Circumvention, Evasion, and Enforcement of Antidumping and Countervailing Duty Orders Before Commerce and Customs: Statutory Frameworks, Recent Trends, and the Interplay between EAPA and Circumvention Regimes

CHASE DUNN,[*] JAMIE SHOOKMAN,[†] NITHYA NAGARAJAN,[‡]
TAMARI LAGVILAVA,[§] HARDEEP JOSAN[**]

The circumvention statute, codified at 19 U.S.C. § 1677j, provides the U.S. Department of Commerce (Commerce) with broad authority to address circumvention and evasion of antidumping duty (AD) and countervailing duty (CVD) orders. More recently, Title IV, Section 421 of the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), commonly known as the Enforce and Protect Act (EAPA), codified at 19 U.S.C. § 1517, established a new administrative process directing U.S. Customs and Border Protection (CBP) to investigate evasion of AD/CVD orders. The evolving relationship between Commerce's circumvention practice and CBP's EAPA evasion practice has generated important and unique issues related to the enforcement and interpretation of AD/CVD orders.

This paper provides a robust discussion of Commerce's circumvention practice and CBP's EAPA practice, as well as an analysis of the interplay between the two agencies in carrying out their respective enforcement missions. The paper begins with a brief overview of the circumvention statute, outlining the criteria necessary for reaching an affirmative determination and highlighting recent trends in Commerce's circumvention practice. Next, the paper provides an overview of EAPA's legislative history and statutory framework, outlining the criteria for an investigation, the timeline for such investigations, and discussing recent trends in CBP's EAPA

[*] Chase Dunn is an associate in Cassidy Levy Kent's Washington office, where he assists clients in proceedings before the U.S. Department of Commerce and U.S. International Trade Commission involving a wide range of trade remedy actions.

[†] Jamie Shookman is a senior counsel in Husch Blackwell's international trade and supply chain team. Ms. Shookman was previously a trial attorney at the U.S. Department of Justice where she represented federal agencies in the U.S. Court of International Trade and Court of Appeals for the Federal Circuit.

[‡] Nithya Nagarajan is a partner in Husch Blackwell's international trade and supply chain team. Ms. Nagarajan has over 30 years of experience in the field of trade remedies, which includes previous roles at the U.S. Department of Commerce, the U.S. Department of Justice and the U.S. Court of International Trade, as well as founding her own international trade practice in 2010.

[§] Tamari Lagvilava contributed to the Section II.B of this article regarding Enforce and Protect Act Legislative History and Statutory Framework. Ms. Lagvilava is an attorney with the Office of Chief Counsel, U.S. Customs and Border Protection. The views expressed herein are the author's own, and do not necessarily represent the position of the Office of Chief Counsel, U.S. Customs and Border Protection, or the Government of the United States.

[**] Hardeep Josan contributed to Section I of this article regarding Circumvention: Legislative History, Statutory Framework, and Recent Trends. Ms. Josan is a trial attorney at the U.S. Department of Justice. The views expressed herein are the author's own and do not necessarily represent the position of the U.S. Department of Justice of the Government of the United States.

practice. Finally, the paper concludes with a discussion of key procedural and substantive issues that arise when both CBP and Commerce evaluate the same AD/CVD orders.

I. Circumvention: Legislative History, Statutory Framework, and Recent Trends

In 1988, Congress amended the Tariff Act of 1930 by, *inter alia*, adding section 781, "Prevention of Circumvention of Antidumping and Countervailing Duty Orders."[1] In proposing the addition of the circumvention provisions, Congress expressed its concern "about the increasing instances in numerous product sectors of circumvention, diversion, and evasion of antidumping and countervailing duty orders."[2] In particular, Congress highlighted that

> parties subject to these orders have been able to evade the order by making slight changes in their method of production or shipment of merchandise destined for consumption in the United States. As a result, the existence of these 'loopholes' has seriously undermined the effectiveness of the remedies provided by the antidumping and countervailing duty proceedings, and frustrated the purpose for which these laws were enacted.[3]

Congress instructed that "aggressive implementation of {the circumvention law} by the Commerce Department can foreclose these practices."[4]

As enacted, the circumvention statute provides Commerce with authority to "apply antidumping and countervailing duty orders in such a way as to prevent circumvention and diversion of U.S. law."[5] To this end, the statute outlines four categories of circumventing merchandise that may be brought within the scope of an AD/CVD order even though such merchandise falls outside the literal scope of the order.[6] These four types of merchandise fall into two broad categories: (1) manipulation of a product's country of origin (*i.e.*, minor "assembly or completion" in the U.S. or third countries), and (2) manipulation of the product itself (*i.e.*, minor alterations of merchandise or later-developed merchandise).[7] The statutory criteria for each type of circumvention is provided below, along with a brief discussion of Commerce's analytical frameworks applied in evaluating these criteria.

A. Merchandise Completed or Assembled Through "Minor or Insignificant" Processing

The statute outlines two different types of circumvention related to the manipulation of a product's country of origin: completion or assembly through "minor or insignificant" processing

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[1] *See* 19 U.S.C. § 1677j.
[2] Omnibus Trade Act of 1988, Report of the Senate Finance Committee, S. Rep. 100-71 at 101 (1987).
[3] *Id*.
[4] *Id*.; *see also Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws: Final Rule*, 86 Fed. Reg. 52300, 52302 (Sept. 20, 2021) (*Circumvention Final Rule*) (noting that with "the implementation of the {Uruguay Round Agreements Act}, the {Statement of Administrative Action} expressed similar concerns about scenarios limiting the effectiveness of the AD duty law").
[5] *Id.* at 52347 (quoting S. Rep. No. 100-71 at 101).
[6] *See Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1370 (Fed. Cir. 1998) (*Wheatland Tube*).
[7] *See Ceramark Technology, Inc. v. United States*, 11 F. Supp. 3d 1317 n.9 (Ct. Int'l Trade 2014).

in the United States and "minor or insignificant" processing in a third country.[8] Although the statute differentiates between these two types of circumvention, the statutory criteria for both are substantially similar.[9] As a result, Commerce has historically employed the same analytical framework and methodologies for evaluating both types of minor assembly operations.[10]

Pursuant to 19 U.S.C. § 1677j(a), Commerce may include within the scope of an order imported parts and components that are used to assemble or complete in the United States the merchandise subject to an order if four conditions are met:[11]

A. the merchandise sold in the United States is of the same class or kind as merchandise subject to an order;
B. such merchandise is completed or assembled in the United States from parts or components produced in the country with respect to which such order 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 used constitute a significant portion of the total value of the merchandise.

Pursuant to 19 U.S.C. § 1677j(b), Commerce may include within the scope of an order merchandise imported from a third country that was produced from parts and components manufactured in the country subject to an order if five conditions are met:

A. the merchandise imported into the United States is of the same class or kind as any merchandise produced in a country subject to an order;
B. before importation into the United States, such imported merchandise is completed or assembled in a third country from parts or components which is subject to an order;
C. the process of assembly or completion in the third country is minor or insignificant;
D. the value of the parts and components used in the production process constitute a significant portion of the total value of the merchandise exported to the United States; and
E. Commerce finds that action is appropriate to prevent evasion of the order.

In determining whether to include the parts or components within the scope of an order under both provisions, Commerce is also instructed to consider: (1) the pattern of trade, including sourcing patterns; (2) any affiliation between the producer of the inputs and the entity assembling the final product in the United States/third country; and (3) whether imports into the United States of the parts or components/finished product increased after the underlying investigation which resulted in the order was initiated.[12] While Commerce must take these additional factors

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[8] *See* 19 U.S.C. §§ 1677j(a), (b).
[9] *See id.*
[10] *See, e.g., Antidumping Duty Order on Prestressed Concrete Steel Wire Strand from Mexico: Preliminary Affirmative Determination of Circumvention*, 89 Fed. Reg. 22668 (Apr. 2, 2024) (noting that "the statute and its legislative history support that sections 781(a)(2) and 781(b)(2) of the Act should be applied in much the same way when faced with similar facts").
[11] *See Spa v. E.I. Dupont De Nemours*, 26 C.I.T. 1357,1362-63 (2002) ("Commerce thus interprets the effect of an affirmative circumvention determination as rendering 'parts or components' *ispi dixit* the same 'class or kind' of merchandise as the completed merchandise.").
[12] 19 U.S.C. §§ 1677j(a)(3), (b)(3).

into account, they are not mandatory criteria for reaching an affirmative finding of circumvention.[13]

Although the circumvention statute outlines several criteria that must be met before Commerce can reach an affirmative determination, the core of the agency's analysis has historically been focused on whether the processing in the United States or third country is "minor or insignificant." In conducting this analysis, the statute instructs Commerce to take into account five specific factors:

(1) the level of investment in the United States/third country,
(2) the level of research and development (R&D) in the United States/third country,
(3) the nature of the production process in the United States/third country,
(4) the extent of the production facilities in the United States/third country, and
(5) whether the value of the processing in the United States/third country represents a small proportion of the value of the merchandise sold in the United States.[14]

The statute, however, does not instruct Commerce to use any particular methodology in evaluating these criteria. In the absence of a designated methodology, Commerce has developed an analytical framework for evaluating whether a process of completion or assembly is "minor or insignificant" that compares the upstream production of inputs in the country subject to an AD/CVD order to the downstream processing of those inputs into finished merchandise in the United States or third country. As Commerce explained in *SDGE from China–UK*:

> the purpose of the analysis set out in {sections 1677j(a)(1)(C), (b)(1)(C)}…is to evaluate whether a process is minor or insignificant within the context of the totality of the production of subject merchandise. That is, the Department's analysis addresses the relative size and significance of the processing provided by {the respondent} in comparison to the processing necessary to produce the overall finished product.[15]

Thus, Commerce's practice is to "compare the total investment required (as well as, separately, the R&D, production process, and facilities) from the beginning of the production process in the country subject to an antidumping or countervailing duty order to the investment required (as

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[13] *See, e.g., Brass Sheet and Strip from Canada; Final Affirmative Determination of Circumvention of Antidumping Duty Order*, 58 Fed. Reg. 33,610 (June 18, 1993), IDM at Comment 5 ("While we have noted that it is 'more likely' for related parties to engage in circumvention activity, a relationship between the exporter and importer is not a necessary condition for finding circumvention. While circumvention may be more likely to occur between related parties, it is also possible for circumvention to occur between unrelated companies.").
[14] 19 U.S.C. §§ 1677j(a)(2), (b)(2).
[15] *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) (*SDGE from China—UK*), IDM at Comment 3; *see also Small Diameter Graphite Electrodes from the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order and Extension of Final Determination*, 77 Fed. Reg. 33405, 33413 (June 6, 2012) ("we find that the evaluation of the assembly/completion stages (including investment, R&D, production process, and facilities) with regard to the overall manufacture of subject merchandise is consistent with the Department's practice in prior anticircumvention proceedings").

