U.S. Court of International Trade

Slip Op. 17–113

LINYI BONN FLOORING MANUFACTURING CO., LTD., Plaintiff, OLD MASTER PRODUCTS, INC. & LUMBER LIQUIDATORS SERVICES, LLC, Plaintiff-Intervenors, v. UNITED STATES, Defendant, COALITION FOR AMERICAN HARDWOOD PARITY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Court No. 15–00227

[Sustaining a decision in response to court order in litigation contesting a final determination in an administrative review of an antidumping duty order]

Dated: August 25, 2017

Jeffrey S. Neeley, Husch Blackwell LLP, of Washington D.C., for plaintiff Linyi Bonn Flooring Manufacturing Co., Ltd.

John Robert Magnus and *Sheridan Scott McKinney*, Tradewins LLC, of Washington D.C., for plaintiff-intervenor Old Master Products, Inc.

Mark Rett Ludwikowski, Clark Hill PLC, of Washington D.C., for plaintiff-intervenor Lumber Liquidators Services, LLC.

Tara K. Hogan, Senior Trial Counsel, Civil Division, U.S. Department of Justice, of Washington D.C., for defendant United States. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Shelby M. Anderson*, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Jeffrey Steven Levin, Levin Trade Law, P.C., of Bethesda, M.D., for defendant-intervenor Coalition for American Hardwood Parity.

OPINION

Stanceu, Chief Judge:

Before the court is the decision (the "Remand Redetermination") the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued in response to the court's order in *Linyi Bonn Flooring Mfg. Co. v. United States*, 41 C.I.T. __, 222 F. Supp. 3d 1274 (2017) (*"Linyi Bonn"*). *Final Results of Redetermination Pursuant to Court Order* (June 19, 2017), ECF No. 53 (*"Remand Redeterm."*). For the reasons set forth below, the court sustains the Remand Redetermination.

I. BACKGROUND

Background in this case is set forth in *Linyi Bonn* and is summarized and supplemented herein. 44 C.I.T. at __, 22 F. Supp. 3d at 1277–81. This litigation arose from a challenge by plaintiff Linyi Bonn Flooring Manufacturing Co., Ltd. ("Linyi Bonn") to the final results of the second periodic administrative review of an antidumping duty order multilayered wood flooring ("MLWF") from the People's Republic of China ("Final Results"). *See Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Results of New Shipper Review; 2012–2013*, 80 Fed. Reg. 41,476 (Int'l Trade Admin. July 15, 2015). The second review pertained to the period of December 1, 2012 through November 30, 2013. *Id.*, 80 Fed. Reg. at 41,476. In the Final Results, Commerce assigned Linyi Bonn an antidumping duty rate of 58.84%. *Id.*, 80 Fed. Reg. at 41,478, 41,478 n.18. Commerce took this action upon concluding that Linyi Bonn was part of the "PRC-wide entity" based on Linyi Bonn's failure to submit "a certification of no shipment, separate rate application or separate rate certification" following the initiation of the second review. *Id.*

Prior to the issuance of the Final Results, Linyi Bonn had been assigned a zero margin and zero cash deposit rate in a new shipper review ("NSR") that covered the period of December 1, 2012 through May 31, 2013, i.e., a period parallel to the first six months of the period of review for the second review. *See Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty New Shipper Reviews; 2012–2013*, 79 Fed. Reg. 66,355 (Int'l Trade Admin. Nov. 7, 2014).

A. The Court's Decision in Linyi Bonn

In *Linyi Bonn*, the court held that the assignment of the 58.84% rate to Linyi Bonn was unlawful because Commerce failed to provide Linyi Bonn notice of the availability of "a special procedure by which Linyi Bonn could have sought to retain its previously-obtained zero margin and its previously-obtained zero cash deposit rate in the second review . . . ." *Linyi Bonn*, 41 C.I.T. at __, 222 F. Supp. 3d at 1282–83. The court referred to that procedure as a procedure for a "partial no shipment certification." *Id.*, 41 C.I.T. at __, 222 F. Supp. 3d at 1291. The court observed that two other parties to the new shipper review, Dalian Huade Wood Product Co., Ltd. ("Huade") and Zhejiang Fuerjia Wooden Co., Ltd. ("Fuerjia"), had availed themselves of such a procedure. *Id.*, 41 C.I.T. at __, 222 F. Supp. 3d at 1284. The court stated that "[o]n remand, Commerce must correct the problem"

created by its failure to provide notice of the special procedure to Linyi Bonn. *Id.*, 41 C.I.T. at __, 222 F. Supp. 3d at 1291.

B. The Remand Redetermination

In response to the court's order in *Linyi Bonn*, Commerce requested that "Linyi Bonn provide confirmation of no shipments during the applicable portion of the period of review that was not covered by the *Final Results of NSR* (i.e., June 1, 2013, through November 30, 2013)." *Remand Redeterm.* 4. After receiving this confirmation and consulting with U.S. Customs and Border Protection ("CBP"), Commerce in the Remand Redetermination "determined that Linyi Bonn had no shipments during the period of review that were not covered in the overlapping period of review for the partially concurrent NSR." *Id*. The Remand Redetermination states that "[a]ccordingly, the Department has determined that Linyi Bonn had no shipments that are subject to the second administrative review." *Id.* It informs the court of the Department's intention to "take the necessary steps to correct its prior assessment instructions with respect to Linyi Bonn to: (1) give effect to the finding of no shipments during the period June 1, 2013, through November 30, 2013; and (2) ensure that liquidation of any entries of subject merchandise that were produced and exported by Linyi Bonn during the period December 1, 2012, through May 31, 2013 are liquidated in accordance with the *Final Results of the NSR*." *Id.* at 5. Regarding timing, Commerce stated that its intended actions are pending "a final and conclusive court decision in this litigation, including all appeals and remand proceedings, as provided in section 516A of the Tariff Act of 1930, as amended." *Id.* at 4–5.

C. Comments on the Remand Redetermination

On July 5, 2017, plaintiff indicated its support for the Remand Redetermination in comments submitted to the court. Comments on Remand Results, ECF No. 55. Neither plaintiff-intervenors nor defendant-intervenor commented on the Remand Redetermination. On July 20, 2017, defendant responded to plaintiff's comments, requesting that the court "sustain the Remand Redetermination and enter judgment in favor of the United States." Def.'s Resp. to Comments Regarding the Remand Redetermination 3, ECF No. 57.

II. DISCUSSION

The court will sustain the Remand Redetermination because it concludes that Commerce has complied with the court's order in *Linyi Bonn* and because no party has objected to the Remand Redetermination. In this Opinion, the court presents its reasoning for conclud-

ing that the Remand Redetermination complies with the court's order and addresses certain matters involving the implementation of the Remand Redetermination by Commerce and CBP, specifically, the cash deposit rate and the liquidation of affected entries.

A. Compliance with the Court's Order in Linyi Bonn

In *Linyi Bonn*, the court ordered Commerce to correct the problem created by the failure to provide Linyi Bonn notice of the partial no shipment certification procedure. *Linyi Bonn*, 41 C.I.T. at __, 222 F. Supp. 3d at 1291. The court held that "[b]ecause the procedural flaw was prejudicial to Linyi Bonn, the only remedy that will suffice is one that affords Linyi Bonn the opportunity it would have had if the Department's failure to provide notice had not occurred." *Id.* The court did not direct a specific method by which Commerce could provide that opportunity, instead allowing the Department discretion as to how to proceed. *Id.*

Exercising its discretion, Commerce requested a "partial no shipment" certification from Linyi Bonn, which Linyi Bonn supplied on May 23, 2017. *Remand Redeterm.* 4. "Additionally, the Department issued a no shipment inquiry to CBP to confirm that Linyi Bonn did not ship subject merchandise to the United States during the period June 1, 2013, through November 30, 2013." *Id.* (footnote omitted). Commerce added that "[o]n June 5, 2017, the Department received notice from CBP that Linyi Bonn did not have any shipments of MLWF from June 1, 2013, through November 30, 2013." *Id.*

The court concludes that the court's order was satisfied by the Department's method of allowing Linyi Bonn the opportunity to demonstrate for the record that it had no shipments of subject merchandise during the period of June 1 through November 30, 2013. Accordingly, the court sustains the Department's ultimate determination that "Linyi Bonn had no shipments that are subject to the second administrative review."[1] *Id.*

B. Cash Deposit Rate

Commerce explained that Linyi Bonn's cash deposit rate will not change as a result of implementation of the Remand Redetermination because Linyi Bonn's weighted-average dumping margin for the fourth administrative review, the final results for which were issued on May 26, 2017, was zero, which is also the cash deposit rate.[2]

[1] In reaching this ultimate determination, based on a procedure of its own choosing, Commerce does not indicate that its determination is being made under protest.

[2] The court notes that in the intervening review, the third administrative review, Commerce found that Linyi Bonn had no shipments during the period for that review (December 1,

Remand Redeterm. 5. Commerce further explained that any excess cash deposits on entries of subject merchandise occurring during the period of review for the fourth review (December 1, 2014 through November 30, 2015) will be refunded with interest upon liquidation. *Id.*

C. Liquidation of Entries

In the Remand Redetermination, Commerce determined that it would "ensure that liquidation of any entries of subject merchandise that were produced and exported by Linyi Bonn during the period December 1, 2012, through May 31, 2013 are liquidated in accordance with the *Final Results of the NSR*." *Id.* In the final results of the new shipper review, Commerce determined a zero weighted-average dumping margin for Linyi Bonn. *Linyi Bonn*, 41 C.I.T. at __, 222 F. Supp. 3d at 1280 (*citing Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty New Shipper Reviews; 2012–2013*, 79 Fed. Reg. 66,355 (Int'l Trade Admin. Nov. 7, 2014)). Commerce stated that its determination is "pending a final and conclusive court decision in this litigation, including all appeals and remand proceedings, as provided in section 516A of the Tariff Act of 1930, as amended (the Act)." *Remand Redeterm.* 4–5 (footnote omitted). Commerce explained that "[t]here is an active injunction for Linyi Bonn's exports of subject merchandise that were entered, or withdrawn for warehouse, for consumption on or after December 1, 2012, until November 30, 2013." *Id.* 5 n.20 (citation omitted). Commerce added that "[a]bsent any further order by the Court, the Department cannot instruct CBP to liquidate entries during the period covered by the injunction until there is a final and conclusive court decision in this case." *Id.* In the judgment to be entered, the court will order that the entries at issue in this litigation be liquidated in accordance with the final court decision in this case.

III. CONCLUSION

For the reasons discussed above, the court will enter judgment sustaining the Remand Redetermination.

Dated: August 25, 2017
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU
CHIEF JUDGE

2013 through November 30, 2014). *Multilayer Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013–2014*, 81 Fed. Reg. 46,899, 46,900 (Int'l Trade Admin. July 19, 2016).

Slip Op. 17–114

THE FLORIDA TOMATO EXCHANGE, Plaintiff, v. UNITED STATES, Defendant, and CAADES SINALOA, A.C., CONSEJO AGRÍCOLA DE BAJA CALIFORNIA, A.C., ASOCIACIÓN MEXICANA DE HORTICULTURA PROTEGIDA, A.C., UNIÓN AGRÍCOLA REGIONAL DE SONORA PRODUCTORES DE HORTALIZAS FRUTAS Y LEGUMBRES, and CONFEDERACIÓN NACIONAL DE PRODUCTORES DE HORTALIZAS, Defendant-Intervenors.

Before Richard K. Eaton, Judge
Court No. 13–00148

[United States Department of Commerce's Remand Results are remanded.]

Dated: August 25, 2017

Terence P. Stewart, Stewart and Stewart, of Washington, DC, argued for plaintiff. With him on the brief were *Geert De Prest* and *Nicholas J. Birch*.

Mikki Cottet, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of Counsel on the brief was *Henry J. Loyer*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Thomas B. Wilner and *David L. Earnest IV*, Shearman & Sterling LLP, of Washington, DC, argued for defendant-intervenors. With them on the brief was *Robert S. LaRussa*.

OPINION AND ORDER

Eaton, Judge:

This case involves a determination by the United States Department of Commerce ("Commerce" or the "Department") to enter into a suspension agreement with exporters of fresh tomatoes from Mexico to "eliminate completely the injurious effect of exports to the United States of the subject merchandise," pursuant to 19 U.S.C. § 1673c(c) (2012).[1] *Fresh Tomatoes From Mexico: Suspension of Antidumping Investigation*, 78 Fed. Reg. 14,967, 14,968 (Dep't Commerce Mar. 8, 2013) ("2013 Suspension Agreement" or "2013 Agreement"). In *Florida Tomato Exchange v. United States*, 39 CIT __, 107 F. Supp. 3d 1342 (2015) ("*Tomato Exchange I*"), the court held that Commerce had failed to comply with the notice, comment, and consultation requirements of 19 U.S.C. § 1673c(e) prior to entering into the 2013 Suspension Agreement, and remanded to Commerce.

Before the court are Commerce's final results of redetermination following remand. *See* Final Results of Redetermination Pursuant to Court Remand, ECF No. 84–1, P.R. 62–65 at bar code 3476104–01 to

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

-04 ("Remand Results"). During remand proceedings, Commerce provided interested parties with notice, and an opportunity for comment and consultations, regarding certain Department memoranda whose purpose was to explain the bases for its determination that the 2013 Agreement would eliminate completely the injurious effect of imports of the Mexican tomatoes. In the Remand Results, Commerce continued to determine that the agreement met the requirements of 19 U.S.C. § 1673c(c).

Plaintiff the Florida Tomato Exchange[2] ("plaintiff" or the "Tomato Exchange") challenges, as unsupported by substantial evidence or otherwise not in accordance with law, several of Commerce's determinations on remand, including (1) that the 2013 Agreement will limit dumping to the level permitted by statute; and (2) that the agreement will prevent price suppression or undercutting and thereby eliminate completely the injurious effect of the subject imports. Plaintiff asks the court to again remand this matter to Commerce with instructions either to comply with subsection 1673c(c)'s requirements or to terminate the 2013 Suspension Agreement. *See* Pl.'s Cmts. Opp'n Final Results of Redetermination on Remand, ECF No. 86 ("Pl.'s Cmts.") 1–3.

The United States ("defendant"), on behalf of Commerce, argues that the Remand Results are supported by substantial evidence and otherwise in accordance with law. *See* Def.'s Resp. Cmts. Remand Redetermination, ECF No. 96 ("Def.'s Resp. Cmts."). Defendant-intervenors CAADES Sinaloa, A.C., *et al*.[3] (collectively, "defendant-intervenors"), the Mexican signatories to the 2013 Agreement, join the defendant in urging the court to sustain the Remand Results. *See* Def.-Int.'s Mem. Supp. Def.'s Final Results of Redetermination, ECF No. 90.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012), and 19 U.S.C. § 1516a(a)(2)(B)(iv). For the reasons set forth below, the court remands this matter to Commerce.

LEGAL FRAMEWORK

Commerce is authorized, under limited circumstances, to suspend an antidumping investigation by entering into a suspension agree-

[2] The Florida Tomato Exchange is "a trade association representing growers and first handlers of the domestic like product of the subject merchandise." *Tomato Exchange I*, 39 CIT at __, 107 F. Supp. 3d at 1344.

[3] Defendant-intervenors CAADES Sinaloa, A.C., Consejo Agrícola de Baja California, A.C., Asociación Mexicana de Horticultura Protegida, A.C., Unión Agrícola Regional de Sonora Productores de Hortalizas Frutas y Legumbres, and Confederación Nacional de Productores de Hortalizas represent producers and exporters in Mexico that account for substantially all of the subject tomatoes imported into the United States. *See* 2013 Suspension Agreement, Section II (U.S. Import Coverage).

ment with exporters and producers of particular merchandise, or a foreign government.[4] Generally, suspension agreements are entered into where Commerce has made an affirmative preliminary dumping determination. *See* 19 C.F.R. § 351.208(f)(1)(i)(A) (2012) (proposed suspension agreement must be submitted to Commerce within 15 days of the preliminary determination); *id*. § 351.208(g)(1)(i) (Commerce may accept a suspension agreement within 60 days of issuance of a preliminary determination). "[I]n a suspension agreement, the exporters and producers or the foreign government agree to modify their behavior so as to eliminate dumping . . . or the injury caused thereby." *Id*. § 351.208(a).

Suspension agreements are an atypical remedy in antidumping cases. *See* S. Rep. No. 96–249, at 71 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 457 ("[S]uspension is an unusual action which should not become the normal means for disposing of cases."). Congress, in providing for such agreements, intended that they be used "as a means of achieving the remedial purposes of the [antidumping] law in as short a time as possible and with a minimum expenditure of resources by all parties involved." H.R. Rep. No. 96–317, 96th Cong., 1st Sess. 53 (1979); *see also PPG Indus., Inc. v. United States*, 11 CIT 344, 355, 662 F. Supp. 258, 267 (1987), *aff'd*, 928 F.2d 1568 (Fed. Cir. 1991) (noting "congressional desire that suspension agreements lead to rapid resolution of the issues").

The availability of suspension agreements is circumscribed by statute. *See* 19 U.S.C. § 1673c(b), (c), (*l*).[5] The most common type is an agreement entered into pursuant to 19 U.S.C. § 1673c(b) ("subsection (b) agreement"), by which exporters that account for "substantially all" of the imports of subject merchandise into the United States agree to cease exports to the United States or revise their prices to eliminate all dumped sales. Following the publication of its preliminary dumping determination, however, Commerce entered into a second type of agreement found in 19 U.S.C. § 1673c(c) ("subsection

[4] *Compare* 19 U.S.C. § 1673c(b) (authorizing suspension upon the acceptance of an agreement to cease exports or revise prices from exporters of the subject merchandise "who account for substantially all of the imports of that merchandise" into the United States), *and* § 1673c(c)(1) (authorizing suspension if the "exporters of the subject merchandise who account for substantially all of the imports of that merchandise into the United States" agree to meet certain statutory requirements), *with* § 1673c(*l*)(1) (authorizing suspension of "an investigation . . . upon acceptance of an agreement with a nonmarket economy country to restrict the volume of imports into the United States of the merchandise under investigation," where certain criteria are met).

[5] The 2013 Suspension Agreement was entered into pursuant to 19 U.S.C. § 1673c(c). For clarity, neither § 1673c(b) nor § 1673c(*l*) is applicable here. Subsection (b) governs agreements to eliminate all dumped sales; subsection (*l*) governs agreements with nonmarket economy countries.

(c) agreement"). Unlike subsection (b) agreements, the goal of subsection (c) agreements is not to eliminate all dumped sales. Rather, subsection (c) agreements seek to eliminate the *injurious effect* of exports of subject merchandise. 19 U.S.C. § 1673c(c)(1).

For the Department to enter into a subsection (c) agreement, "extraordinary circumstances" must be present. 19 U.S.C. § 1673c(c)(1). The statute defines extraordinary circumstances as those "in which . . . (i) suspension of an investigation will be more beneficial to the domestic industry than continuation of the investigation, and (ii) the investigation is complex." 19 U.S.C. § 1673c(c)(2)(A). An investigation is considered complex when either "(i) there are a large number of transactions to be investigated or adjustments to be considered, (ii) the issues raised are novel, or (iii) the number of firms involved is large." 19 U.S.C. § 1673c(c)(2)(B).

Once Commerce determines that extraordinary circumstances are present, it may suspend its investigation "upon the acceptance of an agreement to revise prices from exporters of the subject merchandise who account for substantially all of the imports of that merchandise into the United States," if certain conditions are met. 19 U.S.C. § 1673c(c)(1). Specifically, Commerce may enter into a subsection (c) agreement if (1) "the agreement will eliminate completely the injurious effect of exports to the United States of that merchandise," (2) "the suppression or undercutting of price levels of domestic products by imports of that merchandise will be prevented,"[6] and (3) dumping will not exceed a statutorily prescribed limit. *Id*. This last condition provides that:

> for each entry of each exporter the amount by which the estimated normal value exceeds the export price (or the constructed export price) will not exceed 15 percent of the weighted average amount by which the estimated normal value exceeded the export price (or the constructed export price) for all [dumped] entries of the exporter examined during the course of the investigation.

19 U.S.C. § 1673c(c)(1)(B).

In other words, a significant feature of a subsection (c) agreement is that Commerce must be satisfied that the agreement will prevent the

[6] Notably, the effect of imports on domestic prices is a relevant factor in material injury determinations made by the United States International Trade Commission following the initiation of a dumping investigation. *See* 19 U.S.C. § 1677(7)(C)(ii). It is Commerce, however, that makes these findings when determining whether to enter into a suspension agreement under 19 U.S.C. § 1673c(c). *See* 19 U.S.C. § 1673c(c)(1)(A) (authorizing Commerce to enter into a suspension agreement "if . . . the suppression or undercutting of price levels of domestic products by imports of that merchandise will be prevented," and where certain other criteria are met).

"suppression or undercutting" of U.S. prices for the domestic like product, and the estimated dumping margin of each entry of subject merchandise of each exporter will not exceed 15 percent of the weighted average dumping margin preliminarily determined for that exporter, or the all-others rate in the case of exporters that were not selected for individual examination by Commerce. Finally, Commerce may not enter into a suspension agreement of any kind unless "(1) it is satisfied that suspension of the investigation is in the public interest, and (2) effective monitoring of the agreement by the United States is practicable." 19 U.S.C. § 1673c(d).

Commerce may suspend an investigation only after considering the comments of the petitioner who sought the unfair trade investigation, and other interested parties. Thus, before an investigation may be suspended, Commerce must (1) "notify . . . and consult with the petitioner concerning, its intention to suspend the investigation, and notify other parties to the investigation and the [United States International Trade Commission (the "Commission" or "ITC")]"; (2) "provide a copy of the proposed agreement to the petitioner at the time of the notification, together with an explanation of how the agreement will be carried out and enforced, and of how the agreement will meet the requirements of . . . subsections . . . (c) and (d)"; and (3) "permit all interested parties . . . to submit comments and information for the record . . . ." 19 U.S.C. § 1673c(e)(1)-(3).

Even after an investigation has been suspended, interested parties have an ongoing role to play. For example, either exporters or domestic interested parties may ask Commerce to continue the suspended investigation. If Commerce receives a request for continuation of the investigation "within 20 days after the date of publication of the notice of suspension of an investigation" from "exporters accounting for a significant proportion of exports to the United States of the subject merchandise, or . . . an interested party . . . which is a party to the investigation, then [Commerce] and the Commission shall continue the investigation." 19 U.S.C. § 1673c(g). Additionally, interested parties may request an annual review by Commerce of "the current status of, and compliance with, any agreement by reason of which an investigation was suspended, and review the amount of any . . . dumping margin involved in the agreement . . . ." 19 U.S.C. § 1675(a)(1)(C).

Last, for subsection (c) agreements, domestic interested parties are afforded an additional tool to secure compliance with the terms of the agreement by the foreign signatories and to ensure that the agreement is achieving its intended goal of eliminating the injurious effect of exports of subject merchandise: "Within 20 days after the suspen-

sion of an investigation[,] . . . an interested party which is a party to the investigation . . . may, by petition filed with the [ITC] and with notice to [Commerce], ask for a review of the suspension." 19 U.S.C. § 1673c(h)(1); *see Imperial Sugar Co. v. United States*, 40 CIT __, __, 181 F. Supp. 3d 1284, 1293 n.14 (2016), *appeal dismissed per agreement*, No. 17–1320 (Fed. Cir. May 31, 2017) (noting that the ITC determination under review was "the first time the Commission has been asked to review a suspension agreement pursuant to subsection (h)"). Following the receipt of such a petition, the ITC "shall, within 75 days after the date on which the petition is filed with it, determine whether the injurious effect of imports of the subject merchandise is eliminated completely by the agreement." 19 U.S.C. § 1673c(h)(2). Should the ITC make a negative determination, Commerce is directed to resume its investigation "on the date of publication of notice of such determination as if the affirmative preliminary determination . . . had been made on that date." 19 U.S.C. § 1673c(h)(2).

BACKGROUND

The pertinent background facts are set out in the court's opinion in *Tomato Exchange I*, and are supplemented here.

I. Suspension Agreements on Fresh Tomatoes from Mexico

In April 1996, in response to a petition filed by the Tomato Exchange and other domestic interested parties, Commerce and the ITC commenced their respective investigations of fresh tomatoes from Mexico that allegedly had been dumped in the United States. *See Fresh Tomatoes From Mexico*, 61 Fed. Reg. 18,377 (Dep't Commerce Apr. 25, 1996) (initiation of antidumping duty inv.).

In May 1996, the ITC made an affirmative preliminary injury determination, and so notified the Department. *See Fresh Tomatoes from Mexico*, USITC Pub. 2967, Inv. No. 731- TA-747 (May 1996) ("ITC Prelim. Injury Determination"); *Fresh Tomatoes From Mexico*, 61 Fed. Reg. 28,891 (ITC June 6, 1996) (prelim. determination).

Commerce proceeded with its antidumping investigation and, several months later, on October 28, 1996, preliminarily determined that fresh tomatoes from Mexico were being dumped in the United States during the period of investigation, *i.e.*, March 1, 1995 to February 29, 1996. *Fresh Tomatoes From Mexico*, 61 Fed. Reg. 56,608, 56,610 (Dep't Commerce Nov. 1, 1996) (affirmative prelim. dumping determination and postponement of final determination) ("Preliminary Determination"). Based on information supplied by the Mexican respondents during the investigation, Commerce calculated weighted-average dumping margins for several individual exporters, as well as an all-others rate, that ranged from 4.16 percent to 188.45 percent.

See Preliminary Determination, 61 Fed. Reg. at 56,615.

On the same day the Preliminary Determination was issued, Commerce entered into a subsection (c) agreement with Mexican exporters accounting for substantially all fresh tomatoes imported into the United States from Mexico, thereby suspending the antidumping investigation. *Fresh Tomatoes From Mexico*, 61 Fed. Reg. 56,618, 56,619, App. I (Dep't Commerce Nov. 1, 1996) ("1996 Suspension Agreement" or "1996 Agreement"). In the 1996 Agreement, each exporter agreed that its tomatoes would be sold at or above an established reference price, and that, for each entry of subject merchandise, dumping would not exceed 15 percent of the weighted-average dumping margin preliminarily determined for that exporter in the antidumping investigation. *See* 1996 Suspension Agreement, 61 Fed. Reg. at 56,619, App. I, Section IV (Basis for the Agreement). Accordingly, Commerce determined that the 1996 Suspension Agreement would "(1) [e]liminate completely the injurious effect of exports to the United States of the subject merchandise; and (2) prevent the suppression or undercutting of price levels of domestic fresh tomatoes by imports of that merchandise from Mexico." 1996 Suspension Agreement, 61 Fed. Reg. at 56,618.

