U.S. Court of International Trade

16–1

FOSHAN SHUNDE YONGJIAN HOUSEWARES & HARDWARES CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 12–00069

OPINION AND ORDER

[Results on redetermination sustained in part and remanded in part.]

Dated: January 8, 2016

Gregory S. Menegaz, *J. Kevin Horgan*, and *John J. Kenkel*, deKieffer & Horgan PLLC, of Washington, DC for Plaintiff Foshan Shunde Yongjian Housewares & Hardwares Co., Ltd.

Michael D. Snyder, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice for Defendant United States. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Amanda T. Lee*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, DC.

Frederick L. Ikenson and *Larry Hampel*, Blank Rome LLP of Washington, DC for Defendant-Intervenor Home Products International, Inc.

Gordon, Judge:

This action involves the U.S. Department of Commerce's ("Commerce") sixth administrative review of the antidumping duty order covering Floor-Standing, Metal-Top Ironing Tables from China. *See Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China*, 77 Fed. Reg. 14,499 (Dep't of Commerce Mar. 12, 2012) (final results admin. review) (*Final Results*); *see also* Issues and Decision Memorandum for Final Results of Antidumping Duty Administrative Review of Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China, A-570–888 (Dep't of Commerce Mar. 5, 2012), available at http://enforcement.trade.gov/frn/summary/prc/2012–5915–1.pdf (last visited this date) ("*Decision Memorandum*"). Before the court are the Final Results of Redetermination, ECF No. 64 ("*Remand Results*") filed by Commerce pursuant to *Foshan Shunde Yongjian Housewares & Hardwares Co. v. United States*, 37 CIT ___,

896 F. Supp. 2d 1313 (2013) ("*Foshan I*"). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[1] and 28 U.S.C. § 1581(c) (2012). Familiarity with *Foshan I* is presumed.

Foshan Shunde challenges several aspects of the *Remand Results*: (1) Commerce's use of a provision in the Harmonized Tariff Schedule ("HTS") that includes high-carbon steel to value its steel wire input; (2) Commerce's use of the World Bank's *Doing Business 2010: Indonesia* publication to value Foshan Shunde's brokerage and handling ("B&H"), or in the alternative, Commerce's failure to adjust the World Bank data to reflect Foshan Shunde's actual experience; and (3) Commerce's application of zeroing. Pl.'s Comments on Remand Redetermination (June 5, 2015), ECF No. 70 ("Pl.'s Br."); *see also* Def.'s Resp. to Pl.'s Comments to the Remand Redetermination (Aug. 7, 2015), ECF No. 77 ("Def.'s Resp."); Def.-Intervenor's Resp. to Pl.'s Comments to the Remand Redetermination (Aug. 13, 2015), ECF No. 79; Letter from Gregory S. Menegaz, attorney for Plaintiff, to the Hon. Leo M. Gordon, Judge (Aug. 13, 2015), ECF No. 80 (letter correcting factual misstatement).

I. Standard of Review

For administrative reviews of antidumping duty orders, the court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3

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

Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2015). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms, National Courts* § 3:6 (5th ed. 2015).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the antidumping statute. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (Commerce's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.").

II. Discussion

A. Steel Wire Surrogate Value

In *Foshan I* the court remanded to Commerce to further consider the surrogate value for Foshan Shunde's steel wire input. *Foshan I*, 37 CIT at ___, 896 F. Supp. 2d at 1326–28. During the administrative review Commerce had three choices. Foshan Shunde proposed a relatively lower cost surrogate value derived from Indonesian HTS 7217.10.10 ("Containing by weight less than 0.25% of carbon"), a category assigned to low carbon steel wire. Home Products International, Inc. ("HPI"), the petitioner, proposed a relatively higher cost surrogate value derived from Indonesian HTS 7217.10.39 ("Containing by weight 0.6% or more of carbon"), a category assigned to high carbon steel wire. Conf. J.A. at JA002672–73 (Feb. 15, 2015), ECF Nos. 37–39 (HPI's brief in rebuttal to Foshan Shunde's administrative case brief) ("J.A."). HPI also suggested, as an alternative, a surrogate value derived from the six-digit basket category, Indonesian HTS 7217.10 ("Wire of iron or non-alloy steel"), which encompassed both of the other two proposed categories. *Id.* at JA002673 ("[Commerce] may consider it appropriate to broaden the surrogate value classification beyond the sublevels reflecting carbon content and simply base the value on data reflecting Indonesian imports at the 6-digit level.") (HPI's administrative rebuttal brief).

The Indonesian "carbon" metric posed an issue because the administrative record, through no fault of Foshan Shunde, did not identify the carbon content of Foshan Shunde's steel wire inputs. HPI acknowledged that the absence of record information was not the result of "a shortcoming of [Foshan Shunde's] production records system." *See id.* Foshan Shunde did not capture that information in its production records, and as one can infer from HPI's concession, it is not

something about which an ironing board manufacturer appears to care. Commerce therefore had to choose the "best available" surrogate value based on incomplete information, or more simply, a lack of direct information about the carbon content of Foshan Shunde's steel wire input.

The surrogate value for the steel wire input was not an issue in the prior administrative review in which India was the surrogate country. Commerce used Indian HTS 7217.10.10. India, though, unlike Indonesia, categorizes its additional subheadings under HTS 7217.10 according to wire thickness, not carbon content. Foshan Shunde, nevertheless, argues that Indonesian HTS 7217.10.10 is a logical, if not comparable, surrogate selection given the past selection of Indian HRS 7217.10.10. HPI argued, and Commerce agreed, however, that no direct concordance exists between the diameter-based provisions of the Indian tariff schedule and the carbon-based provisions of the Indonesian schedule. *Remand Results* at 17–18.

In the *Final Results* Commerce chose the relatively higher cost, higher carbon surrogate value for Foshan Shunde's steel input. *Decision Memorandum* at 13. When subsequently challenged by Foshan Shunde, the court found persuasive Foshan Shunde's argument made before Commerce that ironing boards do not require the higher cost steel input Commerce selected: "As a matter of common sense, this common household product has no special requirement for high strength high carbon steel wire . . . ." J.A. at JA002593 (Foshan Shunde's administrative case brief). The court remanded the issue to Commerce and asked why "it is reasonable to infer/assume from the administrative record that a household item like an ironing board requires higher carbon content." *Foshan I*, 37 CIT at ___, 896 F. Supp. 2d at 1327–28.

On remand, Commerce replaced the higher cost, high carbon surrogate value with a surrogate value derived from the broader six-digit HTS subheading 7217.10 that includes both high carbon and low carbon steel wire. *Remand Results* at 17. Commerce concluded, "while the record establishes that Foshan Shunde consumed steel wire in the production process, there is nothing on the record of this proceeding that establishes the particular carbon content of the steel wire that Foshan Shunde used." *Id.* at 8. As further justification, Commerce noted that Foshan Shunde had failed to demonstrate that the administrative record supported its claims that it used only low carbon steel wire as its input. *Id.* at 7–8.

These conclusions, however, still do not, in the court's view, provide a reasoned basis for Commerce's choice of a surrogate value that includes some high carbon steel for Foshan Shunde's steel wire in-

puts. More specifically, the conclusions do not provide a reasonable basis to infer that Foshan Shunde, or any ironing board manufacturer for that matter, would choose to source higher cost, high carbon steel wire inputs to make ironing boards. The court still does not understand how a reasonable mind would include those higher cost inputs as surrogate values. Neither Commerce nor HPI has explained why an ironing board manufacturer requires higher cost, high carbon inputs. This is not an adverse facts available situation in which Foshan Shunde withheld information or failed to cooperate. Foshan Shunde offered a common sense explanation in lieu of direct evidence of the actual carbon content of its steel inputs, which everyone concedes was not knowable. As HPI itself stated in its administrative rebuttal brief, "the record does not reflect the necessary specification (carbon content) but not through a shortcoming of the respondent's production records system." J.A. at JA002673.

HPI could have buttressed its preferred inferences about Foshan Shunde's potential use of higher cost, higher carbon steel wire with HPI's own declarations demonstrating that ironing board manufacturers typically use higher cost, higher carbon steel wire, or that they typically use a mixture of high carbon and low carbon steel wire. Without that informational proffer, however, it is difficult for the court to conceive a reasonable mind disregarding the common sense intuition that an ironing board manufacturer simply does not require higher cost, higher carbon steel wire, and would therefore logically favor the lower cost input. "Occasionally, even in the law, common sense must prevail." *Wind Tower Trade Coal. v. United States*, 741 F.3d 89, 99 (Fed. Cir. 2014).

Without a reasonable explanation supporting Commerce's inference that Foshan Shunde would have sourced the relatively higher cost, high carbon steel wire to manufacture its ironing boards, the court holds that the relatively lower cost, low carbon surrogate value derived from Indonesian HTS subheading 7217.10.10 is the only surrogate value on this administrative record that a reasonable mind would select as the best available information for Foshan Shunde's steel wire input. Accordingly, the court remands this issue to Commerce to use HTS subheading 7217.10.10 to calculate Foshan Shunde's steel wire input.

B. Brokerage and Handling

Foshan Shunde challenges Commerce's calculation of its B&H. This has become a well-worn issue in the administrative reviews of the ironing board antidumping order. The issue resulted in four remands from this Court covering the fifth administrative review. In a series of

decisions in that action, most notably *Since Hardware (Guangzhou) Co. v. United States*, 38 CIT ___, 37 F. Supp. 3d 1354 (2014) ("*Since Hardware IV*") and *Since Hardware (Guangzhou) Co v. United States*, 38 CIT ___, 977 F. Supp. 2d 1347, *vacated in part after remand*, 38 CIT ___, 37 F. Supp. 3d 1354 ("*Since Hardware III*"), the court and the parties came to a fuller understanding of the World Bank's *Doing Business 2010* series of publications, the source for Commerce's B&H surrogate value selection in the fifth administrative review. Commerce turned to *Doing Business 2010* again in this administrative review (and *Remand Results*), but used Indonesian data. *See Foshan I*, 37 CIT at ___, 896 F. Supp. 2d at 1323 (sustaining Commerce's selection of Indonesia as the primary surrogate country). Foshan Shunde challenges Commerce's use of the *Doing Business* data over other sources in the record and in the alternative seeks adjustments to the *Doing Business* data points to conform with other evidence on the record.

The *Doing Business 2010* series compares the costs of doing business in 183 different economies based on surveys of local companies. The survey data are compiled into the costs a hypothetical business would incur when undertaking various activities in an economy. B&H costs in particular are aggregated as those a hypothetical medium-sized business located within an economy's largest city would incur when exporting merchandise in a single 20-foot shipping container. The *Doing Business 2010: Indonesia* data point is thus the cost a hypothetical business in Indonesia's largest city, Jakarta, might incur when exporting a single 20-foot shipping container as derived from survey responses from companies all over Indonesia. *See* J.A. at JA1394–412.

The *Doing Business 2010: Indonesia* B&H figure consists of three relevant components:

Document Preparation Fees	$210
Customs Clearance Fees	$169
Ports & Terminal Handling Charges	$165
Total	$544

Remand Results at 9. Commerce doubled these amounts to reflect Foshan Shunde's use of 40-foot containers rather than the 20-foot containers presumed in the World Bank's surveys. *Id.*

Foshan Shunde first argues that Commerce's selection of the *Doing Business 2010: Indonesia* data is unreasonable because the data comes from survey responses describing hypothetical costs. Pl.'s Br. at 7–10. The court does not agree. Commerce in the *Remand Results* explained that *Doing Business 2010: Indonesia* meets its announced

surrogate value selection criteria. Specifically, the *Doing Business 2010* data is sourced from the primary surrogate country and "reflect the experience of a broad number of exporters, are publicly available, specific to the costs in question, represent a broad market average, and are contemporaneous to the [period of review]." *Remand Results* at 12–13. Commerce reasonably found that Foshan Shunde's proffered alternative sources were inferior to the *Doing Business 2010* data when measured against those same criteria. Specifically, Foshan Shunde's alternative data are from individual, mostly non-Indonesian freight forwarding companies, which represent less of a broad market average and are not sourced from the primary surrogate country. Foshan Shunde's Indonesian data similarly fall short of the *Doing Business* source because they are from individual companies and cover only portions of the total B&H cost. *See Remand Results* at 12–14. Commerce's conclusion that the World Bank data represent the "best available" data to value Foshan Shunde's B&H costs is therefore reasonable.

Foshan Shunde next argues that Commerce should have altered the World Bank data to reflect Foshan Shunde's actual experience. Pl.'s Br. at 10–16. Specifically, Foshan Shunde argues that Commerce should subtract $255 for letter of credit preparation fees because Foshan Shunde did not actually incur that cost. *Id.* at 11–13. Foshan Shunde points to correspondence from a World Bank staffer indicating that the $210 document preparation component of the *Doing Business* data point includes the cost of procuring a letter of credit. The court, though, agrees with Defendant that Commerce's refusal to subtract the $255 letter of credit fee was reasonable. The document preparation component of the *Doing Business* data point is an aggregate figure that includes costs for the preparation of numerous documents. Foshan Shunde identifies no evidence to indicate what segment of the $210 document preparation cost is attributable to obtaining a letter of credit. As Commerce reasonably explained, "without knowing the exact breakdown of the data included in the World Bank report, and how the business practices of this broad pool of companies relate to the business practices of Foshan Shunde, the Department can no more deduct a letter of credit expense, or remove elements of document and preparation charges, than it can add extra expenses which Foshan Shunde incurred but which are not reflected by the World Bank data." *Remand Results* at 24. The court therefore sustains Commerce's refusal to subtract Foshan Shunde's suggested letter of credit fee from the *Doing Business* data point.

Foshan Shunde also argues that Commerce unreasonably doubled

the *Doing Business* data point (and, by extension, each component of that data point) to reflect Foshan Shunde's use of 40-foot containers instead of 20-foot containers as described in the World Bank's surveys. The court agrees.

