U.S. Court of International Trade

Slip Op. 16–56

SUNPOWER CORP., Plaintiff, v. UNITED STATES, Defendant.

Before: Donald C. Pogue, Senior Judge
Consol. Court No. 15–000671[1]

[remanding Department of Commerce's antidumping and countervailing duty scope determinations]

Dated: June 8, 2016

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[1] This action is consolidated with *Suniva, Inc. v. United States*, Ct. No. 15–00071; *Shanghai BYD Co. v. United States*, Ct. No. 15–00083, *Shanghai BYD Co. v. United States*, Ct. No. 15–00087, *Canadian Solar Inc. v. United States*, Ct. No. 15–00088, *Canadian Solar Inc. v. United States*, Ct. No. 15–00089, and *SunPower Corp. v. United States*, Ct. No. 15–00090. Order, July 1, 2015, ECF No. 31, at ¶ 1; Order, Jan. 13, 2016, ECF No. 75.

OPINION AND ORDER

Pogue, Senior Judge:

This consolidated action arises from the final affirmative determinations made by the U.S. Department of Commerce ("Commerce") in its antidumping and countervailing duty ("AD" and "CVD," respectively) investigations of solar panels from the People's Republic of China ("PRC" or "China").[2] Before the court are motions for judgment on the agency record, challenging Commerce's final determinations regarding the scope of these proceedings.[3]

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012),[4] and 28 U.S.C. § 1581(c) (2012).

As explained below, Commerce's final scope determinations departed from the agency's prior rule for determining national origin for solar panels without adequate consideration or discussion of the continuing relevance, if any, of Commerce's prior factual finding that the assembly of imported solar cells into panels is insufficient to change the product's country-of-origin from the country of cell-production to the country of panel-assembly. In addition, Commerce's final scope determinations did not consider or explain an important aspect of the national origin determination, specifically the reasonableness of applying AD/CVD duties to the entire value of solar panels assembled in the PRC when only a small percentage of the cost of production actually occurs there. Therefore, Commerce's final scope determinations for these proceedings are remanded for reconsideration.

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[2] *See Certain Crystalline Silicon Photovoltaic Products from the [PRC]*, 79 Fed. Reg. 76,970 (Dep't Commerce Dec. 23, 2014) (final determination of sales at less than fair value) and accompanying Issues & Decision Mem., A-570–010, Investigation (Dec. 15, 2014)("*Solar II PRC AD I & D Mem.*"); *Certain Crystalline Silicon Photovoltaic Products from the [PRC]*, 79 Fed. Reg. 76,962 (Dep't Commerce Dec. 23, 2014) (final affirmative countervailing duty determination) and accompanying Issues & Decision Mem., C-570–011, Investigation (Dec. 15, 2014) ("*Solar II PRC CVD I & D Mem.*").

[3] *See* Consol. Pls.' Joint Br. in Supp. of their Rule 56.2 Mot. for J. on the Agency R., ECF No. 61 ("Resp'ts' Br."); Br. in Supp. of SunPower Corp.'s Rule 56.2 Mot. for J. on the Agency R., ECF Nos. 59 (conf. version) & 60 (pub. version) ("SunPower's Br."); Br. of Consol. Pl. Suniva, Inc. in Supp. of its Mot. for J. on the Agency R., ECF No. 58–1 ("Suniva's Br."); *see also* Mot. of Consol. Pl.-Intervenors Yingli Green Energy Holding Co., Ltd. & Yingli Green Energy Americas, Inc. for J. on the Agency R., ECF No. 57, at 2 (adopting the arguments presented in Resp'ts' Br., ECF No. 61).

[4] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

After a statement of the relevant background, the Plaintiffs' arguments, and the standard of review, the claims presented are discussed below.

BACKGROUND

The production process for solar panels complicates Commerce's national origin determination. Solar panels (also commonly referred to as solar modules or laminates) are assembled from solar cells, which use crystalline silicon to convert sunlight into electricity.[5] Importantly, the complete solar panel production process consists of multiple steps, each of which may occur in different plants or locations,[6] and potentially in different countries. First, polysilicon is refined, then it is formed into ingots, which are sliced into wafers; the wafers are then converted to cells, which are finally assembled into solar panels.[7]

Solar panels from the PRC were also subject to investigation in prior proceedings, resulting in separate AD and CVD orders (hereinafter referred to as the "*Solar I PRC*" proceedings).[8] The *Solar I PRC* proceedings covered solar cells produced in China, including cells assembled into panels, regardless of whether or where such panel assembly occurred.[9] The proceedings at issue here (hereinafter referred to as the "*Solar II PRC*" proceedings) cover all solar panels assembled in China, regardless of where their constituent cells were produced, except those panels already covered by the *Solar I PRC* proceedings (i.e., panels assembled in China from cells that were also made in China).[10] Relevant background with regard to each of these proceedings is provided below.

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[5] *Certain Crystalline Silicon Photovoltaic Products from China and Taiwan*, USITC Pub. 4519, Inv. Nos. 701-TA-511 and 731-TA-1246–1247 (Feb. 2015) (final determination) ("*Solar II ITC Final Determination*") at 10.

[6] *See, e.g., Crystalline Silicon Photovoltaic Cells and Modules from China*, USITC Pub. 4360, Inv. Nos. 701-TA-481 and 731-TA-1190 (Nov. 2012) (final determination) at I-15.

[7] *Id.*

[8] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the [PRC]*, 77 Fed. Reg. 63,791 (Dep't Commerce Oct. 17, 2012) (final determination of sales at less than fair value, and affirmative final determination of critical circumstances, in part) and accompanying Issues& Decision Mem., A-570–979, Investigation (Oct. 9, 2012) ("*Solar I PRC AD I & D Mem.*"); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the [PRC]*, 77 Fed. Reg. 63,788 (Dep't Commerce Oct. 17, 2012) (final affirmative countervailing duty determination and final affirmative critical circumstances determination) and accompanying Issues & Decision Mem., C-570–980, Investigation(Oct. 9, 2012) ("*Solar I PRC CVD I&D Mem.*").

[9] *See id.*

[10] *See Solar II PRC AD I & D Mem.* cmt. 1 at 11 ("[S]ubject merchandise includes all modules, laminates and/or panels assembled in the PRC that contain crystalline silicon

I. Solar I PRC

In the *Solar I PRC* proceedings, Petitioner SolarWorld Americas, Inc. ("SolarWorld") – Defendant-Intervenor in this action – initially sought investigations and orders covering, as subject merchandise from the PRC: 1) all solar cells produced in China, regardless of whether or where they were assembled into panels; and also 2) all solar panels assembled in China, regardless of where the constituent cells were produced.[11] But Commerce decided that this scope proposal would have impermissibly required the agency to simultaneously establish that China is the country-of-origin both for the cells produced in China but assembled into panels elsewhere, as well as for the cells produced outside of China but assembled into panels in China.[12] To Commerce, this proposal would have required two conflicting origin rules for the same class of products.[13] Commerce therefore decided, in *Solar I PRC*, that either constituent cell-production or ultimate panel-assembly must determine the country-of-origin.[14] Accordingly, Commerce concluded that an AD/CVD order on merchandise from China may cover either cells produced in China, regardless of where they are subsequently assembled into panels, or panels assembled in China, regardless of the origin of the cells, but not both.[15]

To choose between these alternatives, Commerce employed its usual "substantial transformation" test to determine the country-of-

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photovoltaic [solar] cells produced in a customs territory other than the PRC."); *id.* at 28 ("[T]he scopes adopted in the final determinations of the *[Solar II PRC]* investigations emphasize that they do not alter, revise, or overlap the scope of *[Solar I PRC]*."); *Solar II PRC CVD I & D Mem.* cmt. 1 at 36, 54 (same).

[11] [SolarWorld's] Revised Scope Language, *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the [PRC]*, A-570–979 & C-570–980 (Nov. 7, 2011) ("*Solar I PRC Proposed Scope Clarification*"), *reproduced in* App. to [SolarWorld]'s Rule 56.2 Mot. for J. on the Agency R. & Br. in Supp., Ct. No. 13–00219, ECF No. 29 at Tab 8, at 3 & Attach. 2.

[12] [Commerce's] Mem. re Scope Clarification, *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the [PRC]*, A-570–979 and C-570–980, Investigations (Mar. 19,2012), *reproduced in, e.g.*, App. to Br. of Consol. Pl. Suniva, Inc. in Supp. of its Mot. for J. on the Agency R., ECF No. 58–3 at Tab 1 Ex. 2 ("*Solar I PRC Scope Clarification Mem.*"), at 8 (unchanged in *Solar I PRC AD I & D Mem.* cmt. 1 at 8); *Solar I PRC CVD I & D Mem.* cmt. 32 at 80 & n. 214 (same)).

[13] *See id.*

[14] *Id.*

[15] *Id.*

origin for merchandise that is manufactured in multiple countries.[16] Specifically, Commerce analyzed whether solar panel assembly constitutes a substantial transformation of the solar cells included in the panel, sufficient for the final product to be considered to originate in the country of panel assembly.[17] Based on this analysis, Commerce determined that "solar module assembly does not substantially transform solar cells such that it changes the country-of-origin."[18] Accordingly, Commerce concluded that "where solar cell production occurs in a different country from solar module assembly, the country-of-origin of the solar modules/panels is the country in which the solar cell was produced [and not the country of panel assembly]."[19]

Thus, in response to SolarWorld's *Solar I PRC* scope request, Commerce decided that the scope of the *Solar I PRC* proceedings would include Chinese cells assembled into panels in third countries, but exclude panels assembled in China from third-country cells.[20] The agency suggested that to the extent that SolarWorld continued to allege additional injury from products left unaddressed by this product coverage, SolarWorld could petition for additional orders to cover

[16] *See id.* at 5 ("Because AD and CVD orders apply to merchandise from particular countries, determining the country where the merchandise is produced is fundamental to proper administration and enforcement of the AD and CVD statute. The scope of an AD or CVD order is limited to merchandise that originates in the country covered by the order.") (citing *Stainless Steel Plate in Coils from Belgium*, 69 Fed. Reg. 74,495 (Dep't Commerce Dec. 14,2004) (final results of antidumping duty administrative review)and accompanying Issues & Decision Mem., A-423–808, ARP 02–03(Dec. 14, 2004) ("*SSPC from Belgium*") at cmt. 4); *id.* at 5–6 ("[Commerce] has applied, as appropriate, the following analyses in determining whether substantial transformation occurs, thereby changing a product's country-of-origin [from the country where the component parts were produced to the country of subsequent processing or assembly]. These have included: 1) whether the processed downstream product falls into a different class or kind of product when compared to the upstream product; 2) whether the essential component of the merchandise is substantially transformed in the country of exportation; or 3) the extent of processing. We have examined these criteria in conducting our substantial transformation analysis [for solar panels assembled in a different country from that where their constituent cells were produced].") (citation omitted); *see also SSPC from Belgium*, cmt. 4 at 14 ("As the [Court of International Trade] held, the substantial transformation test 'provides a means for Commerce to carry out its country of origin examination and properly guards against circumvention of existing antidumping orders.'") (quoting *E.I. DuPont de Nemours & Co. v. United States*, 22 CIT 370, 375, 8 F. Supp. 2d 854, 859(1998)).

No party to these proceedings challenges Commerce's substantial transformation test.

[17] *Solar I PRC Scope Clarification Mem.*, ECF No. 58–3 at Tab 1 Ex. 2, at 5–10.

[18] *Id.* at 8.

[19] *Id.*

[20] *Id.* at 10; *see Solar I PRC AD I & D Mem.* cmt. 1 at 5; *Solar I PRC CVD I & D Mem.* cmt. 32 at 77.

the merchandise excluded from *Solar I PRC* as not of Chinese origin.[21]

Following up on this suggestion, SolarWorld filed the *Solar II* petition discussed below.[22]

II. Solar II PRC

SolarWorld's *Solar II* petition, and Commerce's final *Solar II* determinations, state that they aim to address (1) production shifts that occurred after imposition of the *Solar I PRC* orders; and (2) unfair subsidization by the Chinese Government of the panel assembly process for panels assembled in China from non-Chinese cells.[23] Specifically, "following the implementation of the orders in *Solar I [PRC]*, numerous Chinese companies began to contract with Taiwanese cell producers to manufacture cells for the purpose of exporting those cells to China for use in the production of panels, modules and laminates, and then to export those panels, modules and laminates to the United States."[24] As a factual matter, no party challenges this shift of pro-

[21] *Solar I PRC AD I & D Mem.* cmt. 1 at 8 (noting that "Petitioner has the option of bringing additional petitions to address any dumping concerns it has regarding solar modules/panels assembled from solar cells produced in a third country"); *Solar I PRC CVD I & D Mem.* cmt. 32 at 80 (same for subsidy concerns). Obviously, this also invited petitions addressing any PRC subsidization of panel assembly from solar cells produced in a third country.

[22] *See* Pet. for Imposition of Antidumping & Countervailing Duties Pursuant to Secs. 701 & 731 of the Tariff Act of 1930, as Amended, *Certain Crystalline Silicon Photovoltaic Products from the [PRC] and Taiwan*, A-570–010, A-583–853, & C-570–011, Investigations (Dec. 31, 2013), *reproduced in* App. to Consol.Pls.' Joint Br. in Supp. of their Rule 56.2 Mot. for J. on the Agency R., ECF No. 64 ("Respt's' App.") at Tab 1("*Solar II Pet.*").

[23] *Id.* at 4–6; *Solar II PRC AD I & D Mem.* cmt. 1 at 13, 24; *Solar II PRC CVD I & D Mem.* cmt. 1 at 38–39; *see id.* at cmts. 6 and 7 (explaining Commerce's determination that the Chinese governmental provision of aluminum extrusions and solar glass (inputs used to assemble solar cells into panels) for less than adequate remuneration constitutes counter vailable subsidies).

[24] *Solar II PRC AD I & D Mem.* cmt. 1 at 18; *Solar II PRC CVD I & D Mem.* cmt. 1 at 44 (same); *see also* Issues & Decision Mem., *Certain Crystalline Silicon Photovoltaic Products from Taiwan*, A-583–853, Investigation (Dec. 15, 2014) (adopted in 79 Fed. Reg. 76,966, 76,967 (Dep't Commerce Dec. 23, 2014) (final determination of sales at less than fair value)) ("*Solar II Taiwan I & D Mem.*") cmt. 1 at 17 ("[SolarWorld's *Solar II*] Petition claimed that Chinese solar producers were 'using cells fully or partially manufactured in Taiwan in the modules they assembled for export to the United States,' which allowed the Chinese solar producers to 'export those modules, duty-free, to the U.S. market.' . . . The Petition claimed that Taiwanese cell and module imports increased by 85 percent, in large part as a result of this alleged loophole.") (quoting and citing, respectively, *Solar II Pet.*, [ECF No. 64 at Tab 1], at 4, 6); id. at 21 ("[F]ollowing the implementation of the [*Solar I PRC*] AD and CVD orders . . ., there has been a measurable shift in trade flows that has resulted in increased import of non-subject modules produced in China.") (citing *Solar II Pet.*, [ECF No. 64 at Tab 1], at 3, 5–6, 21, 34, 37, 53).

duction or its negative effect on the reach of the *Solar I PRC* AD/CVD orders.[25]

Accordingly, SolarWorld petitioned for, and Commerce initiated, separate AD and CVD investigations to cover (1) panels assembled in China from non-Chinese cells (*Solar II PRC*); and (2) cells and panels from Taiwan ("*Solar II Taiwan*").[26]

Initially, in its preliminary determination in *Solar II PRC*, Commerce accepted SolarWorld's proposal that, in addition to the solar panels that were already covered as Chinese merchandise under *Solar I PRC* – because they were assembled in China from cells that were also produced in China – panels assembled in China from cells not made in China – but made using ingots, wafers, or partially completed cells that were made in China – should also be covered as 'solar panels from China' under the new *Solar II PRC* proceedings.[27]

Subsequently, however, Commerce proposed to modify the scope of the *Solar II PRC* proceedings to include all solar panels assembled in China, regardless of the source of their constituent parts.[28] After considering interested parties' comments regarding this revised scope proposal, Commerce ultimately concluded, over numerous parties' objections, that the scope of the *Solar II PRC* proceedings would cover all solar panels assembled in China, regardless of cell-origin, excluding only those panels that are already covered by the scope of the parallel *Solar I PRC* proceedings.[29]

Because *Solar I PRC* covers all panels assembled in China from cells that are also produced in China, and all panels covered by *Solar*

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[25] *See* Resp'ts' Br., ECF No. 61; SunPower's Br., ECF Nos. 59& 60; Suniva's Br., ECF No. 58–1.

[26] *See Solar II Pet.*, ECF No. 64 at Tab 1; *Certain Crystalline Silicon Photovoltaic Products from the [PRC] and Taiwan*, 79 Fed. Reg. 4661, 4661 (Dep't Commerce Jan. 29, 2014) (initiation of AD investigations); *Certain Crystalline Silicon Photovoltaic Products from the [PRC]*, 79 Fed. Reg. 4667, 4668 (Dep't Commerce Jan. 29, 2014) (initiation of CVD investigation); *Solar II PRC AD I & D Mem.* cmt. 1; *Solar II PRC CVD I & D Mem.* cmt. 1; *Solar II Taiwan I & D Mem.* cmt. 1.

[27] Decision Mem. for the Prelim. Determination, *Certain Crystalline Silicon Photovoltaic Products from the [PRC]*, A-570–010, Investigation (July 24, 2014) (adopted in 79 Fed. Reg. 44,399, 44,399 (Dep't Commerce July 31, 2014) (affirmative preliminary determination of sales at less than fair value and postponement of final determination)) at 4; Decision Mem. for Prelim. Affirmative Countervailing Duty Determination, *Certain Crystalline Silicon Photovoltaic Products from the [PRC]*, C-570–011, Investigation (June 2, 2014) (adopted in 79 Fed. Reg. 33,174, 33,175 (Dep't Commerce June 10, 2014) (preliminary affirmative countervailing duty determination)) at 5; *Solar II Pet.*, ECF No. 64 at Tab 1, at 11.

