This Article summarizes 2014 U.S. Court of International Trade ("CIT") cases addressing questions of whether imported products fall within the scope of antidumping/countervailing duty orders, the process of obtaining a court order enjoining U.S. Customs and Border Protection from liquidating imports during the pendency of appeals before the CIT and U.S. Court of Appeals for the Federal Circuit, and the CIT’s decisions disfavoring motions to strike during the normal briefing process. An examination of the court’s opinions addressing scope matters reveals that the government’s litigation strategy in these cases often consists of repeatedly failing to comply with the court’s remand instructions, resulting in multiple rounds of unnecessary remands and redeterminations where the court finds that the agency’s initial determination was unlawful. An examination of the court’s opinions addressing procedural matters exposes the fact that litigants often require the court to address unneeded objections to routine procedural motions to maintain the status quo as well as the CIT’s jurisdiction, and ill-advised motions to strike that create obstacles to efficient resolution of appeals. These three topics taken together expose unnecessary strain upon the CIT’s orderly appeal process as a result of unsound litigation strategy that goes against the spirit, if not the letter, of the court’s rules and remand instructions.

I. INTRODUCTION

II. REMAND PROCEDURE AND THE NIPPON QUAGMIRE: A REVIEW OF THE CIT’S 2014 SCOPE OPINIONS

A. Introduction to Scope Rulings

B. CIT Review of Commerce’s Scope Rulings Generally

C. Remand Proceedings and the “Nippon Quagmire”

D. 2014 Anti-circumvention Cases

1. Deacero S.A.P.I. de C.V. v. United States

2. Ceramark Technologies v. United States

E. 2014 Scope Inquiry Cases

1. Medline Industries, Inc. v. United States

2. Trade Associates Group, Ltd. v. United States
I. INTRODUCTION

This Article summarizes 2014 U.S. Court of International Trade ("CIT") cases addressing questions of whether imported products fall within the scope of antidumping/countervailing duty orders, the process of obtaining a court order enjoining U.S. Customs and Border Protection from liquidating imports during the pendency of appeals before the CIT and U.S. Court of Appeals for the Federal Circuit ("CAFC"), and the CIT’s decisions disfavoring motions to strike during the normal briefing process. These three topics taken together expose unnecessary strain upon the CIT’s orderly appeal process as a result of multiple rounds of remands and redeterminations where Commerce’s initial agency determination was unlawful, unneeded objections to routine procedural motions to maintain the status quo as well as the CIT’s jurisdiction, and ill-advised motions to strike that create obstacles to efficient resolution of appeals.

Statistics compiled by the CIT indicate that, between 2007 and 2012, of the 225 appeals filed under 28 U.S.C. § 1581(c) that were fully

---

1. The data were provided to the authors upon request to the CIT Clerk’s office.
brieﬁed and closed during that time period, 116, or 51.49%, resulted in at least one remand to the U.S. Department of Commerce (“Commerce”) or the U.S. International Trade Commission (“ITC” or the “Commission”). While the ITC is included in these totals, Commerce cases make up the bulk of the CIT’s docket under section 1581(c) because both investigations and multiple annual reviews contribute to the court’s caseload.\textsuperscript{2} Thus, when even the highly deferential standard of review is used by the CIT to scrutinize Commerce’s decisions, the data conﬁrm that more than half of Commerce’s decisions that reach the court are unlawful in some respect.\textsuperscript{3} In the context of the scope proceedings that are examined in this Article, Commerce’s track record is much worse. In eleven substantive decisions in 2014 related to scope issues, Commerce’s original decision was upheld in the ﬁrst instance only one time. With such a low afﬁrmance rate, Commerce’s continued ability to assert itself as “master of the dumping laws” can reasonably be questioned, and the CIT would be justiﬁed in exerting its authority to rule on the legality of Commerce’s decisions in a manner that replaces the typical cycle of remands, “do-overs,” and (eventually) decisions rendered “under protest,” with speedy evaluation of Commerce’s original decisions, based on the reasons articulated by Commerce at the agency level. Decisions as to whether a product falls in, or out, of a scope can be binary in a way that other Commerce decisions often are not. In a “yes” or “no” question—for example, of whether a product is below ﬁve millimeters or meets other objective criteria and is therefore out of scope—the CIT should not hesitate to reverse Commerce where the agency’s originally articulated decision is found to be unlawful and thus spare the court, parties, and agency from countless rounds of remands.

II. Remand Procedure and the \textit{Nippon Quagmire}: A Review of the CIT’s 2014 Scope Opinions

A. Introduction to Scope Rulings

Consistent with the framework established by the various international trade agreements to which the United States is a party, Congress

\begin{quote}
\textsuperscript{2} Appeals of ITC decisions under section 1581(c) are focused chiefly on appeals from the ITC’s singular original injury determinations.

\textsuperscript{3} When the CAFC is included in the data, the agencies’ “batting average” is even worse, with 120 section 1581(c) appeals resulting in remands to the agency, or 53.33%, reﬂecting the addition of cases where the CIT originally afﬁrmed Commerce without remand but the CAFC reversed the agencies after applying a de novo standard of review.
\end{quote}
has provided a statutory scheme through which a domestic industry may seek governmental intervention in the marketplace to protect against competition from unfairly priced imports of goods.\(^4\) The most common “trade remedy” market intervention sought by domestic goods manufacturers pursuant to this statutory scheme is the imposition of “antidumping” and/or “countervailing” import duties on “a class or kind” of competing imported foreign goods pursuant to Title VII of the Tariff Act of 1930, as amended.\(^5\) Specifically, the statute provides that the imposition of antidumping duties is appropriate when “a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value . . . .”\(^6\) Likewise, the statute provides that countervailing duties are appropriate where a foreign country’s government—or any “public entity” affiliated with that country’s government—is providing a “countervailable subsidy” with respect to “the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation into the United States . . . .”\(^7\) Before antidumping and/or countervailing duties are imposed on a “class or kind” of imported merchandise, however, the statute further requires that subject imports are either: (1) causing or threatening material economic injury to the domestic industry; or (2) causing the establishment of an industry in the United States to be “materially retarded.”\(^8\) If a positive determination of a countervailable subsidy and/or affirmative determination of sales at less-than-fair value (“LTFV”) is made and there is an affirmative material injury or “retardation” determination, antidumping and/or countervailing duties are assessed on the subject imported merchandise in an amount “equal to” the amount deemed necessary to offset the alleged dumping and/or countervailable subsidy benefit.\(^9\)


5. 19 U.S.C. §§ 1671-1677n (2012) [hereinafter the “Act”]. The statute provides that these duties may also be imposed as a result of proceedings initiated sua sponte by the U.S. government. \(\text{See id.} \) §§ 1671a(a) (countervailing duties), 1673a(a) (antidumping duties). As a practical matter, however, this is exceedingly rare. Accordingly, this Part of the Article discusses antidumping and countervailing duty proceedings initiated and carried out as a result of petitions filed on behalf of the affected domestic industry. \(\text{See id.} \) §§ 1671(b), 1673a(b).

6. \(\text{Id.} \) § 1673.

7. \(\text{Id.} \) § 1671.

8. \(\text{Id.} \) §§ 1671, 1673.

9. \(\text{See id.} \)
Congress assigned responsibility for making the above determinations and the administration of the antidumping and countervailing duty laws generally to two separate administrative agencies: Commerce and the “Commission.” A domestic industry seeking government intervention in the market through the imposition of antidumping and/or countervailing duties must petition both agencies simultaneously. The Commission is then tasked with determining whether there exists one of the three types of economic injury specified in the statute required for the imposition of antidumping and/or countervailing duties. Concurrently, Commerce evaluates the domestic industry’s petition to determine whether it meets certain threshold statutory criteria necessary to initiate an antidumping and/or countervailing duty investigation. If Commerce initiates the investigation, Commerce must determine whether—and, if so, to what extent—imports of the subject foreign merchandise into the United States are being sold at LTFV and/or with the benefit of a countervailable subsidy.

After the investigation has concluded, if the Commission makes an affirmative economic injury determination and Commerce makes and

---

10. See id. (assigning responsibility for the countervailable subsidy and LTFV determinations to “the administering authority” and the corresponding material injury determination to the “Commission”); see also id. §§ 1677(1) (defining, in relevant part, “the administering authority” as “the Secretary of Commerce”), 1677(2) (defining the “Commission” as the “United States International Trade Commission”).

11. Id. §§ 1671a(b) (countervailing duty petitions), 1673a(b) (antidumping duty petitions).

12. See id. §§ 1671a(b), 1673a(b).

13. Id. §§ 1671a(c), 1673a(c). The statute provides Commerce with the authority to formally initiate the antidumping and/or countervailing duty investigation. As a practical matter, however, the Commission generally commences its economic injury portion of the investigation as soon as the petition is filed but before Commerce makes its suitability determination with respect to the petition and publishes the formal notice of initiation in the Federal Register. See 19 C.F.R. § 207.12 (2015). If Commerce notifies the Commission that it is declining to initiate the investigation, however, the Commission terminates its portion of the investigation. Id. § 207.14.

14. 19 U.S.C. §§ 1671, 1673 (2012). Scope issues may arise even in circumstances where Commerce does not ultimately reach a final LTFV or countervailable subsidy determination. The statute provides that an investigation may be suspended prior to the investigation’s conclusion pursuant to an agreement between Commerce and the parties to the investigation. See id. §§ 1671c, 1673c. The agreement must be designed to eliminate the alleged dumping and/or subsidization of which petitioners complained. See id. While this Article discusses scope issues in terms of an order, issues can and do arise with respect to the scope of these so-called “suspension agreements.” Issues that arise with respect to the scope of a suspension agreement are analyzed through the same legal framework as arising in the context of an order. See 19 C.F.R. § 351.225 (2015) (Commerce’s regulation addressing issues arising “as to whether a particular product is included within the scope of an antidumping or countervailing duty order or a suspended investigation”).
affirmative finding of above de minimis LTFV sales and/or countervailable subsidy, Commerce issues an antidumping and/or countervailing duty “order” directing U.S. Customs and Border protection to assess additional duties on imports of the “class or kind” of subject merchandise “equal to” the amount of net countervailable subsidy benefit or dumping margin found by Commerce.\textsuperscript{15} The actual antidumping and/or countervailing duty rates assessed on subject imports while the order remains in effect may vary, most typically as a result of Commerce’s statutorily-mandated annual administrative reviews.\textsuperscript{16} An order issued as a result of an antidumping or countervailing duty investigation remains in place until it is revoked via various statutory mechanisms.\textsuperscript{17}

The statute requires Commerce to define the types of products covered by an order imposing antidumping or countervailing duties. Specifically Commerce is required to include in an order a description of the class or kind of imported merchandise subject to the order “in such detail as [Commerce] deems necessary . . . .”\textsuperscript{18} As a practical matter, this description of the subject merchandise, also known as the “scope” of the order, is generally defined at the time that Commerce initiates the investigation, and is derived from the description of the “class or kind” of merchandise contained in the domestic industry’s petition.\textsuperscript{19} As the CIT has recognized, however, “the responsibility for defining the scope falls on Commerce, not the petitioner.”\textsuperscript{20} Accordingly, in the normal course, Commerce consults with petitioning parties to clarify scope issues pre-initiation, and then allows all interested parties an opportunity to comment and raise issues regarding product coverage after initiating the investigation.\textsuperscript{21} At times, scope

\textsuperscript{15} See 19 U.S.C. §§ 1671e(a) (2012), 1673e(a); 19 C.F.R. § 351.222 (2015).
\textsuperscript{17} See 19 U.S.C. § 1675(d) (2012).
\textsuperscript{18} Id. §§ 1671e(a)(2), 1673e(a)(2).
\textsuperscript{19} See, e.g., Hardwood and Decorative Plywood From the People’s Republic of China, 77 Fed. Reg. 65,172, 65,173 (Dep’t of Commerce Oct. 25, 2012) (initiation of antidumping duty investigation). The scope language is subject to revision even up until the publication of the antidumping and/or countervailing duty order. After publication of those orders, the scope language may be changed only by interpretation in the context of requests by interested parties for scope rulings or by changed-circumstances reviews. The scope of an antidumping/countervailing duty order may not be expanded through the scope ruling process.
\textsuperscript{21} See id. (citing Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296, 27,323 (May 19, 1997) (preamble to Commerce’s regulations) (providing that Commerce will “set aside a
issues remain in dispute at the administrative level until Commerce’s final I.T.F.V and/or countervailing subsidy determination leading to an order.\textsuperscript{22} Once Commerce issues the order, however, the agency cannot “interpret an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms.”\textsuperscript{23} Despite the finality of the terms of the scope language once the order is issued, Commerce recognizes in its regulations that “[i]ssues arise as to whether a particular product is included within the scope of an antidumping or countervailing duty order.”\textsuperscript{24} One of these “issues” arises when an interested party alleges that the scope of an order is ambiguous with respect to whether a particular product is covered.\textsuperscript{25} Commerce’s regulations further state that a scope ruling is appropriate when a petitioner alleges “that changes to an imported product or the place where the imported product is assembled constitutes circumvention” of the order as that term is defined by the statute.\textsuperscript{26} To address these two separate issues, Commerce has provided in its regulations procedures through which a party may submit a request that Commerce initiate either: (1) a general “scope inquiry” to seek clarification regarding whether a particular item is subject merchandise; or (2) an “anti-circumvention inquiry” to determine whether “a product in the penumbra of an order, outside the literal scope of its language, is

\begin{itemize}
\item specific period early in an investigation for issues regarding product coverage to be raised” in an effort to “alleviate the need to revisit these issues in the future”).
\item \textsuperscript{22} See, e.g., Countervailing Duty Investigation of Certain Passenger Vehicle and Light Truck Tires From the People’s Republic of China, 80 Fed. Reg. 34,888 (June 18, 2015) (final affirmative determination and final affirmative critical circumstances determinations, in part) accompanying Issues & Dec. Mem. at Cmt. 11 (clarifying scope exclusion of certain merchandise in AD and CVD investigations in response to parties’ arguments).
\item \textsuperscript{23} Eckstrom Indus., Inc. v. United States, 254 F.3d 1068, 1072 (Fed. Cir. 2001). There is, however, a statutory provision for modifying the scope language to include “later-developed merchandise” should the court find that such merchandise is circumventing the scope of the order. See 19 U.S.C. § 1677j(d) (2012); Target Corp. v. United States, 609 F.3d 1352, 1363 (Fed. Cir. 2010) (finding that Commerce’s determination that mixed-waxed candles are “later-developed merchandise” covered by the antidumping duty order on petroleum candles from China was supported by substantial evidence).
\item \textsuperscript{24} 19 C.F.R. § 351.225(a) (2015).
\item \textsuperscript{25} Id. (emphasis added); cf. 19 U.S.C. §§ 1671c(a)(2), 1673c(a)(2) (2012) (providing Commerce with the discretion to describe the subject merchandise in “such detail as [Commerce] deems necessary”).
\item \textsuperscript{26} 19 C.F.R. § 351.225(a); see also 19 U.S.C. § 1677j (2012) (statutory “anti-circumvention” provisions).
\end{itemize}
covered by that order.”

