U.S. Court of International Trade

Slip Op. 16–95

ABB Inc., Plaintiff, v. United States, Defendant, Hyundai Heavy Industries Co. Ltd., Hyundai Corporation USA, Hyosung Corporation, and HICO America Sales and Technology, Inc., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Court No. 15–00108
PUBLIC VERSION

[Plaintiff's motion is granted, in part, and the determination is remanded to the Department of Commerce]

Dated: October 7, 2016

R. Alan Luberda, Kelley Drye & Warren LLP, of Washington, DC, argued for plaintiff. With him on the brief were *David C. Smith, Jr.* and *Joshua R. Morey*.

John J. Todor, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him 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 *James H. Ahrens, II,* Attorney, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance, of Washington, DC.

David E. Bond, White & Case, LLP, of Washington, D.C., argued for defendant-intervenor Hyundai Heavy Industries, Co., Ltd. and Hyundai Corporation USA. With him on the brief were *Walter J. Spak, William J. Moran* and *Ron Kendler*.

Henry D. Almond, Arnold & Porter LLP, of Washington, D.C., argued for defendant-intervenors Hyosung Corporation and HICO America Sales and Technology, Inc. With him on the brief were *J. David Park, Andrew M. Treaster* and *Yujin K. McNamara*.

OPINION AND ORDER

Barnett, Judge:

In this action ABB, Inc. ("Plaintiff" or "ABB") challenges the final results of the U.S. Department of Commerce ("Commerce") in its first administrative review of the antidumping duty order on large power transformers ("LPTs") from the Republic of Korea for the February 16, 2012 to July 31, 2013 period of review ("POR"). *Large Power Transformers from the Republic of Korea*, 80 Fed. Reg. 17,034 (Dep't Commerce Mar. 31, 2015) (final results of antidumping duty admin-

istrative review; 2012–2013) ("*Final Results*"), Public Joint App. ("PJA"), Doc. 1, ECF No. 72; Confidential Joint App. ("CJA"), Doc. 1; Public Admin. R. ("P.R.") 276, ECF No. 26–9;[1] and accompanying *Issues and Decision Mem.*, A-580–867 (Mar. 23, 2015) ("*I&D Mem.*"), CJA, Doc. 2; PJA, Doc. 2; P.R. 261;[2] *Large Power Transformers from the Republic of Korea*, 80 Fed. Reg. 26,001 (Dep't Commerce May 6, 2015) (amended final results of antidumping duty admin. review; 2012–2013) ("*First Am. Final Results*"), CJA, Doc. 3; PJA, Doc. 3; P.R. 291, and accompanying Am. Final Results of the Antidumping Duty Admin. Review of Large Power Transformers from the Republic of Korea; 2012 2013: Allegations of Ministerial Errors (Dep't Commerce Apr. 28, 2015) ("*First Am. Final Results Mem.*"), CJA, Doc. 42; PJA, Doc. 42; P.R. 284; *Large Power Transformers from the Republic of Korea*, 80 Fed. Reg. 35,628 (Dep't Commerce June 22, 2015) (second amended final results of antidumping duty administrative review; 2012–2013) ("*Sec. Am. Final Results*"), CJA, Doc. 4; PJA, Doc. 4; P.R. 304, and accompanying Second Am. Final Results of the Antidumping Duty Admin. Review of Large Power Transformers from the Republic of Korea; 2012–2013: Allegations of Ministerial Error (Dep't Commerce June 15, 2015) ("*Sec. Am. Final Results Mem.*"), CJA, Doc. 44; PJA, Doc. 44; P.R. 294. Plaintiff argues that the final dumping margins assigned to Defendant-Intervenors, Hyundai Heavy Industries Co., Ltd. ("HHI") and Hyundai Corp., USA (collectively, "Hyundai"), and Hyosung Corp. and HICO America Sales and Technology, Inc. (collectively, "Hyosung") are based on data that were unreliable and are therefore unsupported by substantial evidence and not in accordance with law. *See generally* Conf. Pl.'s Mem. of Law in Supp. of Mot. for J. on the Agency R. ("Pl.'s MJAR."), ECF No. 45–1. Plaintiff further argues that Commerce should have used facts available or "adverse facts available" to arrive at more accurate dumping margins for Hyosung and Hyundai. *See id*. at 33, 39–42. Finally, Plaintiff argues that Commerce should not have granted home market commission offsets to Hyosung and Hyundai and that its decision to do so is unsupported by substantial evidence and not in accordance with

[1] The administrative record is divided into a Public Administrative Record ("P.R."), ECF No. 26–9, and a Confidential Administrative Record ("C.R."), ECF No. 26–8. Parties submitted joint appendices containing all record documents cited in their briefs. *See* Public Joint App. ("PJA"), ECF No. 72, and Confidential Joint App. ("CJA"), ECF No. 71. Additionally, the Court requested complete versions of certain record documents for which parties had only submitted selected pages in the joint appendices. These are cited separately as they appear in this opinion.

[2] *See also* Proprietary Arguments from the Issues and Decision Mem. of the Admin. Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea; 2012–2013: Hyundai Heavy Industries (HHI) and Hyundai Corp. U.S.A. (Hyundai USA) (collectively, Hyundai) (Dep't Commerce Mar. 23, 2015) ("*Proprietary I&D Mem. - Hyundai*"), CJA, Doc. 36; PJA, Doc. 36; C.R. 546; P.R. 270; Proprietary Arguments from the Issues and Decision Mem. for the Final results of the Antidumping Duty Admin. Review of Large Power Transformers (LPTs) from the Republic of Korea (Korea): – Hyosung Corp. (Hyosung) (Dep't Commerce Mar. 23, 2015) ("*Proprietary I&D Mem. - Hyosung*"), CJA, Doc. 37; PJA, Doc. 37; C.R. 525; P.R. 263.

law. *Id*. at 47–52; *see also* Conf. Pl.'s Reply Br. ("Pl.'s Reply") at 18–22, ECF No. 69. For the reasons detailed below, the Court will sustain, in part, and remand, in part, Commerce's Final Results.

BACKGROUND

The present case challenges the final results of Commerce's first administrative review of the antidumping duty order on large power transformers from the Republic of Korea. *See generally Final Results; see also Large Power Transformers from the Republic of Korea*, 77 Fed. Reg. 53,177 (Dep't Commerce Aug. 31, 2012) (antidumping duty order) ("*AD Order*"). The Court begins with a brief discussion of the original investigation to the extent that it is relevant to the issues raised by Plaintiff in this case.

I. Original Investigation

On August 10, 2011, Commerce initiated an antidumping duty investigation on large power transformers from Korea. *Large Power Transformers from the Republic of Korea*, 77 Fed. Reg. 9,204 (Dep't Commerce Feb. 16, 2012) (prelim. determination of sales at less than fair value and postponement of final determination) ("*LTFV Prelim. Notice*"). The period of investigation ("POI") was from July 1, 2010, through June 30, 2011. *Large Power Transformers from the Republic of Korea,* 77 Fed. Reg. 40,857 (Dep't Commerce July 11, 2012) (final determination of sales at less than fair value) (*"LTFV Final Results"*), CJA, Doc. 5; PJA, Doc. 5 and accompanying *Issues and Decision Mem.*, A-580–867 (July 2, 2012) (*"LTFV I&D Mem."*) at 2, CJA, Doc. 6; PJA, Doc. 6. Commerce selected Hyundai and Hyosung as mandatory respondents and issued its final determination on July 11, 2012. *LTFV Prelim. Notice,* 77 Fed. Reg. at 9,205; s*ee generally LTFV Final Results*.

In the final determination for the less than fair value ("LTFV") investigation and accompanying Issues and Decision Memo, Commerce addressed the issue of "unshipped sales," explaining that when "the merchandise under consideration are large, complex, capital intensive custom made products that take many months to produce and install, the Department is often faced with the decision to balance the use of actual costs in their entirety with maximizing the population of sales to use to calculate a dumping margin." *LTFV I&D Mem.* at 43–44, 61–62. In the investigation, Commerce extended the period for reporting actual costs incurred to six months beyond the end of the POI. *Id.* at 43. However, in calculating the dumping margins, Commerce used only POI sales that had been completed and shipped as of December 31, 2011, and excluded from consideration those sales that were incomplete or unshipped as of that date. *Id.*Commerce reasoned that, because the unfinished sales continued to be produced, the

relevant sales and cost data would continue to change. *Id.*; *see also id.* at 59 (Hyosung explained that customers may request additional services or cancel previously requested services up until the time of delivery).

II. First Administrative Review

On October 2, 2013, Commerce initiated the first administrative review for the period February 16, 2012 through July 31, 2013. *Initiation of Antidumping and Countervailing Duty Admin. Reviews and Request for Revocation in Part*, 78 Fed. Reg. 60,834 (Dep't Commerce Oct. 2, 2013), CJA, Doc. 7; PJA, Doc. 7; P.R. 6. ABB requested the review, and Hyosung and Hyundai were again selected as mandatory respondents. *I&D Mem.* at 3.

As part of the review, Commerce requested that both Hyosung and Hyundai report actual and/or updated data for all transactions that were shipped, sold and entered the United States during the POR, including "overlapping sales" that were reported based on estimated data during the investigation, but had shipped during the POR. *Id.* at 14–16 (explaining the issue of "overlapping sales" with respect to Hyosung and noting Commerce's request for updated information for all "overlapping sales" shipping during POR); *see also id.* at 47 (explaining the issue of "overlapping sales" with respect to Hyundai); *see also LTFV I&D Mem.* at 42–44, 61–62.

On September 24, 2014, Commerce published the preliminary results of its review. *Large Power Transformers from the Republic of Korea*, 79 Fed. Reg. 57,046 (Dep't Commerce Sept. 24, 2014) (prelim. results of antidumping duty admin. review; 2012–2013) ("*Prelim. Results*"), CJA, Doc. 27; PJA, Doc. 27; P.R. 217 and accompanying *Issues and Decision Mem.*, A-580–867 (Sept. 18, 2014) ("*Prelim. I&D Mem.*"), CJA, Doc. 62; PJA, Doc. 62; P.R. 208.[3] On March 31, 2015, Commerce issued the *Final Results. Final Results,* 80 Fed. Reg. at 17,034. ABB timely filed the present case on April 10, 2015. *See generally* Summons, ECF No. 1; Compl., ECF No. 6. Subsequently (and with leave from this Court), on May 6, 2015, Commerce issued the First Amended Final Results and then, on June 22, 2015, the Second Amended Final Results, both in response to allegations of ministerial error. *See First Am. Final Results*, 80 Fed. Reg. 26,001;

[3] *See also* Analysis of Data Submitted by Hyosung Corp. in the Prelim. Results of the 2012–2013 Admin. Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea (Dep't Commerce Sept. 18, 2014) ("*Prelim. Mem. - Hyosung*"), ECF No. 82–3; CJA, Doc. 26; PJA, Doc. 26; C.R. 423; P.R. 209 (proprietary prelim. mem. for Hyosung accompanying the prelim. results); Analysis of Data Submitted by Hyundai Heavy Indus. Co. Ltd., Corp. in the Prelim. Results of the 2012–2013 Admin. Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea (Dep't Commerce Sept. 18, 2014) ("*Prelim. Mem. - Hyundai*"), ECF No. 82–4; CJA, Doc. 56; PJA, Doc. 56; C.R. 430; P.R. 211 (proprietary prelim. mem. for Hyundai accompanying the prelim. results).

Sec. Am. Final Results, 80 Fed. Reg. at 35,628; Order, ECF No. 24 (June 3, 2015).[4] The second amended final results assigned weighted average dumping margins of 8.23 percent and 12.36 percent to Hyosung and Hyundai respectively. *See Sec. Am. Final Results*, 80 Fed. Reg. at 35,629.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012),[5] and 28 U.S.C. § 1581(c) (2012).

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB.*, 305 U.S. 197, 229 (1938)). It "'requires more than a mere scintilla," but "less than the weight of the evidence." *Nucor Corp. v. United States*, 34 CIT 70, 72, 675 F. Supp. 2d 1340, 1345 (2010) (quoting *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004)). In determining whether substantial evidence supports Commerce's determination, the court must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). However, the fact that a plaintiff can point to evidence that detracts from the agency's conclusion or that there is a possibility of drawing two inconsistent conclusions from the evidence does not preclude the agency's finding from being supported by substantial evidence. *Matsushita Elec. Indus. Co. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20 (1966)). The court may not "reweigh the evidence or . . . reconsider questions of fact anew." *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1377 (Fed. Cir. 2015) (quoting *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 815 (Fed. Cir. 1992)); *see also Usinor v. United States*, 28 CIT 1107, 1111, 342 F. Supp. 2d 1267, 1272 (2004) (citation omitted) (the court "may not reweigh the evidence or substitute its own judgment for that of the agency").

[4] The First Amended Final Results were published on May 6, 2015, prior to the issuance of this order, as a result of an inadvertent error by Defendant, United States. *See* Def.'s Mot. for Leave, Out of Time, for the Dep't of Commerce to Consider Ministerial Error Allegations and, if Necessary, to Publish Am. Final Results, ECF No. 23 at 2–3.

[5] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2012 edition.

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.* 467 U.S. 837, 842–45 (1984), guides judicial review of the Department's interpretation of the antidumping and countervailing duty statutes. *See Nucor Corp. v. United States*, 414 F. 3d 1331, 1336 (Fed. Cir. 2005). First, the Court "must determine whether Congress has directly spoken to the precise question at issue." *Heino v. Shinseki*, 683 F.3d 1372, 1377 (Fed. Cir. 2012) (quoting *Chevron*, 467 U.S. at 842). If Congress's intent is clear, "that is the end of the matter." *Id.* (quoting *Chevron*, 467 U.S. at 842–43). However, "[i]f the statute is silent or ambiguous," the Court must determine "whether the agency's [action] is based on a permissible construction of the statute." *Dominion Res., Inc. v. United States*, 681 F.3d 1313, 1317 (Fed. Cir. 2012) (citing *Chevron*, 467 U.S. at 842–43).

DISCUSSION

I. Hyosung's Final Margin Determination

ABB argues that Commerce's determination of Hyosung's final margin is unsupported by substantial evidence on the record because discrepancies exist between data that Hyosung provided to Commerce during the LTFV investigation and the first administrative review. ABB argues that these and other discrepancies undermine the reliability of Hyosung's U.S. price and expense data and Commerce should have used facts available or facts available with an adverse inference ("adverse facts available" or "AFA")[6] to calculate Hyosung's dumping margin. In support of this argument, ABB identifies a number of alleged discrepancies in Hyosung's data. *See generally* Pl.'s MJAR. at 14–36. Defendant argues that Commerce confirmed the accuracy of Hyosung's data by issuing multiple questionnaires and reviewing source documentation, and that the difference in data between the LFTV investigation and the first administrative review is attributable to Hyosung having provided estimated data during the LTFV investigation and actual data during the review. *See generally* Conf. Def.'s Resp. to Pl.'s Rule 56.2 Mot. for J. on the Agency R. ("Def.'s Resp."), ECF No. 61 at 12–17.

[6] 19 U.S.C. § 1677e(a) provides that Commerce may use "facts otherwise available" in reaching the applicable determination if necessary information is not on the record or an interested party withholds information that has been requested, fails to provide such information in a timely manner, significantly impedes the proceeding, or provides information that cannot be verified. Subsection (b) further provides that Commerce may use an adverse inference in selecting from among the facts otherwise available if the interested party failed to cooperate by not acting to the best of its ability. *See also* 19 C.F.R. § 351.308.

A. The Reliability of Hyosung's U.S. Price and Expense Data

i. Discrepancies in Hyosung's Data for Overlapping Sales

ABB contends that "Commerce relied on inconsistent and inaccurate data" submitted by Hyosung that artificially increased reported U.S. prices in the underlying [first administrative review] from those verified for the same sales reported in the immediately preceding original investigation" and that Commerce failed to "adequately address this detracting information in the Final Results." Pl.'s MJAR at 14 (underline omitted). ABB's claims rest on allegations of discrepancies in price and expense data reported for U.S. sales that were unshipped during the original investigation and that entered the United States during the first administrative review (referred to as "overlapping sales"). *Id*. Defendant notes that Commerce issued multiple questionnaires in response to ABB raising this concern during the administrative proceeding and reasonably determined that the data was sound. Def.'s Resp. at 12–13.

The Court reviews Commerce's determination for substantial evidence on the record. In response to ABB's concern regarding the discrepancies between the estimated and actual data, Hyosung responded to multiple supplemental questionnaires, providing information to permit Commerce to evaluate the reliability of Hyosung's data. *I&D Mem.* at 16–17; *see e.g.* Hyosung's Apr. 10, 2014, Supplemental Section A-C Questionnaire Response ("Hyosung Apr. 10 SQR") at 23–24, ECF Nos. 829 – 82–14; C.R. 255–260; P.R. 125–126; Hyosung's July 2, 2014, Supplemental Section A-C Questionnaire Response ("Hyosung July 2 SQR") at S-18 – S-22, ECF No. 82–26; C.R. 308–14; P.R. 160–61. Commerce determined that Hyosung persuasively demonstrated the completeness and accuracy of its reported sales by providing source documentation such as "sales contracts/purchase orders, amended purchase orders, invoices, payment records, and numerous other documents" and that "[ABB's] analyses are misplaced and simply incorrect in each instance." *I&D Mem.*at 16. Commerce also concluded that ABB's claims regarding the changes in data for the overlapping sales "can be attributed to either Petitioner's own misrepresentation of record evidence[,] or (1) the reporting of estimated values . . ., (2) consideration of amended or revised purchase orders issued by the U.S. customer, or (3) expanded scope of services requested by the U.S. customer for the sale . . ." *Id*. at 16.

The Court has reviewed the record evidence showing that Commerce requested documents and information, and Hyosung complied with these requests in order to address questions about its data. The Court finds that Commerce's conclusion that Hyosung's data was

reliable is supported by substantial evidence on the record. *I&D Mem.* at 16 n. 77 (noting multiple questionnaire responses from Hyosung). It logically follows from the circumstances surrounding the "overlapping sales" that the estimates reported during the LFTV investigation could and would differ from the actual costs reported during the administrative review, and both Commerce and Hyosung had anticipated this.[7] Moreover, the critical question for this administrative review is whether Hyosung adequately substantiated the data it is now reporting. As detailed in the Issues and Decision Memo, Commerce reviewed numerous documents, including contracts, purchase orders, invoices and amended invoices, and payment records to confirm Hyosung's data and reasonably found that it was accurate as reported. *I&D Mem.* at 16.

