An Inside Scoop on Scopes:
An Overview of the Laws and Policies Governing
The Scopes of Trade Remedy Orders

by Scott D. McBride

I. Introduction

II. Defining the Scope

A. Commerce is Owed Significant Deference in Defining the Scope

B. The Physical Description of the Class or Kind of Merchandise

C. The Country of Origin of the Class or Kind of Merchandise

III. Interpreting the Scope of an AD or CVD Order Through a Scope Ruling

A. The Scope Ruling Regulations

B. The Federal Circuit's Plain Meaning Rule

C. Judicial Deference Over (k)(1) and (k)(2) Determinations

D. Commerce's Mixed Media Analysis

E. Scope Exclusion "Tests" Can Be Difficult to Interpret and Apply

IV. If Merchandise is Found to Circumvent an AD or CVD Order, It Can Be Determined to be Within the Scope of the Order

A. Merchandise Completed or Assembled in the United States

B. Merchandise Completed or Assembled in Other Foreign Countries

C. Minor Alterations of Merchandise

D. Later-Developed Merchandise

E. Country-Wide Application

V. Conclusion

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By Scott D. McBride[1]

I. Introduction

There is nothing more fundamental to the antidumping (AD) and countervailing duty (CVD) laws than the AD and CVD Orders themselves. Following an AD and/or CVD investigation, in which the United States Department of Commerce (Commerce) has found imported merchandise to be sold for less than fair value and/or unfairly subsidized,[2] and the International Trade Commission (ITC) has determined that an industry is materially injured or threatened with material injury in the United States by sales of that merchandise, Commerce is directed by statute to issue an AD and/or CVD Order.[3] The "general rule" with respect to an AD determination is that if a "***class or kind of foreign merchandise*** is being, or is likely to be, sold in the United States at less than its fair value" and is found to be causing (or threatening) material injury, "then there shall be imposed upon ***such merchandise*** an antidumping duty....."[4] Likewise, in the context of an affirmative CVD determination finding the existence of a "countervailable subsidy with respect to the manufacture, production, or export of ***a class or kind of merchandise*** imported, or sold (or likely to be sold) for importation, into the United

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[2] Final Determinations, 19 U.S.C. § 1673d.
[3] 19 U.S.C. § 1673d(c)(2); Final Determinations, 19 U.S.C. § 1671d(c)(2).
[4] Imposition of antidumping duties, 19 U.S.C. § 1673 (emphasis added).

States," the statute says "there shall be imposed upon ***such merchandise*** a countervailing duty . . . ."[5]

Accordingly, perhaps the most important factor in drafting an AD or CVD Order is making certain that the description of the "class or kind of foreign merchandise" covered by that Order is sufficiently specific – covering the merchandise which was found to be "dumped" in the United States market or unfairly subsidized, as well as causing material injury to a domestic industry. It is important that the Order covers the breadth of products that were intended to be covered, but is not so broad that it covers products unrelated to the merchandise subject to the underlying investigation. In the lexicon of trade remedies, we call that description of merchandise subject to an AD or CVD Order the "scope" of the Order.

There are in fact three different, well-established proceedings in the AD and CVD laws which pertain to the scope of an Order. The first occurs during an AD or CVD investigation and is the procedure in which Commerce defines the scope, with some possible modifications implemented as a result of the ITC's final injury determination. The second arises after the AD or CVD Order has been issued and an interested party wants Commerce to determine if a product is or products are covered by the Order. The third takes center stage when a product appears to be outside the scope of an Order, but a domestic industry alleges that a respondent, or respondents, is circumventing the order – thereby requiring Commerce to consider whether the product is truly outside the scope, and if so, to determine if certain factors exist to nonetheless draw the product under the umbrella of the Order through a circumvention determination. This

[5] Countervailing duties imposed, 19 U.S.C. § 1671 (emphasis added).

paper will attempt to shed some light on each of these areas of law[6] and the procedures unique to each,[7] while highlighting some legal issues which have been addressed in the past by the Court of International Trade (CIT) and the Court of Appeals for the Federal Circuit (Federal Circuit).

II. Defining the Scope

A. Commerce is Owed Significant Deference in Defining the Scope

In every investigation, the scope of the merchandise being investigated is initially set forth in the Petition filed by the allegedly aggrieved domestic industry (petitioners) requesting the initiation of an investigation. In general, as the CIT has recognized, Commerce owes a great deal of deference to the petitioners in defining the scope because they are experts in their industries and, as the allegedly aggrieved parties, have personal knowledge of the imported products causing harm.[8]

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[6] There are certain outstanding legal and policy issues not addressed in this article, but it is the author's hope that one can use this paper as a gateway to understanding some of the more fundamental issues and concepts covering scope matters before Commerce.

[7] There is a relatively new fourth area of law which pertains to Commerce's scopes, not covered by this paper. On February 24, 2016, the Trade Facilitation and Trade Enforcement Act of 2015 was signed into law, which contains Title IV – Prevention of Evasion of Antidumping and Countervailing Duty Orders (short title "Enforce and Protect Act of 2015," or "EAPA"). Pub. L. No. 114-125, 130 Stat. 122, 155 (2016). The EAPA added section 19 U.S.C. §1517, which provides a means by which an interested party can request that Customs and Border Protection (CBP) investigate potential evasion of AD and CVD Orders, and if CBP is unable to determine whether the merchandise at issue is "covered merchandise," pursuant to 19 U.S.C. §1517(b)(4)(a), it refers the matter to Commerce to make a covered merchandise determination. Commerce has not yet issued regulations pursuant to this new area of law, and has received a limited number of EAPA referrals to date. Accordingly, there is little to reference or analyze with respect to this area of law, unlike the other three areas discussed in this paper, as it is just in its nascent stage.

[8] "Under the statutory scheme, Commerce owes deference to the intent of the proposed scope of an antidumping investigation as expressed in an antidumping petition. *See* 19 U.S.C. § 1673; *see also* 19 U.S.C. § 1673a(b); *see also NTN Bearing Corp. of Am. v. United States,* 14 CIT 623, 626, 747 F.Supp. 726, 730 (1990) ('If the petition is deemed sufficient, the ITA is statutorily obliged to insure that the proceedings are maintained in a form which corresponds to the petitioner's clearly evinced intent and purpose.' (citing *Mitsubishi Elec. Corp. v. United States,* 12 CIT 1025, 700 F. Supp. 538 (1988), *aff'd,* 898 F.2d 1577, 1579 (Fed. Cir. 1990)))." *Ad Hoc Shrimp Trade Action Committee v. United States*, 637 F. Supp. 2d 1166, 1174, n. 2 (Ct. Int'l Trade 2009) (citing *Mitsubishi I* and *Mitsubishi II*).

However, Commerce may modify, amend, or otherwise change the scope of merchandise being investigated for various reasons.[9] Ultimately, the Federal Circuit has held that Commerce is tasked by statute with the "responsibility to determine the proper scope" of an "investigation and of the antidumping order."[10] As the Federal Circuit has explained, an "antidumping investigation is typically initiated by a petition filed by a domestic industry requesting that Commerce conduct an investigation into possible dumping" and the "petition initially determines the scope of the investigation," but Commerce "has the inherent power to establish the parameters of the investigation so that it would not be tied to an initial scope definition that . . . may not make sense in light of the information available to {Commerce}or subsequently obtained in the investigation."[11] This is because the "purpose of the petition is to propose an investigation," while "{a} purpose of the investigation is to determine what merchandise should be included in the final order."[12]

Thus, the Federal Circuit has acknowledged that Commerce is granted a "large" amount of discretion to determine "the applicable scope" of an "order that will be effective to remedy the dumping that the Administration has found."[13] It is not uncommon that Commerce might need to adjust the scope of a petition to address concerns it has with respect to the ability of Customs and Border Protection (CBP), or Commerce itself, to administer or enforce a scope. Perhaps

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[9]"Commerce retains authority to define the scope of the investigation and may depart from the scope as proposed by a petition if it determines that petition to be 'overly broad, or insufficiently specific to allow proper investigation, or in any other way defective.' *NTN Bearing Corp.,* 14 CIT at 627, 747 F. Supp. at 731 (citing *Torrington Co. v. United States,* 14 CIT 507, 745 F. Supp. 718 (1990), *aff'd,* 938 F.2d 1276, 1278 (Fed. Cir. 1991))." *Id.* (*citing Torrington I* and *Torrington II*).

[10] *See Mitsubishi II*, 898 F.2d at 1582.

[11] *See Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1089 (Fed. Cir. 2002).

[12] *See Duferco*, 296 F.3d at 1096-1097 (citing to sections 19 U.S.C. §§1671a(b)(1), 1671d(a)(1), 1673a(b)(1), and 1673d(a)(1)); *see also Tak Fat Trading Company v. United States*, 396 F.3d 1378, 1382-83 (Fed. Cir. 2005) (*Tak Fat*); *see also Walgreen Co. v. United States*, 620 F.3d 1350, 1355-56 (Fed. Cir. 2010) (citing to *Duferco* for the concept that "it is the responsibility of the agency, not those who initiated the proceedings, to determine the scope of the final orders") (*Walgreen*).

[13] *See Mitsubishi II*, 898 F.2d at 1583.

some of the proposed scope language might be too broad, or too narrow, or too confusing to administer at the border. For example, a petitioner in good faith might propose an exclusion for a "completed product" that in practice actually enters into the United States not in one shipment or entry, but in pieces over the span of several months. As CBP would only apply the exculsion to a "completed" product, the exclusion would therefore be worthless for all intents and purposes and likely cause confusion if importers nonetheless request exclusion upon importation of the individual parts. In another scenario, some language in a proposed scope might unintentionally cover a steel item already covered by other AD and CVD orders, forcing Commerce to modify the language to be assured that no single product enters the United States covered simultaneously (in full) by two different AD or two CVD orders.[14]

Commerce might also have to remove certain products from the scope because the ITC has concluded a subset of products in the scope do not cause injury to the domestic industry. After all, an AD or CVD Order reflects "merchandise which is both in a class of merchandise being sold at (less than fair value)" or being unfairly subsidized "*and* which is causing material injury to the domestic industry."[15] Thus, under that scenario, the scope of the Order would naturally be smaller than the scope of the petition.

Finally, Commerce might have to tweak the language of the scope to prevent the possibility of future evasion. As the CIT held in *Mitsubishi I*, and affirmed in *Mitsubishi II*, the Department "has been vested with authority to administer the antidumping laws in accordance

[14] Such a situation might not be a problem for a product composed of different parts which are separately covered by different Orders, like, for example, a product containing both extruded aluminum (one Order), and certain steel products (other Orders). In that scenario, importers might be able to individually report the different amounts of materials within the bigger product subject to the different Orders for purposes of assessing duties. Such an analysis would depend largely on Commerce's instructions to CBP.

