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Public Document

SolarWorld Americas, Inc., v. United States
Court of International Trade Consolidated Court No. 15-00232

FINAL RESULTS OF REDETERMINATION PURSUANT TO REMAND

A. Summary

The Department of Commerce (the Department) prepared these final results of redetermination (Final Remand Results) pursuant to the opinion and remand order of the U.S. Court of International Trade (Court) issued on October 14, 2016.[1] These Final Remand Results concern the Department's final results of review of the countervailing duty (CVD) order on crystalline silicon photovoltaic cells, whether or not assembled into modules (Solar Cells), from the People's Republic of China (PRC), covering the period of review (POR) March 26, 2012, through December 31, 2012.[2] For these Final Remand Results, the Department continues to find that mandatory respondents Shanghai BYD Co., Ltd., Shangluo BYD Industrial Co., and BYD Company Ltd. (collectively, BYD) and Lightway Green New Energy Co., Ltd. (Lightway), as well as all other producers/exporters, including Jinko Solar Import & Export Co., Ltd., Jinko Solar International Limited, and Jinko Solar Co. Ltd. (collectively, Jinko Solar), benefitted from countervailable subsidies at above *de minimis* rates.

B. Background

On July 14, 2015, the Department's *Final Results* determined *ad valorem* countervailable subsidy rates of 15.43 percent for BYD, 23.28 percent for Lightway, and 20.94 percent for all

[1] *See SolarWorld Americas, Inc., v. United States*, Slip Op. 16-99, Court No. 15-00232 (CIT 2016).
[2] *See Final Results of Countervailing Duty Administrative Review: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China*, 80 FR 41003 (July 14, 2015) (*Final Results*) and accompanying issues and decisions memorandum (Final Decision Memo.).

other companies subject to the review that were not individually examined, including Jinko Solar. In calculating the *ad valorem* countervailable subsidy rates for the individually reviewed companies, the Department determined, as adverse facts available (AFA), that both BYD and Lightway benefitted from Export Buyer's Credits at the rate of 5.46 percent.[3] The rate for all other companies subject to the review was determined to be the weighted average of the net countervailable subsidy rates calculated for BYD and Lightway.[4]

In selecting the rate of 5.46 percent for the Export Buyer's Credits program, the Department relied on its AFA rate selection hierarchy for administrative reviews.[5] That hierarchy provides that when no rate has been calculated for a cooperative respondent for the identical program in the same administrative review, the Department will use, as AFA, the highest non-*de minimis* rate calculated for a similar program in any segment of the proceeding (*e.g.*, prior reviews of the same order, the investigation).[6] Because no rate was calculated in this review for a cooperative respondent for the identical program, we selected the rate of 5.46 percent for BYD and Lightway, a rate calculated in the investigation for a similar preferential financing program.[7]

In its briefs to the Department and before the Court, SolarWorld argued the Department should have applied, as AFA, a rate of 10.54 percent, instead of 5.46 percent.[8] The Department, as AFA, applied a rate of 10.54 percent to the respondents in the investigation of Solar Cells from the PRC under our AFA investigation hierarchy.[9] Under the investigation hierarchy,

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[3] *See* Final Decision Memo. at 44; *SolarWorld*, Slip Op. 16-99, at 5.
[4] *See* Final Decision Memo. at 4.
[5] *See Id*. at 13-15, 18.
[6] *See Id*. at 44; *SolarWorld*, Slip Op. 16-99, at 9. The terms "proceeding" and "segment" are defined in 19 CFR 351.102(40) and 19 CFR 351.102(47), respectively.
[7] *See* Final Decision Memo. at 18; *SolarWorld*, Slip Op. 16-99, at 5.
[8] *See SolarWorld*, Slip Op. 16-99, at 6.
[9] *See Id.* at 12 n.10.

because no rate was calculated in the investigation for a cooperative respondent for the identical program, the Department applied the highest rate calculated for a similar program (*i.e.*, another preferential financing program) in any proceeding against the PRC, *i.e.*, 10.54 percent.[10] In the *Final Results*, the Department determined that, although the 10.54 percent rate was properly applied in the investigation under the Department's investigation hierarchy, applying that rate was not consistent with our review hierarchy; accordingly, the Department continued to apply the 5.46 percent rate under its review hierarchy.

