandum at Attachment (in which the Department based its subsidy offsets on the rates calculated in the previous administrative review)).

³¹² *Id.* (citing *Aluminum Extrusions From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2010 and 2011*, 79 FR 106 (January 2, 2014) (“*Aluminum Extrusions CVD AR1*”); and *Aluminum Extrusions from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2012*, 79 FR 78788 (December 31, 2014) (“*Aluminum Extrusions CVD AR2*”)).

³¹³ See, e.g., *Aluminum Extrusions AD AR1*; *Aluminum Extrusions AD AR2*, and accompanying Issues and Decision Memorandum at the Attachment.

³¹⁴ *Id.*

³¹⁵ *Id.*; see also *Aluminum Extrusions CVD AR1* and *Aluminum Extrusions CVD AR2*.

Petitioner

- The Department should deny Wuxi Suntech's claimed by-product offset for broken wafers because: (1) record evidence indicates that an offset is not warranted, and (2) Wuxi Suntech failed to provide sufficient information to establish that it is entitled to the offset.³¹⁶

Wuxi Suntech

- Wuxi Suntech answered all of the Department's questions regarding the by-product offset for broken wafers and, thus, there is insufficient cause to reject the claimed offset.³¹⁷

Department's Position:

The Department finds that Wuxi Suntech demonstrated that its broken wafers had commercial value (as they were sold for revenue) during the POR, and, therefore, for these final results of review, the Department has granted Wuxi Suntech's claim for a by-product offset for broken wafers generated during the POR. The Department has explained its by-product offset practice as follows: "the by-product offset is limited to the total production quantity of the byproduct ... produced during the POR, so long as it is shown that the by-product has commercial value."³¹⁸ For a by-product offset to have commercial value, the respondent must demonstrate that the product was sold for revenue or reintroduced into production.³¹⁹

In the instant administrative review, Wuxi Suntech reported that "broken wafers are generated during solar cell production and are sold, or reintroduced into the production."³²⁰ The record indicates that Wuxi Suntech's broken wafers had commercial value during the POR because its broken wafers were sold for revenue.³²¹ Therefore, consistent with the Department's by-product offset practice, as articulated in *Frontseating Service Valves* and *Silicon Metal*, the Department has granted Wuxi Suntech's request for a broken wafer by-product offset for these final results of review.

³¹⁶ See Petitioner's Case Brief at 38-39. Petitioner has treated the name of this reported by-product as proprietary information in its case brief; however Wuxi Suntech publically disclosed that the claimed by-product is broken wafers. See Wuxi Suntech's Rebuttal Brief, dated March 30, 2015, at 14.

³¹⁷ See Wuxi Suntech Rebuttal Brief, dated March 30, 2015, at 14.

³¹⁸ See *Frontseating Service Valves From the People's Republic of China: Final Results of the 2008-2010 Antidumping Duty Administrative Review of the Antidumping Duty Order*, 76 FR 70706 (November 15, 2011) ('*Frontseating Service Valves*'), and accompanying Issues and Decision Memorandum at Comment 18.

³¹⁹ See *Silicon Metal from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 77 FR 54563 (September 5, 2012) ("*Silicon Metal*"), and accompanying Issues and Decision Memorandum at Comment 3.

³²⁰ See Wuxi Suntech's May 13, 2014 Section D Questionnaire Response at 20.

³²¹ For a discussion of the proprietary information considered by the Department, see Memorandum to Robert Bolling, Acting Director, AD/CVD Operations, Office IV through Howard Smith, Program Manager, AD/CVD Operations, Office IV, concerning, "Antidumping Duty Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Wuxi Suntech Broken Wafer By-Product Offset Analysis," dated concurrently with this memorandum. Wuxi Suntech has publically disclosed that its claim that it reintroduced broken wafers into production is at issue in this case. See Wuxi Suntech's Rebuttal Brief, dated March 30, 2015, at 14.

Comment 30: Surrogate Value for Quartz Crucibles³²²*Petitioner*

- The Department should value Yingli’s crucibles using Thai HTS category 8486.90.28000 and/or category 8514.90.90000, which pertain to “Parts of Industrial or Laboratory Electric Furnaces and Ovens” because these categories are more specific to this input.³²³
- A CBP ruling indicates that crucibles used to grow iridium crystals and which must be periodically replaced are classified under HTSUS category 8514.90.90000.
- Another CBP ruling indicates that molybdenum crucibles used to grow sapphire crystals are classified under HTSUS category 8486.90.0000.
- Alternatively, the Department should value Yingli’s crucibles using Thai HTS category 6903.20 (Refractory Nonconstructional Ceramic Goods Nesoi (Retorts, Muffles, Plugs, Etc.), Containing Over 50% (Wt.) Singly Or Combined, Of Alumina Or Silica.), which is more specific than the HTS category used to value this input in the *Preliminary Determination*.

Yingli

- The Department should continue to value Yingli’s quartz crucibles using Thai HTS category 6903.90 because it is specific to the input, and identical to the HTS category used to value this input in the underlying investigation.³²⁴ Thai HTS category 6903.20, which includes material that contains alumina, is not specific to Yingli’s crucibles, which do not contain alumina.
- Because Thai HTS categories 8486.90.28000 and 8514.90.90000 reflect “machines and machine parts,” it would be inappropriate to use them to value crucibles as direct materials. If the Department agrees that Yingli’s quartz crucibles are machine parts, as Petitioner’s proposed HTS categories suggest, then they should be classified as manufacturing overhead and not a direct material.

Department’s Position:

We have continued to value Yingli’s crucibles using imports under Thai HTS category 6903.90 because this category is more specific to the crucibles than Thai HTS categories 8486.90.28000, 8514.90.90000, or 6903.20. Yingli described the input in question as a crucible, and information submitted by Yingli (which is proprietary) indicates that it is a refractory item.³²⁵ HTS category 6903 explicitly covers refractory items and crucibles. In addition, record evidence (which is proprietary) indicates that Yingli’s crucibles have properties consistent with Thai HTS category 6903.90.³²⁶ Additionally, in the underlying investigation, the Department noted that “the explanatory notes to HTS category 6903 state that in many cases, the refractory products are not

³²² A significant amount of factual information pertaining to this issue may not be publically disclosed. For a discussion of the property information relied on by the Department in analyzing the issue *see*, Memorandum to Edward Yang, Senior Director, Office VII, AD/CVD Operations, Office IV, from Robert Bolling, Acting Director, AD/CVD Operations, Office IV, “Comments in the Issues and Decision Memorandum Containing Business Proprietary Information,” dated concurrently with this notice.

³²³ *See* Petitioner Case Brief at 25-26.

³²⁴ *See* Yingli Rebuttal Brief at 23-24.

³²⁵ *See* Yingli’s October 1, 2014 submission at Exhibit D-30.

³²⁶ *See id.*

permanent fixtures.”³²⁷ The record of the instant administrative review contains information (which is proprietary) indicating that Yingli’s crucibles are not permanent fixtures.³²⁸ Thai HTS category 6903.90 includes ceramic refractory goods, including crucibles that do not contain alumina, and is, therefore, specific to the crucibles used by Yingli.

The three HTS categories proposed by Petitioner are not more specific to Yingli’s crucible input than Thai HTS category 6903.90. Petitioner argues that CBP rulings support the selection of Thai HTS categories 8486.90.28000 and 8514.90.90000 to value Yingli’s crucibles. However, Petitioner’s reliance on these CBP rulings is misplaced. CBP Ruling NI67595 describes the product at issue as a molybdenum crucible.³²⁹ CBP Ruling N061759 describes the product at issue as a crystal grower, and does not describe the composition of the product.³³⁰ Thus, there is no evidence that these crucibles share the same physical characteristics as the ceramic crucibles used by Yingli. Furthermore, we disagree that Thai HTS category 6903.20 is more specific to Yingli’s crucibles because this category covers items not consistent with Yingli’s crucibles (the difference between items covered by this category and Yingli’s crucibles is proprietary). For the foregoing reasons, we have continued to value Yingli’s crucibles using imports under HTS category 6903.90 for these final results of review.

Comment 31: Surrogate Value for Junction Boxes³³¹

Petitioner

- The Department should value Yingli’s junction boxes using Thai HTS category 8544.42.99000 (Other Electric Conductors, for a Voltage not Exceeding 1,000V, Fitted with Connectors, Other).³³²
- Thai HTS category 8544.42.9100 (Other electric conductors, for a voltage not exceeding 1,000 V: Fitted with connectors: Electric Cables Insulated With Plastics Having A Core Diameter Not Exceeding 19.5Mm), which was used to value this input in the *Preliminary Determination*, is limited only to electric cables and does not include the junction box or other components incorporated into the box.

Yingli

- The Department should continue to value Yingli’s junction boxes using Thai HTS category 8544.42.9100 because it is more specific to Yingli’s junction boxes (based on certain proprietary information).³³³

³²⁷ 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), and accompanying Issues and Decision Memorandum at Comment 15.

³²⁸ See, e.g., Yingli’s May 13, 2014 Section D Response at Exhibit D-1.

³²⁹ See Petitioner’s November 10, 2014 submission at Exhibit 3.

³³⁰ See *id.*

³³¹ A significant amount of factual information pertaining to this issue may not be publically disclosed. For a discussion of the property information relied on by the Department in analyzing the issue see, Memorandum to Edward Yang, Senior Director, Office VII, AD/CVD Operations, Office IV, from Robert Bolling, Acting Director, AD/CVD Operations, Office IV, “Comments in the Issues and Decision Memorandum Containing Business Proprietary Information,” dated concurrently with this notice.

³³² See Petitioner Case Brief at 23-24.

³³³ See Yingli Rebuttal Brief at 22-23.

Department's Position:

The Department agrees with Petitioner and has valued Yingli's junction boxes using Thai HTS category 8544.42.99000 (Other Electric Conductors, for a Voltage not Exceeding 1,000V, Fitted with Connectors, Other) for these final results of review. As Petitioner states, Thai HTS category 8544.42.9100 is limited to electrical cables. While Yingli provided certain information (which is proprietary) in response to the Department's request for information regarding the physical characteristics of Yingli's junction boxes,³³⁴ record evidence indicates that junction boxes used in the production of solar modules include additional components not initially described by Yingli. Specifically, Yingli's marketing materials contain diagrams of its modules, which depict the junction box as a rectangular device with two attached wires.³³⁵ Accordingly, we find that Thai HTS category 8544.42.99000 is more specific to input at issue and have used this category to value Yingli's junction boxes for these final results of review.

Comment 32: Differential Pricing

Yingli

- The Department should not apply its “differential pricing” analysis to determine which comparison method to use to calculate Yingli's dumping margin, because that analysis is not in accordance with U.S. law.
- First, the Department's “differential pricing” analysis fails to identify a pattern of export prices that differ significantly among purchasers, regions or time periods (*i.e.*, it fails to identify targeted dumping), as required by section 777A(d)(1)(B)(i) of the Act and the Statement of Administrative Action accompanying the Uruguay Round Agreements Act because: (i) the Cohen's *d* test does not evaluate whether targeted dumping exists, but rather measures only the extent of the difference between the mean of a test group and the mean of a comparison group; (ii) the Cohen's *d* test cannot differentiate between “targeted dumping” and the myriad of other potential causes of variations in price; (iii) the Cohen's *d* test identifies all instances in which prices of the test group deviate from prices of the comparison group regardless of whether the deviation is positive or negative, while targeted dumping could exist only if test group sales were priced significantly below comparison group sales; (iv) the Cohen's *d* test excludes test group sales from the comparison group, and therefore fails to compare pricing of sales in the test group with the normal pattern of pricing for all sales; and (v) the ratio test aggregates the results of the application of the Cohen's *d* test to purchasers, regions, and time periods, and therefore masks the fact that sales may not in fact be differentially priced by any of these individual bases identified in the statute.
- Second, the Department fails to explain why any targeted dumping identified cannot be taken into account by a standard average-to-average (“A-A”) or transaction-to-transaction (“T-T”) comparison methodology, as required by section 777A(d)(1)(B)(ii) of the Act.
- Third, the Department's use of several unjustified numerical thresholds in its “differential pricing” analysis leads to arbitrary and unreasonable results, and renders the Department's entire analytical framework unlawful. For example: (i) the Cohen's *d* test

³³⁴ See Yingli's October 1, 2014 submission at Exhibit D-30.

³³⁵ See Yingli's April 18, 2014 Section A Response at Exhibit A-42.

leads to meaningless conclusions because it applies whenever at least two observations exist in the test and comparison groups; (ii) the 0.8 cutoff for the Cohen's *d* test means that prices may be considered to be targeted almost half the time; and (iii) variables unrelated to the issue of targeted dumping may determine which of the three bands of the ratio test a particular respondent falls into.

- Fourth, the Department has no basis in law for applying the average-to-transaction (“A-T”) methodology with zeroing to sales that it does not find to be targeted. Rather, section 777A(d)(1)(B) of the Act permits the Department to apply the A-T method only to sales that it finds to be targeted. Moreover, the Department has never explained why applying the A-T method to all sales when the ratio test yields a result of 66 percent or greater is a reasonable approach in an administrative review.

Petitioner

- Yingli's arguments have all been previously rejected by the Department.
- The Department's differential pricing analysis appropriately identifies a pattern of export prices that differ significantly among purchasers, regions, or time periods.
- The Cohen's *d* test is an appropriate measure of a pattern of prices that differ “significantly.”
- The Department should reject Yingli's claims that it failed to explain why targeted dumping cannot be accounted for by the average-to-average or transaction-to-transaction methodology. Further, the Department's sample size and thresholds are reasonable and in accordance with law.

Department's Position:

We disagree with Yingli. The SAA expressly recognizes that the statute “provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an average-to-average or transaction-to-transaction methodology cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, i.e., where targeted dumping may be occurring.”³³⁶ As the SAA implies, we are not tasked with determining whether targeted dumping is, in fact, occurring. Rather, the SAA recognizes that targeted dumping may be occurring where there is a pattern of prices that differ significantly among purchasers, regions, or time periods. In our view, the purpose of section 777A(d)(1)(B) of the Act is to evaluate whether the A-A method or the A-T method is the appropriate tool to measure whether, and if so, to what extent, a given respondent is dumping the merchandise at issue.³³⁷ While targeting may be occurring with respect to such sales, it is neither a requirement nor a precondition for us to otherwise determine that the A-T method is warranted based upon a finding of a pattern of prices that differ significantly as provided in the statute.