[15] *Badger-Powhatan v. United States*, 633 F. Supp. 1364, 1370 (Ct. Int'l Trade 1986).

with the legislative intent. To this end, {Commerce} has a certain amount of discretion to expand the language of a petition . . . with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty laws."[16] Most recently, in *Canadian Solar, Inc. v. United States*, the Federal Circuit affirmed that Commerce could consider evasion concerns when drafting the scope of an Order, holding that the "Tariff Act does not require Commerce to define the 'class or kind of [foreign] merchandise' in any particular manner. Because the Tariff Act is silent in this regard, Commerce has the authority to fill that gap and define the scope of an order consistent with the countervailing duty and antidumping duty laws."[17]

B. The Physical Description of the Class or Kind of Merchandise

In defining the scope in every single investigation, Commerce must determine the physical description of the imported products alleged to be the cause of injury to a domestic industry. As the CIT held in *Sunpower*, the "statute and the case law instruct that the term 'class or kind of merchandise'refers to the products in a particular proceeding." [18] Section 19 U.S.C. §1677(25) defines "subject merchandise" as "the *class or kind* of merchandise that is within *the scope of an investigation*, a suspension agreement, *an order* under this subtitle or section 1303 of this title, *or* a finding under the Antidumping Act, 1921." (emphasis added). To be clear, the

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[16] *See Mitsubishi Elec. Corp. v. United States*, 700 F. Supp. 538, 555 (1988); *see also id.* at 556 (explaining that Commerce "has the authority to define and/or clarify what constitutes the subject merchandise to be investigated as set forth in the petition . . . taking into consideration such factors as . . . the known tactics of foreign industries attempting to avoid a countervailing duty order"), affirmed by *Mitsubishi II*, 898 F.2d at 1582 and 1584. Likewise, in *Torrington I*, the CIT upheld Commerce's determination to "narrow the scope" by finding the existence of five classes or kinds of merchandise, although the petition had alleged the existence of a single, larger class or kind of merchandise. *Torrington* I, 745 F. Supp. at 721, *aff'd Torrington II*, 938 F.2d at 1276. The Federal Circuit affirmed the CIT's judgment, noting additionally that it would not "disturb" Commerce's interpretation of the "involved sections of the antidumping duty laws" unless Commerce's interpretation was "unreasonable." *Torrington II*, 938 F.2d at 1278 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. at 837, 843-44 (1984)).

[17] *Canadian Solar, Inc. v. United States*, 918 F.3d 909, 917 (Fed. Cir. 2019) (*Canadian Solar*).

[18] *Sunpower Corporation v. United States*, 253 F. Supp. 3d 1275, 1286 (Ct. Int'l Trade. 2017) (*Sunpowe*r), *aff'd* in *Canadian Solar*.

merchandise within the scope of an investigation meets the description of the merchandise initially set forth in the petition, and it may be called "subject merchandise" throughout an investigation, but that description might change once the Order is issued, creating a new (and final) description of "subject merchandise."

Therefore, as Commerce explained in the *Sunpower* litigation, and the Court affirmed, "class or kind of merchandise" does not refer to a "general type of product," somehow separate and removed from the language of the scope of an investigation or Order.[19] It is instead a reference to the specific products described in the scope allegedly causing harm in a specific investigation. Analogizing a scope to a baked treat everyone enjoys, imagine the general term "blue widgets from Taiwan" represented by a round cookie. The scope might include, however, only dark blue widgets five inches or bigger and light blue widgets two inches or smaller, while excluding widgets which are combination of light and dark blue. Suddenly, that "blue widgets" representative cookie is no longer round, but has multiple bite marks and cuts throughout, and the result might look more like an hourglass. This could be true even if in the past there was a revoked Order covering blue widgets from Taiwan that looked more like a fully round cookie, or a parallel Order on blue widgets from another country that takes on an entirely different shape. All these scopes might be generally described as covering "blue widgets," but the class or kind of merchandise being investigated, and upon which an Order might be placed, can be narrower or broader than past or other current AD or CVD investigations covering blue widgets. Commerce is under no obligation in defining the physical description of the subject merchandise to exclude certain products, or include additional products, just because prior or parallel Orders

[19] *Sunpower*, 253 F. Supp. 3d. at 1287 (quoting Commerce's remand redetermination results in that litigation).

on "blue widgets" did, or did not, include that merchandise because, as the Federal Circuit has held, the class or kind of merchandise is "determined by the order."[20]

In general, an Order provides three explicit elements: (1) physical descriptions of the products covered by the Order; (2) physical descriptions of the products explicitly excluded from coverage by the Order; and (3) references to the Harmonized Tariff Schedule of the United States subheadings that currently cover the described merchandise and are used for identification upon import. For an example, here is the AD Order covering *Kegs from Mexico*.[21]

Scope of the Investigation

> The merchandise covered by this investigation are kegs, vessels, or containers with bodies that are approximately cylindrical in shape, made from stainless steel (*i.e.*, steel containing at least 10.5 percent chromium by weight and less than 1.2 percent carbon by weight, with or without other elements), and that are compatible with a "D Sankey" extractor (refillable stainless steel kegs) with a nominal liquid volume capacity of 10 liters or more, regardless of the type of finish, gauge, thickness, or grade of stainless steel, and whether or not covered by or encased in other materials. Refillable stainless steel kegs may be imported assembled or unassembled, with or without all components (including spears, couplers or taps, necks, collars, and valves), and be filled or unfilled.

"Unassembled" or "unfinished" refillable stainless steel kegs include drawn stainless steel cylinders that have been welded to form the body of the keg and attached to an upper (top) chime and/or lower (bottom) chime. Unassembled refillable stainless steel kegs may or may not be welded to a neck, may or may not have a valve assembly attached, and may be otherwise complete except for testing, certification, and/or marking.

Subject merchandise also includes refillable stainless steel kegs that have been further processed in a third country, including but not limited to, attachment of necks, collars, spears or valves, heat treatment, pickling, passivation, painting, testing, certification or any other processing that would not otherwise remove the merchandise from the scope of the investigation if performed in the country of manufacture of the in-scope refillable stainless steel keg.

Specifically excluded are the following:

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[20] *See Target Corp. v. United States*, 609 F.3d 1352, 1363 (Fed. Cir. 2010) (*Target II*); *Smith Corona Corp. v. United States*, 915 F.2d 683, 685 (Fed. Cir. 1990).

[21] *Refillable Stainless Steel Kegs From Mexico: Antidumping Duty Order*, 84 FR 54591(October 10, 2019).

> (1) vessels or containers that are not approximately cylindrical in nature (*e.g.*, box, "hopper" or "cone" shaped vessels);
> (2) stainless steel kegs, vessels, or containers that have either a "ball lock" valve system or a "pin lock" valve system (commonly known as "Cornelius," "corny" or "ball lock" kegs);
> (3) necks, spears, couplers or taps, collars, and valves that are not imported with the subject merchandise; and
> (4) stainless steel kegs that are filled with beer, wine, or other liquid and that are designated by the Commissioner of Customs as Instruments of International Traffic within the meaning of section 332(a) of the Tariff Act of 1930, as amended.
>
> The merchandise covered by this investigation are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 7310.10.0010, 7310.10.0050, 7310.29.0025, and 7310.29.0050.
>
> These HTSUS subheadings are provided for convenience and customs purposes; the written description of the scope of this investigation is dispositive.

As one can see from the scope of the *Kegs from Mexico* Order, the scope starts with a general description of covered merchandise, then specifically excludes certain merchandise, and finally refers to the HTSUS subheadings that generally apply to the described merchandise. Notably, the last sentence of the scope of the Order includes language which appears in all AD and CVD Orders; an explicit provision that states that written descriptions of the subject merchandise are dispositive, not the HTSUS subheadings. The primary reason this sentence exists is because CBP is frequently called upon to issue Customs Rulings as to what terms and characteristics appearing in the HTSUS mean, and it is possible that when a descriptor in the HTSUS is the same or similar to the narrative of an AD or CVD Order, CBP might rule in a way on a term or terms that differs from Commerce's interpretation or understanding of those same words.[22] This is not to say that Commerce does not sometimes agree with the CBP interpretation of a word or phrase. In fact, Commerce has even looked to CBP rulings for insight and guidance in making

[22] CBP's NY and HQ Customs Rulings are found at https://rulings.cbp.gov/home.

certain scope rulings in the past, such as in the scope ruling before the Federal Circuit in *Tak Fat*, in which the Court affirmed Commerce's determination to look to CBP rulings for guidance on the meaning of the terms "marinated," "acidified," and "pickled."[23] Nonetheless, HTSUS subheadings and CBP's interpretation of those subheadings, although helpful in assisting the enforcement of AD and CVD Orders, do not trump the actual physical description of the merchandise provided in the scope.

Perhaps the greatest challenge with defining the physical characteristics in a scope is that on one hand, the domestic industry wants the language to be general enough to cover models or types of merchandise similar to products causing them injury and that could easily take the place of current models being dumped or subsidized once an Order is in place (*i.e.*, evasion or circumvention of the Order), but on the other hand Commerce and the ITC require a great deal of specificity in the scope to address the injurious dumping and subsidization alleged in the first place. Furthermore, it is not uncommon for a domestic industry to produce certain models of a product, while importing other models.[24] Obviously, in that scenario, the domestic industry wants the Order to only cover merchandise that is causing injury, not merchandise it is

[23] *See Tak Fat Trading Company v. United States*, 396 F.3d 1378, 1384-86 (Fed. Cir. 2005).

[24] In determining the physical characteristics of the products covered by a scope, one of the factors Commerce must consider is the domestic like product produced and sold by the petitioning domestic industry. Sections 19 U.S.C. §§1673a(c)(1)(ii) and (c)(4)(A) state that Commerce may only initiate an investigation if it determines within twenty days of filing that the "petition has been filed by or on behalf of the domestic industry, which must "account for at least 25 percent of the total production of the domestic like product" and support must "account for more than 50 percent of the production of the domestic like product produced by that portion of the industry." Accordingly, Commerce must make its own "domestic like product" determination separate and apart from the "domestic like product" determination made by the ITC. *See Fujitsu Limited v. United States*, 36 F. Supp. 2d 394, 402 (Ct. Int'l Trade 1999). While Commerce and the ITC must both apply the statutory definition of domestic like product found at 19 U.S.C. §1677(10), "they do so for different purposes and pursuant to a separate and distinct authority. In addition, (Commerce's) determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law." *Ni-Resist Piston Inserts from Argentina and the Republic of Korea: Initiation of Countervailing Duty Investigations*, 74 Fed. Reg. 8054, 8055-8056 (Feb. 23, 2009) (referencing *USEC, Inc. v. United States*, 132 F.Supp. 2d 1, 8 (Ct. Int'l Trade 2001)).

importing. Accordingly, to address these concerns, exclusions play an extremely important role in finding that necessary balance between general and specific language.

Frequently, but not always, the products listed as "excluded" in a scope would have been covered by the preceding scope language, but for the exclusion. By specifically listing models of merchandise not covered by the scope of the investigation or Order, the "class or kind" of merchandise subject to the investigation is expressly diminished – providing clarity to the products covered by the scope, and allowing the domestic industry and Commerce to focus on the imported merchandise allegedly causing harm. It is therefore no surprise that importers and exporters requesting scope rulings after the Order has been issued frequently argue that their merchandise should be determined to fall under one or more exclusions listed in the scope of the Order. Thus, just as it is important that the petitioners and Commerce draft a general scope description that is accurate and clear, so too is it extremely vital that all exclusions in the scope are as clearly articulated as possible. Otherwise, CBP's ability to administer the scope upon importation of merchandise, and Commerce's ability to make a scope ruling upon request following the issuance of the Order, become more of a challenge and quite possibly controversial.

Another challenge which petitioners and Commerce frequently face in defining the scope of an Order is "usage" language. There are many products which are distinguished and described in the trade in accordance with their usage, and reflect the clear intent of the products which the petitioners want to have covered. Nonetheless, Commerce does its best to avoid such language in its scopes. The reasons for that avoidance are best described through examples, such as the current AD Order on Wooden Bedroom Furniture from China.[25] The scope of that Order

[25] *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture From the People's Republic of China*, 70 FR 329 (January 4, 2005).

is extremely detailed and specific, but the fundamental usage term "bedroom" in the scope narrative proved to be a challenge for Commerce when wooden furniture meeting all the physical characteristics of chests of drawers in the scope were sometimes advertised for use in other rooms in the household and sometimes shown as being used in a bedroom.[26] At that point, the question faced by Commerce and the Court on appeal was: What makes furniture used in the bedroom "bedroom furniture" for purposes of the AD Order? Is it the capacity to store clothing, particular design features, or something else?[27] As explained below, the answer to that question was subject to different interpretations by Commerce and the Court based on the evidence on the record.

