U.S. Court of International Trade

Slip Op. 17–88

XYZ CORPORATION, Plaintiff, v. UNITED STATES and U.S. CUSTOMS & BORDER PROTECTION, Defendants, and DURACELL U.S. OPERATIONS, INC., Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Court No. 17–00125
PUBLIC VERSION

[Denying Defendant's motion to dismiss for lack of jurisdiction and Plaintiff's application for a preliminary injunction.]

Dated: July 17, 2017

John M. Peterson, Russell A. Semmel, and *Richard F. O'Neill*, Neville Peterson LLP, of New York, NY, for Plaintiff XYZ Corporation.

Alexander J. Vanderweide, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for Defendant the United States. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Beth C. Brotman*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, New York, NY.

OPINION AND ORDER

Choe-Groves, Judge:

This case involves the "Lever-Rule" restriction on imports of gray market goods, which are products bearing genuine trademarks identical to or substantially indistinguishable from those trademarks appearing on articles authorized by the United States trademark owner for importation or sale in the United States, that may create a likelihood of consumer confusion when the gray market goods and those bearing the authorized trademark are physically and materially different.

XYZ Corporation ("Plaintiff")[1] is a company engaged in the business of importing and distributing bulk-packaged gray market batteries bearing the "DURACELL" mark, a United States trademark cur-

[1] Plaintiff has assumed the fictitious name of XYZ Corporation for purposes of this litigation because Plaintiff fears that it would be subject to commercial retaliation as a result of filing this action if its company name is revealed. *See* Compl. ¶ 1 n.1. Plaintiff's true name is [[ ]]. *See* Confidential Summons, June 1, 2017, ECF No. 26.

rently owned by Duracell U.S. Operations, Inc. ("Duracell U.S."). *See* Compl. ¶ 6, May 19, 2017, ECF No. 2. Plaintiff brings this action seeking declaratory and injunctive relief from the decision of U.S. Customs and Border Protection ("Customs") to grant Lever-Rule protection to Duracell U.S., thereby restricting imports of gray market batteries bearing its trademark. *See* Summons, May 19, 2017, ECF No. 1; Compl.; *see also* U.S. Customs and Border Protection Grant of "Lever-Rule" Protection, 51 Cust. Bull. & Dec. No. 12 at 1 (Mar. 22, 2017). Plaintiff asserts that the grant of Lever-Rule protection was (1) null and void because Customs failed to observe notice and comment rulemaking requirements of the Administrative Procedure Act ("APA"), and (2) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law because Customs restricted the importation of merchandise that is not materially and physically different from batteries authorized by Duracell U.S. for importation or sale in the United States. *See* Compl. ¶¶ 31–54.

Before the court are two motions. First, Plaintiff requests the issuance of a preliminary injunction to enjoin Customs from enforcing the Lever-Rule restrictions against Plaintiff's goods during the pendency of this action. *See* Pl.'s Appl. Prelim. Inj., May 19, 2017, ECF No. 6 ("Pl.'s Appl. Prelim. Inj."); Pl.'s Mem. P. & A. Supp. Appl. Prelim. Inj., May 19, 2017, ECF No. 7 ("Pl.'s Mem. Supp. Appl. Prelim. Inj."). Plaintiff asserts that it is entitled to injunctive relief because it has shown that it will be immediately and irreparably injured if the status quo is not preserved throughout this action, there is a likelihood of success on the merits, granting the request is in the public's interest, and the balance of hardship favors Plaintiff. *See* Pl.'s Mem. Supp. Appl. Prelim. Inj. 11–24. The United States and Customs (collectively, "Defendant") argue that Plaintiff's application for a preliminary injunction must be denied because Plaintiff has failed to demonstrate that it is entitled to injunctive relief. *See* Defs.' Mem. Supp. Mot. Dismiss and Resp. Opp'n Pl.'s Appl. for Prelim. Inj. 22–31, June 7, 2017, ECF No. 33 ("Defs.' Mot. Dismiss and Resp. Pl.'s Appl. Prelim. Inj.").

Second, Defendant moves pursuant to USCIT Rule 12(b)(1) to dismiss this action for lack of jurisdiction, arguing that this action does not fall within any of the Court's specific grants of jurisdiction under 28 U.S.C. § 1581 (2012).[2] *See* Defs.' Mot. Dismiss and Resp. Pl.'s Appl. Prelim. Inj. 6–21. Plaintiff opposes Defendant's motion and asserts that the court possesses jurisdiction. *See* Pl.'s Mem. Opp'n Defs' Mot. Dismiss 4–13, June 12, 2017, ECF No. 36 ("Pl.'s Resp. Defs.' Mot. Dismiss").

[2] All further citations to Titles 5, 15, and 28 of the U.S. Code are to the 2012 edition.

For the reasons set forth below, the court denies both Defendant's motion to dismiss for lack of jurisdiction and Plaintiff's application for a preliminary injunction.

BACKGROUND

Generally, the law prohibits the importation of goods that infringe upon the rights of United States trademark owners. *See, e.g.*, 15 U.S.C. § 1124;[3] Section 526 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1526.[4] Merchandise imported into the United States in violation of the trademark laws shall be subject to enforcement for violation of the customs laws. 19 U.S.C. § 1526(b). Customs has promulgated regulations to restrict the importation of certain gray market goods.[5] *See* 19 C.F.R. § 133.23 (2012).[6] Under the Lever-Rule,[7] United States trademark owners have the ability to submit an application to Customs requesting restrictions on imports of gray market goods bearing a genuine trademark that are physically and materially different from the articles authorized by the United States trademark owner for importation or sale in the United States. *See* 19 C.F.R. §§ 133.2(e) (providing trademark owners with the ability to apply for Lever-Rule protection), 133.23(a)(3) (describing the goods that are restricted under the Lever-Rule). If Customs grants Lever-Rule protection to the trademark owner, the gray market goods shall be denied entry into the United States, detained for a minimum

[3] Section 42 of the Lanham Act forbids the importation and entry of merchandise that copies or simulates a United States trademark in a manner that induces the public to believe that the article is manufactured in a country other than the country in which the merchandise is in fact manufactured. *See* 15 U.S.C. § 1124.

[4] Section 526 of the Tariff Act of 1930 provides that it is unlawful to import into the United States any foreign-produced merchandise that bears a registered trademark owned by a United States citizen or company and that imports of any such merchandise shall be subject to seizure and forfeiture. *See* 19 U.S.C. § 1526. All further citations to the Tariff Act of 1930 are to the relevant provisions of Title 19 of the U.S. Code.

[5] Customs defines restricted gray market goods as "foreign-made articles bearing a genuine trademark or trade name identical with or substantially indistinguishable from one owned and recorded by a citizen of the United States or a corporation or association created or organized within the United States and imported without the authorization of the U.S. owner." 19 C.F.R. § 133.23(a).

[6] All further citations to Title 19 of the Code of Federal Regulations are to the 2012 edition.

[7] The Lever-Rule derives its name from the Court of Appeals for the District of Columbia Circuit's decision in *Lever Bros. Co. v. United States*, which clarified that 15 U.S.C. § 1124 bars the importation of gray market goods that are physically and materially different from the goods authorized for importation or sale in the United States, regardless of the trademark's genuine character abroad or affiliation between the producers. *See* 981 F.2d 1330, 1333–39 (D.C. Cir. 1993). Customs amended its regulation restricting imports of gray market goods and created the Lever-Rule to comply with the decision in *Lever Bros. Co. See Gray Market Imports and Other Trademarked Goods,* 64 Fed. Reg. 9,058 (Dep't Treasury Feb. 24, 1999).

period of thirty days, and potentially subject to seizure and forfeiture proceedings. *See* 19 C.F.R. § 133.23(c)–(f).

On January 25, 2017, Customs issued a notice in the U.S. Customs Bulletin and Decisions publication that it received an application from Duracell U.S. seeking Lever-Rule protection "against importations of OEM bulk packaged batteries and foreign retail packaged batteries, intended for sale in countries outside the United States that bear the 'DURACELL' mark." *See* U.S. Customs and Border Protection Receipt of Application for "Lever-Rule" Protection, 51 Cust. Bull. & Dec. No. 4 at 1 (Jan. 25, 2017). The application submitted by Duracell U.S. was not publicly available and Customs did not seek input from the public. Customs announced on March 22, 2017 that it granted Duracell U.S. Lever-Rule protection because the subject "gray market Duracell battery products differ physically and materially from the Duracell battery products authorized for sale in the United States with respect to the following product characteristics: label warnings, consumer assistance information, product guarantees, and warranty coverage." *See* U.S. Customs and Border Protection Grant of "Lever-Rule" Protection, 51 Cust. Bull. & Dec. No. 12 at 1 (Mar. 22, 2017). Customs declared that the importation of such batteries was restricted and subject to seizure and forfeiture, unless certain labeling requirements have been satisfied.[8] *See id.*

Thereafter, counsel for Plaintiff sent a letter to Customs requesting that it reconsider its grant of Lever-Rule protection to Duracell U.S. *See* Compl. Ex. C, May 19, 2017, ECF No. 3. The letter asserted that decisions granting Lever-Rule protection are the type of rules that must follow notice and comment rulemaking procedures as required by the APA. *See id.* The letter also claimed that Duracell U.S. was not entitled to Lever-Rule protection against bulk OEM batteries because these gray market products are not physically and materially different from batteries that are sold by Duracell U.S. *See id.* Counsel for Plaintiff requested that Customs withdraw its determination and solicit public comments regarding whether any Lever-rule protection should be granted with respect to these gray market battery products. *See id.* Plaintiff alleges that Customs reviewed the letter and declined to reconsider its decision to grant Lever-Rule protection to Duracell U.S. *See* Compl. ¶ 29.

[8] Gray market products determined to be physically and materially different from those products authorized for importation and sale in the United States are permitted entry if "the merchandise or its packaging bears a conspicuous and legible label designed to remain on the product until the first point of sale to a retail consumer in the United States stating that: 'This product is not a product authorized by the United States trademark owner for importation and is physically and materially different from the authorized product.'" 19 C.F.R. § 133.23(b).

Plaintiff commenced this action on May 19, 2017 invoking jurisdiction under 28 U.S.C. § 1581(i) to obtain judicial review of Customs' decision to grant Duracell U.S. Lever-Rule protection. *See* Summons. On the same day, Plaintiff filed an application for a preliminary injunction seeking to enjoin Customs from enforcing the Lever-Rule restrictions against Plaintiff's imports of gray market Duracell batteries.[9] *See* Pl.'s Appl. Prelim. Inj. Plaintiff submitted an affidavit from the president of XYZ Corporation to support its claim for injunctive relief. *See* Confidential Affirmation of John Doe, June 1, 2017, ECF No. 30 ("John Doe Affidavit").

Defendant filed a response objecting to the issuance of a preliminary injunction and moving to dismiss Plaintiff's action for lack of jurisdiction on June 7, 2017. *See* Defs.' Mot. Dismiss and Resp. Pl.'s Appl. Prelim. Inj. Defendant argues that this action must be dismissed because there is no basis for jurisdiction under 28 U.S.C. § 1581, Plaintiff does not have standing to bring this action, and the issues raised by Plaintiff are not ripe for judicial review. *See* Defs.' Mot. Dismiss and Resp. Pl.'s Appl. Prelim. Inj. 6–22. Defendant asserts that even if the court has jurisdiction over this action, Plaintiff has not established the necessary factors required to grant a preliminary injunction. *See* Defs.' Mot. and Resp. Pl.'s Appl. Prelim. Inj. 22–31. Plaintiff filed its response to Defendant's motion to dismiss on June 12, 2017, refuting Defendant's standing and ripeness arguments and maintaining that the court has jurisdiction pursuant to 28 U.S.C. § 1581(i)(4) because the action arises out of laws relating to the administration and enforcement of the exclusion of merchandise.[10] *See* Pl.'s Resp. Defs.' Mot. Dismiss 4–13.

The court held a hearing with the Parties on June 14, 2017 regarding the two motions before the court. *See* Confidential Hearing, June 14, 2016, ECF No. 38. During the hearing, the president of XYZ Corporation testified under direct- and cross-examination in support

[9] While Plaintiff's application for a preliminary injunction was pending before the court, Plaintiff filed an application for a temporary restraining order. *See* Pl.'s Appl. TRO, May 26, 2017, ECF No. 23; *see also* Def.'s Resp. Opp'n Pl.'s Appl. TRO, May 30, 2017, ECF No. 25. The court granted Plaintiff's application for a temporary restraining order on June 1, 2017 and scheduled a hearing on Plaintiff's application for a preliminary injunction. *See* Order Granting Mot. TRO, June 1, 2017, ECF No. 32. On three separate occasions, the court extended the temporary restraining order at Plaintiff's request. *See* Temporary Restraining Order Extension, June 15, 2017, ECF No. 39; Second Temporary Restraining Order Extension, June 26, 2017, ECF No. 52; Amendment to Second Temporary Restraining Order Extension, June 27, 2017, ECF No. 54; Third Temporary Restraining Order, July 10, 2017, ECF No. 60.

[10] Plaintiff has abandoned its argument that 28 U.S.C. § 1581(i)(3) serves as an alternative jurisdictional basis for this action. *See* Pl.'s Resp. Defs.' Mot. Dismiss 11 n.3; *see also* Compl. ¶ 5.

of Plaintiff's application for a preliminary injunction. *See id.* Plaintiff also submitted the following three exhibits into evidence at the hearing: (1) one box of Plaintiff's Duracell bulk batteries, (2) one box of Duracell U.S.'s bulk batteries, and (3) a notification from Customs indicating that Plaintiff's shipments of Duracell batteries have been held by Customs, ostensibly due to Lever-Rule restrictions.[11] *See* Physical Exs., June 14, 2017, ECF No. 56; Confidential Ex. 3, June 14, 2017, ECF No. 57. Defendant filed its reply to the motion to dismiss for lack of jurisdiction on June 15, 2017. *See* Defs.' Reply Pl.'s Resp. Defs.' Mot. Dismiss Lack Jurisdiction, June 15, 2017, ECF No. 40.

In a letter dated June 27, 2017, the court requested the Parties to submit supplemental briefs addressing whether 28 U.S.C. § 1581(h) provides the court with jurisdiction. Plaintiff filed its supplemental brief on June 30, 2017, explaining that § 1581(h) would serve as a basis for jurisdiction if the court determines that Customs' decision to impose Lever-Rule restrictions on gray market Duracell batteries is the type of ruling reviewable under § 1581(h). *See* Pl.'s Suppl. Mem. Opp'n Defs.' Mot. Dismiss 10, June 30, 2017, ECF No. 55. Plaintiff also maintained its position that 28 U.S.C. § 1581(i)(4) provides the court with jurisdiction. *See id.* at 3–9. Defendant responded to Plaintiff's submission on July 6, 2017. *See* Def.'s Suppl. Resp. Br. Addressing 28 U.S.C. § 1581(h), July 6, 2017, ECF No. 58 ("Defs.' Suppl. Resp. Br.").

DISCUSSION

The Court must possess jurisdiction over an action as a precondition to granting injunctive relief. *See Henry v. Polish Am., Inc.*, 57 F.3d 1085 (Fed. Cir. 1995); *Int'l Custom Prods., Inc. v. United States*, 32 CIT 465, 466 (2008) (citing *Am. Air Parcel Forwarding Co. v. United States*, 6 CIT 147, 150, 573 F. Supp. 117, 120 (1983)). The court will first address Defendant's motion to dismiss for lack of jurisdiction before addressing Plaintiff's application for a preliminary injunction.

[11] The temporary restraining order in this action was issued on June 1, 2017, restraining Customs from enforcing Lever-Rule restrictions against Plaintiff's shipments of battery products bearing the "DURACELL" trademark, whether by excluding from entry, seizing goods, or demanding the redelivery of conditionally released goods, effective upon the payment of security. *See* Temporary Restraining Order, June 1, 2017, ECF No. 32. The court notes that Customs was free to hold and detain Plaintiff's shipments for reasons other than enforcement of Lever-Rule restrictions. Customs issued a notice on June 9, 2017 indicating that Plaintiff's shipments of Duracell batteries had been held. *See* Confidential Ex. 3, June 14, 2017, ECF No. 57. Defendant represented that Plaintiff's shipments would be released after Plaintiff posted the security required by the temporary restraining order. *See* Confidential Hearing at 1:36:30–1:38:44; In-Person Status Conference at 0:14:41–0:15:25, June 20, 2017, ECF No. 47.

I. Defendant's Motion to Dismiss

A. Jurisdiction

Plaintiff filed this action seeking declaratory and injunctive relief with respect to Customs' decision to grant Lever-Rule protection to Duracell U.S., which resulted in restrictions on the importation of gray market Duracell battery products. This action does not concern Customs' application of the Lever-Rule restrictions to specific entries of merchandise. Rather, Plaintiff's claims are APA challenges concerning the validity of the Lever-Rule restrictions on gray market Duracell batteries. *See* Compl. ¶¶ 31–54. Plaintiff claims that Customs' decision to grant Duracell U.S. Lever-Rule protection was unlawful and must be set aside because Customs failed to follow notice and comment rulemaking requirements of the APA.[12] *See id.* ¶¶ 31–41; *see also* 5 U.S.C. § 553 (requiring agencies to notify the public and provide an opportunity for comment prior to issuing a rule); 5 U.S.C. § 706(2)(D) (providing that a reviewing court shall set aside agency action performed "without observance of procedure required by law"). Plaintiff also claims that Customs' decision must be held unlawful because it was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law. *See* Compl. ¶¶ 42–54; *see also* 5 U.S.C. § 706(2)(A). "[T]he APA is not to be interpreted as an implied grant of subject-matter jurisdiction to review agency actions." *Califano v. Sanders*, 430 U.S. 99, 105 (1977); *see also Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1552 (Fed. Cir. 1983) (providing that the APA "does not give an independent basis for finding jurisdiction in the Court of International Trade."). The Court must have its own independent statutory basis for jurisdiction in order for Plaintiff's action to proceed. *See Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304 (Fed. Cir. 2004).

Defendant contends that this action does not fall within any of the specific grants of jurisdiction under 28 U.S.C. § 1581. *See* Defs.' Mot. Dismiss and Resp. Pl.'s Appl. Prelim. Inj. 17–21; Defs.' Suppl. Resp. Br. 1–9. Plaintiff argues that the court has authority to review Customs' grant of Lever-Rule protection pursuant to 28 U.S.C. § 1581(i)(4). *See* Pl.'s Resp. Defs.' Mot. Dismiss 11–13. Plaintiff asserts that 28 U.S.C. § 1581(i)(4) vests the court with jurisdiction because

[12] According to the APA, an agency is required to notify the public of proposed rulemaking and provide the public with an opportunity to comment as part of the process for formulating a rule. *See* 5 U.S.C. § 553. A rule is defined by statute in relevant part as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy." 5 U.S.C. § 551(4). Plaintiff argues that the grant of the Lever-Rule protection constituted the type of rulemaking that required Customs to follow notice and comment procedures. *See* Pl.'s Mem. Supp. Appl. Prelim. Inj. 12–13.

this action relates to Customs' administration and enforcement of Lever-Rule restrictions and the exclusion of merchandise, which is a matter embraced within 28 U.S.C. § 1581(a) according to Plaintiff. *See* Compl. ¶ 4; Pl.'s Resp. Defs.' Mot. Dismiss 11–13. Plaintiff also argues that 28 U.S.C. § 1581(h) can serve as a basis for the court's jurisdiction.[13] *See* Pl.'s Suppl. Mem. Opp'n Defs.' Mot. Dismiss 10.

The U.S. Court of International Trade, like all federal courts, is one of limited jurisdiction and is "presumed to be 'without jurisdiction' unless 'the contrary appears affirmatively from the record.'" *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006) (quoting *King Iron Bridge & Mfg. Co. v. Otoe Cty.*, 120 U.S. 225, 226 (1887)). The party invoking jurisdiction must "allege sufficient facts to establish the court's jurisdiction," *id.* (citing *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936)), and therefore "bears the burden of establishing it." *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). The court must draw all reasonable inferences in favor of the non-movant when deciding a motion to dismiss for lack of jurisdiction. *See Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995).

The Court is empowered to hear civil actions brought against the United States pursuant to the specific grants of jurisdiction enumerated under 28 U.S.C. § 1581(a)–(i). Plaintiff asserts that 28 U.S.C. § 1581(h) and (i)(4) confer jurisdiction in this action. *See See* Pl.'s Resp. Defs.' Mot. Dismiss 11–13; Pl.'s Suppl. Mem. Opp'n Defs.' Mot. Dismiss 3–10. The court notes that § 1581(i) provides for the Court's residual jurisdiction[14] and may not be invoked "when jurisdiction

[13] Defendant argues that Plaintiff's "failure to plead 28 U.S.C. § 1581(h) as a possible jurisdictional ground now precludes this Court from taking jurisdiction under section 1581(h)." Defs.' Suppl. Resp. Br. 2 (citing *Autoalliance Int'l, Inc. v. United States*, 29 CIT 1082, 1091–92, 398 F. Supp. 2d 1326, 1334 (2005)). As explained later in this opinion, the court finds that jurisdiction under 28 U.S.C. § 1581(h) exists. The court notes that the existence of jurisdiction does not absolve Plaintiff from satisfying the requirement to plead the court's jurisdiction under USCIT Rule 8(a). The court is authorized, however, to permit a litigant to amend defective allegations of jurisdiction. *See* 28 U.S.C. § 1653. Accordingly, the court instructs Plaintiff to amend its jurisdictional allegations in accordance with this opinion.

[14] Under 28 U.S.C. § 1581(i), the Court has exclusive jurisdiction over:

> any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

28 U.S.C. § 1581(i).

under another subsection of § 1581 is or could have been available." *Ford Motor Co. v. United States*, 688 F.3d 1319, 1323 (Fed. Cir. 2012) (quoting *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987)). Thus, the court must determine first whether 28 U.S.C. § 1581(h) provides the court with jurisdiction prior to determining the viability of exercising jurisdiction pursuant to the court's residual jurisdiction.

An importer may seek review of a ruling prior to the importation of goods under 28 U.S.C. § 1581(h), which provides in relevant part that:

> The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, . . . relating to . . . restricted merchandise, . . . or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

28 U.S.C. § 1581(h). This provision has been interpreted to set out four requirements to establish jurisdiction: (1) judicial review must be sought prior to importation; (2) judicial review must be sought of a ruling, a refusal to issue a ruling, or a refusal to change such a ruling; (3) the ruling must relate to certain subject matter; and (4) the importer must demonstrate that irreparable harm will result unless judicial review prior to importation is obtained. *See Best Key Textiles Co. v. United States*, 777 F.3d 1356, 1360 (Fed. Cir. 2015); *Am. Air Parcel Forwarding Co.*, 718 F.2d at 1551–52. The court will address each factor in turn.

1) Judicial review must be sought prior to importation of goods

As a general rule, "judicial review pursuant to 28 U.S.C. § 1581(h) is available only for prospective transactions." *Inner Secrets/Secretly Yours, Inc. v. United States*, 18 CIT 1028, 1031, 869 F. Supp. 959, 963 (1994). Plaintiff's action does not seek to correct a decision made by Customs with regard to past imports of gray market Duracell batteries. Rather, Plaintiff's action seeks declaratory and injunctive relief with respect to prospective imports. *See* Compl. ¶¶ 1–3. Plaintiff is seeking judicial review, therefore, prior to the importation of the goods involved. The first factor under 28 U.S.C. § 1581(h) has been satisfied.

2) Judicial review must be sought of a ruling

A ruling within the meaning of 28 U.S.C. § 1581(h) is defined as "a determination by the Secretary of the Treasury as to the manner in which it will treat [a] completed transaction." H.R. Rep. 96–1235, at 52 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3758. "Internal advice" or a "general interpretive ruling" will not meet the requirements under the statute. *See id.* The decision that is the subject of this case is Customs' grant of Lever-Rule protection to Duracell U.S. on March 22, 2017, which restricted the importation of gray market Duracell battery products. The decision is not an internal advice ruling, which are rulings "available only for goods already imported and are not prospective." *See Am. Air Parcel Forwarding Co. v. United States,* 5 CIT 8, 11–12, 557 F. Supp. 605, 608, *aff'd*, 718 F.2d 1546 (Fed. Cir. 1983), *cert. denied*, 466 U.S. 937 (1984). Nor is the decision a general interpretive ruling because it "speak[s] to specific contemplated import transactions which contain identifiable merchandise and which will feel the impact of the ruling with virtual certainty." *Pagoda Trading Co. v. United States*, 6 CIT 296, 298, 577 F. Supp. 22, 24 (1983). In the decision at issue, Customs notified the public that it "granted 'Lever-Rule' protection for battery products bearing the 'DURACELL' mark, U.S. Trademark Registration No. 3,144,722/CBP Recordation No. TMK 16–01135." *See* U.S. Customs and Border Protection Grant of "Lever-Rule" Protection, 51 Cust. Bull. & Dec. No. 12 at 1 (Mar. 22, 2017). The decision identifies the merchandise with specificity and unequivocally directs Customs to restrict the importation of such merchandise, unless certain labeling requirements have been satisfied. *See id.*

Customs' own regulations support the conclusion that Customs' decision in this case is a ruling reviewable under 28 U.S.C. § 1581(h). Customs has defined a ruling as "a written statement issued by the Headquarters Office or the appropriate office of Customs as provided in this part that interprets and applies the provisions of the Customs and related laws to a specific set of facts." 19 C.F.R. § 177.1(d)(1). The definition provides that a ruling can either be "issued in response to a written request therefor . . . set forth in a letter addressed to the person making the request," or "published in the Customs Bulletin." 19 C.F.R. § 177.1(d)(1). The decision at issue in this case was (1) a written statement, (2) issued by the Headquarters Office,[15]

[15] Customs defines the "Headquarters Office" as "Regulations and Rulings, Office of International Trade at Headquarters, U.S. Customs and Border Protection, Washington, DC." 19 C.F.R. § 177.1(d)(6). The decision here was issued by the Intellectual Property Rights Branch within that office. *See* U.S. Customs and Border Protection Grant of "Lever-Rule" Protection, 51 Cust. Bull. & Dec. No. 12 at 1 (Mar. 22, 2017).

(3) published in the Customs Bulletin, and (4) interpreted 19 C.F.R. § 133.23(a)(3) as authorizing import restrictions on gray market OEM bulk packaged batteries bearing the "DURACELL" trademark. The court finds that Customs' decision falls squarely within the regulatory definition of a ruling and constitutes the type of ruling within the scope of review under 28 U.S.C. § 1581(h).[16] The second factor under 28 U.S.C. § 1581(h) has therefore been satisfied.

3) The ruling must relate to certain subject matter

To determine if the ruling relates to the necessary subject matter, the court must determine whether the ruling involves the required subject matter of 28 U.S.C. § 1581(h). *See Holford USA Ltd. Inc. v. United States*, 19 CIT 1486, 1489, 912 F. Supp. 555, 558 (1995). The Customs' Bulletin notice announced that "[i]mportation of the . . . subject gray market Duracell battery products is restricted, unless the labeling requirements of 19 CFR § 133.23(b) have been satisfied." U.S. Customs and Border Protection Grant of "Lever-Rule" Protection, 51 Cust. Bull. & Dec. No. 12 at 1 (Mar. 22, 2017). The statute expressly provides for pre-importation review of "a ruling . . . related to . . . restricted merchandise." *See* 28 U.S.C. § 1581(h). The Lever-Rule ruling at issue is, by its terms, a restriction on imports of gray market battery products bearing the Duracell trademark. Thus, the ruling relates to the subject matter of the statute. The third factor under 28 U.S.C. § 1581(h) has therefore been satisfied.