well as, separately, the R&D, production process, and facilities) to finish the final product in a third country."[16]

Commerce's comparative analytical framework was recently affirmed as a lawful interpretation of the circumvention law by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit or Court). Specifically, in *Corrosion-Resistant Steel (CORE) from China—UAE* Commerce evaluated whether Al Ghurair Iron & Steel LLC (AGIS), a steel company located in the United Arab Emirates, was circumventing the AD order on CORE from China within the meaning of 19 U.S.C. § 1677j(b). CORE is produced by coating or plating hot-rolled steel (HRS) or cold-rolled steel (CRS) with a corrosion- or heat-resistant metal to prevent corrosion and thereby extend the service life of products produced from the steel. AGIS acknowledged that it relied on HRS from China to produce CORE in the UAE, which was subsequently exported to the United States.[17]

In evaluating the "minor or insignificant" criteria, Commerce applied its comparative framework and explained that comparison of AGIS' investment in the UAE "vis-à-vis the Chinese companies' investment is relevant because the evaluation of the assembly/completion stages (including investment, R&D, production process, and facilities) in comparison to the overall manufacture of merchandise subject to these inquiries indicates what portion of the total value of the merchandise subject to these inquiries is accounted for by the last step of processing, and is consistent with Commerce's practice in prior anticircumvention proceedings."[18] Commerce's comparative analysis also demonstrated that "the production of HRS and/or CRS in China, which subsequently undergoes minor processing to make CORE, comprises most of the value associated with the merchandise imported from the UAE into the United States, and {} the processing occurring in the UAE adds relatively little to the overall value of the finished CORE."[19] Accordingly, Commerce's comparative analysis demonstrated that AGIS' processing of CORE in the UAE was "minor or insignificant" under the statute.

On appeal, AGIS contested Commerce's use of a comparative analysis and argued its operations in the UAE were significant under the statute. The U.S. Court of International Trade (CIT or Court) rejected this argument, explaining that Commerce had the discretion to decide its own method of analysis. Moreover, the Court explained that AGIS' argument "ignore{d} the comparative aspect" of Commerce's analysis, and failed to recognize that "a seemingly 'extensive operation' may nonetheless be 'minor' in the context of the overall process of manufacturing a product – depending on the nature of that product."[20] The Court thus held that a "comparative analysis was reasonable" because a "determination of the third country's portion of the total sum of investment is useful to gauge the level of investment in a third country" and that a comparative analysis "helps also to ensure that larger companies with much smaller operations in a third country – operations that may appear significant in absolute terms given the size of the

[16] *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 (May 23, 2018) (*CORE from China—Vietnam*), IDM at Comment 5.
[17] *Certain Corrosion-Resistant Steel Products from the People's Republic of China: Affirmative Final Determination of Circumvention Involving the United Arab Emirates*, 85 Fed. Reg. 41957 (July 13, 2020) (*CORE from China—UAE*), IDM at 7.
[18] *Id.* (citing, *inter alia*, *SDGE From China—UK*). Because AGIS had no established R&D facilities in the UAE, Commerce found this factor supported finding the processing in the UAE to be "minor or insignificant." *See id.*
[19] *Id.* at 14.
[20] *Al Ghurair Iron & Steel LLC v. United States*, 536 F. Supp. 3d 1357, 1371 (Ct. Int'l Trade 2021).

firm, but that comprise a small share of total operations – will not be able to elude an AD/CVD order simply on account of the firm's large overall size."[21] The Federal Circuit agreed, affirming the CIT's analysis and Commerce's use of a comparative analysis to evaluate the minor or insignificant criteria.[22]

Commerce has consistently applied its comparative framework in the vast majority of its minor assembly cases, sometimes modified to account for unique products or industries or to account for limited record evidence.[23] Commerce maintains, however, that it has discretion to depart from this methodology in certain cases because "Congress and our past practice require us to consider the unique facts and circumstances of each specific case."[24] Thus, although Commerce typically applies a product-specific comparative analysis in evaluating the minor or insignificant criteria, the agency has departed from this framework in certain cases where Commerce found the circumvention scenario or the industry in question warranted such a departure.[25]

B. Merchandise Altered in Minor Respects

Pursuant to 19 U.S.C. § 1677j(c), Commerce may include within the scope of an AD/CVD order "articles altered in form or appearance in minor respects," even if the altered product is included in a different tariff classification. In essence, the minor alterations provision "includes within the scope of an antidumping duty order products that are so insignificantly changed from a covered product that they should be considered within the scope of the order even though the alterations remove them from the order's literal scope."[26]

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[21] *Id.* at 1368.
[22] *See Al Ghurair Iron & Steel LLC v. United States,* 65 F.4th 1351 (Fed. Cir. 2023).
[23] *See, e.g., Glycine from the People's Republic of China: Final Partial Affirmative Determination of Circumvention of the Antidumping Duty Order*, 77 Fed. Reg. 73426 (Dec. 10, 2012) ("the Department determined that the process of refinement is minor when compared to the production of glycine from raw materials"); *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. 39,805 (Aug. 12, 2019), IDM at 9 ("we continue to find that the level of investment in Vietnam for inquiry merchandise is minor compared to the investment in China for merchandise that is subject to the *Orders*."); *Antidumping and Countervailing Duty Orders on Certain Collated Steel Staples from the People's Republic of China: Final Affirmative Determinations of Circumvention With Respect to the Kingdom of Thailand and the Socialist Republic of Vietnam*, 89 Fed. Reg. 5855 (Jan. 30, 2024) (*Staples from China*), IDM at Comment 3 ("consistent with current practice, our circumvention analysis of YF's production process is in relation to a fully integrated production process in Thailand for purposes of determining whether the criteria articulated in {§ 1677j(b)(2)} are met").
[24] *Antidumping and Countervailing Duty Orders on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Scope Determination and Final Affirmative Determinations of Circumvention With Respect to Cambodia, Malaysia, Thailand, and Vietnam*, 88 Fed. Reg. 57419 (Aug. 23, 2023) (*CSPV Cells and Modules from China*), IDM at Comment 4.
[25] *See, e.g., id.* (departing from its longstanding comparative analysis because of the "circumvention scenario" alleged and after finding that the "solar industry is distinguishable from the industries involved" in prior inquiries and "therefore warrants a different methodological approach, when considering the 'minor or insignificant' factors"); *Hot-Rolled Lead and Bismuth Carbon Steel Products from Germany and the United Kingdom: Negative Final Determinations of Circumvention of Antidumping and Countervailing Duty Orders*, 64 Fed. Reg. 40,336 (July 26, 1999), IDM at Comment 2 (departing from its comparative analysis because "the rolling mills which subsequently roll lead billets into hot-rolled lean bar {in the United States} predate the order" and thus "the U.S. re-rollers historically represent{ed} a pre-existing and distinct segment of the leaded steel industry").
[26] *Wheatland Tube,* 161 F.3d at 1371.

The statute, however, does not explain what kinds of alterations are "minor." In the absence of statutory direction, Commerce's practice has been to evaluate the following five factors identified in the statute's legislative history when making this determination: (1) overall physical characteristics of the merchandise (including chemical, dimensional, and technical characteristics); (2) the expectations of the ultimate users; (3) the use of merchandise; (4) the channels of marketing; and (5) the cost of any modification relative to the value of the imported products.[27] Commerce may also consider the circumstances under which the products under review entered the United States, including but not limited to the timing of the entries and the quantity of merchandise entered during the circumvention review period.[28]

One aspect of Commerce's minor alterations practice that has generated significant litigation is whether Commerce may bring certain merchandise within the scope of an order pursuant to § 1677j(c) when the order itself expressly excludes such merchandise. In *Wheatland Tube*, for example, the Federal Circuit affirmed Commerce's decision to not initiate a minor alterations inquiry after finding that "minor alteration inquiries are inappropriate where the antidumping order expressly excludes the allegedly altered product."[29] The Court reasoned that if the scope expressly excluded a certain product (as was the case in *Wheatland*), that same product could not be brought within the scope via the minor alterations provision without rendering the order internally inconsistent (*i.e.*, excluding certain merchandise and, via the minor alterations provision, including the same merchandise).[30] The Court further reasoned that including the merchandise expressly excluded in the scope would "frustrate the purpose of the antidumping laws because it would allow Commerce to assess antidumping duties on products intentionally omitted from the {U.S. International Trade Commission's} injury investigation."[31]

The Federal Circuit clarified in *Deacero*, however, that such exclusions must be explicit. In that case, the scope of the order set a cross-sectional range (5.00mm to 19.00mm) for in-scope pipes. Although the inclusion of a range of products in the order necessarily excluded merchandise that fell outside that range, the Court held that a cross-sectional range "cannot be read to expressly exclude for purposes of the anti-circumvention inquiries all products outside that range," and to "conclude otherwise would render meaningless Congress' intent to address circumvention."[32] Accordingly, although a minor alteration inquiry may not be appropriate for merchandise that is expressly excluded from the scope of an order, scope language that necessarily limits coverage to certain merchandise and not others is not considered an "express exclusion" for purposes of the minor alterations provision of the statute.

C. Later-Developed Merchandise

Pursuant to 19 U.S.C. § 1677j(d), Commerce may include within the scope of an order certain later-developed merchandise. Neither the statute, nor Commerce's regulations, define "later-

[27] *See* 19 C.F.R. § 351.226(j); *see also Deacero S.A. De C.V. v. United States*, 817 F.3d 1332, 1337 (Fed. Cir. 2016).
[28] *See* 19 C.F.R. § 251.226(j).
[29] *Wheatland Tube,* 161 F.3d at 1370.
[30] *Wheatland Tube*, 161 F.3d at 1371.
[31] *Id.* Notably, the minor alterations provision is the only type of circumvention that does not require Commerce to notify the U.S. International Trade Commission of its determination or take into account any advice provided by the Commission. *See* 19 U.S.C. § 1677j(e).
[32] *Deacero*, 817 F.3d at 1338.

developed merchandise.[33] Instead, in order to make its determination the statute instructs Commerce to evaluate five factors: (1) whether the later-developed merchandise has the same general physical characteristics as the merchandise covered by an AD/CVD order; (2) whether the expectations of the ultimate purchaser of the later-developed merchandise are the same as for the earlier product; (3) whether the ultimate use of the later-developed product and the earlier product are the same; (4) whether the later-developed merchandise is sold through the same channels of trade as the earlier product; and (5) whether the later-developed product is advertised and displayed in a manner similar to the earlier product.[34] The statute further provides that Commerce may not exclude later-developed merchandise from an order merely because the merchandise is classified under a different tariff classification or permits the purchaser to perform additional functions, unless such functions constitute the primary use of the merchandise and the cost of the additional functions constitute more than a significant proportion of the total cost of production of the merchandise.[35]