Unquestionably, however, the most infamous example of exclusion language pertains to an exclusion to Petroleum Wax Candles from China[28] issued in the late 1980s for "certain novelty candles specially designed for use only in connection with the Christmas holiday season" and candles associated with "scenes or symbols" for "religious holidays or special events."[29] That scope exclusion forced Commerce to struggle numerous times over whether, for example, heart and flower shaped candles were included, or excluded, by the Order, as they could be used and shared on Valentine's Day but could *also* be shared and used all year round.[30] Indeed, there are many stories arising out of the enforcement of that particular scope in which Commerce teams had to decide, for example, if a lumpy red candle was more akin to Sesame Street's Elmo, a garden gnome, or Santa Claus. For this reason, Commerce strongly dissuades domestic

[26] *Ethan Allen Operations, Inc. v. United States*, 121 F. Supp. 3d 1342 , 1348-53 (Ct. Int'l Trade 2015) (*Ethan Allen*).
[27] *See Ethan Allen*, 121 F. Supp. 3d at 1348-53.
[28] *Antidumping Duty Order: Petroleum Wax Candles from the People's Republic of China*, 51 Fed. Reg. 30686 (August 28, 1986).
[29] *Russ Berrie & Company, Inc. v. United States*, 23 C.I.T 429, 430 (July 13, 1999).
[30] *See id.* at 441 (affirming Commerce's determination that they were not excluded in that case).

industries from including usage language in scopes, and takes a critical look at such language if it is proposed for inclusion in the scope of a petition during investigations.

C. The Country of Origin of the Class or Kind of Merchandise

In addition to the physical description of the products covered and excluded from the AD or CVD Order, a scope also identifies "the merchandise's country of origin."[31] In most investigations, that is not a significant issue. A blue widget from China made entirely in China is Chinese in origin, and no one would argue otherwise. However, sometimes, a product might, in fact, be manufactured in more than one country -- part might be made in one country and then completed in a second, third, or even fourth country. In that situation, Commerce might have to conduct a country of origin analysis. Frequently, the issue arises in an investigation, but sometimes it does not become a matter for dispute until a scope ruling request has been made, long after the Order has been issued.

The statute is silent on a country of origin analysis, but the Federal Circuit has held that "Commerce's authority to define the class or kind of merchandise within the scope of an order ecompasses the authority to determine the country of origin."[32] Commerce's traditional country of origin test is known as the "substantial transformation" test or analysis.[33] In particular, Commerce generally uses this analysis to determine whether a product's country of origin has changed as a result of processing that occurs in third countries before a product is imported into the United States. Courts have upheld Commerce's substantial transformation analysis,[34] which

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[31] *Canadian Solar, Inc. v. United States*, 918 F.3d 909, 913 (Fed. Cir. 2019).
[32] *Canadian Solar*, 918 F.3d at 917.
[33] *See Bell Supply Company, LLC v. United States*, 888 F.3d 1222, 1228-29 (Fed. Cir. 2018) ("A substantial transformation occurs where, 'as a result of manufacturing or processing steps ... {,} the {product} loses its identity and is transformed into a new product having a new name, character and use.'") (*Bell Supply*) (internal citations omitted).
[34] *See E.I. DuPont de Nemours & Co. v. United States*, 8 F. Supp. 2d 854, 858 (Ct. Int'l Trade 1998) ("The 'substantial transformation' rule provides a yardstick for determining whether the processes performed on

has, in different iterations and based on different fact patterns, looked at factors such as: 1) whether the processed downstream product is a different class or kind of merchandise than the upstream product; 2) the technical, physical, and chemical characteristics of the product and its parts; 3) the intended end-use of the product; 4) the cost of production and value added to the product as a result of further processing in third countries; 5) the nature and sophistication of processing in third countries; 6) the level of investment in third countries; 7) where the essential component of the product (if there is one) is produced; and/or 8) where the essential characteristics of the product are imported

All that being said, Commerce is not required by law to apply its "substantial transformation" test to determine the country of origin for purposes of the scope of an Order, and in 2019 the Federal Circuit affirmed Commerce's determination to use an alternative "country of assembly" (of solar panels) test in *Canadian Solar*.[35] Chinese solar panel companies had earlier shifted the production of their solar cells to other countries, such as Taiwan, to avoid the payment of duties when Commerce had determined that the country of origin for previous AD and CVD Orders was determined by the fabrication of the solar cell under the agency's substantial transformation analysis.[36] In new petitions, the domestic industry had explained that this shift in production had largely undermined the effectiveness of the previous Orders, and after contentious new investigations, Commerce concluded that the application of a different country of origin test was necessary in the resulting new AD and CVD Orders to address

merchandise in a country are of such significance as to require the resulting merchandise to be considered the product of the country in which the transformation occurred").

[35] *Canadian Solar*, 918 F.3d at 917.

[36] *See id.* at 919.

injurious dumping and subsidiziation of solar panels exported to the United States.[37] The Federal Circuit agreed, holding that "evasion concerns constitute a reasoned explanation for departing from Commerce's previous practice."[38]

Thus, in determining the scope of an Order, Commerce must consider not just the physical descriptions of the merchandise at issue, but in some cases also the country of origin of the merchandise,[39] taking into consideration the best methology available to address the alleged injurious dumping and subsidization of certain imported products.

III. Interpreting the Scope of an AD or CVD Order Through a Scope Ruling

Once the AD or CVD Order has been issued, the scope is like hardened concrete, changeable only through a changed circumstances review,[40] and then only by shrinking the amount of products covered by the scope as originally set forth in the Order, and then usually only with the consent of the injured domestic parties. Nonetheless, Commerce frequently is called upon to issue a "scope ruling" to determine if something is or is not covered by the scope of the Order at issue. Section 19 U.S.C. §1516a(a)(2)(B)(vi) provides that the CIT has jurisdiction to review "(a) determination by the administering authority 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." Like other Commerce determinations, the CIT and Federal Circuit are directed by the statute to uphold Commerce's determinations, findings, or conclusions unless they are

[37] *Id.* at 915-920. *See Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China: Antidumping Duty Order; and Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 80 Fed. Reg. 8592 (Feb. 18, 2015).
[38] *Canadian* Solar, 918 F.3d at 919.
[39] It is worth pointing out that Commerce is not bound by the country of origin determinations of other agencies, such as CBP. Sometimes confusion arises out of the fact that CBP might conclude a product has a different country of origin from that determined by Commerce. Each agency's country of origin analysis is based on different factors for different reasons.

[40] *See* Administrative review of determinations, 19 U.S.C. § 1675(b)(1).

"unsupported by substantial evidence on the record, or otherwise not in accordance with the law."[41] Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[42]

Other than those provisions, no other section of the statute directly applies to Commerce's scope rulings. The "class or kind" provisions described in the first section above apply directly only to the process of defining the scope in the underlying investigation, and the circumvention provision, as discussed below, by necessity requires that Commerce initially determine if a product is, or is not, covered by the scope of an Order, but that analysis is conducted only in the context of making a circumvention determination.[43] Accordingly, Commerce's scope ruling proceedings are governed almost entirely by its scope ruling regulations found in section 19 CFR 351.225.

A. The Scope Ruling Regulations

Section 225(a) of the scope regulations provides the processes by which an interested party may make a request for a scope inquiry, section (b) allows for Commerce to self-initiate, and section (c) describes the contents of an application for a scope ruling and deadlines. For purposes of this paper, however, it is section (d) which is particularly relevant because it states that if Commerce can "determine, based solely upon the application and the descriptions of the merchandise referred to in paragraph (k)(1) of this section whether a product is included within the scope of an order" Commerce "will issue a final ruling as to whether the product is included within the order . . . ." Section (k) is arguably the most significant provision within section 225, and (k)(1) in particular lists four sources of information Commerce should consider in making a

[41] Judicial review in countervailing duty and antidumping duty proceedings, 19 U.S.C. § 1516a(b)(1)(B)(i).
[42] *A.L. Patterson, Inc. v. United States*, 585 Fed. Appx. 778, 781–82 (Fed. Cir. 2014) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)).
[43] *See* Prevention of circumvention of antidumping and countervailing duty orders, 19 U.S.C. §1677j.

determination under section (d) – "The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission."

By its terms, one might infer from the text of section 225(d) that any information on the record which cannot be found in the scope application or in one of the (k)(1) sources of information therefore cannot be considered for purposes of a determination under that provision, but such a reading directly conflicts with the requirements of section 19 USC §1516a(b)(1)(B)(i) that Commerce's determinations be based on the "substantial evidence" on the record. This issue arose in the long and drawn out litigation covering "curtain walls," imported in multiple parts in multiple entries over a lengthy period of time to the United States under AD and CVD Orders covering Aluminum Extrusions from China.[44] In its holding, the Court stated that because the record included a "letter, written by Petitioners specifically for this scope proceeding, supporting Commerce's position, and a news article quoting Petitioner's counsel . . ." that were "not (k)(1) materials," "neither of these documents" was "appropriate"[45] for Commerce to consider as part of its analysis. Commerce explained on remand that the referenced "news article" was actually attached to the scope request application, and therefore was appropriate for consideration under section 225(d), and that the Petitioner's letter was not one of those factors, but nonetheless, was a relevant part of the administrative record, and therefore under section 19 USC §1516a(b)(1)(B)(i) Commerce could not just ignore that record evidence in making its determination. In time the CIT upheld Commerce's underlying scope ruling, as further analyzed on remand,[46] and on appeal, in 2019, the Federal Circuit held that

[44] *Shenyang Yuanda v. United States*, 146 F. Supp. 3d 1331, 1351 (Ct. Int'l Trade 2016) (*Yuanda I*).
[45] *Id.*
[46] *Shenyang Yuanda v. United States,* 279 F. Supp. 3d 1209 (Ct. Int'l Trade 2017) (*Yuanda II).*

Commerce's scope ruling was supported by substantial evidence on the record and otherwise in accordance with law.[47] Thus, to be clear, although section 225(d) does allow for Commerce to make a determination based on a smaller administrative record than it would otherwise have before it were it to invite comment and briefing from the parties, it does not permit the agency to outrightly ignore information that is already on the record at the time it makes its scope ruling determination.

The remainder of section 225 provides notice and comment requirements for scope rulings, allows for consolidation of scope inquiries, and directs Commerce to order suspension of liquidation of imports upon entry under various scenarios, (*see* sections 225 (e), (f), (l), (m), (n) and (o)), but for purposes of this paper, section 225(k)(2) is key. Section 225(k)(2) provides that if the (k)(1) factors and the application are "not dispositive," Commerce "will further consider" the following: "(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." These factors are commonly referred to as the *Diversified Products* factors, named after a 1983 CIT case in which the Court affirmed Commerce's use of the first four of those listed criteria.[48] As the regulation provides, Commerce considers these factors only as a last step in analyzing whether or not merchandise is subject to an Order.

B. The Federal Circuit's Plain Meaning Rule

In *Duferco*, the Federal Circuit explained that it "grants significant deference to Commerce's own interpretation of (its) orders,"[49] but stressed that unlike in the procedures

[47] *Shenyang Yuanda v. United States*, 918 F.3d 1355, 1366-1368 (Fed. Cir. 2019) (*Yuanda III*).
[48] *See Diversified Products Corporation v. United States*, 572 F. Supp. 883, 889 (Ct. Int'l Trade 1983).
[49] *See Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1094 (Fed. Cir. 2002) (citing *Ericsson GE Mobile Communications, Inc. v. United States,* 60 F.3d 778, 782 (Fed. Cir. 1995).

defining a scope in an investigation, "Commerce cannot 'interpret' an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms."[50] Indeed, the Federal Circuit has stated in multiple holdings that in making a scope ruling, Commerce must first consider the "plain language of the Orders," calling the language of the scopes "the cornerstone" of "any scope determination.[51] This line of reasoning has unfortunately resulted in at least three different interpretations of (and/or by) the Federal Circuit's holding that Commerce must first consider the plain meaning of scope before looking to the (k)(1) sources of information, and what the Courts must consider when Commerce has done a (k)(1) and/or (k)(2) analysis.