4) The importer must demonstrate that irreparable harm would occur unless judicial review prior to importation is obtained

The standard for proving irreparable harm in the context of 28 U.S.C § 1581(h) is "essentially identical to that used to determine irreparable injury in cases where injunctive relief is sought." *Otter Products, LLC. v. United States*, 38 CIT __, __, 37 F. Supp. 3d 1306, 1317 (2014) (quoting *Connor v. United States*, 24 CIT 195, 199, 2000 WL 341097 *1, *4 (2000)). While allegations of financial harm may

[16] Plaintiff argues primarily that the court possesses jurisdiction pursuant to 28 U.S.C. § 1581(i) due to apparent concerns that declaring Customs' decision a "ruling" reviewable under 28 U.S.C. § 1581(h) would prevent the court from ultimately finding that Customs' decision was a "rule" under the APA and subject to notice and comment rulemaking requirements. *See* Pl.'s Suppl. Mem. Opp'n Defs.' Mot. Dismiss 3–9. The court notes that Plaintiff's concerns are misplaced because the court may conclude that Customs' decision is both a "ruling" for purposes of 28 U.S.C. § 1581(h) and a "rule" for purposes of the APA. *See Am. Frozen Food Institute, Inc. v. United States*, 18 CIT 565, 855 F. Supp. 388 (1994) (finding that the decision made by Customs was both a ruling reviewable under 28 U.S.C. § 1581(h) and a rule subject to APA rulemaking requirements). The two are not mutually exclusive.

not rise to the level of irreparable harm, *see Sampson v. Murray*, 415 U.S. 61, 90 (1974), harm such as "[p]rice erosion, loss of goodwill, damage to reputation, and loss of business opportunities are all valid grounds for finding irreparable harm." *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012); *see also CPC Int'l, Inc. v. United States*, 19 CIT 978, 979, 896 F. Supp. 1240, 1243 (1995).

Through an affidavit from the president of XYZ Corporation, witness testimony that was subject to cross-examination during the hearing held on June 14, 2017, and an exhibit indicating that Plaintiff's shipments of batteries have been held by Customs, Plaintiff has established that it would suffer irreparable harm without pre-importation judicial review of Customs' grant of Lever-Rule protection. *See* John Doe Affidavit; Confidential Hearing; Confidential Ex. 3. Plaintiff has shown that as a result of the Lever-Rule ruling at issue, Plaintiff has lost approximately six customers (approximately 40% of its total customers), has lost revenue,[17] has had several contracts cancelled, has suffered injury to his business reputation, has suffered injury to his goodwill with long-standing customers, and has lost the confidence of his customers. *See* John Doe Affidavit ¶¶ 6–11; Confidential Hearing at 0:08:30–0:10:13, 0:34:02–0:34:12, 0:41:52–0:42:08. Plaintiff's customers canceled their orders and were reluctant to make any future purchases from Plaintiff because of concerns "that the batteries will be seized by [Customs], or that they will be exposed to suit and harassed by the [trademark owner]." John Doe Affidavit ¶ 6. Witness testimony indicated that, without judicial review at this juncture, Plaintiff would lose additional business opportunities, suffer harm to his goodwill and reputation, and be unable to continue business operations. *See* Confidential Hearing at 0:09:05–0:10:13; 0:25:44–0:26:06; *see also* John Doe Affidavit ¶¶ 6–11.

Plaintiff's witness also testified that Customs had already held Plaintiff's battery shipments.[18] *See* Confidential Hearing at 0:23:55–0:24:35; Confidential Ex. 3. Defendant confirmed that Customs held approximately six of Plaintiff's shipments while awaiting Plaintiff's posting of the bond pursuant to the temporary restraining

[17] Plaintiff's witness testified that he has lost approximately [[ ]] in business. *See* Confidential Hearing at 0:08:50–0:08:53.

[18] Plaintiff testified that the value of shipments held by Customs at the time totaled approximately [[ ]] in goods. *See* Confidential Hearing at 0:29:57–0:30:00.

order issued by the court.[19] *See id.* at 1:36:30–1:38:44; In-Person Status Conference at 0:14:41–0:15:25, June 20, 2017, ECF No. 47. Defendant clarified that Customs held Plaintiff's shipments, but would not move forward with seizure or forfeiture proceedings pursuant to the Lever-Rule until the court decides the application for a preliminary injunction and the motion to dismiss pending before this court. *See* In-Person Status Conference at 0:14:41–0:15:25. Plaintiff's witness testified that he expects several additional shipments of batteries to arrive at the port in the coming weeks,[20] which he expects also will be denied entry and will be held by Customs pursuant to the Lever-Rule. *See* Confidential Hearing at 0:22:21–0:22:31, 0:22:38–0:23:05, 0:23:47–0:23:48.

The harms alleged by Plaintiff include significant non-monetary injuries to goodwill, reputation, and customer confidence that occurred prior to importation in anticipation of Customs' application of the Lever-Rule for Duracell batteries. Plaintiff's entries may also be subject to seizure and forfeiture, absent the ability to comply with any labeling requirements imposed by Customs. If Plaintiff is unable to obtain judicial review before importation of the goods, Plaintiff will

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[19] Pursuant to USCIT Rule 65, the court required Plaintiff to post security equal to the entered value of the shipments as a condition to the temporary restraining order. *See* Temporary Restraining Order, June 1, 2017, ECF No. 32; Temporary Restraining Order Extension, June 15, 2017, ECF No. 39. Plaintiff filed a letter with the court on June 19, 2017 requesting a hearing regarding the amount of security because Customs has held all of Plaintiff's shipments of batteries pursuant to the temporary restraining order. *See* Confidential Letter re Issues Relating to Temporary Restraining Order and Security, June 19, 2017, ECF No. 42.

A hearing was held on June 20, 2017 to determine whether the security required by the temporary restraining order should be reduced. *See* In-Person Status Conference, June 20, 2017, ECF No. 47. Defendant confirmed during the hearing that a number of Plaintiff's shipments during the temporary restraining order period were not released because Plaintiff did not post the security required by the court's order. *See id.* Plaintiff requested that the court lower the required security to a one-time bond in the amount of $25,000 because Defendant is not incurring any monetary costs or damages by Customs being restrained from enforcing Lever-Rule restrictions against Plaintiff's shipments. *See* Confidential Letter re Issues Relating to Temporary Restraining Order and Security; In-Person Status Conference.

After the hearing, the court amended the security requirement to a one-time bond in the amount of $25,000. *See* Amendment to Temporary Restraining Order Extension, June 21, 2017, ECF No. 48. The Parties filed a status report confirming that Plaintiff posted the $25,000 bond and that Customs has released the holds on Plaintiff's shipments in compliance with the temporary restraining order. *See* Joint Statement, June 23, 2017, ECF No. 50. The temporary restraining order became effective when Plaintiff posted the required security with the Clerk of the Court on June 22, 2017. *See* Letter re Payment of Bond, June 22, 2017, ECF No. 49.

[20] Plaintiff's upcoming shipments total approximately [[ ]] in goods. *See* Confidential Hearing at 0:22:21–0:22:31.

experience harm that cannot be remedied by monetary relief.[21] Therefore, Plaintiff will suffer irreparable harm if it is unable to obtain judicial review prior to the importation of the merchandise. The fourth factor under 28 U.S.C. § 1581(h) has also been satisfied.[22]

The court finds that Plaintiff has alleged sufficient facts to demonstrate that the court has jurisdiction under 28 U.S.C. § 1581(h) to hear Plaintiff's claims regarding the validity of the Lever-Rule restrictions on gray market Duracell battery products. Because the court finds that it has jurisdiction under 28 U.S.C. § 1581(h), the court does not have jurisdiction under 28 U.S.C. § 1581(i)(4) in the instant case.

B. Standing and Ripeness

Defendant argues that Plaintiff's action must be dismissed, even if 28 U.S.C. § 1581 provides the court with jurisdiction, because Plaintiff does not have standing and the issues are not ripe for judicial review. *See* Defs.' Mot. Dismiss and Resp. Pl.'s Appl. Prelim. Inj. 6–17. An Article III court has authority only over actions where there is a live case or controversy. *See Liner v. Jafco, Inc.*, 375 U.S. 301, 306 (1964); *3V, Inc. v. United States*, 23 CIT 1047, 1049, 83 F. Supp. 2d 1351, 1352–53 (1999). The party bringing an action must establish that it has standing to bring suit, *see Raines v. Byrd,* 521 U.S. 811, 818 (1997) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)), and the issues raised must be ripe for judicial resolution in order to satisfy the Article III case or controversy requirement. *See Nat'l Park Hospitality Ass'n v. Dep't of Interior,* 538 U.S. 803, 807–808 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). The court explains below that this action presents a case or controversy satisfying the requirements of Article III of the U.S. Constitution.

1) Standing

Defendant asserts that, even if a provision under 28 U.S.C. § 1581 provides the court with jurisdiction, Plaintiff lacks standing to bring this action. *See* Defs.' Mot. Dismiss and Resp. Pl.'s Appl. Prelim. Inj. 6–7. "Article III standing requires plaintiffs to demonstrate: (1) that

[21] In any event, the APA does not authorize monetary relief. *See* 5 U.S.C § 702; *Wopsock v. Natchees*, 454 F.3d 1327, 1333 (Fed. Cir. 2006) (noting that "the APA does not authorize an award of money damages at all; to the contrary, section 10(a) of the APA, 5 U.S.C. § 702, specifically limits the Act to actions 'seeking relief other than money damages.'"); *Canadian Lumber Trade All. v. United States*, 30 CIT 892, 897, 441 F. Supp. 2d 1259, 1265 (2006).

[22] Defendant contends that Plaintiff has not satisfied its burden of proof under 28 U.S.C. § 2639(b). That statutory provision puts the burden on Plaintiff to demonstrate by clear and convincing evidence that it will suffer irreparable harm absent pre-importation judicial review. *See* 28 U.S.C. § 2639(b). The court finds that Plaintiff has made the required demonstration by clear and convincing evidence and has met its burden of proof.

they have suffered some injury-in-fact; (2) a causal connection between the defendant's conduct and this injury-in-fact; and (3) that this injury is redressable by the court." *Canadian Lumber Trade Alliance v. United States*, 30 CIT __, __, 425 F. Supp. 2d 1321, 1335 (2006) (citing *Lugan*, 504 U.S. at 560). Plaintiff has been engaged in the business of importing and distributing gray market Duracell batteries for over twenty-seven years. Plaintiff has already been adversely affected or aggrieved by Customs' restriction on imports of gray market Duracell batteries. *See* John Doe Affidavit ¶ 6; Confidential Hearing at 0:08:30–0:10:13, 0:34:02–0:34:12, 0:41:52–0:42:08. The harm was a direct result of Customs' decision to impose Lever-Rule restrictions on gray market Duracell batteries, as evidenced by the fact that Plaintiff's customers feared "that the batteries will be seized by [Customs], or that they will be exposed to suit and harassed by the [trademark owner]." John Doe Affidavit ¶ 6. It is within the authority of the court to hold unlawful and set aside agency rules formulated without observing procedures that are required by law or any agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See* 5 U.S.C. § 706(2). Plaintiff satisfies all three requirements.

Defendant argues that the statutory standing requirement under 28 U.S.C. § 2631 is fatal to Plaintiff's action because Plaintiff would not be able to protest the seizure of its merchandise and bring an action pursuant to 28 U.S.C. § 1581(a). *See* Defs.' Suppl. Resp. Br. 3–4. An action under 28 U.S.C. § 1581(h) may only be commenced "by the person who would have standing to bring a civil action under section 1581(a) of this title if he imported the goods involved and filed a protest which was denied, in whole or in part, under section 515 of the Tariff Act of 1930." 28 U.S.C. § 2631. The court disagrees that the scope of 28 U.S.C. § 1581(h) is strictly confined to the matters referred to in 28 U.S.C. § 1581(a) and 19 U.S.C. § 1514(a). The protest mechanism and judicial review under 28 U.S.C. § 1581(a) allow an importer to challenge Customs' decision to exclude merchandise, whereas judicial review under 28 U.S.C. § 1581(h) allows an importer to challenge a Customs ruling relating to restricted merchandise. It is axiomatic that Congress would not have used the language "restricted merchandise" had it intended to limit 28 U.S.C. § 1581(h) to the exclusion of merchandise. An examination of the legislative history reveals that the purpose of the standing provision relied upon by Defendant is to allow only importers the ability to obtain judicial review prior to the importation of merchandise "because the importer is the party directly affected by the ruling of the Secretary or his refusal to issue or change a ruling." *See* H.R. Rep. 96–1235, at 52

(1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3763–64; *see also* 19 U.S.C. § 1514(c)(2) (listing parties other than importers entitled to file a protest). The plaintiff in this action is an importer. Thus, the court finds that Plaintiff has standing to bring this action.

2) Ripeness

Defendant asserts that Plaintiff's action is not ripe for review. *See* Defs.' Mot. Dismiss and Resp. Pl.'s Appl. Prelim. Inj. 6–10. To determine whether an action taken by an agency is ripe for judicial review, the court must evaluate two factors: "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *See Nat'l Park Hospitality Ass'n*, 538 U.S. at 808 (citing *Abbott Labs.*, 387 U.S. at 149).

Issues are fit for judicial review if the agency action was final and if the issue presented is purely legal. *See Abbott Labs.*, 387 U.S. at 149; *Sys. Application & Techs., Inc. v. United States*, 691 F.3d 1374, 1384 (Fed. Cir. 2012). Customs issued a notice on January 25, 2017 that it received an application from Duracell U.S. for Lever-Rule protection for gray market batteries bearing the "DURACELL" trademark. Customs published a second notice on March 22, 2017 announcing that it granted Duracell U.S.'s application for Lever-Rule protection. Customs' decision was final because it "mark[ed] the 'consummation' of the agency's decision making process" and notified the public of the type of conduct "from which 'legal consequences will flow.'" *See Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). Customs' second notice declared definitively that the importation of the subject gray market batteries is restricted and that its decision was not subject to change or any conditions. Further, Customs' regulations provide that Lever-Rule restrictions take effect upon granting an application for protection. *See* 19 C.F.R. § 133.2(f). The issues in Plaintiff's action are purely legal because additional facts are not needed for the court to determine whether Customs was required to comply with notice and comment rulemaking requirements. *See Ohio Forestry Ass'n v. Sierra Club,* 523 U.S. 726, 733 (1998).

The court determines whether the parties will experience hardship by considering whether the impact of the agency action would be felt immediately and whether substantially irreparable consequences would result from requiring a later challenge. *See Nat'l Park Hospitality Ass'n*, 538 U.S. at 810. The hardship requirement is satisfied here because Plaintiff has shown that it has already experienced, and will continue to experience, considerable harm as a result of Customs' grant of Lever-Rule protection. *See* John Doe Affidavit ¶¶ 6–11; Confidential Hearing at 0:08:30–0:10:13,

0:34:02–0:34:12, 0:41:52–0:42:08; *see also Am. Frozen Food Institute, Inc. v. United States*, 18 CIT 565, 570 n.11, 855 F. Supp. 388, 393 n.11 (1994) (citing *Association of Food Indus., Inc. v. Von Raab*, 9 CIT 626, 627, 624 F. Supp. 1557, 1558 (1985)). The court concludes that Plaintiff's action is ripe for review because Customs' decision to grant Lever-Rule protection was a final agency action, the issues in this action would not benefit from further factual development, and Plaintiff would continue to suffer hardship without judicial review at this point in time.[23]

II. Plaintiff's Application for a Preliminary Injunction

Plaintiff's Application for a Preliminary Injunction seeks to enjoin Customs from enforcing Lever-Rule restrictions against imports of gray market Duracell batteries during the pendency of the litigation. *See* Pl.'s Appl. Prelim. Inj.; Pl.'s Mem. Supp. Appl. Prelim. Inj. 11–25. Defendant argues that Plaintiff has failed to satisfy the necessary requirements to grant the extraordinary relief sought. *See* Defs.' Mot. Dismiss and Resp. Pl.'s Appl. Prelim. Inj. 22–31. The Court generally is empowered to grant injunctive relief where appropriate, *see* 28 U.S.C. § 2643(c)(1). However, the scope of relief for actions under 28 U.S.C. § 1581(h) is limited to declaratory relief. *See* 28 U.S.C. § 2643(c)(4); *see also* H.R. Rep. 96–1235, at 61 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3773. Plaintiff's potential remedy in this action is limited to declaratory relief with respect to prospective imports because the court has jurisdiction pursuant to 28 U.S.C. § 1581(h).[24] The court accordingly denies Plaintiff's Application for a Preliminary Injunction.[25]

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[23] The court does not address the merits of the Parties' claims in this opinion, but limits its analysis to the preliminary issues raised in the motion to dismiss for lack of jurisdiction and the application for a preliminary injunction. The court will address the merits of the case at a later time as appropriate, including whether Customs' grant of the Lever-Rule protection qualifies as rulemaking within the meaning of the APA and whether a violation of the APA has occurred.

[24] Plaintiff may continue to import gray market Duracell batteries during the pendency of this litigation, but with the understanding that the goods may be held, detained, and potentially subject to seizure and forfeiture due to the Lever-Rule restrictions.

[25] Defendant contends that Plaintiff's complaint fails to state a claim upon which relief could be granted because the court does not have authority under 28 U.S.C. § 1581(h) to order injunctive relief. *See* Defs.' Suppl. Resp. Br. 9. The court finds that Defendant's contention is without merit because Plaintiff's cause of action is not limited to injunctive relief. Plaintiff also requests the court to declare null and void Customs' grant of Lever-Rule protection against the importation of gray market Duracell batteries. *See* Compl. ¶¶ 1, 3, 31–54. It is within the court's authority under 28 U.S.C. § 1581(h) to provide such declaratory relief if appropriate.

CONCLUSION

Therefore, upon consideration of Plaintiff's Application for a Preliminary Injunction, Defendants' Memorandum in Support of Their Motion to Dismiss and Response in Opposition to Plaintiff's Application for Preliminary Injunction, and all other papers and proceedings in this action, it is hereby

ORDERED that Defendant's motion to dismiss for lack of jurisdiction is denied; and it is further

ORDERED that Plaintiff shall file an amended complaint on or before July 25, 2017 to amend its jurisdictional allegations to the extent allowed by this opinion; and it is further

ORDERED that Plaintiff's application for a preliminary injunction is denied; and it is further

ORDERED that the Third Temporary Restraining Order Extension entered by this court on July 10, 2017 is dissolved and the Clerk of the Court shall return the security posted by Plaintiff; and it is further

ORDERED that Plaintiff's Application to Extend Temporary Restraining Order, ECF No. 66, is denied as moot; and it is further **ORDERED** that the Parties shall confer and submit a joint proposed scheduling order for the remainder of this action on or before August 1, 2017.

Dated: July 17, 2017
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 17–89

SUNPOWER CORPORATION et al., Plaintiff and Consolidated Plaintiffs, and CANADIAN SOLAR INC. et al., Plaintiff-Intervenors and Consolidated Plaintiff-Intervenors, v. UNITED STATES, Defendant, and SOLARWORLD AMERICAS, INC., Defendant-Intervenor and Consolidated Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Consol. Court No. 15–00067

[Sustaining the U.S. Department of Commerce's remand determination in the antidumping and countervailing duty investigations of certain crystalline silicon photovoltaic products from the People's Republic of China.]

Dated: July 21, 2017

Daniel Joseph Gerkin, Vinson & Elkins, LLP, of Washington, DC, argued for plaintiff SunPower Corporation. With him on the brief was *Jerome J. Zaucha*, K&L Gates, LLP, of Washington, DC.

Craig Anderson Lewis, Hogan Lovells US LLP, of Washington, DC, argued for consolidated plaintiffs Shanghai BYD Co., Ltd. and BYD (Shangluo) Industrial Co., Ltd. *Diana Dimitriuc-Quaia*, Arent Fox LLP, of Washington, DC, argued for consolidated plaintiffs and plaintiff-intervenors Canadian Solar Inc., Changzhou Trina Solar Energy Co., Ltd., China Sunergy (Nanjing) Co., Ltd., China Solar (Zhejiang) Co., Ltd., ET Solar Industry Ltd., Hefei JA Solar Technology Co., Ltd., Jinko Solar Co., Ltd., LDK Solar Hi-Tech (Nanchang) Co., Ltd., Perlight Solar Co., Ltd., ReneSola Jiangsu Ltd., Shanghai JA Solar Technology Co., Ltd., Shenzhen Sacred Industry Co., Ltd., Shenzhen Sungold Solar Co., Ltd., Sumec Hardware & Tools Co., Ltd., Sunny Apex Development Ltd., Wuhan FYY Technology Co., Ltd., Wuxi Suntech Power Co., Ltd., Zhongli Talesun Solar Co., Ltd., Znshine PV-Tech Co., Ltd. With her on the brief were *John Marshall Gurley* and *Julia L. Diaz*.

Neil R. Ellis, Richard L.A. Weiner, Brenda A. Jacobs, and *Rajib Pal*, Sidley Austin LLP, of Washington, DC, for plaintiff-intervenors Yingli Green Energy Holding Co., Ltd., and Yingli Green Energy Americas, Inc.

Tara Kathleen Hogan, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Scott McBride*, Assistant Chief Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance.

Timothy C. Brightbill, Wiley Rein LLP, of Washington, DC, argued for defendant-intervenor SolarWorld Americas, Inc. With him on the brief was *Laura El-Sabaawi*.

OPINION

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Commerce" or "Department") remand determination in the antidumping and countervailing duty investigations of certain crystalline silicon photovoltaic products from the People's Republic of China ("PRC" or "China"), filed pursuant to the court's order in *SunPower Corp. v.*

United States, 40 CIT __, 179 F. Supp. 3d 1286 (2016) ("*SunPower*").[1] *See* Final Results of Redetermination Pursuant to Court Order, Oct. 5, 2016, ECF No. 105–1 ("Solar II PRC Remand Results"). For the reasons set forth below, Commerce has complied with the court's order in *SunPower*, 40 CIT at __, 179 F. Supp. 3d at 1308, and Commerce's conclusions are supported by substantial evidence and in accordance with law. Commerce's remand determination is therefore sustained.

BACKGROUND

The court assumes familiarity with the facts of this case as discussed in the previous opinion, *see SunPower*, 40 CIT at __, 179 F. Supp. 3d at 1289–93, and here recounts the facts relevant to the court's review of the Solar II PRC Remand Results. This case concerns an antidumping duty ("ADD") investigation and a countervailing duty ("CVD") investigation of certain solar products from the People's Republic of China ("China" or "PRC") which is intrinsically related to an ADD investigation and CVD investigation of certain crystalline silicon photovoltaic cells ("solar cells" or "cells") from the PRC and an ADD investigation of certain solar cells from Taiwan. An overview of all three sets of investigations[2] is warranted to contextualize the current proceeding.

Initially, Commerce investigated the solar industry in China on the basis of a petition from domestic producer SolarWorld Americas, Inc. ("SolarWorld"), Defendant-Intervenor here, alleging dumping activity and countervailable subsidies injurious to the domestic solar industry ("the Solar I PRC investigations"). *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 76 Fed. Reg. 70,960 (Dep't Commerce Nov. 16, 2011) (initiation of ADD investigation); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 76 Fed. Reg. 70,966, 70,967 (Dep't Commerce Nov. 16, 2011) (initiation of CVD investigation). The Solar I PRC investigations resulted in ADD and CVD orders covering solar cells from China, including Chinese cells assembled into modules, laminates, and panels outside of China; these orders did not cover solar modules, laminates, or panels assembled in

[1] This consolidated action was originally assigned to Judge Donald C. Pogue, who remanded in *SunPower* on June 8, 2016. *See SunPower*, 40 CIT at __, 179 F. Supp. 3d at 1308. On November 18, 2016, pursuant to USCIT Rule 77(e)(4) and 28 U.S.C. § 253(c) (2012), the case was reassigned following Judge Pogue's death. Order of Reassignment, Nov. 18, 2016, ECF No. 114. Oral argument was held on April 28, 2017. *See* Oral Arg., Apr. 28, 2017, ECF No. 130.

[2] For clarification, the three sets of investigations are: i) the Solar I PRC ADD and CVD investigations; ii) the Solar II PRC ADD and CVD investigations; and iii) the Solar II Taiwan ADD investigation.

China using solar cells produced outside of China. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 77 Fed. Reg. 73,018 (Dep't Commerce Dec. 7, 2012) (amended final determination of sales at less than fair value and ADD order); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 77 Fed. Reg. 73,017 (Dep't Commerce Dec. 7, 2012) (CVD order) ("the *Solar I PRC Orders*"). Although the *Solar I PRC Orders* covered both solar cells and modules, laminates, and/or panels containing solar cells, Commerce determined that the solar cell is the origin-conferring component. *See* Issues and Decision Mem. for the Final Determination in the [ADD] Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the [PRC], A-570–979, 5–9 (Oct. 9, 2012), *available at* http://ia.ita.doc.gov/frn/summary/prc/2012–25580–1.pdf (last visited July 18, 2017) ("Solar I PRC ADD Final Decision Memo"); Issues and Decision Mem. for the Final Determination in the [CVD] Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the [PRC], C-570–980, 77–81 (Oct. 9, 2012), *available at* http://ia.ita.doc.gov/frn/summary/prc/2012–25564–1.pdf (last visited July 18, 2017) ("Solar I PRC CVD Final Decision Memo"). Further, using a substantial transformation analysis, Commerce determined that assembly of solar cells into modules, laminates, and/or panels in a third country did not change the country of origin of the merchandise.[3] Solar I PRC ADD Final Decision Memo at 5–6; Solar I PRC CVD Final Decision Memo at 77–78. Thus, solar modules, laminates, and panels assembled in a third country using Chinese solar cells are covered by the *Solar I PRC Orders*, while solar modules, laminates, and panels assembled in the PRC using non-Chinese solar cells are not covered. *See Solar I PRC Orders*.

[3] Commerce applied a "substantial transformation analysis" in the Solar I PRC investigation to ascertain the origin of the solar panels. Using this analysis,

> the Department found that solar cells are the "essential active component" that define the module/panel and that stringing third-country solar cells together and assembling them with other components into a module in the PRC does not constitute substantial transformation such that the assembled module could be considered a product of the PRC.

Solar I PRC ADD Final Decision Memo at 6; Solar I PRC CVD Final Decision Memo at 77–78. In its substantial transformation analysis, Commerce considers: 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. *See, e.g.*, Certain Crystalline Silicon Photovoltaic Products from Taiwan: Issues and Decision Mem. for the Final Determination of Sales at Less than Fair Value, A-583–853, 19 (Dec. 15, 2014), *available at* http://ia.ita.doc.gov/frn/summary/taiwan/2014–30107–1.pdf (last visited July 18, 2017).

Subsequently, SolarWorld petitioned Commerce to initiate additional proceedings related to the Chinese and Taiwanese solar industry. Pet. for Imposition of [ADD] and [CVD] Investigation, Certain Crystalline Silicon Photovoltaic Products from the [PRC] and Taiwan, ADD PD 1–8, bar codes 3171232–01–08 (Dec. 31, 2013); Pet. for Imposition of [ADD] and [CVD] Investigation, Certain Crystalline Silicon Photovoltaic Products from the [PRC] and Taiwan, CVD PD 1–8, bar codes 3171278–01–08 (Dec. 31, 2013) ("Solar II PRC and Taiwan Petition").[4] SolarWorld claimed ongoing injury to the domestic solar industry, alleging that the Chinese solar industry had, in response to the *Solar I PRC Orders*, shifted from the assembly of modules, laminates, and panels (or "panels") using Chinese cells to the assembly of panels in China using non-Chinese cells. *Id.* at 3–6 (stating that the *Solar I PRC Orders* "failed to cover Chinese solar modules assembled from non-Chinese solar cells, allowing Chinese solar producers to begin using cells fully or partially manufactured in Taiwan in the modules they assembled for export to the United States, and to export those modules, duty-free, to the U.S. market."). At the same time, the petition alleges that imports of solar cells and panels from Taiwan increased as well, causing material injury to the domestic industry. *See id.* at 2–7. On the basis of this petition, Commerce initiated a second ADD and CVD investigation of the Chinese solar industry and an ADD investigation of the Taiwanese solar industry. *Certain Crystalline Silicon Photovoltaic Products from the [PRC] and Taiwan*, 79 Fed. Reg. 4,661 (Dep't Commerce Jan. 29, 2014) (initiation of ADD investigations) ("*Solar II PRC and Taiwan ADD Initiation Notice"); Certain Crystalline Silicon Photovoltaic Products from the [PRC],* 79 Fed. Reg. 4,667 (Dep't Commerce Jan. 29, 2014) (initiation of CVD investigation) ("*Solar II PRC CVD Initiation Notice*").