We use the A-A method unless we determine that another method is appropriate in a particular case.³³⁸ In order to determine whether the A-A method or an alternative comparison method is an appropriate tool with which to measure the extent of a respondent's dumping in a given situation, we look to section 777A(d)(1)(B) of the Act. Section 777A(d)(1)(B)(i) of the Act

³³⁶ SAA at 843.

³³⁷ See 19 CFR 351.414(c)(1).

³³⁸ *Id.*

requires that there exists “a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time.” The statute leaves to our discretion how to determine the existence of such a pattern under section 777A(d)(1)(B) of the Act and does not provide a specific direction on how to make such determination. The statute simply requires that we find the existence of a pattern of prices that “differ significantly,” and we reasonably demonstrated that such a pattern exists in this administrative review.

The Cohen’s *d* coefficient is a statistical measure which gauges the extent (or “effect size”) of the difference between the means of two groups. “Effect size is a simple way of quantifying the difference between two groups and has many advantages over the use of tests of statistical significance alone.”³³⁹ As we stated in *Xanthan Gum from China*:

Effect size is the measurement that is derived from the Cohen’s *d* test. Although Deosen argues that effect size is a statistic that is “widely used in meta-analysis,” we note that the article also states that “[e]ffect size quantifies the size of the difference between two groups, and may therefore be said to be a *true measure of the significance of the difference*.” The article points out the precise purpose for which the Department relies on Cohen’s *d* test to satisfy the statutory language, to measure whether a difference is significant.³⁴⁰

Accordingly, we disagree with Yingli’s claim that the Cohen’s *d* test is not an appropriate and reasonable approach to examine whether there exists a pattern of prices that differ significantly.

The statute only requires a finding of a pattern of prices that differ “significantly.” The statute does not require that the difference be “statistically significant.” Yingli does not demonstrate that our reliance on the Cohen’s *d* test, which is a generally recognized statistical measure of effect size, is unreasonable and that some higher threshold, not enumerated in the statutory language, must be satisfied. Further, as discussed above, the Cohen’s *d* test is a generally recognized measure of the significance of the differences of two means, and we set a threshold of “large” to provide the strongest indication that there is a significant difference between the means of the test and comparison groups.

If Congress intended to require a particular result be obtained, with a level of “statistical significance” of price differences as a condition for finding that there exists a pattern of prices that differ significantly, then Congress presumably would have used language beyond the stated requirement and more precise than “differ significantly.” This is what Congress did, for example, with respect to enacting the sampling provision for respondent selection in section 777A(c)(2)(A) of the Act. But it did not do so with respect to the determination of the existence of a pattern in section 777A(d)(1)(B)(i) of the Act. As the executive agency tasked with

³³⁹ See *Xanthan Gum From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 33351 (June 4, 2013) (“*Xanthan Gum from China*”) and the accompanying Issues and Decision Memorandum at Comment 3, quoting from Coe, Robert, “It’s The Effects Size, Stupid: What effect size is and why it is important,” presented at the Annual Conference of British Educational Research Association (September 12-14, 2002).

³⁴⁰ *Id.* Footnote omitted and emphasis originally included.

implementing the antidumping law, resolving statutory ambiguities, and filling gaps in the statute, we do not agree with Yingli's opinion that the term "significantly" in the statute can mean only "statistically significant." The law includes no such directive. Our analysis, including the use of the Cohen's d test, reasonably fills the statutory gap as to how to determine whether a pattern of prices "differ significantly."

The Cohen's d test does not need to take into account any "causal links" for the identified pattern of prices that differ significantly. The statute does not require that we account for some kind of causality for any observed pattern of prices that differ significantly, such as differences in market factors, production costs, or material inputs. Congress did not speak to the intent of the producers or exporters in setting export prices that exhibit a pattern of significant price differences. Nor is an intent-based analysis consistent with the purpose of the statutory provision, as noted above, which is to determine whether averaging is a meaningful tool to measure whether, and if so, to what extent, dumping is occurring. Consistent with the statute and the SAA, we determined whether a pattern of significant price differences exists. Neither the statute nor the SAA requires us to conduct an additional analysis to account for potential reasons for the observed pattern of prices that differ significantly.

We disagree with Yingli's contention that the Cohen's d test does not measure the significance of the differences between the mean prices between the test and comparison groups. The examination of the price differences between test and comparison groups is relative to the "pooled standard deviation." The pooled standard deviation reflects the dispersion, or variance, of prices within each of the two groups. When the variance of prices is small within these two groups, then a smaller difference between the weighted-average sale prices of the two groups represents a more significant difference because there is less of an overlap in the prices between the test and comparison groups. When the variance within the two groups is larger (*i.e.*, the dispersion of prices within one or both of the groups is greater), then the difference between the weighted-average sale prices of the two groups must be larger in order for the difference to be significant. When the difference in the weighted-average sale prices between the two groups is measured relative to the pooled standard deviation, this value is expressed in standardized units based on the dispersion of the prices within each group. This is the concept of an effect size, as represented in the Cohen's d coefficient.

We disagree with Yingli's assertion that the sales in each test group should also be included in the comparison group rather than have the test and comparison groups be independent (*i.e.*, mutually-exclusive) of each other. This would result in purchasers', regions' or time periods' sale prices being compared to themselves.

We disagree with Yingli's contention that the statute and the SAA require that the differential price analysis identify "targeted dumping." Rather, as discussed above, the SAA recognizes that targeted dumping may be occurring where there is a pattern of prices that differ significantly among purchasers, regions, or time periods. Further, the purpose of the application of the differential price analysis in this review is to determine whether the A-A method is the appropriate tool to evaluate the extent of dumping by Yingli. We disagree further with Yingli's claims that a pattern of prices that differ significantly necessarily involves only sales priced significantly below the comparison group sales as these can be the only sales which are

“targeted” and that the Department should not consider test group sales priced above the comparison group. The statute does not require that we consider only lower-priced sales when considering whether the A-A method is appropriate. In our view, it is reasonable for us to consider sales information on the record and to draw reasonable inferences as to what the data show. Contrary to Yingli’s claim, it is reasonable for us to consider both lower-priced and higher-priced sales in the Cohen’s *d* analysis because higher-priced sales are equally capable as lower-priced sales to create a pattern of prices that differ significantly.

Further, the statute states that we may apply the A-T method if “there is a pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions, or periods of time,” and we explain “why such differences cannot be taken into account” using the A-A method.³⁴¹ The statute directs us to consider whether a pattern of significantly different prices exist. The statutory language references prices that “differ” and does not specify whether the prices differ by being lower or higher than the remaining prices. The statute does not provide that we consider only higher-priced sales or only lower-priced sales when conducting the analysis, nor does the statute specify whether the difference must be the result of certain sales being priced higher or lower than other sales. Higher-priced sales and lower-priced sales do not operate independently; all sales are relevant to the analysis.³⁴²

The statute allows us to apply the A-T method if “there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time,” and we explain “why such differences cannot be taken into account” using the A-A comparison method.³⁴³ The first requirement examines a pattern of export prices or constructed export prices (*i.e.*, the prices of transactions in the U.S. market) and makes no provision for comparisons with normal values as is provided for when examining dumping.³⁴⁴ In other words, the statute does not require us to find whether higher-priced sales are not dumped or lower-price sales are dumped before we examine whether a pattern of prices that differ significantly exists. Therefore, whether U.S. prices are above or below their comparable normal values, *i.e.*, whether they are dumped or not, is not a consideration when examining whether there exists a pattern of prices that differ significantly consistent with section 777A(d)(1)(B)(i) of the Act.

The purpose of considering an alternative comparison method is to examine whether the A-A method is appropriate to measure the amount of Yingli’s dumping, some of which may be masked. Masked dumping is the result of two concurrent situations: dumped sales and non-dumped sales. One without the other does not result in masked dumping. Because the existence of both dumped and non-dumped sales creates the potential for masked dumping, we must consider both low-priced and high-priced sales to determine whether a pattern of prices that differ significantly exists and whether masking is occurring. When we look for a pattern of

³⁴¹ See section 777A(d)(1)(B) of the Act.

³⁴² See *Hardwood and Decorative Plywood From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 58273 (September 23, 2013) and the accompanying Issues and Decision Memorandum at Comment 5.

³⁴³ See section 777A(d)(1)(B) of the Act.

³⁴⁴ See section 771(35)(A) of the Act.

prices that differ significantly pursuant to section 777A(d)(1)(B)(i) of the Act, a pattern can involve prices that are higher and/or lower than the comparison price.

Consequently, it is reasonable for us to consider the sales prices that are higher and lower than the comparison sales price in the Cohen's *d* analysis because higher priced sales are equally capable as lower priced sales to create a pattern of prices that differ significantly. Further, higher priced sales will offset lower priced sales, either implicitly through the calculation of a weighted average price or explicitly through the granting of offsets, that can mask dumping. The statute directs us to consider whether there is a pattern of prices that differ significantly. The statutory language references prices that "differ" and does not specify whether the prices differ by being lower or higher than the remaining prices. The statute does not provide that we consider only higher priced sales or only lower priced sales when conducting the analysis, nor does the statute specify whether the difference must be the result of certain sales being priced higher or lower than other sales.³⁴⁵

Higher priced sales and lower priced sales do not operate independently; all sales are relevant to the analysis. Higher or lower priced sales could be dumped or could be masking other dumped sales – this is immaterial in the Cohen's *d* test and the question of whether there is a pattern of prices that differ significantly because this analysis includes no comparisons with normal values. By considering all sales, higher priced sales and lower priced sales, we are able to (1) analyze an exporter's pricing behavior and (2) identify whether there is a pattern of prices that differ significantly. Moreover, finding such a pattern of prices that differ significantly among purchasers, regions, or periods of time signals that the exporter is discriminating between purchasers, regions, or periods of time within the U.S. market, rather than following a more uniform pricing behavior. Where the evidence indicates that the exporter is engaged in a pricing behavior which creates a pattern, there is cause to continue with the analysis to determine whether masked dumping is occurring. Accordingly, both higher and lower priced sales are relevant to our analysis of Yingli's pricing behavior.

Finally, we disagree with Yingli's claim that the thresholds provided for in our differential pricing analysis regarding the results of the ratio test and the identification of an appropriate alternative comparison method, if any, are unlawful. Neither the statute nor the SAA provides any guidance in determining how to apply the A-T method once the requirements of section 777A(d)(1)(B)(i) and (ii) of the Act have been satisfied. Accordingly, we have reasonably created a framework to determine how the A-T method may be considered as an alternative to the standard A-A method based on the extent of the pattern of prices that differ significantly as identified with the Cohen's *d* test. When 66 percent or more of a respondent's U.S. sales, by value, are found to differ significantly, then we find that the extent of these price differences throughout the pricing behavior of the respondent does not permit the segregation of this pricing behavior from the remainder of the respondent's U.S. sales.

Accordingly, we determine that considering the application of the A-T method to all U.S. sales is reasonable. Further, when 33 percent or less of a respondent's U.S. sales, by value, differ significantly, then we consider this extent of the pattern to not be significant in considering whether the A-A method is appropriate, and we do not consider the application of the A-T

³⁴⁵ See section 777A(d)(1)(B)(i) of the Act.

method as an alternative comparison method. When between 33 percent and 66 percent of a respondent's U.S. sales, by value, differ significantly, then the extent of this pattern justifies considering whether the A-A method is appropriate, but we also find that segregating this pricing behavior from the pricing behavior which does not contribute to the pattern is reasonable. Therefore, we only consider the application of the A-T method as an alternative comparison method to this limited portion of a respondent's U.S. sales.

In the instant case, between 33 and 66 percent of Yingli's U.S. sales, by value, differ significantly so the extent of the pattern justifies considering whether the A-A method is appropriate and we consider the application of the A-T method as an alternative comparison method to pricing behavior which contributes to this pattern. As part of this analysis, it is necessary to determine whether there is a meaningful difference between the A-A and alternative margins. A meaningful difference would be either a 25 percent difference in the margin or when the margin changes from a zero or *de minimis* rate to an above *de minimis* rate. Because Yingli's margin changes from a *de minimis* rate using the A-A method to an above *de minimis* rate using the mixed alternative method (where we calculated a weighted average, based on quantity, of the dumping rate from the reported sales (from our standard antidumping duty program) and the dumping rate from the unreported sales (based on the partial AFA calculation)),³⁴⁶ we have determined that it is appropriate to use the mixed alternative method to determine Yingli's final margin.³⁴⁷

Comment 33: Surrogate Value for the Polysilicon Feedstock and Solar Cell Offsets

Petitioner

- The Department should use Thai HTS category 2804.69, silicon containing by weight less than 99.99 percent but not less than 99 percent silicon, instead of the world market price of polysilicon or HTS category 8548.10³⁴⁸ to value Yingli's polysilicon feedstock and solar cell offsets. These items, generated during production, include broken chunks of polysilicon from ingots and blocks, broken wafers, or broken/unusable cells.
- The polysilicon feedstock and cell material generated during production have contaminants and impurities³⁴⁹ and must undergo substantial processing in order to be suitable for reintroduction and melting with pure virgin polysilicon.³⁵⁰ Thus, these items

³⁴⁶ See Analysis of the Final Results Margin Calculation for Yingli Energy (China) Company Limited; Baoding Tianwei Yingli New Energy Resources Co., Ltd.; Tianjin Yingli New Energy Resources Co., Ltd.; Hengshui Yingli New Energy Resources Co., Ltd.; Lixian Yingli New Energy Resources Co., Ltd.; Baoding Jiasheng Photovoltaic Technology Co., Ltd.; Beijing Tianneng Yingli New Energy Resources Co., Ltd.; Hainan Yingli New Energy Resources Co., Ltd. (collectively, "Yingli"), ("*Yingli Final Analysis Memo*"), dated July 7, 2015.