Over the course of approximately the next seventeen years, Commerce continued to suspend its antidumping investigation of fresh tomatoes from Mexico by way of subsection (c) agreements. Thus, in addition to the 1996 Agreement, Commerce entered into suspension agreements in 2002, 2008, and 2013. *See* 1996 Suspension Agreement, 61 Fed. Reg. at 56,619; *Fresh Tomatoes From Mexico*, 67 Fed. Reg. 77,044, 77,046 (Dep't Commerce Dec. 16, 2002); *Fresh Tomatoes From Mexico*, 73 Fed. Reg. 4831, 4833 (Dep't Commerce Jan. 28, 2008); 2013 Suspension Agreement, 78 Fed. Reg. at 14,968. Each of these agreements contained pledges by Mexican signatories to adhere to established minimum reference prices to prevent price suppression or undercutting and to limit dumping of subject merchandise to the level permitted by statute. Also, each agreement was determined by Commerce to eliminate completely the injurious effect of subject imports.

At issue in this case is the 2013 Suspension Agreement, pursuant to which the Mexican signatories pledged not to sell their tomatoes in the United States for less than established reference prices in order to prevent price suppression or undercutting.[7] As in past agreements, signatories also pledged to limit their dumping to permissible levels

[7] The agreement established both summer season and winter season reference prices for four categories of tomatoes: (1) open field and adapted environment, other than specialty (winter: $0.31 per pound; summer: $0.2458 per pound); (2) controlled environment, other

in accordance with 19 U.S.C. § 1673c(c)(1)(B).[8] *See* 2013 Suspension Agreement, 78 Fed. Reg. at 14,969. Appendices A and B to the agreement set forth the reference prices and the methods used to calculate normal value and export price. *See* 2013 Suspension Agreement, 78 Fed. Reg. at 14,972. The agreement also contained provisions permitting Commerce and other government agencies to monitor and enforce its terms and conditions. *See* 2013 Suspension Agreement, 78 Fed. Reg. at 14,969–71. Accordingly, Commerce "determined that the 2013 Suspension Agreement [would] eliminate completely the injurious effect of exports to the United States of the subject merchandise and prevent the suppression or undercutting of price levels of domestic fresh tomatoes by imports of that merchandise from Mexico." 2013 Suspension Agreement, 78 Fed. Reg. at 14,968.

II. The Court's Opinion In *Tomato Exchange I*

In *Tomato Exchange I*, the court agreed with plaintiff that the Tomato Exchange was "depriv[ed] . . . of procedural rights afforded to it by the suspension agreement statute" because Commerce failed to make two of the three explanatory memoranda on the record regarding extraordinary circumstances, price suppression, and the public interest (the "Explanatory Memoranda")[9] available until after it had entered into the 2013 Suspension Agreement. *Tomato Exchange I*, 39 CIT at __, 107 F. Supp. 3d at 1354. Holding that Commerce's failure

than specialty (winter: $0.41 per pound; summer: $0.3251 per pound); (3) specialty—loose (winter: $0.45 per pound; summer: $0.3568 per pound); and (4) specialty—packed (winter: $0.59 per pound; summer: $0.4679 per pound). *See* 2013 Suspension Agreement, 78 Fed. Reg. at 14,972.

[8] While Commerce has entered into relatively few subsection (c) agreements, previous agreements have included similar pledges. *See, e.g.*, *Sugar From Mexico*, 79 Fed. Reg. 78,039, 78,042 (Dep't Commerce Dec. 29, 2014) (suspension agreement) ("Each Signatory individually agrees that for each entry the amount by which the estimated normal value exceeds the export price (or the constructed export price) will not exceed 15 percent of the weighted average amount by which the estimated normal value exceeded the export price (or constructed export price) for all less-than-fair-value entries of the producer/exporter examined during the course of the investigation, in accordance with the Act and the Department's regulations and procedures, including but not limited to the calculation methodologies described in Appendix II of this Agreement."); *Potassium Chloride From Canada*, 53 Fed. Reg. 1393, 1394 (Dep't Commerce Jan. 19, 1988) ("In order to satisfy the requirements of section 734(c) of the Act, each signatory producer/exporter of potassium chloride from Canada, individually, agrees that the price it will charge for each entry of potassium chloride exported to the United States from Canada for consumption in the United States will be such that any amount by which the estimated foreign market value exceeds the United States price will not exceed 15 percent of the weighted-average amount by which the estimated foreign market value exceeded the United States price for all less-than-fair-value entries by such signatory producer/exporter that were examined during the Department's investigation.").

[9] The Explanatory Memoranda are: (1) the "Extraordinary Circumstances Memorandum," P.R. 4 at bar code 3413166–04 (Mar. 4, 2013); (2) the "Price Suppression Memorandum," P.R. 5 at bar code 3413166–05 (Apr. 18, 2013); and (3) the "Public Interest Memorandum," P.R. 3 at bar code 3413166–03 (Mar. 4, 2013).

to comply with the statute's notice, comment, and consultation requirements compelled remand, the court directed the Department to reopen the record, afford plaintiff the opportunity to comment on Commerce's determinations in the Explanatory Memoranda, consult with plaintiff about the comments if appropriate, and make any appropriate revisions to the agreement after giving meaningful consideration to plaintiff's arguments. *Id.* at __, 107 F. Supp. 3d at 1354–56.

III. The Remand Results

On remand, Commerce invited interested parties to comment on the Explanatory Memoranda in accordance with the court's instructions in *Tomato Exchange I*. Remand Results at 6. In response to a request by plaintiff, Commerce placed on the record the United States Department of Agriculture's ("USDA") Tomato Fax Report, which contained data for the 2008–2009, 2009–2010, and 2010–2011 growing seasons—data that Commerce had examined previously in the Price Suppression Memorandum. *See* Remand Results at 6.

Commerce received comments on the Explanatory Memoranda from one domestic interested party—plaintiff, the Tomato Exchange. Commerce also received comments from one Mexican exporter based in the United States, and the Mexican signatories to the 2013 Suspension Agreement. Additionally, the Mexican signatories and the Tomato Exchange requested consultations with Commerce.[10] *See* Remand Results at 6–7.

After these consultations, and having considered the parties' comments on the Explanatory Memoranda, Commerce produced a draft of the remand results and invited comments. Upon consideration of comments received on the draft, Commerce concluded that the 2013 Suspension Agreement as previously drafted met the requirements of § 1673c(c) and (d) and that no revisions to the agreement were necessary. *See* Remand Results at 7–8.

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[10] There is no dispute that on remand Commerce complied with the notice, comment, and consultation requirements of 19 U.S.C. § 1673c(e) in accordance with the court's order in *Tomato Exchange I*.

STANDARD OF REVIEW

"The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Central to Commerce's decision to enter into the 2013 Suspension Agreement were its determinations that the agreement would (1) limit dumping, on an entry-by-entry basis, to no more than 15 percent of the weighted-average dumping margins preliminarily determined during the investigation; and (2) prevent price suppression or undercutting through the use of minimum reference prices. Remand Results at 58, 41. For the reasons that follow, the court sustains the Department's determination that the 2013 Agreement would limit dumping to the level permitted by statute, but remands for further explanation its determination that the agreement would prevent price suppression or undercutting. Since Commerce's price suppression determination formed the basis of its "injurious effect" determination and, in part, its "extraordinary circumstances" determination, Commerce's explanation will necessarily affect those determinations, too.

I. Limitation of Dumping in Accordance with 19 U.S.C. § 1673c(c)(1)(B)

Commerce may enter into a subsection (c) agreement if it will limit dumping as provided in 19 U.S.C. § 1673c(c)(1)(B). *See* 19 U.S.C. § 1673c(c)(1)(B) (stating, as a condition to entering into a subsection (c) agreement, that "for each entry of each exporter the amount by which the estimated normal value exceeds the export price (or the constructed export price) will not exceed 15 percent" of the weighted average dumping margins determined in the investigation). As the parties acknowledge, § 1673c(c) is silent as to the particular method that Commerce must use to determine whether § 1673c(c)(1)(B) is satisfied. *See* Pl.'s Cmts. 7 (acknowledging that the statute does "not direct Commerce to use a particular method to determine the level of dumping" under a subsection (c) agreement); Def.'s Resp. Cmts. 18 (noting that "the statute is silent with respect to the method by which Commerce may [determine whether § 1673c(c)(1)(B) is satisfied]"). This being the case, the court will uphold Commerce's method so long as it is "sufficiently reasonable" and consistent with congressional intent, "giv[ing] due weight to the agency's interpretation of the

statute it administers . . . ." *Ipsco, Inc. v. United States*, 899 F.2d 1192, 1194–95 (Fed. Cir. 1990) (internal quotation marks and citations omitted); *see also Parkdale Intern., Ltd. v. United States*, 31 CIT 1229, 1245, 508 F. Supp. 2d 1338, 1355 (2007) ("Commerce has authority to fill gaps in a legislative scheme it is entrusted to administer, even where Congress has not provided a direct statement delegating rulemaking authority." (citing *Viraj Group v. United States*, 476 F.3d 1349, 1357 (Fed. Cir. 2007)).

Here, Commerce determined that the 2013 Suspension Agreement satisfied the requirements of § 1673c(c)(1)(B) by relying on a particular provision of the agreement—the pledge made by the exporters:

> In order to satisfy the requirements of [19 U.S.C. § 1673c(c)(1)(B)], each signatory individually agrees that for each entry the amount by which the estimated normal value exceeds the export price (or the constructed export price) will not exceed 15 percent of the weighted average amount by which the estimated normal value exceeded the export price (or the constructed export price) for all less-than-fair-value entries of the producer/exporter examined during the course of the investigation, in accordance with the Act and the Department's regulations and procedures, including but not limited to the calculation methodologies described in Appendix B of this Agreement.

2013 Suspension Agreement, 78 Fed. Reg. at 14,969. When deciding to rely on the pledge (rather than some other mechanism or standard), Commerce noted that an "extensive length of time" had passed between Commerce's 1996 antidumping investigation and the negotiation of the 2013 Agreement, and the absence of contemporaneous information on the record regarding whether Mexican tomato sales in the intervening years had complied with § 1673c(c)(1)(B):

> The record does not include information regarding the level of dumping at which subject merchandise sales were made in the year(s) prior to and around the time that negotiations regarding the 2013 Suspension Agreement occurred, and no such evidence was submitted during this remand proceeding. As such, the Department continues to find that an enforceable pledge by the signatory producers/exporters to ensure that each and every one of their sales is made in accordance with [19 U.S.C. § 1673c(c)(1)(B)] is a reasonable basis to determine that the 2013 Suspension Agreement meets this statutory requirement.

Remand Results at 58–59.

In addition to relying on the pledge, Commerce cited various provisions under section IV (Monitoring of the Agreement) and section V (Violations of the Agreement) of the 2013 Suspension Agreement that authorize the Department to monitor compliance by the signatories with the limitation on dumping in § 1673c(c)(1)(B). *See* Remand Results at 59, 73–75.

Importantly, the Department also found that the absence of any evidence in the record of dumping by the Mexican growers and exporters in excess of permitted levels under the 1996, 2002, and 2008 suspension agreements, which contained similar pledges, supported the reasonableness of its reliance on the pledge in the 2013 Agreement. *See* Remand Results at 53 ("[T]here was no available evidence, including on the record of the 2008 Suspension Agreement, indicating that the Mexican tomato growers/exporters made sales at prices exceeding the permitted level of dumping . . . ."). Commerce further noted that no interested party has asked the Department to continue its antidumping investigation, or perform an administrative review of the 2013 Agreement (or any of the prior agreements) to determine whether sales of subject merchandise were exceeding permissible dumping levels. *See* Remand Results at 53 ("[N]o interested party ha[s] ever requested an administrative review of the prior agreements . . . to determine whether sales of Mexican tomatoes were in compliance with [19 U.S.C. § 1673c(c)(1)(B)].").

Despite acknowledging the statute's silence on any particular method that Commerce must apply to determine whether § 1673c(c)(1)(B) is satisfied, plaintiff insists that Commerce had a "duty to investigate" the level of dumping that would be eliminated by the 2013 Agreement. *See* Pl.'s Cmts. 4 ("Commerce has continued to refuse to make even a perfunctory investigation into the level of dumping that will occur under the [2013] Suspension Agreement."), 6 (referring to Commerce's "abdication of its duty to investigate"), 11–12 (referring Commerce's "duty to investigate"). Plaintiff's main argument is that Commerce improperly delegated this duty to investigate to the Mexican signatories by relying on the pledge in the 2013 Agreement. According to plaintiff, since "Commerce has collected no data to support any determination on the level of dumping under the 2013 Suspension Agreement, . . . [the] determination cannot be held to be supported by substantial evidence." Pl.'s Cmts. 7.

The Tomato Exchange attempts to bolster its argument with case law. Specifically, it relies on *Timken Co. v. United States*, 10 CIT 86, 630 F. Supp. 1327 (1986) as support for the proposition that Commerce was required to collect data on whether the agreement would

limit dumping to permissible levels. Pl.'s Cmts. 12 ("'The burden of ensuring such up-to-date review should not rest upon a domestic party. Antidumping proceedings are investigatory, not adjudicatory.'" (quoting *Timken*, 10 CIT at 92, 630 F. Supp. at 1333)). Plaintiff also cites this Court's decisions in *Rhone-Poulenc, Inc. v. United States*, 20 CIT 573, 927 F. Supp. 451 (1996) and *Weiland-Werke AG v. United States*, 22 CIT 129, 4 F. Supp. 2d 1207 (1998), among others.

These cases, however, are not persuasive on the issue presented here. *Timken* does not address Commerce's obligations under § 1673c(c). Rather, *Timken* discusses Commerce's obligation to gather information in the context of a periodic review of an antidumping duty order. *Timken*, 10 CIT at 92, 630 F. Supp. at 1333 ("The responsibility for making findings pursuant to [19 U.S.C. § 1675 (1982), as amended] rests upon [Commerce]."). Likewise, *Rhone-Poulenc* was a challenge to Commerce's final affirmative dumping determination in a nonmarket economy case, and *Weilend-Werke* was a challenge to Commerce's final decision not to revoke an antidumping order in the context of a periodic review. In each of these cases, Commerce was looking backward in time, at sales made during a particular period in the past, for use in calculating dumping margins. The record in each of these cases, then, could be compiled using facts already in existence.

By way of contrast, when determining whether 19 U.S.C. § 1673c(c)(1)(B) is satisfied, Commerce's perspective is forward-looking. This is borne out by the language of the statute, which is put in the future tense. *See* 19 U.S.C. § 1673c(c)(1)(B) ("[T]he amount by which the estimated normal value exceeds the export price . . . *will* not exceed 15 percent . . . .") (emphasis added); *see also id*. § 1673c(c)(1) ("[T]he agreement *will* eliminate completely the injurious effect of exports to the United States . . . .") (emphasis added); *id*. § 1673c(c)(1)(A) ("[T]he suppression or undercutting of price levels of domestic products by imports of that merchandise *will* be prevented . . . .") (emphasis added). The facts about future dumping are, of course, not known now. Thus, the reasoning found in the cases cited by plaintiff has no application here.

Further, it is difficult to credit plaintiff's "duty to investigate" where the statute itself provided a number of ways for interested parties to ask Commerce to investigate, once the 2013 Agreement had gone into effect and the facts of any dumping during its term could be established; none of which the Tomato Exchange has availed itself of. As noted by Commerce, neither the Tomato Exchange nor any other domestic interested party asked the Department to continue its antidumping investigation, under 19 U.S.C. § 1673c(g), or conduct an

annual review, under 19 U.S.C. § 1675(a)(1)(C); nor has the Tomato Exchange petitioned the ITC to review the suspension, under 19 U.S.C. § 1673c(h)(1). *See* Remand Results at 53.

Because there is nothing in the law placing on Commerce a "duty to investigate," and in light of the history of earlier agreements, the availability of measures to monitor and enforce the 2013 Agreement, and the statute's silence as to any particular method that Commerce must use to determine whether a suspension agreement will limit dumping to the level permitted by § 1673c(c)(1)(B), the Department's decision to rely on the exporters' pledge in the 2013 Agreement is in accordance with law. That is, the method chosen by Commerce is "sufficiently reasonable" and consistent with Congress' intent that suspension agreements be used "as a means of achieving the remedial purposes of the [antidumping] law in as short a time as possible and with a minimum expenditure of resources by all parties involved." H.R. Rep. No. 96–317, at 53; *see also PPG Indus., Inc.*, 11 CIT at 355, 662 F. Supp. at 267 ("A separate investigation of [each exporter] would have impermissibly expanded the scope and duration of the investigation and violated congressional desire that suspension agreements lead to rapid resolution of the issues."). Moreover, in light of the exporters' apparent compliance with earlier pledges coupled with the lack of contemporaneous evidence in the record regarding dumping levels, the Department's decision is supported by substantial evidence. Accordingly, Commerce's conclusion that the agreement satisfied the requirements of 19 U.S.C. § 1673c(c)(1)(B) is sustained.

II. Prevention of Price Suppression or Undercutting and the Elimination of Injurious Effect of Imports

Commerce may enter into a subsection (c) agreement if it determines that, under the agreement, "the suppression or undercutting of price levels of domestic products by imports of that merchandise will be prevented . . . ." 19 U.S.C. § 1673c(c)(1)(A). Neither "suppression" nor "undercutting" is defined by the statute or Commerce's regulations.

In the absence of a statutory or regulatory definition, Commerce sought to interpret the phrase "suppression or undercutting" in § 1673c(c)(1)(A). To do so, Commerce looked to the statutes governing the ITC's determinations of material injury and threat of material injury for guidance. *See* 19 U.S.C. § 1677(7)(C) (material injury determination), § 1677(7)(F) (threat determination). These statutes require the ITC to consider the effects of imports on U.S. prices when making its injury determinations. Commerce analyzed the pertinent provisions of 19 U.S.C. § 1677(7) in the Price Suppression Memorandum to arrive at a definition of "suppression or undercutting":

> [I]n developing a reasonable definition of price suppression or undercutting, it is instructive to examine [19 U.S.C. § 1677(7)], which references price suppression and undercutting[11] in setting out the procedures that the [ITC] must follow in making its material injury determinations.
>
> Section [1677(7)(C)] directs the ITC to consider various factors when determining whether a domestic industry is materially injured by imports of merchandise subject to investigation, among which is price:
>
> (ii) Price -- In evaluating the effect of imports of such merchandise on prices, the {ITC} shall consider whether --
>
> (I) there has been significant price underselling by the imported merchandise as compared with the price of like products of the United States, and
>
> (II) the effect of imports of such merchandise otherwise *depresses prices* to a significant degree *or prevents price increases, which otherwise would have occurred*, to a significant degree.
>
> Similarly, when the ITC analyzes the *threat* of material injury, it considers, among other factors, "whether imports of the subject merchandise are entering {the United States} at prices that are likely to have a significant *depressing or suppressing* effect on domestic prices, and are likely to increase demand for further imports . . . ." *See* [19 U.S.C. § 1677(7)(F)(i)(IV)].
>
> Assuming that subsections [1677(7)(C)(ii) and 1677(7)(F)(i)(IV)] were intended to be parallel, a comparison of the phrase "depressing or suppressing" in subsection [1677(7)(F)(i)(IV)] to "depresses prices . . . or prevents price increases which otherwise would have occurred" in subsection [1677(7)(C)(ii)(II)] indicates

[11] [The term "undercutting" is not found in the material injury or threat provisions of 19 U.S.C. § 1677(7). However, the term "underselling," does appear in the material injury provision. *See* 19 U.S.C. § 1677(7)(C)(ii)(I) ("In evaluating the effect of imports of [subject] merchandise on prices, the Commission shall consider whether . . . there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States . . . ."). The dictionary definitions of "undercutting" and "underselling" indicate these words have similar meanings. *Compare* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1945 (3d ed. 1996) (defining "undercut" as "[t]o sell at a lower price than . . . a competitor . . ."), *with id*. at 1947 (defining "undersell" as "[t]o sell goods at a lower price than . . . another seller . . ."). While Commerce does not offer its own interpretation of "undercutting," as it appears in § 1673c(c)(1)(A), it seems to use the terms "undercutting" and "underselling" interchangeably. *See* Price Suppression Memorandum at 2–3.]

> that price *"suppression" generally encompasses practices and impacts which prevent price increases which otherwise would have occurred*. The legislative history to section [1677(7)(C)] supports such an interpretation. The Senate Report, for example, states that the ITC "would consider whether there has been significant price undercutting . . . and whether such imports have *depressed or suppressed* such prices to a significant degree." S. Rep. 96–249 at 87, reprinted in 1979 U.S.C.C.A.N. 381, 473 (1979).
>
> Assuming that a reasonable interpretation of the term "suppression" in section [1673c(c)] is the "prevent{ion of} price increases which otherwise would have occurred," *the Department may enter into a [subsection (c) agreement] if it determines, inter alia, that imports of the subject merchandise allowed under the agreement will not prevent price increases, or undercut price levels of the affected domestic products*.

Price Suppression Memorandum at 2–3 (underscoring and braces in original; italics and brackets added).

Applying this rationale, Commerce concluded that the reference prices in the 2013 Suspension Agreement would prevent the suppression or undercutting of domestic U.S. tomato prices by imports of Mexican tomatoes and thereby eliminate the injurious effect of those imports. *See* Remand Results at 30 (determining that the 2013 Suspension Agreement "eliminates injurious effects [of imports] because . . . the [agreement's] reference prices eliminate price suppression or undercutting"). Commerce based this conclusion on information in the USDA's Tomato Fax Report.

With the Tomato Fax Report as a reference, the Department first considered the relative pricing structure of the four tomato categories covered by the 2013 Suspension Agreement: (1) open field and adapted environment, other than specialty ("open field"); (2) controlled environment, other than specialty; (3) specialty—loose; and (4) specialty—packed. In doing so, Commerce examined Mexican and U.S. prices for each category during the 2008–2012 winter seasons and observed that "open field tomatoes were consistently priced below other tomatoes, and that packed specialty tomatoes were higher-priced than loose specialty tomatoes . . . in all years analyzed . . . and through all the price variations that characterize this market." Price Suppression Memorandum at 3. Thus, Commerce found that "elimination and prevention of price suppression within the meaning of [19 U.S.C. § 1673c(c)(1)(A)] require[d] that the entire relative price structure be raised to a sufficiently high level" to prevent price suppres-

sion. Price Suppression Memorandum at 4. Since the relative price structure was "reasonably stable and [gave] rise to a consistent rank ordering of the prices for open field and adapted environment, controlled environment, specialty loose and specialty packed tomatoes," Commerce determined that "raising the structure . . . to a sufficiently high level require[d] only that the lowest price in the structure [*i.e.*, the winter reference price for open field tomatoes] be raised to a sufficiently high level." Price Suppression Memorandum at 4. In other words, for Commerce, it had only to establish a "sufficiently high" winter reference price for open field tomatoes, based on which it would then calculate reference prices for each of the other three tomato categories.

Next, to construct a price for open field tomatoes that would be at a "sufficiently high" level, Commerce examined pricing data for U.S. and Mexican tomatoes sold in the United States during the winter seasons of 2008–2012—years when the 2008 suspension agreement was in effect. Commerce found that "relative to the other years, the average winter season prices for all tomato types reported in the *Tomato Fax Report* were at their *lowest* during the 2011–2012 winter season." Price Suppression Memorandum at 4 (emphasis added). Additionally, Commerce found that during the 2011–2012 winter season, which ran from October 2011–June 2012, "the prices for open field tomatoes were at the minimum reference price for sustained periods of time," (*i.e.*, the reference price found in the 2008 suspension agreement of $0.2169 per pound) and that, as a result, U.S. tomato prices were suppressed. *See* Price Suppression Memorandum at 4; Remand Results at 43.

The Price Suppression Memorandum illustrates average open field tomato prices during the 2011–2012 winter season in U.S. dollars per pound as follows:

	2011/2012	
	Florida	**Mexico**
Oct-11	0.4391	-
Nov-11	0.4547	0.4817
Dec-11	0.2928	0.4145
Jan-12	0.2779	0.2614
Feb-12	0.2914	0.2432
Mar-12	0.3883	0.3186
Apr-12	0.2537	0.2270

May-12	0.3370	0.2609
Jun-12	0.4338	0.4335
Simple Average Price for the Period	**0.3387**	**0.3008**

Price Suppression Memorandum, Attach. Based on this price information, Commerce found

> that the average daily prices for Mexican open field tomatoes were lower than the average daily prices for U.S. open field tomatoes during the 2011–2012 winter season. The simple daily average price for the 2011–2012 winter season was $0.3008 per pound for Mexican tomatoes and $0.3387 per pound for U.S. tomatoes . . . .

Price Suppression Memorandum at 5. Thus, Commerce concluded:

> In light of the sustained pricing of open field tomatoes at the minimum reference price and the price suppressive effects of such pricing, we chose the 2011–2012 winter season as the period for which to determine reference prices that adequately prevent price suppression or undercutting.

Price Suppression Memorandum at 5. In other words, Commerce chose the 2011–2012 winter season because it was a period when tomato prices from both Mexico and the United States were at their lowest for sustained periods, and when Mexican tomatoes were sold at lower prices than U.S. tomatoes. The Department then determined, as a new base reference price, one that would have "adequately" prevented suppression or undercutting during the 2011–2012 winter season.

By way of explanation, Commerce stated that it sought to find a reference price for the lowest price tomatoes (open field) that would achieve a "closer correlation" between Mexican and U.S. prices:

> [W]e examined the calculation of the simple average of the Mexican import prices for open field tomatoes for the season to determine the price to which the lowest Mexican prices would need to rise to bring about a *closer correlation* between Mexican and U.S. prices. We found that we could achieve that correlation if the lowest Mexican daily prices were raised to $0.31 per pound. Specifically, in those instances where the average Mexican import price for a particular day was less than $0.31, we set the Mexican import price to $0.31. Using the minimum price of

> $0.31, we then recalculated the simple average Mexican price for the season. We found that the simple average of the Mexican daily prices using the $0.31 per pound minimum price resulted in a simple average of daily prices of $0.3473 per pound.