These investigations resulted in two sets of orders. The investigation into the Chinese solar industry resulted in an ADD order and a CVD order covering modules, laminates, and/or panels assembled in China consisting of cells manufactured outside of China, including cells manufactured in Taiwan. *Certain Crystalline Silicon Photovoltaic Products from the [PRC]*, 80 Fed. Reg. 8,592 (Dep't Commerce Feb. 18, 2015) (ADD order; and amended final affirmative CVD

[4] On July 7, 2015, Defendant submitted indices to the public and confidential administrative records for the ADD and CVD investigations, which identify the documents that comprise the public and confidential administrative records to Commerce's final determination. The indices to these administrative records can be located at ECF No. 32. All further references to documents from the administrative records are identified by the numbers assigned by Commerce in these administrative records.

determination and CVD order) ("the *Solar II PRC Orders*"). The investigation into the Taiwanese solar industry resulted in an ADD order covering solar cells manufactured in Taiwan,[5] including Taiwanese cells assembled into modules, laminates, and/or panels outside of Taiwan, but excluding Taiwanese cells assembled into modules, laminates, and/or panels in China covered by the *Solar II PRC Orders*.[6] *Certain Crystalline Silicon Photovoltaic Products from Taiwan*, 80 Fed. Reg. 8,596 (Dep't Commerce Feb. 18, 2015) (ADD order) ("the *Solar II Taiwan Order*").[7]

The *Solar II PRC Orders* are at issue in this case. The Solar II PRC Initiation Notices stated that the

> merchandise covered by these investigations is crystalline silicon photovoltaic cells, and modules, laminates and/or panels consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including building integrated materials. For purposes of these investigations, subject merchandise also includes modules, laminates and/or panels assembled in the subject country consisting of crystalline silicon photovoltaic cells that are completed or partially manufactured within a customs territory other than that subject country, using ingots that are manufactured in the subject country, wafers that are manufactured in the subject country, or cells where the manufacturing process begins in the subject country and is completed in a non-subject country.
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[5] Petitioner did not file a CVD petition with respect to subject imports from Taiwan. *See* Solar II PRC and Taiwan Petition at 19.

[6] The *Solar II Taiwan Order* is the subject of litigation as well. *See SunEdison, Inc. v. United States*, 40 CIT __, 179 F. Supp. 3d 1309 (2016); *Kyocera Solar, Inc. and Kyocera Mexicana S.A. de C.V. v. United States*, 41 CIT __, Slip Op. 17-__ (July __, 2017). *SunEdison* linked these cases:

> 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–these same concerns are also implicated here. Accordingly, Commerce's final Solar II Taiwan scope determination must be remanded for the same reasons as those elaborated in the court's prior opinion, to ensure that the agency's approach in these proceedings is consistent.

SunEdison, Inc., 40 CIT at __, 179 F. Supp. 3d at 1321–22.

[7] Therefore, although the *Solar I PRC Orders, Solar II PRC Orders*, and *Solar II Taiwan Order* resulted from three separate sets of investigations, they are intrinsically related. The *Solar II PRC Orders* cover Chinese-assembled modules, laminates, and panels consisting of cells from any country but China. The *Solar II Taiwan Order*, on the other hand, parallels the *Solar I PRC Orders*, focusing on the location of the cells' manufacture; however, the *Solar II Taiwan Order* excludes Taiwanese cells assembled into panels in China, as those panels are within the scope of the *Solar II PRC Orders*.

> [E]xcluded from the scope of these investigations are any products covered by the existing antidumping and countervailing duty orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China. *See* [*Solar I Orders*].

Solar II PRC and Taiwan ADD Initiation Notice, 79 Fed. Reg. at 4,667; *Solar II PRC CVD Initiation Notice*, 79 Fed. Reg. at 4,671. The preliminary determination, published on July 24, 2014, contained identical scope language. *See* Decision Mem. for the Prelim. Determination in the [ADD] Investigation of Certain Crystalline Silicon Photovoltaic Products from the [PRC], A-570–010, 4–5, ADD PD 698, bar code 3217803–01 (July 24, 2014); Decision Mem. for the Prelim. Affirmative Countervailing Determination in the [CVD] Investigation of Certain Crystalline Silicon Photovoltaic Products from the [PRC], C-570–011, 4–5, CVD PD 267, bar code 3206936–01 (June 2, 2014).

The proposed scope for the Solar II PRC investigations included language which Commerce and the parties referred to as "the two out of three rule." This language provided that

> subject merchandise also includes modules, laminates and/or panels assembled in the subject country consisting of crystalline silicon photovoltaic cells that are completed or partially manufactured within a customs territory other than that subject country, using ingots that are manufactured in the subject country, wafers that are manufactured in the subject country, or cells where the manufacturing process begins in the subject country and is completed in a non-subject country.

See, e.g., Solar II PRC CVD Initiation Notice, 79 Fed. Reg. at 4,671. Defendant explained that this language was referred to as the "two-out-of-three rule" because "a product would qualify as subject merchandise if it contained Chinese input (ingots, wafers, or partially manufactured cells) and assembly of the module occurred in China," even if the cell was manufactured or completed in a third country. Def.'s Opp'n Mots. J. Admin. R. 7 n.5, Feb. 9, 2016, ECF No. 78 ("Def.'s Resp.).

Following publication of the preliminary results, on October 3, 2014, Commerce notified interested parties of a proposed revision of the scope language in an attempt to address concerns about administration and enforcement of the "two-out-of-three rule."[8] [ADD] and

[8] Commerce explained the administration and enforcement concerns with the "two-out-of-three rule":

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

[CVD] Investigations of Certain Crystalline Silicon Photovoltaic Products from the [PRC] and the [ADD] Investigation of Certain Crystalline Silicon Photovoltaic Products from Taiwan: Opportunity to Submit Scope Comments, ADD PD 765, bar code 323317301 (Oct. 3, 2014); [ADD] and [CVD] Investigations of Certain Crystalline Silicon Photovoltaic Products from the [PRC] and the [ADD] Investigation of Certain Crystalline Silicon Photovoltaic Products from Taiwan: Opportunity to Submit Scope Comments, CVD PD 349, bar code 3233174–01 (Oct. 3, 2014). The revision altered the scope to cover all modules, laminates, and/or panels assembled in China consisting of solar cells produced in a country other than China. *Id.* at 1–2.

On December 23, 2014, Commerce published the final determinations in the Solar II PRC ADD and CVD investigations. *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) ("*Solar II PRC ADD Final Results*") and accompanying Issues and Decision Mem. for the Final Determination of Sales at Less than Fair Value, A-570–010, (Dec. 15, 2014), ECF No. 32–6 ("Solar II PRC ADD Final Decision Memo"); *[CVD] Investigation of Certain Crystalline Silicon Photovoltaic Products from the [PRC]*, 79 Fed. Reg. 76,962 (Dep't Commerce Dec. 23, 2014) (final affirmative CVD determination) ("*Solar II PRC CVD Final Results*") and accompanying Issues and Decision Mem. for the Final Determination in the [CVD] Investigation of Certain Crystalline Silicon Photovoltaic Products from the [PRC], C-570–011, (Dec. 15, 2014), ECF No. 3211 ("Solar II PRC CVD Final Decision Memo"). Commerce implemented the revised scope language from the October 3, 2014 letter, removing the "two-out-of-three rule" and modifying the scope language to cover all modules, laminates, and/or panels assembled in the PRC consisting of non-Chinese solar cells:

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

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

Solar II PRC Remand Results at 22–23 (quoting Solar II PRC ADD Final Decision Memo at 13, 14, n.45; Solar II PRC CVD Final Decision Memo at 38, 40, n.215).

> . . .
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> . . . [E]xcluded from the scope of this investigation are any products covered by the existing antidumping and countervailing duty orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, laminates and/or panels, from the PRC.

Solar II PRC ADD Final Decision Memo at 4; Solar II PRC CVD Final Decision Memo at 3–4. Commerce determined that, for purposes of the *Solar II PRC Orders*, country of origin would be determined by the country in which the assembly of the panel occurred (*i.e.*, China, for all covered products).[9] Solar II PRC ADD Final Decision Memo at 15–16; Solar II PRC CVD Final Decision Memo at 41. Commerce dispensed with a substantial transformation analysis, finding that "a rote application of a substantial transformation analysis would not allow the Department to address unfair pricing decisions and/or unfair subsidization concerning the modules that is taking place in the country of export." Id.; *see* Solar II PRC Remand Results at 6. Commerce explained that its determination was based on

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

Solar II PRC Remand Results at 6. In the concurrent Solar II Taiwan investigation, however, Commerce, as it had in the Solar I PRC investigations determined that the solar cell is the origin-conferring input, reverted to a substantial transformation analysis, and determined that panel assembly does not substantially transform the cell

[9] Specifically, Commerce explained that, "[w]ith the scope clarification we have adopted for the PRC investigation, the PRC is the country of origin of all modules, laminates and/or panels assembled in the PRC that contain crystalline silicon photovoltaic cells produced in a customs territory other than the PRC." Solar II PRC ADD Final Decision Memo at 16; Solar II PRC CVD Final Decision Memo at 41.

into a different product for purposes of that investigation.[10] *See* Certain Crystalline Silicon Photovoltaic Products from Taiwan: Issues and Decision Mem. for the Final Determination of Sales at Less Than Fair Value, A-583–853, 18–23 (Dec. 15, 2014), *available at* http://ia.ita.doc.gov/frn/summary/taiwan/2014–30107–1.pdf (last visited July 18, 2017) ("Solar II Taiwan Final Decision Memo").

On March 18, 2015, Plaintiff SunPower Corporation ("SunPower") commenced this action. Summons, Mar. 18, 2015, ECF No. 1; *see* Am. Summons, Mar. 25, 2015, ECF No. 13. SunPower moved for judgment on the agency record, SunPower Corporation's Rule 56.2 Mot. J. Agency R., Oct. 5, 2015, ECF No. 60, challenging Commerce's final determination on the grounds that the agency unlawfully and the scope of the petition to include modules and panels assembled in China from cells manufactured outside of China. *See* Br. Supp. SunPower Corporation's Rule 56.2 Mot. J. Agency R. 10–25, Oct. 5, 2015, ECF No. 60 ("SunPower Br."). Specifically, SunPower argued that Commerce's scope alteration in the final determination impermissibly expanded the scope beyond the scope stated in the petition, *id.* at 10–13; was inconsistent with the agency's prior practice for determining country of origin in similar proceedings, and departed from that practice without sufficient explanation, *id.* at 13–21; and deprived parties of procedural due process. *Id.* at 21–24. SunPower also requested the court to ensure that the final scope of the *Solar II PRC Orders* applied only to subject merchandise that entered on or after publication of the antidumping duty order on February 18, 2015, or on or after publication of the final determination on December 23, 2014. *Id.* at 24.

On June 8, 2016, the court remanded the final determination for Commerce to reconsider or further explain its scope determination in the *Solar II PRC Orders*, because the court determined that

> 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

[10] However, Taiwanese solar cells assembled into modules, laminates, or panels in the PRC are excluded from the scope of the *Solar II Taiwan Order*, "to address the concerns expressed in the Petition, *i.e.*, to prevent evasion of the [*Solar I PRC Orders*] and to close the 'loophole' alleged by the Petitioners, and in light of the Department's scope determination in the concurrent PRC AD[D] and CVD investigations." Certain Crystalline Silicon Photovoltaic Products from Taiwan: Issues and Decision Mem. for the Final Determination of Sales at Less Than Fair Value, A-583–853, 23 (Dec. 15, 2014), *available at* http://ia.ita.doc.gov/frn/summary/taiwan/2014–30107–1.pdf (last visited July 18, 2017).

> change the product's country-of-origin from the country of cell-production to the country of panel-assembly.

SunPower, 40 CIT at __, 179 F. Supp. 3d at 1288–89. The court ordered that Commerce further consider and explain what appeared to be: (1) its departure from its prior practice of using a single country of origin test for a particular class or kind of merchandise; (2) Commerce's dissimilar treatment of similarly situated merchandise; and (3) Commerce's departure from its prior practice of calculating normal value using the market where the majority of production of the subject merchandise took place. *Id.*, 40 CIT at __, 179 F. Supp. 3d at 1298–1308. The court deferred consideration of Plaintiff's request that the court "prevent the retroactive application" of the revised scope language in the *Solar II PRC Orders* to entries made prior to the publication of the final *Solar II PRC Orders*.[11] *Id.*, 40 CIT at __, 179 F. Supp. 3d at 1308. On June 14, 2016, the court remanded the final determination in the Solar II Taiwan investigation "for consistency with, and based on the same reasoning as" its remand order in *SunPower, SunEdison, Inc. v. United States*, 40 CIT __, __, 179 F. Supp. 3d 1309, 1312 (2016), as "[b]oth cases concern the rules of origin for solar panels manufactured from Taiwanese cells" such that the issues in the two cases are "inextricably entwined." *Id.*, 40 CIT at __, 179 F. Supp. 3d at 1312–13.

On October 5, 2016, Commerce published the Solar II PRC Remand Results. On remand, as requested by the court, Commerce provided explanation of its determinations in the Solar II PRC and Solar II Taiwan investigations. *See* Solar II PRC Remand Results at 2–31. Commerce explained that it has the authority to modify the scope language from the initiation of the investigation to the issuance of the ADD or CVD order, *see id.* at 12–18, and that "[t]he class or kind of merchandise defined in a petition may not be exactly the same class or kind of merchandise ultimately subject to a countervailing or

[11] *SunPower* also resolved several arguments raised by the parties. Specifically, the court determined that Plaintiffs were not deprived of due process by Commerce's modification of the scope in the final determination, as the parties had, and would continue to have on remand, opportunity to raise their scope arguments; the court accordingly declared the due process challenge "moot." *SunPower*, 40 CIT at __, 179 F. Supp. 3d at 1296. Further, the court determined that the final *Solar II PRC Orders* did not cover different merchandise than the merchandise investigated in the ADD and CVD proceedings. *Id.* Finally, the court held that Commerce did not unlawfully expand the scope of the Solar II PRC investigations beyond the intent in the petition, emphasizing Commerce's authority "to modify the proposed scope as necessary to best effectuate the Petitioner's intent while ensuring that any resulting AD[D]/CVD orders are properly administrable and enforceable, based on a reasonable reading of the record and consistent with applicable legal requirements and principles." *Id.*, 40 CIT at __, 179 F. Supp. 3d at 1297.

antidumping duty order." *Id.* at 12. Commerce explained that it applied a substantial transformation test in the Solar II Taiwan investigation, *id.* at 25–26, in which it determined that cells are not substantially transformed by the process of panel assembly and thus that the cell is origin-conferring, *see* Solar II Taiwan Final Decision Memo at 18–21, but that, due to the specific pricing behaviors in the Solar II PRC investigations, Commerce applied a different origin rule for purposes of these investigations. *See* Solar II PRC Remand Results at 22–28. Commerce also explained that Taiwanese cells assembled into panels in Taiwan are excluded from the *Solar II Taiwan Order*, to avoid subjecting a product to two orders. *Id.* at 40–42.

SunPower challenges the remand determination. *See* Comments of Pls. SunPower Corporation and SunPower Corporation, Systems on Final Results of Redetermination Pursuant to Court Order, Oct. 27, 2016, ECF No. 110. Specifically, SunPower challenges the Solar II PRC Remand Results on the grounds that Commerce unlawfully created two country of origin rules for products within the same class or kind of merchandise, *id.* at 4–6; that Commerce impermissibly departed from a substantial transformation analysis in the Solar II PRC investigations, *id.* at 6–13; and that Commerce insufficiently explained its departure from a substantial transformation analysis in the Solar II PRC investigations. *Id.* at 13–14.

STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012)[12] and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of a countervailing duty order. "The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

[12] 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.

DISCUSSION

In *SunPower*, the court remanded to Commerce for further consideration and explanation of: (1) Commerce's apparent departure from its prior practice of using a single country of origin test for a particular class or kind of merchandise; (2) Commerce's dissimilar treatment of similarly situated merchandise; and (3) Commerce's departure from its prior practice of calculating normal value using the market where the majority of production of the subject merchandise took place. *SunPower*, 40 CIT at __, F. Supp. 3d at 1298–1308. The court deferred consideration of the argument that Commerce applied the *Solar II PRC Orders* to entries made prior to the publication of the final *Solar II PRC Orders*. 40 CIT at __, F. Supp. 3d at 1308. The remanded and deferred issues are addressed in turn.

A. The Class or Kind of Merchandise

The court remanded to Commerce to explain its deviation from its prior policy of applying only one rule of origin to a single class or kind of merchandise, based on the court's assumption that solar panels were a single class or kind of merchandise.[13] *SunPower*, 40 CIT at __, 179 F. Supp. 3d at 1298–1308. Relatedly, the court asked Commerce to explain how it could treat similarly situated products within the same class or kind of merchandise—solar panels consisting of non-Chinese solar cells—differently depending upon the country of panel assembly. *Id.*, 40 CIT at __, F. Supp. 3d at 1302–07.

On remand, Commerce explained its use of different origin rules in the Solar II PRC and Solar II Taiwan investigations. Commerce stated that, contrary to the court's assumption, the *Solar II PRC Orders* and *Solar II Taiwan Order* (as well as the *Solar I PRC Orders*) covered different classes or kinds of merchandise. Solar II PRC Remand Results at 16–17. Therefore, Commerce did not apply different origin rules to the same class or kind of merchandise; it applied different origin rules to different classes or kinds of merchandise. *See id.* at 22, 26. For the reasons that follow, on remand Commerce has

[13] The court found that "Commerce provides two separate grounds for this determination [to apply a different rule of origin in Solar II PRC]: (1) addressing circumvention of the Solar I PRC orders; and (2) addressing assembly-specific Chinese government subsidies. Neither is sufficient." *SunPower*, 40 CIT at __, 179 F. Supp. 3d at 1304. The court went on to state that

> 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[D]/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.

Id.

sufficiently explained that its country-of-origin analysis does not constitute application of two rules of origin to a single class or kind of merchandise.

The statute and case law instruct that the term "class or kind of merchandise" refers to the products within a particular proceeding. The term "subject merchandise" is statutorily defined as "the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, an order under this subtitle or section 1303 of this title, or a finding under the Antidumping Act, 1921." 19 U.S.C. § 1677(25). This definition of subject merchandise provides that the scope of a proceeding establishes the "class or kind of merchandise." Because the statute refers to the "class or kind of merchandise" that is within the scope, one must look to the scope itself to find the parameters of the "class or kind of merchandise." Precedent from the Court of Appeals for the Federal Circuit supports an interpretation of "class or kind of merchandise" as proceeding-specific. *See Target Corp. v. United States*, 609 F.3d 1352, 1363 (Fed. Cir. 2010) (noting, in the context of later-developed goods not specifically excluded in the order, that "[t]he kind or class of merchandise encompassed by a final antidumping order is determined by the order," citing *Smith Corona Corp. v. United States*, 915 F.2d 683, 685 (Fed. Cir. 1990) (explaining that "[t]he class or kind of merchandise encompassed by a final antidumping order is determined by the order," in affirming the holding that certain portable electronic typewriters with text memory, developed after the final order covering "all portable electronic typewriters," were within the covered class or kind of merchandise and were thus within scope)). It would be illogical for "class or kind of merchandise" to be defined by an order and simultaneously refer more broadly to products outside of or beyond a certain proceeding. A product not subject to a proceeding is therefore not of the same class or kind of merchandise as products that are subject to the proceeding, regardless of physical similarities.[14]

[14] Orders often specify exclusions. *See, e.g.*, Issues and Decision Mem. for the Administrative Review of the [ADD] Order on Diamond Sawblades and Parts Thereof from the [PRC], A-579900, 3 (Jun. 6, 2017), *available at* http://ia.ita.doc.gov/frn/summary/prc/2017–12106–1.pdf (last visited July 18, 2017); Issues and Decision Mem. for the Final Results and the Partial Rescission of the 2014–2015 [ADD] New Shipper Reviews: Multilayered Wood Flooring from the [PRC], A570–970, 3 (May 26, 2017), *available at* http://ia.ita.doc.gov/frn/summary/prc/2017–11560–1.pdf (last visited July 18, 2017); Issues and Decision Mem. for Certain Cased Pencils from the [PRC]: Final Results of [ADD] Administrative Review; 2014–2015, A-570–827, 2 (May 22, 2017), *available at* http://ia.ita.doc.gov/frn/summary/prc/2017–11053–1.pdf (last visited July 18, 2017). Since "class or kind of merchandise" refers to the merchandise that is the subject of the order, and an order can have exclusions, it would be illogical to assume that "the class or kind of merchandise" is a static, predefined type of merchandise.

On remand, in response to the court's assumption that it had applied different origin rules to the same class or kind of merchandise, Commerce explained that, pursuant to the statutory framework, the term "class or kind of merchandise" refers to the products covered within a particular proceeding.[15] *See* Solar II PRC Remand Results at 12–22. Commerce stated that the solar products covered by the *Solar II PRC Orders* therefore are not and could not be within the same class or kind of merchandise as the products covered by the *Solar II Taiwan Order*:

> the Department did not apply conflicting country-of-origin analyses to a "single" class or kind of merchandise. The Department initiated investigations (Solar I, Solar II PRC, and Taiwan Solar) into three different classes or kinds of merchandise, independently analyzed the country-of-origin of the products at issue in each, and ultimately issued final determinations as to three different classes or kinds of merchandise which, as is reflected in the Orders themselves, cover different products.

Solar II PRC Remand Results at 16. Commerce explained that "class or kind of merchandise" does not refer to a "general 'type of product,' not restricted by the merchandise specifically described as within, and limited by, the scope of the AD[D] and CVD orders." *Id.* at 35. According to Commerce, as the *Solar II PRC Orders* and *Solar II Taiwan Order* cover products within two distinct classes or kinds of merchandise, the agency did not apply two rules of origin to products within the same class or kind of merchandise.[16] *See id.* at 22, 26.

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[15] Commerce also noted that the legislative history supports an understanding of the phrase "class or kind of merchandise" as subject merchandise. Solar II Taiwan Remand Results at 20. In implementing the Uruguay Round Agreements Act of 1994, Congress modified the Tariff Act of 1930 to render certain statutory provisions consistent with the language of the WTO Antidumping Agreement and Agreement on Subsidies and Countervailing Measures. *See* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. No. 103–316 (1994). In adopting the term "subject merchandise," Congress explained:

> What formerly was referred to as the "class or kind" of merchandise subject to investigation or covered by an order is now referred to simply as the "subject merchandise." The substitution of terms from the Agreement is not, in itself, intended to affect the meaning ascribed by administrative and judicial interpretation to the replaced terms.

Id. at 4,161.

[16] Commerce also emphasized that the statute allows for an evolution in the class or kind of subject merchandise from the initial investigation to the final order. Solar II PRC Remand Results at 34–35. Commerce explained that, during the investigation, the "class or kind of merchandise" is governed by the words of the petition; once an order is published, the "class or kind of merchandise" is defined by the language of the order, and accordingly the "class or kind of merchandise" described in the final determination of an investigation may not be "identical to that upon which the Department initiated the investigation." *Id.* at 34.

On remand Commerce has sufficiently explained the basis for the two distinct rules of origin it applied in the Solar II PRC and Solar II Taiwan investigations. As the harm alleged and ultimately confirmed in the Solar II PRC investigations was specific to solar panels that had been assembled in China, it was reasonable for Commerce to determine that the appropriate country-of-origin for subject merchandise within that investigation was the country of panel assembly. At the same time, the harm alleged and ultimately confirmed in the Solar II Taiwan investigation was specific to the manufacture of solar cells in Taiwan; it accordingly was reasonable for Commerce to determine that the appropriate country-of-origin for subject merchandise within that investigation was the country of cell manufacture. The differing rules of origin appear reasonably tailored to cover the particular solar products at issue in the two sets of investigations, and reflect the particular injurious activity discovered in each investigation. Based on this understanding of the term "class or kind of merchandise" as applicable to products within a particular proceeding, the concern expressed by the court that Commerce applied more than one country-of-origin rule to products within the same class or kind of merchandise necessarily dissipates. The solar panels covered by the *Solar II PRC Orders* are not within the same class or kind of merchandise as the solar panels covered by the *Solar II Taiwan Order*.

B. Similarly Situated Products

A related but distinct issue is the court's concern that Commerce treated similarly situated products differently in the Solar II PRC proceeding than in the Solar II Taiwan proceeding. *See SunPower*, 40 CIT at __, 179 F. Supp. 3d at 1302–07. In the Solar II Consol. Court No. 15–00067 Page 22 PRC investigations, Commerce assessed ADD and CVD liability based on pricing and subsidization behavior in the country of panel assembly and, in the Solar II Taiwan investigation, consistent with prior practice Commerce assessed ADD liability based on pricing behavior in the country of cell manufacture. *See id.*, 40 CIT at __, 179 F. Supp. 3d at 1302–03. The court expressed concern that, in so doing, Commerce "applied two different rules to similarly situated products." *Id.*, 40 CIT at __, 179 F. Supp. 3d at 1303.

On remand, Commerce explained that, due to the particular circumstances present in the Solar II PRC investigations, it sought to investigate different products than in the Solar II Taiwan investigation (*i.e.*, assembled solar modules, laminates, and/or panels rather than solar cells), and it defined the scope in the Solar II PRC investigations differently as a result. *See* Solar II PRC Remand Results at

22, 27–28. Thus, it reasons that the products covered by the *Solar II PRC Orders* are not similarly situated to the products covered by the *Solar II Taiwan Order*. *Id.* at 27–28. The Solar II PRC investigations concern assembled panels while the Solar II Taiwan investigation concerns solar cells.[17] Commerce explained that it determined that China subsidizes the panel assemblies and prices panels exported to the U.S. below the prices at which those products are sold in China. *See id.* at 51–52. Therefore, the Solar II PRC investigations and orders target panel assemblies while the Solar II Taiwan (and Solar I PRC) investigations and orders target cells. Because the Solar II PRC investigations focused on allegations of injurious dumping activity and subsidization with respect to assemblies within the PRC,[18] China was the country in which the activities that led to the injurious behavior in those investigations occurred. *Id.* at 27–28. Commerce concluded that it was therefore reasonable to focus on the pricing behavior within the country of assembly, in order to fashion a remedy to address the particular injury alleged. *Id.* at 27–29, 45–47, 51–52. Commerce emphasized that the same circumstances were not present in the Taiwan investigation, which drove its decision in that investigation to focus on pricing behaviors within the country of cell manufacture.[19] *Id.* at 27–28. Thus, according to Commerce, this is not an instance of arbitrary disparate treatment of similarly situated products; on the contrary, the disparate treatment is specific to the dis-

[17] However, as discussed above, solar cells manufactured in Taiwan and assembled into panels in China are excluded from the scope of the *Solar II Taiwan Order*, to avoid overlapping coverage as these cells are within the scope of the *Solar II PRC Orders*. *See* Solar II PRC Remand Results at 40–42; *Solar II Taiwan Order; Solar II PRC Orders*.

[18] Specifically, in Solar II PRC, Commerce explained that:

> In these investigations, the alleged injury to the domestic industry stems from certain solar modules that are assembled in the PRC using cells produced in third countries, modules which are not covered by the scope of *Solar I* and, thereby, exceed the reach of the remedy afforded by the *Solar I*AD[D] and CVD orders. In addition, taking the instant PRC investigations together with *Solar I*, the Petitioner has alleged that the domestic industry is being injured as a result of the unfair pricing of cells produced in the PRC, modules containing such cells, and modules assembled in the PRC with third-country cells, as well as unfair subsidization in the PRC of both cells and modules.
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> . . . [T]here exist prior AD[D] and CVD orders on related merchandise (i.e., solar cells and modules) from the PRC – *Solar I* – and following the initiation of the *Solar I* investigations and the imposition of those orders, there has been a shift in trade flows that has resulted in increased imports of non-subject modules produced in China. Such imports – if they are dumped and/or unfairly subsidized and injurious – should not be beyond the reach of the AD[D] and CVD laws.

Solar II PRC ADD Final Decision Memo at 13; Solar II PRC CVD Final Decision Memo at 38–39.

[19] In the Solar II Taiwan investigation, Commerce concluded that, although Taiwanese cell production was injuring the U.S. industry, there were not similar concerns regarding evasion and panels assembled in Taiwan as were present in the Solar II PRC investigations:

parate conduct alleged in the petitions and discovered in the investigations, and is targeted in each proceeding to achieve an effective remedy. *See id.*

Commerce provided a reasoned basis for its different approaches in the two different cases. As discussed above, Commerce tailored the Solar II PRC investigations to address injurious pricing decisions for and subsidization of solar panels assembled in China using non-Chinese cells, and therefore reasonably constructed a country-of-origin rule that focused on that panel assembly.[20] Commerce adequately explained that this deviation from prior practice was due to the circumstances in the Solar II PRC investigations that warranted a unique response in order to fashion a remedy for the injurious pricing behavior alleged and found. Fashioning remedies based on the unique circumstances present in the Solar II PRC and Solar II Taiwan investigations did not result in disparate treatment of similarly situated products; these products were situated differently, as Taiwanese cells assembled into panels in third countries are not subject to the subsidies and dumping behaviors present in the Chinese market. Commerce has sufficiently explained the reasons for its disparate treatment of these solar products. *Save Domestic Oil, Inc. v. United States*, 357 F.3d 1278, 1283–84 (Fed. Cir. 2004) ("[I]f Commerce has a routine practice for addressing like situations, it must either apply that practice or provide a reasonable explanation as to why it departs therefrom.").