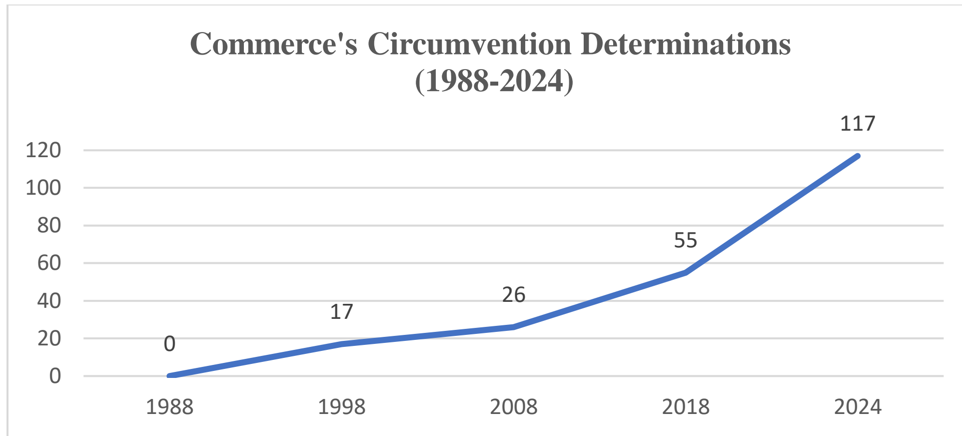
Before evaluating whether the later-developed merchandise should be brought within the scope of an existing AD/CVD order, however, Commerce addresses a threshold question: was the alleged later-developed merchandise at issue commercially available in the United States at the time of the initiation of the underlying order(s)?[36] If the merchandise was not later-developed, Commerce need not examine the statutory factors.[37] As explained in *Target Corp. v. United States*, a "product's actual presence in the market at the time of the {AD} investigation is a necessary predicate of its inclusion or exclusion from the scope of an antidumping order."[38] Furthermore, Commerce has recently clarified that its "definition of later-developed merchandise is not limited to merchandise which represents an advancement of the original product covered by the scope."[39] Rather, Commerce's inquiry is solely about whether the merchandise at issue was commercially available at the time an investigation is initiated and that results in an AD/CVD order.[40]

D. *The Volume and Complexity of Commerce's Circumvention Practice Has Grown Significantly in Recent Years*

One of the most notable trends in Commerce's circumvention practice is the significant increase in the volume and complexity of cases in the last several years. In the first decade after the circumvention law was enacted, Commerce issued only 17 determinations. In contrast, in the last five years alone Commerce has issued more circumvention determinations than it did in the prior thirty. As shown below, more than half (52%) of the 117 preliminary or final circumvention

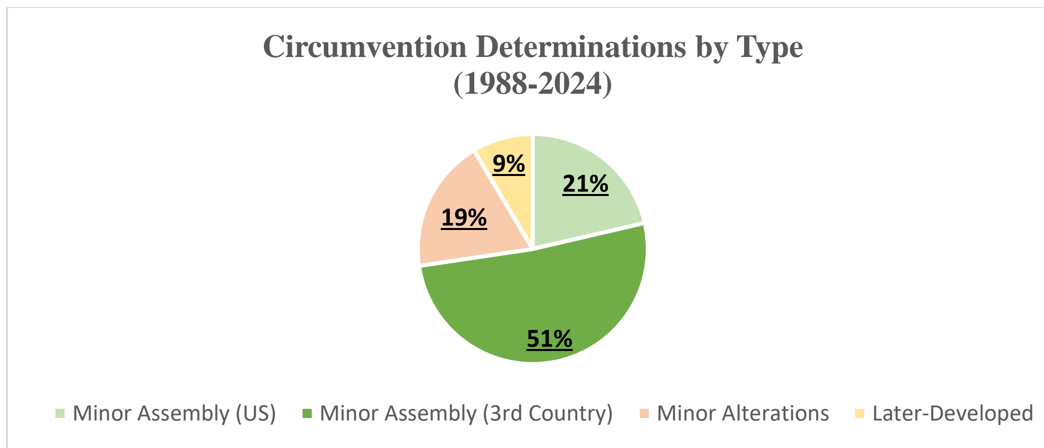
[33] *See Target Corp. v. United States*, 609 F.3d 1352, 1359-1360 (Fed. Cir. 2010).
[34] 19 U.S.C. § 1677j(d)(1).
[35] 19 U.S.C. § 1677j(d)(2)
[36] 19 C.F.R. § 351.226(k).
[37] *Certain Vertical Shaft Engines Between 99cc and Up To 225cc, and Parts Thereof, From the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping and Countervailing Duty Orders—Dual-Piston Engines; Rescission in Part*, 87 Fed. Reg. 59059 (Sept. 29, 2022) at Section V.
[38] *Target Corp.*, 609 F. Supp. at 1359.
[39] *See, e.g., Certain Vertical Shaft Engines Between 99cc and Up To 225 cc, and Parts Thereof, From the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping and Countervailing Duty Orders—Dual-Piston Engines*, 88 Fed. Reg. 12656 (Feb. 28, 2023) (*Vertical Shaft Engines from China—Dual Piston Engines*), IDM at Comment 1.
[40] *Id.*

determinations issued by Commerce since the statute was enacted in 1988 were issued since 2019.[41]



Although most of these inquiries were initiated at the request of interested parties, roughly 14% were self-initiated by Commerce.[42] Consistent with the increase in inquiries overall, approximately 80% of inquiries self-initiated by Commerce occurred since 2019.[43]

Additionally, although Commerce has conducted circumvention inquiries under all four provisions of the circumvention statute (19 U.S.C. §§ 1677j(a)-(d)), the majority of inquiries have been conducted under minor assembly provisions. As shown below, 72% of all circumvention inquiries have concerned minor assembly in the United States/third countries, with minor alterations and later-developed merchandise inquiries accounting for 19% and 9% of all inquiries, respectively.



[41] This number was calculated by adding all preliminary and final determinations on a country-specific basis published in the *Federal Register* as of August 14, 2024.

[42] *See* 19 C.F.R. § 352.226(b) (providing for self-initiation of a circumvention inquiry).

[43] *See, e.g., Corrosion-Resistant Steel Products from the People's Republic of China: Initiation of Anti-Circumvention Inquiries on the Antidumping Duty and Countervailing Duty Orders*, 84 Fed. Reg. 43585 (Aug. 21, 2019) (self-initiating minor assembly inquiries concerning Costa Rica, Guatemala, Malaysia, South Africa, and the United Arab Emirates); *Aluminum Wire and Cable from the People's Republic of China: Initiation of Scope and Circumvention Inquiries of the Antidumping Duty and Countervailing Duty Orders*, 88 Fed. Reg. 72041 (Oct. 19, 2023) (self-initiating minor assembly inquiries concerning Vietnam, South Korea, and Cambodia).

As important as the recent increase in the volume of inquiries is the growing complexity of circumvention fact patterns. Commerce's circumvention inquiries have evaluated minor repackaging operations,[44] further processing of steel and aluminum products,[45] solar cell fabrication and panel assembly,[46] minor modifications to, and later developments of, vertical shaft engines, among many others.[47] Commerce's inquiries have likewise spanned a broad range of products and industries, including pasta, garlic, honey, frozen fish fillets, candles, uncoated paper, tissue paper, hardwood plywood products, folding metal tables and chairs, steel wire, steel staples, CORE, aluminum products, small diameter graphite electrodes, innersprings for mattresses, a variety of pipe and tube products, organic chemicals, synthetic polymers, hydrofluorocarbon gases, solar cells and modules, vertical shaft engines, among others.[48]

Relatedly, Commerce's circumvention inquiries have been conducted under AD/CVD orders covering merchandise from a broad range of countries. As shown below, Commerce has conducted circumvention inquiries under AD/CVD orders covering merchandise from 18 different countries, with the top eight countries accounting for roughly 88% of all inquiries. This fact, however, obscures more recent trends. For example, although AD/CVD orders on merchandise from Japan account for the second most circumvention inquiries, nearly all such inquiries were conducted in the early 1990s. In contrast, circumvention inquiries conducted under AD/CVD orders on merchandise from China accounted for 59% of all inquiries, most of which occurred after 2000.

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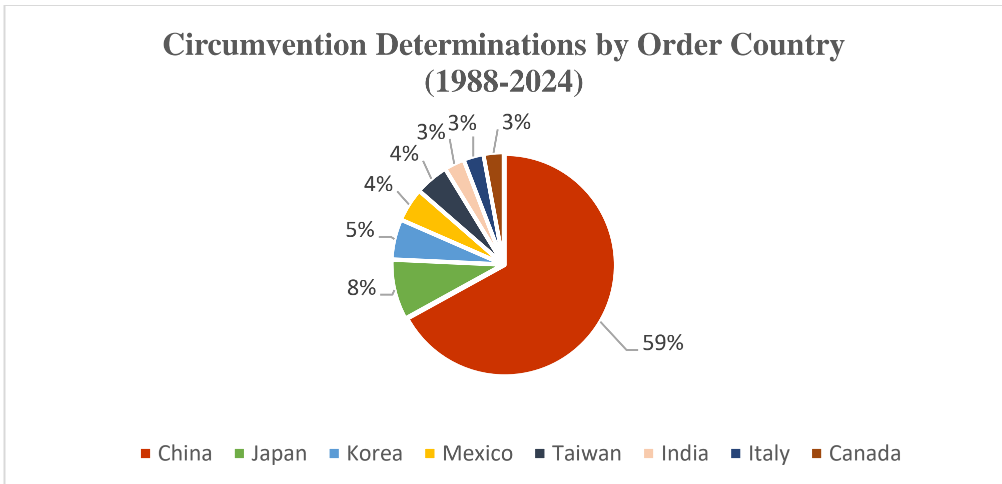
[44] *See Anti-Circumvention Inquiry of the Antidumping Duty Order on Certain Pasta from Italy: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 63 Fed. Reg. 54672 (Oct. 13, 1998)

[45] *See Aluminum Foil From the People's Republic of China: Final Affirmative Determinations of Circumvention With Respect to the Republic of Korea and the Kingdom of Thailand*, 88 Fed. Reg. 82824 (Nov. 27, 2023*); CORE from China—UAE.*

[46] *CSPV Cells and Modules from China*.