In its October 14, 2016 opinion, the Court remanded the *Final Results* to the Department to "clarify or reconsider, as appropriate, its AFA rate selection hierarchy as applied in this administrative review."[11] In particular, the Court instructed the Department to "explain why the{} differences {between its investigation AFA hierarchy and its review AFA hierarchy} are reasonable or reconsider its methodology."[12] Pursuant to the Court's instructions, the Draft Remand Results explained the Department's "rationale for having different AFA rate selection practices in investigations versus administrative reviews"[13] within the context of this administrative proceeding.[14] We provided parties with the opportunity to comment on the Draft Remand Results. SolarWorld provided comments on November 30, 2016,[15] and BYD provided rebuttal comments on December 5, 2016.[16] No other comments were received. Our responses to

[10] *SolarWorld*, Slip Op. 16-99, at 11 n.9, 12 n.10.
[11] *Id.* at 16.
[12] *Id*.
[13] *Id.* at 15.
[14] *See* "SolarWorld Americas, Inc., v. United States, Court of International Trade Consolidated Court No. 15-00232, Final Results of Redetermination Pursuant to Remand," November 21, 2016.
[15] *See* Letter from SolarWorld, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Comments on Draft Results of Redetermination Pursuant to Court Order, *SolarWorld Americas, Inc. v. United States,* Court No. 15-00232," November 30, 2016 (SolarWorld Comments).
[16] *See* Letter from BYD, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China – Draft Redetermination Pursuant to Court Remand, *SolarWorld Americas Inc. v. United State*s, Ct. No. 15-00232," December 5, 2016 (BYD Comments).

all comments are addressed below following the Final Analysis. Besides minor grammatical and formatting changes, the Final Analysis contains no other revisions to the analysis provided in the Draft Remand Results.

C. Final Analysis

As discussed above, the Department has different hierarchies it applies when selecting AFA rates in countervailing duty investigations and reviews.[17] Under the first step of the Department's investigation hierarchy, the Department applies the highest non-zero rate calculated for a cooperating company for the identical program in the investigation. If there is no identical program match within the investigation, or if the rate is zero, the Department shifts to the second step of its investigation hierarchy, and applies the highest non-*de minimis* rate calculated for a cooperating company for the identical program, or if the identical program is not available, a similar program, in another countervailing duty proceeding involving the same country.[18] If no such rate exists, under the third step of the Department's investigation hierarchy, the Department applies the highest rate calculated for a cooperating company from any non-company-specific program that the industry subject to the investigation could have used for the production of subject merchandise.

[17] *Compare, e.g., Certain Magnesia Carbon Bricks from the People's Republic of China*, 79 FR 62101 (October 16, 2014), and accompanying Issues and Decision Memorandum (IDM) at 5, *with Certain Magnesia Carbon Bricks From the People's Republic of China*, 75 FR 45472 (August 2, 2010), and accompanying IDM at 7; *Aluminum Extrusions from the People's Republic of China*, 80 FR 77325 (December 14, 2015), and accompanying IDM at 16-17, *with Aluminum Extrusions from the People's Republic of China*, 76 FR 18521 (April 4, 2011) at 9-16; *Certain Kitchen Appliance Shelving and Racks from the People's Republic of China*, 77 FR 21744 (April 11, 2012) at 2-5, *with Certain Kitchen Shelving and Racks from the People's Republic of China*, 74 FR 37012 (July 27, 2009), and accompanying IDM at 4.

[18] *See Sodium Nitrite from the People's Republic of China: Final Affirmative Countervailing Duty Determination,* 73 FR 38981, 38982 (July 8, 2008) ("because this is an investigation, we have no previous segments of the proceeding from which to draw potential {adverse} rates.") (*Sodium Nitrate*); *Circular Welded Carbon-Quality Steel Pipe from India: Final Affirmative Countervailing Duty Determination*, 77 FR 64468 (October 22, 2012), and accompanying IDM at 11.