> [A]lthough Petitioner has claimed that it wishes Taiwanese modules to be covered by the scope of this investigation, all facts it alleged with respect to the modification of the exporters' commercial activity to avoid the payment of duties under the *Solar I* orders pertained to modules, laminates and panels using Taiwanese solar cells and not solar modules assembled in Taiwan using third country cells. Furthermore, [Petitioner] did not provide evidence on the record that indicates that Taiwanese modules produced using third country cells are being dumped or used to evade the application of any existing AD[D] or CVD order. In fact, nearly all U.S. sales reported by the Taiwanese mandatory respondents were sales of solar cells, not sales of solar modules. . . Therefore, in light of our determination that the module assembly in Taiwan does not constitute substantial transformation, we have determined that the substantial evidence on the record does not support the inclusion of solar modules assembled in Taiwan using third country cells in the scope of this investigation.

Solar II Taiwan Final Decision Memo at 23.

[20] In *SunEdison*, the court addressed the argument that solar products that are further manufactured in a third country may not be included in the scope of the order absent a finding of circumvention pursuant to 19 U.S.C. § 1677j(b). *SunEdison*, 40 CIT at __, 179 F. Supp. 3d at 1319–20. The court determined that 19 U.S.C. § 1677j(b) "applies to circumstances where an order with a defined scope is already in effect." *SunEdison*, 40 CIT at __, 179 F. Supp. 3d at 1319. In the present case, it is not alleged that Commerce was required to address petitioner's circumvention concerns by using the anti-circumvention statute, 19 U.S.C. § 1677j.

C. Normal Value

The court sought further explanation or reconsideration from Commerce regarding its decision to base duty assessments on the Chinese market in the Solar II PRC investigations. *SunPower*, 40 CIT at __, 179 F. Supp. 3d at 1305–07. The court emphasized that Commerce did not consider whether comparing the Chinese price for the finished product to the U.S. export price constituted a "fair comparison" as required by statute, and that Commerce did not explain its deviation from its past practice of assessing antidumping and countervailing duty liability on the market of essential production. *Id.* The court remanded for Commerce to explain or reconsider this determination.[21] *Id.* at 1307.

The statute requires that Commerce compare normal value (the price at which the subject merchandise sells in the country of export (*i.e.*, home market)) and the export price (the price at which the subject merchandise sells in the U.S.).[22] 19 U.S.C. §§ 1673, 1677b(a).[23] The statute instructs that, "to achieve a fair comparison" of the normal value and the export price,[24] normal value of the subject merchandise shall be determined by "the price at which the foreign like product is first sold . . . for consumption in the exporting country. . ."[25] 19 U.S.C. § 1677b(a)(1)(B). Thus, a fair comparison is achieved when the price at which the foreign like product is sold in

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[21] The court stated that

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

SunPower, 40 CIT at __, 179 F. Supp. 3d at 1305.

[22] Pursuant to 19 U.S.C. § 1677b(a), to determine whether subject merchandise is being or is likely to be sold at less than fair value in the United States, "a fair comparison shall be made between the export price or constructed export price and normal value." 19 U.S.C. § 1677b(a).

[23] In *SunPower*, the court noted that "these problematic aspects of Commerce's Solar II PRC decision affect most directly the agency's AD[D], rather than its CVD, analysis," because the ADD statute requires Commerce to calculate normal value of the finished product on the basis of a single foreign market while the CVD statute does not contain a similar requirement. *SunPower*, 40 CIT at __, 179 F. Supp. 3d at 1307–08; *see* 19 U.S.C. § 1671. The court noted that, "[n]onetheless, Commerce has consistently held that, as with AD[D] liability, CVD liability must also be based on a single foreign market's subsidy analysis." *SunPower*, 40 CIT at __, 179 F. Supp. 3d at 1308.

[24] Export price is the price at which the subject merchandise is sold (or agreed to be sold) before importation by the foreign producer or exporter to an unaffiliated purchaser in the United States or for exportation to the United States. 19 U.S.C. § 1677a(a).

[25] "Foreign like product" is defined as:

> merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made:

the exporting country is compared to the price at which the subject merchandise is sold in or to the United States.

The subject merchandise, its physical attributes and its country of origin, is defined by the scope which is set by Commerce (*e.g.*, widgets from China). *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096–97 (Fed. Cir. 2002). To say that a product is "from China" necessarily raises the question of what it means to be "from" a country. Commerce often answers this question by using a substantial transformation test with reference to the merchandise described in the order; but Commerce can answer this question by using the words of the order or some other analysis. *SunEdison, Inc.*, 40 CIT at __, 179 F. Supp. at 1320 ("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."); *see also Duferco Steel, Inc.*, 296 F.3d at 1097.

The origin established by Commerce, using a reasonable means it chooses, determines the relevant market for the purpose of assessing duty. The country-of-origin establishes the country by which normal value is determined. *See* 19 U.S.C. § 1677b(a)(1)(B). Where Commerce employs a substantial transformation test, a test that looks to where the most essential manufacturing occurs, the comparison market will be the market where the essential manufacturing occurs.[26] If Commerce chooses not to apply the substantial transformation test, the relevant market will be a function of the origin rule that Commerce chooses to apply instead.

(A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
(B) Merchandise—
(i) produced in the same country and by the same person as the subject merchandise,
(ii) like that merchandise in component material or materials and in the purposes for which used, and
(iii) approximately equal in commercial value to that merchandise.
(C) Merchandise—
(i) produced in the same country and by the same person and of the same general class or kind as the subject merchandise,
(ii) like that merchandise in the purposes for which used, and
(iii) which the administering authority determines may reasonably be compared with that merchandise.

19 U.S.C. § 1677(16).

[26] Commerce's essential production test is a derivative of the substantial transformation test, in which Commerce considers, *inter alia*, whether the essential component of the merchandise is substantially transformed in the country of exportation. *See, e.g.*, Certain Crystalline Silicon Photovoltaic Products from Taiwan: Issues and Decision Mem. for the Final Determination of Sales at Less than Fair Value, A-583–853, 18–19 (Dec. 15, 2014), *available at* http://ia.ita.doc.gov/frn/summary/taiwan/2014–30107–1.pdf (last visited July 18, 2017).

Commerce explained that the statute does not require a fair comparison based on the country where most of the production occurs, requiring only that a fair comparison be made between normal value and export price. *See* Solar II PRC Remand Results at 30–31. Commerce emphasized that, pursuant to the statute, the agency must be able to, "where appropriate, address unfair pricing decisions or unfair subsidization that is taking place in the exporting country where further manufacturing, such as assembly, occurs, notwithstanding that such activities may not necessarily result in a substantial transformation of merchandise." Solar II PRC ADD Final Decision Memo at 15; Solar II PRC CVD Final Decision Memo at 41. Reasonably discernible from Commerce's explanation is that the proper market for normal value is not necessarily the market where most of the production occurs.[27] Rather, the proper market for normal value is the market of origin as determined by Commerce's origin test in any given situation. As discussed above, in the Solar II PRC investigations, because the petitions alleged dumping and subsidization activities during panel assembly within the PRC, and because Commerce found that panels assembled in China using non-Chinese solar cells were being subsidized in China and dumped in the United States, Commerce applied a country of origin rule based on the country of panel assembly. *See* Solar II PRC Remand Results at 22–26. Commerce explained that this focus on China as the location of "qualitatively" significant production activity caused the agency to base normal value on the Chinese market, "without regard to where the majority of production may have taken place." *See id.* at 28–31.

Commerce has sufficiently explained why its methodology for determining normal value is different in the Solar II PRC and Solar II Taiwan investigations. For each order, Commerce must identify the home market for the purpose of determining normal value. The statute does not require Commerce to base normal value on the country of essential production. While Commerce looks to the country of essential production in the Solar II Taiwan investigation, Commerce may deviate from prior practice as long as it explains why doing so is justified under the circumstances. *Save Domestic Oil, Inc.*, 357 F.3d at 1283–84 ("[I]f Commerce has a routine practice for addressing like

[27] It is reasonably discernible that Commerce's objective in choosing an origin test is to determine the country of export for purposes of ascertaining normal value. It is also reasonably discernable that Commerce believes the substantial transformation test adequately identifies the relevant market for normal value when the objectionable pricing decisions relate to a particular component. The test identifies where that origin-conferring component was last transformed and the country of export/home market will be where that component last underwent a substantial transformation. However, when the objectionable pricing activities relate to a finished product, *i.e.*, an assembled solar module, the substantial transformation test may not capture all the objectionable activities.

situations, it must either apply that practice or provide a reasonable explanation as to why it departs therefrom."). Here, the subject merchandise is solar modules, laminates, and/or panels assembled in the PRC, which are exported to the United States from China. Pursuant to the statute, Commerce must compare the price at which the foreign like product is sold in the home market to the price at which the imported solar panels are sold in the United States. Commerce did this here, and its assessment of antidumping duties based on normal value in China was therefore reasonable.

D. Retroactive application of the scope determination

Finally, in *SunPower* the court deferred consideration of SunPower's argument that "Commerce unlawfully applied the final *Solar II PRC* scope determinations to entries made prior to the publication of the AD[D] and CVD orders."[28] *SunPower*, 40 CIT at __, 179 F. Supp. 3d at 1308. SunPower argues that, should the court sustain Commerce's scope determination, the court should order that determination only applies prospectively. SunPower Br. 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 [ADD] 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.").

SunPower does not point to anything that supports the implication that Commerce's order applies to merchandise entered prior to publication of the final antidumping duty order. Defendant cites Commerce's instructions to U.S. Customs and Border Protection ("CBP") to suspend liquidation and collect cash deposits as of the date of publication of the *Solar II PRC ADD Final Results* and *Solar II PRC CVD Final Results* on December 23, 2014, and Commerce's subsequent instructions (adjusted to reflect subsidy offsets) to CBP to suspend liquidation and collect cash deposits as of the date of publication of the Solar II PRC ADD and CVD orders on February 18, 2015. Def.'s Resp. 49–50. Indeed, Commerce instructed CBP to suspend liquidation of, and collect cash deposits at the final rate for, subject merchandise within the final scope which was "entered, or withdrawn from warehouse, for consumption on or after 12/23/2014," the date of the publication of the *Solar II PRC ADD Final Results. See* CBP Instructions Pertaining to Final ADD Determination, Message No. 5002303, A-470–010, ADD PD 833, bar code 3251068–01 (Jan. 2,

[28] This argument was also raised by former Consolidated Plaintiff Suniva, Inc.; however, *Suniva, Inc. v. United States*, Court No. 15–00071, was severed from the consolidated action and subsequently dismissed. *See* Order, May 16, 2017, ECF No. 133.

2015). Commerce subsequently instructed CBP to suspend liquidation and collect ADD cash deposits at rates "adjusted to reflect the subsidy offsets determined in the companion [CVD] proceeding," as of February 18, 2015, the date of publication of the final ADD and CVD orders. *See* CBP Instructions Pertaining to Interested Parties Order Instructions, Message No. 5051302, ADD PD 847, bar code 3271944–01 (Apr. 23, 2015). Commerce instructed CBP to suspend liquidation and collect CVD cash deposits at the final subsidy rates, as of February 10, 2015, "the date of publication of the International Trade Commission's final determination in the Federal Register." *See* CBP Instructions Pertaining to Interested Parties Amended Final and CVD Order, Message No. 5051303, CVD PD 416, bar code 3261675–01 (Feb. 20, 2015). SunPower states that, "if Defendant's position is that the expanded scope, as embodied in the Department's scope 'clarification,' is not being applied to entries prior to the date of the final determinations, we agree with the Defendant's position." Reply Br. Pls. SunPower Corporation and SunPower Corporation, Systems 21, Mar. 29, 2016, ECF No. 91. That is Defendant's position. *See* Def.'s Resp. at 49–50. Accordingly, there is no dispute to resolve with respect to this issue.

CONCLUSION

For the foregoing reasons, the remand determination in the antidumping and countervailing duty investigations of certain crystalline silicon photovoltaic products from the People's Republic of China are found to comply with the court's order in *SunPower*, 40 CIT at __, 179 F. Supp. 3d at 1308, and the conclusions are supported by substantial evidence and in accordance with law. Judgment will enter accordingly.

Dated: July 21, 2017
New York, New York

/*s*/ *Claire R. Kelly*
CLAIRE R. KELLY, JUDGE

Slip Op. 17–90

KYOCERA SOLAR, INC. and KYOCERA MEXICANA S.A. de C.V., Plaintiffs, v. UNITED STATES, Defendant, and SOLARWORLD AMERICAS, INC., Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 15–000811[1]

[Sustaining the Department of Commerce's remand determination in the antidumping investigation of certain crystalline silicon photovoltaic products from Taiwan.]

Dated: July 21, 2017

J. Kevin Horgan, deKieffer & Horgan, PLLC, of Washington, DC, argued for plaintiffs Kyocera Solar, Inc. and Kyocera Mexicana S.A. de C.V. With him on the brief was *Alexandra H. Salzman*.

Joshua E. Kurland and *Agatha Koprowski*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for the defendant. With them on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel was *Scott McBride*, Assistant Chief Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Timothy C. Brightbill, Wiley Rein LLP, of Washington, DC, argued for defendant-intervenor SolarWorld Americas, Inc. With him on the brief was *Laura El-Sabaawi*.

OPINION

Kelly, Judge:

Before the court for review is the U.S. Department of Commerce's ("Commerce" or "Department") remand determination in the antidumping investigation of certain crystalline silicon photovoltaic products from Taiwan, filed pursuant to the court's order in *SunEdison,*

[1] Plaintiffs Kyocera Solar, Inc. and Kyocera Mexicana S.A. de C.V initiated the present case on March 20, 2015. Summons, Mar. 20, 2015, ECF No. 1, Court No. 15–00081. On July 1, 2015, *Kyocera Solar, Inc. and Kyocera Mexicana S.A. de C.V. v. United States*, Court No. 15–00081, was consolidated under *SunEdison, Inc. v. United States*, Consol. Court No. 15–00066. *See* Order, July 1, 2015, ECF No. 21, Court Nos. 15–00066 & 15–00081. The previous opinion in these proceedings, ordering remand to the Department of Commerce, was accordingly published under *SunEdison, Inc. v. United States*, Consol. Court No. 15–00066 on June 14, 2016. *See SunEdison, Inc. v. United States*, 39 CIT __, 179 F. Supp. 3d 1309 (2016). Subsequently, on April 20, 2017, SunEdison, Inc., original Plaintiff in *SunEdison, Inc. v. United States*, Court No. 15–00066, filed a stipulation of dismissal. Stipulation of Dismissal, Apr. 20, 2017, ECF No. 93, Court No. 15–00066. On April 21, 2017, *SunEdison, Inc. v. United States*, Court No. 15–00066, and *Kyocera Solar, Inc. and Kyocera Mexicana S.A. de C.V. v. United States*, Court No. 15–00081, were severed and deconsolidated; *SunEdison, Inc. v. United States*, Court No. 15–00066, was dismissed with prejudice; and *Kyocera Solar, Inc. and Kyocera Mexicana S.A. de C.V. v. United States*, Court No. 15–00081, was reinstated. Order, Apr. 21, 2017, ECF No. 94.

Inc. v. United States, 40 CIT __, 179 F. Supp. 3d 1309 (2016).[2] *See* Final Results of Redetermination Pursuant to Court Order, Oct. 5, 2016, ECF No. 75–1[3] ("Solar II Taiwan Remand Results"). For the reasons set forth below, the court sustains Commerce's redetermination because Commerce has complied with the court's order in *SunEdison*, 40 CIT __, 179 F. Supp. 3d 1309, and Commerce's conclusions are supported by substantial evidence.

BACKGROUND

The court assumes familiarity with the facts of this case as discussed in the previous opinion, *see SunEdison*, 40 CIT at __, 179 F. Supp. 3d at 1312–16, and here recounts the facts relevant to the court's review of the Solar II Taiwan Remand Results. This case concerns an antidumping duty ("ADD") investigation of certain solar products from Taiwan which is intrinsically related to two sets of ADD and countervailing duty ("CVD") investigations covering certain solar products from the People's Republic of China ("China" or "PRC"). An overview of all three sets of investigations[4] is warranted to contextualize the current proceeding.

Initially, Commerce investigated the solar industry in China on the basis of a petition from domestic producer SolarWorld Americas, Inc. ("SolarWorld"), Defendant-Intervenor here, alleging dumping activity and countervailable subsidies injurious to the domestic solar industry ("the Solar I PRC investigations"). *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 76 Fed. Reg. 70,960 (Dep't Commerce Nov. 16, 2011) (initiation of ADD investigation); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 76 Fed. Reg. 70,966, 70,967 (Dep't Commerce Nov.

[2] This consolidated action was originally assigned to Judge Donald C. Pogue, who remanded in *SunEdison* on June 14, 2016. *See SunEdison*, 40 CIT at __, 179 F. Supp. 3d at 1312, 1326. On November 18, 2016, pursuant to USCIT Rule 77(e)(4) and 28 U.S.C. § 253(c) (2012), the case was reassigned following Judge Pogue's death. Order of Reassignment, Court No. 15–00066, Nov. 18, 2016, ECF No. 80. Oral argument was held on April 28, 2017. *See* Oral Arg., Consol. Court No. 15–00081, Apr. 28, 2017, ECF No. 26.

[3] All docketed documents cited in this opinion that were filed prior to April 21, 2017 are located on the docket of *SunEdison, Inc. v. United States*, Court No. 15–00066, and the cites provided are to that docket. *See* Order, Apr. 21, 2017, ECF No. 94 (ordering all documents filed on the docket of *SunEdison, Inc. v. United States*, Court No. 15–00066 that are pertinent to *Kyocera Solar, Inc. and Kyocera Mexicana S.A. de C.V. v. United States*, Court No. 15–00081, incorporated by reference to the docket of *Kyocera Solar, Inc. and Kyocera Mexicana S.A. de C.V. v. United States*, Court No. 15–00081). All docketed documents cited in this opinion that were filed after April 21, 2017 are located on the docket of *Kyocera Solar, Inc. and Kyocera Mexicana S.A. de C.V. v. United States*, Court No. 15–00081, and the cites provided are to that docket.

[4] For clarification, the three sets of investigations are: i) the Solar I PRC ADD and CVD investigations; ii) the Solar II PRC ADD and CVD investigations; and iii) the Solar II Taiwan ADD investigation.

16, 2011) (initiation of CVD investigation). The Solar I PRC investigations resulted in ADD and CVD orders covering crystalline silicon photovoltaic cells ("solar cells" or "cells") from China, including Chinese cells assembled into modules, laminates, and panels outside of China ("the *Solar I PRC Orders*"); these orders did not cover solar modules, laminates, or panels assembled in China using solar cells produced outside of China. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 77 Fed. Reg. 73,018 (Dep't Commerce Dec. 7, 2012) (amended final determination of sales at less than fair value and ADD order); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 77 Fed. Reg. 73,017 (Dep't Commerce Dec. 7, 2012) (CVD order) ("the *Solar I PRC Orders*"). Although the *Solar I PRC Orders* covered both solar cells and modules, laminates, and/or panels containing solar cells, Commerce determined that the solar cell is the origin-conferring component. *See* Issues and Decision Mem. for the Final Determination in the [ADD] Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the [PRC], A-570–979, 5–9 (Oct. 9, 2012), *available at* http://ia.ita.doc.gov/frn/summary/prc/2012–25580–1.pdf (last visited July 12, 2017) ("Solar I PRC ADD Final Decision Memo"); Issues and Decision Mem. for the Final Determination in the [CVD] Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the [PRC], C-570–980, 77–81 (Oct. 9, 2012), *available at* http://ia.ita.doc.gov/frn/summary/prc/2012–25564–1.pdf (last visited July 12, 2017) ("Solar I PRC CVD Final Decision Memo"). Further, using a substantial transformation analysis, Commerce determined that assembly of solar cells into modules, laminates, and/or panels in a third country did not change the country of origin of the merchandise.[5] Solar I PRC ADD Final Decision Memo at 5–6; Solar I PRC

[5] Commerce applied a "substantial transformation analysis" in the Solar I PRC investigations to ascertain the origin of the solar panels. Using this analysis,

> the Department found that solar cells are the "essential active component" that define the module/panel and that stringing third-country solar cells together and assembling them with other components into a module in the PRC does not constitute substantial transformation such that the assembled module could be considered a product of the PRC.

Solar I PRC ADD Final Decision Memo at 6; Solar I PRC CVD Final Decision Memo at 77–78. In its substantial transformation analysis, Commerce considers: 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. *See, e.g.,* Certain Crystalline Silicon Photovoltaic Products from Taiwan: Issues and Decision Mem. for the Final Determination of Sales at Less than Fair Value, A-583–853, 19 (Dec. 15, 2014), ECF No. 23–2.

CVD Final Decision Memo at 77–78. Thus, solar modules, laminates, and panels assembled in a third country using Chinese solar cells are covered by the *Solar I PRC Orders*, while solar modules, laminates, and panels assembled in the PRC using non-Chinese solar cells are not covered. *See Solar I PRC Orders*.

Subsequently, SolarWorld petitioned Commerce to initiate additional proceedings related to the Chinese and Taiwanese solar industries. Pet. for Imposition of [ADD] and [CVD] Investigation, Certain Crystalline Silicon Photovoltaic Products from the [PRC] and Taiwan, PD 1–8, bar codes 3171322–01–08 (Dec. 31, 2013) ("Solar II PRC and Taiwan Petition").[6] SolarWorld claimed ongoing injury to the domestic solar industry, alleging that the Chinese solar industry had, in response to the *Solar I PRC Orders*, shifted from the assembly of modules, laminates, and panels (or "panels") using Chinese cells to the assembly of panels in China using non-Chinese cells and to the manufacture of cells and assembly of panels in Taiwan.[7] *Id.* at 3–6 (stating that the *Solar I PRC Orders* "failed to cover Chinese solar modules assembled from non-Chinese solar cells, allowing Chinese solar producers to begin using cells fully or partially manufactured in Taiwan in the modules they assembled for export to the United States, and to export those modules, duty-free, to the U.S. market."). At the same time, the petition alleges that imports of solar cells and panels from Taiwan increased as well, causing material injury to the domestic industry. *See id.* at 2–7. On the basis of this petition, Commerce initiated a second ADD and CVD investigation of the Chinese solar industry and an ADD investigation of the Taiwanese solar industry. *Certain Crystalline Silicon Photovoltaic Products from the [PRC] and Taiwan*, 79 Fed. Reg. 4,661 (Dep't Commerce Jan. 29, 2014) (initiation of ADD investigations) ("*Solar II PRC and Taiwan ADD Initiation Notice*"); *Certain Crystalline Silicon Photovoltaic Products from the [PRC]*, 79 Fed. Reg. 4,667 (Dep't Commerce Jan. 29, 2014) (initiation of CVD investigation) ("*Solar II PRC CVD Initiation Notice*").

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[6] On July 2, 2015, Defendant submitted indices to the public and confidential administrative records, which identify the documents that comprise the public and confidential administrative records to Commerce's final determination. The indices to these administrative records can be located at ECF No. 22, on the docket of *SunEdison, Inc. v. United States*, Court No. 15–00066. All further references to documents from the administrative records are identified by the numbers assigned by Commerce in these administrative records.

[7] Petitioners SolarWorld, Defendant-Intervenors here, alleged that, following issuance of the *Solar I Order*, Chinese companies began exporting solar panels to the United States that were assembled in China using solar cells "completed or partially manufactured in Taiwan or other countries," rather than using cells manufactured in China, as had been done prior to the *Solar I* Order. Solar II PRC and Taiwan Petition at 5–6.

These investigations resulted in two sets of orders. The investigation into the Chinese solar industry resulted in an ADD order and a CVD order covering modules, laminates, and/or panels assembled in China consisting of cells manufactured outside of China, including cells manufactured in Taiwan. *Certain Crystalline Silicon Photovoltaic Products from the [PRC]*, 80 Fed. Reg. 8,592 (Dep't Commerce Feb. 18, 2015) (ADD order; and amended final affirmative CVD determination and CVD order) ("the *Solar II PRC Orders*").[8] The investigation into the Taiwanese solar industry resulted in an ADD order covering solar cells manufactured in Taiwan,[9] including Taiwanese cells assembled into modules, laminates, and/or panels outside of Taiwan, but excluding Taiwanese cells assembled into modules, laminates, and/or panels in China covered by the *Solar II PRC Orders*. *Certain Crystalline Silicon Photovoltaic Products from Taiwan*, 80 Fed. Reg. 8,596 (Dep't Commerce Feb. 18, 2015) (ADD order) ("the *Solar II Taiwan Order*").[10]

The *Solar II Taiwan Order* is at issue in this case. The petition alleged injury to the domestic industry from imports of certain solar products from Taiwan, Solar II PRC and Taiwan Petition at 5–6, and the *Solar II Initiation Notice* indicated that the investigation would cover:

> [C]rystalline silicon photovoltaic cells, and modules, laminates and/or panels consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including building integrated materials. For purposes of these investigations, subject merchandise also includes modules, laminates and/or panels assembled in the subject country consisting of crystalline silicon photovoltaic cells that are completed

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[8] The *Solar II PRC Orders* are the subject of litigation as well. *See SunPower Corp. v. United States*, 40 CIT __, 179 F. Supp. 3d 1286 (2016); *SunPower Corp. v. United States*, 41 CIT __, Slip Op. 17-__ (July __, 2017). *SunEdison* linked these cases:

> 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–these same concerns are also implicated here. Accordingly, Commerce's final Solar II Taiwan scope determination must be remanded for the same reasons as those elaborated in the court's prior opinion, to ensure that the agency's approach in these proceedings is consistent.

SunEdison, Inc., 40 CIT at __, 179 F. Supp. 3d at 1321–22.

[9] Petitioner did not file a CVD petition with respect to subject imports from Taiwan. Solar II PRC and Taiwan Petition at 19.

[10] Therefore, although the *Solar I PRC Orders*, *Solar II PRC Orders*, and *Solar II Taiwan Order* resulted from three separate sets of investigations, they are intrinsically related. The *Solar II PRC Orders* cover Chinese-assembled modules, laminates, and panels consisting of cells from any country but China. The *Solar II Taiwan Order*, on the other hand, parallels the *Solar I PRC Orders*, focusing on the location of the cells' manufacture; however, the *Solar II Taiwan Order* excludes Taiwanese cells assembled into panels in China, as those panels are within the scope of the *Solar II PRC Orders*.

> or partially manufactured within a customs territory other than that subject country, using ingots that are manufactured in the subject country, wafers that are manufactured in the subject country, or cells where the manufacturing process begins in the subject country and is completed in a non-subject country.
>
> . . . .
>
> Also excluded from the scope of these investigations are any products covered by the existing antidumping and countervailing duty orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China. [*See Solar I PRC Order*].

See Solar II PRC and Taiwan ADD Initiation Notice, 79 Fed. Reg. at 4,667. Panels assembled in third-countries using Taiwanese cells were not explicitly included or excluded in the scope of the investigation at the outset of the investigation. However, as noted above, at this stage of the proceeding the scope language included what the parties refer to as the "two-out-of-three rule," providing that modules, laminates, and/or panels assembled in Taiwan using third-country cells comprised of Taiwanese ingots or Taiwanese wafers, and cells that were partially manufactured in Taiwan, were included as subject merchandise.[11]

Kyocera Solar, Inc. and Kyocera Mexicana S.A. de C.V. (collectively "Kyocera") are affiliated entities within the Kyocera Corporation, "one of the world's largest vertically-integrated producers and suppliers of solar energy modules." Kyocera Solar, Inc. and Kyocera Mexicana S.A. de C.V. Mem. Supp. Mot. J. Agency R. 3, Nov. 4, 2015,

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[11] The "two-out-of-three rule" refers to the scope language providing that subject merchandise includes modules, laminates, and/or panels assembled in Taiwan using third-country cells comprised of Taiwanese ingots or Taiwanese wafers, and cells that were at least partially manufactured in Taiwan. *Solar II PRC and Taiwan ADD Initiation Notice*, 79 Fed. Reg. at 4,667 ("modules, laminates and/or panels assembled in the subject country consisting of crystalline silicon photovoltaic cells that are completed or partially manufactured within a customs territory other than that subject country, using ingots that are manufactured in the subject country, wafers that are manufactured in the subject country, or cells where the manufacturing process begins in the subject country and is completed in a non-subject country.").