ABB also raised certain specific issues regarding Hyosung's data and the Court will now address those in turn.

- **ABB's First Selected Transaction**

To illustrate its claim that there were discrepancies in the data supplied by Hyosung, ABB alleges that Hyosung reported an increase in gross unit price for a selected transaction at the same time as it reported a decrease in the actual cost of producing the unit.[8] Pl.'s MJAR at 19. ABB argues that there is insufficient evidence in the record to support Hyosung's explanations for these changes.[9] *Id.* at 21. Defendant contends that Commerce examined this allegation during the review and that Hyosung addressed it in its Fourth Supplemental Sales Questionnaire Response (Aug. 21, 2014). Def.'s Resp. at 15 (citing Hyosung's August 21, 2014, Fourth Supplemental Sales Questionnaire Response ("Hyosung Aug. 21 SQR"), CJA, Doc. 22; PJA, Doc. 22; C.R. 367–370; P.R. 194). In that response, Hyosung explained that it had provided an estimated cost to the customer based on revised customer requirements. *Id.; see also* Hyosung Aug. 21 SQR at 11. The customer accepted this estimate. *Id.*; *see also* Hyosung Aug. 21 SQR at 11. Subsequently, Hyosung's design team developed a more efficient unit and Hyosung experienced a decline in

[7] During the LFTV Investigation Commerce had "instructed Hyosung to report sales and expense data for POI sales that may not have shipped as of December 31, 2011" even if actual costs and expenses had yet to be finalized. *I&D Mem.* at 15. At that time, Hyosung indicated that variations would exist between the estimated and actual data, and Commerce "understood[] [that] the estimated data and initial gross-unit prices reported for its unshipped sales would need to be updated to reflect actual data for when these sales shipped during the first administrative review." *Id.* at 15. As expected, the data Hyosung submitted for the first administrative review "differed from the data in the LFTV investigation in certain instances." *Id.* at 15–16.

[8] This transaction was identified in Hyosung's database as SEQU [[ ]]. Pl.'s MJAR at 19.

[9] ABB specifically takes issue with Hyosung's claims that the change in price is attributable to [[ ]].
Pl.'s MJAR at 19–22; Pl.'s Reply at 3–5.

raw material costs. *Id.; see also* Hyosung Aug. 21 SQR at 15–16. As such, Hyosung was able to produce the unit at a lower cost, even though the customer had accepted a higher price. *Id*; *see also* Hyosung Aug. 21 SQR at 10–16. Commerce found that Hyosung had sufficiently demonstrated that changes in data between the original investigation and the first administrative review were attributable to the reporting of estimated versus actual values and amended or revised purchase orders. *I&D Mem.* at 16 & n. 77.

The Court finds that substantial evidence supports Commerce's reliance on Hyosung's reported price and costs for this transaction. *See, e.g.,* Hyosung Aug. 21 SQR at 10–16. Hyosung responded to every request issued by Commerce regarding this sale, and supplied data and supporting documentation for its responses. *See I&D Mem.* at 17. While ABB claims that it was unable to locate a specific document (a test sheet) that should have further confirmed the size and weight of the final product, ABB was not able to identify where or when Commerce requested this particular document. The absence of this unrequested document is contrasted by the record as a whole and the remainder of the documentation and explanations provided by Hyosung to Commerce during the course of the administrative review. Therefore, the Court declines to reweigh the evidence upon which Commerce relied. *See Downhole Pipe & Equip.,*776 F.3d at 1377; *see also Usinor*, 28 CIT at 1111, 342 F. Supp. 2d at 1272. In view of the record as a whole and Commerce's investigation of ABB's allegation, the Court finds that Commerce's determination with respect to this transaction is based on substantial evidence.

ii. Hyosung's Gross Unit Price (GUP) Relative to Reported Expenses

ABB argues that there is conflicting data on the record regarding Hyosung's reported expenses and gross unit prices. ABB alleges that there are discrepancies in Hyundai's reported freight expenses that result in improperly marked-up freight revenues beyond actual costs and consequently, inflated U.S. prices. *See* Pl.'s MJAR at 23–24. ABB identifies a second selected transaction to illustrate its point.[10] *Id*. 22–24. ABB argues that Commerce should have addressed this by capping freight revenue at actual cost. *Id.* at 24. Additionally, ABB contrasts certain expense amounts reported to Commerce with different expense amounts reported for other reasons[11] to suggest that either the expenses reported to Commerce are understated or the prices are overstated. *Id*. at 30–31. For each allegation raised, the Court finds that Commerce requested and reviewed directly relevant source documentation substantiating Hyosung's reported data, found

[10] This second selected transaction is identified in Hyosung's sales database as SEQU [[ ]]. Pl.'s MJAR at 22.

[11] Reported to [[ ]] or in Hyosung's [[ ]]. *See* Pl.'s MJAR at 30–31.

Hyosung's data to be reliable, and made its determination based on substantial evidence in the record.

a. Hyosung's Freight Expense Data

ABB asserts that Hyosung increased the price for a second selected transaction based on a claim for increased freight expenses, which included a mark-up beyond the actual freight expense (*i.e.*, profit). Pl.'s MJAR at 23. ABB contends that, as a result, "Commerce's net price calculations are consistently overstated," *id*. at 24, and that Commerce should have capped Hyosung's freight revenue at the amount of the actual expense. *Id*. at 24, 30–34 (arguing that Commerce has a policy of capping revenues included in gross unit price at the level of expenses actually incurred, as evidenced in *Certain Pasta from Italy,* 78 Fed. Reg. 48,146 (Dep't. Commerce Aug 7, 2013) (prelim. results of antidumping duty admin. review; 2011–2012) and Prelim. Results in the 2011/2012 Admin. Review on Certain Pasta from Italy: Sales Analysis Mem. for the Prelim. Results – the Rummo Group (Dep't Commerce July, 30, 2013), ECF No. 81).

Defendant responds that ABB mistakenly assumed freight revenue was allocated evenly across several units the sales of which were reported separately in Hyosung's database when, in fact, Hyosung correctly had allocated a greater amount of revenue to one of the units.[12] Def.'s Resp. at 17–18; *see also* Hyosung's Aug. 25, 2014 Fourth Supplemental Sales Questionnaire Response ("Hyosung Aug. 25 SQR"), Ex. S-1 at JA101825, CJA, Doc. 23; PJA, Doc. 23; C.R. 371–73; P.R. 195–96 (revised U.S. sales database). The freight revenue was not allocated evenly across units but, rather, it was allocated as it was incurred – with units shipped in multiples receiving a different per unit allocation of the freight expense. *See id.* (revised U.S. sales database noting ship dates and freight expenses for the relevant units). Defendant also explains that the "revenue figures used by ABB are not the reported data used in calculating [Hyosung's] dumping margin," and that "ABB's analysis does not demonstrate that Hyosung's reported gross unit prices are artificially inflated." Def.'s Resp. at 18.

The Court first notes that Commerce identified this second selected transaction as one of the overlapping sales for which it gathered actual data during the POR (and for which Commerce had originally

[12] Defendant also argues that ABB does not use Hyosung's reported revenue in its analysis, but rather, relies on a mistaken estimate of the freight revenue that Hyosung provided in one of its questionnaire responses. Def.'s Resp. at 17–18. Further, ABB used a date-of-sale exchange rate to convert Hyosung's reported figure to U.S. dollars, when the data Hyosung reported to Commerce was itself a converted figured because the freight provider had billed Hyosung in U.S. dollars and Hyosung had not been requested to provide (nor had it provided) the exchange rate it had used to convert the figure into Korean currency before reporting it to Commerce. *Id.* Thus, ABB's exchange rate adjustments based were upon faulty assumptions.

received estimated data during the LTFV investigation). *See I&D Mem.* at 34; *see also* Hyosung July 2 SQR at S-20 – S-21, CJA, Doc. 18; PJA, Doc. 18.[13] As with other overlapping sales, Commerce explained that both the agency and Hyosung had anticipated changes in data from the LTFV investigation to the instant review, *I&D Mem.* at 35, and the Court has already addressed this argument above, *see supra* Discussion Section I.A.i. Moreover, with respect to the change in price for the second selected transaction, Commerce requested and received explanations and corresponding documentation from Hyosung. *See* Hyosung July 2 SQR at S-20 – S-21, CJA, Doc. 18; PJA, Doc. 18; *see also* Hyosung July 2 SQR at Ex. S-11, CJA, Doc. 60; PJA, Doc. 60. Commerce accepted Hyosung's explanation that the data changed because "subsequent to the original purchase order, the U.S. customer requested changes to the original purchase order (*e.g.*, an expanded scope of services)," and that this "understandably resulted in an increase to the build-up of the total reported gross unit price for this transaction." *I&D Mem.* at 35. Hyosung supported its explanation for the price change with documentation, including revised purchase orders and HICO America's invoice to the U.S. customer. *Id.; see also* Hyosung July 2 SQR at S-20 – S-21, CJA, Doc. 18; PJA, Doc. 18; *see also* Hyosung July 2 SQR at Ex. S-11, CJA, Doc. 60; PJA, Doc. 60. In light of the Court's previous analysis of the overlapping sales issue, the documentation contained in the record, and Commerce's determination that Hyosung provided adequate supporting documentation on the final price and expenses of this second selected transaction, the Court finds that Commerce's decision to accept the price and expense data for this transaction is based on substantial evidence.

Responding to ABB's argument that Commerce should have capped Hyosung's freight revenue at the amount of the actual expense, Hyosung argues that while Commerce may have a policy of capping freight revenue, it would not apply in the case at bar because, unlike in *Certain Pasta from Italy,* cited by Plaintiff, Commerce did not request and Hyosung did not attempt to break out any freight or other charges included in its gross unit price. Conf. Hyosung's Resp. in Opp'n to Pl. ABB Inc.'s R. 56.2 Mot. for J. on the Agency R. ("Hyosung Resp.") at 26, ECF No. 66; *Certain Pasta from Italy,*78 Fed. Reg. 48,147. Further, Hyosung argues that capping would be "inappropriate and distortive" in this case because it "established its prices through negotiations with its customers based on the particular terms of sale." Hyosung Resp. at 27.[14] Hyosung contends that capping was not warranted because the terms of sale included delivery and

[13] Parties filed multiple excerpts from the Hyosung July 2 SQR in the CJA and PJA (as well as in separate docket filings as ECF Nos. 82–22 – 82–24, 82–26 – 82–28). Accordingly, where the Court short cites to the Hyosung July 2 SQR it will continue to include the relevant ECF or CJA/PJA numbers.

[14] The sale in question was finalized as "[[ ]]." Hyosung July 3 SQR, Ex. S-11 at JA 400460, CJA, Doc. 60; PJA, Doc. 60.

freight was not separately contracted for with the customer. *See id*. at 18–21, 25–26. The actual freight expenses were not stated in the purchase order because the amount could not be determined until delivery occurred. Hyosung Resp. at 18–19; *see also* Hyosung July 2 SQR, Ex. S-11 at JA 400460, CJA, Doc. 60; PJA, Doc. 60. Hyosung submitted its final invoice to Commerce documenting the expense at the time of delivery. Hyosung Resp. at 20; *see also* Hyosung July 2 SQR, Ex. S-11 at JA 400465–466, CJA, Doc. 60; PJA, Doc. 60.

Having reviewed the record compiled by Commerce, the Court finds that Commerce's acceptance of the reported gross unit price and its use of the freight expense was based on substantial evidence. Commerce did not require Hyosung to report separately the freight revenue. Based on the terms of sale of this second selected transaction, Commerce reasonably treated freight revenue as included in the gross unit price and did not cap it. For the reasons discussed, the Court finds that Commerce's treatment of Hyosung's freight expense (and revenue) is based on substantial evidence.

b. Hyosung's Expense Estimates in its Commission Agreements

ABB claims that Hyosung's net U.S. prices reported to Commerce differed from the net U.S. prices Hyosung used to calculate commissions, and that the difference reflected profit on certain services that were not part of the LPT unit and should not have been included in the unit prices reported to Commerce. Pl.'s MJAR at 25. To illustrate its claim, ABB points to a third selected transaction[15] and argues that "revenues and expenses from services have not been netted out of gross unit price at the same level as they have been included in Hyosung's build-up of gross unit price reported to Commerce." *Id*. at 25–26. Noting that Commerce focused on the wrong issue when it attributed the discrepancy to changes from estimated to actual expenses, ABB maintains that the data on the commission agreements show that the expenses used by Hyosung to build up "reported gross unit prices are inconsistent with the lower expenses reported as deductions to gross unit price." *Id.* at 26. Defendant counters that ABB's claims are unsubstantiated because ABB relies on secondary documents to make assumptions about gross unit price, whereas Hyosung has provided corroborating documents to substantiate its U.S. price and expense data with respect to this third selected transaction, specifically, and commission expenses, generally.[16] Def's Resp. at 19–20; *see also I&D Mem.* at 18–21.

[15] This third selected transaction is identified in Hyosung's sales database as SEQU [[ ]]. *See* Pl.'s MJAR at 25.

[16] Defendant also argues that ABB's claim is waived for failure to exhaust administrative remedies. Def.'s Resp. at 19. ABB replies that its claim regarding the third selected

This issue was broadly raised during the administrative proceeding and Commerce had an opportunity to review the expenses reported for this third selected transaction. *See I&D Mem.* at 18–21; *see also Proprietary I&D Mem. – Hyosung* at 3–4; Hyosung's January 13, 2014, Section C Questionnaire Responses ("Hyosung Jan. 13 CQR") at Ex. C-19, CJA, Doc. 11; PJA, Doc. 11; C.R. 62–74; P.R. 76–78 (sales commission calculation). It is clear from the Issues and Decision Memo and the documentation Hyosung provided that Hyosung properly supported each of the expenses used by Commerce in its margin calculation, including commissions and ocean freight. *See I&D Mem.* at 19–21; *see also* Hyosung Apr. 10 SQR at Exs. S-36AS-36C (purchase orders, invoices and sales representation agreements). Hyosung provided Commerce with "a copy of the commission statement sent to its U.S. sales agent for this sale, a worksheet demonstrating how the commission documentation reconciles to the U.S. sales listing, and documentation demonstrating that Hyosung paid the commission amount listed on the commission statement and reported in Hyosung's U.S. sales database." *See I&D Mem.* at 19; *see also* Hyosung Apr. 10 SQR at Exs. S36A-S-36C. In addition, Hyosung provided sample documentation, including purchase/sales orders, contract amendments, invoices, payments and commission agreements as needed, to support its commission calculations. *I&D Mem.* at 19. In contrast, ABB points to a secondary document, a sample commission calculation, to argue that Hyosung is reporting different expense data for the same sale. Pl.'s MJAR at 25; *see also* Hyosung Jan. 13 CQR at Ex. C-19; Hyosung's First Supplemental Section A Questionnaire Resp. ("Hyosung's Feb. 24 SAQR") at Ex. SA-26, CJA, Doc. 13; PJA, Doc. 13; C.R. 199–206; P.R. 107. That Hyosung may have used expense figures for the purpose of negotiating its commissions that were different from those reported to Commerce is inconsequential when Commerce has confirmed Hyosung's reported expenses with documents directly related to the expense. *See* Hyosung Jan. 13 CQR at Ex. C-19; *see also* Hyosung Apr. 10 SQR at Ex. S-36. Hyosung is under no obligation to negotiate commissions with its commission agents based upon the actual expenses calculated in the manner required by Commerce for antidumping reporting purposes. Any differences between the figures noted on the sample commission document and the actual expenses reported to Commerce do not call into question the accuracy of the expenses reported to Commerce and supported by the record. Consequently, the Court finds Commerce's determination with regard to this issue to be supported by substantial evidence.

transaction is simply a different formulation of the same question: whether expenses deducted from gross unit price were the same as those used in the build-up of gross unit price. Pl.'s Reply at 9 n.1. The Court finds that ABB timely raised the issue in the administrative proceeding as demonstrated by Defendant's citations to the Issues and Decision Memo in support of its own position that Commerce's finding on this matter is supported by the record. *See* Def.'s Resp. at 19–20; *see also I&D Mem.* at 18–21.

c. Comparisons of Hyosung's Data Reported to Commerce and to Another Agency

ABB alleges that Hyosung's U.S. gross unit prices were inflated as reported to Commerce because there is a difference between the figures reported to Commerce and the figures reported to another agency.[17] ABB attempts to combine this difference with the changes from estimates to actual prices and expenses for several sales to call into question the reliability of Hyosung's gross unit prices as reported.[18] *See generally* Pl.'s MJAR at 27–30. Defendant notes that ABB's argument rests on a mistaken premise that the two sets of data should match, when in fact different statutory and regulatory schemes apply at each agency that use different base values and adjustments. Def.'s Resp. at 21; *see also I&D Mem.* at 8–10; *Proprietary I&D Mem. – Hyosung* at 1–7. Commerce found that ABB was effectively asking it to determine whether the data reported to the other agency was accurate and that Commerce is "not in a position to make such a determination." *Proprietary I&D Mem. – Hyosung* at 3. Commerce reviewed supporting documentation for the data it received and concluded that Hyosung had substantiated the data to Commerce's satisfaction. *See* Def.'s Resp. at 22; *I&D Mem.*at 21–22 (noting that Commerce relied on "supporting documentation directly related to the expense itself (*e.g.* invoices, payment documentation) to verify a respondent's reporting of actual expense data"); *Proprietary I&D Mem. – Hyosung* at 4–6.

The Court has already addressed and rejected ABB's broader arguments relating to the differences between the estimated values and actual values reported for overlapping sales. With respect to the differences with data reported to another agency, Commerce reviewed substantiating documentation and concluded that Hyosung had accurately reported and supported its data to Commerce. *See Proprietary I&D Mem. – Hyosung* at 6 n.27 (citing Hyosung Jan. 13 CQR at Ex. C-13). In addition to rejecting ABB's general argument that the ocean freight amounts should match, Commerce requested and reviewed data for certain of the identified transactions,[19] including the third selected transaction for which Hyosung provided detailed documentation supporting its reported expenses, such as ocean freight

[17] The agency in question is [[ ]]. Pl.'s MJAR at 27–30.