Under all three interpretations, there is no disagreement that Commerce must first consider the plain, unambiguous meaning of the scope of the Orders. Nonetheless, under the Federal Circuit's holding in *Fedmet*, because the plain language is "paramount," in "reviewing the plain language of a duty order," "Commerce must consider the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior determinations) and the Commission."[52] In other words, under the Federal Circuit's holding in *Fedmet*, Commerce cannot elect not to review the (k)(1) sources of information, but must always consider those sources in analyzing the plain language of the scope of an Order to determine if the language is unambiguous.

Under the second class of cases, Commerce can make a determination based on the plain meaning of the scope, (sometimes referred to informally as a "k(0)" analysis by parties to Commerce's proceedings), but if Commerce determines to also consider (k)(1) sources of

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[50] *Id.* (quoting *Eckstrom Indus., Inc. v. United States,* 254 F.3d 1068, 1072 (Fed. Cir. 2001)).
[51] *See Walgreen Co. v. United States*, 620 F.3d 1350, 1356 (Fed. Cir. 2010); *see also, e.g., Shenyang Yuanda Aluminum Indus. v. United States*, 776 F.3d 1351, 1357 (Fed. Cir. 2015) (*Yuanda 2015*).
[52] *Fedmet Res. Corp. v. United States*, 755 F.3d 912, 918 (Fed. Cir. 2014) (*Fedmet*).

information, then the CIT and Federal Circuit must consider those sources as well in its holding. For example, in *Wheatland Tube Co. v. United States*, the Federal Circuit held that "because the description of the merchandise contained in the" Orders ***as well as*** "the initial investigation," was "unambiguous," "Commerce was not required to examine the physical characteristics of the accused product, the expectations of the ultimate purchasers, the ultimate use of the accused product, or the channels of trade" (*i.e.*, the (k)(2) factors).[53] In that case, Commerce's interpretation of the scope was considered in tandem with additional regulatory factors, such as the initial investigation record, and not ***instead*** of those factors. Likewise, in its 2015 *Shandong Yuanda* holding, after affirming Commerce's determination that Yuanda's merchandise was "within the plan language of the Orders," the Federal Circuit then turned to the (k)(1) factors and explained that "(i)n addition to the plain language of the Orders," Commerce "will also consider the descriptions of the merchandise contained in the petition,the initial investigation, and the prior determinations of Commerce and the ITC,"[54] and then affirmed Commerce's (k)(1) analysis as well. Although the language quoted suggests the Court was saying that it "will consider" both steps of analysis, the sequence of the Court's analysis and holdings suggested that these steps were considered separately because Commerce had considered <u>both</u> the plain language and the (k)(1) sources of information.

Even more recently, as part of this second class of cases, in *Meridian Products, LLC v. United States*, the Federal Circuit stressed that if the "scope is unambiguous, it governs," but that "the question of whether the unambiguous terms of a scope control the inquiry, or whether some ambiguity exists, is a question of law that" the Court reviews "de novo."[55] The Federal Circuit

[53] *Wheatland Tube Company v. United States*, 161 F.3d 1365, 1367 (Fed. Cir. 1998).
[54] *Yuanda 2015*, 776 F.3d at 1357 (emphasis added).
[55] *Meridian Products LLC v. United States*, 918 F.3d. 1375, 1379-1384 (Fed. Cir. 2017) (*Meridian V*).

explained that "Scope orders are interpreted with the aid of" other sources "as described by" section (k)(1) of the agency's regulation, and the Court then, as part of its analysis, reviewed the factors relied upon by Commerce, such as prior scope determinations, to conclude that the language of the scope was "unambiguous."[56]

In all of these decisions from the second class of cases, the Federal Circuit seemed to indicate that if Commerce considered just the plain meaning, the Court would also stop its analysis there. On the other hand, if Commerce considered both the plain meaning of the scope as well as the (k)(1) sources of information in making its scope determination, then the Court signified that it would ***also*** consider both the language as well as the (k)(1) sources of information, consistent with the substantial evidence on the record standard, set forth in section 19 U.S.C. § 1516a(b)(1)(B)(i).

These decisions contrast with a third strain of cases, such as the Federal Circuit's 2012 decision in *Arcelormittal*.[57] The litigation pertained to the AD Order on Stainless Steel Plate in Coils (SSPC) from Belgium.[58] Key to the dispute, was the scope language covering products which were "4.75 mm or more in thickness."[59] Years earlier, in an investigation of certain cut-to-length carbon steel plate from South Africa, Commerce had determined that the same language referred to *actual* thickness and not *nominal* thickness.[60] Nonetheless, in the scope ruling at issue in this case, Commerce had determined the language referred to "SSPC having a nominal thickness of 4.75 mm but an actual thickness of less than 4.75 mm."[61] In the end, the

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[56] *Id*. at 1384.
[57] *Arcelormittal Stainless Belgium v. United States*, 694 F.3d 82 (Fed. Cir. 2012) (*Arcelormittal*).
[58] *Notice of Amended Antidumping Duty Orders; Certain Stainless Steel Plate in Coils from Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan*, 68 Fed. Reg. 11,520 (Mar. 11, 2003).
[59] *Arcelormittal*, 694 F. 3d at 86-87.
[60] *Notice of Final Determination of Sales of Less than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa*, 62 Fed. Reg. 61,731 (Nov. 19, 1997).
[61] *Arcelormittal*, 694 F. 3d at 83-84.

Federal Circuit overturned Commerce's scope ruling that the merchandise at issue was covered by the scope of the AD Order, which was based on a conclusion that the scope language was ambiguous, the (k)(1) sources of information were not determinative, and that the (k)(2) factors supported finding the product to be subject merchandise. The Federal Circuit held that Commerce had unlawfully enlargened the scope through its new interpretation, because "(o)ver the course of five years, Commerce repeatedly reassured" the exporter "that nominal merchandise as such was excluded from the scope of the order."[62] Significantly, the Federal Circuit pointedly emphasized that "the first step in a scope ruling proceeding is to determine whether the governing language is in fact ambiguous, and thus requires analysis of the regulatory factors previously outlined. If it is not ambiguous, the plain meaning of the language governs."[63] The Court then went on to look at three factors in determining if the plain language was unambiguous: (1) the text of the scope; (2) "trade usage" (stating that "a finding of no ambiguity for unmodified numbers may be rebutted by sufficient evidence showing that actual measurements are not customarily used in the relevant industry"); and (3) Commerce's previous interpretation of the same language in the 1997 South African carbon steel plate AD Order.[64] The Court did not consider Commerce's (k)(1) or (k)(2) analysis, but determined on the basis of these three factors alone that the scope was unambiguous, and therefore Commerce's scope ruling was "contrary to the plain language of the order."[65]

More recently, in *OMG, Inc. v. United States*, the CIT, similar to the Federal Circuit's approach in *Arcelormittal*, abstained from consideration of Commerce's (k)(1) analysis and

[62] *Id.* at 89.
[63] *Arcelormittal*, 694 F. 3d at 87.
[64] *Id.* at 89.
[65] *Id.* at 84.

instead determined that the plain meaning did not support Commerce's determination and ended its analysis there.[66] In the facts of that particular litigation, Commerce had issued a scope ruling in which it determined that both the plain meaning of the AD and CVD Orders covering Certain Steel Nails from Vietnam,[67] as well as the (k)(1) sources of information, supported its determination that certain zinc anchors were steel nails.[68] The Court, citing to traditional statutory tools of interpretation, looked to the definition of a "nail" as defined by the American Heritage Dictionary of the English Language, which had not been analyzed by Commerce in the scope ruling, as well as certain examples of trade usage which were on the record that showed some "industry actors categorize anchors with steel pins as anchors rather than as nails,"[69] and overturned Commerce's scope ruling as inconsistent with the "plain meaning of the word 'nail.'"[70] The Court did not reach Commerce's analysis of the the (k)(1) sources of information because the Court found that the Federal Circuit has concluded that "if the terms of" an order "are unambiguous, then those terms govern."[71] Commerce raised its record evidence concerns with the Court on remand, but the Court called those concerns "not meritorious," explaining that its interpretation of the plain meaning of the scope language was based in part on an analysis of the phrase "two or more pieces" and was supported by trade usage on the record.[72]

As reflected in these three different intepretations of the application of the Federal Circuit's plain meaning rule holdings, the problem with any "plain meaning" test is that language

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[66] *OMG, Inc. v. United States*, 321 F.Supp. 3d 1262, 1268 (Ct. Int'l Trade 2018)(*OMG*).
[67] *See Certain Steel Nails from the Republic of Korea, Malaysia, the Sultinate of Oman, Taiwan, and the Socialist Republic of Vietnam: Antidumping Duty Orders*, 80 FR 39994 (July 13, 2015).
[68] *OMG*, 321 F. Supp. 3d at 1268.
[69] *Id.*
[70] *OMG*, 321 F. Supp. 3d at 1268.
[71] *Id.* at 1264. Suprisingly, for support of its contention, the Court cited to *Tak Fat*, a case in which Commerce had, in fact, analyzed (k)(1) factors and the Federal Circuit considered those factors as part of its holding. *Tak Fat*, 396 F.3d at 1382.
[72] *OMG, Inc. v. United States*, 389 F. Supp. 3d 1312, 1314 (Ct. Int'l Trade 2019), *appeal pending*.

is imperfect, and one person's idea of the "plain meaning," might be another person's idea of ambiguity. As one author explained, "the plain meaning rule … ties the interpretation of" text to "subjective notions of what words mean in language and prevents parties from submitting evidence of alternate meanings that may be publically used and acknowledged, but not set forth in a standard dictionary. Furthermore, the plain meaning rule (or at least unsophisticated versions of it) relies upon the notion that words and phrases can, standing alone, have a single unequivocal meaning--a notion that has been thoroughly debunked by modern scholars who study language."[73]

Arguably, any interpretation of the Federal Circuit's plain meaning rule that would permit a scope analysis that *does not* take into consideration the entirety of record evidence at the time the scope ruling is issued by Commerce is inconsistent with the substantial evidence on the record standard set forth in 19 U.S.C. § 1516a(b)(1)(B)(i). However, the language used by the Federal Circuit and the CIT in multiple cases does seem to suggest that the plain meaning rule analysis could possibly be considered a zero sum game – one allowing Commerce to forgo an analysis under section 225(k) entirely, even if the substantial evidence on the record supports the existence of ambiguity in the text of the scope. It is also unclear how such an interpretation is consistent with the text of the regulation itself, as section 225(k) does not describe a plain meaning rule that ignores entirely the application of the (k)(1) sources of information, although such an interpretion is certainly logical and practical in those situation when, for example, it is unequivocally clear to Commerce that a scope is unambiguous and no party disagrees on the record with a particular interpretation. In any case, as these various CIT and Federal Circuit

[73]Aaron D. Goldstein, *The Public Meaning Rule: Reconciling Meaning, Intent and Contract Interpretation*, 53 SANTA CLARA L. REV. 73, 75 (2013).

holdings show, this legal issue appears to remain, as of late 2019, an outstanding source of disagreement, confusion, or at minimum, inconsistency, in the Courts.