³⁴⁷ As explained in Comment 39, the Department has not included Yingli's two unreported sales in the differential pricing analysis because we do not have verified data, such as gross unit price, CONNUM, date of sale, location, needed.

³⁴⁸ See Petitioner Case Brief at 16, where HTS code 8548.10 is described as, waste and scrap of primary cells, primary batteries and electric accumulators; spent primary cells, spent primary batteries and spent electric accumulators.

³⁴⁹ *Id.* at 14-15, where Petitioner contends that a cropped monocrystalline chunk will contain trace amounts of the dopant material (either N- or P-dopant), which are surface contaminants from the sawing and cutting process including diamond fragments. Further, broken cells may have been infused with numerous acids and process chemicals, such as phosphorous oxychloride, texturization additives, and carbon tetrafluoride.

³⁵⁰ *Id.* at 14-15.

should be valued using Thai HTS category 2804.69. This category is for items with a silicon purity level less than 99.99 percent.³⁵¹

- Thai HTS category 8548.10 is also not an appropriate basis to value offsets for broken, unusable solar cells generated during production for two reasons.
- First, the description for this HTS code is for storage batteries, such as automobile lead-acid batteries, cores to batteries, nickel cadmium batteries, standard disposable personal electronics batteries (*e.g.*, AA type batteries, and 9-volt batteries) and aircraft batteries. None of these items bear any relation to photovoltaic cells.³⁵² The cells referred to in this HTS subheading are not solar cells.³⁵³
- Second, the value derived from Thai HTS category 8548.10 for cell scrap is twice as high as the primary material input, virgin polysilicon.³⁵⁴ It is the Department's practice to not grant a scrap offset higher than the AUV of the primary input that was used to generate that scrap (*see Garment Hangers from China*).³⁵⁵

Yingli

- The Department should not value Yingli's polysilicon feedstock by-product offsets using Thai HTS category 2804.69 because there can be differences in the purity levels of various polysilicon inputs and by-products. For example, the polysilicon input identified as "feedstock" has a purity level as high as 99.999999 percent while the polysilicon input identified as unclassified stores has a lower purity level than solar grade polysilicon. Thus, by products from feedstock polysilicon should be valued using world market prices for polysilicon.³⁵⁶
- Petitioner's proposed Thai HTS category 2804.69 for valuing Yingli's polysilicon feedstock by-products is incorrect because Petitioner has failed to demonstrate that Yingli's polysilicon feedstock by-products have less than 99.99 percent purity.³⁵⁷

Department's Position:

We have examined record information regarding the polysilicon inputs used, and the scrap polysilicon generated from various Yingli production stages (*i.e.*, the ingot, block, wafer, cell, and module stages) to determine the appropriate surrogate value(s) to apply to these offsets.³⁵⁸ The non-silicon inputs used in production at the ingot, block, and wafer stages are limited in number compared to those used in cell production and most of the inputs used at these stages appear to be related more to facilitating the mechanical processes (*e.g.*, ingot forming (silicon nitride and silicon solution), cutting blocks (glycol or cutting slurry used for cooling and

³⁵¹ *Id.* at 15-16.

³⁵² *Id.* at 16-17.

³⁵³ *Id.* at 17.

³⁵⁴ *Id.*

³⁵⁵ *Id.* (citing *Steel Wire Garment Hangers from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 FR 47587 (August 14, 2008) ("*Garment Hangers from China*") and accompanying Issues and Decision Memorandum at Comment 7). Petitioner states that in *Garment Hangers from China*, the Department determined because the steel scrap SV was higher than the price for the product, steel wire rod, this produced an unreasonable result and a new SV was selected.

³⁵⁶ *See* Yingli Rebuttal Brief at 14-15.

³⁵⁷ *Id.* at 15.

³⁵⁸ *See* Yingli's May 13, 2014, Section D response at Exhibit D-3.

lubrication), cutting wafers (silicon carbide for polishing and cutting)), or cleaning, such as alcohol and detergent, than to transforming the composition of the product by being deposited on, diffused in, or incorporated into the product, as happens in solar cell production. In addition, this scrap/recycled polysilicon must remain at solar cell purity levels of 99.999999 percent or the polysilicon could not be used to make solar cells at the cell stage of production.³⁵⁹ Given this information, we do not believe there is sufficient evidence to show that the processing and additional inputs used at the ingot, block, and wafers stages introduced impurities into the ingots or wafers to such an extent that by-product material (*e.g.*, ingot pieces, portions of blocks, pieces of wafers) generated by forming the ingots, cutting ingots into blocks, and cutting blocks into wafers has a significantly lower purity level than the ingots, blocks, or wafers themselves (which are primarily made of solar grade polysilicon with a high purity level). Therefore, we have continued to value Yingli's reported polysilicon feedstock by-products³⁶⁰ for ingot, block, and wafer production using the world market price for polysilicon. However, as noted above, record evidence suggests that the nature of the processes and the additional chemicals and additives used during cell production introduce impurities into solar cells which may lower purity levels if the solar cells were re-melted and used with other feedstock polysilicon for ingot production.³⁶¹ Therefore, we have valued Yingli's reported feedstock polysilicon by-products in the cell and module production stages³⁶² using Thai HTS category 2804.69, which is for inputs of silicon containing less than 99.99 percent purity.³⁶³

Also, we agree with Petitioner that Yingli's by-product identified as recycled cells should not be valued using HTS category 8548.10. HTS category 8548.10 covers waste and scrap of primary cells, primary batteries, spent primary cells, and spent primary batteries. It is not clear that the cells referred to in this category relates to spent (broken or unusable) solar cells or parts of solar cells because the AUV calculated from HTS category 8548.10 is twice that of the value of the primary material input used to make solar cells, polysilicon. Also, this cell parts recycled scrap is recycled as polysilicon, with other recycled polysilicon, at the processing of polysilicon material stage of production, where recycled and virgin (if needed) silicon goes through a cleaning cycle using manual sand blasting and an alkali washing machine, and then packed for ingot production.³⁶⁴ Additionally, it is the Department's practice not to grant an offset for a material that has a higher AUV than the primary input that resulted in the scrap.³⁶⁵ For these reasons, we find that it would not be appropriate to use HTS category 8548.10 to value the by-

³⁵⁹ 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 Cells Investigation*") and accompanying Issues and Decision Memorandum at Comment 9, where the Department determined that solar grade polysilicon requires purity levels as high as 99.999999 percent.

³⁶⁰ These by-products have a "BP" and feedstock in their FOP name.

³⁶¹ See Yingli's May 13, 2014, Section D response at Exhibit D-3; see also, Note 1 of July 7, 2015, memorandum from Brandon Farlander to the file entitled, "Antidumping Duty Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Yingli Issues and Decision Memorandum Business Proprietary Information," ("*Yingli BPI IDM*") for this business proprietary information.

³⁶² These by-products have a "BP" and feedstock in their FOP name as well as an identifier they are from the cell and module stages of production.

³⁶³ See Note 2 of *Yingli BPI IDM* for the name of the FOP file names with "BP" for Yingli's reported recycled feedstock block and ingot FOP.

³⁶⁴ See Yingli verification report at 40.

³⁶⁵ See *Garment Hangers from China IDM* at Comment 7.

product identified as recycled cells. As noted above, because solar cells primarily consist of polysilicon and Yingli's recycled solar cells may contain many contaminants which lower the purity level below solar grade polysilicon of 99.999999 percent we are using Thai imports for HTS code 2804.69, which is for inputs of silicon containing less than 99.99 percent purity, to value both Yingli's polysilicon feedstock by-product from the cell and module stages and its recycled cell by-product.³⁶⁶

Comment 34: Surrogate Value for Semi-finished Polysilicon Ingots and Blocks

Petitioner

- In the *Preliminary Results*, the Department valued purchased ingots and blocks with the same SV, world prices for solar grade polysilicon that was used to value virgin unprocessed polysilicon.³⁶⁷ However, at verification, the Department noted that multiple production steps are required, including additional labor and energy, to convert virgin polysilicon into an ingot or a block.³⁶⁸ Therefore, the Department should include the associated costs to process virgin polysilicon into polysilicon ingots and blocks in the SV for semi-finished ingots and blocks.³⁶⁹
- Yingli made certain market economy purchases of polysilicon blocks. The Department should consider these market economy purchase prices when selecting the SV for semi-finished polysilicon ingots and blocks.³⁷⁰

Yingli

- Polysilicon ingot and blocks consumed by Yingli are comprised primarily of polysilicon so the Department should continue to value these inputs using the world market price for polysilicon or use Thai HTS category 2804.61 to value these inputs.³⁷¹
- The Department should reject Petitioner's argument to consider market economy purchase prices in determining the appropriate SV. The Department has rejected this approach in past proceedings because market economy prices are not public and should not be used as a benchmark to select SVs.³⁷²
- Petitioner's proposal of adding processing costs ignores the fact that the inputs in the submitted data are valued on a per watt basis while the Department would need this information on a per kilogram of ingot or block basis in order to perform such a substitution.³⁷³

³⁶⁶ See Note 3 of *Yingli BPI IDM* for the name of the FOP file name for Yingli's recycled polysilicon cells.

³⁶⁷ See Prelim SV Memo at Exhibit 3; *see also*, Petitioner Case Brief at 18.

³⁶⁸ See Yingli verification report at 18; *see also*, Petitioner Case Brief at 18.

³⁶⁹ See Petitioner Case Brief at 19.

³⁷⁰ *Id.*; *see also*, Yingli Rebuttal Brief at 17, where Yingli publicly states that it made market economy purchases of polysilicon block.

³⁷¹ See Yingli Rebuttal Brief at 16.

³⁷² *Id.* at 17, citing *Certain Cased Pencils from the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 71 FR 38366 (July 6, 2006) ("*Pencils from China*") and accompanying Issues and Decision Memorandum at Comment 1; *Multilayered Wood Flooring From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 26712 (May 9, 2014) ("*Wood Flooring from China*") and accompanying Issues and Decision Memorandum at Comment 6.

³⁷³ See Yingli Rebuttal Brief at 19.

Department's Position:

We agree with Yingli. Because semi-finished polysilicon ingots and blocks are comprised primarily of polysilicon, the Department appropriately valued NME purchases of these inputs using the world market price for polysilicon of \$18.19 per kilogram. Also, no party submitted a SV for ingots and blocks which were purchased. Thus, the Department is using the best SV information on the record to value Yingli's ingots and blocks. Further, because Yingli self-produces most of its ingots and blocks, the Department has accounted for the cost of the additional processing required to manufacture most of the ingots and blocks used in production.

Petitioner contends that the Department should compare Yingli's market economy purchase prices for ingots and blocks with the SV used to value these FOPs to determine whether the Department has selected the appropriate SV. However, the Department's practice is not to use a respondent's market economy purchase prices as benchmarks to determine whether an SV is appropriate³⁷⁴ because a respondent's market economy purchase prices are proprietary information and are not necessarily representative of industry-wide prices available to other producers.³⁷⁵

Comment 35: Surrogate Value for Aluminum Angle Keys

Petitioner

- The Department incorrectly valued aluminum angle keys that are used to fasten together aluminum frame sections using Thai HTS category 7604.29.9010 (aluminum bars, rods and profiles, aluminum alloy bars, rods and profiles, other than hollow profiles, extruded bars and rods).³⁷⁶ Aluminum angle keys are produced from cast alloy aluminum and are not extrusions because they are not produced through the extrusion process. They are also not bars or rods. According to the Explanatory Notes to HTS Chapter 76, bars or rods "have a uniform solid cross-section along their whole length in the shape of circles, ovals, rectangles (including squares) equilateral triangles or regular convex polygons."³⁷⁷ An extruded product will have an unchanging shape along its entire length and will not have odd angles or shapes that run in one or more opposing directions. However, angle keys are complex and cannot be produced through a simple extrusion process.
- Even if Yingli's angle keys were made from aluminum extrusions, they have been substantially manipulated as to result in a product that has but one purpose: an aluminum frame angle key.
- CBP issued a ruling that aluminum corner keys used to put together window glass frames should be classified under HTS Chapter 83, instead of HTS category 7604 because the product is not a simple aluminum good, but a fabricated key.³⁷⁸
- The Department should value the aluminum corner keys using data from HTS category 7616.99.99090 (articles of aluminum, nesoi, other). Alternatively, based on CBP's ruling

³⁷⁴ See *Pencils from China* and accompanying Issues and Decision Memorandum at Comment 1.

³⁷⁵ See *Wood Flooring from China* and accompanying Issues and Decision Memorandum at Comment 6.

³⁷⁶ See Petitioner Case Brief at 10-11.

³⁷⁷ *World Customs Organization Explanatory Notes*, Vol. 3, Chapter 76 (2013) at XV-76-1, attached to Petitioner's November 10, 2014 submission at Exhibit 4 (emphasis added).

³⁷⁸ See Petitioner's July 3, 2014 Surrogate Value submission at Exhibit 6.

concerning corner keys, the Department should value aluminum corner keys using data from HTS category 8302.49.99 (mountings and other hardware for furniture, doors, windows etc.; hatracks, castors etc.; door closures; the foregoing and parts thereof, of base metal, mountings, fittings and similar articles, and parts thereof, nesoi, of base metal, other).³⁷⁹

Yingli

- The Department should reject Petitioner’s request to value aluminum angle keys using HTS categories 7616.99.99090 or 8302.49.99, and continue to value angle keys using HTS category 7604.29.10 because these angle keys are extruded aluminum parts.³⁸⁰
- The majority of Petitioner’s argument is based on information the Petitioner submitted and is not based on the information regarding the input actually consumed by Yingli. Petitioner provides no evidence to support its claim that angle keys cannot be produced through the extrusion process. Yingli submitted documentation which clearly identifies the actual input in question.³⁸¹
- With regard to Petitioner’s argument regarding the CBP ruling, the Department is not bound by CBP rulings for choosing surrogate values for U.S. imports but must select a value using the best information available, which in this case indicates that aluminum keys should be properly classified under HTS category 7604.29.10.³⁸²
- Petitioner argues that angle keys are not simple aluminum goods and, therefore, HTS category 7604 is not the appropriate category with which to value the input. However, the CIT explained that HTS category 7604 includes aluminum bars, rods, and profiles, and products that “have been subsequently worked after production . . . provided that they have not thereby assumed the character of articles or products of other headings.”³⁸³ This description supports the Department’s decision to value aluminum angle keys using HTS 7604.
- The angle keys are extruded products and thus HTS 7604 is the most appropriate HTS category to use to value this product. More specifically, HTS 7604.29.10 is the most appropriate surrogate to value angle keys consumed by Yingli because they are produced from extruded bars and rods.

