Slip Op. 16-93

UNITED STATES COURT OF INTERNATIONAL TRADE

SUNPREME INC., **Plaintiff,** **v.** **UNITED STATES,** **Defendant,** **and** **SOLARWORLD AMERICAS, INC.,** **Defendant-Intervenor.**	**Before: Claire R. Kelly, Judge** **Court No. 16-00171** **PUBLIC VERSION**

OPINION AND ORDER

[Denying Plaintiff's motion for a preliminary injunction in part and granting in part.]

Dated: October 5, 2016

John Marshall Gurley, Diana Dimitriuc-Quaia, and Nancy Aileen Noonan, Arent Fox LLP, of Washington, DC, for plaintiff.

Justin Reinhart Miller, Senior Trial Counsel, International Trade Field Office, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With him on the brief were Tara Kathleen Hogan, Senior Trial Counsel, U.S. Department of Justice, Commercial Litigation Branch – Civil Division, of Washington, DC, Benjamin C. Mizer, Principal Deputy Assistant Attorney General, Jeanne E. Davidson, Director, and Reginald T. Blades, Assistant Director. Of counsel on the brief was Rebecca Cantu, Senior Counsel, Office of the Chief Counsel for Enforcement and Compliance, U.S. Department of Commerce of Washington, DC.

Timothy C. Brightbill and Maureen Elizabeth Thorson, Wiley Rein LLP, of Washington DC, for defendant-intervenor.

Kelly, Judge: This matter is before the court on Plaintiff's motion, pursuant to USCIT Rule 65(a), for a preliminary injunction ("PI") seeking to enjoin Defendant, together

with its delegates, officers, agents, servants and employees of the United States Customs and Border Protection ("Customs" or "CBP") from requiring it to pay cash deposits and enter its solar modules as subject to antidumping and countervailing duty orders on crystalline silicon photovoltaic ("CSPV") cells from the People's Republic of China after the U.S. Department of Commerce ("Commerce") issued a scope ruling to the effect that Plaintiff's merchandise falls within the scope of those orders. See Pl.'s Mot. Prelim. Inj. and Mem. P. & A. Supp. Thereof Confidential Version, Sept. 8, 2016, ECF. No. 20 ("PI Mot."); see also Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People's Republic of China, 77 Fed. Reg. 73,017 (Dep't Commerce Dec. 7, 2012) (countervailing duty order) ("CVD Order"); Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People's Republic of China, 77 Fed. Reg. 73,018 (Dep't Commerce Dec. 7, 2012) (amended final determination of sales at less than fair value and antidumping duty order) ("AD Order"); Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Ruling in the Sunpreme Scope Inquiry, Sept. 14, 2016, ECF No. 28-4 ("Final Scope Ruling"). Additionally, Plaintiff avers that Commerce lacked authority to issue instructions to CBP that permit the collection of cash deposits and suspension of liquidation on entries entered prior to the initiation of the scope inquiry and that Commerce's instructions to CBP are otherwise contrary to law. PI Mot. 46–47; see also Sunpreme Corrected Customs Instructions, AD PD 75, bar code 3505144-01 (Sept. 12, 2016); Sunpreme Corrected Customs Instructions, CVD PD 81, bar code 3505147-01

(Sept. 12, 2016).[1] Therefore, even if the court allows the collection of cash deposits on entries after the initiation of the scope inquiry to continue, Plaintiff requests an injunction to prevent CBP from collecting cash deposits and suspending liquidation on entries entered or withdrawn from warehouse prior to the initiation of the scope inquiry. See Pl Mot. 46–47. Plaintiff brought the underlying action to challenge Commerce's determination that Plaintiff's solar modules are subject to antidumping and countervailing duty orders covering certain crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China (collectively "Orders"). See Compl., Aug. 26, 2016, ECF No. 2; see also Final Scope Ruling; CVD Order, 77 Fed. Reg. 73,017; AD Order, 77 Fed. Reg. 73,018.

On September 9, 2016, Plaintiff requested expedited briefing on its motion for a PI. See Req. for Order to Show Cause Why Time to Respond to Pl.'s Mot. Prelim. Inj. Should Not Be Shortened, Sept. 9, 2016, ECF No. 23. After a telephone conference held the same day, see Teleconference, Sept. 9, 2016, ECF No. 24, the court granted Plaintiff's request for expedited briefing. See Order, Sept. 9, 2016, ECF No. 25. On September 23, 2016, Defendant and Defendant-Intervenor filed response briefs opposing Plaintiff's motion.[2] See Def.'s Mem. Resp. Pl.'s Mot. Prelim. Inj. Confidential Version, Sept. 23, 2016, ECF No. 33 ("Def.'s Resp. Br."); Def.-Intervenor SolarWorld Americas,

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

[2] On September 8, 2016, the court granted Defendant-Intervenor's consent motion to intervene as of right pursuant to USCIT Rule 24(a). See Order, Sept. 8, 2016, ECF No. 18; Consent Mot. Intervene as a Matter of Right, Sept. 7, 2016, ECF No. 13.

Inc.'s Opp'n Pl. Sunpreme Inc.'s Mot. Prelim. Inj. Confidential Version, Sept. 23, 2016, ECF No. 36 ("SolarWorld Br."). On September 28, 2016, Plaintiff filed a motion for leave to file a reply brief to the responses of Defendant and Defendant-Intervenor. See Pl.'s Mot. For Leave To File A Reply To Resps. of United States & SolarWorld Americas Inc. To Pl.'s Mot. Prelim. Inj., Sept. 28, 2016, ECF No. 50. Briefing on the motion concluded on September, 29, 2016 when the court granted Plaintiff's motion. See Order, Sept. 29, 2016, ECF No. 52; see also Pl.'s Reply to Resps. of Def. United States & SolarWorld Americas Inc. to Pl.'s Mot. Prelim. Inj. Confidential Version, Sept. 29, 2016, ECF No. 53 ("Sunpreme Reply Br.").

For the reasons that follow, the court denies Plaintiff's motion to enjoin Commerce from requiring it to pay cash deposits and enter its solar modules as subject to the antidumping and countervailing duty orders on entries entered or withdrawn from warehouse on or after the initiation of the scope inquiry. However, the court enjoins Commerce from ordering CBP to collect and CBP from collecting cash deposits on entries entered or withdrawn from warehouse prior to the initiation of the scope inquiry.

BACKGROUND

Plaintiff, Sunpreme Inc. ("Sunpreme"), is a U.S.-based importer of solar modules manufactured in the People's Republic of China. PI Mot. 7; see also Compl. ¶6. Plaintiff describes its solar modules as containing bi-facial solar cells with "an innovative thin film technology, the Hybrid Cell Technology, developed and owned by Sunpreme." Compl. ¶22; PI Mot. 7. Plaintiff alleges that it manufactures its cells at its facility in Jiaxing, China.

Compl. ¶20; PI Mot. 7. Plaintiff avers that all of its solar modules that are the subject of the Final Scope Ruling

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

Compl. ¶21; PI Mot. 7. Plaintiff alleges that its cells are "made of several layers of amorphous silicon less than one micron in thickness, deposited on both sides of a substrate consisting of a crystalline silicon wafer." Compl. ¶23; PI Mot. 7.

Plaintiff alleges its cells have a p-i-n junction consisting of "thin film p-i-(wafer substrate)-i-n junctions, formed by four amorphous silicon thin film depositions." Compl. ¶24; PI Mot. 8—9. Plaintiff asserts that "the junction is made by the layers of p/i and i/n amorphous silicon on both the front and the back of the substrate, such that the junction is formed on the wafer and inside the thin film layers." Compl. ¶25; PI Mot. 9. Plaintiff claims it uses a

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

Compl. ¶26; PI Mot. 9.

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

> The merchandise covered by this order is crystalline silicon photovoltaic cells, and modules, laminates, and panels, consisting of crystalline silicon photovoltaic cells, whether or not partially or fully

> assembled into other products, including, but not limited to, modules, laminates, panels and building integrated materials.
>
> This order covers crystalline silicon photovoltaic cells of thickness equal to or greater than 20 micrometers, having a p/n junction formed by any means, whether or not the cell has undergone other processing, including, but not limited to, cleaning, etching, coating, and/or addition of materials (including, but not limited to, metallization and conductor patterns) to collect and forward the electricity that is generated by the cell.
>
> . . .
>
> Excluded from the scope of this order are thin film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS).

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

On December 11, 2012, Commerce notified Customs of the CVD Order and instructed Customs, effective December 6, 2012, to require cash deposits equal to the subsidy rates in effect at the time of entry. See Pl.'s Mot. Prelim. Inj. and Mem. P. & A. Supp. Thereof Confidential Version Att. 1 at Ex. 7, Sept. 8, 2016, ECF No. 20-1 ("Exs. Pl Mot."). On December 21, 2012, Commerce notified Customs of the AD Order and instructed Customs, 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 Exs. Pl Mot. Att. 1 at Ex. 6. The messages to Customs contain, respectively, the antidumping duty and countervailing rates applicable to Plaintiff's entries. See Exs. Pl Mot. Att. 1 at Exs. 6, 7. Those rates are 13.94% and 15.24%, respectively. See Exs. Pl Mot. Att. 1 at Exs. 6, 7.

It is undisputed that Plaintiff had been filing its entries as type "01" ordinary consumption entries without depositing antidumping or countervailing duties prior to April 2015. See Def.'s Resp. Br. 4; see also Sunpreme Inc. v. United States, 40 CIT __, __,

145 F. Supp. 3d 1271, 1279 (2016). CBP instructed Plaintiff to file its entries as type "03," the type of entries subject to antidumping and countervailing duties. See Def.'s Resp. Br. 4; see also Sunpreme, 40 CIT at __, 145 F. Supp. 3d at 1279. Although Plaintiff ultimately challenged CBP's action as contrary to law, Plaintiff complied with CBP's instructions. See PI Mot. 12; see also Sunpreme, 40 CIT at __, 145 F. Supp. 3d at 1280. This resulted in the suspension of liquidation and the collection of cash deposits. See 19 C.F.R. § 144.38(d)–(e) (2015);[3] see also Sections 484 and 592 of the Tariff Act of 1930,[4] as amended, 19 U.S.C. §§ 1484, 1592; Sunpreme, 40 CIT at __, 145 F. Supp. 3d at 1292. Plaintiff challenged CBP's determination to collect cash deposits prior to the initiation of a scope inquiry as in excess of its statutory authority in a separate action.[5] See Sunpreme, 40 CIT at __, 145 F. Supp. 3d at 1271. In that separate action, the court issued a temporary restraining order, see id., and then a preliminary injunction halting CBP's collection of cash deposits on its entries.[6] Id., 40 CIT at __, 145 F. Supp. 3d at 1298–99.

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

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

[5] Plaintiff challenged as ultra vires CBP's determination requiring it to enter its merchandise as subject to the Orders, which had the following consequences for Plaintiff's entries: (1) CBP required Plaintiff to enter its goods as type "03" entries, the type required for goods subject to AD and CVD orders; (2) CBP collected cash deposits; and (3) CBP suspended liquidation. See Sunpreme, 40 CIT at __, 145 F. Supp. 3d at 1280 n. 4, 1281.

[6] The preliminary injunction issued by the court

> expire[d] 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

(footnote continued)

On November 16, 2015, Plaintiff filed an application for a scope ruling pursuant to 19 C.F.R. § 351.225(c), requesting that Commerce find Plaintiff's solar modules outside the scope of the Orders. See Sunpreme Scope Ruling Request, AD PD 1–6, bar codes 3417556-01–06 (Nov. 16, 2015); Sunpreme Scope Ruling Request, CVD PD 1–6, bar codes 3417582-01–06 (Nov. 16, 2015). Plaintiff alleges it requested that Commerce issue a scope ruling on an expedited basis due to financial difficulties the company was experiencing.[7] Compl. ¶28; PI Mot. 10. On December 30, 2015, Commerce initiated a formal scope inquiry pursuant to 19 C.F.R. § 351.225(e). See Scope Inquiry Initiation on Photovoltaic Modules Imported by Sunpreme, AD PD 9, bar code 3428728-01 (Dec. 30, 2015); Scope Inquiry Initiation on Photovoltaic Modules Imported by Sunpreme, CVD PD 15, bar code 3428730-01 (Dec. 30, 2015).

> 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).

Sunpreme, 40 CIT at __, 145 F. Supp. 3d at 1299.

While the preliminary injunction remained in effect, Plaintiff was importing its merchandise without posting cash deposits for antidumping duties and countervailing duties. Plaintiff acknowledges that the preliminary injunction "provided some relief to Sunpreme and allowed it to continue to do business." PI Mot. 4. However, the preliminary injunction, by its terms, expired on July 29, 2016, when Commerce issued its Final Scope Ruling to the effect that Plaintiff's goods are subject to the Orders. See Sunpreme, 40 CIT at __, 145 F. Supp. 3d at 1299; see also Final Scope Ruling at 19.

[7] Plaintiff alleges these financial difficulties are being caused by the cash deposit requirement, which Plaintiff contends is causing its [[ ]] and threatening Sunpreme's [[ ]]. See PI Mot. 4.

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

In its Final Scope Ruling, Commerce determined that Plaintiff's solar modules fall within the scope of the Orders based on the language of the Orders and the criteria in 19 C.F.R. § 351.225(k)(1). Final Scope Ruling at 19. On August 1, 2016, Commerce notified

CBP that Plaintiff's merchandise was within the scope of the Orders and instructed Customs to "[c]ontinue to suspend liquidation of entries of solar cells from the PRC, including the bifacial solar products imported by Sunpreme . . . subject to the antidumping [and countervailing] duty order[s] on solar cells from the PRC." Sunpreme Customs Instructions, PD 74, bar code 3505143-01 (Sept. 12, 2016); Sunpreme Customs Instructions, PD 80, bar code 3505146-01 (Sept. 12, 2016). On September 2, 2016, Commerce issued messages to Customs correcting its prior instructions regarding suspension of liquidation. The corrected messages instruct Commerce to

> [c]ontinue to suspend liquidation of entries of merchandise subject to the antidumping [and countervailing] duty order[s] on solar cells from the PRC. Accordingly, because the bifacial solar products imported by Sunpreme, described above, are subject to the antidumping [and countervailing] duty order[s] on solar cells from the PRC, for entries of such merchandise that are currently suspended from liquidation, continue to suspend those entries from liquidation. For entries of bifacial solar products imported by Sunpreme, described above, that are not already suspended from liquidation, begin suspension and collect cash deposits at the applicable rate for entries that entered or were withdrawn from warehouse for consumption on or after 12/30/2015.

Corrected Sunpreme Customs Instructions, AD PD 75, bar code 3505144-01 (Sept. 12, 2016); Corrected Sunpreme Customs Instructions, CVD PD 81, bar code 3505147-01 (Sept. 12, 2016).

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a (a)(2)(B)(vi) and 28 U.S.C. § 1581(c) (2012).

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 Grp. Co. v. United States, 581 F.3d 1375, 1378—79 (Fed. Cir. 2009) (quoting Kowalski v. Chi. Tribune Co., 854 F.2d 168, 170 (7th Cir. 1988)). 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, 741 F.3d 89, 100 (Fed. Cir. 2014) (citing Winter, 555 U.S. at 22).

DISCUSSION

I. Irreparable Harm

A plaintiff seeking a preliminary injunction must demonstrate that irreparable injury is likely in the absence of the injunction. Winter, 555 U.S. at 22. Harm is irreparable when "no damages payment, however great," could address it. Celsis In Vitro, Inc. v. CellzDirect, Inc., 664 F.3d 922, 930 (Fed. Cir. 2012). In addition to alleging that the injury is irreparable, Plaintiff must demonstrate the injury is immediate. See Zenith, 710 F.2d at 809. However, the injury complained of need not have been inflicted when the application is made, or be certain to occur. See United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953) (holding that the movant must show a "cognizable danger of recurrent violation, something more than a mere possibility which serves to keep the case alive"). Therefore, to evaluate whether the harm is sufficient to warrant the requested relief, the court analyzes the magnitude of the injury, the immediacy of the injury, and the inadequacy of future corrective relief.

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 (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, 664 F.3d at 930 (citing Abbott Labs. v. Sandoz, Inc., 544 F.3d 1341, 1362 (Fed. Cir. 2008)). Bankruptcy or substantial loss of business is sufficiently grave and irreparable to demonstrate the inadequacy of corrective relief 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); McAfee v. United States, 3 CIT 20, 24, 531 F. Supp. 177, 179 (1982).

Here, Plaintiff has demonstrated in the form of an affidavit from a key executive with knowledge of its financial position as well as financial documentation that it is likely to suffer grave, immediate, and irreparable harm if an injunction is not granted.[8] Exs. Pl Mot. at Ex. 9. Plaintiff has also demonstrated the immediacy of the potential harm through

[8] Plaintiff has submitted an affidavit supporting its claims that continuing to post cash deposits during the pendency of its challenge to Commerce's scope determination would [[ ]] because it would [[ ]] and [[ ]]. See Exs. Pl Mot. at Ex. 9. The Sunpreme executive's affidavit includes a chart documenting that the company's [[ ]]. Id. Ex. 9 at ¶¶9–10. In fact, the affidavit indicates that, as of July 31, 2016, the company [[ ]]. Id. at ¶10. Sunpreme has also included bank statements, audited financial statements for 2013–2014 and 2014–2015, unaudited financial statements for 2016, the company's 2014 U.S. tax return and correspondence with [[ ]]. See id. Ex. 10–14. Sunpreme points to [[ ]] as well as a [[ ]] and its inability to [[ ]] as raising serious doubts about [[ ]] Id. Ex. 9 at ¶12. Sunpreme alleges that sales of solar modules to the United States represented [[ ]]% of its revenue in 2015 and [[ ]]% of its 2016 revenue year-to-date. See id. Ex. 9 at ¶16. Therefore, Sunpreme has provided documentary support for its allegations that it is likely that: (1) it lacks [[ ]]; and (2) its non-U.S. markets [[ ]] while the scope issue is adjudicated. Id. Moreover, Sunpreme alleges that it [[ ]]. Id. Ex. 9 at ¶21.

Sunpreme has also demonstrated that it would suffer a loss of goodwill, damage to its reputation, and substantial loss of business opportunities if it is [[ ]] solar modules to customers in the United States. Id. Ex. 9 at ¶21. It is unlikely customers [[ ]] if the company cannot [[ ]]. Sunpreme also references the [[ ]] between November 13, 2015 and March 31, 2016. Id. Ex. 9 at ¶26.

the seriousness of its [[

]][9] See Id. at Ex. 9.

[9] Although Defendant-Intervenor questions the sufficiency of the evidence submitted by Plaintiff to support its allegation that it [[ ]], Defendant-Intervenor's points serve to undercut the immediacy of the harm, not its magnitude or the inadequacy of future corrective relief. For example, Defendant-Intervenor highlights that Sunpreme does not mention that it recently received a $5 million "SunShot" award from the U.S. Department of Energy, SolarWorld Resp. Br. 5 (citing id. at Ex. 2), or that it secured additional financing in 2016, including [[ ]]. Id. at 8 (citing Pl.'s Supp. Exs. Ex. 11 at 47). Plaintiff responds that it did not receive the "SunShot" award until September 14, 2016, seven days after it filed its motion for a PI. Sunpreme Reply Br. 2. Plaintiff also contends that the parameters of the "SunShot" award do not provide Plaintiff any relief from its financial situation because the terms of the award require it to initially cover the costs of research projects, and the contract does not allow for any profit and forbids the company from using the award for its general business operations. See id. (citing id. at Ex. 2).

Given the volume and value of Plaintiff's anticipated imports, which it estimates at approximately [[ ]] through the end of 2016, see Exs. Pl Mot. Ex. 9 at ¶16, the size of the anticipated antidumping and countervailing duty cash deposits it would be forced to post (i.e., 13.94% ad valorem and 15.24% ad valorem, respectively), and the company's account of its [[ ]] circumstances, see id. Ex. 9 at ¶12, Defendant-Intervenor's speculation that the "SunShot" award or the additional financing would materially affect Plaintiff's longer term [[ ]] is likely unfounded.

Defendant-Intervenor also points to several deficiencies in documentation submitted by Plaintiff to back up certain allegations in the affidavit from a Sunpreme senior executive. For example, Defendant-Intervenor contends that Plaintiff has failed to provide Master Supply Agreements that Plaintiff alleges oblige it to [[ ]] and to return customer deposits if it cannot deliver contracted goods. SolarWorld Resp. Br. 6. Defendant-Intervenor also highlights a lack of documentary evidence of the [[ ]], to substantiate the [[ ]] if it is unable to deliver on a large customer contracts, and to substantiate [[ ]]. See id. at 6–8. Defendant-Intervenor also speculates that Plaintiff's financial harm is not the result of the cash deposit requirements because the financial statements submitted indicate the company [[ ]]. See id. at 8. Whether the company was in [[ ]] prior to the collection of cash deposits does not undermine the notion that the continued collection of cash deposits would cause Plaintiff irreparable harm. Moreover, Plaintiff need only show likely irreparable harm, not certain irreparable harm. See Winter, 555 U.S. at 22.

Finally, Defendant-Intervenor argues that the court should not ameliorate the consequences of Plaintiff's failure to develop markets outside of the United States and otherwise manage its risk. Def.'s Resp. Br. 9. However, Defendant-Intervenor does not relate this point to the irreparable harm standard. Defendant-Intervenor points to no authority requiring a movant to show harm was avoidable in order to be entitled to a preliminary injunction.

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. In addition, Plaintiff provides sufficient documentary support to demonstrate that the continued collection of cash deposits will cause irreparable harm to Plaintiff because it will either force Plaintiff [[ ]] or cause serious and substantial disruption to [[ ]] of the company [[ ]].

II. Likelihood of Success on the Merits

The party seeking injunctive relief "must demonstrate at least a 'fair chance of success on the merits.'" Qingdao Taifa, 581 F.3d at 1381 (quoting U.S. Ass'n of Imps. of Textiles & Apparel v. Dep't of Commerce, 413 F.3d 1344, 1347 (Fed. Cir. 2005)). Where a plaintiff has shown that a strong threat of irreparable harm exists, "the burden to show a likelihood of success [on the merits] is necessarily lower." Id. Unlike preliminary injunctions to suspend liquidation, which preserve a plaintiff's legal options and allow for a full and fair review of duty determinations before liquidation and are contemplated by the statute, see 19 U.S.C. § 1516a(c)(2); see also Qingdao Taifa, 581 F.3d at 1382, paying deposits pending court review of a Commerce scope ruling is an ordinary consequence of the statutory scheme. See 19 U.S.C. §§ 1673d(c)(1)(B)(ii), 1673e(a)(3), 1675(a)(1), 1675(a)(2)(B)(iii), 1675(a)(2)(C); see also Shree Rama Enterprises v. United States, 21 CIT 1165, 1169, 983 F. Supp. 192, 196 (1997). While the need to demonstrate

the likelihood of success may be lessened where there is a strong showing of irreparable harm, it is not extinguished altogether. See Qingdao Taifa, 581 F.3d at 1381.

Plaintiff challenges the scope determination as both contrary to law and unsupported by substantial evidence. PI Mot. 21. Specifically, Plaintiff first argues that Commerce's interpretation of the thin film exclusion is contrary to law because it added conditions not supported by the scope language or the sources Commerce may consult under 19 C.F.R. § 351.225(k)(1). Id. at 22–29. Second, Sunpreme argues Commerce failed to consider evidence demonstrating that its merchandise falls within the thin film exclusion in the Orders. Id. at 30–33. Third, Sunpreme argues Commerce's determination is based on factual misstatements. Id. at 34–45.

Plaintiff argues that Commerce failed to ground its conclusion that Plaintiff's merchandise are CSPV cells with a p/n junction not entitled to the thin film exclusion in the scope language or any of the (k)(1) sources. PI Mot. 23–29. Defendant responds that Plaintiff fails to show that Commerce unreasonably concluded, based upon its consultation of the (k)(1) sources, that Sunpreme's cells were CSPVs notwithstanding the addition of thin films of amorphous silicon. Def.'s Resp. Br. 17–21.

The language of an order dictates its scope. See Duferco Steel, Inc. v. United States, 296 F.3d 1087, 1097 (Fed. Cir. 2002) (citing Ericsson GE Mobile Commc'ns, Inc. v. United States, 60 F.3d 778, 782 (Fed Cir. 1995)). Commerce's regulations provide that, where Commerce issues scope rulings to clarify the scope of an order with respect to particular products, in addition to the scope language, Commerce will take into account descriptions of the merchandise contained in: (1) the petition; (2) the initial investigation;

(3) and past determinations by Commerce, including prior scope determinations (collectively "(k)(1) sources"). 19 C.F.R. § 351.225(k)(1). Commerce has broad authority "to interpret and clarify its antidumping duty orders." Ericsson GE Mobile, 60 F.3d at 782 (citing Smith Corona Corp. v. United States, 915 F.2d 683, 686 (Fed. Cir. 1990)), as corrected on reh'g (Sept. 1, 1995); see also King Supply Co., LLC v. United States, 674 F.3d 1343, 1349 (Fed. Cir. 2012). However, Commerce may not interpret an order "so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." Eckstrom Indus., Inc. v. United States, 254 F.3d 1068, 1072 (Fed. Cir. 2001) (citing Wheatland Tube Co. v. United States, 161 F.3d 1365, 1370 (Fed. Cir. 1998)). Furthermore, "[s]cope orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it." Duferco, 296 F.3d at 1089. Although the petition and the investigation proceedings may aid in Commerce's interpretation of the final order, the order itself "reflects the decision that has been made as to which merchandise is within the final scope of the investigation and is subject to the order." Id. at 1096.

The Orders at issue provide:

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

> materials (including, but not limited to, metallization and conductor patterns) to collect and forward the electricity that is generated by the cell.
>
> . . .
>
> Excluded from the scope of this order are thin film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS).

CVD Order, 77 Fed. Reg. 73,017; AD Order, 77 Fed. Reg. 73,018.

In its scope ruling Commerce considered the plain language of the Orders and determined that the scope language calls upon it to consider whether Sunpreme's products: "(1) are CSPV cells, (2) are at least 20 micrometers [("μm")] thick, (3) contain a p/n junction, and (4) are excluded thin film products." Final Scope Ruling at 13. Commerce consulted the (k)(1) sources to interpret the relevant scope language, and it concluded that Sunpreme's products were in scope. Sunpreme has not shown that it is likely the court will find that Commerce lacked substantial evidence to find that its merchandise met all of these criteria or that Commerce could not reasonably have interpreted the Orders to include Plaintiff's merchandise.

1. CSPV Cells

In considering whether Plaintiff's products are CSPV cells, Commerce clarified that "CSPV cells," as used in the Orders, include wafers and freestanding cells made of crystalline silicon that rely on the crystalline silicon wafer to generate electricity. Final Scope Ruling at 13. Moreover, Commerce read the scope language as not "preclude[ing] the use of other materials, such as amorphous silicon or metal oxides, in CSPV cell production." Final Scope Ruling at 13. Commerce also noted that the Orders did not "stipulate that the crystalline silicon *within* subject CSPV cells must be able to independently function as a solar cell even before it is incorporated into the relevant

photovoltaic product." Final Scope Ruling at 13. The court cannot say that Sunpreme has raised a serious question as to the reasonableness of Commerce's interpretation.

Relying upon its prior scope determination in the Triex Scope Ruling, a (k)(1) source, Commerce noted that CSPV cells rely upon crystalline silicon to generate electricity. Final Scope Ruling at 13 (citing Triex Scope Ruling at 30). Commerce determined that the scope language does not require that the crystalline silicon component within a CSPV cell be able to independently function as a solar cell even before it is incorporated into the photovoltaic product. Final Scope Ruling at 13. Crediting Sunpreme's acknowledgment that the doped crystalline silicon substrates in its cells are the primary solar absorber over conflicting statements regarding the function of the crystalline silicon wafer in its cells, Commerce concluded that Sunpreme's cells rely upon the crystalline silicon to generate electricity.[10] Final Scope Ruling at 14 (citing Petitioner Comments on Sunpreme Scope Ruling Request at Ex. 21, AD PD 15–16, bar codes 3434369-01–02 (Jan. 20, 2016) and Petitioner Comments on Sunpreme Scope Ruling Request at Ex. 21, CVD PD 21–22, bar codes 3434365-01–02 (Jan. 20, 2016) (collectively "SolarWorld Comments on Scope Ruling Request"); Sunpreme Additional Factual Information at Ex. 7, AD PD 32–48, bar codes 3481978-01–12 (June 27, 2016),

[10] Commerce explained its decision to credit information that the silicon wafer in Sunpreme's cell plays a role in electricity generation over conflicting statements that indicate the wafer is inert and does not interact with the thin film layers by referencing the patent for the technology, which Commerce found specifies the crystalline silicon substrate is part of the cell's electricity generating p/i/n/ junction. Final Scope Ruling at 14 (citing Petitioner Comments on Sunpreme Scope Ruling Request at Ex. 6, AD PD 15–16, bar codes 3434369-01–02 (Jan. 20, 2016) and Petitioner Comments on Sunpreme Scope Ruling Request at Ex. 6, CVD PD 21–22, bar codes 3434365-01–02 (Jan. 20, 2016)). It would be inappropriate for the court to reweigh the evidence.

Sunpreme Additional Factual Information at Ex. 7, CVD PD 38–54, bar codes 3481991-01–17 (June 27, 2016) (collectively "Sunpreme Triex Comments")); Sunpreme Response to Petitioner's Letter at Ex. 4, AD PD 24–25, bar codes 3440093-01–02 (Feb. 8, 2016), Sunpreme Response to Petitioner's Letter at Ex. 4, CVD PD 30–31, bar codes 3440101-01–02 (Feb. 8, 2016) (collectively "Sunpreme Rebuttal Comments"). Plaintiff fails to raise a significant question as to the reasonableness of Commerce's interpretation.

Commerce also grounded its determination that Sunpreme's cells rely on crystalline silicon to generate electricity in the fact that the crystalline silicon in Sunpreme's product is slightly doped. Final Scope Ruling at 14. In reaching this conclusion, Commerce referenced its finding in the Triex Scope Ruling, to the effect that the doping (i.e., processing) of the wafer enhances the wafer's ability to absorb light. See Triex Scope Ruling at 30. Finally, Commerce found that the presence of thin film layers does not undermine the fact that the crystalline silicon is essential to the cell's electricity generating function. See Final Scope Ruling at 14 (citing Triex Scope Ruling at 30). Given the words of the orders and the descriptions of the merchandise relied upon by Commerce, Plaintiff fails to raise a significant question as to the reasonableness of Commerce's conclusion that Sunpreme's products are CSPV cells. See SolarWorld Comments on Scope Ruling Request at Ex. 21; Sunpreme Triex Comments at Ex. 7; Sunpreme Rebuttal Comments at Ex. 4; Triex Scope Ruling at 30.

Plaintiff claims that Commerce "effectively expands the scope language to include any cells containing crystalline silicon substrates/wafers despite the multiple express statements during the investigations, by Petitioner and Commerce, that wafers are not

covered by the investigations." PI Mot. 35. Commerce concluded, relying in part on its prior Triex Scope Ruling, that where the crystalline silicon component performs a key role in electricity generation, the cell is a CSPV cell. Final Scope Ruling at 13—14. In reaching the conclusion that Plaintiff's cells are CSPV cells, Commerce relied upon descriptions of the product contained in the application, the petition, and prior scope determinations to conclude that the crystalline silicon played an active role in the cell's electricity generating function. See Final Scope Ruling at 13—14. Therefore, Commerce relied upon the function of the substrate/wafer within the cell to determine that the cell was a CSPV cell. See Final Scope Ruling at 13–14. Commerce found that a photovoltaic cell containing crystalline silicon performing the function of electricity generation is a CSPV cell, not that any photovoltaic cell containing crystalline silicon is a CSPV cell. See id. Although Plaintiff's arguments focus on the wafers' inability to generate electricity on their own, they do not refute Commerce's implicit finding that the crystalline silicon interacts with other elements in the cell to generate electricity or that the crystalline silicon component is critical to the cell's ability to do so. See PI Mot. 35; see also Final Scope Ruling at 13–14.

Plaintiff contends that a cell where the p/n junction is formed outside of the wafer used for its substrate is not a CSPV. PI Mot. 37. However, Plaintiff points to no language in the Orders indicating that the p/n junction formation must occur within the crystalline silicon component.

Plaintiff also argues that Commerce's finding that the crystalline silicon in Sunpreme's cell is "active," "doped" or "functional" is unsupported by the record. PI Mot.

38. Plaintiff maintains that Commerce lacked record evidence to conclude that its raw silicon wafer is doped, by which Plaintiff means having a slight positive or negative orientation.[11] Id. Plaintiff focuses on the fact that its own production of the wafers does not achieve the slight positive or negative orientation, but rather that this orientation is present prior to its manufacturing process. See id. at 38, 39 n.18. However, Defendant underscores that while Sunpreme understands the meaning of the term "doped" as having a positive or negative orientation, Commerce uses "doped" to mean "processed" to enhance light absorption (i.e., making the substrate an active component of the cell). Def.'s Resp. Br. 20 (citing Final Scope Ruling at 14; Triex Scope Ruling at 30). Plaintiff points to no evidence undermining Commerce's use of the term doped as enhancing light absorption. Sunpreme focuses on the fact that the wafers themselves are "incapable of converting light to electricity." PI Mot. 41. However, as already discussed, Commerce did not find that the wafers generate electricity without interacting with other parts of the cell. See Final Scope Ruling at 14. Nor did Commerce find that Sunpreme's production process imparts the positive negative orientation to its crystalline silicon substrates. See

[11] Sunpreme argues that Commerce mischaracterizes its statements that its products are "'monocrystalline silicon cell[s]' with a doped crystalline silicon component." PI Mot. 43 (citing Final Scope Ruling at 14, 14 n.139). However, Commerce did not rely upon Sunpreme's statements to make its determination. Rather, Commerce merely noted these statements and credited patent information, not Sunpreme's statements, to find that Sunpreme's products rely upon the crystalline silicon component to generate electricity. Final Scope Ruling at 14. As already noted, the court sees no reason to reweigh the evidence on this issue.

id. at 13. Rather Commerce found that the cells "rely on crystalline silicon to generate electricity."[12] Id. Sunpreme offers no record evidence detracting from this finding.[13]

2. Cells At Least 20 Micrometers Thick

Having concluded that Plaintiff's products are CSPV cells, Commerce also clarified that the language of the Orders requiring "cells of thickness equal to or greater than 20 micrometers" requires it to consider the thickness of the entire cell, including the crystalline silicon component. Final Scope Ruling at 14. Plaintiff points to no evidence or rationale to suggest that this interpretation is unreasonable. Since Commerce

[12] In fact Commerce explicitly acknowledges that crystalline silicon may not "be able to independently function as a solar cell even before it is incorporated into the relevant photovoltaic product." Final Scope Ruling at 13.

[13] Sunpreme concedes that its raw silicon wafers can absorb sunlight, but focuses on their inability to convert sunlight to electricity on their own. PI Mot. 41–42. Sunpreme mischaracterizes Commerce's determination as treating the wafers' capacity to absorb sunlight as equivalent to their ability to generate electricity. Id. Commerce explicitly found that nothing in the scope language indicates that the crystalline silicon component must be able to function as a solar cell before it is incorporated into the relevant photovoltaic product. Final Scope Ruling at 13. It is clear from that statement that Commerce recognizes that the silicon wafer cannot generate electricity on its own. See id. Rather, Commerce relied upon the interaction of the silicon wafer with other components of the cell to conclude that the crystalline silicon component was critical to its electricity generating function. See id. at 14.

Sunpreme further argues that Commerce's focus on the function of the crystalline silicon substrate is not based on any (k)(1) sources, but rather is based upon a statement by a third party in the Triex Scope Inquiry. PI Mot. 42 (citing Final Scope Ruling at 13 n.137 (citing Triex Scope Ruling at 30)). However, Commerce's regulation permits it to rely upon prior scope determinations. 19 C.F.R. § 351.225(k)(1). Sunpreme does not allege that Commerce relied upon its prior scope determination for facts about Sunpreme's product, but rather for the notion that the substrate's involvement in electricity generation determines whether it is a CSPV cell within the context of the Orders. See PI Mot. 42.

As the court stated earlier, Commerce credited patent information on the record over other statements in the record to reach its conclusion regarding the function of the crystalline silicon component within Sunpreme's cells. See Final Scope Ruling at 14. Although Sunpreme argues that the products subject to this scope ruling represent a cell developed well after the issuance of the patent, PI Mot. 42 n.21, Sunpreme does not point to any record information indicating that the crystalline silicon component functions materially differently in this product. Therefore, the court defers to Commerce's weighing of the evidence.

concluded the substrate plays an active role in the cell, Plaintiff fails to point to any language or (k)(1) sources that indicate that the measurement contained in the scope language was not intended to measure the thickness of the components that make up the active parts of the cell. Plaintiff fails to raise a significant question as to the reasonableness of Commerce's determination that Sunpreme's cells are 20 µm thick.

3. Contain a P/N Junction Formed By Any Means

Commerce relied on its prior scope ruling to the effect that "a p/i/n junction and other arrangements of positive, negative, and intrinsic/neutral layers within a photovoltaic cell can be understood to be types of p/n junctions" within the meaning of the scope language. Final Scope Ruling at 15 (citing Triex Scope Ruling at 18, 32). In the Triex Scope Ruling, Commerce found that the language "formed by any means" in the Orders indicates "that the type, location, and method by which the p/n junction is formed are irrelevant." Triex Scope Ruling at 17. [14] In its Triex Scope Ruling, Commerce focused on the words "formed by any means," and Commerce determined this language indicates that the function determines whether a p/n junction has been formed, not the specific architecture of the p/n junction. Triex Scope Ruling at 17. Commerce determined that "some type of p/n junction is essential to the creation of an electrical field" in photovoltaic cells; and therefore, the scope language does not imply photovoltaic cells can be categorized into those with p/n junctions and those lacking them. See id. at 17–18.

[14] Commerce referenced its determination in its Triex Scope Ruling that, based upon its consultation of (k)(2) sources, a p/n junction "'can be interpreted as an umbrella term, covering different combinations of positive and negative regions and various means of transferring an electrical charge therein.'" Final Scope Ruling at 15 n.150 (citing Triex Scope Ruling at 31).

Commerce resolved that a p/i/n junction is a type of p/n junction formed by any means because the intrinsic (i.e., inert or "i") layer in the Triex cells merely extends the electrical field over an additional layer of material. Id. at 18.

Here, Commerce found that none of the (k)(1) sources consulted indicate that the positive and negative layers in a p/n junction must be adjacent or that they must be within a crystalline silicon wafer. Final Scope Ruling at 15. Commerce referenced its consultation to pre-initiation versions of the scope language in its prior Triex Scope Ruling in which Commerce found that the petitioner intended to include p/n junctions not within the crystalline silicon component in the scope deliberately because Commerce believed a detailed description of the architecture of junction formation to be unnecessary to defining a p/n junction. See id. (citing Triex Scope Ruling at 13, 31). Therefore, Commerce concluded Plaintiff's product "can be understood to contain a 'p/n junction formed by any means.'" Id. Plaintiff has failed to raise a significant issue with the reasonableness of Commerce's reliance on a (k)(1) source or its reasoning to determine that the p/i/n junction in Plaintiff's merchandise is a p/n junction "formed by any means."

Plaintiff contends that Commerce ignored substantial evidence on the record of the distinctions between p/n junctions and p/i/n junctions and reached its conclusion without any citation to scientific evidence about Sunpreme's products. PI Mot. 44. However, Commerce made reference to materials published by the U.S. Department of Energy and by CBP as well as the expert opinions and declarations submitted by Plaintiff to support its position that p/n junctions are distinct from p/i/n junctions. Final Scope Ruling at 16. Commerce explained that it reached its determination based upon a textual

interpretation and the (k)(1) sources it consulted, which do not include factual assertions made by individuals or entities who were not involved in drafting the scope language (i.e., 19 C.F.R. § 351.225(k)(2) sources).[15] Id. Commerce found that the (k)(1) sources were dispositive and allowed it to interpret the scope language without resort to these (k)(2) sources. See id. Plaintiff points to nothing in the scope language or in the (k)(1) sources consulted by Commerce that contradicts Commerce's conclusions.

Sunpreme also claims that Commerce lacked any scientific evidence to conclude that a p/i/n junction is a form of p/n junction and ignored evidence on the record regarding the distinctions between p/n junctions and p/i/n junctions. PI Mot. 43–44. However, Commerce relied upon its prior Triex Scope Ruling, and incorporated its reasoning, for the proposition that the positive and negative layers need not be adjacent to one another to form a p/n junction. Final Scope Ruling at 15 (citing Triex Scope Ruling at 32). Plaintiff does not attack the underlying reasoning in the Triex Scope Ruling. See PI Mot. 43–44. Sunpreme takes issue with Commerce's reliance on the Triex Scope Ruling altogether because Commerce's determination that a p/i/n junction is a type of p/n junction relied upon (k)(2) factors. PI Mot. 45. However, Commerce may rely upon prior determinations

[15] Commerce's regulation provides that when the (k)(1) sources (i.e., the descriptions of the merchandise contained in the petition, the initial investigation, and prior scope determinations) are not dispositive, Commerce will further consider:

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

19 C.F.R. § 351.225(k)(2).

in interpreting the scope of an antidumping or countervailing duty order. 19 C.F.R. § 351.225(k)(1). Plaintiff points to no reason why such reliance is unreasonable.[16]

Plaintiff argues Commerce was unwilling to consider differences in its technology and that of the Triex cell, which it argues reflects "Commerce's foregone conclusion that Sunpreme's product must be identical to the Triex product." PI Mot. 44. However, Commerce acknowledged the differences highlighted by Plaintiff, but it found those differences did not undercut the formation of a p/n junction because the electrical field generating function or nature of the p/n junction in the cell is unchanged by the addition of an insulating material.[17] Final Scope Ruling at 15 (citing Triex Scope Ruling at 32, 39). Plaintiff points to no difference in its technology that raises a significant question as to the reasonableness of Commerce's determination.

[16] Neither of the two cases Plaintiff cites supports the proposition that Commerce may not rely upon its conclusions in another scope ruling where Commerce determines that the same products are involved. See PI Mot. 45 (citing Tianjin Mach. Imp. & Exp. Corp. v. United States, 29 CIT 1216, 1225, 394 F. Supp. 2d 1369, 1377—78) (2005); Shenyang Yuanda Aluminium Industry Eng'g Co. v. United States, 40 CIT __, ___, 146 F. Supp. 3d 1331, 1346—47 (2016). In Tianjin Mach., the court held merely that a prior scope ruling regarding a different product is not controlling, even if it is a (k)(1) source. Tianjin Mach., 29 CIT at 1225, 394 F. Supp. 2d at 1377–78. There is no indication that Commerce blindly relied upon its reasoning its Triex Scope Ruling, nor does Plaintiff focus on any obvious difference between its products and the Triex cell. In Shenyang Yuanda, the court held that Commerce misconstrued a prior scope determination as precluding consideration of any exclusionary language where that prior scope determination limited its analysis of the scope language's exclusion of the products under consideration. Shenyang Yuanda, 146 F. Supp. 3d at 1346. Here, Commerce considered the differences between the products highlighted by Plaintiff, and it determined that those differences were not material. Final Scope Ruling at 15.

[17] Commerce acknowledged Plaintiff's argument that its cells are distinguishable from those of Triex by noting that Triex cells contain "'a silicon dioxide insulator between the crystalline silicon wafer and the intrinsic and p-type and n-type amorphous thin film layers,' which contributes to its generation of electricity by 'quantum mechanical tunneling.'" Final Scope Ruling at 15 (citing Sunpreme Triex Comments at 13). However, Commerce found both differences irrelevant to the formation of a p/n junction in Sunpreme's products. See id. Plaintiff points to no record evidence indicating that this conclusion is unreasonable or unsupported by the record.

4. Applicability of Thin Film Photovoltaic Products Exclusion

Since the scope language does not define the term "thin film photovoltaic products," Commerce interpreted the thin film product exclusion to apply only to those products where the crystalline silicon component of the cell did not actively contribute to the electricity generating function of the cell. See Final Scope Ruling at 17. Commerce clarified that the term "thin film photovoltaic products" did not mean "any" photovoltaic products containing thin films produced of amorphous silicon. Id. Commerce supported its interpretation by referencing the petition (k)(1) sources, which indicate that "'[t]hin film products do not use crystalline silicon.'" Id. (citing Petitioner Additional Factual Information at Att. 26, AD PD 49–50, bar code 3481990-01–02 (June 27, 2016); Petitioner Additional Factual Information at Att. 26, AD PD 55–70, bar code 3482071-01–16 (June 27, 2016) (collectively "CVD Petition")).

Plaintiff argues that Commerce's interpretation of the exclusion for thin film products is inconsistent with the language of the Orders and contradicted by record evidence. PI Mot. 23–29. Specifically, Plaintiff argues that the scope language of the Orders excludes all thin film products made of specified materials and does not limit the Orders' thin film product exclusion to products of a particular substrate.[18] Id. at 24–25.

[18] Plaintiff also argues that it would be illogical to provide an exclusion for "thin film products" in the scope language if thin film products cannot contain crystalline silicon as there would be no possibility of overlap between CSPVs and thin film products. PI Mot. 22–23. Therefore, Plaintiff argues that Commerce's interpretation, even if it is supported by the petitions, is contradicted by the plain language of the Orders. See id. However, exclusionary language does not merely function as an exception to affirmative scope language. It is an integral component of the scope

(footnote continued)

However, this argument ignores that the Orders do not define the term "thin film photovoltaic products." CVD Order, 77 Fed. Reg. 73,017; AD Order, 77 Fed. Reg 73,018. Commerce looked to the underlying petitions, a (k)(1) source, to define this phrase. See Final Scope Ruling at 17. Plaintiff points to no (k)(1) source that contradicts Commerce's interpretation that thin film products do not use crystalline silicon.[19] Moreover, Commerce

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language, and it defines the scope. The exclusion, as clarified by Commerce, provides that only those thin films that do not contain crystalline silicon are excluded. Even if Commerce's interpretation of the exclusion may render it unnecessary to defining the scope in some instances, that does not make Commerce's interpretation unreasonable. Plaintiff points to no (k)(1) source indicating that thin film products containing crystalline silicon as the electricity generating component were meant to be excluded from the Orders.

Moreover, Commerce necessarily writes scope language in general terms. 19 C.F.R. § 351.225(a); Duferco, 296 F.3d at 1096. Although the (k)(1) sources cannot substitute for the language of the order itself, see Duferco, 296 F.3d at 1097, the scope language here does not define the term "thin film products." See CVD Order, 77 Fed. Reg. 73,017; AD Order, 77 Fed. Reg. 73,018. Commerce's interpretation clarifies the Orders in a way that does not contradict the plain language or any (k)(1) source.

[19] Plaintiff argues that Commerce's reliance on the petition for the notion that thin film products do not use crystalline silicon is misplaced and referenced out of context. Sunpreme Reply Br. 4–5 (citing Final Scope Ruling at 17). Plaintiff references the language of the petition relied upon by Commerce, which states:

> CSPV cells and modules are made from crystalline silicon. Thin-film products do not use crystalline silicon and instead use a thin layer of a compound, such as cadmium telluride, copper indium gallium selenide, or amorphous silicon, which is sputtered or otherwise applied onto a substrate like glass.

Id. at 4 (citing CVD Petition at 17).

Plaintiff argues:

> When read in context, the clause "Thin-film products do not use crystalline silicon" is an introductory clause, intended as a counterpoint to the previous declarative sentence "CSPV cells and modules are made from crystalline silicon." However, the affirmative description of [thin] film products, omitted from the Government's quote, includes the positive elements of thin film products: "instead use a thin layer of a compound, such as cadmium telluride, copper indium gallium selenide, or *amorphous silicon*, which is sputtered or otherwise applied onto a substrate . . . ."

Id. at 5 (citations omitted). Plaintiff's argument only demonstrates that excluded thin film products are defined by both positive and negative attributes. Commerce found that, according to the

(footnote continued)

found not only that Sunpreme's products incorporate a crystalline silicon substrate, but that the crystalline silicon substrate in its cells is essential to the functioning of the complete cell because it has electrical properties.[20] Id. Plaintiff points to no plain language contradicting this interpretation.[21]

Commerce reasons that neither the CSPV product nor the thin film product certification standards provides a definitive means of determining whether or not an imported product is subject to the Orders. Id. at 17. Moreover, Commerce acknowledged the fact that the petition, a (k)(1) source, referenced industry standards to define the

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petition, one of the negative attributes is that they do not contain crystalline silicon. See Final Scope Ruling at 17 (citing CVD Petition).

Plaintiff also argues that the same sentence in the petitions cannot mean that thin film products consist entirely of non-crystalline silicon materials because that reading would require Commerce to read the next sentence in a nonsensical way. See Sunpreme Reply Br. 5. Plaintiff contends that reading the sentence "CSPV cells and modules made from crystalline silicon" as requiring CSPV modules to contain exclusively crystalline silicon components makes no sense because modules include other components that are part of the module but not the cell (i.e., aluminum frame, backsheet, silver paste, etc.). See id. That argument is misplaced because it ignores a key difference in the sentences. A CSPV module can be "made from crystalline silicon" without being made exclusively from crystalline silicon. A thin film product that "does not use crystalline silicon" cannot contain any crystalline silicon.

[20] Plaintiff argues that Commerce's determination to limit the thin film exclusion to products with substrates other than crystalline silicon is arbitrary because it treats some thin film products as covered by the scope of the orders while treating other thin film products with a different substrate as outside the scope. PI Mot. 29. However, the Orders themselves distinguish between CSPV cells and other photovoltaic products. See CVD Order, 77 Fed. Reg. 73,017; AD Order, 77 Fed. Reg. 73,018. The Orders do not include non-CSPV cells and they explicitly exclude thin film products. See CVD Order, 77 Fed. Reg. 73,017; AD Order, 77 Fed. Reg. 73,018. Therefore, Commerce's focus on the crystalline silicon component and its functioning within the cell is not arbitrary but is an interpretation of the language of the Orders based upon permissible sources under 19 C.F.R. § 351.225(k)(1).

[21] Plaintiff also argues that there is no indication that thin film products using crystalline silicon substrates were at any time part of the investigations. PI Mot. 27–28. Commerce, however, bases its interpretation on the language and (k)(1) sources. Plaintiff does not marshall language of the Orders or (k)(1) sources indicating Commerce's interpretation of the ambiguous phrase "thin film photovoltaic products" is unreasonable.

category of thin film products, but found that these sources are not dispositive to define the terms of the exclusion, but rather are merely illustrative. Id. at 16–17. Plaintiff points to nothing in the petitions, or any other (k)(1) source, indicating that such product certification standards were meant to be dispositive of whether a product falls within the thin film product exclusion. Therefore, Plaintiff has not raised a serious question that Commerce's interpretation is unreasonable.[22]

Next, Plaintiff claims that its cells precisely meet the definition of thin film solar products used by the International Trade Commission during the investigation because they "are formed by depositing four different layers of ultra-thin amorphous silicon . . . on a crystalline silicon wafer." PI Mot. 30 (citing Exs. PI Mot. Ex. 4. at I-23 (stating that the thin film production process varies by company technology, but, "general[ly], a thin layer of the photosensitive material (a-Si, CdTe, CIGS, etc.) is deposited directly onto a glass, stainless steel, or plastic substrate via physical vapor deposition, chemical vapor deposition, electrochemical deposition, or a combination of methods."). Plaintiff argues that Commerce ignored the scientific evidence about its products and its production process that established that its products meet these characteristics of thin film products and reached its determination based on unrebutted evidence that Sunpreme's products

[22] Plaintiff highlights Commerce's assertion that Sunpreme's products are certified as CSPV modules as well as thin film products according to industry standards, see PI Mot. 25 (citing Final Scope Ruling at 16–17), which Plaintiff argues is contradicted by record evidence indicating that none of the modules at issue in this scope proceeding were certified under the CSPV standard. Id. at 25–26 (citing Sunpreme Reply to SolarWorld Comments at 34–35, CVD PD 77, bar code 3486320-01 (July 13, 2016)). However, since Commerce found both the CSPV and thin film product industry standards not dispositive of the meaning of the thin film product exclusion, see Final Scope Ruling at 16–17, Commerce did not rely upon this finding.

possessed the physical characteristics of thin film products. PI Mot. 32. However, this argument fails to call into question the reasonableness of Commerce's interpretation of the undefined terms "thin film products" and "CSPV cells." Commerce explained that its determination is based on an interpretation of the scope language as well as the relevant (k)(1) sources. Final Scope Ruling at 16. Commerce determined that it was able to interpret the language in the Orders without needing to consider (k)(2) sources, which include physical characteristics of the product. Where Commerce may interpret the scope language based upon consulting the text as well as the relevant (k)(1) sources, its regulation permits it to do so without consulting the (k)(2) sources. Commerce did not dispute the similarities between thin-film products and CSPV cells, but rather interpreted the term "thin film photovoltaic products" to mean cells where a crystalline silicon component does not contribute to the electricity generating function of the cell. The record evidence cited by Plaintiff about the characteristics of its products fails to raise a significant question as to the reasonableness of that interpretation.

Finally, Plaintiff maintains that Commerce improperly based its interpretation of the scope language on anti-circumvention concerns. PI Mot. 33–34 (citing Final Scope Ruling at 17). Specifically, Plaintiff argues that such concerns "do not control a scope analysis and those concerns impermissibly narrowed [Commerce's interpretation of] the scope exclusion for thin film products." Id. at 34. However, although Commerce referenced the point that excluding all products containing amorphous silicon without further analysis could create circumvention issues, Commerce's interpretation was based on the statement in the petitions that thin film products do not use crystalline silicon, not

based upon such anti-circumvention concerns. See Final Scope Ruling at 17. Therefore, Commerce referenced circumvention concerns in the context of its interpretive analysis. Commerce did not rely upon such concerns to interpret the scope language.

III. Balance of the Hardships

Before granting a preliminary injunction, the court must "balance the competing claims of injury and consider the effect" of granting or denying relief on each party. Winter, 555 U.S. at 24. To do so, the court must "determine which party will suffer the greatest adverse effects as a result of the grant or denial of the preliminary injunction." Ugine-Savoie Imphy v. United States, 24 CIT 1246, 1250, 121 F. Supp. 2d 684, 688 (2000).

The balance of the hardships tips decidedly in the government's favor here. The court acknowledges that Plaintiff faces likely irreparable harm without a preliminary injunction. Nonetheless, the balance of the hardships is a separate and distinct inquiry. In balancing the hardships, harm to Plaintiff must be measured against harm to the government. See Ugine-Savoie, 24 CIT at 1250, 121 F. Supp. 2d at 688. The government faces a significant risk that Plaintiff will not be able to pay duties that Plaintiff might owe without collecting cash deposits on Plaintiff's entries. See Exs. PI Mot. Ex. 9 at ¶16.[23] Plaintiff claims that the government can be protected by a bond, PI Mot. 15, 49, but Plaintiff has not even attempted to show that it would be able to obtain such a bond given its financial condition.

[23] Plaintiff estimates it will owe approximately [[ ]] in cash deposits on the merchandise the company intends to import between mid-September and December 2016. Exs. PI Mot. Ex. 9 at ¶16. Plaintiff asserts that [[ ]] should its goods be found to be subject to the Orders. See PI Mot. 4.

Weighing the prospect that either Sunpreme may suffer [[ ]] or the government will have to forgo [[ ]] in duties should Commerce's scope determination be upheld, the balance of the hardships favors Defendant in this case because Congress has already spoken to how this balance should be struck. Commerce here is acting pursuant to a statutory regime that protects the revenue of the United States where goods are found to be subject to the terms of an antidumping or countervailing duty order even where the extent of any potential liability for the importer is uncertain. See 19 U.S.C. § 1673b(d)(1)(B) (requiring collection of cash deposits, a bond, or other security upon affirmative preliminary determination in antidumping duty investigation); 19 U.S.C. § 1671b(d)(1)(B) (requiring collection of cash deposits, bond, or other security upon affirmative preliminary determination in countervailing duty investigation); 19 U.S.C. § 1673d(c)(1)(B) (requiring the continuation of cash deposits upon issuance of an affirmative final determination for antidumping duty investigations); 19 U.S.C. § 1671d(c)(1)(B) (requiring the continuation of cash deposits upon issuance of an affirmative final determination for countervailing subsidy investigations). Commerce's regulations reflect this same balancing of hardships where Commerce makes a determination that goods are subject to antidumping or countervailing duties. See 19 C.F.R. § 351.205(d) (instructing Commerce that the provisional measures established in the statute is to take the form of cash deposits, rather than bond or other security). The statutory and regulatory antidumping and countervailing duty regime envisions that importers may have to pay cash deposits in excess of what is ultimately determined to be owed. See 19 U.S.C. §§ 167lf, 1673f, 1677g; 19 C.F.R. § 351.205(d). The fact that

payment of those deposits may cause irreparable harm due to the fact the company is a "start-up," and may not be in as strong a financial position as a more established company, only goes to one factor in the court's analysis.[24]

Although this Court previously enjoined cash deposits upon the showing of irreparable harm in Plaintiff's action against CBP, it did so in a case brought under 28 U.S.C. §1581(i) challenging agency action was claimed to have been contrary to the statutory and regulatory scheme. See Sunpreme, 40 CIT at __, 145 F. Supp. 3d at 1286. It is an entirely different matter to balance the hardships created where Commerce has acted within that scheme. Therefore, the balancing of the hardships tips decidedly differently in this case.

IV. The Public Interest

For the same reasons that the balance of the hardships tips in the government's favor, the public interest is served by denying the injunction. See Union Steel v. United States, 33 CIT 614, 622, 617 F. Supp. 2d 1373, 1381 (2009) ("Accurate and effective enforcement of the trade laws serves the public interest"). Congress has, through the statutory scheme, provided for the imposition, assessment, and collection of antidumping

[24] Plaintiff contends that, due to its limited markets in other countries, the company could not support itself financially unless it is able to import the solar modules without making the statutorily required cash deposits. PI Mot. 19. Even accepting Plaintiff's statements regarding the consequences of compliance on its business as true, any such consequences are not appropriate to consider in balancing the equities of either granting or denying the injunction. The government cannot be put in a worse position simply because of Plaintiff's business model or the financial immaturity of its business. Moreover, Plaintiff filed its scope ruling request on November 16, 2015. Therefore, Plaintiff has known for over ten months that its goods could be subject to the Orders. It could have taken steps during that time in anticipation of these hardships to lessen their impact.

and countervailing duties prior to a final determination by Commerce. 19 U.S.C. §§ 167lf, 1671d(c)(1)(B), 1673d(c)(1)(B), 1673f, 1677g. Congress has charged Commerce with implementing that scheme, and Commerce has specifically provided for the protection of the revenue of the United States. See 19 C.F.R. § 351.205(d). The public interest is served by allowing the system devised by Congress and implemented by the agency to operate without disruption where, as here, Commerce acts within its authority and Plaintiff has failed to demonstrate a likelihood of success on the merits.

Sunpreme contends that the requested injunction is in the public interest because the company is unlawfully being required to make cash deposits on products that are excluded from the scope of the Orders. PI Mot. 50. However, this situation is contemplated by the statute and the regulations. It speaks more to the issue of likelihood of success on the merits. The public interest would not be served by enjoining the collection of cash deposits in this case, as those deposits were properly requested pursuant to the statutory and regulatory scheme in place.[25] See 19 U.S.C. §§ 1671d(c)(1)(B), 167lf, 1673d(c)(1)(B), 1673f, 1677g; 19 C.F.R. § 351.205(d).

[25] Sunpreme also argues that the injunction is required "to preserve its opportunity to litigate its meritorious claim." PI Mot. 50. Plaintiff cites Kwo Lee, Inc. v. United States, 38 CIT __, 24 F. Supp. 3d 1322 (2014), to support its position that the public interest tips in its favor. See PI Mot. 50 (citing Kwo Lee, Inc. v. United States, 38 CIT __, __, 24 F. Supp. 3d 1322, 1332 (2014)). In Kwo Lee, the court implicitly relied in part upon its finding of likelihood of success on the merits to find that the public interest favored the proper execution of and compliance with the antidumping laws. See Kwo Lee, 38 CIT at __, 24 F. Supp. 3d at 1332. Here, Plaintiff has failed to demonstrate that the public interest will not be served by denying the injunction because Plaintiff does not demonstrate likelihood that Commerce erred in its determination.

V. The Collection of Cash Deposits with Respect to Entries Prior to the Initiation of the Scope Inquiry

Plaintiff claims that Commerce's instructions effectively embody two separate decisions. See Pl Mot. 46–47. First, Plaintiff argues Commerce instructed CBP to collect cash deposits and suspend liquidation on entries on or after the initiation of the scope inquiry. See id. Second, Plaintiff argues Commerce's instructions, by failing to specify that CBP should not be collecting cash deposits or suspending liquidation on entries before initiation of the scope inquiry, unlawfully direct CBP to collect cash deposits on entries predating the initiation of the scope inquiry in violation of Commerce's regulations. See id. The court has already found that the Plaintiff has failed to make a sufficient showing to enjoin the former. However, Defendant argues that, when entries are already suspended, "Commerce has the authority to order that suspension continue, regardless of when the scope inquiry was initiated." Def.'s Resp. Br. 25–28 (citing 19 C.F.R. §§ 351.225(l)(1), (3)). Here, Plaintiff has demonstrated that, in addition to it suffering likely irreparable harm, it is likely to succeed on the merits of this portion of its claim, and the balance of the hardships and public interest favor an injunction. Therefore, the court grants Plaintiff's motion and enjoins only the collection of cash deposits, but not the suspension of liquidation, on Plaintiff's entries prior to the initiation of the scope inquiry.

In Sunpreme, the court concluded that Sunpreme was likely to succeed on its claim that CBP acted in excess of its authority when it interpreted the Orders to include Sunpreme's merchandise. Sunpreme, 40 CIT at __, 145 F. Supp. 3d at 1296. The court held:

> 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. 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.

Id. (citations omitted).

If the court were to decide that CBP did act ultra vires on Plaintiff's motion for judgment on the agency record in Sunpreme Inc. v. United States, Court No. 15-00315, any suspension of liquidation would be void ab initio.[26] Therefore, Plaintiff has

[26] In Sunpreme, the court did not decide that any conceivable ambiguity identified by an importer would prevent CBP from collecting cash deposits on its merchandise. Rather, the court's decision that Plaintiff was likely to succeed on the merits was based upon the narrow ground that CBP acted ultra vires by interpreting ambiguous language in the Orders. See Sunpreme, 40 CIT at __, 145 F. Supp. 3d at 1296. Where merchandise is covered by the plain language of an order, nothing prevents CBP from collecting cash deposits even in a case where a party claims there is ambiguity in the order. See Xerox Corp. v. United States, 289 F.3d 792, 794 (Fed. Cir. 2002). However, the plain language of the Orders includes both inclusionary and exclusionary language. In this case the exclusionary clause, on its face, would not include Sunpreme's merchandise because they contain thin films of amorphous silicon. Without a definition of the term "thin film products" in the scope language, CBP could not have given effect to the exclusionary language without concluding some products with thin films were not thin film products. It is this interpretation of the exclusion that allowed CBP to conclude Plaintiff's merchandise fell within the scope of the Orders.

Where CBP cannot act to collect cash deposits because the plain scope language does not encompass the merchandise, Commerce has numerous routes available to resolve ambiguity and protect potential duties on merchandise that it believes are subject to an order. First, nothing prevents CBP from bringing scope issues to the attention of Commerce, which can self-initiate a scope inquiry. See 19 C.F.R. § 351.225(b). In addition, interested parties that are harmed by CBP's inability to apply an order containing language that appears not to reach merchandise on

(footnote continued)

demonstrated that it is likely that Defendant's reliance on its regulations to permit the suspension of liquidation and collection of cash deposits for all entries on which there is a continuation of a suspension of liquidation is misplaced.

Turning to Defendant's argument, Commerce's regulations allowing the continuation of suspension of liquidation on entries that are already suspended and allowing the collection of cash deposits on those entries must presume that the suspension of liquidation is lawful. See 19 C.F.R. §§ 351.225(l)(1), (3). Plaintiff has demonstrated it is likely to succeed on its claim that Commerce's regulation cannot reasonably be read to permit an ultra vires suspension of liquidation to continue.

When Commerce conducts a scope inquiry,

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

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

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

19 C.F.R. § 351.225(l)(3).

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its face may bring an application for a scope inquiry under 19 C.F.R. § 351.225(c). Moreover, in either circumstance, Commerce's regulations permit it to act quickly to determine that a product falls within the scope of an order based solely upon the application or based on the (k)(1) factors where the ambiguity in scope language may be easily resolved. See 19 C.F.R. § 351.225(d).

Plaintiff argues here that the suspension of liquidation and imposition of antidumping cash deposits may only take effect on or after the date of initiation of the scope inquiry. PI Mot. 46 (citing AMS Assocs., Inc. v. United States, 737 F.3d 1338, 1344 (Fed. Cir. 2013)). In AMS Assocs., the Court of Appeals for the Federal Circuit held that, where an unclear order renders a product not subject to an existing order and Commerce clarifies ambiguous scope language to determine that the merchandise is subject to the antidumping order, "the suspension of liquidation and imposition of antidumping cash deposits may not be *retroactive* but can only take effect 'on or after the date of the initiation of the scope inquiry.'" AMS Assocs., 737 F.3d at 1344 (citing 19 C.F.R. § 351.225(l)(2), which has identical language to that quoted above in 19 C.F.R. § 351.225(l)(3)). Although in AMS Assocs., Commerce issued corrected liquidation instructions explicitly instructing CBP to suspend liquidation retroactively, see id. at 1341, the Court of Appeals' holding did not depend upon that affirmative act. See id. at 1344. Defendant points to no authority other than CBP's determination to require Plaintiff to enter its merchandise as subject to the Orders for the collection of cash deposits and suspension of liquidation. Since Commerce initiated its scope inquiry on December 30, 2015, see Final Scope Ruling at 2, Plaintiff has demonstrated that it is likely that Commerce's regulations only permit Commerce to order the suspension of liquidation and collection cash deposits prospectively from the date of initiation of the scope inquiry. 19 C.F.R. § 351.225(l)(3); AMS Assocs., 737 F.3d at 1344.

Defendant argues that, unlike in AMS Assocs., here Sunpreme's entries were already suspended prior to the date Commerce initiated its scope inquiry. Def.'s Resp.

Br. 27–28. Therefore, Defendant interprets 19 C.F.R. §§ 351.225(l)(1) and (3) to permit the suspension of liquidation to continue and the collection of cash deposits on all entries for which liquidation was suspended. Id. (citing 19 C.F.R. §§ 351.225(l)(1), (3)). Plaintiff has demonstrated that it is likely that Commerce acted contrary to law because Commerce's regulation cannot reasonably be interpreted to permit the suspension of liquidation and collection of cash deposits to continue where they resulted from CBP's ultra vires interpretation of the scope language. Such an interpretation is unreasonable because it would permit the circumvention of Commerce's regulations by allowing CBP to require a party to enter goods as subject to the Orders before Commerce has interpreted ambiguous scope language to the effect that goods are subject to the Orders. Nor can either portion of Commerce's regulation reasonably be interpreted to permit Commerce to require cash deposits prior to the date of initiation of the scope inquiry merely because CBP suspended liquidation before that date without authority to do so. Plaintiff has therefore demonstrated that it is likely that CBP's purported suspension of liquidation was void ab initio.

Defendant argues that Commerce may liquidate all unliquidated entries pursuant to its final scope ruling regardless of when Commerce issued its final scope ruling. See Def.'s Resp. Br. 28 (citing Ugine & ALZ Belgium v. United States, 551 F.3d 1339, 1349 (Fed. Cir. 2009) ("Ugine II")). Ugine II is inapposite, and Defendant misconstrues its holding. In Ugine, the Court of Appeals held that Commerce may not impose antidumping duties on unliquidated entries it determined were not subject to an antidumping duty order merely because no objection was raised during the course of a subsequent administrative

review. See Ugine II, 551 F.3d at 1349. In Ugine II, the Court of Appeals for the Federal Circuit did not confront an ultra vires interpretation by CBP nor did it interpret Commerce's scope regulations to permit retroactive suspension of liquidation and collection of cash deposits on entries that were suspended by CBP acting contrary to law. See id. at 1349.

Therefore, the combination of the court's prior ruling in Sunpreme Inc. v. United States, Court No. 15-00315, and Commerce's regulations make it likely that Plaintiff will succeed in demonstrating that Commerce was without authority to order the suspension of pre-initiation entries or to collect cash deposits on such entries.[27] Commerce may not continue CBP's suspension of liquidation pursuant to its regulation where Plaintiff has demonstrated it is likely CBP acted contrary to law. The court likewise already found that the public interest and the balance of the hardships favor Plaintiff on this portion of its claim. See Sunpreme, 40 CIT at __, 145 F. Supp. 3d at 1296–1298. Accordingly, since Plaintiff has demonstrated that all four factors favor granting a preliminary injunction preventing Commerce from collecting cash deposits on entries prior to initiation of the scope inquiry, this portion of Plaintiff's motion is granted.

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[27] Commerce's liquidation instructions, see Corrected Sunpreme Customs Instructions, AD PD 75, bar code 3505144-01 (Sept. 12, 2016); Corrected Sunpreme Customs Instructions, CVD PD 81, bar code 3505147-01 (Sept. 12, 2016), permit CBP to collect cash deposits on entries prior to December 30, 2015 that were enjoined by the temporary restraining order and PI given by the court in Plaintiff's action challenging CBP's collection of cash deposits, which is no longer in effect. See Sunpreme Inc. v. United States, 40 CIT at __, 145 F. Supp. 3d at 1299.

USCIT Rule 65(c) requires that the court may issue a PI "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by a party found to have been wrongfully enjoined." USCIT R. 64(c). The court considers a bond of [[ ]] appropriate security to protect Defendant in the event it has been wrongfully enjoined from collecting cash deposits on Plaintiff's entries from the date between the date the temporary restraining order and December 30, 2015.

However, the court does not enjoin the continuation of suspension of liquidation on all entries whose liquidation is suspended on or after Commerce's initiation of the scope inquiry because Plaintiff has made no showing that suspension of liquidation will cause it irreparable harm or that the balance of the hardships or public favor such an injunction.

CONCLUSION

Although Plaintiff has shown that it is likely to suffer irreparable harm without an injunction, it has failed to raise a serious challenge to the reasonableness of Commerce's interpretation of the scope language. Moreover, the balance of hardships and the public interest tip decidedly against enjoining the collection of cash deposits on entries subsequent to the initiation of the scope inquiry in this case. However, Plaintiff has shown that it is likely that Commerce lacks the authority to suspend liquidation on entries or to collect cash deposits on entries prior to the initiation of its scope inquiry. Therefore, Plaintiff's motion for an injunction prohibiting Commerce from instructing CBP to collect and prohibiting CBP from collecting cash deposits prior to the initiation of the scope inquiry is granted. Therefore, it is

ORDERED that Plaintiff's motion for a preliminary injunction is denied in part and granted in part; and 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 entered or withdrawn from warehouse on or before December 30, 2015; and 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; and it is further

ORDERED that this preliminary injunction shall expire upon the entry of a final and conclusive court decision in this matter.

/s/ Claire R. Kelly
Claire R. Kelly, Judge

Dated: October 5, 2016
New York, New York

UNITED STATES COURT OF INTERNATIONAL TRADE

SUNPREME INC., **Plaintiff,** **v.** **UNITED STATES,** **Defendant,** **and** **SOLARWORLD AMERICAS, INC.,** **Defendant-Intervenor.**	**Before: Claire R. Kelly, Judge** **Court No. 16-00171**

JUDGMENT

Upon consideration of Plaintiff's motions for judgment on the agency record pursuant to USCIT Rule 56.2 and USCIT Rule 56.1, and all other papers filed in this action, and the court, after due deliberation, having rendered its opinion, and now in conformity with that opinion, it is

ORDERED that Plaintiff's motion for judgment on the agency record pursuant to USCIT Rule 56.2 is denied and the Final Scope Ruling is sustained; and it is further

ORDERED that Plaintiff's complaint is deemed amended to assert that the Court has jurisdiction over its claim challenging the U.S. Department of Commerce's ("Commerce") liquidation instructions to U.S. Customs and Border Protection ("CBP") pursuant to 28 U.S.C. § 1581(i); and it further

ORDERED that Defendant's motion to dismiss Count VI of Plaintiff's complaint challenging Commerce's liquidation instructions is denied; and it is further

ORDERED that judgment is granted in favor of Plaintiff on Count VI of Plaintiff's complaint; and it is further

ORDERED that Commerce shall issue new liquidation instructions to CBP instructing CBP to suspend liquidation on Plaintiff's entries of solar modules containing bi-facial thin film cells produced from amorphous silicon from the People's Republic of China that are the subject of this action entered or withdrawn from warehouse before December 30, 2015 and liquidate Plaintiff's entries of solar modules containing bi-facial thin film cells produced from amorphous silicon from the People's Republic of China that are the subject of this action entered or withdrawn from warehouse before December 30, 2015 in accordance with the final and conclusive judgment in this action, including all appeals; and it is further

ORDERED that Commerce shall issue new liquidation instructions directing CBP to refund, together with any interest required by law, cash deposits made by Plaintiff for antidumping duties and countervailing duties on entries of solar modules containing bi-facial thin film cells produced from amorphous silicon from the People's Republic of China that are the subject of this action entered or withdrawn from warehouse on or before December 30, 2015 in accordance with the final judgment in this action, including all appeals.

/s/ Claire R. Kelly
Claire R. Kelly, Judge

Dated: August 29, 2017
New York, New York

Slip Op. 17-116

UNITED STATES COURT OF INTERNATIONAL TRADE

SUNPREME INC., **Plaintiff,** **v.** **UNITED STATES,** **Defendant,** **and** **SOLARWORLD AMERICAS, INC.,** **Defendant-Intervenor.**	**Before: Claire R. Kelly, Judge** **Court No. 16-00171**

OPINION AND ORDER

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

Dated: August 29, 2017

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

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

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

Kelly, Judge: This action is before the court on Plaintiff's USCIT Rule 56.2 motion for judgment on the agency record challenging the United States Department of Commerce's ("Commerce") determination that Plaintiff's solar modules are subject to antidumping and countervailing duty orders covering certain crystalline silicon photovoltaic ("CSPV") cells, whether or not assembled into modules, from the People's Republic of China (collectively "Orders"). See Pl.'s Mot. J. Agency R., Dec. 5, 2016, ECF No. 75-1 ("Pl.'s Mot."); see also Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People's Republic of China: Final Ruling in the Scope Inquiry, Sept. 14, 2016, ECF No. 28-4 ("Final Scope Ruling"); Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People's Republic of China, 77 Fed. Reg. 73,017 (Dep't Commerce Dec. 7, 2012) (countervailing duty order) ("CVD Order"); Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People's Republic of China, 77 Fed. Reg. 73,018 (Dep't Commerce Dec. 7, 2012) (amended final determination of sales at less than fair value and antidumping duty order) ("ADD Order"). Additionally, Plaintiff challenges as contrary to law Commerce's liquidation instructions to U.S. Customs and Border Protection ("Customs" or "CBP"), which ordered CBP to collect cash deposits and to suspend liquidation on entries entered prior to the initiation of the scope inquiry that culminated in Commerce's issuance of the Final Scope Ruling.[1] Pl.'s Mot.; see also

[1] Plaintiff brings its challenge to Commerce's liquidation instructions within its USCIT Rule 56.2 motion for judgment on the agency record challenging Commerce's determination that Plaintiff's

(footnote continued)

Message Number 6214307, AD PD 74, bar code 3505143-01 (Sept. 1, 2016), Message Number 6214307, CVD PD 80, bar code 3505146-01 (Sept. 1, 2016) (collectively "Liquidation Instructions"); Message Number 6246309, AD PD 75, bar code 3505144-01 (Sept. 2, 2016), Message Number 6246309, CVD PD 81, bar code 3505147-01 (Sept. 2, 2016) (collectively "Corrected Liquidation Instructions").[2] For the reasons that follow, the court denies Plaintiff's motion for judgment on the agency record and sustains Commerce's final scope determination that Plaintiff's imported solar modules are subject to the Orders. However, the court grants Plaintiff's motion for judgment on the agency record on its claim challenging as contrary to law Commerce's liquidation instructions directing CBP to continue suspension of liquidation and to collect cash deposits with respect to entries prior to the initiation of the scope inquiry. Accordingly, the court directs Commerce to issue new liquidation instructions consistent with this decision.

BACKGROUND

Plaintiff, Sunpreme Inc. ("Sunpreme"), is a U.S.-based importer of solar modules manufactured by Jiawei Solarchina (Shenzen) Co., Ltd. ("Jiawei Shenzen") in the People's Republic of China. See Pl.'s Mem. Supp. Mot. J. Agency R. 3, Dec. 5, 2016,

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

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

ECF No. 75 ("Sunpreme Br.") (incorporating by reference Pl.'s Mot. Prelim. Inj. and Mem. P & A. Supp. Thereof, Sept. 8, 2016, ECF No. 21 ("Mot. Pl")); Compl. ¶ 6, 20, Aug. 26, 2016, ECF No. 2 ("Compl."). Plaintiff imports solar modules, which it describes as containing bi-facial solar cells with "an innovative thin film technology, the Hybrid Cell Technology, developed and owned by Sunpreme." Compl. ¶ 22. Plaintiff designs, develops, and tests the imported solar cells that form the imported solar modules at its facility in California. Id. Plaintiff avers that all of its solar modules that are the subject of Commerce's Final Scope Ruling

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

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

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

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

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

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

> The merchandise covered by this order is [CSPV] cells, and modules, laminates and panels, consisting of [CSPV] cells, whether or not partially or fully assembled into other products, including but not limited to, modules, laminates, panels and building integrated materials.
>
> This order covers [CSPV] cells of thickness equal to or greater than 20 micrometers, having a p/n junction formed by any means, whether or not the cell has undergone other processing, including, but not limited to, cleaning, etching, coating, and/or addition of materials (including, but not limited to, metallization and conductor patterns) to collect and forward the electricity that is generated by the cell.
>
> . . .
>
> Excluded from the scope of this order are thin film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS).

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

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

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

On November 16, 2015, Plaintiff filed an application for a scope ruling requesting that Commerce find Plaintiff's solar modules outside the scope of the Orders. See Request for a Scope Ruling on Solar Modules With Bi-Facial Thin Film Cells, AD PD 1–6, bar codes 3417556-01–06 (Nov. 16, 2015); Request for a Scope Ruling on Solar Modules With Bi-Facial Thin Film Cells, CVD PD 1–6, bar codes 3417582-01–06 (Nov. 16, 2015) (collectively "Sunpreme Scope Ruling Request"). Plaintiff requested Commerce issue a scope ruling on an expedited basis due to financial difficulties the company was

[3] Plaintiff challenged CBP's determination requiring it to enter its imported modules as type "03" entries subject to antidumping and countervailing duties prior to the initiation of a scope inquiry in a separate action. See Sunpreme Inc. v. United States, Court No. 15-315. In that action, the court held that CBP lacked authority to suspend liquidation and order the collection of cash deposits on entries prior to the initiation of a scope inquiry by Commerce. Sunpreme Inc. v. United States, 40 CIT __, __, 190 F. Supp. 3d 1185, 1202 (2016). The court further held that CBP's collection of cash deposits on Plaintiff's imports was contrary to law because CBP lacked authority to interpret ambiguous scope language in the Orders. Id., 40 CIT at __, 190 F. Supp. 3d at 1196.

experiencing. Sunpreme Scope Ruling Request at 2; see also Compl. ¶28. On December 30, 2015, Commerce initiated a formal scope inquiry. See Scope Inquiry Initiation on Photovoltaic Modules Imported by Sunpreme, AD PD 9, bar code 3428728-01 (Dec. 30, 2015); Scope Inquiry Initiation on Photovoltaic Modules Imported by Sunpreme, CVD PD 15, bar code 3428730-01 (Dec. 30, 2015).

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

Information and Comments in Sunpreme Scope Inquiry at 1, CVD PD 35, bar code 3479320-01 (June 17, 2016).

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

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

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

> [c]ontinue to suspend liquidation of entries of merchandise subject to the antidumping [and countervailing] duty order[s] on solar cells from the PRC. Accordingly, because the bifacial solar products imported by Sunpreme . . . are subject to the antidumping [and countervailing] duty order[s] on solar cells from the PRC, for entries of such merchandise that are currently suspended from liquidation, continue to suspend those entries from liquidation. For entries of bifacial solar products imported by Sunpreme . . . that are not already suspended from liquidation, begin suspension and collect cash deposits at the applicable rate for entries that entered or were withdrawn from warehouse for consumption on or after 12/30/2015.

Corrected Liquidation Instructions.

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

("Sunpreme II"). However, the court enjoined Commerce from ordering CBP to collect cash deposits and enjoined CBP from collecting cash deposits on entries entered or withdrawn from warehouse prior to Commerce's initiation of the scope inquiry that is the subject of this challenge until the entry of a final and conclusive court decision in this matter. Id.

JURISDICTION AND STANDARD OF REVIEW

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

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

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

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

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

(footnote continued)

In addition to the enumerated jurisdictional bases provided for in the Court's jurisdictional statute, the Court has exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law providing for "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue," see 28 U.S.C. § 1581(i)(2) (2012), and "administration and enforcement" with respect to laws providing for such tariffs, duties, fees, or other taxes and the "administration and enforcement" of claims that can be challenged under 28 U.S.C. § 1581(c), see 28 U.S.C. § 1581(i)(4) (2012).

Sunpreme's challenge to the liquidation instructions issued by Commerce is a challenge to Commerce's administration and enforcement of the Final Scope Ruling, and not to the substance of the Final Scope Ruling itself. See Compl. ¶ 71 (stating that "any suspension should have commenced as of the date of initiation of the scope inquiry or upon Commerce's finding that the Sunpreme bifacial solar product[s] are within the scope of the [antidumping and countervailing duty orders]"). Jurisdiction is improper under § 1581(c), as the challenge to the instructions does not relate to the review the scope determination issued pursuant to 19 U.S.C. 1516a, over which the Court has jurisdiction

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

under § 1581(c). Commerce did not determine within its Final Scope Ruling what entries should be subject to suspension and liquidation or cash deposits. Nor does the record indicate that any party provided comments on the propriety of issuing liquidation instructions that applied retroactively to entries that entered prior to the initiation of the scope inquiry. Therefore, Commerce issued its liquidation instructions in the administration and enforcement of its Final Scope Ruling and not as a part of that determination.

Sunpreme argues that, where a plaintiff claims harm from liquidation instructions that were a direct result of a scope determination, the true nature of the challenge relates to the scope ruling itself. See Sunpreme Suppl. Br. 3. In support of its argument, Sunpreme cites cases holding that the Court possesses jurisdiction to review a challenge that stems from a scope ruling under 28 U.S.C. § 1581(c). See id. at 4–6 (citing AMS Assocs., Inc. v. United States, 36 CIT __, 881 F. Supp., 2d 1374 (2012) ("AMS I"); United Steel Fasteners, Inc. v. United States, 41 CIT __, Slip Op. 17-2 (2017); Ethan Allen Operations, Inc. v. United States, 39 CIT __, 121 F. Supp. 3d 1342 (2015)). As an initial matter, in the cases cited by Sunpreme, no party challenged the jurisdictional basis for the Court to hear the challenge in question, and none of the holdings in the cases cited by Sunpreme addressed the propriety of hearing the challenges under 28 U.S.C. § 1581(c). Moreover, all of these cases are distinguishable in that Commerce addressed the issue of retroactivity of its scope determination in the determination being reviewed

by the Court pursuant to 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c).[7] Here, Commerce did not address the issue of retroactivity in its Final Scope Ruling.

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

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

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

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

the Court's jurisdiction under § 1581(i) to circumstances where Commerce acts erroneously or inconsistently with its own determination.[8]

Although Defendant moves to dismiss Plaintiff's challenge to Commerce's liquidation instructions pursuant to USCIT Rule 12(b)(1), over which Plaintiff pled the Court had jurisdiction pursuant to 28 U.S.C. § 1581(c), Defendant does not object to Plaintiff amending its complaint to bring the same claim under § 1581(i). See Def.'s Suppl. Br. 7. Even if Sunpreme has explicitly invoked § 1581(c), the court may construe the allegations of a pleading as presenting a claim under § 1581(i) incident to its authority to view the allegations in the pleadings liberally and in the light most favorable to Plaintiff. See Cedars-Sinai Med. Ctr. v. Watkins, 11 F.3d 1573, 1583 (Fed. Cir. 1993) (stating that allegations can be taken as true and construed in a light most favorable to the complainant where a Rule 12(b)(1) motion challenges the Court's subject matter jurisdiction based on the sufficiency of the allegations in the pleadings). In light of Defendant's lack of

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

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

opposition to allowing Plaintiff to amend its pleading, there is no reason to dismiss Plaintiff's claim or to require the amendment of the pleadings to determine that the Court has jurisdiction over Plaintiff's claim under § 1581(i).

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

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

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

DISCUSSION

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

Sunpreme argues that Commerce's determination that Sunpreme's cells are dispositively in-scope merchandise based upon the plain language of the Orders and the criteria under 19 C.F.R. § 351.225(k)(1) is contrary to law and unsupported by substantial

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

A. Legal Framework

The language of an antidumping or countervailing duty order dictates its scope. See Duferco Steel, Inc. v. United States, 296 F.3d 1087, 1097 (Fed. Cir. 2002) (citing Ericsson GE Mobile Commc'ns, Inc. v. United States, 60 F.3d 778, 782 (Fed Cir. 1995)). Commerce's regulations provide that, where Commerce issues scope rulings to clarify the scope of an ambiguous order with respect to particular products, in addition to the scope language, Commerce will take into account descriptions of the merchandise

contained in: (1) the petition; (2) the initial investigation; (3) and past determinations by Commerce, including prior scope determinations (collectively "(k)(1) sources"). 19 C.F.R. § 351.225(k)(1) (2015).[9] When the (k)(1) sources are not dispositive, Commerce will further consider:

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

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

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

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

order, the order itself "reflects the decision that has been made as to which merchandise is within the final scope of the investigation and is subject to the order." Id. at 1096.

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

> The merchandise covered by this order is [CSPV] cells, and modules, laminates and panels, consisting of [CSPV] cells, whether or not partially or fully assembled into other products, including but not limited to, modules, laminates, panels and building integrated materials.
>
> This order covers [CSPV] cells of thickness equal to or greater than 20 [μm], having a p/n junction formed by any means, whether or not the cell has undergone other processing, including, but not limited to, cleaning, etching, coating, and/or addition of materials (including, but not limited to, metallization and conductor patterns) to collect and forward the electricity that is generated by the cell.
>
> . . .
>
> Excluded from the scope of this order are thin film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS).

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

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

B. Sunpreme's Solar Modules Consist of CSPV Cells

Sunpreme contends that Commerce's interpretation of the term CSPV cells unreasonably expands the scope beyond the definition of that term as used in the Orders. Sunpreme Br. 10–15. Further, Sunpreme claims that Commerce's definition is

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

The Orders describe the subject merchandise as CSPV cells and "modules . . . consisting of CSPV cells, whether or not partially or fully assembled into other products, including, but not limited to modules," see CVD Order, 77 Fed Reg. 73,017, ADD Order, 77 Fed. Reg. 73,018, but the term CSPV cell is not defined in the Orders. Commerce determined that the term "CSPV cell" requires that the cell rely on crystalline silicon to generate electricity even where other materials, such as amorphous silicon or other metal oxides, are present in the cell. Final Scope Ruling 13. That interpretation is reasonable because the petition, a (k)(1) source, states that CSPV cells contain crystalline silicon, see Final Scope Ruling at 13. Further, Commerce relied upon the Triex Scope Ruling, also a (k)(1) source, which defines a CSPV cell as a cell that relies on crystalline silicon

to generate electricity.[10] Final Scope Ruling at 13 (citing Triex Scope Ruling at 30). Commerce also reasonably determined that Sunpreme's cells meet the definition of CSPV by crediting Sunpreme's characterization of the crystalline silicon substrate in its product as serving a primary role (i.e., the primary solar absorber), which Commerce found shows that the wafer is an active component in the generation of electricity.[11] See id. at 14 (citing

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

[11] Sunpreme argues that nothing in the record supports Commerce's conclusion that the crystalline silicon substrate in the Sunpreme cells is actively involved in electricity generation. Sunpreme Br. 19. In support of this argument, Sunpreme attaches great significance to a laboratory analysis submitted with its scope application finding that the crystalline silicon wafer in its cells does not interact with the thin film layers, which Sunpreme argues demonstrates that the crystalline silicon wafer does not itself perform the role of converting sunlight to electricity. See id. Sunpreme offers no reason why Commerce could not reasonably conclude that the crystalline

(footnote continued)

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

silicon substrate is actively involved in electricity generation on the basis that the crystalline silicon substrate is the primary solar absorber without determining the substrate interacts with the thin film layers. Without any such evidence, Commerce's determination that the crystalline silicon wafer in Sunpreme's cells is actively involved in electricity generation is supported by substantial evidence. Nothing inherent in the term CSPV cell or in the (k)(1) sources suggests that the crystalline silicon component must be capable of generating energy on its own.

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

(footnote continued)

Commerce determined that the function of the crystalline silicon substrate in the cells making up Sunpreme's modules is similar to that of the crystalline silicon substrate in the Triex cells in that the substrate in Sunpreme's cells is involved in the absorption of sunlight for conversion to electricity. Final Scope Ruling at 14. Commerce's interpretation of the ambiguous term CSPV cell therefore relies on the language in the Orders, and (k)(1) sources, the petition and the Triex Scope Ruling. Therefore Commerce's interpretation is in accordance with law.

Furthermore, Sunpreme points to no evidence either detracting from Commerce's findings regarding the function of the crystalline silicon substrate in its cells or distinguishing that function from the function of the crystalline silicon component in the

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

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

Triex cells.[13] Commerce's determination that Sunpreme's cells meet the definition of a CSPV cell is therefore supported by substantial evidence.

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

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

Ex. 9 at 5, CVD PD 1–6, bar codes 3417582-01–06 (Nov. 16, 2015) (collectively "ITC Injury Determination") (stating that "CSPV cells use either monocrystalline silicon or multicrystalline silicon to convert sunlight into electricity")). However, the language of the Orders controls the scope. See Duferco, 296 F.3d at 1089. Sunpreme points to no language in the Orders indicating that the crystalline silicon component of a CSPV cell must be able to function independently as a solar cell before being incorporated into a photovoltaic product or that the crystalline silicon must be capable of converting sunlight into electricity on its own. Moreover, the notion that the ITC description does not reference that the function may be shared between the crystalline silicon component of a CSPV cell and some other component does not indicate that the ITC meant to exclude products where the electricity generating function is shared between the crystalline silicon component and other parts of the cell. See ITC Injury Determination at 5. Therefore, Commerce reasonably relied upon the petition and the Triex Scope Ruling, both (k)(1) sources, to interpret the term CSPV cell to include a product containing crystalline silicon that is an active component in electricity generation even where that function may be shared with other parts of the cell. See Final Scope Ruling at 13–14.

Sunpreme also argues that Commerce's definition of a CSPV cell as a photovoltaic cell that relies upon crystalline silicon to generate electricity is contrary to law because Commerce's definition is inconsistent with other (k)(1) sources, including the petition and the investigations of Commerce and the ITC injury determination.[14] Sunpreme Br. 10.

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

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

Next, Sunpreme argues that Commerce's definition of a CSPV cell, which requires only that a CSPV cell rely upon crystalline silicon to generate electricity, is inconsistent with the ITC's definition of the term "CSPV cell." Id. at 12 (citing ITC Injury Determination at 5 (stating that "CSPV cells use either monocrystalline silicon or multicrystalline silicon to convert sunlight into electricity")). Sunpreme specifically argues that "the precise

wording of the ITC's description undermines Commerce's definition . . . [a]s 'rely' is a vague term . . . [which permits] a layer of crystalline silicon [to] do less than 'convert sunlight into electricity' but still meet the definition of a CSPV cell." Id. The language indicating that CSPVs "use crystalline silicon" may be vague, but it is not inconsistent with Commerce's interpretation of the function of crystalline silicon in a CSPV cell. Nothing in the ITC's description cited by Sunpreme requires the crystalline silicon to perform the role of converting sunlight into electricity without the aid of other cell components. See ITC Injury Determination at 5.

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

the ambiguous term CSPV cell from the Triex ruling and determined that unrefuted record evidence supports the notion that Sunpreme's cells meet that definition.

Sunpreme also insists that Commerce's failure to consider the factors under 19 C.F.R. § 351.225(k)(2) without addressing the unique factual records developed for each product renders Commerce's determination unsupported by substantial evidence. Sunpreme Br. 31–32. However, Commerce's regulations provide that it will analyze the criteria in 19 C.F.R. § 351.225(k)(2) only where the (k)(1) criteria are not dispositive. See 19 C.F.R. § 351.225(k)(2). To be dispositive, the (k)(1) criteria must definitively answer the scope question. Sango Int'l, L.P. v. United States, 484 F.3d 1371, 1379 (Fed. Cir. 2007) (citations omitted). Here, Commerce reasonably concluded that the language of the petition and the interpretations of the scope language in the Triex Scope Ruling sufficiently clarify the general definition of a CSPV cell to allow Commerce to reasonably conclude that Sunpreme's merchandise meets that definition. See Final Scope Ruling at 13–14. Commerce's interpretation of a CSPV cell in the Triex Scope Ruling relied upon the general functionality of the crystalline silicon component in the Triex cell, and Sunpreme points to no record evidence undermining that the crystalline silicon component of its cells performs a similar function in the generation of electricity. Therefore, Commerce's determination that Sunpreme's products meets the definition of a CSPV cell, as clarified by the (k)(1) sources, is supported by substantial evidence.

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

Sunpreme argues that Commerce's determination that Sunpreme's cells are at least 20 µm thick is unsupported by substantial evidence because the crystalline silicon substrate component of Sunpreme's cell should be excluded from the measurement of

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

The plain language of the Orders does not explicitly state what portion of a CSPV cell must exceed the thickness threshold provided in the scope language. Rather, the Orders provide that the CSPV cell must be at least 20 µm thick. CVD Order, 77 Fed. Reg. 73,017, ADD Order, 77 Fed. Reg. 73,018. Commerce concluded that the crystalline silicon component must be included in measuring the thickness of a CSPV cell because the crystalline silicon component plays an essential role in electricity generation. See Final Scope Ruling at 14. It is reasonably discernible that Commerce concluded that the scope language calling upon it to consider the thickness of a CSPV cell includes all functional components of the cell that play a role in generating electricity from solar energy. See id. That interpretation is reasonable, given the plain language of the Orders.

Sunpreme contends that Commerce should have excluded the crystalline silicon substrate component when measuring the thickness of Sunpreme's cells. See Sunpreme Br. 24. Sunpreme relies upon the argument that the crystalline silicon substrate is not

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

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

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

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

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

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

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

Specifically, Commerce referenced its determination in the Triex Scope Ruling that a "p/i/n junction and other arrangements of positive, negative, and intrinsic/neutral layers within a photovoltaic cell can be understood to be types of p/n junctions within the meaning of the scope of the *Orders*." Final Scope Ruling at 15 (citing Triex Scope Ruling at 18). In the Triex Scope Ruling, Commerce attached great significance to the phrase "formed by any means," which Commerce concluded indicates that the specific

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

architecture of p/n junction formation is irrelevant to determining the meaning of the phrase "p/n junction." See Triex Scope Ruling at 17. To reach this conclusion, Commerce first analyzed the structural distinctions between a p/n junction and the p/i/n junction contained in the Triex cells. See id. Commerce noted that some type of junction between a positively charged and negatively charged region of a cell is essential to the creation of an electrical field, and Commerce concluded that the intrinsic (i.e., inert) layer simply connects the positively charged layers with the negatively charged layers and extends the electrical field over an additional layer of material. Id. at 18. Second, Commerce analyzed the function or purpose of a junction where the positively charged and negatively charged layers are not in direct contact. See id. Commerce concluded that the function of a junction where the p-layer and n-layer is in direct contact is the same as a junction where those layers are separated by an intrinsic layer because the intrinsic layer simply extends the electric field over the crystalline silicon wafer region.[18] See id.

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

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

(footnote continued)

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

which the junction is formed between the p-type layer and an n-type layer."). Moreover, the fact that a p/i/n junction structure is described separately as a structure in which layers of an intrinsic semiconductor between the p-type and n-type semiconductors, see Sunpreme Br. Ex. 1 at Ex. Gen-Supp 4, does not necessarily indicate that a p/i/n junction is not a type of p/n junction for purposes of the Order. Therefore, the record documents cited by Sunpreme do not render Commerce's interpretation unreasonable.

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

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

Sunpreme next argues that Commerce's determination that Sunpreme's products meet the definition of "p/n junction formed by any means" provided in the Triex Scope Ruling is not supported by substantial evidence because Sunpreme's cells are physically

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

distinguishable from the Triex products. Sunpreme Br. 30. Specifically, Sunpreme cites the lack of the silicon dioxide insulator between the crystalline silicon wafer and the intrinsic and p-type and n-type amorphous thin film layers in its cells, which Sunpreme notes distinguish its cells from the Triex cells. Sunpreme Br. 31. However, Commerce explained that the presence or absence of silicon dioxide insulating layers is irrelevant to its analysis regarding p/n junction formation in the Triex cell because "the function or nature of a p/n junction in a CSPV [cell] is unchanged by the addition of a layer of [silicon dioxide] or other insulating material."[21] Final Scope Ruling at 15 (citing Triex Scope Ruling at 32, 39 (internal quotations omitted)). Commerce justified its determination that a p/i/n junction is a type of p/n junction in the Triex Scope Ruling by drawing attention to the inclusion of different types of junction architectures in early drafts of scope language included in the petitions. Triex Scope Ruling at 31. Commerce further justified its determination by noting the absence of record evidence indicating that certain types of junctions characterized by a positive region and a negative region generating an electrical field were meant to be excluded. Triex Scope Ruling at 31–32. Sunpreme points to no record evidence undermining the notion that the junctions in its cells have a materially similar function to the junctions in the Triex cells.[22]

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

[22] Sunpreme argues that the record illustrates that its cells contain a p/i/n junction that is chemically and functionally different from the junction in the Triex cells. Sunpreme Br. 30–31.

(footnote continued)

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

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

The Orders do not define the term "thin film photovoltaic products produced from amorphous silicon." The scope language is silent as to the substrate of excluded thin film products. See CVD Order, 77 Fed. Reg. 73,017, ADD Order, 77 Fed. Reg. 73,018. The

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

term "thin film photovoltaic products" is not unambiguously equivalent to any photovoltaic product with a thin film. Therefore, Commerce reasonably consulted the (k)(1) sources to define the term "thin film photovoltaic products." Commerce cited the petition, a (k)(1) source, which explicitly states that "thin film photovoltaic products" do not use crystalline silicon to conclude that a product that uses crystalline silicon to generate electricity,[23] such as the Sunpreme cell, is not a thin film photovoltaic product. Final Scope Ruling at 17 (citing Request for a Scope Ruling on Solar Modules with Bi-Facial Thin Film Cells at Ex. 6 at 16–17, AD PD 1–6, bar codes 3417556-01–6 (Nov. 18, 2015); Request for a Scope Ruling on Solar Modules with Bi-Facial Thin Film Cells at Ex. 6 at 16–17, CVD PD 1–6, bar codes 3417582-01–06 (Nov. 16, 2015) (collectively "Petitions")). Citing the Triex Scope Ruling, another (k)(1) source, Commerce determined that including all products containing amorphous silicon in the thin film exclusion would create an easy means of circumventing the Orders. Id. (citing Triex Scope Ruling at 33). That interpretation is

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

reasonable because it gives meaning to all of the language of the Orders and is based on the (k)(1) sources, which state that the thin film photovoltaic products exclusion does not apply to products in which a crystalline silicon component contributes to their ability to convert sunlight into electricity.[24]

Commerce adequately addressed Sunpreme's arguments regarding the meaning of the thin film exclusion. Commerce rejected Sunpreme's arguments that the scope language and the (k)(1) sources, including the petition and the ITC investigation broadly exclude products that contain thin films of amorphous silicon. See Final Scope Ruling at 17 (concluding that the mere presence of thin films of amorphous silicon is insufficient to place a product within the thin film photovoltaic product exclusion); see also Sunpreme Br. 33–38. Specifically, Sunpreme points to the petition's explicit statement that "[t]hin film technologies are not covered by the Petitions." Sunpreme Br. 33 (citing Request for a Scope Ruling on Solar Modules with Bi-Facial Thin Film Cells at Ex. 6 at 16–17, AD PD 1–6, bar codes 3417556-01–6 (Nov. 18, 2015); Request for a Scope Ruling on Solar Modules with Bi-Facial Thin Film Cells at Ex. 6 at 16–17, CVD PD 1–6, bar codes 3417582-01–06 (Nov. 16, 2015) at 16–17 (collectively "Petition")). Likewise, Commerce

[24] In the Triex Scope Ruling, Commerce noted that nothing in the scope language explicitly addresses what substrates may be included in thin film photovoltaic products. Triex Scope Ruling at 33. Commerce cites the ITC's investigation, which it found "provides an illustrative list of substrates that were contemplated in [the agency's] discussion of thin film products: 'glass, stainless steel, [and] plastic.'" Id. at 34. Commerce also notes that the petitions state that thin film products do not use crystalline silicon. Id. However, Commerce did not define thin film photovoltaic products merely by excluding any products containing a crystalline silicon substrate. See id. Rather, Commerce read the petition's suggestion that thin film photovoltaic products should not contain crystalline silicon together with the function of the crystalline silicon substrate in the Triex cells to determine that the Orders meant to exclude products containing crystalline silicon that is active and essential to the generation of electricity. See id.

considered and rejected Sunpreme's arguments that the petition's use of the term "thin film technologies" indicates petitioners intended that the definition of thin film photovoltaic products in the scope language should be expansive. See id. Sunpreme points to no definition of the term "technologies" in the petition, and the term "thin film photovoltaic products" is not defined in the scope language of the Orders. See CVD Order, 77 Fed. Reg. 73,017, ADD Order, 77 Fed. Reg. 73,018. Commerce reasonably concluded, based upon an interpretation of the term thin film photovoltaic products derived from the petition, that the mere presence of thin films of amorphous silicon is insufficient to place a product within the exclusion because the petitions explicitly indicate that thin film products do not use crystalline silicon.[25] Final Scope Ruling at 17.

Finally, Commerce did not find the International Standard IEC certification of Sunpreme's modules as a thin film product dispositive in defining the term "thin film photovoltaic products." See Final Scope Ruling at 17 (acknowledging that the IEC certifications are cited in the petition but concluding they are not dispositive as to whether

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

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

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

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

(footnote continued)

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

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Sunpreme first argues that Commerce's finding that Sunpreme's products are certified as CSPV modules is incorrect and unsupported by the record. Sunpreme Br. 35–36. Commerce does find that evidence on the record **"**suggests that Sunpreme's bifacial solar products are also certified as CSPV products by the IEC." Final Scope Ruling at 16. Commerce also states that Sunpreme has not refuted that certifications applicable to CSPV products are not applicable to the specific product that is the subject of this scope proceeding. Id. It is unclear whether Commerce bases its findings on the weighing of the conflicting evidence. However, this finding is not material to Commerce's interpretation of the term "thin film photovoltaic products" or to Commerce's determination that Sunpreme's products are not covered by the exclusionary language in the Orders because Commerce determined that IEC certifications are merely informative, but not dispositive as to whether or not products are CSPV products or thin film photovoltaic products for purposes of the scope of the Orders. Final Scope Ruling at 17.

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

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

only thin film certification.[28] Therefore, Commerce's determination is not undermined by the fact that its products only received thin film certification.

II. Commerce's Liquidation Instructions Were Contrary to Law

Sunpreme objects that Commerce's instructions to CBP to continue suspension of liquidation and to collect cash deposits with respect to entries prior to the initiation of the instant scope inquiry were contrary to law. Sunpreme Br. 41. Defendant responds that Commerce's instructions are in accordance with law because Commerce's regulations

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

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

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

Sunpreme further argues that Commerce's decision to treat the statement in the petition to the effect that thin film photovoltaic products do not contain crystalline silicon as dispositive of whether a product falls within the thin film exclusion while treating the petition's statements about certifications as merely informative is arbitrary. Sunpreme Reply Br. 20. As already, discussed Commerce did not treat the presence of crystalline silicon as dispositive of whether a product is a thin film photovoltaic product, but rather looked to how the crystalline silicon functioned within the cell to determine if the thin film of amorphous silicon caused the product to fall within the exclusion. See Final Scope Ruling at 17. Moreover, the petition language pertaining to the certifications explicitly recognizes the possibility that the IEC 61646 standard could apply to a CSPV product. See Sunpreme Inc.'s Submission of Factual Information at Ex. 1, Attach 1, AD PD 32–48, bar codes 3481963-01–05 and 3481978-01–12 (June 27, 2016); Sunpreme Inc.'s Submission of Factual Information at Ex. 1, Attach 1, CVD PD 38–54, bar codes 3481991-01–17 (June 27, 2016) (stating that the IEC 61646 applies to thin-film products, but not only to thin-film photovoltaic products).

permit the suspension of liquidation to continue, regardless of when a scope inquiry was initiated." See Def.'s Resp. Br. 36. For the reasons that follow, Commerce's liquidation instructions directing CBP to suspend liquidation on entries prior to initiation of the scope inquiry are contrary to law.

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

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

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

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

19 C.F.R. § 351.225(l)(3). In AMS Assocs., Inc. v. United States, 737 F.3d 1338 (Fed. Cir. 2013), the Court of Appeals for the Federal Circuit held that, where an unclear order renders a product not subject to an existing order and Commerce clarifies ambiguous scope language to determine that the merchandise is subject to the antidumping order, "the suspension of liquidation and imposition of antidumping cash deposits may not be *retroactive* but can only take effect 'on or after the date of the initiation of the scope inquiry.'" AMS Assocs., Inc. v. United States, 737 F.3d 1338, 1344 (Fed. Cir. 2013) ("AMS

II") (emphasis in original) (citing identical language in 19 C.F.R. § 351.225(l)(2), as the language quoted above in 19 C.F.R. § 351.225(l)(3)). Although in AMS II, Commerce issued corrected liquidation instructions explicitly instructing CBP to suspend liquidation retroactively, see AMS II, 737 F.3d at 1341, the Court of Appeals' holding barring retroactive application of Commerce's findings did not depend upon Commerce taking such additional action. See id. at 1344.

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

Defendant points to no authority, other than CBP's ultra vires determination to require Plaintiff to enter its merchandise as subject to the Orders, for the collection of cash deposits and suspension of liquidation on Plaintiff's entries. Defendant and Defendant-Intervenor argue that, unlike in AMS II, here Sunpreme's entries were already suspended prior to the date Commerce initiated its scope inquiry. Def.'s Resp. Br. 36;

SolarWorld Americas Inc.'s Resp. Pl.'s Mem. Supp. Rule 56.2 Mot. J. Agency R. 31, Mar. 2, 2017, ECF No. 91 ("SolarWorld Resp. Br."). Therefore, Defendant and Defendant-Intervenor interpret 19 C.F.R. §§ 351.225(l)(1) and (3) to permit the suspension of liquidation to continue and the collection of cash deposits on all entries for which liquidation was suspended. Def.'s Resp. Br. 36 (citing 19 C.F.R. §§ 351.225(l)(1), (3)); SolarWorld Resp. Br. 31–32. (citing 19 C.F.R. §§ 351.225(l)(1), (3)). However, Commerce's regulation cannot reasonably be interpreted to permit the suspension of liquidation and collection of cash deposits to continue where they resulted from an ultra vires interpretation of the scope language. Such an interpretation is unreasonable because it would validate CBP's ultra vires interpretation and permit the circumvention of Commerce's regulations by allowing CBP to require a party to enter goods as subject to the Orders before Commerce has interpreted ambiguous scope language. Nor can either portion of Commerce's regulation reasonably be interpreted to permit Commerce to require cash deposits prior to the date of initiation of the scope inquiry merely because CBP suspended liquidation before that date without authority to do so. CBP's purported suspension of liquidation was void *ab initio*. Sunpreme Inc. v. United States, 40 CIT __, __, 190 F. Supp. 3d 1185, 1204 (2016) ("Sunpreme III"). Commerce could not extend the suspension of liquidation on entries that were not appropriately administratively suspended. See id.

Defendant worries about the policy implications that may result from interpreting the statutory and regulatory framework as barring Commerce from ordering the suspension of liquidation or collection of cash deposits on goods that may be subject to

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

CONCLUSION

The court sustains Commerce's determination to the effect that Sunpreme's merchandise is subject to the Orders. However, Commerce's issuance of liquidation

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

/s/ Claire R. Kelly
Claire R. Kelly, Judge

Dated: August 29, 2017
New York, New York