Commerce’s regulations style the decision made pursuant to either of these separate requests as a “scope ruling” designed to “clarify the scope of an order.”

Commerce’s initial task in responding to a party’s request for either ruling is to determine whether the language of the order and the materials contained in the requesting party’s application are dispositive on the question. If Commerce determines that the text of the scope language vis-à-vis the requesting party’s application materials is dispositive, then Commerce issues a final scope ruling with respect to whether the merchandise in question is in, or out, of scope. Alternatively, if after reviewing the application materials, Commerce decides that “further inquiry is warranted,” Commerce will initiate a formal scope inquiry.

If Commerce decides to initiate a formal investigation, the statute, Commerce’s regulations, and court precedent provide separate analytical frameworks guiding Commerce’s decision making for


28. 19 C.F.R. § 351.225(a). As the CIT recognized in Ceramark, while a successful anti-circumvention inquiry alters the scope in the sense that it has the effect of covering products not within the literal terms of the order, both the CIT and Commerce recognize that, pursuant to 19 U.S.C. § 1677j, this is properly considered to be a “clarification” of the order. See Ceramark, 11 F. Supp. 3d at 1322 & n.11 (citing Nippon Steel Corp. v. United States, 219 F.3d 1348, 1349 (Fed. Cir. 2010) (finding, as the CIT in Ceramark described, that “a minor alteration inquiry is not ultra vires even when products are expressly and unambiguously excluded from an order”).


30. See id. § 351.225(d) (“Ruling based on the application”); see also Rubbermaid Comm. Prods. LLC v. United States, No. 11-00463, 2014 Ct. Int’l Trade LEXIS 113, at *9-10 (Sept. 23, 2014) (“To determine whether a particular product is included within the scope of an antidumping or countervailing duty order, Commerce first analyzes the language of the order at issue.”) (citing Duferco Steel, Inc. v. United States, 296 F.3d 1087, 1097 (Fed. Cir. 2002) (explaining that “a predicate for the interpretive process is language in the order that is subject to interpretation”).

31. See 19 C.F.R. § 351.225(e) (2015) (“ruling where further inquiry is warranted”). Commerce’s decision to issue a scope ruling without initiating a formal scope or anti-circumvention inquiry also potentially affects whether or not particular merchandise may be subject to the retroactive assessment of antidumping and/or countervailing duties. See AMS Assocs., Inc. v. United States, 737 F.3d 1338, 1344 (Fed. Cir. 2013) (holding that when Commerce “clarifies” the scope of an existing order to include, for example, shipments originating from a country not explicitly included in the original scope language, then retroactive liability is impermissible, but when Commerce “issues a ruling that does not clarify the scope of an unambiguous original order,” retroactive liability is permissible).
anti-circumvention and scope inquiries. As the CIT outlined in _Ceramark v. United States_, for scope inquiries:

If the terms of the order alone are not dispositive, Commerce looks to the factors listed in 19 C.F.R. § 351.225(k)(1)—specifically, the descriptions of the merchandise included in the petition, the initial investigation, and in determinations of Commerce and [the Commission], including prior scope determinations. _See_ 19 C.F.R. § 351.225(k)(1); _Sango Int’l, L.P. v. United States_, 484 F.3d 1371, 1376-77, 1379 (Fed. Cir. 2007).

If Commerce determines that a § 351.225(k)(1) analysis is dispositive, then Commerce issues a final scope ruling. When that analysis is not dispositive, however, Commerce considers the five additional criteria set forth in 19 C.F.R. § 351.225(k)(2), known as the Diversified Products criteria—(1) the physical characteristics of the product, (2) the expectations of the ultimate purchasers, (3) the ultimate use of the product, (4) the channels of trade in which the product is sold, and (5) the manner in which the product is advertised and displayed. _See_ 19 C.F.R. § 351.225(k)(2); _Diversified Products Corp. v. United States_, 6 CIT 155, 572 F. Supp. 883 (1983).32

With respect to anti-circumvention inquiries, Commerce’s regulations provide that the analytical framework that the agency will use to resolve the question depends on the nature of the anti-circumvention allegation. As the CIT explained in _Ceramark_, “[c]ircumvention takes two forms, either a product’s country of origin has been manipulated (merchandise completed or assembled in the United States and merchandise completed or assembled in other foreign countries), or the product itself has been manipulated (minor alteration of merchandise or later-developed merchandise).”33 Unlike scope inquiries, Commerce may find that a product subject to an anti-circumvention inquiry is within the scope of the order notwithstanding the fact that the product is excluded by the scope language’s literal terms.34 While Commerce may expand the scope of the order beyond its literal terms in an anti-circumvention ruling, “[Commerce] cannot,” however, change the order or interpret it “in a way contrary to its terms.”

34. _See Duferco Steel, Inc._, 296 F.3d at 1097.
B. CIT Review of Commerce’s Scope Rulings Generally

Statutory authority for judicial review of Commerce’s scope rulings is found in section 516A of the Act.\(^35\) The CIT is the court of primary jurisdiction for judicial review of scope rulings.\(^36\) Appellate jurisdiction of a final decision of the CIT lies in the first instance with the U.S. Court of Appeals for the Federal Circuit (“CAFC”). In its review of Commerce’s scope rulings, the statute directs a reviewing court to uphold Commerce’s interpretation of an order’s scope language unless Commerce’s scope ruling is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.”\(^37\) In the event that the court holds a scope ruling to be unsupported by substantial evidence or otherwise contrary to law, the court will remand to Commerce for further proceedings consistent with its opinion.\(^38\)

Consistent with longstanding precedent, the CIT grants considerable deference to Commerce’s factual determinations based on the agency’s interpretation of the administrative record, describing “substantial evidence” as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”\(^39\) While Commerce’s factual determinations are granted deference, “substantial evidence supporting an agency determination must be based on the whole record,” and the court must take into account the information that supports the agency’s decision as well as “whatever in the record fairly detracts from its weight.”\(^40\) Ultimately, in assessing the reasonableness of Commerce’s interpretation of the record evidence, the CIT’s function is not to “reweigh the evidence or substitute its own judgment for that of the agency” but instead to determine whether Commerce’s interpretation of the evidence is reasonable.\(^41\)

The court reviews Commerce’s interpretations of the statute and the agency’s regulations in scope proceedings according to the familiar deferential framework for judicial review of most federal administrative agency determinations established by the Supreme Court. Regarding matters of Commerce’s interpretation of its organic statute, the CIT

\(^{39}\) Huaiyin Foreign Trade Corp. v. United States, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).
\(^{40}\) Id. at 1375 (quoting Atl. Sugar, Ltd. v. United States, 744 F.2d 1566, 1562 (Fed. Cir. 1984)).
applies the two-pronged standard outlined in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* The first prong of the Chevron analysis requires the court to determine whether Congress’s intent can be ascertained. If it can, the court “must give effect to the unambiguously expressed intent of Congress.” If the statute is ambiguous, the second prong requires the court to determine whether the agency’s interpretation of the statute is reasonable. Under prong two of the *Chevron* analysis, the agency’s construction need not be the only reasonable interpretation, or even the most reasonable interpretation. In sum, even where the statute is ambiguous, the court must defer to the agency’s reasonable interpretation of the statute even if it may have preferred another.

Similarly, with respect to Commerce’s interpretations of its own regulations, the reviewing court will defer to the agency’s interpretation “as long as . . . the agency’s interpretation is neither plainly erroneous nor inconsistent with the regulation.” Additionally, “deference to an agency’s interpretation of its own regulations is broader than deference to the agency’s construction of a statute, because in the latter case the agency is addressing Congress’s intentions, while in the former it is addressing its own.”

**C. Remand Proceedings and the “Nippon Quagmire”**

Despite this deferential standard of review, a survey of the CIT’s opinions issued in 2014 relating to Commerce’s scope rulings reveals that Commerce and the court often disagree with respect to what constitutes a reasonable interpretation of the scope of an order.
Specifically, in 2014, the CIT issued eleven opinions in nine cases appealing Commerce’s scope rulings. Of the eleven opinions issued, seven resulted in the court remanding the scope ruling in question to Commerce for further proceedings consistent with the court’s opinion,\(^50\) while three of the opinions sustained Commerce’s conclusion.\(^51\)

---

50. See Trade Assocs. Grp., Ltd. v. United States, 961 F. Supp. 2d 1306 (Ct. Int’l Trade 2014) (remanding Commerce’s scope ruling finding that certain specialty shaped and holiday themed candles were covered by the scope of the antidumping duty order on certain wax petroleum candles from China); Meridian Prods., LLC v. United States (Meridian II), 971 F. Supp. 2d 1259 (Ct. Int’l Trade 2014) (remanding results of Commerce’s first remand determination continuing to find that plaintiff’s refrigerator/freezer trim kits were outside of the scope of the antidumping and countervailing duty orders on aluminum extrusions from China); Deacero v. United States (Deacero II), No. 12-00345, 2014 Ct. Int’l Trade LEXIS 99 (Aug. 28, 2014) (remanding Commerce’s remand determination continuing to conclude that plaintiff’s wire rod was circumventing the antidumping duty order on certain wire rod from Mexico); Rubbermaid Comm’t Prods., LLC v. United States, No. 11-00463, 2014 Ct. Int’l Trade LEXIS 113 (Sept. 23, 2014) (remanding Commerce’s scope ruling finding Rubbermaid’s cleaning system components within the scope of the antidumping and countervailing duty orders covering aluminum extrusions from China); Ceramark Tech., Inc. v. United States, 11 F. Supp. 3d 1317 (2014) at 1319 (remanding Commerce’s determination that plaintiff’s 17 inch diameter graphite electrodes were circumventing antidumping duty order on graphite electrodes 16 inches or smaller in diameter); Mid Continent Nail Corp. v. United States, 24 F. Supp. 3d 1279 (Ct. Int’l Trade 2014) (remanding Commerce’s third remand determination finding that defendant-intervenor Target’s nails imported as part of a mixed-media set were outside of the scope of the antidumping duty order); Plasticoid Mfg. Inc. v. United States, 28 F. Supp. 3d 1352 (Ct. Int’l Trade 2014) (remanding Commerce’s determination that Plasticoid’s straight edges were within the scope of the antidumping and countervailing duty orders of aluminum extrusions from China).

51. See Medline Indus., Inc. v. United States, 961 F. Supp. 2d 1287 (Ct. Int’l Trade 2014) (sustaining Commerce’s scope ruling finding that Medline’s hospital bed end panel components were within the scope of the antidumping duty order of wooden bedroom furniture from China); Deacero S.A.P.I. de C.V. v. United States (Deacero III), No. 12-00345, 2014 Ct. Int’l Trade LEXIS 159 (Dec. 22, 2014) (sustaining Commerce’s second remand results finding that plaintiff’s 4.75 mm wire rod did not circumvent the antidumping duty order on carbon and certain alloy steel...
Three of the seven opinions remanding Commerce’s scope determinations were not the first remand in a particular case. Of the three opinions sustaining Commerce’s scope ruling, only one opinion sustained Commerce’s original scope ruling based on the reasons articulated by the agency, while the remaining two were sustained after prior remands finding them unlawful in some respect. The remaining opinion denied a plaintiff’s motion for the court to decide the merits of a claim without the benefit of briefing from the parties. In sum, Commerce’s original determination was upheld in only one of the eleven decisions issued by the court in 2014.

While the court’s disposition of each of these cases is intensely fact-specific, a common theme resonating throughout the course of the CIT’s 2014 opinions on scope issues is that a victory for a party appealing a scope ruling may ultimately be pyrrhic. If a party appealing an adverse scope ruling succeeds on the merits in the first instance, the litigation may continue to “ricochet” for multiple rounds of remand proceedings between the CIT and Commerce before a final CIT decision sustaining Commerce’s remand redetermination is reached. As further discussed below, a review of the 2014 scope cases, in the context of their prior and subsequent procedural histories, reveals that


53. See Medline, 961 F. Supp. 2d at 1287 (sustaining Commerce’s initial affirmative scope ruling); Deacero II, 2014 Ct. Int’l Trade LEXIS 134 (sustaining Commerce’s negative circumvention issued under protest after a second remand); Meridian III, 37 F. Supp. 3d at 1342 (sustaining Commerce’s affirmative final results on second remand).

54. See Meridian Prods., LLC v. United States (Meridian III), 37 F. Supp. 3d 1342 (Ct. Int’l Trade 2014) (sustaining second results of remand finding that plaintiff’s trim kits were included in the antidumping and countervailing duty orders on aluminum extrusions from China).

55. See Deacero III, 2014 Ct. Int’l Trade LEXIS 159, at *1-2 (Dec. 22, 2014) (describing scope litigation that has “ricocheted between the court and [Commerce] since 2012” and sustaining Commerce’s determination, made “under protest,” that certain merchandise was outside of the scope of the order.). At times, this “ricochet” phenomenon can involve the Federal Circuit as well. See, e.g., Mid Continent Nail Corp, 24 F. Supp. 3d 1279 (remanding scope ruling to Commerce for fourth remand redetermination after agency’s failure to follow the Federal Circuit’s remand instructions reversing the CIT’s final decision sustaining the remand results).
this may be due at least in part to what CIT Senior Judge Jane Restani and Professor Ira Bloom have termed the “Nippon quagmire” created by the interplay between the statutory framework governing judicial review of Commerce’s scope rulings and certain conflicting statements made in dicta in Federal Circuit precedent.  

According to Judge Restani and Professor Bloom, “[v]arious decisions of the Court of Appeals for the Federal Circuit . . . have raised the issue of whether the CIT is authorized to give complete relief through reversal of agency unfair trade decisions.” This “legal quagmire” is problematic, the authors argue, in part because “agencies often seem reluctant to comply fully with remand orders” and that “multiple remands are required to get to a stage where the CIT can approve the remand results.” Arguably, this is so, at least in part, because, “[i]n a decision [such as scope rulings] . . . where multiple . . . factors are weighed to reach a ‘yes’ or ‘no’ result, it may be difficult to say in a particular case that there is no substantial evidence for a certain result, and that the record will support only the opposite.” Accordingly, an

56. See Jane Restani & Ira Bloom, The Nippon Quagmire: Article III Courts and Finality of United States Court of International Trade Decisions, 39 BROOK. J. INT’L L. 1005 (2014) (noting the difficulty of the CIT to get Commerce to comply sufficiently with its remand orders, and positing that the “inability of the agency to obtain review of these “almost final” decisions may be one reason why [Commerce and the Commission] often seem reluctant to comply fully with CIT remand orders, and why multiple remands are required to get to a stage where the CIT can approve the remand results.”) (citing inter alia Nippon Steel Corp. v. United States, 458 F.3d 1345, 1359 (Fed. Cir. 2006) (noting, in dicta, the conflicting statements in prior cases—also made in dicta—of the Federal Circuit with respect to the CIT’s ability to issue a complete reversal of the agency’s decision.). Compare Altx, Inc. v. United States, 370 F.3d 1108, 1111 n.2 (Fed. Cir. 2004) (the statute “limits the [CIT] to remand orders; an outright reversal without a remand does not appear to be contemplated in the statute”), with Atl. Sugar, Ltd. v. United States, 744 F.2d 1556, 1561 (Fed. Cir. 1994) (upon a finding of a lack of supporting evidence, “the reviewing court must either reverse [the agency’s] determination or remand the case for further fact-finding.”).