Department’s Position:

We have valued Yingli’s aluminum angle keys using Thai HTS category 8302.49.99 for these final results because we find this surrogate source more specific to Yingli’s input than the other potential surrogates on the record. While documentation directly relevant to the input in question is consistent with Yingli’s claim that the aluminum angle keys are produced from extruded aluminum bars and rods,³⁸⁴ Yingli’s aluminum angle keys are not simply aluminum

³⁷⁹ See Petitioner’s June 24, 2014 Surrogate Value Submission at Exhibits 1-2.

³⁸⁰ See Yingli Rebuttal Brief at 11-13.

³⁸¹ See Yingli’s October 1, 2014, Fourth Section D Supplemental Response at Exhibit D-30.

³⁸² 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*, 77 FR 63791, October 17, 2012 and accompanying Issues and Decision memorandum at Comment 16 (emphasis added).

³⁸³ See *Jiangsu Jiasheng Photovoltaic Technology Co., Ltd. v. United States*, 28 F. Supp. 3d 1317, 1337 (CIT 2014) (“*Jiangsu*”).

³⁸⁴ See Yingli’s October 1, 2014, Fourth Section D Supplemental Response at Exhibit D-30.

extruded bars and rods, but aluminum extruded bars and rods that have been worked into angle keys. Thus, we considered whether the best available information to value Yingli's aluminum angle keys was to use an HTS category specific to the finished goods rather than HTS category 7604.29.10, which contains aluminum extruded bars and rods, and is less specific to the FOP to be valued.

As noted by Yingli, the CIT explained that HTS category 7604, the broad category inclusive of Yingli's suggested HTS category 7604.29.10, includes aluminum bars, rods, and profiles, and products that "have been subsequently worked after production . . . provided that they have not thereby assumed the character of articles or products of other headings."³⁸⁵ Thus, even if Yingli's angle keys are aluminum extrusions which had been further processed such that they no longer retain the uniform solid cross-section along their whole length that is characteristic of extruded bars and rods, they still may be appropriately valued under HTS category 7604 if they have not assumed the character of articles or products of other HTS headings. We examined the descriptions of the two alternative HTS categories suggested by Petitioner to determine whether Yingli's aluminum angle keys have a character similar to the articles or products of these HTS headings.

First, HTS category 7616, the broad category inclusive of Petitioner's suggested HTS category 7616.99.99090, covers a number of inputs, such as ferrules used in pencils, slugs, bobbins, spools, reels, spouts, cups, handles for travelling bags, cigarette cases or boxes, and blinds. These items are dissimilar to the aluminum angle keys used by Yingli.

Second, we examined Petitioner's suggested HTS category 8302.49.99. HTS category 8302, the broad category inclusive of Petitioner's suggested HTS category 8302.49.99, is described as: Mountings And Other Hardware For Furniture, Doors, Windows Etc.; Hatracks, Castors Etc.; Door Closures; The Foregoing And Parts Thereof, Of Base Metal). Petitioner placed on the record a CBP ruling that classifies aluminum window keys under HTS category 8302.41 (mountings, fittings and similar articles nesoi (except hinges and castors), and parts thereof, suitable for buildings, of base metal).³⁸⁶ This CBP ruling covers aluminum window keys, a product with the same physical characteristics as Yingli's aluminum angle keys, *i.e.*, made of aluminum and consisting of angled joints.³⁸⁷ Further, we note that aluminum window keys have the same function as Yingli's aluminum angle keys, *i.e.*, to connect and join the ends of frames.³⁸⁸ The Department is not bound by CBP rulings for U.S. imports when selecting surrogate values. Yet, we find this ruling probative for determining the appropriate HTS category with which to value Yingli's aluminum angle keys because the ruling is considered highly similar to Yingli's aluminum angle keys and our analysis of other information on the record does not detract from the relevance of the HTS category cited in the ruling for surrogate value purposes. Thus we have determined that HTS category 8302 is more specific to Yingli's aluminum angle keys than other potential surrogates on the record.

³⁸⁵ See *Jiangsu*, 28 F. Supp. 3d at 1337.

³⁸⁶ See Petitioner's July 3, 2014 submission at Exhibit 6 (CBP Ruling N125355).

³⁸⁷ *Id.*

³⁸⁸ *Id.*

While Thai imports of HTS category 8302.41, the HTS category cited in the CBP ruling, are not on the record of this review, Thai imports of HTS category 8302.49.99 (mountings, fittings and similar articles, and parts thereof, nesoi, of base metal, other) are on the record.³⁸⁹ The difference between the two categories is that HTS category 8302.41 covers aluminum window keys, because such keys are suitable for buildings, while HTS category 8302.49.99 covers items not classifiable under HTS category 8302.41. We believe this category would include aluminum angle keys for solar panels because such keys are not elsewhere specified or indicated (*i.e.*, nesoi). Therefore, for the final results, we have valued Yingli's aluminum angle keys using Thai imports of HTS category 8302.49.99 because we find this surrogate to be the best available information for valuing Yingli's aluminum angle keys.

Comment 36: Surrogate Value for Aluminum Frames

Petitioner

- The Department used HTS category 7604.29.90001, which covers “aluminum alloy bars, rods and profiles, other, other than hollow profiles, other {implying aluminum alloy}, other profiles”³⁹⁰ to value Yingli's aluminum frames. This is incorrect because the notes to HTS Chapter 76 define extrusions and profiles as products of a uniform cross-section along their whole length provided that “they have not... assumed the character of articles of products of other headings.”³⁹¹
- Yingli's aluminum solar frames are not uniform in cross section along their entire length, and have been further manufactured and processed into a good that has assumed the character of a product of a different heading than HTS category 7604. Yingli provided detailed engineering drawings demonstrating that its aluminum profiles had extensive additional processing done to them.³⁹² In general, the processing of aluminum profiles into items capable of making solar modules requires the aluminum profiles to be converted from profiles of uniform cross section to an open shape with numerous mechanical features that are added to increase reliability and longevity and ensure quick and simple assembly.
- Due to the fact that the aluminum frames have been further processed beyond the extrusion process, they have lost their character as an aluminum extrusion and are now a form of a fabricated aluminum good, which should be classified under HTS category 7616.99.9909 (articles of aluminum, nesoi), which covers fabricated aluminum goods, like finished aluminum solar frames.
- CBP has stated that aluminum profiles used to assemble solar modules require significant value-added. Wuxi Suntech, a mandatory respondent in this review and the underlying investigation, requested a binding tariff classification from CBP for aluminum frames that its subsidiary Suntech Arizona imported to produce solar modules. The CBP ruling

³⁸⁹ See Petitioner's June 24, 2014 submission at Exhibit 1.

³⁹⁰ See *World Customs Organization Explanatory Notes*, Vol. 3, Chapter 76 (2013) at XV-76-1, attached to Petitioner's Nov. 10 SV Submission at Exhibit 4.

³⁹¹ See *World Customs Organization Explanatory Notes*, Vol. 3, Chapter 76 (2013) at XV-76-1, attached to Petitioner's Nov. 10 SV Submission at Exhibit 4; Petitioner's Case Brief at 5-9.

³⁹² See Yingli's October 1, 2015 submission at Exhibit D-30.

was that Wuxi Suntech's aluminum frames should be categorized under HTS category 7616.³⁹³

- CBP also confirmed that solar frames from China and Malaysia are not simple extrusions but are instead finished goods (often sold in sets) that have assumed the identity of a product far more advanced than an aluminum extrusion.³⁹⁴ The results of these rulings contrast with CBP rulings concerning aluminum profiles and extrusions that were not further processed which were classified under HTS category 7604.³⁹⁵ Thus, it is clear that while unprocessed aluminum profiles are classified under HTS category 7608, further processed aluminum profiles are classified under HTS 7616 or other categories containing finished articles.
- The Department should not be concerned about the inclusion of dissimilar products under HTS category 7616.99.9909 as expressed in the investigation in this proceeding, because HTS category 7616 includes nails, tacks, staples, screws, bolts, nuts, hooks and other products that are more similar to Yingli's aluminum frames than are items covered by HTS category 7604.

Yingli

- The Department should reject the Petitioner's argument to classify aluminum frames under HTS category 7616.99.9909.³⁹⁶ This HTS category is an "other" category that includes a broad range of products and it is not the best information available for valuing aluminum frames. The Department should continue to use HTS category 7604.29.90001 to value aluminum frames.
- Documentation shows that Yingli's aluminum frames are "alloyed aluminum profiles that are not hollow."³⁹⁷ Yingli's aluminum frames are the same as those used by Trina Solar Energy Co, Ltd. ("Trina") in the investigation in this proceeding, which Trina described as "aluminum profile made frames that do not consist of hollow profiles." The Department classified Trina's aluminum frames under HTS category 7604.29.90001.³⁹⁸
- Petitioner has cited no evidence on the record contradicting Yingli's description of its aluminum frames. A specification sheet from one of Yingli's suppliers confirms that Yingli's aluminum frames are aluminum profiles and that a Chinese Customs Import Declaration form shows that the aluminum frames were imported under an HTS category consistent with HTS category 7604.³⁹⁹
- Petitioner argues for aluminum frames to be valued under HTS category 7616.99 based on CBP rulings, but this argument was rejected by the Department in the underlying investigation. In the investigation, the Department found HTS category 7604 to be the best available information to value respondents' aluminum frames because alloyed

³⁹³ See Petitioner's Nov. 10 SV Submission at Exhibit 3 (CBP Ruling N139353).

³⁹⁴ See Petitioner's Nov. 10 SV Submission at Exhibit 3 (CBP Ruling N238208).

³⁹⁵ See Petitioner's Nov. 10 SV Submission at Exhibit 3 (CBP Rulings NY R01215 and NY TR2931).

³⁹⁶ See Yingli Rebuttal Brief at 7-11.

³⁹⁷ See Yingli's October 1, 2014 response at 18 and Exhibit D-30.

³⁹⁸ 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), and accompanying Issues and Decision Memorandum ("CSPV Cells IDM") at Comment 16.

³⁹⁹ See Yingli's October 1, 2014 Response at 18 and Exhibit D-30; see also Yingli's July 24, 2014, Response at Exhibit D-16.

aluminum profiles are identified under HTS category 7604, while HTS category 7616.99 is an “other category that includes dissimilar products to aluminum frames.”⁴⁰⁰ The Department selected HTS category 7604 because it covers products similar to the aluminum frames at issue. This decision was sustained by the CIT.⁴⁰¹ The Department again reached the same decision to value aluminum frames used in solar modules with HTS category 7604.29 in the investigation of *Solar Products from the PRC*.⁴⁰²

- Petitioner cites a CBP ruling which classified aluminum frames imported by Suntech Arizona under HTS category 7616.99. However, the Department is not bound by CBP rulings for U.S imports when selecting import values from surrogate countries but is expected to use the best available information to value the inputs.⁴⁰³
- Petitioner argues that the Department should not be concerned about Thai HTS category 7616.99.99090 covering dissimilar products. However HTS category 7616.99.99090 is still an “other” category that contains many diverse products. Even Petitioner is forced to concede that this category “largely does not” contain products similar to Yingli’s solar frames.
- Petitioner argues, based on a number of CBP rulings, that the processing of Yingli’s aluminum frames beyond extrusion somehow makes them finished articles or fabricated aluminum goods ineligible for classification under HTS category 7604.17. However, in the underlying investigation the Department stated that “the petitioner’s assertion that the respondents’ aluminum frames are finished articles is not relevant to its choice of a surrogate value.”⁴⁰⁴

Department’s Position:

We agree with Yingli that HTS category 7604.29.90001 continues to constitute the best available information to value Yingli’s aluminum frames. Yingli describes the input in question as non-hollow, aluminum profiles.⁴⁰⁵ In the underlying investigation, the Department concluded that HTS category 7604 constitutes the best available information to value the respondents’ aluminum frames because alloyed aluminum profiles are identified under HTS category 7604, while HTS category 7616.99 is an “other” category that includes products dissimilar to aluminum frames.⁴⁰⁶ This decision was sustained by the CIT.⁴⁰⁷ The Department again reached the same decision to value aluminum frames under HTS category 7604.29 in the *Solar Products*

⁴⁰⁰ 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 Fed. Reg. 63791 (October 17, 2012)(“*Solar Cells Investigation*”), and accompanying Issues and Decision Memorandum (“*Solar Cells Investigation IDM*”) at Comment 16.

⁴⁰¹ See *Jiangsu*, 28 F. Supp. 3d at 1336-37.

⁴⁰² 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 Cells Investigation*”), and accompanying Issues and Decision Memorandum (“*Solar Products IDM*”) at Comment 9.

⁴⁰³ See *Jiangsu*, 28 F. Supp. 3d at 1336 (citing *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006); *Timken Co. v. United States*, 25 CIT 939, 944, 166 F. Supp. 2d 608, 616 (2001); *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994); and 19 U.S.C. § 1677b(c)(1)).

⁴⁰⁴ See *Solar Cells Investigation IDM* at Comment 16.

⁴⁰⁵ See Yingli’s October 1, 2014 submission at 18 and Exhibit D-30.

⁴⁰⁶ See *Solar Cells Investigation IDM* at Comment 16.

⁴⁰⁷ See *Jiangsu*, 28 F. Supp. 3d at 1336-37.