Similar to its investigation hierarchy, under the first step of the Department's review hierarchy, the Department applies the highest non-*de minimis* rate calculated for a cooperating respondent for the identical program in any segment of the same proceeding. However, the hierarchies differ at their second step. Under the second step of the review hierarchy, if there is no identical program match within the proceeding, or if the rate is *de minimis*, the Department applies the highest non-*de minimis* rate calculated for a cooperating company for a similar program within any segment of the same proceeding. If there is no non-*de minimis* rate calculated for a similar program within same proceeding, the Department shifts to the third step of its review hierarchy and applies the highest non-*de minimis* rate calculated for an identical or similar program in another countervailing duty proceeding involving the same country. Under the fourth and final step of the Department's review hierarchy, if no such rate exists under the first through third steps, the Department applies the highest rate calculated for a cooperating company for any program from the same country that the industry subject to the investigation could have used.

The Department has the same goal in applying both hierarchies: in the absence of necessary information from cooperative respondents, the Department is seeking to find a rate that is a relevant indicator of how much the government of the country under investigation is likely to subsidize the industry at issue, through the program at issue, while inducing cooperation. This is satisfied when, under the first step of both hierarchies, the Department is able to apply the highest rate calculated for a cooperating respondent for the identical program in any segment of the same proceeding.

However, when no rate exists for the identical program used by a member of the industry under investigation or review, the Department's investigation and review AFA hierarchies differ

because, primarily, the relative dearth of rates available within an investigation shifts the balance among the three factors the Department takes into account: inducement of cooperation, industry relevancy, and program relevancy.

In reviews, the Department's AFA hierarchy prioritizes an inquiry into the subsidization experience of *the industry at issue* by its government, rather than an inquiry into the use of the identical program by any industry. In a review, the Department is more likely to have some indicator—from the investigation and any prior reviews—about how a specific industry uses subsidy programs similar to the program in question. To make a facts available determination, the Department reasonably assumes that programs that are similar because they confer similar benefits are likely to be used similarly within the same industry. Further, the Department reasonably supposes that the industry under investigation might use a program differently than an unrelated industry uses the program. A rate from within the industry—*i.e.*, within the proceeding—for a similar program has a stronger relationship to the respondent's likely prior commercial activity than a rate from a different industry obtained from outside the proceeding.[19] Accordingly, under the second step of the Department's review AFA hierarchy, when no (usable) calculated rate exists for an identical program in the same proceeding, the Department looks to the highest calculated rate for a similar program in any segment of the same proceeding. In the Department's judgment,[20] this best approximates how the industry under review uses programs

[19] *See Sodium Nitrate*, 73 FR at 38982.

[20] *See F.Lii de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("In the case of uncooperative respondents, the discretion granted by the statute {to the agency} appears to be particularly great, allowing Commerce to select among an enumeration of secondary sources as a basis for its adverse factual inferences…. Commerce is in the best position, based on expert knowledge of the market and the individual respondent, to select adverse facts that will create the proper deterrent to non-cooperation with its investigations and assure a reasonable margin."); *see also Essar Steel Ltd. v. U.S. Steel Corp.*, 880 F. Supp. 2d 1327, 1331 (applying the *de Cecco* standard in the countervailing duty context to determine whether "Commerce chose a reasonably accurate estimate of the respondent's {subsidization} rate with some built-in increase to deter non-compliance").

like the one for which the Department lacks information to calculate a rate, leading to a more relevant AFA rate. Furthermore, although the Department's goal is to achieve a rate that reasonably approximates how the industry at issue is subsidized, the Department also seeks to encourage participation by, among other things, not applying *de minimis* rates under its review AFA hierarchy.[21] Thus, the Department ensures that a non-cooperative respondent will not receive a rate lower than that of a cooperative respondent for the same program.