57. Restani & Bloom, supra note 56, at 1005.

58. Id. at 1014. Judge Restani and Professor Bloom posit that the government likely often fails to comply fully with the court’s remand order for risk of forfeiting the right to appeal the CIT’s final ruling on the matter to the Federal Circuit. Id. at 1013-14 (“The inability of the agency to obtain review of these ‘almost final’ [decisions remanding the agency’s determination] may be one reason why the agencies often seem reluctant to comply with CIT remand orders, and why multiple remands are required to get to a stage where the CIT can approve the remand results.”).

59. Id. at 1016. Judge Restani and Professor Bloom illustrated the difficulties posed by the Nippon quagmire with reference to Commission economic injury determinations because those decisions consist of an agency’s “thumbs up” or “thumbs down” with respect to such determinations. In the normal course, the court’s review of Commerce’s decisions usually involves review of Commerce’s decisions with respect to “the rates of dumping or governmental subsidization,” which are “converted into duty assessments . . . In most cases where judicial relief is granted, rates
agency’s decision on remand may be reflective of “a lack of immediate and full compliance with, at minimum, the intent of the CIT decision on the part of the agency in a number of cases.” As further discussed infra, a review of the court’s 2014 opinions in appeals of Commerce’s scope rulings for both anti-circumvention and general scope inquiries reveals that the Nippon quagmire appears to be a driving force behind the extensive back-and-forth between Commerce and the CIT prevalent in these types of cases.

D. 2014 Anti-circumvention Cases

The CIT issued three opinions in appeals of Commerce’s anti-circumvention scope rulings in 2014. Two of those opinions related to Deacero S.A.P.I. de C.V. v. United States, an appeal of Commerce’s affirmative circumvention finding with respect to the antidumping duty order on certain steel wire rod from Mexico. The remaining opinion related to Ceramark Technology, Inc. v. United States, an appeal of Commerce’s affirmative circumvention determination with respect to the antidumping duty order on certain graphite electrodes from China. Both of these cases involve the court’s finding Commerce’s original affirmative anti-circumvention determination to be unsupported by substantial evidence. As further discussed below, these opinions, when viewed in the context of the “ricochet” effect of multiple remands caused by the Nippon quagmire, are typical of the difficulty that the court has in getting the government to comply with its remand orders. They are also typical of the practical difficulties faced by a party challenging these determinations.

change; they do not vanish. Thus, if the reviewing court finds the methodology applied by Commerce wanting, there are complex tasks for the agency to perform.” Id. at 1007. In contrast, when the CIT reviews Commerce’s scope rulings, the court is tasked with reviewing the kind of “thumbs up” or “thumbs down” determinations that lead to the situation where the Nippon quagmire presents the most difficulty for the court. Thus, the difficulties posed by the Nippon quagmire are just as relevant with respect to the CIT’s review of Commerce’s scope rulings as they are to the court’s review of the Commission’s economic injury determinations.

60. Id. at 1020.
1. *Deacero S.A.P.I. de C.V. v. United States*

The court’s two 2014 opinions in the *Deacero* case reviewed the government’s first and second remand determinations, ultimately sustaining the second as supported by substantial evidence and otherwise in accordance with law. At issue was Commerce’s 2012 final affirmative determination that Deacero’s imports of 4.75 millimeter steel wire rod were circumventing the antidumping duty order on certain wire rod from Mexico, “which defines subject merchandise as ‘certain hot-rolled products of carbon steel and allow steel, in coils, of approximately round cross section, 5.00 mm or more, but less than 19.00 mm.’” Specifically, in its final anti-circumvention determination, Commerce found that Deacero’s 4.75 millimeter wire rod “constitutes merchandise altered in form or appearance in such minor respects that it should be included within the scope of the order” pursuant to 19 U.S.C. § 1677j(c) notwithstanding the fact that the literal terms of the order excluded 4.75 millimeter rod, which existed at the time that the original petition in this case was filed.

Deacero filed suit in the CIT contesting Commerce’s affirmative circumvention determination, arguing that: (1) “because § 1677j(c) applies on its face to subject merchandise ‘altered’ in minor respects to make it non-subject, it ‘cannot apply to pre-existing products that were excluded by [Commerce] and the petitioners from the scope of the original investigation and resulting order’; and (2) 4.75 mm wire rope “was both in existence during the original investigation and specifically excluded from the scope of the subject merchandise as defined during the investigation.” In *Deacero I*, the court rejected Deacero’s statutory claim on *Chevron* step two grounds, but found Commerce’s affirmative anti-circumvention determination to be unsupported by the record. Specifically, the court found that “based on the facts of this case, an
affirmative circumvention determination was an unreasonable expansion of the Order’s scope” because “there is nothing minor or insignificant about producing 4.75 mm wire rod when diameter is the fundamental focus of the Order and the Order intentionally excludes wire rod less than 5.00 mm in diameter.” This was especially so, the court found, because a crucial component of the scope of the order was the subject merchandise’s diameter, and Commerce made an explicit finding that 4.75 mm wire was commercially available at the time of the petition. The court further noted that:

In reality, petitioners want to rewrite the Order so it says what they wish it had said at its inception. This belated attempt (that Commerce sanctioned) was unfair to Deacero, which invested substantial amounts of money in manufacturing what it reasonably considered non-subject merchandise. If petitioners believe they are being injured by imports of 4.75 mm wire rod at less than fair value, they should petition for the imposition of antidumping duties on small diameter wire rod. Based on the court’s present understanding, a circumvention inquiry was not the proper avenue for petitioners in this case.

Accordingly, the court remanded to Commerce with instructions to “reconsider” its finding that 4.75 mm wire rod was circumventing the order. The court was careful not to direct a result on remand, stating specifically that “[i]f Commerce continues to conclude on remand that 4.75 mm wire rod is a circumventing minor alteration of subject merchandise, Commerce must thoroughly explain how the record and relevant law supports that determination in light of the preceding discussion.”

Despite the court’s clear instructions, Commerce was reluctant to comply with the court’s order. After Deacero I, the case subsequently “ricocheted between the court and [Commerce]” for an additional remand order issued in 2014. In the first remand results, Commerce, “under protest,” reached the conclusion clearly favored—but not directed—by the court that Deacero’s 4.75 mm wire rod was not

68. Id. at 1330-31.
69. Id.
70. Id. at 1332.
71. Id.
circumventing the order. In so doing, Commerce stated that it was “precluded from reconsidering its commercial availability finding on remand.” In *Deacero II*, the court remanded the case for further proceedings, holding that “Commerce’s Remand Results cannot be sustained on the basis provided because they are premised on the incorrect conclusion that Commerce was bound by its prior commercial availability finding.” To the contrary, the court explained, *Deacero I* held that the court “could not order Commerce to reconsider its commercial availability finding when Deacero did not contest that finding.” This was so, the court reasoned, because no party with standing had challenged Commerce’s commercial availability determination and it was, therefore, an uncontested fact as far as the court was concerned. Accordingly, because Commerce’s remand results were based on this incorrect premise, the court issued a limited remand to “elicit an explanation from Commerce regarding whether it seeks the court’s leave to revisit the issue of commercial availability.” The court made clear, however, that it had serious misgivings about whether there was sufficient evidence to merit a remand for further proceedings with respect to the commercial availability issue, explaining that “even if Commerce were to reconsider and ultimately reverse its commercial availability finding, the court would likely still have concerns about the

---

73. *See* Deacero v. United States (*Deacero II*), No. 12-00345, 2014 Ct. Int’l Trade LEXIS 99, at *2, *7 (Aug. 28, 2014). The Court explained in *Deacero I* that it did not direct a particular result, but the court also rather clearly indicated that the record would only support a negative determination:

> As the court noted in *Deacero I*, any other conclusion would risk frustrate[ing] the purpose of the antidumping laws’ by allow[ing] Commerce to assess antidumping duties on products intentionally omitted from the ITC’s injury investigation. A contrary holding would also encourage gamesmanship from petitioners who might narrowly frame proposed scope language to assure an affirmative injury determination and later use circumvention inquiries to cover non-subject merchandise that might have originally prompted a negative injury determination.

*Id.* at *16 (internal quotation marks and citations omitted).

74. *See id.*

75. *Id.* at *19-20.

76. *Id.* (emphasis supplied).

77. *Id.* at *5-6. As the court explained, the domestic industry (i.e., the petitioners), “the only parties challenging [the commercial availability] finding, did not meet the jurisdictional prerequisites for judicial review.” *Id.* (citing Target Corp. v. United States, 609 F.3d 1352, 1363 (Fed. Cir. 2010) (citing 19 U.S.C. § 1516a(a)(2)(A) (2012)) (requiring filing of summons and complaint to gain standing in trade remedy suit).

78. *Id.* at *20-22.
reasonableness of an affirmative circumvention determination in this case.”

The court also gave pause to address the contention that the parameters of its remand instructions were unclear. Specifically, the court also gave pause in *Deacero II* to address the parameters of its ruling in *Deacero I* in response to certain arguments made by the domestic industry as defendant-intervenors on remand.\(^{80}\) The court made clear in *Deacero II* that its ruling in *Deacero I* did not hold that prior commercial availability was a bar in all circumstances to obtaining relief through an anti-circumvention inquiry.\(^{81}\) Instead, the court again clarified that “the minor alterations provision is not a vehicle for companies to expand an order in a way that petitioners avoided at the outset.”\(^{82}\) This is so, the court reasoned, because:

> Petitioners were sophisticated companies that could have proposed to define the Wire Rod Order in broader terms or without reference to diameter. But instead petitioners selected diameter as a central physical characteristic and risked the clearly foreseeable possibility that small diameter wire rod was or might soon be in commercial production.\(^{85}\)

Thus, the court reasoned, given the facts in this case, a conclusion in this case that such intentionally excluded merchandise was, in fact, subject to the minor alterations provision would “encourage gamesmanship from petitioners, who might narrowly frame proposed scope language to assure an affirmative injury determination [at the Commission] and later use circumvention inquiries to cover non-subject merchandise that might have originally prompted a negative injury determination.”\(^{84}\)

On second remand, Commerce declined to reconsider its prior commercial availability finding and left its first remand redetermination, finding no circumvention, intact.\(^{85}\) In its second remand redetermination, Commerce alleged, however, “that the court had modified

---

79. *Id.* at *21.
80. *See id.* at *11-12.
81. *See id.*
82. *Id.*
83. *Id.*
84. *Id.*

2015] 119
the minor alterations analysis . . . and barred affirmative circumvention determinations for products that were commercially available before an order issued.” In Deacero III, the court sustained Commerce’s negative remand redetermination, but found that Commerce’s arguments about the nature of the court’s holdings in Deacero I and Deacero II “betray a deep misunderstanding of the court’s opinions” because “[p]roperly viewed, the court’s holdings are narrow and do not blunt Commerce’s power to identify circumventing goods” through the minor alterations inquiry or otherwise.

Accordingly, in Deacero III, the court “reconstruct[ed] its rationale from the ground up” to “set[] a few matters straight” with respect to the court’s precise holdings. The court, pointing to the Federal Circuit’s longstanding holding in Wheatland Tube Co. v. United States, reasoned that, in the first instance, while the statute “lets Commerce reach items outside an order’s plain terms, the exception does not touch products that were placed beyond an order’s scope by design.” According to the court, Wheatland Tube is properly understood to stand for the narrow proposition that “[t]he minor alterations provision does not apply to goods that Commerce knew existed commercially when writing the order, yet excluded from the order anyway.”

Citing Nippon, the court further reasoned that, by contrast, the minor alterations provision “can cover items that were excluded from an antidumping order without intent—and this remains so even if the terms fall outside the order’s plain terms.” In light of this precedent, the court reasoned, the record evidence “signals that Commerce excluded 4.75 mm rod from the Order not by lack of foresight but with full knowledge of the product’s existence.” Moreover, the court reasoned, “though Commerce could have reopened the record and reached a different conclusion regarding commercial availability on a third remand, it declined the invitation to do so.” Thus, the court found that “the Order’s language—and the undisturbed finding that 4.75 mm rod was commercially available before the Order issued—suggest Commerce

86. Id.
87. Id.
88. Id. at *7-8, *14-16.
89. Id. at *9-10 (citing Wheatland Tube Co. v. United States, 161 F.3d 1365, 1371 (Fed. Cir. 1998) (“Section 1677j(c) does not . . . apply to products unequivocally excluded from the order in the first place.”)).
90. Id. at *11.
91. Id. at *11-12 (citing Nippon Steel Corp. v. United States, 219 F.3d 1348 (Fed. Cir. 2000)).
92. Id. at *14.
intentionally excluded 4.75 mm rod from the Order.” Accordingly, under Wheatland Tube, the court held that “the Department’s negative circumvention determination on remand was supported by substantial evidence.”

This case is a prime example of what happens when the government’s litigation strategy consists of attempting to avoid the result clearly indicated by the CIT’s remand instructions by misconstruing the court’s opinion. Specifically, the government’s behavior in response to the court’s two sets of remand instructions in the Deacero case illustrates the difficulties imposed on the CIT and parties seeking relief through judicial review as a result of the Nippon quagmire. The court outlined in Deacero III two of the government’s arguments that mischaracterized the nature of the court’s holdings in Deacero I and Deacero II. According to the court, the government incorrectly alleged that the court’s opinion in Deacero I: (1) announced a new “fundamental focus” test that was inconsistent with Wheatland Tube and Nippon Steel; and (2) “infringed its fact-finding authority by deeming diameter a ‘fundamental’ characteristic of wire rod.” The court stated in Deacero II that “[t]hese arguments twist the court’s holding almost beyond recognition.”

First, the court dismissed Commerce’s assertion that Deacero I had created a “fundamental focus” test designed to determine that diameter was the most important attribute of the subject merchandise. Instead, “diameter was ‘fundamental’ to the minor alterations analysis in a different way” because in writing the order Commerce chose “to distinguish subject rod from nonsubject rod” by establishing a diameter threshold of 5.0 mm with knowledge that wire rod below

93. Id.

94. See id. at *15-16. The government also argued that “commercial availability is irrelevant to the minor alterations analysis.” Id. at *6-7, *17. Citing instances where Commerce reached negative circumvention determinations based on a finding that the product at issue was commercially available at the time that the order was issued, the court held that “past agency practice belies the Department’s stance.” Id. at *18 (citing Brass Sheet and Strip from Germany, 56 Fed. Reg. 65,884, 65,886 (Dep’t of Commerce Dec. 19, 1991) (negative final circumvention determination based in part on finding that merchandise in question “existed prior to, and at the time of, the original investigation.”); Folding Metal Tables and Chairs from the People’s Republic of China, 74 Fed. Reg. 21,392 (Dep’t of Commerce May 7, 2009), accompanying Issues & Dec. Mem. at Cmt. 2 (finding, in the converse of the situation presented here, that certain folding tables could not have been excluded from an order because the tables did not exist during the investigation).