Investigation.⁴⁰⁸ Petitioner now claims that the facts relied upon by the Department to value aluminum frames with HTS category 7604 no longer supports the decision. We disagree. Petitioner cites no new material fact or relevant argument that was not already considered in the previous decisions regarding the surrogate value for aluminum frames in both the *Solar Cells Investigation* and the *Solar Products Investigation*. Just as in those cases, the input in question is described by Yingli as non-hollow, aluminum profiles.⁴⁰⁹ No party has challenged this description and the Department has found nothing on the record to contradict Yingli's description. Further, the product coverage of HTS category 7604.29 (*i.e.*, aluminum alloy bars, rods and profiles, other, other than hollow profiles) is unchanged and continues to pertain to non-hollow aluminum profiles such as those consumed by Yingli in this review, as we found it pertained to the aluminum frames consumed by Trina in previous proceedings.

Petitioner argues that information on the record of this review was not considered in the previous proceedings, including engineering diagrams related to, and descriptions of, further processing of Yingli's aluminum profiles⁴¹⁰, and proof of processing of aluminum frame kits examined by CBP.⁴¹¹ Petitioner claims that these diagrams demonstrate that Yingli's aluminum profiles have been processed to such a degree that they are no longer classifiable under HTS category 7604. Petitioner points to explanatory notes to Chapter 76 of the HTS stating that this category consists of aluminum profiles that "have not... assumed the character of articles of products of other headings."⁴¹² Petitioner thus concludes that since the aluminum profiles used in solar modules are processed to such an extent that they can no longer be classified under HTS category 7604, they must be classified under HTS category 7616. Contrary to Petitioner's assertion, the Department considered the finishing of aluminum profiles in selecting an appropriate surrogate value for aluminum frames in its previous determinations. Specifically, we stated:

Petitioner's assertion that respondents' aluminum frames are finished articles is not relevant to our decision. While CBP rulings on the record supporting the use of HTS category 7604 concern unfinished aluminum articles, this does not necessarily mean that HTS category 7604 would only contain unfinished aluminum profiles. While other HTS categories identify whether they contain finished or unfinished items, HTS category 7604 does not specify whether it contains finished or unfinished aluminum profiles.⁴¹³

Further, we noted in the *Solar Products Investigation* that the "ITC definition of aluminum profiles cited by Petitioner indicates that profiles may be cast, sintered, and worked after production."⁴¹⁴ Also, in sustaining the Department's determination with respect to aluminum frames, the CIT stated that "HTS category 7604 includes aluminum bars, rods, and profiles, and products that have been *subsequently worked after production* . . . provided that they have not

⁴⁰⁸ See *Solar Products IDM* at Comment 9.

⁴⁰⁹ See Yingli's October 1, 2014 submission at 18 and Exhibit D-30.

⁴¹⁰ *Id.* at Exhibit D-30.

⁴¹¹ See Petitioner's November 10, 2014 submission at Exhibit 5.

⁴¹² See *World Customs Organization Explanatory Notes*, Vol. 3, Chapter 76 (2013) at XV-76-1, attached to Petitioner's November 10, 2014 submission at Exhibit 4.

⁴¹³ See *Solar Cells Investigation IDM* at Comment 16. The Department reached the identical conclusion in the *Solar Products Investigation IDM* at Comment 9.

⁴¹⁴ See *Solar Products IDM* at Comment 9.

thereby assumed the character of articles or products of other headings” (emphasis added).⁴¹⁵ Additionally, we previously addressed the argument that because the aluminum frames contain corners, they should not be valued using HTS category 7604, which applies to profiles with a uniform cross section.⁴¹⁶ We stated in response to this argument that while certain aluminum frames purchased by respondents contain corners, we do not believe that this would necessarily change their classification as aluminum profiles. We noted that the ITC definition of aluminum profiles cited by Petitioner indicates that profiles may be cast, sintered, and worked after production.⁴¹⁷ Thus, contrary to Petitioner’s claims, the Department and the CIT have previously considered the fact that aluminum profiles used as aluminum frames have undergone further processing. As noted above, the Department has made determinations in two separate proceedings that HTS category 7604 is the best available information with which to value the frames made of aluminum profiles and used to assemble solar modules, and although one of those decisions was challenged in *Jiangsu*, the determination was sustained by the CIT. The facts here are not materially different from those in the *Solar Cells Investigation* and *Solar Products Investigation*, and we have reached the same conclusion here as we reached in those investigations.

Just as it did in the *Solar Cells Investigation* and *Solar Products Investigation*, Petitioner submitted CBP rulings to support its position that the aluminum frames here should not be classified under HTS category 7604. However, as stated in the previous decisions cited above, the Department is not bound by rulings for U.S. imports when selecting import values from surrogate countries, but instead must select a value using the best available information on the record. Although the CBP ruling cited by Petitioner states that Wuxi Suntech’s frames should be classified under HTS category 7616.99 (articles of aluminum, nesoi), this HTS category is an “other” category which would only contain other articles of aluminum not already identified elsewhere. As stated above, alloyed aluminum profiles are identified under HTS category 7604. Further, HTS category 7616 covers a number of inputs, which are dissimilar to the aluminum frames used by Yingli. Additionally, there was no explanation in the CBP ruling on Wuxi Suntech’s frames as to why the frames should be classified under HTS category 7616.99. Without such an explanation, we are not able to weigh the ruling against record evidence supporting the use of a HTS category different from the one identified in the ruling. The other CBP ruling cited by Petitioner classified aluminum frame sets under HTS category 8541.90 “Diodes, Transistors, photovoltaic cells whether or not assembled in modules or made up into panels.”⁴¹⁸ Despite submitting this CBP ruling, Petitioner has not argued that the Department should follow this CBP ruling.

Petitioner’s arguments partially rest on conclusions it reaches concerning HTS explanatory notes stating that aluminum profiles are only considered as such if “they have not... assumed the character of articles of products of other headings.”⁴¹⁹ Petitioner argues that HTS category 7604 only covers unfinished aluminum profiles and assumes that finished aluminum profiles do not fit

⁴¹⁵ See *Jiangsu*, 28 F. Supp. 3d at 1337.

⁴¹⁶ See *Solar Products IDM* at Comment 9.

⁴¹⁷ *Id.* at Comment 9.

⁴¹⁸ See Petitioner’s Nov. 10 SV Submission at Exhibit 3 (CBP Ruling N238208).

⁴¹⁹ See *World Customs Organization Explanatory Notes*, Vol. 3, Chapter 76 (2013) at XV-76-1, attached to Petitioner’s Nov. 10 SV Submission at Exhibit 4.

in any other HTS heading; thus HTS category 7616, which covers aluminum articles not elsewhere specified or indicated, must be the catch-all category that includes the processed aluminum profiles at issue. We disagree with Petitioner's interpretation. As we stated in both the *Solar Cells Investigation* and the *Solar Products Investigation*, while "other HTS categories identify whether they contain finished or unfinished items, HTS category 7604 does not specify whether it contains finished or unfinished aluminum profiles."⁴²⁰ Thus, we disagree with Petitioner's conclusion that aluminum profiles that were further processed would not typically be contained in HTS 7604 and thus we also do not agree that they would necessarily be contained in HTS category 7616. Rather, we find that the products covered by HTS category 7161 are different from the aluminum frames at issue in this case because this HTS category "includes *in particular* . . . nails, tacks, staples, screws, bolts, nuts, screw hooks, rivets, cotters, cotter pins, washers, knitting needles, bodkins, crochet hooks, embroidery stilettos, safety pins, other pins and chains, and cloth, grill and netting of aluminum wire." This HTS category description does not include anything similar to aluminum profiles that were further processed into frames.

Consistent with section 773(c)(1) of the Act, the Department is attempting to identify the best available information with which to value the aluminum frames used in solar modules. In identifying such information, the Department weighs available information on the record and makes a product-specific and case-specific decision as to what constitutes the "best available information" for a surrogate value for each input.⁴²¹ HTS category 7616 covers items that are dissimilar to the non-hollow, aluminum profiles at issue while HTS category 7604.29 expressly covers non-hollow aluminum profiles and record information does not indicate that aluminum profiles that have been finished or further processed are excluded from this category. Because the definition of HTS category 7604 is far more specific to the input at issue than the definition of HTS category 7616, the Department continues to find that HTS category 7604.29.90001 constitutes the best available information with which to value Yingli's aluminum profiles.⁴²²

Comment 37: Indirect Selling Expenses

Petitioner

- Yingli improperly excluded certain marketing expenses from its U.S. indirect selling expenses.⁴²³ Yingli states that the marketing expenses were excluded from its U.S. indirect selling expenses because they were associated with certain events and have a certain fact pattern. However, the facts demonstrate that Yingli's marketing expenses directly benefitted from these expenditures.
- Yingli's exclusion of bad debt expenses from its U.S. indirect selling expenses was also inappropriate given the facts of these expenses.

⁴²⁰ See *Solar Cells Investigation* IDM at Comment 16 and *Solar Products Investigation* IDM at Comment 9.

⁴²¹ See *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 41808 (July 19, 2010) and accompanying Issues and Decision Memorandum at Comment 2; *Certain New Pneumatic Off-the-Road Tires from China*, 78 FR 22513 (April 16, 2013), and accompanying Issues and Decision Memorandum at Comment 5.A.

⁴²² See Yingli's October 1, 2015 submission at D-18; Yingli's June 24, 2014 submission at Exhibit 1; Yingli's August 24, 2014 submission at Exhibit 1.

⁴²³ Petitioner's Case Brief at 41-42.

- Just as the Department uses warranty expense accruals as an estimate of warranty costs on POR sales, the Department should use the bad debt accrued and booked in YGEA's accounting system during the POR as bad debt expenses on POR sales.

Yingli

- The Department should continue to exclude certain of Yingli's marketing and bad debt expenses from U.S. indirect selling expenses.⁴²⁴ Marketing expenses are reflected in the margin calculation through the use of financial ratios for selling, general and administrative ("SG&A") expenses, which resulted in adding such costs to the cost of material, labor and overhead.
- The Department should not include in the U.S. indirect selling expense ratio an amount for marketing expenses that were reimbursed by YGEA's parent (verified by the Department) and ultimately not incurred by YGEA.
- The bad debt expense booked in December 2012 pertains to sales made, and primarily shipped, prior to the period of review.
- YGEA does not maintain an account for bad debt allowance, thus, the bad debt expense incurred by YGEA in 2012 is extraordinary, and not representative of the company's bad debt experience. The Department has previously taken the position that for bad debt expenses to be included in the margin calculation, it must be representative of the company's experience and not extraordinary.⁴²⁵

Department's Position:

We agree with Petitioner and have included Yingli's marketing and bad debt expenses as part of U.S. indirect selling expenses. However, we disagree with Petitioner that we should make an adjustment for bad debt recovery.

In the *Preliminary Results*, certain marketing expenses incurred by YGEA were excluded from the indirect selling expense ratio. However, for these final results, we have determined that the marketing expenses at issue should be included in YGEA's U.S. indirect selling expenses for the following reasons. First, section 772(d) of the Act directs the Department to deduct from CEP the amount of expenses "incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise". Second, 19 CFR 351.402(b), states that the Department will adjust the price of U.S. sales by "...expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser, no matter where or when paid." While a company affiliated with YGEA may have reimbursed YGEA for the marketing expenses in question, these expenses were incurred and there is neither evidence, nor argument, that these expenses do not relate to sales to unaffiliated

⁴²⁴ Yingli Rebuttal Brief at 34-39.

⁴²⁵ *Id.* (citing *Stainless Steel Sheet and Strip in Coils From Mexico; Final Results of Antidumping Duty Administrative Review*, 70 FR 3677 (January 26, 2005) and accompanying Issues and Decision Memorandum at Comment 6; *Notice of Final Determination of Sales at Less Than Fair Value and Critical Circumstances: Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands*, 67 Fed. Reg. 62112 (October 3, 2002) and accompanying Issues and Decision Memorandum at Comment 9; *Notice of Amendment of Final Determinations of Sales at Less Than Fair Value: Stainless Steel Plate in Coils From the Republic of Korea*, 66 FR 45279 (August 28, 2001) and accompanying Issues and Decision Memorandum at Comment 2).

purchasers in the United States. Finally, with regard to Yingli's claim that these marketing expenses are reflected in the margin calculation through the use of financial ratios, we note that surrogate financial ratios do not duplicate the exact experience of the respondent such that these specific marketing expenses would be reflected in the financial ratios.⁴²⁶ Moreover, Yingli identified the company which reimbursed YGEA for the marketing expenses and the financial ratios used as a surrogate for the SG&A expenses in this case were not applied to this company.

In addition, we agree with Petitioner that YGEA's POR bad debt expenses should be included in the U.S. indirect selling expense ratio; however, Petitioner's request to use accrued bad debt expenses is not fitting here. The record indicates that YGEA does not accrue bad debt expenses or maintain a provision for bad debt expenses; rather YGEA employs a direct write-off method for its bad debt. In utilizing this method, YGEA realizes bad debt expenses upon determining that the debt is uncollectable. Absent a provision for bad debts recorded by a company,⁴²⁷ it is the Department's practice to include the full amount of any bad debt write-offs in our calculations during the period in which the write-offs were recorded in the company's accounting system.⁴²⁸ Additionally, it is our practice to base U.S. indirect selling expenses on the expenses incurred in the U.S. market that are not direct selling expenses.⁴²⁹ At no time during this proceeding did Yingli request that this expense be treated as a direct selling expense.

Furthermore, Yingli's claim that YGEA's 2012 bad debt expense is extraordinary and not representative of its bad debt experience is not supported by record evidence. Yingli claims that the fact that YGEA does not have an account for bad debt allowance is evidence that the bad debt expense was extraordinary and not representative of its bad debt experience. First, as previously noted, YGEA employs a direct write-off method to realize its bad debt expense, as opposed to using a bad debt provision. With regard to each method, the former method does not require an account for the allowance of bad debt, while the later method may require an allowance account. Therefore, the fact that YGEA does not have a bad debt allowance account is not necessarily evidence that incurring bad debt expenses was an unusual event and not representative of the company's bad debt experience; rather it is a consequence of the methodology used by YGEA to record its bad debt expense. Second, information on the record

⁴²⁶ See *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) citing *NFC I*, 985 F. Supp. 133, 137 (CIT 1997) (holding that "while a surrogate value must be as representative of the situation in the NME country as is feasible, the Department need not duplicate the exact production experience of the respondent at the expense of choosing a surrogate value that most accurately represents the fair market value of an input.").