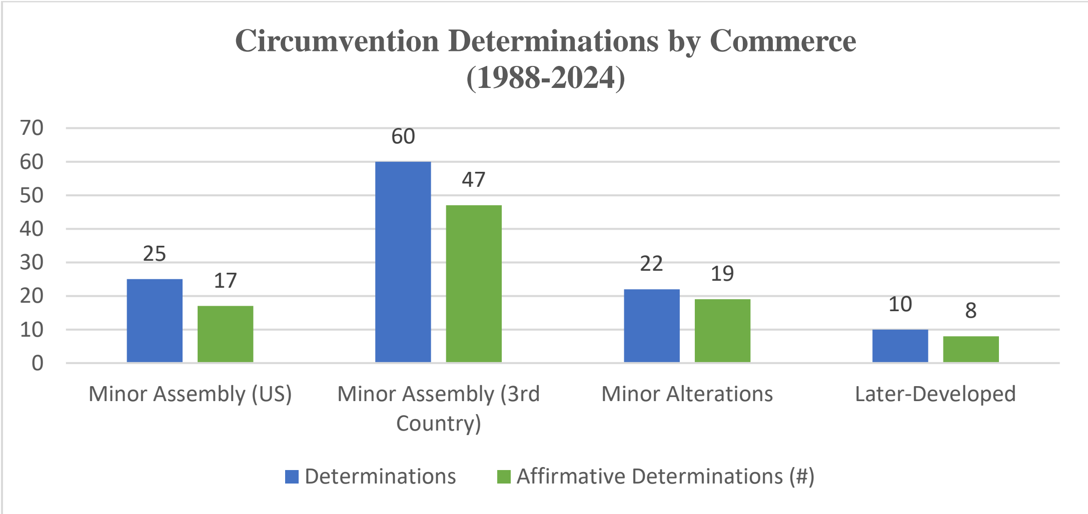
[47] *Certain Vertical Shaft Engines Between 99cc and Up To 225cc, and Parts Thereof, From the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping and Countervailing Duty Orders—60cc Up to 99cc Engines*, 87 Fed. Reg. 77074 (Dec. 16, 2022); *Vertical Shaft Engines from China—Dual Piston Engines*.

[48] *See, e.g., Uncoated Paper from Brazil, the People's Republic of China, and Indonesia: Affirmative Final Determinations of Circumvention of the Antidumping Duty Orders and Countervailing Duty Orders for Certain Uncoated Paper Rolls*, 86 Fed. Reg. 71025 (Dec. 14, 2021) (Minor Assembly-US); *Staples from China* (Minor Assembly-3rd Country); *Common Alloy Aluminum Sheet from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping and Countervailing Duty Orders; 4017 Aluminum Sheet*, 88 Fed. Reg. 48438 (July 27, 2023) (Minor Alteration); *Vertical Shaft Engines from China—Dual Piston Engines* (Later-Developed Merchandise).



On a more granular level, 40% of all minor assembly (U.S.) inquiries, 70% of all minor assembly (3rd country) inquiries, 50% of all minor alterations inquiries, and 60% of all later-developed merchandise inquiries have concerned circumvention of AD/CVD orders covering merchandise from China. It is, thus, unsurprising that Commerce's circumvention inquiries have often applied aspects of the agency's non-market economy (NME) methodology (*e.g.*, use and selection of surrogate countries and surrogate values).[49]

Finally, of the 117 circumvention inquiries conducted since 1988 Commerce has issued affirmative preliminary or final determinations in 91 (or 78%) of all inquiries, as shown below:



More specifically, the overall number of affirmative findings of circumvention has varied by type of circumvention, with the highest number of affirmative determinations issued in minor alteration inquiries (*i.e.,* 86%) and later-developed merchandise inquiries (*i.e.,* 80%).

[49] *See, e.g., U.K. Carbon and Graphite Co., Ltd. v. United States*, 931 F. Supp. 2d 1322 (Ct. Int'l Trade 2013) (affirming Commerce's use of surrogate values from Ukraine to value Chinese inputs); *Al Ghurair*, 536 F. Supp. 3d 1357 (Ct. Int'l Trade 2021) (affirming Commerce's use of its NME surrogate value methodology).

Commerce's minor assembly in third countries (79%) and minor assembly in the United States (68%) have had similar, though somewhat lower, rates of affirmative determinations.

As shown above, the scale and complexity of Commerce's circumvention practice has grown tremendously in the last five years. Administratively, Commerce's circumvention practice has skewed heavily towards the minor assembly provisions of the statute and largely, though by no means exclusively, focused on AD/CVD orders on merchandise from China. Finally, the majority of Commerce's determinations have found circumvention, but the rates of such determinations have varied across the different types of inquiries.

II. EAPA: Legislative History, Statutory Framework, and Recent Trends

EAPA, codified at 19 U.S.C. § 1517, established a new administrative process directing CBP to investigate evasion of AD/CVD orders.[50] In this section, we discuss how this new authority contrasts with CBP's historical, non-EAPA role in interpreting and enforcing AD/CVD orders. We then provide a brief overview of the EAPA's legislative history and statutory framework and analyze the procedure for making covered merchandise referrals under the EAPA statute. We also provide an evaluation of recent trends in EAPA investigations.

A. CBP's Historical (Non-EAPA) Role in Interpreting AD/CVD Orders' Scope

By law, CBP is required to "fix the final amount of duty to be paid on such merchandise and determine any increased or additional duties, taxes, and fees due or any excess of duties, taxes, and fees deposited."[51] CBP is also required to "liquidate" entries, which is defined as "the final computation or ascertainment of duties on entries for consumption or drawback entries."[52] In applying AD/CVD orders at liquidation, CBP's role is generally "ministerial." The distinction between "ministerial" actions by CBP and "decisions" by CBP is critical because only CBP "decisions" can later be challenged in court under the protest mechanism.[53] The oft-cited case, *Mitsubishi Electronics America v. United States*,[54] explains the distinction between CBP's and Commerce's respective roles in applying AD/CVD orders as follows: "Commerce conducts the antidumping duty investigation, calculates the antidumping margin, and issues the antidumping duty order," whereas "Customs merely follows Commerce's instructions in assessing and collecting duties."[55]

As part of this ministerial role, CBP is required to determine for every entry at liquidation whether AD/CVD duties apply. As the Federal Circuit has explained, CBP must make "daily, yes-or-no decisions about whether a particular product meets the test of an antidumping or countervailing duty order," even if the relevant AD/CVD orders are ambiguous.[56] If CBP determines in the first instance that AD/CVD duties apply and suspends an entry to start

[50] Pub. L. No. 114-125, § 421 (2015). CBP has promulgated additional procedures by regulation. 19 C.F.R. Part 165.
[51] 19 U.S.C. § 1500(c).
[52] *Id.* at § 1500(d); 19 C.F.R. § 159.1 (2020).
[53] 19 U.S.C. § 1514(a).
[54] *Mitsubishi Electronics America v. United States,* 44 F.3d 973 (Fed. Cir. 1994).
[55] *Id.* at 976.
[56] *Sunpreme Inc. v. United States*, 946 F.3d 1300, 1320 (Fed. Cir. 2020).

collecting cash deposits, an importer's only recourse is to request a scope ruling from Commerce.[57] In such an instance, the Court distinguishes "the individual product-by-product application decisions Customs is required by law to make" from the "the kind of deference-deserving, boundary-defining authority reserved to Commerce when it interprets or clarifies an order during scope proceedings."[58] As a law enforcement agency, CBP is equipped with authorities to investigate trade violations, such as failure to declare that goods are subject to an AD/CVD Order and impose penalties on those who by negligence, gross negligence, or fraud enter or introduce goods into the United States using false statements, acts, or omissions.[59]

In short, outside of the EAPA context, CBP is required to make daily, ministerial "yes-no" decisions at liquidation regarding the applicability of AD/CVD orders, and these decisions are granted little deference by the Court. Importers, in turn, may only challenge "yes" decisions by requesting a scope ruling from Commerce. If, during a scope proceeding, Commerce disagrees with CBP and finds that AD/CVD does not apply, CBP simply liquidates the entry without assessing such duties, and the two agencies never arrive at separate, divergent determinations.

B. EAPA's Legislative History and Statutory Framework

EAPA enhanced CBP's historical ministerial role providing additional tools to actively investigate evasion of AD/CVD. In carrying out its duties under EAPA, CBP is often tasked with answering the legal and factual questions that determine whether a product is covered by the scope of an AD/CVD order. The intent of EAPA was to "empower the U.S. Government and its agencies with the tools to identify proactively and thwart evasion at earlier stages to improve enforcement of U.S. trade law."[60] EAPA's practical effect, however, blurs the lines between the role CBP plays and the role Commerce plays in the multi-faceted enforcement of the AD/CVD laws.

As discussed more below, the relevant legislative history indicates that the genesis for EAPA was a need for a swift and transparent process for investigating evasion of AD/CVD duties.[61] Congress noted that existing authorities failed to require CBP to act on allegations of evasion in a timely manner, resulting in loss of revenue for the U.S. government.[62] Congress emphasized that "timely collection of the antidumping and countervailing duties owed on evading imports is as important or even more important than having the parties involved in evasion subject to penalties or criminal liability."[63] The result is a multi-party, on-the-record investigation, where CBP is required to determine whether evasion exists in a specified timeframe and is authorized to start collecting duties early in the investigation in the form of interim measures.

[57] *Id.* (discussing *Sandvik Steel Co. v. United States*, 164 F.3d 596, 600 (Fed. Cir. 1998)).
[58] *Sunpreme*, 946 F.3d at 1320.
[59] 19 U.S.C. § 1592
[60] *Diamond Tools Tech. LLC v. United States*, 545 F. Supp. 3d 1324, 1351 (Ct. Int'l Trade 2021).
[61] H.R. Rep. No. 114-114, at 85 (2015).
[62] *Id. at* 381.
[63] *Id.* at 85 (2015).

C. *Procedures in an EAPA Investigation*

Under EAPA, interested parties – importers, domestic and foreign manufacturers, wholesalers, trade or business associations, worker unions, as well as federal government agencies – may submit allegations to CBP that a person has entered covered merchandise into the United States through evasion.[64] The statute defines evasion as:

> {e}ntering covered merchandise into the customs territory of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise.[65]

"Covered merchandise" is defined in the statute as merchandise subject to an AD/CVD duty order.[66] During the investigation, the statute grants CBP broad discretion to determine the scope of the investigation and collect information necessary to reach a determination.[67] Specifically, CBP may issue questionnaires to the alleger, importer, foreign producer or exporter of the covered merchandise, or foreign government from which the merchandise is exported, and conduct on-site verifications of relevant information.[68] Further, if CBP finds that the alleger, importer of covered merchandise, or the manufacturer or exporter of covered merchandise did not cooperate to the best of their ability to respond to CBP's request for information, CBP may draw adverse inferences from the facts otherwise available to make a determination, and rely on the information derived from the allegation, prior investigations, or any other available information.[69]

Given that Commerce administers AD/CVD orders (including determinations as to whether a product is covered by the scope), CBP may, if it is unable to determine whether imported merchandise constitutes covered merchandise, refer the matter for Commerce to provide a determination as to whether merchandise is subject to an AD and/or CVD order.[70] Commerce has promulgated regulations governing its handling of such referrals.[71] While a referral is pending with Commerce, all deadlines in CBP's EAPA investigation are stayed.[72]

On receipt of an allegation, CBP has 15 calendar days to determine whether the allegation reasonably suggests that evasion has occurred, and if so, CBP must initiate the investigation.[73]

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[64] 19 U.S.C. § 1517(b)(2).
[65] 19 U.S.C. § 1517(a)(5).
[66] 19 U.S.C. § 1517(a)(3).
[67] 19 U.S.C. § 1517(c).
[68] 19 U.S.C. § 1517(c)(1).
[69] 19 U.S.C. § 1517(c)(3).
[70] 19 U.S.C. § 1517(b)(4).
[71] 19 C.F.R. § 351.227.
[72] 19 U.S.C. § 1517(b)(4)(C). Should Commerce determine that the product is not within the scope of an AD/CVD duty order, CBP has found that substantial evidence of evasion does not exists. *See Far East American, Inc. et al v. United States*, 693 F.Supp.3d 1378 (Ct. Int'l Tarde 2024).
[73] 19 U.S.C. § 1517(b).