Commerce states that it could "find no record evidence in this redetermination establishing that a 100 percent proportionate increase in shipments between a 20-foot and 40-foot container is unreasonable." *Remand Results* at 11. Foshan Shunde, though, identified several record documents demonstrating that ports and terminal handling fees do not increase *proportionally* with container size and that document preparation fees do not increase *at all* with container size. Specifically, Foshan Shunde cites a document indicating that the Indonesian Government limits ports and terminal handling fees to $95 for 20-foot containers and $145 for 40-foot containers, as well as price quotes from an Indonesian freight forwarder appearing to corroborate these figures. The court therefore wonders how Commerce could reasonably assume that ports and terminal handling fees increase proportionally with container size if, as the record appears to demonstrate, the Indonesian Government sets fees at levels that do not. *See Remand Results* at 14, 22–25. Commerce relies on ports and terminal handling fees in other countries that show less than proportionate increases. Commerce's reliance on this data, however, does not support an inference or assumption that such fees in Indonesia rise proportionately with container size. *See id.* at 14–15 (attempting to justify a 100 percent increase for the Indonesian data point by reference to data for other countries that "range from 67 percent to 84 percent" as well as a suggested calculation from the domestic interested party yielding a "93 percent higher rate"). Quite the opposite. That sort of "reasoning" is, in the court's view, unreasonable.

Next, Foshan Shunde identifies a quote for obtaining a letter of credit from an Indonesian bank that does not depend on container size, as well as correspondence from a World Bank official indicating that letter of credit costs are included within the document preparation component of the *Doing Business 2010: Indonesia* data point. Foshan Shunde also identifies a report from the Association of Southeast Asian Nations Secretariat describing fees for the preparation of bills of lading assessed on a per-document basis. The fees for two of the documents in the document preparation component do not increase proportionally with container size, which should preclude a reasonable mind from "assuming" that the total document preparation component increases proportionally with container size. *See id.* at 22–25.

The court understands that Foshan Shunde utilized 40-foot con-

tainers and that the *Doing Business 2010: Indonesia* study described the hypothetical costs of shipping goods in 20-foot containers. Commerce chose to alter the *Doing Business* data point to reflect that difference, but did so without explaining what relationship (if any) exists between the *Doing Business* data point and container size. With Foshan Shunde's demonstration that two of the three components do not increase proportionally with container size, the court cannot sustain Commerce's approach. *Cf. Remand Results* at 24 (rejecting Foshan Shunde's proposed alteration because Commerce could not determine "the exact breakdown of the data included in the World Bank report, and how the business practices of this broad pool of companies relate to the business practices of Foshan Shunde"). The court therefore remands the B&H issue for Commerce to reconsider its alteration of the *Doing Business 2010: Indonesia* figure.

C. Zeroing

Foshan Shunde challenges Commerce's application of zeroing in this administrative review. The court stayed resolution of this issue pending the Court of Appeals for the Federal Circuit's ("Federal Circuit") decision in *Union Steel v. United States*, 713 F.3d 1101 (Fed. Cir. 2013), and then pending this Court's decision in *Since Hardware IV*. *See* Foshan Shunde Yongjian Housewares & Hardwares Co. v. United States, Ct. No. 12–00069, at 1–2 (CIT Aug. 22, 2013), ECF No. 55 (order continuing stay). The Federal Circuit in *Union Steel* affirmed Commerce's practice of zeroing in administrative reviews as a reasonable interpretation of a silent statutory provision under *Chevron*. The court in *Since Hardware IV* concluded that the reasoning in *Union Steel*, a market economy case, also applied in the non-market economy setting and as a consequence also held Commerce's use of zeroing to be reasonable under *Chevron*. Familiarity with the background and holdings on the issue of zeroing in those cases is presumed.

Foshan Shunde's arguments here are similar to those it made in *Since Hardware IV*, focusing on the difference between Commerce's application of the average-totransaction ("A-to-T") methodology in market economy reviews as compared to non-market economy reviews. As Foshan Shunde explains, Commerce in market economy reviews uses monthly average normal values, so that the "A" in the "A-to-T" comparison changes with each month covered in the period of review. In non-market economy reviews, however, Commerce uses *one* average normal value, so that the "A" in the "A-to-T" comparison does not change at all. According to Foshan Shunde, the single average value produces a "less accurate" and "less reasonable" compari-

son, and therefore renders Commerce's application of zeroing in non-market economy reviews unreasonable. Pl.'s Br. at 22. Foshan Shunde adds that Commerce "offered no explanation" for its conclusion in the *Remand Results*, "merely relying on prior case decisions and not addressing Foshan Shunde's arguments." *Id.* at 24.

The court is not convinced. Foshan Shunde develops its argument by comparing the market economy and non-market economy versions of A-to-T. The question of whether Commerce's application of A-to-T yields more accurate results in the market economy setting as compared to the non-market economy setting, however, is not as critical as Foshan Shunde insists. The issue before the *Union Steel* court was the reasonableness of Commerce's justification for zeroing in administrative reviews but not investigations. *Union Steel*, 713 F.3d at 1107–09. That explanation turned on the differences in Commerce's application of A-to-T *rather than average-to-average* ("A-to-A") in administrative reviews. *Union Steel*, 713 F.3d at 1107–09. Through that lens, the Federal Circuit concluded that Commerce's practice of zeroing when applying A-to-T "better reflect[s] the results of each average-to-transaction comparison" because "zeroing reveals masked dumping," and that zeroing therefore "reasonably reflects unique goals in differing comparison methodologies." *Id.* at 1109.

When using A-to-T in the non-market economy setting, Commerce gains the same kind of comparative advantage *over A-to-A* because it uses individual transaction prices instead of average transaction prices. *Remand Results* at 16. This is why, in the court's view, *Union Steel* applies in the non-market economy setting. *See Since Hardware IV*, 38 CIT at ___, 37 F. Supp. 3d at 1361–63. And although Foshan Shunde may be able to show that A-to-T in the market economy context yields more accurate results than A-to-T in the non-market economy context, Foshan Shunde has not demonstrated that that Commerce's non-market economy practices eliminate the comparative advantage A-to-T has over A-to-A more generally. *See* Pl.'s Br. at 20–24. The court therefore concludes that Commerce's application of zeroing here is reasonable under *Chevron*. *See Union Steel*, 713 F.3d at 1107–09.

The court also does not agree with Foshan Shunde that Commerce did not provide an explanation. Commerce in the *Remand Results* noted that "zeroing can increase accuracy and reveal potential masked dumping," and that both *Union Steel* and *Since Hardware IV* support its position. *Remand Results* at 16, 26. This explanation, though short, is reasonable. *See NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1321–22 (Fed. Cir. 2009) (The court must sustain a determination "'of less than ideal clarity'" where Com-

merce's decisional path is reasonably discernable. (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))).

III Conclusion

For the foregoing reasons, the court sustains the *Remand Results* with the exception of Commerce's surrogate value selection for steel wire and Commerce's adjustment of the documents preparation and ports and terminal handling components of the *Doing Business 2010: Indonesia* data point.

Accordingly, it is hereby

ORDERED that Commerce on remand use Indonesian HTS 7217.10.10 to calculate Foshan Shunde's steel wire input; it is further

ORDERED that Commerce on remand clarify or reconsider its adjustment of the *Doing Business 2010: Indonesia* data point for use as the surrogate value for brokerage and handling; it is further

ORDERED that Commerce shall file its remand results on or before March 8, 2016; and it is further

ORDERED that, if applicable, the parties shall file a proposed scheduling order with page/word limits for comments on the remand results no later than seven days after Commerce files its remand results with the court.

Dated: January 8, 2016
New York, New York

/s/ Leo M. Gordon
JUDGE LEO M. GORDON

Slip Op. 16–2

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

Before: Claire R. Kelly, Judge
Court No. 15–00315
Public Version

OPINION AND ORDER

[Denying Defendant's motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim and granting Plaintiff's motion for a preliminary injunction.]

Dated: January 8, 2016

This matter is before the court on: (1) Defendant's motion to dismiss Plaintiff's cause of action pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction or, in the alternative, pursuant to USCIT Rule 12(b)(6)[1] for failure to state a cause of action, *see generally* Mot. Dismiss Public Version, Dec. 18, 2015, ECF. No. 40 ("Mot. Dismiss"); and (2) Plaintiff Sunpreme Inc.'s ("Sunpreme") motion for a preliminary injunction, *see generally* Pl.'s Appl. TRO and Mot. Prelim. Inj. and Mem. P. & A. in Supp. Public Version, Dec. 10, 2015, ECF. No. 23 ("Mot. TRO and PI"). Plaintiff brought this action to challenge a determination made by U.S. Customs and Border Protection ("CBP" or "Customs") resulting in the collection of cash deposits on Plaintiff's merchandise and the suspension of liquidation, which Plaintiff alleges was beyond the scope of CBP's authority.[2] *See* Public Compl. ¶¶13–16, 27, 41–44, 46–49, ECF No. 5, Dec. 3, 2015 ("Compl."); *see also generally 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)

[1] Defendant denominated its motion to dismiss as for "failure to state a claim" under USCIT Rule 12(b)(5). However, as of July 1, 2015, the enumerated pre-answer defenses under USCIT Rule 12 were renumbered to conform to those of the Federal Rules of Civil Procedure such that a motion for a failure to state a claim is now made under USCIT Rule 12(b)(6). The court will refer to Defendant's motion to dismiss on this ground by its current designation throughout this opinion.

[2] CBP determined that Plaintiff's merchandise is described by the scope of *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) 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). As discussed more fully below, as a consequence of this determination, Plaintiff had to post cash deposits for its merchandise in order to withdraw the merchandise for consumption. *See* 19 C.F.R. § 144.38(d)–(e).

("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") (collectively "Orders").

On December 9, 2015, Plaintiff filed an application for a temporary restraining order ("TRO") and a motion for a preliminary injunction. *See generally* Mot. TRO and PI. That same day the court held a telephonic hearing with Plaintiff and Defendant and subsequently issued a scheduling order directing the Plaintiff to provide, by letter, estimates of anticipated cash deposits that Defendant would forego in the event the court issued a TRO suspending the payment of cash deposits for entries through January 11, 2016. *See* Scheduling Order, Dec. 9, 2015, ECF No. 14. Additionally, the court ordered Defendant to respond to Plaintiff's letter indicating whether it required an evidentiary hearing on the issue of whether Plaintiff would suffer irreparable harm if the court did not grant Plaintiff's application for a TRO. *See id.*

On December 10, 2015, after a motion to intervene brought by SolarWorld Americas, Inc. ("SolarWorld"), the court ordered the permissive intervention of SolarWorld as Defendant-Intervenor.[3] *See generally* Mem. and Order, Dec. 10, 2015, ECF No. 21.

On December 14, 2015, the court issued a memorandum and TRO finding that the Plaintiff had made an adequate showing under the applicable standard that: (1) "Plaintiff would suffer irreparable harm through continued collection of cash deposits" because "[t]he court is convinced that the collection of [ ] additional . . . cash deposits within the period that the parties brief the jurisdictional issues may very well force Plaintiff out of business, or, at the very least, cause serious disruption to Plaintiff's business," Am. Mem. and TRO Confidential Version 7, Dec. 16, 2016, ECF No. 35 ("Am. Conf. TRO"); (2) "[b]ecause the jurisdictional question raised by Defendant is not so clear-cut, the court would not decide this question before full briefing by the parties. Plaintiff has shown the grave potential financial risk

[3] SolarWorld moved to intervene as of right pursuant to USCIT Rule 24(a)(2), or, in the alternative, for permissive intervention pursuant to USCIT Rule 24(b). *See generally* Def.-Intervenor's Unopposed Mot. Intervene as Def.-Intervenor, Dec. 9, 2015, ECF No. 15 ("Mot. Intervene"). Plaintiff did not oppose SolarWorld's intervention in the action as Defendant-Intervenor. *See id.* Defendant conditionally consented to SolarWorld's intervention in the action as Defendant-Intervenor "for the limited purpose of allowing SolarWorld to respond to [its] motion to dismiss for lack of jurisdiction." *Id.* Defendant further indicated that, if the case were properly within the Court's jurisdiction pursuant to 28 U.S.C. § 1581(i), it would consent to SolarWorld's intervention. *See id.* However, Defendant argued the case was not within the Court's jurisdiction. *See id.* Notwithstanding Defendant's conditional consent, the court granted SolarWorld's motion to intervene permissively, pursuant to USCIT Rule 24(b), without limitation.

it faces while the merits of this jurisdictional argument are fully briefed, and Plaintiff should not face such a substantial threat to its existence while its preliminary injunction motion and Defendant's motion to dismiss are decided," *Id.*at 10; and (3) the public interest and balance of hardships favored preventing irreparable harm to Plaintiff while the jurisdictional question was decided "[p]articularly because the court can protect Defendant's interest in the cash deposits that would be foregone through a bond whose costs would put Plaintiff's financial position at less risk." *Id.* Therefore, the court temporarily restrained Defendant from requiring Plaintiff to pay cash deposits on entries of solar modules containing bi-facial thin film cells made with amorphous silicon shipped from the People's Republic of China that are the subject of this action until December 28, 2015 and directed that Plaintiff "provide assurity that it will furnish a bond in the amount of [[ ]] subject to the approval of the Clerk of the Court, to pay the costs or damages as may be incurred or suffered in the event of a finding that the Defendant has been wrongfully enjoined or restrained." *Id.* at 13–14.

On December 18, 2015, Defendant filed its motion to dismiss Plaintiff's cause of action pursuant to USCIT Rule 12(b)(1) for lack of jurisdiction, or, in the alternative, pursuant to USCIT Rule 12(b)(6), arguing that Plaintiff fails to state a cause of action. *See generally*-Mot. Dismiss. Plaintiff filed its response to Defendant's motion to dismiss on December 23, 2015. *See generally* Pl.'s Resp. Def.'s Mot. Dismiss Public Version, Dec. 23, 2015, ECF No. 45 ("Pl.'s Resp. Mot. Dismiss"). On December 28, 2015, finding that good cause existed to continue the TRO because all of the conditions that warranted granting the initial TRO remained while the court awaited final briefing from Defendant and Defendant-Intervenor on Defendant's motion to dismiss, the court extended the TRO to January 11, 2016 . *See generally* Order Extending TRO Public Version, Dec. 30, 2015, ECF No. 52. Briefing on both Defendant's motion to dismiss and Plaintiff's motion for preliminary injunction concluded on December 30, 2015. For the following reasons the court denies Defendant's motion to dismiss on both grounds and grants Plaintiff's motion for a preliminary injunction.

BACKGROUND

Plaintiff is a U.S. company based in Sunnyvale, California that imports solar modules produced by Jiawei Solarchina (Shenzhen) Co., Ltd. ("Jiawei Shenzen") that are composed, in part, of solar cells Plaintiff designs, develops and tests at its facility in California.

