

FINAL RESULTS OF REDETERMINATION PURSUANT TO REMAND ORDER

Mid Continent Nail Corporation v. United States and Target Corporation,
CIT Court No. 10-247, Slip op. 11-55 (May 17, 2011)

SUMMARY

The Department of Commerce (“Department”) has prepared these final results of redetermination pursuant to the U.S. Court of International Trade’s (“Court”) remand order in *Mid Continent Nail Corporation v. United States and Target Corporation*, Slip Op. 11-55 (May 17, 2011) (“*Mid Continent*”). This proceeding addresses the Department’s scope ruling that certain household toolkits containing steel nails, and imported by Target Corporation (“Target”), were outside the scope of the antidumping order on certain steel nails from the People’s Republic of China (“PRC”). *Notice of Antidumping Duty Order: Certain Steel Nails from the People’s Republic of China*, 73 Fed. Reg. 44,961 (Aug. 1, 2008) (“*Order*”).

In *Mid Continent*, the Court remanded the Department’s scope ruling. The Court found that Commerce’s determination to examine Target’s toolkits, rather than only the nails within the toolkits, required additional explanation to be supported by substantial evidence on the record. *See Mid Continent*, Slip Op. 11-55 at 12-13. Further, the Court found that the Department’s past scope rulings addressing “mixed-media sets,” which the Department relied upon in its underlying scope ruling, were inconsistent and did not define either: (1) the procedure to determine the product under review, or (2) the legal authority for such an analysis. On remand, the Court ordered Commerce to “identify a test it will employ” and to explain “the legal justification for employing such a test at all.” *Mid Continent*, Slip Op. 11-55 at 21.

In response to the remand order, on August 25, 2011, the Department provided a draft redetermination to the parties in which it clarified its legal authority to conduct a mixed-media analysis, preliminarily articulated a five factor mixed-media test, preliminarily determined the

proper focus of the mixed-media analysis in the instant scope inquiry was the toolkits, and preliminarily determined the toolkits were outside the scope of the *Order*. On September 1, 2011, the parties provided comments. In response to these comments and as described below, the Department has further clarified its legal authority for conducting a mixed-media analysis, refined the mixed-media test to employ four factors, and addressed the parties' comments. The Department has applied the revised mixed-media test to Target's toolkits containing steel nails and finds that these toolkits are outside the scope of the *Order*.

I. Legal Authority for Mixed-Media Analysis

The Department's authority to issue scope rulings derives generally from section 731 of the Tariff Act of 1930, as amended ("Act"), which provides that the Department shall apply antidumping duties to "a class or kind of foreign merchandise" that is being sold at less than fair value. Section 731(1) of the Act. The text of an antidumping duty order provides the "cornerstone" that defines the class or kind of subject merchandise. *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (CAFC 2001) ("*Eckstrom*"). While the domestic industry initially proposes the scope of an order when filing a petition, the Department has the "inherent power to establish the parameters of the investigation" and is not "tied to an initial scope definition that...may not make sense." *Cellular Mobile Telephones and Subassemblies from Japan: Final Determination of Sales at Less Than Fair Value*, 50 Fed. Reg. 45,447, 45,449 (Oct. 31, 1985). Thus, the Department has inherent authority to define the scope of an order during the initial investigation, and the Department's final scope is outlined in the publication of its order. *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1089-90 (CAFC 2002) ("*Duferco*").

However, the scope of an order must be written in “general terms” that do not directly address every particular product. 19 C.F.R. 351.225(a). The general description is necessary because neither the Department nor domestic petitioners can predict every permutation of a product that might be imported into the United States at a future time. Indeed, products within the market are in a constant state of change (*e.g.*, shifting market preferences, changing technologies, attempts to circumvent orders, etc.), and orders must be written in general enough terms to ensure that such shifts in the market place will not allow parties to evade orders. If the Department were required to address every possible permutation of a product in an order, and the Department were strictly limited to excluding only those products specifically identified and excluded in an order, then there would be little need for scope proceedings.

Precisely because orders are written in more general terms that do not address every possible product, “issues arise as to whether a particular product is included within the scope of an antidumping order.” 19 C.F.R. 351.225(a). In such situations, the Department “issues ‘scope rulings’ that clarify the scope of the order with respect to particular products.” *Id.* The Department “enjoys substantial freedom to interpret and clarify its antidumping orders.” *Novosteel Sa v. United States*, 284 F.3d 1261, 1269 (CAFC 2002) (“*Novosteel*”). However, while scope rulings “interpret” the order, they cannot change the scope of an order, and the Department cannot “interpret an order contrary to its terms.” *Eckstrom*, 254 F.3d at 1072. Thus, the Department has authority to interpret the general terms of an order, but cannot interpret an order in a manner that contradicts its clear terms.

When an imported product containing a mix of items bundled together is subject to a scope inquiry to determine whether the imported product as a whole is, or certain specific components of the imported product are, covered by the scope of the order, the authority outlined

above permits the Department to employ an analysis to determine whether its scope analysis should focus on the entire product or only on certain specific components of the imported product. This is the purpose of a mixed-media analysis.¹

The legal authority to determine the product that is the focus of a scope inquiry is confirmed by the Department's past practice as upheld by the Court of Appeals for the Federal Circuit ("CAFC"). In *Walgreen*, the importer challenged, *inter alia*, the Department's authority to determine whether its scope inquiry should focus on a set of mixed-media as a whole or focus only on certain components of that set.² The CAFC held that the Department, not the importer, has the authority to frame the issue in a scope ruling.³ In its ruling, the CAFC affirmed the Department's authority to consider, prior to a (k)(1) analysis, whether "components of . . . sets . . . interact in any way or otherwise represent a unique product."⁴ Moreover, to deny the Department's authority to determine whether a product is a mixed-media set "would undermine Commerce's discretion at the very heart of its expertise."⁵ In this regard, the CAFC noted that the Department had not yet established a bright line rule to use in mixed-media scope rulings.⁶ Thus, it is clear that the Department has the legal authority to establish factors to consider in a mixed-media analysis which it has done below in announcing the mixed-media test.

Additionally, the CAFC has held that the Department has authority to determine whether subject merchandise has been "transformed into a new product" prior to importation and is

¹ Parties in this proceeding have referred to this analysis as a mixed-media analysis and, for consistency in this remand proceeding, the Department has continued to refer to this analysis as a mixed-media analysis. However, this term is not meant to limit the type of product to which this test would apply. Rather, this test applies when any type of alleged subject merchandise is incorporated into a larger product prior to importation to determine whether a scope inquiry should focus only on the alleged subject merchandise or, instead, on the imported product as a whole.

² *Walgreen Co. v. United States*, 620 F.3d 1350, 1356-57 (Fed. Cir. 2010) ("*Walgreen*").

³ *Id.* at 1355.

⁴ *Id.* at 1356-1357.

⁵ *Id.* at 1355.

⁶ *Id.* at 1356.

thereby outside the scope of an order. *Crawfish Processors Alliance v. United States*, 483 F.3d 1358, 1360 (CAFC 2007) (“*Crawfish*”). The scope ruling in *Crawfish* addressed the importation of *étouffée*, which consisted of freshwater crawfish tail meat that had been cooked with other ingredients. *Id.* The order at issue covered “freshwater crawfish tail meat, *in all its forms*...regardless of how it is packed, preserved or *prepared*.” *Id.* at 1359 (citing *Freshwater Crawfish Tail Meat from the People’s Republic of China*, 62 Fed. Reg. 48,218, 48,219 (Sept. 15, 1997)) (emphasis added). While all parties agreed that the *étouffée* at issue contained crawfish tail meat that would be subject merchandise if imported alone, the Department found that the crawfish tail meat within the *étouffée* had been transformed into a new product and that the question was whether the order covered *étouffée*, not the crawfish tail meat therein. The CAFC upheld this determination, explaining:

The scope order states that *crawfish tail meat*, whether preserved or prepared, is included within the scope of the order, but is silent on whether *étouffée*, which may very well include prepared or preserved crawfish tail meat, is included within the scope of the order. As {the Department} determined, the proper inquiry is whether the product *étouffée* is still properly considered freshwater crawfish tail meat, or whether the tail meat has been transformed into a different product, such that it can no longer be considered crawfish tail meat.

Crawfish, 483 F.3d at 1363. Accordingly, the CAFC upheld the Department’s authority to determine whether subject merchandise had been transformed into a new product prior to importation. *Id.* at 1364. Similarly, in an effort to determine whether merchandise has retained the same characteristics as merchandise subject to an order, the Department also examines whether the component merchandise has been subsumed into the new product, thereby creating a new product with characteristics distinctly separate from the subject merchandise.

At issue in this case are six separate toolkits imported by Target that contain a combination of 59 to 161 unique articles for the purpose of home maintenance and repair. Along

with a variety of non-subject tools and accessories, each toolkit includes a small multi-compartment box in which one section contains steel nails. The CAFC's ruling in *Crawfish* supports the Department's authority to determine whether the steel nails within Target's toolkits have been subsumed into a new and different product and whether this product should be the focus of the Department's scope inquiry. Applying the CAFC's reasoning to the present case, "the proper inquiry is whether the {steel nails within the toolkits are} still properly considered {subject merchandise}, or whether the {steel nails within the toolkits have} been transformed into a different product." *Crawfish*, 483 F.3d at 1363. This is the very question that the Department's mixed-media analysis seeks to address. Indeed, the CAFC upheld the Department's authority to conduct such an analysis even where the order at issue included crawfish tail meat "in all its forms" and "prepared." *Id.* at 1359. In contrast, the *Order* contains no language that could arguably address steel nails imported within toolkits, and the *Order* thus poses no bar to the Department conducting such an analysis.⁷

In sum, the Department has "substantial freedom" to interpret the scope of an order. *Novosteel*, 284 F.3d at 1269. The CAFC in *Walgreen* confirmed that the Department exercises discretion at the very heart of its expertise when it determines the focus of a scope inquiry and that the Department can establish a bright line to make such a determination. Furthermore, *Crawfish* affirmed that such freedom includes the authority to examine the entirety of a product incorporating subject merchandise rather than the subject merchandise component alone.

⁷ In addition, the so-called "Roller Chain Rule" provided that the Department could exclude items from antidumping duties where they were incorporated or manufactured into other articles, of which they constituted an insignificant portion, prior to sale to an unaffiliated customer in the United States. *See Roller Chain, Other Than Bicycle, from Japan; Final Results of Administrative Review*, 48 Fed. Reg. 51801, 51804 (Nov. 14, 1983) ("Roller Chain"). *See Federal Mogul Corp. v. United States*, 20 C.I.T. 234, 262 (1996) (upholding application of Roller Chain Rule in administrative review). A statutory change subsequently obviated the need for the Roller Chain Rule, and the Department no longer applies this practice. *See* section 772(e) of the Act (allowing the Department to substitute the export price for such merchandise with the export price of other merchandise). However, the authority invoked by the Department to promulgate the Roller Chain Rule has not changed. This authority similarly allows the Department discretion in this instance to determine the focus of the instant scope inquiry.

Crawfish, 483 F.3d at 1364. In both *Walgreen* and *Crawfish*, the respective orders' silence regarding the precise products at issue did not inhibit the Department's authority to determine the proper focus of scope inquiries to determine whether the imported product was within the scope of an antidumping order. Accordingly, the Department has legal authority to conduct a mixed-media analysis to determine whether the Department's scope analysis should focus on the toolkits as a whole or, instead, focus solely on the steel nails contained therein.

II. Factors for a Mixed-Media Scope Analysis

In light of the legal authority described above, the Department conducts a mixed-media scope analysis when it receives an allegation that subject merchandise and non-subject merchandise have been combined or bundled as a single imported product. The purpose of such an analysis is to determine the proper focus of the Department's scope inquiry. Where the combination of products results in a unique and new product, the Department's analysis will focus on the entire product as imported. *E.g.*, *Crawfish*, 483 F. 3d at 1363 and *Final Scope Ruling - Antidumping Duty Order on Certain Cased Pencils from the People's Republic of China - Request by Target Corp. Regarding Hello Kitty Fashion Totes*, dated Sept. 29, 2004. Where the combination of products does not result in a unique product, but is instead a simple packaging of alleged subject and non-subject merchandise together, the Department's analysis will focus on the alleged subject merchandise component of the imported product. *E.g.*, *Final Scope Ruling: Antidumping Duty Order on Certain Tissue Paper from the People's Republic of China*, dated Sept. 19, 2008. This bi-furcated approach is consistent with the mixed-media analysis upheld by the CAFC in *Walgreen Co. v. United States*, 620 F.3d 1350, 1353.