Investigations are initiated on an importer specific basis, though CBP may consolidate allegations against multiple importers if circumstances warrant.[74]

Within 90 calendar days of the initiation, CBP determines whether a reasonable suspicion of evasion exists, and if so, it must impose interim measures.[75] As part of interim measures, the statute requires CBP to suspend, and extend, liquidation of entries made prior to initiation of the investigation.[76] In addition, CBP may take additional measures necessary to protect the revenue of the United States, such as requiring single transaction bonds or additional security.[77]

In addition to submitting factual information in response to CBP's requests for information, the regulations provide guidelines governing the voluntary submission of factual information by the parties to the investigation, *i.e.*, the person who submitted the allegation, and the importer alleged to have been engaged in evasion.[78] Parties have 200 calendar days from the initiation of investigation to submit factual information, and 10 calendar days from the voluntary submission to file rebuttal factual information.[79] Further, parties to the investigation may submit written arguments and rebuttal written arguments in support of their position.[80] CBP maintains an administrative record of information obtained and considered during the investigation.[81]

The statute mandates that CBP issue a determination as to whether there is substantial evidence of evasion within 300 calendar days of the initiation of investigation.[82] Once CBP makes a determination of evasion, CBP is required to suspend or continue suspension of liquidation of entries made after the initiation of the investigation, and extend or continue to extend the liquidation of entries made prior to the initiation of the investigation.[83] The statute also requires CBP to notify Commerce of the determination and request that Commerce provide the applicable AD/CVD assessment rate or if such rate is not available, a cash deposit rate, and assess the duties according to those instructions.[84] Finally, CBP may take such additional enforcement measures as necessary, such as initiating penalty proceedings under 19 U.S.C. § 1592 and §1595a(b), modifying targeting rules, or referring the matter to U.S. Immigration and Customs Enforcement for a criminal investigation.[85]

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[74] 19 U.S.C. § 1517(b)(5); 19 C.F.R. § 165.13. CBP has, for example, consolidated allegations involving multiple importers when several importers were alleged to have engaged in a similar evasion scheme, involving imports from the same manufacturer. *See, e.g.*, U.S. Customs and Border Protection, Notice of Determination as to Evasion - EAPA Consolidated Case 7813, Ebuy Enterprises Limited and Highland USA International, Inc., April 24, 2024, *available at* https://www.cbp.gov/document/publications/eapa-consolidated-case-7813-ebuy-enterprises-limited-and-highland-usa.
[75] 19 U.S.C. § 1517(e).
[76] 19 U.S.C. § 1517(e)(1)-(2); 19 U.S.C. § 1504(b).
[77] 19 U.S.C. § 1517(e)(3).
[78] 19 C.F.R. § 165.23.
[79] 19 C.F.R. § 165.23(c)(2).
[80] 19 C.F.R. § 165.26.
[81] 19 C.F.R. § 165.21.
[82] 19 U.S.C. § 1517(c)(1). CBP may extend the investigation by 60 days if it determines that the investigation is extraordinarily complicated. 19 U.S.C. § 1517(c)(1)(B).
[83] 19 U.S.C. § 1517(d)(1)
[84] 19 U.S.C. § 1517(d)(1)(B)-(C).
[85] 19 U.S.C. § 1517(d)(1)(E).

The parties to the investigation, the importer or the alleger, may request an administrative review of the initial determination of evasion.[86] If an administrative review is requested, CBP has 60 business days to conduct a *de novo* review and issue a decision.[87] Both the administrative review decision and the initial determination may be appealed to the CIT.[88]

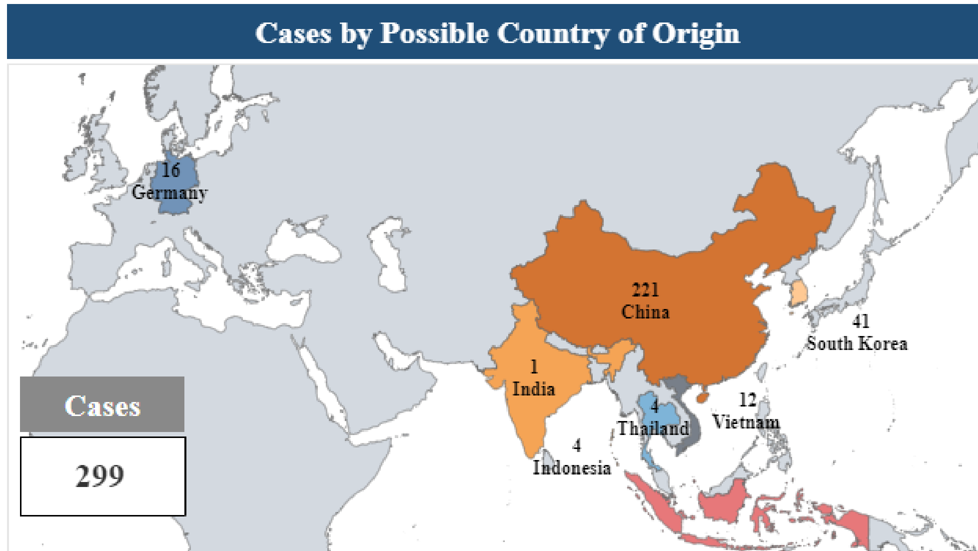
D. *Overview of EAPA Investigations*

The primary type of evasion at issue in EAPA cases is transshipment, although CBP also investigates misclassification, failure to pay AD/CVD duties, and use of wrong AD/CVD rate under EAPA. As of May 2024, the number of EAPA cases broke down as follows:[89]

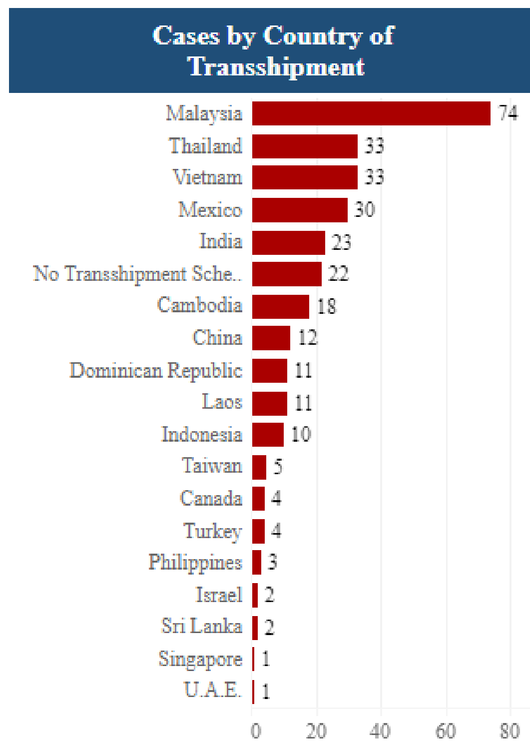
Cases by Primary Evasion Scheme	
Failure to Pay AD/CVD Duties	8
Missclassification	11
Transshipment	277
Use of Wrong AD/CVD Rate	3

Of these cases, the "possible" or alleged country of origin is overwhelmingly China, as demonstrated by the following graphic:[90]

[86] 19 U.S.C. § 1517(f)
[87] 19 U.S.C. § 1517(f).
[88] 19 U.S.C. § 1517(g).
[89] *See Enforce and Protect Act (EAPA) Statistics*, EAPA Case Statistics, available at https://www.cbp.gov/trade/trade-enforcement/tftea/eapa/statistics.
[90] *Id.*



Nearly half of all transshipment cases have concerned Malaysia, Vietnam, and Mexico, followed by India, Cambodia, and Thailand:[91]



[91] *Id.*

III. CBP's Authority to Enforce AD/CVD Orders Pursuant to EAPA and Commerce's Authority to Address Circumvention: Procedural Issues and Areas of Harmonization

As noted, EAPA grants CBP new tools to investigate whether an AD/CVD order has been evaded. In doing so, CBP must determine whether imported merchandise is subject to an AD/CVD order. Concurrently, Commerce's governing statutes grant the authority to interpret the scope of AD/CVD duty orders and to investigate whether modifications to a product's country of origin or changes in the physical characteristics of the product itself constitute circumvention of the existing orders. These two delegated authorities can be in conflict and have resulted in tension between the two agencies when enforcing the same AD/CVD orders. At the heart of this tension is the following question: who determines whether a product is subject to the scope of an AD/CVD order, and what are the various procedural implications when two agencies, each with different grants of authorities, interpret the same text?

This next section of the paper will discuss recent cases and opinions in which both Commerce and CBP examined the same AD/CVD duty orders. In some instances, the two agencies reach disparate conclusions, which raises the question of whose determination prevails. However, we also discuss instances in which the agencies ultimately agreed, but parallel proceedings still ensued resulting in delays and procedural disputes that risk undermining EAPA's very purpose of providing tools to rapidly investigate allegations of evasion. Finally, we conclude with a discussion of Commerce's covered merchandise practice and identify potential areas of harmonization between Commerce's circumvention and CBP's EAPA investigations.

A. Procedural Issues Arising from Covered Merchandise Referrals

A parallel scope proceeding at Commerce in an EAPA investigation may result from either an importer or from CBP itself, with important procedural distinctions. An importer subject to an EAPA investigation, or any other interested party implicated in the investigation, may on their own accord file a scope application with Commerce under 19 C.F.R. § 351.225. During an investigation, CBP may also submit a covered merchandise referral to Commerce and stay all deadlines in the EAPA investigation while Commerce's proceeding is pending. When an importer subject to an EAPA investigation makes a scope request to Commerce, the EAPA investigation continues to proceed. Because the two inquiries then proceed simultaneously on separate tracks at Commerce and CBP, the possibility arises for the agencies to render two divergent scope determinations. When this occurs, the Court becomes referee, determining the respective weight of each agency's determination, something that does not occur outside the EAPA context, where CBP instead simply suspends the liquidation of entries to await Commerce's scope determination.

