



A-570-979

NSR: 12/1/2013 - 5/31/2014

Public Document

E&C/IV: JDP

September 4, 2015

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

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

SUBJECT: Issues and Decision Memorandum for the Final Results of the
Antidumping Duty New Shipper Review: Crystalline Silicon
Photovoltaic Cells, Whether or Not Assembled Into Modules,
From the People's Republic of China

SUMMARY

The Department of Commerce (“Department”) analyzed the comments submitted by Petitioner¹ and Hengdian Group DMEGC Magnetics Co., Ltd. (“DMEGC”) in this new shipper review (“NSR”) of the antidumping duty (AD) order on crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People’s Republic of China (“PRC”). Based on the analysis of the comments received, we continue to find DMEGC’s single sale to be a non-*bona fide* sale. We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum.

BACKGROUND

On April 21, 2015, the Department published the *Preliminary Rescission* of this NSR for the period December 1, 2013, through May 31, 2014.² On May 28, 2015, the Department received a case brief from DMEGC. On June 4, 2015, the Department received a rebuttal brief from Petitioner.

¹ SolarWorld Americas, Inc. (“Petitioner”).

² See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China: Preliminary Rescission of 2013--2014 Antidumping Duty New Shipper Review*, 80 FR 22164 (April 21, 2015) (“*Preliminary Rescission*”); see also Memorandum to Howard Smith, Acting Director, Office 4, AD/CVD Operations, from Jeffrey Pedersen, International Trade Analyst, titled “2013-2014 Antidumping Duty New Shipper Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China: Preliminary *Bona Fide* Sales Analysis for Hengdian Group DMEGC Magnetics Co., Ltd.,” dated April 7, 2015 (“*Prelim Analysis Memorandum*”).



SCOPE OF THE ORDER

The merchandise covered by this order is crystalline silicon photovoltaic cells, and modules, laminates, and panels, consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including, but not limited to, modules, laminates, panels and building integrated materials.

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

Merchandise under consideration may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, modules, laminates, panels, building-integrated modules, building-integrated panels, or other finished goods kits. Such parts that otherwise meet the definition of merchandise under consideration are included in the scope of this order.

Excluded from the scope of this order are thin film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS). Also excluded from the scope of this order are crystalline silicon photovoltaic cells, not exceeding 10,000mm² in surface area, that are permanently integrated into a consumer good whose function is other than power generation and that consumes the electricity generated by the integrated crystalline silicon photovoltaic cell. Where more than one cell is permanently integrated into a consumer good, the surface area for purposes of this exclusion shall be the total combined surface area of all cells that are integrated into the consumer good.

Modules, laminates, and panels produced in a third-country from cells produced in the PRC are covered by this order; however, modules, laminates, and panels produced in the PRC from cells produced in a third-country are not covered by this order.

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

DISCUSSION OF THE ISSUES

Comment 1: Whether DMEGC’s One Sale was *Bona fide*

In the preliminary results of this NSR, the Department determined that DMEGC’S sale of subject merchandise to the United States during the period of review (POR) was not a *bona fide* sale; therefore the Department preliminarily rescinded this NSR. DMEGC and Petitioner submitted

comments on this issue in their case and rebuttal briefs, respectively.³ Their comments are discussed individually below. In addition, both parties submitted comments on whether the Department should have issued additional supplemental questionnaires and verified the information reported by DMEGC.

A significant amount of factual information pertaining to this issue may not be publically disclosed because it is business proprietary in nature. Therefore, below the Department has provided a public discussion of its analysis. For a complete discussion of Comment 1, which includes the business proprietary information relied on by the Department in analyzing the issue, *see* Memorandum to Edward Yang, Senior Director, Office VII, Antidumping and Countervailing Duty Operations, from Abdelali Elouaradia, Director, Office IV AD/CVD Operations regarding the 2013-2014 Antidumping Duty New Shipper Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Comments in the Issues and Decision Memorandum Containing Business Proprietary Information, ("BPI Discussion of Comment 1") dated concurrently with this notice.

1) Additional Supplemental Questionnaires and Verification⁴

DMEGC

- The Department partially based its preliminary non-*bona fide* sale decision on its determination that DMEGC failed to demonstrate that its customer resold the subject merchandise at a profit and its finding that the timing of the sale and certain other aspects of the sale were inconsistent with normal business practices. However, the Department never issued supplemental questions or conducted a verification both of which would have provided DMEGC with an opportunity to demonstrate that the Department's conclusions were incorrect.
- The courts have found unlawful the Department's failure to provide respondents with sufficient notice to remedy deficient submissions.⁵ The Department violated section 782(d) of the Tariff Act of 1930, as amended (Act) by not providing DMEGC an opportunity to remedy or explain its deficiencies.
- The Department cannot rely on a conclusion that supporting information is not on the record when it decided not to verify DMEGC's responses.

³ *See* Letter from DMEGC to the Department, "Crystalline Silicon Photovoltaic Cells, Whether Or Not Assembled Into Modules, from China; New Shipper Review; DMEGC Case Brief," dated May 28, 2015; Letter from Petitioner to the Department, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Rebuttal Brief," dated June 4, 2015.

⁴ As noted above, a complete discussion of Comment 1, which includes the business proprietary information relied on by the Department in analyzing the issue, is contained in the BPI Discussion of Comment 1, which is dated concurrently with this memorandum.