Price Suppression Memorandum at 5 (emphasis added). Applying its rationale that it may enter into a subsection (c) agreement "if it determines, inter alia, that imports of the subject merchandise allowed under the agreement will not prevent price increases, or undercut price levels of the affected domestic products," Commerce then "determined that price suppression or undercutting of prices for U.S. open field tomatoes . . . would have been prevented in the 2011–2012 winter season at a reference price of $0.31 per pound." Price Suppression Memorandum at 3, 5; *see also* Remand Results at 45. The new reference price of $0.31 per pound for open field tomatoes set the floor for the winter and summer reference prices of the other categories of tomatoes covered by the agreement.[12] *See* Price Suppression Memorandum at 5; Remand Results at 35 (setting out winter reference prices for controlled environment, specialty loose tomatoes, and specialty packed tomatoes at $0.41 per pound, $0.45 per pound, and $0.59 per pound, respectively).

Plaintiff does not challenge Commerce's interpretation of the term "suppression" in § 1673c(c)(1)(A), *i.e.*, the "prevent[ion of] price increases which otherwise would have occurred." Price Suppression Memorandum at 3. Nor does there appear to be any dispute regarding the meaning of the term "undercutting," *i.e*., the selling of imports at lower prices than the domestic like product. Rather, plaintiff argues that Commerce's conclusion that the new reference price of $0.31 per pound would prevent price suppression is unsupported by substantial evidence because Commerce unreasonably used the suppressed prices of the 2011–2012 winter season to determine the sufficiency of the reference price. *See* Pl.'s Mem. Supp. Mot. J. Agency R., ECF No. 30, 35 ("Commerce[] . . . only addresses how adherence to the 2013 reference price would have raised import prices in the 2011–12 'winter' season to a point where, on average, they would no longer have undercut U.S. prices. Even accepting, *arguendo*, that this sufficiently addresses the prevention of price *undercutting*, Commerce's reason-

[12] Commerce determined summer reference prices for each category of tomato "by applying the price differential between the summer and winter reference prices in the 2008 Suspension Agreement – 79.29 percent – to winter reference prices it had determined [for] each category." Remand Results at 35 (setting out summer reference prices of $0.2458 per pound for open field and adapted environment tomatoes, other than specialty; $0.3251 per pound for controlled environment tomatoes, other than specialty; $0.3568 per pound for specialty loose tomatoes; and $0.4679 per pound for specialty packed tomatoes).

ing does not at all support a conclusion that price *suppression* will be prevented."). Put another way, plaintiff insists that the price for U.S. tomatoes, used as the point of comparison with the Mexican prices, was itself depressed. For plaintiff, Commerce's determination that $0.31 per pound was a sufficiently high reference price because it would have raised the average Mexican tomato price to $0.3473 per pound, and therefore have permitted the price of U.S. tomatoes to rise from $0.3387 per pound to the Mexican level, would not prevent future price suppression. Rather, it would merely raise the price of Mexican tomatoes to a higher, but still low, price—a price that would not permit U.S. producers to raise their prices to unsuppressed levels. *See* Pl.'s Cmts. 19 ("By setting a reference price not intended to increase average seasons prices beyond that highly injurious 2011–2012 season average price, but instead specifically calculated to raise price levels only to that point, Commerce not only failed to prevent price suppression with the 2013 Suspension Agreement, but also failed to assure the Agreement performed the fundamental function of a [subsection (c)] agreement: to eliminate injurious effect.").

As an initial matter, the court finds reasonable the method used by Commerce to establish a relative pricing structure for the four categories of tomatoes covered by the 2013 Agreement. That is, using information from the Tomato Fax Report to establish what Mexican and U.S. prices were during a particular period and then calculating a floor price that would permit U.S. producers to raise their prices was reasonable. The court also finds reasonable the method used by Commerce to calculate a base reference price high enough to prevent price suppression or undercutting. Specifically, the court finds that raising the lowest price in the relative pricing structure enough to achieve a "closer correlation" between average U.S. and Mexican prices for all categories of tomatoes covered by the agreement was reasonable.

The court agrees with plaintiff, however, that Commerce has failed to support with substantial evidence its determination that suppression or undercutting of U.S. price levels would be prevented by the 2013 Suspension Agreement. That is, it is difficult to understand how Commerce reasonably could have concluded that the new base reference price would have been sufficiently high to prevent price suppression or undercutting based on the evidence on which it relied. The determination of whether the $0.31 per pound price was sufficiently high was based on a comparison of what the average daily price of Mexican tomatoes would have been if sales were made at $0.31 (*i.e.*, $0.3473 per pound) with low U.S. prices.

Although not required to do so, Commerce chose to look retrospectively to determine a new reference price. The chosen period, the 2011–2012 winter season, was especially challenging for the domestic industry. It was a season that, according to plaintiff, led to an attempt by the domestic industry to withdraw its petition, terminate the investigation, and terminate the 2008 suspension agreement. Pl.'s Cmts. 18 ("Due to the financial ruin of the 2011–2012 season domestic producers sought to terminate the investigation entirely as it no longer offered them protection from unfairly traded imports."). Indeed, Commerce itself stated that in the winter season of 2011–2012 Mexican tomato prices were at the minimum reference price for prolonged periods, relative to other years, which suppressed U.S. prices. *See* Remand Results at 43.

Commerce's entire explanation for why it chose the 2011–2012 winter season is as follows:

> As explained in the Price Suppression Memo, the Department determined the prices for open field tomatoes were at the 2008 Suspension Agreement winter reference price ($0.2169/lb.) for sustained periods of time during the 2011–2012 winter season, and that this had price suppressive effects in the U.S. tomato market. While sales made at the reference price are made in accordance with the terms of a [subsection (c) agreement], we find that it is *sustained* periods of sales at the reference price that can cause price suppression, as occurred in the 2011–2012 winter season. In a typical season there are periods when [sales] are made at the reference price, however usually sales are not made at the reference price for prolonged periods of time. When [sales] are made at the reference price over a significant period of time price increases may be less likely and may lead to suppressed prices. This can clearly be seen by examining *Tomato Fax Report* data. For example, from March 22, 2012 through May 10, 2012, the average daily price of imports from Mexico was at or close to the then-current reference price of $0.2169/lb. and all of those imports were at or below the current reference price of $0.31/lb. The average price of imported Mexican tomatoes in April 2012 was $0.227/lb. In contrast, while some sales were made at or below the reference price during the same period of the 2009–2011 winter seasons, sales at the reference price were not made for sustained periods of time. The average prices of Mexican imports in April of those seasons were also markedly higher; in April 2010 the average price of Mexican imports was $0.5247/lb. and in April 2011 they were $0.95/lb. In

> all years we examined, sales were made at various points at the reference price in effect at the time, however, the Department determined that it was the *prolonged* periods of sales at the reference price that suppressed prices. The price-suppressive pressure felt by the entire domestic tomato industry culminated in the domestic producers' request to withdraw the petition and terminate the suspended investigation.

Remand Results at 43–44 (emphasis in original). This explanation falls short of supporting Commerce's determination that "[the 2013 Agreement's] references prices eliminate price suppression or undercutting" in the following respects. Remand Results at 30.

First, Commerce seems to believe, based on its observations that (1) Mexican prices were at or near the 2008 reference price ($0.2169 per pound) for sustained periods during the 2011–2012 winter season, (2) during the same period, U.S. prices were at their lowest for the period examined, and (3) U.S. prices necessarily were suppressed during the 2011–2012 winter season. However, merely observing Mexican prices at the 2008 reference level and low U.S. prices does not constitute an explanation. That is, observations do not constitute reasons. At best Commerce's explanation, and the evidence that supports it, merely demonstrates that, in a very bad year, U.S. growers would not have been prevented from raising their prices had the reference price been $0.31 per pound. Therefore, there is nothing in the explanation that would tend to demonstrate that the U.S. prices, were they to rise to the hypothetical Mexican price ($0.3473 per pound), would not be suppressed or that there would not be undercutting during the term of the 2013 Suspension Agreement.

Second, Commerce does not offer an explanation as to how setting a reference price that would result in average U.S. prices being only marginally higher than concededly low average U.S. suppressed prices achieves the statutory goal of preventing price suppression or undercutting. 19 U.S.C. § 1673c(c)(1)(A). In particular, Commerce does not cite to substantial evidence tending to demonstrate that prices calculated using, as a point of comparison, a growing season of low prices would prevent price suppression or undercutting going forward.

Finally, Commerce does not say why prices were not suppressed during the other winter seasons. In other words, Commerce does not marshal evidence that says why the 2011–2012 winter season was a superior choice as a point of comparison than the winter seasons of other years or a combination of years.

Accordingly, remand is appropriate so that Commerce may explain, in accordance with this Opinion and Order, its determination that suppression or undercutting of U.S. tomato prices will be prevented under the 2013 Agreement and support its redetermination on remand with substantial record evidence. In doing so, Commerce may wish to take a page from the ITC's preliminary injury determination. There, the ITC considered U.S. and Mexican monthly average prices and margins of overselling and underselling spanning a three-year period when preliminarily determining the price effects of subject imports. *See* ITC Prelim. Injury Determination at 29 (citing Part V (pricing data covered the period January 1993–February 1996)).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Commerce's Remand Results are remanded; it is further

ORDERED that, on remand, Commerce shall issue a redetermination that complies in all respects with this Opinion and Order, is based on determinations that are supported by substantial record evidence, and is in all respects in accordance with law; it is further

ORDERED that, on remand, should Commerce continue to find that sustained periods of sales of Mexican tomatoes at or near the 2008 reference price ($0.2169 per pound) supports its decision to choose the 2011–2012 winter season as the time period to compare Mexican and U.S. prices, Commerce must cite substantial record evidence demonstrating that U.S. prices, were they to rise to the hypothetical Mexican price ($0.3473 per pound), would not be suppressed or that there would not be undercutting during the term of the 2013 Suspension Agreement; it is further

ORDERED that, on remand, Commerce must cite to substantial evidence tending to demonstrate that prices calculated using as a point of comparison a growing season of low prices would prevent price suppression or undercutting during the course of the 2013 Suspension Agreement in order to explain how setting a reference price that is marginally higher than an average U.S. suppressed price achieves the statutory goal of preventing price suppression or undercutting; it is further

ORDERED that, on remand, Commerce must examine whether prices were not suppressed during the other winter seasons. That is, Commerce must cite substantial evidence demonstrating why the 2011–2012 winter season was superior to the winter seasons of other years or a combination of years; it is further

ORDERED that, on remand, Commerce must support with substantial evidence its conclusion that the reference price will prevent suppression or undercutting and, thereby, "eliminate completely the injurious effect of exports to the United States" of Mexican tomatoes,

pursuant to 19 U.S.C. § 1673c(c)(1). In doing so, Commerce may wish to take into consideration the ITC's preliminary injury determination, in which the ITC considered U.S. and Mexican monthly average prices and margins of overselling and underselling spanning a three-year period when determining the price effects of subject imports; it is further

ORDERED that, on remand, Commerce is directed to reconsider, in light of its determinations with respect to price suppression and injurious effect, its determination that "suspension of [the] investigation will be more beneficial to the domestic industry than continuation of the investigation," pursuant to 19 U.S.C. § 1673c(c)(2)(A)(i); it is further

ORDERED that Commerce may reopen the record to solicit additional information required to make these determinations or otherwise complete its analysis; and it is further

ORDERED that the remand results shall be due ninety (90) days from the date of this Opinion and Order; comments to the remand results shall be due thirty (30) days following filing of the remand results; and replies to such comments shall be due thirty (30) days following filing of the comments.

Dated: August 25, 2017
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON, JUDGE

Slip Op. 17–115

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

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

JUDGMENT

Defendant United States has advised the court that it does not wish to pursue further discovery in this matter. For the reasons stated in the court's opinion of July 25, 2017, the Plaintiff's Cross Motion for Summary Judgment is granted. The entries at issue shall be reliquidated under subheading 3824.90.92, HTSUS (2010). Interest shall be paid as required by law.

Dated: Dated this 25th day of August, 2017.
New York, NY

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

Slip Op. 17–116

SUNPREME INC., Plaintiff, v. UNITED STATES, Defendant, and SOLARWORLD AMERICAS, INC., Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 16–00171

[Sustaining the U.S. Department of Commerce's determination that Sunpreme Inc.'s imported bifacial solar modules are subject to the antidumping duty and countervailing duty orders covering certain crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China, but granting Plaintiff's motion for judgment on the agency record challenging the terms of the liquidation instructions issued in connection with the U.S. Department of Commerce's affirmative scope determination and entering judgment for Plaintiff on that claim.]

Dated: August 29, 2017

John Marshall Gurley and *Diana Dimitriuc-Quaia*, Arent Fox LLP, of Washington, DC, argued for plaintiff. With them on the brief were *Nancy Aileen Noonan* and *Aman Kakar*.

Justin Reinhart Miller, Senior Trial Counsel, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Mercedes C. Morno*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Timothy C. Brightbill and *Usha Neelakantan*, Wiley Rein, LLP, of Washington, DC, argued for defendant-intervenor.

OPINION AND ORDER

Kelly, Judge:

This action is before the court on Plaintiff's USCIT Rule 56.2 motion for judgment on the agency record challenging the United States Department of Commerce's ("Commerce") determination that Plaintiff's solar modules are subject to antidumping and countervailing duty orders covering certain crystalline silicon photovoltaic ("CSPV") cells, whether or not assembled into modules, from the People's Republic of China (collectively "Orders"). *See* Pl.'s Mot. J. Agency R., Dec. 5, 2016, ECF No. 75–1 ("Pl.'s Mot."); *see also* Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People's Republic of China: Final Ruling in the Scope Inquiry, Sept. 14, 2016, ECF No. 28–4 ("Final Scope Ruling"); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People's Republic of China*, 77 Fed. Reg. 73,017 (Dep't Commerce Dec. 7, 2012) (countervailing duty order) ("*CVD Order*"); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From*

the People's Republic of China, 77 Fed. Reg. 73,018 (Dep't Commerce Dec. 7, 2012) (amended final determination of sales at less than fair value and antidumping duty order) ("*ADD Order*"). Additionally, Plaintiff challenges as contrary to law Commerce's liquidation instructions to U.S. Customs and Border Protection ("Customs" or "CBP"), which ordered CBP to collect cash deposits and to suspend liquidation on entries entered prior to the initiation of the scope inquiry that culminated in Commerce's issuance of the Final Scope Ruling.[1] Pl.'s Mot.; *see also* Message Number 6214307, AD PD 74, bar code 3505143–01 (Sept. 1, 2016), Message Number 6214307, CVD PD 80, bar code 3505146–01 (Sept. 1, 2016) (collectively "Liquidation Instructions"); Message Number 6246309, AD PD 75, bar code 350514401 (Sept. 2, 2016), Message Number 6246309, CVD PD 81, bar code 3505147–01 (Sept. 2, 2016) (collectively "Corrected Liquidation Instructions").[2] For the reasons that follow, the court denies Plaintiff's motion for judgment on the agency record and sustains Commerce's final scope determination that Plaintiff's imported solar modules are subject to the Orders. However, the court grants Plaintiff's motion for judgment on the agency record on its claim challenging as contrary to law Commerce's liquidation instructions directing CBP to continue suspension of liquidation and to collect cash deposits with respect to entries prior to the initiation of the scope inquiry. Accordingly, the court directs Commerce to issue new liquidation instructions consistent with this decision.

BACKGROUND

Plaintiff, Sunpreme Inc. ("Sunpreme"), is a U.S.-based importer of solar modules manufactured by Jiawei Solarchina (Shenzen) Co., Ltd. ("Jiawei Shenzen") in the People's Republic of China. *See* Pl.'s Mem. Supp. Mot. J. Agency R. 3, Dec. 5, 2016, ("Sunpreme Br.") (incorporating by reference Pl.'s Mot. Prelim. Inj. and Mem. P & A. Supp. Thereof, Sept. 8, 2016, ECF No. 21 ("Mot. PI")); Compl. ¶ 6, 20, Aug. 26, 2016, ECF No. 2 ("Compl."). Plaintiff imports solar modules,

[1] Plaintiff brings its challenge to Commerce's liquidation instructions within its USCIT Rule 56.2 motion for judgment on the agency record challenging Commerce's determination that Plaintiff's imported solar modules are subject to the Orders. *See* Pl.'s Mot. As discussed in further detail in the discussion of the Court's jurisdiction over Plaintiff's claim, the court construes Plaintiff's challenge as a motion for judgment on the agency record over which the Court has jurisdiction under 28 U.S.C. § 1581(i). USCIT Rule 56.2 only allows for judgment on the agency record for an action described in 28 U.S.C. § 1581(c). *See* USCIT R. 56.2. Therefore, the court converts Plaintiff's motion to a motion for judgment on the agency record brought pursuant to USCIT Rule 56.1.

[2] On September 14, 2016, Defendant filed indices to the confidential and public administrative records for its antidumping and countervailing duty scope proceedings. Those administrative records can be found at ECF Nos. 28–2 and 28–3, respectively. All further documents from the administrative records may be located in those appendices.

which it describes as containing bi-facial solar cells with "an innovative thin film technology, the Hybrid Cell Technology, developed and owned by Sunpreme." Compl. ¶ 22. Plaintiff designs, develops, and tests the imported solar cells that form the imported solar modules at its facility in California. *Id.* Plaintiff avers that all of its solar modules that are the subject of Commerce's Final Scope Ruling

> consist of solar cells made with amorphous silicon thin films and are certified by an [industry certification body] as thin film modules under the international standard IEC 61646: 2008 which covers "Thin film terrestrial photovoltaic (PV) modules. Design qualification and type approval."

Compl. ¶ 21. Plaintiff alleges that its cells are "made of several layers of amorphous silicon less than one micron in thickness, deposited on both sides of a substrate consisting of a crystalline silicon wafer." Compl. ¶ 23.

Plaintiff alleges its cells have a p/i/n junction consisting of "thin film p-i-(wafer substrate)-i-n junctions, formed by four amorphous silicon thin film depositions." Compl. ¶ 24; *see also* Sunpreme Br. 28. Plaintiff asserts that "the junction is made by the layers of p/i and i/n amorphous silicon on both the front and the back of the substrate, such that the junction is formed on the wafer and inside the thin film layers." Compl. ¶ 25; Sunpreme Br. 28. Further, Plaintiff claims it uses a

> blank crystalline silicon wafer as a substrate for the thin films in order to improve the mechanical reliability of the modules. That wafer is not processed by doping, does not contain a p/n junction, nor is it otherwise processed to become a[ ] CSPV cell. Without the amorphous silicon layers, the substrate is a blank silicon wafer, not a CSPV cell.

Compl. ¶ 26; *see also* Sunpreme Br. 28.

On December 7, 2012, Commerce published the Orders. *See CVD Order*, 77 Fed. Reg. at 73,017; *ADD Order*, 77 Fed. Reg. at 73,018. The scope language of the Orders is identical, and provides:

> The merchandise covered by this order is [CSPV] cells, and modules, laminates and panels, consisting of [CSPV] 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 [CSPV] 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.
>
> . . .
>
> 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).

CVD Order, 77 Fed. Reg. at 73,017; *ADD Order*, 77 Fed. Reg. at 73,018.

On December 11, 2012, Commerce notified CBP of the *CVD Order* and instructed CBP, effective December 6, 2012, to require cash deposits equal to the subsidy rates in effect at the time of entry. *See* Pl.'s Mot. Prelim. Inj. and Mem. P. & A. Supp. Thereof Exs. Ex. 7, Sept. 8, 2016, ECF No. 21–1. On December 21, 2012, Commerce notified CBP of the *ADD Order* and instructed CBP, effective December 7, 2012, to require a cash deposit or the posting of a bond equal to the dumping margins in effect at the time of entry. *See* Pl.'s Mot. Prelim. Inj. and Mem. P. & A. Supp. Thereof Exs. Ex. 6, Sept. 8, 2016, ECF No. 21–1. The instructions issued in connection with the *ADD Order* provided an exporter-specific antidumping duty rate of 13.94 percent for Jiawei Shenzhen, the manufacturer of the solar panels imported by Sunpreme. *See id.*

Prior to approximately April of 2015, Plaintiff had been entering its modules as ordinary consumption entries without depositing antidumping or countervailing duties. *See Def.'s Corrected Mem. Resp. Pl.'s Mot. Prelim. Inj.* 4, Sept. 27, 2016, ECF No. 42 ("Def.'s Resp. PI"); *see generally Sunpreme Inc. v. United States*, 40 CIT __, __ 145 F. Supp. 3d 1271, 1279 (2016) ("*Sunpreme I*"). CBP instructed Plaintiff to file its entries as type "03," the type of entries subject to antidumping and countervailing duties. *See* Def.'s Resp. PI 4; *see generally Sunpreme I*, 40 CIT at __, 145 F. Supp. 3d at 1279. Plaintiff complied with CBP's instructions. *See* Mot. PI 12; *see generally Sunpreme I*, 40 CIT at __, 145 F. Supp. 3d at 1281. As a result of Plaintiff's entry of its merchandise as type "03" CBP began collecting cash deposits, and liquidation of these entries was suspended by operation of law.[3]

On November 16, 2015, Plaintiff filed an application for a scope ruling requesting that Commerce find Plaintiff's solar modules out-

[3] Plaintiff challenged CBP's determination requiring it to enter its imported modules as type "03" entries subject to antidumping and countervailing duties prior to the initiation of

side the scope of the Orders. *See* Request for a Scope Ruling on Solar Modules With Bi-Facial Thin Film Cells, AD PD 1–6, bar codes 3417556–01–06 (Nov. 16, 2015); Request for a Scope Ruling on Solar Modules With Bi-Facial Thin Film Cells, CVD PD 1–6, bar codes 3417582–01–06 (Nov. 16, 2015) (collectively "Sunpreme Scope Ruling Request"). Plaintiff requested Commerce issue a scope ruling on an expedited basis due to financial difficulties the company was experiencing. Sunpreme Scope Ruling Request at 2; *see also* Compl. ¶28. On December 30, 2015, Commerce initiated a formal scope inquiry. *See* Scope Inquiry Initiation on Photovoltaic Modules Imported by Sunpreme, AD PD 9, bar code 342872801 (Dec. 30, 2015); Scope Inquiry Initiation on Photovoltaic Modules Imported by Sunpreme, CVD PD 15, bar code 3428730–01 (Dec. 30, 2015).

On June 17, 2016, Commerce placed a final ruling in a scope inquiry involving the applicability of the Orders to Triex photovoltaic cells manufactured by Silevo, Inc. on the record of this scope proceeding. *See* Memo re: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People's Republic of China: Request for Additional Factual Information and Comments in Sunpreme Scope Inquiry at Att., AD PD 29, bar code 3479321–01 (June 17, 2016); Memo re: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People's Republic of China: Request for Additional Factual Information and Comments in Sunpreme Scope Inquiry at Att., CVD PD 35, bar code 3479320–01 (June 17, 2016) (collectively "Triex Scope Ruling"). In that determination, Commerce found the Triex solar cell to be covered by the scope of the Orders. *See* Triex Scope Ruling at 38. Commerce invited interested parties to submit additional factual information and comments to distinguish the relevant Sunpreme product from the Triex product. Memo re: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People's Republic of China: Request for Additional Factual Information and Comments in Sunpreme Scope Inquiry at 1, AD PD 29, bar code 3479321–01 (June 17, 2016); Memo re: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People's Republic of China: Request for Additional Factual Information and Comments in Sunpreme Scope Inquiry at 1, CVD PD 35, bar code 3479320–01 (June 17, 2016).

a scope inquiry in a separate action. *See Sunpreme Inc. v. United States*, Court No. 15–315. In that action, the court held that CBP lacked authority to suspend liquidation and order the collection of cash deposits on entries prior to the initiation of a scope inquiry by Commerce. *Sunpreme Inc. v. United States*, 40 CIT __, __, 190 F. Supp. 3d 1185, 1202 (2016). The court further held that CBP's collection of cash deposits on Plaintiff's imports was contrary to law because CBP lacked authority to interpret ambiguous scope language in the Orders. *Id.*, 40 CIT at __, 190 F. Supp. 3d at 1196.

On July 29, 2016, Commerce issued the Final Scope Ruling in which it determined that Sunpreme's imported solar modules are subject to the Orders based on the language of the Orders and the criteria in 19 C.F.R. § 351.225(k)(1).[4] *See* Final Scope Ruling at 12–17. Commerce considered the plain language of the Orders and determined that the scope language covers products that: "(1) are CSPV cells, (2) are at least 20 micrometers [("μm")] thick, (3) contain a p/n junction, and (4) are excluded thin film products." Final Scope Ruling at 13. Relying upon the plain language of the Orders and its analysis in the Triex Scope Ruling, Commerce concluded that Plaintiff's products had all of the characteristics of in-scope merchandise, and Commerce further determined that Sunpreme's merchandise was not excluded by the Order's language excluding thin film photovoltaic products. *Id.* at 18. Because Commerce determined that its analysis of the language of the Orders and the sources enumerated under 19 C.F.R. § 351.225(k)(1) are dispositive as to the meaning of ambiguous scope language, Commerce determined that it did not need to consider the criteria under 19 C.F.R. § 351.225(k)(2) or the parties' comments on how those criteria might help Commerce interpret the scope language of the Orders. *Id.* at 19.

On August 1, 2016, Commerce notified CBP that Plaintiff's merchandise was within the scope of the Orders and instructed Customs to "[c]ontinue to suspend liquidation of entries of solar cells from the [People's Republic of China ("PRC")], including the bifacial solar products imported by Sunpreme . . . subject to the antidumping [and countervailing] duty order[s] on solar cells from the PRC." Liquidation Instructions. On September 2, 2016, Commerce issued messages to Customs correcting its prior instructions regarding suspension of liquidation. The corrected messages instruct Commerce to

> [c]ontinue to suspend liquidation of entries of merchandise subject to the antidumping [and countervailing] duty order[s] on solar cells from the PRC. Accordingly, because the bifacial solar products imported by Sunpreme . . . are subject to the antidumping [and countervailing] duty order[s] on solar cells from the PRC, for entries of such merchandise that are currently suspended from liquidation, continue to suspend those entries from liquidation. For entries of bifacial solar products imported by Sunpreme . . . that are not already suspended from liquidation,

[4] Commerce's regulations provide that, where Commerce issues a scope ruling to clarify the scope of an antidumping or countervailing duty order with respect to particular products, Commerce will take into account, in addition to the scope language, the descriptions of the merchandise contained in: (1) the petition; (2) the initial investigation; (3) and past determinations by Commerce, including prior scope determinations. 19 C.F.R. § 351.225(k)(1) (2015).