95. See id. at *15-16.

96. Id. at *15.

97. See id.
that diameter was commercially available. Second, the court explained that “the court never held that products found to be commercially available when an order was drafted cannot also circumvent that order.” Instead, the court explained, the minor alterations provision may apply where, unlike here, merchandise that was commercially available at the time of the order’s issuance was not unambiguously excluded by the order’s explicit terms.

2. Ceramark Technologies v. United States

But for the product at issue, the fact pattern surrounding Commerce’s affirmative circumvention determination ruled to be unsupported by substantial evidence in Ceramark is virtually indistinguishable from Deacero. In Ceramark, petitioners alleged that seventeen-inch diameter graphite electrodes were circumventing the antidumping duty order on graphite electrodes sixteen inches or smaller in diameter from China. In its final affirmative determination of circumvention on minor alterations grounds, Commerce declined to consider whether the product had been commercially available at the time that the order was issued and the scope was defined. According to Commerce, it was unnecessary to do so because Commerce was not required to determine whether the alleged alteration at issue was significant, even in light of the fact that the item in question was explicitly excluded by the order’s literal terms. The court disagreed, finding that Commerce acted contrary to the principle set forth in Wheatland Tube that Commerce may not interpret the scope in a way that reaches merchandise outside of the order’s plain terms, finding that “Commerce, in dismissing this requirement, would suggest that it is merely Plaintiff’s construction of the statute. This is incorrect. It is the Federal Circuit’s construction of the statute.” Accordingly, the court remanded Com-

98. Id. at *16.
99. Id. at *17.
100. See id. Commerce and the domestic industry have appealed Deacero I-III to the Federal Circuit. See Deacero S.A. de C.V. v. United States, Ct. No. 15-1362 (consol.). As of the date of submission of this article, this appeal remains ongoing.
102. See id. at 1319.
103. See id. at 1321-23 (citing Small Diameter Graphite Electrodes From the People’s Republic of China, 78 Fed. Reg. 56,864 (Dep’t of Commerce Sep. 16, 2014) and accompanying Issues & Dec. Mem. at cmt. 2.).
104. See id. at 1323.
105. Id. at 1323 n.17 (citing Scope Ruling Memorandum at 10) (internal citations omitted).
merce’s affirmative finding of circumvention because, in ignoring the prior commercial availability of seventeen-inch electrodes, “Commerce has either ignored or dismissed record evidence that, on its face, indicates that the alteration at issue—a one inch increase in graphite electrode diameter—is neither minor nor an alteration.”

While the fact pattern surrounding Commerce’s initial affirmative circumvention determination in Ceramark is virtually indistinguishable from Deacero, the ultimate outcome of the case in 2015 is markedly different. After remand, Commerce continued to find, contrary to Deacero I-III and the court’s remand in this case, that prior commercial availability “did not so detract from the substantiality of the evidence as to dictate a different outcome.” The court, declining to address the merits of Commerce’s remand redetermination, upheld Commerce’s affirmative finding on exhaustion grounds because Ceramark’s counsel did not file comments during the remand proceeding at the agency level. Counsel’s stated reason for not commenting at the administrative level was that such comments would have been futile. Although noting that “[i]t is possible, indeed likely, that if Ceramark had simply re-submitted its previous comments, Commerce would not have changed its position,” the court disagreed that the futility exception to the exhaustion doctrine applied in this case and, accordingly, sustained Commerce’s determination because, according to the court, “filing comments would not have been a useless formality.” Thus, it appears that, in this case, the “ricochet” effect of the Nippon quagmire was stopped at least partly in this case by counsel’s procedural miscalculation with respect to the applicability of the futility exception to the exhaustion doctrine.

E. 2014 Scope Inquiry Cases

In 2014, the court issued seven substantive opinions in six cases appealing Commerce’s determination in scope inquiries. In all but one of these appeals, the court found Commerce’s original scope determinations to be unlawful—a disquieting statistic for an agency holding
itself out as the “master of the dumping laws.” 112 One of these opinions sustained Commerce’s original determination, 113 while another sustained Commerce’s determination but only after two prior remands, meaning it took Commerce four tries to reach a lawful and factually-supported determination. 114 The remaining five opinions issued in 2014 resulted in remands to the agency for further proceedings consistent with the court’s opinion. 115 Of the five scope inquiry cases remanded to the agency for further consideration, three cases were remanded for a first time, one was remanded for a second, and one was remanded for a fourth. 116 All of the six appeals in which the court issued substantive opinions in 2014 concerned products imported from China. Three addressed Commerce’s interpretation of the scope of the antidumping and countervailing duty orders on aluminum extrusions, 117 while one each addressed Commerce’s interpretations of the scope of the antidumping duty orders on: (1) wooden bedroom furniture, 118 (2) petroleum wax candles, 119 and (3) certain steel nails. 120 As further discussed herein, a review of the court’s 2014 opinions in these cases reveals that, while Commerce is granted wide latitude with respect to its interpretation of the scope of its orders, the court will not hesitate to remand Commerce’s scope ruling when it finds that Commerce interpreted the order at issue in a manner that is either too exclusive or inclusive. A review of the opinions also reveals that the ricochet effect of the Nippon quagmire is as significant with respect to the CIT’s review of Commerce’s scope inquiries as it is for the agency’s anti-circumvention determinations should the court and Commerce

112. See Jinan Yipin Corp. v. United States, 971 F. Supp. 2d 1296, 1303 (Ct. Int’l Trade 2014) (“Commerce is recognized as the ‘master of the antidumping law.’”) (quoting Thai Pineapple Pub. Co. v. United States, 187 F.3d 1362, 1365 (Fed. Cir. 1999)).
118. See Medline, 961 F. Supp. 2d at 1288.
120. See Mid Continent V, 24 F. Supp. 3d at 1280.
find themselves at loggerheads with respect to a particular decision. Each of these cases is discussed below in turn.

1. Medline Industries, Inc. v. United States

The CIT will uphold Commerce’s scope rulings when they are consistent with the language of the scope of the order. For example, Medline Industries, Inc. v. United States presented the question of whether Medline’s imported hospital bed end components made of wood were within the scope of the antidumping duty order covering wooden bedroom furniture from China.\(^{121}\) In its scope-ruling request to Commerce, “Medline argued that the end panels were outside the scope of the Order because hospital beds are classified differently than bedroom furniture and were not discussed in the petition or the investigation underlying the Order.”\(^{122}\) Commerce disagreed, finding that the order’s unambiguous language “explicitly includes wooden headboards and footboards.”\(^{123}\) As the court described:

Although it found the language of the Order to be dispositive, Commerce noted that its decision was consistent with previous scope rulings in which it determined that wooden end panels for metal-framed beds were within the scope of the Order. Commerce also rejected Medline’s argument that its end panel components were not bedroom furniture, noting that it previously found that wooden end panels for beds made for use in long term care facilities were within the scope of the order because “the scope covers all wooden bedroom furniture meeting the written description of the merchandise, and this written description is dispositive, regardless of tariff classifications.”\(^{124}\)

Before the court, Medline argued that this interpretation “impermissibly expanded the scope of the Order to include non-bedroom furniture and failed to perform an adequate [k(1)] analysis in accordance with the regulations governing scope inquiries.”\(^{125}\)

On review, the court agreed with Commerce that the scope language unambiguously applied to Medline’s hospital bed end panel compo-

---

121. Medline, 961 F. Supp. 2d at 1288.
122. Id. at 1289.
123. Id.
124. Id. (internal citations omitted).
125. Id.
nents, finding Medline’s “alternative interpretation of the scope language” to be “unpersuasive.” Specifically, the court found that “[a]lthough Medline repeatedly refers to instances in which the Order mentions ‘bedroom’ furniture, Medline does not identify any language in the Order limiting or defining the term ‘bedroom’ in such a way as to unambiguously exclude” Medline’s end panel components. The court also found that the structure of the order’s scope language did not support Medline’s argument because the scope language defines subject merchandise not with reference to the term “bedroom” or by a product’s end use, but with reference to the specific types of furniture included in the order. Thus, the court held that Commerce’s interpretation of the scope language was reasonable because the order’s scope language unambiguously included both wooden headboards and footboards for beds. Further, having found the scope language to be unambiguous with respect to plaintiff’s end panel components, the court held that it “need not address Medline’s claim that Commerce’s (k)(1) analysis was unreasonable.”

2. Trade Associates Group, Ltd. v. United States

In contrast to Medline, the court will not hesitate to remand Commerce’s scope rulings in cases where Commerce attempts to distort the plain language of the order. For example, in Trade Associates Group, Ltd. v. United States, the court considered an appeal of Commerce’s finding that the majority of the 261 “specially-shaped or holiday-themed” candles imported by Trade Associates for which the ruling was sought were covered by the antidumping duty order on certain petroleum wax candles from China. According to the court, “Plaintiff sought, and Commerce denied, exclusions for candles in the shapes of acorns, beach balls, caramel apples, cupcakes, flip flops, floating leaves, flowers, fruits, garden birdhouses, haunted houses, metallic balls, pears, snowmen, trees, vegetables, witches’ hats, and woodies with surfboards,

126. Id. at 1290-91.
127. Id. at 1291.
128. See id.
129. See id. (“Because the Order specifically identifies wooden headboards and footboards as subject merchandise, Commerce’s interpretation of the scope language was reasonable.”).
130. Id.
131. See Trade Assocs. Grp., Ltd. v. United States, 961 F. Supp. 2d 1306, 1307, 1312 (Ct. Int’l Trade 2014). Interestingly, Commerce preliminarily ruled that plaintiff’s candles were not subject to the order, but changed course after a public comment period. See id. at 1309-10.
among many others.  

The court first found that Commerce’s scope ruling unreasonably interpreted the scope language of the order. At issue in this case was the following scope language: “The products covered by this order are certain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks. They are sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers.”

In Commerce’s final scope ruling, the agency interpreted this language to mean that the scope “includes candles of any shape, with the exception of birthday candles, birthday numeral candles, utility candles, and figurine candles.” Relying on Webster’s Dictionary, Commerce defined a “figurine” candle subject to the exception as “a candle that is in the shape of a human, animal, or deity,” and, accordingly, ruled that the vast majority of plaintiff’s candles did not qualify for Commerce’s newly described exception. The court found this reasoning unpersuasive. Specifically, the court found—contrary to Commerce’s assertion—that the use of the word “certain” in the first sentence of the above-quoted scope language, read in conjunction with the inclusion of specific types of candles in the second, “cannot reasonably be read to include generally candles of any shape.” Additionally, the court found Commerce’s interpretation of the word “certain” in the first sentence of the scope language without reference to the second to be unreasonable because such an interpretation leaves the scope of the order “essentially undefined.” Finally, the court stated that a “third flaw” in Commerce’s interpretation of the scope language was the fact that Commerce construed the word “certain” not in reference to the second sentence of the scope, but instead in response to certain “record evidence” that led Commerce to believe that the petitioners

132. Id.
133. Id.
134. Id. at 1312.
135. Id.
136. Id.
137. Id. at 1312-13. The court also found that “the second sentence . . . read on its own appears to describe the subject merchandise by candle shape, albeit without language expressly limiting the scope to the specific shapes identified.” Id. at 1312.
138. Id.
intended that only certain candle types be outside the scope of the original antidumping petition. The court found this to be irrelevant because “while [t]he purpose of the petition is to propose an investigation . . . [it is] Commerce’s final determination [that] reflects the decision that has been made as to which merchandise is within the final scope of the investigation and is subject to the order.”

The court next found that Commerce’s scope ruling could not be sustained on the basis of any purported ambiguity found in either sentence of the relevant portion of the scope language. This was so, the court explained, because “the scope language is not ambiguous in a way that makes it susceptible to a reasonable construction under which Commerce may hold candles in the shapes of identifiable objects to be within the scope of the Order.”

The court therefore stated in unequivocal terms that resorting to a (k)(1) analysis was unnecessary because “there is no reasonable construction of the scope language under which the Order could include those plaintiff’s candles that were made in shapes that resemble identifiable objects.”

The court remanded the case to Commerce with instructions to “file a remand redetermination comprising a new scope ruling that complies” with the court’s opinion. Commerce subsequently filed remand results with the court under protest, continuing to find that 120 of the 269 candles subject to plaintiff’s scope ruling request were covered by the scope of the order. In the remand results, Commerce

---

139. See id.
140. Id. (quoting Duferco Steel, Inc. v. United States, 296 F.3d 1087, 1089 (Fed. Cir. 2002)).
141. Id. at 1315. The court also ruled against Commerce’s claim that plaintiff was estopped from arguing both that the scope language is unambiguous and, in the alternative, should the court find the scope language to be ambiguous, that Commerce’s interpretation is still unreasonable. See id. at 1312-14.
142. Id. at 1316.
143. Id. While finding that it was unnecessary to address Commerce’s analysis based on the (k)(1) factors, the court went on to reject various arguments of Commerce and petitioners based on 19 C.F.R. § 351.225(k) and various court precedent alleged to support the position that Commerce’s interpretation of the language was reasonable. In essence, the court held that none of the precedent cited by the government or petitioners disturbed the basis of the court’s analysis of the plain text of the order, grounded in the longstanding rule of law articulated in the Federal Circuit’s decision in Duferco Steel that “the language of the Order must take precedence over the guidance provided in the sources identified in § 351.225(k).” Id. at 1319 (citing Duferco, 296 F.3d at 1097).
144. Id. at 1322-23.
stated explicitly that it disagreed with plaintiff’s assertion that the court’s opinion and remand order “definitively determined that all of the candles under consideration are necessarily outside of the scope of the order.” Accordingly, in spite of the court’s unequivocal statement that Commerce “unreasonably interpreted the scope of the Order to include candles in the shapes of identifiable objects,” Commerce continued to find on remand that, by way of example, candles made to clearly resemble apples and pumpkins were subject to the order because they were “round” and “oval,” respectively. As of the date of submission of this Article, the court has yet to rule on Commerce’s remand redetermination.