C. Judicial Deference Over (k)(1) and (k)(2) Determinations

With respect to Commerce's (k)(1) and (k)(2) analyses, the degree of deference that the CIT and the Federal Circuit give the agency clearly depends on the facts of the case, the thoroughness of Commerce's analysis, and the factors the Court believes to be of the greatest significance. Courts frequently affirm Commerce's scope analysis, but there have been several cases in which the Court overturned the agency based on a different view of the relevance and prioritization of the facts on the administrative record. For example, in the aforementioned *Ethan Allen* litigation, Commerce received a scope request for four types of chests of drawers allegedly manufactured and marketed for use in a living room and hallway, rather than a bedroom.[74] One chest in particular was sold as part of a furniture set, was comparable in size and storage capacity to standard bedroom chests, and Commerce placed on the record a picture from Ethan Allen's website that showed furniture from that set being used in a bedroom and five pictures from Ethan Allen's Facebook page showing the chest itself being used in a bedroom setting.[75] Commerce determined that the (k)(1) sources of information were not dispositive with respect to that chest, and applied a (k)(2) analysis, finding the chest to be covered by the scope of the Wooden Bedroom Furniture from China Order under the *Diversified Products* factors.[76] On the other hand, with respect to the other three chests which were sold as "stand alone" chests, Commerce determined that each chest was subject to the order based on a (k)(1) analysis.[77]

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[74] *Ethan Allen Operations, Inc. v. United States*, 121 F. Supp. 3d 1342 (Ct. Int'l Trade 2015).
[75] *Id.* at 1345-1348.
[76] *See id.*
[77] *See id*.

In its scope ruling on all four chests, Ethan Allen argued that Commerce should make a determination based almost entirely on the "design" elements of the chests, such as the cut and style of the chest sides and feet. Commerce did not make that its primary focus, explaining that furniture design is a subjective element not included in the (k)(1) sources of information and only one element among many in an analysis based on the (k)(2) factors.

On appeal, the CIT, on the other hand, had no such problem giving priority to the design elements of the chests. The Court was persuanded by Ethan Allen's claims that the furniture set was "designed for use in the living room" after reviewing the record evidence, and therefore held that Commerce should have applied only a (k)(1) analysis to the first chest,[78] while each of the "stand alone" chests had "qualities of both a wooden bedroom chest (ability to store clothing) and a wooden living room chest (decorative)," and therefore Commerce should have applied a (k)(2) analysis to those chests.[79] On remand, Commerce determined that each chest should be excluded from the scope of the Order, based almost entirely on the Court's holdings that they were each "designed" for use outside of the bedroom or contained non-bedroom decorative features, and the Court affirmed that conclusion.[80]

In *Ethan Allen*, Commerce and the Court each had the same facts before them, but they disagreed that the record objectively supported Ethan Allen's claims that despite the company's website and Facebook posts showing the chests and furniture sets at issue being used in bedrooms, and the fact that all the chests at issue could store clothing (a requirement found in the scope itself), certain design elements were key to distinguishing those chests from "wooden *bedroom* furniture" subject to the scope of the Order at issue. It is a good example to show that

[78] *Id.* at 1351-52.
[79] *Ethan Allen*, 121 F. Supp. 3d at 1348-51.
[80] *Ethan Allen Operations, Inc. v. United States*, Slip Op. 16-19 (Ct. Int'l Trade Feb. 29, 2016).

in many scope ruling cases on appeal, it is not the existence of facts themselves on the record that are in dispute, but the priority and relevance assigned to each of those facts by Commerce that leads the CIT and Federal Circuit to affirm or overturn Commerce's determinations under sections 225(k)(1) and (k)(2).

D. Commerce's Mixed Media Analysis

Most scope rulings involve a review of individual products under section 225(k), but sometimes Commerce is called upon to review products which are components in a larger collection of merchandise. For example, in *Walgreen*, the Federal Circuit addressed a scope ruling pertaining to the AD Order on Tissue Paper from China[81] in which the tissue paper was contained in Walgreen's "Gift Bag to Go" gift bag sets that also contained a gift bag and crinkle bow.[82] In accordance with its practice, Commerce applied its "mixed media" analysis, first determining whether or not the the gift bag was a stand-alone "unique" product, or "merely subject merchandise packaged with non-subject merchandise."[83] Then, once it determined that the gift bags met the latter description, Commerce determined that the tissue paper components of the gift bags were subject to the AD Order, in accordance with 19 CFR 351.225(k)(1).[84] The Federal Circuit affirmed Commerce's analysis, holding that because "the gift bag sets did not interact in any way or otherwise represent a unique product," and "the tissue paper contained therein retained its individual character," Commerce "properly determined, based on the (k)(1)

[81] *Notice of Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order: Certain Tissue Paper Products from the People's Republic of China*, 70 Fed. Reg. 16223 (March 30, 2005).
[82] *Walgreen Co. v. United States*, 620 F.3d 1350, 1353 (Fed. Cir. 2010).
[83] *Id.*
[84] *Id*. at 1354.

criteria and the language of the Final Order," that the tissue paper was covered by the Tissue Paper from China AD Order.[85]

Subsequently, in *Mid-Continent Nail Corp. v. United States*, Commerce's "mixed media" analysis was again before the Federal Circuit, this time in a case involving 50 nails contained in a tool kit, alongside screwdrivers, measuring tapes, hammers, screws, tacks and hooks.[86] In its scope ruling on the AD Order on Nails from China,[87] Commerce applied a (k)(2) analysis, finding that because the quantity of nails was small, and the nails were not advertised separate from the tool kits, the ultimate expectations of customers would not be to pay for the entire tool kits just to get the nails.[88] Thus, Commerce determined that nails should be excluded from the Order. However, the Federal Circuit held that because the "parties agree(d) that the merchandise – the nails within the tool kits" were covered by "the literal terms of the order," the appropriate analysis for Commerce to conduct was to "proceed to the next step and decide whether the inclusion of the merchandise within a mixed media item takes it outside the scope of the order."[89] The Court analyzed both the language of the scope of the Order, as well as the (k)(1) sources, and concluded that there was nothing in either step of analysis "to suggest that the literal language of the order should not govern" in the mixed media case before it.[90] The issue was remanded to Commerce, and in the end, Commerce determined to examine the nails themselves, without regard to the toolkit, and concluded that they were covered by the Order, which the CIT affirmed as consistent with the Federal Circuit's holding.[91]

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[85] *Id.* at 1356-57.
[86] *Mid-Continent Nail Corp. v. United States*, 725 F.3d 1295, 1299 (Fed. Cir. 2013).
[87] *Notice of Antidumping Duty Order: Certain Steel Nails from the People's Republic of China*, 73 Fed. Reg. 44, 961, 44, 961–62 (Aug. 1, 2008) (*Steel Nails from China*).
[88] *See id.*
[89] *Steel Nails from China*, 73 Fed. Reg. at 1303.
[90] *Id.*
[91] *Mid-Continent Nail Corp. v. United States*, 61 F. Supp. 3d 1287, 1289 (Ct. Int'l Trade 2015).

More recently, in *Star Pipe Products v. United States*, the CIT had before it a challenge to Commerce's scope ruling covering steel threaded rod components, which the exporter acknowledged would be subject to the AD Order on Steel Threaded Rod from China[92] if imported alone, packaged in "joint restraint kits" that also contained a combination of castings, bolts, bolt nuts, and washers.[93] In accordance with the analysis set forth in *Mid-Continent*, Commerce first determined that the STR components were "presumptively in-scope" based on the plain reading of the scope of the Order. [94] The Court then found the record evidence did not support a determination that presumption of inclusion had been overcome by their inclusion in the joint restraint kits.[95] The CIT upheld Commerce's determination, noting that Commerce has the discretion under the "mixed media kit" analysis to determine the "parameters" for deciding what information is necessary to overcome a presumption that a product is in-scope, and that in this case, Commerce's determination that the "presumption of inclusion was not overcome" was supported by substantial evidence and in accordance with law.[96]

On the other hand, in the August 2019 decision in *Trendium Pool Products, Inc. v. United States,* the CIT considered, and then remanded, Commerce's application of the *Mid-Continent* two-step analysis in a scope ruling covering pool kits and pool walls which contained Corrosion Resistant Steel (CORE) from Italy and China.[97] As part of its analysis, Commerce first determined whether the CORE included in a larger product item was covered by the literal terms of the Orders, and then analyzed whether the component's inclusion in a larger product

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[92] *See Certain Steel Threaded Rod from the People's Republic of China*, 74 Fed. Reg. 17,154 (Apr. 14, 2009).
[93] *Star Pipe Products v. United States*, 393 F. Supp. 3d 1200 (Ct. Int'l Trade July 8, 2019) (*Star Pipe*).
[94] *Id.* at 1210.
[95] *Id.*
[96] *Star Pipe*, 393 F. Supp. 3d. at 1212-14.
[97] *Trendium Pool Products, Inc. v. United States*, Slip Op. 19-113 (Ct. Int'l Trade Aug. 20, 2019) (*Trendium*). *See also Certain Corrosion-Resistant Steel Products From India, Italy, the People's Republic of China, the Republic of Korea and Taiwan: Amended Final Affirmative Antidumping Determination for India and Taiwan, and Antidumping Duty Orders*, 81 Fed. Reg. 48390 (July 25, 2016).

should result in the component's exclusion from the scope of the Orders, based on the section 225(k) factors. After reviewing the mill certificates, technical diagrams, and narrative descriptions provided by Trendium, Commerce concluded that the individual components of the pool kits fabricated from Italian and Chinese CORE fell within the plain language of the scope of the Orders. Then, Commerce analyzed whether packaging components manufactured from subject CORE in a kit with non-subject components would necessarily remove the former from the scope of the Orders. Because the Orders did not specify whether the Chinese- and Italian-origin CORE components at issue would be subject to the Orders when packaged or included with non-subect merchandise, Commerce reviewed the (k)(1) sources of information, including the petitions and ITC injury reports. Commerce determined, pursuant to its analysis of the (k)(1) sources, that it had been contemplated that CORE would not cease to be subject merchandise if incorporated into larger products for various reasons, and therefore the CORE-fabricated pool components at issue were: (1) covered by the literal scope of the Italian and Chinese Orders, and (2) their inclusion in the pool kits did not remove them from the scopes of those Orders.[98]

The Court in *Trendium* disagreed with Commerce's scope ruling. It held that the Orders at issue covered "CORE," but "not finished pool products that are no longer being used as a raw input" and that "nothing on the record of the original investigation," in its review of the record evidence, "demonstrates that Petitioners intended to include fully finished downstream products as part of the scope of the investigation."[99] The Government argued that the plain language of the Orders contemplated the type of "further processing" which these pool sides went through, but the Court did not agree with that interpretation, holding that the processing in this case

[98] *See Trendium* at *11-*15.
[99] *Id.* at *9-10.

"transformed" the CORE components "from a raw input into a finished product," thereby placing the products outside the scope of the CORE Orders.[100] To be clear, the Court did not actually apply a substantial transformation test, but concluded that "Trendium's substantial processing … creates a finished product fit only for use in Trendium's pools," and because "(p)ools are a product that is absent from the plain language of the Order," that processing was "sufficient to bring Trendium's product outside the scope of the Order."[101]

Furthermore, the Court held that Commerce had erred in relying on *Mid-Continent* and conducting the two-step analysis explained therein, because, in its assessment, the pool kits and walls were not "merely a combination of subject and nonsubject merchandise," (*i.e.* a "mixed media"), but instead the CORE at issue were integrated into pools – singular, unitary items, not appropriately analyzed under the *Mid-Continent* analysis.[102]

Both of these holdings make the *Trendium* analysis interesting with respect to the overall case law and practice of scope rulings. First, the Court essentially held that before the two-part test of *Mid-Content* can be applied, Commerce must first determine if the components at issue have been integrated into the larger merchandise to create a product which is unique, and therefore not covered by the scope of the Order(s) at issue, or if they are part of a "mixed media," similar to the first step of Commerce's analysis affirmed by the Federal Circuit in *Walgreen*.[103] This interpretation of *Walgreen* and *Mid-Continent* suggests that the Federal Circuit's two-step analysis set out in *Mid-Continent* did not replace, but merely amended, Commerce's initial mixed media test.