In contrast, in an investigation, the Department is just beginning to achieve an understanding of how the industry under investigation uses subsidies. The Department is examining the industry in question with, normally, no prior understanding of the industry and, in the preliminary stages, no final calculated and verified rates for the industry. Given the limited information available to the Department in an investigation pertaining to the industry's use of subsidies, when the Department does not have available a rate for the same program within the investigation from a cooperating respondent, the Department adjusts its practice to instead focus on the program.

This adjustment dovetails with the Department's practice of using *de minimis* rates under the first step of the investigation AFA hierarchy, when it does not use *de minimis* rates in reviews, and best encourages respondents to cooperate with the Department's investigation. The Department is attempting to capture how the industry uses the program, so under the first step of the investigation hierarchy, it applies to non-cooperating respondents the highest rate calculated for another cooperating respondent for the identical program in the same investigation, even when the highest rate is *de minimis*. But when no information exists on how the identical industry uses the identical program, the Department focuses on the program itself. Because

[21] *See* Final Decision Memo. at 44.

limited information exists in an investigation regarding the industry's treatment under a particular program, the Department's experience is that there is little to be gained by continuing to give weight to an industry-specific proxy rate for that program. So, under the second step of the investigation hierarchy, the Department will assume that the industry under investigation uses the identical program at the highest above *de minimis* rate of any other industry using the identical program. If the Department were to continue prioritizing the industry focus (as it does in the review methodology), because there are no segments preceding an investigation and limited information is available about the industry's usage of subsidies, the Department would risk selecting a rate that is too low to induce future cooperation. There may well be an insufficient range of rates available, given that the investigation is the first segment of the proceeding, and selecting the highest rate for a "similar" program within the industry may offer an insufficient inducement to future cooperation, with very little gain in relevance (unlike if a rate is available for an identical program).[22]

Whenever it uses AFA, the Department must balance the need to choose a rate sufficiently high to induce cooperation with the need for relevancy. In the CVD context, relevancy is indicated by industry and subsidy program. In essence, the Department is, therefore, trying to strike a balance among three variables: inducement, industry relevancy, and program

[22] In many recent CVD investigations, the Department has exercised its discretion under section 777A(e)(2) of the Act to limit its examination to two or three producers or exporters, or has only had a few available respondents to examine. Thus, if one producer or exporter is uncooperative, there are only one or two other companies that might have used a similar program, and perhaps each has used the similar program only once or twice. This leaves very few observations from which the Department may "adversely" infer usage of the program, and thus the possibility arises that limiting the pool of proxy rates to within the proceeding will mean choosing a rate that is too low. Moreover, by "similar program," the Department refers to a program with the same type of benefit, as defined under 19 CFR 351.504 through 19 CFR 351.520. Thus, a grant would be similar to another grant; a loan subsidy to another loan subsidy; *etc*. The Department does not look at the "next most similar program." Thus, in choosing an AFA rate for a loan program, for example, the Department limits itself to the rates calculated under other loan programs. This limitation on the number of relevant rates that might be available for an AFA rate (a limitation that is necessary to maintain relevancy) further increases the odds that an insufficiently low rate will be selected if the Department confines itself to a single segment (*i.e.*, the investigation) in selecting an AFA rate.

relevancy. In an investigation, for the reasons explained above, the small potential benefit gained from valuing industry-relevancy heavily (unless the identical program is used by the industry) is outweighed by the substantial risk in terms of lost inducement to cooperate. In a review, by contrast, there is more to be gained from a longer history of industry-specific decisions within a proceeding, and simultaneously there is less risk of choosing an inadequate rate (given the greater number of rates available). Moreover, the consequences of choosing an inadequate rate are greater in an investigation than in a review, if the rate is inadequate because it is too low. In an investigation, if the Department were to choose low AFA rates systemically, the result could be a negative determination with no order (or a company-specific exclusion from an order) and a lost opportunity to correct future subsidized behavior. The "reward" for a lack of cooperation would be no order discipline in the future for all or some producers and exporters. Given these differing circumstances, the Department has reasonably exercised its judgment to strike the balance differently among these three variables in an investigation than in a review.