[18] Commerce examined this issue with regard to SEQU [[ ]], *Proprietary I&D Mem. – Hyosung* at 4–6, and ABB specifically calls out SEQU [[ ]] as illustrative examples, Pl.'s MJAR at 29–30. Here ABB alleges that Hyosung reported [[ ]] ocean freight in the U.S sales listing to Commerce than it did to [[ ]]. *See*Pl.'s MJAR at 29–30.

[19] These include SEQU [[ ]]. Commerce identifies these specific sales as examples where Hyosung provided source documentation demonstrating the accuracy of its reporting of ocean freight expenses [[ ]]. *See Proprietary I&D Mem. – Hyosung* at 5–6.

expenses.[20] *See* Hyosung Jan. 13 CQR at Ex. C-13; Hyosung Apr. 10 SQR at Ex. S-29; *see also Proprietary I&D Mem. – Hyosung* at 5–6. Commerce thus reviewed, among other documents, purchase orders, pricing proposals, invoices for international transport and oil, and entry summaries, and these documents are part of the record. *See* Hyosung Apr. 10 SQR at Ex. S-29. Given that Commerce reviewed and the record contains directly relevant source documentation substantiating Hyosung's reported expenses, the Court finds that Commerce's determination that Hyosung's data is reliable is supported by substantial evidence on the record. Commerce does not have an additional obligation to confirm the veracity of information reported to another agency or to explain away differences in reporting between Commerce and another agency when it has otherwise taken adequate steps to address its record information.

iii. Hyosung's Installation Expenses

ABB argues that Hyosung's final dumping margin is inaccurate because Hyosung reported its installation expenses improperly when it categorized them as direct selling expenses in the home market and reported them as indirect selling expenses in the U.S. market. According to ABB, this difference in treatment had the effect of understating the margin of dumping. *See generally* Pl.'s MJAR at 34–35. ABB raised this argument during the administrative proceeding and Commerce determined that Hyosung had documented all of its installation expenses accurately. *I&D Mem.* at 22–24. Further, Commerce allocated Hyosung's installation expenses as reported because, in each case, Hyosung reported the installation expenses in accordance with the way they were maintained in their normal course of business. *Id.* at 23–24; Analysis of Data Submitted by Hyosung Corp. in the Prelim. Results of the 2012–2013 Admin. Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea ("*Prelim. Mem. – Hyosung*") at 8–9, ECF No. 82–3; C.R. 423; P.R. 209. Moreover, in the *Preliminary Analysis Memo* for Hyosung, Commerce put Hyosung on notice that, going forward, Hyosung would need to track and report its installation expenses consistently across the U.S. and home markets. *See I&D Mem.* at 24; *Prelim. Mem. – Hyosung* at 8.[21]

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[20] Commerce reviewed corroborating documentation relating to SEQU [[ ]] and concluded that Hyosung had "accurately reported and substantiated its reported ocean freight amounts" and that specifically for SEQU [[ ]] "Hyosung provided complete source documentation supporting its reported ocean freight expenses for that sale." *Proprietary I&D Mem. – Hyosung* at 6 & n. 27 (citing Hyosung Jan. 13 SQR at Ex. C-13) (emphasis omitted).

[21] According to Commerce,

> while we are accepting Hyosung's reporting of certain expenses for purposes of these preliminary results, going forward, the Department expects Hyosung to be consistent with regard to its reporting of installation and warranty expenses between the home and U.S. markets. Additionally, the Department expects Hyosung to report expenses related

ABB relies on 19 C.F.R. § 351.410(c) to argue that installation expenses are necessarily direct because they bear a direct relationship to particular sales and that, Hyosung's accounting practices notwithstanding, Commerce's decision to accept Hyosung's expenses as reported is not supported by law. *See* Pl.'s Reply at 10–12 (citing 19 C.F.R. § 351.410(c)). The regulation referenced by ABB simply provides the definition of a "direct selling expense."[22] The regulation does not speak to the treatment of direct selling expenses. Moreover, the statute directs Commerce to calculate costs on the basis of the records of the producer or exporter of the merchandise. *See* 19 U.S.C. § 1677b(f)(1).[23]

The Court finds that Commerce's decision to allocate Hyosung's installation expenses as reported is supported by substantial evidence and in accordance with the law. Commerce examined ABB's claim in detail during the administrative proceeding and Hyosung responded to multiple questions regarding the tracking of its installation expenses. *See e.g.* Hyosung Jan. 13 CQR; *see also* Hyosung Apr. 10 SQR. In its questionnaire responses, Hyosung explained that the different reporting of expenses was attributable to Hyosung's business accounting practices. Hyosung Korea tracked all installation expenses by project; however, Hyosung's U.S. affiliate, HICO, did not.[24] As a result, some U.S. installation expenses were reported as indirect expenses. *See I&D Mem.* at 23–24; *see also Prelim. Mem. – Hyosung* at 8. Hyosung supported its explanation with corroborating

to the movement of existing LPTs consistently, and on a transaction-specific basis, in both the home and U.S. markets going forward.

Prelim. Mem. – Hyosung at 8.

[22] Pursuant to 19 C.F.R. § 351.410(c), "Direct selling expenses' are expenses, such as commissions, credit expenses, guarantees, and warranties, that result from, and bear a direct relationship to, the particular sale in question."

[23] Pursuant to 19 U.S.C. § 1677b(f)(1)(A), "costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country . . . and reasonably reflect the costs associated with the production and sale of the merchandise."

[24] According to Hyosung,

based on agreements with the U.S. customer, HICO America is sometimes responsible for the installation of LPTs at the U.S. customer's designated location. [[ ]] HICO America [[ ]]. Hyosung reports the installation costs it incurred on a transaction-specific basis.

Hyosung Jan. 13 CQR at C-38, JA 100713. However, in some cases,

At the customer's request, HICO America will dispatch [[ ]] Although HICO America incurs costs for the salary and travel expenses of the [[ ]] of the installation process, HICO America does not track these expenses by project number in its accounting records.

See Hyosung Apr. 10 SQR at 41. Consequently, these U.S. installation expenses were reported as indirect selling expenses.

documents. *See generally* Hyosung Jan. 13 CQR. Commerce determined that Hyosung had appropriately substantiated all its installation expenses[25] and this determination is supported by substantial evidence on the record. *See I&D Mem.* at 22–24; *Prelim. Mem. - Hyosung* at 8–9*; see also Proprietary I&D Mem. – Hyosung* at 6–7.

Commerce's decision to accept Hyosung's installation expenses as reported also is in accordance with the law. While the regulations define direct expenses as those which bear a direct relationship to a particular sale, the statute also directs Commerce to calculate costs on the basis of the records of the producer or exporter of the merchandise. *See* 19 U.S.C. § 1677b(f)(1). Commerce reasonably exercised its discretion to accept Hyosung's installation expenses as reported and Hyosung's explanation for the accounting inconsistency for the purpose of this first administrative review, while Commerce also put Hyosung on notice that it will require consistent reporting of these expenses in future reviews.[26] *I&D Mem.* at 23–24; *Prelim. Mem. – Hyosung* at 8–9.

B. Commerce's Decision to not Utilize Facts Otherwise Available with respect to Hyosung

ABB argues that Commerce should have utilized facts available to fill gaps or reconcile differences in Hyosung's record data. *See* Pl.'s MJAR at 33–36. Section 1677e of Title 19 provides that Commerce may use "facts otherwise available" in reaching the applicable determination if necessary information is not on the record or an interested party withholds information that has been requested, fails to provide such information in a timely manner, significantly impedes the proceeding, or provides information that cannot be verified. 19 U.S.C. § 1677e(a); *see also* 19 C.F.R. § 351.308.

ABB argues that Hyosung's data is unreliable and that Commerce should have applied facts otherwise available to arrive at the most accurate dumping margin. *See* Pl.'s MJAR at 33–36. However, as discussed above, Commerce reviewed ABB's claims during the administrative proceeding, issued multiple questionnaires to Hyosung regarding alleged discrepancies, and ultimately concluded that Hyosung's reported data was accurate. Commerce determined that Hyosung credibly explained and documented its reported data, that it was fully cooperative, and responded to each of Commerce's requests

[25] Commerce also rejected ABB's reliance on a comparison of the reported installation expenses with the estimates used to negotiate Hyosung's commission payments. As discussed above, Commerce reasonably relied on the actual expenses as reported and did not require a reconciliation with estimated expenses used to negotiate commission agreements. *I&D Mem.* at 23.

[26] Commerce found that Hyosung accurately reported and substantiated its reported installation expenses through "source documentation demonstrating the accuracy of its reporting of installation expenses to the Department." *I&D Mem.*at 23 & n.105 (citing Hyosung Jan. 13 CQR at Ex. C-24; Hyosung Apr. 10 SQR at S-29).

for additional information. *See I&D Mem.* at 17–18. As such, no "necessary" information was missing from the record. Thus, Commerce concluded that neither facts available nor AFA was warranted. *Id.* Having reviewed ABB's claims and having found no reason to disturb Commerce's determinations with regard to any of the specific arguments, the Court sustains Commerce's determination on the application of facts available or AFA. ABB offers no additional support for this claim and instead is asking the Court to reweigh the evidence. The alleged discrepancies ABB identified in the record have been reviewed by the Court and the Court has found that each of Commerce's determinations was based on substantial evidence in the record and in accordance with the law. The Court, therefore, finds that Commerce's decision not to use facts available or AFA is based on substantial evidence and in accordance with law.

II. Hyundai's Final Dumping Margin/Hyundai's Reported Prices and Selling Expenses

ABB argues that Hyundai's reported data on prices and selling expenses is unreliable and that Commerce has a duty to calculate accurate margins and protect the integrity of its own proceeding.[27] *See generally* Pl.'s MJAR at 36–47. As such, ABB asserts that Commerce should have used AFA. *Id*. at 39. Further, ABB claims that discrepancies in expenses reported by Hyundai for two selected transactions[28] resulted in an improperly inflated gross unit price. *Id*. at 45. ABB also highlights discrepancies in the sequencing of certain documents that Hyundai provided to a separate agency[29] (and placed on Commerce's record in order to substantiate its own reporting) to further argue that Hyundai's data, as reported, is unreliable. Pl.'s MJAR at 43–47. Defendant argues that Hyundai adequately explained the alleged differences between the data that it reported to Commerce and to another agency, and that Commerce was able to independently verify Hyundai's data through its own questionnaires. *See generally* Def.'s Resp. at 27–32. Defendant asserts that, for these reasons, AFA was not warranted. *Id.*at 31–32. Defendant also notes that ABB's claims regarding the markup in gross unit price for two selected transactions were waived for failure to exhaust. *Id*. at 30. Finally, Defendant argues that Commerce reasonably determined that discrepancies in sequencing concerning a subset of Hyundai's sales were insufficient to "outweigh the remaining record evidence

[27] In addition to making an overarching argument, ABB identifies two selected transactions to illustrate its claim. These are SEQU [[ ]] and [[ ]] respectively. *See, e.g.,* Pl.'s MJAR at 37.

[28] *See* supra note 27.

[29] The agency in question is [[ ]]. ABB relies on a third selected transaction, SEQU [[ ]], as an illustration, but notes that similar sequencing issues exist for SEQU [[ ]]. Pl.'s MJAR at 46.

indicating that Hyundai's reported data are reliable." *Id.* at 31. For the reasons discussed below, the Court sustains Commerce's findings on the issue of whether AFA was warranted as a result of alleged discrepancies in data between Commerce and another agency. The Court also finds that ABB's claims regarding an alleged improper markup in gross unit price were not exhausted below. Finally, the Court remands the issue raised by ABB regarding the sequencing of certain documents.

A. Differences in Data Reported to Commerce and Another Agency

ABB argues that there were differences between the data Hyundai reported to Commerce and another agency which should have led Commerce to deem the data generally unreliable and Commerce should instead have used facts available or AFA to calculate Hyundai's dumping margin. *See generally* Pl.'s MJAR at 36–47. ABB also alleges that a series of representations Hyundai made to the other agency should have spurred Commerce to find Hyundai's data unreliable[30] and that doing so would have satisfied Commerce's responsibility to calculate accurate dumping margins and to protect the integrity of its own proceedings. *Id.* at 45–47. Defendant contends that Hyundai provided full explanations for the differences between expenses reported to the other agency and Commerce and that it is not Commerce's obligation to evaluate the accuracy of Hyundai's submissions to another agency. Def.'s Resp. at 27.

The Court is mindful that while Commerce has a responsibility to ensure the integrity of its own proceedings and to ensure that the data it uses in its margin calculations is accurate and supported by the record, this obligation does not extend to ensuring the accuracy of data or information that a respondent may report to another agency. It is clear from the record that, particularly on the issue of differences between data reported to Commerce and to the other agency, Hyundai fully participated in the review by responding to numerous questionnaires and supplemental questionnaires and by providing supporting documentation. *See Proprietary I&D Mem. – Hyundai*at 5, 17.[31] On the basis of Hyundai's responses, Commerce concluded that Hyundai's data, as it was reported to Commerce, was reliable, and that Hyundai's explanations for any alleged inconsistency were credible and sufficient. *Id.*at 5–6. Further, Commerce noted that it was not in a position to draw conclusions on the reliability of data reported to it from representations made to another agency when the data reported

[30] ABB argues that Hyundai [[
]] Pl.'s MJAR at 38.

[31] Hyundai responded to over 11 questionnaires and supplemental questionnaires. *Proprietary I&D Mem. – Hyundai*at 17.

to Commerce was appropriately substantiated. *Id*. Finally, Commerce stated that it was not in a position to determine whether representations made to the other agency were accurate as that was a matter properly within the purview of the other agency. *Id.* It is not the Court's role to reweigh evidence already considered by the agency and there is substantial evidence supporting Commerce's determination to rely on the information presented to it by Hyundai. Therefore, the Court finds no reason to upset the agency's finding on this issue. ABB does not offer any further evidence supporting its claim that Hyundai's data in this regard is unreliable.[32] Thus, the Court is satisfied that Commerce's conclusion that Hyundai sufficiently substantiated its reporting to the Department is based on substantial evidence on the record.

On the limited question of whether Commerce should have used AFA due to differences in reporting to Commerce versus another agency, the Court is not persuaded by ABB's argument. This court has previously found that the use of facts available or AFA is warranted when an interested party "failed to accurately respond" to Commerce's questions and subsequently "fail[ed] to credibly explain the inconsistencies" identified by it in the course of the administrative

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[32] To illustrate its overarching argument, ABB points to two selected transactions and argues that, for these transactions, Hyundai reported higher [[ ]] than to Commerce. Pl.'s MJAR at 44. In its brief to this Court, ABB argues that for one selected transaction, SEQU [[ ]], Hyundai gave the other agency a commercial invoice for [[ ]] than the amount it reported to Commerce. *Id*. at 44. Defendant-Intervenor Hyundai explains to the Court that this difference is attributable to the fact that Commerce "required Hyundai to report the amount of the expense that it incurred from the third-party vendors" and not the amount that HHI charged to Hyundai. Conf. Hyundai Heavy Industries Co., Ltd. and Hyundai Corp. USA's Resp. to Pl.'s Mem. in Supp. of its R. 56.2 Mot. For J. on the Agency R. ("Hyundai Resp.") at 12, ECF 62. Further, Hyundai claims that the alleged differences were resolved by [[ ]] and that ABB does not compare the actual expense documentation submitted to [[ ]] in Hyundai's later representations (which are part of the record for this administrative review) in making this allegation anew. *Id.* ABB makes a similar allegation with respect to a second selected transaction, SEQU [[ ]], that Hyundai reported [[ ]] import-related charges for [[ ]] to [[ ]] than to Commerce, but ABB does not further develop this argument before the Court and neither Defendant nor Defendant-Intervenor Hyundai provide a detailed response. *See* Pl.'s MJAR at 43–44; Def.'s Resp. at 27–30; *see also* Hyundai Resp. at 12 (noting, as with SEQU [[ ]], that ABB compares third-party invoices rather than direct expense documentation Hyundai provided to Commerce and that the alleged differences were resolved by the prior disclosures). The Court again looks to its standard of review for Commerce final determinations. Here, Plaintiff's allegations continue to rest on differences that are rooted in Hyundai's reporting to another agency, that have been addressed by Commerce in the Final Results and by this Court, and that do not rise above the level of allegations lacking substantiating documentation. ABB does not offer any further evidence to the Court supporting its claim that Hyundai's data in this regard is unreliable and does not provide an argument for why an invoice between Hyundai and HHI (two affiliated parties) should be given more weight in contrast to the third party invoice that represents the actual [[ ]] expense paid by Hyundai to the [[ ]]. Thus, the Court is satisfied that Commerce's conclusion that Hyundai sufficiently substantiated its reporting to the Department is based on substantial evidence on the record.

review, leading Commerce to "reasonably infer" that the party "purposefully withheld [ ] information to avoid a higher dumping margin." *Shanghai Taoen Int'l Trading Co. v. United States*, 29 CIT 189, 195, 360 F. Supp 2d 1339, 1344–45 (CIT 2005). Given that Hyundai responded to multiple questionnaires and supplemental questionnaires, and supported its responses with source documentation, Commerce concluded that it cooperated with the review to the best of its ability. *Proprietary I&D Mem. – Hyundai* at 5, 17. While ABB is dissatisfied with Hyundai's explanation for the alleged differences in reporting to Commerce and the other agency, it offers the Court nothing further than the argument it already made to Commerce and which Commerce already considered. There is nothing in the record that supports ABB's allegation that Hyundai failed to accurately respond or credibly explain inconsistencies, or purposely withheld information to avoid a higher dumping margin. On the contrary, to the extent that there may have been issues with Hyundai's reporting to the other agency, Hyundai placed those and related documents on the record for Commerce to review. *See*Hyundai Resp. at 12. On this basis, Commerce concluded that Hyundai's explanation for the alleged differences was credible and that, in any event, Hyundai had sufficiently substantiated its reporting to Commerce. *See Proprietary I&D Mem. – Hyundai* at 5–6, 17. The Court finds no reason to disturb Commerce's finding on this issue. In light of Commerce's general finding that Hyundai's data, as reported, is accurate, the fact that Hyundai made distinct representations to another agency, by itself, is not sufficient to call into question Hyundai's data or to warrant an application of facts available or AFA.