⁴²⁷ In cases where a company records a provision for bad debts, the Department's practice is to recognize the amount of the bad debt expense when the corresponding provision is recorded rather than when the actual write-off occurs. See, e.g., *Small Diameter Circular Seamless Carbon and Alloy Steel Pipe from Brazil: Final Results of Antidumping Administrative Review*, 70 FR 7243 (Feb. 11, 2005), and accompanying IDM at Comment 6; *Stainless Steel Bar from India: Final Results of the Administrative Review*, FR 68 FR 47543 (Aug. 4, 2003), and accompanying IDM at Comment 7.

⁴²⁸ See, e.g., *Certain Frozen Warmwater Shrimp from India: Final Results of Antidumping Duty Administrative Review, Partial Rescission of Review, and Notice of Revocation of Order in Part*, 75 FR 41813 (Monday, July 19, 2010), and accompanying IDM at Comment 5; *Notice of Final Determination of Sales at Less Than Fair Value: Saccharin from the People's Republic of China*, 68 FR 27530 (May 20, 2003), and accompanying IDM at Comment 10.

⁴²⁹ See, e.g., *Polyethylene Terephthalate Film, Sheet, and Strip From the People's Republic of China: Final Results of the First Antidumping Duty Administrative Review*, 76 FR 9753 (February 22, 2011), and accompanying IDM at Comment 9.

indicates that YGEA does maintain certain accounts related to bad debt.⁴³⁰ Finally, YGEA has not provided evidence of its historical bad debt experience to show that incurring such expenses is unusual or infrequent. The only information on the record regarding such experience does not support Yingli's claim.⁴³¹

Thus, in accordance with Department practice, we included the amount of YGEA's bad debt expense written off during the POR, as reflected in its income statement, in the indirect selling expense ratio calculation.⁴³² Furthermore, regarding bad debt recovery, the Department's practice is to adjust indirect selling expenses by bad debt recovery when a company utilizes the direct write-off method.⁴³³ However, although YGEA uses the direct write-off method, there is no record evidence that its bad debt recovery was realized and recorded in its income statement during the POR. Therefore, we have not made an adjustment for bad debt recovery.

Comment 38: Application of a By-Product Recovery Cap on Recycled Paste

Yingli

- In the *Preliminary Results*, the Department incorrectly capped the recycled paste by-product offset in the wafer production stage by the value of the primary inputs used in generating the recycled paste because it did not include all of the primary inputs in the production of recycled paste, such as water and other inputs.⁴³⁴ For the final results, the Department should revise its by-product recovery cap to include all of the primary inputs.⁴³⁵

Petitioner

- The Department should use primary inputs, not minor inputs, such as water, in calculating the cap.⁴³⁶ However, in the *Preliminary Results*, the Department inadvertently did not apply any cap because of an error in the SAS programming.⁴³⁷

Department's Position:

We agree with Yingli that the Department did not include all of the primary inputs when applying the by-product offset cap on recycled paste in the wafer stage of production. For the final results, the Department has added all of the additional primary inputs in calculating the by-product cap.⁴³⁸ In addition, we disagree with Yingli that we also should include water in the by-product offset cap. Although Yingli characterizes water as a primary input, Yingli has reported

⁴³⁰ See Note 4 of *Yingli BPI IDM*.

⁴³¹ *Id.*

⁴³² See *Yingli Final SV memo*.

⁴³³ See *Notice of Final Determination of Sales at Less Than Fair Value: Glycine from India*, 73 FR 16640 (March 28, 2008) and accompanying Issues and Decision Memorandum at Comment 2.

⁴³⁴ See *Yingli Case Brief* at 56-57.

⁴³⁵ *Id.* at 57.

⁴³⁶ See *Petitioner Rebuttal Brief* at 31.

⁴³⁷ *Id.* at 31-32.

⁴³⁸ See *Yingli Final Analysis Memo*; see also, Submission of Yingli, "Re: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Yingli's Response to the Department's Fourth Section D Supplemental Questionnaire," dated October 1, 2014, at 15-16.

water for all of its stages of production as one input, rather than water consumption at each stage of production. Hence, the Department is unable to evaluate whether water is indeed a primary input or determine the amount of water that was consumed at the wafer production stage in producing recycled paste. Also, the Department's practice is to consider only primary inputs when applying a by-product offset cap.⁴³⁹

We agree with Petitioner that the Department made an error in the SAS code when applying the cap such that no by-product recovery cap was applied in the *Preliminary Results*. For the final results, the Department has corrected the SAS code error.⁴⁴⁰

Comment 39: Whether the Department Improperly Calculated the Partial AFA Rate Applied to Yingli

Yingli

- The Department erred in its partial AFA calculation because it: 1) failed to use the verified value of the two unreported U.S. sales in its calculation; 2) failed to disregard an outlying transaction-specific margin when calculating the amount of dumping for the two unreported U.S. sales; and 3) failed to offset the dumping calculated by applying partial AFA to the two unreported U.S. sales with the negative dumping calculated for the reported U.S. sales.⁴⁴¹
- The Department should use the verified value of the two unreported U.S. sales in its partial AFA calculation rather than assigning a value to the unreported sales in its partial AFA calculation (the Department assigned a value to the sales equal to the result obtained by multiplying the quantity of the sales by the highest net price of any reported sale). The value assigned to the unreported sales is almost twice as high as the actual sales value.⁴⁴² The Department verified the unreported sales value to the same extent as it verified the unreported sales quantity and this verified sales value should be used in calculating Yingli's partial AFA.⁴⁴³
- The Department cannot ignore Yingli's commercial reality in selecting an AFA rate to apply to the two unreported U.S. sales and must select an AFA rate which reflects Yingli's commercial reality.⁴⁴⁴ Also, the Department may not impose punitive, aberrational, or uncorroborated margins when selecting an AFA rate.⁴⁴⁵
- The Department should disregard the highest transaction-specific margin it used in calculating the AFA rate in the *Preliminary Results*, which was an outlier margin, and instead use an AFA rate based on substantial evidence,⁴⁴⁶ which requires the Department to show some relationship between the AFA rate selected and the respondent's actual dumping

⁴³⁹ See *Monosodium Glutamate From the People's Republic of China: Final Determination of Sales at Less Than Fair Value and the Final Affirmative Determination of Critical Circumstances*, 79 FR 58326 (September 29, 2014) and accompanying Issues and Decision Memorandum at Comment 11.

⁴⁴⁰ See *Yingli Final Analysis Memo*.

⁴⁴¹ See Yingli Case Brief at 29.

⁴⁴² *Id.* at 30-32.

⁴⁴³ *Id.* at 31.

⁴⁴⁴ *Id.* at 36-37.

⁴⁴⁵ *Id.* at 31; see also, *F.lli De Cecco*, 216 F.3d at 1032.

⁴⁴⁶ See Yingli Case Brief at 32; see also, *Dongguan Sunrise Furniture Co. v. United States*, Consol. Court No. 10-00254, Slip Op. 2015-03 (CIT January 14, 2015) at 7 (citing 19 U.S.C. § 1516a(b)(1)(B)(i)); *Dongguan Sunrise Furniture Co. v. United States*, 931 F. Supp. 2d 1346, 1350 (CIT 2013) (citing *Gallant Ocean*, 602 F.3d at 1032).

margin, with a built-in increase intended as a deterrent to non-compliance.⁴⁴⁷

- There is no information on the record of this administrative review that suggests that Yingli's unreported sales were made at margins close to the margin selected by the Department in calculating the partial AFA rate because the Department selected an AFA rate which was several times higher than all other transaction-specific margins on the record.⁴⁴⁸ By excluding several outlier margins, the record demonstrates that Yingli did not engage in dumping during the POR. The small number of sales with positive dumping, with the exception of the sale with the aberrational rate selected, had margins far smaller than the AFA rate selected by the Department.⁴⁴⁹ As an alternative, the Department could select an AFA rate from among control-number specific dumping margins or select either a weighted average or simple average of the positive transaction-specific dumping margins, excluding outlier margins.⁴⁵⁰
- The AFA rate used by the Department in the *Preliminary Results* was based on an impermissibly small sales quantity involving only one U.S. sale. The percentage of sales relied on by the Department for partial AFA in the instant case is far smaller than the percentages accepted in *Ta Chen*⁴⁵¹ and *PAM*,⁴⁵² which the CIT has determined lie at the outer reach of an acceptable percentage of sales upon which to base an AFA rate.⁴⁵³ Also, the AFA rate that the Department selected for Yingli was based on a percentage of sales smaller than the percentages rejected by the court in other cases.⁴⁵⁴
- The Department erred by failing to offset the dumping assigned to the unreported U.S. sales based on partial AFA with the negative dumping calculated for the reported U.S. sales; thereby, effectively applying zeroing.⁴⁵⁵
- Under the Department's current practice, the only situation in which zeroing is permitted is when the Department finds that: 1) the Cohen's *d* test and the ratio test demonstrate the existence of a pattern of prices that differ significantly such that an alternative comparison method should be considered; and 2) the average-to-average comparison method cannot appropriately account for such differences.⁴⁵⁶
- The Department cannot zero with respect to the two unreported U.S. sales because it did not detect a pattern of prices that differ significantly with respect to these sales and these sales were not included in the U.S. sales database that the Department used to conduct its differential pricing analysis.⁴⁵⁷
- By failing to offset the positive dumping calculated for the two unreported U.S. sales with the negative dumping calculated for the reported U.S. sales, the Department has effectively

⁴⁴⁷ See Yingli Case Brief at 32-33; see also, *Gallant Ocean (Thai.) Co. v. United States*, 602 F.3d 1319, 1323 (Fed. Cir. 2010) ("*Gallant Ocean*") (quoting *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("*F.lli De Cecco*")).

⁴⁴⁸ See Yingli Case Brief at 35.

⁴⁴⁹ *Id.* at 36.

⁴⁵⁰ *Id.* at 37.

⁴⁵¹ See *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330 (Fed. Cir. 2002) ("*Ta Chen*").

⁴⁵² See *PAM, S.p.a. v. United States*, 582 F.3d 1336 (Fed. Cir. 2009) ("*PAM*").

⁴⁵³ See Yingli Case Brief at 33-34.

⁴⁵⁴ See *Dongguan Sunrise Furniture Co. v. United States*, 904 F. Supp. 2d 1359, 1363 (CIT 2013); see also, *Dongguan Sunrise Furniture Co. v. United States*, 931 F. Supp. 2d 1346, 1350 (CIT 2013); *Dongguan Sunrise Furniture Co. v. United States*, 997 F. Supp. 2d 1330, 1335-37 (CIT 2014).

⁴⁵⁵ See Yingli Case Brief at 37.

⁴⁵⁶ *Id.* at 38.

⁴⁵⁷ *Id.*

applied an adverse inference to all of the U.S. sales. AFA cannot be applied to all U.S. sales when a deficiency is found only with respect to a discrete set of data, such as the two unreported U.S. sales.⁴⁵⁸

Petitioner

- The Department’s practice is to rely on the highest transaction-specific margin calculated for a respondent as its partial AFA rate. The rate used by the Department as partial AFA is based on Yingli’s own sales during the POR,⁴⁵⁹ and is not an outlier. There is a rational relationship between Yingli’s highest transaction-specific rate and a reasonably accurate estimate of Yingli’s dumping rate on the two unreported sales based on sales specific information which is business proprietary.⁴⁶⁰ Moreover, the Department has frequently selected AFA rates from among the highest rates assigned during any segment of the proceeding.⁴⁶¹
- Use of the highest transaction-specific dumping margin as partial AFA effectuates the purpose of applying adverse inferences, which is to induce respondents to provide the Department with complete and accurate information in a timely manner and to ensure that respondents do not obtain a more favorable result by failing to cooperate than if they had cooperated fully.⁴⁶² Using the “verified” value of the two unreported U.S. sales in the partial AFA calculation would not be an adverse inference and would have no deterrent effect.⁴⁶³
- Also, the Department’s practice is to only offset positive dumping margins with negative margins if the dumped sales fell within the universe of non-differentially price sales.⁴⁶⁴
- Offsetting a partial AFA rate with negative margins could provide respondents with an incentive not to report dumped sales because if the unreported sales were discovered, or finally reported, the negative margins on the reported sales could offset whatever positive dumping margin the Department chose to apply to the non-reported sales.⁴⁶⁵

Department’s Position:

For the reasons explained in response to Comment 9, we have continued to apply partial AFA to Yingli’s unreported sales. However, for the final results, we revised our calculation of the partial AFA rate. In the *Preliminary Results*, in calculating a partial AFA rate, we based the value of the unreported sales using the highest reported net U.S. sales price. Yingli argues that the Department should use the value Yingli presented at verification for these unreported sales. However, contrary to Yingli’s contention, and as explained in Comment 9, we were not able to verify the price (or quantity) of the unreported sales and furthermore, for these unreported sales the Department is basing its determination on partial AFA not partial FA. For these final results, consistent with Department practice, we weight-averaged, based on sales volume, the dumping rate calculated for the reported sales (calculated from our standard antidumping duty program) and the partial AFA rate assigned to the unreported sales to determine Yingli’s overall weighted-

⁴⁵⁸ *Id.* at 38-39.

⁴⁵⁹ See Petitioner Rebuttal Brief at 10.

⁴⁶⁰ *Id.* at 11-13.

⁴⁶¹ See *Nan Ya Plastics Corp. v. United States*, 6 F. Supp. 3d 1362, 1368 (CIT 2014).

⁴⁶² H.R. Rep. No. 103-316, vol. 1, at 870 (1994) (“SAA”); see also, Petitioner Rebuttal Brief at 10.

⁴⁶³ See Petitioner Rebuttal Brief at 10.

⁴⁶⁴ *Id.* at 13.