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[100] *Id.* at *11-12.
[101] *Id.* at *13.
[102] *Id.* at n. 3, at *11
[103] *Walgreen Co. v. United States*, 620 F.3d 1350, 1356-57 (Fed. Cir. 2010).

Second, pursuant to the scope language "any other processing that would not otherwise remove the merchandise from the scope of the order," the Court conducted a "substantial processing" analysis, and on that basis concluded that the plain meaning did not include the merchandise at issue in the Italian and Chinese CORE Orders.[104] That analysis shared some similarities with Commerce's substantial transformation analysis, but as explained above, that analysis has historically been applied separately from a review of the text of a scope, and has been used for purposes of determining the country of origin.[105] The Court's consideration and conclusions with respect to the processing experience of subject merchandise to determine if Commerce's scope ruling was consistent with the plain meaning of the scope appears to differ from previous interpretive tools or analyses considered and applied by the CIT and Federal Circuit, such as the usage of certain terms in the trade or previous Commerce interpretations of the same or similar language in other Orders.[106]

E. Scope Exclusion "Tests" Can Be Difficult to Interpret and Apply

Finally, it is worth noting that a large amount of scope rulings, and naturally scope ruling litigation, pertain to scope exclusions. As one would expect, foreign exporters and importers request that Commerce find their merchandise, which has been determined initally at the border by CBP to be subject merchandise, to be non-subject, excluded merchandise, while petitioners want the opposite – for Commerce to clarify that certain products are subject to an Order. Such a determination is much more complicated when the exclusion language does not explicitly exclude products of definitive sizes and dimensions, but instead excludes generalized products that meet certain criteria, akin to an exclusion "test."

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[104] *See Trendium* at *11-*15.

[105] Commerce never conducted a substantial transformation analysis in the underlying case, nor did the Court direct Commerce to conduct one on remand.

[106] *See., e.g., Arcelormittal Stainless Belgium v. United States*, 694 F.3d 82, 86-87 (Fed. Cir. 2012).

There is no better example than two of the exclusions found in the Aluminum Extrusions from China Orders:

> The scope also excludes finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels.
>
> The scope also excludes finished goods containing aluminum extrusions that are entered unassembled in a "finished goods kit." A finished goods kit is understood to mean a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled "as is" into a finished product. An imported product will not be considered a "finished goods kit" and therefore excluded from the scope of the *Orders* merely by including fasteners such as screws, bolts, *etc.* in the packaging with an aluminum extrusion product.[107]

These two exclusions, known as the "finished merchandise" exclusion and the "finished goods kit" exclusion have been at issue in dozens of scope ruling determinations – very likely the most scope rulings to date that have ever been issued pursuant to a single scope by Commerce. Those scope exclusions have also been the source of a large amount of litigation, such as two separate scope rulings involving "curtain walls,"[108] scope rulings addressing "trim kits," an aesthetic frame around the perimeter of a refrigerator or freezer,[109] and scope rulings pertaining to appliance handles.[110] Questions Commerce, and at times the Courts, have had to struggle with

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[107] *Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order,* 76 Fed. Reg. 30650 (May 26, 2011) and *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order,* 76 Fed. Reg. 30653 (May 26, 2011).

[108] *See, e.g., Yuanda I, Yuanda II*, *Yuanda III*, and *Yuanda 2015*.

[109] *See, e.g., Meridian Products, LLC v. United States*, 971 F. Supp. 2d 1259 (Ct. Int'l Trade 2014), (*Meridian I*), remand affirmed, 37 F. Supp. 3d 1342 (Ct. Int'l Trade 2014) (*Meridian II*), reconsidered, 77 F. Supp. 3d 1307 (Ct. Int'l Trade 2015) (*Meridian III*), remand affirmed, 145 F. Supp. 3d 1329 (Ct. Int'l Trade 2016) (*Meridian IV*), reversed and Commerce scope ruling affirmed in *Meridian V*, 918 F. 3d at 1379-1384.

[110] *See, e.g., Meridian Products, LLC v. United States*, 125 F. Supp. 3d 1306 (Ct. Int'l Trade 2015) (*Meridian VI*), remand affirmed, 180 F. Supp. 3d 1283 (Ct. Int'l Trade 2016) (*Meridian VII*), reversed and remanded, 890 F.3d 1272 (Fed. Cir. 2018) (*Meridian VIII*); *Whirlpool Corp. v. United States,* 144 F. Supp. 3d 1296 (Ct. Int'l Trade 2016) (*Whirlpool I*), remand affirmed, 182 F. Supp. 3d 1307 (Ct. Int'l Trade 2016) (*Whirlpool II*), affirmed in part, reversed in part, vacated in part, and remanded in 890 F.3d 1302 (Fed. Cir. 2018) (*Whirlpool III*).

include, but certainly are not limited to: When is a product considered "finished?" What is the relevance of non-aluminum fasteners to finished merchandise? What makes a product a "fastener?" What does "further finishing or fabrication" mean when a finished product is incorporated into a different product? Can a door be considered "finished merchandise" under the Aluminum Extrusion Orders if it doesn't have glass or vinyl, as expressly articulated, but has a screen instead? What does assembly "as is" into a finished product "at the time of importation" mean for products that can't be assembled after importation until a date later than the date of entry? Can products shipped on multiple vessels, but all imported under the same entry form, be considered excluded under the "finished goods kit" exclusion?

Because there is a wide variety and large quantity of extruded aluminum products exported from China to the United States, Commerce has spent an extensive amount of time and resources analyzing those products, including the processes by which those products are manufactured, assembled, sold and exported, to answer questions such these under those two exclusion paragraphs. In addition, Commerce and the Department of Justice have also spent a great deal of time and resources defending many of those determinations in challenges before the CIT and the Federal Circuit, and the Courts have ordered Commerce in several cases to issue remand redeterminations providing even more analysis and requesting the collection of even more data, resulting in remands which have been at times 60 pages or more in length.

Needless to say, the Aluminum Extrusions from China Orders should be seen as a lesson, or perhaps even a "problematic scope poster child," to both petitioners and Commerce. Petitioners should be cautious in proposing, and Commerce should continue

to discourage, generalized "tests" in drafting scope exclusions. The inclusion of such tests in scope exclusions can create a large burden not only on Commerce, importers and exporters, but also on CBP, the Department of Justice, and the Courts as well. On a broader point, it is also a great example of how decisions made at the investigation phase can have lasting and real impacts on the application and administration of scopes long after the Order has been finalized and issued.

IV. If Merchandise is Found to Circumvent an AD or CVD Order, It Can Be Determined to be Within the Scope of the Order

In addition to defining the scope and scope rulings, Congress provided a provision in the statute to address products which are physically outside the scope of an AD or CVD Order, but have been used by producers, exporters or importers to circumvent the application of the Order. Under section 19 U.S.C. 1677j, titled "(p)revention of circumvention of antidumping and countervailing duty orders," the statute address four specific scenarios where even though merchandise falls outside the text of the scope, if Commerce makes an affirmative circumvention finding, Commerce is permitted to find that circumventing merchandise is subject to the Order at issue. The four scenarios are: (a) Merchandise completed or assembled in the United States; (b) Merchandise completed or assembled in other foreign countries; (c) Minor alterations of merchandise; and (d) Later-developed merchandise. Below are examples of each of these circumvention determinations, and a description of how Commerce sometimes applies its circumvention determinations on a "country wide" basis to prevent future circumvention of an Order.[111]

[111] For three of these circumvention scenarios, Commerce is directed to notify the ITC "of the proposed inclusion of such merchandise in such countervailing duty or antidumping order or finding," and "take into account any advice provided by" the ITC before making a circumvention determination. 19 U.S.C. §1677j(e) and §§1677(a), (b) and (d). *See also* 19 C.F.R. 351.225(f)(7).

A. Merchandise Completed or Assembled in the United States

The statute provides that if (A) "merchandise sold in the United States is of the same class or kind as any other merchandise that is the subject of" an AD or CVD order; (B) "such merchandise is completed or assembled in the United states from parts or components produced in the foreign country with respect to which such order or finding applies"; (C) "the process of assembly or completion in the United States is minor or insignificant"; and (D) "the value of the parts or components refered to in subparagraph (B) is a significant portion of the total value of the merchandise," Commerce "***may include within the scope of such order*** or finding the imported parts or components referred to in subparagraph (B) that are used in the completion or assembly of the merchandise in the United States at any time such order or finding is in effect."[112]

To determine if a "process is minor or insignificant" the statute provides that Commerce "shall take into account --- (A) the level of investment in the United States, (B) the level of research and development in the United States, (C) the nature of the production process in the United States, (D) the extent of production facilities in the United States, and (E) whether the value of the processing performed in the United States represents a small proportion of the value of the merchandise sold in the United States."[113]

Furthermore, to determine "whether to include parts or components" in a CVD or AD order, Commerce is directed to also "take into account factors such as – (A) the pattern of trade, including sourcing patterns, (B) whether the manufacturer or exporter of the parts or components

[112] Prevention of circumvention of antidumping and countervailing duty orders, 19 U.S.C. § 1677j(a)(1)(A-D)(emphasis added).
[113] 19 U.S.C. § 1677j(a)(2). Section 225(g) addresses this analysis, explaining that in determining if a process is minor or insignificant, no "single factor" will be "controlling," and "in determining the value of the parts or components purchased from affiliated person" or "of processing performed by an affiliated person," Commerce may base that value on the "cost of producing the part or component....." 19 C.F.R 351.225(g).

is affiliated with the person who assembles or completes the merchandise sold in the United States from the parts or components produced in the foreign country with respect to which the order" applies, and "(C) whether imports into the United States of the parts or components produced in such foreign country have increased after the initation of the investigation which resulted in the issuance" of the order.[114]

An example of merchandise completed or assembled in the United States was the importation of unfinished Polyethylene Retail Carrier Bags (PRCBs) from Taiwan that resembled the in-scope merchandise except that they were in a continuous roll such that the bottoms were open and they lacked handles.[115] Commerce found that in the United States, nine inch bags were cut off the roll, one side was heat-sealed, and handles were cut out.[116] Commerce determined: 1) that the unfinished PRCBs were of the same "class or kind" as the subject merchandise; 2) that the merchandise sold in the United States was completed from parts or components produced in Taiwan; 3) that the process of assembly or completion in the United States was minor or insignificant; and 4) that the value of the parts or components produced in Tiawan was a significant portion of the total value of the merchandise.[117] With respect to the "additional factors to consider," Commerce concluded that the record was inconclusive as to a change in the pattern of trade, that there was no evidence of affiliation between the producers or exporters and those assembling the bags in the United States, and that subsequent import

[114] 19 U.S.C. § 1677j(a)(3).
[115] *Polyethylene Retail Carrier Bags from Taiwan: Affrmative Final Determination of Circumvention of the Antidumping Duty Order*, 79 Fed. Reg. 61056 (Oct. 9, 2014)(*PRCB Final Determination*).
[116] *Polyethylene Retail Carrier Bags from Taiwan: Affrmative Preliminary Determination of Circumvention of the Antidumping Duty Order*, 79 Fed. Reg. 31302 (June 2, 2014), and accompanying Preliminary Decision Memorandum (PRCB PDM), dated June 2, 2014 (79 ITADOC 31302, WESTLAW).
[117] PRCB PDM at 3-10.

volumes did not detract from, or support, circumvention findings.[118] Accordingly, Commerce determined that "imports of unfinished PRCBs from Taiwan are circumventing the Order."[119]

B. Merchandise Completed or Assembled in Other Foreign Countries

Under the second circumvention scenario, the statute provides that if (A) "merchandise imported into the United States is of the same class or kind as any merchandise produced in a foreign country that is the subject of" an AD or CVD order; (B) "before importation in to the United States, such imported merchandise is completed or assembled in another foreign country from merchandise which (i) is subject to such (an) order or finding, or (ii) is produced in the foreign country with respect to which such order or finding applies; (C) "the process of assembly or completion in the foreign country" is "minor or insignificant"; (D) "the value of the merchandise produced in the foreign country to which the antidumping duty order applies is a significant portion of the total value of the merchandise exported to the United States"; and (E) Commerce "determines that action is appropriate under this pargraph to prevent evasion of such (an) order or finding," Commerce "***may include such imported merchandise within the scope of such order*** or finding at any time such order or finding is in effect."[120]

To determine if a "process is minor or insignificant" the statute provides that Commerce "shall take into account --- (A) the level of investment in the foreign 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

[118] *Id.* at 9-10.
[119] *PRCB Final Determination*, 79 Fed. Reg. at 61057.
[120] 19 U.S.C. § 1677j(b)(1)(A)-(E) (emphasis added).

value of the processing performed in the foreign country represents a small proportion of the value of the merchandise imported into the United States."[121]

Furthermore, to determine "whether to include merchandise assembled or completed in a foreing country" in a CVD or AD order, Commerce is directed to"take into account factors such as – (A) the pattern of trade, including sourcing patterns, (B) whether the manufacturer or exporter of the merchandise" is "affiliated with the person who uses the merchandise" to "assemble or complete in the foreign country the merchandise that is subsequently imported into the United States," and "(C) whether imports into the foreign country of the merchandise" have "increased after the initiation of the investigation which resulted in the issuance" of the Order.[122]

An example of this type of circumvention involved Small Diameter Graphite Electrodes (SDGE) from China.[123] At issue was a company that took Chinese-manufactured artificial/synthetic graphic forms, exported those forms to the United Kingdom, and in the United Kingdom those forms were tooled and shaped through additional machine processing into SDGEs, which were then exported to the United States.[124] Commerce determined that (1) the SDGE exported to the United States was identical to that covered by the AD Order covering SDGE from China; (2) the artificial/synthetic graphic form inputs were produced in China, the country subject to the SDGE AD Order; (3) the process of assembly or completion occurring in the United Kingdom was minor or insignificant in comparison to the totalilty of the production

[121] 19 U.S.C. § 1677j(b)(2). Section 225(h) addresses this analysis, explaining that in determining if a process is minor or insignificant, no "single factor" will be "controlling," and "in determining the value of the parts or components purchased from an affiliated person," or "of processing performed by an affiliated person" Commerce may base that value on the "cost of producing the part or component....." 19 C.F.R 351.225(h).
[122] 19 U.S.C. § 1677j(b)(3).
[123] *Small Diameter Graphite Electrodes from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 77 Fed. Reg. 47596 (Aug. 9, 2012) (*Graphite Electrodes from China*).
[124] *Id.* at 47597.

of subject merchandise; (4) the value of the processing done to the merchandise in the United Kingdom represented a small proportion of the value of the merchandise sold in the United States, both quantitatively and qualitatively; and (5) Chinese-produced merchandise represented a significant percentage of the sales value of the exporter's United States exports of finished merchandise.[125] With respect to the "other factors to consider," Commerce concluded that Chinese exports of SDGE to the United States had decreased significantly, while United Kingdom exports of SDGE exports to the United States, as well as the exporter's sourcing of the relevant inputs from China, had increased – reflecting a pattern of trade that supported a circumvention determination.[126] Furthermore, Commerce found that although the exporter was not affiliated with Chinese producers of artificial graphite rod/unfinished SDGE component imputs, there had been a significant increase in the Chinese exports of artificial graphite to the United Kingdom.[127] Accordingly, taking all of the information and factors into consideration as a whole, Commerce determined that the exporter had circumvented the Chinese AD Order on SDGE in accordance

An interesting legal issue that is unique to circumvention based on completion or assembly in third countries is the interaction between such a circumvention analysis and Commerce's country-of-origin test. For example, in a circumvention inquiry covering Certain Corrosion-Resistant Steel Products (CORE) from China, Commerce applied the statutory criteria of section 19 U.S.C. §1677(b) and concluded that companies which produced hot-rolled steel (HRS) in China or cold-rolled steel (CRS) in China, and then exported that merchandise to Vietnam, and used those inputs in the production of CORE in Vietnam, were circumventing the

[125] *See id.* at 47599.
[126] *See id.* at 47599-47600.
[127] *Graphite Electrodes from China*, 77 Fed. Reg. at 46000.

AD and CVD orders on CORE from China.[128] Exporters argued that because Commerce had determined in past cases that the country-of-origin changed as a result of the substantial transformation that occurred when hot-rolled steel was turned into cold-rolled steel, and that the country-of-origin changed as a result of the substantial transformation that occurred when cold-rolled steel was galvanized and turned into CORE, the resulting CORE constituted Vietnamese merchandise and thus the CORE could not be covered by the Chinese CORE Order with section 19 U.S.C. §1677j(b).[129]

Commerce explained that it did not disagree that the CRS made from the Chinese HRS, and the CORE made from the Chinese CRS, would be considered Vietnamese in origin under its country-of-origin test, but that "(t)he application of a substantial transformation analysis by Commerce to a particular scenario does not preclude Commerce from also applying an analysis pursuant to" section 19 U.S.C. §1677(j)(b), "because the two analyses are distinct and have different purposes."[130] Citing the Federal Circuit's analysis in *Bell Supply*, Commerce explained that in fact, "circumvention can only occur if the articles are from a country *not* covered by the relevant AD or CVD orders."[131] Indeed, Commerce explained if that were not the case, the circumvention provision would be "surperfluous," because if "the processing … applied in a third country … did not substantially transform the subject merchandise, then the resulting product would retain a country-of-origin of the country subject to the order … such that the merchandise at issue would still be subject to the order at issue," and if the finished merchandise

[128] *Certain Corrosion-Resistant Steel Products From the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty and Countervailing Duty Orders*, 83 Fed. Reg. 23895, 23896 (May 23, 2018).
[129] *See id.*
[130] CORE IDM at 14.
[131] CORE IDM at 16 (citing *Bell Supply*, 888 F.3d at 1229 (emphasis added)).

was "subject to the order, then there (would be) no need to engage in an anti-circumvention analysis under" section 19 USC §1677j(b).[132]

In *Bell Supply*, litigation pertaining to the AD Order on Oil Country Tubular Goods from China, the Federal Circuit held in 2018 that this interpretation of the law was correct and concluded that "even where an article is substantially transformed, Commerce can still find that it is subject to an AD or CVD order after conducting a circumvention inquiry."[133] The Court explained that the legislative history showed that this was Congress' intent when it implemented the third country completion or assembly circumvention provision into the statute:

> (L)egislative history indicates that § 1677j can capture merchandise that is substantially transformed in third countries, which further implies that § 1677j and the substantial transformation analysis are not coextensive. In the Conference Report accompanying the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988), Congress explained that § 1677j addresses situations where "parts and components ... are sent from the country subject to the order to the third country for assembly or completion." H.R. Rep. No. 100-576, at 600 (1988). Likewise, the Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994), describes how foreign exporters will attempt to "circumvent an antidumping duty order by ... [p]urchasing as many parts as possible from a third country" and assembling them in the United States. H.R. Doc. No. 103-316, at 893 (1994). Assembling off-the-shelf electronic components may very well create a new product that is "from the U.S." or a third country, but such assembly could still be relatively minor and undertaken with the intention of evading AD or CVD orders. We believe that § 1677j is meant to address these attempts at circumvention, not preclude Commerce from making a country of origin determination in the first instance.[134]

Commerce articulated the differences of these two provisions of AD and CVD law succinctly in the CORE from China Circumvention Final Determination.[135] This description

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[132] *See* CORE IDM at 16.
[133] *Bell Supply Company, LLC v. United States*, 888 F.3d 1222, 1231 (Fed. Cir. 2018).
[134] *Bell Supply*, 888 F.3d at 1231.
[135] *See* CORE IDM at 17-18.

summarizes the purpose of the country of origin test, as well as the purpose of the third country completed or assembled provision:

> As explained above, substantial transformation is focused on whether the input product loses its identity and is transformed into a new product having a new name, character and use, and thus a new country-of-origin. In contrast, section 781(b) of the Act focuses on the extent of processing applied to subject merchandise in a third country and whether such processing is minor or insignificant such that performing this processing in a third country can reasonably be moved across borders, thereby allowing parties to change the country of origin and avoid the discipline of an order. There is nothing inherently contradictory in finding an input substrate to be substantially transformed into a finished product, in terms of its physical characteristics and uses, while also finding the process of effecting that transformation to be minor vis-à-vis the manufacturing process, as a whole, for producing the finished product.[136]

C. Minor Alterations of Merchandise

This means of circumvention is described in the statute as occurring when the "class or kind of merchandise subject to" an investigation, AD Order or CVD Order has been "altered in form or appearance in minor respects (including raw agricultural products that have undergone minor processing), whether or not included in the same tariff classification."[137] The Federal Circuit has held that the "purpose of minor alteration anti-circumvention inquiries is to determine whether articles not expressly within the literal scope of a duty order may nonetheless be found within its scope as a result of a minor alternation to merchandise covered in the investigation."[138]

In the legislative history of this provision, five factors were listed that Commerce should consider as part of its analysis: (1) the overall physical characteristics of the merchandise; (2) the expectations of the ultimate users; (3) the use of the merchandise; (4) the channels of

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[136] *See id*.
[137] Prevention of circumvention of antidumping and countervailing duty orders, 19 U.S.C. § 1677j(c)(1); 19 C.F.R 351.225(i), applies to this provision, but just mirrors the statutory language.
[138] *Deacero S.A. DE C.V. v. United States*, 817 F.3d 1332, 1338 (Fed. Cir. 2016).

marketing of the merchandise; and (5) the cost of any modification relative to the total value of the imported products.[139] It is Commerce's practice to consider those factors in applying the "minor altertions" circumvention provision.[140]

For example, in a circumvention cases pertaining to Steel Threaded Rod from China, the scope provided a description of the percent of various elements composing the steel thread, stating that subject merchandise would not be composed more than, for example, 1.50 percent of silicon, 1.00 percent of copper, or 1.25 percent of chromium by weight.[141] One producer/exporter was found to be exporting steel threaded rod from China containing between 1.25 percent and 1.45 percent chromium by weight.[142] Upon analysis, Commerce made the following conclusions: (1) the only differences physically between the subject merchandise previously exported by the reviewed company and the steel threaded rod at issue was slightly higher amounts of chromium, carbon and manganese, and a slightly higher tensile strength. There was no evidence, however, that the company's customers had ever requested the change in chemical makeup or that the very slight change in tensile strength was ever a specification taken into consideration when making the change; (2) the purchasers of the steel threaded rod at issue did not expect the product to perform differently from subject merchandise; (3) the merchandise at issue was used in the same manner and for the same manner as subject merchandise; (4) the channels and sales of distribution between the merchandise at issue and subject merchandise

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[139] *Omnibus Trade Act of 1987*, S. Fin. Rep. No. 71, 100th Cong., 1st Sess 100 (1987).

[140] The Federal Circuit has held that even if "some quantity" of a product "may have been in existence at some time in non-investigated countries," this fact does "not limit" Commerce's ability to find in a circumvention inquiry that a minor alteration has occurred to products which were not "produced in investigated countries at the time the petition was filed" in circumvention of an Order. *See Deacero*, 817 F.3d at 1339.

[141] *See Certain Steel Threaded Rod from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 78 Fed. Reg. 12718, 12718-12719 (Feb. 25, 2013).

[142] *See Certain Steel Threaded Rod from the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order*, 77 Fed. Reg. 71775 (Dec. 4, 2012), and accompanying PDM, dated December 4, 2012 (77 ITADOC 71776, WESTLAW)(STR PDM), at 8.

were identical; and (5) the costs of modification of the production of the steel threaded rod to increase chromium content were minimal in comparison to the overall cost of the merchandise.[143] Commerce also found that the timing of entries supported a finding of circumvention as sales of the steel threaded rod with additional chromium to the United States started less than a year after the Steel Threaded Rod from China Order was issued.[144] Furthermore, Commerce concluded communications on the record between the importer and the exporter demonstrated that the steel threaded rod at issue "was intended to circumvent the Order."[145] Thus, Commerce determined that the "circumstances under which the" steel threaded rod at issue "entered the Untied States provided substantial evidence of circumvention of the Order."[146]

D. Later-Developed Merchandise

The fourth, and final, means of circumvention addressed in the statute applies when merchandise is "developed after an investigation is initiated." In determining if the later-developed merchandise should be considered "within the scope" of outstanding AD and CVD Orders, Commerce is directed to consider whether (A) "the later-develped merchandise has the same general physical characteristics as the merchandise with respect to which the order was originally issue . . . ;" (B) "the expectations of the ultimate purchasers of the later-developed merchandise are the same as for (the) earlier product;" (C) "the ultimate use of the earlier product and the later-developed merchandise are the same;" (D) "the later-developed merchandise is sold through the same channels of trade as the earlier product," and (E) "the later-

[143] STR PDM at 7-9.
[144] *See id.* at 9.
[145] *Id.*
[146] *Id.*

developed merchandise is advertised and displayed in a manner similar to the earlier product."[147] However, unlike the other circumvention scenarios, the statue states Commerce "may not exclude a later-developed merchandise from" an AD or CVD Order "merely because the merchandise (A) is classified under a tariff classification other than that identified in the petition" or Commerce's "prior notices during the proceeding," or (B) "permits the purchaser to perform additional functions, unless such additional functions constitute the primary use of the merchandise and the cost of additional functions constitute more than a significant proportion of the toal cost of production of the merchandise."[148]

The legislative history of this provision suggests that Congress believed that later-developed products can be ones which have been produced as a result of a "significant technological advancement or a significant alteration of the merchandise involving commercially significant changes."[149] In general, if it was "commercially available" at the time an Order was issued, Commerce will not find a product to be later-developed. However, if the product at issue was not commercially available, but merely existed, at the time the Order was issued, one might still consider that product to be later-developed. Commerce's analysis in this regard has been affirmed by the CIT and Federal Circuit as in accordance with law.[150] Thus, it is Commerce's practice to consider if the product was commercially available at the time the Order was issued in applying the later-developed circumvention provision. Furthermore, Commerce also examines

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[147] Prevention of circumvention of antidumping and countervailing duty orders, 19 U.S.C. § 1677j(d)(1)(A-E); 19 C.F.R 351.225(j) applies to this provision, but just refers back to the statutory language.
[148] 19 U.S.C. § 1677j(d)(2)(A)-(B).
[149] *See* H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess., p. 603 (1988) [reprinted in 1988 U.S.C.C.A.A.N. 1547, 1636] (stating also that "a later-developed product incorporating a new technology that provides additional capability, speed, or functions would be covered by the order as long as it has the same basic characteristics and uses").
[150] *See Target Corp. v. United States*, 578 F. Supp. 2d 1369, 1375-1376 (Ct. Int'l Trade 2008), *aff'd Target II,* 609 F.3d at 1360.

whether the merchandise is "materially different" from merchandise that was under consideration at the time of the investigation.[151]

For example, in a circumvention determination pertaining to the AD Order covering Honey from China, Commerce concluded that blends of honey and rice syrup, regardless of the percentage of honey that they contained, were later-developed merchandise.[152] First, Commerce determined that the evidence on the record indicated that "blends of honey and rice syrup were not commercially available at the time of the investigation."[153] Indeed, evidence on the record showed "that the first imports of blends of honey and rice syrup to the United States from" China "did not occur until August 2004," three years after the AD Order covering Honey from China was issued.[154]

Next, Commerce determined that while honey blends were contemplated by the AD Order, "blends of honey and rice syrup are materially different from those blends because they are not made of C-4 sugars. This difference is important because the percentages present in the Order are premised on honey-sugar blends for which the percentage of honey and sugar are determinate."[155]

Commerce then turned to the factors listed in the statute and after conducting an extensive analysis of each factor, came to the following conclusions: (1) "honey and rice syrup blends, regardless of the percentage of honey they contain, have the same physical characteristics as honey;" (2) "consumers have similar expectations for blends of honey and rice syrup

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[151] *See Honey from the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order*, 77 Fed. Reg. 37378, 37379-80 (June 21, 2012) (*Preliminary Honey Determination*).
[152] *See Honey from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 77 Fed. Reg. 50464, 50464 (Aug. 21, 2012).
[153] *Preliminary Honey Determination*, 77 Fed. Reg. at 37380.
[154] *Id.*
[155] *Id.* at 37381.

regardless of the percentage of honey they contain, as well as for pure honey;" (3) "blends of honey and rice syrup have the same ultimate uses as honey;" (4) "the channels of trade for all ratios of blends of honey and rice syrup are … similar to those used for honey;" and (5) "honey and rice syrup blends are advertised in the same or similar manner as honey."[156] Thus, in accordance with its analysis under section 19 USC §1677j(d) and its analysis of all of these factors on the administrative record, Commerce determined "that blends of honey and rice syrup, regardless of the percentage of honey they contain," had circumvented the AD Order and should be treated as in-scope merchandise.[157]

E. Country-Wide Application

Neither the statute, nor the regulations, direct Commerce on how to implement an affirmative circumvention determination other than to state that Commerce will include "such merchandise" in a CVD or AD Order.[158] As evasion concerns are the fundamental purpose of circumvention inquiries,[159] Commerce has in recent years determined in some cases to apply the results of its circumvention determinations "country-wide" -- addressing not only the actual models of products and specific exporters found to be circumventing an AD or CVD Order, but also other exporters and comparable products that might be able to essentially circumvent a circumvention determination. For example, imagine if Company A circumvented an AD Order on 2 inch, 3 inch, 4 inch and 5 inch widgets, by exporting a 1.9 inch widget to the United States,

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[156] *Preliminary Honey Determination*, 77 Fed. Reg. at 37381-83.
[157] *Id*. at 37383.
[158] Prevention of circumvention of antidumping and countervailing duty orders, 19 U.S.C. § 1677j(e).
[159] The legislative history of the circumvention provisions makes this clear, as it states that the purpose of the circumvention statute "is to authorize {Commerce} to apply {AD and CVD} orders in such as a way as to prevent circumvention and diversion of U.S. law." Omnibus Trade Act, Report of the Senate Finance Committee, S. Rep. No. 71, 100th Cong., 1st sess. 100 (1987). It also states that Congress was concerned with the existence of "loopholes" because such senarios "seriously undermine the effectiveness of the remedies provided by the {AD and CVD} proceedings, and frustrated the purposesfor which these laws were enacted." *Id.* Further, Congress indicated it anticipated that Commerce would implement and administer the circumvention laws aggressively so that it could "foreclose" those "practices." *Id.*

and then adding on .1 inches of rubber covering in the United States, thereby circumventing the very specifically-described 2 inch product covered by the order. If Commerce only applied the circumvention determination to Company A, and then only to the 1.9 inch widgets it exported, nothing would stop Company A from later doing the same or similar activities to avoid the order on 3, 4 or 5 inch widgets. Likewise, if it was only applied to Company A, nothing would stop Companies B, C and D from exporting 1.9 inch widgets and adding .1 inch of rubber themselves in the United States in circumvention of the Order. Accordingly, it is logical in certain circumstances for Commerce to issue a circumvention determination that covers all exporters of not only a certain type of merchandise, but also comparable merchandise that could otherwise benefit from the same type of circumvention.

In a recent, real-world experience, Commerce applied its circumvention determination "country-wide" in proceedings covering the Aluminum Extrusions from China AD and CVD Orders.[160] A Chinese company, which had been previously found to be circumventing those Orders in a different case involving similar merchandise completed or assembled in the United States, entered into a scheme where it spent the time and money to fabricate aluminum extrusion products from their raw imputs in China, then exported those products to its affiliate in Vietnam, remelted the aluminum extrusion products into other aluminum extrusion products, and either exported the merchandise to the United States, declaring the merchandise as Vietnamese in origin, or sold the merchandise in billet form to unaffiliated Vietnamese producers, who then

[160] *Aluminum Extrusions from the People's Republic of China: Final Affirmative Determination of Circumvention of the Antidumping Duty and Countervailing Duty Orders, and Partial Rescission*, 84 Fed. Reg. 39805, 39805-3906 (Aug. 12, 2019) (*Final Aluminum Circumvention Determination*), and accompanying Issues and Decision Memorandum, dated July 31, 2019 (Aluminum Circumvention IDM).

fabricated extruded products from the billets and did the same.[161] Commerce found that this company was not only one of the largest extruders of aluminum in the world, but that it accounted for the largest volume of aluminum extrusions exportered from China to Vietnam, that Vietnamese imports of Chinese aluminum extrusions increased during the period of time Commerce was analyzing, and that the level of investment and research in Vietnam was minor compared to the investment in China for the intial extruded aluminum.[162] It should come as no surprise that Commerce determined that this company had circumvented the AD and CVD Orders covering Aluminum Extrusions from China through the process of assembly or completion in Vietnam.[163]

In light of the facts and scheme before it, Commerce determined that the application of a country-wide application of this circumvention determination was appropriate, concluding that "all extruded aluminum from Vietnam produced from aluminum previously extruded in China (including billets created from re-melted Chinese extrusions)" were covered by the AD and CVD Orders covering Aluminum Extrusions from China.[164] To enforce such a determination, Commerce published certification requirements for importers and exporters of aluminum extrusions from Vietnam.[165] All importers and exporters of aluminum extrusions from Vietnam on or after March 5, 2018, are now required to complete and maintain a certification that certifies that the exported extrusions were not produced from Chinese aluminum extrusions, including

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[161] Aluminum Circumvention IDM at 7-8, 11. Commerce in fact had issued three affirmative circumvention determinations involving this particular company in the past. *See id*. at n. 21. Interestingly, the former chairman and president of this company was indicted in July 2019 by a federal grand jury of smuggling large quantities of aluminum into the United States to evade the payment of $1.8 million in AD and CVD duties. *See Chinese billionaire indicted on charges of skirting U.S. aluminum tariffs*, Washington Post (July 31, 2019), found at www.washingtonpost.com/business/economy on Oct. 25, 2019.
[162] Aluminum Circumvention IDM at 9.
[163] *Final Aluminum Circumvention Determination*, 84 Fed. Reg at 39806.
[164] *Id.*
[165] *Id*. at 39806-39808.

billets created from re-melted Chinese extrusions.[166] In this manner, Commerce looked beyond the specific circumventing company and products and realized that the nature of the circumvention was such that a country-wide application was necessary to effectively address the evasion concerns brought to light in this circumvention inquiry.

V. Conclusion

There are numerous legal and policy issues which pertain to the scope of Commerce's AD and CVD Orders. Whether it is the defining of the scope of an Order in an investigation, the issuance of a scope ruling following a detailed scope inquiry, or the publishing of a circumvention determination in the *Federal Register*, the laws and policies pertaining to the scopes of AD and CVD Orders are interesting and somewhat complicated. Accordingly, it is this author's hope that this paper has provided some insight on how these scope-related laws and procedures operate. All of the United States' AD and CVD laws should be properly and effectively administered, and as explained above, there is nothing more fundamental to the administration and enforcement of those laws than a clear, well-written and well-thought-out scope. Of the numerous "scoops" on Commerce's scopes described in this paper, that is the most important "scoop" of them all.

[166] *Final Aluminum Circumvention Determination*, 84 Fed. Reg at 39806-08.