What happens when Commerce and CBP decisions diverge, given that a single product cannot be inside the scope of AD/CVD orders for some purposes, but out-of-scope for others? In instances where Commerce's scope ruling differs from CBP's evasion determination, both cases percolate up to the CIT, where the Court must grapple with the agencies' respective but conflicting decisions. Such cases highlight how CBP's active role under EAPA determining whether merchandise is subject to existing orders places the Court in the crosshairs of each agency's respective authorities.

One case pending before the Court, *Zinus, Inc. v. United States*,[92] highlights this very tension. In *Zinus*, the importer contested CBP's affirmative EAPA determination, which found that the inquiry merchandise, imported bedframes containing wood and metal components, constituted covered merchandise that had entered the United States without payment of requisite AD duties. While the EAPA investigation was pending, the importer requested a scope ruling from Commerce as to whether its imported bedframes were covered by the relevant orders. However, CBP concluded its EAPA investigation before Commerce issued a scope ruling. CBP determined that the goods in question were "covered merchandise" and issued an affirmative evasion determination, whereas Commerce later found the goods were not covered by the relevant AD order, placing its determination at odds with that of CBP.

The practical impact of such diverging decisions is that importers are required to post duties once CBP issues interim measures, and then wait until Commerce's final determination to know whether such duty deposits were legally required. At the time of publication of this paper, the EAPA case initiated by the importer in the CIT is stayed pending the outcome of the separate case contesting Commerce's scope determination, but the outcome of these cases promises to provide important clarity regarding how the Court will navigate such instances of diverging determinations by Commerce and CBP.

Another case, *Ikadan Sys. USA, Inc. v. United States* provides a second example of CBP concluding its EAPA investigation while a scope inquiry requested by an importer was ongoing.[93] In *Ikadan*, while CBP and Commerce ultimately agreed that the goods in question were covered merchandise, procedural complications still arose. Specifically, the Government, in defending the EAPA case, moved for a voluntary remand to allow CBP "to place on the record and consider {Commerce's scope ruling} that certain products imported by plaintiffs are subject to the {AD/CVD Steel Orders}."[94] In its remand results, CBP cited to Commerce's scope determination as additional support for its own determination.

The importer in *Ikadan* challenged CBP's remand results, arguing that it erred both in making its initial covered merchandise determination without referral to Commerce, as well as when it included Commerce's scope ruling on the record, arguing that:

> CBP is attempting to have it both ways—independent enough under the EAPA statute to be able to make its own scope determinations without Commerce's aid, yet hiding behind Commerce by insisting that it ... is not required to defend its scope determinations when it relies on a scope determination by Commerce in a separate proceeding."). Plaintiffs argue that the court "must determine whether all aspects of CBP's determination," including its covered merchandise determination, "are supported by substantial evidence."[95]

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[92] CIT Court No. 23-00272 (*Zinus*); *see also CVB Inc. v. United States* (CIT Court No. 24-00036) (scope case).
[93] *Ikadan Sys. USA, Inc. v. United States*, 639 F. Supp. 3d 1339, 1351 (Ct. Int'l Trade 2023).
[94] *Id.* at 1346.
[95] *Id.* at 1350.

The Court rejected the argument that CBP lacks authority to make a covered merchandise determination without referral to Commerce, noting that "CBP was not making a 'scope determination' in Commerce's stead; it was acting pursuant to EAPA's directive to initiate an investigation based on CBP's determination 'that the information provided in the allegation ... reasonably suggests that covered merchandise has been entered into the customs territory of the United States through evasion.'"[96]

Notably, the Court also rejected the argument that CBP exceeded its authority when it "did not 'follow' or rely on Commerce's Scope Ruling in this matter," and only treated the ruling as "additional information on the record that supported CBP's independent covered merchandise determination."[97] This approach, the Court held, was "in accord with CBP's position throughout the administrative proceedings below: that Commerce's interpretation was not a prerequisite for CBP to reach its own covered merchandise determination under EAPA."[98] *Ikadan* therefore demonstrates the Court's recognition of CBP's increased role vis-à-vis enforcement of AD/CVD duty laws, particularly in determining whether merchandise is subject to the scope of relevant orders.

When CBP itself submits a covered merchandise referral during an EAPA investigation, it stays the EAPA investigation to await Commerce's scope determination, after which CBP renders a final determination taking into account Commerce's finding.[99] Such delays, however, inevitably disrupt and prolong CBP's investigation. While Commerce has implemented regulations since EAPA's enactment to accelerate covered merchandise referrals, scope determinations from Commerce may still add up to 290 days to the investigation.[100] And, just as when importers initiate scope requests during an EAPA investigation, a CBP-initiated covered merchandise referral may also lead to two parallel lawsuits at the CIT, one to challenge the EAPA determination, and a second to challenge the scope determination. Parties in these lawsuits typically agree to stay the case challenging the EAPA determination to await the outcome of the case challenging the scope determination, necessarily leading to delay.[101]

One such case is *Far East American, Inc. et al v. United States*.[102] In *Far East*, parallel cases proceeded in the Court, one challenging an affirmative EAPA determination, another challenging Commerce's scope determination. The parties jointly moved to stay the EAPA case, which the

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[96] *Id.* at 1351 (discussing 19 U.S.C. § 1517(b)(1)).
[97] *Id.* at 1352 (emphasis in original).
[98] *Id.* at 1353.
[99] *See*, *e.g.*, EAPA Investigation Number 7252: Far East America, Inc., CIEL Group, American Pacific Plywood, Interglobal Forest, and Liberty Woods International, Inc. (Notice of Scope Referral, August 23, 2019); *see also Far E. Am., Inc. v. United States*, 673 F. Supp. 3d 1333, 1336 (Ct. Int'l Trade 2023) (discussing CBP's initiation of covered merchandise referral following investigation, including onsite verification, on the last day of statutory period in which to submit final EAPA determination).
[100] 19 C.F.R. § 351.227(c)(1)-(2)).
[101] *See*, *e.g.*, *Worldwide Door Components, Inc. v. United States* (CIT Court No. 20-00062) (stayed pending *Worldwide Door Components, Inc., v. United States* (CIT Court No. 19-00012)); *Pitts Enterprises, Inc. v. United States* (CIT Court No. 23-00234) (stayed pending related scope case, CIT 24-00030); *Vanguard National Trailer Corporation v. United States* (CIT Court No. 24-00034) (stayed pending *Asia Wheel v. United States*, CIT Court No. 23-00143); *Dexter Distribution Group v. United States* (CIT Court No. 24-00019) (stayed pending CIT Court No. 23-00096).
[102] *Far East American, Inc. et al v. United States*, CIT Court No. 22-00213 (*Far East EAPA*).

Court denied on the basis that the plaintiffs' claims in the underlying EAPA case were "largely independent of Commerce's scope ruling," in that they concerned "various procedural and substantive violations of the EAPA statue and procedural due process claims,"[103] some of which might even survive a reversal of Commerce's scope ruling.

Following the resolution of the related scope case, in which the Court reversed Commerce scope determination and remanded the case,[104] the government filed a renewed motion to stay in *Far East*, arguing that the outcome in the parallel scope litigation created a "pressing need" for a stay of the EAPA litigation.[105] Specifically, the government argued that an "essential element to determining evasion" is whether merchandise can legally be construed as "covered merchandise," and that if the Court's decision in the related scope case became final, a substantial amount of merchandise at issue in the EAPA investigation could not legally be considered "covered merchandise" within the meaning of 19 U.S.C. § 1517(a)(5). Further, the government argued, addressing non-scope issues while the scope issue was unresolved was "procedurally problematic."[106]

In opposing the renewed motion to stay, plaintiffs-importers in *Far East* demonstrated impatience with the length of the process involved, noting the severe impact on their financial resources due to the cash deposits required for estimated AD/CVD duties. Plaintiff-importers also argued that certain merchandise at issue would not be affected by the ultimate outcome of the related scope case, further weighing against a stay.[107] Ultimately the government's renewed motion for a stay was denied as moot, since in the scope litigation the Court sustained Commerce's remand determination reversing its original scope ruling and finding that the scope of the AD/CVD orders did not include the product in question.[108]

The *Far East* case demonstrates the likely sequence of events when CBP bases its affirmative evasion determination in an EAPA investigation on Commerce's determination that the merchandise in question constitutes "covered merchandise," and Commerce's determination is later overturned in court. As the Court explained in sustaining CBP's negative evasion determination reached on remand: "Absent the importation of covered merchandise into the United States, CBP had no choice but to issue a negative determination."[109] The same sequence of events occurred in *Norca Indus. Company, LLC v. United States*, with the Court determining that CBP's negative evasion determination on remand was "supported by substantial evidence and in accordance with law, and complies with the Court's remand order.[110] However, the government's renewed motion to stay in the *Far East* EAPA case, and the opposition thereto, leaves unresolved the question of whether the Court should proceed with non-scope issues in an EAPA case when the outcome of a litigation involving Commerce's scope determination could negate the need for future litigation for at least some overlapping claims.

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[103] *Id.* at ECF No. 30.
[104] *Vietnam Finewood Company Limited, et al. v. United States* (CIT Consol. Court No. 22-00049) (*Finewood III*).
[105] *Far East* at ECF No. 48.
[106] *Id.*
[107] *Id.* at ECF No. 52.
[108] *Far E. Am., Inc. v. United States*, 654 F. Supp. 3d 1308 (Ct. Int'l Trade 2023).
[109] *Far E. Am., Inc. v. United States*, 693 F. Supp. 3d 1378, 1379 (Ct. Int'l Trade 2024).
[110] *Norca Indus. Company, LLC v. United States*, 680 F. Supp. 3d, 1343 (Ct. Int'l Trade. 2024).

B. *Procedural Issues That Arise When CBP Submits Covered Merchandise Referrals During Litigation*

CBP may initiate covered merchandise referrals at any stage in the proceeding, including after an importer commences litigation to challenge final EAPA determinations. EAPA states that CBP shall seek a covered merchandise determination from Commerce when it "is unable to determine whether the merchandise at issue is covered merchandise{.}"[111] The statute, however, does not impose a limitation as to *when* CBP may request such a determination from Commerce.[112]

CBP has interpreted EAPA's covered merchandise provision as allowing referrals at any stage, even following the conclusion of an EAPA investigation and after the commencement of litigation. In several cases, for example, CBP submitted covered merchandise referrals to Commerce after moving the Court for a voluntary remand in litigation. In *Norca Industries*,[113] for example, CBP first made a covered merchandise referral after it had reached an affirmative evasion determination, and after importers initiated a lawsuit and filed Rule 56.2 motions for judgment on the agency record. CBP then moved for voluntary remand, and on remand initiated a covered merchandise referral to Commerce. Ultimately, CBP reached a negative evasion determination over three years after the lawsuit challenging the original affirmative determination was filed, which the Court upheld.[114]

Similarly, in *Fedmet Resources Corporation v. United States*, CBP moved for voluntary remand after an importer challenged an affirmative EAPA determination in court, and after the importer filed its Rule 56.2 motion for judgment on the agency record. After reviewing additional record information on remand, CBP could not determine whether the merchandise at issue was subject to the relevant AD/CVD orders and submitted a covered merchandise referral to Commerce.[115] As of the date of publication of this paper, the *Fedmet* case remains stayed.