For these reasons, although the Department could look to comparable programs in the same investigation for which there is a calculated rate, the Department has developed its practice so as to best understand the industry and subsidy programs under investigation, to account for the limited array of data available to the Department in an investigation as compared to the information available in a review, and to induce the industry's cooperation in its investigation. The circumstances of this case led to a lower AFA rate for the Export Buyers' Credit program in the 2012 review than in the investigation. However, in both the investigation and the review, the Department achieved its dual goals of applying an AFA rate that reflects how the respondent, as part of the industry under the order, likely used the subsidy program, while also ensuring that the respondent did not receive a more favorable rate for the program than a cooperative respondent.

D. Comments on Draft Remand Results

SolarWorld Comments:

- The Department has not provided additional analysis and explanation sufficient to address the Court's concerns that it support its selection of the 5.46 percent AFA rate.
- The Court recognized, and the Department acknowledges in the Draft Remand Results, that the Department seeks to balance the same interests in investigations and reviews when applying AFA: deterrence and accuracy. The Department has not provided a sufficient basis for weighing these interests differently in investigations versus reviews.
- The Department has not explained why selecting a rate for a similar program that may offer an insufficient inducement to future cooperation, with very little gain in relevance, is an acceptable result in an administrative review when it is not acceptable in an investigation.
- The Department has not explained why the limited additional information obtained through conducting a single administrative review necessarily justifies a shift in its focus.
- The Department has failed to explain why it is reasonable to prioritize industry-specific data in a review, but program-specific data in an investigation.
- As a general matter, the Department has failed to explain why it is reasonable for it to adhere to strict hierarchies in selecting the appropriate AFA rate for either investigations or reviews. As the Draft Remand Results acknowledges, the Department's selection of an AFA rate seeks to balance various interests under a wide array of factual scenarios. In this case, such inflexibility had the absurd result of lowering the AFA rate from the investigation despite the GOC's continued refusal to cooperate. Thus, even if reasonable in general, the hierarchy cannot be considered reasonable as applied here.

BYD Comments:

- There is nothing arbitrary or capricious in the Department's differing approaches in investigations and reviews. The differences are firmly grounded in the differing factual contexts that are presented to the agency in investigations and reviews – in particular, the differences in the range of data on subsidy rates that is normally available to the Department and the Department's knowledge and experience of the industry in question.
- That Petitioner can, nevertheless, identify alternative methodologies that are more suited to their personal interest is neither surprising, nor relevant. The Department is entitled to choose its own methodology, so long as it is sound.
- Petitioner's proposal for a case-by-case selection process is an invitation to pursue a results-oriented methodology that would be both arbitrary and capricious.
- The Department's methodology is reasonable, has been fully explained, and is grounded in facts.

Department's Position: The Federal Circuit has previously held that Congress intended for an AFA rate to be a *reasonably* accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.[23] The Federal Circuit elaborated on the requirement to apply an "accurate" rate as AFA in the antidumping context, explaining that the AFA selection process was limited only by section 776(b) of the Act: "Congress decided what requirements Commerce must fulfill in reaching its determinations, §1677e(b), and we do not impose conditions not present in or suggested by the statute's text."[24] Our CVD AFA rate selection hierarchies are clearly in compliance with section 776(b) of the Act, as both rely on findings from final determinations in investigations and previous reviews, two potential sources

[23] *De Cecco*, 216 F.3d at 1032.
[24] *Nan Ya Plastics Corp., Ltd. v. United States*, 810 F.3d 1333, 1347 (January 19, 2016).

of information for adverse inferences provided by section 776(b)(2) of the Act. Thus, the Department's methodology satisfies the "accuracy" requirements of the Act, as outlined by the Federal Circuit; in particular, it satisfies the Act's requirements for a reasonable AFA rate without the unnecessary administrative burden, unpredictability, and potential for inconsistency that might result from the flexible, case-by-case approach advocated by SolarWorld. Importantly, both the investigation and review hierarchies also provide an adequate deterrent to future non-compliance, as both methodologies are ultimately based on the selection of the highest rate from a pool of calculated rates. Moreover, as explained in detail above, the existence of two separate hierarchies stems from the Department's efforts to recognize the distinct nature of investigations and reviews in selecting an AFA rate, thus already incorporating some measure of flexibility into our methodology.

