Will the Real Country of Origin Please Stand Up?

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I. INTRODUCTION

For imported merchandise to be considered subject to an antidumping (AD) or countervailing duty (CVD) order, it must fall under a particular product scope (i.e., is within the "class or kind" of merchandise subject to the measure), and it must originate from a particular country.[1] "Country of origin" and "class or kind" (and its domestic counterpart, the "like product"[2]) are, accordingly, fundamental concepts in the U.S. AD and CVD regime that establish both the legal limits of AD measures and the potential extent of their effectiveness. As pointed out by the United States Court of International Trade (CIT), determining the country of origin of a product "is fundamental to the proper administration and enforcement of the antidumping statute."[3]

Despite the importance of origin determinations in AD and CVD administration, the United States Department of Commerce's (Commerce) approach in making origin determinations has been perplexing to traders, producers, and even trade attorneys. While Commerce's origin rule resembles that employed by the United States Customs and Border Protection (Customs) in determining the origin of imported articles for marking and other purposes, Commerce has expressly declined to be bound by Customs' origin determinations and indeed has often reached origin determinations that differ from Customs' when presented with similar facts.[4] Adding to the complexity, Commerce has changed its approach to origin over the years and has apparently adopted a different approach to origin in investigations involving alleged "circumvention" of AD and CVD orders.

This Article seeks to shed light on these issues by providing a detailed analysis of Commerce's past and present approach to country-of-origin determinations and by offering modest proposals on how its approach may be improved. Part II of this Article accordingly describes Customs' approach in making country-of-origin determinations. Part III analyzes Commerce's approach to country of origin in its AD and CVD administration with a particular focus on the relationship between Commerce's and Customs' approaches. Parts IV and V analyze legal and

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1. 19 U.S.C. §§ 1671, 1673 (2006).

2. Domestic industries with standing to bring AD and CVD actions are limited to producers of the domestic "like product." *Id.* §§ 1671a(c)(4)(A), (D), 1673a(c)(4)(A), (D). The "like product" is a product that is "like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation." *Id.* § 1677(10).

3. E.I. DuPont de Nemours & Co. v. United States, 22 Ct. Int'l Trade 370, 375 (1998) (citation omitted).

4. *See, e.g.*, Certain Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China, 59 Fed. Reg. 15,155, 15,156 (Dep't of Commerce Mar. 31, 1994) (final determination).

policy problems with Commerce's approach. Finally, Part VI concludes the Article by recommending that Commerce consider conforming its approach in AD and CVD proceedings to the well-established approach followed by Customs in its country-of-origin determinations.

II. CUSTOMS' COUNTRY-OF-ORIGIN DETERMINATIONS

Customs[5] has the general authority to determine, on a case-by-case basis, the country of origin of imported merchandise for purposes of country-of-origin marking, statistical, and other purposes.[6] In making such determinations, Customs has applied a "substantial transformation" test, under which a product's country of origin is the last country in which the merchandise was substantially transformed into a new and different article of commerce.[7] As guided by the courts, Customs has explained that substantial transformation further requires that the component materials of the article acquire a new "name, character, or use."[8] Customs has traditionally focused on character and use and has rarely determined that a substantial transformation has taken place solely because the name of the article differs from those of its component materials.[9]

Customs' substantial transformation test thus essentially turns on whether the character and use of a product's components were significantly changed in the country at issue.[10] Customs has applied this test on a case-by-case basis. For example, the CIT has famously determined that processing whole fish into frozen fish fillets constitutes substantial transformation for Customs purposes because the processing significantly alters the fish's character by changing the shape of the fish and making it a product suitable for other market segments.[11] On the

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5. Prior to its reorganization in 2003, U.S. Customs and Border Protection was referred to as the United States Customs Service. *See* H.R. DOC. NO. 108-32, at 4 (2003); 6 U.S.C. § 542 (2006).

6. *See* 19 U.S.C. § 1304; 19 C.F.R. § 134 (2012).

7. 19 C.F.R. § 134.35. Under certain free trade agreements, such as the North American Free Trade Agreement (NAFTA), Customs has adopted "tariff shift" rules that focus on whether the nonoriginating materials used to produce the product undergo specified changes in tariff classification. *Id.* § 102. However, these tariff shift rules are intended to codify the results that would be obtained under the traditional substantial transformation rules. *See, e.g.*, Bestfoods v. United States, 165 F.3d 1371, 1372-73 (Fed. Cir. 1999).

8. *See* Nat'l Juice Prods. Ass'n v. United States, 10 Ct. Int'l Trade 48, 58 n.14 (1986) (citation omitted) (internal quotation marks omitted).

9. *See, e.g.*, U.S. Customs & Border Prot., Headquarters Ruling Letter H197582, at 5 (Aug. 9, 2012) ("[A] change in the name of a product is the weakest evidence of a substantial transformation.").

10. *Id.* at 3.

11. Koru N. Am. v. United States, 12 Ct. Int'l Trade 1120, 1125, 1127-28 (1988).

other hand, Customs has determined that peeling, deveining, cooking, and freezing shrimp does not constitute a substantial transformation because the process neither fundamentally changes the character of the shrimp (i.e., its size or quality) nor endows it with a different use.[12]

With respect to assembly and finishing processes, Customs likewise generally examines whether the character or use of the essential component underwent significant changes.[13] In particular, Customs frequently evaluates the sophistication of the production process as a yardstick for whether such changes took place.[14] For example, Customs has found that assembling over 600 parts into a desktop scanner constitutes a substantial transformation because the assembly is complex and requires considerable time and skill.[15] On the other hand, Customs has determined that cold-drawing hot-rolled steel wire rod does not constitute substantial transformation, partly because the processing adds little value to the product.[16]

III. COMMERCE'S APPROACH IN COUNTRY-OF-ORIGIN DETERMINATIONS

Unlike Customs, which determines the countries of origin for all imported merchandise, Commerce makes country-of-origin determinations only in the narrower context of AD and CVD administration.[17] The U.S. AD and CVD statutes provide that AD and CVD orders are issued for "class or kind of foreign merchandise."[18] In other words, AD and CVD orders apply to merchandise from particular countries rather than merchandise from particular producers.[19] As a result, Commerce often needs to answer the following two questions: (1) whether a product produced in a country subject to the AD and CVD investigation (subject country) with component materials from a third country should be

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12. *See, e.g.*, U.S. Customs & Border Prot., Headquarters Ruling Letter 731763, at 8 (May 17, 1989).
13. *See, e.g.*, *id.* at 4.
14. *See, e.g.*, *id.* at 7.
15. U.S. Customs & Border Prot., Headquarters Ruling Letter 563294, at 4-5, 8 (Sept. 9, 2005).
16. *E.g.*, Superior Wire v. United States, 11 Ct. Int'l Trade 608, 617 (1987).
17. 19 U.S.C. §§ 1671, 1673 (2006).
18. *See id.*; *see also* E.I. DuPont de Nemours & Co. v. United States, 22 Ct. Int'l Trade 370, 373 (1998).
19. *See, e.g.*, Memorandum from Susan H. Kuhbach, Dir., Office I Antidumping & Countervailing Duty Operation, to Ronald K. Lorentzen, Deputy Assistant Sec'y for Imp. Admin. cmt. 1, at 6 (Dec. 28, 2009) (on file with the U.S. Department of Commerce) (regarding the final results of an administrative review of AD duty order for tapered roller bearings from the People's Republic of China).

treated as a product of the subject country and (2) whether a product produced in a third country using component materials from the subject country should be treated as a product of the subject country.[20]

Commerce makes country-of-origin determinations in two basic categories of AD and CVD proceedings: (1) original AD and CVD investigations, administrative reviews, and related scope investigations and (2) investigations of alleged circumvention of an existing AD and CVD order.[21] While Commerce's approach in its origin determinations resembles Customs' approach, Commerce has consistently taken the position that it is not bound by Customs' origin determinations and has often reached origin determinations different from, and at odds with, Customs' position, even with respect to the same type of merchandise and production process.[22] Moreover, there is significant tension between anticircumvention investigations on the one hand and Commerce origin determinations in AD and CVD investigations, administrative reviews, and scope investigations on the other.