The preliminary determination was published on July 31, 2014. *Certain Crystalline Silicon Photovoltaic Products from Taiwan*, 79 Fed. Reg. 44,395 (Dep't Commerce July 31, 2014) (affirmative preliminary determination of sales at less than fair value and postponement of final determination) ("*Prelim. Results*") and accompanying Decision Mem. for the Prelim. Determination in the [ADD] Investigation: Certain Crystalline Silicon Photovoltaic Products from Taiwan, A-583–853, (July 24, 2014), *available at* http://ia.ita.doc.gov/frn/summary/taiwan/2014–18055–1.pdf (last visited July 18, 2017) ("Prelim. Decision Memo"). It maintained the "two-out-of-three rule." *See Prelim. Results*, 79 Fed. Reg. at 44,395; Prelim. Decision Memo at 4–5. Commerce selected Gintech Energy Corporation and Motech Industries, Inc. as mandatory respondents, two Taiwanese companies producing/exporting subject merchandise. *See Prelim. Results*, 79 Fed. Reg. at 44,395–96; Prelim. Decision Memo at 2.

ECF No. 30 ("Kyocera 56.2 Br."). Kyocera Solar, Inc. is a U.S. importer of solar panels, headquartered in the United States, and Kyocera Mexicana S.A. de C.V. is a Mexico-based foreign manufacturer of solar panels, which it assembles at its plant in Mexico using solar cells manufactured in other countries, including Taiwan. *See id.* at 3–5. On September 15, 2014, Kyocera requested Commerce to clarify the scope of the investigation and to find Kyocera's solar panels assembled in Mexico using Taiwanese cells outside the scope of the investigation.[12] Certain Crystalline Silicon Photovoltaic Products from Taiwan: Request for Scope Determination re Solar Products from Mexico, PD 337, bar code 3228306–01 (Sept. 15, 2014). Kyocera did not receive a response from Commerce to this scope ruling request. *See* Kyocera 56.2 Br. 24.

On October 3, 2014, Commerce notified interested parties of a proposed revision of the scope language, seeking comment on the same.[13] [ADD] and [CVD] Investigations of Certain Crystalline Silicon Photovoltaic Products from the [PRC] and the [ADD] Investigation of Certain Crystalline Silicon Photovoltaic Products from Taiwan: Opportunity to Submit Scope Comments, PD 348, bar code 3233175–01 (Oct. 3, 2014) ("Scope Revision Notice Letter"). The scope revision was made to address concerns about the administration and enforcement of the "two-out-of-three rule."[14] *See id.* at 1. The revision

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[12] Kyocera states that it filed the scope ruling request after CBP requested that the company deposit estimated antidumping duties on certain of its solar panel imports from Mexico; Kyocera states that this was the first indication it had that its solar panels assembled in Mexico using Taiwanese cells would come within the scope of this investigation. *See* Kyocera 56.2 Mot. 23–24.

[13] Kyocera was among the interested parties to submit scope comments in response to Commerce's October 3, 2014 letter. *See* Certain Crystalline Silicon Photovoltaic Products from Taiwan: Case Brief, PD 361, bar code 3235607–01 (Oct. 16, 2014); Certain Crystalline Silicon Photovoltaic Products from Taiwan: Rebuttal Brief, PD 380, bar code 3237704–01 (Oct. 27, 2014).

[14] Commerce explained the administration and enforcement concerns with the "two-out-of-three rule":

> the Department found that the two-out-of-three scope language originally proposed by Petitioner would not be administrable, given that certain parties reported that they did not track where the ingots, wafers, or partial cells used in third-country cells being assembled into modules in the PRC were produced, and that it would be "virtually impossible" for importers to have that information. Additionally, in light of the history of evasion under the *Solar I PRC Orders* and the undisputed "complex and readily adaptable global supply chain," the Department found that the two-out-of-three scope language would permit further evasion and ultimately incomplete relief.

Solar II Taiwan Remand Results at 24–25 (quoting Certain Crystalline Silicon Photovoltaic Products from the [PRC]: Issues and Decision Mem. for the Final Determination of Sales at Less than Fair Value, A-570–010, 13, 14, n.45 (Dec. 15, 2014), *available at* http://ia.ita.doc.gov/frn/summary/prc/2014–30092–1.pdf (last visited July 14, 2017); Issues and Decision Mem. for the Final Determination in the [CVD] Investigation of Certain Crystalline Silicon Photovoltaic Products from the [PRC], C-570–011, 38, 40, n.215 (Dec. 15, 2014), *available at* http://ia.ita.doc.gov/frn/summary/prc/2014–30071–1.pdf (last visited July 14, 2017)).

altered the scope to explicitly cover modules, laminates, and/or panels assembled in a third country, other than China, using solar cells produced in Taiwan. *Id.* at 1–2.

On December 23, 2014, Commerce published the final determination in the Solar II Taiwan investigation. *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 and Decision Mem. for the Final Determination of Sales at Less than Fair Value, A-583–853, (Dec. 15, 2014), ECF No. 23–2 ("Solar II Taiwan Final Decision Memo"). Commerce implemented the revised scope language from the October 3, 2014 Scope Revision Notice Letter, removing the "two-out-of-three rule" and modifying the scope language to explicitly cover all modules, laminates, and/or panels assembled in a third-country using Taiwanese cells:

> The merchandise covered by this investigation is crystalline silicon photovoltaic cells, and modules, laminates and/or panels consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including building integrated materials.
>
> . . .
>
> Modules, laminates, and panels produced in a third-country from cells produced in Taiwan are covered by this investigation. However, modules, laminates, and panels produced in Taiwan from cells produced in a third-country are not covered by this investigation.
>
> . . .
>
> Further, also excluded from the scope of this investigation are any products covered by the existing antidumping and countervailing duty orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, from the [PRC]. Also excluded from the scope of this investigation are modules, laminates, and panels produced in the PRC from crystalline silicon photovoltaic cells produced in Taiwan that are covered by an existing proceeding on such modules, laminates, and panels from the PRC.

Solar II Taiwan Final Decision Memo at 4–5. Commerce determined that, for purposes of this investigation, country of origin would be determined by the location of manufacture of the solar cell and applied a substantial transformation test, as it did in the Solar I PRC

investigations, to determine that solar cells from Taiwan are not substantially transformed when assembled into modules, laminates, or panels. *Id.* at 18–21. Accordingly, Commerce determined that Kyocera's solar panels assembled in Mexico using Taiwanese cells are within the scope of the final order. *Id.* at 23–24.

On November 4, 2015, Kyocera moved for judgment on the agency record. *See* Consolidated Pls. Kyocera Solar, Inc., and Kyocera Mexicana S.A. de C.V.'s Mot. J. Agency R., Nov. 4, 2015, ECF No. 28. Kyocera challenged four aspects of Commerce's final affirmative determination in the investigation, relevant to Kyocera's imports of solar panels from Mexico. *See* Kyocera 56.2 Br. at 11–26. Specifically, Kyocera challenged Commerce's determinations: 1) that Taiwanese solar cells assembled into solar modules in Mexico are within the scope of the *Solar II Taiwan Order*, absent a finding of circumvention, *id.* at 11–18; 2) that Taiwanese solar cells assembled into panels in Mexico are not substantially transformed into a new and different article of commerce, *id.* at 18–23; 3) to alter the language describing the scope of the merchandise under investigation in its final determination, "retroactively enlarg[ing] the scope of the investigation in a manner that unlawfully compromised the ability of interested parties to participate in the antidumping investigation conducted by the Department," *id.* at 23–25; and 4) to assess antidumping duties based on the full value of the finished product—solar panels, modules, and laminates produced in Mexico—when only the solar cell is from Taiwan, the subject country. *Id.* at 25–26.

On June 14, 2016, the court remanded the final determination in the Solar II Taiwan investigation to Commerce "for consistency with, and based on the same reasoning as" its remand order in the litigation concerning the Solar II PRC investigation. *SunEdison*, 40 CIT at __, 179 F. Supp. 3d at 1312. The court stated that the issues in the two cases are "inextricably entwined" because both "concern the rules of origin for solar panels manufactured from Taiwanese cells." *Id.*, 40 CIT at __, 179 F. Supp. 3d at 1312–13; *see SunPower, Corp. v. United States*, 40 CIT __, __, 179 F. Supp. 1286, 1298–1308 (2016) ("*SunPower*"). In *SunEdison*, the court sustained several of Commerce's determinations, and remanded or deferred determination on issues related to scope for consistency with *SunPower*.[15] *See SunEdison*, 40 CIT at __, 179 F. Supp. 3d at 1317–27.

[15] In *SunEdison* the court:

1) sustained Commerce's determinations that:

(a) solar cells are not substantially transformed when assembled into modules, laminates, or panels, bringing Taiwanese solar cells assembled into panels in Mexico within scope of the *Solar II Taiwan Order*, *SunEdison*, 40 CIT at __, 179 F. Supp. 3d at 1322–24;

Commerce published the Solar II Taiwan Remand Results on October 5, 2016. On remand, as requested by the court, Commerce provided explanation of its determinations in the Solar II PRC and Solar II Taiwan investigations. *See* Solar II Taiwan Remand Results at 2–33. Commerce explained that it has the authority to modify the scope language from the initiation of the investigation to the issuance of the ADD or CVD order, *see id.* at 12–18, and that "[t]he class or kind of merchandise defined in a petition may not be exactly the same class or kind of merchandise ultimately subject to a countervailing or antidumping duty order." *Id.* at 13. Commerce explained that it applied a substantial transformation test in the Solar II Taiwan investigation, in which it determined that cells are not substantially transformed by the process of panel assembly and thus that the cell is origin-conferring, but that, due to the specific pricing behaviors and subsidization in the Solar II PRC investigations, Commerce applied a different origin rule for purposes of the Solar II PRC investigations.

(b) the Solar II Taiwan scope was not contrary to 19 U.S.C. §1673, 19 U.S.C. § 1677j(b), or 19 C.F.R. § 351.225(h), *id.*, 40 CIT at __, 179 F. Supp. 3d at 1318–20; and (c) it was not required to use a substantial transformation test to determine origin in all instances, *id.*, 40 CIT at __, 179 F. Supp. 3d at 1320;

2) remanded

(a) the scope determination for consistency with *SunPower*, requesting that Commerce explain whether: (i) it established two origin rules for products within a single class or kind of merchandise; (ii) it treated similarly-situated products differently; and (iii) it departed from prior practice by calculating normal value of panels assembled in China based on Chinese prices, rather than on prices in the market of cell production, *id.*, 40 CIT at __, 179 F. Supp. 3d at 1321–22; and

(b) for further consideration and explanation its decision to base duty assessments on the full value of solar panels assembled in a third country from Taiwanese cells, *id.*, 40 CIT at __, 179 F. Supp. 3d at 1324–27;

3) deferred decisions on whether

(a) Commerce lacks authority to alter the scope during the investigation, resulting here in alleged "incongruence between the sales used to determine dumping liability and those ultimately covered by the order," *id.*, 40 CIT at __, 179 F. Supp. 3d at 1317–18;

(b) 19 U.S.C. §§ 1677b(a) and 1677(16)(A)–(C) require a uniform test to determine when the foreign like product is "produced in the same country" as subject merchandise, *id.*, 40 CIT at __, 179 F. Supp. 3d at 1319;

(c) whether Kyocera as a third-country panel assembler was unlawfully deprived of the right to participate in the investigation, *id.*, 40 CIT at __, 179 F. Supp. 3d at 1317; and

(d) whether Commerce may exclude third-country sales that mandatory respondents reported as destined for the United States, *id.*, 40 CIT at __, 179 F. Supp. 3d. at 1327; and

4) determined Kyocera's due process argument regarding the scope determination was moot, *id.*, 40 CIT at __, 179 F. Supp. 3d at 1317.

The deferred issues regarding whether 19 U.S.C. §§ 1677b(a) and 1677(16)(A)–(C) require a uniform test to determine when the foreign like product is "produced in the same country" as subject merchandise and whether Commerce may exclude third-country sales that mandatory respondents reported as destined for the United States were arguments raised only by former Plaintiff SunEdison, Inc. *See id.*, 40 CIT at __, 179 F. Supp. 3d at 1319, 1327. Because SunEdison, Inc. has since been dismissed from the case, *see* Order, Apr. 21, 2017, ECF No. 94, these issues are no longer in the case so the court does not reach these issues here.

Id. at 23–28. Commerce also explained that Taiwanese cells assembled into panels in Taiwan are excluded from the *Solar II Taiwan Order*, to avoid subjecting a product to two orders. *Id.* at 21–22.

Kyocera challenges the Solar II Taiwan Remand Results on the grounds that Commerce impermissibly applied two origin rules within the same order. *See* Kyocera Solar, Inc. and Kyocera Mexicana S.A. de C.V. Comments on Remand Determination 3– 5, Oct. 28, 2016, ECF No. 77 ("Kyocera Remand Comments").

STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012)[16] and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of a countervailing duty order. "The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

DISCUSSION

In *SunEdison*, the court remanded to Commerce for further consideration and explanation of: (1) Commerce's apparent departure from its prior practice of using a single country of origin test for a particular class or kind of merchandise; (2) Commerce's dissimilar treatment of similarly situated merchandise; and (3) Commerce's departure from its prior practice of calculating normal value using the market where the majority of production of the subject merchandise took place. *SunEdison*, 40 CIT at __, 179 F. Supp. 3d at 1321–22. The court remanded for further explanation or reconsideration regarding Commerce's decision to base duty assessments on the full value of solar panels assembled in a third country from Taiwanese cells. *Id.*, 40 CIT at __, 179 F. Supp. 3d at 1324–27. The court deferred

[16] 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.

consideration of the arguments that Commerce "unlawfully altered the sales databases relied on throughout the investigation, resulting in incongruence between different sales used to determine dumping liability and those ultimately covered by the order," *id.*, 40 CIT at __, 179 F. Supp. 3d at 1317–18, and that the alteration of the scope in the final determination deprived Kyocera and other third-country producers of a right to participate in the investigation. *Id.*[17] The remanded and deferred issues are addressed in turn.

I. Remanded Issues

In *SunEdison*, the court remanded the final scope determination in the Taiwan investigation for consistency with *SunPower* because the scope of the *Solar II Taiwan Order* incorporates the *Solar II PRC Orders'* exception for solar panels assembled in China, and because of the court's concern that the orders had conflicting rules of origin. *SunEdison*, 40 CIT at __, 179 F. Supp. 3d at 1321–22; *see SunPower*, 40 CIT at __, 179 F. Supp. 3d at 1298–1308. More specifically, the court in *SunEdison* asked Commerce to further consider or explain: (1) whether Commerce had departed from its prior practice of using a single rule of origin for a class or kind of merchandise; (2) whether Commerce treated similarly situated merchandise dissimilarly; and (3) whether Commerce had departed from its prior practice of calculating normal value "in the market where the majority of production of the subject merchandise took place." *SunEdison*, 40 CIT at __, 179 F. Supp. 3d at 1321. The court also sought further explanation or reconsideration from Commerce regarding its decision to base duty assessments on the full value of solar panels assembled in third countries from Taiwanese solar cells. *Id.*, 40 CIT at __, 179 F. Supp. 3d at 1324–27.

A. The Class or Kind of Merchandise

In *SunEdison*, the court referenced its decision in *SunPower* and remanded to Commerce to explain its deviation from its prior policy of applying only one rule of origin to a single class or kind of merchandise, based on the court's assumption that all solar panels were

[17] *SunEdison* determined that Kyocera's "due process challenges to the final scope determination are moot," because Kyocera would "have ample opportunity to address the scope issues on remand." *SunEdison*, 40 CIT __, 179 F. Supp. 3d at 1317. The court nonetheless deferred Kyocera's argument that it was deprived of its right to participate in the proceedings as a respondent and to submit factual information. *Id.*

a single class or kind of merchandise.[18] *SunEdison*, 40 CIT at __, 179 F. Supp. 3d at 1321–22; *see SunPower*, 40 CIT at __, 179 F. Supp. 3d at 1298–1308.

On remand, Commerce explained its use of different origin rules in the Solar II PRC and Solar II Taiwan investigations. *See* Solar II Taiwan Remand Results at 12–28. Commerce stated that, contrary to the court's assumption, the *Solar II PRC Orders* and *Solar II Taiwan Order* (as well as the *Solar I PRC Orders*) covered different classes or kinds of merchandise.[19] Solar II Taiwan Remand Results at 16–18. Therefore, Commerce did not apply different origin rules to the same class or kind of merchandise; it applied different origin rules to different classes or kinds of merchandise. *See id.* at 22– 23, 27–28. For the reasons that follow, on remand Commerce has sufficiently explained that its country-of-origin analyses in Solar II PRC and Solar II Taiwan do not constitute application of two rules of origin to a single class or kind of merchandise.

The statute and case law instruct that the term "class or kind of merchandise" refers to the products within a particular proceeding. The term "subject merchandise" is statutorily defined as "the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, an order under this subtitle or section 1303 of this title, or a finding under the Antidumping Act, 1921."

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[18] In *SunPower* the court found that "Commerce provides two separate grounds for this determination [to apply a different rule of origin in Solar II PRC]: (1) addressing circumvention of the Solar I PRC orders; and (2) addressing assembly-specific Chinese government subsidies. Neither is sufficient." *SunPower*, 40 CIT at __, 179 F. Supp. 3d at 1304. The court went on to state that

> 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[D]/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.

Id.

[19] In *SunPower* the court questioned the application of different origin rules to what it assumed were products within the same class or kind of merchandise:

> 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. Then in Solar II PRC, Commerce covered, also as merchandise from China, all panels assembled in China from cells produced anywhere in the world, other than China. 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.

SunPower, 40 CIT at __, 179 F. Supp. 3d at 1298–99, 1303. Throughout the *SunPower* opinion, the court assumed that all solar panels are products within a single class or kind of merchandise. *See, e.g.,*40 CIT at __, 179 F. Supp. 3d at 1299 ("[I]t appears unprecedented for Commerce to apply more than one country-of-origin determinative rule to products within the same class or kind of merchandise."), 1303 ("Commerce has nonetheless applied two different rules to similarly situated products within the same class or kind of merchandise.").

19 U.S.C. § 1677(25). This definition of subject merchandise demonstrates that the scope of a proceeding establishes the "class or kind of merchandise." Because the statute refers to the "class or kind of merchandise" that is within the scope, one must look to the scope itself to find the parameters of the "class or kind of merchandise." Precedent from the Court of Appeals for the Federal Circuit supports an interpretation of "class or kind of merchandise" as proceeding-specific. *See Target Corp. v. United States*, 609 F.3d 1352, 1363 (Fed. Cir. 2010) (noting, in the context of later-developed goods not specifically excluded in the order, that "[t]he kind or class of merchandise encompassed by a final antidumping order is determined by the order," citing *Smith Corona Corp. v. United States*, 915 F.2d 683, 685 (Fed. Cir. 1990) (explaining that "[t]he class or kind of merchandise encompassed by a final antidumping order is determined by the order," in affirming the holding that certain portable electronic typewriters with text memory, developed after the final order covering "all portable electronic typewriters," were within the covered class or kind of merchandise and were thus within scope)). It would be illogical for "class or kind of merchandise" to simultaneously also refer more broadly to products outside of or beyond a certain proceeding. A product not subject to a proceeding is therefore not of the same class or kind of merchandise as products that are subject to the proceeding, regardless of physical similarities.[20]

On remand, in response to the court's assumption that it had applied different origin rules to the same class or kind of merchandise, Commerce explained that, pursuant to the statutory framework, the term "class or kind of merchandise" refers to the products covered within a particular proceeding.[21] *See* Solar II Taiwan Remand Results at 12–23. Commerce stated that the solar products covered by

[20] Orders often specify exclusions. *See, e.g.*, Issues and Decision Mem. for the Administrative Review of the [ADD] Order on Diamond Sawblades and Parts Thereof from the [PRC], A-579900, 3 (Jun. 6, 2017), *available at* http://ia.ita.doc.gov/frn/summary/prc/2017–12106–1.pdf (last visited Jun. 19, 2017); Issues and Decision Mem. for the Final Results and the Partial Rescission of the 2014–2015 [ADD] New Shipper Reviews: Multilayered Wood Flooring from the [PRC], A570–970, 3 (May 26, 2017), *available at* http://ia.ita.doc.gov/frn/summary/prc/2017–11560–1.pdf (last visited Jun. 19, 2017); Issues and Decision Mem. for Certain Cased Pencils from the [PRC]: Final Results of [ADD] Administrative Review; 2014–2015, A-570–827, 2 (May 22, 2017), *available at* http://ia.ita.doc.gov/frn/summary/prc/2017–11053–1.pdf (last visited Jun. 19, 2017). Since subject merchandise is defined with reference to an order, the fact that there can be an exclusion further supports the understanding that "class or kind of merchandise" cannot refer to a static, predefined type of merchandise.

[21] Commerce also noted that the legislative history also supports an understanding of the phrase "class or kind of merchandise" as subject merchandise. Solar II Taiwan Remand Results at 20. In implementing the Uruguay Round Agreements Act of 1994, Congress modified the Tariff Act of 1930 to render certain statutory provisions consistent with the

the *Solar II PRC Orders* therefore are not and could not be within the same class or kind of merchandise as the products covered by the *Solar II Taiwan Order*:

> the Department did not apply conflicting country-of-origin analyses to a "single" class or kind of merchandise. The Department initiated investigations (Solar I, Solar II PRC, and Taiwan Solar) into three different classes or kinds of merchandise, independently analyzed the country-of-origin of the products at issue in each, and ultimately issued final determinations as to three different classes or kinds of merchandise which, as is reflected in the Orders themselves, cover different products.

Solar II Taiwan Remand Results at 17. Commerce explained that "class or kind of merchandise" does not refer to a "general 'type of product,' not restricted by the merchandise specifically described as within, and limited by, the scope of the AD[D] and CVD orders." *Id.* at 37. According to Commerce, as the *Solar II PRC Orders* and *Solar II Taiwan Order* cover products within two distinct classes or kinds of merchandise, the agency did not apply two rules of origin to products within the same class or kind of merchandise.[22] *See id.* at 22–23, 27–28.

On remand Commerce has sufficiently explained the basis for the two distinct rules of origin it applied in the Solar II PRC and Solar II Taiwan investigations. As the harm alleged and ultimately confirmed in the Solar II PRC investigations was specific to solar panels that had been assembled in China, it was reasonable for Commerce to determine that the appropriate country-of-origin for subject merchandise within that investigation was the country of panel assembly. At the same time, the harm alleged and ultimately confirmed in the Solar II Taiwan investigation was specific to the manufacture of solar cells in Taiwan; it accordingly was reasonable for Commerce to

language of the WTO Antidumping Agreement and Agreement on Subsidies and Countervailing Measures. *See* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. No. 103–316 (1994). In adopting the term "subject merchandise," Congress explained:

> What formerly was referred to as the "class or kind" of merchandise subject to investigation or covered by an order is now referred to simply as the "subject merchandise." The substitution of terms from the Agreement is not, in itself, intended to affect the meaning ascribed by administrative and judicial interpretation to the replaced terms.

Id. at 4,161.

[22] Commerce also emphasized that the statute allows for an evolution in the class or kind of subject merchandise from the initial investigation to the final order. Solar II Taiwan Remand Results at 36–37. Commerce explained that, during the investigation, the "class or kind of merchandise" is governed by the words of the petition; once an order is published, the "class or kind of merchandise" is defined by the language of the order, and accordingly the "class or kind of merchandise" described in the final determination of an investigation may not be "identical to that upon which the Department initiated the investigation." *Id.* at 36.

determine that the appropriate country-of-origin for subject merchandise within that investigation was the country of cell manufacture. The differing rules of origin appear reasonably tailored to cover the particular solar products at issue in the two sets of investigations, and reflect the particular injurious activity discovered in each investigation. Based on this understanding of the term "class or kind of merchandise" as applicable to products within a particular proceeding, the concern expressed by the court that Commerce applied more than one country-of-origin rule to products within the same class or kind of merchandise necessarily dissipates. The solar panels covered by the *Solar II PRC Orders* are not within the same class or kind of merchandise as the solar panels covered by the *Solar II Taiwan Order*.

B. Similarly Situated Products

A related but distinct issue is the court's concern in *SunPower*, incorporated by reference in *SunEdison*, that Commerce treated similarly situated products differently in the Solar II PRC proceeding than in the Solar II Taiwan proceeding. *See SunEdison*, 40 CIT at __, 179 F. Supp. 3d at 1321–22; *SunPower*, 40 CIT at __, 179 F. Supp. 3d at 1302–07. In the Solar II PRC investigations, Commerce assessed ADD and CVD liability based on pricing and subsidization behavior in the country of panel assembly and, in the Solar II Taiwan investigation, consistent with prior practice Commerce assessed ADD liability based on pricing behavior in the country of cell manufacture. *SunPower*, 40 CIT at __, 179 F. Supp. 3d at 1302–03; *see SunEdison*, 40 CIT at __, 179 F. Supp. 3d at 1321–22. The court expressed concern that, in so doing, Commerce "applied two different rules to similarly situated products." *SunPower*, 40 CIT at __, 179 F. Supp. 3d at 1303.

On remand, Commerce explained that, due to the particular circumstances present in the Solar II PRC investigations, it sought to investigate different products than in the Solar II Taiwan investigation (*i.e.*, assembled solar modules, laminates, and/or panels rather than solar cells), and it defined the scope in the Solar II PRC investigations differently as a result. *See* Solar II Taiwan Remand Results at 22–23, 29–30. Thus, it reasons that the products covered by the *Solar II PRC Orders* are not similarly situated to the products covered by the *Solar II Taiwan Order. Id.* at 29–30. The Solar II PRC investigations concern assembled panels while the Solar II Taiwan investigation concerns solar cells.[23] Commerce explained that it de-

[23] However, as discussed above, solar cells manufactured in Taiwan and assembled into panels in China are excluded from the scope of the *Solar II Taiwan Order*, to avoid overlapping coverage as these cells are within the scope of the *Solar II PRC Orders. See* Solar II Taiwan Remand Results at 21–22; *Solar II Taiwan Order; Solar II PRC Orders.*

termined in the Solar II PRC investigations that China subsidizes the panel assemblies and prices panels exported to the U.S. below the prices at which those products are sold in China. *See id.* at 53–54. Therefore, the Solar II PRC investigations and orders target panel assemblies while the Solar II Taiwan (and Solar I PRC) investigations and orders target cells. Because the Solar II PRC investigations focused on allegations of injurious dumping activity and subsidization with respect to assemblies within the PRC,[24] China was the country in which the activities that led to the injurious behavior in those investigations occurred. *Id.* at 29–30. Commerce concluded that it was therefore reasonable to focus on the pricing behavior within the country of assembly, in order to fashion a remedy to address the particular injury alleged. *See id.* at 29–31, 47–48, 53–54. Commerce emphasized that the same circumstances were not present in the Taiwan investigation, which drove its decision in that investigation to focus on pricing behaviors within the country of cell manufacture.[25] *Id.* at 29–30. Thus, according to Commerce, this is not an instance of arbitrary disparate treatment of similarly situated products; on the contrary, the disparate treatment is specific to the disparate conduct alleged in the petitions and discovered in the investigations, and is targeted in each proceeding to achieve an effective remedy. *See id.*

Commerce provided a reasoned basis for its different approaches in the two different cases. As discussed above, Commerce tailored the

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[24] Specifically, in the Solar II PRC final determinations, Commerce explained that:

> In these investigations, the alleged injury to the domestic industry stems from certain solar modules that are assembled in the PRC using cells produced in third countries, modules which are not covered by the scope of *Solar I* and, thereby, exceed the reach of the remedy afforded by the *Solar I* AD[D] and CVD orders. In addition, taking the instant PRC investigations together with *Solar I*, the Petitioner has alleged that the domestic industry is being injured as a result of the unfair pricing of cells produced in the PRC, modules containing such cells, and modules assembled in the PRC with third-country cells, as well as unfair subsidization in the PRC of both cells and modules.
>
> . . .
>
> . . . [T]here exist prior AD[D] and CVD orders on related merchandise (i.e., solar cells and modules) from the PRC – *Solar I* – and following the initiation of the *Solar I* investigations and the imposition of those orders, there has been a shift in trade flows that has resulted in increased imports of non-subject modules produced in China. Such imports – if they are dumped and/or unfairly subsidized and injurious – should not be beyond the reach of the AD[D] and CVD laws.