As to Plaintiff's claim that discrepancies in expenses reported to Commerce regarding the two selected transactions resulted in an improperly inflated gross unit price, the Court considers whether these claims were exhausted below. "[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). Exhaustion of administrative remedies is a doctrine that holds "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Consol. Bearings Co. v. United States*, 348 F.3d 997,1003 (Fed. Cir. 2003) (internal quotation marks and citation omitted). Commerce regulations require in order to preserve claims for appeal that parties raise all arguments before it in their case briefs. *See* 19 CFR § 351.309.[33] This has been confirmed by

[33] *See* 19 C.F.R. § 351.309(c)(2) ("The case brief must present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination or final results, including any arguments presented before the date of publication of the preliminary determination or preliminary results."); *see also* 19 C.F.R. § 351.309(d)(2) ("The rebuttal brief may respond only to arguments raised in case briefs and should identify the arguments to which it is responding.")

the Federal Circuit. *See Qingdao Sea-Line Trading Co. Ltd. v. U.S.*, 766 F.3d 1378, 1388 (Fed. Cir. 2014) (Commerce regulations require presentation of all issues and arguments in a party's administrative case brief)*; Dorbest Ltd v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010) (insufficient for party to have raised an issue in a footnote in the rebuttal brief or during the ministerial comment period when the issue was not raised in the party's case brief). Issues not raised before the agency in case and rebuttal briefs are waived for failure to exhaust and cannot be raised on appeal before the CIT.[34] 28 U.S.C. § 2637(d). There are exceptions to the requirement of exhaustion, to be applied at the court's discretion, but none of the exceptions apply here.[35]

ABB argues that its claim that overstated freight costs for two selected transactions[36] were included in gross unit prices as reported to Commerce was appropriately raised during the administrative proceeding. Pl.'s Reply at 15. In its Reply, ABB cites to its case brief as proof that it had raised this issue during the administrative proceeding; however a close review of ABB's own citation shows that ABB only made a generalized claim regarding Hyundai's allegedly inconsistent reporting to Commerce and to another agency.[37] *See* Pl.'s Reply at 15–16; Pet'rs Case Br. Regarding Hyundai ("ABB Case Br.") at 12–13, ECF No. 78–3; P.R. 245. ABB's case brief does not make the argument that for the selected transactions Hyundai also reported improperly marked up expenses that were passed on in the gross unit price reported to Commerce. The Federal Circuit has confirmed that in order to exhaust remedies, parties must raise all issues and arguments in briefing before the agency. *See Dorbest,* 604 F.3d at 1375; *Qingdao Sea-Line Trading Co. Ltd.*, 766 F.3d at 1388. Arguing that there were discrepancies in data reported to two different agencies related to two sales observations, particularly when there is an independent rationale for those discrepancies, is not the same as arguing

[34] Parties are able to raise ministerial errors with the Department if such errors appear in the Final Results. *See* 19 C.F.R. 351.224(e).

[35] There is no exhaustive list of exceptions. Previously enumerated exceptions include futility, an intervening court decision such that the new interpretation would impact the agency's actions, pure question of law, or when plaintiff had no reason to believe the agency would not follow established precedent. *See Luoyang Bearing Factory v. United States,*26 CIT 1156, 1186, n.26, 240 F. Supp. 2d 1268, 1297 n.26 (2002) (collecting cases). The Court has also found exceptions to exhaustion when a private party is denied access to critical information at a time when its case brief is due or when requiring exhaustion is burdensome such that it would result in "undue prejudice to subsequent assertion of a court action." *See Corus Staal BV v. United States,* 502 F.3d 1370, 1381 (Fed. Cir. 2007) (citation omitted).

[36] SEQU [[ ]] and [[ ]].

[37] ABB argues in its case brief that "[f]or SEQU [[ ]] for example, the [[

]] Any claim that [[
]] does not stand up to scrutiny" and further that "[[
]]" ABB Case Br. at 12–13.

that improperly marked up expenses were included in the calculation of gross unit price. The Court, therefore, is persuaded that ABB failed to exhaust this claim during the administrative proceeding because merely bringing up a general issue does not serve to "exhaust[] all specific issues under that general umbrella." *Trust Chem Co. Ltd. v. United States*, 35 CIT __,__ 791 F. Supp. 2d 1257, 1268 n. 27 (2011) (citing *Gerber Food (Yunnan) Co. v. United States,* 33 CIT 186, 195, 601 F. Supp. 2d 1370, 1379 (2009)). Further, the Court finds that a discretionary exception to exhaustion is not warranted in this case.

B. Sequencing

ABB argues that there were other inconsistencies in Hyundai's reporting, specifically, the sequencing of documents provided by Hyundai to another agency as part of the representations Hyundai made to the other agency related to a third selected transaction.[38] ABB alleges that for the third selected transaction the HHI/Hyundai sales contract is dated after the date of the commercial invoice and the date of entry to the United States.[39] Pl.'s MJAR at 46. ABB further notes that the same/similar document sequencing problem also applies to certain other U.S. observations.[40] *Id*. Defendant acknowledges this issue was raised during the proceeding but avers that Commerce made a reasonable determination that ABB's alleged discrepancies "concerning a subset of Hyundai's U.S. sales did not outweigh the remaining record of evidence indicating that Hyundai's reported data are reliable." Def.'s Resp. at 31.

The Court cannot agree that Commerce's determination was based on substantial evidence. In the Proprietary Issues and Decision Memo for Hyundai, Commerce acknowledged that Hyundai did not address the sequencing of documents, but concluded that this was an issue that normally would have been resolved through supplemental questionnaires. *Proprietary I&D Mem. – Hyundai* at 12. Such supplemental questionnaires, however, were never sent and, therefore, Hyundai never explained these discrepancies.[41] *Id*. Similarly, with respect to the third selected transaction, Commerce noted that Hyundai did not address the discrepancy but also acknowledged that Com-

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[38] The third selected transaction for Hyundai is SEQU [[ ]]. Pl.'s MJAR at 40.

[39] ABB alleges that documents provided by Hyundai to "[[

]]" Pl.'s MJAR at 46.

[40] Specifically, SEQU [[ ]]. Pl.'s MJAR at 46.

[41] Commerce noted that "Hyundai failed to answer Petitioner's concerns with respect to the [[ ]]" but that "this is an issue that would normally be addressed in supplemental questionnaires, and for the purposes of the final results, the Department is unable [to] question the [[ ]]" *Proprietary I&D Mem. – Hyundai* at 12.

merce did not ask Hyundai to provide further information, even though ABB had raised similar concerns for additional sales observations.[42] *Id.* at 15. While Defendant argues that Commerce made a reasonable finding that Hyundai's reported data is reliable regardless of the discrepancies in sequencing, Defendant's supporting citations point to a separate finding that AFA is not warranted.[43] *See* Def.'s Resp. at 31. Thus, even this statement is unsupported by the record. Neither Commerce nor Defendant-Intervenor offered any further explanation in briefing to this Court or during oral argument.

In light of Commerce's apparent recognition that questions remain as to Hyundai's reported data for the above sales, and no clear statement or explanation from Commerce whether Hyundai's reported data is sufficient and reliable regardless of this discrepancy, the Court cannot find that Commerce's decision to rely on these documents without further query or explanation is supported by substantial evidence. Therefore, the Court remands the issue of discrepancies in sequencing for the third selected transaction and the related U.S. observations,[44] so that Commerce may further investigate and/or explain its conclusion.

C. Commerce's Decision not to Apply Facts Available or AFA

ABB argues that, based on the alleged discrepancies noted above, Hyundai's data was sufficiently unreliable to "necessitat[e] application of adverse facts available." Pl.'s MJAR at 39. Defendant argues that Commerce's decision not to apply AFA was a proper exercise of discretion and not warranted under law. Def.'s Resp. at 31–32. In light of the Court's conclusion on the sequencing of documents (above), the Court does not reach this issue at this time.

III. Home Market Commission Offset for Hyosung and Hyundai

ABB argues that Commerce erred in granting Hyundai and Hyosung a home market commission offset related to commissions on sales made in the United States. According to ABB, Hyundai and

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[42] Commerce noted that Hyundai does not address the [[

]]," but concluded that "the Department did not ask about this discrepancy in a supplemental questionnaire" even though "Petitioner raised concerns of a similar nature with respect to [[ ]] other observations." *Proprietary I&D Mem. – Hyundai* at 15.

[43] In sections addressing ABB's arguments that Commerce should apply AFA, Commerce noted that the criteria for an application of AFA had not been met because Hyundai had cooperated to the best of its ability and provided satisfactory explanations to Commerce's questions, including by responding to [11] questionnaires. *See I&D Mem.* at 42–43, 53–54; *Proprietary I&D Mem. – Hyundai*at 15–17.

[44] SEQU [[ ]].

Hyosung incurred these commissions "inside" the United States. Because they were incurred inside the United States, ABB argues these commissions should be deducted from constructed export price ("CEP") under the statute and Hyundai and Hyosung should not receive a commission offset to normal value ("NV"). Pl.'s MJAR at 48. Defendant argues that ABB has waived any challenge to the commission offsets because it failed to exhaust its administrative remedies before Commerce.[45] Defendant asserts that Commerce indicated its intention to grant the commission offsets in the Preliminary Results and ABB did not challenge this decision in its case briefs before the agency. Def.'s Resp. at 33–34 (citing *Prelim. Mem. – Hyosung* at 13). ABB replies that it timely raised the issue because Commerce announced changes to its treatment of U.S. commissions in both the Amended Final Results and the Second Amended Final Results issued following the publication of the Final Results. Pl.'s Reply at 19.

The statute directs Commerce to deduct from the price used to establish CEP "commissions for selling the subject merchandise in the United States," 19 U.S.C. § 1677a(d)(1)(A), and the profit allocated to such commissions, 19 U.S.C. § 1677a(d)(3). Commerce claims that its practice has been to recognize two types of commissions paid on U.S. sales: (i) commissions incurred *inside* the United States, for which Commerce deducts the commission expenses from the price used to establish CEP, and (ii) commissions incurred *outside* the United States, for which Commerce deducts the commission expenses from the price used to establish CEP and offsets these deductions in the home market. *See* Def.'s Resp. at 32–33; *see also* 19 U.S.C. § 1677a(d); 19 U.S.C. § 1677b(7). Commerce may make a "commission offset" in certain cases when a commission is paid in relationship to the U.S. sale, but not the comparison market sales. *See* 19 C.F.R. § 351.410(e).

Defendant argues that Commerce made its "methodological decision to provide a home market commission offset in the *Preliminary Results*." Def.'s Resp. at 32, 34. Defendant claims that Commerce determined that "Hyosung and Hyundai incurred their commissions *outside of the United States* and, therefore, that a commission offset was warranted." Def.'s Resp. at 33 (citing *Prelim. Mem. – Hyundai* at 13) (emphasis added). However, the Preliminary Analysis Memo for Hyundai cited by Defendant does not support the Defendant's assertion. In fact, the memo concludes quite the opposite, stating that "while these [commission and other] expenses were *incurred in the United States*, we note that the sale was made prior to importation."

[45] Hyundai agrees that ABB failed to raise the commission offset issue after the Preliminary Results and that Commerce's granting of the commission offset is not a ministerial error. Hyundai asserts that granting the commission offset was specifically intended and referenced in the Preliminary Analysis Memo for Hyundai. Hyundai Resp. at 14–16; *see also Prelim. Mem. – Hyosung* at 13.

Prelim. Mem. – Hyundai at 10, 13 (emphasis added). Moreover, the cited document is devoid of any reference to a commission offset, whether it was being granted or denied. *Id*. at 13. Instead, the document discusses the calculation of the CEP offset, a distinct adjustment, associating it with the difference in the level of trade and omitting any reference to commissions. *Id*. Therein, Commerce also stated that "we are not including commission, [...] and other related expenses as "CEP 'Other' Expenses." *Id*. at 10.

In the margin calculation program accompanying the Second Amended Final Results, Commerce indicates that the field "CEPOTHER" would normally include "Any other CEP (incurred in the U.S.) commissions [...]," however, Commerce appears to have excluded U.S. commissions from this field, suggesting that Commerce treated them as if they were incurred outside the United States. Margin Calculation Program – Sec. Am. Final – Hyundai (June 2015) at 38, ECF No. 82–6; C.R. 581. Similarly, the U.S. commissions field is set to equal the reported commissions ("USCOMM = COMMU"), with the description for this field indicating that "All commissions on EP sales, and those on CEP sales incurred outside of the U.S. [. . .] Do NOT include commissions on CEP sales incurred in the U.S. here, instead include these in CEPSELL." *Id*. Again, it appears that Commerce treated the commissions as having been incurred outside of the United States. Thus, Commerce's treatment of U.S. commissions in the margin calculation program is inconsistent with its characterization of those commissions in the Second Amended Final Results.

While the purpose of the exhaustion doctrine is to "allow[] the agency to apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review–advancing the twin purposes of protecting administrative agency authority and promoting judicial efficiency," *Carpenter Tech. Corp. v. United States*, 30 CIT 1373, 1374–75, 452 F. Supp. 2d 1344, 1346 (2006) (citing *Woodford v. Ngo*, 548 U.S. 81, 88–90 (2006)), the Court of Appeals for the Federal Circuit has held that the application of exhaustion principles in trade cases is exercised with a measure of discretion by the Court. *See, e.g., Corus Staal*, 502 F.3d at 1381; *Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1356 n.17 (Fed. Cir. 2006); *Consol. Bearings*, 348 F.3d at 1003.

In this case, ABB did not exhaust its administrative remedies. ABB's administrative case and rebuttal briefs do not make arguments about the treatment of commissions or whether a commission offset was granted, and ABB does not provide any citations in its briefing to this Court that would show that ABB made this argument to Commerce before the issuance of the Final Results. Despite Commerce's general policy with respect to the treatment of U.S. commis-

sions incurred inside and outside the United States, the Preliminary Analysis Memo indicates that Commerce was diverging from that policy. *See Prelim. Mem. – Hyundai* at 10, 13. Nevertheless, Commerce did not discuss the implications of this divergence on whether it would provide a commission offset in this case. The Court finds that it is not appropriate to require ABB to have exhausted its administrative remedies in this case when Commerce failed to adequately address its treatment of commission offsets in the preliminary determination. Such notice was necessary in this particular case because Commerce indicated that it was not treating the U.S. commissions in accordance with its normal practice, but it did not explain the extent of its different treatment.

The Court will remand this issue to Commerce for further clarification. Upon remand, Commerce is to explain its treatment of the respondents' U.S. commissions, the record basis for such treatment, whether such U.S. commissions result in the granting of commission offsets, and the legal and factual basis for the granting or denial of the commission offsets.

CONCLUSION

In accordance with the foregoing, it is hereby

ORDERED that Commerce's Final Determination is remanded to Commerce to further address the sequencing of certain of Hyundai's documents in the record, as set forth in Discussion Section II.B above; and it is further

ORDERED that the Court defers ruling on the issue of whether Commerce should have applied facts available or AFA in calculating Hyundai's dumping margin with respect to the discrepancies in the sequencing of Hyundai's documents alleged by ABB during the administrative proceeding; and it is further

ORDERED that Commerce's Final Determination is remanded to Commerce to further explain its treatment of the respondents' U.S. commissions, the record basis for such treatment, whether such U.S. commissions result in the granting of commission offsets, and the legal and factual basis for the granting or denial of the commission offsets, as set forth in Discussion Section III above; and it is further

ORDERED that Commerce shall file its remand results on or before January 5, 2017; and it is further

ORDERED that the agency must file an index of any new administrative record documents on or before January 19, 2017; and it is further

ORDERED that parties may file and serve comments in opposition to the remand determination on or before February 6, 2017; and it is further

ORDERED that defendant and other parties supporting the remand determination may file and serve responsive comments in support of the remand determination on or before March 8, 2017; and it is further

ORDERED that parties must file a joint appendix of any record documents cited in their comments on or before March 15, 2017; and it is further

ORDERED that any comments or responsive comments must not exceed 2500 words.

Dated: October 7, 2016
New York, New York

/*s*/ *Mark A. Barnett*
MARK A. BARNETT, JUDGE

Slip Op. 16–97

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

Before: Claire R. Kelly, Judge
Court No. 15–00315 PUBLIC VERSION

[Granting Plaintiff's motion for judgment on the agency record and entering judgment for Plaintiff.]

Dated: October 11, 2016

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

Tara Kathleen Hogan, Trial Counsel, Commercial Litigation Branch – Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Justin Reinhart Miller*, Senior Trial Counsel, International Trade Field Office, Civil Division, U.S. Department of Justice, of New York, NY, *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and Reginald T. Blades, Assistant Director. Of counsel on the brief was *Paula Smith*, Senior Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection of New York, NY.

Timothy C. Brightbill and *Maureen Elizabeth Thorson*, Wiley Rein, LLP, of Washington DC, argued for defendant-intervenor. With them on the brief was *Usha Neelakantan*.

OPINION

Kelly, Judge:

This action is before the court on Plaintiff's USCIT Rule 56.1 motion for judgment on the agency record challenging United States Customs and Border Protection's ("Customs" or "CBP") determination to require that Plaintiff file its entries as type "03" entries subject to antidumping and countervailing duty ("AD/CVD") orders on crystalline silicon photovoltaic cells, whether or not assembled into modules

from the People's Republic of China ("Orders").[1] *See* Pl.'s Rule 56.1 Mot. J. Agency R., May 11, 2016, ECF No. 102 ("Pl.'s 56.1 Mot."); CBP Notices of Action at 000001–000010, CD 1, CBP AR 000001–000010 (Apr. 20, 2015–May 20, 2015) ("CBP Notices of Action");[2] *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) ("*AD Order*") and *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*"). As a result of CBP's determination, it began collecting cash deposits and suspending liquidation on Plaintiff's entries because it considered Plaintiff's merchandise to fall within the scope of Orders. *See* CBP Notices of Action; *CVD Order*, 77 Fed. Reg. 73,017; *AD Order*, 77 Fed. Reg. 73,018.