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

Even though the AD and CVD statutes provide that AD and CVD orders only apply to merchandise from particular countries, neither contains a standard for Commerce to apply in determining the country of origin for AD or CVD purposes.[23] Since the transfer of authority for the administration of the AD and CVD laws to Commerce in 1980,[24] Commerce has taken the position that a product originates from a country if it has been "substantially transformed" in that country.[25] Even though the substantial transformation test appears to originate from Customs' origin determinations, Commerce has consistently insisted that it is not bound by Customs because it needs to address concerns about potential circumvention of AD and CVD orders.[26] In the 1998 decision

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20. *See* Memorandum from Christian Marsh, Deputy Assistant for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Sec'y for Imp. Admin. cmt. 32, at 77-82 (Oct. 9, 2012) (on file with the U.S. Department of Commerce) (regarding CVD investigation of crystalline silicon photovoltaic cells from the People's Republic of China).

21. *See, e.g.*, *DuPont*, 22 Ct. Int'l Trade at 370, 374; Certain Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China, 59 Fed. Reg. 15,155, 15,155 (Dep't of Commerce Mar. 13, 1994) (final determination).

22. *See, e.g.*, Butt-Weld Pipe Fittings from China, 59 Fed. Reg. at 15,155-56.

23. *See* 19 U.S.C. §§ 1671, 1673.

24. Reorganization Plan No. 3 of 1979, 3 C.F.R. 513 (1980), *reprinted in* 5 U.S.C. § 205 app. at 677-81 (2006); 5 U.S.C. § 903 (2006).

25. *See DuPont*, 22 Ct. Int'l Trade at 374.

26. Butt-Weld Pipe Fittings from China, 59 Fed. Reg. at 15,156.

E.I. DuPont de Nemours & Co. v. United States, the CIT upheld Commerce's use of the substantial transformation test to make the country-of-origin determinations in the AD administration, noting that the test is a "permissible construction" of the AD statute.[27]

As explained below, a close examination of Commerce's determinations in AD and CVD investigations, administrative reviews, and related scope determinations reveals that the precise factors Commerce considers when applying the substantial transformation test have changed over the years. In the 1980s and 1990s, like Customs, Commerce focused on the change in character and use of the product at issue, even though it often reached origin determinations that were different from Customs' when confronting similar circumstances.[28] In the early 2000s, Commerce further deviated from Customs' approach and focused on certain additional factors analogous to those listed in the U.S. anticircumvention statute,[29] such as the level of investment and value added.[30] In the late 2000s, Commerce took a step back and gave equal consideration to the factors related to anticircumvention and the change in character and use.[31] Finally, in the 2012 AD and CVD determination in Photovoltaic Cells from China, Commerce appears to have largely reverted to its pre-2000 approach and focused on the change in character and use as a result of the production process.[32]

1. Commerce's Pre-2000 Approach

Prior to 2000, Commerce's application of the substantial transformation test was similar to Customs', focusing on whether there was a change in the character and use of the essential component of the product as a result of the production process in the subject or third country.[33] Despite this similarity between their approaches, Commerce and Customs often reached opposite conclusions on whether substantial transformation took place when presented with similar facts.

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27. 22 Ct. Int'l Trade at 373 (internal quotation marks omitted).

28. *See, e.g.*, Erasable Programmable Read Only Memories (EPROMs) from Japan, 51 Fed. Reg. 39,680, 39,685, 39,692 (Dep't of Commerce Oct. 30, 1986) (final determination).

29. 19 U.S.C. § 1677j (2006).

30. *See, e.g.*, Wax and Wax/Resin Thermal Transfer Ribbon from the Republic of Korea, 69 Fed. Reg. 17,645, 17,647 (Dep't of Commerce Apr. 5, 2004) (final determination); 19 U.S.C. § 1677j.

31. Memorandum from Susan H. Kuhbach to Ronald K. Lorentzen, *supra* note 19, cmt. 1, at 6-11.

32. Memorandum from Christian Marsh to Paul Piquado, *supra* note 20, cmt. 32, at 77-82.

33. *See, e.g.*, EPROMs from Japan, 51 Fed. Reg. at 39,692.

For example, in the 1986 AD determination in Erasable Programmable Read Only Memories (EPROMs) from Japan, Commerce examined whether EPROMs produced in a third country through encapsulation of wafers and dice from Japan should be treated as a product of Japan or of the third country.[34] Commerce concluded that the processed wafers and dice, the essential components, remained products of Japan because they retained their fundamental properties and use after encapsulation.[35] Commerce also noted that the encapsulation in the third country was not a sophisticated process.[36] Importantly, Commerce rejected the respondents' argument that Customs had considered a similar assembly process to constitute substantial transformation, noting that it was not bound by Customs rulings because it had independent authority to determine the scope of AD investigations.[37]

In the 1993 final AD determination in Cold-Rolled Steel from Argentina, Commerce examined whether the galvanization of U.S.-originated cold-rolled steel sheets in Argentina rendered the steel sheets a product of Argentina.[38] Customs had taken the position that galvanization alone did not constitute substantial transformation.[39] According to Customs, the process that would effect a change in character and use (and thus substantial transformation) of cold-rolled steel was full annealing (i.e., annealing under a high temperature) that caused changes in metallurgical structure.[40] The CIT upheld Customs' conclusion in *Ferrostaal Metals Corp. v. United States*, a landmark 1987 decision.[41] Because the steel sheets at issue were not fully annealed, the steel sheets would retain their U.S. origin according to Customs.[42] Commerce took a different position, however, determining that the steel sheets were of Argentinian origin because galvanization did result in a change in character and use of the cold-rolled steel sheets.[43] Specifically, Commerce reasoned that galvanization transformed the physical character of cold-rolled steel sheets by giving them a corrosion-resistant property and thereby made the sheets fit for use in the construction of

34. *Id.* at 39,680.
35. *Id.* at 39,692.
36. *Id.*
37. *Id.*
38. Certain Cold-Rolled Carbon Steel Flat Products from Argentina, 58 Fed. Reg. 37,062 (Dep't of Commerce July 9, 1993) (final determination).
39. *Id.* at 37,066.
40. *Id.*
41. 11 Ct. Int'l Trade 470, 480 (1987).
42. *Id.*
43. Cold-Rolled Steel from Argentina, 58 Fed. Reg. at 37,066.

products such as air conditioners.[44] Commerce again justified its deviation from Customs' earlier origin determination on its authority to determine the scope of an AD investigation.[45] Commerce further explained that, unlike Customs, it needed to address concerns related to potential circumvention of AD orders.[46]

In the 1999 final AD determination in Stainless Steel Round Wire from Canada, Commerce considered whether the process of cold-drawing stainless wire in Canada constituted substantial transformation of the wire.[47] Both Customs and the CIT previously examined a similar cold-drawing process with respect to carbon steel wire, concluding that such a process did not constitute a substantial transformation for Customs purposes because the process did not change the character or use of the product and added little value to the product.[48] Notwithstanding these earlier determinations in the Customs context, Commerce concluded that the cold-drawing process resulted in a product with "physical properties and end-uses that are distinct from those of the stainless steel wire rod input" because the cold-drawing process changed the size and tensile strengths of the stainless wire rod and thereby affected its uses.[49] Commerce again justified its deviation from Customs' determinations on anticircumvention grounds.[50] The divergence between the Commerce and Customs approaches in this case was particularly depressing for the respondents—their products did not qualify for the preferential North American Free Trade Agreement (NAFTA) tariff rates as products of non-Canadian origin, but at the same time were subject to AD duties as products of Canadian origin.[51]

2. Commerce's Approach in the Early 2000s

Beginning in the early 2000s, Commerce gradually steered away from focusing on the change in character and use and instead focused on the vague and broader criterion of whether the processing resulted in an article of a different class or kind. As the substantial transformation test was originally designed to clarify what products fall under the class or