While covered merchandise referrals submitted after the commencement of litigation have not resulted in divergent scope determinations by Commerce and CBP, they still create procedural complications. In both *Norca* and *Fedmet*, for example, importers strongly objected to staying the cases to await resolution of the covered merchandise referrals. In *Norca*, plaintiff-importers noted that CBP had not submitted a covered merchandise referral in the years since initiating its EAPA investigation, and that its request for voluntary remand in litigation did not suggest that it contemplated such a referral. Plaintiff-importers also argued that CBP lacked authority to submit a covered merchandise referral after the conclusion of its EAPA investigation.[116] The Court granted the government's motion to stay without addressing these arguments.[117]

Importers-plaintiffs in *Norca* later moved for reconsideration of the stay, arguing that Commerce was inappropriately extending the covered merchandise referral inquiry into a circumvention inquiry, noting that Commerce's questions in the covered merchandise referral, which focused

[111] *Id.* (quoting 19 U.S.C. § 1517(b)(4)(A)).
[112] 19 U.S.C. § 1517(b)(4)(A).
[113] *Norca Indus. Co., LLC v. United States*, 561 F. Supp. 3d 1379, 1381 (Ct. Int'l Trade 2022).
[114] *Norca Indus*, 680 F. Supp. 3d at 1343.
[115] *Fedmet Resources Corporation v. United States* (CIT Court No. 21-00248) (*Fedmet*).
[116] *Norca Industrial Company, LLC v. United States* (CIT Court No. 21-00192), ECF No. 28.
[117] *Id.* at ECF No. 30.

on whether third-country processing of Chinese-origin products in Vietnam should be covered by an AD order on goods from China, were similar to those asked in the circumvention inquiry initiated after plaintiffs-importers filed their lawsuit challenging the affirmative EAPA determination, but before the covered merchandise referral by CBP. The Court rejected the motion for reconsideration without addressing these concerns.[118]

Similarly, the plaintiff-importer in *Fedmet* initially opposed staying the case to await the outcome of CBP's covered merchandise request. The plaintiff-importer's opposition focused primarily on the commercial harm that would be suffered from further delay. Specifically, plaintiff-importer noted that CBP had imposed interim measures two years prior, that the combined AD/CVD cash deposit rate of 260 percent *ad valorem* made importing the subject merchandise "commercially impossible," and that the proposed stay could extend resolution of the EAPA case by more than a year.[119] The Court ultimately granted the stay without addressing these arguments.[120]

The procedural disputes in *Norca* and *Fedmet* raise unresolved issues that highlight the tension between CBP's authority under EAPA and Commerce's authority under its own governing statute. Notably, importers eager to resolve a court challenge to an affirmative evasion determination by CBP may oppose staying a case when CBP first submits a covered merchandise referral years after initiating its EAPA investigation, and only after the initiation of litigation. Similarly, an importer is likely to oppose a stay when the Court overturns Commerce's scope determination in a parallel litigation and finds that a product is outside the scope of an AD duty order, even when that determination is appealed to the Federal Circuit.[121] Finally, if EAPA authorizes CBP to make a covered merchandise referral years after initiating an EAPA investigation, what suspension of liquidation rules should apply? In *Norca* and *Fedmet* the Court did not address these issues, instead granting the contested motions to stay with little discussion.

C. Cases Analyzing CBP's Interpretation of Commerce's Scope Determinations

Other cases demonstrate that even when Commerce reviews the scope of the AD/CVD duty orders in question, the Court may challenge the degree to which CBP should align its own determination with that of Commerce.

One such case reflecting this tension is *Columbia Aluminum*, in which the Court had to determine the weight of Commerce's scope determination in the context of a challenge to CBP's "covered merchandise" determination in an EAPA investigation.[122] In that case, importers challenged CBP's affirmative determination finding that in importing door thresholds from Vietnam the importer evaded the AD/CVD on aluminum extrusions from China. As an initial matter, the Court analyzed, and ultimately overturned, certain factual determinations underlying

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[118] *Id.* at ECF Nos. 39, 43.
[119] *Fedmet* at ECF 41.
[120] *Id.* at ECF 44; *see also id.* at ECF 60 (plaintiff-importer later requested further staying proceedings, following the Federal Circuit's holding in *Saha Thai Steel Pipe Public Co. Ltd. v. United States*, 101 F.4th 1310 (Fed. Cir. 2024), and the Court's request for additional briefing on the relevance of that opinion in the related scope case, CIT Court No. 23-00117).
[121] *See*, *e.g.*, *Blue Pipe Steel Center Co., Ltd. v. United States*, (CIT Court No. 21-00081), ECF No. 44.
[122] *Columbia Aluminum Prod., LLC v. United States*, 681 F. Supp. 3d 1323 (Ct. Int'l Trade 2024).

CBP's determination, namely, the findings that the imported goods in question were "aluminum" door thresholds from China.[123] The Court found that CBP's factual findings were arbitrary and capricious, because "uncontradicted record evidence was that the door thresholds subject to CBP's investigation were not 'aluminum' door thresholds and that they were a product of Vietnam, not in China."[124]

The Court then analyzed CBP's interpretation of two determinations issued by Commerce regarding door thresholds from Vietnam, a circumvention determination and a scope ruling. The scope ruling found that the AD/CVD orders on aluminum extrusions covered door thresholds from China, and the circumvention determination found that aluminum extrusions from Vietnam were circumventing those orders. Putting these two determinations together, CBP concluded that door thresholds from Vietnam were also in-scope, *i.e.*, "covered merchandise" for EAPA purposes. The Court found this interpretation "contrary to law."[125]

Starting with Commerce's circumvention determination, the Court found that CBP misinterpreted this decision and improperly expanded the scope of the AD/CVD orders. The circumvention determination in question, the Court held, expressly applies only to "*aluminum extrusions exported from Vietnam*, that are produced from aluminum previously extruded in the People's Republic of China (China)."[126] CBP, however, interpreted the circumvention determination as "extend{ing} the scope of the Orders to pertain to merchandise assembled in {Vietnam} that contained a Chinese-origin aluminum extrusion *as a component part*."[127] The scope ruling, in turn, "applied only to assembled door thresholds that were produced in, and that were imported from, China," and the Court found that it therefore "lent no support" for CBP's affirmative finding of evasion in an EAPA investigation that only involved merchandise produced in Vietnam."[128]

In sum, the Court rejected CBP's conclusion that a circumvention order applying to aluminum extrusions from Vietnam can be used to include as "covered merchandise" goods from Vietnam that include aluminum extrusions as components. *Columbia Aluminum* therefore raises the question of what—if any—deference the Court should give to CBP's attempt to apply Commerce's determinations, when the facts in Commerce's underlying investigations are not entirely analogous to those in CBP's EAPA investigation. *Columbia Aluminum* also highlights the potential pitfall of CBP relying on a scope determination by Commerce that was initiated by an importer, as the goods in the importer's request may differ in key respects from those at issue in an EAPA investigation.

D. *Commerce's Creation of Covered Merchandise Inquiries May Harmonize its Circumvention Practice with CBP's EAPA Investigations*

In contrast to its decades-long circumvention practice, Commerce's experience with covered merchandise referrals from CBP as part of an EAPA evasion investigation is relatively new.

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[123] *Id.* at 1329.
[124] *Id.*
[125] *Id.* at 1331.
[126] *Id.* at 1333 (emphasis in original).
[127] *Id.* at 1335 (emphasis added).
[128] *Id.* at 1335.

Indeed, since EAPA was enacted in 2016 Commerce has published notification of only eleven covered merchandise referrals from CBP. Yet, Commerce's covered merchandise practice has evolved significantly since 2016.

As discussed below, Commerce's initial practice after receiving a covered merchandise referral was to conduct a scope or circumvention inquiry to determine if the product was subject merchandise and then to notify CBP of its conclusion. Because CBP and Commerce have different periods of investigation, and apply different suspension of liquidation rules, a tension developed between Commerce's circumvention practice and CBP's EAPA investigations. With the creation of covered merchandise inquiries (CMIs) in 2021, however, Commerce appears to have harmonized its suspension of liquidation rules issued in circumvention inquiries with CBP's EAPA investigation timeline.

1) *Independent Authority, Conflicting Suspension of Liquidation Rules, and the Case of Diamond Tools*

Under EAPA, when Commerce receives a covered merchandise referral from CBP the agency should make its determination pursuant to its existing statutory authority to issue scope and circumvention determinations.[129] As a result, Commerce's practice upon receiving a covered merchandise referral, prior to the regulations implemented in 2021 that are discussed more below, was to initiate a scope or circumvention inquiry and utilize its pre-existing scope and circumvention procedures to determine whether a product is "covered merchandise."[130] If Commerce found the merchandise was "covered," the agency would then transmit that answer to CBP and, separately, would issue suspension of liquidation instructions to CBP in accordance with its standard scope and circumvention procedures.

Although an affirmative scope or circumvention determination resulted in the same answer transmitted to CBP (*i.e.*, the product is "covered merchandise"), the type of inquiry Commerce conducted resulted in different suspension of liquidation and cash deposit instructions sent to CBP. Moreover, Commerce's suspension of liquidation instructions did not always align with CBP's own period of investigation and suspension of liquidation authority. These differences resulted from the fundamental difference between a scope inquiry and a circumvention inquiry with respect to when merchandise is considered in-scope.