Plaintiff began depositing AD/CVD duties in order to enter its merchandise from approximately April 20, 2015 until December 16, 2015, *See* Entry Documents at 000957–001250, CD 38, CBP AR 000957–001250 (June 3, 2015–Nov. 5, 2015) ("Entry Documents"), when the court entered a temporary restraining order ("TRO") restraining CBP from requiring Plaintiff to pay cash deposits on its entries until December 28, 2015.[3] *See* Am. Mem. and TRO, Dec. 16, 2015, ECF No. 36; *Sunpreme Inc. v. United States*, 40 CIT __, __, 145 F. Supp.3d 1271, 1299 (2016).

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[1] CBP's determination was not published in the Federal Register.

[2] On February 12, 2016, Defendant submitted indices to the confidential and public administrative records, which can be found at ECF Nos. 92 and 93, respectively. All further documents from the administrative record may be located in those appendices.

[3] On December 28, 2015, the court extended its initial TRO to January 11, 2016 unless extended by further. *See* Order Extending TRO Confidential Version 2, Dec. 28, 2015, ECF No. 48. On January 8, 2016, the court granted Plaintiff's motion for a preliminary injunction. *See Sunpreme Inc. v. United States*, 40 CIT __, __, 145 F. Supp. 3d 1271, 1299 (2016). The preliminary injunction expired upon the issuance of a preliminary or final scope determination by the U.S. Department of Commerce ("Commerce") "to the effect that entries of solar modules containing bifacial thin film cells made with amorphous silicon from the People's Republic of China that are the subject of this action are included within the scope of" the Orders. *See Sunpreme*, 40 CIT __, __, 145 F. Supp.3d at 1299.

On July 29, 2016, Commerce issued an affirmative final scope determination. *See* Letter from Plaintiff Notifying the Court of Scope Decision at Att., Aug. 5, 2016, ECF No. 109; *see also AD Order*, 77 Fed. Reg. at 73,018, *CVD Order*, 77 Fed. Reg. at 73,017. Since the preliminary injunction expired upon Commerce's issuance of an affirmative scope determination, Commerce is no longer enjoined from collecting cash deposits on Plaintiff's imports. *See Sunpreme*, 40 CIT at __, 145 F. Supp.3d at 1299. As a result of Commerce's affirmative scope ruling, Commerce's regulations provide any suspension of liquidation will continue and that Commerce will instruct CBP "to suspend liquidation and to require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry on or after the date of initiation of the scope inquiry." 19 C.F.R. § 351.225(l)(3) (2015).

Plaintiff commenced this action pursuant to § 2631 of the Customs Court Act of 1980, as amended, 28 U.S.C. § 2631(i) (2012). Compl., Dec. 3, 2015, ECF No. 5. SolarWorld Americas, Inc. ("SolarWorld") moved to intervene, *see* Unopposed Mot. Intervene, Dec. 9, 2015, ECF No. 15, and the court granted that motion pursuant to USCIT Rule 24(b) on December 10, 2015. *See* Mem. and Order, Dec. 10, 2015, ECF No. 21. Plaintiff filed a motion for judgment on the agency record pursuant to USCIT Rule 56.1. Pl.'s 56.1 Mot. Defendant and Defendant-Intervenors filed responses to the Plaintiff's motion. *See* Def.'s Mem. Resp. Pl.'s Mot. J. Agency R. Confidential Version, Aug. 19, 2016, ECF No. 112 ("Def.'s Resp. Br."); Resp. Br. Def.-Intervenor SolarWorld Americas, Inc. Confidential Version, Aug. 19, 2016, ECF No. 113; Resp. Br. Def.-Intervenor SolarWorld Americas, Inc. Revised Confidential Version, Aug. 26, 2016, ECF No. 117 ("SolarWorld Resp. Br."). Briefing concluded on September 16, 2016, when Plaintiff filed its reply brief. *See* Reply Br. of Pl. Sunpreme Inc. Confidential Version, Sept. 16, 2016, ECF No. 123 ("Sunpreme Reply Br."). The court held oral argument on October 7, 2016. *See* Confidential Oral Arg., Oct. 7, 2016, ECF No. 133.

BACKGROUND

Plaintiff is a U.S. company that imports solar modules produced by Jiawei Solarchina (Shenzhen) Co., Ltd. that are composed of solar cells Plaintiff designs, develops, and tests at its facility in California. Compl. ¶1; Def.'s Answer ¶1, Feb. 12, 2016; ECF No. 95 ("Answer"); ACE Inquiry # [[ ]] at 000244, CD 14, CBP AR 000244 (May 13, 2015) ("ACE Inquiry # [[ ]]"); *see also* Sunpreme Letter to CBP re: Sunpreme at 000174–000175, 000181–000201, CD 12, CBP AR 000173–000236 (May 6, 2015). Neither party disputes that the frameless double tempered-glass constructed solar modules imported by Plaintiff are "bifacial solar modules made using its Hybrid Cell Technology." Compl. ¶¶10–11; Answer ¶¶10–11.

On December 7, 2012, the U.S. Department of Commerce ("Commerce") published the Orders. *See CVD Order*, 77 Fed. Reg. at 73,017; *AD Order*, 77 Fed. Reg. at 73,018. The scope language of the AD/CVD orders is identical. It provides:

> The merchandise covered by this order is crystalline silicon photovoltaic cells, and modules, laminates, and panels, consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including, but not limited to, modules, laminates, panels and building integrated materials.
>
> This order covers crystalline silicon photovoltaic cells of thickness equal to or greater than 20 micrometers, having a p/n junction formed by any means, whether or not the cell has

> undergone other processing, including, but not limited to, cleaning, etching, coating, and/or addition of materials (including, but not limited to, metallization and conductor patterns) to collect and forward the electricity that is generated by the cell.
>
> . . .
>
> 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; *AD Order*, 77 Fed. Reg. at 73,018. On December 11, 2012 and December 21, 2012, Commerce issued liquidation instructions, which incorporated the scope language common to the Orders, and instructed CBP to require cash deposits equal to the rates in effect at the time of entry. *See* Message No. 2346303 at 000011–000019, PD 2, CBP AR 000011–000019 (Dec. 11, 2012); Message No. 2356306 at 000020–000033, PD 3, CBP AR 000020–000033 (Dec. 21, 2012) (collectively "Liquidation Instructions").

Neither party contests that, prior to April 20, 2015, Plaintiff was entering its merchandise as entry type "01." *See* CBP Notices of Action at 000001–000010; Request for Information to Sunpreme Inc. at 000036–000037, CD 4, CBP AR 000034–000044 (Jan. 8, 2015) ("Request for Information"); *see also* Pl.'s Mem. Supp. Mot. J. Agency R. Confidential Version 1, 3, May 10, 2016, ECF No. 100 ("Sunpreme Br."); Def.'s Resp. Br. 4. Before April 20, 2015, CBP was also not requiring Plaintiff to pay cash deposits or to enter its merchandise as type "03.". *See* Sunpreme Br. 1, 3; Def.'s Resp. Br. 4.

In early 2015, CBP began to consider whether Plaintiff's entries matched the description of merchandise covered by the Orders and the Liquidation Instructions by requesting supporting documentation.[4] *See* Request for Information at 000034. Plaintiff cooperated with CBP's request.[5] *Id.* at 000035. In March 2015, CBP examined a

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[4] CBP requested that Plaintiff provide [[

]]. Request for Information at 000034.

[5] In response, Plaintiff indicated that [[

]]. Request for Information at 000035. Plaintiff indicated its solar cells are [[ ]]. Id. at 000039. In describing its fabrication process, Plaintiff indicated that "[[

]]." Plaintiff then referenced its patent, which it argued states that '[[

]].'" *Id.*

> Plaintiff further explained that:
> [[
>
>]]

Id.

sample of Plaintiff's modules from one of its shipments by sending that sample to a CBP laboratory for analysis.[6] *See* Laboratory Report No. SF20150252 at 000045, CD 5, CBP AR 000045–000073 (Mar. 26, 2015) ("Laboratory Report No. SF20150252"). CBP's laboratory confirmed the cells contain crystalline silicon. *Id.* On April 17, 2015, the same laboratory issued a supplemental report further confirming the presence of crystalline silicon in the sample.[7] Supplemental Laboratory Report No. SF20150252S at 000076, CD 8, CBP AR 000076–000093 (Apr. 17, 2015) ("Supplemental Laboratory Report No. SF20150252S").[8]

On April 7, 2015, CBP [[

]]. *See* CBP Letter to Sunpreme, CD 6, CBP AR 000074 (Apr. 7, 2015); CBP Letter to Sunpreme, CD 7, CBP AR 000075 (Apr. 8, 2015). Beginning on April 20, 2015, CBP began sending Plaintiff Notices of Action requiring that it file those entries as type "03" entries subject to AD/CVD duties and pay cash deposits in order for its shipments to be released from the port warehouse.[9] *See* CBP Notices of Action at 000001–000010. As a result, the liquidation of Plaintiff's entries became suspended by operation of law.[10] In May

---

[6] On March 26, 2015, CBP's laboratory found that a sample from entry # 32212346070 is a solar panel consisting of "[[

]]."
Laboratory Report No. SF20150252 at 000045, CD 5, AR 000045–000073 (Mar. 26, 2015).

[7] CBP's laboratory specifically found that "[[

]]." Supplemental Laboratory Report No. SF20150252S at 000076, CD 8, CBP AR 000076–000093 (Apr. 17, 2015).

[8] Neither of these two initial CBP laboratory reports indicates CBP [[

]].
See Laboratory Report No. SF20150252 at 000045–000073; Supplemental Laboratory Report No. SF20150252S at 000076–000093.

E-mail communications between CBP's Electronics Center of Excellence and Expertise ("ECEE") and CBP's laboratory, which were annexed to Supplemental Laboratory Report No. SF20150252S, indicated that ECEE [[

]]. Supplemental Laboratory Report No. SF20150252S at 000092–000093. No response to these inquiries was included with the laboratory report filed with the administrative record. *See id.*

[9] One effect of CBP requiring Plaintiff to file its entries as type "03" entries is to require Plaintiff to post cash deposits for its merchandise in order to withdraw the merchandise for consumption or risk exposing itself to penalties. *See* Sections 484 and 592 of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1484, 1592 (2012); *see also* 19 C.F.R. § 144.38(d)–(e) (2015).

[10] Although liability to pay duties accrues upon entry of subject merchandise into "the Customs territory of the United States," *see* 19 C.F.R. § 141.1(a) (2015), because the United States employs a retrospective duty assessment system, the amount of actual liability may not be known for some time after entry occurs. *See Parkdale Int'l v. United States*, 475 F.3d 1375, 1376–77 (Fed. Cir. 2007). Commerce clarifies the implications of retroactivity in its regulations, explaining that under the system:

> final liability for antidumping and countervailing duties is determined after merchandise is imported. Generally, the amount of duties to be assessed is determined in a review of the order covering a discrete period of time. If a review is not requested, duties are

2015, Plaintiff submitted several letters to CBP's Electronics Center for Excellence and Expertise ("ECEE") in Long Beach, California, arguing that its products were not subject to the Orders.[11] *See* Letter from Sunpreme re: Sunpreme, CD 12, CBP AR 000173–000236 (May 6, 2015); Letter from Sunpreme re: Sunpreme Retention Notices, CD 13, CBP AR 000237–000243 (May 12, 2015); Letter from Sunpreme re: Sunpreme Modules – Exclusion from the AD/CVD Orders on *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From China*, CD 15, CBP AR 000245–000434 (May 14, 2015); Letter from Sunpreme re: Sunpreme, CD 16, CBP 000435–000457 (May 19, 2015).

On June 3, 2015, CBP contacted Commerce seeking guidance on whether Plaintiff's products are included within the scope of the Orders. *See* ACE Inquiry # [[ ]], CD 18, CBP AR 000479 (June 3, 2015) ("ACE Inquiry # [[ ]]"). Commerce responded that "a determination as to whether this product is covered by antidumping duty order A-570–979 and countervailing duty order C-570–980 would need to be made by the Department of Commerce in a scope

assessed at the rate established in the completed review covering the most recent prior period or, if no review has been completed, the cash deposit rate applicable at the time merchandise was entered.

19 C.F.R. § 351.212(a) (2015). When merchandise is imported, the importer deposits with CBP an amount equal to the prospective duties on each item being entered or withdrawn that the port director estimates will be owed when the entries of merchandise are "liquidated." *See* 19 C.F.R. §§ 141.101, 141.103 (2015). "Liquidation" is defined as "the final computation or ascertainment of duties on entries for consumption or drawback entries." 19 C.F.R. § 159.1 (2015).

Commerce's regulations provide that liquidation shall be suspended on merchandise entered or withdrawn from warehouse for consumption subject to AD/CVD orders on or after the date of publication of the notice of affirmative AD/CVD determination. *See* 19 C.F.R. §§ 159.58(a)–(b) (2015). This suspension of liquidation enables Commerce to calculate assessment rates for subject entries, *see* Section 751 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(a)(2) (2012), which are applied by Customs pursuant to liquidation instructions received from Commerce after completion of the administrative review. *See* Section 751 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(a)(3)(B) (2012).

[11] Plaintiff argued that CBP's [[

]]" Letter from Sunpreme re: Sunpreme Modules – Exclusion from the AD/CVD Orders on *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From China* at 000246, CD 15, CBP AR 000245–000434 (May 14, 2015). Plaintiff further argued that its

[[

]]

Id. Plaintiff's letter cited the U.S. International Trade Commission's ("ITC") definition of thin-film products for its AD/CVD injury investigations, which it indicated provides that

[[

]]

Id. at 000255 (citations omitted). Plaintiff contended that "[[

]]" *Id.* Finally, Plaintiff claimed that "[[

]]" *Id.* at 000256.

ruling which can be requested by the importer or exporter." *Id.* Defendant avers that CBP "conveyed to Sunpreme verbally that, if Sunpreme believed that its products were not covered by the scope description or were described by the exclusionary language, it would need to seek a scope ruling from Commerce." Def.'s Resp. Br. 7.

Thereafter, CBP continued to test and analyze samples of Plaintiff's imported products.[12] *See* Laboratory Report # LA20150736 at 000534–000535, CD 21, CBP AR 000534–000657 (Aug. 13, 2015); Laboratory Report # SF20151545 at 000658, CD 22, CBP AR 000658–000700 (Sept. 30, 2015). Plaintiff continued to submit additional information to CBP, including its own independent laboratory testing, to assist CBP in its further investigation. *See* Letter from Sunpreme re: Sunpreme – Five-Step Production Process of Thin Film Cells and Characterization of the Solar Cell By Independent Laboratory Testing, CD 19–20, CBP AR 000480–000533 (July 6, 2015).

On November 16, 2015, Plaintiff filed a request for a scope ruling with Commerce under 19 C.F.R. § 351.225 (2012).[13] Request for a Scope Ruling on Solar Modules with Bi-Facial Thin Film Cells Public Version, PD 25, CBP AR 000767–000828 (Nov. 16, 2015). On December 30, 2015, Commerce initiated a formal scope inquiry pursuant to 19 C.F.R. § 351.225(e). *See* Letter from Plaintiff Notifying the Court of Scope Decision Att. at 2, Aug. 5, 2016, ECF No. 109 ("Final Scope Determination"). On July 29, 2016, Commerce issued its final determination concluding that Plaintiff's products fall within the scope of the Orders. Final Scope Determination at 18.

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[12] On August 13, 2015, another CBP laboratory issued a report confirming
[[

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Laboratory Report # LA20150736 at 000534–000535, CD 21, CBP AR 000534–000657 (Aug. 13, 2015). Following further laboratory testing, CBP found that
[[

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Laboratory Report # SF20151545 at 000658, CD 22, CBP AR 000658–000700 (Sept. 30, 2015).

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

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over Plaintiff's claim under 28 U.S.C. § 1581(i)(2) and (i)(4).[14] 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.[15] *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

[14] On December 17, 2015, Defendant moved to dismiss Plaintiff's cause of action, arguing that: (1) Plaintiff may not invoke the Court's residual jurisdiction because it could challenge CBP's determination under 28 U.S.C. § 1581(a) (2012) or by the U.S. Department of Commerce under 28 U.S.C. § 1581(c); and (2) in the alternative, that Plaintiff failed to state a claim upon which relief can be granted. *See* Mot. Dismiss 8–25, Dec. 18, 2015, ECF No. 40. After full briefing by the parties, the court denied Defendant's motion to dismiss because Plaintiff demonstrated judicial review under either 28 U.S.C. § 1581(a) or 28 U.S.C. § 1581(c) was unavailable and Plaintiff has identified final agency action subject to challenge that is reviewable under the Administrative Procedure Act, as amended, 5 U.S.C. § 704 (2012). *See Sunpreme*, 40 CIT at __, 145 F. Supp. 3d at 1283–1294.

Defendant-Intervenor argues that the court's decision is in tension with *Sandvik Steel Co. v. United States*, 164 F.3d 596 (Fed. Cir. 1998). SolarWorld Resp. Br. 11–12, 11 n. 5 (citing *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599–602 (Fed. Cir. 1998)). Defendant-Intervenor contends that, in *Sandvik*, CBP interpreted the antidumping orders at issue yet the Court of Appeals for the Federal Circuit did not perceive CBP as having acted ultra vires. *Id.* (citing *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599–602 (Fed. Cir. 1998)).

Sandvik is inapposite, and Defendant-Intervenor's reading misstates the holding. In the two cases that were consolidated in *Sandvik*, CBP concluded based upon the plain language that plaintiff's goods fell within the scope of the antidumping order. *See Sandvik*, 164 F.3d at 598. In each case, the importer had forgone a scope ruling, waited for the goods to liquidate and then protested the liquidation. *Id.* The Court of Appeals for the Federal Circuit held that an importer cannot challenge the applicability of antidumping duty orders by challenging CBP's denial of a protest under 19 U.S.C. § 1581(a). *Id.* at 601–2. The Court of Appeals held to bring a suit challenging the applicability of antidumping duty orders to a party's imports the party must seek a scope determination from Commerce, which can be reviewed in under 19 U.S.C. § 1581(c). *See id.* at 602. In *Sunpreme*, the court held CBP failed to give effect to all of the scope language and could not have found Plaintiff's products fell within the scope, including exclusions, without engaging in an interpretive act. *Sunpreme*, 40 CIT at __, 145 F. Supp. 3d at 1286.