> begin suspension and collect cash deposits at the applicable rate for entries that entered or were withdrawn from warehouse for consumption on or after 12/30/2015.

Corrected Liquidation Instructions.

On September 8, 2016, Sunpreme filed a motion for a preliminary injunction seeking to enjoin Defendant, together with its delegates, officers, agents, servants, and employees of CBP, from requiring Sunpreme to pay cash deposits and enter its solar modules as subject to the Orders in accordance with Commerce's liquidation instructions while this action is considered. *See* Mot. PI. The court denied Plaintiff's motion for a preliminary injunction seeking to enjoin CBP from collecting cash deposits on entries entered or withdrawn from warehouse on or after initiation of the Final Scope Ruling. *Sunpreme Inc. v. United States*, 40 CIT __, __, 181 F. Supp. 3d 1322, 1326 (2016) ("*Sunpreme II*"). However, the court enjoined Commerce from ordering CBP to collect cash deposits and enjoined CBP from collecting cash deposits on entries entered or withdrawn from warehouse prior to Commerce's initiation of the scope inquiry that is the subject of this challenge until the entry of a final and conclusive court decision in this matter. *Id.*

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over Plaintiff's challenge to Commerce's scope determination pursuant to Section 516A of the Tariff Act of 1930,[5] as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi) and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting scope determinations that find certain merchandise to be within the class or kind of merchandise described in an antidumping or countervailing duty order. *See* 19 U.S.C. § 1516a(a)(2)(B)(vi); 28 U.S.C. § 1581(c) (2012). The court must "hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

Plaintiff argues that the Court possesses jurisdiction over its claim challenging Commerce's liquidation instructions under 28 U.S.C. § 1581(c). *See* Sunpreme Suppl. Br. Proper Jurisdictional Basis Hearing Pl.'s Claim Challenging Liquidation Instructions 2–6, Aug. 11, 2017, ECF No. 111 ("Sunpreme Suppl. Br."). Defendant argues that "Sunpreme's challenge to the [liquidation] instructions (Count VI of the Complaint) represents a challenge to the administration and

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

enforcement of the [Final] Scope Ruling. Accordingly . . . the proper jurisdictional basis for the Court to review Sunpreme's claim is 28 U.S.C. § 1581(i)—and not subsection 1581(c)." Def.'s Suppl. Br. Resp. Court's July 24, 2017 Order, and Mot. Dismiss Count VI Compl. Lack Subject Matter Jurisdiction Under 28 U.S.C. § 1581(c) 6–7, Aug. 11, 2017, ECF No. 110 ("Def.'s Suppl. Br."). However, Defendant does not object to the Court permitting Sunpreme to amend its pleadings to invoke 28 U.S.C. § 1581(i) because Plaintiff would be capable of commencing a separate action to challenge Commerce's liquidation instructions and consolidating it with this action. *Id.* at 7. *See id.* SolarWorld supports Defendant's position. *See* Def.-Intervenor SolarWorld Americas, Inc. Suppl. Br., Aug. 11, 2017, ECF No. 111. Plaintiff also argues in the alternative that, if the court found jurisdiction proper under 28 U.S.C. 1581(i), Sunpreme should be allowed to amend its complaint to assert jurisdiction over its claim under 28 U.S.C. § 1581(i) (2012). *See* Sunpreme Suppl. Br. 7. For the reasons that follow, the Court has jurisdiction over the Plaintiff's challenge to the liquidation instructions issued by the U.S. Department of Commerce following the scope determination under review in this action pursuant to 28 U.S.C. § 1581(i) (4).[6]

In addition to the enumerated jurisdictional bases provided for in the Court's jurisdictional statute, the Court has exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law providing for "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue," *see* 28 U.S.C. § 1581(i)(2) (2012), and "administration and enforcement" with respect to laws providing

[6] Plaintiff brought its claim challenging Commerce's liquidation instructions issued incident to, but not addressed within the context of Commerce's scope determination, pursuant to 19 U.S.C. § 1516a(a)(2)(B)(vi). *See* Compl. ¶ 3. Section 1516a(a)(2)(B)(vi) of Title 19 of the United States Code makes a determination as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing finding of dumping or antidumping or countervailing duty order reviewable by the Court. *See* 19 U.S.C. § 1516a(a)(2)(B)(vi). As a result, Plaintiff claimed the Court has jurisdiction over this claim under 28 U.S.C. § 1581(c), which grants the Court exclusive jurisdiction of any civil action commenced under 19 U.S.C. § 1516a. *See* Compl. ¶ 3; *see also* 19 U.S.C. § 1516a(a)(2)(B)(vi).

On July 24, 2017, the court held a teleconference to request that the parties address whether and, if so, on what jurisdictional basis the Court could hear Plaintiff's challenge to Commerce's liquidation instructions. *See* Teleconference, July 24, 2017, ECF No. 105. Following the teleconference, the court ordered that the parties submit supplemental briefing addressing the jurisdictional basis for the Court to decide Plaintiff's claim challenging Commerce's liquidation instructions. *See* Order, July 24, 2017, ECF No. 107. The parties submitted supplemental briefs on August 11, 2017. *See* Def.'s Suppl. Br. Resp. Court's July 24, 2017 Order, and Mot. Dismiss Count VI Compl. Lack Subject Matter Jurisdiction under 28 U.S.C. § 1581(c), Aug. 11, 2017, ECF No. 110; Def.-Intervenor SolarWorld Americas, Inc.'s Suppl. Br., Aug. 11, 2017, ECF No. 111; Suppl. Br. Proper Jurisdictional Basis Hearing Pl.'s Claim Challenging Liquidation Instructions, Aug. 11, 2017, ECF No. 112.

for such tariffs, duties, fees, or other taxes and the "administration and enforcement" of claims that can be challenged under 28 U.S.C. § 1581(c), *see* 28 U.S.C. § 1581(i)(4) (2012).

Sunpreme's challenge to the liquidation instructions issued by Commerce is a challenge to Commerce's administration and enforcement of the Final Scope Ruling, and not to the substance of the Final Scope Ruling itself. *See* Compl. ¶ 71 (stating that "any suspension should have commenced as of the date of initiation of the scope inquiry or upon Commerce's finding that the Sunpreme bifacial solar product[s] are within the scope of the [antidumping and countervailing duty orders]"). Jurisdiction is improper under § 1581(c), as the challenge to the instructions does not relate to the review the scope determination issued pursuant to 19 U.S.C. 1516a, over which the Court has jurisdiction under § 1581(c). Commerce did not determine within its Final Scope Ruling what entries should be subject to suspension and liquidation or cash deposits. Nor does the record indicate that any party provided comments on the propriety of issuing liquidation instructions that applied retroactively to entries that entered prior to the initiation of the scope inquiry. Therefore, Commerce issued its liquidation instructions in the administration and enforcement of its Final Scope Ruling and not as a part of that determination.

Sunpreme argues that, where a plaintiff claims harm from liquidation instructions that were a direct result of a scope determination, the true nature of the challenge relates to the scope ruling itself. *See* Sunpreme Suppl. Br. 3. In support of its argument, Sunpreme cites cases holding that the Court possesses jurisdiction to review a challenge that stems from a scope ruling under 28 U.S.C. § 1581(c). *See id.* at 4–6 (citing *AMS Assocs., Inc. v. United States*, 36 CIT __, 881 F. Supp., 2d 1374 (2012) ("*AMS I*"); *United Steel Fasteners, Inc. v. United States*, 41 CIT __, Slip Op. 17–2 (2017); *Ethan Allen Operations, Inc. v. United States*, 39 CIT __, 121 F. Supp. 3d 1342 (2015)). As an initial matter, in the cases cited by Sunpreme, no party challenged the jurisdictional basis for the Court to hear the challenge in question, and none of the holdings in the cases cited by Sunpreme addressed the propriety of hearing the challenges under 28 U.S.C. § 1581(c). Moreover, all of these cases are distinguishable in that Commerce addressed the issue of retroactivity of its scope determination in the determination being reviewed by the Court pursuant to 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c).[7] Here, Commerce did not address the issue of retroactivity in its Final Scope Ruling.

[7] In *AMS I*, Commerce concluded during the course of its first administrative review that plaintiff's goods were subject to the antidumping order in question pursuant to a

Sunpreme also argues that jurisdiction is not proper under § 1581(i) because the Court only has jurisdiction under § 1581(i) where Commerce's liquidation instructions are erroneous or contrary to the final scope ruling. Sunpreme Suppl. Br. 6 (citing *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304–05 (Fed. Cir. 2004); *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003)). Although Sunpreme correctly points out that both cases upon which it relies involved liquidation instructions that were erroneous or contrary to the final scope ruling, nothing in the holding of either case limits the Court's jurisdiction under § 1581(i) to circumstances where Commerce acts erroneously or inconsistently with its own determination.[8]

substantial transformation analysis. *AMS I*, 36 CIT at __, 881 F. Supp. 2d at 1376. Thereafter, in the course of conducting its second administrative review under the same antidumping order, Commerce retroactively suspended liquidation of Plaintiff's entries made during the second administrative review period. *See id.*, 36 CIT at __, 881 F. Supp. 2d at 1376–77. Plaintiff challenged Commerce's issuance of liquidation instructions, which were addressed and defended by Commerce within the context of its final determination of the second administrative review. *See id.*, 36 CIT at __, 881 F. Supp. 2d at 1377–78.

In *United Steel Fasteners*, petitioner requested in its request for administrative review that Commerce instruct CBP to suspend liquidation and require cash deposits for all of respondents' entries retroactive to the first day of the administrative review period. *United Steel Fasteners*, 41 CIT at __, Slip Op. 17–2 at 6. Commerce also determined within its final determination that "retroactive suspension of liquidation was reasonable because it had not initiated a scope inquiry under 19 C.F.R. § 351.225(3)." *Id.*, 41 CIT at __, Slip Op. 17–2 at 6–7.

In *Ethan Allen*, the court noted that it has, at least, a colorable claim of jurisdiction under § 1581(c) over plaintiff's challenge to Commerce's liquidation instructions that stem directly from Commerce scope ruling and remand results. *Ethan Allen*, 39 CIT at __, 121 F. Supp. 3d at 1352 n. 5. However, in its decision, the court explicitly noted that "Commerce's *Remand Results* specifically address the issue of suspension of liquidation, indicating that a § 1581(c) may be the proper method to challenge not only the *Scope Ruling* and *Remand Results*, but also the liquidation instructions deriving therefrom." *Id.* Therefore, it is apparent that the court relied in part on the notion that Commerce addressed the retroactivity of its liquidation instructions in its remand results to determine that the claim of jurisdiction under § 1581(c) is colorable. *See id.*

[8] In *Shinyei*, the Court of Appeals for the Federal Circuit noted that liquidation instructions issued incident to an antidumping duty administrative review that are contrary to Commerce's determination are not antidumping duty determinations reviewable under 19 U.S.C. § 1516a over which the Court would have jurisdiction under 28 U.S.C. § 1581(c). *Shinyei*, 355 F.3d at 1309. Although not part of the Court of Appeals holding, the Court of Appeals remarked that the Court had jurisdiction over such an action under 28 U.S.C. § 1581(i). But nothing in the decision indicates that the decision relied on the notion that Commerce's instructions are inconsistent with its own determination in order for the Court to have jurisdiction over such a claim under § 1581(i). Likewise, nothing in the Court of Appeals for the Federal Circuit's holding in *Consol. Bearings* indicates that the Court's jurisdiction over a claim challenging Commerce's liquidation instructions issued incident to the final results in an administrative review is limited to circumstances where Commerce acts erroneously or inconsistently with its final results. *Consol. Bearings*, 348 F.3d at 1002.

Moreover, both cases involved determinations made in the course of administrative reviews of antidumping orders. *See Shinyei*, 355 F.3d at 1301–02; *Consol. Bearings*, 348 F.3d at 1001. Therefore, neither case holds that there are any limitations upon the Court's jurisdiction over a challenge to liquidation instructions issued incident to a scope proceeding before Commerce.

Although Defendant moves to dismiss Plaintiff's challenge to Commerce's liquidation instructions pursuant to USCIT Rule 12(b)(1), over which Plaintiff pled the Court had jurisdiction pursuant to 28 U.S.C. § 1581(c), Defendant does not object to Plaintiff amending its complaint to bring the same claim under § 1581(i). *See* Def.'s Suppl. Br. 7. Even if Sunpreme has explicitly invoked § 1581(c), the court may construe the allegations of a pleading as presenting a claim under § 1581(i) incident to its authority to view the allegations in the pleadings liberally and in the light most favorable to Plaintiff. *See Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993) (stating that allegations can be taken as true and construed in a light most favorable to the complainant where a Rule 12(b)(1) motion challenges the Court's subject matter jurisdiction based on the sufficiency of the allegations in the pleadings). In light of Defendant's lack of opposition to allowing Plaintiff to amend its pleading, there is no reason to dismiss Plaintiff's claim or to require the amendment of the pleadings to determine that the Court has jurisdiction over Plaintiff's claim under § 1581(i).

The court reviews an action brought under 28 U.S.C. § 1581(i) under the same standards as provided under § 706 of the Administrative Procedure Act ("APA"), as amended. *See* 28 U.S.C. § 2640(e) (2012). Under the statute,

> [t]he reviewing court shall--
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings and conclusions found to be--
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

5 U.S.C. § 706(2)(A), (C). Under the arbitrary and capricious standard, courts consider whether the agency "'entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [the decision] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Alabama Aircraft Indus., Inc. v. United States*, 586 F.3d 1372, 1376 (Fed. Cir. 2009) (quoting *Motor Vehicle Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

DISCUSSION

I. Commerce Reasonably Determined that Sunpreme's Imported Modules Are In-Scope

Sunpreme argues that Commerce's determination that Sunpreme's cells are dispositively in-scope merchandise based upon the plain language of the Orders and the criteria under 19 C.F.R. § 351.225(k)(1) is contrary to law and unsupported by substantial evidence for several reasons. First, Sunpreme argues that Commerce's definition of CSPV cells is not supported by the plain language of the Orders or the (k)(1) sources. *See* Sunpreme Br. 8–17. Sunpreme also argues Commerce lacked substantial evidence to conclude that Sunpreme's imported modules are composed of CSPV cells as that term is used in the scope language. *See* Sunpreme Br. 17–23. Second, Sunpreme claims that Commerce's determination that the cells in Sunpreme's imported merchandise are more than 20 µm thick is not supported by substantial evidence. *Id.* at 23. Third, Sunpreme contends that Commerce's interpretation of the term "p/n junction formed by any means" is contrary to law and that Commerce unreasonably concluded that the p/i/n junction in Sunpreme's cells is a p/n junction formed by any means. *See id.* 24–32. Fourth, Sunpreme contests Commerce's interpretation of the term thin film photovoltaic products and Commerce's determination that Sunpreme's imported merchandise is not covered by the language in the Orders excluding thin film photovoltaic products. *Id.* at 32–40. After briefly reviewing the legal framework for Commerce's interpretation of scope language, the court discusses each of Sunpreme's challenges to Commerce's scope determination in turn.

A. Legal Framework

The language of an antidumping or countervailing duty order dictates its scope. *See Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002) (citing *Ericsson GE Mobile Commc'ns, Inc. v. United States*, 60 F.3d 778, 782 (Fed Cir. 1995)). Commerce's regulations provide that, where Commerce issues scope rulings to clarify the scope of an ambiguous order with respect to particular products, in addition to the scope language, Commerce will take into account descriptions of the merchandise contained in: (1) the petition; (2) the initial investigation; (3) and past determinations by Commerce, including prior scope determinations (collectively "(k)(1) sources"). 19 C.F.R. § 351.225(k)(1) (2015).[9] When the (k)(1) sources are not dispositive, Commerce will further consider:

[9] Further citations to the Code of Federal Regulations are to the 2015 edition.

(i) The physical characteristics of the product;

(ii) The expectations of the ultimate purchasers;

(iii) The ultimate use of the product;

(iv) The channels of trade in which the product is sold; and

(v) The manner in which the product is advertised and displayed.

19 C.F.R. § 351.225(k)(2) (collectively "(k)(2) sources").

Commerce has broad authority "to interpret and clarify its antidumping duty orders." *Ericsson GE Mobile*, 60 F.3d at 782 (citing *Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990)), *as corrected on reh'g* (Sept. 1, 1995)); *see also King Supply Co., LLC v. United States*, 674 3d 1343, 1348 (Fed. Cir. 2012) (stating that Commerce is entitled to substantial deference with regard to interpretations of its own antidumping orders). However, Commerce may not interpret an order "so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001) (citing *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1370 (Fed. Cir. 1998)). Furthermore, "[s]cope orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it." *Duferco*, 296 F.3d at 1089. Although the petition and the investigation proceedings may aid in Commerce's interpretation of the final order, the order itself "reflects the decision that has been made as to which merchandise is within the final scope of the investigation and is subject to the order." *Id.* at 1096.

Therefore, to the extent Commerce determines that any terms of the Orders are ambiguous, Commerce must interpret the relevant language in the Orders to determine whether it includes the merchandise at issue. The scope language of the Orders at issue provides:

> The merchandise covered by this order is [CSPV] cells, and modules, laminates and panels, consisting of [CSPV] 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 [CSPV] cells of thickness equal to or greater than 20 [µm], 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 addi-

> tion of materials (including, but not limited to, metallization and conductor patterns) to collect and forward the electricity that is generated by the cell.
>
> . . .
>
> 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).

CVD Order, 77 Fed. Reg. at 73,017; *ADD Order*, 77 Fed. Reg. at 73,018.

After considering the plain language of the Orders, Commerce determined that the scope language calls upon it to consider whether Sunpreme's products: "(1) are CSPV cells, (2) are at least 20 micrometers [("μm")] thick, (3) contain a p/n junction [formed by any means], and (4) are excluded thin film products." Final Scope Ruling at 13.

B. Sunpreme's Solar Modules Consist of CSPV Cells

Sunpreme contends that Commerce's interpretation of the term CSPV cells unreasonably expands the scope beyond the definition of that term as used in the Orders. Sunpreme Br. 10–15. Further, Sunpreme claims that Commerce's definition is unsupported by either the plain language of the orders or the sources enumerated in 19 C.F.R. § 351.225(k)(1). *Id.* at 15–23. Defendant responds that Commerce reasonably relied upon the Triex Scope Ruling to interpret the term CSPV cells. Def.'s Resp. Pl.'s Rule 56.2 Mot. J. Upon Agency R. 13–19, Mar. 1, 2017, ECF No. 88 ("Def.'s Resp. Br."). In addition, Defendant argues that Commerce properly determined that the cells in Sunpreme's solar modules meet the definition of CSPV cells. *Id.* at 19–21. For the reasons that follow, Commerce acted in accordance with law by interpreting the term "CSPV cells" based on the plain language of the Orders and the (k)(1) sources. Commerce's determination that Sunpreme's cells meet Commerce's definition is also supported by substantial evidence.

The Orders describe the subject merchandise as CSPV cells and "modules . . . consisting of CSPV cells, whether or not partially or fully assembled into other products, including, but not limited to modules," *see CVD Order*, 77 Fed Reg. 73,017, *ADD Order*, 77 Fed. Reg. 73,018, but the term CSPV cell is not defined in the Orders. Commerce determined that the term "CSPV cell" requires that the cell rely on crystalline silicon to generate electricity even where other materials, such as amorphous silicon or other metal oxides, are present in the

cell. Final Scope Ruling 13. That interpretation is reasonable because the petition, a (k)(1) source, states that CSPV cells contain crystalline silicon, *see* Final Scope Ruling at 13. Further, Commerce relied upon the Triex Scope Ruling, also a (k)(1) source, which defines a CSPV cell as a cell that relies on crystalline silicon to generate electricity.[10] Final Scope Ruling at 13 (citing Triex Scope Ruling at 30). Commerce also reasonably determined that Sunpreme's cells meet the definition of CSPV by crediting Sunpreme's characterization of the crystalline silicon substrate in its product as serving a primary role (*i.e.*, the primary solar absorber), which Commerce found shows that the wafer is an active component in the generation of electricity.[11] *See id.* at 14 (citing Crystalline Silicon Photovoltaic Cells, Whether or Not As-

[10] In the Triex Scope Ruling, Commerce concluded that neither the plain meaning of the scope language nor the (k)(1) sources is dispositive of whether solar cells that have characteristics typically associated with both CSPV cells and thin film cells are subject to the Orders. Triex Scope Ruling at 31. However, Commerce found that the physical characteristics, consumer expectations and channels of trade and distribution are largely the same for both CSPV cells and for the Triex cells. *See* Triex Scope Ruling at 36–38. Specifically, Commerce notes that the crystalline silicon wafers in both CSPV and the Triex products are physically processed (*i.e.*, doped) "to create a charge that, in turn, forms part of the electrical-field-generating junction." *Id.* at 37. Commerce makes clear that the function of the crystalline silicon wafer in the Triex cell is to "generate energy when struck by sunlight." *See id.* at 30. Here, Commerce determined that the functionality of the doped crystalline silicon substrate in the Sunpreme cells is materially identical to the functionality of the crystalline silicon component in Triex Cells in that Sunpreme acknowledged that the doped crystalline silicon substrates serve a primary role (*i.e.*, the primary solar absorber) in its bifacial solar product. *See* Final Scope Ruling at 14. Sunpreme claims that Commerce does not substantiate its assertion that Sunpreme acknowledged that the substrates in Sunpreme's cells serve a primary role (*i.e.*, the primary solar absorber), but the record contains several statements attributable to Sunpreme that acknowledge that the substrate in its cells serves as the primary solar absorber. *See* Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from The People's Republic of China: Sunpreme Inc.'s Submission of Comments Regarding the Silevo Final Scope Ruling at 27, CVD PD 72, bar code 348960–01 (July 5, 2016) (stating that "[i]n Sunpreme's cells the role of the wafer substrate is primarily to provide a light absorbing material and a stable mechanical/thermal interface for the amorphous silicon cells.")). Therefore, whether or not Commerce may have also referenced material that, as Sunpreme claims, is attributable to a journalist and not to Sunpreme, *see* Oral Arg. at 00:54:09–00:54:37, June 15, 2017, ECF No. 103, there is record evidence to support Commerce's finding that Sunpreme acknowledged the role of the substrate in its cells as absorbing sunlight.

[11] Sunpreme argues that nothing in the record supports Commerce's conclusion that the crystalline silicon substrate in the Sunpreme cells is actively involved in electricity generation. Sunpreme Br. 19. In support of this argument, Sunpreme attaches great significance to a laboratory analysis submitted with its scope application finding that the crystalline silicon wafer in its cells does not interact with the thin film layers, which Sunpreme argues demonstrates that the crystalline silicon wafer does not itself perform the role of converting sunlight to electricity. *See id.* Sunpreme offers no reason why Commerce could not reasonably conclude that the crystalline silicon substrate is actively involved in electricity generation on the basis that the crystalline silicon substrate is the primary solar absorber without determining the substrate interacts with the thin film layers. Without any such evidence, Commerce's determination that the crystalline silicon wafer in Sunpreme's cells is actively involved in electricity generation is supported by substantial evidence. Nothing inherent in the term CSPV cell or in the (k)(1) sources suggests that the crystalline silicon component must be capable of generating energy on its own.

sembled into Modules, from The People's Republic of China: Sunpreme Inc.'s Submission of Comments Regarding the Silevo Final Scope Ruling at 14, 27–28, AD PD 66, bar code 348958–01 (July 5, 2016); Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from The People's Republic of China: Sunpreme Inc.'s Submission of Comments Regarding the Silevo Final Scope Ruling at 14, 27–28, CVD PD 72, bar code 348960–01 (July 5, 2016) (collectively "Sunpreme Comments on Triex Scope Ruling" (stating that the raw wafer in Sunpreme's cells have a positive or negative orientation that is inherent in the wafer production process, and "the role of the wafer substrate is primarily a light absorbing material and a stable mechanical/thermal interface for the amorphous silicon cells").[12] Commerce determined that the function of the crystalline silicon substrate in the cells making up Sunpreme's modules is similar to that of the crystalline silicon substrate in the Triex cells in that the substrate in Sunpreme's cells is involved in the

[12] Sunpreme argues that Commerce's determination that Sunpreme's wafers are an active component in the production of electricity relies upon the notion that Sunpreme acknowledged its wafers are doped in that they are processed to impart an electrical charge. *See* Sunpreme Br. 21. Sunpreme claims that Commerce incorrectly defines the word "doped" (*i.e.*, processed or active in the generation of electricity) in Sunpreme's statement, and, further, that the definition used by Commerce is inconsistent with the use of the word "doped" in the Petition and other investigation documents. Sunpreme Br. 21. Sunpreme cites the petition supplement, which defines a "dopant" as "a chemical element (impurity) added in small amounts to an otherwise pure semiconductor material to modify the electrical properties of the material." *Id.* (citing *id.* at Ex. 1). Sunpreme's admission that is critical to Commerce's determination is that the crystalline silicon substrate in Sunpreme's cells is the primary solar absorber, not that the substrate has a positive or negative charge. *See* Final Scope Ruling at 14 (stating that Commerce cannot ignore Sunpreme's acknowledgments that the substrates serve a primary role in absorbing sunlight and, therefore, are active components). Sunpreme admits that the crystalline wafer in its cells absorb sunlight. Sunpreme Br. 22.

Defendant explains that Commerce understands the term "doped" to be broad enough to encompass the meaning used by Sunpreme (*i.e.,* either negatively or positively charged) and to mean the component is "processed or active in electricity generation," which Commerce incorporated from the Triex Scope Ruling, *see* Triex Scope Ruling at 16, 30, 33). Oral Arg. at 01:14:50–01:15:15, June 15, 2017, ECF No. 103 ("Oral Arg."). Defendant further argues that these definitions are not contradictory despite the fact that Commerce's use of the term is broader than the definition cited by Sunpreme. *Id.* at 01:16:03–01:16:15. The court agrees that these definitions of the term "doped" are not logically inconsistent.

Moreover, Defendant points out that the term "dope" is not part of the scope language. *See* Oral Arg. 01:16:30–01:16:33. Further, Defendant states that Commerce frequently clarifies the sense in which Commerce uses the term "doped" throughout the Triex Scope Ruling by parenthetically clarifying the sense of the term "doped" it is using in each portion of its analysis. *Id.* at 01:15:15–01:15:28; *see also* Triex Scope Ruling at 16–17 (referring to "'dope' (*i.e.*, either negatively or positively charge) the silicon"), 30 (clarifying the meaning of "slightly doped" as "(*i.e.*, processed) and perform[ing] the critical energy-generating function in the operation of the cell."), 33 (clarifying that the use of the term "doped" by stating that "a product containing a doped (i.e., active) crystalline silicon component does not *de facto* override the significance of that crystalline silicon component"); Final Scope Ruling 14 (using the term doped to refer to the "absorption of sunlight for conversion to electricity" in the sense that Sunpreme's cells rely upon crystalline silicon for electricity generation), 17 (stating that Sunpreme's product contains a doped (i.e., active) crystalline silicon wafer).

absorption of sunlight for conversion to electricity. Final Scope Ruling at 14. Commerce's interpretation of the ambiguous term CSPV cell therefore relies on the language in the Orders, and (k)(1) sources, the petition and the Triex Scope Ruling. Therefore Commerce's interpretation is in accordance with law.

Furthermore, Sunpreme points to no evidence either detracting from Commerce's findings regarding the function of the crystalline silicon substrate in its cells or distinguishing that function from the function of the crystalline silicon component in the Triex cells.[13] Commerce's determination that Sunpreme's cells meet the definition of a CSPV cell is therefore supported by substantial evidence.

Sunpreme raises numerous arguments challenging the support in the scope language and (k)(1) sources for Commerce's interpretation of the term CSPV cell. All are unpersuasive. First, Sunpreme argues that the International Trade Commission's ("ITC") description of a CSPV cell requires that the crystalline silicon component of a CSPV cell be able to function independently as a solar cell because the ITC report describes the crystalline silicon in a CSPV cell as performing the function of converting sunlight into electricity. Sunpreme Br. 16–17. Further, Sunpreme claims that nothing in the ITC's report indicates that the function of converting sunlight into electricity is shared with any other components in a CSPV cell. *See id.* (citing Request for a Scope Ruling on Solar Modules with Bi-Facial Thin Film Cells at Ex. 9 at 5, AD PD 1–6, bar codes 3417556–01–6 (Nov. 18, 2015); Request for a Scope Ruling on Solar Modules with Bi-Facial Thin Film Cells at Ex. 9 at 5, CVD PD 1–6, bar codes 3417582–01–06 (Nov. 16, 2015) (collectively "ITC Injury Determination") (stating that "CSPV cells use either monocrystalline silicon or multicrystalline silicon to convert sunlight into electricity")). However, the language of

[13] Supreme argues that Commerce's finding that its cells rely upon crystalline silicon to generate electricity is belied by the fact that the patent on the record uses a substrate of metallurgical-grade crystalline silicon, which is never used in CSPV cells. Sunpreme Br. 20–21. Sunpreme claims that the petition and the International Trade Commission's injury determination states that CSPV cells use only solar-grade silicon with ultra-high purity over 99.9999%. *Id.* at 21 (citing Request for a Scope Ruling on Solar Modules with Bi-Facial Thin Film Cells at Ex. 9 at I-16, AD PD 1–6, bar codes 3417556–01–6 (Nov. 18, 2015); Request for a Scope Ruling on Solar Modules with Bi-Facial Thin Film Cells at Ex. 9 at I-16, CVD PD 1–6, bar codes 3417582–01–06 (Nov. 16, 2015) (collectively "ITC Injury Determination")). Sunpreme claims that the fact that its design can function with metallurgical-grade crystalline silicon instead of solar-grade crystalline silicon undermines Commerce's conclusion that its cells rely on the crystalline silicon to generate electricity. Sunpreme Br. 21; *see also* Oral Arg. 00:47:21–00:47:59, June 15, 2017, ECF No. 103. Commerce's determination acknowledges that there is conflicting evidence on the record regarding the role of the wafer in Sunpreme's cells, but Commerce ultimately credits Sunpreme's own statements about the role of the silicon substrate in its cells (*i.e.*, the primary solar absorber) over other conflicting evidence. Final Scope Ruling at 14. Sunpreme's argument asks the court to reweigh the evidence as to what extent Sunpreme's cells rely on crystalline silicon to generate electricity. The court declines to do so.

the Orders controls the scope. *See Duferco*, 296 F.3d at 1089. Sunpreme points to no language in the Orders indicating that the crystalline silicon component of a CSPV cell must be able to function independently as a solar cell before being incorporated into a photovoltaic product or that the crystalline silicon must be capable of converting sunlight into electricity on its own. Moreover, the notion that the ITC description does not reference that the function may be shared between the crystalline silicon component of a CSPV cell and some other component does not indicate that the ITC meant to exclude products where the electricity generating function is shared between the crystalline silicon component and other parts of the cell. *See* ITC Injury Determination at 5. Therefore, Commerce reasonably relied upon the petition and the Triex Scope Ruling, both (k)(1) sources, to interpret the term CSPV cell to include a product containing crystalline silicon that is an active component in electricity generation even where that function may be shared with other parts of the cell. *See* Final Scope Ruling at 13–14.

Sunpreme also argues that Commerce's definition of a CSPV cell as a photovoltaic cell that relies upon crystalline silicon to generate electricity is contrary to law because Commerce's definition is inconsistent with other (k)(1) sources, including the petition and the investigations of Commerce and the ITC injury determination.[14] Sunpreme Br. 10. Sunpreme contends that Commerce's definition allows cells containing only a crystalline silicon wafer without a p/n junction to be considered CSPV cells without support in the plain language of the orders or in the relevant (k)(1) sources. *See id.* Sunpreme's narrower understanding of a CSPV cell requires a specific type of p/n junction that is formed within the CSPV cell. *See id.* at 12–14. However, as discussed more fully below, the term p/n junction is not defined in the Orders. Commerce's definition of a CSPV cell does require the presence of a p/n junction, albeit not of the specific structure advocated by Sunpreme. *See* Final Scope Ruling at 15–16. Commerce relied upon the plain language of the Orders, which references "a p/n junction formed by any means" and the Triex Scope Ruling, a (k)(1) source, to conclude that a p/n junction formed by any means includes architectures in which the positively charged and negatively charged layers are in close proximity. *See* Final Scope Ruling at 15; *see also* Triex Scope Ruling at 17–18 (reasoning that the purpose of the crystalline silicon wafer serves the same purpose in both a traditional CSPV cell and the Triex cell: electricity generation between

[14] Sunpreme specifically claims that the petition and the Commerce and ITC investigations define CSPV cells by the presence of a p/n junction and not by the cells' reliance upon crystalline silicon. *See* id. 10–13.

positively and negatively doped regions of the cell). Therefore, Commerce's definition of a CSPV is consistent with the plain language of the orders as well as the (k)(1) sources, which require subject merchandise to contain "a p/n junction formed by any means."

Next, Sunpreme argues that Commerce's definition of a CSPV cell, which requires only that a CSPV cell rely upon crystalline silicon to generate electricity, is inconsistent with the ITC's definition of the term "CSPV cell." *Id.* at 12 (citing ITC Injury Determination at 5 (stating that "CSPV cells use either monocrystalline silicon or multicrystalline silicon to convert sunlight into electricity")). Sunpreme specifically argues that "the precise wording of the ITC's description undermines Commerce's definition . . . [a]s 'rely' is a vague term . . . [which permits] a layer of crystalline silicon [to] do less than 'convert sunlight into electricity' but still meet the definition of a CSPV cell." *Id.* The language indicating that CSPVs "use crystalline silicon" may be vague, but it is not inconsistent with Commerce's interpretation of the function of crystalline silicon in a CSPV cell. Nothing in the ITC's description cited by Sunpreme requires the crystalline silicon to perform the role of converting sunlight into electricity without the aid of other cell components. *See* ITC Injury Determination at 5.

Sunpreme claims that Commerce's definition of a CSPV cell is not based upon an interpretation of ambiguous language in the Orders, but rather is based upon statements made in the Triex proceeding that do not apply to Sunpreme's product. Sunpreme 18–19. However, Commerce relies upon its interpretation of the ambiguous term CSPV cell from the Triex Scope Ruling because it determined that the function of the crystalline silicon component in the Triex cells and the cells making up Sunpreme's modules is similar. *See* Final Scope Ruling at 14 (citing Triex Scope Ruling at 30). Commerce based its conclusion that the crystalline silicon substrate in the Sunpreme cells is involved in electricity generation on Sunpreme's own statement that the crystalline silicon substrate in the cells making up its modules contains doped crystalline silicon substrates that enhance the function of the amorphous silicon layers and act as the primary solar absorbers. *See id.* Sunpreme fails to point to evidence on the record undermining Commerce's conclusion that the crystalline silicon substrate in its cells is involved in electricity generation. Therefore, Commerce's reasonably adopted the interpretation of the ambiguous term CSPV cell from the Triex ruling and determined that unrefuted record evidence supports the notion that Sunpreme's cells meet that definition.

Sunpreme also insists that Commerce's failure to consider the factors under 19 C.F.R. § 351.225(k)(2) without addressing the unique

factual records developed for each product renders Commerce's determination unsupported by substantial evidence. Sunpreme Br. 31–32. However, Commerce's regulations provide that it will analyze the criteria in 19 C.F.R. § 351.225(k)(2) only where the (k)(1) criteria are not dispositive. *See* 19 C.F.R. § 351.225(k)(2). To be dispositive, the (k)(1) criteria must definitively answer the scope question. *Sango Int'l, L.P. v. United States*, 484 F.3d 1371, 1379 (Fed. Cir. 2007) (citations omitted). Here, Commerce reasonably concluded that the language of the petition and the interpretations of the scope language in the Triex Scope Ruling sufficiently clarify the general definition of a CSPV cell to allow Commerce to reasonably conclude that Sunpreme's merchandise meets that definition. *See* Final Scope Ruling at 13–14. Commerce's interpretation of a CSPV cell in the Triex Scope Ruling relied upon the general functionality of the crystalline silicon component in the Triex cell, and Sunpreme points to no record evidence undermining that the crystalline silicon component of its cells performs a similar function in the generation of electricity. Therefore, Commerce's determination that Sunpreme's products meets the definition of a CSPV cell, as clarified by the (k)(1) sources, is supported by substantial evidence.

C. Sunpreme's Cells Are At Least 20 µm Thick

Sunpreme argues that Commerce's determination that Sunpreme's cells are at least 20 µm thick is unsupported by substantial evidence because the crystalline silicon substrate component of Sunpreme's cell should be excluded from the measurement of the product's thickness. Sunpreme Br. 23. Instead, Sunpreme contends that Commerce should be measuring the amorphous silicon layers, which it argues are far thinner than 20 µm, deposited onto the crystalline silicon substrate. *See id.* at 23–24. Defendant responds that Commerce properly included the crystalline silicon component in its measurement of Sunpreme's cells because Commerce reasonably determined that the scope language calls upon it to measure the thickness of the active components of the cell. Def.'s Resp. Br. 26. For the reasons that follow, Commerce's determination that Sunpreme's cells meet the 20 µm thickness threshold is supported by substantial evidence.

The plain language of the Orders does not explicitly state what portion of a CSPV cell must exceed the thickness threshold provided in the scope language. Rather, the Orders provide that the CSPV cell must be at least 20 µm thick. *CVD Order*, 77 Fed. Reg. 73,017, *ADD Order*, 77 Fed. Reg. 73,018. Commerce concluded that the crystalline silicon component must be included in measuring the thickness of a CSPV cell because the crystalline silicon component plays an essen-

tial role in electricity generation. *See* Final Scope Ruling at 14. It is reasonably discernible that Commerce concluded that the scope language calling upon it to consider the thickness of a CSPV cell includes all functional components of the cell that play a role in generating electricity from solar energy. *See id.* That interpretation is reasonable, given the plain language of the Orders.

Sunpreme contends that Commerce should have excluded the crystalline silicon substrate component when measuring the thickness of Sunpreme's cells. *See* Sunpreme Br. 24. Sunpreme relies upon the argument that the crystalline silicon substrate is not part of the active part of the cell.[15] *See id.* Commerce supported its determination that the crystalline silicon substrate in Sunpreme's cells is an active and essential component in generating electricity by noting that the substrate is the primary solar absorber. Final Scope Ruling 14. Sunpreme admits that the substrate is the primary solar absorber. Sunpreme Br. 22, 25. Commerce also rejected Sunpreme's argument that the crystalline silicon component is not part of the electricity-generating component of the cell. *See* Final Scope Ruling at 16. Commerce concluded that the idea that an electricity-generating junction could be created, either between a positively charged and an intrinsic (*i.e.*, neutral charged) layer or between a negatively charged and an intrinsic layer, is illogical because "both a positive 'p' layer and a negative 'n' layer are required in order to generate an electrical field." *Id.* Sunpreme points to no record evidence undermining Commerce's conclusion that "the [crystalline silicon] wafer is a necessary connection between the positive and negative regions of Sunpreme's cells."[16] *Id.* Therefore, Sunpreme's contention that the crystalline silicon substrate is not part of the active part of the cell fails.

D. Sunpreme's Cells Contain a "P/N Junction Formed By Any Means"

Sunpreme argues that Commerce unreasonably interpreted the term "p/n junction formed by any means" to include the p/i/n junction in Sunpreme's cells. Sunpreme Br. 24–32. Defendant responds that substantial evidence supports Commerce's determination that the scope language "p/n junction formed by any means" includes a p/i/n junction and other arrangements of positive, negative, and intrinsic/

[15] Sunpreme claims that the p/i/n junction in its cells is formed in the thin film layers of doped and undoped amorphous silicon, which are the active component of its cells. *See* Sunpreme Br. 24.

[16] In fact, Sunpreme concedes that a junction between positively charged and negatively charged components of the cell "is essential to the creation of an electrical field." *See* Sunpreme Br. 25.

neutral layers within a photovoltaic cell like those contained in Sunpreme's cells. Def.'s Resp. Br. 21–25. For the reasons that follow, Commerce's determination that Sunpreme's cells contain a "p/n junction formed by any means" is supported by substantial evidence.

The Orders do not define the phrase "p/n junction formed by any means." Commerce interpreted the phrase "p/n junction formed by any means" to include structures in which the positively charged and negatively charged layers are not adjacent or within the crystalline silicon wafer. Final Scope Ruling at 15. That interpretation is reasonable and consistent with the scope language and the (k)(1) sources because it gives significance to the entire phrase "formed by any means," while referencing pre-initiation versions of scope language proposed by the petitioner that indicate alternative architectures were meant to be included in the scope of the Orders.[17] *See* Final Scope Ruling at 15.

Specifically, Commerce referenced its determination in the Triex Scope Ruling that a "p/i/n junction and other arrangements of positive, negative, and intrinsic/neutral layers within a photovoltaic cell can be understood to be types of p/n junctions within the meaning of the scope of the *Orders*." Final Scope Ruling at 15 (citing Triex Scope Ruling at 18). In the Triex Scope Ruling, Commerce attached great significance to the phrase "formed by any means," which Commerce concluded indicates that the specific architecture of p/n junction formation is irrelevant to determining the meaning of the phrase "p/n junction." *See* Triex Scope Ruling at 17. To reach this conclusion, Commerce first analyzed the structural distinctions between a p/n junction and the p/i/n junction contained in the Triex cells. *See id.* Commerce noted that some type of junction between a positively charged and negatively charged region of a cell is essential to the creation of an electrical field, and Commerce concluded that the intrinsic (*i.e.*, inert) layer simply connects the positively charged layers with the negatively charged layers and extends the electrical field over an additional layer of material. *Id.* at 18. Second, Commerce analyzed the function or purpose of a junction where the positively charged and negatively charged layers are not in direct contact. *See id.* Commerce concluded that the function of a junction where the p-layer and n-layer is in direct contact is the same as a junction where

[17] Specifically, Commerce underscores that pre-initiation versions of scope language submitted by petitioner included a more exhaustive description of possible means of forming a p/n junctions, including heterojunctions and p/n junctions formed by means other than diffusion. Final Scope Ruling at 16. Commerce notes that such descriptions were omitted from the final scope language because Commerce believed such itemization was unnecessary. *Id.*

those layers are separated by an intrinsic layer because the intrinsic layer simply extends the electric field over the crystalline silicon wafer region.[18] *See id.*

Sunpreme argues that Commerce's interpretation is contrary to law because the phrase "formed by any means" refers to structures where the positive and negative layers within the cell are adjacent but are formed by different methods, not to junctions of any type or located anywhere in the cell. Sunpreme Br. 26. However, it is reasonably discernible that Commerce discounted an interpretation of the phrase "formed by any means" that limits the phrase to apply to a structure in which the positive and negative layers are formed within the cell because Commerce found that pre-initiation versions of scope language indicate that petitioner intended to include structures where the p/n junction is formed outside of the cell.[19] Final Scope Ruling at 15 (citing Triex Scope Ruling at 13, 31). Moreover, Commerce notes that the scope language describes the junction without reference to any specific method of junction formation because Commerce did not believe itemization was necessary. *See id.*; *see also* Triex Scope Ruling at 17 (stating that the Orders describe covered merchandise without reference to the method of junction formation (*i.e.*, either diffusion or deposition), which Commerce concluded undercuts the argument that

[18] Sunpreme contends that the fact that p/n and p/i/n junctions are recognized in the scientific community as distinct photovoltaic structures belies Commerce's interpretation that a p/i/n junction can be understood as a type of p/n junction for purposes of the Orders. *See* Sunpreme Br. 26–27. Sunpreme cites the glossary attached the petition in which the Department of Energy defines the two types of junctions separately as additional evidence that a p/n junction involves a structure in which the p and n layers must be adjacent. *See id.* at 27 (citing Sunpreme Br. Ex. 1 at Ex. Gen-Supp 4).

However, Commerce explicitly acknowledged that presence on the record of materials published by other government agencies such as the Department of Energy. *See* Final Scope Ruling at 16. In response to these sources, Commerce indicated that its determination is based on a textual interpretation of the scope language and the relevant (k)(1) sources rather than the assertions of experts that were not involved in drafting the scope language. *Id.* Although the definition of p/n junction cited by Sunpreme references a p-type layer and an n-type layer, *see* Sunpreme Br. 27, the definition cited by Sunpreme does not define a p/n junction to the exclusion of a structure in which those layers are separated by an intrinsic layer. *See* Sunpreme Br. Ex. 1 at Ex. Gen-Supp 4 (defining a "p/n" junction as "a semiconductor photovoltaic device structure in which the junction is formed between the p-type layer and an n-type layer."). Moreover, the fact that a p/i/n junction structure is described separately as a structure in which layers of an intrinsic semiconductor between the p-type and n-type semiconductors, *see* Sunpreme Br. Ex. 1 at Ex. Gen-Supp 4, does not necessarily indicate that a p/i/n junction is not a type of p/n junction for purposes of the Order. Therefore, the record documents cited by Sunpreme do not render Commerce's interpretation unreasonable.

[19] Specifically, Commerce states that it found the pre-initiation versions of the scope language indicate that SolarWorld intended to include heterojunctions and p/n junctions formed by means other than diffusion. Final Scope Ruling at 15. It is reasonably discernible that Commerce viewed heterojunctions and p/n junctions formed by means other than diffusion as including structures where the p/n junction is formed outside of the crystalline silicon component cell. *See* Triex Scope Ruling at 17.

the orders require a p/n junction to be formed within a CSPV cell).[20] It is also reasonably discernible that Commerce ruled out the notion that the phrase "formed by any means" limits a CSPV cell to only a structure in which the positive and negative layers are adjacent because Commerce concluded in the Triex Scope Ruling that the presence or absence of layers between the positively charged and negatively charged layers does not change the function or purpose of the junction to generate an electrical field, but rather simply extend that electrical field over a wider region of the cell. *See* Triex Scope Ruling at 18. Even if Sunpreme's alternative reading that the phrase "p/n junction formed by any means" implies that the positively charged and negatively charged layers are adjacent, is reasonable, Commerce has explained why its broader interpretation of the phrase "p/n junction formed by any means" is reasonable and supported by the scope language and the (k)(1) sources.

Sunpreme next argues that Commerce's determination that Sunpreme's products meet the definition of "p/n junction formed by any means" provided in the Triex Scope Ruling is not supported by substantial evidence because Sunpreme's cells are physically distinguishable from the Triex products. Sunpreme Br. 30. Specifically, Sunpreme cites the lack of the silicon dioxide insulator between the crystalline silicon wafer and the intrinsic and p-type and n-type amorphous thin film layers in its cells, which Sunpreme notes distinguish its cells from the Triex cells. Sunpreme Br. 31. However, Commerce explained that the presence or absence of silicon dioxide insulating layers is irrelevant to its analysis regarding p/n junction formation in the Triex cell because "the function or nature of a p/n junction in a CSPV [cell] is unchanged by the addition of a layer of [silicon dioxide] or other insulating material."[21] Final Scope Ruling at

[20] Sunpreme argues that Commerce unreasonably concluded that reducing the list of many forms of junctions in early drafts of proposed scope language to a single junction in the final scope language did not narrow the scope language. Sunpreme Br. 30. But Commerce reasonably explained its logic that the removal of the reference to various types of junctions in the scope language sought to avoid limiting potential products. *See* Triex Scope Ruling at 18. Further, Commerce found the absence of language explicitly including a p/i/n junction not dispositive because the scope language does not define a p/n junction by excluding certain structures. *See* Triex Scope Ruling at 18. Where scope is defined by excluding items that are explicitly defined, it is reasonable to assume that removing such exclusions would broaden the scope. On the other hand, where, as here, Commerce supported its explanation for why it reads the term p/n junction broadly and the scope language enumerates no specific architectures, it is reasonable for Commerce to conclude that the removal of specific descriptions of structures was not meant to narrow the scope.

[21] The absence of a layer of silicon dioxide in Sunpreme's cells does not affect the applicability of Commerce's logic from the Triex Scope Ruling. Commerce grounded its determination that a p/n junction is a broad term meant to capture multiple structures that are all, by nature, characterized by a positive region and a negative region generating an electrical field in the function of the p/n junction, not in the actual composition of the p/n junction. *See* Triex Scope Ruling at 32.

15 (citing Triex Scope Ruling at 32, 39 (internal quotations omitted)). Commerce justified its determination that a p/i/n junction is a type of p/n junction in the Triex Scope Ruling by drawing attention to the inclusion of different types of junction architectures in early drafts of scope language included in the petitions. Triex Scope Ruling at 31. Commerce further justified its determination by noting the absence of record evidence indicating that certain types of junctions characterized by a positive region and a negative region generating an electrical field were meant to be excluded. Triex Scope Ruling at 31–32. Sunpreme points to no record evidence undermining the notion that the junctions in its cells have a materially similar function to the junctions in the Triex cells.[22]

E. Sunpreme's Cells are Not Excluded Thin-Film Photovoltaic Products

Sunpreme argues that Commerce's interpretation of the language excluding "thin film photovoltaic products produced from amorphous silicon" is unreasonably narrow and unsupported by the petition or the (k)(1) sources. Sunpreme Br. 32–40. Defendant responds that Commerce reasonably determined that the petition and the Triex Scope Ruling, both (k)(1) sources, indicate that cells containing a crystalline silicon component that contributes to their photovoltaic function are not thin film photovoltaic products as that term is defined in the Orders even if such products contain thin films produced from amorphous silicon. Def.'s Resp. Br. 28–29. For the reasons that follow, Commerce's definition of thin film products is in accordance with law.

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[22] Sunpreme argues that the record illustrates that its cells contain a p/i/n junction that is chemically and functionally different from the junction in the Triex cells. Sunpreme Br. 30–31. However, the specific differences that Sunpreme highlights are not functional differences, but rather structural differences. Specifically, Sunpreme argues that the positively charged layers and negatively charged layers are not adjacent and that the junction is formed inside the amorphous silicon thin film layers, not in the silicon substrate. *Id.* at 31. As already discussed, Commerce reasonably concluded that the term "p/n junction formed by any means" includes structures where these layers are not adjacent. *See* Final Scope Ruling at 15–16. As to the notion that two separate junctions are formed in the thin film layers, not the substrate, Commerce discounted this claim because Commerce found that it is illogical to reason that an electricity generating junction could be formed between a negatively charged layer and an uncharged layer or between a positively charged layer and an uncharged layer because both a positive and negative layer are necessary to generate an electrical field. *See id.* at 16. Sunpreme acknowledges that each amorphous silicon p-layer and n-layer in its bifacial cells is immediately adjacent to a layer of undoped intrinsic amorphous silicon thin film, *see* Sunpreme Br. 31, which is sandwiched between a naturally slightly doped silicon substrate. *Id.* at 22. Sunpreme does not question Commerce's understanding that a positive and negative layer are necessary to generate an electrical field within the cell. Moreover, Commerce determined that Sunpreme's claim is directly contradicted by Sunpreme's earlier description of its products as containing a p/i/n junction similar to the junction contained in the Triex cells. *Id.* at 16.

The Orders do not define the term "thin film photovoltaic products produced from amorphous silicon." The scope language is silent as to the substrate of excluded thin film products. *See CVD Order*, 77 Fed. Reg. 73,017, *ADD Order*, 77 Fed. Reg. 73,018. The term "thin film photovoltaic products" is not unambiguously equivalent to any photovoltaic product with a thin film. Therefore, Commerce reasonably consulted the (k)(1) sources to define the term "thin film photovoltaic products." Commerce cited the petition, a (k)(1) source, which explicitly states that "thin film photovoltaic products" do not use crystalline silicon to conclude that a product that uses crystalline silicon to generate electricity,[23] such as the Sunpreme cell, is not a thin film photovoltaic product. Final Scope Ruling at 17 (citing Request for a Scope Ruling on Solar Modules with Bi-Facial Thin Film Cells at Ex. 6 at 16–17, AD PD 1–6, bar codes 3417556–01–6 (Nov. 18, 2015); Request for a Scope Ruling on Solar Modules with Bi-Facial Thin Film Cells at Ex. 6 at 16–17, CVD PD 1–6, bar codes 3417582–01–06 (Nov. 16, 2015) (collectively "Petitions")). Citing the Triex Scope Ruling, another (k)(1) source, Commerce determined that including all products containing amorphous silicon in the thin film exclusion would create an easy means of circumventing the Orders. *Id.* (citing Triex Scope Ruling at 33). That interpretation is reasonable because it gives meaning to all of the language of the Orders and is based on the (k)(1) sources, which state that the thin film photovoltaic products exclusion does not apply to products in which a crystalline silicon component contributes to their ability to convert sunlight into electricity.[24]

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[23] Sunpreme argues that Commerce's interpretation that a thin film product cannot contain any crystalline silicon conflicts with statements by the ITC describing certain thin film products as using a combination of amorphous silicon and micro-crystalline silicon. Sunpreme Br. 34 (citing ITC Final Determination at I-20). However, Commerce's definition of thin film photovoltaic products assessed the presence of a thin film in relation to other substrates of the product. *See* Final Scope Ruling at 17. Commerce did not base its determination that Sunpreme's modules are not thin film photovoltaic products solely upon the presence of crystalline silicon, but rather upon the role the crystalline silicon wafer played in converting solar energy into electricity. *See id.* Commerce references the fact that the statement in the petitions to the effect that thin film products do not use crystalline silicon to explain its determination that "the presence of an amorphous silicon thin film element in a product containing a doped (*i.e.*, active) crystalline silicon wafer . . . does not *de facto* override the significance of the crystalline silicon component." *Id.* The plain language of the Orders is silent with regard to what substrates may be used in thin film photovoltaic products. *See CVD Order*, 77 Fed. Reg. 73,017, *ADD Order*, 77 Fed. Reg. 73,018. Commerce reasonably looked to the Triex Scope Ruling and the petitions to determine whether function of the crystalline silicon substrate in Sunpreme's products matched the function of crystalline silicon within a CSPV cell.