⁵ DMEGC cites *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 23 CIT 804, 1999 WL 1001194 (CIT 1999) (*Ta Chen Stainless*) and *NSK Ltd. v. United States*, 19 CIT 1319, 1328, 910 F. Supp. 663, 671 (CIT 1995), *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1572-75 (Fed.Cir.1990) (*Olympic Adhesives*), *China Kingdom Import & Export Co., Ltd. v. United States*, 507 F. Supp. 2d 1337, 1361 (CIT 2007) (*China Kingdom*), *SKF USA Inc. v. United States*, 885 F. Supp. 274, 278 (CIT 1995).

- The Court of International Trade (CIT) found that “{a} deliberate refusal to subject certain factual information to a verification procedure is not the equivalent of a valid finding that ... such information ‘cannot be verified.’”⁶
- Having not verified or issued supplemental questionnaires, the Department must base its decision on the presumption that all factual statements provided by DMEGC are accurate.

Petitioner

- The facts in the cases cited by DMEGC are markedly different from those in this proceeding. In *Ta Chen Stainless*, after attempting to obtain information concerning a Taiwanese producer’s affiliation with a U.S. company, the Department determined that the two companies were affiliated and because the administrative record lacked data pertaining to constructed export price sales adjustments, the Department determined that it would rely upon facts available using an adverse inference against the respondent for having failed to provide the data.⁷ Similarly, in *China Kingdom*, the Department applied adverse facts available after the respondent attempted to submit a revised database prior to verification to replace incorrect data.⁸
- As opposed to these two cases, here, all of the information necessary to reach a decision is already on the record. In this proceeding, the Department did not assign a punitive rate based upon information that was never supplied by the respondent. Instead, the Department made a determination as to the *bona fides* of the sale based on the information that was supplied by DMEGC.

Department’s Position:

We disagree with DMEGC that the Department should have issued additional supplemental questionnaires and conducted verification before finding that DMEGC’s sale was a non-*bona fide* sale. The cases cited by DMEGC as well as its reliance on section 782(d) of the Act address situations in which there was missing or deficient information. In this case, however, the Department based its decision on record information and not on the basis of facts available to fill gaps in the record. For example, in *Ta Chen Stainless*, the Department applied an adverse inference in filling in information that was missing from the record. The CIT found that the Department should have provided an opportunity to the respondent to submit the missing information before making such an inference.⁹ In *China Kingdom*, the Department rejected a respondent’s attempt to submit a revised database and applied adverse facts available for certain missing information.¹⁰ Such findings are distinguishable from this NSR, where, as discussed in detail below, the Department provided DMEGC several opportunities to submit information to support its claims, and accepted the submitted information as the basis for its decision (*e.g.*, that information includes information regarding the sales price and quantity, the timing of the sale, payment, and DMEGC failing to demonstrate that its customer resold the merchandise at a profit). Because the Department provided DMEGC with several opportunities to submit the

⁶ See *China Kingdom*, 507 F. Supp. 2d at 1341.

⁷ See *Ta Chen Stainless*, 23 CIT at 804-806.

⁸ See *China Kingdom*, 507 F. Supp. 2d at 1337, 1361.

⁹ See *Ta Chen Stainless*, 23 CIT at 804-806.

¹⁰ See *China Kingdom*, 507 F. Supp. 2d at 1361.

necessary information and the information it did provide supported finding the sale to be a non-*bona fide* sale, the Department determined that it did not need to issue further supplemental questionnaires or verify information submitted by DMEGC.

DMEGC argues that the Department should have issued an additional supplemental questionnaire concerning the profitability of its customer's resale. Contrary to DMEGC's assertion, however, the Department did ask numerous supplemental questions concerning the purchases, profitability, and pricing behavior of DMEGC's customer, in response to which DMEGC provided no information.¹¹ For example, with respect to the profitability of DMEGC's customer's resale, the Department issued a supplemental questionnaire asking DMEGC to “{d}escribe the process of how your first unaffiliated U.S. customer sets prices with its U.S. customers.”¹² In response, DMEGC stated that it “does not know how its unaffiliated U.S. customer sets prices with its U.S. customers.”¹³ Similarly, in response to the Department's question regarding whether DMEGC's U.S. customer resold the subject merchandise for a profit, DMEGC stated that it “does not know whether its unaffiliated U.S. customer sold the subject merchandise for a profit.”¹⁴

Given DMEGC's response, another supplemental questionnaire on this issue was not appropriate. DMEGC responded to the Department's question, explaining that it did not know the answer. DMEGC's purported lack of knowledge also stands in contrast to its answers to other questions about its U.S. customer.¹⁵ Specifically, DMEGC reported that it has a close relationship with its unaffiliated U.S. customer, as “individuals employed by DMEGC USA knew and conducted business with the owner of the unaffiliated U.S. customer since before he founded his current company.”¹⁶

We also asked numerous questions concerning the terms of the purchase order and payment terms on this order, but given DMEGC's response, for reasons detailed in the BPI Discussion of Comment 1,¹⁷ determined another supplemental questionnaire was not necessary.¹⁸

DMEGC also argues that the Department should have issued supplemental questions concerning whether the timing of the sale and certain other aspects of the sale, which are discussed in the BPI Discussion of Comment 1,¹⁹ are within DMEGC's normal business practices. However, as explained in detail in Section 4 below, the record already contained information concerning the timing of events associated with the sale which indicated that this transaction may not be a typical commercial sale but rather one structured for the purpose of seeking new shipper status. Similarly, with regard to another aspect of the sale identified in the BPI Discussion of Comment

¹¹ See DMEGC's November 3, 2014 Section A Supplemental response to Questions 12, 13, 19, 20, 22, 24, and 25.