[28] Opportunity to Submit Scope Comments, *Crystalline Silicon Photovoltaic Products from the [PRC] and Taiwan*, A-570–010, C-570–011, & A-583–853, Investigations (Oct. 3, 2014), *reproduced in* Respt's' App., ECF No. 64 at Tab 8, at 1.

[29] *See Solar II PRC AD I & D Mem.* cmt. 1 at 11, 28; *Solar II PRC CVD I & D Mem.* cmt. 1 at 36, 54.

I PRC are explicitly excluded from *Solar II PRC*, the final *Solar II PRC* scope effectively covers solely panels assembled in China from cells that are manufactured outside of China.[30] Unlike the prior preliminary determination, however, the agency's final *Solar II PRC* scope does not require that the non-Chinese cells be partially produced in China or produced from Chinese inputs or components.[31] Rather, the mere fact of assembly into panels in the PRC is deemed sufficient to confer PRC origin on any non-PRC cells thus assembled, including, for example, for panels assembled from cells produced entirely in the United States.[32] Thus, in the final *Solar II PRC* scope determination, Commerce effectively changed its origin-determinative rule from that established for solar panels in *Solar I PRC*.[33]

Plaintiffs – interested parties that participated in the administrative process below – now challenge this final *Solar II PRC* scope determination.

PARTIES' ARGUMENTS

The Plaintiffs make the following arguments regarding Commerce's final scope determinations in the *Solar II PRC* investigations.

(I) Commerce's late modification of the *Solar II PRC* scope substantially deprived interested parties of due process.[34]

(II) Commerce unlawfully expanded the *Solar II PRC* scope coverage after the close of factual submissions, to cover merchandise that had been excluded from Commerce's unfair pricing and countervailable subsidies analyses (as well as the ITC's injury analysis) throughout the investigations.[35]

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[30] *Solar II PRC AD I & D Mem.* cmt. 1 at 28 (excluding merchandise covered by *Solar I PRC*); *Solar II PRC CVD I & D Mem.* cmt. 1 at 54 (same); *Solar I PRC Scope Clarification Mem.*, ECF NO. 58–3 at Tab 1 Ex. 2, at 8 (covering all panels made from cells made in China as subject merchandise under *Solar I PRC*) (unchanged in *Solar I PRC AD I & D Mem.* cmt. 1 at 6–7; *Solar I PRC CVD I & D Mem.*cmt. 32 at 78–79).

[31] *Solar II PRC AD I & D Mem.* cmt. 1 at 14; *Solar II PRC CVD I & D Mem.* cmt. 1 at 40.

[32] *See id.*; Scope Ruling on Aireko Construction LLC's Solar Modules Composed of U.S.-Origin Cells, *Crystalline Silicon Photovoltaic Products from [the PRC]*, A-570–010 & C-570–011, Scope Ruling (Nov. 12, 2015), *reproduced in* Ct. No. 15–00319, ECF No. 16–4 ("*Solar II PRC Scope Ruling*"), at 5 ("[M]odules [that] are assembled in the PRC from U.S.-origin cells . . . are within the scope of the [*Solar II PRC* orders].").

[33] *See Solar II PRC AD I & D Mem.* cmt. 1 at 28–29 ("[T]he country of origin criteria in *Solar I PRC*, applicable to solar modules, differ from these [*Solar II PRC*] investigations."); *Solar II PRC CVD I & D Mem.* cmt. 1 at 41, 54 (same).

[34] Resp'ts' Br., ECF No. 61, at 31; SunPower's Br., ECF Nos. 59 & 60, at 23.

[35] *See* Resp'ts' Br., ECF No. 61, at 31–33; SunPower's Br., ECF Nos. 59 & 60, at 12–13, 21–22.

(III) Commerce unlawfully expanded the scope of the *Solar II PRC* proceedings beyond the Petitioner's intent, which was to address solely panels assembled in China using third-country cells that themselves incorporate Chinese inputs.[36]

(IV) Commerce's final *Solar II PRC* scope determinations unlawfully departed from prior practice without sufficient explanation.[37] Commerce provided insufficient explanation to reconcile the *Solar II PRC* country-of-origin rule with the rule established for the same class/kind of merchandise in the *Solar I PRC* and *Solar II Taiwan* proceedings.[38] "Simply put, the same product—third country cells assembled into modules in China—cannot be both of third country origin [for purposes of *Solar I PRC* and *Solar II Taiwan*] and [of PRC] origin [for purposes of *Solar II PRC*]."[39] Moreover, because the final *Solar II PRC* scope captures panels assembled in China from U.S. made cells, which Commerce previously found to be domestic (non foreign) merchandise, Commerce's final *Solar II PRC* scope determination also does not explain how its treatment of U.S.-made cells under *Solar II PRC*, as compared with the treatment of such cells under *Solar I PRC* and *Solar II Taiwan*, is consistent with the statutory requirements that AD/CVD orders apply to foreign merchandise.[40]

(V) Commerce unlawfully applied the final *Solar II PRC* scope determinations to entries made prior to the publication of the AD and CVD orders.[41]

Following a brief statement of the applicable standard of review, each group of arguments is addressed in turn below.

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[36] SunPower's Br., ECF Nos. 59 & 60, at 18; Resp'ts' Br., ECF No. 61, at 23–24.

[37] Resp'ts' Br., ECF No. 61, at 13, 15, 17–18, 25–27, 37; Suniva's Br., ECF No. 58–1, at 2, 22–23.

[38] *See* Resp'ts' Br., ECF No. 61, at 14 ("Commerce failed to reconcile the rationale used to determine origin in [*Solar II PRC*] with the long-standing substantial transformation rule that was used in [*Solar II Taiwan*], [*Solar I PRC*] and scores of prior agency determinations."); *id.* at 21–22 , 27–28; SunPower's Br., ECF Nos. 59 & 60, at 13; Suniva's Br., ECF No. 58–1, at 13–15.

[39] Resp'ts' Br., ECF No. 61, at 21 (emphasis omitted).

[40] Suniva's Br., ECF No. 58–1, at 10 ("U.S. law gives Commerce the authority to impose AD duties only on 'foreign merchandise.'") (quoting 19 U.S.C. § 1673); *id.* at 12 ("If U.S.-origin [solar] cells are not substantially transformed in China, then such U.S.-origin cells have not become 'foreign.' In [*Solar II PRC*], [Commerce] has not explained how it differentiates 'foreign' from domestic merchandise as required by the statute [, particularly in light of its *Solar I PRC*] analysis, on the very same merchandise, [finding that] such goods . . . retain domestic origin.") (citing *Solar I PRC Scope Clarification Mem.*, [ECF No. 58–3 at Tab 1 Ex. 2]).

[41] SunPower's Br., ECF Nos. 59 & 60, at 24 ("[S]hould the Court [affirm Commerce's final *Solar II PRC* scope determinations], the Court must prevent the retroactive application of the 'scope clarification' to entries made prior to the publication of the antidumping duty

STANDARD OF REVIEW

The court will sustain Commerce's AD/CVD determinations if they are supported by substantial evidence and are otherwise in accordance with law.[42] Substantial evidence refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,"[43] considering any relevant evidence that fairly detracts from the reasonableness of the agency's determination.[44] The substantial evidence standard of review can be roughly translated to mean "is the determination unreasonable?"[45] The agency must "examine the relevant data and articulate a satisfactory explanation for its action,"[46] including "a 'rational connection between the facts found and the choice made.'"[47]

"[A]n agency determination that is arbitrary is *ipso facto* unreasonable,"[48] and a determination is arbitrary when it fails to "consider an important aspect of the problem,"[49] or "treat[s] similar situations in dissimilar ways."[50]

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order on February 18, 2015, or at least prior to the publication of [Commerce]'s final determination in the Federal Register on December 23, 2014."); Suniva's Br., ECF No. 58–1, at 2, 23.

[42] *See* 19 U.S.C. § 1516a(b)(1)(B)(i).

[43] *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S.197, 229 (1938).

[44] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

[45] *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (quotation and alteration marks and citation omitted).

[46] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*,463 U.S. 29, 43 (1983).

[47] *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S.156, 168 (1962)).

[48] *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, __ CIT __, __ F. Supp. 3d __ [2016 WL 524268], __ n.148 (2016) (quoting Ward v. Sternes, 334 F.3d 696, 704 (7th Cir. 2003)("[A] decision [that is] so inadequately supported by the record as to be arbitrary [is] therefore objectively unreasonable.") (quotation marks and citations omitted)).

[49] *State Farm*, 463 U.S. at 43.

[50] *Anderson v. U.S. Sec'y of Agric.*, 30 CIT 1742, 1749,462 F. Supp. 2d 1333, 1339 (2006) ("Agencies have a responsibility to administer their statutorily accorded powers fairly and rationally, which includes not 'treat[ing] similar situations in dissimilar ways.'") (quoting *Burinskas v. NLRB*, 357 F.2d 822, 827 (D.C. Cir. 1966) ("[An agency] cannot act arbitrarily nor can it treat similar situations in dissimilar ways.") (citation and footnote omitted)); *see also id.* ("Indeed, a principal justification for the administrative state is that in 'area[s] of limitless factual variations, like cases will be treated alike.'") (quoting *Nat'l Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979) (citations omitted)) (also quoting *South Shore Hosp., Inc. v. Thompson*, 308 F.3d 91, 101 (1st Cir. 2002) ("The goal of regulation is not to provide exact uniformity of treatment, but, rather, to provide uniformity of rules so that those similarly situated will be treated alike.")); *Trs. in Bankruptcy of N. Am. Rubber Thread Co. v. United States*, 32 CIT 663, 665, 558 F. Supp. 2d 1367, 1370(2008) ("Generally, an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently.") (quotation and alteration marks and citation omitted).

Where the statutory language is sufficiently broad to permit a range of policy choices, the agency may change course from its prior practice and adopt a new approach within its statutory authority,[51] but it must explain how the new policy is consistent with the continued relevance (if any) of the factual findings on which the agency's prior policy was based.[52] "[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[53] Thus, "when departing from its own precedent, Commerce must explain its departure,"[54] providing a rational link between the facts found and the conclusions reached, after considering all important aspects of the problem.

DISCUSSION

I. Remand on Other Grounds Makes Reaching Due Process Arguments Unnecessary.

Because remand of Commerce's final *Solar II PRC* scope determinations is warranted on other grounds,[55] and because the parties will therefore have ample opportunity to address the scope issues on remand, Plaintiffs' due process challenges are moot. The court therefore need not reach those of Plaintiffs'arguments that are grounded in due process concerns, and accordingly offers no opinion in this regard.

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[51] *See, e.g., Nakornthai Strip Mill Pub. Co. v. United States*, 32 CIT 1272, 1276, 587 F. Supp. 2d 1303, 1307 (2008) ("Commerce has discretion to change its policies and practices as long as they are reasonable and consistent with their statutory mandate and may adapt its views and practices to the particular circumstances . . . at hand, so long as the agency's decisions are explained and supported by substantial evidence on the record.") (quotation and alteration marks and citation omitted).

[52] *See British Steel PLC v. United States*, 127 F.3d 1471, 1475 (Fed. Cir. 1997) ("An agency is obligated to follow [its] precedent, and if it chooses to change, it must explain why.") (quotation marks and citations omitted); *State Farm*, 463 U.S. 29, 46–48 (holding that an agency may not change course without addressing the continued relevance of factual findings on which the agency's prior policy was based); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (J. Kennedy, concurring in part and concurring in judgment) (explaining that *State Farm* followed the principle that an agency "cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate").

[53] *Fox*, 556 U.S. at 516.

[54] *Nakornthai*, 32 CIT at 1276, 587 F. Supp. 2d at 1308 (citing and quoting *Trs. in Bankruptcy of N. Am. Rubber Thread Co. v. United States*, 31 CIT 2040, 2047, 533 F. Supp. 2d 1290, 1297 (2007) ("Commerce [must] attempt to distinguish the reasoning set forth in [prior cases] from the present case.") (alterations in *Nakornthai*)).

[55] *See infra* Discussion Section IV.

II. Commerce's Final Solar II PRC Scope Determinations Did Not Affect the Actual Datasets Used to Calculate Dumping Margins and Subsidy Rates Throughout the Investigations.

As Commerce explains, the final *Solar II PRC* scope modification had "no impact on the data required from and submitted by the parties"[56] – it "result[ed] in no change in the reported sales of the mandatory respondents,"[57] because in fact "most, if not all, parties reported in their Quantity and Value questionnaires all [sales of] solar modules containing solar cells from third countries,"[58] claiming that they "did not know the source of the wafer contained in the solar cells they purchased from third countries."[59] Accordingly, the final *Solar II PRC* scope did not cover different merchandise than that which was actually investigated.[60]

III. Commerce Did Not Unlawfully Expand the Scope of the Solar II PRC Proceedings Beyond the Petitioner's Intent.

Third, the record adequately supports Commerce's conclusion that covering all panels assembled in China as merchandise from China, regardless of cell origin, was in accord with SolarWorld's intent.[61]

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[56] *Solar II PRC AD I & D Mem.* cmt. 1 at 23; *Solar II PRC CVD I & D Mem.* cmt. 1 at 48 (same).

[57] *Id.*

[58] *Id.*

[59] *Id.* (citations omitted).

[60] *Id.*; *see also Solar II ITC Final Determination*, *supra* note 5, at 7 ("[Although] Commerce did not finalize the scope of the [*Solar II PRC*] investigations until a late stage in the investigations[,] . . . [t]he [International Trade] Commission recognized early in these investigations that changes in the scopes were likely and took steps to ensure that it collected the information that would allow it to fulfill its statutory obligations. In the questionnaires issued in the final phase of these investigations, the Commission asked U.S. producers and importers to segregate their import data into sixteen categories, which were designed to provide the Commission with flexibility to adjust the data to conform to different possible scope definitions. The manner in which the Commission collected the data in these investigations permitted the agency and the parties to consider and evaluate the implications of various possible scope definitions to the Commission's analysis.") (citations omitted); *cf.* Resp'ts' Br., ECF No. 61, at 31–33; SunPower's Br., ECF Nos. 59 & 60, at 12–13 (arguing that "[Commerce] investigated modules/panels with non-Chinese-origin [solar] cells containing Chinese-origin inputs, but issued a final determination as to modules/panels with non-Chinese-origin [solar] cells, regardless of the origin of the [solar] cell inputs") (relying on *Smith Corona Corp. v. United States*, 16 CIT 562, 565, 796 F. Supp. 1532, 1535 (1992) ("[Commerce] must exercise caution in redefining scope in midstream to include items which were clearly known about and excluded at the time of initiation of the investigation and, indeed in this case, at the time of the preliminary determination.")); *id.* at 21–22.

[61] *See Solar I PRC Proposed Scope Clarification*, Ct. No. 13–00219, ECF No. 29 at Tab 8, at 3 & Attach. 2 (seeking to cover, under *Solar I PRC*, all solar modules and panels assembled

Moreover, Commerce may modify the proposed scope as necessary to best effectuate the Petitioner's intent while ensuring that any resulting AD/CVD orders are properly administrable and enforceable, based on a reasonable reading of the record and consistent with applicable legal requirements and principles.[62] Here, although Commerce preliminarily agreed with SolarWorld's proposal in the *Solar II* Petition to cover panels assembled in China using third-country cells containing Chinese inputs,[63] the agency ultimately determined that a scope covering all panels assembled in China from non-Chinese cells was more easily administrable and enforceable.[64] This determination

in China, regardless of where the constituent cells were produced); *Solar II Pet.*, ECF No. 64 at Tab 1; *Solar II PRC AD I & D Mem.* cmt. 1 at 12 ("The Petition and Petitioner's comments in this investigation demonstrate that the Petitioner's intent is a scope that covers all solar modules assembled in the PRC using third-country solar cells. In its Petition to this investigation, the Petitioner stated its intent to include all of these modules within the scope, citing the 'loophole' that resulted [from the exclusion from *Solar I PRC* coverage of panels assembled in China from third-country cells].") (citing *Solar II Pet.*, [ECF No. 64 at Tab 1], at 3, 5–6, 21, 34, 37, and 53); *Solar II CVD I & D Mem.* cmt. 1 at 38 (same).

[62] *See, e.g., Ad Hoc Shrimp Trade Action Comm. v. United States*, 33 CIT 915, 637 F. Supp. 2d, 1166, 1175 (2009) ("Commerce retains authority to define the scope of the investigation and may depart from the scope as proposed by a petition if it determines that petition to be overly broad, or insufficiently specific to allow proper investigation, or in any other way defective.") (quotation marks and citation omitted).

[63] *See supra* note 27 (providing relevant citations).

[64] *See Solar II PRC AD I & D Mem.* cmt. 1 at 14 ("[C]ertain interested parties commented that they did not track their merchandise in a manner that would allow them to definitively report only that merchandise falling within the 'two-out-of three' scope proposed in the [*Solar II*] Petition. The scope being adopted in these [*Solar II PRC*] investigations resolves [these administrability and enforcement concerns], by covering *all* modules assembled in the PRC from third-country cells. Under the scope being adopted for these final [*Solar II PRC*] determinations, producers and exporters would not need to track for purposes of these proceedings the ingots, wafers, or partial cells that are being used in the third-country cells being assembled into modules in China.") (footnote and citations omitted); *Solar II PRC CVD I & D Mem.* cmt. 1 at 40 (same); *see also Solar II Taiwan I & D Mem.* cmt. 1 at 24 ("We have determined that the enforcement of the 'two out of three' language [contained in SolarWorld's *Solar II* Petition and adopted in Commerce's *Solar II PRC* and *Solar II Taiwan* preliminary determinations] could be difficult and complicated.. . . Importers might have to: 1) provide evidence that the ingot, wafer, or solar cell was/was not processed in Taiwan [or China]; 2) provide evidence that the cell was then subsequently processed in a third country; and then 3) provide evidence that it was subsequently assembled into a solar module in Taiwan [or China, as the case may be]. Given that different, unaffiliated parties might be responsible for each of these steps of production, and that additional parties might provide additional steps of subassembly in the production process of a solar product, the evidentiary burden on importers could be complicated, and likewise the burden on [U.S. Customs and Border Protection] to confirm the validity and reliability of such evidence could also be difficult. Further complicating this task is the fact that respondents have been nearly unanimous in claiming that they are unable to track where the wafer contained in a solar cell was manufactured . . . .") (footnote and citation omitted).

did not contravene SolarWorld's original intent to cover all panels assembled in the PRC as PRC-origin merchandise.[65]

IV. Commerce Insufficiently Considered, and Did Not Adequately Explain, its Departure from Prior Policy, the Factual Findings Upon Which its Prior Policy Was Based, and an Important Aspect of its Revised Origin Determination.