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44. *Id.*
45. *Id.*
46. *Id.*
47. Stainless Steel Round Wire from Canada, 64 Fed. Reg. 17,324, 17,324-26 (Dep't of Commerce Apr. 9, 1999) (final determination).
48. Superior Wire v. United States, 11 Ct. Int'l Trade 608, 617 (1987), *affirmed in* 867 F.2d 1409 (Fed. Cir. 1989).
49. Stainless Steel Round Wire from Canada, 64 Fed. Reg. at 17,326-27.
50. *Id.* at 17,327.
51. *Id.* at 17,325.

kind of foreign merchandise subject to the AD investigation, Commerce's reliance on the class or kind factor effectively made the standard circular. The resulting ambiguity allowed Commerce to make the country-of-origin determination based on a number of additional factors that bear a striking resemblance to those listed in the U.S. anticircumvention statute.[52]

In the 2000 Memorandum for the final AD determination in Cold-Rolled Carbon Steel from Taiwan, the country-of-origin issue confronting Commerce was whether reprocessing Japanese-origin cold-rolled steel coils into cold-rolled steel strip in Taiwan made the steel strip a product of Taiwan for AD purposes.[53] Citing to both Customs' practice and Commerce's earlier determinations, the respondent argued that the reprocessing in Taiwan substantially changed the physical characteristics—by reducing the thickness, extending the length, changing the microstructure, and significantly increasing the strength—ultimately resulting in a product with different applications.[54] Even though the changes in physical characteristics appeared to resemble those in Cold-Rolled Carbon Steel Flat Product and Steel Round Wire from Canada, Commerce rejected the respondent's argument and did not even address the alleged changes in character and use of the product.[55] Instead, Commerce stated that the reprocessing in Taiwan "generally involve[d] repetition of [the same] steps performed by Japanese producers" and as a result "did not result in a change in the class or kind of the merchandise."[56] On that basis, Commerce concluded that substantial transformation did not take place and that the reprocessed steel coil remained a product of Japanese origin.[57]

In the final AD determination in Wax and Wax/Resin from Korea, which concerned whether transforming jumbo rolls into thermal transfer ribbon constituted substantial transformation, Commerce clearly indicated that it no longer focused on the change in character or use.[58] Instead, Commerce claimed that the single most important element of its

52. *See* 19 U.S.C. § 1677j (2006).

53. Memorandum from Holly Kuga, Acting Deputy Assistant Sec'y for Imp. Admin. Grp. II, to Troy H. Cribb, Acting Assistant Sec'y for Imp. Admin. (May 31, 2000) (on file with the U.S. Department of Commerce) (regarding the investigation of certain cold-rolled, flat rolled carbon quality steel products from Taiwan).

54. *Id.* cmt. 1.

55. *Id.*

56. *Id.*

57. *Id.*

58. *See* Wax and Wax/Resin Thermal Transfer Ribbon from the Republic of Korea, 69 Fed. Reg. 17,645, 17,647 (Dep't of Commerce Apr. 5, 2004) (final determination).

substantial transformation test is whether there has been a change in the class or kind:[59]

> The Department has considered several factors in determining whether a substantial transformation has taken place . . . . [M]ost prominently, [it looks at] whether the processed product falls into a different class or kind of product when compared to the downstream product. . . . [This] factor [has been] consistently examined and emphasized. When the upstream and processed products fall into different classes or kinds of merchandise, the Department generally finds that this is indicative of substantial transformation. . . . [T]he Department has generally found that substantial transformation has taken place when the upstream and downstream products fall within two different "classes or kinds" of merchandise . . . . Conversely, the Department almost invariably determines substantial transformation has not taken place when both products are within the same "class or kind" of merchandise . . . .[60]

Commerce's claim that the term "class or kind" was frequently referenced in past substantial transformation determinations is both correct and unsurprising, because the substantial transformation test was applied in the first instance to clarify the meaning of this term.[61] Yet Commerce broke new ground in Wax and Wax/Resin from Korea by implying that the change in class or kind is not necessarily affected by a change in character or use.[62] Citing to a Customs determination that slitting constitutes substantial transformation, the respondent argued that that slitting resulted in an article of a new, different character and use because the process transformed the product into its final end-use dimensions, inserted cores for loading the ribbons into printers, and added leaders, bridges, and trailers.[63] Commerce rejected the respondent's argument on the grounds that it did not sufficiently address anticircumvention concerns and focused on a range of other factors arguing (1) that coating and ink making is a more important process than slitting, (2) that the slitting operation was not "particularly complex" when compared to the production of jumbo rolls, (3) that the capital investment for slitting was only a fraction of that for coating and ink making, and (4) that the primary cost involved in slitting and packaging

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59. *Id.*

60. *Id.* (footnote omitted) (citations omitted). Products falling within two different classes or kinds of merchandise include "steel slabs converted to hot-rolled band" or "flowers arranged into bouquets." *Id.* Products falling within a same class or kind include "hot-rolled coils pickled and trimmed" or "green rod[s] cleaned, coated, and heat treated into wire rod." *Id.*

61. *Id.*

62. *Id.* at 17,647-48.

63. *Id.* at 17,647.

was labor cost rather than capital cost, which, Commerce pointed out, increases the risk that a slitting operation may be established in a third country for anticircumvention purposes.[64]

The above factors, especially the "level of investment" factor, are noticeably similar to the factors listed in the U.S. anticircumvention statute.[65] Based on these factors, Commerce concluded that slitting did not result in a product of a different class and accordingly did not constitute substantial transformation.[66] Commerce's apparent circular reasoning aside—the substantial transformation test was intended to clarify the meaning of "class or kind of foreign merchandise" in the first instance—the effect of Commerce's new approach was to replace the focus on character and use in previous substantial transformation determinations with a focus on a number of anticircumvention factors, such as the level of capital investment and value added.

3. Commerce's Approach in the Late 2000s

In the late 2000s, Commerce shifted its approach again, this time moving away from predominantly relying on the broad class or kind factor in its origin determinations and instead examining the "totality of circumstances," which includes, among others, both the class and kind and the traditional character and use factors.[67] For example, in the 2009 AD administrative review on Tapered Roller Bearings (TRBs) from China, Commerce examined whether to treat TRBs finished in a third country with components from China as originating from the third country rather than China.[68] In response to a suggestion from the respondent, Commerce agreed to examine "the totality of the circumstances on the record when making its substantial transformation determination, not just class or kind of merchandise."[69] Commerce went on to examine a variety of factors, including (a) change in class or kind of merchandise, (b) nature and sophistication of processing, (c) change in physical and chemical properties of the essential component, (d) cost of

64. *Id.* at 17,647-48 (internal quotation marks omitted).

65. *See* 19 U.S.C. § 1677j (2006). The complexity of the production process is, strictly speaking, not an exclusive anticircumvention factor, as Customs has relied on this criterion in determining whether there has been a significant change in the character or use of the product. However, the extent of value added and the level of investment are not routinely relied upon in Customs' substantial transformation analysis.

66. Wax and Wax/Resin from Korea, 69 Fed. Reg. at 17,648.

67. *See, e.g.*, Memorandum from Susan H. Kuhbach to Ronald K. Lorentzen, *supra* note 19.

68. *Id.* cmt. 1.