⁴⁶⁵ *Id.* at 14.

average dumping margin.⁴⁶⁶ In keeping with Department practice, as partial AFA, we assigned a dumping rate to the unreported sales equal to the highest appropriate transaction-specific dumping margin calculated for Yingli. We find that, as with *Ta Chen*⁴⁶⁷ and *Pam*,⁴⁶⁸ a company's own individual reported sales of subject merchandise can reflect the commercial reality of the company. The margin selected as partial AFA is for a transaction that is not atypical, and therefore, is properly considered part of the company's commercial reality. Although Petitioner argues for use of a different transaction-specific dumping margin as partial AFA, we do not find Petitioner's comparisons which it offers as evidence that this margin is appropriate, to be persuasive.⁴⁶⁹ Moreover, because the rate was calculated using Yingli's own data provided during the course of the administrative review and, therefore, does not constitute secondary information, the statute does not require the Department to corroborate the rate.

Lastly, in its arguments, Yingli mistakenly conflates the Department's differential pricing analysis with its partial AFA methodology. Yingli contends that the Department cannot zero with respect to the two unreported U.S. sales because it did not detect a pattern of prices that differ significantly with respect to these sales. However, the Department's differential pricing analysis examines whether to apply an alternative comparison method in determining the dumping margin of all or certain U.S. sales. We are not conducting an analysis of which comparison method to apply with respect to the unreported sales because the Department is neither applying an average-to-average comparison methodology nor an alternative comparison methodology in deriving the dumping margins for these sales because the Department does not have verified data (*i.e.*, control number, sale date, price, customer's zip code), to run these two unreported U.S. sales through the Cohen's *d* test. Rather, the Department is assigning a dumping margin to the unreported sales based on AFA. In addition, offsetting the dumping determined through application of the partial AFA rate could eliminate application of an adverse inference under section 776(b) of the Act and may therefore fail to ensure that the company did not benefit by its own lack of cooperation. To take full account of the purpose of the adverse inference, we have not offset the dumping determined through application of the partial AFA rate as proposed by Yingli.

Comment 40: Whether to Exclude Certain Reported CEP Sales⁴⁷⁰

Petitioner

- The Department should exclude Suntech America, Inc.'s ("Suntech America") sales to Party A from its dumping margin calculation because:

⁴⁶⁶ See *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 20197 (April 15, 2015) and accompanying Issues and Decision Memorandum at Comment 5.

⁴⁶⁷ See *Ta Chen*, 298 F.3d 1330, 1340.

⁴⁶⁸ See *PAM*.

⁴⁶⁹ See Note 5 of *Yingli BPI IDM*.

⁴⁷⁰ A significant amount of factual information pertaining to this issue may not be publically disclosed. For a discussion of the property information relied on by the Department in analyzing the issue *see*, Memorandum to Edward Yang, Senior Director, Office VII, AD/CVD Operations, Office IV, from Robert Bolling, Acting Director, AD/CVD Operations, Office IV, "Comments in the Issues and Decision Memorandum Containing Business Proprietary Information," dated concurrently with this notice.

- Record information (which is proprietary) indicates that they are not properly classified as CEP sales.
- The nature of the transactions and the parties involved in the transaction (both of which are proprietary) present a significant risk of manipulation. It is unclear how the prices were established for sales to Party A.
- There is a significant potential for price shifting between subject merchandise and non-PRC-origin merchandise (details regarding the potential for price shifting are proprietary).
- The Department's date of sale methodology also provides a basis for excluding these sales.

Wuxi Suntech

- Exclusion of sales to Party A is not warranted because:
 - The Department examined and accepted reported sales made to Party A pursuant to the same contract under identical facts in the investigation, and, thus, there was no reason for Wuxi Suntech to treat these sales differently in this administrative review.
 - Wuxi Suntech properly classified sales to Party A as sales to an unaffiliated party because Party A is not a legal entity and, thus, does not meet the definition of an affiliated party within the meaning of section 771(33) of the Act. Rather, Party A is a "consortium" or business association between Suntech America and Party B. The use of the term "joint venture" was specifically agreed upon by the two members of the consortium for limited purposes under specified circumstances. Also, Wuxi Suntech's audited 2012 and 2013 financial statements do not mention Party A as an affiliated party.
 - Record evidence demonstrates that the sales price from Party A to Party C is identical to Suntech America's price reported to the Department.
 - Wuxi Suntech had full discretion in setting the prices of the reported sales at issue, and there is no markup added by Party A to Suntech America's unit price. Suntech America delivered the merchandise directly to Party C. There is no second sale to report.
 - The reported sales to Party A were identified based on Suntech America's invoice date, which is the same as the date of shipment to Party C's construction site. Given that date of sale, as defined by the Department, is the earlier of shipment date or invoice date, reporting sales to this customer using the Suntech America shipment/invoice date is correct.

Department's Position:

We disagree with Petitioner, and have included the sales at issue in the calculation of Wuxi Suntech's dumping margin for these final results of review. As explained below, record evidence indicates that Wuxi Suntech reported the price and quantity of sales to the first unaffiliated customer, and, thus, they are properly classified as CEP sales within the meaning of section 772(b) of the Act. Further, we find that Wuxi Suntech reported the appropriate POR sales. Accordingly, the Department is not excluding these sales from our margin calculations.

Section 772(b) of the Act defines CEP as “the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections (c) and (d).”

Wuxi Suntech reported the price at which the subject merchandise was sold to a purchaser not affiliated with Wuxi Suntech or any of its affiliates, including Suntech America and Party A.⁴⁷¹ Specifically, Wuxi Suntech reported the sales price (and other required transaction-specific information such as the sales quantity, and selling expenses) of subject merchandise sales to Party C, the unaffiliated purchaser of the subject merchandise at issue. Wuxi Suntech demonstrated that the price reported to the Department is identical to the price that Party C agreed to pay. It is important to note that Party C is identified as the buyer in the contract. No interested party in this proceeding has alleged, nor is there any record evidence indicating, that Party C is affiliated with Wuxi Suntech or any of its affiliates. Furthermore, Wuxi Suntech reported the information needed by the Department to make the adjustments to the reported price that are required by sections 772(c) and (d) of the Act. In light of the foregoing, the Department finds that the reported sales in question were made to a purchaser not affiliated with the producer or exporter, and pursuant to section 772(b) of the Act are properly treated as CEP sales, which we have adjusted in accordance sections 772(c) and (d) of the Act.

Petitioner’s claims that these sales present a significant risk of manipulation or price shifting are not supported by record evidence. First, as noted above, the price reported to the Department was the price that Party C, the unaffiliated customer agreed to pay for the subject merchandise that was sold during the POR, and there is no evidence that this unaffiliated customer was involved in price manipulation. Second, Petitioner cites no record evidence of actual manipulation, or price shifting, and the Department has not found any evidence of actual manipulation or price shifting.

Furthermore, the Department disagrees with Petitioner that the date of sale is the contract date and thus the sales at issue should be excluded because the date of sale precedes the POR. First, the Department finds that shipment date is the appropriate date of sale for these transactions. While these sales were made pursuant to a certain type of contract, the record in this case indicates that contract date is not the appropriate date of sale. Wuxi Suntech reported that the material terms of Suntech America’s contracts can change up until the issuance of the commercial invoice.⁴⁷² The record of this review also indicates that the material terms of Suntech America’s contracts are subject to change.⁴⁷³ Furthermore, the Department’s knowledge of solar industry contract pricing practices, including those of Wuxi Suntech, indicates that the material terms of its contracts are subject to change.⁴⁷⁴ Petitioner has not argued that the material

⁴⁷¹ See Wuxi Suntech’s December 4, 2014 supplemental questionnaire response at 12-16 and Exhibits 5-A - 5-F.

⁴⁷² See Wuxi Suntech’s June 2, 2014 supplemental questionnaire response at 5.

⁴⁷³ See Wuxi Suntech’s April 18, 2014 Section A Response at Exhibit 16.

⁴⁷⁴ 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) and accompanying Issue and Decision Memorandum at Comment 3 (“Both Wuxi Suntech and Trina have provided examples of changes in material terms of contracts and purchase orders up until issuance of the commercial invoice.”), unchanged in *Crystalline Silicon Photovoltaic Cells*,

terms of Suntech America's contracts are not subject to change. Thus, the Department finds that the contract date is not the appropriate date of sale for the sales at issue. While invoice date is normally the presumptive date of sale, the appropriate date of sale for the sales to Party C is the shipment date, because shipment date precedes the date of the relevant commercial invoice.⁴⁷⁵

Additionally, the Department notes that Wuxi Suntech followed the Department's instructions in determining the appropriate universe of reportable sales in this administrative review using the date of shipment. The Department's questionnaire contains the following instructions:

Report each U.S. sale of merchandise entered for consumption during the POR, except: (1) for EP sales, if you do not know the entry dates, report each transaction involving merchandise shipped during the POR; and (2) for CEP sales made after importation, report each transaction that has a date of sale within the POR.⁴⁷⁶

Subsequently, Wuxi Suntech reported that Suntech America's does not track entry date in its normal course of business and that all sales were made after importation.⁴⁷⁷ Accordingly, Wuxi Suntech correctly reported the universe of POR CEP sales using the date of shipment as the date of sale.

In light of the foregoing considerations, we find that the sales at issue are properly classified as CEP sales within the meaning of section 772(b) of the Act and that they were made during the POR. Thus, we have included these sales in Wuxi Suntech's margin calculation.

Comment 41: Wuxi Suntech Separate Rate Status

Petitioner

- The Wuxi Suntech Single Entity has not established an absence of de facto government control, and should not be granted a separate rate. In its preliminary results, the Department properly considered the entire Wuxi Suntech collapsed entity, including Wuxi Sunshine, and correctly found that the Wuxi Suntech collapsed entity is ineligible for a separate rate because of the significant government ownership and control of Wuxi Sunshine giving the PRC government the potential to control the activities of one of the exporting companies within the collapsed single entity. Additionally, the intertwined operations of the companies demonstrate the significant potential for the manipulation of price and production.
- Record evidence shows that Wuxi Sunshine and the entire collapsed entity were unable to rebut the presumption of government control in this administrative review. The

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).

⁴⁷⁵ See *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of the Antidumping Duty Administrative Review*, 77 FR 34344 (June 11, 2012), and accompanying Issues and Decision Memorandum at Comment 2 ("Moreover, the Department has a longstanding practice of finding that, where invoice date is the presumptive date of sale, but shipment date precedes invoice date, shipment date should be used as date of sale").

⁴⁷⁶ See Wuxi Suntech's May 15, 2014 Section C Response at C-2.

⁴⁷⁷ See Wuxi Suntech's June 2, 2014 supplemental questionnaire response at 4.

Department normally considers majority government ownership, such as Wuxi Sunshine's, to be dispositive of government control.

- Even though Wuxi Suntech and Wuxi Sunshine ceased to be affiliated by the end of the POR, they were still affiliated for a portion of the POR, and it is appropriate for the Department to analyze the level of PRC government control over each company within the collapsed entity. Whether certain of the collapsed companies had no POR U.S. sales is irrelevant because the companies met the criteria for collapsing.
- The Department did not assign the PRC-wide rate to Wuxi Suntech as AFA in the preliminary results as contended by Wuxi Suntech. Rather, the Department found that Wuxi Suntech was part of the PRC entity, to which the PRC-wide rate was assigned. The same finding is appropriate for the Department's final results.
- The Department may use any reasonable method to calculate the separate rate, but the application of Yingli's preliminary margin to the separate rate respondents led to an unrepresentative and inaccurate result which denied relief to the domestic industry. If the Department continues to find that Wuxi Suntech is ineligible for a separate rate for the final results, it should use another reasonable method to calculate the rate applied to the other separate rate companies, *e.g.*, using Wuxi Suntech's data to calculate a margin and averaging it with Yingli's calculated margin.

Wuxi Suntech

- The Department should grant separate rate status to Wuxi Suntech because Wuxi Suntech itself was not owned or controlled by the PRC government. The record of the review shows that Wuxi Suntech is both *de jure* and *de facto* free from PRC government control.
- The Department should not consider Wuxi Sunshine in its determination of Wuxi Suntech's separate rate status because Wuxi Sunshine was not a respondent in this review and it had no POR sales, as verified by Department officials. Additionally, Wuxi Suntech ceased to be affiliated with Wuxi Sunshine during the POR.
- If the Department does consider Wuxi Sunshine in its determination of Wuxi Suntech's separate rate status, Wuxi Sunshine is eligible for separate rate status under the *de jure* and *de facto* criteria, based on the information on the record of the review. The record shows that the government owners of Wuxi Sunshine neither had the potential to influence, nor did influence, Wuxi Sunshine's selection of management, sales, production, or export activity. The facts on the record show that the government entities with ownership in Wuxi Sunshine were financial investors without significant influence over the management or operation of Wuxi Sunshine, and that the daily operations of Wuxi Sunshine were conducted by Wuxi Suntech. The Department must undertake its *de jure* and *de facto* analysis in applying separate rate status, rather than finding that government ownership automatically results in the denial of a separate rate.
- As a result of denying Wuxi Suntech a separate rate in the preliminary results, the Department effectively assigned an AFA rate to Wuxi Suntech, since the PRC-wide rate is the same as the AFA rate. The Department is allowed to apply an AFA rate only when an exporter fails to cooperate by not acting to the best of its ability. Wuxi Suntech fully participated in this proceeding, so the Department has no basis for applying an adverse inference.

Shanghai BYD and Trina

- Petitioner’s argument that the Department should apply to the separate rate companies a margin based on Wuxi Suntech’s data, while applying an AFA rate to Wuxi Suntech itself, is illogical. If the Department continues to find that the Wuxi Suntech collapsed entity is controlled by the PRC government, it should not apply this company’s data to companies who demonstrated independence from the PRC government.
- Petitioner provided no support for its statement that the preliminary separate rate margin was “anomalous and inaccurate.” If the Department continues to deny Wuxi Suntech a separate rate, the margin calculated for Yingli is the most reliable and accurate measure of dumping for the non-selected companies.

Department’s Position:

As explained in the “Treatment of Wuxi Suntech, Luoyang Suntech, Shanghai Suntech, and Wuxi Sunshine” section above, the Department has determined that Wuxi Suntech and Luoyang Suntech (but not Shanghai Suntech and Wuxi Sunshine) should be collapsed and treated as a single entity for the final results of review. Therefore, we find the arguments raised by interested parties concerning the separate rate status of the four-company Wuxi Suntech Single Entity, as determined in the Preliminary Results, are no longer applicable and need not be addressed.