Defendant-Intervenor also argues that, in *Xerox Corp. v. United States*, 289 F.3d 792 (Fed. Cir. 2002), the Court of Appeals for the Federal Circuit left room for CBP to interpret an antidumping order while still acting within its ministerial role. SolarWorld Br. 13 (citing *Xerox Corp. v. United States*, 289 F.3d 792, 795 (Fed. Cir. 2002)). SolarWorld misconstrues the holding in *Xerox* as implying that CBP does not act ultra vires by interpreting an antidumping order. *Id.* at 12–13 (citing *Xerox*, 289 F.3d at 795). In *Xerox*, the Court of Appeals held that the scope of the antidumping duty order unambiguously did not cover plaintiff's merchandise, but CBP made a factual error in finding the merchandise subject to the antidumping order. *Xerox*, 289 F.3d at 795. Therefore, the court held that the misapplication of an unambiguous antidumping order, as opposed to the erroneous interpretation of an ambiguous order, is a protestable decision under 19 U.S.C. § 1514(a)(2). *Id.* Nothing in *Xerox* implies, as SolarWorld suggests, that CBP acts within its authority where it interprets an ambiguous antidumping order.

[15] Further references to the Administrative Procedure Act, as amended, are to the relevant provisions of Title 5 of the United States Code, 2012 edition.

(2) hold unlawful and set aside agency action, findings and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or]

(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. CBP Acted Beyond the Scope of Its Authority

Plaintiff contends that CBP acted contrary to law because it interpreted ambiguous scope language in the Orders to decide that Plaintiff's merchandise fell within the scope of the Orders. Sunpreme Br. 14. Defendant counters that CBP preliminarily determined, based solely upon its review and testing of the merchandise, that Sunpreme's products possess the physical characteristics of the merchandise described by the plain language of the Orders.[16] Def.'s Resp. Br.

[16] Defendant repeatedly characterizes CBP's determination as preliminary. Def.'s Resp. Br. 1, 2, 8, 10, 11, 13, 22, 23. For purposes of the court's review under 5 U.S.C. § 706 (2012), CBP's action is a final agency action. Agency action is final where it is neither tentative nor interlocutory and marks the consummation of the agency's process and where as a result "'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted).

As the court previously held in deciding Defendant's motion to dismiss, CBP has limited decision-making responsibilities in order to administer AD/CVD Orders. *Sunpreme*, 40 CIT at __, 145 F. Supp. 3d 1292. Congress has charged CBP only with deciding whether the language of the Orders, as explained in Commerce's instructions, includes merchandise with the characteristics implicated by the plain language of the Orders. *See Xerox Corp. v. United States*, 289 F.3d 792, 794–95 (Fed. Cir. 2002). CBP's decision to require Plaintiff to enter its goods as subject to the Orders or otherwise be denied entry left nothing for CBP to decide to administer the orders. In addition, discernible consequences flowed from CBP's determination for Plaintiff. CBP cannot evade review of a determination from which legal consequences flow for Plaintiff while subjecting Plaintiff to cash deposit requirements during its investigative process. If CBP's investigation of the nature of the merchandise is ongoing, then CBP has yet to determine that the merchandise possesses the physical characteristics of merchandise covered by the Orders. If CBP has not determined that the goods possess the physical characteristics of subject merchandise, then CBP lacks authority to require cash deposits. *See Xerox*, 289 F.3d at 794–95; *see also* 19 C.F.R. § 144.38(d)–(e).

13. The Orders exclude "thin film photovoltaic products." *See CVD Order*, 77 Fed. Reg. at 73,017; *AD Order*, 77 Fed. Reg. at 73,018. Nothing in the common sense meaning of the exclusionary language suggests that it is meant to cover certain thin film products. *See CVD Order*, 77 Fed. Reg. at 73,017; *AD Order*, 77 Fed. Reg. at 73,018. Defendant does not contest the presence of a thin film of amorphous silicon in Plaintiff's products. Def.'s Resp. Br. 13. CBP could not place the goods within the scope of the Orders without interpreting the Orders to exclude certain photovoltaic products with thin films of amorphous silicon. Therefore, CBP acted in excess of its authority by requiring Plaintiff to enter its goods as subject to the Orders.

Only Commerce has the power to interpret antidumping and countervailing duty orders. *See Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096—97 (Fed. Cir. 2002); *Xerox Corp. v. United States*, 289 F.3d 792, 794–95 (Fed. Cir. 2002) (discussing *Sandvik Steel Co. v. United States*, 164 F.3d 596, 600 (Fed. Cir. 1998)); *see also* Section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(2)(B)(vi);[17] 19 U.S.C. § 1677(25); 19 C.F.R. § 351.225. Congress made clarifications of the scope of an AD/CVD order by Commerce reviewable.[18] *See* 19 U.S.C. § 1516a(2)(B)(vi); 19 U.S.C. § 1677(25). Therefore, if there is a question as to the meaning of the language of an AD/CVD order, it is for Commerce to answer that question.

CBP, incident to its function of fixing the amount of duties chargeable, must make factual findings to determine "what the merchandise is, and whether it is described in an order." *See Xerox*, 289 F.3d at 794. CBP has no authority to modify the scope of the Orders. *Cf. Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994) (CBP follows Commerce's instructions in assessing and collecting duties, and its "merely ministerial role in liquidating antidumping duties" does not allow it to modify Commerce's determinations, their underlying facts, or their enforcement). CBP's role is relegated to implementing Commerce's instructions. *Cf. Mitsubishi*, 44 F.3d at 977, *Koyo Corp. of U.S.A. v. United States*, 497 F.3d 1231, 1242 (Fed. Cir. 2007).

CBP's laboratory testing indicated the presence of thin films in Plaintiff's merchandise. *See* Laboratory Report # LA20150736 at

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

[18] Congress has empowered Commerce to provide the scope of antidumping and countervailing duty orders. *See* 19 U.S.C. § 1516a(2)(B)(vi); 19 U.S.C. § 1677(25). "The 1979 Act transferred the administration of the antidumping laws from the United States Treasury Department to Commerce." *J.S. Stone, Inc. v. United States*, 27 CIT 1688, 1691 (2003) *aff'd,* 111 F. App'x 611 (Fed. Cir. 2004) (citing *Comm. To Preserve Am. Color Television v. United States,* 706 F.2d 1574, 1577 (Fed.Cir.1983); *Reorg. Plan No. 3 of 1979*, § 5(a)(1)(c), 44 Fed. Reg. 69,273, 69,275 (Dec. 3, 1979)). Commerce has also been given the power to interpret and clarify those orders. *See Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096—97 (Fed. Cir. 2002). Commerce instructs CBP to carry out those orders. *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994).

000534–000535, CD 21, CBP AR 000534–000657; Laboratory Report # SF20151545 at 000658, CD 22, CBP AR 000658–000700 (Sept. 30, 2015). Plaintiff brought the potential applicability of the thin film exclusion to the attention of CBP on September 19, 2014 in its response to CBP's request for information. *See* Request for Information at 000039.

CBP determined that Plaintiff's merchandise was included in the scope of the Orders by interpreting the exclusion to apply only to certain photovoltaic products with thin films produced from amorphous silicon. The scope language does not define the term thin film products.[19] *See CVD Order*, 77 Fed. Reg. 73,017, *AD Order*, 77 Fed. Reg. 73,018. Defendant does not contest the presence of a thin film of amorphous silicon in Plaintiff's products. Def.'s Resp. Br. 13. Thus, CBP cannot have given effect to the exclusion without concluding that the Orders are meant to include at least some photovoltaic cells with thin films produced from amorphous silicon. Any such interpretation must be set aside under 5 U.S.C. § 706(2)(C) as contrary to law.[20]

In order to act within its designated role, CBP must be able to point to clear language in the scope of the Orders, including any exclusions, that places goods within the scope based upon observable facts. *See Xerox*, 289 F.3d at 794–95. Where factual determinations alone do not permit CBP to determine that a good falls within exclusionary language in an order, the good must be considered outside of the scope until Commerce interprets the order and clarifies that the merchan-

[19] Defendant-Intervenors argue that CBP's finding that Plaintiff's merchandise is subject to the Orders is wholly supported by Commerce's final ruling in the scope proceeding. SolarWorld Br. 20–21. First, whether or not CBP interpreted the language of the Orders correctly does not excuse the fact that CBP lacks the authority to interpret the Orders. *Cf. Mitsubishi*, 44 F.3d at 977. Second, although Defendant-Intervenors imply that Commerce interpreted the exclusion to mean that the presence of thin film layers is insufficient to make photovoltaic cells thin film products in prior scope determinations, *see id.* (citing SolarWorld Br. Att 1 ("Triex Scope Ruling"), that interpretation by Commerce occurred well after CBP's determination on June 17, 2016. *See* Triex Scope Ruling at 1. Therefore, CBP cannot have relied upon Commerce's determination to support the inapplicability of the exclusion for thin film products produced from amorphous silicon to Plaintiff's products.

[20] Defendant argues that CBP had good reason to conclude that Plaintiff's products exhibited physical characteristics that are described by the Orders because CBP sought clarification from Commerce on the meaning of the scope language and followed Commerce's advice. Def.'s Resp. Br. 15 (citing ACE Inquiry # [[ ]]). As an initial matter, CBP made its determination to begin requiring Plaintiff to file its entries as type "03" entries more than seven weeks prior to these communications with Commerce. *See* Notices of Action at 00001; ACE Inquiry # [[ ]]. Moreover, Commerce's guidance to CBP did not indicate that Plaintiff's product is covered by the Orders. *See* ACE Inquiry # [[ ]]. Commerce advised CBP that "a determination as to whether this product is covered by [the Orders] would need to be made by the Department of Commerce in a scope ruling which can be requested by the importer or exporter." *Id.* CBP cannot have given effect to the exclusionary language in the orders without interpreting the Orders to cover only certain thin film products, which is not indicated by the common import of the plain terms of the exclusion. *See CVD Order*, 77 Fed. Reg. 73,017, *AD Order*, 77 Fed. Reg. 73,018.

dise should be included.[21] *See id.* (to protect Commerce's administrative authority, Customs should not decide whether an antidumping order covers particular products in the first instance).

Defendant argues that "CBP's preliminary determination to apply the Orders to Sunpreme's merchandise was based on the fact that the merchandise possessed the physical characteristics that are described by the plain terms of the scope of the order, notwithstanding the presence of the thin film." Def.'s Resp. Br. 13. Defendant contends that the presence of a layer of amorphous silicon does not

> necessarily preclude the application of the orders because the description clearly states that crystalline photovoltaic cells are included whether or not the cell "has undergone other processing, . . . and/or the addition of materials . . . to collect and forward the electricity that is generated by the cell."

Def.'s Resp. Br. 13–14 (quoting Message No. 2346303 at 000012, CD 2, CBP AR 000011–000019 (Dec. 11, 2012); Message No. 2356306 at 000021, CD 3, CBP AR 000020–000033 (Dec. 21, 2012)). However, Defendant's attempt to characterize the thin films in Plaintiff's product as "an addition of materials . . . to collect and forward the electricity that is generated by the cell" is misplaced. Even if the layers of amorphous silicon identified were additional materials used to "collect and forward the electricity that is generated by" Plaintiff's cell, thin film photovoltaic products produced from amorphous silicon are nonetheless excluded by the scope language. *See CVD Order*, 77 Fed. Reg. 73,017, *AD Order*, 77 Fed. Reg. 73,018. In order to conclude that the thin films in Plaintiff's merchandise were not thin film products, CBP had to act beyond its authority by interpreting the term "thin film products." Commerce must clarify whether the words of the Orders reach these products. *See Duferco*, 296 F.3d at 1096–97.

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[21] Commerce's regulations do not permit it to impose antidumping cash deposits where the scope of an AD/CVD order is ambiguous until Commerce has acted to resolve that ambiguity. *See 19 C.F.R. § 351.225(l)(1)(3); AMS Assocs., Inc. v. United States*, 737 F.3d 1338, 1344 (Fed. Cir. 2013) (holding that where Commerce clarifies the scope of an existing AD duty order that has an unclear scope, Commerce may not act on a retrospective basis to impose cash deposits before Commerce has resolved that ambiguity). In its scope determination, Commerce determined that "the mere existence of thin film in a solar module does not constitute an excluded thin film product." Scope Determination at 17. Commerce further relied upon the petitions under 19 C.F.R. § 351.225(k)(1) to find that "thin film products do not use crystalline silicon." *Id.* Commerce therefore interpreted the term "thin film products" not to include products having an amorphous silicon thin film element in a product containing a doped (*i.e.*, active) silicon wafer. *Id.* Commerce attached greater significance to the crystalline silicon component of Sunpreme's cells over the thin film component. *Id.* Without discussing the reasonableness of Commerce's determination, nothing in the common import of the language of the Orders attaches any such meaning to the term "thin film products."

Defendant also argues that CBP may act to protect the revenue of the United States and collect cash deposits until all ambiguities in the Orders are resolved. Def.'s Resp. Br. 17–18. The court disagrees. As the court observed in *Sunpreme*, "CBP cannot interpret ambiguous words to place goods within the scope of an antidumping or countervailing duty order."[22] *Sunpreme*, 40 CIT at __, 145 F. Supp. at 1289. At the point CBP realized the exclusionary language of the Orders would on its face exclude Plaintiff's goods, it could not place the goods within the scope of the Orders until Commerce clarified the Orders. Only Commerce may clarify and interpret its antidumping and countervailing orders. *See Duferco*, 296 F.3d at 1096—97; *Xerox*, 289 F.3d at 794; *Koyo*, 497 F.3d at 1241–42. Defendant's position would render CBP's ultra vires interpretation of the scope language

[22] The court explained that several points support this reading of antidumping and countervailing duty regime:

> First, the statutory scheme supports this view. After Commerce and the ITC make the requisite affirmative dumping and injury findings, Commerce "shall issue an antidumping duty order under section 1673e(a) of this title." 19 U.S.C. § 1673d(c)(2). Commerce is charged with writing the antidumping or countervailing duty order to include "a description of the subject merchandise, in such detail as the administering authority deems necessary." 19 U.S.C. § 1673d(c)(2). If Commerce writes the words in an antidumping or countervailing duty order in such general terms such that CBP is unable to determine whether goods are included or excluded from the scope on the basis of clear facts implicated by the plain language of the Orders, then it is up to Commerce to clarify the meaning of its scope language. *Cf.* 19 C.F.R. § 351.225(a) (stating that issues will arise "because the descriptions of subject merchandise . . . must be written in general terms" and noting that when such issues arise "the Department issues 'scope rulings' that clarify the scope of an order or suspended investigation with respect to particular products."). Given Commerce's role in crafting the scope language and in scope determinations, *see* 19 U.S.C. §1673d(c)(2); 19 C.F.R. § 351.225, where the language contained in the Orders is insufficient to permit CBP to determine if goods are in or out of the Orders based upon factual determinations alone, CBP cannot interpret goods as falling within the scope of the Orders until Commerce says they do.
>
> Second, . . . Commerce's regulations charge it with the responsibility of interpreting ambiguous scope language when a question arises as to whether a particular product is included within the scope of an antidumping or countervailing duty order. *See* 19 C.F.R. § 351.225(a). Likewise, since the regulations permit Commerce to act quickly to interpret the scope, *see id.* at §§ 351.225(d), (k)(1), it stands to reason that goods should only be considered to fall within the scope of antidumping and countervailing duty orders once the agency with the capacity to interpret them has done so.
>
> Finally, this principle is entirely consistent with the controlling precedent of the Court of Appeals for the Federal Circuit. . . . in [*AMS Assocs., Inc. v. United States*, 737 F.3d 1338, 1344 (Fed. Cir. 2013)], the Court of Appeals for the Federal Circuit held that where there was ambiguous scope language, Commerce can only suspend liquidation and impose cash deposits prospectively after the initiation of a formal scope ruling. *See* [*AMS Assocs., Inc. v. United States*, 737 F.3d 1338, 1344 (Fed. Cir. 2013)]. Both Commerce and the Government, however, are protected from unmeritorious claims that scope language is ambiguous because Commerce may, where it considers scope language unambiguous, avoid initiating a formal scope ruling under 19 C.F.R. § 351.225(d). *See id.* ("[i]mporters cannot circumvent antidumping orders by contending that their products are outside the scope of existing orders when such orders are clear as to their scope"). Commerce need not "initiate a formal scope inquiry when the meaning and scope of an existing antidumping order is clear." *Id.* (citing *Huayin Foreign Trade Corp (30) v. United States*, 322 F.3d 1369, 1378–79 (Fed. Cir. 2003)).

Sunpreme, 40 CIT at __, 145 F. Supp. 2d at 1289.

unreviewable. *See Sunpreme*, 40 CIT at __, 145 F. Supp. 3d at 1286. It would also allow CBP to subject Plaintiff's entries to cash deposits before Commerce may do so.[23] *See AMS Assocs., Inc. v. United States*, 737 F.3d 1338, 1344 (Fed. Cir. 2013). It is inconceivable that the regulatory scheme would permit CBP, which should defer to Commerce to determine the scope in the first instance and which is charged with implementing Commerce's instructions, to suspend liquidation and collect cash deposits prior to a scope determination when Commerce itself cannot do so.

Defendant also argues that, where the scope of an AD/CVD order is unclear, the importer has the burden to seek clarification on the scope of the Orders to determine whether its products may be excluded. Def.'s Resp. Br. 18–22. Defendant grounds this assignment of responsibility in an importer's statutory obligation to use reasonable care in providing information necessary to enable CBP to properly assess duties on the merchandise, collect accurate statistics with respect to the merchandise, and determine whether any other requirement of law is met. *See* Def.'s Resp. Br. 19 (citing 19 U.S.C. § 1484(a)(1)). Nothing in the statute provides that importers must seek clarification where the language of the order prima facie excludes their products. *See* 19 U.S.C. § 1484. Moreover, Commerce's regulations allow any interested party to apply for a scope ruling. 19 C.F.R. § 351.225(c)(1). Commerce's advice to CBP recognized this fact when it advised CBP that "a determination as to whether this product is covered by antidumping duty order A-570–979 and countervailing duty order C-570–980 would need to be made by the Department of Commerce in a scope ruling which can be requested by the importer or exporter." ACE Inquiry # [[ ]].