69. *Id.* cmt. 1, at 7.

production and value added, (e) level of investment and potential for circumvention, and (f) change in ultimate use.[70] Commerce also explained, "[T]here is no hierarchy in determining what factor alone determines substantial transformation."[71] Based on consideration of these factors, Commerce determined that the TRBs finished in the third country were still of Chinese origin.[72] With respect to the class or kind factor in particular, Commerce pointed out that both the components from China and the product in the third country fell under the scope of the AD order.[73]

Commerce's totality of circumstances approach in TRBs from China represents a balanced combination of its approach in Wax and Wax/Resin from Korea and its earlier approach, because the "totality of circumstances" includes equal consideration of both change in character/use of the essential component and anticircumvention.[74] Moreover, rather than using the class or kind factor as an umbrella for anticircumvention factors such as levels of investment and value added, Commerce apparently recast the class or kind factor as a more straightforward examination of whether both the input materials and the finished product fall under the scope of the existing AD or CVD order.[75] Notably, Commerce also retained the common denominator between Wax and Wax/Resin from Korea and earlier determinations: the disregard of Customs' country-of-origin determinations.[76] In rejecting the respondent's argument that prior Customs rulings supported a finding of substantial transformation, Commerce reiterated its position that it was not bound by such rulings.[77]

Since 2009, Commerce has generally followed the totality of circumstances approach articulated in TRBs from China.[78] While the description of totality of circumstances factors varies from case to case, the substance of these factors largely remains the same. For example, in the 2011 AD administrative review on Laminated Woven Sacks from China, Commerce considered four factors in determining that sacks produced in China from fabric woven in third countries were not of Chinese origin: "(1) whether the processed downstream product falls

70. *Id.* cmt. 1, at 6-11.
71. *Id.* cmt. 1, at 7.
72. *Id.* cmt. 1, at 11.
73. *Id.* cmt. 1, at 7.
74. *Id.* cmt. 1, at 6, 11.
75. *Id.* cmt. 1, at 6-8.
76. *Id.* cmt. 1, at 9.
77. *Id.*
78. *Id.* cmt. 1, at 6.

into a different class or kind of product when compared to the upstream product; (2) whether the essential component of the merchandise is substantially transformed in the country of exportation; (3) the extent of processing, and (4) the value added to the product."[79] Like in TRBs from China, Commerce examined whether a change in class or kind took place based on whether both woven fabric and woven sacks fell under the scope of the AD order (it quickly pointed out woven fabric did not fall under the scope of the AD order).[80] Not surprisingly, Commerce also rejected the petitioner's arguments based on allegedly contrary Customs rulings and reiterated that it was not bound by Customs' country-of-origin determinations.[81]

4. Commerce's Approach in Photovoltaic Cells from China

Commerce's October 17, 2012, final AD and CVD determination in Photovoltaic Cells from China[82] is interesting because it appears to represent a return to Commerce's pre-2000 approach. A key country-of-origin issue confronting Commerce in Photovoltaic Cells from China was whether modules assembled in China from solar cells that had been produced in third countries should be treated as originating from China and, accordingly, subject to the AD investigation.[83] In determining whether the third-country solar cells were substantially transformed in China, Commerce analyzed only three factors: (1) whether there was a change in class or kind, (2) whether the essential component was substantially transformed, and (3) the extent of processing in China.[84]

Specifically, Commerce first summarily determined that there was no change in class or kind because both modules and solar cells fell

79. Memorandum from Christian Marsh, Deputy Assistant for Antidumping and Countervailing Duty Operations, to Kim Glas, Acting Deputy Assistant Sec'y for Imp. Admin. cmt. 1b (Mar. 14, 2011) (on file with the U.S. Department of Commerce) (regarding the AD investigation of laminated woven sacks from the People's Republic of China) (footnotes omitted).

80. *Id.*

81. *Id.*

82. Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China, 77 Fed. Reg. 63,788 (Dep't of Commerce Oct. 17, 2012) (final determination).

83. Memorandum from Christian Marsh to Paul Piquado, *supra* note 20, cmt. 32, at 77. Commerce was similarly concerned with the analogous question of whether solar modules and panels assembled in third countries using Chinese cells are within the scope of the investigation and resulting order. *Id.* cmt. 32, at 80.

84. Memorandum from Jeff Pedersen, Case Analyst, AD/CVD Operations Office 4, to Gary Taverman, Acting Deputy Assistant Sec'y for Antidumping and Countervailing Duty Operations 5-9 (Mar. 19, 2012) (on file with the U.S. Department of Commerce) (regarding AD and CVD investigations of crystalline silicon photovoltaic cells from the People's Republic of China).

under the scope of the AD and CVD investigation.[85] With respect to the "essential component" factor, Commerce relied on the 1986 AD final determination in EPROMS from Japan[86] and conducted a detailed analysis of whether the processing of solar cells into modules changed the "important qualities or use" of the solar cells.[87] Commerce observed that the module assembly did not "change the important qualities, *i.e.*, the physical or chemical characteristics, of the solar cell itself," and that "the function of a solar cell is not changed when assembled into the module/panels; the cell still functions to convert sunlight into electricity."[88] Accordingly, Commerce concluded that similar to the encapsulation process in EPROMs from Japan, "solar module assembly connects cells into their final end-use form but does not change the 'essential active component,' the solar cell, which defines the module/panel."[89] Finally, Commerce determined that the extent of processing in China was not particularly sophisticated because it was "principally an assembly process" that consisted of "stringing together solar cells, laminating them, and fitting them in a glass-cover aluminum frame for protection."[90] Based on the above analysis, Commerce determined that modules assembled in China from solar cells in third countries were not of Chinese origin and accordingly not within the scope of the AD and CVD investigation.[91]

The Photovoltaic Cells from China analysis is remarkable not just because of its heavy focus on the change in the character and use, but also because of its apparent neglect of the additional anticircumvention factors listed in Wax and Wax/Resin from Korea, such as the level of investment and the extent of the value added.[92] Interestingly, Commerce in fact rejected the petitioner's argument that modules assembled from third-country solar cells should be subject to the AD and CVD investigation because of circumvention concerns. While acknowledging that circumvention concerns are reflected in Commerce country-of-origin determinations, Commerce explained that the best way to address the circumvention concerns voiced by the petitioners was not through the

85. *Id.* at 6.

86. Erasable Programmable Read Only Memories (EPROMs) from Japan, 51 Fed. Reg. 39,680, 39,692 (Dep't of Commerce Oct. 30, 1986) (final determination).

87. Memorandum from Jeff Pedersen to Gary Taverman, *supra* note 84, at 6.

88. *Id.* at 7.

89. *Id.*

90. Memorandum from Jeff Pedersen to Gary Taverman, *supra* note 84, at 7; *see also* Memorandum from Christian Marsh to Paul Piquado, *supra* note 20, cmt. 32, at 7.

91. Memorandum from Christian Marsh to Paul Piquado, *supra* note 20, cmt. 32, at 77-82.

92. *See id.*

country-of-origin determination, but rather through effective cooperation between Commerce and Customs (to that end, Commerce had instructed Customs to require importer and exporter certifications if the importer or exporter claimed that the panels and modules imported from China did not contain any solar cells of Chinese origin).[93]

Clearly, a critically influential contextual factor underlying Commerce's determination was the fact that Commerce was also considering the related origin question involving the assembly of solar modules and panels in third countries using cells manufactured in China.[94] Based on the same three factors, Commerce determined that such third-country modules and panels should be considered Chinese modules and panels and are therefore covered by the order.[95] The existence of both Chinese modules with third-country cells and third-country cells with Chinese cells presents Commerce with a dilemma with respect to circumvention, because any anticircumvention considerations in favor of including the former product in the scope of the AD and CVD investigations would work against including the latter product in the same investigations. Thus, undoubtedly a significant factor in Commerce's determination regarding the use of third-country cells in China was the need to impose an internally consistent rule. Commerce could not, in other words, reasonably conclude that assembled modules and panels retain the origin of the cells when the assembly occurs in third countries, but do not retain the origin of the cells when assembled in China. Nonetheless, Commerce's approach in Photovoltaic Cells from China may signal a subtle shift in focus away from the anticircumvention factors to a more traditional change in character and use approach. Whether this will lead to better consistency between the country-of-origin determinations made by Commerce and Customs remains to be seen.

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

The U.S. anticircumvention regime bears a close relationship to both AD and CVD investigations and country-of-origin determinations that are made in such investigations. By defining what products fall under existing AD and CVD orders, which only cover products from

93. *Id.* cmt. 32, at 80; Memorandum from Jeff Pedersen to Gary Taverman, *supra* note 84, at 9.

94. Memorandum from Christian Marsh to Paul Piquado, *supra* note 20, cmt. 32.

95. *Id.* cmt. 32, at 80; Memorandum from Jeff Pedersen to Gary Taverman, *supra* note 84, at 8.

designated countries, Commerce's anticircumvention investigations necessarily involve country-of-origin determinations.

Under the U.S. anticircumvention statute, anticircumvention measures may be adopted in four situations:

(a) *Final Assembly or Completion in the United States*—Merchandise that is of "the same class or kind" as the merchandise that is presently under the AD and CVD order or finding and is completed or assembled in the United States with components from foreign countries that are subject to AD and CVDs. Anticircumvention measures may be adopted with respect to such merchandise if the assembly operation performed in the United States is "minor or insignificant" and if the value of the assembled components is a significant portion of the total value of the merchandise.[96]

(b) *Completion or Assembly in a Third Country*—Merchandise that is of "the same class or kind" as the merchandise that is presently under the AD and CVD order or finding and is completed or assembled in a third country with components from foreign countries that are subject to AD and CVDs. Anticircumvention measures may be adopted with respect to such merchandise if the assembly operation performed in the United States is "minor or insignificant," and if the value of the assembled components is a "significant portion" of the total value of the merchandise.[97]

(c) *Minor Alterations*—Merchandise that is of "the same class or kind" as the merchandise that is presently under the AD and CVD order or finding and is "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."[98]

(d) *Later-Developed Products*—Merchandise developed after the initiation of an investigation. Anticircumvention measures may be adopted based on considerations of whether "the later-developed merchandise has the same general physical characteristics" as the merchandise under an AD and CVD order, whether "the expectations of the ultimate purchasers of the later-developed merchandise are the same as for the earlier product," whether "the ultimate use of the earlier product and later-developed merchandise are the same," whether "the later-developed merchandise is sold through the same channels of trade as the earlier product, and [whether] the later-

96. 19 U.S.C. § 1677j(a) (2006).
97. *Id.* § 1677j(b).
98. *Id.* § 1677j(c).

> developed merchandise is advertised and displayed in a manner similar to the earlier product."[99]

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

(A) "the level of investment in the United States [or the foreign country]",[100]
(B) "the level of research and development in the United States [or the foreign country],"[101]
(C) "the nature of the production process in the United States [or the foreign country],"[102]
(D) "the extent of production facilities in the United States [or the foreign country], and"[103]
(E) "whether the value of the processing performed in the United States [or the foreign country] represents a small proportion of the value of the merchandise sold in [(or imported into)] the United States.[104]

Notably, the above factors are quite similar to those listed in Wax and Wax/Resin from Korea and some of the totality of circumstances factors in subsequent AD and CVD investigations prior to Photovoltaic Cells from China.[105]

Commerce may initiate an anticircumvention investigation either on its own initiative or upon application by an interested party.[106] As a result of such investigations, Commerce may issue an AD investigation that includes circumventing merchandise in the existing AD or CVD order. Under the anticircumvention statute, except in the "minor alterations" situation, Commerce must consult with the United States International Trade Commission (Commission) before including circumventing merchandise in the AD or CVD order, and the Commission may advise Commerce whether the inclusion is consistent with the Commission's prior affirmative injury determination.[107] Even though country-of-origin issues are not explicitly referenced in either the anticircumvention statute

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99. *Id.* § 1677j(d).
100. *Id.* § 1677j(a)(2)(A), (b)(2)(A).
101. *Id.* § 1677j(a)(2)(B), (b)(2)(B).
102. *Id.* § 1677j(a)(2)(C), (b)(2)(C).
103. *Id.* § 1677j(a)(2)(D), (b)(2)(D).
104. *Id.* § 1677j(a)(2)(E), (a)(2)(E).
105. *See* Wax and Wax/Resin Thermal Transfer Ribbon from the Republic of Korea, 69 Fed. Reg. 17,645, 17,647 (Dep't of Commerce Apr. 5, 2004) (final determination); *e.g.*, Memorandum from Susan H. Kuhbach to Ronald K. Lorentzen, *supra* note 19, cmt. 1, at 6 (discussing the totality of circumstances as applied in TRBs from China).
106. 19 C.F.R. § 351.225(b)-(c) (2012).
107. 19 U.S.C. § 1677j(e).

or its implementing regulations, inclusion of circumventing merchandise in the scope of the existing AD or CVD order necessarily implies country-of-origin determinations because an existing AD or CVD order only covers products from designated countries. There is thus one additional dimension to country-of-origin determinations in anticircumvention investigations: in addition to the issue of consistency with Customs' origin determinations, there is a separate issue of consistency with the substantial transformation determinations in Customs' own original AD and CVD investigations.[108]

As in AD and CVD investigations and administrative reviews, Commerce has not made any effort to conform its circumvention determinations to Customs' substantial transformation determinations. In Carbon Steel Butt-Weld Pipe Fittings from China, Commerce determined that carbon steel butt-weld pipe fittings assembled or completed in Thailand with components from China fall under the same class or kind of merchandise as pipe fittings from China, which were subject to an existing AD order.[109] The respondent argued that it relied on a Customs' decision that the operation constituted substantial transformation for Customs purposes.[110] Commerce rejected this argument, reiterating its position that it was not bound by Customs' determinations of origin.[111]

Commerce has been more ambiguous with respect to the relationship between its class or kind determinations in anticircumvention investigations and the substantial transformation determinations in its original AD investigation. In the 2006 anticircumvention determination in Frozen Fish Fillets from Vietnam, Commerce examined whether processing whole, live fish into frozen fish fillets in Cambodia constituted circumvention of an existing AD order on frozen fish fillets from Vietnam.[112] One interested party argued that the frozen fish fillets from Cambodia were not of the same class or kind as frozen fish from Vietnam and accordingly, should not be subjected to the AD order because the processing in Cambodia substantially transformed whole,

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108. Certain Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China, 59 Fed. Reg. 15,155, 15,156 (Dep't of Commerce Mar. 31, 1994) (final determination).

109. *Id.* at 15,155.

110. *Id.* at 15,156.

111. *Id.*

112. Memorandum from Stephen J. Claeys, Deputy Assistant Sec'y Imp. Admin., to David M. Spooner, Assistant Sec'y for Imp. Admin. (June 30, 2006) (on file with the U.S. Department of Commerce) (regarding anticircumvention/scope inquiry for certain frozen fish fillets from the Socialist Republic of Vietnam).

live fish from Vietnam into a product of Cambodian origin.[113] The interested party cited to a series of Customs and CIT decisions that suggest processing live fish into frozen fish fillets constitutes substantial transformation for Customs purposes.[114] It also argued that Commerce's own substantial transformation test would reveal that the frozen fish fillets processed in Cambodia were of Cambodian origin because live fish and frozen fish fillets fall into two different classes or kinds of products and because whole, live fish do not fall under the scope of the AD order.[115]

Commerce rejected the interested party's argument and insisted that an anticircumvention analysis requires a focus on class or kind rather than a substantial transformation.[116] Commerce further stated that the relevant issue was whether the frozen fish fillets from Cambodia were of the same class or kind as the *frozen fish fillets from Vietnam*, not whether frozen fish fillets from Cambodia and *live fish from Vietnam* were of the same class or kind.[117] Not surprisingly, Commerce found that frozen fish fillets from Vietnam and Cambodia were of the same class or kind and determined that frozen fish fillets from Cambodia were subject to the existing AD order.[118] In the same determination, Commerce curiously acknowledged that there were "commonalities" between a substantial transformation analysis and an anticircumvention analysis.[119] Given what Commerce actually did in that determination, it is difficult to see what these commonalities are. While a substantial transformation analysis in Commerce's own practice would require a comparison between the class or kind of the finished product and that of the component material, Commerce actually compared the class or kind of the finished product with that of the same finished product originating from a different country.[120]

Commerce recently appears to have taken the connection between the substantial transformation in original investigations and class or kind determinations in anticircumvention investigations more seriously. In the April 10, 2012, preliminary anticircumvention determination on Glycine from China, Commerce determined that the production of certain glycine products in India from raw materials of Chinese origin constituted

113. *Id.* cmt. 1, at 3.
114. *Id.*
115. *Id.* cmt. 1, at 3-4.
116. *Id.* cmt. 1, at 19-20.
117. *Id.* cmt. 1, at 20.
118. *Id.*
119. *Id.* cmt. 1, at 19.
120. *Id.* cmt. 1, at 19-20.

circumvention.[121] Commerce based this determination in significant part on a 2002 scope ruling with respect to the same AD order, where Commerce determined that a similar production process in India with Chinese raw materials did not constitute substantial transformation.[122] This argument is clearly in tension with Frozen Fish from Vietnam, according to which the circumvention analysis should involve a determination of whether the allegedly circumventing product falls under the same class or kind of the product under the existing order, not whether the circumventing product underwent a substantial transformation.[123] It is unclear whether this determination signals that Commerce would reconcile its class or kind determinations in anticircumvention cases with its substantial transformation analysis in other AD proceedings.

IV. LEGAL PROBLEMS WITH COMMERCE'S APPROACH TO COUNTRY OF ORIGIN

As explained below, while Commerce's approach in making country-of-origin determinations may have started to take a turn for the better, its historical approach is not only questionable under both U.S. law and World Trade Organization (WTO) rules, but also has undesirable consequences from a policy perspective. Two characteristics of Commerce's approach are particularly troublesome: (1) its deviation from Customs' origin determinations and (2) its refusal to apply a substantial transformation analysis in anticircumvention investigations.[124] These two characteristics of Commerce's approach have undermined the reasonable administration of the U.S. and possibly the global AD and CVD regime. Accordingly, Commerce should make a greater effort to apply the substantial transformation analysis in all AD and CVD proceedings (including anticircumvention investigations) in a way that is consistent with Customs' origin determinations.

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121. Glycine from the People's Republic of China, 77 Fed. Reg. 21,532, 21,532 (Dep't of Commerce Apr. 10, 2012) (prelim. determination).

122. *Id.* at 21,535.

123. Memorandum from Stephen J. Claeys to David M. Spooner, *supra* note 112, cmt. 1, at 19-20.

124. Wax and Wax/Resin Thermal Transfer Ribbon from the Republic of Korea, 69 Fed. Reg. 17,645, 17,648 (Dep't of Commerce Apr. 5, 2004) (final determination); *see* Certain Tissue Paper Products from the People's Republic of China, 76 Fed. Reg. 47,551, 47,552 (Dep't of Commerce Aug. 5, 2011) (final determination).

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

Despite changes in Commerce's substantial transformation factors over the years and the unclear status of the substantial transformation analysis in anticircumvention investigations, one thing is remarkably constant in Commerce's country-of-origin determinations: Commerce's insistence that it is not bound by Customs' country-of-origin determinations because of concerns about potential circumvention of the AD or CVD order.[125] Commerce's position has resulted in two sets of substantial transformation tests respectively administered by Commerce and Customs, making it possible that a product can originate from one country for AD and CVD purposes and another for tariff purposes.[126] As shown below, this lack of uniformity between the Commerce and Customs origin determinations not only has little support in U.S. jurisprudence, but also directly contradicts WTO rules.

Despite Commerce's confident claims that its disregard of Customs' origin determinations is perfectly legitimate, the support for this position in U.S. case law is in fact rather limited. While the CIT in *DuPont* approved Commerce's use of the substantial transformation test in making country-of-origin determinations, it did not address whether Commerce may apply the test in a way that contradicts Customs' origin determinations.[127] Commerce has in fact relied on two other CIT decisions from the early 1980s to justify its deviation from Customs' origin determinations.[128] In the 1980 case *Royal Business Machines, Inc. v. United States*, Commerce and Customs disagreed on whether a certain typewriter was included in the scope of an AD order on portable electric typewriters from Japan, which was defined by reference to the then-applicable tariff classification numbers.[129] The CIT distinguished between "the authority of the Customs Service to classify according to tariff classifications . . . and the power of the agencies administering the antidumping law to determine a class or kind of merchandise" and held

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125. Certain Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China, 59 Fed. Reg. 15,155, 15,156 (Dep't of Commerce Mar. 31, 1994) (final determination); Wax and Wax/Resin from Korea, 69 Fed. Reg. at 17,648.

126. Superior Wire v. United States, 11 Ct. Int'l Trade 608, 614 (1987); Stainless Steel Round Wire from Canada, 64 Fed. Reg. 17,324, 17,325-27 (Dep't of Commerce Apr. 9, 1999) (final determination).

127. *See* E.I. DuPont de Nemours & Co. v. United States, 22 Ct. Int'l Trade 370, 374 (1998).

128. Royal Bus. Machs., Inc. v. United States, 1 Ct. Int'l Trade 80 (1980); Diversified Prods. Corp. v. United States, 6 Ct. Int'l Trade 155 (1983).

129. 1 Ct. Int'l Trade at 83-84.

that Commerce's "determinations under the antidumping law may properly result in the creation of classes which do not correspond to classifications found in the tariff schedules."[130] Similarly, in the 1983 case *Diversified Products Corp. v. United States*, the CIT confirmed that Commerce may include a particular type of speedometer in an AD investigation on all bicycle speedometers when Customs classified such speedometers to be "other than" bicycle speedometers.[131] Yet the holdings in *Royal Business Machines* and *Diversified Products* merely affirmed that Commerce may determine the scope of an AD investigation independently from Customs' tariff classification determinations.[132] As such, they do not appear to give Commerce express license to deviate from Customs' country-of-origin determinations.

If Commerce's disregard of Customs' origin determinations is only questionable under U.S. law, it is almost certainly inconsistent with WTO Rules. Article 2(e) of the WTO Agreement on Rules of Origin (WTO Origin Agreement) provides that member countries must ensure that "their rules of origin are administered in a consistent, uniform, impartial and reasonable manner."[133] Moreover, article 1(2) of the WTO Origin Agreement expressly states that the rules of origin subject to the WTO Origin Agreement shall include

> all rules of origin used in non-preferential commercial policy instruments, such as in the application of: most-favoured-nation treatment under Articles I, II, III, XI and XIII of GATT 1994; *anti-dumping and countervailing duties under Article VI of GATT 1994*; safeguard measures under Article XIX of GATT 1994; origin marking requirements under Article IX of GATT 1994; and any discriminatory quantitative restrictions or tariff quotas. They shall also include rules of origin used for government procurement and trade statistics.[134]

Note 1 to article 1(2) further explains, "It is understood that this provision is without prejudice to those determinations made for purposes of defining 'domestic industry' or 'like products of domestic industry' or similar terms wherever they apply."[135] Because Commerce's country-of-origin determinations are made in the context of AD and CVD

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130. *Id.* at 87 n.18.

131. 6 Ct. Int'l Trade at 163.

132. *Royal Bus. Machs.*, 1 Ct. Int'l Trade at 87 n.18; *Diversified Prods.*, 6 Ct. Int'l Trade at 159.

133. Agreement on Rules of Origin art. 2(e), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 397 [hereinafter WTO Origin Agreement].

134. *Id.* art. 1(2) (emphasis added) (footnote omitted).

135. *Id.* art. 1(2) n.1.

administration and are not for the purposes of defining "domestic industry" or "domestic like product," it should be subject to the uniformity and consistency requirements under article 2(e).[136] Commerce's repeated deviations from Customs' origin determinations clearly do not meet these requirements. Moreover, to the extent that Commerce's deviations from Customs' origin determinations have subjected certain merchandise to adverse treatment under both the tariff and the AD regimes—such as in Stainless Steel Round Wire from Canada, where the product was simultaneously subject to AD duties as a Canadian product and excluded from preferential NAFTA treatment as a non-Canadian product[137]—Commerce's country-of-origin determinations arguably are not even "reasonable" under article 2(e) of the WTO Origin Agreement.[138]

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

As explained in Part III.2, even though Commerce's determinations to include certain circumventing merchandise in anticircumvention proceedings necessarily involve a country-of-origin determination, Commerce has refused to apply the substantial transformation test in anticircumvention investigations.[139] This approach may result in the extension of an AD or CVD order on an import activity that was not subject to the AD or CVD investigation. As such, Commerce's refusal to apply the substantial transformation test would be inconsistent with both U.S. AD and CVD law and article VI of the General Agreement on Tariff and Trade (GATT).[140]

For example, the U.S. AD statute states that the administering authority may impose AD duties on a class or kind of foreign merchandise if the Commission determines that the domestic industry is "materially injured" or "threatened with material injury" "by reason of imports of *that merchandise*."[141] Likewise, GATT article VI(5) provides, "No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting

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136. *Id.* art. 2(e).

137. Stainless Steel Round Wire from Canada, 64 Fed. Reg. 17,324, 17,325 (Dep't of Commerce Apr. 9, 1999) (final determination).

138. WTO Origin Agreement, *supra* note 133, art. 2(e).

139. *See supra* Part III.2.

140. *See* General Agreement on Tariffs and Trade art. VI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

141. 19 U.S.C. § 1673 (2006) (emphasis added). Section 1671, the CVD statute, uses this same language. *Id.* § 1671.

party unless it determines that the effect of the dumping or subsidization . . . is such as to cause or threaten material injury . . . ."[142] Accordingly, an AD or CVD order may be imposed on a product only if the product is found by Commerce to have been dumped into the United States and by the Commission to have caused injury to the domestic industry.

Therefore, if alleged circumventing merchandise from the subject country was in fact substantially transformed in a third country, or if the alleged circumventing goods from a third country did not actually undergo a substantial transformation in the subject country, including such goods in an existing AD or CVD order merely because it falls under the same class or kind of goods under the AD or CVD order arguably would be inconsistent with both the U.S. AD and CVD laws and GATT article VI. In fact, similar concerns appear to have been raised in a 1997 WTO panel request submitted by South Korea.[143] The panel request concerned the initiation of a U.S. anticircumvention investigation against South Korean components assembled into television sets in Mexico and Thailand.[144] In the panel request, South Korea suggested that the anticircumvention proceeding would be inconsistent with both GATT article VI and the WTO AD Agreement, because it might extend the AD order on television sets from South Korea to television sets assembled in Mexico and Thailand "without findings of dumping and resulting injury ever having been made."[145] Unfortunately, it is impossible to know how the WTO panel would have addressed this important issue raised by South Korea because the panel was never established; after South Korea submitted its panel request, the United States revoked the AD order at issue, and South Korea withdrew the request for the establishment of a panel.[146]

To be sure, there are arguments that Commerce's refusal to apply the substantial transformation test would not lead to the inclusion of a product under an existing AD or CVD order without findings of either dumping or a countervailable subsidy and resulting injury.[147] Two strong

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142. GATT, *supra* note 140, art. VI(5).

143. Request for the Establishment of a Panel by Korea, *United States—Imposition of Anti-Dumping Duties on Imports of Colour Television Receivers from Korea*, WT/DS89/7 (Nov. 7, 1997); *see also* Lucia Ostoni, *Anti-Dumping Circumvention in the EU and the US: Is There a Future for Multilateral Provisions Under the WTO?*, 10 FORDHAM J. CORP. & FIN. L. 407, 430-31 (2005).

144. Request for the Establishment of a Panel by Korea, *supra* note 143, at 2-3.

145. *Id.*

146. Ostoni, *supra* note 143, at 431.

147. *See, e.g.*, 19 U.S.C. § 1677j(a)-(c) (2006).

arguments are as follows. First, the anticircumvention statute provides that Commerce should consider factors such as the extent of value added and the complexity of the processing when making circumvention decisions.[148] These factors are also considered by both Commerce and Customs when applying the substantial transformation test.[149] Second, the anticircumvention statute requires Commerce to consult with the Commission on potential injury-related issues regarding the proposed inclusion of additional articles in the AD order (except in the "minor alterations" situation).[150] However, neither of the above arguments convincingly establishes that Commerce's current approach poses no risk of subjecting a product to an existing AD or CVD order without the requisite findings of dumping and injury. With respect to the first argument, Commerce's determination to treat frozen fish fillets from Cambodia as a circumventing good in Fish Fillets from Vietnam demonstrates that the danger does exist.[151] There is no evidence that Commerce examined the dumping of frozen fish fillets from Cambodia in its original AD investigation on frozen fish fillets from Vietnam, and frozen fish fillets and whole live fish (the component material of frozen fish fillets from Cambodia) were not even included in the scope of the original investigation.[152] With respect to the second argument, the consultations with the Commission do not appear to be an adequate safeguard against injury-related problems. Based on our research of past cases, while Commerce has routinely notified the Commission of its proposed inclusion of circumventing merchandise in the existing order, there has never been evidence that the Commission ever gave Commerce any advice regarding injury issues. In fact, the few Commerce documents that discuss the results of the Commission notifications all state that the Commission found such advice to be unnecessary.[153]

V. DANGERS OF USING ORIGIN DETERMINATIONS TO ADDRESS ANTICIRCUMVENTION CONCERNS

Now that we have seen the legal problems with Commerce's approach to country-of-origin determinations, it is appropriate to take a closer look at the policy foundation of Commerce's approach.

148. *Id.*

149. *See, e.g.*, Stainless Steel Round Wire from Canada, 64 Fed. Reg. 17,324, 17,327 (Dep't of Commerce Apr. 9, 1999) (final determination).

150. 19 U.S.C. § 1677j(e).

151. Memorandum from Stephen J. Claeys to David M. Spooner, *supra* note 112.

152. *See id.*

153. *See, e.g.*, Certain Tissue Paper Products from the People's Republic of China, 76 Fed. Reg. 47,551, 47,552 (Dep't of Commerce Aug. 5, 2011) (final determination).

Commerce has been comfortable with routinely relying on circumvention concerns to justify its approach in making country-of-origin determinations. But is this rationale really as strong as Commerce believes?

As an initial matter, anticircumvention measures are not expressly authorized under the WTO AD Agreement or any other WTO agreement.[154] Circumvention was discussed during the Uruguay Round and referenced in one of the last versions of the GATT 1994, but the negotiating parties ultimately were not able to reach any consensus regarding circumvention and deleted all references to circumvention from final agreements.[155] As such, anticircumvention measures are only allowed to the extent that they do not contradict existing WTO agreements.[156] Accordingly, Commerce cannot justify its deviation from the GATT article VI and the WTO Origin Agreement on anticircumvention grounds.

A more fundamental question is whether it is at all proper to use the country-of-origin determinations to address anticircumvention concerns. The WTO Origin Agreement specifically warns against using rules of origin to advance trade objectives.[157] Article 2(b) of the WTO Origin Agreement requires WTO members to ensure that "notwithstanding the measure or instrument of commercial policy to which they are linked, their rules of origin are not used as instruments to pursue trade objectives directly or indirectly."[158] By this logic, even if the trade policy of preventing circumvention of AD orders is itself legitimate, rules of origin are not the proper means to advance this policy.

In fact, even the utility of using rules of origin to prevent circumvention is questionable. While Commerce has taken for granted the need to apply a unique rule of origin to prevent circumvention, it has not addressed two crucial assumptions underlying this position.

The first question is whether the substantial transformation determinations used by Customs are really vulnerable to circumvention. If not, there would be little need for Commerce to apply the test differently. There also appears to be a solid argument that Customs' application of the substantial transformation test would not incentivize

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154. See generally Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201, and other WTO agreements.

155. *See* Decision on Anti-Circumvention, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 72; *see also* Ostoni, *supra* note 143, at 413-14.

156. *See* Ostoni, *supra* note 143, at 427-29.