3. Mid Continent Nail Corp. v. United States

The court’s 2014 opinion in Mid Continent Nail Corp. v. United States illustrates the phenomenon of the Nippon quagmire when the Federal Circuit disagreed with a final CIT opinion sustaining Commerce’s scope ruling after a series of remands. The CIT’s 2014 opinion in Mid Continent was the penultimate chapter in a longstanding dispute surrounding Commerce’s determination in a 2010 scope ruling requested by national retailer Target Corporation that steel nails contained in its imported toolkits were not subject to the antidumping duty order on certain steel nails from China. From the outset of the proceedings before Commerce, the parties agreed that the nails, if imported alone, would be subject to the order. As the court explained, however, “[a]lthough it conceded that the nails in the toolkit would be in-scope merchandise if considered on their own, Target insisted that Commerce should focus on the toolkits as a whole.” In its 2010 scope ruling, Commerce agreed with Target that the nails contained in its imported toolkits were not in scope after conducting this “mixed media” inquiry as part of its (k)(2) analysis. On appeal, the court in Mid Continent I “rejected Commerce’s analysis in the Scope Ruling, 

146. Id. at 10.
147. Compare id. at Attachment (itemized table with pictures and brief statement of Commerce’s reasoning on remand), with Trade Assocs. Grp., Ltd. v. United States, 961 F. Supp. 2d 1306, 1322 (Ct. Int’l Trade 2014) (ruling that Commerce “unreasonably interpreted the scope of the Order to include candles in the shapes of identifiable objects”).
149. See id. at 1281.
150. Id.
151. See id. at 1282.
finding that Commerce failed to articulate adequate reasoning for its
decision to focus the scope inquiry on the toolkits rather than the nails”
and remanded the scope ruling “so that Commerce could identify a test
for making such a determination and provide legal justification” for
using the mixed media test.152

On remand, Commerce continued to determine that it had the
authority to conduct a mixed media analysis and attempted to articu-
late a four-factor test to determine whether the agency should focus the
scope inquiry on the set as a whole or solely on the nails.153 Commerce
outlined the four factors as: (1) “the practicability of separating the
component merchandise for repackaging or resale”; (2) “the value of
the component merchandise as compared to the value of the product”;
(3) “the ultimate use or function of the component merchandise
relative to the ultimate use or function of the mixed-media set as a
whole”; and (4) “any other relevant factors that may arise on a product-
specific basis.”154 Applying this test, Commerce determined that the
nails in the toolkits were not in-scope.155 In Mid Continent II, the court,
“[u]pon review of the First Remand Results, found that Commerce’s
analysis was improper because Commerce did not have the authority to
conduct a mixed-media analysis,” and remanded to Commerce to issue
a second remand redetermination “consistent with its opinion that ‘the
nails in question here are unambiguously subject to the Nails Order,
and there is no support in the law or the record for concluding
otherwise.’”156

Commerce subsequently issued, and the court upheld in Mid Conti-
ment III, a second remand redetermination finding, under protest, that
the nails in Target’s toolkits were subject to the order.157 The govern-
ment subsequently appealed the CIT’s opinion in Mid Continent III to
the Federal Circuit.158 In Mid Continent IV, the Federal Circuit reversed
the CIT’s opinion in Mid Continent III, finding that “the CIT’s holding
that Commerce lacked authority to conduct a mixed-media inquiry was

152. Id. (citing Mid Continent Nail Corp. v. United States (Mid Continent I), 770 F. Supp. 2d
1372, 1382-83 (Ct. Int’l Trade 2011)).
153. See id.
154. Id.
155. See id.
156. Id. (citing Mid Continent Nail Corp. v. United States (Mid Continent II), 825 F. Supp. 2d
1290, 1296 (Ct. Int’l Trade 2012)).
157. See id. at 1282-83 (citing Mid Continent Nail Corp. v. United States (Mid Continent III),
No.: 10-00247, 2012 Ct. Int’l Trade LEXIS 99 (July 25, 2012)).
158. See id. at 1283.
erroneous.”¹⁵⁹ As the CIT described in *Mid Continent V*, the Federal Circuit:

. . . also found that Commerce had yet to reasonably interpret the Nails Order in such a way as to justifiably exclude the nails in Target’s toolkits from the scope, noting that the fourth factor of the mixed-media test was overly broad. The CAFC provided Commerce with guidance for its remand redetermination, stating that “any implicit mixed-media exception to the literal scope of the order must be based on preexisting public sources,” and that “Commerce may attempt to draw an ascertainable standard from these rulings if they were publicly available at the time the [Nails Order] was issued.”¹⁶⁰

On remand from the Federal Circuit’s opinion in *Mid Continent IV*, Commerce “attempted to find a test by which it could determine whether to focus its scope ruling on the mixed-media set as a whole or on the individual component.”¹⁶¹ Specifically, Commerce examined its prior “mixed media” scope rulings and modified the four-factor test outlined above to eliminate the fourth factor and to add a requirement that Commerce examines the “unique language of the order.”¹⁶² Applying this new test, Commerce again determined that: (1) the scope inquiry should focus on the toolkits as a whole; and (2) the nails contained therein should be excluded from the scope of the order because both the mixed-media analysis and the (k)(2) factors supported finding that the nails were not in-scope merchandise.¹⁶³

In *Mid Continent V*, the CIT found that “[u]ltimately, Commerce’s mixed media test fails to comply with the instructions the [Federal Circuit] articulated in [Mid Continent IV], which required Commerce to draw an ascertainable mixed media standard from information that was publicly available at the time the Nails Order was issued.”¹⁶⁴ Specifically, the court found that the scope rulings upon which Commerce relied in formulating the test “do not identify a coherent and ascertainable standard encompassing all of the factors in Commerce’s mixed

---

¹⁵⁹. *Id.* (citing *Mid Continent Nail Corp. v. United States (Mid Continent IV)*, 725 F.3d 1295, 1301 (Fed. Cir. 2013)).

¹⁶⁰. *Id.* (citing *Mid Continent IV*, 725 F.3d at 1305) (internal citations omitted).

¹⁶¹. *Id.*

¹⁶². *Id.*

¹⁶³. *See id.* at 1284.

¹⁶⁴. *Id.* at 1289.
media test, and thus, they do not provide guidance that would allow importers to predict how Commerce would treat their mixed media products.”

Having found that Commerce’s rearticulation of its mixed media inquiry was not legally supported by the precedent on which it relied, the court declined to determine whether Commerce’s application of that test to determine that the nails were not in-scope was supported by substantial evidence. Accordingly, the court remanded to Commerce a fourth time “for reconsideration of its mixed media standard in accordance with” the Federal Circuit’s instructions in Mid Continent IV.

Commerce’s fourth remand results ultimately abandoned, under protest, the mixed-media inquiry and “‘examine[d] the nails themselves, without regard to the toolkits,’ and therefore concluded that the nails were within the scope” of the order. The court in Mid Continent VI sustained this determination, finding that “Commerce’s Fourth Remand Results comply with the court’s remand order and are supported by substantial evidence.” The court further found that Target had failed to exhaust administrative remedies with respect to its objections to Commerce’s fourth remand redetermination because it had failed to raise the objections at the administrative level. The time for Commerce to appeal Mid Continent VI to the Federal Circuit having elapsed in June 2015, it appears as if Mid Continent VI is the final say with respect to whether Commerce may conduct a mixed media inquiry in the manner that it had espoused in this litigation.

4. Meridian Products, LLC v. United States

In 2014, the court issued two opinions in the continuing saga of Meridian Products, LLC v. United States, an appeal of Commerce’s 2012 scope ruling finding that plaintiff’s imported refrigerator/freezer “trim kits” were within the scope of the antidumping and countervailing duty

---

165.  Id.
166.  See id.
168.  Id. at 1289.
169.  See id. at 1288-89.
170.  See Fed. R. App. P. 4(a) (b) (providing that an appeal must be taken in a case in which the United States is a party within 60 days of the order of final judgment). The final judgment in Mid Continent was entered on April 22, 2015. See Order Sustaining Final Results of Redetermination Pursuant to Remand Order, Ct. No. 10-247, ECF. No. 130. Accordingly, the deadline for filing a notice of appeal in this case lapsed on June 23, 2015.
orders on imports of certain aluminum extrusions from China. In the orders, Commerce broadly describes the subject merchandise in relevant part as “[a]luminum extrusions which are shapes and forms, produced by an extrusion process, made from aluminum alloys.” The orders, however, contain an exclusion for products that would otherwise be considered “finished goods” or “finished goods kits.” Specifically, the exclusion is as follows:

The scope also excludes certain finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels. The scope also excludes finished goods containing aluminum extrusions that are entered unassembled in a “finished goods kit.” A finished goods kit is understood to mean a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further processing or fabrication, such as cutting or punching and is assembled ‘as is’ into a finished product.

Plaintiff describes its trim kits as “aluminum trim kit packages which are utilized as an aesthetic frame around the perimeter of (though not attached to) a major home appliance” that are imported into the United States unassembled but containing all of the components necessary to fully assemble them. Plaintiff requested a scope ruling from Commerce, arguing that its trim kits as described above qualified for the “finished goods kit” exception contained in the scope. Commerce disagreed, finding that “the Trim Kits were unambiguously included in the scope of the Orders as subject aluminum extrusions identified by reference to their end use.” Specifically, “Commerce

---

173. Id. at 30,654.
175. Id.
176. Id.
concluded that the Trim Kits are like the geodesic dome frame kits in a previous ruling and met the initial requirements for the finished good kits exclusion, but it also found that the Trim Kits consisted entirely of aluminum extrusions, fasteners, and extraneous materials and accordingly did not qualify for the exclusion.”

Plaintiff filed suit contesting Commerce’s scope ruling in early 2013, alleging initially that remand was necessary because Commerce failed to take into account certain scope rulings that modified the test through which Commerce determined whether merchandise qualified for the finished good kit exception, despite the fact that the rulings announcing those tests were issued prior to Meridian’s scope ruling request. In *Meridian I*, the court agreed, and remanded to the agency with instructions to “reconsider the Trim Kits under the finished goods scope exclusion” of the order, as modified by Commerce’s new stated analytical framework announced in recent scope rulings interpreting the finished goods and finished goods kit exceptions.

On remand, Commerce synthesized the analytical framework used in prior scope rulings on the issue and determined that its finished goods kit exception applies to merchandise that is “designed to *display or incorporate customizable materials or work with removable/replaceable components,*” if such merchandise “contains, at the time of importation, all of the parts necessary to assemble a final finished good for such purposes.” In light of this new test, Commerce continued to find that the finished goods kits exception did not apply here because the trim kits were not analogous to other merchandise previously excluded pursuant to this exception. This was so, Commerce found, because

---

177. *Id.*

178. See *Meridian Prods., LLC v. United States (Meridian I)*, No. 13-00018, 2013 Ct. Int’l Trade LEXIS 73, at *1-3 (June 17, 2013) (ordering remand prior to substantive briefing on the issue pursuant to USCIT R. 7 because “[w]ithout remand prior to [that] stage the court would on a summary judgment motion be left to consider whether Commerce would have agreed with plaintiff that the new finished goods analysis would exclude the trim kits from the Order’s scope. Without having Commerce’s official stand on this issue, the court could be required to remand the case after full briefing so that the agency could opine on the record. The delay and expense necessary to litigate this issue in that manner would, in the court’s opinion, frustrate the ‘just, speedy and inexpensive determination’ of this action. CIT Rule 1.”). Compare *id.*, with *Meridian Prods., LLC v. United States*, No. 13-00246, 2014 Ct. Int’l Trade LEXIS 19 (Feb. 19, 2014) (denying Rule 7 motion in appeal of separate scope proceeding to consider intervening court precedent).


180. *Id.* at 1265 (quoting *Home Meridian Int’l, Inc. v. United States (First Remand Results)*, 925 F. Supp. 2d 1377 (Ct. Int’l Trade 2013)) (emphasis in original).

181. *See id.* at 1263.
plaintiff’s trim kits did not “display or incorporate customizable materials” nor “work with removable/replaceable components.”

In *Meridian II*, the court found that while Commerce’s articulation of the synthesis of its new analytical framework was acceptable in principle, the agency failed to support certain parts of its application to plaintiff’s trim kits with substantial evidence. Specifically, the court found that Commerce provided “substantial evidence to support its determination that Trim Kits do not ‘incorporate’ customizable material.” The court also found, however, that Commerce failed “to point to substantial evidence to support the finding that Trim Kits are not intended to ‘display’ an appliance or ‘work with removable or replaceable components.’” This was so, the court explained, because “Commerce provid[ed] no analysis, outside of conclusory statements, to support its conclusion that an ‘aesthetic frame’ designed to ‘enhance the appearance of the cabinetry surrounding the appliance in the consumer’s home and lend[] a customized, ‘built-in’ look’ is not intended to ‘display’ a ‘customizable’ freezer or refrigerator unit.” Additionally, the court found that “Commerce also [failed] to expressly conclude or analyze in its remand if, like the products [in a prior ruling] the Trim Kits are designed to ‘work with removable/replaceable components’ that can change with user needs.” Thus, the court found, “Commerce’s analysis falls short of that minimally cleared path that would enable the reader to understand the logic of the remand.” Accordingly, the court ordered a second remand with instructions to Commerce to “support its remand decision with findings of fact grounded in substantial evidence of record.”

Notably, in ordering a second remand, the court clearly stated that it agreed with Commerce’s assessment that the first remand instructions “did not ‘direct or require Commerce [to] find that Meridian’s trim kits are excluded.’” Instead, the court explained, Commerce’s first remand ruling “evinces inconsistency” with the prior rulings from

---

182. *Id.* at 1268.
183. *See id.*
184. *Id.* at 1268 (second remand).
185. *Id.*
186. *Id.* at 1269 (quoting First Remand Results, at 15) (first alteration in quoted text added; second in original).
187. *Id.* at 1270.
188. *Id.*
189. *Id.* at 1271.
190. *Id.*
which its finished goods kit analytical framework was derived. Accordingly, instead of explicitly directing a result, the court provided Commerce with the opportunity to “sufficiently explain why the Trim Kits do not meet the ‘additional criteria identified’” in those prior scope rulings.

In its second remand redetermination, Commerce continued to find that Meridian’s trim kits were covered by the scope of the orders. Commerce determined as a threshold matter that the finished goods kit exception did not apply to the trim kits because “they consisted entirely of aluminum extrusions, fasteners, and extraneous materials.” Essentially, according to Commerce’s second remand determination, whether or not the trim kits consisted entirely of aluminum extrusions was a preliminary step in the analysis and it was, therefore, unnecessary in the first instance to determine whether or not the trim kits “displayed” or “worked” with an appliance. Commerce further determined, however, that the trim kits did not “display” or “work with” an appliance because the trim kits “merely frame the space into which the refrigerator is placed” and were therefore unlike the goods in [prior rulings], because in those rulings the subject goods were designed to ‘display’ or ‘work with’ a missing non-essential interchangeable component by the functional means of holding the component.

In Meridian III, the court upheld Commerce’s second remand redetermination. The court first found that plaintiff had failed to exhaust administrative remedies with respect to Commerce’s “aluminum content” threshold analysis because it had failed to adequately dispute this issue before the agency during the second remand proceedings, or incorporate the arguments that it had made before the agency in the prior remand proceedings. Accordingly, the court found that it was “left unable to further address the plaintiff’s critique of” Commerce’s interpretation of the word “display” because “‘display’ is only applicable in the final step of Commerce’s analysis and the plaintiff did not exhaust its administrative remedies on the finding of whether the trim

191. Id.
192. Id. (quoting First Remand Results, at 16).
194. Id. at 1346.
195. See id. at 1345-46.
196. Id. at 1342 (quoting Final Results of the Redetermination Pursuant to Court Remand).
197. See id. at 1344.
198. See id. at 1347-48.
kits consisted of ‘more than’ aluminum extrusions, fasteners, and extraneous materials.” Thus, the court sustained Commerce’s second remand redetermination without reaching the merits of the reasons for remand in Meridian II.

The saga of the Meridian Products case does not, however, end with Meridian III. Plaintiff subsequently filed a motion for reconsideration with respect to the court’s exhaustion ruling in Meridian III shortly after the opinion was handed down. In Meridian IV, the court granted plaintiff’s motion because “the need to prevent manifest injustice” favored ruling for Meridian. Reaching the merits, the court found that a third remand was appropriate because Commerce’s threshold “aluminum content” analysis was contrary to the orders’ terms and thus unreasonable. Commerce has yet to issue its third remand redetermination in response to Meridian IV, and the case thus continues to “ricochet” between the court and Commerce as a result of Commerce’s recalcitrance and the Nippon quagmire.

5. Rubbermaid Commercial Products LLC v. United States

In the underlying administrative proceedings giving rise to Rubbermaid Commercial Products LLC v. United States, plaintiffs contested Commerce’s determination that thirteen of its products, including “a variety of mop frames and handles, a squeegee blade replacement” and mopping kits were within the scope of the orders in the aluminum extrusions case because they did not fall under either the “finished merchandise” or “finished goods kit” exceptions. Rubbermaid contended that its mopping kits fell under the “finished goods kit” exclusion, while all of the other cleaning system component products addressed in Commerce’s scope ruling were “finished goods.” Relying on (k)(1) factors, Commerce held that the cleaning system components were not eligible for the finished goods exclusion because they were designed to function with other components after importation,

---

199. Id. at 1351. The court also dismissed plaintiff’s additional argument that the trim kits qualified as “finished merchandise.” Id.


201. Id. at *9-10.

202. See id. at *12-26.


204. See id.
and were thus not “fully and permanently assembled and completed at the time of entry.”^205 Likewise, Commerce determined that the mopping kits “do not constitute ‘finished good kits’ because, although each kit includes ‘a tube, a trigger handle, a soap reservoir, and a wet/dry frame on which disposable mops are attached,’ there are no disposable mop heads or mop ends included in the kits at the time of importation.”^206

In *Rubbermaid*, the court found both of these determinations lacking. With respect to the “finished goods” exception and the cleaning system components, the court held that: (1) Commerce erroneously grafted language found in the “finished goods kits” exclusion requiring that the products be “complete” upon importation onto the “finished goods” exception when no such language existed; (2) Commerce “made no effort to explain how or why” the fact that Rubbermaid’s cleaning system components must be attached to other components to fulfill their ultimate function precluded them from the finished goods exception; and (3) Commerce improperly distinguished prior scope rulings on this point, which in fact indicated that the attempted dichotomy that the agency was attempting to draw here was untenable.^207 With respect to Rubbermaid’s mop kits, the court found unpersuasive Commerce’s conclusion that the mop kits were not properly considered “finished goods kits” because the actual mop was not included with the kit.^208 In the first instance, the court held that this was inconsistent with prior scope rulings finding the finished goods kit exclusion to be applicable where, like here, the allegedly “incomplete” imported merchandise was “‘designed to be readily interchangeable and to be modified according to the end user’s needs and specifications’ and thus did not constitute ‘integral components’ that

^205. Id. at *11.
^206. Id. at *12-13.
^207. Id. at *16-44. As the court succinctly put it, the government’s position with respect to the finished goods exception as it related to the cleaning system components was untenable because:

If—as Commerce ruled here—Rubbermaid’s products are not “finished merchandise” but are instead (in essence) “mop parts,” why are doors and windows [explicitly excluded by the scope language as] “finished merchandise” and not mere “house parts” or “building parts”? Thus far, Commerce and the Government have offered little more than *ipse dixit*. It seems that Commerce’s position on “finished merchandise” is akin to Justice Potter Stewart’s take on obscenity—Commerce can’t define it, but it “know[s] it when [it] see[s] it.” See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

Id. at *30 (alterations in first sentence added, remainder of alterations in original).
^208. See id. at *50-51.
SCOPE AND PROCEDURAL MATTERS

were ‘necessary to assemble a full and complete ‘finished goods kit.’”209 Thus, the court remanded the case to Commerce with instructions to reconsider its interpretation of the “finished goods” and “finished goods kits” exclusions in a manner consistent with its opinion.210

On remand, Commerce found that the cleaning system components and the mop kits were excluded from the scope of the order because they were properly considered to be “finished goods” and “finished goods kits,” respectively.211 In Rubbermaid II, the court subsequently upheld Commerce’s remand redetermination, but took issue with an assertion that Commerce made with respect to the agency’s insistence on defining the word “parts” with reference to a minimum portion of the merchandise that does not consist of aluminum extrusions in a lengthy footnote.212 Pointing to, among others, the court’s ruling in Meridian IV, the court noted in the first instance that “there is room for doubt as to the soundness of Commerce’s reasoning on this point.”213 The court further noted that “[t]here is nothing in the definition of the word ‘parts’ that inherently goes to the material composition of the ‘parts’ (much less requires that ‘parts’ must be made of at least two different materials).”214 “Fortunately,” the court further noted, there was “no need to decide this question here” because Rubbermaid’s products were all made of aluminum and other non-extruded aluminum products.215 Thus, finding that no party objected to Commerce’s remand results, the court sustained them.216

6. Plasticoid Manufacturing Inc. v. United States

At issue in Plasticoid Manufacturing Inc. v. United States was Commerce’s determination that the finished aluminum cutting and marking straight edges designed for use in the art and drafting industries

209. Id. at *49-50 (quoting Commerce’s final scope ruling on EZ Fabric Wall Systems (Nov. 9, 2011)).
210. See id. at *51.
211. See Final Results of the Redetermination Pursuant to Court Remand, Rubbermaid Commercial Products LLC v. United States, Court No. 13-00463 (Ct. Int’l Trade September 23, 2014), ECF No. 61-1. Notably, Commerce does not appear to have filed this remand redetermination under protest.
212. See id. at *8-15 n.2.
213. Id.
214. Id. The court also discussed a number of other reasons that Commerce’s interpretation was untenable, including a discussion of policy rationale of the principle of contra proferentum vis-à-vis Commerce and the petitioners having drafted the scope language.
215. Id.
216. See id.
imported by Plasticoid were subject to the antidumping and countervailing duty orders on aluminum extrusions from China.\textsuperscript{217} As the court describes, Plasticoid, relying on petitioners’ statements giving rise to Commerce’s prior Precision Machine Parts scope ruling and the plain language of the order, argued in its scope ruling request here that its straight edges fit the finished goods exception because:

\textit{[T]he Orders reflect a bright line distinction between mere “parts, elements or components” and “assemblies” containing aluminum extrusions (which are within the scope of the Orders) and “stand-alone,” “finished, end use products” that are “fully functional independent of any other part, component, or element” (which are excluded).} Pl.’s Brief at 7, 11, 12.\textsuperscript{218}

Pointing to the petitioners’ statements reflected in a prior scope ruling, Plasticoid further argued in its scope ruling request that “the straight edges are ‘precisely the type of merchandise [that] Petitioner [in the underlying antidumping and countervailing duty investigations] sought to exclude from the [Orders].’”\textsuperscript{219}

Without resort to a (k)(2) analysis, Commerce determined in its scope ruling that the straight edges were in-scope.\textsuperscript{220} Specifically, Commerce stated that the “finished goods” exclusion was inapplicable here because: (1) “[t]he scope [of the Orders] expressly includes aluminum extrusions which are \textit{identified by reference to their end use};”\textsuperscript{221} (2) the fact that the straight edges are ready for use at the time of importation does not necessarily lead to their exclusion;\textsuperscript{222} (3) the straight edges consisted entirely of aluminum; and (4) any “fabrication” or specialized machining that the straight edges underwent in manufacturing does not exclude them from the order.\textsuperscript{223}

On review, the court first found that “Commerce’s response in the instant scope ruling was a complete \textit{non sequitur}” because the agency “offered no substantive response to Plasticoid’s reliance on the intent of Petitioner as manifest” in a prior scope ruling where the petitioners

\textsuperscript{218.} Id. at 1360-61.
\textsuperscript{219.} Id. at 1364 (quoting Plasticoid’s brief) (quoting Precision Machine Parts Scope Ruling at 9) (alterations in original).
\textsuperscript{220.} See id. at 1365.
\textsuperscript{221.} Id. at 1365-66 (quoting Scope Ruling at 10) (emphasis and alterations in original).
\textsuperscript{222.} See id. at 1368.
\textsuperscript{223.} See id. at 1369.
explicitly stated that “the scope does not encompass downstream products that have been converted into finished merchandise.”224 According to the court, “Commerce gave no indication as to what Petitioner possibly could have been referring to which would be more ‘finished’ than the straight edges at issue here. Nor did Commerce explain how the straight edges could have been any further ‘downstream’—or any more ‘finished’—than they were.”225

The court further found that “[o]ther than Commerce’s ‘non-sensical’ response to Plasticoid’s reference to the Precision Machine Parts Scope Ruling,” Commerce “never directly addressed Plasticoid’s arguments that its straight edges are ‘finished merchandise’ within the meaning of the Orders and are thus excluded from the scope of the Orders pursuant to the finished merchandise exclusion.”226 Instead, the court found, Commerce “predicated its ruling on three other provisions of the Orders,” all of which were insufficient grounds for the court to sustain Commerce’s scope ruling.227 First, the court found “ridiculous” Commerce’s argument that the straight edges were in-scope because the orders’ language specifically includes products “identified with reference to their end use” because this interpretation of the scope language was “overly simplistic” in that the language was not meant to be a “catch-all.”228 The court further reasoned that, “contrary to Commerce’s implication, ‘[t]he scope language simply indicates that aluminum extrusions subject to the [Orders] ‘may’ be identified by their end use. It does not state that where aluminum extrusions are identified by their end use the finished goods exclusion does not apply.”229

Likewise, the court found Commerce’s reasoning that the goods were “ready for use at the time of importation” provided “no greater support for the Scope Ruling than the language concerning ‘end use’” because the agency failed to address the distinction that Plasticoid drew between the “ready for use” articles specifically mentioned in the scope language, which were designed to be installed in a large system, and its

224. Id. at 1364 (emphasis in original).
225. Id. at 1365. The court noted that the government attempted to respond to Plasticoid’s contention in its briefing before the court, but dismissed this explanation as impermissible post hoc rationale because “[w]hatever the merits of the reasoning set forth in the Government’s brief, that reasoning played no part in Commerce’s Scope Ruling.” Id. at 1365 n.12.
226. Id.
227. Id.
228. See id. at 1366-67.
229. Id. (quoting plaintiff’s brief) (alterations in court’s opinion).
straight edges, which were stand-alone products.230 The court further reasoned that this contention was meritless because the finished good’s reference to merchandise that is “fully and permanently assembled and completed at the time of entry,” the finished goods exclusion “essentially requires that excluded products be ‘ready for use at the time of importation.’”231 Thus, the court found that “Commerce’s emphasis on ‘readiness for use’ as a basis for ruling the straight edges in-scope is unavailing.”232

Finally, the court found unconvincing Commerce’s assertion, based on the so-called “fasteners exception” outlined in Commerce’s prior Geodesic Dome scope ruling, that the straight edges were in-scope because they were made completely of aluminum extrusions.233 Pointing to Meridian Products, the court first found this rationale problematic because the language in the orders containing the provisions addressed in the Geodesic Dome scope ruling pertained to the “finished goods kits” exception, not “finished goods.”234 The court further found that Commerce failed to address Plasticoid’s arguments regarding the factual distinctions between the merchandise addressed in the Geodesic Dome scope ruling and the straight edges at issue here.235 In addition, the court ruled that Commerce’s concern with respect to the “finished goods” exception potentially swallowing the scope language was unfounded, because “it is unclear” based on Commerce’s explanation “why other scope language in the Orders (such as the restrictions limiting the finished merchandise exclusion to only that ‘finished merchandise’ that is ‘fully and permanently assembled and completed at the time of entry’) would not suffice to keep the proverbial floodgates closed.”236 Finally, the court found Commerce’s rationale lacking on the grounds that the government conceded at oral argument that Commerce would have ruled the straight edges out of scope as finished merchandise “if a cap (or caps) made of plastic or other non-extruded aluminum material had been affixed to one or both ends of each straight edge at some point in time prior to importation, whether for

230. Id. at 1368.
231. Id.
232. Id.
233. See id. at 1368-73.
234. See id. at 1370 (pointing generally to the remand proceedings in Meridian Products, discussed supra).
235. See id.
236. Id. at 1371.
decorative or protective purposes, or for some other reason.”

In light of the foregoing, the court found Commerce’s scope ruling unsupported by substantial evidence and remanded to Commerce to “afford Commerce the opportunity to articulate on the record a clear, coherent rationale for a reasonable interpretation of the relevant scope language in the Orders.” The court provided a detailed set of instructions, designed to guide the agency in adhering to the court’s instructions to be “mindful of, inter alia, the history of the Orders and the intent of Petitioner as reflected in that history.” The court also emphasized that Commerce’s remand results should “give appropriate consideration to any potential for unintended consequences, if not absurd results, that may be inherent in, or flow from, its interpretation” of the scope language.

Commerce issued its draft remand results in the remand proceedings at the agency level on March 18, 2015, continuing to find that the straight edges are in-scope. Before Commerce could file its final remand results with the court, however, the court dismissed the case on plaintiff’s request on April 3, 2015. According to the court’s dismissal order, “Plaintiff’s ownership has changed” and the successor entity “has not filed comments on [Commerce’s] Draft Results of Redetermination Pursuant to Court Remand . . . and does not plan to pursue this action.”

F. Conclusions

As outlined above, a review of the outcome or current procedural posture of the scope cases addressed in the court’s 2014 opinions on scope matters illustrates that the Nippon quagmire creates practical difficulties for parties seeking final judicial resolution of scope-related issues where Commerce and the court disagree sharply. As Judge Restani and Professor Bloom posit:

The continual remands caused partly by the CAFC’s refusal to accept, or discouragement of, appeals following dispositive
remands by the CIT, together with lack of clear recognition of the authority of the CIT to issue a substantive reversal, can result in decisions that have no effect on the parties and thus are purely advisory opinions. Under current practice, the CIT’s decisions cease to be advisory and have some effect only when the administrative agency agrees to accept the CIT’s direction, under protest, often after several remands, and the case proceeds to a final conclusive result. This is not a rational system for resolving cases in our constitutional system. 244

Indeed, as outlined in this Article, in cases such as Ceramark, Deacero, Meridian Products, Mid Continent, Plasticoid, Rubbermaid, and Trade Associates, where the court and Commerce disagree sharply with respect to whether Commerce’s legal reasoning or analysis of the record supports a specific scope ruling, the case tends to “ricochet” until Commerce relents or the party challenging the action either seeks dismissal of the case or makes a procedural miscalculation by failing to exhaust all available opportunities to contest Commerce’s draft remand redeterminations at the administrative level. Further, as seen in Mid Continent, even in cases where the Federal Circuit steps in and issues remand orders, Commerce and the court may still engage in additional back-and-forth until Commerce ultimately relents or again appeals a final determination made under protest to the Federal Circuit. Thus, in order to mitigate the “foot dragging and noncompliance by the reviewed agency” caused by the Nippon quagmire, it will be necessary to take practical steps, such as those outlined by Judge Restani and Professor Bloom, to allow the CIT clear authority to issue substantive reversals in an effort to promote more timely final judicial resolution of challenges to Commerce’s scope rulings. 245

Commerce’s low initial affirmance rate in scope appeals in 2014, combined with the resulting burdensome and frustrating “ricochet” remand cycle, provide support for addressing the “quagmire” resulting from the Nippon, Altx and Atlantic Sugar limitations on the court’s authority to issue remand orders as opposed to outright reversals. The statistics observed in the 2014 appeals call into question Commerce’s title as “master of the dumping laws.” Endless “do overs” by the agency drain the resources of the court and private litigants and reward Commerce for crafting determinations at the agency level which are

244. Restani & Bloom, supra note 56, at 1025.
245. Id.
skeletal at best, or “absurd” at worst. A familiar cycle often results: (1) a first remand decision by the agency attempting to reaffirm/re-explain the original decision; (2) a second remand where the agency makes a half-hearted attempt to address the court’s analysis but often reaches the same conclusion; and (3) a final redetermination in which the agency protests the legal authority for the court’s prior decisions but relents after three or more remands. Commerce’s initial reasoning, which was the basis upon which all interested parties elected to appeal, or not appeal, to the court, often bears little resemblance to the ultimate redetermination upheld as lawful by the court after multiple remands. The court, not Commerce, should be freed to deliver prompt justice by reversing Commerce in the first instance—on the grounds articulated by the agency—where the court in its authority determines that Commerce misapplied the law.

III. A REVIEW OF PROCEDURAL ISSUES ADDRESSED BY THE COURT IN 2014

A number of the court’s opinions in 2014 touched on particularly complex procedural issues unique to the CIT. Two of these procedural issues that featured prominently in the court’s 2014 jurisprudence were: (1) the extent of the court’s authority to enjoin liquidation of entries subject to court appeal; and (2) the court’s treatment of parties’ requests for the court to limit itself to the information that it may consider in rendering a decision on the merits. As further discussed below, a review of these rulings reveals that effective representation of a client before the CIT depends as much on a mastery of the nuances of these rules as it does with avoiding the ire of the court by attempting to leverage a favorable litigation outcome by manipulating them.

A. Motions to Enjoin Customs From Liquidating Entries Pending a Court Appeal

Of paramount concern in a court appeal of either Commerce’s or the Commission’s determination in an antidumping or countervailing duty case is ensuring that entries of subject merchandise are assessed the proper amount—if any—of remedial import duties applicable to the merchandise. In the normal course, U.S. Customs and Border Protection (“CBP”) is tasked with making “the final computation or

246. See id. at 1014 (discussing drain on court’s resources as a result of the Nippon quagmire); see also Plasticoid Mfg. Inc., 28 F. Supp. 3d at 1373 (instructing Commerce on remand to avoid “absurd” results).
ascertainment of the duties . . . accruing on an entry” of merchandise imported into the United States.247 This process, known as “liquidation,” is “long honored in customs procedure as the final reckoning of an importer’s liability on an entry.”248 The court’s rules and the statute provide a mechanism to enjoin CBP from liquidating subject entries until the case is resolved. As the court described in Husteel Co. v. United States:

The court “may enjoin the liquidation of some or all entries of merchandise covered by a determination of . . . [Commerce] . . . , upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances.” 19 U.S.C. § 1516a(c) (2). The purpose and effect of granting such an injunction is to preserve the status quo during the pendency of the judicial proceedings in order to ultimately provide parties any relief the court grants. See 19 U.S.C. § 1516a(e) (2) (providing that “entries, the liquidation of which was enjoined under subsection (c) (2) of this section, shall be liquidated in accordance with the final court decision in the action”); Ugine & ALZ Belg. v. United States, 452 F.3d 1289, 1297 (Fed. Cir. 2006).249

As the court explained in Diamond Sawblades Manufacturers Coalition v. United States (DSMC), “the primary purpose of injunction in these types of actions” is more fundamentally “not only to preserve the status quo pending the outcome of the litigation, but also to preserve the court’s jurisdiction.”250

250. Diamond Sawblades Mfrs. Coal. v. United States, No. 06-00248, 2014 Ct. Int’l Trade LEXIS 105, at *7-8 (Sept. 10, 2014); see also Zenith Radio Corp. v. United States, 710 F.2d 806, 810 (Fed. Cir. 1983) (holding that liquidation “eliminates the only remedy available to Zenith for an incorrect review determination by depriving the trial court of the ability to assess dumping duties on Zenith’s competitors in accordance with a correct margin”).
The CIT reviews motions for these injunctions under the familiar four-part framework established by the Supreme Court.\textsuperscript{251} Under this framework, a party seeking an injunction “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”\textsuperscript{252} Under this framework, the CIT “has traditionally applied a ‘sliding scale’ approach to this determination, whereby no single factor will be treated as necessarily dispositive, and the weakness of the showing on one factor may be overcome by the strength of the showing on the others.”\textsuperscript{253} In the trade remedy context, however, “injunctions against liquidation have become almost automatic due to the retrospective nature of U.S. trade remedies, the length of the judicial review process, and the cruciality of unliquidated entries for judicial review.”\textsuperscript{254}

In 2014, the CIT issued four opinions with respect to how the court analyzes a party’s request for this type of statutory injunction. In each of the cases, the court granted the moving party’s request for the injunction amid a different set of circumstances. As further discussed below, a review of these cases reveals that the court liberally grants these motions for injunction, and will modify an existing injunction where it is within its powers to do so and equity so requires.

1. Husteel Co., Ltd. v. United States

Notwithstanding the fact that the court’s decision to enjoin liquidation of entries subject to a court appeal of Commerce’s or the Commission’s determination in an unfair trade case has “become almost automatic,” a party’s motion for an injunction in these circumstances is often subject to intense opposition from adverse parties in the litigation. As the court recognized in its 2014 opinion granting a statutory injunction suspending liquidation of subject merchandise in Husteel, parties challenging an injunction motion as a matter of course or with the aim of vexing opposing counsel risk doing so at the expense of drawing the ire of the court. In Husteel, the court stated that it wished

\textsuperscript{251} See Wind Tower Trade Coal. v. United States, 741 F.3d 89, 95 (Fed. Cir. 2014) (citing Winter v. NRDC, 555 U.S. 7, 20-21 (2008)) (outlining four-part test for preliminary injunctions.).

\textsuperscript{252} Winter, 555 U.S. at 20.

\textsuperscript{253} Husteel, 34 F. Supp. 3d at 1359 (citing Belgium v. United States, 452 F.3d 1289, 1292-93 (Fed. Cir. 2006); Corus Grp. PLC v. Bush, 217 F. Supp. 2d 1347, 1353-54 (Ct. Int’l Trade 2002)).

\textsuperscript{254} Wind Tower Trade Coal., 741 F.3d at 95 (quoting Wind Tower Trade Coal. v. United States, 904 F. Supp. 2d 1349, 1352 (Ct. Int’l Trade 2013)).
... to commend the [United States] for consenting to these motions [for injunction]. As explained, the government will not be harmed in any meaningful way by the granting of the motions, whereas movants have a legitimate interest in the injunctions being granted. The government seems to have concluded, quite wisely, that this is an issue that it has no need to fight over, thereby attempting to save everyone time, expense, and effort.  

"Unfortunately," the court further stated, the defendant-intervenors in the case "did not take the same stance, even though the same calculus would seem to apply, as they similarly do not face any harm by the granting of the injunctions." In "stress[ing] that parties should be thoughtful in deciding which battles to fight," the court stated with respect to the defendant-intervenors that it "presume[d] that counsel for [defendant-intervenors], as officers of the court, had reason to oppose the motions beyond annoying the movants and increasing litigation expenses, although what those reasons were was not made clear to the court in the opposition papers."

The court also explained that such opposition on the part of defendant-intervenors might have been "somewhat short-sighted." This was so, the court reasoned, because, without the protection provided by the court’s granting of the statutory injunction, in the case of an entry that was mistakenly liquidated by CBP at a rate advantageous to the importers, the domestic producers (the intervenors at issue in this case) would not have standing to challenge that erroneous suspension. Accordingly, the court cautioned parties to "be mindful of the possible ramifications of their positions in future cases."

---

255. Husteel, 34 F. Supp. 3d at 1363.
256. Id.
257. Id. at 1363-64.
258. Id. at 1364.
259. Id. (citing Cemex, S.A. v. United States, 384 F.3d 1314, 1323 n.9 (Fed. Cir. 2004)) (holding, according to the court, that [the relevant provision of the statute, 19 U.S.C. § 1514] does not provide an avenue for a domestic producer to contest Customs’ improper liquidation of entries). In some circumstances, such as the case of Diamond Sawblades Manufacturers Coalition v. United States, the domestic industry appealing a trade remedy determination may seek a statutory injunction to avoid subject entries being liquidated at a rate that they believe to be unlawful. See Diamond Sawblades Mfrs. Coal. v. United States (DMSC), No. 06-00248, 2014 Ct. Int’l Trade LEXIS 105, at *3 (Sept. 10, 2014).
2. Diamond Sawblades Manufacturers Coalition v. United States

The CIT’s 2014 injunction-related opinion in DSMC reveals the importance of both seeking consent from opposing parties before moving for an injunction, as well as properly representing to the court both the nature of a moving party’s efforts to receive the consent, as well as the other parties’ response to such efforts. At issue in DSMC was consolidated plaintiff Hyosung D&P Co., Ltd.’s motion to amend the injunction. Hyosung moved to amend the injunction after discovering that it had been previously amended at the request of the government without the consent of Hyosung’s prior counsel—or the court’s knowledge that Hyosung had not consented—in a way that allowed liquidation of Hyosung’s entries prior to the final adjudication of the merits on its claim in the consolidated case.

In seeking the prior injunction amendment, the government represented that “[a]ll parties to this action have reviewed the clarified language we are proposing and have indicated that they consent to this modification,” yet it did not seek consent from Hyosung’s prior counsel. At the time that the government sought its modification, Hyo-
sung was awaiting final CIT resolution of other issues in the consolidated case so that it could appeal a prior adverse ruling to the Federal Circuit.\(^{266}\) In response to Hyosung’s attempt to restore the \textit{status quo} with respect to its entries, the government opposed, arguing \textit{inter alia} that: (1) Hyosung could not demonstrate a likelihood of success on the merits because its claim had been unsuccessful at the CIT; and (2) Hyosung did not object to the amended injunction soon enough.\(^{267}\)

The court disagreed with the government and granted Hyosung’s motion to amend the injunction to cover Hyosung’s entries.\(^{268}\) In so doing, the court first found that the government’s arguments “overlook the primary purpose of injunction in these types of actions, which is to continue to suspend liquidation pending a final decision on the merits, including all appeals thereof, not only to preserve the \textit{status quo} pending the outcome of the litigation, but also to preserve the court’s jurisdiction.”\(^{269}\) Additionally, the court dismissed the government’s arguments with respect to the likelihood on the merits aspect of the test because, while the court previously ruled against Hyosung, \textit{any} likelihood of success of Hyosung’s appeal “pales in comparison to the harm Hyosung would suffer were its case to be mooted simply by the procedural expedient of liquidation’s finality.”\(^{270}\) This is so, the court reasoned, because “a court has a duty to resist change, unless by act of God, or Congress, or other \textit{force majeur}, in order to maintain the \textit{status quo} and preserve jurisdiction during the pendency of a cause of action, including appeals.”\(^{271}\) The court alluded to the government’s failure to obtain consent from Hyosung in stating that the public interest is “best served by proper representations to the court that its rules are being complied with.”\(^{272}\) Thus, “[o]n balance,” the court found that it was “persuaded that granting Hyosung’s motion for injunction, which involves a correction or modification of the current injunction that was erroneously amended without Hyosung’s consent” was “the correct course of action.”\(^{273}\)

\(^{266}\) See DSMC, 2014 Ct. Int’l Trade LEXIS 105, at *3. As of the date of submission of this Article, Hyosung’s appeal to the Federal Circuit is pending. See id., \textit{appeal docketed}, No. 15-1216 (consol.) (Fed. Cir. December 29, 2014) Fed. Cir. No. 15-1216-1224 (consol.).

\(^{267}\) Gov’t Opp. at 6, 8, DSMC, 2014 Ct. Int’l Trade LEXIS 105.


\(^{269}\) Id. at *7.

\(^{270}\) Id. at *12.

\(^{271}\) Id. at *13.

\(^{272}\) Id. at *15.

\(^{273}\) Id. Hyosung subsequently moved, pursuant to USCIT Rule 60, to restore the \textit{status quo} with respect to entries that had been erroneously liquidated while the erroneous injunction was in
In *Navneet Publications (India) Ltd. v. United States* the court was faced with the question of whether it should grant a preliminary injunction protecting entries that were affected by the underlying lawsuit as a result of a “legal chain reaction” leading to the rescission of a subsequent administrative review with respect to Navneet. Specifically, at issue in the underlying appeal in the case was the antidumping duty rate assessed to Navneet in the fifth annual administrative review. Navneet had already prevailed on the merits in its challenge to the rate originally assessed in the fifth administrative review, but was awaiting the matter to be finally settled on remand as a result of Commerce’s recalculated rate in accordance with the court’s remand instructions. Meanwhile, both petitioners and Navneet withdrew their requests for a subsequent review, rescinding that subsequent review with respect to Navneet, and subjecting the entries for that period to liquidation at the “cash deposit” rate based off of the invalidated fifth administrative review rate. As a result, Navneet moved the court in this action for an injunction to avoid having these entries liquidated at the invalid fifth review rate.

The court granted Navneet’s motion. The court first found, over the government’s objection, that it had jurisdiction over the entries as a result of the underlying suit contesting the rate at which the entries would be liquidated absent the injunction. This was so, the court held, because the statute permits the court to grant an injunction with respect to any entries “covered” by a contested review. The court subsequently ordered that CBP re-suspend the erroneously liquidated entries and declared that any liquidations that had already occurred were void.
because the statute “implies that an administrative decision ‘covers’ an entry if it brings that entry within its scope or has binding legal effect on the entry,” which was the case here.  

The court also found that, contrary to the government’s assertion, Navneet did not implicitly consent to the risk of having the entries contested here liquidated at the invalidated fifth administrative review rate by declining to participate in the subsequent review because the court retains jurisdiction over entries subject to the fifth review period, which was the case here.