We also believe we have adequately explained the differences between the investigation and review hierarchies, as ordered by the Court. Central to our explanation is the statement in the final analysis above that

> {i}n an investigation, . . . the small potential benefit gained from valuing industry-relevancy heavily (unless the identical program is used by the industry) is outweighed by the substantial risk in terms of lost inducement to cooperate. In a review, by contrast, there is more to be gained from a longer history of industry-specific decisions within a proceeding, and simultaneously there is less risk of choosing an inadequate rate (given the greater number of rates available).

Thus, the differences between the hierarchies are a result of a simple, fundamental distinction between investigations and reviews: investigations are the first segment in the proceeding, with no proceeding-specific history from which to draw.

While it is true that the review hierarchy weights deterrence somewhat less heavily, this weighting reflects consideration of the Department's obligation to select, as explained above, a reasonable rate, and additional information pertaining to the reasonableness of the rate that is

typically available during a review (*i.e.*, information indicating which rates are more likely to be relevant to the respondents under examination), is not available during an investigation. We do not rest our selection of an AFA rate on maximizing deterrence alone. Industry-specific precedent for identical or similar programs is information that pertains to the selection of a reasonable rate. During the course of an administrative review, an adequate amount of such information first becomes available, and the Department incorporates that information into its analysis. The incorporation of such additional information might, on occasion, as in this case, lead to the selection of an AFA rate in a review that is lower than the AFA rate chosen for the same program in the underlying investigation. That is not an "absurd" result, as SolarWorld characterizes it, but rather the outcome of the Department's selection of a reasonable rate, and consideration of information specific to the industry or proceeding under examination, when an adequate amount of such information is available. Regardless, the methodology does not necessarily lead to lower rates in reviews than in investigations. For example, in the administrative review of narrow woven ribbons,[25] the AFA rates for six programs were higher than the rates applied in the investigation.[26]

Finally, SolarWorld takes issue with the Department's determination that industry-specific information becomes more relevant in a first review, arguing that, as is true in an investigation, only a limited amount of industry-specific information is available in a first review. Thus, claims SolarWorld, drawing a distinction between investigations and first reviews is arbitrary. Likewise, SolarWorld suggests we discard the industry-specific focus when it is

[25] *Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2012*, 79 FR 78036 (December 29, 2014), and accompanying Issues and Decision Memorandum (2012 AR IDM).
[26] *Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 41801 (July 19, 2010), and accompanying Issues and Decision Memorandum (Investigation IDM).

apparent that there is inadequate industry-specific information available (*e.g.*, there is nothing in the investigation preceding this review indicating how the industry benefits from export buyer's credits). These arguments are essentially a restatement of SolarWorld's proposal for a flexible, case-by-case approach, requiring the Department to reevaluate and balance industry relevancy, program relevancy, and deterrence in each investigation or review. As explained above, such an approach might lead to unpredictable and inconsistent results, and is unnecessary given that our current approach determines a reasonably accurate rate, including an adequate, built-in increase to deter future non-compliance.

E. Final Remand Results

Per the Court's instructions, we have provided further explanations above supporting the *Final Results*. In particular, we have provided a "rationale for having different AFA rate selection practices in investigations versus administrative reviews."[27] We continue to apply the review methodology for these final results of redetermination pursuant to remand. Therefore, there are no changes to the rates determined for any exporter or producer.

1/13/2017

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Signed by: PAUL PIQUADO

Paul Piquado
Assistant Secretary
for Enforcement and Compliance

[27] *SolarWorld*, Slip Op. 16-99, at 15.