¹² See October 17, 2014 Section A Supplemental Questionnaire at Question 13.

¹³ See DMEGC's November 3, 2014 Section A Supplemental response to Question 13.

¹⁴ See DMEGC's November 3, 2014 Section A Supplemental response to Question 20.

¹⁵ See DMEGC's November 3, 2014 Section A Supplemental response to Questions 11 through 25.

¹⁶ DMEGC's customer was owned by a person who was known by personnel at DMEGC even before the formation of the customer's company. See DMEGC's November 3, 2014 Supplemental Section A Response at 4.

¹⁷ See BPI Discussion of Comment 1 at 4.

¹⁸ See DMEGC's November 3, 2014 response to Question 17.

¹⁹ *Id.*

1,²⁰ information on the record demonstrates that it was inconsistent with normal business practices. If DMEGC had additional relevant evidence that its sale was a *bona fide* sale or was made as part of its normal business practices, the burden was DMEGC's to place such information on the record.²¹ The Federal Circuit stated that the burden of producing relevant evidence belongs "to the party in possession of the necessary information."²² DMEGC indicated in its case brief that its understanding of the Department's criteria for finding a sale to be a *bona fide* sale is that the criteria relate to whether the sale is indicative of normal commercial practices. DMEGC even identified the five criteria which the Department examines in making a *bona fide* sale determination, which include whether the goods were resold at a profit, the timing of the sale, and whether the sale is made at arm's length.²³ Thus, DMEGC was aware of the five criteria applied by the Department. It was DMEGC's obligation to supply the Department with evidence relating to these criteria to support its claim that the reported sale was a *bona fide* sale.²⁴

As such, the Department made its determination based on the evidence on the record, including information identified in the BPI Discussion of Comment 1 concerning: (1) negotiations;²⁵ (2) production and shipment;²⁶ and (3) timing of the merchandise entering into the United States²⁷ and the fact that, based on the timing, DMEGC qualified for a NSR that only covered six months.²⁸ Based on the evidence on the record, and as explained more fully below, we determined that these circumstances do not appear to be the characteristics of a normal sale.

Finally, with respect to DMEGC's argument that the Department should have conducted a verification in this proceeding, we note that the purpose of verification is to verify the accuracy of information previously submitted on the record by the respondent, not to continue the information-gathering stage of the Department's review. Verification would not have been an opportunity for DMEGC to submit new information with respect to its normal business practices or other issues.

²⁰ *Id.*

²¹ See DMEGC's November 3, 2014 Section A Supplemental response to Question 18.

²² See *Zenith Electronics Corp. v. United States*, 988 F. 2d 1573, 1583 (Fed. Cir. 1993); see also *Jinxiang Yuanxin Imp. & Exp. Co. v. United States*, 71 F. Supp. 3d 1338 (CIT 2015); *Tianjin Mach. Import & Export Corp. v. United States*, 806 F. Supp. 1008, 1015 (CIT 1992) ("The burden of creating an adequate record lies with respondents and not with Commerce.").

²³ See DMEGC's case brief at 3.

²⁴ See *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) ("the burden of creating an adequate record lies with interested parties and not with the Department of Commerce"); see also *NTN Bearing Corp. of Am. v. United States*, 997 F.2d 1453, 1458 (Fed. Cir. 1993) (finding that even where the Department does not ask a respondent for specific information that would enable it to make a determination in the respondent's favor, the respondent has the burden of proof to present the information in the first place with its request).

²⁵ See Section A questionnaire response at Exhibit A-7 and DMEGC's November 3, 2014 Section A Supplemental response to Question 23.

²⁶ See Section A questionnaire response at Exhibit A-13 and DMEGC's September 22, 2014 Section D response to Question 23 and Section A questionnaire response at Exhibit A-13.

²⁷ See Section A questionnaire response at Exhibit A-13.

²⁸ See 19 CFR 351.214(g)(1)(i)(B) defining the period of review for new shippers as the six month period immediately preceding the semiannual anniversary month, if the new shipper review was initiated in the month immediately following the semiannual anniversary month, as in the instant case.

In sum, and as discussed further in detail below, the Department based its determination that DMEGC's sale is a non-*bona fide* sale on record evidence. This record information was provided by DMEGC. While DMEGC disagrees with the Department's conclusions regarding this information, when the Department issued supplemental questions concerning areas on which it would base its analysis of the *bona fides* of the sale, DMEGC at times responded by either not providing any information concerning certain areas, such as profitability of its customer's resale, or by providing unclear information regarding payment.²⁹ In any case, the information that DMEGC did provide supported finding the sale to be a non-*bona fide* sale.