Certain Crystalline Silicon Photovoltaic Products from the [PRC]: Issues and Decision Mem. for the Final Determination of Sales at Less than Fair Value, A-570–010, 13 (Dec. 15, 2014), *available at* http://ia.ita.doc.gov/frn/summary/prc/2014–30092–1.pdf (last visited July 14, 2017); Issues and Decision Mem. for the Final Determination in the [CVD] Investigation of Certain Crystalline Silicon Photovoltaic Products from the [PRC], C-570–011, 38–39 (Dec. 15, 2014), *available at* http://ia.ita.doc.gov/frn/summary/prc/2014–30071–1.pdf (last visited July 14, 2017).

[25] In the Solar II Taiwan investigation, Commerce concluded that, although Taiwanese cell production was injuring the U.S. industry, there were not similar concerns regarding evasion and panels assembled in Taiwan as were present in the Solar II PRC investigations. *See* Solar II Taiwan Final Decision Memo at 23.

Solar II PRC investigations to address injurious pricing decisions for and subsidization of solar panels assembled in China using non-Chinese cells, and therefore reasonably constructed a country-of-origin rule that focused on that panel assembly.[26] Commerce adequately explained that this deviation from prior practice was due to the circumstances in the Solar II PRC investigations that warranted a unique response in order to fashion a remedy for the injurious pricing behavior alleged and found. Fashioning remedies based on the unique circumstances present in the Solar II PRC and Solar II Taiwan investigations did not result in disparate treatment of similarly situated products; these products were situated differently, as Taiwanese cells assembled into panels in third countries are not subject to the subsidies and dumping behaviors present in the Chinese market. Commerce has sufficiently explained the reasons for its disparate treatment of these solar products. *Save Domestic Oil, Inc. v. United States*, 357 F.3d 1278, 1283–84 (Fed. Cir. 2004) ("[I]f Commerce has a routine practice for addressing like situations, it must either apply that practice or provide a reasonable explanation as to why it departs therefrom.").

Kyocera argues that Commerce should apply the origin rule that Commerce applied to Taiwanese cells assembled into panels in the PRC, finding those panels to be products of the country of panel assembly rather than of the country of cell manufacture. *See* Kyocera Remand Comments 5 ("There is no reasonable basis for adopting a second, inconsistent origin analysis that treats modules produced outside of Taiwan (or China) as products of Taiwan absent evidence that pricing decisions for such modules are being made in Taiwan."). However, Commerce's substantial transformation analysis as applied in this case—determining that the location of cell manufacture is origin-conferring—is supported by substantial evidence. *SunEdison*, 40 CIT at __, F. Supp. 3d at 1322–24 (finding that Kyocera had not presented "a basis to disturb [Commerce's] conclusion that the cell is not substantially transformed in the process of panel assembly so as

[26] *SunEdison* addressed Kyocera's argument that solar products that are further manufactured in a third country may not be included in the scope of the order absent a finding of circumvention pursuant to 19 U.S.C. § 1677j(b). *SunEdison*, 40 CIT at __, 179 F. Supp. 3d at 1319–20; *see* Kyocera 56.2 Br. 11–18. The court determined that 19 U.S.C. § 1677j(b) "applies to circumstances where an order with a defined scope is already in effect." *SunEdison*, 40 CIT at __, 179 F. Supp. 3d at 1319. Because, 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," the court determined that the anticircumvention statute is "inapposite to the specific issues presented." *Id.*, 40 CIT at __, 179 F. Supp. 3d at 1320.

to change the cell's country-of-origin, pursuant to Commerce's usual substantial transformation test in the antidumping context."). This argument is not revisited here.

C. Normal Value

The court sought further explanation or reconsideration from Commerce regarding its decision to base duty assessments on the Chinese market in Solar II PRC as compared to its approach in Solar II Taiwan. *SunEdison*, 40 CIT at __, 179 F. Supp. 3d at 1321–22; *SunPower*, 40 CIT at __, 179 F. Supp. 3d at 1305–07. The court determined this issue was implicated in the Solar II Taiwan investigation because the exclusion in the *Solar II Taiwan* scope incorporates the *Solar II PRC* scope. *SunEdison*, 40 CIT at __, 179 F. Supp. 3d at 1321–22. The court emphasized that Commerce did not consider whether comparing the Chinese price for the finished product to the U.S. export price constituted a "fair comparison" as required by statute, and that Commerce did not explain its deviation from its past practice of assessing antidumping and countervailing duty liability on the market of essential production. *SunPower*, 40 CIT at __, 179 F. Supp. 3d at 1305–07; *see SunEdison*, 40 CIT at __, 179 F. Supp. 3d at 1325–26. The court remanded for Commerce to explain or reconsider this determination.[27] *SunPower*, 40 CIT at __, 179 F. Supp. 3d at 1307; *SunEdison*, 40 CIT at __, 179 F. Supp. 3d at 1321– 22, 1325–26.

The statute requires that Commerce compare normal value (the price at which the subject merchandise sells in the country of export (*i.e.*, home market)) and the export price (the price at which the subject merchandise sells in the U.S.).[28] 19 U.S.C. §§ 1673, 1677b(a).[29] The statute instructs that, "to achieve a fair comparison"

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[27] *SunPower* stated that

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

SunPower, 40 CIT at __, 179 F. Supp. 3d at 1305.

[28] Pursuant to 19 U.S.C. § 1677b(a), to determine whether subject merchandise is being or is likely to be sold at less than fair value in the United States, "a fair comparison shall be made between the export price or constructed export price and normal value." 19 U.S.C. § 1677b(a).

[29] In *SunPower*, the court noted that "these problematic aspects of Commerce's Solar II PRC decision affect most directly the agency's AD[D], rather than its CVD, analysis," because the ADD statute requires Commerce to calculate normal value of the finished product on the basis of a single foreign market while the CVD statute does not contain a similar requirement. *SunPower*, 40 CIT at __, 179 F. Supp. 3d at 1307–08; *see* 19 U.S.C. § 1671. The court noted that, "[n]onetheless, Commerce has consistently held that, as with AD[D] liability, CVD liability must also be based on a single foreign market's subsidy analysis." *SunPower*, 40 CIT at __, 179 F. Supp. 3d at 1308.

of the normal value and the export price,[30] normal value of the subject merchandise shall be determined by "the price at which the foreign like product is first sold . . . for consumption in the exporting country. . ."[31] 19 U.S.C. § 1677b(a)(1)(B). Thus, a fair comparison is achieved when the price at which the foreign like product is sold in the exporting country is compared to the price at which the subject merchandise is sold in or to the United States.

The subject merchandise, its physical attributes and its country of origin, is defined by the scope which is set by Commerce (*e.g.*, widgets from China). *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096–97 (Fed. Cir. 2002). To say that a product is "from China" necessarily raises the question of what it means to be "from" a country. Commerce often answers this question by using a substantial transformation test with reference to the merchandise described in the order; but Commerce can answer this question by using the words of the order or some other analysis. *SunEdison*, 40 CIT at __, 179 F. Supp. at 1320 ("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."); *see also Duferco Steel, Inc.*, 296 F.3d at 1097.

The origin established by Commerce, using a reasonable means it chooses, determines the relevant market for the purpose of assessing duty. The country-of-origin establishes the country by which normal value is determined. *See* 19 U.S.C. § 1677b(a)(1)(B). Where Commerce employs a substantial transformation test, a test that looks to where the most essential manufacturing occurs, the comparison mar-

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[30] Export price is the price at which the subject merchandise is sold (or agreed to be sold) before importation by the foreign producer or exporter to an unaffiliated purchaser in the United States or for exportation to the United States. 19 U.S.C. § 1677a(a).

[31] "Foreign like product" is defined as:

> merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made:
>
> (A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> (B) Merchandise—
>
> (i) produced in the same country and by the same person as the subject merchandise,
>
> (ii) like that merchandise in component material or materials and in the purposes for which used, and
>
> (iii) approximately equal in commercial value to that merchandise.
>
> (C) Merchandise—
>
> (i) produced in the same country and by the same person and of the same general class or kind as the subject merchandise,
>
> (ii) like that merchandise in the purposes for which used, and
>
> (iii) which the administering authority determines may reasonably be compared with that merchandise.

19 U.S.C. § 1677(16).

ket will be the market where the essential manufacturing occurs.[32] If Commerce chooses not to apply the substantial transformation test, the relevant market will be a function of the origin rule that Commerce chooses to apply instead.

Commerce explained that the statute does not require a fair comparison based on the country where most of the production occurs, requiring only that a fair comparison be made between normal value and export price. *See* Solar II Taiwan Remand Results at 32–33. Commerce emphasized that, pursuant to the statute, the agency must be able to, "where appropriate, address unfair pricing decisions or unfair subsidization that is taking place in the exporting country where further manufacturing, such as assembly, occurs, notwithstanding that such activities may not necessarily result in a substantial transformation of merchandise." Solar II Taiwan Final Decision Memo at 22 (quoting Certain Crystalline Silicon Photovoltaic Products from the [PRC]: Issues and Decision Mem. for the Final Determination of Sales at Less than Fair Value, A-570–010, 15 (Dec. 15, 2014), *available at* http://ia.ita.doc.gov/frn/summary/prc/2014–30092–1.pdf (last visited July 14, 2017); Issues and Decision Mem. for the Final Determination in the [CVD] Investigation of Certain Crystalline Silicon Photovoltaic Products from the [PRC], C-570011, 41 (Dec. 15, 2014), *available at* http://ia.ita.doc.gov/frn/summary/prc/2014–300711.pdf (last visited July 14, 2017)). Reasonably discernible from Commerce's explanation is that the proper market for normal value is not necessarily the market where most of the production occurs.[33] Rather, the proper market for normal value is the market of origin as determined by Commerce's origin test in any given situation. As discussed above, in the Solar II PRC investigations, because the petitions alleged dumping and subsidization activities during panel assembly within the PRC, and because Commerce found that panels assembled in China using non-Chinese solar cells were being subsidized in China and dumped in the United States, Commerce applied a country of origin rule based on the coun-

[32] Commerce's essential production test is derivative of the substantial transformation test, in which Commerce considers, *inter alia*, whether the essential component of the merchandise is substantially transformed in the country of exportation. *See, e.g.*, Solar II Taiwan Final Decision Memo at 18–19.

[33] It is reasonably discernible that Commerce's objective in choosing an origin test is to determine the country of export for purposes of ascertaining normal value. It is also reasonably discernable that Commerce believes the substantial transformation test adequately identifies the relevant market for normal value when the objectionable pricing decisions relate to a particular component. The test identifies where that origin-conferring component was last transformed and the country of export/home market will be where that component last underwent a substantial transformation. However, when the objectionable pricing activities relate to a finished product, *i.e.*, an assembled solar module, the substantial transformation test may not capture all the objectionable activities.

try of panel assembly. *See* Solar II Taiwan Remand Results at 24–27. Commerce explained that this focus on China as the location of "qualitatively" significant production activity caused the agency to agency to base normal value on the Chinese market, "without regard to where the majority of production may have taken place." *See id.* at 30–33.

Commerce has sufficiently explained why its methodology for determining normal value is different in the Solar II PRC and Solar II Taiwan investigations. For each order, Commerce must identify the home market for the purpose of determining normal value. The statute does not require Commerce to base normal value on the country of essential production. While Commerce looks to the country of essential production in the Solar II Taiwan investigation, Commerce may deviate from prior practice as long as it explains why doing so is justified under the circumstances. *Save Domestic Oil, Inc.*, 357 F.3d at 1283–84 ("[I]f Commerce has a routine practice for addressing like situations, it must either apply that practice or provide a reasonable explanation as to why it departs therefrom."). In the Solar II PRC investigations, the subject merchandise is solar modules, laminates, and/or panels assembled in the PRC, which are exported to the United States from China. Pursuant to the statute, Commerce must compare the price at which the foreign like product is sold in the home market to the price at which the imported solar panels are sold in the United States. Commerce did this in the Solar II PRC investigations, and its assessment of antidumping duties based on normal value in China was therefore reasonable. There is no claim here that Commerce's choice to use Taiwan as the home market for the purpose of normal value in the Solar II Taiwan investigation is problematic.[34]

[34] Although Kyocera does not challenge Commerce's choice to use Taiwan as the home market for the purpose of normal value in the Solar II Taiwan investigation, Kyocera argues on remand that the differing origin rules in the *Solar II PRC Orders* and the *Solar II Taiwan Order* "results in the arbitrary application of the antidumping law in a manner that is not supported by the factual record and is inconsistent with the Department's avowed policy of applying antidumping remedies to exports from the country where the pricing decisions are made." Kyocera Remand Comments 5. The court has determined, for the reasons discussed above, that Commerce reasonably explained the application of two different origin rules in these sets of investigations. Further, as discussed above, Commerce's substantial transformation analysis as applied in this case— determining that the location of cell manufacture is origin-conferring—is supported by substantial evidence. *SunEdison*, 40 CIT at __, F. Supp. 3d at 1322–24 (finding that Kyocera had not presented "a basis to disturb [Commerce's] 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."). This argument is not revisited here.

D. Duties on the Full Value of the Panel

SunEdison remanded on the issue of assessing antidumping duties based on the full value of solar panels assembled in a third country from Taiwanese cells. *SunEdison*, 40 CIT at __, 179 F. Supp. 3d at 1324–27. In addition to the apparent inconsistency between the approaches used in the Solar II PRC and Solar II Taiwan investigations,[35] the court reasoned that explanation here was necessary because, by its exclusion of Taiwanese cells assembled into panels in China, the *Solar II Taiwan Order* incorporated the *Solar II PRC Orders*. *Id.,* 40 CIT at __, 179 F. Supp. 3d at 1325–27.

On remand, Commerce explained that, with respect to assessment of CVD duties, the duties are based upon the amount of the subsidy provided and thus the subsidization rates "reflect a percentage of the respondent's relevant sales values, regardless of the degree of production or value added that occurred in the PRC." Solar II Taiwan Remand Results at 31. With respect to assessment of ADD duties, Commerce explained that its comparison of normal value to export value necessarily is a comparison of the finished product:

> [Commerce] determined the extent of that unfair pricing by comparing the [normal value] of the finished, assembled panel to the [US price] for a finished, assembled panel from the PRC. With this focus in mind, the Department appropriately does not necessarily focus on the cost to the cell producer outside of the PRC, because the relevant consideration here was the [normal value] of the finished, assembled panel produced by the Chinese company.

Id. at 32. The court cannot say that this explanation is unreasonable. Commerce's determination to assess duties based upon the full value of the subject merchandise in Solar II PRC and Solar II Taiwan is reasonable because it remedies illegal subsidization or pricing decisions relating to the finished product.

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[35] The court found that, in the Solar II Taiwan investigation, Commerce reasonably determined to assess antidumping duties on the full value of the solar panels assembled in Mexico using the normal value of foreign like products from Taiwan, "because it is undisputed that at least fifty percent of the production costs of Plaintiffs' solar panels were incurred in the production of the panels' constituent cells in Taiwan." *SunEdison*, 40 CIT at __, 179 F. Supp. 3d at 1325. This approach differed from the approach used in the Solar II PRC investigation, which was based on a comparison to normal values calculated for China, rather than for the market where most of the production of the panels (*i.e.*, cell production) occurred. *Id.*, 40 CIT at __, 179 F. Supp. 3d at 1326.

II. Deferred Issues

SunEdison deferred decision on whether Commerce: (i) "unlawfully altered the sales databases relied on throughout the investigation," *SunEdison*, 40 CIT at __, 179 F. Supp. 3d at 1317–18, and (ii) deprived Kyocera and other third-country producers of a right to participate as respondents in the investigation. *Id.*, 40 CIT at __, 179 F. Supp. 3d at 1317.

A. The Effect of Altering the Scope during the Investigation

SunEdison deferred decision on whether Commerce's alteration of the scope language in the final determination unlawfully resulted in different sales included in the final order than were used to determine dumping liability. *SunEdison*, 40 CIT at __, 179 F. Supp. 3d at 1317–18. Commerce has the authority to modify the scope language until the final order is issued, and thus the authority to capture different sales in the scope of the final order than were included earlier in the proceedings. Therefore, Kyocera's argument to the contrary fails and Commerce's determination on this issue is sustained.

The final order determines the merchandise that is within scope. *See Duferco Steel, Inc.*, 296 F.3d at 1096. Commerce has the authority to initially determine the scope of the investigation, as well as the authority to modify the scope language until the final order is issued, based on the agency's findings during the course of the investigation. *Id.* ("Commerce's final determination reflects the decision that has been made as to which merchandise is within the final scope of the investigation and is subject to the order."); *Mitsubishi Electric Corp. v. United States*, 898 F.2d 1577, 1582 (Fed. Cir. 1990) (Commerce has "[t]he responsibility to determine the proper scope of the investigation and of the antidumping order. . . ."). Commerce "has inherent power to establish the parameters of the investigation" throughout the proceedings, "so that it would not be tied to an initial scope definition that may not make sense in light of the information subsequently obtained in the investigation." *Duferco Steel, Inc.*, 296 F.3d at 1089 (internal quotations and citations omitted). Commerce's authority to determine the scope of the final order is in service of "best effectuat[ing] the purpose of the antidumping laws and the violation found." *Mitsubishi Electric Corp.*, 898 F.2d at 1583.

Here, Commerce determined during the course of the investigation that the scope as written in the petition, initiation notice, and preliminary determination required clarification to ensure that the order

would be administrable and would cover the intended products. *See* Scope Revision Notice Letter at 1–2. Accordingly, Commerce adjusted the scope in the final determination, *see* Solar II Taiwan Final Decision Memo at 4–5, and ultimately the final order, *see Solar II Taiwan Order*, 80 Fed. Reg. at 8,596, which necessarily brought certain sales within that final order that were not explicitly included during previous stages of the proceeding. Doing so was not contrary to law, as Commerce has the authority to modify the scope language until the final determination based on information gathered during the investigation. *See Duferco Steel, Inc.*, 296 F.3d at 1089, 1096. It is reasonable to assume that, if the scope is adjusted, certain sales not explicitly included in earlier stages of the proceedings will ultimately be included within the final order.

B. The Right to Participate in the Investigation

SunEdison also deferred consideration of Kyocera's claim that the change in scope language from the outset of the investigation to the final determination deprived it of the opportunity to participate in the investigation and to be a respondent, and therefore of the opportunity to submit information demonstrating that it was not dumping solar products. *SunEdison*, 40 CIT at __, 179 F. Supp. 3d at 1317. Kyocera argues that, because modules assembled in third countries were not explicitly included within the scope of the order at the outset of the proceedings, it "was not notified by the Department of the pending investigation or served with Department questionnaires that would have enabled Kyocera to participate in the investigation during the early information gathering stage of the investigation." Kyocera 56.2 Br. 24. Kyocera alleges that the alteration of the scope in the final determination deprived the company of the right to participate in the proceedings and to submit factual information. *Id.* at 24–25. Kyocera's argument is without merit.

As discussed above, Commerce may alter the scope of the investigation until the final order. *See, e.g., Duferco Steel, Inc.,* 296 F.3d at 1089, 1096. Here, Commerce acted within its authority to alter the scope of the investigation prior to the final order. Doing so brought Kyocera's panels assembled in Mexico from Taiwanese solar cells explicitly within the scope of the order. Solar II Taiwan Final Decision Memo at 23–24. Given Commerce's authority to alter the scope, this result is not unreasonable.

Kyocera's argument that it was not given notice of and was deprived of a right to participate in the investigation is without merit. First, Commerce's authority to alter the scope until the final order

necessarily implies that some parties covered by the final order may not be able to submit factual information at the early stages of the proceedings. As discussed above, Commerce's authority to alter the scope necessarily includes the authority to bring parties within the final order who were not within scope earlier in the case. *See Duferco Steel, Inc.*, 296 F.3d at 1089, 1096. The court need not reach whether it is always reasonable for parties to be brought into proceedings after the investigation has commenced because Commerce has modified the scope. But, here, it is evident that Kyocera was on notice of the proceedings and was heard in the course of the investigation prior to the final determination.[36] On September 15, 2014, Kyocera requested Commerce to clarify the scope of the investigation. Certain Crystalline Silicon Photovoltaic Products from Taiwan: Request for Scope Determination re Solar Products from Mexico, PD 337, bar code 3228306–01 (Sept. 15, 2014). Kyocera then submitted a case brief in response to Commerce's October 3 Scope Revision Notice Letter notifying interested parties of a proposed scope clarification, *see* Certain Crystalline Silicon Photovoltaic Products from Taiwan: Case Brief, PD 361, bar code 3235607–01 (Oct. 16, 2014), and subsequently submitted a rebuttal brief as well. *See* Certain Crystalline Silicon Photovoltaic Products from Taiwan: Rebuttal Brief, PD 380, bar code 3237704–01 (Oct. 27, 2014). Although Kyocera's case and rebuttal briefs focused only on issues related to scope, the case and rebuttal briefs were Kyocera's opportunity to be heard on any issues it deemed relevant to its position. *See* 19 C.F.R. § 351.309(c)(1)–(2) (2014) ("The case brief must present all arguments that continue in the submitter's view to be relevant to [Commerce's] final determination or final results. . . ."). Commerce acknowledged and responded to the arguments Kyocera raised in its case and rebuttal briefs. *See* Solar II Taiwan Final Decision Memo at 15–25. Kyocera's participation in the investigation prior to the final determination demonstrates that it

[36] Defendant emphasizes that, throughout this investigation, Commerce put interested parties on notice that the scope may be clarified or revised. Specifically, Commerce stated in the initiation notice that it was "'setting aside a period for interested parties to raise issues regarding product coverage' and that Commerce's intent was that its decisions on product coverage would be informed by its previous decision in *Solar I*." Def.'s Resp. Opp'n Pls.' Rule 56.2 Mots. J. Agency R. 39, Mar. 11, 2016, ECF No. 45 ("Def.'s Resp.") (quoting *Solar II Taiwan Initiation Notice*, 79 Fed. Reg. at 4,662). Defendant also emphasizes that, in the preliminary determination, Commerce stated that its intention to "'continu[e] to analyze interested parties' scope comments.'" Def.'s Resp. 39 (quoting Decision Mem. for the Prelim. Determination in the [ADD] Investigation, A-583–853, 5 (July 24, 2014)). Finally, Defendant highlights Commerce's October 3, 2014 Scope Revision Notice Letter, in which Commerce notified interested parties of a proposed revision of the scope language. *See* Def.'s Resp. 40 (citing Scope Revision Notice Letter at 1–2).

was on notice of and was heard during the investigation.[37] Kyocera points to no place in the record demonstrating that it tried to submit information that was rejected or to participate in the investigation in some other way and was prevented from doing so. Kyocera's submissions focused only on issues related to scope.

Further, the statutory and regulatory scheme do not guarantee the right to participate in an investigation as a respondent. To the contrary, the statute indicates that respondent selection is within Commerce's discretion. *See* 19 U.S.C. §§ 1677f1(c)(2)(A)–(B). Commerce explained that, per the statute, "[a] respondent selection determination must be based on information that is known and available at the time of selection," notwithstanding changes to the scope or information gained during the course of the investigation. Solar II Taiwan Final Decision Memo at 28; *see* 19 U.S.C. §§ 1677f1(c)(2)(A)–(B). As Defendant emphasizes, there is no indication in the statute that the selection process is to evolve as the proceedings and scope evolve. *See* Def.'s Resp. Opp'n Pls.' Rule 56.2 Mots. J. Agency R. 64–66, Mar. 11, 2016, ECF No. 45. The opposite is suggested by the limiting phrases "based on information available to [Commerce] at the time of selection" and "that can be reasonably examined." *See* 19 U.S.C. §§ 1677f-1(c)(2)(A)–(B). Kyocera points to no statutory or regulatory authority that contradicts Commerce's position. Accordingly, it cannot reasonably be said that a party ultimately covered by the scope of a final order has a right to participate as a respondent in an investigation or to submit factual information throughout the investigation. Therefore, Kyocera's argument that it was deprived of such a right necessarily fails.

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[37] Kyocera's reliance on *Smith Corona Corp. v. United States*, 16 CIT 562, 796 F. Supp. 1532 (1992), to support its position that Commerce deprived it of a right to participate in the proceedings by clarifying the scope in the final determination is misplaced. *See* Kyocera 56.2 Br. 24–25. *Smith Corona* is not instructive here, as it presented facts which differed significantly from those in the instant case. In the investigation at issue in *Smith Corona*, after issuance of the preliminary determination, petitioner requested that Commerce modify the scope of the order to include parts which had been previously excluded from the scope. *Smith Corona*, 16 CIT at 563–64, 796 F. Supp. at 1533–34. Commerce declined to modify the scope, finding the request "vague and untimely" and the allegations of increase in imports unsupported. *Id.*, 16 CIT at 564, 796 F. Supp. at 1534. In sustaining Commerce's decision not to modify the scope, the *Smith Corona* court found it significant that scope had not previously been at issue in the investigation and the products that petitioner sought to include had been specifically excluded earlier in the investigation. *Id.*, 16 CIT at 564–65, 796 F. Supp. at 1534. The court nonetheless acknowledged Commerce's authority to modify the scope of an investigation prior to the final order, *id.*, 16 CIT at 565–66, 796 F. Supp. at 1534–35, and distinguished the case "from the numerous cases wherein Commerce has exercised its discretion to clarify the scope of orders which were ambiguous when issued or which became ambiguous due to the introduction of new technology into the market." *Id.*, 16 CIT at 564, 796 F. Supp. at 1534.

CONCLUSION

For the foregoing reasons, the remand determination in the antidumping duty investigation of certain crystalline silicon photovoltaic products from Taiwan complies with the court's order in *SunEdison*, 40 CIT at __, 179 F. Supp. 3d at 1327, and the conclusions are supported by substantial evidence and in accordance with law. Judgment will enter accordingly.

Dated: July 21, 2017
New York, New York

/*s*/ *Claire R. Kelly*
CLAIRE R. KELLY, JUDGE

Slip Op. 17–91

TIANJIN WANHUA CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 15–00190

[Commerce's remand results sustained.]

Dated: July 24, 2017

David J. Craven, Sandler, Travis & Rosenberg of Chicago, Illinois, for Plaintiff Tianjin Wanhua Co., Ltd.

Tara K. Hogan, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC for Defendant United States. On the brief with her were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Nanda Srikantaiah*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce of Washington, DC.

J. Michael Taylor, Stephen A. Jones, and *Mark T. Wasden*, King & Spalding of Washington, DC for Defendant-Intervenor Terphane, Inc.

Jeffrey I. Kessler, Ronald I. Meltzer, Patrick J. McLain, and *David M. Horn*, Wilmer, Cutler, Pickering, Hale & Dorr, LLP of Washington, DC for Defendant-Intervenors Mitsubishi Polyester Film, Inc. and SKC, Inc.

OPINION AND ORDER

Gordon, Judge:

This action involves the fifth administrative review conducted by the U.S. Department of Commerce ("Commerce") of the antidumping duty order covering polyethylene terephthalate film, sheet, and strip from the People's Republic of China ("PRC"). *See Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China*, 80 Fed. Reg. 33,241 (Dep't of Commerce June 11, 2015) (final results admin. review) ("*Final Results*") and accompanying Issues and Decision Mem. for Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China, A-570–924 (Dep't of Commerce June 3, 2015), ECF No. 33–3 ("*Decision Memorandum*").

Before the court are the Final Results of Redetermination ("*Remand Results*"), ECF No. 71, filed by Commerce pursuant to *Tianjin Wanhua Co. v. United States*, 40 CIT ___, 182 F. Supp. 3d 1301 (2016), as well as the comments of Plaintiff Tianjin Wanhua Co., Ltd. ("Plaintiff" or "Wanhua"). *See* Pl.'s Comments on the U.S. Dep't of Commerce's First Remand Redetermination, ECF No. 78 ("Pl.'s Cmts."); *see also* Def.'s Resp. to Comments to the Remand Redetermination, ECF No. 82 ("Def.'s Resp. Cmts."); Pl.'s Reply to Def.'s Resp. to Remand Comments, ECF No. 88 ("Pl.'s Reply Cmts."). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of

1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012)[1] and 28 U.S.C. § 1581(c) (2012). The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Familiarity with the prior judicial and administrative decisions in this action is presumed.