In a scope inquiry, Commerce determines whether a product falls within the scope of an order by applying the criteria outlined in 19 C.F.R. § 351.225. Commerce maintains that if "a product is found to be covered by the language of the scope, then the product has always been covered by that language."[131] Therefore, if Commerce finds a product to be within the scope of an order the agency instructs CBP to suspend liquidation and collect cash deposits on all unliquidated entries

[129] *See Circumvention Final Rule*, 86 Fed. Reg. at 52354.
[130] *See Diamond Sawblades and Parts Thereof from the People's Republic of China: Notice of Covered Merchandise Referral and Initiation of Scope Inquiry*, 85 Fed. Reg. 11951 (Feb. 28, 2020); *Hydrofluorocarbon Blends from the People's Republic of China: Final Scope Ruling on Unpatented R-421A; Affirmative Final Determination of Circumvention of the Antidumping Duty Order for Unpatented R-421A*, 85 Fed. Reg. 34416 (June 4, 2020).
[131] *Circumvention Final Rule*, 86 Fed. Reg. at 52312.

of such merchandise, including merchandise that entered prior to the initiation of the scope inquiry.[132]

In contrast to scope inquiries, "circumvention inquiries seek to determine whether, under section 781 {of the Act}, it is appropriate to expand the scope of the order to include merchandise which was originally not covered by the scope."[133] Because a circumvention inquiry may bring within the scope of an AD or CVD order merchandise that "does not fall within the order's literal scope," Commerce maintains that parties may not always have sufficient notice that the products alleged to be circumventing could be subject to AD/CVD duties as a result of an affirmative circumvention determination.[134] Consequently, "circumvention determinations typically limit the inclusion of {the circumventing} merchandise in the scope to the date of initiation of the circumvention inquiry."[135]

Given the critical difference in Commerce's suspension of liquidation rules as between scope and circumvention inquiries, the following question arose in the EAPA context: if Commerce determines, as part of a circumvention inquiry that is aligned with an EAPA investigation, that merchandise constitutes "covered merchandise," does that determination apply only to goods entered on or after the date of initiation of the circumvention inquiry, or only to goods that were entered during the period of review for the EAPA investigation?

This was precisely the issue before the CIT in *Diamond Tools*.[136] In that case, a group of U.S. producers of diamond sawblades filed an EAPA allegation in February of 2017 arguing that importer DTT USA was evading the AD order on diamond sawblades from China by transshipping Chinese diamond sawblades through Thailand. CBP initiated an EAPA investigation covering all entries of allegedly covered merchandise that entered on March 1, 2016, through the pendency of the EAPA investigation.[137] In August of 2017, the same group of U.S. producers also requested that Commerce conduct a circumvention inquiry concerning the same merchandise, which Commerce initiated on December 1, 2017.[138]

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[132] *See* 19 C.F.R. §§ 351.225(l)(2), (l)(3); *see also Circumvention Final Rule*, 86 Fed. Reg. at 52326 (noting that this "includes any unliquidated entries back to the first date of suspension under the order that remain unliquidated at the time of the preliminary or final scope ruling").

[133] *Procedures Covering Suspension of Liquidation, Duties and Estimated Duties in Accord with Presidential Proclamation 10414: Final Rule*, 87 Fed. Reg. 56868, 56876 (Sept. 16, 2022) (*Final Rule—Proclamation 10414*) (citing *Deacero*, 817 F.3d at 1337-38 (noting that Commerce "may determine that certain types of articles are within the scope of a duty order, even when the articles do not fall within the order's literal scope")).

[134] *Circumvention Final Rule*, 86 Fed. Reg. at 52347.

[135] *Final Rule—Proclamation 10414*; *see also* 19 C.F.R. § 351.226(l); *Tai-Ao Aluminum (Taishan) Co., Ltd. v. United States*, 983 F.3d 487 (Fed. Cir. 2020) (holding that Commerce could not suspend liquidation and apply cash deposits on a country-wide basis starting on the date of initiation when Commerce initiated the inquiry on a company-specific basis because parties lacked notice their merchandise could fall under the circumvention inquiry until publication of the country-wide preliminary determination). *But see Antidumping Duty Order on Hydrofluorocarbon Blends From the People's Republic of China: Final Affirmative Determination of Circumvention With Respect to R-410A and R-407C From Malaysia*, 89 Fed. Reg. 49842 (June 12, 2024), IDM at Comment 1 (applying its retroactive suspension of liquidation exception to an affirmative circumvention determination for the first time).

[136] *See Diamond Tools*, 545 F. Supp. at 1329.

[137] *Id.*

[138] *Id.* at 1330.

During the EAPA investigation CBP made a covered merchandise referral to Commerce, who in turn "aligned" the covered merchandise referral with its "concurrent anti-circumvention inquiry." Commerce ultimately determined that "diamond sawblades made in Thailand by {the importer} using Chinese cores and Chinese segments are subject to the AD order but diamond sawblades made in Thailand by {the importer} using either Thai cores or Thai segments are not subject to the AD order."[139] Commerce then informed CBP of its affirmative circumvention determination in response to the covered merchandise referral and, separately, issued suspension of liquidation instruction to CBP in accordance with its circumvention regulations (*i.e.*, to impose cash deposits for all entries that entered on or after the date the circumvention inquiry was initiated).

Based on Commerce's determination, CBP reached a final affirmative evasion determination in its EAPA investigation. With respect to suspension of liquidation, however, CBP explained that:

> Because Commerce did not place any temporal limitation or provide liquidation instructions to {Customs} with respect to entries covered by the EAPA investigation, we find that Commerce's response to the covered merchandise referral applies to all entries covered by the EAPA investigation, including those made prior to the initiation of {sic} anti-circumvention investigation.[140]

Following CBP's affirmative determination, the importer initiated a lawsuit challenging that decision, arguing that CBP "retroactively applied" Commerce's circumvention determination to entries covered by the EAPA investigation made prior to the circumvention inquiry's date of initiation.[141] In issuing its first opinion in the case, the Court first noted that the text of EAPA is "silent as to whether Commerce in using its findings from a separate circumvention inquiry to make its 'covered merchandise' determination under the EAPA consequently imposes a temporal limitation on its 'covered merchandise' response to Customs."[142]

In addition, while EAPA's legislative history indicated that CBP should be able to access Commerce's circumvention inquiries through the referral provision, it did not clarify how those two statutory regimes should interface. CBP, for its part, argued that "Commerce's circumvention inquiry was a 'distinct' administrative proceeding that had no bearing on Customs' independent statutory authority with respect to entries subject to an EAPA investigation."[143] This, in turn, meant that Commerce's role was to essentially submit a yes-or-no determination as to whether the imports in question were covered merchandise, and CBP's role to incorporate that determination into its investigation.

The Court agreed, explaining as follows:

[139] *Id.* at 1330.
[140] *Id.* at 1331.
[141] *Id.* at 1344.
[142] *Id.* at 1349.
[143] *Id.* at 1350.

> Commerce's role in an EAPA investigation is limited to the extent that the statute provides for Commerce simply to determine whether merchandise is covered by an applicable AD or CVD order and "promptly transmit" its determination to Customs, which can then take any appropriate action. *Id.* As such, Commerce's decision to base its covered merchandise determination in response to Customs' EAPA referral request on Commerce's results from a separate parallel circumvention proceeding neither expands Commerce's authority under the EAPA statute, nor does Commerce's action diminish Customs' authority under the EAPA to apply Commerce's affirmative covered merchandise determination to all entries covered by the EAPA investigation.[144]

The Court concluded that to require CBP to "be bound by Commerce's later circumvention timeline" would restrict CBP's authority with respect to the entries covered by the EAPA investigation. This, in turn, would be contrary to the "congressional intent underlying the EAPA statute" to "empower the U.S. Government and its agencies with the tools to identify proactively and thwart evasion at earlier stages to improve enforcement of U.S. trade laws, including by ensuring full collection of AD and CVD duties and, thereby, preventing a loss in revenue."[145]

While the Court ultimately remanded CBP's determination on other grounds, *Diamond Tools* still provides an important example of the Court upholding CBP's interpretation of its authority vis-à-vis AD/CVD scope issues "as a permissible construction" of the referral provision of the statute.[146] The question remains, however, whether the Court's articulation of the clear-cut division of authority in EAPA cases—wherein Commerce provides as "yes-or-no" answer to the covered merchandise question, and CBP determines how to incorporate that answer into its final EAPA determination—will be adopted in future cases.

2) *Covered Merchandise Inquiries and the Harmonization of Suspension of Liquidation*

The potentially conflicting suspension of liquidation rules at issue in *Diamond Tools* may have been resolved by Commerce's significant revisions to its scope and circumvention regulations in 2021. As part of that process, Commerce adopted 19 C.F.R. § 351.227 concerning CMIs, a new type of segment of a proceeding, which provide procedures and standards specific to Commerce's consideration of covered merchandise referrals from CBP.[147] Under the new regulations, when Commerce receives a covered merchandise referral from CBP it will initiate a CMI and will continue to rely on either the scope analysis described under 19 C.F.R. § 351.225(j) or (k), or the circumvention criteria outlined in 19 U.S.C. § 1677j and 19 C.F.R. § 351.226, to determine whether the product in question is "covered merchandise."[148]

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[144] *Id.* at 1350-1351.
[145] *Id.* at 1351.
[146] *Id.*
[147] *Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws: Proposed Rule; Request for Comments*, 85 Fed. Reg. 49472 (Aug. 13, 2020).
[148] *Circumvention Final Rule*, 86 Fed. Reg. at 52355; 19 C.F.R. § 351.227(f).

However, if Commerce determines that the merchandise is "covered merchandise" as part of a circumvention inquiry the agency will no longer apply its typical suspension of liquidation rules for circumvention inquiries.[149] Instead, Commerce will apply suspension of liquidation rules that apply to CMIs, which mirror the suspension of liquidation rules for scope inquiries and apply to all unliquidated entries of inquiry merchandise.[150] As a result, the conflicting suspension of liquidation rules present in *Diamond Tools* are unlikely to appear in future cases insofar as Commerce will issue suspension of liquidation instructions as part of a CMI that cover all unliquidated entries of inquiry merchandise, including all entries subject to CBP's EAPA investigation. Although the revised regulatory framework appears to provide for harmonization of the suspension of liquidation rules as between Commerce and CBP, Commerce has not addressed a covered merchandise referral in the context of a circumvention inquiry since its new regulations were adopted in 2021.[151] Consequently, Commerce's implementation of its new regulations, and CBP's interpretation of Commerce's new suspension of liquidation instructions, is unclear.

[149] 19 C.F.R. § 351.226(l)(3)(iii)(B).
[150] *See* 19 C.F.R. § 351.226(l)(3)(iii)(B) (noting that if Commerce "has determined to address a covered merchandise referral (*see* § 351.227) in a circumvention inquiry under § 351.226, the rules of § 351.227(l)(3)(iii) will apply"); 19 C.F.R. § 351.227(l)(3)(iii) (noting Commerce "normally will direct U.S. Customs and Border Protection to begin the suspension of liquidation and require a cash deposit of estimate duties….for each unliquidated entry of the product not yet suspended, entered, or withdrawn from warehouse, for consumption prior to the date of publication of the notice of initiation of the covered merchandise inquiry until appropriate liquidation instructions are issued").
[151] Commerce has initiated only two CMIs since its regulations were implemented in 2021, both of which addressed whether a product was "covered merchandise" using Commerce's scope criteria. *See Certain Magnesia Carbon Bricks From the People's Republic of China: Final Determination in Covered Merchandise Inquiry*, 88 Fed. Reg. 28495 (May 4, 2023); *Certain Carbon Steel Butt-Weld Pipe Fittings From the People's Republic of China: Final Determination of Covered Merchandise Inquiry*, 88 Fed. Reg. 69909 (Oct. 10, 2023)