2) Price and Quantity of the Sale³⁰

In conducting a *bona fide* sales analysis in NSRs, the Department examines a number of factors that address the commercial realities surrounding the sale of subject merchandise.³¹ Those factors, *inter alia*, are: (1) the timing of the sale; (2) the price and quantity of the sale; (3) the expenses arising from the transaction; (4) whether the goods were resold at a profit; and (5) whether the transaction was made on an arms-length basis.³² To determine whether a sale is *bona fide* for AD purposes, the Department employs a totality of the circumstances test.³³ In examining the totality of the circumstances, the Department looks to whether the transaction is "commercially reasonable" or "atypical."³⁴ Atypical or non-typical in this context means unrepresentative of a normal business practice.³⁵

In the preliminary results of review, we analyzed the price of the reported sale by comparing it to the prices of DMEGC's sales of non-subject solar panels, international prices of solar panels from the *Bloomberg New Energy Finance* report, and prices of subject solar panels reported by a respondent in the 2012-2013 AD administrative review of solar cells from the PRC. Our

²⁹ See DMEGC's November 3, 2014 Section A Supplemental response at question 18 requesting detailed information concerning payment. DMEGC responded that it "received payment within a reasonably acceptable time frame per industry standards and by wire payment." However, other significant information regarding this matter (see the BPI Discussion of Comment 1) was discovered by the Department only after examining attachments to this and other narrative responses.

³⁰ As noted above, a complete discussion of Comment 1, which includes the business proprietary information relied on by the Department in analyzing the issue, is contained in the BPI Discussion of Comment 1, which is dated concurrently with this memorandum.

³¹ See *Tianjin Tiancheng Pharmaceutical Co. Ltd. v. United States*, 366 F. Supp. 2d 1246, 1249-50 (CIT 2005) (*TTPC*).

³² See *TTPC*, 366 F. Supp. 2d at 1250, citing *American Silicon Technologies v. United States*, 110 F. Supp. 2d 992, at 995-96 (CIT 2000) ("*Silicon Techs*").

³³ See *TTPC*, 366 F. Supp. 2d at 1246, 1249-1250; see also *Polyethylene Terephthalate Film, Sheet, and Strip From India: Final Results of Antidumping Duty New Shipper Review*, 76 FR 30908 (May 27, 2011) (*PET Film*), and accompanying Issues and Decision Memorandum at Comment 2; *Glycine from the People's Republic of China: Rescission of Antidumping Duty New Shipper Review of Hebei New Donghua Amino Acid Co., Ltd.*, 69 FR 47405, 47406 (August 5, 2004).

³⁴ See *Hebei New Donghua Amino Acid Co., Ltd. v. United States*, 374 F. Supp. 2d 1333, 1339 (CIT 2005) ("*New Donghua*"); see also, e.g., *PET Film* at Comment 2; *Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty New Shipper Review and Final Rescission of Antidumping Duty New Shipper Review*, 68 FR 1439, 1440 ("*Crawfish Final*") and accompanying Issues and Decision Memorandum at Comment 1 (January 10, 2003).

³⁵ See *Silicon Techs*, 110 F. Supp. 2d 992, 996-98 (CIT 2000).

analysis called into question whether the reported sale was a *bona fide* sale. We further noted that while not conclusive, the quantity of the reported sale additionally called into question whether it is a *bona fide* sale.³⁶

DMEGC

- The Department's comparison of the price of DMEGC's reported sale to the prices of DMEGC's sales of non-subject solar panels failed to take into account differences in the products sold.
- The Department's comparison of the price of DMEGC's reported sale to international spot market prices is improper because the *Bloomberg New Energy Finance* report³⁷ containing the spot prices is largely illegible and is completely devoid of specific data. Thus, it is unclear where in the report the price of \$0.88 per watt that the Department uses in its comparison comes from.
- The *Bloomberg New Energy Finance* report itself acknowledges that its prices are distorted and understated, noting that the reported average price of panels "dropped ... affected by a higher-than-usual number of {low} quotes from Chinese manufactures."³⁸
- The *Bloomberg New Energy Finance* report contains only spot prices.³⁹ Spot market prices reflect many variations in the market, depending on the current supply and demand of particular products, which are not relevant to DMEGC's sales. As DMEGC reported to the Department, DMEGC does not sell in the spot market.⁴⁰ Further, a company that sells in the spot market, by definition, has stock on hand, which DMEGC does not.⁴¹
- The Department's comparison of DMEGC's sales price to the sales prices of Yingli in the 2012-2013 AD administrative review of solar cells from the PRC (AR1) is flawed because of timing differences between the sales.
- Furthermore the Department did not consider its own finding regarding Yingli's sales when comparing the price of DMEGC's reported sale with Yingli's prices. The Department's comparison is unlawfully, circular, and punitive.
- In the preliminary results of review, the Department concluded that the quantity of DMEGC's reported sale was not commercially typical of solar module sales. However, record evidence demonstrates that the Department's conclusion is incorrect.

Petitioner

- Contrary to DMEGC's claims, the differences discussed in detail in the BPI Discussion of Comment 1 of certain types of solar panels do not explain irregularities in DMEGC's sale.

³⁶ See *Preliminary Rescission*; see also Prelim Analysis Memorandum.

³⁷ See Petitioner's February 27, 2015 Submission at Exhibit 2.

³⁸ *Id.*

³⁹ *Id.* at Exhibit 2 at 1 (*October 2014 PV Spot Price Index*)

⁴⁰ See DMEGC's August 29, 2014 Section A Response at 15 ("DMEGC and DMEGC USA made sales pursuant to purchase orders."). See also DMEGC's November 3, 2014 Supplemental A Response at 3.

⁴¹ See DMEGC's September 15, 2014 Section C Response at 26.