Defendant also grounds its assignment of responsibility to an importer to seek clarification of any scope language ambiguity in *Sandvik* and *Xerox*. *See* Def.'s Resp. Br. 21 (citing *Sandvik*, 164 F.3d at 598–600; *Xerox*, 289 F.3d at 795). Neither case holds that an importer must seek clarification where the language of the order prima facie

[23] When a question over whether a particular product is included within the scope of an antidumping or countervailing duty order arises, Commerce "issues 'scope rulings' that clarify the scope of an order or suspended investigation with respect to particular products." 19 C.F.R. § 351.225(a). If Commerce cannot determine that a product falls within the scope language of antidumping or countervailing duty orders "based solely upon the application," under 19 C.F.R. § 351.225(d), Commerce will proceed with a formal scope inquiry, *see* 19 C.F.R. §§ 351.225(e).

Where Commerce initiates a formal scope inquiry, as it has did here, *see* Final Scope Determination at 5, Commerce will not suspend liquidation or order the collection of cash deposits until Commerce issues a preliminary or final scope ruling, whichever occurs earlier, that the antidumping or countervailing duty order includes the goods. *See* 19 C.F.R. § 351.225(l)(2); *id.* at § 351.225(l)(3); *AMS Assocs., Inc. v. United States*, 737 F.3d 1338, 1344 (Fed. Cir. 2013) (holding that under 19 C.F.R. § 351.225(l)(2), where Commerce clarifies existing scope language that is unclear, the imposition of cash deposits can only take effect on or after the initiation of the scope inquiry).

excludes their products. In *Xerox*, the Court of Appeals for the Federal Circuit held that a scope determination by Commerce was unnecessary because plaintiff's merchandise was facially outside the scope of the antidumping order. *Xerox*, 289 F.3d. at 795. It follows from the holding in *Xerox* that, where factual determinations alone do not permit CBP to determine whether a good is within the scope or outside the scope of the Orders, goods must be considered outside of the scope until Commerce clarifies or interprets the Orders. *Cf. Xerox*, 289 F.3d at 795. Where, as here, CBP lacks authority to determine goods to be subject to an order, it follows that the domestic party, not the importer, would have a greater interest in seeking a scope ruling.

Sandvik is inapposite. In *Sandvik*, plaintiffs failed to challenge CBP's determination that its goods were subject to antidumping orders until after liquidation. *Sandvik*, 164 F.3d at 598. The question confronted by the Court of Appeals for the Federal Circuit was whether this Court had jurisdiction under 28 U.S.C. § 1581(a) to review CBP's decision to include the merchandise in the scope of the antidumping order where the plaintiffs failed to seek timely scope determinations. *Sandvik*, 164 F.3d at 601. In *Sandvik*, the Court of Appeals in fact affirmed that it is Commerce that makes scope determinations, and the mechanism to review those determinations is an action under 28 U.S.C. § 1581(c). *See id.* In *Sandvik*, the court's holding did not assign responsibility to an importer to seek a scope ruling where the language of the order prima facie excludes their products. In fact, in *Xerox*, the Court of Appeals for the Federal Circuit clarified its holding in *Sandvik. See Xerox*, 289 F.3d at 795. In *Xerox*, the Court of Appeals held that Customs should not make a determination as to whether goods are covered in the first instance where the common import of the scope language does not permit CBP to place the goods within the scope based upon observable physical characteristics of the products. *See id.* (discussing *Sandvik*, 164 F.3d 600). It follows that, where CBP cannot place goods within the plain terms of an order, Commerce must interpret the ambiguous terms before CBP can demand cash deposits.

Defendant believes the court's standard leaves it unclear when CBP can determine goods are in scope where an interested party contends there is ambiguity in an AD/CVD order. Here, the Orders contained an exclusion for thin film photovoltaic products. Defendant does not deny the exclusion exists, and CBP did not point to observable physical characteristics of Plaintiff's products that rendered them outside the scope of the exclusionary language. CBP's determination that Plaintiff's merchandise were not thin film photovoltaic products was therefore the result of an interpretation that thin film photovoltaic products are not equivalent to photovoltaic products with thin films.

Defendant points to no language in the statute or in the regulations that militates a different outcome. None of the policy issues raised by Defendant is convincing.

Defendant and Defendant-Intervenor oversimplify the court's holding in *Sunpreme*, implying that any conceivable ambiguity identified by an importer would prevent CBP from collecting cash deposits on its merchandise.[24] *See* Def.'s Resp. Br. 23; SolarWorld Br. 16. Where merchandise is prima facie covered by both the inclusive and exclusive words of the order, CBP may suspend liquidation and collect cash deposits even in a case where an importer claims there is ambiguity in an order. In this case, even if the merchandise was prima facie a crystalline silicon photovoltaic cell, it also had thin films. *See* Laboratory Report # LA20150736 at 000534–000535, CD 21, CBP AR 000534–000657. Without a definition of the term "thin film products," CBP could not have given effect to the exclusionary language without concluding some products with thin films were not thin film products. It is this interpretation of the exclusion, not its prima facie meaning, that allowed CBP to conclude Plaintiff's merchandise fell outside of the exclusion.

Defendant worries that this standard would leave certain scope issues unresolved because "CBP does not have the regulatory ability or statutory burden to seek a scope ruling from Commerce when it is presented with issues involving the scope of an order." Def.'s Resp. Br. 24. Yet, nothing prevents CBP from bringing scope issues to the attention of Commerce, which can self-initiate a scope inquiry. *See* 19 C.F.R. § 351.225(b). Moreover, Commerce's regulations permit it to act quickly to determine that a product falls within the scope of an order based solely upon the application or based on the (k)(1) factors where the ambiguity in scope language may be easily resolved. *See* 19 C.F.R. § 351.225(d).[25]

Defendant-Intervenor argues domestic interested parties are not in a position to police importers' attempts to skirt the otherwise proper application of orders by relying upon subjective ambiguities. SolarWorld Br. 16. Therefore, Defendant-Intervenor believes that CBP should have the power to err on the side of protecting revenue by placing merchandise within the scope of the order. *Id.* The burden, and the incentive, to seek a scope ruling would then shift to the importer. *See id.* Yet, any interested party and Commerce itself, may

[24] On a related note, Defendant and Defendant-Intervenor also raise concerns that removing CBP's ability to collect cash deposits and giving an importer an avenue to challenge CBP's determinations under 28 U.S.C. § 1581(i) would give the importer no incentive to seek a scope ruling to resolve ambiguities in scope language and would stand to encourage importers to delay or forgo scope rulings. *See* Def.'s Resp. Br. 23; SolarWorld Br. 16–17.

[25] Finally, if the scope regime as set forth in the statute and the regulations is less than ideal, then it is for Congress or the agencies to remedy those shortcomings. It is not for the court to speculate on a mechanism for the agencies to resolve such shortcomings. The court reviews the statutory and regulatory framework as it exists.

request a scope ruling. *See* 19 C.F.R. §§ 351.225(b), (c). Defendant and Defendant-Intervenor point to nothing in the statute or in Commerce's regulations regarding scope rulings that indicates the burden must always fall on importers. Moreover, in this case the prima facie language excludes Plaintiff's merchandise, and therefore the burden should not fall upon the importer to clarify the Orders.

Defendant contends that deciding whether scope language is ambiguous is subjective. Def.'s Resp. Br. 24. Admittedly, parties can always make a subjective claim that the language is ambiguous, but doing so does not make unambiguous language ambiguous. More importantly, the scope language here did not contain a mere ambiguity. It contained exclusionary language that prima facie excluded thin film photovoltaic products. Although it is possible that this term could have been clarified to include Plaintiff's goods, it is Commerce's job to clarify, not CBP's. Commerce's regulations specifically provide for Commerce to clarify the meaning of scope language without initiating a "formal scope inquiry when the meaning and scope of an existing antidumping order is clear." *See* 19 C.F.R. § 351.225(d); *see also AMS Assocs.*, 737 F.3d at 1344 (citing *Huayin Foreign Trade Corp (30) v. United States*, 322 F.3d 1369, 1378–79 (Fed. Cir. 2003)). Where CBP can match physical characteristics of the merchandise with the common import of the language of an order, CBP may act within its authority to collect cash deposits. *See Xerox*, 289 F.3d at 795. Where CBP cannot, Commerce must resolve the ambiguity before CBP can collect cash deposits. *See Xerox*, 289 F.3d at 795; *cf. Mitsubishi*, 44 F.3d at 977.

Defendant argues that if the scope is ambiguous, it is equally unclear whether imported merchandise is in scope or out of scope. Def.'s Resp. Br. 25. Defendant contends that, by allowing merchandise to enter as type "01" where the scope language is ambiguous, CBP would implicitly be concluding that merchandise is not covered by an order. Defendant's argument is contradicted by the statutory scheme. The court stated in *Sunpreme*:

> Commerce is charged with writing the antidumping or countervailing duty order to include "a description of the subject merchandise, in such detail as the administering authority deems necessary." 19 U.S.C. § 1673d(c)(2). If Commerce writes the words in an antidumping or countervailing duty order in such general terms such that CBP is unable to determine whether goods are included or excluded from the scope on the basis of clear facts implicated by the plain language of the Orders, then it is up to Commerce to clarify the meaning of its scope language. *Cf.* 19 C.F.R. § 351.225(a) (stating that issues will arise "because the descriptions of subject merchandise . . . must be written in general terms" and noting that when such

> issues arise "the Department issues 'scope rulings' that clarify the scope of an order or suspended investigation with respect to particular products.")

Sunpreme, 40 CIT at __, 145 F. Supp. 3d at 1288. Therefore, merchandise only comes within the scope of an order when Commerce, either in the language of the order or in a subsequent scope ruling interpreting ambiguous language, says the merchandise comes within the scope of an order.

Defendant implies that Plaintiff, in filing its action under 28 U.S.C. § 1581(i), effectively seeks a preemptive review of Commerce's scope determination before Commerce acted.[26] *See* Def.'s Resp. Br. 25. Defendant's objection misses the mark. The court has not reviewed Commerce's interpretation of the scope language, but rather CBP's determination to begin collecting cash deposits. As already discussed, CBP's determination as to whether Plaintiff's merchandise is subject to the Orders was final, and thus reviewable under 5 U.S.C. § 706, when it required Plaintiff to post cash deposits.

On a related note, Defendant argues that CBP could not know whether it is acting beyond the scope of its authority until Commerce decides to initiate a scope inquiry. *See* Def.'s Resp. Br. 25. However, where CBP can conclude that a product falls within the words of the order, both the affirmative scope language and any exclusions, CBP properly requires an importer to enter its goods as subject to an order. *See Xerox*, 289 F.3d at 794–95. In such a case, the burden falls upon the importer to show that the language requires clarification to properly reflect the scope of the orders. The language of an order either clearly instructs CBP or it does not. Whether it does so comes down to whether CBP can determine that merchandise falls within the common meaning of the scope language based upon observable physical characteristics.

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[26] On a related note, Defendant-Intervenor argues that the court's holding would lead to a significant increase in litigation under 28 U.S.C. § 1581(i). SolarWorld Br. 17 n.10. As an initial matter, the court believes this assessment depends upon Defendant-Intervenor's oversimplification of the court's holding here. Where merchandise is prima facie covered by an order, and not excluded by the plain meaning of any exclusionary language, CBP may suspend liquidation and collect cash deposits even in a case where an importer claims there is ambiguity in an order. Under such circumstances, an importer would have no available avenue for review under § 1581(i). Moreover, Defendant-Intervenor's conception of the regulatory regime would effectively deny importers an avenue to review any interpretation of scope language by CBP, no matter how wrong-headed, and subject the importer to cash deposits while the matter is adjudicated. That would also permit CBP to subject imports to cash deposits under scope language before Commerce may do so. *See* 19 C.F.R. § 351.225(l)(3); *AMS Assocs., Inc. v. United States*, 737 F.3d 1338, 1344 (Fed. Cir. 2013) (holding that under 19 C.F.R. § 351.225(l)(2), where Commerce clarifies existing scope language that is unclear, the imposition of cash deposits can only take effect on or after the initiation of the scope inquiry).

II. CBP Lacked Authority to Suspend Liquidation and Order the Collection of Cash Deposits Prior to Commerce's Initiation of a Scope Inquiry

Plaintiff argues that CBP lacked authority to suspend liquidation and order the collection of its cash deposits prior to the initiation of a scope inquiry by Commerce. Sunpreme Br. 16–17 (citing *AMS Assocs.*, 737 F.3d at 1344). Specifically, Plaintiff argues Commerce's regulation prevents suspension of liquidation and collection of cash deposits prior to the initiation of a scope inquiry where CBP must interpret ambiguous scope language to determine a product falls within the scope. Sunpreme Br. 16–17 (citing *AMS Assocs.*, 737 F.3d at 1344). Defendant argues that, when entries are already suspended, "Commerce has the authority to order that suspension continue, regardless of when the scope inquiry was initiated." Def.'s Resp. Br. 27 (citing 19 C.F.R. §§ 351.225(l)(1), (3)). The court concludes that CBP acted in excess of its authority in suspending liquidation on Plaintiff's entries prior to initiation of Commerce's scope inquiry. Commerce's regulations must 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.*, 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 antidumping 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.*, 737 F.3d at 1344 (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 Assocs.*, Commerce issued corrected liquidation instructions explicitly instructing CBP to suspend liquidation retroactively, *see AMS Assocs.*, 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 or 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*, 289 F.3d at 794–95; *see also* Final Scope Determination at 18. Since Commerce initiated its scope inquiry on December 30, 2015, *see* Final Scope Determination 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 Assocs.*, 737 F.3d at 1344.

Defendant points to no authority other than CBP's 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 Assocs.*, here Sunpreme's entries were already suspended prior to the date Commerce initiated its scope inquiry. Def.'s Resp. Br. 26; SolarWorld Resp. Br. 26–27. 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. 26 (citing 19 C.F.R. §§ 351.225(l)(1), (3)); SolarWorld Resp. Br. 24–27. (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. To do so would be to permit CBP to collect cash deposits and suspend cash deposits where Commerce cannot. *See* 19 C.F.R. §§ 351.225(l)(1), (3); *AMS Assocs.*, 737 F.3d at 1344. 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 depos-

its 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*. Commerce could not extend the suspension of liquidation on entries that were not administratively suspended.

Defendant argues that it may liquidate all unliquidated entries pursuant to its final scope ruling regardless of when Commerce issued its final scope ruling. *See* Def.'s Resp. Br. 27–28 (citing *Ugine & ALZ Belgium v. United States*, 551 F.3d 1339, 1349 (Fed. Cir. 2009)). *Ugine* is inapposite, and Defendant misconstrues its holding. In *Ugine*, the Court of Appeals for the Federal Circuit held, on narrow grounds, that Commerce may not impose antidumping duties on unliquidated entries it were not subject to an antidumping duty order merely because no objection was raised during the course of a subsequent administrative review.[27] *See id.* at 1349. In *Ugine*, the Court of Appeals did not confront an ultra vires interpretation of an order by CBP nor did it interpret Commerce's scope regulations to permit retroactive suspension of liquidation and collection of cash deposits on entries that were suspended by CBP acting contrary to law. *See id.* at 1349. Plaintiff cites no other authority allowing the collection of cash deposits and suspension of liquidation on entries prior to the initiation of a scope inquiry on merchandise that CBP could not determine fell within the unambiguous scope language based solely upon the words of the orders and physical characteristics. Therefore, CBP's purported suspension of liquidation is void *ab initio*, and there is no suspension of liquidation to continue under Commerce's regulation.

CONCLUSION

CBP lacked authority to require Plaintiff to enter its merchandise as subject to the Orders because its determination depended upon an interpretation of the scope language. Therefore, CBP's collection of

[27] In *Ugine*, the AD/CVD orders in question covered stainless steel plate in coils from Belgium, and the importers entries were entered as subject to those orders because the importer made what it characterized as a mistake in its invoice by designating some SSPC of German origin as being Belgian in origin. *See Ugine*, 551 F.3d at 1344. Suspension of liquidation occurred because plaintiff appealed the results of Commerce's CVD administrative review, claiming it erroneously believed at the time that all of its goods were subject to the orders, not because of a pending scope inquiry. *See id.* Plaintiff did not recognize that the company had mis-designated certain products as Belgian in origin that it believed should have been treated as German in origin until sometime before the fourth administrative review. *See id.* at 1344. During the course of the fourth administrative review, Commerce interpreted the orders to the effect that plaintiff's imports were not subject to the orders because steel hot rolled in Germany and not further cold rolled in Belgium is not Belgian in origin. *Id.* at 1345. Consequently, Commerce initially issued liquidation instructions that entries entered on or after the initiation of the fourth antidumping administrate review should be liquidated without regard to antidumping duties. *Id.* However, despite its determination that products hot rolled in Germany and not further cold rolled in Belgium are not subject to the orders, Commerce issued liquidation instructions to the effect that entries covered by the first administrative review were subject to duties. *Id.*

cash deposits and suspension of liquidation before Commerce interpreted the Orders to include Plaintiff's merchandise was 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 order the collection of cash deposits on entries prior to the initiation of the scope inquiry. All cash deposits collected on entries prior to the initiation of the scope inquiry must be returned to Plaintiff. Judgment will enter accordingly.

Dated: October 11, 2016
New York, New York

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

Slip Op. 16–100

PLEASURE-WAY INDUSTRIES, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 10–00173

[On Customs classification of certain motorhomes, denying plaintiff's motion for summary judgment; granting defendant's cross motion for summary judgment.]

Dated: October 18, 2016

John M. Peterson, Elyssa R. Emsellem, Maria E. Celis, Richard F. O'Neill, and *Russell Andrew Semmel*, Neville Peterson, LLP, of New York, NY, for the plaintiff.

Marcella Powell, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, for the defendant. On the brief were *Benjamin C. Mizer*, Acting Assistant Attorney General, and *Amy M. Rubin*, Assistant Director. Of counsel on the brief was *Michael W. Heydrich*, Attorney, Office of the Assistant Chief Counsel for International Trade Litigation, U.S. Customs and Border Protection, of Washington DC.

OPINION

Musgrave, Senior Judge:

This matter is before the court on cross-motions for summary judgment concerning the re-entry of 144 motor vehicles from Canada. The plaintiff Pleasure-Way Industries, Inc. challenges the decision of the defendant's U.S. Customs and Border Protection ("Customs") denying the plaintiff's protests of Customs' classification of the imported merchandise under the Harmonized Tariff Schedule of the United States ("HTSUS"). Customs classified the merchandise under subheading 8703.33.00, HTSUS as "Motor cars and other motor vehicles principally designed for the transport of persons", which carries a 2.5% duty

rate (2007).[1] The plaintiff argues that the proper classification for the merchandise is under subheading 9802.00.50, HTSUS ("Articles returned to the United States after having been exported to be advanced in value or improved in condition by any process of manufacture or other means: Articles exported for repairs or alterations: Other"), which enjoys duty-free treatment upon return to the United States under the North American Free Trade Agreement ("NAFTA").

The court has jurisdiction pursuant to 28 U.S.C. §1581(a). Ruling from the bench, the court denied the plaintiff's motion for summary judgment and granted the defendant's cross-motion for summary judgment. This opinion sets forth the court's reasoning and holds that the subject merchandise is properly classified under subheading 8703.33.00, HTSUS.

I. *Standard of Review*

The court reviews Customs' protest decisions *de novo*. 28 U.S.C. § 2640(a)(1). Summary judgment is appropriate when "there is no genuine issue as to any material fact." USCIT R. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In considering whether materials facts are in dispute, the evidence must be considered in the light most favorable to the non-moving party, drawing all reasonable inferences in its favor. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Anderson*, 477 U.S. at 261 n.2.

Classification for customs duty purposes is a two-step process of determining the meaning of relevant tariff provisions (a question of law) and determining whether the "nature" of the merchandise (a question of fact) falls within the tariff provision as properly construed. *E.g., Orlando Food Corp. v. United States*, 140 F.3d 1437 (Fed. Cir. 1998). When there is no factual dispute regarding the merchandise, the resolution of the classification issue turns on the first step, determining the proper meaning and scope of the relevant tariff provisions. *See, e.g., Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006) ("[w]hen the nature of the merchandise is undisputed . . . the classification issue collapses entirely into a question of law"); *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365–66 (Fed. Cir. 1998). This is such a case, and summary judgment is appropriate. *See Bausch & Lomb*, 148 F.3d at 1365–66.

In its analysis, the court accords a measure of deference to Customs classification rulings in proportion to their "power to persuade".

[1] 8703.33.00, HTSUS in full reads: Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 8702), including station wagons and racing cars: Other vehicles, with compression-ignition internal combustion piston engine (diesel or semi-diesel): Of a cylinder capacity exceeding 2,500 cc.

United States v. Mead Corp., 533 U.S. 218, 235 (2001), citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). In the final analysis, however, the court also has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms." *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005), citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001).

II. *Undisputed Facts*

Among the parties' papers, the following are averred as material facts not in dispute. The subject merchandise is certain van-based Class B motorhomes marketed and sold in the United States as the "Pleasure-Way Ascent TS" or "Plateau TS." Plaintiff's Rule 56.3 Statement of Material Facts Not in Dispute ("Pl's MFNID"), ECF No. 63, ¶ 114; Defendant's Response to Plaintiff's Statement of Material Facts Not in Dispute ("Def's MFNID"), ECF No. 74, ¶ 114.

The plaintiff exported Daimler Chrysler AG ("DCAG") "Sprinter" cargo vans from the United States to Canada, where the vans were classified under subheading 8703.33 of the Canadian Customs Tariff and were subject to duty at 6.1% *ad valorem*. Pl's MFNID, ¶¶ 70–72; Def's MFNID, ¶ 70–72.

The plaintiff engaged in processing in Canada that encompassed the following changes to the cargo vans: adding fiberglass running boards, installing subflooring, installing custom cabinetry, installing a kitchenette with cooking facilities, installing a "wet bath" of toilet and shower facilities, fitting a propane tank, installing a three-tank plumbing system and discharge outlets, installing carpeting and linoleum flooring, adding an electric sofabed, adding electronics such as a television and digital media players, and other modifications not listed here. Pl's MFNID, ¶¶ 74–110.

The plaintiff imported the subject merchandise from Canada to the United States between January 2008 and September 2009. Pl's MFNID, ¶ 111; *but see* Def's MFNID, ¶ 111 ("the merchandise was entered between May 25, 2008 and November 10, 2008").

In September 2009, the plaintiff submitted a ruling request to Customs concerning the applicability of subheading 9802.00.50, HTSUS, to the subject merchandise. While Customs' original ruling, HQ H077417, found that the subject merchandise was eligible for preferential treatment under 9802.00.50, HTSUS, Customs later revoked the ruling and voided it *ab initio*, citing Pleasure-Way's failure to adhere to Customs' regulation 19 C.F.R. §177.1(a)(2)(ii), which forbids Customs from issuing a ruling where a similar or identical transaction has taken place or is pending at the time the rule request is made. Pl's MFNID, ¶ 25–30; Def's MFNID, ¶ 25–30.

Lastly, at liquidation Customs classified the motorhomes under 8703.33.00, HTSUS as "other motor vehicles principally designed for the transport of persons, with compression-ignition internal combustion reciprocating piston engine (diesel or semi-diesel) of a cylinder capacity exceeding 2,500 cc" with duty of 2.5% ad valorem.[2]

III. *Analysis*

The issue here is whether the plaintiff's van-based motorhomes are properly classifiable as goods exported to Canada for "repairs or alterations" under subheading 9802.00.50, HTSUS, as contended by the plaintiff, or whether the changes to the vehicles exceed the scope of that classification, as contended by the defendant.

There is no dispute that motorhomes are classifiable under 8703.33.00, HTSUS.[3] However, the plaintiff contended the motorhomes at issue properly belonged under subheading 9802.00.50, HTSUS, because the plaintiff made alterations to "completed" Sprinter vans exported from the United States to Canada which "advanced [the vans] in value or improved [the vans] in condition", as provided in 19 C.F.R. §181.64, by "upfitting" the vans from cargo vans to motor homes. Pl.'s Br. at 29. The plaintiff further argued that under Article 307 of NAFTA, the van-based motorhomes should receive duty-free treatment. *Id*. The defendant argued that the Sprinter vans exported to Canada as "unfinished" goods were altered beyond the permissible scope of subheading 9802.00.50, HTSUS, and that the plaintiff's alterations destroyed the essential characteristics of the exported vans and created a new commercial product, and that this new commercial product cannot be properly classified under the plain meaning of subheading 9802.00.50. Def's Br. at 5–6. The court agrees with the defendant's characterization.

In order to qualify for the preferential treatment under subheading 9802.00.50, HTSUS, the exported good must meet the requirements of 19 C.F.R. §181.64. Importantly, the alterations must be made to goods that were "completed" or "finished" goods when exported from the United States to Canada or Mexico."[4] *See Chevron Chem.,* 23 CIT

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[2] The plaintiff stated that the vehicles were entered under 8703.24.00, HTSUS; however, the entry documents submitted by the plaintiff demonstrate that the vehicles were entered under 8703.33.0030, HTSUS. *See* Pl's MFNID, ¶ 111; Pl's Complaint, ¶ 13; *but see* Pl's Exhibit A1-A4, Parts 1–4; Def's MFNID, ¶ 111.

[3] Def's Br. at 5. The Explanatory Note to heading 8703, HTSUS, states that the heading includes "motor-homes (campers, etc), vehicles for the transport of persons, specially equipped for habitation (with sleeping, cooking, toilet facilities, etc.)".

[4] The relevant portion of 19 C.F.R. §181.64 provides:

(a) For purposes of this section, "repairs or alterations" means restoration, addition, renovation, redyeing, cleaning, resterilizing, or other treatment which does not destroy the essential characteristics of, or create a new or commercially different good from, the good exported from the United States.

500, 508, 59 F. Supp. 2d 1361, 1369–70 (1990). A "finished" good is one that is suitable for its ultimate "intended use." *United States v. J.D. Richardson Co.*, 36 C.C.P.A. 15, 18 (1948) (finding that exported articles that are not yet suitable for their intended use are unfinished). "[A]lterations are made to *completed* articles and do not include intermediate processing operations which are performed as a matter of course in the preparation or the manufacture of finished articles." *Dolliff & Co. v. United States*, 66 C.C.P.A. 77, 82, 599 F.2d 1015, 1019 (1979) (italics in original). The parties disagreed over the meaning of "intended use".

The plaintiff attempted to demonstrate that the "intended use" of consequence is what use pertains to the merchandise in its condition as exported from the United States The plaintiff argued that the vans were "completed" or "finished" prior to exportation to Canada because they were suitable for the use intended for them by the manufacturer, DCAG. Pl's Resp. at 7. The plaintiff argued that DCAG's intended use was for the vans to be driven as-is or to be upfitted, and that this intended use is the use upon which 19 C.F.R. §181.64 turns. *Id.*

Precedent does not support the plaintiff's interpretation. The use of the article upon return to the United States is the "intended use" for purposes of HTSUS item 9802 classification. *See J.D. Richardson*, 36 C.C.P.A. at 17 ("unflanged" metal rims exported from the United States were not suitable for their intended use upon return to the United States as "flanged" metal rims under predecessor provision of HTSUS item 9802); *May Food*, 33 CIT 430, 433, 616 F. Supp. 2d 1349, 1352–53 (2009) (raw almonds exported from the US to be mixed with other ingredients and returned as almond brittle were "not commercially interchangeable with, or suitable to be sold as" almond brittle at the time of export); *Chevron Chem.*, 23 CIT at 509, 59 F. Supp. 2d at 1370 (holding that alpha olefin fraction exported from the United States was "unfinished" and that the French processing was intermediate processing because the returned article contained benzene rings that the exported fraction did not contain); *Peg Bandage*, 17 CIT 1344, 1344–45 (1993) (exported unsewn bandages were not suitable prior to export for their ultimate intended use as reusable bandages); *Guardian Indus.*, 3 CIT 9, 12–16 (1982) ("the exported articles of raw annealed glass were not 'completed articles' as they were entirely unsuitable for their intended use in the United States as sliding glass patio doors"). Contrary to the plaintiff's characterization of the current state of the law, "[t]he question is not whether the [exported good] is finished for purposes of being manufactured into [the altered

(b) *Goods not eligible for duty-free or reduced-duty treatment after repair or alteration.* The duty-free or reduced-duty treatment referred to in paragraph (a) of this section shall not apply to goods which, in their condition as exported from the United States to Canada or Mexico, are incomplete for their intended use and for which the processing operation performed in Canada or Mexico constitutes an operation that is performed as a matter of course in the preparation or manufacture of finished goods.

good].” *Chevron Chem.*, 23 CIT at 508, 59 F. Supp. 2d at 1369–70. “Rather, the question is whether the [exported good] is a finished product for tariff purposes” on return to the United States, and “in order for an article to be ‘finished’ it must be suitable for its ultimate intended use” at the time of export from the United States. *See id.*, 23 CIT at 508, 59 F. Supp. 2d at 1370.

Here, the Sprinter vans were not “interchangeable with[] or suitable to be sold as” motorhomes at the time of export to Canada. Therefore, following the reasoning of the court in *May Food* and other prior cases, the vans were not “complete” or “finished” for their ultimate intended purposes (*i.e.*, as motorhomes) at the time of export to Canada and are therefore ineligible for preferential treatment under subheading 9802.00.50, HTSUS.

Additionally, to qualify for preferential treatment, repairs or alterations made to the exported good must not “destroy the essential characteristics of, or create a new or commercially different good from, the good exported from the United States.” 19 C.F.R. §181.64. “Changes and additions to an article constitute alterations so long as the article has not lost its identity or has not been converted into something else.” *Chevron Chem.*, 23 CIT at 507, 59 F. Supp. 2d at 1369. To determine whether foreign processing has created a new commercial article, the court compares the differences between the exported article and the returned article, including name, uses, performance characteristics and commercial applications. *Guardian Indus.,* 3 CIT at 14 (“for tariff purposes[,] a process which converts one article into a new article is not an ‘alteration’”) (citations omitted). The processing completed in Canada destroyed the essential characteristics of the Sprinter cargo vans and created a new commercial article, making the motorhomes ineligible for preferential treatment under subheading 9802.00.50, HTSUS.

First, the changes made in Canada destroyed essential characteristics of the Sprinter cargo vans. *See Marubeni America Corp. v. United States*, 17 CIT 360, 821 F. Supp. 1521 (1993), *aff’d* 35 F.3d 530 (Fed. Cir. 1994) (addressing distinctions between motor vehicles for transport of goods and motor vehicles for transport of persons). It is true, as the plaintiff argues, that several characteristics of the motorhomes remained unchanged during the Canadian processing, specifically the vans’ “size, power, maneuverability, and safe operation”, and that the plaintiff’s processing did not make any modifications to those van parts listed in the Body Builder Book as “forbidden” to modify (axles, steering system, brake system, springs, spring mountings, shock absorbers, wheel alignment, fuel system, engine, and drive train components). Pl’s Br. at 35–38. But this set of characteristics applies to a broad range of motor vehicles, not uniquely to an exported cargo van or an imported motorhome. Determining essential characteristics only on these grounds neglects to consider the signifi-

cant changes made to the name, price, and usage of the vehicles. *See Guardian Indus.*, 3 CIT at 12–16 (finding that the name, use, and tariff heading were relevant to determining the essential characteristics of an article). Further, as the defendant averred, "[t]he most important, indispensable and necessary characteristic of a cargo van is its ability to transport goods", and the modifications made by the plaintiff stripped the Sprinter vans of their cargo-transporting identity by "virtually eliminat[ing] the vans' cargo areas by filling [the cargo area] with sleeping accommodations, bathrooms, kitchens, and other facilities." Def's Br. at 24; *see also* Pl's Ex. F. Furthermore, these motorhomes would no longer be classifiable as motor vehicles used for transporting goods because the cargo hold has been refitted with living quarters.[5] *See Guardian Indus.*, 3 CIT at 15–16.

Second, these changes created a new commercial vehicle, as evidenced by changes to the pricing, the applicable tariff heading, the use, and the name of the vans. Def's Br. at 20–21; *Guardian Indus.*, 3 CIT at 12–16. The plaintiff purchased the Sprinter cargo vans from car dealerships in the United States at (obviously) lower prices than the manufacturer's suggested retail price of the motorhomes it sells. The defendant argues that the motorhomes' tariff classifications also changed: the cargo vans at export to Canada were classifiable under 8704, HTSUS, as motor vehicles for the transport of goods, and upon return to the United States they are motorhomes classifiable under 8703, HTSUS, as motor vehicles principally designed for the transport of persons.[6]

Attempting to demonstrate that no new commercial article is created, the plaintiff relied heavily on *Press Wireless* for the proposition that an article which, when returned to the United States after processing, is recognizable as the same article previously exported but in an altered or improved condition is not a new commercial article. Pl's Br. at 38, citing *Press Wireless, Inc. v. United States*, 6 Cust. Ct. 102, 105 (1941) (which found that repairs to worn-out radio tubes using an improved material, which made the tubes "more efficient[, was] of no consequence"). The plaintiff argued that because the VIN remains the same after processing and that the relevant United States agency would therefore recognize the van as the same article

[5] *See* heading 8703, HTSUS ("[m]otor cars and other motor vehicles principally designed for the transport of persons" and 8704, HTSUS ("[m]otor vehicles for the transport of goods"); *see also* Explanatory Note to 8703, HTSUS, "[t]he heading also includes: . . . [m]otor-homes, (*campers*, etc.), vehicles for the transport of persons, specially equipped for habitation (with sleeping, cooking, toilet facilities, etc.)" (bolding omitted; italics in original).

[6] According to Pleasure-Way, the Sprinter vans were imported into Canada under the Canada Customs Tariff subheading 8703.33 which covers "motor cars and other motor vehicles principally designed for the transport of persons". Canada Customs Tariff Schedule, section 8703.33 (note that 8703.33.00.21 and 8703.33.00.22 both address motorhomes but in its papers, the plaintiff did not specify under which subheading the vans were imported into Canada).

upon return, the Canadian processing has not created a new commercial article. Pl's Br. at 38–39. However, the instant merchandise is readily distinguishable from the holding in *Press Wireless*, wherein the goods were exported to be repaired to their "original" state of good (albeit improved) working order, not for the purpose of creating an entirely new use.

The exported article was a Sprinter van ready for use as a cargo van, with a cargo bed in the back and no additional "creature comforts". Upon return, the motorhomes no longer resembled the exported cargo vans, as they had lost their interior cargo space in exchange for cooking, sleeping, and toilet facilities. The motorhomes are no longer classifiable as motor vehicles for the transport of goods, are not recognizable (in the interior) as cargo vans, have different price points than the exported vehicles, and are classifiable under a different tariff heading and subheading. This is a different vehicle in its very nature from that which was exported.

Finally, regarding Customs Ruling HQ H077417, the ruling was properly revoked and is, as stated, void *ab initio*, as *per* Customs' revocation dated Jan. 22, 2009. Despite Customs not finding fault with its own logic as the plaintiff avers, the voided ruling has neither binding nor persuasive bearing on the court's decision here and does not merit *Skidmore* deference. On the evidentiary issue raised in Pleasure-Way's briefing, the argument is moot since the Customs rulings were already admitted into evidence as part of the administrative proceeding.

A "repair or alteration" is a change to a good finished for its intended use, which does not destroy the essential characteristics of, or create a new commercially different good from, the good exported from the United States. The plaintiff's changes were to vehicles not finished for their intended use upon re-entry as motorhomes. These changes destroyed the cargo vans' essential characteristics of being able to transport cargo because the cargo space became fully occupied by structures for inhabitation. Furthermore, these additions created a new commercially different good from the good exported.

IV. *Conclusion*

The court grants defendant's cross-motion for summary judgment, on the basis that the plaintiff's goods do not satisfy the requirements of 19 C.F.R. §181.64 and therefore cannot be classifiable under subheading 9802.00.50, HTSUS.

Dated: October 18, 2016
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE