

UNITED STATES COURT OF INTERNATIONAL TRADE

**SOLARWORLD AMERICAS, INC.,**

**Plaintiff,**

**SINO-AMERICAN SILICON  
PRODUCTS INC. and SOLARTECH  
ENERGY CORP.,**

**Consolidated Plaintiffs,**

**v.**

**UNITED STATES,**

**Defendant,**

**and**

**MOTECH INDUSTRIES, INC.,  
KYOCERA SOLAR, INC., and  
KYOCERA MEXICANA S.A. DE C.V.,**

**Defendant-Intervenors.**

**Before: Jennifer Choe-Groves, Judge**

**Consol. Court No. 17-00208**

**OPINION AND ORDER**

[Sustaining in part and remanding in part the U.S. Department of Commerce's final results following an administrative review of the antidumping duty order on certain crystalline silicon photovoltaic products from Taiwan.]

Dated: November 13, 2018

Timothy C. Brightbill, Laura El-Sabaawi, and Usha Neelakantan, Wiley Rein, LLP, of Washington, D.C., for Plaintiff SolarWorld Americas, Inc. Adam M. Teslik, Cynthia C. Galvez, Maureen E. Thorson, and Tessa V. Capeloto also appeared.

Robert G. Gosselink, Jarrod M. Goldfeder, and Jonathan M. Freed, Trade Pacific, PLLC, of Washington, D.C., for Consolidated Plaintiffs and Defendant-Intervenors Sino-American Silicon Products Inc. and Solartech Energy Corp. and Defendant-Intervenor Motech Industries, Inc.

Stephen C. Tosini, Senior Trial Counsel, and Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them 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 Reza Karamloo, Office of the Chief Counsel for Trade and Enforcement Compliance, U.S. Department of Commerce, of Washington, D.C.

James K. Horgan and Alexandra H. Salzman, deKieffer & Horgan, PLLC, of Washington, D.C., for Defendant-Intervenors Kyocera Solar, Inc. and Kyocera Mexicana S.A. de C.V. Gregory S. Menegaz and John J. Kenkel also appeared.

Choe-Groves, Judge: This case involves crystalline silicon photovoltaic products (typically, solar cells) from Taiwan. The Department of Commerce (“Commerce” or “Department”) conducted an administrative review of the antidumping duty order on crystalline silicon photovoltaic products, in which Commerce concluded that two producers, Sino-American Silicon Products Inc. (“SAS”) and its affiliated entity Solartech Energy Corp. (“Solartech”) (collectively, “SAS-Solartech”), and Motech Industries, Inc. (“Motech”) sold the subject merchandise at prices below the normal value during the period of review. See Certain Crystalline Silicon Photovoltaic Products from Taiwan, 82 Fed. Reg. 31,555 (Dep’t Commerce July 7, 2017) (final results of antidumping duty administrative review; 2014–2016) (“Final Results”); see also Issues and Decision Memorandum for the Final Results of the 2014–2016 Administrative Review of the Antidumping Duty Order on Certain Crystalline Silicon Photovoltaic Products from Taiwan, A-583-853, (June 29, 2017), available at <https://enforcement.trade.gov/frn/summary/taiwan/2017-14281-1.pdf> (last visited Nov. 7, 2018) (“Final IDM”). This matter is before the court on the Rule 56.2 motion for judgment on the agency record filed by Plaintiff SolarWorld Americas, Inc. (“SolarWorld”) and the Rule 56.2 motion for judgment on the agency record filed by SAS-Solartech challenging various aspects of the Department’s Final Results. See SolarWorld’s Mot. J. Agency R., Feb. 27, 2018, ECF No.

51 (“SolarWorld’s Motion”); Mem. Pl. SolarWorld Americas, Inc. Supp. Mot. J. Agency R., Feb. 28, 2018, ECF No. 57 (“SolarWorld’s Br.”); Consol. Pls.’ Rule 56.2 Mot J. Agency R., Feb. 27, 2018, ECF No. 53 (“SAS-Solartech’s Motion”); Mem. Supp. Rule 56.2 Mot. Consol. Pls. J. Agency R., Feb. 27, 2018, ECF No. 55 (“SAS-Solartech’s Br.”).

### **ISSUES PRESENTED**

The court reviews the following issues:

1. Whether Commerce properly adjusted Motech’s reported per-unit costs when it declined to apply partial adverse facts available;
2. Whether Commerce properly adjusted SAS-Solartech’s reported costs for different grades of merchandise when it declined to apply partial adverse facts available; and
3. Whether Commerce properly determined that all merchandise shipped by SAS during the period of review were United States sales.

### **PROCEDURAL HISTORY**

Commerce commenced an administrative review of the antidumping duty order on crystalline silicon photovoltaic products from Taiwan on April 7, 2016 at the request of domestic petitioners, including SolarWorld. See Initiation of Antidumping and Countervailing Duty Administrative Reviews, 81 Fed. Reg. 20,324 (Dep’t Commerce Apr. 7, 2016). The administrative review covered 14 exporters of the subject merchandise, including mandatory respondents Motech and SAS, which Commerce treated as one entity with Solartech. See Decision Memorandum for Preliminary Results of the 2014–2016 Antidumping Duty Administrative Review of Certain Crystalline Silicon Photovoltaic Products from Taiwan, A-

583-853, (Feb. 28, 2017), available at <https://enforcement.trade.gov/frn/summary/taiwan/2017-04413-1.pdf> (last visited Nov. 7, 2018) (“Prelim. IDM”).

Commerce published its preliminary results on March 7, 2017. See *Certain Crystalline Silicon Photovoltaic Products from Taiwan*, 82 Fed. Reg. 12,802 (Dep’t Commerce Mar. 7, 2017) (preliminary results of antidumping duty administrative review and partial rescission of antidumping duty administrative review; 2014–2016) (“Prelim. Results”); see also Prelim. IDM. The Department labeled Defendant-Intervenor Kyocera Mexicana S.A. de C.V. (“Kyocera”) an “unexamined respondent” because it was subject to the administrative review, but was not a mandatory respondent. Prelim. IDM at 5–6. The Department concluded that sales of subject merchandise by SAS-Solartech and Motech were made below normal value. Id. at 1.

Following the preliminary results, the Department received case briefs and rebuttal briefs from SolarWorld, SAS-Solartech, and Motech. See Final IDM at 2. Commerce issued its Final Results on June 29, 2017. See *Final Results*. The Department assigned a weighted-average dumping margin of 4.20 percent to Motech and 3.56 percent to SAS-Solartech. Id. at 31,556. Non-selected companies such as Kyocera were assigned a rate of 4.10 percent. Id.

Commerce adjusted the costs for both mandatory respondents. See Final IDM at 23, 36. Commerce adjusted Motech’s costs for grade B crystalline silicon photovoltaic products to reflect the full value of prime merchandise, and adjusted all grade Z merchandise to reflect the reduced value assigned by Motech in its books and records. Id. at 36. Commerce also adjusted SAS-Solartech’s costs for its grade 4 non-prime crystalline silicon photovoltaic products to reflect their net realizable values because the market price of grade 4 merchandise was “considerably less” than production costs. Id. at 25.

SolarWorld and SAS-Solartech initiated separate actions contesting Commerce's Final Results, which the court consolidated. See Order, Sept. 26, 2017, ECF No. 20. SolarWorld filed a Rule 56.2 motion for judgment on the agency record challenging Commerce's decisions not to apply partial adverse facts available ("AFA") to SAS-Solartech and Motech as unsupported by substantial evidence and otherwise contrary to law. See SolarWorld's Motion. Kyocera joined Defendant's opposition to SolarWorld's motion. See Statement of Kyocera Solar, Inc. and Kyocera Mexicana S.A. de C.V. Concurring Def.'s Opp'n Pl.'s Rule 56.2 Mot. J. Agency R., July 10, 2018, ECF No. 63. SAS-Solartech and Motech filed a joint response in opposition. See Resp. Def.-Intervenors SAS-Solartech and Motech to SolarWorld's Mot. J. Agency R., July 10, 2018, ECF No. 64. SolarWorld filed a reply brief. See Reply Br. Pl. SolarWorld, Aug. 8, 2018, ECF No. 75.

SAS-Solartech filed a Rule 56.2 motion for judgment on the agency record, contesting Commerce's decision to include in its margin calculation for the Final Results certain sales made via United States foreign trade zones ("FTZs") to Mexico. See SAS-Solartech's Motion. Kyocera joined SAS-Solartech's arguments that Commerce should not include these sales in its margin calculation. See Notice Statement SAS-Solartech's Rule 56.2 Mot. Mem. Supp., Feb. 27, 2018, ECF No. 50. Defendant filed a consolidated response to both Rule 56.2 motions. See Def.'s Resp. Pl.'s Mots. J. Agency R., June 19, 2018, ECF No. 62 ("Def.'s Br."). SolarWorld submitted a response brief to statements filed by SAS-Solartech. See Resp. Br. Def.-Intervenor SolarWorld, July 11, 2018, ECF No. 67. Consolidated Plaintiffs submitted a reply brief. See Reply Consol. Pls. SAS-Solartech Def.'s SolarWorld's Mem. Opp'n Consol. Pls.' Rule 56.2 Mot. J. Agency R., Aug. 7, 2018, ECF No. 72. SolarWorld also submitted a reply brief. See Reply Br. SolarWorld, Aug. 8, 2018, ECF No. 75 ("SolarWorld's Reply").

## **JURISDICTION AND STANDARD OF REVIEW**

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012) and Sections 516A(a)(2)(A)(i)(I) and (B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I) and (B)(iii). 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 the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

## **ANALYSIS**

### **I. SolarWorld's Rule 56.2 Motion for Judgment on the Agency Record**

Plaintiff SolarWorld's Rule 56.2 motion for judgment on the agency record contests Commerce's adjustments of Motech's and SAS-Solartech's reported costs instead of applying adverse facts available to Motech and SAS-Solartech in the Final Results. For the following reasons, the court finds that Commerce properly adjusted both Motech's and SAS-Solartech's costs.

#### **A. Commerce's Cost Adjustments for Motech**

Pursuant to the Tariff Act, Commerce has the authority to conduct antidumping duty investigations to determine if a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and to impose antidumping duties if appropriate. Id. § 1673. In order to calculate the dumping duty, Commerce compares the foreign market value (the normal value) of the product to the United States price (the export price or constructed export price). See id. If the United States price is greater than the normal value, dumping has occurred. See id. In determining both the normal value and the United States price of a product, Commerce makes adjustments to the costs that go into the calculation of those prices to obtain comparable prices for goods sold in the foreign market and for export to

the United States. See id. §§ 1677a(c), 1677b(a)(6). The Tariff Act provides that “[c]osts shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country . . . and reasonably reflect the costs associated with the production and sale of the merchandise.” Id. § 1677b(f)(1)(A). Commerce’s practice in evaluating costs for non-prime merchandise is to determine if that merchandise can be used in the same applications as prime merchandise. See Final IDM at 23.

SolarWorld argues that Commerce’s adjustments of Motech’s reported per-unit costs are not supported by substantial evidence because Commerce relied on Motech’s assignment of grades to its crystalline silicon photovoltaic products, but Motech failed to provide a complete and accurate description of these grades. SolarWorld’s Br. 12. The court disagrees. In its Supplemental Section D Questionnaire Response, Motech explained the difference between its prime grade A merchandise, and grade B merchandise, stating that “Grade B cells have full efficiency and electrical function. They are distinguished from Grade A cells by certain cosmetic defects,” and “[b]ecause of these defects, Grade B cells are often sold to module producers that do not care about these defects, generally in non-prime markets.” Motech Supplemental Section D Questionnaire Response at 4, PD 241, bar code 3537552-01 (Jan. 18, 2017). Motech reported that its grade B crystalline silicon photovoltaic products had the same use as prime merchandise “in addition [to being] used in street lights, small modules or calculators.” See id. (emphasis added). Because both grades of crystalline silicon photovoltaic products can be used in the same applications, Commerce adjusted Motech’s grade B merchandise to reflect the full value of prime merchandise. The court concludes that Commerce’s adjustment is reasonable and supported by substantial evidence.

SolarWorld argues that Commerce's reliance on Motech's assignments of grades to its merchandise is unreasonable and unsupported by substantial evidence because Motech identified a number of product grades in its Initial Section B Questionnaire Response that were not in its Initial or Supplemental Section D Questionnaire Response. See SolarWorld's Br. 12–15. Commerce found in its Final Results that Motech's reporting was consistent because “[a]lthough additional grades are noted in [Motech's Initial Section B Questionnaire Response], these grades relate to the same below top-grade products (*i.e.*, products with either cosmetic or electrical defects).” Final IDM at 36. The additional grades outlined in Motech's Initial Section B Questionnaire Response list defective crystalline silicon photovoltaic products by type of defect such as cosmetic, whereas the grades in Motech's Initial Section D Questionnaire Response combine merchandise with these types of defects. See Final IDM at 36 (citing Motech Sections B and C Questionnaire Response at Exhibit B-11, PD 134, bar code 3485696-02 (July 8, 2016), Motech Section D Questionnaire Response at D-25, PD 141, bar code 3487335-01 (July 14, 2016)). The difference in type of defect would not change the cost adjustments, which are based on the merchandise's end-use, and Commerce's reliance on Motech's grade reporting is therefore reasonable and supported by substantial evidence on the record.

#### **B. Commerce's Cost Adjustments for SAS-Solartech**

SolarWorld argues that Commerce erred in reallocating SAS-Solartech's reported costs for certain non-prime merchandise in the Final Results because Commerce applied a flawed calculation of the total costs to assign to grade 4 crystalline silicon photovoltaic products. See SolarWorld's Reply 8. Specifically, SolarWorld contends that Commerce based the costs for grade 4 merchandise on the control numbers for which “no power output” was reported in the cost file and there is not a one-to-one correlation between code “04” and “no power output.” See



id. SolarWorld agrees that an adjustment needed to be made to SAS-Solartech's costs. See Final IDM at 22. The fact that there is not a "one-to-one correlation" between grade 4 merchandise and crystalline silicon photovoltaic products that had no power output is not enough to conclude that Commerce's reallocation is unreasonable. Even though merchandise with no power output can be found under multiple codes and not just under code "04," Commerce's reallocation of the costs of grade 4 crystalline silicon photovoltaic products based on control numbers is reasonable because Commerce's analysis of grade 4 merchandise demonstrated that their market prices were "considerably less than the full production costs that the company assigns to them in the normal course of business." Id. at 25. Even though a "precise reallocation" is not possible, it is reasonable for Commerce to reduce the costs for grade 4 crystalline silicon photovoltaic products based on evidence on the record that the grade 4 merchandise could not be used for the same applications as prime merchandise. See id. at 24. Commerce's reallocation is therefore reasonable and supported by substantial evidence.

### **C. Commerce's Decisions Not to Apply AFA to Motech and SAS-Solartech**

Section 776 of the Tariff Act provides that if necessary information is not available on the record or if a respondent fails to provide such information by the deadline for submission of the information or in the form and manner requested, then the agency shall use the facts otherwise available in reaching its determination. 19 U.S.C. §§ 1677e(a)(1), (a)(2)(B). If the Department finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the agency, then the Department may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Id. § 1677e(b)(1)(A). Commerce may rely on information derived from the petition, a final determination in the investigation, a previous administrative review, or any other

information placed on the record when making an adverse inference. See id. § 1677e(b)(2); 19 C.F.R. § 351.308(c) (2015). 19 U.S.C. § 1677e grants the Department discretion to decide whether to apply AFA in each case. See 19 U.S.C. § 1677e. When Commerce can independently fill in gaps in the record, adverse inferences are not appropriate. See Zhejiang DunAn Hetian Metal Co. v. United States, 652 F.3d 1333, 1348 (Fed. Cir. 2011).

SolarWorld argues that Commerce should have applied partial AFA to Motech because Motech failed to provide a complete and accurate description of the grades it assigned to its cells, and therefore failed to cooperate with Commerce. See SolarWorld's Br. 2, 12. SolarWorld contends that "Motech clearly maintained clear and extensive information and data on its products by grade, which it did not provide to the agency, thus failing to cooperate." Id. at 17. Because Commerce did not have this data, SolarWorld argues that Commerce's failure to apply partial AFA is "unsupported by substantial evidence, arbitrary, and an abuse of discretion." See id. at 18. In this case, Commerce was able to fill in the gaps regarding the different grades Motech reported in its Initial Section B and Section D Questionnaire Responses. See Final IDM at 36. Because Commerce found that the record data provided by Motech allowed Commerce to reallocate costs, adverse inferences are not warranted. The court concludes that substantial evidence supports the Department's decision not to apply partial AFA to Motech.

SolarWorld argues that AFA should have been applied to SAS-Solartech's reported costs. See SolarWorld's Br. 2-3. As with Motech, Commerce determined in the review that SAS-Solartech was "fully responsive to [Commerce's] supplemental questions with regard to non-prime merchandise" and explained any "anomalies" in its reporting. See Final IDM at 25. Because SAS-Solartech complied with Commerce's requests, Commerce declined to apply AFA.

Id. The court concludes that substantial evidence supports the Department's decision not to apply AFA because SAS-Solartech complied fully with Commerce's requests.

## **II. SAS-Solartech's Rule 56.2 Motion for Judgment on the Agency Record**

Consolidated Plaintiff SAS-Solartech's Rule 56.2 motion for judgment on the agency record contests Commerce's decision to include in its margin calculations certain sales made by SAS because the sales were destined for Mexico via transit through United States FTZs. For the following reasons, the court finds that Commerce's inclusion of certain SAS sales as destined for the United States in its antidumping duty calculation is unreasonable and not supported by substantial evidence.

### **A. Commerce's Inclusion of the Sales at Issue in its Dumping Calculation**

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 the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The court must determine whether the evidence and reasonable inferences from the record support Commerce's findings. Daewoo Elecs. Co. v. Int'l Union, 6 F.3d 1511, 1520 (Fed. Cir. 1993) (citing Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984)). The court reviews whether Commerce has taken the record evidence into account and provided an adequate explanation for its reasonable determination. See Cleo Inc. v. United States, 501 F.3d 1291, 1296 (Fed. Cir. 2007).

SAS-Solartech argues that Commerce unreasonably ignored evidence establishing that SAS knew at the time of sale that its merchandise entered United States FTZs in transit, but was destined for sale in Mexico. SAS-Solartech's Br. 3. SAS-Solartech alleges that Commerce unreasonably included the sales to Mexico in its United States price calculations, despite no evidence on the record demonstrating that the merchandise actually entered the United States for

consumption. Id. at 14–15. SAS-Solartech claims also that Commerce’s determination to base export price on sales to a third country directly violated Commerce’s statutory mandate. See id. at 17.

SAS-Solartech argues that sufficient evidence demonstrates that SAS knew at the time of sale that its merchandise was ultimately shipped to Mexico, including: (1) verbal instruction from its customers that the final destination of the merchandise was Mexico; (2) SAS’ knowledge that its customers had manufacturing facilities in Mexico; (3) the sales documentation generated at the time of sale listed “Mexico as the ultimate ‘ship to’ destination and a Mexican entity as the ‘notify’ party, meaning that a Mexican entity was the intended recipient of the merchandise;” and (4) the United States addresses on the sales documentation were of “consignee freight forwarders that operated within approved” United States FTZs. See SAS-Solartech Br. 10; SAS-Solartech’s Reply 5. Defendant contends that Commerce need not take this evidence into consideration because it is neither physical evidence nor contemporaneous, and SAS obtained the sales documentation “after the fact.” See Def.’s Br. 18. Commerce argues also that the sales documentation only “relat[es] to a few of the sales at issue.” Id.

The court notes that the four documents cited by SAS-Solartech are evidence on the record. In its Supplemental Section A Response, SAS writes that during the sales process its “customers verbally advised SAS that the sales were ultimately destined for Mexico.” SAS’ Supplemental Section A Response at SA-3, PD 166, bar code 3497125-01 (Aug. 11, 2016). SAS states that it “knows that both customers had factories” in a non-United States country and that its customers did not intend for the merchandise to enter into the United States customs territory. See id. at SA-4. Commerce acknowledged that “[t]he sales and shipping documentation at the time of the sales indicate the names of Mexican entities to be notified.” Final IDM at 10–11

(emphasis added). Commerce acknowledged also that the “shipping addresses are FTZ-designated addresses.” Id. at 10. SAS is not able to provide all sales information because one of its customers filed for bankruptcy. SAS’ Supplemental Section A Response at SA-3–SA-4, PD 166, bar code 3497125-01 (Aug. 11, 2016). Because evidence on the record establishes sales to customers in Mexico and demonstrates that the merchandise was shipped to United States FTZ addresses, with no actual United States customers identified and no evidence showing that merchandise entered the United States customs territory for sale, the court concludes that it is unreasonable for Commerce to have ignored the record evidence regarding SAS sales shipped through United States FTZs destined for sale in Mexico. The court concludes that Commerce’s decision to include certain SAS sales as sales to United States customers is unreasonable and not supported by substantial evidence.

### CONCLUSION

For the foregoing reasons, the court concludes that:

1. Commerce’s adjustments of Motech’s and SAS-Solartech’s costs are proper;
2. Commerce’s decisions not to apply AFA against Motech and SAS-Solartech are proper; and
3. Commerce’s decision to include certain SAS sales as sales to United States customers is unreasonable and not supported by substantial evidence.

The court remands the Final Results for redetermination on the issue of United States sales consistent with this opinion. Accordingly, it is hereby

**ORDERED** that Commerce shall file its remand redetermination on or before January 11, 2019; and it is further

**ORDERED** that Commerce shall file the administrative record on remand on or before January 24, 2019; and it is further

**ORDERED** that the Parties shall file any comments on the remand redetermination on or before February 11, 2019; and it is further

**ORDERED** that the Parties shall file replies to the comments on or before March 13, 2019; and it is further

**ORDERED** that the joint appendix shall be filed on or before March 27, 2019.

/s/ Jennifer Choe-Groves  
Jennifer Choe-Groves, Judge

Dated: November 13, 2018  
New York, New York