Compl. ¶1. Plaintiff avers that its cells "utilize thin-film amorphous silicon as the photovoltaic material that generates electricity in a symmetrical bifacial solar cell design." *Id.* Plaintiff alleges the solar modules it imports are "bi-facial double glass frameless solar modules with outputs of 280 – 370W, made of thin film solar cells using its proprietary technology called the Hybrid Cell Technology." *Id.* Plaintiff also alleges that:

> [a]ll of Sunpreme's solar modules in question consist of solar cells made with amorphous silicon thin films and are certified by the solar industry certification body as thin film products. Sunpreme's modules have received the TUV certification to IEC 61646: 2008 which covers "Thin film terrestrial photovoltaic (PV) modules. Design qualification and type approval." TUV is a well-known international third party certification body whose certification process includes laboratory testing of the product, as well as factory inspection.

Compl. ¶16.

On December 7, 2012, the U.S. Department of Commerce ("Commerce") published the Orders. The scope language of each of the AD Order and the CVD Order, which is identical, 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 at 73,017, AD Order at 73,018. On December 11, 2012, Commerce notified CBP of the CVD Order by Message #2346303, which incorporated the scope language from the CVD Order and instructed CBP to require cash deposits equal to the subsidy rates in

effect at the time of entry. *See* Exs. Pl's Appl. TRO and Mot. Prelim. Inj. and Mem. P. & A. Supp. Thereof Public Version Attach. 1 at Ex. 4, Dec.10, 2015, ECF No. 23–1–4 ("Exs. Mot. TRO & PI"). On December 21, 2012, Commerce notified CBP of the AD Order by Message #2356306, which incorporated the scope language from the AD Order and instructing CBP, effective December 7, 2012, to require a cash deposit or the posting of a bond equal to the dumping margins in effect at the time of entry. *See id.* at Attach. 1 at Ex. 3.

Neither party contests that Plaintiff had been entering its merchandise as entry type "01," the entry type designation for ordinary consumption entries. Moreover, neither party contests that, prior to April 20, 2015, CBP was not requiring Plaintiff to pay cash deposits or to enter its merchandise as type "03," the designation for entries subject to antidumping and countervailing duties.

In early 2015, Defendant alleges that CBP began to investigate whether Plaintiff's imports may be subject to the Orders. *See* Mot. Dismiss 3. On April 7, 2015, CBP notified Plaintiff by letter that it [[ ]] App. to Def.'s Resp. Opp. Pl.'s Mot. Prelim. Inj. Confidential Version Ex. 3, Dec. 23, 2015, ECF No. 41–1 ("App. Conf. Resp. Mot. PI"). Thereafter, Defendant alleges that CBP sent a sample of Plaintiff's merchandise for analysis at its laboratory in San Francisco. *See* Mot. Dismiss 3. CBP's Laboratory Report # SF20150252 found that one sample from entry # 32212346070 is a solar panel consisting of "[[ ]]" App. Conf. Resp. Mot. PI Ex. 1. CBP's Supplemental Laboratory Report # SF20150252S [[ ]]" *Id.* at Ex. 2. Defendant alleges that, following these reports, CBP preliminarily determined that Plaintiff's merchandise is included within the scope of the Orders. *See* Mot. Dismiss 6. According to Defendant,

> CBP's preliminary view that Sunpreme's merchandise is described by the scope of the antidumping and countervailing duty orders is based on the fact that the imported merchandise possesses the physical characteristics that are described by the plain terms of the scope of the order, irrespective of whether a thin film is also present. Therefore, the precise measurements of the film were not believed to be significant.

Id. at 8 (citations omitted).

Plaintiff alleges that on April 20, 2015, CBP began rejecting its entries and requesting that Plaintiff file these entries as type "03"[4]

[4] Defendant does not contest that Plaintiff began filing its entries as type "03" and making cash deposits beginning in May, 2015, *see* Mot. Dismiss 22, but Defendant avers that Plaintiff cannot identify any "specific entry rejection or other notices that would embody the contested agency determination because Sunpreme has not identified with any specificity

and requesting that Plaintiff deposit antidumping duties at the China-wide rate of 239.42 percent and countervailing duties at the "all others" rate of 15.24 percent. *See generally* Compl. ¶¶8–9; Exs. Mot. TRO & PI Attach. 1 at Ex. 1–B.

On May 6 and May 19, 2015, Plaintiff submitted letters to CBP's Electronics Center for Excellence and Expertise in Long Beach, California, objecting that its products were not subject to the Orders, or alternatively, asserting that the appropriate antidumping duty rate should be the exporter–specific rate of Jiawei Shenzen.[5] *See generally* App. Conf. Resp. Mot. PI Exs. 4, 5. After reviewing Plaintiff's submissions, Defendant concedes that "CBP agreed that the lower AD rate of 13.94 percent for [Jiawei Shenzen] (and not the China-wide rate) appeared to be correct." Def.'s Resp. Opp. Pl.'s Mot. Prelim. Inj. Public Version 7, Dec. 28, 2015, ECF No. 47 ("Def.'s Resp. Mot. PI"). Although Plaintiff continued to take the position that its solar modules were not included in the scope of the Orders, Plaintiff thereafter began filing its entries as type "03" and depositing antidumping duties at the rate of 13.94% and countervailing duties at the rate of 15.24%. *See* Compl. ¶¶9, 29; *see also* Mot. TRO & PI 2. As a result, the

the 'final' agency action that it believes is reviewable under 28 U.S.C. § 1581(i)." *Id.* at 22 n.10. Defendant argues that it located the Notice of Action dated April 20, 2015 referenced by Plaintiff in its Complaint, but "it relates to an entry that was cancelled because the merchandise has moved to a bonded warehouse. A separate entry was made following withdrawal from the warehouse, for which Sunpreme included an antidumping and countervailing duty cash deposit." *Id.*In other words, Defendant argues that Plaintiff has not identified any CBP determination requiring Plaintiff to pay cash deposits, but was merely acting pursuant to Commerce's liquidation instructions contained in its message #2346303 and message #2356306. *See id.* CBP sent Plaintiff notices of action relating to multiple entries with explanations that the merchandise for the entries "are subject to antidumping and countervailing duties under case # A–570–979–000" which carry AD and CVD rates. *See generally* Exs. Pl.'s Appl. TRO and Mot. Prelim. Inj. and Mem. P. & A. Supp. Thereof Final Confidential Version Attach 1 at Ex. 1-B. Further, these notices required the entries to be filed as type "03" entries. *See generally id.* As discussed more fully below, as a consequence of this change, Plaintiff had to post cash deposits for its merchandise in order to withdraw the merchandise for consumption and delivery to its customers. *See* 19 C.F.R. § 144.38(d)–(e).

[5] In its letter dated May 6, 2015, Plaintiff indicated that, although its takes the position that its products are:
[[

]]"
App. Conf. Resp. Mot. PI Ex. 4 at 1–2. Jiawei Shenzen, which produced Plaintiff's solar cells into solar modules, was a producer subject to the AD Order with an exporter-specific rate of 13.94%. *See* AD Order at 73,020.

liquidation of Plaintiff's entries became suspended by operation of law.[6] *See* Def.'s Resp. Mot. PI 7.

Following Plaintiff's objections, at Plaintiff's invitation, CBP visited Plaintiff's domestic facilities to observe its manufacturing process on July 9, 2015. *See* Compl. ¶31, Def.'s Resp. Mot. PI 7. Over the course of the next several months, Plaintiff made samples of its modules at various stages of manufacture available to CBP for examination. *See* Mot. TRO & PI 15, Def.'s Resp. Mot. PI 7. Plaintiff continued to submit material to CBP describing the production, design, and functionality of its cells, and Plaintiff alleges that its representatives met with CBP officials at the port of Long Beach, California to provide additional clarification regarding the features of its products. *See* Mot. TRO & PI 14.

On May 14, 2015, Plaintiff submitted a letter to CBP arguing that its products do not fall within the scope of the Orders. *See generally* Exs. Pl.'s Appl. TRO and Mot. Prelim. Inj. and Mem. P. & A. Supp. Thereof Final Confidential Version, Attach. 5 at Ex. 28, Dec. 10, 2015, ECF No. 22–1–5 ("Exs. Conf. Mot. TRO & PI"). Plaintiff argued in its letter that [[

]]" *Id.* Plaintiff further argued that its

> products do not incorporate silicon [photovoltaic ("PV")] cells. The fact that the particular substrate on which the thin film cell is deposited is a *blank* silicon wafer does not make Sunpreme's cell a crystalline PV cell because the blank wafer is not diffused

[6] 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), 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. 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 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 is entered.

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

Here, no party disputes that CBP began collecting cash deposits for entries Plaintiff began filing as type "03." Nor does any party dispute that, as a result of filing its entries as "03," liquidation was suspended. *See* Compl. ¶8, Def.'s Mem. Supp. 5.

> so as to allow it to generate electricity. . . *i.e.* the silicon wafer does not contain the p/n junction, which is the key element of a solar cell.

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

> Thin film cells and modules use a several micron thick layer of either amorphous silicon (a-Si), cadmium telluride (CdTe), copper indium (gallium) (di) selenide (CIS or CIGS), or a combination of a-Si and micro-crystalline silicon (μ-Si) to convert sunlight to electricity.

Id. at 11 (citations omitted). Plaintiff further asserted that "[t]he ITC also recognized that thin film products may use different types of substrates." *Id.* Plaintiff summarized, arguing that "the ITC had defined thin film products as having an amorphous silicon thin film layer deposited on a substrate, which can be glass, a flexible material or different types of substrates." *Id.*at 12.

Following laboratory testing, on September 30, 2015, CBP made the following findings in laboratory report no. SF20151545:

> [[
>
>]]

Id. at Ex. 14.

On November 16, 2015, Plaintiff filed a scope inquiry with Commerce under 19 C.F.R. § 351.225 (2012).[7] *See* Compl. ¶35. On December 8, 2015, citing its authority under 19 C.F.R. § 351.302(b), Commerce extended the deadline to issue a final scope ruling on Plaintiff's application by 45 days, to February 15, 2016, because Commerce needed additional time to consider Plaintiff's application for a scope inquiry. *See generally* Exs. Conf. Mot. TRO & PI Attach. 5 at Ex 30. On December 30, 2015, Commerce initiated a formal scope inquiry pursuant to 19 C.F.R. § 351.225(e) indicating Commerce's intention "to issue its final determination within 120 days from this initiation,

[7] Further citations to the Code of Federal Regulations are to the 2015 edition, unless otherwise noted.

on April 28, 2016, as specified in 19 C.F.R. § 351.225(f)(5)." *See* Def.-Intervenor's Reply Pl.'s Resp. Def.'s Mot. Dismiss Public Version Ex. 3, Dec. 31, 2015, ECF No. 60 ("Def.-Int. Reply Mot. Dismiss").

Plaintiff initiated this action on December 3, 2015, under 28 U.S.C. § 1581(i) (2012),[8] challenging CBP's collection of cash deposits and the suspension of liquidation that resulted from CBP requiring Plaintiff to file its entries as type "03" entries. *See generally* Summons, Dec. 3, 2015, ECF No. 1; Compl. Defendant moved to dismiss Plaintiff's cause of action pursuant to USCIT Rule 12(b)(1) for lack of jurisdiction, or, in the alternative, pursuant to USCIT Rule 12(b)(6), arguing that Plaintiff fails to state a cause of action.[9] *See generally* Mot. Dismiss.

STANDARD OF REVIEW

The party seeking the Court's jurisdiction has the burden of establishing that jurisdiction exists. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). Moreover, "[w]here, as here, claims depend upon a waiver of sovereign immunity, a jurisdictional statute is to be strictly construed." *Celta Agencies, Inc. v. United States*, 36 CIT __, __, 865 F. Supp. 2d 1348, 1352 (2012) (citing *United States v. Williams*, 514 U.S. 527, 531 (1995)).

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to USCIT Rule 12(b)(6), the court assumes all factual allegations in the complaint to be true and draws all reasonable inferences in favor of the plaintiff. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1584 n.13 (Fed. Cir. 1993) (citations omitted); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991).

DISCUSSION

I. The Court Has Jurisdiction Under 28 U.S.C. § 1581(i)

Title 28 of U.S.C. § 1581(i) provides the Court with residual jurisdiction to the specific grants of jurisdiction outlined in subsections (a)–(h) of § 1581. *See* 28 U.S.C. § 1581. Section 1581(i) provides that

[8] Further citations are to the relevant provisions of Title 28 of the U.S. Code, 2012 edition.

[9] When faced with motions to dismiss under both 12(b)(1) and 12(b)(6), a court, absent good reason to do otherwise, should ordinarily decide the 12(b)(1) motion first "because if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined by the judge." *See* 5B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350 (3d ed.1998). "Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy." *Bell v. Hood*, 327 U.S. 678, 682 (1945).

> [i]n addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section . . . , the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue . . . .

Id. It has been consistently held that jurisdiction under § 1581(i) may not be invoked if jurisdiction under another subsection is or could have been available, unless the other subsection is shown to be manifestly inadequate. *See, e.g.*, *Chemsol, LLC v. United States*, 755 F.3d 1345, 1349 (Fed. Cir. 2014), *Norman G. Jensen, Inc. v. United States*, 687 F.3d. 1325, 1329 (Fed. Cir. 2012), *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006), *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988). Section 1581(i) will not confer jurisdiction when a litigant has access to the Court on an enumerated basis. *See Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1549 (Fed. Cir. 1983). In such circumstances, a litigant must proceed on the available avenue for review on an enumerated jurisdictional basis, complying with all the relevant prerequisites, before invoking jurisdiction under 1581(i). *See id.*

The two jurisdictional routes potentially available to the Plaintiff here are under 28 U.S.C. § 1581(a) and 1581(c). If either avenue is available to Plaintiff, either at the time the action is filed or through further action that would make such review available on an enumerated jurisdictional basis, then the Court lacks jurisdiction over Plaintiff's claim under 28 U.S.C. § 1581(i). *See id.* However, if both routes, even if theoretically available, are "manifestly inadequate," then the Court possesses jurisdiction under § 1581(i). *See id.* When jurisdiction under another provision of § 1581 "is or could have been available, the party asserting § 1581(i) jurisdiction has the burden to show how that remedy would be manifestly inadequate." *See Miller & Co.*, 824 F.2d at 963. Here, Plaintiff has demonstrated that review is unavailable under any enumerated basis for Court jurisdiction.

A. Jurisdiction Under § 1581(c) is Unavailable

Defendant argues that the Court lacks jurisdiction over Plaintiff's claim brought under 28 U.S.C. § 1581(i) because "to the extent [Plaintiff] requests that the [c]ourt agree with its interpretation of the scope of the antidumping or countervailing duty orders . . . [Plaintiff's

claim] is not ripe for the [c]ourt's review because Commerce's scope proceeding is pending, and the agency has not yet issued a determination reviewable under 28 U.S.C. § 1581(c)." Mot. Dismiss 10–11. Plaintiff claims that it is not challenging a scope determination by Commerce, and specifically none should be necessary, because "[t]he true nature of this proceeding is a challenge to CBP's failure to perform its ministerial function by properly applying the thin film exclusion explicitly spelled-out in Commerce's instructions relating to the subject antidumping and countervailing duty orders." Pl.'s Resp. Mot. Dismiss 8. Plaintiff further argues that "[t]his exclusion is not a minor detail. It is an essential component of the scope itself. CBP has never disputed that Sunpreme's modules are thin-film products." *Id.* at 10. Finally, Plaintiff argues that

> CBP had an obligation to apply the exclusionary language to Sunpreme's imports but it failed to do so. Rather, CBP reasoned that Sunpreme's product "possesses the physical characteristics that are described by the plain terms of the scope of the order, irrespective of whether a thin film is also present." In other words, CBP decided to ignore the thin film exclusion. This is unlawful.

Id. at 11 (footnotes and citations omitted).

The court finds Plaintiff is challenging CBP's unilateral interpretation of ambiguous scope language in excess of its authority. Therefore, Plaintiff lacks an adequate remedy in § 1581(c) to challenge CBP's interpretive act. *See* Section 516A of the Tariff Act of 1930,[10] 19 U.S.C. § 1516a(a)(2)(B)(vi)[11] (describing the classes of reviewable determinations in countervailing duty and antidumping duty proceedings).

Under 28 U.S.C. § 1581(c) the Court of International Trade "shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930." 28 U.S.C. § 1581(c). Under 19 U.S.C. § 1516a, which codifies 516A of the Tariff Act of 1930, the Court may review a determination by Commerce "as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing . . . antidumping or countervailing duty order." 19 U.S.C. § 1516a(a)(2)(B)(vi). Therefore, under § 1581(c), the Court

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

[11] Further citations are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

has jurisdiction to review scope determinations by Commerce, but not ultra vires interpretations of scope language by CBP.[12]

While Congress gave the role of determining the scope of an antidumping or countervailing duty order to Commerce, *see* 19 U.S.C. § 1516a(2)(B)(vi); 19 U.S.C. § 1677(25), 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 Corp. v. United States*, 289 F.3d 792, 794–95 (Fed. Cir. 2002). CBP has no authority to modify Commerce's determinations, in this case, 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). If there is a question as to the meaning of an antidumping or countervailing duty order, however, then it is for Commerce to answer that question. *See Sandvik Steel Co. v. United States*, 164 F.3d 596, 600 (Fed. Cir. 1998). The agency charged with the regulatory authority to do such interpretation is Commerce. *See* 19 U.S.C. § 1516a(2)(B)(vi); 19 U.S.C. § 1677(25); 19 C.F.R. § 351.225; *see also Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096–97 (Fed. Cir. 2002). If CBP attempts to determine whether a product falls within the scope based upon factual information that the scope language does not explicitly call on CBP to consider, it acts beyond its authority. Therefore, a challenge to an ultra vires interpretation of an antidumping or countervailing duty order by CBP is not a reviewable determination under 19 U.S.C. § 1516a, and such interpretation by CBP cannot be the subject of Court review under 28 U.S.C. § 1581(c).

Plaintiff's complaint alleges, and both Defendant and Defendant-Intervenor appear to concede, that an interpretive question over the meaning of the scope arose. Compl. ¶¶41–44. From its initial laboratory findings, CBP [[

]]*See generally* App. Conf. Resp. Mot. PI Exs. 1, 2. CBP's laboratory report No. SF20151545 not only [[

[12] 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 C.I.T. 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).

]]" but it also [[

]] Exs. Conf. Mot. TRO & PI Attach. 2 at Ex. 14. Whether or not it was clear from the face of the Orders that Plaintiff's cells were CSPV Cells "of thickness equal to or greater than 20 micrometers, having a p/n junction formed by any means," CVD Order at 73,017; AD Order at 73,018, CBP's laboratory report unequivocally [[

]]" Exs. Conf. Mot. TRO & PI Attach. 2 at Ex. 14. Neither CBP nor Defendant contests the presence of amorphous silicon in Plaintiff's products. [13]

Defendant argues CBP's view is grounded in "the fact that the imported merchandise possesses the physical characteristics that are described by the plain terms of the scope of the [O]rder[s], irrespective of whether a thin film is also present." Def.'s Resp. TRO & PI 8. Defendant concedes that:

> The extent to which Sunpreme's imports constitute a "hybrid" product, incorporating characteristics explicitly covered by the scope of the [O]rder[s] and at the same time incorporating a thin film potentially covered by the exclusionary language of the [O]rder[s], and whether any such "hybrid" product is covered by the scope of the [O]rder[s], are matters reserved for Commerce in a scope inquiry.

Id. at 8 n.9 (citations omitted). In light of CBP's finding of [[

]], considering the apparent breadth of the exclusion within the scope language for "thin film photovoltaic products produced from amorphous silicon (a-Si)," CBP could not have given effect to that exclusion without concluding that the Orders were meant to cover some products with thin films produced from amorphous silicon. Yet nothing on the face of the Orders indicates any such products were meant to be included in the scope. *See generally* AD Order 73,018; CVD Order 73,017. Therefore, CBP's conclusion that Plaintiff's products, which it conceded contain thin films, did not fall

[13] The CBP laboratory report no. SF20151545 does not specifically address the absence or presence of amorphous silicon in Plaintiff's products. *See* Exs. Conf. Mot. TRO & PI Attach. 2 at Ex. 14. However, CBP found "[[

]]" *Id.* Plaintiff alleges that the thin film layers that form the p-i(wafer substrate)-i-n junctions are the components of its cells that are formed by "four amorphous silicon depositions." Mot. TRO & PI 10. Nonetheless, Defendant argues CBP's view "is based on the fact that the imported merchandise possesses the physical characteristics . . . irrespective of whether a thin film is also present." Def.'s Resp. TRO & PI 8. Defendant does not argue that CBP excluded the goods on the basis of being unable to detect amorphous silicon.

within the exclusion was not based upon observed factual information that brought Plaintiff's products within the scope of the Orders, but rather represented an interpretation of ambiguous scope language.[14] CBP lacks the authority to interpret ambiguous scope language in the Orders.

At the point CBP realized it was unsure that the language of the Orders included Plaintiff's merchandise, it could not place the goods within the scope of the Orders because Congress charged Commerce with clarifying and interpreting its antidumping and countervailing orders. *Duferco*, 296 F.3d at 1096–97. CBP's role is relegated to implementing Commerce's instructions. *Koyo Corp. of U.S.A. v. United States*, 497 F.3d 1231, 1241–42 (Fed. Cir. 2007); *Mitsubishi*, 44 F.3d at 977. Plaintiff's challenge is not a challenge to Commerce's interpretation of the scope of the Orders, which would be reviewable under 19 U.S.C. § 1516a in an action brought pursuant to 28 U.S.C. § 1581(c), but to CBP's actions in excess of its authority in interpreting the Orders.

Defendant argues that "Sunpreme's claims are those that are routinely reviewed under 28 U.S.C. § 1581(c) or (a), depending on the particular administrative action that the importer is challenging and the nature of the relief the importer is seeking." Mot. Dismiss 9. Defendant further argues that

> [t]o the extent an importer is seeking clarity as to whether a particular product is included within the class or kind of merchandise that is covered by the scope of an antidumping or countervailing duty order, the importer must request a scope ruling from Commerce, and if desired, pursue judicial review of the scope determination in the context of 28 U.S.C. § 1581(c).

Id. However, although jurisdiction under § 1581(c) may make review of Commerce's interpretation of the scope reviewable by the Court after Commerce has issued a scope determination, review of CBP's ultra vires interpretation of the scope language is unavailable under § 1581(c). That Plaintiff may obtain clarification of the scope of the Orders at a later time from Commerce does not render CBP's impermissible interpretive act unreviewable. Since Plaintiff is complaining about the ultra vires suspension of liquidation and collection of cash deposits, which were clearly based upon CBP's interpretation of the

[14] Indeed, Defendant-Intervenor explicitly states that CBP "reasonably *interpreted* the definition of excluded products and determined that Sunpreme's products did not qualify for this exclusion." Def.-Intervenor's Pub. Reply Mot. Dismiss 6 (emphasis added).

ambiguous language of the Orders excluding thin film products, review of a Commerce scope determination will not grant Plaintiff the relief it seeks.

The structure of Commerce's regulations concerning scope rulings confirms that review of Commerce's scope determination under § 1516a will not grant Plaintiff the relief it seeks. 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). The regulations permit Commerce to act quickly to determine that a product falls within the scope of antidumping or countervailing duty orders "based solely upon the application," 19 C.F.R. § 351.225(d), or based upon the relevant descriptions of the merchandise in the petition, the initial investigations, and the determinations of the Secretary (including prior scope determinations) and the ITC. *See* 19 C.F.R. § 351.225(k)(1); *see also AMS Assocs., Inc. v. United States*, 737 F.3d 1338, 1344 (Fed. Cir. 2013).

If Commerce issues a final scope ruling based solely upon the application, and suspension of liquidation had already occurred because CBP properly determined the plain language of the antidumping or countervailing duty order included the merchandise, any such suspension of liquidation will continue upon a final scope ruling to the effect that the product is included within the scope of an antidumping or countervailing duty order. 19 C.F.R. § 351.225(l)(3). Where there was no suspension of liquidation, Commerce will instruct CBP "to suspend liquidation and to require cash deposit of estimated duties, at the applicable rate, for each unliquidated entry entered, or withdrawn from warehouse, for consumption on or after the date of initiation of the scope inquiry." *Id.*

However, if Commerce cannot make such an immediate determination based solely upon the application, then it will proceed with a scope inquiry. *See* 19 C.F.R. §§ 351.225(e), (f). If it does, 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(1)(2); *id.*§ 351.225(l)(3). As the Court of Appeals for the Federal Circuit left clear in *AMS Assocs.*:

> [W]here Commerce "clarifies" the scope of an existing antidumping duty order that has an unclear scope, 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." [19 C.F.R. § 351.225(l)(2). The unambiguous plain language of the regulation only authorizes Commerce to act on a *prospective basis*, and such express prospective authorization reasonably is interpreted to preclude retroactive authorization.

AMS Assocs., 737 F.3d at 1344. Thus, Commerce's regulations envision the case where scope language is ambiguous. In such a case, the regulations provide that goods will not be considered in scope until Commerce at least makes a preliminary determination. *See* 19 C.F.R. § 351.225(l)(2). To permit CBP to effectively clarify the scope language and order cash deposits where the scope of an antidumping or countervailing duty order is ambiguous would allow CBP to do what Commerce cannot do.[15]

It is inconceivable that the regulatory scheme would permit CBP, 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. Moreover, if Commerce clarifies that Plaintiff's products properly fall within the scope of the Orders, an action under 28 U.S.C. § 1581(c) only provides a mechanism for the Court to review Commerce's interpretation, not CBP's. Nor would 28 U.S.C. § 1581(c) necessarily provide a mechanism to order the return of cash deposits collected by CBP prior to a scope determination by Commerce notwithstanding the fact that the regulation only permits the suspension of liquidation and collection of cash deposits after an affirmative scope ruling has been issued. *See* 19 C.F.R. § 351.225(l)(2).

Both Defendant and Defendant-Intervenor argue that it is Plaintiff that is seeking an interpretation by CBP. *See* Mot. Dismiss 11; Def.-Int. Reply Mot. Dismiss 10–12. Therefore, both parties argue that Plaintiff must pursue a scope ruling that will ultimately be reviewable under 19 U.S.C. § 1516a. *See* Mot. Dismiss 11; Def.-Int. Reply Mot. Dismiss 10–12. Implicit in Defendant's and Defendant-Intervenor's arguments is the conception that, where the language of an antidumping or countervailing duty order is ambiguous, CBP would "interpret" the Orders regardless of whether it reads the Orders to include Plaintiff's products or not. *See* Mot. Dismiss 11; Def.-Int. Reply Mot. Dismiss 10–12. In essence, they argue that no matter

[15] It would be bootstrapping to argue that Commerce's regulation delaying the imposition of cash deposits and suspension of liquidation does not apply because here the entries were already suspended by virtue of CBP's determination. CBP cannot rely on the fact that liquidation has been suspended on Plaintiff's entries to justify the suspension of liquidation on those entries.

whether CBP finds the exclusion of "thin film products" contained in the Orders to include Plaintiff's merchandise or to exclude them, CBP would be interpreting the Orders. *See* Mot. Dismiss 11; Def.-Int. Reply Mot. Dismiss 10–12. Defendant and Defendant-Intervenor believe that the importer should have to seek a scope ruling to obtain the interpretation it seeks. Until Commerce has ruled, Defendant and Defendant-Intervenor would have CBP err on the side of protecting potentially owed duties because the importer will get a refund of those cash deposits back if Commerce determines that the goods are outside the scope of the Orders. The court disagrees.

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. 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 and clarifies what products should be included.

Several points support the principle that CBP cannot interpret ambiguous words to place goods within the scope of an antidumping or countervailing duty order. 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, as already discussed, 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. As already discussed, in *AMS Assocs.*, 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.*, 737 F.3d at 1344. 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))

B. Jurisdiction Under 1581(a) is Unavailable

Defendant also argues that Plaintiff's claims are the sort routinely reviewed under 28 U.S.C. § 1581(a). Defendant argues that to the extent Plaintiff

> is challenging CBP's factual application of the scope of an antidumping or countervailing duty order, from which the collection of cash deposits or notices of the suspension of liquidation follow, the importer must allow CBP to complete its administrative processing of the entries (*i.e.*, allow CBP to affirmatively liquidate the entry), and if desired, protest the liquidation and pursue judicial review in the context of 28 U.S.C. § 1581(a).

Mot. Dismiss 9. However, Defendant argues that prior to liquidation, an importer is precluded from seeking judicial review of CBP's actions taken in preparation of liquidation by invoking jurisdiction under §1581(i). *See id.* at 12.

The Court has "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under [19 U.S.C. § 1515]." 28 U.S.C. § 1581(a). Section 1515(a) instructs CBP to timely review and decide any protest filed in accordance with 19 U.S.C. § 1514. *See* 19 U.S.C. § 1515(a). Section 1514(a) lists the decisions of CBP that may be protested, which include:

> Any clerical error, mistake of fact, or other inadvertence, whether or not resulting from or contained in an electronic transmission, adverse to the importer, in any entry, liquidation, or reliquidation, and, decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to—
>
> (1) the appraised value of merchandise;
>
> (2) the classification and rate and amount of duties chargeable;
>
> (3) charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
>
> (4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;
>
> (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof, including the liquidation of an entry, pursuant to either section 1500 or section 1504 of this title;
>
> (6) the refusal to pay a claim for drawback; or
>
> (7) the refusal to reliquidate an entry under subsection (d) of section 1520 of this title.

19 U.S.C. § 1514(a). A protest properly brought under § 1514(a) that is denied by CBP will form the basis for a challenge under 28 U.S.C. § 1581(a). *See* 19 U.S.C. § 1514; 28 U.S.C. § 1581(a).

After protest, a party may challenge the enumerated CBP determinations, but no such determinations are the substance of Plaintiff's challenge here. As discussed, Plaintiff is not challenging CBP's factual application of the scope, but rather, CBP's ultra vires interpretation of the ambiguous exclusionary language addressing thin film products. The effect of CBP's interpretation is to require cash deposits and suspend liquidation prior to Commerce's issuance of a scope ruling interpreting the scope of the Orders. If CBP had liquidated

Plaintiff's entries based upon factual information that the scope language explicitly calls upon CBP to consider, Plaintiff could have protested that action under § 1514(a)(2). *See Xerox*, 289 F.3d at 794–95, *LDA Incorporado v. United States*, 38 CIT __, __, 978 F. Supp. 2d 1359, 1370 (2014). Since CBP did not act on the basis of factual information, no protest is available to Plaintiff under § 1514. Therefore, here the court would lack a denied protest to review under 28 U.S.C. § 1581(a). Finally, it is worth noting that a protest properly brought under § 1514(a) involves a decision that CBP has the authority to make. CBP acting outside the scope of its authority is not a protestable decision. Therefore, the Court does not have jurisdiction under 28 U.S.C. § 1581(a).

C. Jurisdiction is Available Under 1581(i)

Plaintiff argues that the Court has jurisdiction under § 1581(i) because CBP failed "to properly perform its ministerial function to apply the instructions Commerce issued to CBP relating to the Orders . . ." which "contain a specific, unqualified exclusion for thin film products." Pl.'s Resp. Mot. Dismiss 8. The court has already addressed why Defendant's arguments that Plaintiff can appropriately bring claims under § 1581(a) or (c) are unavailing. In addition, Defendant argues that

> [t]o preserve the integrity of CBP's administrative processing of entries, challenges involving CBP's actions taken in preparation of liquidation are not ripe for judicial review until CBP has completed its administrative functions and liquidates the entries.

Mot. Dismiss 13. Defendant argues that the Court lacks jurisdiction under § 1581(i) until after liquidation because "liquidation is the 'final challengeable event' and '[{f}indings related to liquidation,' such as the need for extensions, 'merge with liquidation." *Id.* (citing *Chemsol*, 755 F.3d at 1350). Citing *Chemsol*, Defendant argues that "the administrative transactions surrounding liquidation are not completed until the agency affirmatively liquidates the entry. Judicial intervention prior to this point would disrupt the congressionally intended framework." *Id.* at 15. However, *Chemsol* involved "an investigation to determine whether Chinese citric acid was being transshipped through other countries to evade antidumping and countervailing duties applicable to imports of citric acid from China." *Chemsol*, 755 F.3d at 1347. At the time the suit was filed, CBP had not collected cash deposits and CBP had extended liquidation for all of

the importers' entries at least twice, but the importers filed suit seeking declaratory relief that the extensions were unlawful such that the entries were deemed liquidated by operation of law. *See id.* The Court of Appeals for the Federal Circuit held that, because CBP had extended liquidation for the express purpose of undertaking further investigation on the transshipment issue, allowing earlier review "could cut off legitimate investigatory work conducted by Customs, such as the investigation into the suspected fraudulent transshipment scheme in this case, preventing Customs from concluding its investigation." *See id.* at 1353. The Court of Appeals for the Federal Circuit further held that "[o]nly where Customs fails to extend the liquidation period, or fails to notify the importers of an extension as required by statute . . . may importers seek a declaration that their entries have liquidated by operation of law *once the deemed liquidation period has passed*. Where extensions are made with proper notice during ongoing investigations by CBP, however, § 1581(a) provides jurisdiction for importers who object to the final liquidation, or any interim decisions merged therein, including the decision to extend the liquidation period." *Id.* at 1353.

However, *Chemsol* does not control this case. First, in *Chemsol*, CBP had made no ultra vires interpretation of ambiguous scope language that resulted in the collection of cash deposits and suspension of liquidation. *Id.* at 1347. Therefore, the consequences to the importer of awaiting review until after liquidation were significantly different.

Second, here, although Defendant characterizes CBP's actions as "prefatory," here CBP has completed its tasks in connection with the administration of the Orders. In *Chemsol*, CBP and United States Immigration and Customs Enforcement were investigating the factual issue of whether the entries were being transshipped through the Dominican Republic and India when they were actually produced in China to avoid antidumping and countervailing duties. *Id.* Had CBP found the goods to be produced in China and not their declared countries of origin, a factual matter, it would have had authority to consider the goods within the scope of the antidumping order. Nothing indicates there was any ambiguity about whether the products at issue in *Chemsol* fell within the scope of the antidumping order. Here, the Orders are ambiguous, and CBP's determination was an interpretative one. Although Defendant argues that "Customs does not make any final determinations regarding the factual nature of particular imports until liquidation," Mot. Dismiss 15, for the reasons already discussed, CBP's actions did not rely upon factual assessment of Plaintiff's products.

Third, in *Chemsol*, the importer was not denied any relief by awaiting liquidation and challenging CBP's determination under § 1514(a). As already discussed, awaiting a challenge under § 1514(a) will not give the Plaintiff the ability to challenge CBP's interpretation of the scope language beyond its authority. Therefore, *Chemsol* does not preclude a challenge to CBP's interpretation of the scope of the Orders, the consequences of which required Plaintiff's entries to be entered as type "03."

II. The Plaintiff Has Stated a Claim For Which Relief Can Be Granted

Defendant has also moved to dismiss pursuant to USCIT Rule 12(b)(6) for failure to state a claim upon which relief can be granted because it claims that Plaintiff has failed to identify a final agency action necessary for an action under the Administrative Procedure Act ("APA"). *See* Mot. Dismiss 21–24.

In deciding a USCIT Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, the court assumes all factual allegations to be true and draws all reasonable inferences in the plaintiff's favor. *See Cedars-Sinai Med. Ctr.*, 11 F.3d at 1584 n.13; *Gould, Inc.*, 935 F.2d at 1274. Under this standard, the court finds that Plaintiff has identified a final agency action subject to challenge and stated a claim under the APA.

The Court shall "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; . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *See* 5 U.S.C. § 706(2)(A), (C); *see also* 28 U.S.C. § 2640(e). Section 704 of the APA provides for judicial review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court . . . ." 5 U.S.C. § 704. Agency action is defined as including "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act . . ." 5 U.S.C. § 551(13). 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).

Logically, to discern if the agency has completed its decision-making process, the court must identify the agency's decision-making responsibilities. CBP has many decision-making responsibilities, but, within the realm of antidumping and countervailing duty orders, CBP's decision-making responsibilities are few. In this context, Congress has charged CBP only with deciding whether the language of

the Orders, as explained in the instructions issued by Commerce, include merchandise with the characteristics implicated by the plain language of the Orders. *See Xerox*, 289 F.3d at 794–95. Here, CBP interpreted the scope language contained within those instructions to include Plaintiff's products. There was nothing else left for CBP to decide for the administration of the Orders. Once CBP instructed Plaintiff to enter its goods as subject to the Orders or be denied entry, it had completed its decision-making process.

CBP's decision to collect cash deposits imposes legal consequences upon Plaintiff. *See* 19 U.S.C. § 1484; 19 U.S.C. § 1592. CBP's interpretation rendered Plaintiff's goods subject to the Orders, which caused liquidation to be suspended by operation of law. As a consequence of CBP's interpretive act Plaintiff has posted [[ ]] in cash deposits. Plaintiff argues that CBP has taken final action, and Plaintiff alleges such action was made without authority. The court agrees. For the reasons already discussed, CBP's ultra vires interpretation is not reviewable under any other jurisdictional basis. Therefore, Plaintiff has stated a cause of action for which relief can be granted and dismissal is not warranted.

Defendant cites *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 19–20 (D.C. Cir. 2006), to support its argument that "Federal courts do not have jurisdiction to review everything an agency does because some agency activities are only in anticipation of final agency action." Mot. Dismiss 21–22. However, as discussed above, final agency action has occurred here as far as CBP's involvement is concerned.

Defendant also argues that this case must be dismissed because "[t]he Government cannot identify any specific entry rejection or other notices that would embody the contested agency determination" and "Sunpreme has been filing its merchandise as type '03' entries and it has been making cash deposits for the past several months." Mot. Dismiss 22. However, Plaintiff has been entering its merchandise as subject to the Orders, but only in response to the very agency act it challenges here. CBP sent Plaintiff notices of action relating to multiple entries alerting Plaintiff that the merchandise for those entries "are subject to antidumping and countervailing duties under case #A-570–979–000," which carry antidumping duty and countervailing duty rates. *See generally* Exs. Conf. Mot. TRO & PI Attach. 1 at Ex. 1–B. The notices of action directing Plaintiff enter its goods as subject to the Orders or be denied entry embodied CBP's determination, based upon interpretation of the ambiguous scope language, that Plaintiff's products were included within the scope of the Orders.

Consequently, Plaintiff was required to act in the same manner prospectively for future entries without further direction. Under 19 U.S.C.§ 1484,

> . . . one of the parties qualifying as "importer of record" under paragraph (2)(B), either in person or by an agent authorized by the party in writing, shall, using reasonable care-
>
> (A) Make entry therefor by filing with the Bureau of Customs and Border Protection such documentation or . . . such information as is necessary to enable the Bureau of Customs and Border Protection to determine whether the merchandise may be released from custody of the Bureau of Customs and Border Protection;
>
> (B) complete the entry . . . by filing with the Customs Service the declared value, classification and rate of duty applicable to the merchandise, and such other documentation . . . as is necessary to enable the Customs Service to-
>
> (i) properly assess duties on the merchandise,
>
> (ii) collect accurate statistics with respect to the merchandise, and
>
> (iii) determine whether any other applicable requirement of law (other than a requirement relating to release from customs duty) is met.

19 U.S.C. § 1484. Thus, after CBP alerted Plaintiff that its merchandise was subject to antidumping and countervailing duty orders, Plaintiff, using reasonable care, was required to continue to enter its merchandise as subject to the Orders. If Plaintiff were to act otherwise, it would potentially expose itself to penalties. *See* 19 U.S.C. § 1592(a). CBP's conduct was not, in effect, validated by the fact that Plaintiff has continued to enter its goods as type "03" entries.

Defendant additionally contends that, if this case were to proceed, "CBP cannot identify the relevant documents that the agency considered, directly or indirectly, in rendering the challenged determination" to comply with USCIT Rule 73.3 by filing the administrative record of the contested determination. *See* Mot. Dismiss 22–23. According to Defendant's logic, a party would be precluded from contesting an agency's extra-statutory act simply because there is no process in place by which to compile an administrative record. The fact that an agency acting in excess of its authority cannot identify relevant documents it considered in making its determination cannot

preclude judicial review. *Cf. Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417, (1971). Moreover, Defendant's claims that it cannot compile a record stem from its confusion as to the nature of Plaintiff's challenge. Now that the court has clarified the nature of Plaintiff's challenge, Defendant should be able to compile a record of CBP's determination that the Orders included Plaintiff's products.

III. The Plaintiff is Entitled to a Preliminary Injunction

A preliminary injunction is an extraordinary form of equitable relief that is only appropriate where the moving party establishes that: (1) it will suffer irreparable harm absent the requested relief; (2) it is likely to succeed on the merits of its underlying claim; (3) the balance of hardships favors the movant; and (4) the public interest would be better served by granting the relief. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted); *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983) (citations omitted). While "'no one factor, taken individually, is necessarily dispositive,'" *Ugine & ALZ Belg. v. United States*, 452 F.3d 1289, 1292–93 (Fed. Cir. 2006) (quoting *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993), "irrespective of relative or public harms, a movant must establish both a likelihood of success on the merits and irreparable harm." *Reebok Int'l Ltd. v. J. Baker, Inc.*, 32 F.3d 1552, 1556 (Fed. Cir. 1994). "If a preliminary injunction is granted by the trial court, the weakness of the showing regarding one factor may be overborne by the strength of the others." *FMC Corp.*, 3 F.3d at 427.

Therefore, "the more the balance of irreparable harm inclines in the plaintiff's favor, the smaller the likelihood of prevailing on the merits he need show in order to get the injunction." *Qingdao Taifa*, 581 F.3d at 1378–79 (citations omitted). That said, "a showing on one preliminary injunction factor does not warrant injunctive relief in light of a weak showing on other factors." *Wind Tower Trade Coalition v. United States*, 74 F.3d 89, 100 (Fed. Cir. 2014) (citing *Winter*, 555 U.S. at 22)

A. There is a Threat of Irreparable Harm

Generally, an allegation of financial loss alone, however substantial, which is compensable with monetary damages, is not irreparable harm if such corrective relief will be available at a later date. *See Sampson v. Murray*, 415 U.S. 61, 90, 94 S. Ct. 937, 952–53 (1974). Nonetheless, irreparable harm may take the form of "[p]rice erosion, loss of goodwill, damage to reputation, and loss of business opportunities." *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012) (citing *Abbott Labs. v. Sandoz, Inc*., 544 F.3d 1341, 1362 (Fed. Cir. 2008)). Bankruptcy or substantial loss of business is irrepa-

rable harm because, in addition to the obvious economic injury, loss of business renders a final judgment ineffective, depriving the movant of meaningful judicial review. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932(1975); *see also McAfee v. United States*, 3 CIT 20, 24, 531 F. Supp. 177, 179 (1982).

As it had in its application for a TRO, Plaintiff has, in its motion for preliminary injunction, demonstrated substantial, immediate and irreparable harm if the court does not grant the relief sought. Since the court granted Plaintiff's application for a TRO, no facts have been brought to the court's attention to change those circumstances. As the court noted earlier in its Amended Memorandum and TRO:

> Plaintiff has submitted affidavits and supporting documentation demonstrating substantial likelihood that its [[ ]] while still retaining [[ ]] cash balances of [[ ]]. *See* Pl.'s Mot. for TRO & PI 22. On the record here, Plaintiff has established that under the cash deposit rate presently being applied, the company has already posted antidumping and countervailing duty deposits in excess of $[[ ]], and the company would anticipate posting an additional $[[ ]]. *See* Pl.'s Conf. Resp. 4. Plaintiff has also demonstrated that it has suffered loss of goodwill, damage to its reputation, and substantial loss of business opportunities through documenting [[ ]] and the [[ ]]. *See* Pl.'s Mot. for TRO & PI 23. Moreover, Plaintiff has demonstrated that it was denied a $[[ ]] term loan because the lender found that it "has '[[ ]].'" *Id.* Without [[ ]], Plaintiff, which is reliant on the importation of subject merchandise into the United States for [[ ]]% of its 2015 revenues, has little chance of turning around its precarious financial position. *See id.*at 23–24. Plaintiff has also demonstrated the immediacy of the potential harm because through the seriousness of its [[ ]], [[ ]], and the inability to change the course [[ ]], Plaintiff, without suspending its cash deposit requirements, cannot count on [[ ]]. Defendant does not challenge Plaintiff's claims as to the magnitude of the injury, the immediacy of the injury, or the inadequacy of future collective relief. The court is convinced that the collection of an additional [[ ]] in cash deposits within the period that the parties brief the jurisdictional issues may very well force Plaintiff out of business, or, at the very least, cause serious disruption to Plaintiff's business.

See Am. Conf. TRO 6–7. Indeed, the magnitude of the harm imposed by CBP's determination has only grown larger since the court granted Plaintiff's application for a TRO. Without a preliminary injunction to limit Plaintiff from suffering further harm in the form of loss of goodwill, damage to its reputation, and loss of business opportunities from the continued collection of cash deposits until the case is resolved on the merits, the harm to Plaintiff's business will only grow more severe. Thus, the court finds that Plaintiff has sufficiently established irreparable harm through CBP's continued collection of cash deposits if a preliminary injunction were not issued.

B. The Plaintiff Has Shown That it is Likely That it Will Succeed on the Merits

The party seeking injunctive relief must demonstrate that it is likely to succeed on the merits. *Qingdao Taifa*, 581 F.3d at 1381. Because the Plaintiff has shown that without preserving the status quo it faces grave injury to its financial viability and its reputation in the industry, "the burden to show a likelihood of success [on the merits] is necessarily lower." *Id.* Such a plaintiff need only raise "questions which are 'serious, substantial, difficult and doubtful.'" *Timken Co. v. United States*, 6 CIT 76, 80, 569 F. Supp. 65, 70 (1983) (quoting *Cnty. of Alameda v. Weinberger*, 520 F. 2d 344, 349 n.12 (9th Cir. 1975)).

Plaintiff has shown that it is very likely to succeed on the merits because it has demonstrated that the Court has jurisdiction and that CBP acted beyond the scope of its authority in interpreting the scope of the Orders. Plaintiff has successfully demonstrated that it is challenging CBP's ultra vires interpretation of Commerce's Orders. It is clear that CBP interpreted ambiguous scope language rather than relying solely upon factual information that the scope language explicitly called on CBP to consider. CBP lacks the authority to interpret ambiguous scope language in the Orders. *See Mitsubishi*, 44 F.3d at 977; *Sandvik*, 164 F.3d at 600. Since the language of the Orders is insufficient to permit CBP to determine if goods are in or out of scope based upon factual determinations alone, CBP cannot interpret goods as falling within the Orders until Commerce says they are included within the scope. *See Sandvik*, 164 F.3d at 600.

Further, the Plaintiff has shown that it has stated a claim upon which relief can be granted. The court finds that CBP acted contrary to law under the APA. 5 U.S.C. §§ 704, 706. Congress has charged CBP only with deciding whether the language of the Orders, as explained in the instructions issued by Commerce, include merchandise with the characteristics raised by the plain language of the

Orders. Here, CBP interpreted the scope language contained within those instructions to include Plaintiff's products. There was nothing else left for CBP to decide for the administration of these antidumping duty and countervailing duty orders. Once CBP instructed Plaintiff to enter its goods as subject to the Orders or be denied entry, it had completed its decision-making process. CBP's decision to instruct Plaintiff to enter the goods as subject to the Orders imposes legal consequences upon Plaintiff, including the collection of cash deposits and suspension of liquidation. CBP's interpretation rendered Plaintiff's goods subject to the Orders, which caused liquidation to be suspended by operation of law. Because Plaintiff has shown that CBP took final action from which clear consequences for Plaintiff followed, Plaintiff has stated a cause of action for which relief can be granted. Consequently, Plaintiff has shown a strong likelihood of success on the merits.

C. The Balance of the Hardships Weighs in Favor of Granting the Preliminary Injunction

Before granting a preliminary injunction, the court must also "balance competing claims of injury and must consider the effect" of granting or denying relief on each party. *Winter*, 555 U.S. at 24.

Plaintiff argues that there is no harm to Defendant if Commerce were to determine that its products are within the scope of the Orders because the regulations provide that suspension of liquidation and cash deposits can be "made from the date of the scope inquiry, not retroactively applied to entries prior to when that inquiry was made." Mot. TRO & PI 43. Further, Plaintiff argues that CBP cannot enlarge the period for which entries may be subject to cash deposits and suspension of liquidation. *See id.* Defendant argues that Plaintiff "maintains its ability to argue that its merchandise is out of the scope of the AD/CVD orders both before Commerce in its ongoing scope proceeding or following liquidation in a protest before CBP to the extent it believes CBP has misunderstood the facts." Def.'s Resp. Mot. PI 25. However, Defendant argues that the Government loses its security for any potential duty liability if the court grants Plaintiff's request for an injunction, and it bears the risk if Plaintiff is unable to pay duties at liquidation. *See id.*at 25–26.

The court concludes that Defendant's view is based upon its flawed assumption that CBP made its determination that Plaintiff's products fell within the scope of the Orders on the basis of a factual determination alone. For the reasons already discussed, CBP's interpretation of the ambiguous scope language to include Plaintiff's products, which it conceded were thin film products, required an interpretation of the Orders. That interpretation was beyond the scope of

CBP's authority. Therefore, until Commerce issues a scope ruling concluding that Plaintiff's products fall within the scope of the Orders, liquidation should not have been suspended and cash deposits should not have been required by CBP. *See* 19 C.F.R § 351.225(l)(2).

Although the court recognizes that enjoining CBP from collecting cash deposits may deprive the Government of some security for the payment of potential duties and potentially limits the Government's ability to protect domestic industry, all parties have an interest in a correct and authoritative interpretation of the Orders. Neither domestic industry nor importers are served here by having CBP interpret antidumping and countervailing duty orders written by Commerce when it lacks the expertise of Commerce and familiarity with the investigation and findings that led Commerce to draft the language contained in the Order. All parties are better served by referring the interpretive question here to Commerce immediately. This CBP interpretation of scope language that may conflict with Commerce's ultimate interpretation only generates confusion and uncertainty for all parties. Further, a clear prohibition on any interpretive act by CBP also helps domestic industry by ensuring that fewer potential gaps can arise in the form of Orders that CBP may interpret too narrowly. Therefore, the balance of equities favors Plaintiff because any possible harm to the Government and the domestic industry can be mitigated through requiring Plaintiff to post a bond as security. Finally, Commerce has a regulatory scheme in place for scope interpretations that adequately protects the Government and domestic industry. Where the scope language is not ambiguous and CBP can determine the merchandise falls within the scope language based upon the clear language of the Orders, CBP can act without a scope ruling. *Cf. Xerox*, 289 F.3d at 795. Where Commerce can easily interpret the scope language, it can act immediately under 19 C.F.R. § 351.225(d). Where the language is ambiguous Commerce can initiate a scope inquiry (as it has here) and protect any revenue as of the date of the initiation of the scope inquiry. 19 C.F.R. §§ 351.225(e), (l)(2), (l)(3).

D. The Public Interest will be Served by Granting the Preliminary Injunction

While CBP has a public interest in protecting the revenue of the United States, there is also a public interest in ensuring the accurate and effective, uniform and fair enforcement of trade laws. *See Union Steel v. United States*, 33 CIT 614, 622, 617 F. Supp. 2d 1373, 1381 (2009); *Ceramica Regiomontana, S.A. v. United States*, 7 CIT 390, 397, 590 F. Supp. 1260, 1265 (1984). Maintaining security for unliquidated entries cannot be done at the expense of subjecting Plaintiff

to suspension of liquidation and cash deposit requirements that were implemented outside of the regulatory scheme for interpreting the scope of antidumping and countervailing duty orders. As with the balancing of the hardships, particularly because the court can protect Defendant's interest in the cash deposits that would be foregone through a bond whose costs would put Plaintiff's financial position at less risk, cash deposits should be suspended to prevent the possibility that Plaintiff suffers [[ ]]. Therefore, the public interest favors granting Plaintiff a preliminary injunction.

E. Requirement that Plaintiff Post Security Pursuant to USCIT Rule 65(c)

While the court has found injunctive relief appropriate here, pursuant to USCIT Rule 65(c), the court may issue a preliminary injunction "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." USCIT R. 65(c). Thus, the issuance of a preliminary injunction is conditioned upon providing the enjoined party with security in an amount calibrated to the costs and damages that may be sustained if that party is found to have been wrongfully enjoined. Due to Plaintiff's precarious financial situation, Defendant has substantial concerns regarding securing any potential damages it may sustain while the preliminary injunction is in effect if Defendant is found to have been wrongfully enjoined.

Until the merits of the case are resolved, the court therefore finds it appropriate to require Plaintiff to post a bond in the amount of [[ ]] in addition to the [[ ]] bond already in place. *See generally* Am. Mem. and TRO Confidential Version; Order Extending TRO Public Version. This figure reflects an estimate of the amount of antidumping and countervailing duties that will be owed in the next thirty days based on the information provided by Plaintiff regarding entries for which cash deposits have been made and liquidation has been suspended since April 2015. *See* Exs. Mot. TRO & PI Attach. 1 at Ex. 1-A; Pl.'s Confidential Resp. Ct.'s Request/Order 4, Dec. 10, 2015, ECF No. 20. The court believes that requiring Plaintiff to secure a bond in the amount of [[ ]], in addition to continuing the bond in the amount of [[ ]], is adequate and reasonable to secure Defendant against possible costs and damages it may sustain if the court later finds it was wrongfully enjoined. If any party believes the [[ ]] is now, or later becomes, inappropriate, that party may file a motion to modify the security indicating why a different amount is sufficient or insufficient

to secure Defendant against possible costs and damages it may sustain if the court later finds Defendant was wrongfully enjoined.

CONCLUSION

Therefore, upon consideration of Defendant's motion to dismiss, upon Plaintiff's motion for a preliminary injunction, all papers and proceedings in this action, and upon due deliberation, it is hereby

ORDERED that Defendant's motion to dismiss is denied on both grounds; it is further

ORDERED that Plaintiff's motion for a preliminary injunction is granted; it is further

ORDERED that Defendant, United States, together with its delegates, officers, agents, servants, and employees of the International Trade Administration of the U.S. Department of Commerce and the U.S. Department of Homeland Security, U.S. Customs and Border Protection, shall be enjoined during the pendency of this action from requiring Plaintiff to pay cash deposits on entries of solar modules containing bi-facial thin film cells made with amorphous silicon from the People's Republic of China that are the subject of this action; it is further

ORDERED that as a condition to the grant of preliminary injunctive relief, Plaintiff shall provide assurity that it will furnish a bond in the amount of [[ ]] subject to the approval of the Clerk of the Court, to pay the costs or damages as may be incurred or suffered in the event that Defendant has been wrongfully enjoined; it is further

ORDERED that until further order of the court Plaintiff shall continue the bond in the amount of [[ ]] subject to the approval of the Clerk of the Court, to pay the costs or damages as may be incurred or suffered in the event of a finding that the Defendant has been wrongfully enjoined or restrained for entries from December 16, 2016 through January 11, 2016; it is further

ORDERED that this preliminary injunction shall expire upon the earlier of: (1) the entry of a final and conclusive court decision in this matter; or (2) Commerce's issuance of a preliminary or final scope determination to the effect that entries of solar modules containing bi-facial 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 *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) 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); and it is further

ORDERED that the temporary restraining order extended by the court on December 28, 2015 shall expire when the preliminary injunction granted herein comes into effect, but in no event shall the temporary restraining order remain in effect beyond 11:59 PM on January 11, 2016.

Dated: January 8, 2016
New York, New York

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

Slip Op. 16–3

CC METALS AND ALLOYS, LLC, AND GLOBE SPECIALTY METALS, INC., Plaintiffs, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 14–00202

OPINION AND ORDER

[Final determination of sales not at less than fair value sustained in part and remanded in part.]

Dated: January 12, 2016

William D. Kramer and *Martin Schaefermeier*, DLA Piper LLP (US), of Washington, DC for Plaintiff CC Metals and Alloys, LLC and Globe Specialty Metals, Inc.

William D. Kramer and *Martin Schaefermeier*, DLA Piper LLP (US), of Washington, DC for Plaintiff CC Metals and Alloys, LLC and Globe Specialty Metals, Inc.

Sydney H. Mintzer and *Jing Zhang*, Mayer Brown LLP, of Washington, DC for Defendant-Intervenors Kuznetsk Ferroalloys OAO, Chelyabinsk Electro-Metallurgical Plant OAO and RFA International LP, Calgary (Kanada) Schaffausen.

Gordon, Judge:

This action involves the U.S. Department of Commerce's ("Commerce") final negative determination in the less than fair value investigation of ferrosilicon from the Russian Federation. *See Ferrosilicon from the Russian Federation*, 79 Fed. Reg. 44,393 (Dep't of Commerce July 31, 2014) (final LTFV determ.) ("*Final Determination*"); *see also* Issues and Decision Memorandum for the Final Determination of the Antidumping Duty Investigation of Ferrosilicon from the Russian Federation, A-821–820 (Dep't of Commerce July 24, 2014), *available at* http://enforcement.trade.gov/frn/summary/russia/2014–18059–1.pdf (last visited this date) ("*Decision Memorandum*").

Before the court is the USCIT Rule 56.2 motion for judgment on the agency record of Plaintiffs CC Metals and Alloys, LLC, and Globe Specialty Metals, Inc. ("Plaintiffs"). Pls.' Br. in Supp. of Mot. for J.

upon the Agency R. (Jan. 22, 2015), ECF No. 23 ("Pls.' Br."); *see also* Def.'s Resp. to Pl.'s Mot. for J. upon the Agency R. (Apr. 14, 2015), ECF No. 38 ("Def.'s Resp."); Br. of Def.-Intervenors in Opp. to Pls.' Mot. for J. upon the Agency R. (May 7, 2015) ("Def-Int.'s Resp."); Pls.' Reply Br. (May 29, 2015), ECF No. 49 ("Pls.' Reply"). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[1] and 28 U.S.C. § 1581(c) (2012).

Plaintiffs challenge Commerce's date of sale selection and model matching analysis, as well as Commerce's treatment of certain revenue and expenses. For the reasons that follow, the court sustains Commerce's determination in part and remands to Commerce the warehousing and imputed credit expense issues for further consideration.

I. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2015). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms, National Courts* § 3:6 (5th ed. 2015).

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

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the antidumping statute. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (Commerce's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous."). And when reviewing Commerce's interpretation of its regulations, the court must give substantial deference to Commerce's interpretation, *Torrington Co. v. United States*, 156 F.3d 1361, 1363–64 (Fed. Cir. 1998), according it "'controlling weight unless it is plainly erroneous or inconsistent with the regulation,'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citations omitted). *See also Am. Signature, Inc. v. United States*, 598 F.3d 816, 827 (Fed. Cir. 2010) (citing *Reizenstein v. Shinseki*, 583 F.3d 1331, 1335 (Fed. Cir. 2009)) (explaining standard of review for agency interpretations of its own regulations).

Discussion

A. Date of Sale

In general "an antidumping analysis involves a comparison of export price or constructed export price in the United States with normal value in the foreign market." 19 C.F.R. § 351.401(a) (2015); *see also* 19 U.S.C. §§ 1677a, 1677b. The date of sale for a respondent's home market sales is part of the normal value calculation. *See* 19 C.F.R. § 351.401(a), (i).

During the proceeding, Commerce, consistent with its regulatory presumption, selected invoice date as the date of sale for RFA International LP's ("RFAI") home market sales, including RFAI's "storage sales." These "storage sales" are "bill-and-hold" type transactions where RFAI's affiliated producer Chelyabinsk Electrometallurgical Integrated Plant Joint Stock Company ("CHEMK") stores customers' ferrosilicon after the invoice is issued for delivery at a later date. Plaintiffs argue that Commerce should not have selected the invoice date as the date of sale for these storage sales because of differences between the ferrosilicon described in the invoices and the ferrosilicon CHEMK delivered.

Commerce "normally" uses invoice date as the date of sale. 19 C.F.R. § 351.401(i). Commerce "may," however, "use a date other than the date of invoice if [Commerce] is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale." *Id.* An interested party proposing something other than invoice date must demonstrate that the material terms of sale were "firmly" and "finally" established on its proposed

date of sale. *Antidumping Duties; Countervailing Duties: Final Rule*, 62 Fed. Reg. 27,296, 27,348–49 (Dep't of Commerce May 19, 1997) ("*Preamble*"); *see generally Yieh Phui Enter. Co. v. United States*, 35 CIT ___, ___, 791 F. Supp. 2d 1319, 1322–24 (2011) (describing in detail Commerce's date of sale regulation).

Plaintiffs' argument attacks the "virtual" nature of CHEMK's storage sales. *See* Pls.' Br. at 6–12. CHEMK does not set aside particular ferrosilicon from its ongoing production when it completes a storage sale. Instead, CHEMK virtually "reserves" orders so that ferrosilicon meeting the customer's specifications is available when the customer requests delivery. Some physical differences between the "as invoiced" and "as delivered" product can and do emerge because CHEMK and its customers specify only certain terms when the sale is invoiced. These are typically "base weight" (the weight of silicon contained within the ferrosilicon), grade (based on silicon content by percent), price, and size. Home Market Verification Report, 8–9 (Dep't of Commerce May 22, 2014), CD 151 ("*Verification Report*").[2] Plaintiffs note that the CONNUMs for a significant number of the "as delivered" storage sales differ from their "as invoiced" counterparts. Pls.' Br. at 8–9. Plaintiffs also argue that using invoice date artificially reduces RFAI's normal value, thereby lowering its overall margin.

Problematically, Plaintiffs do not appear to understand the applicable standards governing Commerce's date of sale determinations. Plaintiffs never identify the date on which Plaintiffs believe the material terms of sale are firmly and finally established. *See id*. at 3–12. To prevail, Plaintiffs need to establish that Commerce erred by using invoice date because the administrative record supports one and only one other date of sale on which the material terms of sale are firmly and finally established. *See Allied Tube & Conduit Corp. v. United States*, 24 CIT 1357, 1371–72, 127 F. Supp. 2d 207, 220 (2000) ("Plaintiff, therefore, must demonstrate that it presented Commerce with evidence of sufficient weight and authority as to justify its [date of sale] as the only reasonable outcome."). Here, CHEMK's storage sales comprise numerous documents, addendums, and circumstances other than mere issuance of an invoice. Commerce's regulation defaults to the invoice date precisely because this sort of complexity is prevalent in most industries. *Preamble*, 62 Fed. Reg. at 27,348–49 ("[I]n most industries, the negotiation of a sale can be a complex process . . . . In fact, it is not uncommon for the buyer and seller themselves to disagree about the exact date on which the terms became final. However, for them, this theoretical date usually has little, if any, relevance. From their perspective, the relevant issue is that the terms

[2] "CD" refers to a confidential document contained in the administrative record.

be fixed when the seller demands payment . . . ."). By failing to identify the date on which the material terms of sale are firmly and finally established, Plaintiffs leave the court no option but to sustain Commerce's choice of its regulatory presumptive invoice date as the date of sale.

With that said, the court does address some of Plaintiffs' date of sale arguments that are relied upon by Plaintiffs in their subsequent model match issue. Chief among them is Plaintiffs' argument about which terms are material. During the investigation Commerce concluded (and Plaintiffs do not dispute) that the material terms of sale were grade, price, base weight, and size. *Decision Memorandum* at 14 (listing grade, price, and base weight as material terms); *Verification Report* at 8 (discussing size). Each of these terms "are finalized" on CHEMK's invoices. *Id.*; *see also* Def.'s Br. at 11–13 (summarizing specific examples on the record). With one exception discussed below (size), these material terms did not change after invoicing. CHEMK's storage agreements *explicitly stipulate* "that the customer agrees to receive merchandise that was commingled whilst in storage, as long as the merchandise it receives is the same grade, size, and base quantity as invoiced." *Verification Report* at 8–9. CHEMK's customers paid for and subsequently accepted later delivered merchandise despite some variances in physical characteristics, but price, grade, and base weight remained the same, as did size, except in a few instances (discussed below). *Decision Memorandum* at 14–15. The reasonable conclusion, which Commerce reached, is that characteristics other than price, grade, size, and base weight are *not* material terms. *Decision Memorandum* at 17–22; Final Analysis Memorandum, 2–4 (Dep't of Commerce July 25, 2014), CD 162 ("*Final Analysis Memorandum*").

Plaintiffs argue that "chemical composition" is also a material term. Plaintiffs reference one confidential sale outside the period of review in which a customer made a request regarding chemical composition. Plaintiffs also note that CHEMK issues certificates detailing chemical composition before delivery. Pls.' Br. at 10–12. There were also other "rare[]" instances where customers specified maximum tolerances for elements other than silicon. *Verification Report* at 9. Plaintiffs also argue that the number of changes in the "product characteristics" after the invoice date demonstrate that the terms of sale became finalized on some other date. Pls.' Br. at 8, 15, 17–20. Despite changes in chemical composition, however, *all* of CHEMK's customers "received the identical commercial grade of merchandise that was invoiced and eventually delivered without incident." *Id.* at 14–15. So as Commerce noted, whatever changes to "chemical composition"

occurred, they "were not commercially relevant because record evidence shows that the customers paid for the merchandise and did not reject or return the merchandise." *Id.* at 14–15. This is an important, and ultimately decisive point.

CHEMK did have a number of storage sales in which the size of ferrosilicon changed between time of invoice and delivery. These sales represented a relatively small portion of CHEMK's storage sales, *Final Analysis Memorandum* at 2–4, and without a more definitive quantification from Plaintiffs, the court, like Commerce, cannot identify how Plaintiffs' argument about the changes in size have any noticeable impact on the margin calculation. *Decision Memorandum* at 22 ("Petitioners have not provided any alternative quantitative calculations showing exactly how using the 'as delivered' subset of sales, accounting for 18 percent of those home market sales, in the margin calculation program would have resulted in an affirmative determination."). To reiterate again, the court sustains Commerce's reasonable selection, in accordance with its regulatory presumption, of the invoice date as the date of sale.

B. Model Matching

Plaintiffs' goal in challenging Commerce's date of sale selection is to increase (or at least alter) the universe of home market sales used to calculate RFAI's margin. Pls.' Br. at 3, 9. To that same end, Plaintiffs challenge Commerce's model-matching analysis. Specifically, Plaintiffs argue that Commerce's use of the "as invoiced" product characteristics of CHEMK's home market storage sales instead of the "as delivered" product characteristics deviates from past practice and is unreasonable.

Commerce determines dumping margins by comparing export price or constructed export price to normal value. Commerce sets normal value at "the price at which the foreign like product is first sold . . . for consumption in the exporting country." 19 U.S.C. § 1677b(a)(1)(B)(i). "[F]oreign like product" is either identical merchandise, similar merchandise, or reasonable comparable merchandise. *Id.* § 1677(16); *see Samsung Elecs. Co. v. United States*, 39 CIT ___, ___, 72 F. Supp. 3d 1359, 1376 (2015) (summarizing the model matching provision). Where a given export sale lacks a corresponding identical home-market sale, Commerce looks to similar merchandise. Where an export sale lacks a corresponding identical or similar home market sale, Commerce then turns to reasonably comparable merchandise. *See id.* The process by which Commerce identifies "foreign like product" in accordance with the statute is called "model-matching." *Koyo Seiko v. United States*, 551 F.3d 1286, 1289 (Fed. Cir. 2008).

"[A]n agency must either follow its own precedents or explain why it departs from them." *See generally*, 2 Richard J. Pierce, *Administrative Law Treatise* § 11.5, at 1037 (5th ed. 2010). Plaintiffs aver that Commerce departed from past practice by failing "to make product comparisons based on the physical characteristics of the merchandise actually delivered to the customer." Pls.' Br. at 13–14 (citing *Stainless Steel Sheet and Strip in Coils from France*, 64 Fed. Reg. 30,820, 30,830 (Dep't of Commerce June 8, 1999) (final LTFV determ.) ("*SSSS from France*")). The court does not agree. Commerce in *SSSS from France* noted that its practice is to use the product characteristics of delivered merchandise over invoiced merchandise "in cases where the *grades* reported in [specific CONNUM fields covering the grade of invoiced and delivered merchandise] differ." *SSSS from France*, 64 Fed. Reg. at 30,830 (emphasis added); *see also* Pls.' Br. at 14 (quoting the same language in *SSSS from France*). Commerce below reasonably distinguished *SSSS from France*, explaining that the *grade* did not change between invoicing and delivery for any of CHEMK's storage sales. Commerce explained further that, unlike *SSSS from France*, the differences in product characteristics here were not "commercially relevant" since they involved immaterial terms like chemical composition and total weight. *Decision Memorandum* at 22. Commerce's use of the invoiced product characteristics therefore did not run afoul of *SSSS from France*.

Plaintiffs' substantial evidence challenge largely tracks their arguments in opposition to Commerce's date of sale selection. *See* Pls.' Br. at 15–21. Plaintiffs highlight what they allege is a significant number of post-invoice changes in characteristics that they believe to be material, and argue that Commerce should have used the "as delivered" product characteristics for model match. *See id.* Unfortunately for Plaintiffs, for the same reasons described above, Commerce reasonably found that any differences between the "as delivered" and "as invoiced" merchandise are not material. *See Decision Memorandum* at 17–22. Plaintiffs have no good answer to the fact that CHEMK's Customers were invoiced, made payment, and then subsequently accepted the "as delivered" merchandise (with whatever changes in characteristics), leading Commerce to conclude that the "as delivered" merchandise was "commercially equivalent" to the "as invoiced" merchandise. *Id.* at 21–22.

Plaintiffs also failed to quantify the actual numerical effect of the small proportion of sales in which one material characteristic (size) did change post-invoice. The court notes that size, although a material term, ranked *last* in priority for the purposes of comparison to U.S. sales on Commerce's list of relevant physical characteristics.

Decision Memorandum for Preliminary Determination of the Antidumping Duty Investigation of Ferrosilicon from the Russian Federation, A-821–820, at 12 (Dep't of Commerce Mar. 4, 2014), *available at* http://enforcement.trade.gov/ frn/summary/russia/2014–05251–1.pdf (last visited this date). The relative unimportance of size for model-matching purposes weakens Plaintiffs' position that using "as delivered" sales has a material effect on RFAI's margin, which again, Plaintiffs failed to specifically quantify. *See Decision Memorandum* at 22.

The court therefore sustains Commerce's use of "as invoiced" sales characteristics in its model-matching analysis.

C. Warehouse Expense and Revenue

As described above, RFAI's affiliated producer CHEMK warehouses some ferrosilicon at its production facility after completing a sale. Commerce found that CHEMK's warehousing produced both movement expenses deductible from normal value and, to a greater extent, revenues that could increase normal value. In accordance with its established practice, Commerce capped CHEMK's warehousing revenue at the level of warehousing expenses, resulting in no net effect on normal value. *Decision Memorandum* at 26; *see also* Issues and Decision Memorandum for Final Results of Antidumping Duty Administrative Review of Circular Welded Carbon Steel Pipes and Tubes from Thailand, A-549–502, at 10–13 (Dep't of Commerce Oct. 23, 2013), *available at* http://enforcement.trade.gov/frn/summary/thailand/2014–25611–1.pdf (last visited this date) (describing and applying movement expense capping practice). Plaintiffs challenge Commerce's deduction of CHEMK's warehousing expense as inconsistent with law, thereby indirectly challenging Commerce's decision to cap CHEMK's warehousing revenue.

The statute directs Commerce to deduct from normal value "the amount, if any, . . . attributable to any costs, charges, and expenses incident to bringing the foreign like product from the original place of shipment to the place of delivery to the purchaser." 19 U.S.C. § 1677b(a)(6)(B)(ii). Commerce's regulations specify that movement expenses include any transportation and other associated expenses, including "warehousing expenses that are incurred *after* the merchandise leaves the original place of shipment." 19 C.F.R. § 351.401(e)(2) (emphasis added). The "original place of shipment" is "normally" the production facility. *Id.* § 351.401(e)(1). Plaintiffs argue that Commerce violated the regulation because CHEMK incurred warehousing expenses *before* the merchandise left the production facility.

Commerce's interpretation of its regulation is generally of controlling weight unless it is plainly erroneous or inconsistent with the regulation. *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Am. Signature, Inc. v. United States*, 598 F.3d 816, 827 (Fed. Cir. 2010). Commerce acknowledges that CHEMK incurred its on-site, post-sale warehousing expenses before the goods left the production facility. *Decision Memorandum* at 26. The regulation specifies that Commerce will deduct warehousing expenses that are incurred "after" the merchandise leaves the production facility. 19 C.F.R. § 351.401(e). Commerce explained that CHEMK's on-site warehousing "qualif[ies] . . . as a movement-related expense, because the Preamble states that the Department will deduct all movement expenses (including all warehousing) that the producer incurred *after* the goods left the production facility." *Decision Memorandum* at 26 (referring to *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,345 (Dep't of Commerce May 19, 1997) (final rule) ("*Preamble*")) (emphasis added). Just like the regulation, the *Preamble* refers to warehousing expenses incurred "after" goods have left the production facility. *Id.* And here the goods did not leave the production facility. Commerce's application of its regulation therefore appears inconsistent with both the regulation and the *Preamble*.

Defendant's counsel, for its part, explains that the on-site warehousing described in the regulation and *Preamble* covers *pre-sale* warehousing, not CHEMK's *post-sale* warehousing at issue here. Def.'s Resp. at 30–31. Although, the regulation does not specifically address whether such *post-sale* warehousing may qualify as a deductible movement expense, the court cannot defer to the *post hoc* rationalizations of agency counsel. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962). Commerce itself did not discuss the "post-sale" vs. "pre-sale" distinction. The court therefore must remand this issue to Commerce for further consideration.

D. Imputed Credit Expenses

Commerce adjusts normal value to account for differences in the circumstances of sale in the United States and foreign markets. 19 U.S.C. § 1677b(a)(6)(C)(iii). Commerce typically makes such an adjustment to account for differences in credit terms by "imput[ing] a U.S. credit expense and a foreign market credit expense on each sale." Imputed Credit Expenses and Interest Rates (Dep't of Commerce Feb. 23, 1998), *available at* http://enforcement.trade.gov/policy/bull98–2.htm (last visited this date). "The imputed credit expense represents the producer's opportunity cost of extending credit to its customers. By allowing the purchaser to make payment after the

shipment date," on either home market sales or U.S. sales, "the producer forgoes the opportunity to earn interest on an immediate payment. Thus, the imputed credit expense reflects the loss attributable to the time value of money." *Mitsubishi Heavy Indus., Ltd. v. United States*, 23 CIT 326, 330, 54 F. Supp. 2d 1183, 1188 (1999), *after remand*, 24 CIT 275, 97 F. Supp. 2d 1023 (2000), *aff'd*, 275 F.3d 1056 (Fed. Cir. 2001). Plaintiffs challenge the interest rate Commerce selected to calculate RFAI's home market imputed credit expenses.

Commerce's announced policy is to select "a short-term interest rate tied to the currency in which the sales are denominated" that is "base[d] . . . on the respondent's weighted-average short-term borrowing experience in the currency of the transaction." Import Administration Policy Bulletin 98.2: Imputed Credit Expenses and Interest Rates (Dep't of Commerce Feb. 23, 1998), *available at* http://enforcement.trade.gov/ policy/bull98–2.htm (last visited this date) ("*Policy Bulletin 98.2*"). "In cases where a respondent has no short-term borrowings" in the same currency as its foreign transactions, however, Commerce selects a proxy rate "on a case-by-case basis using publicly available information, with a preference for published average short-term lending rates." *Id.*

RFAI's affiliated producer CHEMK used "factoring" arrangements to finance receivables on home market sales denominated in rubles during the period of review. Factoring is a recognized form of financing that involves the sale of receivables at a discounted rate. Issues and Decision Memorandum for the Final Results of the Antidumping Administrative Review of Welded Carbon Steel Standard Pipe and Tube Products from Turkey, A-489–501, at 14 (Dep't of Commerce Dec. 23, 2013), *available at* http://enforcement.trade.gov/frn/summary/turkey/2013–31344–1.pdf ("*Pipe and Tube from Turkey Memorandum*"). Despite these arrangements, however, RFAI reported in its Section B questionnaire response that CHEMK had no-short term borrowings in rubles. As a consequence, Commerce selected Russian short-term interest rates described in a publicly available source as a proxy for RFAI's own short-term borrowing experience. *See Decision Memorandum* at 27–29; *see also Policy Bulletin 98.2*.

After the *Preliminary Results* but before verification, RFAI notified Commerce in a "minor corrections" submission that it believed CHEMK's factoring arrangements could be used to derive a rate that more accurately described its short-term borrowing experience. *Decision Memorandum* at 28–30; *see, e.g.*, *Pipe and Tube from Turkey Memorandum* at 14 (using respondent's factoring arrangements to

derive a rate "based on the weighted-average interest rate paid by the [respondent] for short-term loans in the currency of the sale" in accordance with *Policy Bulletin 98.2*). RFAI also provided Commerce with a letter from a Russian bank describing the rates applicable to CHEMK's factoring arrangements in support of its position. Commerce accepted RFAI's submission as information that "corroborate[d], support[ed], or clarifie[d]" its initial Section B response and verified that the supplied rates were accurate. *Decision Memorandum* at 30. Commerce thereafter used an average of the rates applicable to the sales it verified as the rate for RFAI's imputed credit expenses. *Id.* at 32.

Plaintiffs first argue that Commerce should have rejected RFAI's minor corrections submission because the interest rates it described constituted new information. The court does not agree. Commerce's established practice is to accept new information when it "corroborates, supports, or clarifies information already on the record." *Ass'n of Am. Sch. Paper Suppliers v. United States*, 32 CIT 1196, 1217 (2008) (quoting *CITIC Trading Co. v. United States*, 27 CIT 356, 373 (2003)). Here, RFAI reported the existence of the factoring arrangements with respect to certain sales in its original Section B questionnaire response. As Commerce explained, "in reviewing [during verification] the payment details of each sales trace where factoring occurred, the factoring arrangement with the customer was an intrinsic detail of the actual payment for ferrosilicon purchases." *Decision Memorandum* at 30. Commerce therefore reasonably found that RFAI's minor corrections submission, which described interest rates intrinsic to the transactions it already reported, "corroborate[d], support[ed], or clarifie[d]" information already on the record. *See Decision Memorandum* at 30.

Plaintiffs next argue that Commerce's use of the factoring arrangements to derive an interest rate for RFAI's imputed credit costs is unreasonable because the factoring rates represent "the short-term interest rates at which the bank was willing to loan money to CHEMK's customers, rather than the rate at which the bank would loan money to CHEMK." Pls.' Br. at 32. The court again does not agree. Commerce's announced practice, which Plaintiffs do not challenge, is to use factoring arrangements as a source for short term interest rates. As Commerce explained:

> An accurate measure of a company's opportunity cost should include all of its sources of short-term funds, including factoring. Since factoring is a recognized method of financing receivables, the discount from face value can be used to establish credit

> expense. [Commerce] has previously recognized that factoring is a method of financing a receivable.

Decision Memorandum at 31 (quoting *Pipe and Tube from Turkey Memorandum* at 14); *see also* Decision Memorandum for the Final Determination in the Less Than Fair Value Investigation of Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) from India, at cmt. 8 (Dep't of Commerce May 6, 2002), *available at* http://enforcement.trade.gov/frn/summary/india/02–12295–1.txt (last visited this date). Commerce's decision here to use CHEMK's factoring arrangements to derive an interest rate for RFAI's imputed credit costs therefore reflects the routine and reasonable application of its past practice.

Finally, Plaintiffs argue that Commerce's selection is inconsistent with *Policy Bulletin 98.2* because the rate is based on the simple average of the interest rates applicable to the subset of transactions Commerce analyzed during verification rather than a weighted average. Pls.' Br. at 31; Pls.' Reply at 15–17; *see Policy Bulletin 98.2* (explaining that Commerce will select a rate "base[d] . . . on the respondent's weighted-average short-term borrowing experience in the currency of the transaction"). Commerce announced its selection for the first time in the *Decision Memorandum* and other materials released on the same day. *See Decision Memorandum* at 32 (citing *Final Analysis Memo* (Dep't of Commerce July 25, 2014), CD 162). CC Metal's first opportunity to challenge Commerce's selection as inconsistent with *Policy Bulletin 98.2* was in its brief before the court. This means the agency has not had the opportunity to consider this argument in the first instance. Defendant's response presents the *post hoc* rationalizations of agency counsel to which the court may not defer. *See Burlington Truck Lines*, 371 U.S. at 168–69. There may be some merit in Plaintiffs' contention: Commerce described its selection as "the average of factoring-related interest rates that [it] verified," which does not appear to be a *weighted* average as described in *Policy Bulletin 98.2*. *See Decision Memorandum* at 32; *see also* Def.'s Resp. at 36 (referring to the rate as a "simple average short term rate"). The court therefore remands for Commerce to consider Plaintiffs' contention that the selected rate is inconsistent with *Policy Bulletin 98.2* because it is a simple average rather than a weighted average.

E. Inbound Movement Expenses

The statute permits Commerce to reduce constructed export price by "the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import

duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States." 19 U.S.C. § 1677a(c)(2)(A). Commerce's regulations explain further that, if a party cannot report such expenses on a transaction-specific basis, Commerce "may consider allocated expenses[,] . . . provided [Commerce] is satisfied that the allocation method used does not cause inaccuracies or distortions." 19 C.F.R. § 351.401(g)(1). A party advancing an allocation method must demonstrate to Commerce's satisfaction that "the allocation is calculated on as specific a basis as is feasible" and that "the allocation methodology used does not cause inaccuracies or distortions." 19 C.F.R. § 351.401(g)(2).

RFAI reported that it incurred certain movement expenses—sampling, brokerage and handling, customs charges, and inland transport—incident to shipping ferrosilicon to the United States ("U.S."). RFAI also reported that it could not report those expenses on a transaction-specific basis and proposed an allocation methodology that tied to the quantity of ferrosilicon RFAI sold in the U.S. Commerce accepted RFAI's methodology, explaining that "RFAI reported in an as specific manner as it could" and because "there is nothing to indicate or support the conclusion that there are distortions or inaccuracies." *Decision Memorandum* at 36–37, 41–42.

Plaintiffs challenge Commerce's decision to accept RFAI's methodology for allocating movement expenses in calculating constructed export price. Specifically, Plaintiffs argue that four different types of movement expenses should have been allocated by the quantity of ferrosilicon RFAI *shipped* to the U.S. during the POR rather than the quantity of ferrosilicon RFAI *sold* in the U.S. during the POR. According to Plaintiffs, RFAI's methodology produces inaccuracies and distortions, and is not "as specific as possible." Pls.' Br. at 37–39.

In the court's view, Commerce's acceptance of RFAI's allocation methodology over Plaintiffs' proposed alternative was reasonable. Plaintiffs contend that RFAI's methodology "is distortive because it understates the amounts of the expenses actually incurred." Pls.' Br. at 37. Plaintiffs do not, however, support this contention with anything other than the unremarkable observation that their preferred denominator is smaller than that used in RFAI's allocation methodology. Are there inaccuracies in RFAI's reported sales volume? Are there discrepancies between the results of RFAI's allocation methodology and other data on the record? Apparently not, as Commerce noted. *Decision Memorandum* at 41 ("[T]here is nothing to indicate or support the conclusion that there are distortions or inaccuracies" in RFAI's allocation methodology.).

As to Plaintiffs' preferred allocation methodology, Commerce verified that RFAI assigned lot numbers to bulk shipments of ferroalloy (not just ferrosilicon) from the third country to the United States and generated new lot numbers once the ferroalloy products (including ferrosilicon) reached the United States port, such that the lot numbers created in the third country are no longer relevant for the final sale to the U.S. customer. Consequently, as Commerce explained, the four movement expenses at issue "do not correspond, by discrete lot number, to the quantity of merchandise that shipped from the intermediary warehouse[e] during the [period of investigation]." *Decision Memorandum* at 36, 41. Put more simply, RFAI's books and records did not tie these four movement expenses to the quantity shipped during the period of investigation. Commerce also explained that Plaintiffs' preferred methodology would itself cause inaccuracies and distortions because RFAI shipped its ferrosilicon along with non-subject ferroalloy products. *Decision Memorandum* at 41. Because Plaintiffs' methodology did not tie to RFAI's books and records and had the potential to cause inaccuracies and distortions, Commerce reasonably concluded that RFAI's allocation was "as specific as RFAI was able to provide." *See id.* at 36–37, 41–42.

The court therefore sustains Commerce's decision to accept RFAI's movement expense allocation methodology.

III. Conclusion

In accordance with the foregoing, it is hereby

ORDERED that Commerce's *Final Determination* is sustained with respect to the date of sale, model matching, and inbound movement expense issues; it is further

ORDERED that this action is remanded to Commerce to clarify or reconsider, as appropriate, the warehousing expense and imputed credit expense issues; it is further

ORDERED that Commerce shall file its remand results on or before March 14, 2016; and it is further

ORDERED that, if applicable, the parties shall file a proposed scheduling order with page limits for comments on the remand results no later than seven days after Commerce files its remand results with the court.

Dated: January 12, 2016
New York, New York

/*s*/ *Leo M. Gordon Judge*
LEO M. GORDON