It is well-established that the scope of an antidumping or countervailing duty proceeding is "defined by the type of merchandise and by the country-of-origin (e.g., widgets from Ruritania)."[66] Accordingly, "[f]or merchandise to be subject to an order it must meet both parameters, i.e., product type and country of origin."[67] This "involve[s] two separate inquiries."[68]

The product type covered by the *Solar II PRC* proceedings is solar cells assembled into solar panels.[69] In *Solar I PRC*, Commerce covered all solar cells produced in China and assembled into panels anywhere in the world, including China, as merchandise from China.[70] Then in *Solar II PRC*, Commerce covered, also as merchandise from China, all panels assembled in China from cells produced

[65] *See supra* note 61 (discussing and providing citations for the Petitioner's intent in this regard).

[66] *Certain Cold-Rolled Carbon Steel Flat Products from Argentina*, 58 Fed. Reg. 37,062, 37,065 (Dep't Commerce July 9, 1993) (notice of final determination of sales at less than fair value) ("*Cold-Rolled Steel from Argentina*") (relied on by Commerce in *Solar I PRC*, *see Solar I PRC Scope Clarification Mem.*, ECF No. 58–3 at Tab 1, at 5 n.7, 8, and *Solar II Taiwan*, *see Solar II Taiwan I & D Mem.* cmt. 1 at 18 n.52).

[67] *Id.; see also Solar II Taiwan I & D Mem*. cmt. 1 at 18 ("In determining the scope of the investigation, [Commerce] must not only address . . . the products intended to be covered by the scope, but also determine the country-of-origin of the solar products at issue.").

[68] *3.5" Microdisks and Coated Media Thereof from Japan*, 54 Fed. Reg. 6433 (Dep't Commerce Feb. 10, 1989) (final determination of sales at less than fair value) ("*3.5" Microdisks from Japan*") (relied on in *Cold-Rolled Steel from Argentina*, 58 Fed. Reg.at 37,065).

[69] Because the *Solar II PRC* scope excludes any merchandise covered by the *Solar I PRC* orders, which cover all solar cells produced in China, whether or not and regardless of where assembled, the type of merchandise covered by the *Solar II PRC* scope is exclusively cells assembled into panels. *See also Solar II Taiwan I & D Mem.* cmt. 1 at 19 ("[T]he scope of the concurrent [*Solar II PRC*] investigations on solar products from the PRC . . . covers only modules, and not cells.")(footnote and citation omitted). In any event, Commerce has determined that the individual solar cells and the panels assembled from them are products within the same class/kind of merchandise. *Solar I PRC Scope Clarification Mem.*, ECF No. 58–3 at Tab 1 Ex. 2, at 6.

[70] *See Solar I PRC Scope Clarification Mem.*, ECF NO. 58–3 at Tab 1 Ex. 2, at 8 (unchanged in *Solar I PRC AD I & D Mem.* cmt. 1 at 6–7; *Solar I PRC CVD I & D Mem.* cmt. 32 at 78–79); *see also Solar I PRC AD I & D Mem.* cmt. 1 at 8 ("[Commerce] has determined that modules from the PRC are those that have been assembled in the PRC using solar cells produced in the PRC."); *Solar I PRC CVD I & D Mem.* cmt. 32 at 80 (same).

anywhere in the world, other than China.[71] To do this, Commerce established two different rules of origin for solar panels, depending on where they were assembled. For solar panels assembled anywhere other than China, origin is the country of cell-production.[72] For solar panels assembled in China, origin is instead determined by the country of assembly,[73] even though most of the production (the making of the constituent cells) takes place in another country.[74] The *Solar II PRC* rule is an exception to the agency's otherwise generally applicable rule that the country of cell-production determines a solar panel's country-of-origin.[75]

Historically, however, it appears unprecedented for Commerce to apply more than one country-of-origin determinative rule to products within the same class or kind of merchandise. Rather, when faced with merchandise produced in more than one country, Commerce has consistently held that AD/CVD liability for such products is based on

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[71] *See Solar II PRC AD I&D Mem.* cmt. 1 at 28–29; *Solar II PRC CVD I & D Mem.* cmt. 1 at 54; *Solar I PRC Scope Clarification Mem.*, ECF NO. 58–3 at Tab 1, at 8 (unchanged in *Solar I PRC AD I & D Mem.* cmt. 1 at 6–7; *Solar I PRC CVD I & D Mem.* cmt. 32 at 78–79); *see also* supra note 30.

[72] *See Solar I PRC Scope Clarification Mem.*, ECF NO. 58–3 at Tab 1 Ex. 2, at 8 (unchanged in *Solar I PRC AD I & D Mem.* cmt.1 at 6–7; *Solar I PRC CVD I & D Mem.* cmt. 32 at 78–79); *Solar II Taiwan I & D Mem.* cmt. 1 at 24 ("[T]he solar cell determines the country of origin, unless manufactured into a module, laminate or panel in the PRC.").

[73] *See Solar II PRC AD I & D Mem.* cmt. 1 at 14, 16; *Solar II PRC CVD I & D Mem.* cmt. 1 at 40, 41; *Solar II Taiwan I & D Mem.* cmt. 1 at 5, 16 (excluding Taiwanese cells assembled into panels in China from the otherwise applicable rule that panels assembled anywhere in the world from Taiwanese cells are products of Taiwan).

[74] Commerce has found that the panel assembly process "only strings cells together, adding a protective covering and an aluminum base" – it simply "connects cells into their final end-use form but does not change the 'essential active component,' the solar cell, which defines the module/panel." *Solar I PRC Scope Clarification Mem.*, ECF NO. 58–3 at Tab 1 Ex.2, at 7–8 (unchanged in *Solar II PRC AD I & D Mem.* cmt. 1at 15; *Solar II PRC CVD I & D Mem.* cmt. 1 at 40–41). Commerce also found that "solar module/panel assembly is relatively insubstantial in terms of number of steps, inputs, research and development required, and time"; that of the six stages of producing a finished solar panel, five are "dedicated to solar cell production and only one pertained to solar module/panel assembly"; that many more types of inputs are consumed in cell production as compared with panel assembly; and that the production time and complexity for producing the constituent solar cells far outweighs that for then assembling them into panels. *Id.*

[75] *Solar II PRC AD I & D Mem.* cmt. 1 at 15, 28; *Solar II PRC CVD I & D Mem.* cmt. 1 at 41, 54; *Solar I PRC Scope Clarification Mem.*, ECF NO. 58–3 at Tab 1 Ex. 2, at 8 (unchanged in *Solar I PRC AD I & D Mem.* cmt. 1 at 6–7; *Solar I PRC CVD I & D Mem.* cmt. 32 at 78–79); *Solar II Taiwan I & D Mem.* cmt. 1 at 23 ("[S]olar modules assembled in the PRC using Taiwanese cells are within the scope of, and therefore subject to, the [*Solar II PRC*] AD and CVD investigations as Chinese modules assembled from third-country cells[,] [but for] . . . cells from Taiwan which are used in the assembly of solar modules in other countries[,]. . . the country-of-origin of the solar modules assembled using Taiwanese cells will not change through the assembly of those solar modules.").

an analysis of the market in a single country-of-origin for the product, and that such origin rule will generally be applied consistently to all products within that class or kind of merchandise.[76]

In *DRAMs from Korea*, for example, Commerce determined that because the country-of-origin of semiconductors assembled in other countries from wafers produced in Korea was the country of wafer-production (Korea), the origin of semiconductors assembled in Korea from wafers produced outside of Korea must also be the country of wafer-production (i.e., not Korea).[77] Commerce reasoned that "it would not be appropriate or feasible to have a class or kind of merchandise subject to investigation that would require two different potentially conflicting country-of-origin tests."[78] As with solar panels here, Commerce based its general origin rule for semiconductors on the country where the essential components were produced, rather than the country where those components were then assembled into the finished product.[79] Also like here, the Petitioner then argued that the effect of this component-based origin rule was that the assembly-specific governmental subsidies provided by the country-of-assembly for products assembled from essential components made elsewhere

[76] *See, e.g., Erasable Programmable Read Only Memories (EPROMs) from Japan*, 51 Fed. Reg. 39,680, 39,692 (Dep't Commerce Oct. 30,1986) (final determination of sales at LTFV) ("*EPROMs from Japan*") (finding country of constituent wafer-production to determine legal origin of semiconductors assembled in a different country from that where the wafers were produced); *Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 67 Fed. Reg. 70,927, 70,927–28 (Dep't Commerce Nov. 27,2002) (notice of initiation of countervailing duty investigation) ("*DRAMs from Korea*") ("[I]n numerous past proceedings on DRAMs and similar products such as EPROMs, [Commerce] has consistently maintained that the country of origin is the country where wafer fabrication occurs."); *Solar I PRC Scope Clarification Mem.*, ECF NO. 58–3 at Tab 1 Ex.2, at 8 & n.29 (noting that "Petitioner has not cited any example" where Commerce used "inconsistent country-of-origin [rules] for a single [type of] product" in the past).

[77] *DRAMs from Korea*, 67 Fed. Reg. at 70,927–28.

[78] *Id.*

[79] *Compare Solar I PRC Scope Clarification Mem.*, ECF NO. 58–3 at Tab 1 Ex. 2, at 6–8 (determining the solar cell to be the most technologically intensive, essential active component of finished solar panels, the substance and function of which is unchanged by the relatively insubstantial assembly process)(unchanged in *Solar I PRC AD I & D Mem.* cmt. 1 at 6–7; *Solar I PRC CVD I & D Mem.* cmt. 32 at 78–79; *Solar II PRC AD I & D Mem.* cmt. 1 at 15; *Solar II PRC CVD I & D Mem.* cmt. 1 at 40–41; *Solar II Taiwan I & D Mem.*cmt. 1 at 19–20), *with DRAMs from Korea*, 67 Fed. Reg. at 70,928; *EPROMs from Japan*, 51 Fed. Reg. at 39,692; *Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above from Japan*, 51 Fed. Reg. 28,396, 28,397 (Dep't Commerce Aug. 7, 1986) (suspension of antidumping investigation and amendment of preliminary determination) ("*DRAMs from Japan*").

could not be addressed.[80] Unlike here, however, in *DRAMs from Korea* Commerce concluded, as the agency has consistently maintained in all other proceedings up to and including the *Solar I PRC* proceedings, that a single class or kind of merchandise (like wafers assembled into semiconductors or solar cells assembled into panels) cannot be subject to multiple "different and potentially conflicting country-of-origin tests,"[81] notwithstanding the resultant necessary exclusion from the product's AD/CVD liability analysis of that portion of production that occurs in a country other than the country where most of the essential production takes place.[82]

As the agency explained in *Solar I PRC*, because "[a] product can only have one country-of-origin for AD/CVD purposes,"[83] Commerce rejected SolarWorld's proposal to treat both cells made in China and assembled into panels elsewhere and cells made elsewhere and assembled into panels in China as subject merchandise from China because doing so would "necessitate making inconsistent country-of-origin determinations for a single product."[84] Instead, in *Solar I PRC* as in all prior cases, Commerce established a single consistent country-of-origin rule for the class/kind of merchandise, even though – as with semiconductors assembled in a country other than the

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[80] *Compare Solar I PRC AD I & D Mem.* cmt. 1 at 8 & n.32 ("Petitioner argues that all modules assembled in the PRC must be covered [as Chinese-origin merchandise], regardless of the origin of the solar cells . . . ."); *Solar I PRC CVD I & D Mem.* cmt. 32 at 80 & n.214 (same), with *Solar II PRC AD I & D Mem.* cmt.1 at 24–25; *Solar II PRC CVD I & D Mem.* cmt. 1 at 38–39 (stating that one of the considerations underlying Commerce's ultimate *Solar II PRC* scope determination was the aim to capture Chinese assembly-specific subsidies), *with DRAMs from Korea*, 67 Fed. Reg. at 70,928.

[81] *Compare DRAMs from Korea*, 67 Fed. Reg. at 70,928 (quoted), *with Solar I PRC AD I & D Mem.* cmt. 1 at 8 & n.32 ("[F]inding that module assembly in the PRC . . . [renders] the country-of-origin of the module [to be] the PRC while also finding that module assembly outside the PRC using PRC produced solar cells . . .[also renders] the country-of-origin of the module [to be] the PRC . . . necessitate[s] making inconsistent country-of-origin determinations for a single product . . . ."); *Solar I PRC CVD I & D Mem.* cmt. 32 at 80 & n.214 (same).

[82] *See DRAMs from Korea*, 67 Fed. Reg. at 70,928 (declining to address assembly-specific subsidies provided by the government of a different foreign country from that where the essential components were produced, because a given product's AD/CVD liability is holistically based upon a single foreign country-of-origin, even where that results in some additional subsidies provided by other foreign governments remaining unaccountable, and explaining that "[w]hile the petitioner may be correct that testing and assembly may be more costly than in the past, there does not seem to be any dispute that wafer fabrication is still the more important stage of the production process").

[83] *Solar I PRC Scope Clarification Mem.*, ECF NO. 58–3 at Tab 1 Ex.2, at 8.

[84] *Id.*

country of wafer-production,[85] or pipes refurbished in a country other than the country of pipe production,[86] or pistachios roasted in a country other than the one where they were grown[87] – doing so necessarily limits the AD/CVD analysis to the pricing behavior and subsidies occurring in the country where most of the essential production takes place, leaving any subsidies provided by the country of subsequent processing effectively unaccounted for.[88] Because a product's AD/CVD liability may be based on only one country's comparison market,[89] it follows that, when production takes place in more than one country, it is reasonable and consistent with prior practice to focus on the country where "the more important stage of the production process" takes place.[90]

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[85] *DRAMs from Korea*, 67 Fed. Reg. at 70,928; *EPROMs from Japan*, 51 Fed. Reg. at 39,681, 39,692; *DRAMs from Japan*, 51 Fed. Reg. at 28,397.

[86] *Certain Carbon Steel Butt-Weld Pipe Fittings from India*, 60 Fed. Reg. 10,545, 10,545 (Dep't Commerce Feb. 27, 1995)(final determination of sales at less than fair value) (determining that rusty pipe fittings obtained from Singapore and then reconditioned and refurbished in India prior to exportation to the United States are legally products of Singapore, not India (despite the fact that removing the rust and then re-painting the Singaporean fitting incurred costs in the Indian market)).

[87] *Certain In-Shell Pistachios from Iran*, 51 Fed. Reg. 18,919,18,920 (Dep't Commerce May 23, 1986) (final determination of sales at less than fair value) ("[Commerce] considers pistachios grown in Iran as products of Iran, whether or not they have been sold or roasted in the European market [prior to exportation to the United States].").

[88] *But see infra* notes 127–31 and accompanying text.

[89] *See Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany*, 61 Fed. Reg. 38,166, 38,171 (Dep't Commerce July 23, 1996) (notice of final determination of sales at less than fair value) ("*LNPPs from Germany*") ("[Commerce] has stated that any interpretation [of the law] which sought to limit the application of antidumping duties . . . to the foreign content [attributable solely to a particular country] would be inconsistent with [Commerce]'s statutory mandate to assess antidumping duties on the extent to which the normal value . . . (previously referred to as 'foreign market value') exceeds the export price (previously referred to as 'United States price'). Application of antidumping duties only on [a particular country's partial] processing or content portion of the import might mean that the margin of dumping would not be fully offset.") (citing *Certain Corrosion-Resistant Carbon Steel Products from Canada*, 58 Fed. Reg. 37,099 (Dep't Commerce July 9, 1993) (final determination of sales at less than fair value), *aff'd, In the Matter of Certain Corrosion-Resistant Carbon Steel Products from Canada*, USA-93–1904–03 (Binational Panel under the United States-Canada Free Trade Agreement Oct. 31, 1994)); *Cold-Rolled Steel from Argentina*, 58 Fed. Reg. at 37,065 (same); *see also DRAMs from Korea*, 67 Fed. Reg. at 70,928 (explaining that the country-of-origin of a given product within a certain class or kind of merchandise is determined using the same test "for purposes of both antidumping and countervailing duty proceedings"). *But see infra* notes 127–31 and accompanying text.

[90] *See DRAMs from Korea*, 67 Fed. Reg. at 70,928.

In *Solar I PRC*, Commerce determined (in findings left unmodified by *Solar II PRC*[91]) that the most essential and important stage of the solar panel production process is the production of the panels' constituent solar cells, such that it is most important to capture the pricing behavior and subsidies occurring within the cell-producing country, even if that means that additional subsidies provided by the country of assembly will not be included in the analysis.[92] Moreover, because Commerce generally has interpreted the law to permit only one country to serve as the comparison home market, on which the AD/CVD liability for the entire value of the product is based,[93] the origin rule established for a given class/kind of merchandise also serves to determine whether products that are partially manufactured within the United States but further processed abroad thereby acquire "foreign" origin.[94] That origin rule therefore also determines whether AD/CVD duties "would be assessed on the full value of the import, inclusive of the U.S. content,"[95] or, conversely, whether such products retain their U.S. origin, and are therefore not subject to AD/CVD liability at all.[96] Because "[solar panel assembly] does [not] constitute significant processing such that it changes the country-of-origin of the cell,"[97] panels assembled from U.S.-origin cells were accordingly exempted from AD/CVD liability under *Solar I PRC* as not "foreign."[98]

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[91] *See Solar II PRC AD I & D Mem.* cmt. 1 at 15; *Solar II PRC CVD I & D Mem.* cmt. 1 at 41 (same).

[92] *See Solar I PRC Scope Clarification Mem.*, ECF NO. 58–3 at Tab 1 Ex.2, at 8 ("While we understand the intent of Petitioner's argument that the scope should cover solar modules/panels produced in the PRC, regardless of the origin of the solar cells, this is not tenable because doing so would. . . necessitate making inconsistent country-of-origin determinations for [products within a single class or kind of merchandise] . . . .") (footnote omitted).

[93] *LNPPs from Germany*, 61 Fed. Reg. at 38,171.

[94] *See* 19 U.S.C. § 1673 (providing for the imposition of duties solely on "foreign" merchandise).

[95] *LNPPs from Germany*, 61 Fed. Reg. at 38,171.

[96] *See, e.g., Cold-Rolled Steel from Argentina*, 58 Fed. Reg. at 37,065 ("The AD/CVD provisions provide for the assessment of duties only on products of the subject foreign country – not on products of the United States. Therefore, even if a U.S. origin product is deemed to be 'foreign' for Customs purposes, it is not subject to AD and CVD duties unless it is transformed through processing or manufacture into a product of the subject country.").

[97] *Solar I PRC Scope Clarification Mem.*, ECF No. 58–3 at Tab 1 Ex. 2, at 8 (unchanged in *Solar II PRC AD I & D Mem.* cmt. 1 at 15; *Solar II PRC CVD I & D Mem.* cmt. 1 at 41); *Solar II PRC AD I & D Mem.* cmt. 1 at 15 ("[Commerce] determined in [*Solar I PRC*] that the solar cell [is] the essential active component of the module, [and] that assembly of cells into modules [does] not constitute substantial transformation such that the assembled module could be considered a product of the country of assembly. . . .") (citation omitted); *Solar II PRC CVD I & D Mem.* cmt. 1 at 40–41 (same).

[98] *See id.*

Here in the *Solar II PRC* proceedings, however, Commerce adopted a different policy, without explicitly acknowledging it as such, that provides an exception from the otherwise generally applicable origin rule for solar panels.[99] And while Commerce is correct that the use of multiple orders ensures that no individual product is simultaneously deemed to originate from two different countries,[100] Commerce has nonetheless applied two different rules to similarly situated products within the same class or kind of merchandise.

For example, the general country-of-origin rule established for solar panels in *Solar I PRC* and maintained in *Solar II Taiwan* provides that, for all Taiwanese cells assembled into panels in any country other than China, AD/CVD liability is based on pricing and subsidies within the Taiwanese market.[101] *Solar II PRC*, on the other hand, provides that those same Taiwanese cells assembled into panels in China are instead assessed AD/CVD liability based on pricing and subsidies within the Chinese (surrogate) market.[102] And the disparate treatment of similarly situated products is even more apparent in the case of panels assembled abroad using cells produced in the United States. Pursuant to the general origin-determinative rule established for solar panels, such merchandise is not subject to AD/CVD liability at all when assembled in any country other than China, because the origin of such merchandise is the United States, and such

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[99] *See supra* note 75.

[100] *See Solar II PRC AD I & D Mem.* cmt. 1 at 16 ("No [single] product would at any time have two countries of origin for AD/CVD purposes."), 28–29 ("[T]he country-of-origin criteria in *Solar I PRC*, applicable to solar modules, differ from these [*Solar II PRC*] investigations[,] . . . but the scopes adopted in the final determinations of [*Solar II PRC and Solar II Taiwan*] emphasize that they do not alter, revise, or overlap the scope of *Solar I PRC*. . . . Further, any possible overlaps between [*Solar II PRC*] and [*Solar II Taiwan*] are eliminated by the scope language stating that solar cells assembled in China using solar cells manufactured in Taiwan are subject to [the *Solar II PRC* exception for panels assembled in China from non-Chinese inputs] and not [*Solar II Taiwan*]. Thus, we have eliminated any overlap of solar products subject to [*Solar II PRC* or *Solar II Taiwan*] and those subject to *Solar I PRC*. . . . Thus, while the country of origin criteria of [*Solar I PRC*] and the country of origin analysis [of *Solar II PRC*] may differ, . . . identifying he proceeding to which a given solar module may be subject, based on these analyses, will be straightforward.") (citations omitted); *Solar II PRC AD I & D Mem.* cmt. 1 at 41, 54 (same).

[101] *See Solar II Taiwan I & D Mem.* cmt. 1 at 19–21, 24.

[102] *See Solar II PRC AD I & D Mem.* cmt. 1 at 28 ("[S]olar cells assembled in China using solar cells manufactured in Taiwan are subject to [the *Solar II PRC* exception for panels assembled in China from non-Chinese inputs] and not [*Solar II Taiwan*]."); *Solar II Taiwan I & D Mem.* cmt. 1 at 23 ("[S]olar modules assembled in the PRC using Taiwanese cells are within the scope of, and therefore subject to, the [*Solar II PRC*] AD and CVD investigations as Chinese modules . . . .").

products are accordingly not "foreign" for AD/CVD purposes.[103] But when those same U.S. solar cells are assembled into panels in China, they are treated differently from the U.S. cells that are assembled into panels in any other customs territory. Unlike the latter, which retain their U.S. origin regardless of where they are ultimately assembled, the U.S. cells that are assembled into panels in China are subject to AD/CVD liability as merchandise of China.[104] Commerce has determined that this result prevails despite the agency's unmodified finding that panel-assembly does not substantially transform the constituent cells so as to change their country-of-origin.[105] This appears to be contrary to the agency's long-standing policy that U.S. merchandise that is further processed abroad does not become "foreign" merchandise unless it is substantially transformed.[106]

Moreover, the origin rule of the *Solar II PRC* proceedings for panels assembled in China from non-Chinese cells imposes AD/CVD liability on the entire value of such solar panels based on an analysis of "foreign like product[s]" in the Chinese (surrogate) market,[107] despite the fact that most of the cost of manufacture and essential production occurred in another country,[108] including products mostly manufactured within the United States.[109] Thus Commerce essentially reversed course and, without acknowledging any deviation from its established prior policy, not only applied two different rules of origin to solar panels, depending on where they were assembled, but also applied AD/CVD liability to the entire value of merchandise mostly produced outside of the subject country's comparison market, including merchandise that was mostly produced in the United States.

Commerce provides two separate grounds for this determination:

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[103] *See Solar I PRC Scope Clarification Mem.*, ECF NO. 58–3 at Tab 1 Ex.2, at 8; *Solar II Taiwan I & D Mem.* cmt. 1 at 24; *Solar II PRC AD I & D Mem.* cmt. 1 at 15; *Solar II PRC CVD I&D Mem.* cmt. 1 at 41.

[104] *See Solar II PRC Scope Ruling*, Ct. No. 15–00319, ECF No. 16–4, at 5.

[105] *See supra* notes 18 and 97.

[106] *Cf. Cold-Rolled Steel from Argentina*, 58 Fed. Reg. at 37,065 ("[A U.S.-origin product] is not subject to AD and CVD duties unless it is transformed through processing or manufacture into a product of the subject country").

[107] *See* 19 U.S.C. §§ 1677b(a), 1677b(c).

[108] For Taiwanese cells assembled into panels in China, for example, Commerce uses a constructed normal value based on factors of production in a surrogate for China, *see* 19 U.S.C.§ 1677b(c), when in fact most of the inputs (which mostly go into cell production) were actually consumed in Taiwan, a market economy. *See Solar II Taiwan I & D Mem.* cmt. 1 at 20, 23.

[109] *See, e.g., Solar II PRC* Scope *Ruling,* Ct. No. 15–00319, ECF No. 16–4, at 5.

(1) addressing circumvention of the *Solar I PRC* orders; and (2) addressing assembly-specific Chinese government subsidies.[110] Neither is sufficient.

First, while it is generally well-established that Commerce may consider the effectiveness of an order in determining its scope,[111] Commerce does not explain why either of its rationales provides a sufficient basis for disregarding Commerce's prior factual findings regarding the relative insignificance of panel assembly in determining country-of-origin. Nor does Commerce explain why either ground provides a sufficient basis for applying AD/CVD duties to the entire value of panels that are assembled in China from non-Chinese cells, thereby failing to consider and explain an important aspect of the problem.

Specifically, with regard to circumvention of *Solar I PRC*, SolarWorld's *Solar II* petitions identified two types of production shifts that SolarWorld characterized as circumventions of the *Solar I PRC* orders: (1) the shifting of cell-production out of China to make non-Chinese cells that are still largely made out of Chinese inputs (i.e., using Chinese ingots or wafers);[112] and (2) the increase in imports of panels assembled in China using Taiwanese cells made from Taiwanese inputs.[113] Commerce's solution was to cover all non-Chinese (including Taiwanese and U.S.) cells assembled into panels in China under *Solar II PRC*, and to cover all remaining Taiwanese cells, whether or not and regardless of where else assembled, under *Solar II Taiwan*. But at the same time Commerce continued to hold, in *Solar II Taiwan* as in *Solar I PRC*, with respect to all solar cells except those assembled into panels in China, that analyzing the

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[110] *Solar II PRC AD I & D Mem.* cmt. 1 at 12–15; *Solar II PRC CVD I & D Mem.* cmt. 1 at 38–40.

[111] *E.g.*, *Ad Hoc Shrimp*, 33 CIT at __, 637 F. Supp. 2d at 1175.

[112] *Solar II Pet.*, ECF No. 64 at Tab 1, at 5–6 (concerned with "modules assembled in China from solar cells completed or partially manufactured in . . . other countries *from Chinese inputs*, including wafers"); *see also SolarWorld's Solar I PRC Case Br.*, Ct. No. 13–00219, ECF No. 29–1 at Tab 17, at 10–11 (explaining SolarWorld's original concern in *Solar I PRC* that Commerce's 'country of cell-production is the country-of-origin' rule could lead to circumvention because Chinese inputs could beused to make cells outside of China and thereby avoid duties on products from China "even though the *overwhelming majority of the production activities and costs [would still] occur in China*") (emphasis added).

[113] *See Solar II Pet.*, ECF No. 64 at Tab 1, at 5–6 ("[Before the imposition of the *Solar I PRC* orders], imports of modules from China consisted largely of modules assembled with Chinese cells. Since that time, imports of modules from China have consisted almost entirely of modules assembled in China from solar cells completed or partially manufactured in Taiwan or other countries (i.e., cells manufactured in Taiwan from Taiwanese inputs, or cells manufactured in Taiwan or other countries from Chinese inputs, including wafers.").

market where most of the essential production takes place, i.e., the country of cell-production, is more important than basing the AD/CVD analysis and liability on the market of the much less significant subsequent assembly step. Commerce does not square this circle in its rationale.

Thus while *Solar II PRC* does provide the product coverage sought by SolarWorld, Commerce does not explain why, with respect to only the panels assembled in China, the analysis of inputs consumed during cell-production – that is, most of the finished product's inputs – in, for example, Taiwan, is no longer important or relevant, and instead the country of final assembly should be the basis for all home market comparisons. Nor does the agency explain why all panels that are assembled from U.S.-made cells anywhere in the world, other than China, are treated as domestic merchandise, and therefore not subject to AD/CVD liability, but when those same U.S. cells are assembled into panels in China, the fact that most of the panel's production occurred in the U.S. is no longer relevant.

If, as Commerce found in *Solar I PRC*, and as it continues to maintain in *Solar II PRC*, the essential component that is generally determinative of the relevant country-of-origin for this class or kind of merchandise is the solar cell,[114] why are SolarWorld's concerns regarding the shifting of cell-production to different countries not appropriately addressed, consistent with the agency's own analysis and suggestion in *Solar I PRC*,[115] by issuing orders to cover those cell-producing countries, just as was done with respect to cells made in Taiwan? Why would it not be more appropriate and effective to focus on the country with the highest percentage of production of inputs for the entire process?

In addition, as previously noted, Commerce's solution has the effect of imposing AD/CVD liability based on a relatively insignificant production step for products mostly produced (i.e., with over fifty percent of the cost of production occurring) in a market other than the one on which the AD/CVD liability is based, including for products that are mostly produced in the United States. Although Commerce does not consider or explain this important aspect of the problem here, the agency has emphasized in the past that when determining the appropriate scope of AD (or CVD[116]) orders, "we are primarily concerned

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[114] *See Solar I PRC Scope Clarification Mem.*, ECF NO. 58–3 at Tab 1 Ex.2, at 8; *Solar II PRC AD I & D Mem.* cmt. 1 at 15; *Solar II PRC CVD I & D Mem.* cmt. 1 at 41 (same).

[115] *See Solar I PRC Scope Clarification Mem.*, ECF NO. 58–3 at Tab 1 Ex.2, at 8–9.

[116] *See DRAMs from Korea*, 67 Fed. Reg. at 70,928 (noting that the antidumping statute and the subsidy statute use "almost the identical language" to define the "class or kind of

with where the actual manufacturing is occurring."[117] More generally, a fair comparison is required between the U.S. export price and the subject merchandise's foreign "normal value."[118] To achieve this goal, most production of subject merchandise must occur in the subject country (or, put another way, the country-of-origin of a product subject to AD/CVD duties will ordinarily be the country where most of the production occurs).[119] This is because duties are ultimately assessed on the entire value of the final product, and those duties must be based on an analysis of pricing and subsidies within a single appropriate home market.[120] Using the market where most of the production occurs as the home market for AD normal value comparison and/or CVD governmental subsidy evaluation ensures that the appropriate comparisons are made.[121] Commerce does not appear to have considered, and certainly did not discuss, this important aspect

merchandise," and concluding that, for each individual member of such class or kind of merchandise, the country-of-origin must be determined based on a consistent test "for purposes of both antidumping and countervailing duty proceedings"). *But see infra* notes 127–31 and accompanying text.

[117] *LNPPs from Germany*, 61 Fed. Reg. at 38,168.

[118] *See* 19 U.S.C. § 1677b(a)(1).

[119] *See LNPPs from Germany*, 61 Fed. Reg. at 38,168–171.

[120] *Id.* at 38,171.

[121] *In LNPPs from Germany*, Commerce explicitly linked the country-of-origin determinative rule to the country in which a majority of the production took place – establishing a rule whereby if a part of the LNPP (the subject class or kind of merchandise) is imported from Germany (the subject country), it is covered by the order on LNPPs from Germany if the part comprises at least *50 percent of the cost of manufacture* of the entire LNPP. *See LNPPs from Germany*, 61 Fed. Reg. at 38,170–71(emphasis added). This was implicitly also the case in all the prior instances where Commerce relied on its 'substantial transformation' test to determine country-of-origin, including the general country-of-origin rule established for solar panels in *Solar I PRC* and *Solar II Taiwan*. Thus in the semiconductor (EPROMs and DRAMs) cases, for example, Commerce consistently focused on the country where the most "technology intensive portion" of production took place as the relevant country-of-origin comparison market for determining the full AD/CVD liability of the finished semiconductors. *EPROMs from Japan*, 51 Fed. Reg. at 39,692; *DRAMs from Japan*, 51 Fed. Reg. at 28,397; *DRAMs from Korea*, 67 Fed. Reg. at 70,928. Moreover, although this situation is not explicitly addressed by the statute, a "fair comparison" between the U.S. export price and the "foreign like product"'s "normal value" is required for the imposition of antidumping duties, *see* 19 U.S.C. § 1677b(a)(1),and the statutory parameters defining foreign "normal value" are generally consistent with Commerce's prior practice of basing normal value on data from the market where most of production takes place. *See id.* (normal value determined by market of exporting country); *id.* at § 1677(16) ("foreign like product" must be "produced in the same country" as subject merchandise); *id.* at § 1677b(a)(3) (normal value not to be based on market of countries through which merchandise "is merely transshipped"); *id.* at § 1677b(c)(1),(4) (for non-market economy merchandise, normal value may be based on factors of production used to produce the merchandise in an appropriate market economy surrogate for the non-market exporting country); *id.* at § 1677b(e) (normal value may be constructed using the sum of the producer's actual costs of producing merchandise in the same general category of products as the subject merchandise).

of the problem here. Because "[solar panel assembly] does [not] constitute significant processing such that it changes the country-of-origin of the cell,"[122] it would seem to follow that Plaintiff Suniva's U.S. cells[123] and Plaintiff SunPower's Malaysian/Philippine cells[124] – and indeed all of the non-Chinese solar cells covered by the *Solar II PRC* scope – are similarly not sufficiently transformed by the panel assembly process to justify using China as the relevant comparison market for calculating the normal value of the entire finished product. Calculating the cost of producing the merchandise in China, when in fact the vast majority of the production occurs in another country, seems to ignore a significant aspect of the problem to be addressed here. Commerce's final *Solar II PRC* scope determination does not explain, or consider, this important aspect of the problem.

For the same reason, Commerce's second ground for the *Solar II PRC* exception to the otherwise generally-applicable origin rule for solar panels – that of addressing assembly-specific Chinese government subsidies – is also insufficient to explain the agency's action. Commerce does not address or explain how this case is different from the agency's consistent prior position that products can only have one origin, which is determined by a consistent origin rule for all products within a given class/kind of merchandise, and which should generally result in a country-of-origin and comparison market where most of the essential or cost-intensive production takes place. Because the *Solar II PRC* scope addresses assembly-specific subsidies by covering solely products that were otherwise produced entirely outside the country-of-assembly, including those that were mostly produced in the United States, it imposes AD/CVD liability based on an analysis that excludes consideration of the majority of actual essential production, contrary to the reasoning consistently employed in prior precedents.[125] Because Commerce did not acknowledge, consider, or discuss this matter, remand is necessary so that the agency may address this important aspect of the problem, and either provide additional explanation or modify its decision, as necessary.[126]

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[122] *Solar I PRC Scope Clarification Mem.*, ECF No. 58–3 at Tab 1 Ex. 2, at 8 (unchanged in *Solar II PRC AD I & D Mem.* cmt. 1 at 15; *Solar II PRC CVD I & D Mem.* cmt. 1 at 41); *see also Solar II Taiwan I & D Mem.* cmt. 1 at 19–20.

[123] Suniva's Br., ECF No. 58–1, at 5–6.

[124] SunPower's Br., ECF Nos. 59 & 60, at 3.

[125] *See DRAMs from Korea*, 67 Fed. Reg. at 70,927–28; *LNPPs from Germany*, 61 Fed. Reg. at 38,168; *Cold-Rolled Steel from Argentina*, 58 Fed. Reg. at 37,065.

[126] No opinion is expressed herein regarding Plaintiff SunPower's challenge to Commerce's since-abandoned approach from the preliminary determination. *See* SunPower's Br., ECF

The court notes that these problematic aspects of Commerce's *Solar II PRC* decision affect most directly the agency's AD, rather than its CVD, analysis. As Commerce has previously explained, antidumping duties should be assessed on the entire value of the finished product, rather than solely the value added within just one of the multiple countries in which the product is manufactured, because the AD statute requires that Commerce assess such duties "in an amount 'equal to the amount by which the foreign market value [now referred to as 'normal value'] of the merchandise [i.e., the entire finished product] exceeds the United States price of the merchandise.'"[127] Because the calculation of the foreign like product's normal value is not susceptible to subdivision (because the market value of a fully completed product is not equivalent to the sum of the market values of its individual constituent parts[128]), Commerce must ordinarily choose a single foreign market within which to calculate the normal value of the entire finished product. Accordingly, to obtain a fair comparison,[129] it is generally reasonable to base the product's AD liability on an analysis of the foreign market in which the majority of production occurred.

On the other hand, the CVD statute does not appear to require that the same reasoning apply.[130] Nonetheless, Commerce has consistently held that, as with AD liability, CVD liability must also be based

Nos. 59 & 60, at 24–25; *see also supra* note 27 and accompanying text. Should Commerce decide to reinstate that approach on remand, the agency and the court will then consider SunPower's challenges thereto.

[127] *Cold-Rolled Steel from Argentina*, 58 Fed. Reg. at 37,065(quoting predecessor to 19 U.S.C. § 1673e (requiring assessment of antidumping duties "equal to the amount by which the normal value of the merchandise exceeds the export price (or constructed export price) of the merchandise"));*see also LNPPs from Germany*, 61 Fed. Reg. at 38,171.

[128] *See Cold-Rolled Steel from Argentina*, 58 Fed. Reg. at 37,065 ("[Antidumping] duties are not an assessment against value. They are expressed as a percentage of value merely . . . to facilitate the mechanics of implementing assessment. . . . [T]he amount of [the antidumping] duties is determined by the amount of [ultimate] price discrimination . . ., not by the value of the good.").

[129] *See* 19 U.S.C. § 1677b(a)(1).

[130] *Cf., e.g.*, 19 U.S.C. § 1677(3) (providing that, "except for the purpose of antidumping proceedings, [the relevant 'foreign country'] may include an association of 2 or more foreign countries, political subdivisions, dependent territories, or possessions of countries into a customs union outside the United States"); *id.* at § 1671(a) (providing that if Commerce determines that "the government of a country . . . is providing. . . a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported. . . into the United States," then "there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net countervailable subsidy," and imposing no explicit limits on how many countries' subsidies may be thus countervailed with respect to a given product). The court expresses no view at this time on the reach of this statute.

on a single foreign market's subsidy analysis,[131] even though it is not immediately apparent why the net subsidy amount received in the course of producing a product in multiple countries may not be subdivided to account for each country's contribution.

V. Effective Date of Final Solar II PRC Scope

The court defers consideration of Plaintiffs' arguments that Commerce unlawfully applied the final *Solar II PRC* scope determinations to entries made prior to the publication of the AD and CVD orders[132] until after Commerce's remand results are complete.

CONCLUSION

For all of the foregoing reasons, the *Solar II PRC* final scope determination is remanded to Commerce for reconsideration in accordance with this opinion. Commerce shall have until August 8, 2016, to complete and file its remand results. Plaintiffs shall have until August 29, 2016, to file comments, and the agency and Defendant-Intervenor shall then have until September 12, 2016, to respond.

It is SO ORDERED.

Dated: June 8, 2016
New York, NY

/s/ Donald C. Pogue
DONALD C. POGUE, SENIOR JUDGE

[131] *See Cold-Rolled Steel from Argentina*, 58 Fed. Reg. at 37,065; *DRAMs from Korea*, 67 Fed. Reg. 70,928.

[132] SunPower's Br., ECF Nos. 59 & 60, at 24; Suniva's Br., ECF No. 58–1, at 2, 23.

Slip Op. 16–58

NEO SOLAR POWER CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Court No. 16–00088

[Motion to enjoin liquidation of entries pending challenges to antidumping duty administrative review granted.]

Dated: June 9, 2016

Neil B. Mooney, The Mooney Law Firm, LLC, of Tallahassee, FL, for plaintiff.

Agatha Koprowski, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant.

OPINION

Restani, Judge:

This matter is before the court on plaintiff Neo Solar Power Corporation's ("Neo") motion for a preliminary injunction of liquidation of entries imported or exported by Neo into the United States. The court has jurisdiction pursuant to 28 U.S.C. § 1581(i). The injunction is granted.[1]

BACKGROUND

Neo is a producer and exporter of certain crystalline silicon photovoltaic ("CSPV") products from Taiwan. Decl. of Henry Chen in Supp. of Mot. for Prelim. Inj. ¶ 4, ECF No. 6 ("Chen Decl."). Such merchandise is subject to an antidumping ("AD") duty order. *See Certain Crystalline Silicon Photovoltaic Products From Taiwan: Antidumping Duty Order*, 80 Fed. Reg. 8596, 8596 (Dep't Commerce Feb. 18, 2015). At issue here are liquidation instructions relating to an administrative review of that order covering entries from July 31, 2014 through January 31, 2016. *See* Liquidation Instructions Message No. 6117311, ECF No. 5–4 ("Liquidation Instructions").

The liquidation instructions at issue instruct the United States Customs and Border Protection ("Customs") to liquidate all entries of certain CSPV products from Taiwan for firms not specifically listed in the instructions. Liquidation Instructions ¶ 2. The instructions also

[1] The court issued a temporary restraining order ("TRO") with respect to entries that were either exported to or imported into the United States by Neo between July 31, 2014 and January 31, 206, effective 5:11PM May 26, 2016. Temporary Restraining Order, ECF No. 13. After a hearing, the court extended the TRO until 5:00PM June 10, 2016. Order, ECF No. 14.

indicate that Customs is to "assess antidumping duties on merchandise entered, or withdrawn from warehouse, for consumption at the cash deposit or bonding rate in effect on the date of entry." *Id.* Neo is not listed in the liquidation instructions, and accordingly, its entries will be subject to liquidation unless a preliminary injunction issues.

Neo asserts that it was improperly excluded from the administrative review because the United States Department of Commerce ("Commerce") refused to accept Neo's request to be included. Compl. ¶ 1, ECF No. 4. Neo further asserts that a preliminary injunction is required to prevent its entries from being liquidated pending the duration of this case, effectively mooting its challenge. The government opposes the motion arguing that Neo is not likely to succeed on the merits of its claim.

DISCUSSION

A preliminary injunction is "extraordinary relief," which may be awarded when the movant establishes: "(1) that it will be immediately and irreparably injured; (2) that there is a likelihood of success on the merits; (3) that the public interest would be better served by the relief requested; and (4) that the balance of hardship on all the parties favors the [movant]." *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983); *see FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993). No one factor is dispositive and the court typically applies a "sliding scale" approach to this determination, whereby the "weakness of the showing on one factor may be overborne by the strength of the others. *See Ugine & ALZ Belg. v. United States*, 452 F.3d 1289, 1292 (Fed. Cir. 2006) (quoting *FMC*, 3 F.3d at 427). The court will discuss each factor in turn.

First, there is a strong possibility that liquidation will foreclose plaintiff's remedies resulting in irreparable harm. Once entries are liquidated, the court's ability to compel changes to AD duties is lost and effective judicial review is foreclosed. *See Zenith*, 710 F.2d at 810 (explaining that once liquidation occurs, a subsequent court decision on the merits can have no effect on the AD duties assessed on the liquidated entries, even if the duties ultimately are determined to be erroneous). The preservation of remedies is to be favored. Suspension of liquidation is thus necessary to ensure effective judicial review of agency action as a party challenging its exclusion from an administrative review is deprived of its right to judicial review of such challenge if its entries are liquidated. *See id.*; *Wind Tower Trade Coal. v. United States*, 741 F.3d 89, 95 (Fed. Cir. 2014) (indicating that in AD duty proceedings preliminary injunctions are particularly important and routinely granted because of the "cruciality of unliquidated en-

tries for judicial review" (quoting *Wind Tower Trade Coal. v. United States*, 904 F. Supp. 2d 1349, 1352 (CIT 2013))). Absent the preliminary injunction, Neo will be left without recourse, and as stated in *Zenith*, "the consequences of liquidation . . . constitute irreparable injury." 710 F.2d at 810. Thus, Neo has satisfied the requirement to show irreparable harm and as this factor is traditionally given the greatest weight, it weighs heavily in favor of granting the preliminary injunction. *See Corus Grp. PLC v. Bush*, 26 CIT 937, 942, 217 F. Supp. 2d 1347, 1354 (2002) (collecting cases).

Second, there is a substantial question to be decided. When, as here, the irreparable harm factor strongly favors the movant, the burden of showing likelihood of success on the merits is lessened. *Qingdao Taifa Grp. Co. v. United States*, 581 F.3d 1375, 1381–82 (Fed. Cir. 2009); *Ugine*, 452 F.3d at 1292–93. In such circumstances, it is "sufficient that the movant has raised serious substantial, difficult and doubtful questions that are the proper subject of litigation," *NMB Singapore Ltd. v. United States*, 24 CIT 1239, 1245, 120 F. Supp. 2d 1135, 1140 (2000) (internal quotation marks omitted), or that the movant "has at least a fair chance of success on the merits," *Wind Tower Trade Coal.*, 741 F.3d at 96 (quoting *Taifa*, 581 F.3d at 1381); *see also Ugine*, 452 F.3d at 1294–95 (granting injunction when the merits of the case were not "clearcut"). There is enough of a colorable claim that plaintiff should have its day in court instead of being denied relief because of mootness. Maintaining the status quo pending full airing of issues is important. The issue raised by Neo in its complaint is of a type commonly raised and sometimes successfully litigated before the court and Neo has therefore carried its burden of showing a likelihood of success.

Third, "the public interest is served by permitting a full examination of the facts and law." *Walgreen Co. v. United States*, 34 CIT 1574, 1578 (2010) (citing *Am. Signature, Inc. v. Untied States*, 598 F.3d 816, 830 (Fed. Cir. 2010). Securing judicial review and ensuring that Commerce properly administers the AD law is in the public interest. *See NMB Sing.*, 24 CIT at 1245, 120 F. Supp. 2d at 1141 ("It is well settled that the public interest is served by ensuring that [Commerce] complies with the law, and interprets and applies the international trade statutes uniformly and fairly." (internal quotation marks and brackets omitted)); *Timken Co. v. United States*, 6 CIT 76, 82, 569 F. Supp. 65, 71 (1983) ("Short-circuiting [a party's statutory right to judicial review of an agency determination] by allowing the subject matter to escape the reach of a reviewing court cannot be in the public interest."). Granting the injunction thus accords with public policy.

Fourth and finally, the balance of hardships weighs in favor of Neo. Neo has already paid cash deposits on the entries at issue. Chen Decl. ¶ 6. Customs thus will not have to expend any additional time or resources seeking to recover those funds in the event Neo is unsuccessful on the merits. The government argues that Customs will have to expend time and energy to find the affected entries, however, the TRO has been in effect for over ten days, and by now, the parties should have communicated to ease mutual burdens. Additionally, the government notes that given the delay in filing the motion for preliminary injunction, the administrative review at issue has commenced and there may be timing complications if the preliminary injunction is granted. The government has not demonstrated that including Neo in the administrative review would cause undue delay to the proceedings.[2] The United States will thus not be deprived of anything if liquidation is enjoined, and Neo will suffer irreparable harm without preliminary relief. *See OKI Elec. Indus. Co. v. United States*, 11 CIT 624, 632–33, 669 F. Supp. 480, 486– 87 (1987) (granting preliminary injunction based on the sliding scale analysis where the court was not able to determine whether the movant was likely to prevail on the merits, but the irreparable harm, balance of hardships, and public interest all weighed in favor of granting the preliminary injunction).

CONCLUSION

On balance, the four factors support granting the motion for preliminary injunction. Accordingly, it is granted and the injunction will issue.

Dated: June 9, 2016
New York, New York

/s/ Jane A. Restani
JANE A. RESTANI JUDGE

[2] The government has not indicated that plaintiff would be specifically examined in the review and the most likely outcome would result in Neo being assigned the all-others rate, which would not delay or impede the review.

Slip Op. 16–59

SUNEDISON, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Donald C. Pogue, Senior Judge
Consol. Court No. 15–000661[1]

[remanding Department of Commerce's antidumping duty scope determination]

Dated: June 14, 2016

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OPINION AND ORDER

Pogue, Senior Judge:

This consolidated action arises from the final affirmative determination made by the U.S. Department of Commerce ("Commerce") in its antidumping investigation of certain crystalline silicon photovoltaic products (solar cells and panels) from Taiwan.[2] Before the court are motions for judgment on the agency record, challenging Commerce's final determinations regarding the scope of these proceedings.[3]

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012),[4] and 28 U.S.C. § 1581(c) (2012).

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[1] This action is consolidated with *Kyocera Solar, Inc. v. United States*, Ct. No. 15–00081. Order, July 1, 2015, ECF No. 21, at ¶ 4; Order, Apr. 28, 2016, ECF No. 64.

[2] *See Certain Crystalline Silicon Photovoltaic Products from Taiwan*, 79 Fed. Reg. 76,966 (Dep't Commerce Dec. 23, 2014) (final determination of sales at less than fair value) and accompanying Issues & Decision Mem., A-583–853, Investigation (Dec. 15, 2014) ("*Solar II Taiwan I & D Mem.*") cmt. 1.

[3] *See* Br. of Pl. SunEdison, Inc. in Supp. of Pl.'s Mot. for J. Upon the Agency R., ECF Nos. 32 (conf. version) & 33 (pub. version) ("SunEdison's Br."); Kyocera Solar, Inc. & Kyocera Mexicana S.A. de C.V. Mem. in Supp. of Mot. for J. on the Agency R., ECF Nos. 29 (conf. version) & 30 (pub. version) ("Kyocera's Br.").

[4] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

As explained below, Commerce's final scope definition is remanded for consistency with, and based on the same reasoning as, related proceedings concerning solar panels from the People's Republic of China ("China" or "PRC").[5] Essentially, Commerce's final scope determination, in both cases, treated solar panels differently depending on their country of assembly, and failed to consider or discuss either the proportion of production necessary to determine a solar panel's country of origin or the reasonableness of applying duties to the entire value of solar panels assembled in the PRC when only a small percentage of the cost of production actually occurs there.

After a statement of the background, arguments presented, and standard of review, the Plaintiffs' challenges to Commerce's final scope determination are discussed below.

BACKGROUND

Relevant background leading to this case is summarized in the court's prior opinion.[6] Briefly, the *Solar II PRC* opinion addressed Commerce's scope determinations in related proceedings concerning solar panels from China that are assembled from cells manufactured outside of China,[7] including specifically cells that were manufactured in Taiwan (the "*Solar II PRC*" proceedings).[8] Commerce's final scope definition here (in the "*Solar II Taiwan*" proceedings) covers all solar cells manufactured in Taiwan that are assembled into panels anywhere in the world, except those covered by the *Solar II PRC* proceedings because they are assembled into panels in China.[9] Both cases concern the rules of origin for solar panels manufactured from Taiwanese cells. For this reason, the issues here are inextricably entwined with those already addressed in the *Solar II PRC* opinion. Familiarity with the *Solar II PRC* opinion is therefore presumed.

Solar panels assembled from solar cells made in the PRC were also, and initially, the subject of separate proceedings (the "*Solar I PRC*"

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[5] *See SunPower Corp. v. United States*, Slip Op. 16–56, Consol. Ct. No. 15–00067, ECF No. 98, (June 8, 2016) ("*Solar II PRC Slip Op.*" or "the *Solar II* opinion"); *infra* Discussion Sections IV, VI, & VII.

[6] *Solar II PRC Slip Op.*, Slip Op. 16–56, Consol. Ct. No. 15–00067, ECF No. 98, at Background Sections I & II.

[7] Solar panels (also referred to as modules or laminates) are assembled from solar cells, which use crystalline silicon to convert sunlight into electricity. *Certain Crystalline Silicon Photovoltaic Products from China and Taiwan*, USITC Pub. 4519, Inv. Nos. 701-TA-511 & 731-TA-1246–1247 (Feb. 2015) (final determination) ("*Solar II ITC Final Determination*") at 10.

[8] *Solar II PRC Slip Op.*, Slip Op. 16–56, Consol. Ct. No. 15–00067, ECF No. 98, at Background Section II & Discussion Section IV.

[9] *See Solar II Taiwan I & D Mem.* cmt. 1 at 23.

proceedings). The *Solar I PRC* proceedings resulted in antidumping and countervailing duty orders covering all solar cells manufactured in China, whether or not and regardless of where in the world such cells are assembled into solar panels prior to exportation to the United States.[10]

In the *Solar I PRC* proceedings, Commerce determined that "solar module assembly does not substantially transform solar cells such that it changes the country-of-origin."[11] Accordingly, Commerce concluded that "where solar cell production occurs in a different country from solar module assembly, the country-of-origin of the solar modules/panels is the country in which the solar cell was produced [and not the country of panel assembly]."[12]

Following the imposition of the *Solar I PRC* orders, however, domestic producer SolarWorld Americas Incorporated ("SolarWorld") (now Defendant-Intervenor in this action) petitioned Commerce to initiate additional proceedings. SolarWorld alleged, *inter alia*, that after the *Solar I PRC* orders were imposed, exports of solar panels to the United States from China shifted from panels assembled from cells that were also made in China, to panels assembled from cells "completed or partially manufactured in Taiwan or other countries (i.e., cells manufactured in Taiwan from Taiwanese inputs, or cells manufactured in Taiwan or other countries from Chinese inputs, including wafers)."[13]

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[10] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the [PRC]*, 77 Fed. Reg. 63,791 (Dep't Commerce Oct. 17, 2012) (final determination of sales at less than fair value, and affirmative final determination of critical circumstances, in part) and accompanying Issues & Decision Mem., A-570–979, Investigation (Oct. 9, 2012) ("*Solar I PRC AD I & D Mem.*"); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the [PRC]*, 77 Fed. Reg. 63,788 (Dep't Commerce Oct. 17, 2012) (final affirmative countervailing duty determination and final affirmative critical circumstances determination) and accompanying Issues & Decision Mem., C-570–980, Investigation (Oct. 9, 2012); *Solar II PRC Slip Op.*, Slip Op. 16–56, Consol. Ct. No. 15–00067, ECF No. 98, at Background Section I.

[11] [Commerce's] Mem. re Scope Clarification, *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the [PRC]*, A-570–979 & C-570–980, Investigations (Mar. 19, 2012), *reproduced in, e.g.*, App. to Br. of Consol. Pl. Suniva, Inc. in Supp. of its Mot. for J. on the Agency R., Consol. Ct. No. 15–00067, ECF No. 58–3 at Tab 1 Ex. 2 ("*Solar I PRC Scope Clarification Mem.*"), at 8 (unchanged in *Solar I PRC AD I & D Mem.* cmt. 1 at 6–7).

[12] *Id.*

[13] Pet. for Imposition of Antidumping & Countervailing Duties Pursuant to Secs. 701 & 731 of the Tariff Act of 1930, as Amended, *Certain Crystalline Silicon Photovoltaic Products from the [PRC] and Taiwan*, A-570–010, A-583–853, & C-570–011 Investigations (Dec. 31, 2013), *reproduced in* App. to Def.'s Resp. in Opp'n to Pls.' Rule 56.2 Mots. for J. on the Agency R., ECF Nos. 53–1 (conf. version) & 54–1 (pub. Version) at Tab 1 ("*Solar II Pet.*"), at 5–6.

Commerce agreed that this "measurable shift in trade flows . . . resulted in increased imports of non-subject modules produced in China."[14] In response, Commerce initiated (1) antidumping and countervailing duty investigations that ultimately resulted in orders covering all panels assembled in China from solar cells made outside of China, including Taiwanese cells[15] (the *Solar II PRC* proceedings); and (2) an antidumping investigation that ultimately resulted in an order covering all solar cells produced in Taiwan, whether or not, and regardless of where, assembled into panels, except those assembled into panels in China[16] (the *Solar II Taiwan* proceedings).

Plaintiffs here[17] are U.S. importers and a foreign producer of solar panels containing solar cells manufactured in Taiwan.[18] Plaintiffs now challenge Commerce's final determination regarding the scope of the *Solar II Taiwan* proceedings. Specifically, the Plaintiffs make the following arguments regarding Commerce's final scope determination in the *Solar II Taiwan* investigation.

PARTIES' ARGUMENTS

(I) Commerce's late modification of the *Solar II Taiwan* scope substantially deprived interested parties – including Kyocera, a Mexican assembler of Taiwanese solar cells into panels exported to the United States – of due process.[19]

(II) Commerce unlawfully expanded the scope of *Solar II Taiwan*, after the close of factual submissions, to include merchandise that

[14] *Solar II Taiwan I&D Mem*. cmt. 1 at 21 (citing *Solar II Pet*., [ECF Nos. 53–1 & 54–1 at Tab 1], at 3, 5–6, 21, 34, 37, 53); *see also id.* at 17 ("[SolarWorld's *Solar II*] Petition claimed that Chinese solar producers were 'using cells fully or partially manufactured in Taiwan in the modules they assembled for export to the United States,' which allowed the Chinese solar producers to 'export those modules, duty-free, to the U.S. market.' . . . The Petition claimed that Taiwanese cell and module imports increased by 85 percent, in large part as a result of this alleged loophole.") (quoting and citing, respectively, *Solar II Pet.*, [ECF Nos. 53–1 & 54–1 at Tab 1],at 4, 6); id. at 21 ("[F]ollowing the implementation of the [*Solar I PRC*] AD and CVD orders . . ., there has been a measurable shift in trade flows that has resulted in increased imports of non-subject modules produced in China.") (citing *Solar II Pet*., [ECF Nos. 53–1 & 54–1 at Tab 1], at 3,5–6, 21, 34, 37, 53).

[15] *See Solar II PRC Slip Op*., Slip Op. 16–56, Consol. Ct. No. 15–00067, ECF No. 98, at Background Section II & Discussion Section IV).

[16] *See Solar II Taiwan I&D Mem.* cmt. 1 at 23.

[17] SunEdison, Inc. ("SunEdison"), and Kyocera Solar, Inc. and Kyocera Mexicana S.A. de C.V. (collectively "Kyocera").

[18] Compl., ECF No. 11, at ¶ 5; *see* Compl., Ct. No. 15–00081, ECF No. 6, at ¶¶ 5–6, 9, 17.

[19] *See* Kyocera's Br., ECF Nos. 29 & 30, at 3 (describing Kyocera's production structure), 24–25 (arguing that Commerce's approach to scope definition throughout this investigation deprived Kyocera of due process); *see also* SunEdison's Br., ECF Nos. 32 & 33, at 28 ("[Commerce] deprived respondents of the opportunity to comment on the novel scope

had been excluded from Commerce's unfair pricing analysis (as well as the International Trade Commission's injury analysis) throughout the investigations.[20]

(III) Commerce's final *Solar II Taiwan* scope determination was contrary to explicit statutory and regulatory requirements.[21] Specifically, Plaintiffs argue that Commerce's final *Solar II Taiwan* scope determination was contrary to one or more of the following statutory/regulatory provisions: (A) 19 U.S.C. § 1673 (providing Commerce's authority to impose antidumping duties on products within "a class or kind of foreign merchandise");[22] (B) 19 U.S.C. §§ 1677b(a) (requiring a "fair comparison" between prices of the foreign like product from the country under investigation (normal value) and the U.S. export prices of the subject merchandise) & 1677(16)(A)-(C) (requiring that the "foreign like product" must be "produced in the same country" as the subject merchandise);[23] (C) 19 U.S.C. § 1677j(b) (dealing with circumvention of existing antidumping duty orders) & 19 C.F.R. § 351.225(h) (providing for Commerce's issuance of scope rulings, under existing antidumping duty orders, for "products completed or assembled in other foreign countries").[24] SunEdison also argues that, (D) "by enacting and revising the antidumping law in 1984, 1988 and 1994, Congress bound Commerce to [continue to] use the substantial trans-

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adopted in the final determination by issuing it so late in the proceeding."); *id*. at 9 ("[Commerce] did not address any of the comments opposing [its ultimate] scope proposal . . ., even though it adopted in its final determination virtually all of [that] proposal with respect to Taiwan.").

[20] *See* SunEdison's Br., ECF Nos. 32 & 33, at 28 ("In reporting U.S. sales in their questionnaire responses, Commerce instructed the Taiwan respondents to follow . . . a scope definition that Commerce totally abandoned [in the final determination,] long after verifications of those responses were completed . . . ."); *id*. at 26 ("In *Allegheny Bradford*, this Court explained that 'Commerce's discretion to define and clarify the scope of an investigation is limited in part by concerns for the finality of administrative action, which caution against including a product that was understood to be excluded at the time the investigation began.'") (quoting *Allegheny Bradford Corp. v. United States*,28 CIT 830, 342 F. Supp. 2d 1172, 1187–88 (2004) (citation omitted)); Kyocera's Br., ECF Nos. 29 & 30, at 7 ("[Commerce]'s attempt to expand the [final] scope of the [*Solar II Taiwan*]investigation comes too late. The [prior] scope ha[d] not only been used in [Commerce]'s selection of mandatory respondents, it has also defined the scope of the International Trade Commission's injury investigation . . . .") (quoting Kyocera's administrative case brief below).

[21] SunEdison's Br., ECF Nos. 32 & 33, at 14–16, 21–24; Kyocera's Br., ECF Nos. 29 & 30, at 11–16.

[22] SunEdison's Br., ECF Nos. 32 & 33, at 12–14; 19 U.S.C. § 1673.

[23] SunEdison's Br., ECF Nos. 32 & 33, at 14–15.

[24] Kyocera's Br., ECF Nos. 29 & 30, at 11–16.

formation test to determine the scope of antidumping duty orders . . . "[25]

(IV) Commerce's final *Solar II Taiwan* scope determination unlawfully departed from prior practice without sufficient explanation.[26]

(V) Commerce's conclusion that, with the exception of Taiwanese cells assembled into solar panels in China, all panels assembled from Taiwanese cells are subject to the *Solar II Taiwan* proceedings as products of Taiwan, regardless of where they are assembled, is not supported by substantial evidence.[27] Specifically, Commerce's determination that Taiwanese solar cells are not substantially transformed when assembled into panels in Mexico is unreasonable in light of the evidentiary record.[28]

(VI) Commerce unreasonably determined to apply antidumping duties on the full value of the panels into which Taiwanese solar cells are incorporated, rather than solely the value of the cells themselves.[29]

(VII) Commerce unreasonably excluded from its final dumping analysis third-country sales that the mandatory respondents reported as ultimately destined for the United States.[30]

Following a statement of the applicable standard of review, each group of arguments is addressed in turn below.

STANDARD OF REVIEW

The court will sustain Commerce's antidumping determinations if they are supported by substantial evidence and are otherwise in accordance with law.[31] Substantial evidence refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,"[32] considering any relevant evidence that fairly detracts

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[25] SunEdison's Br., ECF Nos. 32 & 33, at 21 (relying on *GPX Int'l Tire Corp. v. United States*, 666 F.3d 732, 739 (Fed. Cir. 2011) ("In the case of a widely known judicial decision or agency practice, 'Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.'") (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)); *id.* at 21–25 (expanding on this argument).

[26] SunEdison's Br., ECF Nos. 32 & 33, at 12–13, 21.

[27] Kyocera's Br., ECF Nos. 29 & 30, at 7, 18–23.

[28] *See id.*; *infra* Standard of Review Section (defining "substantial evidence" review).

[29] SunEdison's Br., ECF Nos. 32 & 33, at 10, 54–56; Kyocera's Br., ECF Nos. 29 & 30, at 8, 15–16, 25–26.

[30] SunEdison's Br., ECF Nos. 32 & 33, at 4–6, 27, 33–40.

[31] *See* 19 U.S.C. § 1516a(b)(1)(B)(i).

[32] *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

from the reasonableness of the agency's determination.[33] The substantial evidence standard of review can be roughly translated to mean "is the determination unreasonable?"[34] The agency must "examine the relevant data and articulate a satisfactory explanation for its action,"[35] including "a 'rational connection between the facts found and the choice made.'"[36]

"[A]n agency determination that is arbitrary is *ipso facto* unreasonable,"[37] and a determination is arbitrary when it fails to "consider an important aspect of the problem,"[38] or "treat[s] similar situations in dissimilar ways."[39]

Where the statutory language is sufficiently broad to permit a range of policy choices, the agency may change course from its prior practice and adopt a new approach within its statutory authority,[40] but it must explain how the new policy is consistent with the continued relevance (if any) of the factual findings on which the agency's

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[33] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

[34] *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (quotation and alteration marks and citation omitted).

[35] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*,463 U.S. 29, 43 (1983).

[36] Id. (quoting *Burlington Truck Lines v. United States*, 371 U.S.156, 168 (1962)).

[37] *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*,__ CIT __, __ F. Supp. 3d __, Slip Op. 16–11, 2016 WL 524268, at *17 n.148 (Feb. 9, 2016) (quoting *Ward v. Sternes*, 334 F.3d 696, 704 (7th Cir. 2003) ("[A] decision [that] is so inadequately supported by the record as to be arbitrary [is] therefore objectively unreasonable.") (quotation marks and citations omitted)).

[38] *State Farm*, 463 U.S. at 43.

[39] *Anderson v. U.S. Sec'y of Agriculture*, 30 CIT 1742, 1749, 462 F. Supp. 2d 1333, 1339 (2006) ("Agencies have a responsibility to administer their statutorily accorded powers fairly and rationally, which includes not 'treat[ing] similar situations in dissimilar ways.'") (quoting *Burinskas v. NLRB*, 357 F.2d 822, 827 (D.C. Cir. 1966) ("[An agency] cannot act arbitrarily nor can it treat similar situations in dissimilar ways.") (citation and footnote omitted)); *see also id*. ("Indeed, a principal justification for the administrative state is that in 'areas of limitless factual variations, like cases will be treated alike.'") (quoting *Nat'l Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979) (citations omitted)) (also quoting *South Shore Hosp., Inc. v. Thompson*, 308 F.3d 91, 101 (1st Cir. 2002) ("The goal of regulation is not to provide exact uniformity of treatment, but, rather, to provide uniformity of rules so that those similarly situated will be treated alike.")); *Trs. in Bankruptcy of N. Am. Rubber Thread Co. v. United States*, 32 CIT 663, 665, 558 F. Supp. 2d 1367, 1370 (2008) ("Generally, an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently.") (quotation and alteration marks and citation omitted).

[40] *See, e.g., Nakornthai Strip Mill Pub. Co. v. United States*, 32 CIT 1272, 1276, 587 F. Supp. 2d 1303, 1307 (2008) ("Commerce has discretion to change its policies and practices as long as they are reasonable and consistent with their statutory mandate and may adapt its views and practices to the particular circumstances at hand, so long as the agency's decisions are explained and supported by substantial evidence on the record.")(quotation and alteration marks and citation omitted).

prior policy was based.[41] "[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[42] Thus, "when departing from its own precedent, Commerce must explain its departure,"[43] providing a rational link between the facts found and the conclusions reached, after considering all important aspects of the problem.

DISCUSSION

I. Remand on Other Grounds Makes Reaching Due Process Arguments Unnecessary.

Because remand of Commerce's final *Solar II Taiwan* scope determinations is warranted on other grounds,[44] and because the parties will therefore have ample opportunity to address the scope issues on remand, Plaintiffs' due process challenges to the final scope determination are moot. The court therefore offers no opinion in this regard.

In addition, Kyocera's claim that, as a third-country assembler of Taiwanese solar cells into panels, it was deprived of its "right to participate in the investigation as a respondent and submit information demonstrating that it was not dumping solar products"[45] is entwined with the scope determinations remanded here and in *Solar II PRC*.[46] Accordingly, this matter will be clarified once the issues remanded here are resolved, and the scope of these proceedings is finalized.

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[41] *See British Steel PLC v. United States*, 127 F.3d 1471, 1475 (Fed. Cir. 1997) ("An agency is obligated to follow [its] precedent, and if it chooses to change, it must explain why.")(quotation marks and citation omitted); *State Farm*, 463 U.S. at 46–48 (holding that an agency may not change course without addressing the continued relevance of factual findings on which the agency's prior policy was based); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (J. Kennedy, concurring in part and concurring in judgment) (explaining that *State Farm* followed the principle that an agency "cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate").

[42] *Fox*, 556 U.S. at 516.

[43] *Nakornthai*, 32 CIT at 1276, 587 F. Supp. 2d at 1308 (citing and quoting *Trs. in Bankruptcy of N. Am. Rubber Thread Co. v. United States*, 31 CIT 2040, 2047, 533 F. Supp. 2d 1290, 1297 (2007) ("Commerce [must] attempt to distinguish the reasoning set forth in [prior cases] from the present case.") (alterations in *Nakornthai*)).

[44] *See infra* Discussion Section IV.

[45] Kyocera's Br., ECF Nos. 29 & 30, at 25.

[46] *See infra* Discussion Sections IV, VI, & VII; *Solar II PRC Slip Op*., Slip Op. 16–56, Consol. Ct. No. 15–00067, ECF No. 98, at Discussion Section IV.

II. Commerce's Final Solar II Taiwan Scope Modification's Effect On the Databases Used Throughout the Investigation

Plaintiffs next argue that Commerce's final Solar II Taiwan scope determination unlawfully altered the sales databases relied on throughout the investigation, resulting in incongruence between the sales used to determine dumping liability and those ultimately covered by the order.[47] Because this claim also implicates the specific agency decisions that are remanded here and in *Solar II PRC*,[48] the court also defers consideration of this matter until the issues remanded here are resolved, and the scope of these proceedings is finalized.

III. Commerce's Final Solar II Taiwan Scope Determination Was Not Contrary to Explicit Statutory and Regulatory Requirements.

Next, Plaintiffs argue that Commerce's final *Solar II Taiwan* scope determination was contrary to one or more statutory/regulatory provisions.[49] Each argument is addressed in turn.

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[47] *See* SunEdison's Br., ECF Nos. 32 & 33, at 28 ("In reporting U.S. sales in their questionnaire responses, Commerce instructed the Taiwan respondents to follow . . . a scope definition that Commerce totally abandoned long after verifications of those responses were completed . . . ."); *id*. at n.14 (noting that in *Solar II PRC* Commerce had emphasized that its final scope modification "'result[ed] in no change to [the mandatory respondents'] reported database[s]'") (quoting Issues & Decision Mem., *Certain Crystalline Silicon Photovoltaic Products from the* [*PRC*], A-570–010, Investigation (Dec. 15, 2014) (adopted in 79 Fed. Reg. 76,970 (Dep't Commerce Dec. 23, 2014) (final determination of sales at less than fair value)) ("*Solar II PRC AD I&D Mem*.") cmt. 1 at 19); Kyocera's Br., ECF Nos. 29 & 30, at 7 (quoting Kyocera's administrative case brief below ("[Commerce's scope modification changed the scope from that] used in [Commerce]'s selection of mandatory respondents [and]. . . the International Trade Commission's injury investigation, which has undertaken no analysis of the impact of third-country solar modules on the domestic industry.")); but *see Solar II ITC Final Determination*, *supra* note 7, at 7 ("The [International Trade] Commission recognized early in these [*Solar II PRC* and *Solar II Taiwan*] investigations that changes in the scopes were likely and took steps to ensure that it collected the information that would allow it to fulfill its statutory obligations. In the questionnaires issued in the final phase of these investigations, the Commission asked U.S. producers and importers to segregate their import data into sixteen categories, which were designed to provide the Commission with flexibility to adjust the data to conform to different possible scope definitions. The manner in which the Commission collected the data in these investigations permitted the agency and the parties to consider and evaluate the implications of various possible scope definitions to the Commission's analysis.")(citations omitted).

[48] *See infra* Discussion Sections IV, VI, & VII; *Solar II PRC Slip Op.*, Slip Op. 16–56, Consol. Ct. No. 15–00067, ECF No. 98, at Discussion Section IV.

[49] *See supra* notes 21–25 and accompanying text.

A. 19 U.S.C. § 1673

SunEdison argues that Commerce impermissibly "assigned to [the statutory phrase] 'a class or kind of foreign merchandise' different and inconsistent meanings for the same merchandise – modules containing Taiwanese-origin cells – depending on where the module assembly took place."[50]

But as explained in the *Solar II PRC* opinion, it is well-established that the scope of an antidumping order is defined by two *separate* inquiries – (1) is the product within the relevant class/kind of merchandise? and (2) did the product originate in the country covered by the order?[51] Here, the relevant class/kind of merchandise is solar cells, whether or not assembled into panels.[52] The essence of the parties' dispute concerns the second inquiry – Commerce's rule for determining whether a given product within this class/kind of merchandise originates in the country covered by the order. Commerce did not assign different and inconsistent meanings to the phrase "class or kind of foreign merchandise" in 19 U.S.C. § 1673, but rather applied two different origin rules to products within this class or kind of merchandise, depending on where the solar cells were assembled into panels.[53] Because the statute does not directly address this concern, Commerce's decision in this regard was not explicitly contrary to the plain language of 19 U.S.C. § 1673.

B. 19 U.S.C. § 1677b(a) & 1677(16)(A)-(C)

SunEdison also argues that, because "[t]he statute defines the term 'country' as limited to a single country for purposes of antidumping proceedings,"[54] it therefore "compels a uniform test to determine when the foreign like product is 'produced in the same country' as subject merchandise, because multiple tests arbitrarily create a mismatch between the universes [i.e., respective scopes] of subject merchandise and the foreign like product."[55] Because this claim is related

[50] SunEdison's Br., ECF Nos. 32 & 33, at 14 (quoting 19 U.S.C.§ 1673).

[51] *Solar II PRC Slip Op*., Slip Op. 16–56, Consol. Ct. No. 15–00067, ECF No. 98, at 25 (quoting and citing relevant authorities).

[52] *See Solar II Taiwan I&D Mem*. Section III (Scope of the Investigation) at 4 ("The merchandise covered by this investigation is crystalline silicon photovoltaic [i.e., solar] cells, and modules, laminates and/or panels consisting of [such] cells, whether or not partially or fully assembled into other products, including building integrated materials.").

[53] *See infra* Discussion Section IV; *Solar II PRC Slip Op*., Slip Op. 16–56, Consol. Ct. No. 15–00067, ECF No. 98, at Discussion Section IV.

[54] SunEdison's Br., ECF Nos. 32 & 33, at 14–15 (quoting 19 U.S.C.§ 1677(3)).

[55] *Id.* (quoting 19 U.S.C. § 1677(16)) (also citing and quoting *Slater Steels v. United States*, 27 CIT 1786, 1788, 297 F. Supp. 2d 1362, 1364 (2003) ("Under any of these definitions [of

to one of the grounds for remand, both here and in *Solar II PRC*, [56] the court will defer its adjudication of this issue until the agency has had an opportunity to reconsider on remand.

C. 19 U.S.C. § 1677j(b) & 19 C.F.R. § 351.225(h)

Next, Kyocera argues that Commerce's decision – to include, within the scope of this order on merchandise from Taiwan, all Taiwanese solar cells that are assembled into panels in Taiwan or in other countries (except those that are assembled into panels in China) – should be evaluated under 19 U.S.C. § 1677j(b) (dealing with circumvention of existing antidumping duty orders) and 19 C.F.R. § 351.225(h) (providing for Commerce's issuance of scope rulings, under existing antidumping duty orders, for "products completed or assembled in other foreign countries").[57]

As Kyocera acknowledges, however, these provisions apply to circumstances where an order with a defined scope is already in effect,[58] whereas here Commerce was defining the scope of an order prior to its imposition. Although Kyocera argues that this distinction is immaterial,[59] the distinction is in fact significant. Here, Commerce is fashioning the foundational scope of a proceeding, before the imposition of the order, rather than extending an existing order to cover new merchandise so as to address circumvention of an order's pre-existing scope. 19 U.S.C. § 1677j(b) and 19 C.F.R. § 351.225(h) are therefore inapposite to the specific issues presented here.

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normal value], both the 'foreign like product' and the 'subject merchandise' must be in the same country as the merchandise that is the subject of the investigation.") (footnote omitted).

[56] *See infra* Discussion Sections IV & VI; *Solar II PRC Slip Op*., Slip Op. 16–56, Consol. Ct. No. 15–00067, ECF No. 98, at Discussion Section IV.

[57] Kyocera's Br., ECF Nos. 29 & 30, at 11–16.

[58] *See id.* at 14; 19 U.S.C. § 1677j(b)(1)(A)(i) (providing that this provision applies to "merchandise imported into the United States [that] is of the same class or kind as any merchandise produced in a foreign country that is the subject of . . . *an antidumping duty order [that is already] issued*") (emphasis added); 19 C.F.R. § 351.225(h) (noting that this regulatory provision applies once an antidumping duty order "is [already] in effect").

[59] *See* Kyocera's Br., ECF Nos. 29 & 30, at 14 (arguing that "the same reasoning applies" regardless of whether Commerce is initially establishing an origin rule for a class of merchandise in which products are manufactured in more than one country, or whether the agency is subsequently asked to cover additional merchandise that was not previously covered by the origin rule initially established).

D. Congress Did Not Bind Commerce To Always Use The Substantial Transformation Test To Establish the Origin of Products Manufactured in Multiple Countries.

Finally, Congress did not require Commerce to continue to use its substantial transformation test[60] when determining the origin of (and hence the appropriate foreign market for calculating the comparison normal values for) merchandise manufactured in multiple countries.[61] Because the plain language of the antidumping statute does not unambiguously prescribe any specific approach to origin determinations, Commerce may exercise reasonable discretion in selecting a reasonable method for such determinations.[62] Thus even if SunEdison were correct that, by revisiting the antidumping law without explicitly rejecting Commerce's prior use of the substantial transformation test to determine the origin of products made in multiple countries, Congress ratified the agency's use of this test,[63] it does not follow that the agency is therefore *required* to always exercise its discretion in the same way. That Congress did not reject the agency's particular exercise of discretion is not equivalent to a requirement that the agency must always exercise its discretion using the same method.[64]

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[60] *See infra* Discussion Section V (discussing Commerce's substantial transformation test); *Solar II Taiwan I&D Mem.* cmt. 1 at 19–23 (applying the substantial transformation test to determine the origin of all panels assembled from solar cells made outside the country-of-assembly, except panels assembled in China); *Solar II PRC Slip Op.*, Slip Op. 16–56, Consol. Ct. No. 15–00067, ECF No. 98, at Background Sections I & II, and Discussion Section IV (providing additional background and discussion).

[61] *See* SunEdison's Br., ECF Nos. 32 & 33, at 21–25 (making the argument that "Congress bound Commerce to use the substantial transformation test to determine the scope of [all] antidumping duty orders").

[62] *See supra* Standard of Review Section.

[63] *See* SunEdison's Br., ECF Nos. 32 & 33, at 21–25 (making this argument).

[64] *See, e.g., Nakornthai*, 32 CIT at 1276, 587 F. Supp. 2d at 1307 ("Commerce has discretion to change its policies and practices as long as they are reasonable and consistent with their statutory mandate and may adapt its views and practices to the particular circumstances . . . at hand, so long as the agency's decisions are explained and supported by substantial evidence on the record.") (quotation and alteration marks and citation omitted). SunEdison's argument regarding the Statement of Administrative Action ("SAA"), SunEdison's Br., ECF Nos. 32 & 33, at 24 (arguing that the SAA requires Commerce to always use the substantial transformation test to determine the origin of products manufactured in multiple countries) (quoting Uruguay Round Agreements Act, SAA, H.R. Doc. No. 103–316 (1994) at 844, reprinted in 1994 U.S.C.A.A.N. 4040 ("Outside of a situation involving circumvention of an antidumping duty order, a substantial transformation of a good in an intermediate country would render the resulting merchandise a product of the intermediate country rather than the original country of production.")), is unpersuasive for the same reason. That the SAA accepts "substantial transformation" as *sufficient* to determine country-of-origin does not mean that it requires this test as *necessary* for that purpose.

IV. Commerce's Final Solar II Taiwan Scope Determination Is Remanded for Consistency with the Solar II PRC Proceedings.

Next, SunEdison argues that Commerce's final *Solar II Taiwan* scope determination unlawfully departed from prior practice without sufficient explanation.[65] Both here in *Solar II Taiwan* and in *Solar II PRC*, Commerce established two different origin rules for solar panels, depending on where they are assembled.[66] As this Court has already ruled with regard to the *Solar II PRC* proceedings, in doing so, Commerce did not provide sufficient explanation for (1) departing from the agency's prior practice of establishing a single consistent origin rule for all products within a single class or kind of merchandise; (2) treating similarly-situated products differently; and (3) departing from the agency's prior practice of calculating the foreign like product's normal value in the market where the majority of production of the subject merchandise took place.[67]

Because the final *Solar II Taiwan* scope incorporates the *Solar II PRC* exception for solar panels assembled in China – which exempts all such panels from the otherwise generally-applicable rule that the origin of solar panels is determined by the origin of their constituent cells[68] – these same concerns are also implicated here.[69] Accordingly,

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[65] *See* SunEdison's Br., ECF Nos. 32 & 33, at 12–13, 21–22.

[66] *See Solar II Taiwan I&D Mem.* cmt. 1 at 23 ("[S]olar modules assembled in the PRC using Taiwanese cells are within the scope of, and therefore subject to, the [*Solar II PRC*] investigations as Chinese modules . . . . This is in contrast to cells from Taiwan which are used in the assembly of solar modules in other countries . . ., [which] are considered Taiwanese in origin, and are within the scope of this [*Solar II Taiwan*] investigation.")(footnote omitted); *Solar II PRC Slip Op*., Slip Op. 16–56, Consol. Ct. No. 15–00067, ECF No. 98, at Background Section II & Discussion Section IV.

[67] *Solar II PRC Slip Op*., Slip Op. 16–56, Consol. Ct. No. 15–00067, ECF No. 98, at Discussion Section IV.

[68] *See, e.g., Solar II Taiwan I&D Mem.* cmt. 1 at 24 ("[T]he solar cell determines the country of origin, unless manufactured into a module, laminate or panel in the PRC.").

[69] The Government's additional reliance here on *Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 15,545 (Dep't Commerce Apr. 2, 2002) (notice of final affirmative countervailing duty determination and final negative critical circumstances determination) ("*Softwood Lumber from Canada*"), in support of the proposition that "[s]uch exclusions [as the exception from the general origin rule for panels assembled in China] are common," Def.'s Resp. in Opp'n to Pls.' Rule 56.2 Mots. for J. on the Agency R., ECF Nos. 44 (conf. version) & 45 (pub. version), at 33 (citing *Softwood Lumber from Canada*, 67 Fed. Reg. at 15,547), is unpersuasive. In that case, Commerce exempted softwood lumber products made in certain Canadian Provinces (referred to as the "Maritime Provinces") from its countervailing duty investigation, *Softwood Lumber from Canada*, 67 Fed. Reg. at 15,547 (citing *Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 40,228 (Dep't Commerce Apr. 2, 2001)(amendment to the notice of initiation of countervailing duty investigation)), due to "unique circumstances," 66 Fed. Reg. at 40,228. Specifically, Commerce explained

Commerce's final *Solar II Taiwan* scope determination must be remanded for the same reasons as those elaborated in the court's prior opinion,[70] to ensure that the agency's approach in these proceedings is consistent.

V. Commerce's Determination that Solar Cells Are Not Substantially Transformed When Assembled Into Panels Is Supported by Substantial Evidence.

Next, Plaintiff Kyocera argues that the Taiwanese cells used to assemble Kyocera's solar panels in Mexico are substantially transformed in Mexico, such that they cannot be assessed antidumping liability as products of Taiwan.[71]

Here, as in *Solar I PRC*, Commerce employed the substantial transformation test that is the agency's "usual starting point" when deciding which country's foreign market should provide the basis for the antidumping liability of products produced in multiple countries.[72] Using this test, Commerce found that (1) solar cells and panels are within the same class or kind of merchandise; (2) solar panel assembly does not change the nature or use of the product's essential component, the solar cell; and (3) solar panel assembly does not constitute substantial or sophisticated processing of the constituent solar cells.[73] Accordingly, Commerce concluded that, "consistent with

that "[t]hroughout much of the history of this dispute, the Maritime Provinces have been exempt from the various actions taken," and that (unlike here, with regard to solar panels) "[a]ll parties have generally recognized that there are unique circumstances associated with the Maritime Provinces and have supported those exemptions." *Id*. at 40,229. Thus not only was the exemption uncontested and non-controversial (unlike here), the *Softwood Lumber from Canada* example is in any event inapposite to the issue presented here and in *Solar II PRC* with respect to the multiple origin rules established for solar panels. Here the issue is not (as in *Softwood Lumber from Canada*) that some products were exempted from antidumping/countervailing duty liability (for whatever political reasons), but rather that some products within the class or kind of merchandise are treated using a different rule than that which is otherwise generally applicable to products within that overall class/kind. *Softwood Lumber from Canada* is not an example of a case where the agency has established two different national origin rules for products within the same class or kind of merchandise.

[70] *See Solar II PRC Slip Op*., Slip Op. 16–56, Consol. Ct. No. 15–00067, ECF No. 98, at Discussion Section IV.

[71] *See* Kyocera's Br., ECF Nos. 29 & 30, at 18–23; *see also id.* at 7.

[72] *Solar II Taiwan I&D Mem.* cmt. 1 at 18; *compare id.* at 19–21, *with Solar I PRC Scope Clarification Mem*., Consol. Ct. No. 15–00067, ECF No. 58–3 at Tab 1 Ex. 2, at 8 (unchanged in *Solar I PRC AD I&D Mem*. cmt. 1 at 6–7).

[73] *Solar II Taiwan I&D Mem*. cmt. 1 at 19–21 (explicitly also relying on the analysis conducted for the same class/kind of merchandise in *Solar I PRC*).

[the] determination in *Solar I [PRC]*," panel assembly does not substantially transform the constituent solar cells so as to change the cells' country-of-origin.[74]

Kyocera argues that Commerce should have instead concluded that solar cells *are* substantially transformed when assembled into panels in Mexico, such that a solar panel's country-of-origin for antidumping purposes should be the country in which the panel is assembled, rather than the country where the constituent cells are produced.[75] But Kyocera does not directly challenge the factors that Commerce has chosen to use for determining whether components produced in a country different from where they are then incorporated into a finished product are so transformed in the exporting country as to justify an assessment of antidumping liability based on normal values calculated in the market of ultimate assembly, rather than the market of component production.[76]

Instead of making an argument about the reasonableness of the factors of analysis that Commerce actually employed here, Kyocera argues that Commerce should have used a different test, analogizing this case to country-of-origin analyses undertaken by different agencies in contexts unrelated to antidumping.[77] But Customs' country-of-origin determinations, made pursuant to and in furtherance of entirely different statutory authority, are inapposite to the issue presented here.[78]

Here, Commerce exercised its discretion to use the test that it had previously established for determining which country will be used to

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[74] *See id*.; *see also Solar I PRC Scope Clarification Mem*., Consol. Ct. No. 15–00067, ECF No. 58–3 at Tab 1 Ex. 2, at 8 ("[W]here solar cell production occurs in a different country from solar module assembly, the country-of-origin of the solar modules/panels is the country in which the solar cell was produced.") (unchanged in *Solar I PRC AD I&D Mem.* cmt. 1 at 6–7); *Solar II PRC AD I&D Mem.* cmt. 1 at 15 ("[Commerce] determined in [*Solar I PRC*] that the solar cell [is] the essential active component of the module, [and] that assembly of cells into modules [does] not constitute substantial transformation such that the assembled module could be considered a product of the country of assembly . . . .")(citation omitted).

[75] *See* Kyocera's Br., ECF Nos. 29 & 30, at 7, 18–23.