I. Standard of Review

For administrative reviews of antidumping duty orders, the court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., Administrative Law and Practice § 9.24[1] (3d ed. 2017). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A West's Fed. Forms, National Courts § 3.6 (5th ed. 2017).

[1] 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.

II. Discussion

A. Rejection of Data & Economic Comparability

1. Legal Framework

In an antidumping duty administrative review, Commerce determines whether subject merchandise is being, or is likely to be, sold at less than fair value in the United States by comparing the export price and the normal value of the merchandise. 19 U.S.C. §§ 1675(a)(2)(A), 1677b(a). In the non-market economy ("NME") context, Commerce calculates normal value using data from surrogate countries to value the factors of production ("FOPs"). 19 U.S.C. § 1677b(c)(1)(B). Commerce must use the "best available information" in selecting surrogate data from "one or more" surrogate market economy countries. 19 U.S.C. § 1677b(c)(1)(B), (c)(4). Commerce has a stated regulatory preference to "normally . . . value all factors in a single surrogate country." 19 C.F.R. § 351.408(c)(2) (2015).

The antidumping statute requires that surrogate data must "to the extent possible" be from a market economy country or countries that are (1) "at a level of economic development comparable to that of the [NME] country" and (2) "significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4). The statute does not define the phrase "level of economic development comparable to that of the [NME] country," nor does it require Commerce to use any particular methodology in determining whether that criterion is satisfied. To partially fill the statutory gap, Commerce promulgated 19 C.F.R. § 351.408(b), which emphasizes per capita Gross Domestic Product ("GDP") as a measure of economic comparability:

> In determining whether a country is at a level of economic development comparable to the non-market economy under [19 U.S.C. § 1677b(c)(1)(B)] or [19 U.S.C. § 1677b(c)(4)(A)] of the Act, the Secretary will place primary emphasis on per capita GDP as the measure of economic comparability.

19 C.F.R. § 351.408(b). Commerce has since explained that it "now uses per capita [Gross National Income, or "GNI"], rather than per capita GDP, because while the two measures are very similar, per capita GNI is reported across almost all countries by an authoritative source (the World Bank), and because [Commerce] believes that the per capita GNI represents the single best measure of a country's level of total income and thus level of economic development." *Antidumping Methodologies in Proceedings Involving Non–Market Economy*

Countries: Surrogate Country Selection and Separate Rates, 72 Fed. Reg. 13,246, 13,246 n.2 (Dep't of Commerce Mar. 21, 2007) (req. for comments).

Commerce uses GNI data "as reported in the most current annual issue of the World Development Report (World Bank)" to identify potential surrogate countries that are economically comparable to the NME country. Import Admin., U.S. Dep't of Commerce, Non–Market Economy Surrogate Country Selection Process, Policy Bulletin 04.1 at 2 (2004), http://enforcement.trade.gov/policy/bull04–1.html (last visited this date) ("*Policy Bulletin*"). The identification of potential surrogate countries occurs early in a dumping proceeding, *id.*, and is the first step in Commerce's four-step process to select a surrogate country:

> (1) the Office of Policy ("OP") assembles a list of potential surrogate countries that are at a comparable level of economic development to the NME country; (2) Commerce identifies countries from the list with producers of comparable merchandise; (3) Commerce determines whether any of the countries which produce comparable merchandise are significant producers of that comparable merchandise; and (4) if more than one country satisfies steps (1)–(3), Commerce will select the country with the best factors data.

Vinh Hoan Corp. v. United States, 39 CIT ___, ___, 49 F. Supp. 3d 1285, 1292 (2015) (internal quotation marks omitted) (quoting the *Policy Bulletin*).

2. Procedural History

In conducting the fifth administrative review, as it did in the fourth administrative review, Commerce again selected Indonesia as the primary surrogate country for calculating the normal value of polyethylene terephthalate film, sheet, and strip from the PRC, an NME country. Wanhua challenges that selection and contends that Commerce should have instead selected South Africa. *See* Pl.'s Mem. Supp. Mot. J. Agency R., ECF No. 41 ("Pl.'s 56.2 Br."). The issue of the surrogate country selection turned into something of a mess during the proceeding, a mess that has carried forward into the litigation before the court. Wanhua created that mess by untimely attempting to introduce GNI data for surrogate country selection in a submission for FOP data. Much of Wanhua's briefing and argument concerns alleged unfairness during the proceeding, but the court believes that it was Wanhua that acted inequitably by failing to identify that it was

seeking a waiver of the applicable deadline in its untimely submission of GNI data. More on that after the court explains what transpired below.

Early in the proceeding Commerce issued a "Request for Surrogate Country and Surrogate Value Comments and Information" that solicited from all interested parties submissions of comments and factual information to aid in Commerce's selection of an "appropriate surrogate market economy country." *See Fifth Antidumping Duty Admin. Review of Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China*, PD 89 at bar code 3195959 (Apr. 16, 2014) (request for cmts.) ("*Request for Comments*"). The request included a "non-exhaustive list of countries that . . . based on per capita Gross National Income ("GNI"), are at the same level of economic development as the People's Republic of China." *Id.* (South Africa, Columbia, Bulgaria, Thailand, Ecuador, and Indonesia). The request also set deadlines for the submission of information and comments on surrogate country selection: April 23, 2014 for initial comments on the list and other possibilities, and April 28, 2014 for rebuttal comments. *Id.* at *1. For comments and information on Commerce's ultimate selection of the surrogate country, Commerce set the deadline of May 7, 2014, with rebuttal comments due by May 19, 2014. *Id.* at *2. These same deadlines also applied to the submission of information/comments and rebuttal comments relating to Commerce's selection of surrogate value information used to value FOPs. *Id.* Commerce noted, however, that [n]otwithstanding the above deadlines, in accordance with 19 CFR 351.301(c), interested parties may submit publicly-available information to value factors of production no later than 30 days before the scheduled date of the preliminary results." *Id.*

The *Request for Comments* emphasized Commerce's "practice to determine economic comparability early in a proceeding" and that Commerce "intends to identify the surrogate country preliminarily selected in the preliminary results of this segment of the proceeding." To achieve that end Commerce provided early deadlines for all parties to provide information and comments regarding the surrogate country list and surrogate country selection generally. *Id.* No party objected to the deadlines provided in the *Request for Comments*.

On April 23, 2014, Wanhua timely submitted comments "on the those countries which are on a level of economic development comparable to the People's Republic of China." *See* Wanhua Comments on Economic Comparability & Request for Clarification of Date, PDs 93–97 at bar codes 3197604–01 to -05 (Apr. 23, 2014) (sic). Wanhua acknowledged that the six countries selected by Commerce were

"economically comparable" to China, but also argued Commerce should consider India even though India's GNI was much lower than China's and therefore was not on Commerce's preliminary list of comparable countries. *Id.* at bar code 3197604–01, *9–10.

Wanhua also noted that GNI data for 2013, rather than 2012, would be more relevant for Commerce's analysis because the 2012 data only overlapped 2 months of the period of review whereas the 2013 data would overlap 10 months. *Id.* at bar code 3197604–01, *3–4. The 2013 GNI data, however, would not be available until July 2014, two months *after* Commerce's May 7th deadline for information and comments on surrogate country selection. *Id.* Despite suggesting that Commerce should use the 2013 GNI data, Wanhua failed to address the obvious problem that the data was untimely. *Id.* Wanhua did not request that Commerce waive or extend the deadline. Wanhua also did not argue that the untimely 2013 GNI data could easily be factored into the surrogate country analysis without time-consuming complexity or delay. What Wanhua offered instead was this incomplete thought: "The Department should anticipate the likely data in preparing to make its comparability determination and should not continue to find that a Country is comparable, based on GNI, if the data presented to the Department[.]" *Id.* (sic).

Subsequently, on May 7, 2014, Wanhua submitted its "Comments on the Selection of Surrogate Country, Submission of Initial Surrogate Value Information and Request for Clarification of Deadline." Wanhua SC/SV Comments, PDs 103–110 at bar codes 3200113–01 to -10 (May 7, 2014). Wanhua acknowledged that it was commenting "on the selection of a surrogate country." *Id.* at bar code 3200113–01, *1. On economic comparability Wanhua argued that Commerce

> should consider all of the countries that fall within the GNI range, as well as India, to be economically comparable to China with a caveat. The caveat is that the Department must reconsider the economic comparability of Indonesia and the other countries at the bottom edge of the GNI band when the new World Bank data is released which will show that the gap between Indonesia and China will has grown and was significant during the POR.

Id. at bar code 3200113–01, *2 (sic). Wanhua's argument contains a jarring asymmetry. On the one hand, Wanhua argues that Commerce should ignore GNI differences and select India. On the other, Wanhua argues that Commerce should disqualify Indonesia based on GNI differences with China. Oblivious to this irreconcilable dissonance, Wanhua goes on to argue the suitability of India and/or South Africa

for selection, contending that both countries are significant producers of comparable merchandise and that both countries had readily available, high quality data. *Id.* at bar code 3200113–01, *2–6.

Wanhua also addressed its data submissions for surrogate values, and noted its intention to submit additional surrogate value information 30 days prior to the scheduled release of the preliminary results. *Id.* at bar code 3200113–01, *6–7. Wanhua did not notify Commerce or the other interested parties that it intended to submit the untimely 2013 GNI data on surrogate country selection at the same time as its additional surrogate value submission. On July 7, 2014, Wanhua submitted "certain Surrogate Value Information" pursuant to the *Request for Comments* and 19 CFR § 351.301(c). *See* Wanhua Rejected Surrogate Value Information, PDs 157–159 at bar codes 3214057–01 to -03 (July 7, 2014) ("the July 7th Submission"). Without highlighting that it was also including untimely information on surrogate country selection, Wanhua included the 2013 GNI data, which, unlike the other information and data included in the submission, were not surrogate FOP values. *Id.* at bar code 3214057–01, *2 & Ex. 1.

On November 28, 2014, Commerce issued its preliminary results and selected Indonesia as the primary surrogate country, relying on the interested parties' *April and May* submissions to make the determination. *See* Decision Memorandum for the Preliminary Results of the 2012–2013 Antidumping Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from the PRC, PD 190 at bar code 3244446 (Nov. 28, 2014). Commerce found that both Indonesia and South Africa were at a comparable level of economic development to the PRC, were significant producers of merchandise similar to the subject merchandise, and offered usable surrogate values. *Id*. at 7–14. Although the South African producer made "comparable merchandise" such as polyethylene film, the Indonesian producer, made "identical merchandise." *Id.* at 14. Relying on a "preference for selecting the financial statements of a producer of identical merchandise over a producer of comparable merchandise," Commerce preliminarily selected Indonesia as the primary surrogate country for the administrative review. *Id.*

Wanhua subsequently submitted its initial administrative case brief on January 14, 2015. Wanhua argued that Commerce should not have selected Indonesia as the surrogate country, but instead should have chosen South Africa (abandoning its argument about India). *See* Wanhua Administrative Case Brief, PD 209 at bar code 3252778 (Jan. 14, 2015). In its case brief Wanhua directly referenced for the first time the untimely 2013 GNI data Wanhua in its July 7th Submission.

See id. at *5–6, *8–10. It appears that Commerce and the other interested parties first became aware of the untimely 2013 GNI data when they read Wanhua's case brief. On March 12, 2015, Commerce issued a letter to Wanhua rejecting the inclusion of the untimely 2013 GNI data within its July 7th Submission. Commerce reasonably noted that the untimely data was related to the selection of surrogate countries with earlier deadlines than the FOP submission of July 7th. *See* Rejection of Surrogate Information, PD 216 at bar code 3264120 (Mar. 2, 2015). Commerce also rejected Wanhua's January 2015 case brief and requested that Wanhua re-file it after redacting references and arguments relating to the untimely 2013 GNI data. *See* Rejection of Wanhua Case Brief, PD 223 at bar code 3265209 (Mar. 19, 2015). Wanhua complied with Commerce's request, but also filed a letter objecting to and seeking clarification of Commerce's rejection of the 2013 GNI data and its requirement of redactions to Wanhua's case brief. *See* Wanhua Request for Clarification of Rejection, PD 224 at bar code 3265244 (Mar. 19, 2015). Wanhua objected that Commerce's rejection of the July 7th Submission was improper and inconsistent with *Dupont Teijin Films v. United States*, 39 CIT ___, 931 F. Supp. 2d 1297 (2013), in which the court remanded Commerce's surrogate country selection where a party had placed new GNI data on the record and such data was not rejected as untimely but Commerce nevertheless determined the date of the data submission was too late in the review process to merit substantive consideration. *See Dupont Teijin Films*, 39 CIT at ___, 931 F. Supp. 2d at 1300, 1303–05.

On June 3, 2015, Commerce issued a memorandum explaining again its rejection of the untimely 2013 GNI data as well as responding to Wanhua's objection to the redaction and resubmission requirements for its case brief. *See* Department Memorandum re: Rejection of Untimely Filed Information, PD 232 at bar code 3281665 (June 3, 2015). Commerce reasonably distinguished the facts in *Dupont Teijin Films* from those presented in Wanhua's case. Commerce noted that in the current administrative review of polyethylene terephthalate film, sheet, and strip from the PRC, Commerce had established clear deadlines for factual information submissions relating to surrogate country selection and surrogate value calculation, whereas no clear deadlines were present in *Dupont Teijin Films*. *Id.* at *2. Commerce also expressly rejected the 2013 GNI data as untimely, unlike in *Dupont Teijin Films* where Commerce did not reject as untimely the GNI data but instead merely found that the submission was too late in the process to substantively affect the surrogate country selection analysis. *Id.* at *2–3 ("Regardless, in this proceeding, unlike in the

review underlying *Dupont Teijin Films*, Wanhua's factual information was untimely filed pursuant to the deadlines specified by the Department as well as 19 CFR 351.301."). On June 11, 2015 Commerce issued its *Final Results* and calculated antidumping duty rates for Wanhua based on Indonesia as the primary surrogate country. *See Final Results*.

Wanhua subsequently commenced this action challenging (1) Commerce's rejection of the untimely 2013 GNI data, (2) Commerce's rejection and mandated redactions of Wanhua's administrative case brief and subsequent objection letter, and (3) Commerce's surrogate country selection. *See* Pl.'s 56.2 Br. Commerce, in turn, requested a remand to address its treatment of Wanhua's case brief, and on August 15, 2016, the court remanded the matter to Commerce. *See Tianjin Wanhua Co. v. United States*, 40 CIT ___, 182 F. Supp. 3d 1301 (2016). The court reserved decision on the lawfulness of Commerce's rejection of the untimely 2013 GNI data. *Id.* at 1306.

On remand, Commerce softened some of its redactions to Wanhua's case brief, and ultimately chose Indonesia again, rather than South Africa, as the primary surrogate country. *Remand Results* at 6–9, 11–13.

3. Analysis

In writing its case brief before Commerce, Wanhua proceeded on the incorrect assumption that Commerce would use the untimely 2013 GNI data in making its primary surrogate country selection. Wanhua was aware of the deadlines for information relating to Commerce's surrogate country selection. Wanhua was also aware the 2013 GNI data would not be available until *after* those deadlines had passed. Instead of formally objecting to or challenging the deadlines in Commerce's *Request for Comments*, or seeking a formal acceptance of the untimely 2013 GNI data by Commerce, Wanhua instead merely assumed in its briefing that Commerce would quietly waive its established deadlines and incorporate the 2013 GNI data into its analysis. *See* Wanhua Comments on Economic Comparability, PDs 93–97 at bar codes 3197604–01 to -05; Wanhua SC/SV Comments, PDs 103–110 at bar codes 320013–01 to -10.

The court cannot understand Wanhua's cavalier assumption about an untimely data submission, especially given the manner in which Wanhua tried to introduce it onto the record. Without a formal acceptance by Commerce of the untimely data, other interested parties would not know to consider that data in their own analyses and argument about surrogate country selection. The result is a fractured administrative record, and Commerce's trade analyst conducting the

review is left in an unworkable situation, with case briefs and arguments that do not line up because the parties are working from differing data sets.

Wanhua attempts to argue that Commerce's rejection of the 2013 GNI data was unreasonable and unfair. *See* Pl.'s Cmts. 12–23; *see also* Pl.'s 56.2 Br. 15–18. Wanhua further contends that even if Commerce properly rejected the 2013 GNI data as untimely, Commerce's delay in rejecting the data, and Wanhua's related briefing relying on that data, was fundamentally unfair to Wanhua. *See* Pl.'s Cmts. 15–17, 32. Wanhua frames this argument as either a "deprivation of due process rights," or alternatively, a violation of the "fair process doctrine" adopted by the U.S. Court of Appeals for the Federal Circuit in *Sprinkle v. Shinseki*, 733 F.3d 1180 (Fed. Cir. 2013). *Id.*

The court is not persuaded by these arguments. It is difficult to generate sympathy for Wanhua's lamentations about a lack of fair process given how it handled the untimely 2013 GNI data submission. Rather than challenge the surrogate country selection deadlines directly, and argue that Commerce could not reasonably reject untimely 2013 GNI data covering 10 months of the period of review, Wanhua chose opacity over transparency by including the untimely 2013 GNI data in an FOP submission. In choosing to then incorporate the untimely 2013 GNI data into its case brief without a formal acknowledgment that Commerce would waive the deadlines and accept the data, Wanhua effectively derailed the case brief process, putting Commerce's trade analyst, as well as the other interested parties, in an untenable situation. Wanhua conveniently ignores the resulting unfairness it created by relying on untimely data that no other interested parties briefed and argued. If fairness and fair process are truly the guide, the court wonders how Wanhua could reasonably expect Commerce to do anything other than what it did.

Wanhua did not just create procedural confusion below. Wanhua's substantive arguments were also confusing. In its surrogate country selection submissions Wanhua argued that Commerce should select India as the surrogate country, despite India not being included on Commerce's preliminary list of countries economically comparable to China, while simultaneously arguing that Commerce should not select Indonesia because it was *not* economically comparable to China. The court does not understand how Wanhua could have reasonably expected to prevail on the issue of surrogate country selection given the irreconcilable dissonance of its substantive arguments.

Wanhua also asserts in its remand comments that Commerce acted inconsistently in its treatment of untimely information, but fails to

identify any specific prior instance of inconsistent treatment. *See* Pl.'s Cmts. 17–19. Wanhua attempts to avoid this deficiency by contending that "Wanhua is unable to place on the record new factual information demonstrating this inconsistency or cite to such inconsistency as it would constitute new factual information not of record and the brief would be rejected." *Id.* at 18. This is a weak apologia for Wanhua failing to provide specific instances of agency inconsistency. A purported inability to submit new factual information does not excuse Wanhua's failure to identify any specific prior instances of inconsistency that Commerce would have to address and explain. As Defendant points out, "Wanhua did not even attempt to articulate *in what way* Commerce's rejection of its untimely submitted surrogate country data was inconsistent with prior practice." Def.'s Resp. Cmts. 19. Suffice it to say, Plaintiff's vague argument is unpersuasive. The court sustains Commerce's rejection of Wanhua's untimely 2013 GNI data and Commerce's redaction of Wanhua's case brief.

B. Financial Statement Quality and Surrogate Country Selection

Wanhua also contends that Commerce unreasonably selected Indonesia as the primary surrogate country despite an alleged lack of quality data. Wanhua argues that Commerce improperly relied upon an incomplete annual report of Indonesian company PT Argha Karya Prima Industry, Tbk ("Argha Karya"), and that the missing data resulting from the incompleteness of the report, coupled with the allegation that Argha Karya's financials are distorted by Indonesian subsidies, rendered Argha Karya's financial statements and the resulting financial ratio unusable, or at least of questionable quality in comparison with available South African data. *See* Pl.'s 56.2 Br. 23–24, 26–29. In requesting remand on the issue of surrogate country selection, Commerce did not address in its Rule 56.2 brief Wanhua's subsidiary arguments regarding the surrogate country selection issue, including Wanhua's arguments regarding the quality of the Argha Karya data. *See* Def.'s Mem. Opp'n Pl.'s R. 56.2 Mot. J. Agency R. and Mot. Partial Voluntary Remand 23, ECF No. 51 ("Def.'s 56.2 Resp.") ("In light of our request for a voluntary remand for Commerce to reconsider its treatment of Wanhua's "Request for Clarification of Rejection" letter, we further respectfully request a remand on the issue of surrogate country selection, an issue which Wanhua has challenged in its present brief." (citing pages 22–28, comprising "Section 3" of Pl.'s 56.2 Br., which addressed Wanhua's challenge to Commerce's selection of Indonesia as the primary surrogate country).

Wanhua now argues that Commerce's failure to respond to its arguments about the Indonesian financial ratio constitutes a waiver.

See Pl.'s Cmts. 5–8; *see also* Pl.'s Reply Cmts. Wanhua specifically argues that it challenged in its opening brief Commerce's determination that the Argha Karya financials were usable and suitable for selection over the South African financial statements, and that Commerce failed to respond to such arguments in any form. *See* Pl.'s Cmts. 5–7. Wanhua is incorrect. Commerce expressly asked for a remand on the entire issue of surrogate country selection, including the subsidiary issues as to the quality of the Indonesian financial data raised in Section 3 of Wanhua's brief. *See* Def.'s 56.2 Resp. 23 (requesting remand specifically to address surrogate country selection issues raised in Section 3 of Wanhua's brief). On remand Commerce considered and discussed all of Wanhua's arguments regarding surrogate country selection, including the issues of Argha Karya's financial statements and their impact on surrogate country selection. Defendant did not waive arguments on surrogate country selection.

This Court has previously addressed Wanhua's arguments regarding the weaknesses of the Argha Karya financial report in a case involving a prior administrative proceeding. *See Tianjin Wanhua Co. v. United States*, 40 CIT ___, 179 F. Supp. 3d 1062, 1068–71 (2016) ("*Tianjin I*"). In *Tianjin I*, Wanhua challenged Commerce's selection of Indonesia as the primary surrogate country and Commerce's reliance upon the same incomplete financial report of Argha Karya used in the fifth administrative review. Wanhua in *Tianjin I* similarly urged Commerce to instead select South Africa and use the financial statements of the South African company AstraPak. *Id.* This Court in *Tianjin I* concluded that although Wanhua raised serious issues about the potential unreliability of Argha Karya's financial report (specifically the report's incomplete nature and the potential distortive effect of Indonesian subsidies on the data), a reasonable mind, and therefore Commerce, could select the Argha Karya data over the AstraPak data given Commerce's uncontroverted finding that the Indonesian company produced *identical* merchandise, whereas the South African company produced the less exact *comparable* merchandise. *Id.* at 1070–71. The court noted that "[f]or the court to remand for Commerce to use the AstraPak dataset, Wanhua needed to establish that AstraPak, when compared with Argha, is the *one and only reasonable surrogate selection on this administrative record*, not simply that AstraPak may have constituted another possible reasonable choice." *Id.*, 40 CIT at ___, 179 F. Supp. 3d at 1071 (emphasis added).

In this action Commerce again selected the Argha Karya data set over Wanhua's preferred data set from South African AstraPak, finding that it came from a producer of "identical" merchandise rather than a producer of "comparable" merchandise (Astrapak) and that the

Indonesian data was "reliable and usable." *See Decision Memorandum* at 5--6. Here, Wanhua has failed to grapple with or provide any "analysis of the consequence of 'comparable' vs. 'identical' merchandise on the margin calculation, *e.g.*, what complexities or difficulties would or would not be engendered[, s]o although the court may agree that the Argha annual report has weaknesses as a surrogate dataset, the court cannot evaluate those weaknesses against the noted weaknesses of the AstraPak dataset because Wanhua did not provide any comparative analysis." *Id.* 40 CIT at ___, 179 F. Supp. 3d at 1070–71. Misreading the court's decision in *Tianjin I*, Wanhua asserts that the financial ratio derived from the Argha Karya financial record is "unusable" and that the unsuitability of the Indonesian financial ratio has even been established as a "key fact of record." *See* Pl.'s Cmts. 4, 8–9. Wanhua suggests that the only reason this Court sustained Commerce's use of the Argha Karya financial ratios in the fourth administrative review was because "the usability of the South African ratios had not been established." *Id.* at 7. Although Wanhua provides some additional detail on why the South African AstraPak data may be reliable and complete and another reasonable choice available to Commerce, Wanhua has still failed to undertake a comparative analysis or provide an explanation about whether the relative advantages of using a producer of identical merchandise (Indonesian Argha Karya) are outweighed by using a less specific producer of "comparable" merchandise (South African Astrapak) to demonstrate that AstraPak is the "one and only reasonable surrogate selection." *Tianjin I*, 40 CIT at ___, 179 F. Supp. 3d at 1071.

The court therefore sustains Commerce's selection of Indonesia as the primary surrogate country.

III. Conclusion

For the foregoing reasons, the *Remand Results* are sustained. Judgment will be entered accordingly.

Dated: July 24, 2017
New York, New York

/*s*/ *Leo M. Gordon*
JUDGE LEO M. GORDON

Slip Op. 17–92

MONDELEZ GLOBAL LLC (SUCCESSOR to CADBURY ADAMS USA, LLC), Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Court No. 12–00076

[Parties' cross-motions for summary judgment in customs classification matter are denied.]

Dated: July 25, 2017

Craig A. Lewis, Chandri Navarro, Michael Jacobson, and *A. Elizabeth Korchin*, Hogan Lovells US LLP, of Washington, DC, and *A. Elizabeth Korchin*, Hogan Lovells US LLP, of New York, NY, for plaintiff.

Jamie L. Shookman, Trial Attorney, Commercial Litigation Branch, U.S. Department of Justice, Civil Division, of New York, NY, for defendant. With her on the brief were *Chad Readler*, Acting Assistant Attorney General, *Amy M. Rubin*, Assistant Director, and *Justin R. Miller*, Senior Trial Counsel. Of counsel on the brief was *Michael W. Heydrich*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection.

OPINION

Restani, Judge:

This matter is before the court on cross-motions for summary judgment made by plaintiff Mondelez Global LLC (Successor to Cadbury Adams USA, LLC) ("Mondelez"), an importer of gum base used in manufacturing chewing gum, and defendant United States ("the government"). *See* Def.'s Mem. in Supp. of the Mot. for Partial Summ. J. 1, ECF No. 63 ("Gov't Br."); Mem. of Law in Supp. of Pl.'s Opp'n to Def.'s Partial Mot. for Summ. J. & in Supp. of Pl.'s Cross Mot. for Summ. J. 1, ECF No. 69 ("Mondelez Br."). The government argues that United States Customs and Border Protection ("Customs") properly classified the subject merchandise as a "food preparation" under subheading 2106.90.99 of the Harmonized Tariff Schedule of the United States[1] ("HTSUS"),[2] Gov't Br. at 5–15; Def.'s Mem. in Opp'n to Pl.'s Mot. for Summ. J. & in Reply to Pl.'s Resp. to Def.'s Partial Mot. for Summ. J. 6–15, 17–21, ECF No. 78 ("Gov't Resp."), and that gum

[1] All citations to the Harmonized Tariff Schedule of the United States ("HTSUS") refer to the HTSUS at the time of importation, i.e. 2010.

[2] The relevant portion of Chapter 21 of the HTSUS reads:

2106 Food preparations not elsewhere specified or included: . . .
2106.90 Other: . . .
Other: . . .
Other: . . .
Other: . . .
Other: . . .
2106.99 Other

base is not classifiable under heading 3824, HTSUS, Gov't Br. at 16; Gov't Resp. at 15–17. Mondelez, however, asserts that the gum base is properly classified under subheading 3824.90.92, HTSUS, as a "chemical product[] and preparation[] of the chemical or allied industries,"[3] Mondelez Br. at 1–2, 24–27; Pl.'s Reply in Further Supp. of its Cross Mot. for Summ. J. 11–13, ECF No. 83 ("Mondelez Resp."), and not under heading 2106, HTSUS, Mondelez Br. at 9–24; Mondelez Resp. at 4–11.[4] For the reasons stated below, the court denies both parties' motions for summary judgment.