157. WTO Origin Agreement, *supra* note 133, art. 2(b).

158. *Id.*

circumvention activities because it already accounts for factors such as complexity of processing in the "character and use" analysis. Moreover, Commerce's approach may not address circumvention concerns better than the Customs approach even if the former supposedly incorporates the anticircumvention factors. As explained earlier, Commerce's origin determinations usually involve the following two scenarios: (1) a product produced in a subject country with component materials from a third country and (2) a product produced in a third country using component materials from the subject country.[159] As demonstrated by Photovoltaic Cells from China, these two scenarios pull the origin determinations in two different directions as far as circumvention is concerned.[160] Any anticircumvention factors designed to deal with the type of circumvention in the first scenario will make the type of circumvention in the second scenario more likely. It is thus unclear whether adding anticircumvention factors on top of the factors already considered by Customs would really address anticircumvention concerns more adequately. Of course, Commerce could manipulate the anticircumvention analysis in origin determinations to maximize the scope of the AD or CVD measure. But that would be patently unreasonable because the same production process that transforms component materials into finished products could be either substantial or insubstantial depending on whether it takes place in the subject country or the third country.

The second, and related, question, which is more important, is whether origin determinations are really a good place to address circumvention concerns in light of their limitations. It appears that the better means to address these concerns is through the analysis of the factors listed in the anticircumvention investigations under the U.S. anticircumvention statute, which were specifically designed by the legislators to deal with circumvention.[161] An even better means to address circumvention concerns is through closer cooperation between Commerce and Customs in administering AD orders, such as requiring proper export and import documentation as explained by Commerce in Photovoltaic Cells from China.[162] In fact, Commerce appears increasingly to recognize the dubious assumptions underlying its historical approach to origin determinations and has attempted to steer its

159. *See, e.g.*, Memorandum from Christian Marsh to Paul Piquado, *supra* note 20, cmt. 32, at 77-82.

160. *Id.*

161. 19 U.S.C. § 1677j (2006).

162. Memorandum from Christian Marsh to Paul Piquado, *supra* note 20, cmt. 32, at 80.

country-of-origin determinations away from circumvention discussions, as evidenced by the origin analysis in Photovoltaic Cells from China.[163] This is certainly a welcome development.

While the benefit of using rules of origin to prevent circumvention is limited, the problem associated with this practice from a policy perspective is substantial for several reasons. First, the inconsistency between Commerce and Customs has consistently upset the reasonable expectations of importers and exporters who regularly deal with Customs compliance issues and rely on Customs' directions and rulings. Particularly troubling are cases such as Stainless Steel Round Wire from Canada, where traders got the worse end of the deal under both the tariff and AD regimes.[164] Second, Commerce's refusal to apply the substantial transformation test in anticircumvention investigations raises due process concerns regarding producers and traders whose products were not investigated in the original AD and CVD investigation but later included in the AD and CVD order. These producers and traders are effectively deprived of an opportunity to present their position regarding dumping and injury before both Commerce and the Commission.

More broadly speaking, Commerce's use of origin determinations to advance anticircumvention goals sets a dangerous precedent for global AD and CVD administration under the WTO system. Specifically, Commerce's practice may open the door for using origin determinations and the anticircumvention rationale as a shortcut to avoid the dumping and injury requirements established under the WTO AD Agreement. This danger is particularly great as major global trade players such as China and India have started to step up their anticircumvention practices, following the footsteps of the United States and the European Union. In early 2012, the Ministry of Finance of India issued Notice No. 6, which established—for the first time—procedures for taking measures to prevent circumvention of AD orders.[165] The following language of the notice strongly suggests that an existing AD order may be extended to merchandise originating in a country that has not been subject to the original AD investigation:

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163. *See id.* cmt. 32, at 77-82.

164. Stainless Steel Round Wire from Canada, 64 Fed. Reg. 17,324, 17,325 (Dep't of Commerce Apr. 9, 1999) (final determination).

165. Custom Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 2012, Gazette of India, Extraordinary, section III(2)(i) (Jan. 19, 2012), *available at* http://www.cbec.gov.in/customs/cs-act/notifications/notfns-2012/cs-nt2012/csnt06-2012.htm.

> Where an article subject to anti dumping duty is imported into India through exporters or producers or *country not subject to anti dumping duty*, such exports shall be considered to circumvent the anti dumping duty in force if the exporters or producers notified for the levy of anti-dumping duty change their trade practice, pattern of trade or channels of sales of the article in order to have their products exported to India through exporters or producers or country not subject to anti dumping duty.[166]

Notice No. 6 ominously contains no requirement that the circumventing good must originate from a country that was subject to the original AD order.[167]

Perhaps China, which is already the second largest importer-country in the world,[168] is the place where the abuse of origin determinations for anticircumvention purposes will have the greatest impact. While China does not have any detailed regulation governing circumvention of AD orders, article 55 of the AD Regulations of China gives its Ministry of Commerce (MOFCOM) broad authority to take appropriate measures to prevent circumvention of AD measures.[169] In recent years, a few Chinese scholars have urged MOFCOM to follow the United States' suit in using anticircumvention measures to "supplement" AD orders.[170] MOFCOM may have recently decided to follow such advice and, in fact, may have taken the U.S. approach one step further. In the October 12, 2012, Final Sunset Review Determination on Spandex from Japan, South Korea, Singapore, Taiwan, and the United States, MOFCOM decided to extend the AD order on all spandex from Singapore for another five years while acknowledging the abundance of factual support for revocation of the AD order.[171] MOFCOM based its decision exclusively on the ground that the only Singaporean producer of spandex had a joint venture with a Japanese producer in Japan and thus could circumvent the AD order on spandex from Japan by transshipping Japanese-origin spandex through Singapore.[172] While maintaining an AD order of *Singaporean-originating* spandex because of concerns about *Japanese-originating* spandex is patently unreasonable, MOFCOM's approach appears to be a natural

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166. *Id.* (emphasis added).

167. *See id.*

168. *The World Factbook—Country Comparisons: Imports*, CIA, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2087rank.html (last visited Mar. 22, 2013).

169. Antidumping Regulations of the People's Republic of China (promulgated by the State Council, Nov. 26, 2001, effective Mar. 31, 2004) (China).

170. *See, e.g.*, Xiao Hai, *Improvements of Legislation on Anti-Circumvention in China Based on the Legislation of Europe and America*, 22 J. E. CHINA JIAOTONG UNIV. 83 (2005).

171. Announcement No. 62 of 2012, MOFCOM Ruling Made in Final Review of Anti-Dumping Measures Against Spandex (Oct. 15, 2012) (China).

172. *Id.*

extension of the U.S. approach of using a combination of origin determinations and the anticircumvention rationale to extend the reach of AD orders.

Accordingly, even aside from legal considerations, Commerce should consider conforming its origin determinations in AD and CVD investigations, administrative reviews, and anticircumvention investigations to those made by Customs for the policy reasons of maintaining the integrity of the U.S. and global AD and CVD regimes. Commerce's approach in Photovoltaic Cells from China[173] is a promising start.

VI. CONCLUSION

This Article has demonstrated that Commerce's approach to country of origin in the AD and CVD context has been questionable from both a legal and a policy perspective. To be sure, Commerce's approach to country of origin has not been static; in fact, as shown by this Article, it has undergone at least three discernible phases in the past twenty-five years. However, these various historical approaches are united by one common thread: their distrust and disregard of Customs' origin determinations. This attitude towards Customs' origin determinations is not only ironic from a historical perspective (Commerce borrowed the very concept of substantial transformation from Customs' origin analysis), but has also fundamentally undermined reasonable AD and CVD administration by upsetting the reasonable expectations of traders and producers and depriving them of important due process rights. Moreover, circumvention concerns do not justify Commerce's deviation from Customs' origin determinations, both because the origin analysis is not the best place to effectively address circumvention concerns and because anticircumvention measures should not be used as a shortcut for extending the reach of AD and CVD orders without findings of dumping and injury.

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

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173. Memorandum from Christian Marsh to Paul Piquado, *supra* note 20.