Having found in favor of Navneet with respect to the threshold jurisdictional issue, the court went on to find that Navneet met the requirements of the four-part test for a preliminary injunction with respect to these entries. First, the court found that “Navneet has shown that it will suffer irreparable harm if the court withholds an injunction” for the typical reason that liquidation at the invalidated rate would cause Navneet to “lose the full benefit of judicial review” with respect to the invalidated rate. Second, the court found that Navneet “faces a high likelihood of success on the merits.” “In a way,” the court reasoned, “it has succeeded already” because it prevailed in the underlying case, leading the court to invalidate the rate from the fifth administrative review and leading Commerce to recalculate a new rate on remand. Finally, the court also found that the third and fourth prongs were satisfied because: (1) it would be contrary to the public interest to “allow the liquidation of entries at a rate held invalid by this court; and (2) “the injunction would cause little hardship” to the government.

4. Tianjin Wanhua Co. Ltd. v. United States

The final case that addressed the extent of the CIT’s power to enjoin liquidation of entries subject to court appeal was Tianjin Wanhua Co. Ltd. v. United States. At issue in this opinion was whether or not a group of DuPont subsidiaries, which were participating in the case as

281. Id. at *7-8 (citing Asociacion Colombiana de Exportadores de Flores v. United States, 916 F.2d 1571, 1577 (Fed. Cir. 1990)).
282. See id. at *13.
283. See id. at *13-14.
284. Id. at *14.
285. Id. at *16.
286. Id.
287. Id. at *16-17.
plaintiff-intervenors pursuant to USCIT Rule 24, is entitled to a statutory injunction suspending liquidation pending the outcome of the case.\textsuperscript{289} The government and petitioners (entered as defendant-intervenors in the action) opposed DuPont’s motions, arguing that enjoiner was inappropriate with respect to DuPont’s entries because, they alleged, “granting DuPont’s injunction would impermissibly alter the nature of this action, i.e., enlarge the action, by enjoining entries that [] are not the subject of either [plaintiffs’] complaints.”\textsuperscript{290} Notably, neither the government nor petitioners argued that DuPont would otherwise be ineligible for the injunction pursuant to the four-part test.\textsuperscript{291}

The court disagreed with the government and defendant-intervenors, and granted DuPont’s motions, finding that “the concept of enlargement is one that is best ‘reserved for situations in which an intervenor adds new legal issues to those already before the court.’”\textsuperscript{292} Here, the court found that DuPont was not attempting to add to the legal issues presented to the court by plaintiffs.\textsuperscript{293} Instead, the court reasoned, DuPont was merely attempting to ensure that its right, as a plaintiff-intervenor, to have its entries liquidated at a rate deemed by the court to be supported by the record and otherwise in accordance with law.\textsuperscript{294} In support of this finding, the court stated that “to deny DuPont’s motions for a preliminary injunction would be tantamount to providing Plaintiff-Intervenors (as interested parties to the underlying administrative proceeding) with a statutory right to participate in the litigation (via intervention under 28 U.S.C. § 2631(j) without any chance of relief.”\textsuperscript{295} The “end result,” the court reasoned further, “would in effect require all similarly situated interested parties to file a summons and complaint challenging Commerce’s determinations simply to bring the subject entries under the authority of the court, which the court believes is needless and inefficient.”\textsuperscript{296} Accordingly, having also found that DuPont satisfied the four-factor test, the court granted

\textsuperscript{289}. See \textit{id.} at 1284-85; see also 28 U.S.C. § 2631(j) (2012) (providing statutory right to intervene in trade remedy cases); Ct. Int’l Trade R. 24 (providing procedure for intervention in trade remedy appeals).
\textsuperscript{290}. \textit{Ti\u{a}njin Wanhua Co.}, 11 F. Supp. 3d at 1284-85.
\textsuperscript{291}. \textit{See id.}
\textsuperscript{292}. \textit{Id.} at 1285 (quoting NSK Corp. v. United States, 547 F. Supp. 2d 1312, 1318 (Ct. Int’l Trade 2008) (citing references omitted in court’s opinion)).
\textsuperscript{293}. See \textit{id.}
\textsuperscript{294}. See \textit{id.} at 1285-86
\textsuperscript{295}. \textit{Id.} at 1286.
\textsuperscript{296}. \textit{Id.}
DuPont’s motion and enjoined the government from liquidating DuPont’s entries pending the final disposition of the case. 297

5. Conclusions

The CIT’s 2014 opinions addressing controversy surrounding preliminary injunction motions reveals that the court will reject parties’ arguments narrowly construing its authority to enjoin liquidation of entries pending the outcome of a trade remedy determination subject to judicial review. As outlined above, while the court employs the traditional test outlined by the Supreme Court with respect to these injunctions, it is a rare case where a party properly participating in an appeal will be denied the benefit of a preliminary injunction because doing so would render the appeal moot. Indeed, as reflected in dicta in Husteel and DSMC, the court both commends parties for avoiding needlessly challenging a party’s right to the injunction and expresses frustration where it appears that an opposing party is engaging in gamesmanship in an effort to undermine the substance of an adverse party’s claim. Thus, it appears that the fundamental lesson of the court’s jurisprudence on this issue over the course of 2014 is that parties should avoid needlessly challenging these motions because they are part and parcel of a party’s statutory right to appeal adverse trade remedy decisions.

B. Motions to Strike Information from the Record

In 2014, the court issued three opinions regarding parties’ attempts to strike information supplied to the court or to the agency in appeals of trade remedy cases, all of which were denied. 298 The court’s first 2014 opinion reveals that the court will not compel Commerce to disregard information properly on the record. 299 The court’s second

297. See id.

298. See Papierfabrik August Koehler SE v. United States (Papierfabrik I), 953 F. Supp. 2d 1348, 1349 (Ct. Int’l Trade 2014) (denying plaintiff’s motion to compel Commerce to strike information or, in the alternative, to disclose information relating to allegations of fraud with respect to home market reporting); Fla. Tomato Exch. v. United States, 973 F. Supp. 2d 1334, 1336 (Ct. Int’l Trade 2014) (denying plaintiff’s motion to strike information not on the administrative record with respect to defendant-intervenor’s estoppel argument); Papierfabrik August Koehler SE v. United States (Papierfabrik II), 997 F. Supp. 2d 1347, 1350 (Ct. Int’l Trade 2014) (denying defendant-intervenor’s two motions to strike information provided to the court surrounding plaintiff’s submissions to the court that were either: (1) rejected by the agency during the administrative proceeding; or (2) not before the agency during the administrative proceeding).

299. See Papierfabrik I, 953 F. Supp. 2d at 1349.
opinion on a motion to strike reveals that the motion is treated differently if the court considers the information at issue to be information supporting a legal argument, as opposed to information offered in support of a party’s position on the agency’s factual determination. Finally, the court’s third opinion reflects that the court takes seriously the longstanding gloss on the court’s rules that motions to strike are “disfavored,” even when factual information presented to the court unquestionably was not on the administrative record before the agency. In all, as further discussed below, the court’s treatment of these issues reveals that a party’s dispute with respect to factual information offered by an opposing party is best left to briefing before the court as opposed to requiring the court to rule on the drastic remedy of a motion to strike, unless the disputed information is “redundant, immaterial, impertinent, or scandalous” as those terms have been construed by the court.

1. Papierfabrik August Koehler SE v. United States

In a particularly acrimonious dispute surrounding Koehler’s appeal of the final results of an administrative review on the antidumping duty order on certain lightweight thermal paper from Germany, the CIT addressed two separate sets of motions to strike information presented to Commerce and the court related to the calculation of Koehler’s antidumping duty margin. The dispute centered around Commerce’s calculation of Koehler’s antidumping duty rate using adverse facts available (“AFA”) as a result of Koehler’s alleged attempts to conceal certain home market sales that had a negative effect on the company’s dumping margin for the period of review. Specifically, Commerce calculated Koehler’s rate in large part in response to an affidavit submitted by petitioners alleging that “Koehler has been engaged in a scheme to defraud [Commerce] by intentionally concealing certain

300. See Florida Tomato Exch., 973 F. Supp. 2d at 1336.
301. See Papierfabrik II, 997 F. Supp. 2d at 1349; see also Hynix Semiconductor, Inc. v. United States, 27 Ct. Int’l Trade 1469, 1470 (2003) (“motions to strike are generally ‘disfavored’ or ‘extraordinary’ remedies”).
303. See Papierfabrik I, 953 F. Supp. 2d at 1350. In calculating a party’s antidumping duty margin, Commerce may resort to AFA if, inter alia, a party “withholds information that has been requested” by Commerce. See 19 U.S.C. §§ 1677c(a)(2) (A), (C) (2012). This rate, however, may not be unduly punitive. See, e.g., Fengchi Imp. & Exp. Co. v. United States, 59 F. Supp. 3d 1386, 1396 (Ct. Int’l Trade 2015) (outlining Federal Circuit and CIT precedent surrounding prohibition of assessing an unduly punitive AFA rate).
otherwise reportable home market transactions” designed to “arti-
entially manipulate prices attributable to those sales.”

At issue in Papierfabrik I was whether Commerce properly accepted this affidavit as it was presented to the agency. As it was presented to Commerce, the affidavit contained certain information designated as business proprietary subject to release only under an administrative protective order (“APO”) and other information that was not releas-
able to any party to the administrative proceeding because, consistent with Commerce’s regulations, there was a “clear and compelling need” to withhold the information from disclosure.

Here, Koehler was attempting to have the court force Commerce to strike this information or, alternatively, to replace the affidavit with an un-redacted version because Commerce allegedly “erroneously determined that there was a ‘clear and compelling need’ to withhold [certain information pertaining to Koehler’s alleged activities] in the Affidavit from disclosure under the APO.”

According to Koehler this remedy was appropriate because, “Commerce’s treatment of this information violated due process as well as its statutory and regulatory rights.”

The court found Koehler’s argument unavailing and declined to order Commerce to strike the affidavit or remove the material that the agency designated as business proprietary or exempt from disclosure under the APO. The court so concluded because it found that Koehler’s motion was “not properly before the court” in accordance with the statute because the statute was designed to allow parties to protest being denied access to business proprietary information, not, as Koehler alleged here, to contest Commerce’s choice to designate certain information as either business proprietary or exempt from disclosure.

Accordingly, the court held that it was inappropriate to order Commerce to change its designation of the material or strike it altogether.

305. See id. The statute provides in relevant part that the agency may withhold disclosure of certain information presented to the agency in the course of its proceedings if a party can demonstrate to Commerce that there is a “clear and compelling need” to withhold the disclosure. See 19 U.S.C. § 1677f(c) (2012).
307. Id.
308. See id. at 1352.
309. Id.
In *Papierfabrik II*, the court considered two motions filed by petitioner to strike certain information presented to the court by Koehler in its briefing before the court in defense of its claim that the AFA-derived rate that Commerce assigned to it was inappropriate.\(^{311}\) Petitioners’ first motion to strike concerned information that Commerce rejected at the administrative level as untimely filed.\(^{312}\) The second motion concerned information related to Commerce’s calculation of Koehler’s antidumping duty rate in a prior administrative review that was not on the record with respect to the segment of the proceeding that was the subject of the appeal before the court.\(^{313}\)

The court, reiterating that motions to strike are “disfavored remedies,” denied both of petitioners’ motions, finding it “unnecessary to strike either portions of Koehler’s reply brief.”\(^{314}\) As the court explained:

Despite Appvion’s claims that Koehler included the contested information to confuse or mislead the court, its sole argument appears to be that the court cannot consider this information because it was not on the record of AR3. This court has held, however, that “there is no occasion for a party to move to strike portions of an opponent’s brief (unless they be scandalous or defamatory) merely because he thinks they contain material that is incorrect, inappropriate, or not part of the record.” *Hynix*, 27 CIT at 1470 (quoting *Acciai Speciali Terni S.P.A. v. United States*, 24 CIT 1211, 1217, 120 F. Supp. 2d 1101, 1106 (2000)). Rather, “[t]he proper method of raising those issues is by so arguing, either in the brief or in a supplemental memorandum, but not by filing a motion to strike.” *Id.* (quoting *Acciai Speciali*, 24 CIT at 1217, 120 F. Supp. 3d at 1106). The court can address the issues on the merits as part of its decision on Koehler’s motion for judgment on the agency record.\(^{315}\)

Accordingly, the court denied petitioners’ motions because it “had less extreme means by which to contest Koehler’s reliance on the information at issue.”\(^{316}\)

---

311. See id. at 1348.
312. Id. at 1349.
313. See id.
314. Id.
315. Id. at 1350.
316. Id.
2. Florida Tomato Exchange v. United States

In Florida Tomato Exchange v. United States, the court denied plaintiff’s motion to strike certain exhibits appended to defendant-intervenors’ response brief in support of their argument that plaintiff was judicially estopped from making arguments to the court that were “contrary to the arguments it offered before Commerce and the ITC during earlier proceedings.”\(^{317}\) Plaintiff contended that because the documents referred to were not part of the index in the administrative record provided by Commerce to the court, it was improper for defendant-intervenor to offer them in support of the estoppel argument.\(^ {318}\)

In denying the motion, the court reiterated its stance that, as a threshold matter, the CIT views motions to strike as “disfavored.”\(^ {319}\) The court further noted that, while “[g]enerally speaking, this Court’s authority for judicial review is confined to the administrative record,” a party may “offer whatever legal arguments it chooses.”\(^ {320}\) Here, the court found that “plaintiff’s motion to strike lacks merit” because “[b]y its nature, defendant-intervenors’ judicial estoppel argument is being made for the first time before this Court.”\(^ {321}\) Accordingly, “the general rule that this Court must only consider the record compiled by the agency has no application here.”\(^ {322}\) In addition, the court found that the court would be unable to rule on the estoppel claim without the information that the defendant-intervenors provided the court.\(^ {323}\) Thus, the court held that the factual information proffered in support of defendant-intervenors’ estoppel claim was properly before the court.\(^ {324}\)

3. Conclusions

The court’s ruling in Papierfabrik I makes clear that the court grants Commerce wide deference with respect to whether Commerce properly chose to withhold disclosure of confidential information, and will not read the statute in a way that allows a party to move the court to

---

318. See id. at 1340.
319. Id. at 1338.
321. Id. at 1340-41.
322. Id. at 1341.
323. See id.
324. See id.
force Commerce to strike that information from the administrative record. Further, as Papierfabrik II and Florida Tomato Exchange reflect, the court takes seriously its longstanding position that motions to strike information are disfavored, and the court will only strike information contained in a party’s briefing in extreme circumstances. In cases, such as Papierfabrik II, where the argument is made in support of a factual contention, the court will refuse to strike the information even if it is clear that the information was not before the agency in the proceeding currently before the court. Additionally, as reflected in Florida Tomato Exchange, the court will grant wide latitude with respect to the submissions not on the agency record where such information is essential with respect to a legal claim such as the estoppel claim at issue in that case. Read together, these opinions suggest that a party contemplating a motion to strike would be better served by limiting its objections to responsive argument absent extreme circumstances.