[76] *See id.*

[77] *See id*. at 19–21 (arguing that Commerce should have used the country-of-origin test applied by the predecessor to U.S. Customs & Border Protection ("Customs") in *Koru N. Am. v. United States*, 12 CIT 1120, 701 F. Supp. 229 (1998), enforcing country-of-origin marking requirements under 19 U.S.C. § 1304(1982), *see Koru*, 12 CIT at 1125–26, 701 F. Supp. at 233–34); id. at 22–23 (arguing that *Texas Instruments, Inc. v. United States*, 681 F.2d 778 (CCPA 1982), in which the court reviewed Customs' interpretation of 19 C.F.R. § 10.177(a) (1982), relating to country-of-origin determinations for purposes of the U.S. Generalized System of Preferences, *see Texas Instruments*, 681 F.2d at 781–82, constitutes "binding authority" in this case).

[78] *See Certain Cold-Rolled Carbon Steel Flat Products from Argentina*, 58 Fed. Reg. 37,062, 37,065 (Dep't Commerce July 9,1993) (notice of final determination of sales at less than fair

calculate normal values for antidumping duty assessment when products are manufactured in multiple countries.[79] Kyocera neither addresses this particular analysis nor makes any specific argument as to why it was not reasonable for the agency to apply its usual test in this case.[80] Nor does Kyocera present any argument, or point to any record evidence, to suggest that Commerce's conclusions in applying the three factors of its substantial transformation test[81] to the evidence here[82] do not comport with a reasonable reading of the evidentiary record.[83]

value) ("*Cold-Rolled Steel from Argentina*") (explaining that the statutory provisions governing Customs' country-of-origin determinations are separate from those governing Commerce's antidumping determinations, such that imported products may be determined by different agencies to have different origins for different statutory purposes); *see also, e.g.*, *Wax & Wax/Resin Thermal Transfer Ribbon from the Republic of Korea*, 69 Fed. Reg. 17,645, 17,648 (Dep't Commerce Apr. 5, 2004) (notice of final determination of sales at not less than fair value) ("*Ribbon from Korea*") ("As [Commerce] has stated on numerous occasions, [Customs] decisions regarding substantial transformation and customs regulations . . . are not binding on [Commerce], because we make these decisions with different aims in mind (e.g., anticircumvention).") (citation omitted); *Stainless Steel Round Wire from Canada*, 64 Fed. Reg. 17,324, 17,327 (Dep't Commerce Apr. 9, 1999) (notice of final determination of sales at less than fair value) ("[W]e reiterate that the disciplines of the [World Trade Organization] Agreement on Rules of Origin that are currently in effect under Article 2 of the Agreement simply do not require us to apply the country-of-origin determinations made by the Customs Service when making determinations in [antidumping] proceedings.").

[79] *See Solar II Taiwan I&D Mem*. cmt. 1 at 19 (relying on Issues & Decision Mem., *Glycine from India*, A-533–845, Investigation (Mar. 28, 2008) (adopted in 73 Fed. Reg. 16,640 (Dep't Commerce Mar. 28, 2008) (notice of final determination of sales at less than fair value)) ("*Glycine from India*") at cmt. 5); *see Glycine from India* cmt. 5 at 5–6 ("The Department applies, as appropriate, the following criteria in determining whether substantial transformation occurs, thereby changing a product's country of origin [for antidumping purposes]: 1) whether the processed downstream product falls into a different class or kind of product when compared to the upstream product, 2) whether the essential component of the merchandise is substantially transformed in the country of exportation, and 3) the extent of processing.") (citing *Ribbon from Korea*, 69 Fed. Reg. at 17,647; *Erasable Programmable Read Only Memories (EPROMs) from Japan*, 51 Fed. Reg. 39,680, 39,692 (Dep't Commerce Oct. 30, 1986) (final determination of sales at less than fair value)).

[80] *See* Kyocera's Br., ECF Nos. 29 & 30, at 18–23.

[81] *See supra* note 79 (quoting and providing relevant citations for Commerce's statement of the factors employed in its substantial transformation test).

[82] *See supra* note 73 and accompanying text (summarizing and providing relevant citation for Commerce's evidentiary findings).

[83] *See supra* Standard of Review Section. Kyocera attempts to analogize this case to *Diamond Sawblades Mfrs.' Coalition v. United States*, Slip Op. 13–130, 2013 WL 5878684 (CIT Oct. 11, 2013), Kyocera's Br., ECF Nos. 29 & 30, at 21–22, where the court affirmed Commerce's determination that, with respect to the class/kind of merchandise containing diamond sawblades, "the essential quality of the [finished] product is not imparted until the [components] are attached to create a finished [diamond sawblade]," *Diamond Sawblades*, 2013 WL 5878684 at *10–11. But the court's unrelated decision that Commerce reasonably weighed the particular evidentiary record in a different case, concerning a different class/

Accordingly, this case presents no basis to disturb Commerce's factual findings that (1) solar cells and panels are within the same class or kind of merchandise; (2) solar panel assembly does not change the nature or use of the product's essential component, the solar cell; and (3) solar panel assembly does not constitute substantial or sophisticated processing of the constituent solar cells.[84] Nor do the parties present a basis to disturb the agency's consequent conclusion that the cell is not substantially transformed in the process of panel assembly so as to change the cell's country-of-origin, pursuant to Commerce's usual substantial transformation test in the antidumping context.

VI. Assessment of Antidumping Duties Based on the Full Value of Solar Panels Assembled in Third Countries from Taiwanese Cells

Plaintiffs also challenge Commerce's decision to apply antidumping duties to the full value of solar panels assembled in other countries from cells produced in Taiwan, rather than only the value of the constituent Taiwanese cells.[85] But as explained in the *Solar II PRC* opinion, Commerce previously had a reasonable policy of applying antidumping duties to the full value of merchandise that is manufactured in part in countries other than the subject country, because the statute requires that Commerce assess such duties "in an amount 'equal to the amount by which the foreign market value [now referred to as 'normal value'] of the merchandise [i.e., the entire finished

kind of merchandise, has no bearing on whether Commerce's factual determinations with respect to the products in this case are reasonably supported by the specific evidentiary record presented here. And to the extent that Kyocera simply invites the court to re-weigh the evidence to conclude that the process of panel assembly does substantially transform the solar cells used in panel production, *see* Kyocera's Br., ECF Nos. 29 & 30, at 20–23, it is not the court's providence to do so. *See, e.g.*, *Jiangsu Jiasheng Photovoltaic Tech. Co. v. United States*, __ CIT __, 121 F. Supp. 3d 1263, 1272 (2015); *Pakfood Pub. Co. v. United States*, 34 CIT 1122, 724 F. Supp. 2d 1327, 1348 (2010).

[84] *Solar II Taiwan I&D Mem.* cmt. 1 at 19–21.

[85] SunEdison's Br., ECF Nos. 32 & 33, at 10, 54–56; Kyocera's Br., ECF Nos. 29 & 30, at 8, 15–16, 25–26; *see Solar II Taiwan I&D Mem.* cmt. 1 at 24 n.80 ("[W]ith regard to [the] argument that [Commerce] should take into consideration the processing done in the country that produces the cell and the country that produces the module, laminate or panel, and then only apply [antidumping] duties to the portion of the processing that was done in Taiwan, we disagree. Solar modules assembled in third-countries using Taiwanese solar cells are covered by the scope of the [*Solar II Taiwan*] investigation, no matter the amount of processing done in the third country. Thus the full value of these solar modules [is] subject to . . . applicable antidumping duties.").

product] exceeds the United States price of the merchandise.'"[86] As Commerce had previously explained, because the foreign market value of the finished foreign like product is not necessarily subdivisible, "[a]pplication of antidumping duties only on [a particular country's partial] processing or content portion of the import might mean that the margin of dumping would not be fully offset."[87]

But as also discussed in the *Solar II PRC* opinion, this policy of assessing antidumping duties on the full value of finished products was also coupled with Commerce's policy of calculating normal value using foreign like products in the country where most of the essential production of the subject merchandise took place.[88] Because the statute requires a fair comparison between the U.S. export price of the subject merchandise and the normal value of the foreign like product,[89] Commerce had, prior to its decisions in *Solar II PRC* and *Solar II Taiwan*, reasonably assessed antidumping duties on the full value of finished products after calculating dumping margins using foreign normal values from the same market as that where most of the actual manufacturing of the subject merchandise occurred.[90]

Given this policy, Commerce reasonably determined to assess antidumping duties pursuant to the *Solar II Taiwan* order on the full value of the solar panels produced/imported by the Plaintiffs here, because it is undisputed that at least fifty percent of the production

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[86] *Cold-Rolled Steel from Argentina*, 58 Fed. Reg. at 37,065 (quoting predecessor to 19 U.S.C. § 1673e (requiring assessment of antidumping duties "equal to the amount by which the normal value of the merchandise exceeds the export price (or constructed export price) of the merchandise")); *see also Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany*, 61 Fed. Reg. 38,166,38,171 (Dep't Commerce July 23, 1996) (notice of final determination of sales at less than fair value) ("*LNPPs from Germany*") ("[A]ny interpretation [of the law] which sought to limit the application of antidumping duties . . . to the foreign content [attributable solely to a particular country] would be inconsistent with [Commerce]'s statutory mandate to assess antidumping duties on the extent to which the normal value . . .(previously referred to as 'foreign market value') exceeds the export price (previously referred to as 'United States price').Application of antidumping duties only on [a particular country's partial] processing or content portion of the import might mean that the margin of dumping would not be fully offset.") (citing *Certain Corrosion-Resistant Carbon Steel Products from Canada*, 58 Fed. Reg. 37,099 (Dep't Commerce July 9, 1993) (final determination of sales at less than fair value), aff'd, *In the Matter of Certain Corrosion-Resistant Carbon Steel Products from Canada*, USA-93–1904–03 (Binational Panel under the United States-Canada Free Trade Agreement Oct. 31, 1994)); *Solar II PRC Slip Op*., Slip Op. 16–56, Consol.Ct. No. 15–00067, ECF No. 98, at 32–35, 47–48.

[87] *LNPPs from Germany*, 61 Fed. Reg. at 38,171.

[88] *Solar II PRC Slip Op*., Slip Op. 16–56, Consol. Ct. No. 15–00067, ECF No. 98, at 31–33, 38–39, 42–44.

[89] 19 U.S.C. § 1677b(a)(1).

[90] *Solar II PRC Slip Op*., Slip Op. 16–56, Consol. Ct. No. 15–00067, ECF No. 98, at 43–44.

costs of Plaintiffs' solar panels were incurred in the production of the panels' constituent cells in Taiwan.[91]

But as the court also held in *Solar II PRC*, Commerce deviated from its prior policy by determining, in *Solar II PRC* and also here in *Solar II Taiwan*, that solar panels assembled in China from cells produced elsewhere are to be assessed antidumping duties based on a comparison to normal values calculated for China, rather than the market where most of the production of the panels (i.e., cell-production) took place.[92] Because Commerce neither discussed nor reconciled this aspect of its *Solar II PRC* and *Solar II Taiwan* scope decisions with the agency's prior policy and reasoning, remand is necessary for the agency to do so.[93] The outcome of these remand proceedings will bear directly on the reasonableness of Commerce's approach to antidumping duty assessment here.

Commerce's *Solar II PRC* exception for solar panels assembled in China from non-Chinese cells (which is incorporated into the *Solar II Taiwan* scope[94]) seemingly abandons the agency's reasonable prior policy, and thereby removes that policy's explanatory power with respect to Commerce's decision here. In the absence of such explanation, Commerce's conclusory statement that antidumping duties will be assessed pursuant to *Solar II Taiwan* on the full value of solar panels assembled in third countries from Taiwanese cells simply

[91] *See* SunEdison's Br., ECF Nos. 32 & 33, at 10, 54–56 (arguing that Commerce "must limit the collection of antidumping duty deposits and assessments to the value of Taiwanese-origin [solar] cells in the module," without disputing that the majority of a solar panel's production costs are incurred in the production of the constituent cells); Kyocera's Br., ECF Nos. 29& 30, at 5, 8, 15–16, 25–26 (essentially same). Kyocera makes an argument regarding the value added by panel assembly as compared with the market value of the individual cells, Kyocera's Br., ECF Nos. 29 & 30, at 5, 16, but as Commerce has explained, the agency is concerned with where the costs of production are incurred, rather than percentages of value added, because "we are primarily concerned with where [most of] the actual manufacturing is occurring." *LNPPs from Germany*, 61 Fed. Reg. at 38,168; *see also Cold-Rolled Steel from Argentina*, 58 Fed. Reg. at 37,065 (explaining that antidumping liability is not susceptible to subdivision using the market values of a finished product's constituent parts, because "[antidumping] duties are not an assessment against value," but are rather "determined by the amount of [ultimate] price discrimination . . ., not by the value of the good"). In any event, even the evidence regarding the percentage of value added by panel assembly that Kyocera relies on does not dispute that a majority of the value of a solar panel resides in the constituent cells. *See* Kyocera's Br., ECF Nos. 29 & 30, at 5 (citing [Kyocera's] Req. for Scope Determination re Solar Prods. from Mexico, *Certain Crystalline Silicon Photovoltaic Products from Taiwan*, A-583–853, Investigation (Sept. 15, 2014), *reproduced in* App. to Pl.'s Rule 56.2 Mem. in Supp. of J. on the Agency R., ECF Nos. 34 (conf. version) & 35 (pub. Version) at App. 2, at 4).

[92] *Solar II PRC Slip Op*., Slip Op. 16–56, Consol. Ct. No. 15–00067, ECF No. 98, at 38–39, 45–46.

[93] *Id.*; *see supra* Discussion Section IV.

[94] *See, e.g*., *Solar II Taiwan I&D Mem.* cmt. 1 at 23.

because such panels "are covered by the scope of the [*Solar II Taiwan*] investigation, no matter the amount of processing done in the third country,"[95] is by itself insufficient to address Plaintiffs' arguments.[96]

Thus how Commerce addresses this concern on remand in *Solar II PRC*, and here, will also have implications for the reasonableness of its decision with respect to this issue.

VII. Commerce's Treatment of Sales of Taiwanese Cells to Third-Country Panel Assemblers For Export to the United States

Finally, SunEdison challenges Commerce's treatment of respondents' "sales to third countries for which [the Taiwanese solar cell producers/exporters] ha[d] knowledge that the merchandise was ultimately destined for the United States."[97] A significant proportion of such sales, however, appear to have been sales of Taiwanese solar cells to panel assemblers in China,[98] which Commerce specifically excluded as non-subject merchandise pursuant to the determinations that are remanded here and in *Solar II PRC*.[99] The court will therefore defer its review of Commerce's treatment of sales of Taiwanese cells to third-country panel assemblers that were reported as des-

[95] *Id.* at 24 n. 80.

[96] *See Solar II PRC Slip Op.*, Slip Op. 16–56, Consol. Ct. No. 1500067, ECF No. 98, at 24–25 (noting that it is well-established that the scope of an antidumping order is defined by two separate inquiries – (1) is the product within the relevant class/kind of merchandise? and (2) did the product originate in the country covered by the order?) (relying on *Cold-Rolled Steel from Argentina*, 58 Fed. Reg. at 37,065 (relied on by Commerce in *Solar II Taiwan I&D Mem*. cmt. 1 at 18 n.52); 3.5" *Microdisks and Coated Media Thereof from Japan*, 54 Fed. Reg. 6433 (Dep't Commerce Feb. 10, 1989) (final determination of sales at less than fair value) (relied on in *Cold-Rolled Steel from Argentina*, 58 Fed. Reg. at 37,065); and *Solar II Taiwan I&D Mem*. cmt. 1 at 18 ("In determining the scope of the investigation, [Commerce] must not only address . . . the products intended to be covered by the scope, but also determine the country-of origin of the solar products at issue."). In the absence of the explanatory power of its prior policy, Commerce's explanation here appears to conflate these two separate inquiries.

[97] SunEdison's Br., ECF Nos. 32 & 33, at 4 (quoting [Commerce's] Quantity & Value Questionnaire, *Certain Silicon Photovoltaic Products from Taiwan*, A-583–853, Investigation (Jan. 29, 2014), *reproduced in* [Pub.] App. to Br. of Pl. [SunEdison] in Supp. of Pl.'s Mot. for J. Upon the Agency R., ECF No. 37–1 at Tab 22, at Attach. I ("*Format for Reporting Quantity & Value of Sales*")); *see id.* at 29–49 (presenting this challenge); *see also id.* at 27 ("Commerce's respondent selection was faulty because Taiwan respondents reported indirect U.S. sales of cells through China as 'subject merchandise' in accordance with Commerce's instructions, yet Commerce in the end removed those transactions as 'non-subject' merchandise under its final scope determination[, and t]his eliminated many of their reported sales.") (footnote omitted) & 49–54 (expanding this argument).

[98] *See* SunEdison's Br., ECF Nos. 32 & 33, at 34–36.

[99] *Solar II Taiwan I&D Mem*. cmt. 1 at 23 ("Neither Taiwanese cells used to assemble solar modules in the PRC nor those solar modules are covered by the scope of this investigation.

tined for export to the United States until the issues remanded here are resolved, and the scope of these proceedings is finalized.

CONCLUSION

For all of the foregoing reasons, the *Solar II Taiwan* final scope determination is remanded to Commerce for reconsideration in accordance with this opinion. Commerce shall have until August 15, 2016, to complete and file its remand results. Plaintiffs shall have until September 6, 2016, to file comments, and the agency and Defendant-Intervenor shall then have until September 20, 2016, to respond.

It is SO ORDERED.

Dated: June 14, 2016
New York, NY

/s/ Donald C. Pogue
DONALD C. POGUE, SENIOR JUDGE

Rather, solar modules assembled in the PRC using Taiwanese cells are within the scope of, and therefore subject to, the [*Solar II PRC*] AD and CVD investigations as Chinese modules. . . ."); *Solar II PRC AD I&D Mem*. cmt. 1 at 28 ("[S]olar cells assembled in China using solar cells manufactured in Taiwan are subject to [the *Solar II PRC* exception for panels assembled in China from non-Chinese inputs] and not [*Solar II Taiwan*].")(citation omitted); *see supra* Discussion Sections IV & VI; *Solar II PRC Slip Op*., Slip Op. 16–56, Consol. Ct. No. 15–00067, ECF No. 98, at Discussion Section IV.