[24] In the Triex Scope Ruling, Commerce noted that nothing in the scope language explicitly addresses what substrates may be included in thin film photovoltaic products. Triex Scope Ruling at 33. Commerce cites the ITC's investigation, which it found "provides an illustrative list of substrates that were contemplated in [the agency's] discussion of thin film products: 'glass, stainless steel, [and] plastic.'" *Id.* at 34. Commerce also notes that the

Commerce adequately addressed Sunpreme's arguments regarding the meaning of the thin film exclusion. Commerce rejected Sunpreme's arguments that the scope language and the (k)(1) sources, including the petition and the ITC investigation broadly exclude products that contain thin films of amorphous silicon. *See* Final Scope Ruling at 17 (concluding that the mere presence of thin films of amorphous silicon is insufficient to place a product within the thin film photovoltaic product exclusion); *see also* Sunpreme Br. 33–38. Specifically, Sunpreme points to the petition's explicit statement that "[t]hin film technologies are not covered by the Petitions." Sunpreme Br. 33 (citing Request for a Scope Ruling on Solar Modules with Bi-Facial Thin Film Cells at Ex. 6 at 16–17, AD PD 1–6, bar codes 3417556–01–6 (Nov. 18, 2015); Request for a Scope Ruling on Solar Modules with Bi-Facial Thin Film Cells at Ex. 6 at 16–17, CVD PD 1–6, bar codes 3417582–01–06 (Nov. 16, 2015) at 16–17 (collectively "Petition")). Likewise, Commerce considered and rejected Sunpreme's arguments that the petition's use of the term "thin film technologies" indicates petitioners intended that the definition of thin film photovoltaic products in the scope language should be expansive. *See id.* Sunpreme points to no definition of the term "technologies" in the petition, and the term "thin film photovoltaic products" is not defined in the scope language of the Orders. *See CVD Order*, 77 Fed. Reg. 73,017, *ADD Order*, 77 Fed. Reg. 73,018. Commerce reasonably concluded, based upon an interpretation of the term thin film photovoltaic products derived from the petition, that the mere presence of thin films of amorphous silicon is insufficient to place a product within the exclusion because the petitions explicitly indicate that thin film products do not use crystalline silicon.[25] Final Scope Ruling at 17.

petitions state that thin film products do not use crystalline silicon. *Id.* However, Commerce did not define thin film photovoltaic products merely by excluding any products containing a crystalline silicon substrate. *See id.* Rather, Commerce read the petition's suggestion that thin film photovoltaic products should not contain crystalline silicon together with the function of the crystalline silicon substrate in the Triex cells to determine that the Orders meant to exclude products containing crystalline silicon that is active and essential to the generation of electricity. *See id.*

[25] At oral argument, Sunpreme emphasized that the Orders contain an exclusion for "thin film photovoltaic products," which is a broader term than thin film cells. Oral Arg. 00:05:48–00:05;59, ECF No. 103 ("Oral Arg."). Sunpreme further underscored that its imported merchandise consists of bifacial solar modules, not photovoltaic cells. *Id.* at 00:06:00–00:06:12; *see also* Reply Br. Pl. Sunpreme, Inc. 6–10, Mar. 29, 2017, ECF No. 97. Sunpreme argues that it is unreasonable for Commerce to rely upon its determination in the Triex Scope Ruling interpreting thin film photovoltaic products on the basis of the characteristics of the Triex cells and apply that interpretation to Sunpreme's modules. Reply Br. Pl. Sunpreme, Inc. 7, Mar. 29, 2017, ECF No. 97. However, Commerce's analysis in interpreting the term thin film photovoltaic products relies upon the function of crystalline silicon within the photovoltaic cells that compose the modules. Final Scope Ruling at 17. Sunpreme points to no scope language or (k)(1) source indicating that it is unreasonable to conclude that a module consisting of cells in which crystalline silicon contributes to the electricity generating function would not be considered a thin film photovoltaic product

Finally, Commerce did not find the International Standard IEC certification of Sunpreme's modules as a thin film product dispositive in defining the term "thin film photovoltaic products." *See* Final Scope Ruling at 17 (acknowledging that the IEC certifications are cited in the petition but concluding they are not dispositive as to whether a product is a thin film photovoltaic product); *see also* Sunpreme Br. 35. Specifically, Sunpreme underscores that the petition clearly referenced industry standard (IEC 61646) in relation to the category of thin film products, and Sunpreme contends the petition evidences a desire to exclude all products meeting this industry standard from the scope of the Orders. Sunpreme Br. 35. However, the scope language itself does not reference any industry standard in defining thin film photovoltaic products. *See CVD Order*, 77 Fed. Reg. 73,017, *ADD Order*, 77 Fed. Reg. 73,018. Commerce specifically acknowledges that the IEC certifications are cited in the petition, a (k)(1) source, but Commerce concluded that they are not relied upon as dispositive authorities because these certifications were not relied upon in the initial investigations to define thin film photovoltaic products and the standards are not referenced in the scope language itself.[26] Final Scope Ruling at 17 (citing Triex Scope Ruling at 31). Sunpreme points to no language in the petitions or any (k)(1) source that makes it unreasonable for Commerce to conclude that the certifications are non-dispositive.[27]

where the cells making up that module would. Therefore, Commerce reasonably applied its interpretation of thin film photovoltaic products from the Triex Scope Ruling to determine whether Sunpreme's solar modules fall within the thin film photovoltaic products exclusion.

[26] In the Triex Scope Ruling, Commerce notes that the Triex cells have characteristics typically associated with CSPV products and thin film photovoltaic products. Triex Scope Ruling at 31. Sunpreme does not argue that its products do not possess characteristics typically associated with both CSPV cells and thin film cells. Commerce further supports its determination that the certifications are not dispositive by referencing that the Orders do not explicitly exclude "hybrid" cells that contain amorphous silicon thin film but are otherwise subject to the Orders. *Id.*

[27] Although Commerce stated that Sunpreme's products are certified as both CSPV products and thin film products, Commerce cites its determination in the Triex Scope Ruling that certifications are non-dispositive in regard to whether or not an imported project is subject to the scope of the Orders. Final Scope Ruling 17. In the Triex Scope Ruling, Commerce points out that the scope language does not explicitly exclude "hybrid" products, or products that meet both classifications. Triex Scope Ruling at 31. Therefore, Commerce concluded, based on the plain language of the Orders that the certifications received by a product are not dispositive as to whether a product is a thin film photovoltaic product. *Id.*

Sunpreme first argues that Commerce's finding that Sunpreme's products are certified as CSPV modules is incorrect and unsupported by the record. Sunpreme Br. 35–36. Commerce does find that evidence on the record "suggests that Sunpreme's bifacial solar products are also certified as CSPV products by the IEC." Final Scope Ruling at 16. Commerce also states that Sunpreme has not refuted that certifications applicable to CSPV products are not applicable to the specific product that is the subject of this scope proceeding. *Id.* It is unclear whether Commerce bases its findings on the weighing of the conflicting evidence. However, this finding is not material to Commerce's interpretation of the term "thin film photovoltaic products" or to Commerce's determination that Sunpreme's products are not covered by the

Sunpreme points out that its products are only certified according the IEC standard for thin film products. Sunpreme Br. 35–36. Commerce's reasoning that those certifications are non-dispositive is supported by the plain language of the Orders as well as the (k)(1) sources is not undermined by the fact that Sunpreme's products received only thin film certification.[28] Therefore, Commerce's determination is not undermined by the fact that its products only received thin film certification.

exclusionary language in the Orders because Commerce determined that IEC certifications are merely informative, but not dispositive as to whether or not products are CSPV products or thin film photovoltaic products for purposes of the scope of the Orders. Final Scope Ruling at 17.

Second, Sunpreme cites testimony by petitioner before the ITC that hybrid cells containing crystalline silicon and amorphous silicon are not meant to be covered by the petitions as detracting from Commerce's determination that a thin film photovoltaic product does not use crystalline silicon. *See* Sunpreme Br. 38–39 (citing Sunpreme Scope Ruling Request at Ex. 13). However, Commerce excluded products containing crystalline silicon that is active in the cell's generation of electricity, not based merely on the presence of crystalline silicon within the cell. *Id.* The statement relied upon by Sunpreme says nothing about the function of the crystalline silicon in the hybrid cell discussed in testimony before the ITC.

Third, Sunpreme references this same testimony to claim that it is unreasonable to read the scope language as applying to cells containing both crystalline silicon and amorphous silicon because it demonstrates that the ITC made no material injury finding with regard to such "hybrid" products. *See id.* at 40. Although Commerce acknowledged that the testimony may indicate that the ITC may not have made an injury determination with respect to products containing both amorphous silicon and crystalline silicon, Commerce determined that the ITC's investigation provides little guidance as to the proper interpretation of the thin film exclusion because the record before the ITC does not reflect the full universe of processes used to produce either thin film cells or CSPV cells.. *See id.* at 13. Commerce's conclusion as to the relative insignificance of the ITC's findings is reasonable, and the court declines to reweigh the evidence.

[28] Sunpreme argues that Commerce's interpretation that the certification is non-dispositive is contradicted by a statement in the petition to the effect that:

> Notably, International Standard IEC 61215 applies only to crystalline silicon products; a separate standard –IEC 61646–applies to thin-film products, further demonstrating the distinctions between these two products.

Reply Br. Pl. Sunpreme, Inc. 19–20, Mar. 29, 2017, ECF No. 97 ("Sunpreme Reply Br.") (citing Sunpreme Inc.'s Submission of Factual Information at Ex. 1, Attach 1, AD PD 32–48, bar codes 3481963–01–05 and 3481978–01–12 (June 27, 2016); Sunpreme Inc.'s Submission of Factual Information at Ex. 1, Attach 1, CVD PD 38–54, bar codes 3481991–01–17 (June 27, 2016)). However, whereas the petition states that the CSPV standard applies only to CSPV products, it does not state that the thin-film product standard applies only to thin film products. *See* Sunpreme Inc.'s Submission of Factual Information at Ex. 1, Attach 1, AD PD 32–48, bar codes 3481963–01–05 and 3481978–01–12 (June 27, 2016); Sunpreme Inc.'s Submission of Factual Information at Ex. 1, Attach 1, CVD PD 38–54, bar codes 3481991–01–17 (June 27, 2016). Therefore, the petition language cited by Sunpreme does not render Commerce's interpretation unreasonable.

Sunpreme further argues that Commerce's decision to treat the statement in the petition to the effect that thin film photovoltaic products do not contain crystalline silicon as dispositive of whether a product falls within the thin film exclusion while treating the petition's statements about certifications as merely informative is arbitrary. Sunpreme Reply Br. 20. As already, discussed Commerce did not treat the presence of crystalline silicon as dispositive of whether a product is a thin film photovoltaic product, but rather looked to how the crystalline silicon functioned within the cell to determine if the thin film of amorphous silicon caused the product to fall within the exclusion. *See* Final Scope Ruling at 17. Moreover, the petition language pertaining to the certifications explicitly recognizes

II. Commerce's Liquidation Instructions Were Contrary to Law

Sunpreme objects that Commerce's instructions to CBP to continue suspension of liquidation and to collect cash deposits with respect to entries prior to the initiation of the instant scope inquiry were contrary to law. Sunpreme Br. 41. Defendant responds that Commerce's instructions are in accordance with law because Commerce's regulations permit the suspension of liquidation to continue, regardless of when a scope inquiry was initiated." *See* Def.'s Resp. Br. 36. For the reasons that follow, Commerce's liquidation instructions directing CBP to suspend liquidation on entries prior to initiation of the scope inquiry are contrary to law.

Commerce's regulations presume suspension of liquidation is lawful. *See* 19 C.F.R. §§ 351.225(l)(1), (3). Commerce's regulation cannot reasonably be read to permit an ultra vires suspension of liquidation to continue. When Commerce conducts a scope inquiry,

> and the product in question is already subject to suspension of liquidation, that suspension of liquidation will be continued, pending a preliminary or final scope ruling, at the cash deposit rate that would apply if the product were ruled to be included within the scope of the order.

19 C.F.R. § 351.225(l)(1). Once Commerce issues a final scope ruling to the effect that the product is included within the scope of the order,

> Any suspension of liquidation under paragraph (l)(1) . . . of this section will continue. Where there has been no suspension of liquidation, [Commerce] will instruct [CBP] to suspend liquidation and to require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product entered, or withdrawn from the warehouse, for consumption on or after the date of initiation of the scope inquiry.

19 C.F.R. § 351.225(l)(3). In *AMS Assocs., Inc. v. United States*, 737 F.3d 1338 (Fed. Cir. 2013), the Court of Appeals for the Federal Circuit held that, where an unclear order renders a product not subject to an existing order and Commerce clarifies ambiguous scope language to determine that the merchandise is subject to the antidumping order, "the suspension of liquidation and imposition of an-

the possibility that the IEC 61646 standard could apply to a CSPV product. *See* Sunpreme Inc.'s Submission of Factual Information at Ex. 1, Attach 1, AD PD 32–48, bar codes 3481963–01–05 and 3481978–01–12 (June 27, 2016); Sunpreme Inc.'s Submission of Factual Information at Ex. 1, Attach 1, CVD PD 38–54, bar codes 3481991–01–17 (June 27, 2016) (stating that the IEC 61646 applies to thin-film products, but not only to thin-film photovoltaic products).

tidumping cash deposits may not be *retroactive* but can only take effect 'on or after the date of the initiation of the scope inquiry.'" *AMS Assocs., Inc. v. United States*, 737 F.3d 1338, 1344 (Fed. Cir. 2013) ("*AMS II*") (emphasis in original) (citing identical language in 19 C.F.R. § 351.225(l)(2), as the language quoted above in 19 C.F.R. § 351.225(l)(3)). Although in *AMS II*, Commerce issued corrected liquidation instructions explicitly instructing CBP to suspend liquidation retroactively, *see AMS II*, 737 F.3d at 1341, the Court of Appeals' holding barring retroactive application of Commerce's findings did not depend upon Commerce taking such additional action. *See id.* at 1344.

Here, CBP could not determine whether Plaintiff's merchandise was within the scope of the Orders based solely upon the words of the Orders and the physical characteristics of the merchandise. Therefore, Plaintiff's goods were outside of the scope of the Orders until Commerce interpreted the ambiguous scope language to the effect that Plaintiff's products were subject to the Orders because CBP lacks the authority to interpret ambiguous scope language. *See Xerox Corp. v. United States*, 289 F.3d 792, 794–95 (Fed. Cir. 2002); *see also* Final Scope Ruling at 18. Since Sunpreme's products were not subject to the Orders at the time Commerce initiated its scope inquiry on December 30, 2015, *see* Final Scope Ruling at 2, Commerce's regulations only permitted Commerce to suspend liquidation and collect cash deposits prospectively from the date of initiation of the scope inquiry. 19 C.F.R. § 351.225(l)(3); *AMS II*, 737 F.3d at 1344.

Defendant points to no authority, other than CBP's ultra vires determination to require Plaintiff to enter its merchandise as subject to the Orders, for the collection of cash deposits and suspension of liquidation on Plaintiff's entries. Defendant and Defendant-Intervenor argue that, unlike in *AMS II*, here Sunpreme's entries were already suspended prior to the date Commerce initiated its scope inquiry. Def.'s Resp. Br. 36; SolarWorld Americas Inc.'s Resp. Pl.'s Mem. Supp. Rule 56.2 Mot. J. Agency R. 31, Mar. 2, 2017, ECF No. 91 ("SolarWorld Resp. Br."). Therefore, Defendant and Defendant-Intervenor interpret 19 C.F.R. §§ 351.225(l)(1) and (3) to permit the suspension of liquidation to continue and the collection of cash deposits on all entries for which liquidation was suspended. Def.'s Resp. Br. 36 (citing 19 C.F.R. §§ 351.225(l)(1), (3)); SolarWorld Resp. Br. 31–32. (citing 19 C.F.R. §§ 351.225(l)(1), (3)). However, Commerce's regulation cannot reasonably be interpreted to permit the suspension of liquidation and collection of cash deposits to continue where they resulted from an ultra vires interpretation of the scope language. Such an interpretation is unreasonable because it

would validate CBP's ultra vires interpretation and permit the circumvention of Commerce's regulations by allowing CBP to require a party to enter goods as subject to the Orders before Commerce has interpreted ambiguous scope language. Nor can either portion of Commerce's regulation reasonably be interpreted to permit Commerce to require cash deposits prior to the date of initiation of the scope inquiry merely because CBP suspended liquidation before that date without authority to do so. CBP's purported suspension of liquidation was void *ab initio*. *Sunpreme Inc. v. United States*, 40 CIT __, __, 190 F. Supp. 3d 1185, 1204 (2016) ("*Sunpreme III*"). Commerce could not extend the suspension of liquidation on entries that were not appropriately administratively suspended. *See id.*

Defendant worries about the policy implications that may result from interpreting the statutory and regulatory framework as barring Commerce from ordering the suspension of liquidation or collection of cash deposits on goods that may be subject to the scope of the orders prior to the initiation of a scope inquiry. Def.'s Resp. Br. 39. Defendant argues that tying the ultimate duty assessment to whether, and the date on which, Commerce initiates a scope inquiry may shield merchandise entered prior to the date of initiation from antidumping or countervailing duty liability altogether. *Id.* Where merchandise is prima facie covered the words of the order, Commerce may order the suspension of liquidation and collection of cash deposits even in a case where an importer claims there is ambiguity in an order. However, where the unambiguous language of an order and factual determinations alone do not allow CBP to determine that a good falls within an order, the good must be considered outside of the scope until Commerce interprets the order and clarifies that the merchandise should be included in the context of a scope determination. *See Xerox*, 289 F.3d at 794–95 (stating that Commerce should decide whether an ambiguous antidumping order covers particular products in the first instance). In the event Commerce initiates a scope proceeding because the goods were not prima facie covered by the order, Commerce's regulations bar it from suspending liquidation or collecting cash deposits prior to the initiation of a scope inquiry. *See* 19 C.F.R. §§ 351.225(l)(1), (3). Commerce cannot purport to continue a suspension of liquidation that was itself without authority. The court must interpret the statutory and regulatory scheme as is. The court leaves it to Congress and Commerce to address the policy drawback identified here.

CONCLUSION

The court sustains Commerce's determination to the effect that Sunpreme's merchandise is subject to the Orders. However, Commerce's issuance of liquidation instructions directing CBP to suspend liquidation on entries prior to initiation of the scope inquiry is contrary to law. As a result, there was no valid suspension of liquidation for Commerce to continue under 19 C.F.R. §§ 351.225(l)(1) and (3). Therefore, Commerce lacks authority to suspend liquidation or order the collection of cash deposits on entries prior to the initiation of the scope inquiry. Any suspension of liquidation must not cover entries entered prior to December 30, 2015. All cash deposits collected on entries prior to the initiation of the scope inquiry must be returned to Plaintiff. Judgment will enter accordingly.

Dated: August 29, 2017
New York, New York

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

Slip Op. 17–117

MAQUILACERO S.A. DE C.V., Plaintiff, v. UNITED STATES, Defendant, and WHEATLAND TUBE COMPANY, Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Court No. 15–00287

[Plaintiff's Rule 56.2 motion is granted, and the United States Department of Commerce's Final Scope Ruling on Certain Black, Circular Tubing Produced to ASTM A-513 Specifications by Maquilacero S.A. de C.V. is remanded.]

Dated: August 30, 2017

Diana Dimitriuc-Quaia, Arent Fox LLP of Washington, DC, argued for plaintiff. With her on the brief were *John M. Gurley* and *Aman Kakar*.

Elizabeth A. Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Lydia C. Pardini*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Jordan C. Kahn, Schagrin Associates of Washington, DC, argued for defendant-intervenor. With him on the brief was *Roger B. Schagrin*.

OPINION AND ORDER

Eaton, Judge:

Before the court is Maquilacero S.A. de C.V.'s ("Maquilacero" or "plaintiff") motion for judgment on the agency record challenging the final scope ruling by the United States Department of Commerce ("Commerce" or the "Department") in *Final Scope Ruling on Certain Black, Circular Tubing Produced to ASTM A-513 Specifications by Maquilacero S.A. de C.V.*, Case No. A-201–805, P.R. 10, ECF No. 40 (Dep't Commerce July 27, 2015) ("Final Scope Ruling"), which found that certain black mechanical tubing made by Maquilacero was within the scope of the antidumping duty order on *Certain Circular Welded Non-Alloy Steel Pipe from Brazil, the Republic of Korea (Korea), Mexico, and Venezuela*, 57 Fed. Reg. 49,453 (Dep't Commerce Nov. 2, 1992) (the "Order").

Maquilacero argues that Commerce's inclusion of its tubing within the scope of the Order is contrary to law and unsupported by substantial evidence because: "(1) Commerce failed to give effect to the unqualified exclusion for mechanical tubing in the scope language; (2) Commerce modified, rather than interpreted, the scope language to require 'stenciling' as a condition for excluding certain mechanical tubing from the scope; and (3) Commerce failed to address Maquilacero's arguments" regarding the factors found in 19 C.F.R. § 351.225(k)(2) (2015) (the "(k)(2) factors")[1] which establish that Maquilacero's mechanical tubing meets the description of mechanical tubing excluded from the Order. Pl.'s Br. Supp. Mot. J. Agency R., ECF No. 30, ("Pl.'s Br.") 2.

Defendant, the United States (the "government" or "defendant"), on behalf of Commerce, argues that Commerce's ruling is supported by substantial evidence and in accordance with law. Specifically, defendant asserts that Commerce reasonably determined that (1) the term "mechanical tubing" was subject to interpretation; (2) the plain language of the Order does not exclude plaintiff's products; (3) an analy-

[1] Under 19 C.F.R. § 351.225(k), "in considering whether a particular product is included within the scope of an order or a suspended investigation," Commerce first considers:

(1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.

19 C.F.R. § 351.225(k)(1). If the criteria listed above are "not dispositive," however, Commerce will consider the (k)(2) factors, which consist of:

(i) The physical characteristics of the product;
(ii) The expectations of the ultimate purchasers;
(iii) The ultimate use of the product;
(iv) The channels of trade in which the product is sold; and
(v) The manner in which the product is advertised and displayed.

19 C.F.R. § 351.225(k)(2).

sis of the factors in 19 C.F.R. § 351.225(k)(1) (the "(k)(1) factors") requires that tubing must be stenciled in order to qualify for the scope exclusion; and (4) Commerce was not obligated to analyze the (k)(2) factors. Def.'s Resp. Pl.'s Mot. J. Agency R., ECF No. 38, ("Def.'s Br.") 9, 11.

Defendant-Intervenor, Wheatland Tube Company ("defendant-intervenor" or "Wheatland"), adds that Commerce properly interpreted the scope of the Order to exclude only tubing produced to the ASTM A-513 specifications "meeting certain physical requirements and stenciled" because (1) Commerce interpreted the Order's scope in accordance with law; (2) the stenciling requirement "enhances . . . enforceability and avoids duty evasion"; and (3) Commerce was not required to conduct a (k)(2) factors analysis. Def.-Int. Resp. Opp'n Pl.'s Mot. J. Agency R., ECF No. 39, ("Def.-Int.'s Br.") 13.

This court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012) and 19 U.S.C. § 1516a(a)(2)(B)(vi) (2012).

Because the court finds that Commerce's ruling that Maquilacero's products must be stenciled to be excluded from the Order is an unlawful expansion of the scope's language, the court remands the Final Scope Ruling with instructions.

BACKGROUND

On September 24, 1991, members of the U.S. steel pipe industry, including defendant-intervenor, petitioned for the imposition of antidumping duties on circular welded non-alloy steel pipe from Brazil, the Republic of Korea, Mexico, Romania, Taiwan, and Venezuela. *See Initiation of Antidumping Duty Investigations: Circular Welded Non-Alloy Steel Pipe From Brazil, the Republic of Korea, Mexico, Romania, Taiwan, and Venezuela*, 56 Fed. Reg. 52,528 (Dep't Commerce Oct. 21, 1991) ("Initiation Notice"). On September 17, 1992, Commerce's investigation resulted in a determination that circular welded non-alloy steel pipe from Mexico was being sold at less than fair value (*i.e.*, dumped). *See Circular Welded Non-Alloy Steel Pipe From Mexico*, 57 Fed. Reg. 42,953 (Dep't Commerce Sept. 17, 1992) ("Final Determination"). The Final Determination's scope language described, in pertinent part, the subject merchandise as being "generally known as standard pipe, though [it] may also be called structural or mechanical tubing in certain applications." Final Determination, 57 Fed. Reg. at 42,953. In the following paragraph, however, Commerce specifically excluded "cold-drawn or cold-rolled mechanical tubing" from the scope of the determination. Final Determination, 57 Fed. Reg. at 42,953. Thus, even before the United States International Trade Commission's ("ITC") negative injury determination, Commerce de-

termined that some mechanical tubing would not be included in the Order. Final Determination, 57 Fed. Reg. at 42,953.