- The *Bloomberg New Energy Finance* report⁴² shows clear data points, trend lines, pricing per watt for any number of inputs, and contains detailed narrative analysis of the very type of product that DMEGC sold.
- DMEGC's single sale has characteristics of a spot sale, and thus a comparison to the prices of solar panel sales in the spot market is probative.
- Yingli's sales were made under a regime where preliminary AD and CVD duties were already in place. Specifically, the Department published its preliminary finding of countervailing duties on March 26, 2012, and published its preliminary finding of antidumping duties on May 25, 2012. Cash deposits and bonds pertaining to entries of these goods were required as early as late December 2011 due to the preliminary affirmative finding of critical circumstances with respect to all producers. Given this fact, DMEGC's claim that the Department did not consider its own finding regarding Yingli's sales when comparing the prices of those sales to the price of DMEGC's reported sale is misleading.
- Data on the record⁴³ demonstrate that prices were stable and largely unchanged between the period when DMEGC made its sale and when Yingli made the bulk of its sales to which the Department compared DMEGC's sale.
- DMEGC's assertion that its pricing is "actually at fair value" because its goods were priced on par with Yingli's goods- after adding total AD and CVD duties to Yingli's price- is equally unavailing. DMEGC ignores the fact that its own pricing is subject to AD and CVD duties. The Department preliminarily found Yingli's AD deposit rate for AR1 (which covers the period when Yingli made the sales used in the *bona fide* sales analysis) to stand at 1.8 percent, while DMEGC's AD deposit rate continues to stand at 238.56 percent.

Department's Position:

Compared to the diverse prices on the record, as discussed in the preliminary results of review and summarized in the table in the BPI Discussion of Comment 1 at 6-7, DMEGC's sales price calls into question whether the reported sale is a *bona fide* sale. The record contains three distinct and unrelated groups of prices for: (1) the same type of solar panels sold by Yingli,⁴⁴ the only mandatory respondent that received a separate rate in the preliminary results of AR1,⁴⁵ (2) DMEGC's sales of non-subject solar panels, and (3) sales of certain types of solar panels identified in the BPI Discussion of Comment 1 reported by *Bloomberg New Energy Finance*, a

⁴² *Id.*

⁴³ *Id.*

⁴⁴ The name "Yingli" refers to the following companies that were treated as a single entity for AD purposes in the preliminary results of the first AD administrative review in this proceeding: Yingli Energy (China) Company Limited; Baoding Tianwei Yingli New Energy Resources Co., Ltd.; Tianjin Yingli New Energy Resources Co., Ltd.; Hengshui Yingli New Energy Resources Co., Ltd.; Lixian Yingli New Energy Resources Co., Ltd.; Baoding Jiasheng Photovoltaic Technology Co., Ltd.; Beijing Tianneng Yingli New Energy Resources Co., Ltd.; and Hainan Yingli New Energy Resources Co., Ltd. (collectively "Yingli").

⁴⁵ See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review; 2012; and Partial Rescission of Countervailing Duty Administrative Review*, 80 FR 1019 (January 8, 2015). The mandatory respondent whose prices we compared to DMEGC's sales prices is Yingli.

consultant in the clean energy industry.⁴⁶ We compared the price of DMEGC's sale to the sales price of each group, and each comparison called into question whether DMEGC's reported sale is a *bona fide* sale.⁴⁷ None of DMEGC's arguments explain the price patterns that we found to be significant and fully explain in the BPI Discussion of Comment 1 at section 2.

Although DMEGC claimed that certain characteristics account for price patterns that we observed in certain comparisons, BPI information on the record does not support DMEGC's claims.

DMEGC also failed to demonstrate that prices in the *Bloomberg New Energy Finance* report are unreliable. We find that the key section concerning solar panel sales prices is, contrary to DMEGC's claim, legible and the prices in the graph correspond to prices cited in the narrative. For example, the narrative accompanying the graph entitled "Spot Prices of C-SI Modules," expressly identifies the most recent price of monosilicon solar panels and multicrystalline solar panels, and these prices clearly correspond to the prices presented in the graph.⁴⁸

Regarding the note in the *Bloomberg New Energy Finance* report that solar panel prices "dropped ... affected by a higher-than-usual number of {low} quotes from Chinese manufactures", we find that rather than being an acknowledgement that prices are distorted, the note is simply a statement on market conditions at the time (*i.e.*, a large number of Chinese manufacturers were offering solar panels at lower prices).⁴⁹ Further, the quoted passage concerns prices in September and October of 2014, which is a period occurring long after the POR. Thus, these prices are irrelevant to, and not considered in, our decision.

DMEGC's claims that the spot prices in the *Bloomberg New Energy Finance* report cannot be compared to its price because it does not sell in the spot market is undermined by the fact that most of the characteristics of the reported sale are consistent with those of spot sales. Thus, we see no basis for DMEGC's contention that the price of its sale, and those of spot sales cited in the *Bloomberg New Energy Finance* report, are incomparable.

DMEGC noted that the results of the Department's price comparison involving Yingli's sales would be different if it took into account AD and CVD rates. However, cash deposits were not only being collected from Yingli's sales; cash deposits were also being collected from DMEGC's sale. The combined AD and CVD cash deposit rate applied to DMEGC's sale was approximately 250 percent, while the combined AD and CVD cash deposit rate applied to Yingli's sales was only approximately 40 percent. Thus, while the Department does not consider AD and CVD amounts paid when making price comparisons, if we applied DMEGC's approach, and increased Yingli's and DMEGC's sales prices by the applicable AD and CVD cash deposit rates, it would not change the results of the Department's price comparison.⁵⁰

⁴⁶ See DMEGC's February 27, 2015 submission for the price survey.

⁴⁷ See Prelim Analysis Memorandum at Attachment I and DMEGC's September 15, 2014 submission at Exhibit C-4.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See DMEGC's Section A questionnaire response at Exhibit A-14, which identifies the AD and CVD cash deposits it paid.

DMEGC also argues that it was improper to compare the price of its sale during the POR of this NSR to the prices of Yingli's sales during the POR of AR1 because the sales were made in different time periods. For the reasons discussed in detail in the BPI Discussion of Comment 1 at Section 2, we disagree. Further, the *Bloomberg New Energy Finance* report, discussed above, shows that, in general, 2013 and 2014 prices for solar panels were stable.⁵¹ Thus, despite the timing difference between DMEGC's sale and Yingli's sales, international prices during the two periods were comparable. Therefore, contrary to DMEGC's claims, the price comparisons used by the Department in the *Preliminary Results* are valid.

DMEGC additionally contends that the timing of the AD and CVD orders affected the Department's price comparisons. We disagree with DMEGC's contention. AD and CVD cash deposits were being collected on Yingli's sales, just as they were collected on DMEGC's sale.

In the preliminary results of review, we found that price information from multiple and varied sources indicated that DMEGC's sale was not a *bona fide* sale. Our price comparisons for the final results of review, which involve BPI, continue to indicate that DMEGC's sale is not a *bona fide* sale. As discussed above, DMEGC has raised nothing that would warrant changing our preliminary determination. Thus, consistent with our finding in the preliminary results of review, the price comparisons call into question whether the price of the reported was based on normal commercial considerations and whether it is representative of the prices at which DMEGC would be able to sell solar panels in the future.

In addition to the sales price, in the preliminary results of review we found that the quantity of the reported sale also called into question the *bona fides* of the sale. Specifically, we found that differences between the quantity of the reported sale and the quantity of Yingli's sales of subject merchandise made to the United States during the POR of AR 1, which involve BPI, also called into question whether the reported sale is a *bona fide* sale.⁵²

DMEGC states that the average quantity of its non-subject solar panel sales demonstrates that the quantity of the reported sale is typical. However, other BPI on the record regarding DMEGC's sales orders and the shipment of the reported subject merchandise call into question the commercial reasonableness of the sale. While not conclusive, the quantity of the reported sale continues to raise questions as to whether the sale is a *bona fide* sale.

3) Whether the Goods Were Resold at a Profit⁵³

We noted in the preliminary results of review that we sought information regarding the subsequent resale of the subject merchandise. We included importer-specific questions in the

⁵¹ See Petitioner's February 27, 2015 Submission at Exhibit 2 and the graph entitled "Spot Prices of C-SI Modules" and accompanying narrative concerning this graph.

⁵² See Prelim Analysis Memorandum at Attachment II.

⁵³ As noted above, a complete discussion of Comment 1, which includes the business proprietary information relied on by the Department in analyzing the issue, is contained in the BPI Discussion of Comment 1, which is dated concurrently with this memorandum.

AD questionnaire.⁵⁴ In addition, in the Department's October 17, 2014 supplemental questionnaire, we specifically requested that DMEGC describe how its first unaffiliated U.S. customer finds its customers and sets prices of sales to them. We also inquired as to whether the first unaffiliated U.S. customer resold the subject merchandise for a profit. In response to these questions, DMEGC stated that it did not know the answers to the questions.⁵⁵ However, DMEGC provided no evidence that it attempted to obtain this information. Accordingly, we determined in the preliminary results of review that DMEGC did not demonstrate that its unaffiliated customer resold the merchandise in question at a profit.

DMEGC

- Nowhere in its questions or in the *Bona fide* Sales Questionnaire did the Department request that DMEGC describe or document whether or how it attempted to obtain information from its unaffiliated U.S. customer.
- After not receiving the information to its inquiry, if the Department wanted to know whether or how DMEGC attempted to obtain information from its unaffiliated U.S. customer, it could have asked. It could also have chosen to conduct an on-site verification. It did neither. DMEGC cannot lawfully be faulted or penalized for not submitting information that the Department specifically chose not to request.
- Therefore, the Department cannot conclude that the unaffiliated U.S. customer did not resell the merchandise in question at a profit because the Department failed to obtain the information required to rebut that conclusion.

Petitioner

- DMEGC has provided no information to demonstrate whether its first unaffiliated U.S. customer resold the merchandise at a profit. Where the Department lacks such information, it must rely on facts available. Given certain record evidence, the Department can rightfully assume that DMEGC's customer would have had extreme difficulty reselling these panels at a profit.

Department's Position:

The Department already addressed the question of whether it should have issued additional supplemental questionnaires or should have conducted a verification concerning the profitability of the resale in Section 1 above. Here, we again cover this topic in responding to the comments summarized above.

We disagree with DMEGC's argument that it was the Department's responsibility to obtain additional information with respect to DMEGC's response regarding the profitability of the resale. The Department twice asked for information regarding the resale of the subject merchandise and ultimately DMEGC responded, but did not provide the requested information.

The original questionnaire asked DMEGC questions about the resale by its importer because the Department did not know at the time that DMEGC's sales office in the United States imported

⁵⁴ See Appendix IX of the Department's New Shipper Review Questionnaire (August 29, 2014).

⁵⁵ See DMEGC's November 3, 2014 Supplemental Section A response at 6.

and resold the merchandise to DMEGC's first unaffiliated U.S. customer.⁵⁶ Upon receiving DMEGC's Section A response stating that DMEGC's sales office imported the merchandise, we again focused on the resale in a supplemental questionnaire, asking "did your first unaffiliated U.S. customer sell the subject merchandise for a profit?"⁵⁷ As discussed above, DMEGC stated in its case brief that the profitability question is one of the five criteria the Department applies in determining whether a sale is a *bona fide* sale. Thus, it is reasonable to conclude that DMEGC should have known that the Department's initial questions, despite being directed towards DMEGC's importer, were aimed at obtaining information to determine whether DMEGC's first unaffiliated U.S. customer's purchase and resale of the merchandise indicated that the reported sale was a typical commercial transaction, and thus a *bona fide* sale.

Regardless of the reasonableness of this assumption, the Department asked questions attempting to determine whether the resale was indicative of a typical commercial transaction a second time, specifically redirecting the question to DMEGC's first unaffiliated U.S. customer. This time, in response to the Department's request for information concerning whether DMEGC's first unaffiliated U.S. customer sold the merchandise at a profit, DMEGC responded that it "does not know whether its unaffiliated U.S. customer sold the subject merchandise for a profit."⁵⁸ DMEGC's response indicates that it had no evidence that the merchandise was resold at a profit. The Department had requested information concerning the resale twice and DMEGC provided a response; there was no obligation for the Department to request details regarding the response or to verify the response when it was clear from the response that DMEGC was stating that it had no evidence that the merchandise was resold at a profit.

Rather, it was DMEGC's obligation to supply the Department with evidence relating to the resale and profitability if it desired to support its claim that the reported sale was a *bona fide* sale. DMEGC did not do so. DMEGC's lack of knowledge regarding this matter stands in contrast to its statement regarding its relationship with its U.S. customer. As stated above, DMEGC reported that it has a close relationship with its U.S. customer, as "individuals employed by DMEGC USA knew and conducted business with the owner of the unaffiliated U.S. customer since before he founded his current company."⁵⁹ In addition, DMEGC's U.S. sales office had dealings with this U.S. customer prior to the start of the new shipper POR and it frequently communicated with the U.S. customer after the sale during the POR.⁶⁰ Nonetheless, regardless of this relationship, the important point is that DMEGC did not provide any evidence regarding the profitability of the resale.

Contrary to DMEGC's claim, the Department is not penalizing the company for not submitting information that the Department specifically chose not to request. The Department did request information from DMEGC concerning whether its unaffiliated U.S. customer was able to resell the merchandise in question at a profit. DMEGC did not provide evidence of a profitable resale.

⁵⁶ See DMEGC's August 29, 2014 section A response which contains both the Department's question and DMEGC's responses on behalf of its sales office located in the United States.

⁵⁷ See DMEGC's November 3, 2014 Supplemental Section A Response at 6.

⁵⁸ *Id.*

⁵⁹ DMEGC's customer was owned by a person who was known by personnel at DMEGC even before the formation of the customer's company. See DMEGC's November 3, 2014 Supplemental Section A Response at 4.

⁶⁰ *Id.* at 4-5.

The correct conclusion, based on the foregoing, is that there is no evidence on the record that DMEGC's unaffiliated U.S. customer resold the merchandise at a profit. Thus, there is no support, related to this criterion, for finding the reported sale to be a *bona fide* sale. On the other hand, the most relevant information on the record, which is identified in the BPI Discussion of Comment 1 in Section 3, indicates that it would have been extremely difficult for DMEGC's unaffiliated U.S. customer to resell the merchandise at a profit.

4) Whether the Transaction was made on an Arm's-Length Basis/Timing of the Sale⁶¹

In the preliminary results of review, we found that there were a number of aspects of the transaction, which are identified in the BPI Discussion of Comment 1 in Section 4, which raise questions with respect to the arm's-length nature of the sale and whether the sale was typical. While DMEGC claimed that these aspects of the sale are typical, we found that the company provided no documentation to support this claim.

DMEGC

- The sales practice regarding payment that the Department found atypical is in fact typical.
- Certain aspects of negotiations identified in the BPI Discussion of Comment 1 at section 4 were consistent with DMEGC's typical sales practices. In response to the Department's questions regarding the sale process, DMEGC fully explained that this sequence of events, including the time between order confirmation, production of the merchandise, and shipment of the merchandise, is typical and consistent with its normal commercial practices, as well as the established sale process in the solar cell industry in general.⁶²
- The timing of the sale towards the end of the POR does not indicate that the sale was not a *bona fide* sale.

Petitioner

- DMEGC provided no other sales documentation that would demonstrate that it typically negotiates sales and ships merchandise in the manner described in the BPI Discussion of Issue 1 at Section 4.
- By shipping and entering its single sale when it did, DMEGC sought to effect the highest degree of control over its sale and the administrative review in that: 1) the respondent's POR would be only six months in length; 2) its costs would be confined to a tighter (six month) period of time; 3) its sales made after July 2014 would not have been subject to review (permitting DMEGC to risk shipping goods in the hopes that the Department would award it a separate rate). The timing of its sale, combined with certain BPI aspects of the sales process, which are identified in the BPI Discussion of Issue 1 at Section 4, indicates that DMEGC sought to manipulate the process by making a sale of goods that was not made under normal commercial considerations.

⁶¹ As noted above, a complete discussion of Comment 1, which includes the business proprietary information relied on by the Department in analyzing the issue, is contained in the BPI Discussion of Comment 1, which is dated concurrently with this memorandum.

⁶² See DMEGC's November 3, 2014 Section A Supplemental response.

Department's Position:

The Department already addressed the question of whether it should have issued additional supplemental questionnaires or conducted verification concerning the timing of the sale and payment in Section 1 above. Here, we address the factual basis for our conclusion that the timing of the sale and certain other BPI aspects of the sale, further indicate that DMEGC's sale is a non-*bona fide* sale.

DMEGC claims that certain aspects of the sales negotiations and shipment⁶³ are part of its, and the solar cell industries,' in general, typical trade practices, but it failed to support its claim with documentation demonstrating this to be the case. Meanwhile, DMEGC does not dispute the facts on which the Department based its finding, in part, regarding the sales negotiations and shipment.⁶⁴ These facts together with the timing of the sale, which are discussed in the BPI Discussion of Comment 1 at Section 4, appear atypical and raise concerns that this transaction may not be indicative of normal commercial practices, but rather may be structured for the purpose of seeking new shipper status.

There are also certain facts regarding payment, which are identified in the BPI Discussion of Comment 1 at Section 4, which the Department finds significant. These facts further indicate that the sale in question may not be an arm's-length commercial transaction.

Conclusion⁶⁵

Price information from multiple and varied sources provide a context for DMEGC's sale price which calls into question whether the sale is a *bona fide* sale. DMEGC cited no facts nor has it made any argument that changes the results of the price comparisons on the record of this review. The record evidence indicates that DMEGC may be unable to make similar commercial sales of subject merchandise in the future. It also indicates that DMEGC's first unaffiliated U.S. customer likely could not have resold the merchandise that it purchased at a profit. We provided DMEGC with opportunities to demonstrate that its U.S. customer resold the merchandise at a profit but it failed to do so. These factors alone indicate that DMEGC's sale was not a *bona fide* sale.

Additional information concerning the reported sale indicates that it may have been structured in order to qualify as a new shipper. As explained above, the quantity, timing of events surrounding the sale, and other BPI regarding payment and sales negotiations indicate that the sale may not be an arm's-length, commercial transaction.

⁶³ See Section A questionnaire response at Exhibit A-7.

⁶⁴ See DMEGC's November 3, 2014 Section A supplemental questionnaire response at question 23. See also DMEGC's September 22, 2014 Section D response to Question 23 and Section A questionnaire response at Exhibit A-13 where its customer made a special request .

⁶⁵ As noted above, a complete discussion of Comment 1, which includes the business proprietary information relied on by the Department in analyzing the issue, is contained in the BPI Discussion of Comment 1, which is dated concurrently with this memorandum.

DMEGC argues that the Department should have provided it with an opportunity to address these findings either through supplemental questionnaires or verification. We disagree. The Department provided several opportunities for DMEGC to submit relevant information regarding the sale. DMEGC provided the information discussed above but as explained, the Department finds that this information supports a conclusion that the reported sale is a non-*bona fide* sale.

While our analyses concerning the sales quantity, timing of the sale, and other BPI regarding payment and sales negotiations contribute to our overall determination that the sale is a non-*bona fide* sale, these factors are not the primary reason for the Department's decision for finding the sale to be a non-*bona fide* sale. The central reason why the Department finds the sale to be a non-*bona fide* sale, as we stated in our preliminary decision, is its price. The CIT emphasized the importance of a commercially realistic price when determining whether a sale is a *bona fide* sale, when, in *TTPC*, it stated that in *bona fide* sales analyses, "the price factor has significant weight, and cannot necessarily be offset by . . . other factors by which the sale could be considered typical . . . The transaction must be 'normal' as a whole, and price must be a large part of what produces 'normal' sales in the context of an antidumping determination."⁶⁶ Further, the price is even more important in this case because DMEGC's NSR is based upon a single sale, and this sale is the sole basis upon which a calculated separate AD margin would be based, which is the basis for future cash deposits.

Based on the analysis above, we continue to find that the sale does not represent DMEGC's future commercial behavior and we recommend finding the sale to be a non-*bona fide* sale.

Comment 2: Surrogate Country/Surrogate Value Selection

DMEGC

- The Department should select Thailand as the primary surrogate country.
- The Department should value DMEGC's factors of production using its suggested surrogate values.
- The Department should calculate surrogate financial ratios based on the financial statements of Thai companies provided by DMEGC.

⁶⁶ See *TTPC*, 366 F. Supp. 2d 1250, 1263 (CIT 2005).

Petitioner

- If the Department does not rescind this review, it should reject the surrogates proposed by DMEGC in its case brief.

Department's Position:

Due to the rescission of this NSR, we have not addressed the comments regarding surrogate country and surrogate values.

RECOMMENDATION

Based on our analysis of the comments received and the factors described above, we recommend continuing to find the sale under review not a *bona fide* sale and we recommend rescinding this NSR. If accepted, we will publish the rescission of this review in the *Federal Register*.

AGREE ✓ DISAGREE

Paul Piquado
Assistant Secretary
for Enforcement and Compliance

4 SEPTEMBER 2015
Date