Interested parties also submitted comments concerning the method of calculating the separate rate margin, in the event the Department continued to deny a separate rate to the Wuxi Suntech Single Entity in the final results of review. Because we are no longer collapsing the four companies noted above into the Wuxi Suntech Single Entity and have found that the single entity consisting of Wuxi Suntech and Luoyang Suntech (the Wuxi Luoyang Single Entity) is eligible for a separate rate, we believe these comments are no longer applicable and have not addressed these comments. As we have found that the Wuxi Luoyang Single Entity has established that it is entitled to a separate rate, we are basing the separate-rate margin for companies that have not been individually examined, in part, on the weighted-average margin assigned to this single entity.

Comment 42: The Department’s Separate Rates Practice in AD Proceedings Involving the PRC*Wuxi Suntech*

- The Department’s practice with respect to its application of separate rates does not comport with U.S. law because the statute requires the Department to apply an “all others” rate to all exporters and producers not individually investigated, rather than condition the application of the all others rate on additional criteria.⁴⁷⁸
- Even if the Department’s separate rates practice is not contrary to U.S. law, the Department should abandon its separate rates practice with respect to cases involving China because the Chinese economy has undergone significant economic reforms since the establishment of the separate rates practice and, as a result, the assumption of Chinese government control of exporters is no longer supported.

⁴⁷⁸ See Wuxi Suntech’s May 8, 2015 Case Brief at 4-12.

- Since *Silicon Carbide from the PRC*,⁴⁷⁹ the Department has granted separate rate status to almost all cooperating Chinese exporters, including state-owned enterprises. Additionally, when the Department began applying U.S. CVD laws to China in 2007, it found that market-oriented economic reforms resulted in operational autonomy from the Chinese government for many companies.
- The Department’s findings supporting its application of CVD law to NME entities contravenes the presumption in the AD separate rates practice that all firms within an NME country are subject to government control and should be assigned a single, country-wide rate unless the respondent company can demonstrate absence of *de jure* and *de facto* control over its export activities.
- The PRC 1994 Company Law, as amended in 2006, requires that all companies make all export decisions independently from PRC government control, so government control over a Chinese company’s export activities cannot be presumed.⁴⁸⁰ In addition, the Department’s findings in its 2007 *Georgetown Steel* Memorandum⁴⁸¹ suggest that there cannot be a presumption of government control over domestic or export pricing, as “market forces now determine the prices of more than 90 percent of products traded in China.”⁴⁸²
- The Department should not simultaneously find that the PRC government both controls and does not control Chinese companies depending on whether the proceeding is an AD or CVD proceeding. If the Department finds that Wuxi Suntech is under the control of the PRC government as part of the PRC entity, it cannot also calculate CVD subsidies provided to the company by the PRC government.
- The Department should abolish its current separate rates practice in China cases, beginning with the instant review. Even after abolishing its current separate rates practice, the Department could still employ its surrogate value practice for calculating normal value, consistent with 771(18)(A) of the Act. Because the Act itself does not require the Department’s separate rate test, a decision to abandon the separate rates test would not constitute determining China to be a market economy country.
- If the Department declines to abandon its separate rates practice in this review, it should, in the alternative, amend its *de facto* analysis to remove the criterion concerning “autonomy from the government in making decisions regarding the selection of management” because this criterion is no longer relevant for determining a Chinese exporter’s independence from the PRC government with respect to the company’s export activities.

Petitioner

⁴⁷⁹ See *Silicon Carbide From the People’s Republic of China*, 59 FR 22585 (May 2, 1994) (“*Silicon Carbide from the PRC*”).

⁴⁸⁰ See Wuxi Suntech’s May 8, 2015 Case Brief at 9-10.

⁴⁸¹ See Department Memorandum, “Countervailing Duty Investigation of Coated Free Sheet Paper from the People’s Republic of China – Whether the Analytical Elements of the *Georgetown Steel* Opinion are Applicable to China’s Present-Day Economy,” dated March 29, 2007, available at <http://enforcement.trade.gov/download/prc-cfsp/CFS%20China.Georgetown%20applicability.pdf> (“*Georgetown Steel* Memorandum”). See also *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986) (“*Georgetown Steel*”).

⁴⁸² See Wuxi Suntech’s May 8, 2015 Case Brief at 10-11.

- The Department should continue to apply its separate rates framework in this review and other NME antidumping proceedings. Various aspects of the Department’s separate rates practice have been considered and upheld by the CIT and CAFC. The Department also recently rejected arguments similar to Wuxi Suntech’s arguments in the final results of *OTR Tires from the PRC*.⁴⁸³
- Wuxi Suntech failed to provide sufficient supporting evidence that the economic reforms undertaken in the PRC have rendered the Department’s separate rates practice unnecessary or inappropriate. No has it provided convincing rationale for the Department to abandon its well-established separate rates practice.
- It is reasonable for the Department to find that an entity is not eligible for a separate rate, while also finding that it benefitted from countervailable government subsidies. For the final results, the Department should continue to find that the Wuxi Suntech collapsed entity is subject to the PRC-wide rate in this review and the companion CVD review.

Department’s Position:

We disagree with Wuxi Suntech that the Department should abandon its well-established separate rates practice. As noted by Petitioner, the Department recently addressed comments about its separate rates practice in *OTR Tires from the PRC*.⁴⁸⁴ The Department considers the PRC to be a non-market economy country under section 771(18) of the Act. In antidumping proceedings involving NME countries, such as the PRC, the Department has a rebuttable presumption that the export activities of all firms within the country are subject to government control and influence. Therefore, in PRC cases, the Department uses a rate established for the PRC-wide entity, which it applies to all imports from an exporter that has not established its eligibility for a separate rate. Section 351.107(d) of the Department’s regulations provides that “in an antidumping proceeding involving imports from a nonmarket economy country, ‘rates’ may consist of a single dumping margin applicable to all exporters and producers.”⁴⁸⁵ The Department’s practice of assigning a PRC-wide rate has been upheld by the Federal Circuit. In *Sigma Corp*, the Federal Circuit affirmed that it was within the Department’s authority to employ a presumption for state control in a NME country and place the burden on the exporters to demonstrate an absence of central government control.⁴⁸⁶ The Federal Circuit recognized that sections 771(18)(B)(iv)-(v) of the Act recognized a close correlation between an NME economy

⁴⁸³ *Certain New Pneumatic Off-the-Road Tires From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 20197 (April 15, 2015) (“*OTR Tires from the PRC*”).

⁴⁸⁴ *Id.* and accompanying Issues and Decision Memorandum at Comment 1.

⁴⁸⁵ *See 1,1,1,2-Tetrafluoroethane From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 79 FR 62597 (October 20, 2014) and the accompanying Issues and Decision Memorandum at Comment 1 (explaining the Department’s practice with respect to separate rates as upheld by the Federal Circuit in *Sigma Corp v. United States*, 117 F.3d 1401, 1405-6 (Fed. Cir. 1997) (“*Sigma Corp*”), and describing the Department’s practice with respect to the rate assigned to the PRC-wide entity).

⁴⁸⁶ *See Sigma Corp*, 117 F.3d at 1405-1406 (“We agree with the government that it was within Commerce’s authority to employ a presumption of state control for exporters in a nonmarket economy, and to place the burden on the exporters to demonstrate an absence of central government control. The antidumping statute recognizes a close correlation between a nonmarket economy and government control of prices, output decisions, and the allocation of resources. Moreover, because exporters have the best access to information pertinent to the ‘state control’ issue, Commerce is justified in placing on them the burden of showing a lack of state control.”) (internal citations omitted).

and government control of prices, output decisions, and allocation of resources and, therefore, the Department's presumption was reasonable.⁴⁸⁷ The application of a PRC-wide entity rate to all parties not eligible for a separate rate was also affirmed by the Federal Circuit in *Transcom* in 2002.⁴⁸⁸ In *Transcom*, the Federal Circuit also found that a rate based on "BIA" (the precursor to facts available and AFA under the current statute) is not punitive.⁴⁸⁹ Thus, the courts have consistently upheld the Department's authority to apply a presumption of state control in NME countries and to apply a single rate to all exporters that fail to rebut that presumption.

The Department also recently addressed its separate rates practice in light of the *Georgetown Steel* Memorandum in *Diamond Sawblades from the PRC*.⁴⁹⁰ The Department explained that the concept of the "NME-wide entity" for antidumping duty assessment purposes should not be conflated with the "single economic entity" that characterized those economies in *Georgetown Steel*, and that the Department's analysis in its *Georgetown Steel* Memorandum focused only on the latter concept.⁴⁹¹ The CAFC and the Department characterized those economies as having a marked absence of market forces, in which:

(p)rices are set by central planners. "Losses" suffered by production and foreign trade enterprises are routinely covered by government transfers. Investment decisions are controlled by the state. Money and credit are allocated by the central planners. The

⁴⁸⁷ *Id.* See also *Coalition for the Preservation of American Brake Drum and Rotor Aftermarket Manufacturers v. United States v. United States*, 44 F.Supp. 2d 229, 243 (CIT 1999) ("CPABDRAM"), quoting *Sigma Corp.*, 117 F.3d at 1405 ("Under the broad authority delegated to it from Congress, Commerce has employed 'a presumption of state control for exporters in a nonmarket economy' ... Under this presumption, all exporters receive one non-market economy country ('NME') rate, or country-wide rate, unless an exporter can 'affirmatively demonstrate' its entitlement to a separate, company specific margin by showing 'an absence of central government control, both in law and in fact, with respect to exports.'"); *Michaels Stores, Inc. v. United States*, 931 F. Supp. 2d 1308, 1315 (CIT 2013) ("*Michaels Stores*"), quoting *SKF USA Inc. v. United States*, 263 F.3d 1369 (Fed. Cir. 2001) ("The regulations clarify, however, that for non-market economies, 'rates may consist of a single dumping margin applicable to all exporters and producers.' Moreover, whenever the statute is silent on a particular issue, it is well-settled that Commerce may 'formulate policy' and make rules 'to fill any gap left, implicitly or explicitly, by Congress.'") (internal citations omitted).

⁴⁸⁸ See *Transcom v. United States*, 294 F.3d 1371, 1381-83 (Fed. Cir. 2002) ("*Transcom*"). (The PRC-wide rate and its adverse inference are applicable to all companies which were initiated on yet failed to show their entitlement to a separate rate. "Accordingly, while section 1677e provides that Commerce may not assign a {best information available}-based rate to a particular party unless that party has failed to provide information to Commerce or has otherwise failed to cooperate, the statute says nothing about whether Commerce may presume that parties are entitled to independent treatment under 1677e in the first place" {emphasis added}). See also *Transcom*, 294 F.3d at 1376 citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990) (Instead, the objective of best information available ("BIA") is to aid Commerce in determining dumping margins as accurately as possible). The litigation in *Transcom* covered three periods of review between June 1990 and May 1993. See *Transcom*, 294 F.3d at 1374-75, and *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of Antidumping Duty Administrative Reviews*, 61 FR 65527 (Dec. 13, 1996). The term BIA is now referred to under the statute as facts available or AFA. *Id.*

⁴⁸⁹ See *Transcom*, 294 F.3d at 1376.

⁴⁹⁰ See *Diamond Sawblades and Parts Thereof From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 35723 (June 24, 2014) ("*Diamond Sawblades from the PRC*"), and accompanying Issues and Decision Memorandum at Comment 4.

⁴⁹¹ *Id.*

wage bill is set by the government. Access to foreign currency is restricted. Private ownership is limited to consumer goods.⁴⁹²

Given the reforms discussed in the *Georgetown Steel* Memorandum, the Department found that a single central authority no longer comprises the PRC's economy and that the policy that gave rise to the *Georgetown Steel* litigation does not prevent the Department from concluding that the PRC government has bestowed a countervailable subsidy upon a Chinese producer.⁴⁹³

In proceedings involving NME countries such as the PRC, the Department has a rebuttable presumption that the export activities of all firms within the country are subject to government control and influence. This presumption stems not from an economy comprised entirely of the government (*e.g.*, a firm is nothing more than a government work unit), but rather from the NME-government's use of a variety of legal and administrative levers to exert influence and control (both direct and indirect) over the assembly of economic actors across the economy. As such, this presumption is patently different from a presumption that all firms are one and the same as the government, such that they comprise a monolithic economic entity. Moreover, as noted above, the presumption underlying the separate rates test was upheld in *Sigma*, where the CAFC affirmed the Department's separate rates test as reasonable, stating that the statute recognizes a close correlation between an NME and government control of prices, output decisions, and the allocation of resources.⁴⁹⁴

⁴⁹² See *Georgetown Steel* Memorandum at 4, citing *Georgetown Steel* quoting *Carbon Steel Wire Rod from Poland; Final Negative Countervailing Duty Determination*, 49 FR 19375, 19376 (May 7, 1984).

⁴⁹³ See *Diamond Sawblades from the PRC* and accompanying Issues and Decision Memorandum at Comment 4.

⁴⁹⁴ See *Sigma*, 117 F.3d 1401, 1405-6.

Firms that do not rebut the presumption are assessed a single antidumping duty rate, *i.e.*, the NME-wide entity rate.⁴⁹⁵ However, in recognition that parts of the PRC's economy are transitioning away from the state-controlled economy, the Department has developed the separate rates test. In an economy comprised of a single, monolithic state entity, it would be impossible to identify separate firms, let alone rebut government control. Rather, the PRC's economy today is "neither command-and-control, nor market-based; government control and/or influence is omnipresent (which gives rise to the presumption), but not omnipotent (and hence, the presumption is rebuttable)."⁴⁹⁶

RECOMMENDATION

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

✓

Agree

Disagree



Paul Piquado
Assistant Secretary
for Enforcement and Compliance

7 July 2015

Date

⁴⁹⁵ See 19 CFR 351.107(d), which provides that "in an antidumping proceeding involving imports from a nonmarket economy country, 'rates' may consist of a single dumping margin applicable to all exporters and producers."

⁴⁹⁶ See *Diamond Sawblades from the PRC* and accompanying Issues and Decision Memorandum at Comment 4, citing *Georgetown Steel* Memorandum at 9.