BACKGROUND

The following facts are undisputed. Gum base is an ingredient of finished chewing gum. Def.'s Statement of Undisputed Material Facts ¶ 6, ECF No. 63–1 ("Def.'s SUMF"); Pl.'s Resp. to Def.'s Statement of Undisputed Material Facts ¶ 6, ECF No. 69–1 ("Pl.'s Resp. to SUMF"). It is composed of "fillers, plasticizers, softeners, emulsifiers, antioxidants, and other chemicals." Pl.'s Statement of Undisputed Material Facts ¶ 7, ECF No. 69–2 ("Pl.'s SUMF"); Def.'s Resp. to Pl.'s Statement of Undisputed Material Facts ¶ 7, ECF No. 78–1 ("Def.'s Resp. to SUMF"). Gum base lacks any coloring, flavoring, or sweetener. Pl.'s SUMF ¶ 8; Def.'s Resp. to SUMF ¶ 8. Some of the subject merchandise's ingredients—hydrogenated oil, calcium carbonate, triacetin, and lecithin—have nutritive value when presented to the body in digestible form. Am. Compl. ¶ 24, ECF No. 58; Def.'s SUMF ¶¶ 9–10; Pl.'s Resp. to SUMF ¶¶ 9–10.[5] Gum base is not intended to be ingested, eaten, or swallowed. Pl.'s SUMF ¶ 12; Def.'s Resp. to SUMF ¶ 12. After importation, Mondelez adds flavor, sweetener, and color to the gum base to manufacture chewing gum. Def.'s SUMF ¶ 7; Pl.'s Resp. to SUMF ¶ 7.

In July of 2008, Customs issued ruling letter NYRL N031237 (July 10, 2008), *available at* 2008 WL 2944756 in response to a request by Mondelez's predecessor, Cadbury Adams USA, LLC ("Cadbury") as to

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[3] The relevant portion of Chapter 38 of the HTSUS reads:

3824 Prepared binders for foundry moulds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included: . . .
3824.90 Other: . . .
Other: . . .
3824.90.92 Other

[4] In addition, if gum base is classifiable under both headings, the government contends that heading 2106, HTSUS, prevails under HTSUS General Rule of Interpretation ("GRI") 3(a), Gov't Resp. at 21–23, whereas Mondelez posits that heading 3824, HTSUS, controls under GRI 3(c), Mondelez Br. at 27–29.

[5] There are three forms of gum base at issue in this case, Def.'s SUMF ¶ 1; Pl.'s Resp. to SUMF ¶ 1, of which only one contains lecithin, Def.'s SUMF ¶¶ 2–4; Pl.'s Resp. to SUMF ¶¶ 2–4.

the classification of gum base. In this ruling, Customs classified the subject merchandise without discussion as a "food preparation" under subheading 2106.90.99. *Id.* at *1. Subsequently, in January and February of 2010, Cadbury made six entries of gum base from Ireland through the Port of Chicago, Illinois. Am. Compl. ¶ 14. Cadbury timely protested Customs' classification of these entries as food preparations, which protests Customs denied. *Id.*¶¶ 34–35. Cadbury then filed this action challenging Customs' classification of the gum base.[6] Summons 1, ECF No. 1. Both parties now move for summary judgment pursuant to United States Court of International Trade ("USCIT") Rule 56. Gov't Br. at 1; Mondelez Br. at 1.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT Rule 56(a). In tariff classification cases, "summary judgment is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is." *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). The court reviews de novo Customs' classification decision. *See* 28 U.S.C. § 2640(a)(1); *Telebrands Corp. v. United States*, 865 F. Supp. 2d 1277, 1279–80 (CIT 2012).

DISCUSSION

Tariff classification is governed by the General Rules of Interpretation ("GRIs"), which must be applied in numerical order. *Wilton Indus., Inc. v. United States*, 741 F.3d 1263, 1266 (Fed. Cir. 2013). GRI 1 states that "classification shall be determined according to the terms of the headings and any relative section or chapter notes." When, as here, a tariff term "is not defined in either the HTSUS or its legislative history, the term's correct meaning is its common meaning. A court may rely upon its own understanding of terms used, and may consult standard lexicographic and scientific authorities, to determine the common meaning of a tariff term." *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (internal citation

[6] Cadbury had previously filed a related action, *Mondelez Global LLC (Successor to Cadbury Adams USA, LLC) v. United States*, Court No. 11–00393. Summons 1–2, Court No. 11–00393 (CIT Sept. 27, 2011), ECF No. 1. The present case, Court No. 12–00076, was designated as a test case, and Court No. 11–00393 has been stayed pending disposition of the present case. Order, Jan. 1, 2016, ECF No. 45.

omitted). A court should also refer to the Explanatory Notes ("ENs")[7] in classification cases, which "provide persuasive guidance and 'are generally indicative of the proper interpretation,' though they do not constitute binding authority." *Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1164 (Fed. Cir. 2017) (quoting *Kahrs Int'l, Inc. v. United States*, 713 F.3d 640, 645 (Fed. Cir. 2013).

I. Heading 2106, HTSUS (Customs' Claimed Classification)

A. Government's Construction of "Food Preparation"

The government contends that gum base is a "food preparation" under heading 2106 because chewing gum is a "food," a "preparation" is a substance specially prepared for a particular application, and gum base is used exclusively for manufacturing chewing gum, itself a food. Gov't Br. at 6–12; Gov't Resp. at 10–15. Relying on *Franklin v. United States*, 289 F.3d 753, 760–61 (Fed. Cir. 2002), Mondelez responds that heading 2106 covers only products that are themselves "consumed as food," not those simply used in food, and that gum base is not "consumed as food." Mondelez Br. at 9–18. Mondelez also argues that the ENs for HS heading 21.06 weigh against the inclusion of gum base in that heading because gum base falls under a different heading, and gum base is neither "for human consumption" nor "valued for its nutritional qualities." *Id.* at 18–24.

Products are not classifiable under heading 2106, HTSUS, merely because they are specifically made for use in food. The government is correct that the *word*, "preparation," in this context means "a substance specially prepared, or made up for its appropriate use or application, e.g. as food or medicine, or in the arts or sciences." *See Orlando Food Corp. v. United States*, 140 F.3d 1437, 1441 (Fed. Cir. 1998) (quoting *The Oxford English Dictionary* 374 (2d ed. 1989)); *Nestle Refrigerated Food Co. v. United States*, 18 CIT 661, 673–74 (1994) ("The term 'preparation' has been defined as 'something that is prepared: something made, equipped, or compounded for a specific purpose . . . .'") (quoting *Preparation*, WEBSTER'S THIRD NEW INT'L DICTIONARY 1790 (unabridged 1993)); *abrogated on unrelated grounds Orlando Food*, 140 F.3d at 1440.[8] But, the govern-

[7] The ENs to the Harmonized Commodity Description and Coding System ("HS"), of which the HTSUS is an embodiment, are published by the World Customs Organization. *See Tyco Fire Prods, Ltd. P'ship. v. United States*, 841 F.3d 1353, 1356 (Fed. Cir. 2016); *Chemtall, Inc. v. United States*, 179 F. Supp. 3d 1200, 1203 (CIT 2016).

[8] The government does not explicitly state, but apparently contends, that a product is "specifically prepared for use in food" only if it is "used exclusively" in food. Gov't Resp. at 10–11.

ment's construction of the *phrase*, "food preparation," runs counter to its common meaning. The phrase "food preparation" is simply an attributive noun, "food," followed by another noun, "preparation." Similarly to how the attributive noun "chicken" in the phrase "chicken soup" describes what type of soup is meant, the word "food" simply specifies what type of "preparation" is covered by heading 2106, HTSUS.

The government's arguments to the contrary are unpersuasive. First, the government cites *Orlando Food* and *Nestle* as support for its construction of heading 2106, HTSUS, but these cases analyzed materially different headings—ones that covered "preparations" *for* something, rather than "preparations" *of* something. Gov't Br. at 8–9; *see Orlando Food*, 140 F.3d at 1441 (analyzing a heading covering "sauces and preparations therefor"); *Nestle*, 18 CIT at 673–74 (interpreting a heading covering "[p]reparation for sauce").[9] Indeed, the difference between the heading in those cases and heading 2106, HTSUS, highlights the failure of the government's argument. The HTSUS is rife with headings and subheadings that distinguish between preparations *for* something, and preparations in and of themselves.[10] If heading 2106, HTSUS, were intended to cover "preparations *for* food," the HTSUS could have said so. *Cf. Whitfield v. United States*, 543 U.S. 209, 216 (2005) (reasoning that Congress's inclusion of an express overt-act requirement in twenty-two different conspiracy statutes meant that Congress did not intend such requirement to be included in a statute lacking one). Second, the government relieson past Customs rulings in which Customs "classified preparations employed in the processing and manufacture of foods and beverages under heading 2106." Gov't Br. at 10 n.6. But, such arguments

[9] *Arbor Foods, Inc. v. United States*, 30 CIT 670, 677–78 (2006), cited by the government, does not aid the inquiry here. In that case, "neither party contest[ed] that the [sugar and gelatin] blend f[ell] within the definition of food preparation because it [was] used to make confections and other gelatin-based desserts." This indicates the parties believed the subject merchandise was classified under heading 2106, HTSUS, solely because, in accordance with the government's interpretation, the subject merchandise was used in food. But, this single sentence noting the parties' understanding of the heading does little for the government's argument, given that the court in *Arbor Foods* did not have the occasion, as it does now, to consider the meaning of heading 2106 in a contested setting.

[10] For instance, in the latter category are "[o]ther [pasta], including pasta packaged with sauce preparations," subheading 1902.11.40, HTSUS; "[c]hocolate and other food preparations containing cocoa," heading 1806, HTSUS; and "[p]re-shave, shaving or after shave preparations," heading 3307, HTSUS. Examples of the former category include "[s]oups and broths and preparations therefor," heading 2104, HTSUS; "[m]ixes and doughs for the preparation of bakers' wares of heading 1905," subheading 1901.20, HTSUS; and "other animal products used in the preparation of pharmaceutical products," subheading 0510.00, HTSUS. This distinction in language is further highlighted by heading 2104, HTSUS, which covers both "[s]oups and broths and *preparations therefor*" and "homogenized composite *food preparations*."

fall short because no ruling cited by the government explicitly relied on the incorporation of the subject merchandise into food to classify the subject merchandise under heading 2106, HTSUS. *See* NYRL N196776 (Jan. 19, 2012), *available at* 2012 WL 421493; NYRL N186795 (Oct. 28, 2011), *available at* 2011 WL 5829228; NYRL N171670 (July 5, 2011), *available at* 2011 WL 3473014; HQ W967896 (Feb. 5, 2008), *available at* 2008 WL 2610983; HQ 965805 (Oct. 7, 2002), *available at* 2002 WL 32097162. And indeed, each product at issue in these rulings appears to be a "food," which term is discussed below, in its own right. *See, e.g.*, NYRL N171670 (classifying "Orange Jelly Balls" under heading 2106, HTSUS).[11] Third, the ENs to HS heading 21.06 do not support the government's contention that a product is a "food preparation" simply because it is specifically manufactured for use in food.[12] Thus, a product is not classifiable under heading 2106, HTSUS, merely because it is specially prepared for use in food, instead the preparation must itself be food. *See also Drygel, Inc. v. United States*, 31 CIT 1319, 1328, 507 F. Supp. 2d 1371, 1380 (2007), *rev'd on other grounds*, 541 F.3d 1129 (Fed. Cir. 2008) (limiting "food preparations" under heading 2106, HTSUS, to "substances pre-

[11] In its opposition to the government's construction of "food preparation," Mondelez cites several Customs rulings in which Customs classified a product ultimately used in food under a heading other than 2106, HTSUS. Mondelez Br. at 12–14; *see* NYRL N063515 (July 29, 2009), *available at* 2009 WL 2488977; NYRL N061200 (May 29, 2009), *available at* 2009 WL 1915895; NYRL G82028 (Jan. 18, 2001), *available at* 2001 WL 359794. These rulings are of limited value, however, given that they include no discussion as to why the products at issue were not classified under heading 2106, HTSUS. The government merely contends that a product used in food can be classified under heading 2106, HTSUS, not that it always must be classified there.

[12] The Explanatory Notes to HS heading 21.06 provide that the heading covers:

> (A) Preparations for use, either directly or after processing (such as cooking, dissolving or boiling in water, milk, etc.), for human consumption.
>
> (B) Preparations consisting wholly or partly of foodstuffs, used in the making of beverages or food preparations for human consumption. The heading includes preparations consisting of mixtures of chemicals (organic acids, calcium salts, etc.) with foodstuffs (flour, sugar, milk powder, etc.), for incorporation in food preparations either as ingredients or to improve some of their characteristics (appearance, keeping qualities, etc.) (see the General Explanatory Note to Chapter 38).

EN Ch. 21 at IV-2106–1 (2007). All citations to the ENs are to the 2007 version, the most recently promulgated edition at the time of importation.

As the government notes, paragraph (A) brings under heading 2106, HTSUS, "substances that are [] *themselves* 'for human consumption.'" Gov't Resp. at 13 (emphasis added). Although paragraph (B)'s language of "used in the making of . . . food preparations" seems to lend some support to the government's contention, paragraph (B) applies only to preparations consisting "wholly or partly *of foodstuffs*." EN Ch. 21 at IV-2106–1. Thus, paragraph (B) does not capture a product solely because it is specially made for use in food. Furthermore, paragraph (B) appears intended to note that a preparation "for human consumption," that is, as discussed below, a "food," need not itself be composed entirely of classic "foodstuffs" such as flour and sugar, but can also contain items commonly described as "chemicals." (Although the court notes that, of course, even food is composed of chemicals.)

pared for human consumption."). Accordingly, the government's motion for summary judgment on its construction of heading 2106, HTSUS, is denied.

B. Common Meaning of "Food Preparation"

1. Construction

Having concluded that a product may be classified under heading 2106, HTSUS, only if it is a "preparation" that is "food," the court turns to the question of the common meaning of "food" under heading 2106, HTSUS.[13] *See* GRI 1. The government never directly defines "food," but appears to hold to the following definition— a "food" need not be "edible," a term which the government describes as "suitable for human consumption," *see* Gov't Resp. at 14, need not be swallowed or ingested, *see* Gov't Br. at 13–14, and need not provide nutritive value in digestible form or even have nutrition at all, although the government states that if a product does have nutritive value then it is a "food," *see id.* at 11–12 n.8; Gov't Resp. at 7–8, 16. The only requirement the government would impose is that "food" must be "for human consumption," which the government defines as "the act of consuming, as by use, decay, or destruction." *See* Gov't Br. at 10 (defining "consumption"); Gov't Resp. at 13–14. Mondelez on the other hand seems to define "food" as a substance that is intended to be ingested. *See* Mondelez Br. at 9–11, 20, 22; Mondelez Resp. at 6, 9. Mondelez reads the case law and ENs' references to "edible," "for human consumption," and "consumed as food" to be merely myriad ways of describing this same definition of food.[14] *See* Mondelez Br. at 9–11, 20, 22; Mondelez Resp. at 6, 9. Mondelez qualifies its definition by noting that some substances, for example, tea and a bouquet garni, are "consumed as food" because they impart flavor or nutrients without themselves necessarily being ingested. Mondelez Br. at 14 n.10. Of course, some compounds from the tea and bouquet garni become part of the ingested food, and that is their chief purpose.

The common meaning of "food" is that of a substance that is intended to be ingested. *See Franklin*, 289 F.3d at 760–61 (concluding that a sand coral packet used to purify water was not a "food preparation" under heading 2106, HTSUS, because no evidence

[13] Other than disputing whether a "food preparation" covers something specially prepared for use in food, the parties do not argue over whether gum base is a "preparation."

[14] Mondelez provides a table in its opening brief that seems to indicate a distinction between the concepts of "food" and "edible." *See* Mondelez Br. at 15–16. But, elsewhere, Mondelez makes clear that it believes these ideas to be indistinguishable. *See* Mondelez Resp. at 9 (stating that *Franklin* "found that merchandise must be edible to be 'consumed as food'"); Mondelez Br. at 22 ("[T]he USCIT has equated 'for human consumption' with being 'edible.'").

suggested the product itself was consumed as food); EN Ch. 21 at IV-2106–1 (stating that a "preparation" only qualifies as a "food preparation" if it is "for human consumption");[15] *Food*, OXFORD ENGLISH DICTIONARY, *available at* http://www.oed.com/view/Entry/72632?rskey=McgZSa&result=1#eid (last visited July 20, 2017) (including in the definition of food a requirement "that people or animals eat or drink" the substance). But, a preparation that itself is not ingested in the classic sense is nonetheless a food if its purpose is to impart flavor or nutrition into a substance that is ingested. *See Franklin*, 289 F.3d at 761 (noting that herbal infusions and teas are "food preparation[s]" even though they are not "consumed as food" and holding that a coral sand packet's impartation of hardness and alkalinity into water did not qualify it as a "food preparation"); EN Ch. 21 at IV-2106–3 (stating that "herbal infusions" and "herbal 'teas'" are food preparations).

Although some dictionaries also require that a substance provide nutrition for it to be a "food," *see, e.g. Food*, OXFORD ENGLISH DICTIONARY (defining food as "[a]ny nutritious substance that people or animals eat or drink in order to maintain life and growth"), substances can be "food" for tariff classification purposes even if they do not provide nutrition. Neither *Franklin* nor the ENs require a nutrition analysis, thus, neither party argues that providing nutrition is a necessary condition for a product to be a food. Furthermore, as demonstrated by this case, such analysis would increase the cost of resolving tariff disputes due to the laboratory experiments required to determine if a product provides nutrition. Although the government claims that being a vehicle for delivering nutrition is a sufficient condition for a substance to be a "food," the common meaning of "food" requires that the substance be ingested.

The parties agree that gum base is not intended to be ingested. Pl.'s SUMF ¶ 12; Def.'s Resp. to SUMF ¶ 12. Thus, gum base is not to be classified under heading 2106, HTSUS, unless like tea leaves or bouquet garni it is intended to leach flavor or any nutritive compounds it contains to be then ingested themselves. No party argues

[15] The phrase "consumed as a food" in *Franklin*, 289 F.3d at 761 and "for human consumption" in the ENs to HS heading 21.06 refer to the substance being intended to be ingested, as opposed to the government's preferred definition of "consumption" as "the act of consuming, as by use, decay, or destruction." *See Consume*, AMERICAN HERITAGE DICTIONARY, *available at* https://ahdictionary.com/word/search.html?q=consume&submit.x=0&submit.y=0 (last visited July 20, 2017) (defining "consume" as "[t]o take in as food; eat or drink up"); *Consume*, OXFORD ENGLISH DICTIONARY, *available at* http://www.oed.com/view/Entry/39973?rskey=8Wko6X&result=1#eid (last visited July 20, 2017) (defining "consume" as "[t]o eat or drink; to ingest"). If a food were simply something that is done away with by the human mouth, as the government seems to contend, clearly nonfood products such as toothpaste and cigarettes could qualify as "food preparations."

that gum base provides flavor. *See* Pl.'s SUMF ¶¶ 8, 14; Def.'s Resp. to SUMF ¶¶ 8, 14. So, the question is, does gum base contain and is it intended to provide nutritive compounds to be ingested?

2. Application to Gum Base

The court declines to rule at this time on the purpose that gum base's only nutritive ingredients—vegetable oil, calcium carbonate, lecithin, and triacetin—serve. Mondelez contends that the court should rule on its summary judgment motion now because the government has shown nothing more than a "'speculative hope' of finding evidence to support [its] claim." Mondelez Resp. at 15 (quoting *Brubaker Amusement Co., Inc. v. United States*, 304 F.3d 1349, 1361 (Fed. Cir. 2002)). The government responds that it has not had "adequate time for discovery." Gov't Resp. at 1 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)); *see also* Def.'s Resp. to SUMF at 1 (stating "that the Government has not had an adequate opportunity to develop [its position] in discovery . . . [T]he parties jointly moved to keep discovery open pending the resolution of the Government's [partial] motion [for summary judgment]. Therefore, if the Court denies the Government's motion, the Government would request that the Court refrain from deciding Mondelez's motion for summary judgment without first allowing the Government to probe the facts asserted in [Mondelez's statement of facts].").

The government moved for summary judgment prior to discovery's close to avoid expenses associated with proving that gum base's ingredients are released from chewing gum and subsequently digested. Def.'s Partial Mot. for Summ. J. 2–3, ECF No. 63 ("Gov't Summ. J. Mot."). The government should not, in effect, be punished for attempting to save expenses. Although Mondelez has submitted evidence supporting its contention that "[e]ach of the components of gum base are added for structural, tactile, cohesion, or preservation purposes" and that "[n]one of the constituent ingredients of gum base are included for a nutritional purpose," and the government has not submitted evidence to the contrary, the government should have the opportunity to do so. *See* Pl.'s SUMF at ¶¶ 9–10.[16] Indeed, the government has "yet to complete depositions or discuss the necessity for expert witnesses." Gov't Summ. J. Mot. at 2.

[16] For instance, Mondelez cites an expert report that "[e]ach of the components of gum base is added for structural, tactile, cohesion, or preservation purposes" and that "[n]one of the three subject gum bases includes any ingredient that is added for nutritional purposes." Decl. & Expert Report of Glenn Visscher, Ph.D. ¶¶ 13, 19, ECF No. 69–4 ("Visscher Rep.").

II. Heading 3824, HTSUS (Plaintiff's Claimed Classification)

The government argues that gum base is excluded from heading 3824, HTSUS, because it is included in heading 2106, HTSUS. Gov't Br. at 16. The government also contends the ENs exclude gum base from heading 3824, HTSUS, because gum base has nutritional value, and this nutritive value is not "incidental" to its function because the nutritive value of gum base did not occur "merely by chance." Gov't Resp. at 16–17. Mondelez counters that Note 1(b) to Chapter 38 of the HTSUS does not exclude gum base from heading 3824, HTSUS, because gum base has no nutritive value, given that its nutritive ingredients, although nutritive when consumed independently, are not digested when chewing gum is chewed. Mondelez Br. at 24 & n.17. Mondelez also asserts that, even if gum base has nutritive value, the "mere presence" of nutritive ingredients in gum base does not exclude it from heading 3824, HTSUS. Mondelez Br. at 23, 26 n.19; Mondelez Resp. at 13.

Heading 3824, HTSUS, covers, inter alia, "chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included." Note 1(b) to Chapter 38 of the HTSUS provides that Chapter 38 does not cover "[m]ixtures of chemicals with foodstuffs or other substances with nutritive value, of a kind used in the preparation of human foodstuffs (generally, heading 2106)." The heading is further explained by the ENs. First, the General EN to HS Chapter 38 states that

> The mere presence of 'foodstuffs or other substances with nutritive value' in a mixture would not suffice to exclude the mixture from Chapter 38, by application of Note 1(b). Substances having a nutritive value that is merely incidental to their function as chemical products, e.g., as food additives or processing aids, are not regarded as 'foodstuffs or substances with nutritive value' for the purpose of this Note. The mixtures which are excluded by virtue of Note 1(b) are those which are of a kind used in the preparation of human foodstuffs and which are valued for their nutritional qualities.

EN from Chapter 38 at VI-38–3. Second, EN(B) to HS heading 38.24, says that

> the heading does not cover mixtures of chemicals with foodstuffs or other substances with nutritive value, of a kind used in the preparation of certain human foodstuffs either as ingredients or to improve some of their characteristics (e.g., improvers for

> pastry, biscuits, cakes and other bakers' wares), provided that such mixtures or substances are valued for their nutritional content itself.

EN Ch. 38 at VI-3824–2.

Products that are mixtures of chemical products with "foodstuffs or other substances with nutritive value" are excluded from heading 3824, HTSUS, only if the mixture is valued for its nutritional content. Although Note 1(b) to Chapter 38 of the HTSUS is somewhat ambiguous, the ENs, which "are generally indicative of the proper interpretation," *Schlumberger Tech. Corp.*, 845 F.3d at 1164 (quoting *Kahrs Int'l, Inc.*, 713 F.3d at 645), clarify the matter. *See* EN Ch. 38 at VI-38–3 ("The mixtures which are excluded from Chapter 38 by virtue of Note 1(b) are those which are of a kind used in the preparation of human foodstuffs *and which are valued for their nutritional qualities*.") (emphasis added).[17] A necessary question to be resolved in deciding whether gum base is excluded from heading 3824, HTSUS, then, is whether gum base is valued for its nutritive properties. [18] This is essentially the same question to be resolved with respect to heading 2106, HTSUS.

Mondelez also makes a separate argument that it is entitled to summary judgment on the classification of gum base under heading 3824, HTSUS, because gum base's nutritive ingredients are not released during the chewing process. Mondelez Resp. at 11–12. Monde-

[17] As long as a product prima facie falls under Chapter 38, which gum base does, and is not valued for its nutritional qualities, a product is not excluded from heading 3824, HTSUS, merely because it is used in a food preparation. *See* EN Ch. 38 at VI-3824–3, 5 (listing "[s]orbitol other than that of heading 29.05," "[s]alt for curing or salting," and "[p]reparations used mainly for clarifying wines and other fermented beverages" as examples of products classifiable under heading 38.24." Thus, even though gum base is used in a food, gum, this fact does not on its own exclude gum base from heading 3824, HTSUS. *See* subheading 1704.10.00, HTSUS (classifying "[c]hewing gum" under a heading for "[s]ugar confectionary"); subheading 2106.90.99, HTSUS (classifying "gums . . . containing synthetic sweetening agents (e.g., sorbitol) instead of sugar" under heading 2106, HTSUS).

[18] A possibly separate, but ultimately indistinguishable question, is whether gum base's nutritive properties are "incidental" to its other functions. This possible threshold question derives from the General EN to Chapter 38's sentence that "[s]ubstances having a nutritive value that is merely incidental to their function as chemical products, e.g., as food additives or processing aids, are not regarded as 'foodstuffs or substances with nutritive value' for the purpose of this Note." EN Ch. 38 at VI-38–3. Mondelez contends this is a separate inquiry from whether the substance is valued for its nutritional properties. *See* Mondelez Resp. at 13. The government, meanwhile posits that "incidental" means "without intention." *See* Gov't Resp. at 16–17. "Incidental" here, however, means "[o]f a minor, casual, or subordinate nature," rather than "without intention," given that the ENs' language refers to the substance's nutritive value being "incidental *to*" other functions rather than being "incidental" in general. *See Incidental*, AMERICAN HERITAGE DICTIONARY, *available at* https://ahdictionary.com/word/search.html?q=incidental (last visited July 20, 2017); EN Ch. 38 at VI-38–3. Given this meaning of "incidental," regardless of whether the "incidental" question is technically a separate inquiry from whether the product is valued for its nutritive properties, the analysis is the same.

lez correctly notes that if a product *has* nutritive ingredients but does not release these ingredients, then the mixture does not have "nutritive value" for purposes of Note 1(b) to Chapter 38 because inherent in a product *having* nutrition is that it *provides* nutrition. *Id.* at 12; *see Nutrition*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/nutrition?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited July 20, 2017) (defining nutrition as "the sum of the processes by which an animal or plant takes in *and utilizes* food substances") (emphasis added); *Nutrition*, AMERICAN HERITAGE DICTIONARY, https://ahdictionary.com/word/search.html?q=nutrition (last visited July 20, 2017) (defining "nutrition" as [t]he process of nourishing or being nourished, especially the process by which a living organism *assimilates food and uses it* for growth and for replacement of tissues.") (emphasis added). Without a substance having "nutritive value," there is, of course, no need to consider whether the substance is valued for its nutritive ingredients. Here, although Mondelez has submitted evidence that gum base's nutritive ingredients are not released from gum base during the chewing of chewing gum, *see* Decl. & Expert Report of Glenn Visscher, Ph.D. ¶¶ 10, 18, 22–23, ECF No. 69–4, summary judgment is not appropriate on this issue at this time. The government contends that nutrients in gum base may be released during chewing, and indeed, the reason it moved for summary judgment was to avoid the costs associated with determining this fact. *See* Gov't Summ. J. Mot. at 2; Def.'s Resp. to SUMF ¶ 16 (averring that "the Government has not had an adequate opportunity to fully test or probe the evidence that Mondelez cites in support of [its statement that '[g]um base is non-nutritive']").

Whether the chewing process releases nutrients is a necessary but not sufficient fact to sustain the government's classification. As discussed above, the government must establish that gum base is valued for its nutritive properties or that the nutritive value is not incidental. Given the government's approach to this litigation it may decide against trying to prove that nutrition is not incidental or that nutrition is a valuable aspect of the gum base. The bare existence of nutritive properties will not win the day.

CONCLUSION

For the foregoing reasons, the parties' summary judgment motions are denied. The government shall advise within 10 days whether it desires discovery. If no further discovery is desired Mondelez will prevail on its uncontroverted evidence that gum base lacks nutritive

value and that any nutritive value is incidental to the gum base's functions. Any discovery shall be completed no later than 60 days from the date of this opinion.

Dated: July 25, 2017
New York, New York

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