In October 1992, the ITC found that the United States' circular welded non-alloy steel pipe industry was materially injured by imports of standard and structural pipe from, among other countries, Mexico. *See Certain Circular, Welded, Non-Alloy Steel Pipes and Tubes from Brazil, the Republic of Korea, Mexico, Romania, Taiwan, and Venezuela*, Inv. Nos. 731-TA-532537, USITC Pub. 2564 (Oct. 1992) ("ITC Final Determination"). In its determination, the ITC also found that "subject mechanical tubing" (*i.e.*, mechanical tubing that is not cold-drawn or cold-rolled) constituted a separate like product from "standard and structural pipes and tubes" based on different end uses and lack of interchangeability. ITC Final Determination at 16–17. The ITC also noted, however, that "the majority of domestically-produced mechanical tubing is either cold-drawn or cold-rolled" (the product previously excluded by Commerce) and that "[n]o party has argued that [cold-drawn or cold-rolled] mechanical tubing, which [is] not included in the scope of the investigation, should be included in a like product consisting of mechanical tubing." ITC Final Determination at 15–16 n.49. In addition, because the ITC found that there had been "no significant imports of subject mechanical tubing from . . . Mexico," there was no material injury to the domestic industry. ITC Final Determination at 38. Moreover, the ITC found that Mexico had "no industries producing the subject mechanical tubing," and there was

> no likelihood that the market penetration of subject mechanical tubing from Mexico . . . will increase to an injurious level; no probability that imports of the Mexican . . . merchandise will enter the United States at prices that will have a depressing or suppressing effect on domestic prices of the merchandise; and no actual and potential negative effects on the existing development and production efforts to develop a derivative or more advanced version of the like product.

ITC Final Determination at 42. Accordingly, the ITC found "no threat of material injury by reason of [the dumping of] imports of subject mechanical tubing from Mexico . . . ." ITC Final Determination at 42. Thus, the ITC found that the mechanical tubing that remained under investigation following Commerce's exclusion of "cold-drawn or cold-rolled" mechanical tubing (1) represented a domestic industry separate from standard and structural pipes and tubes, and (2) had not resulted in a rapid increase in U.S. market penetration due to its

importation. ITC Final Determination at 38, 42. Thus, the ITC's findings did not consider that subject mechanical tubing should be included in the scope of the Order. *See* ITC Final Determination at 38, 42.

Following the ITC Final Determination, on November 2, 1992, Commerce issued an antidumping duty order for circular welded non-alloy steel pipe from, among other countries, Mexico. *See* Order, 57 Fed. Reg. at 49,453. Because the ITC had found that mechanical tubing from Mexico was not causing or threatening injury, Commerce's Order contained the following language:

> In its final determination, the ITC determined that three like products exist for the merchandise covered by the Commerce investigations: (a) Mechanical tubing; (b) finished conduit, and (c) standard and structural pipe. The ITC's affirmative injury determination covered only standard and structural pipe. Accordingly, the scope of the antidumping duty orders . . . have been modified to reflect the ITC's findings.

Order, 57 Fed. Reg. at 49,453–54. In particular, the scope's first paragraph, which describes the subject merchandise, removed the earlier reference to "mechanical tubing" and instead described the merchandise as being "generally known as standard pipes and tubes":

> The products covered by these orders are circular welded non-alloy steel pipes and tubes, of circular cross-section, not more than 406.4 millimeters (16 inches) in outside diameter, regardless of wall thickness, surface finish (black, galvanized, or painted), or end finish (plain end, bevelled end, threaded, or threaded and coupled). *These pipes and tubes are generally known as standard pipes and tubes and are intended for the low pressure conveyance of water, steam, natural gas, and other liquids and gasses in plumbing and heating systems, air conditioning units, automatic sprinkler systems, and other related uses, and generally meet ASTM A-53 specifications*. Standard pipe may also be used for light load-bearing applications, such as for fence tubing, and as structural pipe tubing used for framing and support members for reconstruction or load-bearing purposes in the construction, shipbuilding, trucking, farm equipment, and related industries. Unfinished conduit pipe is also included in these orders.

Order, 57 Fed. Reg. at 49,453 (emphasis added).

Moreover, in keeping with the ITC's findings that mechanical tubing from subject countries presented no threat of material injury, the scope's exclusionary paragraph contained an unqualified exclusion for "mechanical tubing":

> *All carbon steel pipes and tubes within the physical description outlined above are included within the scope of these orders, except* line pipe, oil country tubular goods, boiler tubing, *mechanical tubing*, pipe and tube hollows for redraws, finished scaffolding, and finished conduit. Standard pipe that is dual or triple certified/stenciled that enters the U.S. as line pipe of a kind used for oil or gas pipelines is also not included in these orders.

Order, 57 Fed. Reg. at 49,453 (emphasis added).

On December 3, 2014, Commerce issued a preliminary scope ruling for mechanical tubing produced by Productos Laminados de Monterrey S.A. de C.V. and Prolamsa, Inc. (collectively, "Prolamsa"), companies that are not a party to this action. *See* Mem. from R. Weible to C. Marsh, re: Certain Black, Circular Tubing Produced to ASTM A-513 Specifications by Prolamsa (Dep't Commerce Dec. 3, 2014), P.R. 2, ECF No. 32 ("Prolamsa Preliminary Scope Ruling"). In its scope ruling request, Prolamsa asked Commerce to find that its tubing—made to the ASTM A-513 specifications[2]—qualified for the mechanical tubing exclusion from the Order's scope. Prolamsa Preliminary Scope Ruling at 3. Prolamsa provided a description of the subject merchandise, which included various physical, chemical, and mechanical properties of the tubing. Notably, Prolamsa described its tubes as "single stenciled as ASTM A-513."[3] Prolamsa Preliminary Scope Ruling at 4.

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[2] The ASTM A-513 standard, titled "Standard Specifications for ElectricResistance-Welded Carbon and Alloy Steel Mechanical Tubing" covers "electric-resistancewelded carbon and alloy steel tubing for use as mechanical tubing" and "mechanical tubing made from hot- or cold-rolled steel." Standard Specification for Electric-Resistance-Welded Carbon and Alloy Steel Mechanical Tubing, P.R. 2, ECF No. 32 at 400.

[3] The Prolamsa Preliminary Scope Ruling notes that the initial scope ruling request "included a multitude of products meeting the A-513 mechanical tubing specification," but that "this original request did not provide sufficient information for the Department to *initiate* a scope review at that time, so the Department requested clarification." Prolamsa Preliminary Scope Ruling at 1 n.1 (emphasis added). Subsequently, "[t]hrough the clarification process, the request ha[d] been modified to entail a set of physical, mechanical, and chemical properties which is intended to enable parties and the U.S. Government to identify mechanical tubing with both greater exactness and enhanced simplicity." Prolamsa Preliminary Scope Ruling at 1 n.1. While domestic interested parties had no objection to the final description provided, there is no indication in the Prolamsa Preliminary Scope Ruling that stenciling was a "physical, mechanical," or "chemical" property of Prolamsa's tubing—notably, stenciling is not addressed at all in the ruling's (k)(2) factor analysis. *See generally* Prolamsa Preliminary Scope Ruling.

Commerce found that Prolamsa's tubing was outside the scope of the Order. In making its determination, Commerce initially found that the term "mechanical tubing" was not defined in the Order. Accordingly, Commerce examined the (k)(1) factors, but found that an examination of the Order, the ITC Final Determination, and Commerce's own prior scope rulings failed to provide an adequate description of what amounts to mechanical tubing. Prolamsa Preliminary Scope Ruling at 8. Commerce then turned to the (k)(2) factors. Using the (k)(2) factors, Commerce determined that tubing, which met the description provided by Prolamsa, was excluded from the scope of the Order. Specifically, Commerce found:

> The following are mechanical tubes excluded from the scope of the antidumping duty order: circular tubes that are neither galvanized nor coated with zinc [i.e., "black"], *and are single stenciled as ASTM A-513*, and meet the ASTM A-513 specification for "as welded tubing," and either (a) do not overlap with the diameter and wall thickness combinations (*i.e.*, "nominal pipe sizes") of pipe (*e.g.*, ASTM A-53) for Schedules 10, 40, or 80; or (b) do overlap with the diameter and wall thickness combinations (*i.e.*, "nominal pipe sizes") of pipe (*e.g.*, ASTM A-53) for Schedules 10, 40, or 80, and have not been hydrostatically tested, and have a carbon content not greater than 0.13 percent, and meet the Rockwell B Hardness test (that is, a minimum of 55 for grade 1010, and a minimum of 50 for lower carbon grades (*e.g.*, 1008)), and have a minimum elongation (in 2 inches) of 24 percent for pipes and tubes with a diameter over 1.5 inches or have a minimum elongation (in 2 inches) of 15 percent for pipes and tubes with a diameter of 1.5 inches or less.

Prolamsa Preliminary Scope Ruling at 5 (emphasis added). No party to the Prolamsa Preliminary Scope Ruling commented on the ruling, and on January 12, 2015, Commerce issued a final scope ruling that adopted, unchanged, the description of mechanical tubing provided by Prolamsa itself and that was contained in the preliminary scope ruling. *See* Mem. from R. Weible to C. Marsh, re: Antidumping Duty Order on Certain Circular Welded Non-Alloy Steel Pipe from Mexico: Final Scope Ruling on Certain Black, Circular Tubing Produced to ASTM A513 Specifications by Prolamsa, (Dep't Commerce Jan. 12, 2015), P.R. 2, ECF No. 32 ("Prolamsa Final Scope Ruling").

On May 29, 2015, Maquilacero applied for a scope ruling, asking Commerce to find its products to be excluded from the scope of the

Order as mechanical tubing.[4] Maquilacero's Request for a Scope Ruling on Certain Bare Mechanical Tubing Meeting the ASTM A-513 Specification (May 29, 2015), P.R. 4, ECF No. 32 ("Scope Ruling Request"). In its Scope Ruling Request, Maquilacero first claimed that its tubing should be excluded based on the "plain reading of the scope and the description of Maquilacero's black mechanical tubing . . . ." Scope Ruling Request at 2. Next, Maquilacero argued its tubing qualified for exclusion under the description of excluded mechanical tubing found in the Prolamsa Final Scope Ruling. Scope Ruling Request at 11. Specifically, Maquilacero argued its products "meet the physical, chemical and mechanical properties used by the Department to identify mechanical tubing in the [Prolamsa Final Scope Ruling]." Scope Ruling Request at 2. In other words, Maquilacero argued that since its tubing had the same physical and chemical properties as Prolamsa's, it too should be excluded from the Order.

In support of this second claim, Maquilacero attached the Prolamsa Final Scope Ruling to its Scope Ruling Request and provided a list of 46 of its products with outer diameters ranging from 0.75 to 4.5 inches in various combinations with wall thicknesses ranging from 0.059 to 0.173 inches. Scope Ruling Request, Exs. 1, 2, P.R. 4, 2. Also, Maquilacero claimed that, in accordance with the Prolamsa Final Scope Ruling, none of the products' outer diameter and wall thickness combinations overlapped with those found in standard pipe (*e.g.*, ASTM A-53) size schedules 10, 40, or 80, and that all of its products were not galvanized or coated with zinc, had a carbon content of less than 0.13 percent, and met the Rockwell B Hardness test requirements. Scope Ruling Request at 4–6. Accordingly, Maquilacero asserted that its tubing fit the description of mechanical tubing used in the Prolamsa Final Scope Ruling.

Maquilacero's request noted that none of its tubing was stenciled. Scope Ruling Request at 5. Although plaintiff observed that the tubing was tagged with "the date, the outer diameter of the tube, the wall thickness . . . the number of pieces and the weight," it acknowledged its tubing did not "include any markings indicating the specification."

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[4] The product subject to the Scope Ruling Request is welded mechanical tubing produced from

> hot-rolled and cold-rolled steel in coils, which is the primary raw material input. The coils are first slit into thinner strips according to the dimension of the product desired and the size limitations of Maquilacero's tube mill, and then are fed into Maquilacero's tube rolling lines, where the products are formed into round, rectangular, or square shaped, and longitudinally welded.

Scope Ruling Request at 5–6. Maquilacero's "size range . . . is limited and ranges from tubes with 0.75" in actual outer diameter to 4.5" actual outer diameter." Scope Ruling Request 4. In addition, "[o]nce the tube is welded, it is moved to a cooling bed and then moved to the warehouse to be prepared for shipment. The mechanical tubing is not galvanized nor coated with any other surface coating." Scope Ruling Request 6.

Scope Ruling Request at 5. Maquilacero maintained, however, that because stenciling is "not a physical or chemical property of the tubing," the "requirement for stenciling is [not] necessary or reasonable" to include in a scope ruling. Scope Ruling Request at 5. Nonetheless, Maquilacero offered to stencil its pipe in the future "if necessary" to indicate the ASTM A-513 specification. Scope Ruling Request at 5.

Maquilacero then argued that, were the Department to find its products did not fit the description found in the Prolamsa Final Scope Ruling, it should nevertheless be excluded from the scope of the Order based on the criteria found in the (k)(2) factors. Scope Ruling Request at 17. These factors include the (1) "physical characteristics of the product," (2) "expectations of the ultimate purchasers," (3) "ultimate use of the product," (4) "channels of trade in which the product is sold," and (5) "manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2). For Maquilacero, an analysis of the (k)(2) factors would demonstrate that its products should be excluded from the scope of the Order. Scope Ruling Request at 17–22. Thus, Maquilacero asked Commerce to conduct the same analysis it had used to find that the Prolamsa pipe was excluded from the Order.

On July 27, 2015, Commerce issued its Final Scope Ruling, and concluded that Maquilacero's tubing was within the scope of the Order. *See* Final Scope Ruling at 9. Initially, Commerce found that although "[t]he plain language of the scope of the Order states that the order does not cover 'mechanical tubing,'" the Order itself does not further define "mechanical tubing." Final Scope Ruling at 5. Therefore, Commerce found it should construct a definition of mechanical tubing based on the description of the merchandise contained in the petition, the initial investigation, and prior scope determinations (*i.e.*, by looking at the (k)(1) factors). In looking at the (k)(1) factors, Commerce chose to rely exclusively on the description found in the Prolamsa Final Scope Ruling.[5] Final Scope Ruling at 5.

When considering the Prolamsa Final Scope Ruling, Commerce found that, because the ruling specifically described Prolamsa's products as "single stenciled as ASTM A-513," stenciling is required for ASTM A-513 mechanical tubing to be excluded from the scope. Final Scope Ruling at 5. Commerce disagreed with Maquilacero's claim that stenciling was not a physical property of the tubing, and noted that the Order itself states, when referring to certain standard pipe, that "[s]tandard pipe that is dual or triple certified/stenciled that enters

[5] Commerce noted that "the petition and initial investigations by the Department and the International Trade Commission do not shed sufficient light on the meaning of 'mechanical tubing.'" Final Scope Ruling at 5 n.21 (citing Prolamsa Final Scope Ruling).

the U.S. as line pipe of a kind used for oil or gas pipelines is also not included in the order." Final Scope Ruling at 5. For Commerce, this language "contemplates stenciling as a physical property of the merchandise which is significant such that a lack of stenciling could render merchandise within the scope when it would otherwise be excluded." Final Scope Ruling at 5. Moreover, Commerce found that the Prolamsa Final Scope Ruling's inclusion of a stenciling requirement "is a specific reference to the language of the scope itself, where stenciling is a significant physical property of the product (though in a different context)." Final Scope Ruling at 5. Commerce thus concluded that "[u]nder the plain language of the [Prolamsa Final Scope Ruling], only pipe and tube stenciled as A-513 can be considered under parts (a) or (b) of the exclusion from scope of the Order." Final Scope Ruling at 5. Based on Maquilacero's own statements that its tubing was not stenciled, Commerce concluded that plaintiff's products did not qualify for an exclusion under the Order. Final Scope Ruling at 5.

Because Commerce found the (k)(1) factors dispositive on "whether Maquilacero's products meet the scope exclusion for mechanical tubing," it did not move on to an examination of the (k)(2) factors (*i.e.*, the product's physical characteristics, expectations of ultimate purchasers, ultimate use, channels of trade, and manner of advertisement). Final Scope Ruling at 2, 5. Thus, although the Department had employed the (k)(2) factors to reach its decision excluding Prolamsa's tubing from the Order, it concluded that it could interpret the Prolamsa Final Scope Ruling as excluding Maquilacero's tubing without further reference to other tools of interpretation such as the (k)(2) factors. *See* 19 C.F.R. § 351.225(k)(1) ("[I]n considering whether a particular product is included within the scope of an order . . . [Commerce] will take into account . . . [t]he descriptions of the merchandise contained in . . . the determinations of [Commerce] (including prior scope determinations) . . . .").

Although Commerce found that, in accordance with the Prolamsa Final Scope Ruling, stenciling was required for pipe to be excluded from the Order, and that Maquilacero's products were not stenciled, "for the purpose of clarification to all parties," Commerce sought "to lay out in detail the steps to be taken to determine whether Maquilacero's A-513 products examined under the [Prolamsa Final Scope Ruling] are within the scope of the Order." Final Scope Ruling at 6. Thus, for the claimed purpose of clarification, Commerce analyzed whether Maquilacero's products had the same characteristics Commerce previously found excluded Prolamsa's mechanical tubing from the scope under a (k)(2) factors analysis. *See* Final Scope Ruling 6–9;

see also Prolamsa Preliminary Scope Ruling 5, 8–10. Accordingly, Commerce then looked at whether Maquilacero's products were galvanized or black (finding they were black), whether the products overlapped with the combinations listed in standard pipe schedules 10, 40, or 80 with regard to outside diameter and wall thickness (finding that 39 of the 46 products did not overlap), and for those products that did overlap, that they met the paragraph (b) specifications in the Prolamsa Final Scope Ruling—namely, the products had not been hydrostatically tested, had a carbon content not greater than 0.13 percent, met the Rockwell B Hardness test, and had the requisite minimum elongation (finding that each of the remaining products met these specifications).[6] Final Scope Ruling at 6–9. In other words, other than the stenciling requirement, Commerce's analysis demonstrated that Maquilacero's products met all of the other requirements of the Prolamsa Final Scope Ruling and that were it not for the lack of stenciling, plaintiff's pipe would be excluded from the Order. At the start of this analysis, however, Commerce specifically stated that it was "[l]eaving to one side the *requirement* that the product be single-stenciled as A-513 as addressed above . . . ." Final Scope Ruling at 6 (emphasis added). Put another way, Commerce conducted an analysis that demonstrated that Maquilacero's pipe would have been excluded from the Order, had it been stenciled.

This action followed.

STANDARD OF REVIEW

"The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

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[6] According to the analysis in the Prolamsa Preliminary Scope Ruling, these requirements exclude a manufacturer's tubing from the Order because "a product which is not galvanized (or otherwise painted or coated) is not suitable for fencing applications," which is one of the intended uses of subject merchandise. Prolamsa Preliminary Scope Ruling at 8. Likewise, "[a] product which has a carbon content of 0.13 percent or less and an elongation (in 2 inches) of a minimum of 24 percent for pipes and tubes with a diameter over 1.5 inches . . . would generally not be considered for use in load-bearing or structural applications," which are also intended uses of subject merchandise. Prolamsa Preliminary Scope Ruling at 8. In addition, Commerce noted that "while Rockwell B Hardness testing is a requirement of A-513, it is not required for A-53." Prolamsa Preliminary Scope Ruling at 8. Moreover, according to Commerce, "[f]ailure to conduct hydrostatic testing would indicate that products are not so intended" for subject uses covered by the Order, such as "the low pressure conveyance of water, steam, natural gas, and other liquids and gases in plumbing and heating systems . . . ." Prolamsa Preliminary Scope Ruling at 8.

LEGAL FRAMEWORK

Because no statutory provision governs the interpretation of the scope of an antidumping duty order, Commerce determines whether a product is included within the order's scope in accordance with its regulations. *See generally* 19 C.F.R. § 351.225; *see also Sango Int'l, L.P. v. United States*, 484 F.3d 1371, 1376 (Fed. Cir. 2007). Interested parties often make scope ruling requests because Commerce must write its scope language in "general terms." 19 C.F.R. § 351.225(a); *see also Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096 (Fed. Cir. 2002). When reviewing Commerce's scope rulings, the Court "afford[s] significant deference to Commerce's own interpretation of its orders, mindful that scope determinations are 'highly fact-intensive and case-specific.'" *Fedmet Res. Corp. v. United States*, 755 F.3d 912, 918 (Fed. Cir. 2014) (quoting *King Supply Co. v. United States*, 674 F.3d 1343, 1345 (Fed. Cir. 2012)). Commerce's interpretation of an antidumping order, however, may not "change the scope of that order," nor "interpret an order in a manner contrary to its terms." *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001); *see also Kirovo-Chepetsky Khimichesky Kombinant, JSC v. United States*, 39 CIT __, ___, 58 F. Supp. 3d 1397, 1402 (2015). As to the interplay between Commerce's conclusions and those of the ITC, "allow[ing] Commerce to assess antidumping duties on products intentionally omitted from the ITC's injury investigation" would "frustrate the purpose of the antidumping laws" because it would be assessing antidumping duties on products the ITC found did not injure domestic producers. *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1371 (Fed. Cir. 1998) (citing 19 U.S.C. § 1673 (1994)); *see also A.L. Patterson, Inc. v. United States*, 585 F. App'x. 778, 785–86 (Fed. Cir. 2014) ("[T]here is insufficient evidence to conclude that [plaintiff's merchandise] . . . was part of the [ITC's] material injury investigation. As such, Commerce may not impose antidumping duties . . . under [19 U.S.C.] § 1673.").

When interpreting the antidumping duty order's scope, Commerce first examines the scope language from the order to determine if that language "is ambiguous and open to interpretation." *Kirovo-Chepetsky*, 39 CIT at __, 58 F. Supp. 3d at 1402; *see also Duferco Steel*, 296 F.3d at 1097 ("[A] predicate for the interpretative process is language in the order that is subject to interpretation."). Should Commerce find that language is subject to interpretation, Commerce may turn to the (k)(1) factors, *i.e.*, "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations)

and the Commission" for clarification. 19 C.F.R. § 351.225(k)(1); *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1382 (Fed. Cir. 2005). While these (k)(1) sources may provide valuable guidance as to the interpretation of the final order, however, "they cannot substitute for language in the order itself." *Duferco Steel*, 296 F.3d at 1097; *see also Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 776 F.3d 1351, 1354 (Fed. Cir. 2015) ("[T]he language of the order is the 'cornerstone' of a scope analysis." (quoting *Duferco Steel*, 296 F.3d at 1097)).

Pursuant to its regulation, if Commerce is able to interpret the scope of the order after examination of the (k)(1) factors—that is, if Commerce finds that the (k)(1) factors are "dispositive"—then its inquiry ends, and Commerce will issue a final scope ruling regarding whether the subject merchandise is covered by the order. 19 C.F.R. § 351.225(d). For a (k)(1) determination to be dispositive, "the permissible sources examined by Commerce 'must be controlling of the scope inquiry in the sense that they *definitely answer* the scope question.'" *OTR Wheel Eng'g, Inc. v. United States*, 36 CIT __, __, 853 F. Supp. 2d 1281, 1287–88 (2012) (quoting *Sango Int'l*, 484 F.3d at 1379) (emphasis added). Should Commerce find that the (k)(1) factors are "not dispositive," however, it must further consider the (1) "physical characteristics of the product"; (2) "expectations of the ultimate purchasers"; (3) "ultimate use of the product"; (4) "channels of trade in which the product is sold"; and (5) "manner in which the product is advertised and displayed" (*i.e*, the (k)(2) factors). 19 C.F.R. § 351.225(k)(2). Where a scope determination is challenged, the Court's purpose is to determine whether the scope of the order "contain[s] language that specifically includes the subject merchandise or may be reasonably interpreted to include it." *Duferco Steel*, 296 F.3d at 1089.

DISCUSSION

Maquilacero's first contention is that the plain language of the Order explicitly excludes all mechanical tubing (and thus Maquilacero's tubing) from its scope. Pl.'s Br. 17. Specifically, plaintiff refers to the Order's exclusionary provision:

> *All carbon steel* pipes and *tubes within the physical description* outlined above *are included within the scope of these orders, except* line pipe, oil country tubular goods, boiler tubing, *mechanical tubing*, pipe and tube hollows for redraws, finished scaffolding and finished conduit.

Pl.'s Br. 17 (quoting Order, 57 Fed. Reg. at 49,453). Under plaintiff's reading of the Order, because there is "no limitation on the exclusion

for mechanical tubing, nor is [the] exclusion drafted in ambiguous terms," it follows that there is no need for Commerce to look to other (k)(1) materials for interpretation. Pl.'s Br. 17. Therefore, plaintiff argues that so long as its tubing is mechanical tubing, it must be excluded from the Order. Thus, for plaintiff, the scope of the Order "cannot be reasonably interpreted to include Maquilacero's . . . mechanical tubing" because the Order provides an "express exclusion" for its product. Pl.'s Br. 18.

In making its case, Maquilacero notes that its tubing is produced to the ASTM A-513 standard, which covers "electric-resistance-welded carbon and alloy steel tubing for use as mechanical tubing," and "mechanical tubing made from hot- or cold-rolled steel," and "is recognized to be a standard for mechanical tubing." Pl.'s Br. 19–20 ("In a different proceeding, Commerce recognized that ASTM A-513 is a mechanical tubing specification." (citing *Certain Circular Welded Non-Alloy Steel Pipe from Mexico*, 72 Fed. Reg. 19,880, 19,881 (Dep't Commerce Apr. 20, 2007) ("New Shipper Review Ruling") (notice of prelim. intent to rescind new shipper rev.)); Pl.'s Br. 26 ("[T]he ITC noted that 'some industry guides for mechanical tubing such as ASTM-A-513 . . . provide a wide degree of options with respect to size and other characteristics.'" (quoting ITC Final Determination at 16 n.51)); *see also* Standard Specification for Electric-Resistance-Welded Carbon and Alloy Steel Mechanical Tubing, P.R. 2, ECF No. 32 ("ASTM A-513 Standard"). Maquilacero further argues that its tubing "complies with the steel chemistry required by the standard," and the "testing requirements" of ASTM A-513, "including the flaring test, a heat analysis, and tests for squareness of cut, straightness, and ovality." Pl.'s Br. 19. In addition, Maquilacero notes that its product cannot be used in the end uses described in the scope (such as the conveyance of water, steam, or gas) because it "is not hydrostatically tested, [and] thus unsuitable as standard pipe . . . ." Pl.'s Br. 19. Moreover, Maquilacero claims that its product is specifically advertised as mechanical tubing meeting the ASTM A-513 specification. Pl.'s Br. 19.