Thus, the mixed-media analysis has varied from proceeding to proceeding depending upon the particular characteristics of the product under investigation and the text of the order at

issue. *Walgreen*, 620 F.3d at 1356 (noting that there was no “bright line rule” for which analysis applies and that the Department will exercise “its discretion under the facts and circumstances” in applying the appropriate analysis). Given the uniqueness of each proceeding and the necessity for flexibility, the Department has not previously provided a complete listing of the factors it may consider when conducting a mixed-media analysis. Rather, as affirmed by the CAFC in *Walgreen*, our practice in considering mixed-media scope determinations has been to take into account the unique product characteristics on a case-by-case basis.

Notwithstanding our case-by-case practice, following the Court’s remand instructions that the Department identify a test it will employ consistently, the Department hereby clarifies the factors that it will consider when conducting a mixed-media analysis and applies this analysis below. In this regard, the Department is addressing the “inconsistency in agency procedure” identified by the Court. *Mid Continent*, Slip Op. 11-55 at 20.

The purpose of the mixed-media analysis is to discern whether the Department’s scope analysis should focus on the product as a whole or just the alleged subject merchandise component of the imported product.⁸ As explained below, to address this question, the Department will consider, at the time of importation: (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 as a whole; (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. In

⁸ Typically in mixed-media scope inquiries the subject component of the imported product is characterized by parties as subject merchandise. However, the Department notes that the particular component is not determined to be subject to the antidumping duty order until a final determination has been made following a 19 CFR 351.225(k) analysis.

conducting this analysis, no single factor is dispositive and the Department will consider the totality of evidence on the record with respect to each of the factors outlined above.

(1) Practicability of Repackaging for Resale

In looking to the ease with which the component merchandise may be repackaged or resold separately, the Department seeks to ensure that parties cannot use a mixed-media set to import subject merchandise for purposes of evading antidumping duties. If the component merchandise of a product may be repackaged and resold separately with relative ease, it is more likely that parties may use the mixed-media set to avoid antidumping duties. In contrast, if the component merchandise cannot easily be repackaged for individual sale, it is more likely that the set is a unique product of which the component merchandise is incidental. For these reasons, the Department will examine whether component merchandise may be repackaged and sold separately in its determination of whether its scope analysis should focus on the entire product incorporating the subject merchandise or just the component merchandise.

(2) Value

In looking to the value of the component merchandise compared to the value of the imported product, including all non-subject merchandise, the Department seeks to address whether the component merchandise is an insignificant component of the imported product. Indeed, where component merchandise is an insignificant portion of a product, it is unlikely that U.S. customers will purchase the imported product for the component merchandise portion, making the component incidental to a different product. For these reasons, the Department will examine the value of the component merchandise compared to the value of the imported product in determining whether its scope analysis should focus on the entire product incorporating the component merchandise or just the component itself.

(3) Ultimate Use or Function

In looking to the ultimate use or function of component merchandise as compared to the ultimate use of the entire imported product, the Department seeks to determine whether the imported product's use is distinct enough from that of component merchandise to support a determination that the scope analysis should focus on the entire product incorporating the component merchandise rather than just the component itself. For instance, where the imported product ultimately has a similar use to that of the component merchandise (*e.g.*, a collection of cookware that includes subject and non-subject pots, but all of which share the common use of cooking), this would support a finding that the imported product as a whole was not a unique product with new characteristics different from that of a component.⁹ Therefore, in such a situation, the Department's scope analysis should focus on the component merchandise. However, where the imported product's use is distinct from that of component merchandise (*e.g.*, where a pencil is incorporated into a compass for the purpose of drawing circles or circular arcs and for taking measurements rather than retaining the single use of a writing instrument),¹⁰ this would support a finding to examine the entire imported product.

(4) Other Relevant Factors

As discussed above, scopes necessarily are written in general terms and cannot cover every imaginable product or permutation thereof. Therefore, and as also discussed above, a scope investigation and any mixed-media analysis will vary from proceeding to proceeding depending upon the particular characteristics of the product under investigation and the text of

⁹ See Recommendation Memo-Final Scope Ruling on the Request by Texsport for Clarification of the Scope of the Antidumping Duty Order on Porcelain-on-Steel Cooking Ware from the People's Republic of China at 4, U.S. Dept't of Commerce Memorandum from Richard Moreland, