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For imported merchandise to be considered subject to an antidumping duty ("AD") or countervailing duty ("CVD") order, it must fall under a particular product scope (i.e., is within the "class or kind" of merchandise subject to the measure) and it must originate from a particular country. "Country of origin" and "class or kind" (and its domestic counterpart, the "like product"[2]) are, accordingly, fundamental concepts in the U.S. AD/CVD regime that both establish the legal limits of antidumping measures and the potential extent of their effectiveness. As pointed out by the U.S. Court of International Trade, determining the country of origin of a product is "fundamental to the proper administration and enforcement of the anti-dumping statute."[3]

Despite the importance of origin determinations in AD/CVD administration, the U.S. Department of Commerce's ("DOC") approach in making origin determinations has been perplexing to traders, producers, and even trade attorneys. While DOC's origin rule resembles that employed by U.S. Customs and Border Protection ("CBP") in determining the origin of imported articles for marking and other purposes, DOC has expressly declined to be bound by CBP's origin determination and indeed has often reached origin determinations that differ from CBP's when presented with similar facts. Adding to the complexity, DOC has changed its approach to origin over the years and has apparently adopted a different approach to origin in

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2 Domestic industries with standing to bring antidumping and countervailing duty actions are limited to producers of the domestic "like product." 19 U.S.C. §§ 1671a(c)(4)(A) and (D); 1673A(c)(4)(A) and (D). The "like product" is a product that is "like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation." 19 U.S.C. § 1677(10).

3 *E. I. Du Pont de Nemours. Co. v. United States*, 8 F.Supp.23 854 (Ct. Int'l Trade 1998).

investigations involving alleged "circumvention" of AD/CVD orders.

This article seeks to shed light on these issues by providing a detailed analysis of DOC's past and present approach to country of origin determinations and by offering modest proposals on how the agency's approach may be improved. Section I of this article accordingly describes CBP's approach in making country of origin determinations. Section II analyzes' DOC's approach to country of origin in its AD/CVD administration with a particular focus on the relationship between the DOC and CBP's approaches. Sections III and IV analyzes legal and policy problems with DOC's approach. Finally, section V concludes the article by recommending that DOC consider conforming its approach in AD/CVD proceedings to the well-established approach followed by CBP in its country of origin determinations.

I. U.S. CUSTOMS' COUNTRY OF ORIGIN DETERMINATIONS

U.S. Customs and Border Protection ("Customs" or "CBP")4 has the general authority to determine, on a case-by-case basis, the country of origin of imported merchandise for purposes of country of origin marking, statistical, and other purposes.5 In making such determinations, Customs has applied a "substantial transformation" test, under which a product's country of origin is the last country in which the merchandise was substantially transformed into new and different article commerce.6 Customs has explained that substantial transformation further requires that the component materials of the article acquire "a new name, character, or use."7

4 Prior to its reorganization in 2003, U.S Customs and Border Protection was referred to as the U.S. Customs Service. *See* Reorganization Plan Modification for the Department of Homeland Security (Jan. 30, 2003); 6 U.S.C.§ 542.

5 *See* 19 U.S.C. § 1304; 19 C.F.R. § 134.

6 Under certain free trade agreements, such as the North American Free Trade Agreement ("NAFTA"), Customs has adopted 'tariff shift' rules that focuses on whether the non-originating materials used to produce the product undergo specified changes in tariff classification. *See generally* 19 C.F.R. Part 102. However, these "tariff shift" rules are intended to "codify" the results that would obtain under the traditional substantial transformation rules. *See, e.g. Bestfoods v. United States*, 165 F.3d 1371, 1372 (Fed. Cir. 1999).

7 *See, e.g., Nat'l Juice Prods. Ass'n v. United States*, 628 F. Supp. 978, 988-90 (Ct. Int'l Trade 1986).

Among "name," "character," and "use," Customs has traditionally focused on "character" and "use," and has rarely determined that substantial transformation took place solely because the name of an article is different from those of its component materials. 8

Customs' "substantial transformation" test thus essentially turns on whether the character and use of a product's components were significantly changed in the country at issue. Customs has applied this test on a case-by-case basis. For example, the Court of International Trade has famously determined that processing whole fish into frozen fish fillets constitutes substantial transformation for customs purposes because the processing significantly alters the fish's character by changing the shape of the fish and making it a product suitable for other market segments.9 On the other hand, Customs has determined that peeling, deveining, cooking and freezing shrimp does not constitute a substantial transformation because the process neither fundamentally changed the character of the shrimp (i.e., its size or quality) nor does it endow the article with a different use.10

With respect to assembly and finishing processes, Customs likewise generally examines whether the character or use of the essential component underwent significant changes. In particular, Customs frequently evaluates the sophistication of the production process as a yardstick for whether such changes took place. For example, Customs has found that assembling over 600 parts into a desktop scanner constitutes a substantial transformation because the assembly is complex and requires considerable time and skill.11 On the other hand, Customs has determined that cold-drawing hot-rolled steel wire rod did not constitute substantial

8 *See, e.g.* U.S. Customs and Border Protection, Headquarters Letter Ruling H197582 (Aug. 9, 2012)("a change in the name of a product is the weakest evidence of a substantial transformation").

9 *Koru N. Am. V. United States*, 701 F. Supp.229 (Ct. Int'l Trade 1988), *affirmed in* 155 F.3d 568 (Fed. Cir. 1998).

10 *See* U.S. Customs and Border Protection, Headquarters Letter Ruling 731763 (May 17, 1989).

11 U.S. Customs and Border Protection, Headquarters Letter Ruling 563294 (September 9, 2005).

transformation in part because the processing added little value to the product.12

II. THE DEPARTMENT OF COMMERCE'S APPROACH IN COUNTRY OF ORIGIN DETERMINATIONS

Unlike U.S. Customs, which determines the countries of origin for all imported merchandise, the U.S. Department of Commerce ("DOC") makes country of origin determinations only in the narrower context of AD/CVD administration. The U.S. antidumping and countervailing duty statutes provide that AD/CVD orders are issued for "class or kind of foreign merchandise."13 In other words, AD/CVD orders apply to merchandise from particular countries rather than merchandise from particular producers.14 As a result, DOC often needs to answer the following two questions: (1) whether a product produced in a country subject to the AD/CVD investigation ("subject country") with component materials from a third-country should be treated as a product of the subject country, and (2) whether a product produced in a third-country using component materials from the subject country should be treated as the a product of the subject country.

DOC makes country of origin determinations in two basic categories of AD/CVD proceedings: (1) original AD/CVD investigations, administrative reviews, and related scope investigations; and (2) investigations of alleged "circumvention" of an existing AD/CVD order. While DOC's approach in its origin determinations resembles Customs' approach, DOC has consistently taken the position that it is not bound by Customs' origin determinations and has often reached origin determinations different from, and at odds with, Customs' position, even with respect to the same type of merchandise and production process. Moreover, there is

12 U.S. Customs and Border Protection, Headquarters Letter Ruling 075923(April 18, 1988); *see also Superior Wire v. United States*, 669 F. Supp. 472 (Ct. Int'l Trade 1987).

13 19 U.S.C. §§ 1673; 1671(; *see also E. I. Du Pont de Nemours. Co. v. United States*, 8 F.Supp.23 854 (Ct. Int'l Trade 1998).

14 *See, e.g., Tapered Roller Bearings from the People's Republic of China,* 75 Fed.Reg. 844 (Dep't Commerce)(Jan. 6, 2010) (final results of 2007-2008 antidumping duty administrative review) (Issues and Decision Memorandum at 6).

significant tension between DOC origin determinations in AD/CVD investigations, administrative reviews, and scope investigations on the one hand, and anticircumvention investigations on the other hand.

A. DOC's "Substantial Transformation" Test in AD/CVD Investigations, Administrative Reviews, and Related Scope Rulings

Even though the AD/CVD statute provides that AD/CVD orders only apply to merchandise from particular countries, the statute does not contain a standard for Commerce to apply in determining the country of origin for AD or CVD purposes.15 Since the transfer of authority for the administration of the AD/CVD laws to DOC in 1980,16 DOC has taken the position that a product originates from a country if it has been "substantially transformed" in that country. Even though the "substantial transformation' test appears to originate from Customs' origin determinations, DOC has consistently insisted that it is not bound by the U.S. customs' origin determinations because it needs to address concerns about the potential of circumvention of the AD/CVD order. In the 1998 decision in *E.I Du Pont de Nemours Co. v. United States* ("*Du Pont*"), the U.S. Court of International Trade ("CIT") upheld DOC's use of the 'substantial transformation" test to makes the country of origin determinations in the AD administration, noting that the test is a "permissible construction" of the AD statute. 17

As explained below, a close examination of DOC's determinations in AD/CVD investigations, administrative reviews, and related scope determinations reveals that the precise factors DOC considers when applying the "substantial transformation" test have changed over the years. In the 1980s and 1990s, like Customs, DOC focused on the change in character and

15 *See* 19 U.S.C. §§ 1673;1671b.

16 Reorganization Plan No. 3 of 1979: Message from the President of the United States, Transmitting a Reorganization Plan to Consolidate Trade Functions of the United States Government (Sept. 25, 1979); 5 U.S.C. § 903.

17 8 F. Supp.2d 854, 858 (Ct. Int'l Trade 1998).

use of the product at issue, even though it often reach origin determinations that were different from customs' when confronting similar circumstances. In the early 2000s, DOC further deviated from Customs' approach and focused on certain additional factors analogous to those listed in the U.S. anticircumvention statute,[18] such as the level of investment and value-added. In late 2000s, DOC took a step back and gave equal considerations to the factors related to anticircumvention and the change in character and use. Finally, in the 2012 AD/CVD determination in *Photovoltaic Cells from China*, DOC appears to have largely reverted to its pre-2000 approach and focused on the change in character and use as a result of the production process.

1. DOC's Pre-2000 Approach

Before the 2000s, DOC's application of the "substantial transformation" test was similar to Customs', focusing on whether there was a change in the character and use of the essential component of product as a result of the production process in the subject or third country. Despite this similarity between their approaches, DOC and Customs often reached opposite conclusions on whether substantial transformation took place when presented with similar facts.

For example, in the 1986 AD determination in *EPROMs from Japan*,[19] DOC examined whether erasable programmable read only memories (EPROMs) produced in a third country through encapsulation of wafers and dice from Japan should be treated as a product of Japan or the third country. DOC concluded that the processed wafers and dice remained products of Japan, as the essential component (the wafer and dice) retained their essential properties and use after encapsulation. DOC also noted that the encapsulation in the third country was not a sophisticated process. Importantly, DOC rejected the respondents' argument that Customs had

[18] 19 U.S.C. §1677j.

[19] *Erasable Programmable Read Only Memories (EPROMs) From Japan*, 51 Fed. Reg. 39,680 (Dep't Commerce)(Oct. 30, 1986) (final determination of sales at less than fair value).

considered a similar assembly process to constitute substantial transformation, noting that it was not bound by Customs rulings because it had independent authorities to determine the scope of an AD investigation. 20

In the 1993 final AD determination in *Cold-Rolled Steel from Argentina*, 21 DOC examined whether the galvanization of U.S. origin cold-rolled steel sheets in Argentina rendered the steel sheets product of Argentina. Customs had taken the position that galvanization alone did not constitute substantial transformation. According to Customs, the process that would effect a change in character and use (and thus substantial transformation) of cold-rolled steel was full annealing (i.e. annealing under a high temperature) that caused changes in metallurgical structure. The CIT upheld Customs' conclusion in *Ferrostaal Metals Corp. v. United States*, a landmark 1987 decision.22 Since the steel sheets at issue were not fully annealed, the steel sheets would retain their U.S. origin according to Customs. DOC took a different position, however, determining that the steel sheets were of Argentinian origin because galvanization did result in a change in character and use of the cold-rolled steel sheets. Specifically, DOC reasoned that galvanization transformed the physical character of cold-rolled steel sheets by giving them a corrosion-resistant property and thereby made the sheets fit for use in the construction of certain products such as air conditioners. 23 DOC again justified its deviation from Customs' earlier origin determination on its authority to determine the scope of an AD investigation. DOC further explained that, unlike Customs, it needed to address concerns related to potential circumvention of AD orders. 24

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20 *Id.* at 39,291-92.

21 *Cold-Rolled Steel from Argentina* , 58 Fed. Reg. 37,062 (Dep't Commerce)(July 19, 1993)(final determination of sales at less than fair value).

22 *Ferrostaal Metals Corp. v. United States*, 664 F. Supp. 535, 540 (Ct. Int'l Trade 1987).

23 *Cold-Rolled Steel from Argentina*, 58 Fed. Reg. at at 37,066.

24 *Id.*

In the 1999 final AD determination in *Steel Round Wire from Canada*, 25 DOC considered whether the process of cold-drawing stainless wire in Canada constituted substantial transformation of the wire. Both Customs and the CIT previously examined a similar cold-drawing process with respect to carbon steel wire, concluding that such a process did not constitute a substantial transformation for customs purposes because the process did not change the character or use of the product and added little value to the product.26 Notwithstanding these earlier determinations in the customs context, DOC concluded that the cold-drawing process resulted in a product with "physical properties and end uses that are distinct from the wire rod input" because the cold-drawing process changed the size and tensile strengths of the stainless wire rod and thereby affected their uses.27 DOC again justified its deviation from Customs determinations on anticircumvention grounds. The divergence between the DOC and CBP approaches in this case was particularly depressing for the respondents – their products did not qualify for the preferential NAFTA tariff rates as products of non-Canadian origin, but at the same time were subject to AD duties as products of Canadian origin. 28

2. DOC's Approach in the Early 2000s

Beginning in the early 2000s, DOC gradually steered away from focusing on the change in character and use and instead focused on a vague and broader criterion of whether the processing resulted in an article in a different "class or kind." As the "substantial transformation" test was originally designed to clarify what products fall under the "class or kind of foreign merchandise" subject to the AD investigation, DOC's reliance on the "class or kind' factor effectively made the standard circular. The resulting ambiguity allowed DOC to make the

25 *Steel Round Wire from Canada*, 64 Fed. Reg. 17,324 (Dep't Commerce)(April 9, 1999)(final determination of sales at less than fair value).

26 *Superior Wire v. United States*, 669 Supp. 472 919870, *affirmed in* 867 F. 2d 1409 (Fed. Cir. 1989).

27 *Steel Round Wire from Canada*, 64 Fed. Reg. at 17,326-27.

28 *Id.*

country of origin determination based on a number of additional factors that bear a striking resemblance to those listed in the U.S. anticircumvention statute.29

In the 2000 Issues and Decision Memorandum for the final AD determination in *Cold-Rolled Carbon Steel from Taiwan* (May 22, 2000),30 the country of origin issue confronting DOC was whether reprocessing Japanese-origin cold-rolled steel coils into cold-rolled steel strip in Taiwan made the steel strip a product of Taiwan for antidumping purposes. Citing to both the CBP practice and DOC's earlier determinations, the respondent argued that the reprocessing in Taiwan substantially changed the physical characteristics such as reduced thickness, extended length, changed microstructure, and significantly increased strength, and resulted in a product with different applications. Even though the changes in physical characteristics appeared to resemble those in *Cold-Rolled Carbon Steel Flat Product* and *Steel Round Wire from Canada*, DOC rejected the respondent's argument and did not even address the alleged changes in character and use of the product. 31 Instead, DOC stated that the reprocessing in Taiwan "generally involve[d] the same steps performed by Japanese producers" and as a result did not "result in a change in the class or kind of the merchandise." 32 On that basis, CBP concluded that substantial transformation did not take place and that the reprocessed steel coil remained a product of Japanese origin.

In the final AD determination in *Wax from Korea*,33 which concerned whether transforming jumbo rolls into thermal transfer ribbon constituted substantial transformation, DOC clearly indicated that it no longer focused on the change character or use. Instead, DOC

29 *See* 19 U.S.C. §1677j; *see also* Section II.2, *infra*.

30 *Cold-Rolled Carbon Steel from Taiwan*, 65 Fed. Reg. 34,658 (Dep't Commerce)(May 22, 2000)(final determination of sales at less than fair value)(Issues and Decision Memorandum).

31 *Id.* at Comment 1.

32 *Id.*

33 *Wax and Wax/Resin Thermal Transfer Ribbon from the Republic of Korea*, 69 Fed. Reg. 17,645 (Dep't Commerce)(Apr. 5, 2004)(final determination of sales at less than fair value).

claimed that the single most important element of the DOC's substantial transformation test is whether there has been a change in the class or kind, stating that

> The Department has considered several factors in determining whether a substantial transformation has taken place, thereby changing a product's country of origin. These have included: the value added to the product; the sophistication of the third-country processing; the possibility of using the third-country processing as a low cost means of circumvention; and most prominently, whether the processed product falls into a different class or kind of product when compared to the downstream product. While all of these factors have been considered by the Department in the past, it is the last factor which is consistently examined and emphasized. When the upstream and processed products fall into different classes of kinds of merchandise, the Department generally finds that this is indicative of substantial transformation.
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> The Department has generally found that substantial transformation has taken place when the upstream and downstream products fall within two different ''classes or kinds'' of merchandise: (*see, e.g.,* steel slabs converted to hot–rolled band; wire rod converted through cold–drawing to wire; cold–rolled steel converted to corrosion resistant steel; flowers arranged into bouquets; automobile chassis converted to limousines).
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> Conversely, the Department almost invariably determines substantial transformation has not taken place when both products are within the same ''class or kind'' of merchandise: (*see, e.g.*, computer memory components assembled and tested; hot–rolled coils pickled and trimmed; cold–rolled coils converted into cold–rolled strip coils; rusty pipe fittings converted to rust free, painted pipe fittings; green rod cleaned, coated, and heat treated into wire rod). 34

DOC's claim that the term "class or kind" was frequently referenced in past "substantial transformation" determinations is both correct and unsurprising, because the "substantial transformation" test was applied in the first instance to clarify the meaning of this term. Yet DOC broke new ground in *Wax from Korea* by implying that the change in "class or kind" is not necessarily effected by a change in character or use. Citing to a Customs determination that slitting constitutes substantial transformation, the respondent had argued that that slitting resulted

34 *Id.*

in an article of a new different character and use because the process transformed the product into its final end–use dimensions, inserted cores for loading the ribbons into printers, and added of leaders, bridges, and trailers. DOC rejected the respondent's argument on the grounds that it did not sufficiently address anticircumvention concerns, and focused on a range of other factors, including:

> coating and inking making is a more important process than slitting, the slitting operation was not "particularly complex" when compared to the production of jumbo rolls; the capital investment for slitting was only a fraction of that for coating and ink-making; the primary cost involved in slitting and packaging was labor cost rather than capital cost, which increases the risk that a slitting operation may be established in a third country for anticircumvention purposes. 35

The above factors, especially the "level of investment" factor, are noticeably similar to the factors listed in the U.S. anticircumvention statute.36 Based on these factors, DOC concluded that slitting did not result in a product of a different class and accordingly did not constitute substantial transformation. DOC's apparent circular reasoning aside – the substantial transformation test was intended to clarify the meaning of "class or kind of foreign merchandise" in the first instance - the effect of DOC's new approach was to replace the focus on "character and use" in previous substantial transformation determinations with a focus on a number of anticircumvention factors such as the level of capital investment and value-added.

3. DOC's Approach in the Late 2000s

In late 2000s, DOC shifted its approach again, this time moving away from predominantly relying on the broad "class or kind" factor in its origin determinations and instead

35 *Id.*

36 *See* 19 U.S.C. §1677j*; see also* Section II.2, *infra*. The complexity of the production process is, strictly speaking, not an exclusive "anticircumvention" factor, as Customs has relied on this criterion in determining whether there has been a significant change in the character or use of the product. However, the extent of value-added and especially the level of investment are not routinely relied upon in Customs' "substantial transformation" analysis.

examining the "totality of circumstances," which includes, among others, both the "class and kind" and the traditional character and use factors. For example, in the 2009 AD administrative review on *Tapered Roller Bearings from China*,37 DOC examined whether to treat tapered roller bearings (TRBs) finished in a third country with components from China as originating from the third country rather than China. In response to a suggestion from the respondent, DOC agreed to examine "the totality of circumstances on the record when making its substantial transformation determination, just not class or kind of merchandise."38 DOC went on to examine a variety of factors, including: (a) change in class or kind of merchandise, (b) nature and sophistication of processing, (c) change in physical and chemical properties of the essential component, (d) cost of production and value-added, (e) the level of investment and potential for circumvention, and (f) change in ultimate use. DOC also explained that "there is no hierarchy in determining what factor alone determines substantial transformation." Based on considerations of these factors, DOC determined that the TRBs finished in the third country were still of Chinese origin. With respect to the "class or kind" factor in particular, DOC pointed out that both the components from China and the product in the third country fell under the scope of the AD order.39

DOC's "totality of circumstances" approach in *Bearings from China* represents a balanced combination of its approach in *Wax from Korea* and its earlier approach, as the "totality of circumstances" includes equal considerations of both change in character/use of the essential component and anticircumvention considerations. Moreover, rather than using the "class or kind" factor as an umbrella for anticircumvention factors such as levels of investment and value-added, DOC apparently recast the "class or kind" factor as a more straightforward examination of

37 *Tapered Roller Bearings from the People's Republic of China,* 75Fed. Reg. 844 (Dep't Commerce)(Jan. 6, 2010)(final results of antidumping duty administrative review)(Issues and Decision Memorandum).

38 *Id.* at 7.

39 *Id.*

whether both the input materials and the finished product fall under the scope of the existing AD/CVD order. Notably, DOC also retained the common denominator between *Wax from Korea* and earlier determinations – the disregard of Customs' country of origin determinations. In rejecting the respondent's argument that prior customs rulings supported a finding of substantial transformation, DOC reiterated its position that it was not bound by such rulings.40

Since 2009, DOC has generally followed the "totality of circumstances" approach articulated in *Bearings from China*. While the description of "totality of circumstances" factors varied from case to case, the substance of these factors largely remained the same. For example, in the 2011 AD administrative review on *Laminated Woven Sacks from China*,41 DOC considered the following factors in determining that sacks produced in China from fabric woven in third countries were not of Chinese origin: (1) whether the processed downstream product falls into a different class or kind of product when compared to the upstream product; (2) whether the essential component of the merchandise is substantially transformed in the country of exportation; (3) the extent of processing, and (4) the value added to the product. Like in *Bearings from China*, DOC examined whether a change in "class or kind" took place based on whether both woven fabric and woven sacks fell under the scope of the Order (it quickly pointed out woven fabric did not fall under the scope of the AD order). Not surprisingly, DOC also rejected the petitioner's arguments based on allegedly contrary customs rulings and reiterated that it was not bound by Customs' country of origin determinations. 42

40 *Id.* at 9.

41 *Laminated Woven Sacks from the People's Republic of China*, 76 Fed. Reg. 21,333, (Dep't Commerce)(April 15, 2011)(final results of antidumping duty administrative review)(Issues and Decision Memorandum at 1).

42 *Id.*.

4. DOC's Approach in Photovoltaic Cells from China

DOC's October 17, 2012 final AD/CVD determination in *Photovoltaic Cells from China*43 is interesting because it appears to represent a return to the Department's pre-2000 approach. A key country of origin issue confronting DOC in *Photovoltaic Cells from China* was whether modules assembled in the People's Republic of China ("PRC") from solar cells produced in third countries should be treated as originating from the PRC and accordingly subject to the AD investigation. *44* In determining whether the third-country solar cells were substantially transformed in the PRC, DOC analyzed only three factors: (1) whether there was a change in class or kind; (2) whether the essential component was substantially transformed, and (3) the extent of processing in the PRC.45

Specifically, DOC first summarily determined that there was no change in class or kind because both modules and solar cells fell under the scope of the AD/CVD investigation. With respect to the "essential component" factor, DOC relied on the 1986 AD final determination in *EPROMS from Japan*46 and conducted a detailed analysis of whether the processing of solar cells into modules changed the "important qualities or use" of the solar cells. DOC observed that the module assembly did not "change the important qualifies, i.e. physical or chemical characteristics of the solar cell itself," and that "the function of a solar cell is not changed when

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*43 Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China*77 Fed. Reg. 63,788 (Dep't Commerce)(October 17, 2012)(final determination of sales at less than fair value)(Issues and Decision Memorandum, Comment 1).

44 Commerce was similarly concerned with the analogous question of whether solar modules and panels assembled in third countries using PRC cells are within the scope of the investigation and resulting order.

45 *Memorandum from Jeff Pedersen to Christian Marsh, regarding ``Scope Clarification: Antidumping and Countervailing Duty Investigations of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China,''* dated March 19, 2012 ("Photovoltaic Cells Scope Clarification Memorandum'").

46 Fed. Reg. 38,680 (October 30, 1986). See also Section II.1 of this article, *supra*.

assembled into the module/panels; the cell still functions to convert sunlight into electricity."47 Accordingly, DOC concluded that like in the encapsulation process in *EPROMs from Japan*, "solar module assembly connects cells into their final end-use form but does not change the "essential active component," the solar cell, which defines the module/panel." Finally, DOC determined that the extent of processing in the PRC was not particularly sophisticated because it was "principally an assembly process" that consisted of "stringing together solar cells, laminating them, and fitting them in a glass-cover aluminum frame for protection."48 Based on the above analysis, DOC determined that modules assembled in the PRC from solar cells in third-countries were not of PRC origin and accordingly not within the scope of the AD/CVD investigation.

The *Photovoltaic Cells from China* analysis is remarkable not just because of its heavy focus on the change in the character and use, but also because of its apparent neglect of additional "anticircumvention" factors listed in *Wax from Korea*, such as the level of investment and the extent of value-added. Interestingly, DOC in fact rejected the petitioner' argument that modules assembled from third-country solar cells should be subject to the AD/CVD investigation because of circumvention concerns. While acknowledging that 'circumvention concerns are reflected in DOC country-of-origin determinations, DOC explained that the best way to address the circumvention concerns voiced by the petitioners was not through the country of origin determination, but rather through effective cooperation between DOC and Customs (to that end, DOC had instructed CBP to require importer and exporter certifications if the importer/exporter

47 Photovoltaic Cells Scope Clarification Memorandum, 6-7.

48 Photovoltaic Cells Final Determination, 7; Photovoltaic Cells Scope Clarification Memorandum, 7.

claimed that the panels modules imported from China did not contain any solar cells of Chinese origin).49

Clearly a critically influential contextual factor underlying DOC's determination was the fact that DOC was also considering the related origin question involving the assembly of solar modules and panels in third countries using cells manufactured in the PRC. Based on the same three factors, DOC determined that such third country modules and panels should be considered PRC modules and panels and are therefore covered by the order.50 . The existence of both PRC modules with third-country cells and third-country cells with PRC cells presents DOC with a dilemma with respect to circumvention, as any anti-circumvention considerations in favor of including the former product in the scope of the AD/CVD investigations would work against including the latter product in the same investigations. Thus, undoubtedly a significant factor in DOC's determination regarding the use of third country cells in China was the need to impose an internally consistent rule. DOC could not, in other words, reasonably conclude that assembled modules and panels retain the origin of the cells when the assembly occurs in third countries, but do not retain the origin of the cells when assembled in the PRC. Nonetheless, DOC's approach in *Photovoltaic Cells from China* may signal a subtle shift in focus away from the anticircumvention factors to a more traditional change in character and use approach. Whether this will lead to better consistency between the country of origin determinations made by DOC and Customs remains to be seen.

B. The Country of Origin Determinations in DOC's Anticircumvention Investigations

The U.S. anticircumvention regime bears a close relationship to both AD/CVD

49 Photovoltaic Cells Final Determination, 8-9; Photovoltaic Cells Scope Clarification Memorandum, 9.

50 Photovoltaic Cells Final Determination, 8; Photovoltaic Cells Scope Clarification Memorandum, 8.

investigations and country of origin determinations that are made in such investigations. By defining what products fall under existing AD/CVD orders, which only cover products from designated countries, DOC's anticircumvention investigations necessarily involve country of origin determinations.

Under the U.S. anticircumvention statute (19 U.S.C. § 1677j), anticircumvention measures may be adopted in four situations:

> (a) Final Assembly or Completion in the United States - Merchandise that is of "the same class or kind" as the merchandise that presently under AD/CVD order or finding and is completed or assembled in the United States with components from foreign countries that are subject to AD/CVD duties are applied. Anticircumvention measures may be adopted with respect to such merchandise if the assembly operation performed in the United States is "minor or insignificant," and if the value of the assembled components is a "significant portion" of the total value of the merchandise.51
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> (b) Completion or Assembly in a Third Country - Merchandise that is of "the same class or kind" as the merchandise that presently under AD/CVD order or finding and is completed or assembled in a third country with components from foreign countries that are subject to AD/CVD duties are applied. Anticircumvention measures may be adopted with respect to such merchandise if the assembly operation performed in the United States is "minor or insignificant," and if the value of the assembled components is a "significant portion" of the total value of the merchandise. 52
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> (c) Minor Alterations - Merchandise that is of "the same class or kind" as the merchandise that is presently under the AD/CVD order or finding and is 'altered in form or appearance in minor respect (including raw agricultural products that have undergone minor processing), whether or not included in the same tariff classification." 53
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> (d) Later-Developed Products - Merchandise developed after the initiation of an investigation. Anticircumvention measures may be adopted based on considerations of whether the later developed

51 19 U.S.C. § 1677j(a).

52 19 U.S.C. § 1677j(b).

53 19 U.S.C. § 1677j(c).

> merchandise has the same 'general physical characteristics" as the merchandise under an AD/CVD order, whether the expectations of the ultimate purchasers of the later-developed merchandise are the same as for the earlier product, whether the ultimate use of the earlier products and later-developed merchandise are the same, whether the later-developed merchandise is sold through the same channels of trade as the earlier product, and whether the later developed merchandise is advertised and displayed in a manner similar to the earlier product. 54

With respect to situations (a) and (b), the anticircumvention statute requires DOC to consider the following factors when determining whether a process is "minor or insignificant":

> (A) the level of investment in the United States or the third country
> (B) the level of research and development in the foreign country
> (C) the nature of the production process in the foreign country
> (D) the extent of production facilities in the foreign country, and
> (E) whether the value of processing performed in the foreign country represents a small proportion of the merchandise imported into the United States. 55

Notably, the above factors are quite similar to those listed in *Wax from Korea* and some of the "totality of circumstances" factors in subsequent AD/CVD investigations prior to *Photovoltaic Cells from China*.

DOC may initiate an anticircumvention investigation' either on its own initiative or upon application by an interested party. 56 As a result of such investigations, DOC may issue an antidumping investigation that includes circumventing merchandise in the existing AD/CVD order. Under the anticircumvention statute,57 except in the "minor alterations" situation, DOC must consult with the U.S. International Trade Commission ("ITC") before including circumventing merchandise in the AD/CVD order, and ITC may advise DOC whether the inclusion is consistent with ITC's prior affirmative injury determination. Even though country of

54 19 U.S.C. § 1677j(d).

55 19 U.S.C. § 1677j(a)&(b).

56 19 C.F.R. §351.225(g)-(j).

57 19 U.S.C. §1677j(e).

origin issues are not explicitly referenced in either the anticircumvention statute or its implementing regulations, inclusion of circumventing merchandise in the scope of the existing AD/CVD order necessarily implies country of origin determinations because an existing AD/CVD order only covers products from designated countries. There is thus one additional dimension to country of origin determinations in anticircumvention investigation – in addition to the issue of consistency with Customs origin determinations, there is a separate issue of consistency with the "substantial transformation" determinations in CBP's own original AD/CVD investigations.

As in AD/CVD investigations and administrative reviews, DOC has not made any effort to conform its circumvention determinations to Customs' substantial transformation determinations. In *Carbon Steel Butt-Weld Fitting from China* (1994),58 DOC determined that carbon steel butt-weld pipe fittings assembled or completed in Thailand with components from China fall under the same "class or kind" of merchandise as pipe fittings from China, which were subject to an existing AD order. The respondent argued that it relied on a CIT decision that the operation constituted "substantial transformation" for customs purposes. DOC rejected this argument, reiterating its position that it was not bound by customs determinations of origin. 59

DOC has been more ambiguous with respect to the relationship between its "class or kind' determinations in anticircumvention investigations and the "substantial transformation" determinations in its original AD investigation. In the 2006 anticircumvention determination in *Frozen Fish Fillets from Vietnam*,60 DOC examined whether processing whole, live fish into frozen fish fillets in Cambodia constituted circumvention of an existing AD order on frozen fish

58 *Carbon Steel Butt-Weld Fitting from the People's Republic of China*, 59 Fed. Reg. 15,155 (Dep't Commerce)(March 31, 1994)(final antidumping duty determination).

59 *Id.* at 15,156.

60 *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 71 Fed. Reg. 38,608(Dep't Commerce)(July 7, 2006)(Anticircumvention/Scope Inquiry)

fillets from Vietnam. One interested party argued that the frozen fish fillet from Cambodia are not of the "same class or kind' as frozen fish from Vietnam and accordingly should not be subject to the AD order, because the processing in Cambodia substantially transformed whole, live fish from Vietnam into a product of Cambodian origin. The interested party cited to a series of customs and CIT decisions suggesting that processing live fish into frozen fish fillet constituted substantial transformation for customs purposes, and argued the Department's own substantial transformation test would reveal that the frozen fish fillets processed in Cambodia was of Cambodian origin, because live fish and frozen fish fillet fall into two different classes or kinds of products and because whole live fish did not fall under the scope of the AD order. 61

DOC rejected the interested party's argument and insisted that an anticircumvention analysis requires a focus on "class or kind" rather than a substantial transformation.62 DOC further stated that the relevant issue was whether the frozen fish fillets from Cambodia was of the same or class with *frozen fish fillets from Vietnam* were of the same class or kind, not whether frozen fish fillet from Cambodia and *live fish from Vietnam* were of the same class or kind. Not surprisingly, DOC found that frozen fish fillets from Vietnam and Cambodia were of the same class or kind and determined to subject frozen fish fillets from Cambodia to the existing AD order. 63 In the same determination, DOC curiously acknowledged that there were "commonalities" between a substantial transformation analysis and an anticircumvention analysis. Given what DOC actually did in that determination, it is difficult to see what these commonalities are – while a substantial transformation analysis in DOC's own practice would require a comparison between the class or kind of the finished product and that of the component material, DOC actually compared the class or kind of the finished product with that of the same

61 *Id.* at 8.

62 *Id.* at 19-20.

63 *Id.*

finished product originating from a different country.

DOC recently appears to have taken the connection between the substantial transformation in original investigations and "class or kind' determinations in anticircumvention investigations more seriously. In the April 12, 2012 preliminary anticircumvention determination on *Glycine from China*,64 DOC determined that the production of certain glycine products in India from raw materials of Chinese origin constituted circumvention. DOC based this determination in significant part on a 2006 scope ruling with respect to the same AD order, where DOC determined that a similar production process in India with Chinese raw materials did not constitute substantial transformation. This argument is clearly in tension with *Frozen Fish from Vietnam*, according to which the a circumvention analysis should involve an analysis of whether the allegedly circumventing product falls under the same class or kind of the product under the existing order, not whether the circumventing product underwent a substantial transformation. It is unclear whether this determination signals that DOC would reconcile its "class or kind" determinations in anticircumvention cases with its substantial transformation analysis in other AD proceedings.

III. LEGAL PROBLEMS WITH THE DEPARTMENT OF COMMERCE'S APPROACH TO COUNTRY OF ORIGIN

As explained below, while DOC's approach in making country of origin determinations may have started to make a turn for the better, its historical approach is not only questionable under both U.S. law and WTO rules, but also has undesirable consequences from a policy perspective. Two characteristics of DOC's approach are particularly troublesome – (1) its deviation from Customs' origin determinations; and (2) its refusal to apply a "substantial transformation' analysis in anticircumvention investigations. These two characteristics of

64 *Glycine from the People's Republic of* China, 77 Fed. Reg. 21,532 (Dep't Commerce)(April 10, 2012)(preliminary affirmative determination of circumvention).

DOC's approach have undermined the reasonable administration of the U.S. and possibly the global AD/CVD regime. Accordingly, DOC should make greater effort to apply the "substantial transformation" analysis in all AD/CVD proceedings (including anticircumvention investigations) in a way that is consistent with Customs' origin determinations.

A. Inconsistency Between DOC's and Customs' Origin Determinations

Despite changes in DOC's "substantial transformation" factors over the years and the unclear status of the "substantial transformation" analysis in anticircumvention investigations, one thing is remarkably constant in DOC's country of origin determinations – DOC's insistence that it is not bound by Customs' country of origin determinations because of concerns about potential circumvention of the AD/CVD order. DOC's position has resulted in two sets of 'substantial transformation" tests respectively administered by DOC and U.S. Customs, making it possible that a product can originate from one country for AD/CVD purposes, and another for tariff purposes. As shown below, this lack of uniformity between the DOC and Customs origin determinations not only has little support in U.S. jurisprudence, but also directly contradicts WTO rules.

Despite DOC's confident claims that its disregard of Customs' origin determinations is perfectly legitimate, the support for this position under the U.S. jurisprudence is in fact rather limited. While the CIT in *Du Pont* approved DOC's use of the "substantial transformation' test in making country of origin determinations, it did not address whether DOC may apply the test in a way that contradicts U.S. Customs' origin determinations. DOC has in fact relied on two other CIT decisions in the early 1980s to justify its deviation from CBP's origin determinations. In the 1980 *Royal Business Machines v. United States*, 65 DOC and Customs disagreed on whether a certain typewriter was included in the scope of an AD order on portable electric

65 *Royal Business Machines Inc. v. United States*, 507 F. Supp. 1007, 1014 (Ct. Int'l Trade 1980).

typewriters from Japan, which was defined by reference to the then-applicable tariff classification numbers. The CIT distinguished between "the authority of the Customs Service to classify according to tariff classifications" from "the power of the agencies administering the antidumping law to determine the class or kind of merchandise," and held that DOC's "determinations under the antidumping law may properly result in the creation of classes which do not correspond to classifications found in the tariff schedules." 66 Similarly, in the 1983 *Diversified Products Co. v. United States*, 67 the CIT confirmed that DOC may include a particular type of speedometer in an AD investigation on all bicycle speedometers when Customs classified such speedometers to be non-bicycle speedometers. 68 Yet *Royal Business Machines* and *Diversified Products* merely affirmed that DOC may determine the scope of an AD investigation independently from Customs' *tariff classification determinations*. As such, they do not appear to give DOC expressed license to deviate from Customs' *country of origin* determinations.

If DOC's disregard of Customs' origin determinations is only questionable under U.S. law, it is clearly inconsistent with WTO Rules. Article 2(e) of the WTO Agreement on Rules of Origin ("WTO Origin Agreement") provides that member countries must ensure that:

> their rules of origin are administered in a consistent, uniform, impartial and reasonable manner. 69

Moreover, Article 1(a) of the Agreement expressly states that the "the rules of origin" subject to the Agreement shall include:

> all rules of origin used in non-preferential commercial policy instruments, such as in the application of: most-favored-nation treatment under Articles I, II, III, XI and XIII of GATT 1994; anti-

66 *Id.* at 1014.

67 *Diversified Product Co. v. United States*, 572 F. Supp. 883, 889 (Ct. Int'l Trade 1983).

68 *Id.* at 889.

69 Agreement on Rules of Origin of the World Trade Organization (20 September 1986).

> *dumping and countervailing duties under Article VI of GATT 1994*; safeguard measures under Article XIX of GATT 1994; origin marking requirements under Article IX of GATT 1994; and any discriminatory quantitative restrictions or tariff quotas. They shall also include rules of origin used for government procurement and trade statistics. 70

Note 1 to Article 1(a) further explains:

> It is understood that this provision is without prejudice to those determinations made for purposes of defining "domestic industry" or "like products of domestic industry" or similar terms wherever they apply.71

Since DOC's "country of origin" determinations are made in the context of AD/CVD administration and are not for the purposes of defining 'domestic industry" or "domestic like product," it is subject to the uniformity and consistency requirements under Article 2(e). DOC's repeated deviations from Customs' origin determinations clearly does not meet these requirements. Moreover, to the extent that DOC's deviations from Custom's origin determinations have subjected certain merchandise to adverse treatments under both the tariff and the AD regimes – such as in *Steel Round Wire from Canada*, where the product was simultaneously subject to AD duties as a Canadian product and excluded from preferential NAFTA treatment as a non-Canadian product – DOC's country of origin determinations arguably are not even "reasonable" under Article 2(e) of the WTO Origin Agreement.

B. Inconsistency Between DOC's Origin Determinations in AD/CVD Investigations and Anticircumvention Investigations

As explained in Section II.2, even though DOC's determinations to include certain "circumventing" merchandise in anticircumvention proceedings necessarily involve a country of origin determination, DOC has refused to apply the 'substantial transformation" test in anticircumvention investigations. This approach may result in the extension of and AD/CVD

70 *Id.* at art. 1(a).

71 *Id.*

order on an import activity that was not subject to the AD/CVD investigation. As such, DOC's refusal to apply the "substantial transformation" test would be inconsistent with both U.S. AD/CVD law and Article VI of the General Agreement on Tariff and Trade ("GATT").

Specifically, the U.S. AD/CVD statute states that the administering authority may impose AD duty on "a class or kind of foreign merchandise" if ITC determines that the domestic industry is materially injured or threatened with material injury "by reasons imports of *that merchandise*."72 Likewise, GATT Article VI(6)(a) provides that "no contracting party shall levy any anti-dumping . . . duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization . . . is such as to cause or threaten material injury."73 Accordingly, an AD or CVD order may be imposed on a product only if the product is found by DOC to have been dumped into the United States and by ITC to have caused injury to the domestic industry.

Therefore, if an allegedly circumventing merchandise from the subject country was in fact substantially transformed in a third country, or if the allegedly circumventing good from a third country did not actually undergo a substantial transformation in the subject country, including such good in an existing AD/CVD order merely because it falls under the same "class or kind" of goods under the AD/CVD order arguably would be inconsistent with both the U.S. AD/CVD statute and GATT Article VI. In fact, similar concerns appear to have been raised in a 1997 WTO panel request submitted by South Korea.74 The panel request concerned the initiation of a U.S. anticircumvention investigation against South Korean components assembled

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72 19 U.S.C. §§ 1671;1673 (emphasis added).

73 General Agreement on Tariffs and Trade 1994 (15 April 1994), art. VI(a).

74 *United States - Imposition of Anti-Dumping Duties on Imports of Color Television Receivers from Korea: Request for the Establishment of a Panel by Korea*, WT/DS89/7, No. 76-4923 (7 November 1997); *see also* Lucia Ostoni, *Anticircumvention in the EU and the US: Is There A Future for Multilateral Provisions Under the WTO?*, 10 FORDHAM J. CORP. & FINANCIAL LAW 407, 430-31 (2005).

into television sets in Mexico and Thailand. In the panel request, South Korea suggested that the anticircumvention proceeding would be inconsistent with both GATT Article VI and the WTO Antidumping Agreement, because it may extend the AD order on television sets from South Korea to television sets assembled in Mexico and Thailand without findings of dumping a resulting injury ever having been made.[75] Unfortunately, it is impossible to know how the WTO panel would have addressed this important issue raised by South Korea because the panel was never established – after South Korea submitted its panel request, the United States revoked the AD order at issue, and South Korea withdrew the request for the establishment of a panel.[76]

To be sure, there are arguments that DOC's refusal to apply the "substantial transformation" test would not lead to the inclusion of a product under an existing AD/CVD order without findings of dumping/countervailable subsidy and resulting injury. Two strong arguments are as follows. First, the anticircumvention statute provides that DOC should consider factors such as the extent of value added and the complexity of the processing when making circumvention decisions.[77] These factors are also considered by both DOC and Customs when applying the "substantial transformation" test. Second, the anticircumvention statute requires DOC to consult with ITC on potential injury-related issues regarding the proposed inclusion of additional articles in the AD order (except in the "minor alterations" situation).[78] However, neither of the above arguments convincingly establishes that DOC's current approach poses no risk of subjecting a product to an existing AD/CVD order without requisite findings of dumping and injury. With respect to the first argument, DOC's determination to treat frozen fish fillets from Cambodia as a circumventing good in *Fish Fillets*

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[75] *Id.*

[76] Ostoni, *supra* note 74, at 431.

[77] 19 U.S.C. §1677j(a)-(c).

[78] 19 U.S. C. §1677j(e).

from Vietnam demonstrates that the danger does exist – there is no evidence that DOC examined the dumping of frozen fish fillets from *Cambodia* in its original AD investigation on frozen fish fillets from *Vietnam*, and frozen fish fillets and whole live fish (the component material of frozen fish fillets from Cambodia) were not even included in the scope of the original investigation. With respect to the second argument, the consultations with the ITC do not appear to be an adequate safeguard against injury-related problems. Based on our research of past cases, while DOC has routinely notified ITC of its proposed inclusion of circumventing merchandise in the existing order, there was no evidence that ITC ever gave DOC any advice regarding injury issues. In fact, the few DOC documents that discuss the results of ITC notifications all stated that ITC found such advice to be "unnecessary."79

IV. DANGERS OF USING ORIGIN DETERMINATIONS TO ADDRESS ANTICIRCUMVENTION CONCERNS

Now that we have seen the legal problems with DOC's approach to country of origin, it is appropriate to take a closer look at the policy foundation of DOC's approach. DOC has been comfortable with routinely relying on circumvention concerns to justify its approach in making country of origin determination. But is this rationale is really as strong as DOC believes?

As an initial matter, anticircumvention measures are not expressly authorized under the WTO Antidumping Agreement or any other WTO agreement. Circumvention was discussed during the Uruguay Round and referenced in one of the last versions of GATT 1994, but the negotiating parties ultimately were not able to reach any consensus regarding circumvention and

79 *See, e.g. Circumvention and Scope Inquiries on the Antidumping Order on Certain Frozen Fish Fillets from the Socialist Republic of Vietnam; Partial Affirmative Final Determination of Circumvention of the Antidumping Duty Order, Partial Final Termination of Circumvention Inquiry and Final Rescission of Scope Inquiry,* 71 Fed. Reg. 38,608 (Dep't Commerce)(July 7, 2006*); Certain Tissue Paper Products from the People's Republic of China,* 76 Fed. Reg. 47,551 (Dep't Commerce)(August 5, 2011)(affirmative final determination of circumvention of the antidumping order).

deleted all references to circumvention from final agreements.80 As such, anticircumvention measures are only allowed to the extent that they do not contradict existing WTO agreements.81 Accordingly, DOC cannot justify its deviation from GATT Article VI and the WTO Origin Agreement on anticircumvention grounds.

A more fundamental question is whether it is at all proper to use the country of origin determinations to address anticircumvention concerns. The WTO Origin Agreement specifically warns against using rules of origin to advance trade objectives. Article 2(b) of the Agreement requires WTO members to ensure that:

> Notwithstanding the measure or instrument of commercial policy to which they are linked, their rules of origin are not used as instruments to pursue trade objects directly or indirectly. 82

By this logic, even if the trade policy of preventing circumvention of AD orders is itself legitimate, rules of origin are not the proper means to advance this policy. In fact, the utility of using rules of origin to prevent circumvention is questionable. While DOC has taken for granted the need to apply a unique rule of origin to prevent circumvention, it has not addressed two crucial assumptions underlying this position.

The first question is whether the "substantial transformation" determinations used by U.S. Customs are really vulnerable to circumvention? If not, there would be little need for DOC to apply the test differently. Such application would be redundant. There also appears to be a solid argument that Customs' application of the "substantial transformation" test would not provide incentives for circumvention activities, as it already accounts for factors such as complexity of processing in the "character and use" analysis. Moreover, the DOC approach may

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80 *See* WTO Ministerial Decision on Anticircumvention, *available at* https://www.wto.org/english/docs_e/legal_e/39-dadp1_e.htm; see also Ostoni, supra note _, at 413-14.

81 *See id.* at 427-29.

82 Agreement on Rules of Origin of the World Trade Organization (20 September 1986), art. 2(b).

not address circumvention concerns better than the Customs approach even if the former supposedly incorporates the anticircumvention factors. As explained earlier, DOC's origin determinations usually involve the following two scenarios: (1) a product produced in a subject country with component materials from a third-country should be treated as a product of the subject country, and (2) a product produced in a third-country using component materials from the subject country. As demonstrated by *Photovoltaic Cells from China*, these two scenarios pull the origin determinations in two different directions as far as circumvention is concerned. Any anticircumvention factors designed to deal with scenario (1) type of circumvention will make scenario (2) type of circumvention more likely. It is thus unclear whether adding "anticircumvention" factors on top of the factors already considered by Customs would really address anticircumvention concerns more adequately. Of course, DOC could manipulate the anticircumvention analysis in origin determinations to maximize the scope of the AD/CVD measure. But that would be patently unreasonable because the same production process that transforms component materials into finished products could be either substantial or not substantial depending on whether it takes place in the subject country or the third country.

The second and related question, which is more important, is whether origin determinations are really a good place to address circumvention concerns in light of their limitations. It appears that the better means to address these concerns are through the analysis of the factors listed in the anticircumvention investigations under the U.S. anticircumvention statute, which were specifically designed by the legislators to deal with circumvention. An even better means to address circumvention concerns is through closer cooperation between DOC and Customs in administering AD orders, such as requiring proper export and import documentation as explained by DOC in *Photovoltaic Cells from China*. In fact, DOC appears to increasingly recognize the dubious assumptions underlying its historical approach to origin determinations

and has attempted to steer its country of origin determinations away from circumvention discussions, as evidenced by the origin analysis in *Photovoltaic Cells from China*. This is certainly a welcome development.

While the benefit of using rules of origin to prevent circumvention is limited, the problem associated with this practice from a policy perspective is substantial for several reasons. First, the inconsistency between DOC and Customs has consistently upset the reasonable expectations of importers and exporters who regularly dealt with Customs compliance issues and relied on Customs' directions and rulings. Particularly troubling are cases such as *Steel Round Wire from Canada*, where traders got the worse end of the deal under both the tariff and AD regimes. Second, DOC's refusal to apply the 'substantial transformation" test in anticircumvention investigations raises due process concerns regarding producers and traders whose products were not investigated in the original AD/CVD investigation but later included in the AD/CVD order. These producers and traders are effectively deprived an opportunity to present their position regarding dumping and injury before both DOC and ITC.

More broadly speaking, DOC's use of origin determinations to advance anticircumvention goals sets a dangerous precedent for global AD/CVD administration under the WTO system. Specifically, DOC's practice may open the door for using origin determinations and the anticircumvention rationale as a shortcut to avoid the dumping and injury requirements established under the WTO Antidumping Agreement. This danger is particularly great as major global trade players such as China and India have started to step up their anticircumvention practices following the footsteps of the United States and the European Union. In early 2012, the Ministry of Finance of India issued Notice No. 6, which established for the first time procedures for taking measures to prevent circumvention of AD orders.83 The following language of the

83 Government of India, Ministry of Finance, Notice No. 6 (January 19, 2012), *available at*

notice strongly suggests that an existing AD order may be extended to merchandise originating in a country that has not been subject to the original AD investigation:

> Where an article subject to antidumping duty is imported into India through exporters or producers or *country not subject to antidumping duty*, such exports shall be considered to circumvent the antidumping duty in force if the exporters or producers notified for the levy of anti-dumping duty change their trade practice, pattern of trade or channels of sales of the article in order to have their products exported to India through exporters or producers or country not subject to antidumping duty.84

Notice No. 6 ominously contains no requirement that the circumventing good must originate from a country that was subject to the original AD order.

Perhaps China, which is already the second largest importer-country in the world,85 is the place where the abuse of origin determinations for anticircumvention purposes will have a greater impact. While China does not have any detailed regulation governing circumvention of AD order, Article 55 of the Antidumping Regulations of the People's Republic of China gives its Ministry of Commerce ("MOFCOM") broad authority to "take appropriate measures to prevent circumvention of antidumping measures."86 In recent years, a few Chinese scholars have urged the ministry to follow the United States' suit in using anticircumvention measures to "supplement" AD orders.87 MOFCOM may have recently decided to follow such advice and, in

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http://www.cbec.gov.in/customs/cs-act/notifications/notfns-2012/cs-nt2012/csnt06-2012.htm.

84 *Id.* (emphasis added).

85 *See* International Monetary Fund World Economic Outlook Database, available at http://www.imf.org/external/pubs/ft/weo/2012/02/weodata/weorept.aspx?pr.x=42&pr.y=14&sy=2009&ey=2012&scsm=1&ssd=1&sort=country&ds=.&br=1&c=924&s=NGDPD%2CNGDPDPC%2CPPPGDP%2CPPPPC%2CLP&grp=0&a= (last checked November 3, 2012).

86 Antidumping Regulations of the People's Republic of China, promulgated November 26, 2001, amended March 31, 2004, available in Chinese at http://www.gov.cn/gongbao/content/2004/content_62747.htm.

87 *See, e.g.* Xiao Hai, Learning from the European Union and the United States to Improve China's Anticircumvention Laws, Journal of East China Jiaotong University (2005 Volume 22, No.6), *available at* http://course.lixin.edu.cn/course_center/files_upload/4b974850-3244-47af-8841-ec5a38af8c37/content/3c23373c-74c1-4a06-910e-15270ee9814f/COLUMN_276/default.files/file.pdf (in Chinese).

fact, have taken the U.S. approach one step further. In the October 12, 2012 *Final Sunset Review Determination on Spandex from Japan, South Korea, Singapore, Taiwan, and the United States*, MOFCOM decided to extend the AD order on all spandex from Singapore for another five years while acknowledging the abundance of factual support for revocation of the AD order.[88] MOFCOM based its decision exclusively on the ground that the only Singaporean producer of spandex had a joint venture with a Japanese producer in Japan and thus may circumvent the AD order on spandex from Japan by trans-shipping Japanese-origin spandex through Singapore.[89] While maintaining an AD order of *Singaporean-originating* spandex because of concerns about *Japanese-originating* spandex is patently unreasonable, MOFCOM's approach appears to be a natural extension of the U.S. approach of using a combination of origin determinations and the anticircumvention rationale to extend the reach of AD orders.

Accordingly, even aside from legal considerations, DOC should consider conforming its origin determinations in AD/CVD investigations, administrative reviews, and anticircumvention investigations to those made by U.S. Customs for the policy reasons of maintaining the integrity of the U.S. and global AD/CVD regime. DOC's approach in *Photovoltaic Cells from China* is a promising start.

V. CONCLUSION

This article has demonstrated that DOC's approach to country of origin in the AD/CVD context has been questionable from both a legal and a policy perspective. To be sure, DOC's approach to country of origin has not been static; in fact, as shown by this article, it underwent at least three discernible phases in the past 25 years. However, these various historical approaches are united by one common thread – their distrust and disregard of Customs' origin

88 Notice No. 62 of MOFCOM (October 12 2012), available in Chinese at http://www.mofcom.gov.cn/aarticle/b/e/201210/20121008379920.html.

89 *Id.*

determinations. This attitude towards Customs origin determinations is not only ironic from a historical perspective (DOC borrowed the very concept of "substantial transformation" from Customs' origin analysis), but has also fundamentally undermined reasonable AD/CVD administration by upsetting the reasonable expectations of traders and producers and depriving them of important due process rights. Moreover, circumvention concerns do not justify DOC's deviation from Customs origin determinations, both because the origin analysis is not best place to effectively address circumvention concerns and because anticircumvention measures should not be used as a short-cut for extending the reach of AD/CVD orders without findings of dumping and injury.

As evidenced by recent actions by other major trade players such as India and China, DOC's approach to country to origin has set a dangerous precedent for using rules of origin to artificially expand the AD/CVD regime beyond what is allowed under the current WTO rules. It is time for DOC to correct this decades-long mistake and conform its approach to country of origin to Customs' in all AD/CVD proceedings. The real country of origin must now stand up.

*This is a draft of an article that is forthcoming in 21 Tul. J. Int'l & Comp. L. (2013). Reprinted with the permission of the Tulane Journal of International and Comparative Law.