Plaintiff then argues that Commerce "provided no explanation as to why the information provided by Maquilacero did not establish that its tubing is mechanical tubing," and observes that in prior proceedings, Commerce explicitly recognized ASTM A-513 as a mechanical tubing specification. Pl.'s Br. 19–20 (citing New Shipper Review Ruling, 72 Fed. Reg. at 19,881 ("[P]ipe produced to the A-513 standard, or generally 'mechanical tubing,' is specifically excluded from the scope of the antidumping duty order on pipe and tube from Mexico.")). For plaintiff, therefore, because its product was produced to the mechani-

cal tubing standard, it should be excluded under the plain language of the Order because it is, in fact, mechanical tubing. Indeed, plaintiff maintains that Commerce recognized that Maquilacero's tubing would be excluded from the Order as mechanical tubing if it were stenciled. *See* Pl.'s Br. 20, 34.

In response, defendant argues that Commerce "reasonably determined that the term mechanical tubing require[d] further clarification" and therefore acted reasonably in looking to the (k)(1) factors for guidance, specifically, the Prolamsa Final Scope Ruling. Def.'s Br. 19–20. Defendant maintains that Commerce is afforded "substantial discretion when determining whether a term requires further clarification." Def.'s Br. 13, 14 ("'Commerce need only meet a low threshold to show that it justifiably found an ambiguity in scope language.'" (quoting *Laminated Woven Sacks Comm. v. United States*, 34 CIT 906, 914, 716 F. Supp. 2d 1316, 1325 (2010))). Accordingly, because Commerce found that the phrase "mechanical tubing" was not defined in the Order, defendant argues that Commerce acted reasonably in consulting the other (k)(1) factors to help define the term. Def.'s Br. 14 (citing *A.L. Patterson*, 585 F. App'x. at 782–83).

Defendant further argues that plaintiff's claim that Commerce "recognized" that Maquilacero's products met the ASTM A-513 specification is unsupported by Commerce's Final Scope Ruling. Def.'s Br. 15. Defendant cites the Final Scope Ruling which states that "[Maquilacero's tubing] 'is not currently stenciled, nor does it include any markings indicating the specification,'" and therefore could not be called mechanical tubing for purposes of the exclusion from the scope of the Order. Def.'s Br. 16 (quoting Final Scope Ruling at 5). For Commerce, its remaining analysis, which does seem to conclude that Maquilacero's product met the physical requirements for mechanical tubing, was added "'for the purpose of clarification to all parties.'" Def.'s Br. 16 (quoting Final Scope Ruling at 6). Put another way, defendant insists that this analysis was not part of the Final Scope Ruling, but rather, that it was merely a "hypothetical" analysis. Def.'s Br. 16 ("[A]lthough Maquilacero . . . asserts that Commerce 'determined' that Maquilacero's mechanical tubing otherwise satisfied the ASTM A-513 standard, Commerce never made that determination. Rather . . . Commerce discussed the hypothetical steps Commerce would take to determine whether Maquilacero's tubing, had it been stenciled, would qualify as mechanical tubing under the [Prolamsa Final Scope Ruling]."). Accordingly, for Commerce, even though it went through an analysis that demonstrated that plaintiff's merchandise, had it been stenciled, was mechanical tubing within the meaning of the Order's exclusion, the analysis should be ignored.

As an initial matter, the court finds that Commerce reasonably determined that the plain language of the Order's exclusion was subject to interpretation and was therefore justified in employing the (k)(1) and (k)(2) factors. *See Duferco Steel*, 296 F.3d at 1097 ("[A] predicate for the interpretive process is language in the order that is subject to interpretation."); *see also Meridian Prods., LLC v. United States*, 851 F.3d 1375, 1381 n.7 (Fed. Cir. 2017) ("The relevant scope terms are 'unambiguous' if they have a 'single clearly defined or stated meaning.'" (quoting *Unambiguous*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (3d ed. 1986)). Here, there is nothing to suggest that the term "mechanical tubing" has a single definition, and so Commerce's finding that it was ambiguous was in accordance with law. *See Meridian Prods.*, 851 F.3d at 1381–82. Therefore, Commerce reasonably concluded that it could use interpretive tools to define "mechanical tubing." *See* 19 C.F.R. § 351.225(k).

Without abandoning its argument that the term mechanical tubing is unambiguous, plaintiff takes issue with the manner Commerce went about constructing its definition. Specifically, plaintiff faults the Department's reliance "solely on the narrow description of certain mechanical tubing imported . . . in [the Prolamsa Final Scope Ruling], to 'interpret' the mechanical tubing exclusion from the scope," with no explanation as to why the other (k)(1) sources do not "shed sufficient light on the meaning of 'mechanical tubing.'" Pl.'s Br. 20 (quoting Final Scope Ruling at 5 n.21). For plaintiff, the ITC's final injury determination and petitioners' agreement with that determination, are "highly relevant to the interpretation of 'mechanical tubing'" because, following the ITC's negative injury determination with respect to mechanical tubing, Commerce specifically amended the scope language to remove certain references to mechanical tubing in the paragraph containing the physical description of subject merchandise and added an unqualified exclusion for mechanical tubing in the exclusionary paragraph.[7] Pl.'s Br. 22–23 (citing Order, 57 Fed. Reg. at 49,453). Because Commerce provided no explanation as to why the ITC Final Determination and Commerce's Initiation Notice should be ignored, however, plaintiff maintains that Commerce's sole reliance on the stenciling requirement in the Prolamsa Final Scope Ruling is not supported by substantial evidence. Pl.'s Br. 20–21.

[7] Specifically, Commerce's Initiation Notice and Final Determination described subject merchandise as "circular welded non-alloy steel pipes and tubes . . . generally known as standard pipe, *though they may also be called structural or mechanical tubing in certain applications*." Initiation Notice, 56 Fed. Reg. at 52,529 (emphasis added); Final Determination, 57 Fed. Reg. at 42,953. The Order, however, removed this reference to mechanical tubing within the scope and carved out an unqualified exclusion for "mechanical tubing." *See* Order, 57 Fed. Reg. at 49,453.

Plaintiff further contends that the other (k)(1) sources "demonstrate that the clear exclusion for mechanical tubing is consistent with the record developed at the ITC and Commerce in the underlying [antidumping] investigations and Petitioner's position at the time." Pl.'s Br. 21. For plaintiff, Commerce's examination of the (k)(1) factors should have revealed that the mechanical tubing exclusion was meant to exclude its products. Pl.'s Br. 21–24. To support this position, Maquilacero points to the ITC Final Determination, which it argues demonstrate that "mechanical tubing is produced by a distinct domestic industry, which did not suffer material injury by reason of imports of mechanical tubing." Pl.'s Br. 22. Plaintiff further notes that Commerce itself excluded some mechanical tubing from the investigation's scope. Pl.'s Br. 6 ("In Commerce's final determination, the scope language included an exception for 'cold-drawn and cold-rolled mechanical tubing.'" (citing Final Determination, 57 Fed. Reg. at 42,953)). Moreover, plaintiff argues that because the ITC found that subject mechanical tubing and standard pipe were separate like products—a finding that was consistent with the petitioners' position in the dumping investigation—and made a negative injury determination with respect to mechanical tubing imports, Commerce "cannot read the scope language to impose antidumping duties on a product for which the ITC made no material injury determination." Pl.'s Br. 22 ("To 'allow Commerce to assess antidumping duties on products intentionally omitted from the ITC's injury investigation' would 'frustrate the purpose of the antidumping laws.'" (quoting *Wheatland Tube*, 161 F.3d at 1371)). Accordingly, Plaintiff maintains that Commerce's determination is not in accordance with law.

Moreover, plaintiff argues that while Commerce determined that the Order "does not define 'mechanical tubing,' the same can be said of the Prolamsa Final Scope Ruling . . . ." Pl.'s Br. 20. That is, for plaintiff, the stenciling requirement found in the Prolamsa Final Scope Ruling only "reflects the product descriptions provided by one importer" and thus, "does not provide a general-purpose definition of mechanical tubing." Pl.'s Br. 20, 27. For plaintiff, the stenciling in the Prolamsa Final Scope Ruling only described mechanical tubing as "delineated in Prolamsa's request to Commerce." Pl.'s Br. 27. Put another way, for plaintiff, the description of Prolamsa's tubing as being stenciled was solely the result of the happenstance that Prolamsa, although not required to by any standard, in fact stenciled its tubes.[8]

[8] As discussed above, although there was a need for some clarification about Prolamsa's products before Commerce could initiate a scope review, neither the Prolamsa Preliminary Scope Ruling nor the Prolamsa Final Scope Ruling mentions whether stenciling is a physical, mechanical, or chemical property of the tube—in fact the stenciling "requirement"

Moreover, plaintiff argues that, not only does "Commerce provide[] no discussion on how this set of characteristics can be reconciled with the scope's unambiguous exclusion for mechanical tubing," but Commerce's "attempt to define mechanical tubing with the Prolamsa criteria is not simply an 'interpretation,' but a revision of the scope." Pl.'s Br. 27–28. That is, plaintiff argues that Commerce's inclusion of a stenciling requirement "is an unlawful revision of the scope language." Pl.'s Br. 29–30 ("While Commerce has the authority to interpret its scope and clarify ambiguous terms, Commerce may not import a stenciling requirement into the mechanical tubing scope exclusion where none exists in the language of the scope." (citing *Ericsson GE Mobile Commc'ns, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995)). Thus, plaintiff maintains that Commerce's determination unlawfully narrowed the scope exclusion based on "criteria that are not grounded in the Order, the petition or the original investigations." Pl.'s Br. 29.

To support its position, plaintiff argues that, contrary to Commerce's assertion, stenciling is not a physical characteristic intended as a requirement for pipe to be either included or excluded from the Order because it is not mentioned in the Order's scope language relating to either included pipe or excluded mechanical tubing. Pl.'s Br. 31–32. For plaintiff, because the first sentence in the second paragraph of the scope states "'[a]ll carbon steel pipes and tubes within *the physical description outlined above*'" are included within the scope of the Order, the scope's first paragraph contains all the physical characteristics of the standard pipe subject to the Order. Pl.'s Br. 31 (quoting Order, 57 Fed. Reg. at 49,453). Plaintiff notes that stenciling is not mentioned "among the physical characteristics in the first paragraph of the scope." Pl.'s Br. 31. Plaintiff finds support for its position that stenciling was not contemplated in the first sentence by its explicit inclusion in the second paragraph. The second paragraph references an exclusion for "'[s]tandard pipe that is dual or triple certified/stenciled that enters the U.S. as line pipe of a kind used for oil or gas pipelines.'" Pl.'s Br. 31 (quoting Order, 57 Fed. Reg. at 49,453). The explicit requirement that certain *line pipe* be stenciled to be excluded from the Order, for plaintiff, means that if the authors of the Order intended that mechanical tubing be stenciled, they knew how to say so.

Moreover, plaintiff argues that the "context in which stenciling is mentioned in the scope language indicates that 'certification' and 'stenciling' are used as equivalent terms." Pl.'s Br. 31. That is, for

is not mentioned outside of the description itself. *See generally* Prolamsa Preliminary Scope Ruling; *see also supra* text accompanying note 3.

plaintiff, the phrasing "certified/stenciled" for standard pipe that enters the United States as line pipe indicates that excluded tubing may be "certified" or "stenciled." Pl.'s Br. 3132; *see also* Reply. Br. Pl., ECF No. 41 ("Pl.'s Reply Br.") 14 ("By requiring stenciling and certification, Commerce interprets 'certified/stenciled' to mean 'certified' and 'stenciled,' when the normal rules of interpretation would interpret the phrase as 'certified' or 'stenciled.'"). Accordingly, plaintiff contends that including Maquilacero's product within the Order's scope unlawfully amends the scope's language. Pl.'s Br. 32.

The Department argues that, contrary to plaintiff's contentions, it properly considered the other (k)(1) factors but determined that they were not helpful in defining mechanical tubing. Thus, Commerce claims that it did consider the other sources mentioned in 19 C.F.R. § 351.225(k)(1) but failed to find them useful. Def.'s Br. 19, 24. ("Maquilacero . . . heavily relies upon the underlying ITC investigations and contends that because the ITC purportedly made a 'negative injury determination' regarding mechanical tubing, Maquilacero's product cannot be included within the scope of the Order. The ITC determination that Maquilacero cites, however, does not define mechanical tubing."). Defendant then notes that Commerce specifically cited to a similar finding in the Prolamsa Final Scope Ruling. Def.'s Br. 24 ("Commerce determined that the ITC determination was not helpful in defining mechanical tubing during the Prolamsa Preliminary Scope ruling . . . . As a result, it was reasonable for Commerce to regard the ITC's past determination on mechanical tubing to be similarly not dispositive for interpreting the exclusion in relation to Maquilacero's products." (first citing Prolamsa Preliminary Scope Ruling at 8; then citing Final Scope Ruling at 5 n.21)). Defendant then argues that "even assuming that the [ITC Final Determination] does provide guidance in interpreting what constitutes mechanical tubing," under § 351.225(k)(1), the ITC Final Determination does not take precedence "over any other factor when Commerce makes a scope determination." Def.'s Br. 24. That is, defendant maintains that Commerce is under "no legal obligation to make a determination in accordance with a previous ITC determination when other factors mandate a different outcome." Def.'s Br. 25. Thus, for defendant, Commerce's reliance on the Prolamsa Final Scope Ruling's mention of stenciling was reasonable because Commerce found that other sources "[did] not shed sufficient light" on what constitutes mechanical tubing. Final Scope Ruling at 5 n.21.

As to plaintiff's argument that the stenciling requirement amounts to an unlawful revision of the scope, defendant responds that "requiring stenciling in order to fall within the Order's mechanical tubing

exclusion does not impermissibly narrow the exclusion" and is "fully harmonious with the language in the Order." Def.'s Br. 20. In support of its position, defendant argues that the Order's reference to "certified/stenciled" in the description of excluded line pipe "plainly recognizes that a lack of stenciling on tubing can render some merchandise within the scope [of the Order] when it would otherwise be excluded." Def.'s Br. 21 (citing Final Scope Ruling at 5). For defendant, therefore, Commerce lawfully determined that to be excluded from the Order, mechanical tubing must be stenciled. Def.'s Br. 21.

The court finds that Commerce's ruling unlawfully expanded the scope of the Order to include plaintiff's merchandise. While the court agrees that Commerce lawfully looked to the Prolamsa Final Scope Ruling as an interpretative aid, its importation of a stenciling requirement for pipe to qualify as mechanical tubing unreasonably imposed a requirement not contained in the Order. Here, the relevant language of the Order provides that

> The products covered by [the Order] are circular welded nonalloy steel pipes and tubes, of circular cross-section, not more than [16 inches] in outside diameter, regardless of wall thickness, surface finish . . . or end finish . . . . These pipes and tubes are generally known as standard pipes and tubes and are intended for the low pressure conveyance of water, steam, natural gas, and other liquids and gases . . . [and] may also be used for light load-bearing applications . . . .

Order, 57 Fed. Reg. at 49,453. Notably, stenciling is not mentioned in the scope's description of merchandise covered by the Order.

Portions of the exclusionary paragraph, on the other hand, do mention stenciling. In particular, "*[s]tandard pipe that is dual or triple certified / stenciled that enters the U.S. as line pipe* of a kind used for oil or gas pipelines is also not included in [the Order]." Order, 57 Fed. Reg. at 49,453 (emphasis added).

This stenciling requirement, however, is notably absent from the portions of the Order dealing with plaintiff's product, mechanical tubing:

> All carbon steel pipes and tubes within the physical description outlined above are included within the scope of these orders, except line pipe, oil country tubular goods, boiler tubing, *mechanical tubing*, pipe and tube hollows for redraws, finished scaffolding, and finished conduit.

Order, 57 Fed. Reg. at 49,453 (emphasis added).

Thus, neither the scope language itself nor the mechanical tubing exclusion mentions stenciling. Indeed, the only mention of stenciling appears in the exclusionary paragraph, with reference to a different product, "[s]tandard pipe . . . that enters the U.S. as line pipe of a kind used for oil or gas pipelines . . . ." Order, 57 Fed. Reg. at 49,453. Thus, defendant's first claim for a stenciling requirement is unconvincing. Stenciling is not found in the description of pipes included within the Order's scope, and not found in the exclusion for mechanical tubing. The reference to stenciling in the exclusion for "[s]tandard pipe . . . that enters the U.S. as line pipe" merely illustrates that if the authors of the Order had intended to make it a "physical property of the merchandise" to be excluded from the Order, they knew how to do so explicitly.[9] Accordingly, because the scope language is the "cornerstone" of any scope determination, and Commerce is bound by "the general requirement of defining the scope of antidumping and countervailing duty orders by the actual language of the orders," *Duferco Steel*, 296 F.3d at 1098, Commerce's ruling "strayed beyond the limits of interpretation and into the realm of amendment." *Ericsson*, 60 F.3d at 782.

Commerce's claim that "stenciling is an integral requirement pursuant to the [Prolamsa Final Scope Ruling]" is equally unconvincing. Final Scope Ruling at 5. While it is the case that the Prolamsa Final Scope Ruling does describe the excluded mechanical tubing as "single stenciled as ASTM A-513," Commerce fails to say how stenciling could possibly be a physical property affecting the scope of the Order. Final Scope Ruling at 4; *see Fedmet*, 755 F.3d at 921 ("[T]he reason why the (k)(1) sources are afforded primacy in the scope analysis is because interpretation of the language used in the orders must be based on the meaning given to that language during the underlying investigations."). Thus, the meaning given to the term mechanical tubing in the investigations conducted by Commerce and the ITC must be the basis for the scope ruling. Here, there is nothing to suggest that the ITC considered stenciling when it made its negative injury determination nor is there any indication that the authors of the Order themselves had stenciling in mind when they drafted the Order. Indeed, it would have been surprising for them to have done so.

To the extent that Commerce is arguing that the ITC's final determination does not take precedence over factors found in § 351.225(k)(1), it misstates the law. Commerce may not interpret an order to include products for which the ITC has issued a negative

[9] *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . ., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks and citations omitted).

injury determination. *See Wheatland Tube Co. v. United States*, 21 CIT 808, 819, 973 F. Supp. 149, 158 (1997) ("A fundamental requirement of both U.S. and international law is that an antidumping duty order must be supported by an ITC determination of material injury covering the merchandise in question. . . . It would follow that any expansion of the scope by Commerce would extend the antidumping duty order beyond the limits of the ITC injury determination and would therefore violate both U.S. and international law." (citing 19 U.S.C. § 1673 (1994))).

Nor does Commerce properly consider how the mention of stenciling came to be found in the ruling excluding Prolamsa's pipe from the Order. It is apparent that the description of the pipe provided by the producer in Prolamsa included mention of stenciling because Prolamsa's pipe was actually stenciled. *See* Prolamsa Preliminary Scope Ruling at 7; *see also* Prolamsa Final Scope Ruling at 3 (adopting, unchanged, the description of merchandise provided in the preliminary ruling). Had the producer described its pipe, and omitted mention of stenciling, there can be little doubt that Commerce would not have elevated stenciling to be a required physical property for the exclusion of mechanical tubing from the Order. That is, stenciling has no effect on the pipe's physical characteristics, expectations of ultimate purchasers, its ultimate use, channels of trade, or manner in which the product is advertised, *i.e.*, the (k)(2) factors that were considered by Commerce when excluding Prolamsa's pipe. *See* Prolamsa Preliminary Scope Ruling at 8–10.

Stenciling is simply "[a] marking operation by which numbers, designs, labels, etc, are applied to a surface, using a stencil." *Stenciling*, METALLURGICAL DICTIONARY (1st ed. 1953). It does not change the inherent quality or the intended use of the product. Indeed, the Prolamsa Preliminary Scope Ruling emphasized that Prolamsa's product should be excluded from the Order because the physical and chemical properties provided in Prolamsa's description—aside from the stenciling requirement, which was not discussed at all—demonstrated that its products were not likely to be used as subject merchandise. *See, e.g.,* Prolamsa Preliminary Scope Ruling at 8 ("With regard to the physical characteristics of the merchandise, we note that the scope states that products covered by the Order 'are intended for the low pressure conveyance of water, steam, natural gas, and other liquids and gases in plumbing and heating systems . . . .' Failure to conduct hydrostatic testing would indicate that

products are not so intended."); *see also* Prolamsa Preliminary Scope Ruling at 9 ("[W]e find that none of [the Prolamsa's listed uses of its tubing] are uses for, or expectations of purchasers of, the subject pipes and tubes . . . .").

Moreover, Commerce, in an effort to do a complete job, took the step of analyzing plaintiff's pipe for its physical and chemical characteristics. Commerce's findings demonstrated that Maquilacero's products were mechanical tubing with the same physical properties as Prolamsa's.[10] *See* Final Scope Ruling at 6–9. Nevertheless, Commerce unreasonably found that the lack of stenciling directed that plaintiff's product not be excluded. Final Scope Ruling at 6.

Although defendant-intervenor argues that a stenciling requirement "enhances the enforceability of [the Order] . . . [b]ecause the Scope Ruling excludes mechanical tubing that could be imported having the same dimensions as standard pipe," and therefore that "Commerce properly require[d] stenciling so that U.S. Customs and Border Protection [("Customs")] can readily assess why merchandise is being entered as non-subject," this argument also does not carry the day. Def.-Int. Br. 22. First, neither the Prolamsa Final Scope Ruling nor the Final Scope Ruling mention enforceability. Moreover, while it may be true that it is easier for Customs to assess why stenciled pipe is being entered as non-subject merchandise, this consideration is irrelevant to determining whether merchandise is within the scope of the Order. Accordingly, the court finds that the "ease of enforceability" argument lacks merit.

Finally, although defendant argues that Maquilacero's tubing does not meet the ASTM A-513 standard (and thus, is not mechanical tubing) because the specification itself requires tubing to be stenciled, the court is unconvinced. *See* Def.'s Br. 16. Commerce itself seems to concede this point by frequently referring to plaintiff's tubing as "Maquilacero's A-513 products." *See, e.g.*, Final Scope Ruling at 6–8. Also, because it is put forth here for the first time, this argument is a post-hoc rationalization not properly before the court. *See Itochu Bldg. Prods. Co. v. United States*, 40 CIT __, __, 163 F. Supp. 3d 1330, 1337–38 (2016) ("[The Court] may only sustain the agency's decision

[10] Specifically, Commerce stated that Maquilacero's tubing, like Prolamsa's, was not galvanized and met the ASTM A-513 specification for "welded tubing." Final Scope Ruling at 6. In addition, Commerce found that the majority of Maquilacero's tubing did not overlap with the combinations listed in standard pipe schedules 10, 40, or 80 with regard to outside diameter and wall thickness. Final Scope Ruling at 6–9. As to the seven products that did overlap, however, Commerce nevertheless determined "based upon the information placed upon the record by Maquilacero" that because the products had not been hydrostatically tested, had a carbon content not greater than 0.13 percent, met the Rockwell B Hardness test requirement, and had the requisite minimum elongation, they too would be considered mechanical tubing. Final Scope Ruling at 9.

'on the same basis articulated in the order by the agency itself.' Thus, reasoning that is offered post-hoc, in briefing to the Court or during oral argument, is not properly part of this Court's review of the agency's underlying determination . . . ." (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962)).

Even if defendant's argument were before the court, however, it would nevertheless fail. First, the ASTM A-513 stenciling "requirement" defendant refers to is found in the "Product and Package Marking" section of the A-513 specification. The placement of the "requirement" in the packaging section does not help, but hurts, defendant by further supporting the court's finding that stenciling is not a physical characteristic of the tubing itself, but rather, a method of identification. *See* ASTM A-513 Standard at 413. Had the stenciling requirement been found in the "Workmanship, Finish, and Appearance" section, for example, Commerce's argument might gain some purchase. In addition, contrary to defendant's characterization, the specification does not state that each pipe must be stenciled, but rather that "*each box, bundle, lift, or piece* shall be identified by *a tag or stencil* with the manufacturers name or brand, specified size, type, purchaser's order number *and [the A-513] specification number*." ASTM A-513 Standard at 413 (emphasis added). Under the ASTM A-513 Product and Package Marking standard, then, a manufacturer has an option of how to identity the specification number either by stenciling or tagging. Indeed, this same "requirement" is found in the description of standard pipe that is subject to the Order, but is found nowhere in the scope language for that product. The court notes that, aside from stenciling the specification number, neither the Prolamsa Final Scope Ruling nor the Final Scope Ruling say anything about the other identifying information required by the Product and Package Marking section (*i.e.*, the brand, specified size, type, and purchaser's order number). Therefore, defendant's argument that including Maquilacero's products within the scope of the Order is consistent with the A-513 standard itself fails to convince.

Accordingly, the court finds that the imposition of a requirement having nothing to do with the physical characteristics of mechanical tubing and that appeared in the Prolamsa Final Scope Ruling by chance, was unreasonable. Therefore, Commerce's ruling was unsupported by substantial evidence.

CONCLUSION

For the foregoing reasons, the court finds that Commerce unlawfully expanded the scope of the Order by adding a stenciling requirement. Therefore, the court remands the matter to Commerce with

instructions that (1) it not impose a stenciling requirement, and (2) it find that Maquilacero's tubing is excluded from the Order based on its analysis found on pages 6–9 of the Final Scope Ruling. Although Commerce claims that this analysis was somehow outside of the Final Scope Ruling, on remand Commerce shall find plaintiff's products are excluded from the Order using the same analysis in the Final Scope Ruling and that is found in this opinion.

Based on the foregoing, it is hereby

ORDERED that Commerce's Final Scope Ruling is remanded; it is further

ORDERED that, on remand, Commerce shall issue a ruling that complies in all respects with this Opinion and Order, is based on determinations that are supported by substantial record evidence, and is in all respects in accordance with law; it is further

ORDERED that, on remand, Commerce is directed to find that stenciling is not required for Maquilacero's products to be excluded from the scope of the Order and that, based on Prolamsa's Final Scope Ruling, the analysis found on found on pages 6–9 of the Final Scope Ruling, and this opinion, Maquilacero's pipe is excluded from the Order; it is further

ORDERED that, Commerce may reopen the record to solicit additional information required to make these determinations or otherwise complete its analysis; and it is further

ORDERED that the remand results shall be due ninety (90) days following the date of this Opinion and Order; comments to the remand results shall be due thirty (30) days following filing of the remand results; and replies to such comments shall be due fifteen (15) days following filing of the comments.

Dated: August 30, 2017
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON, JUDGE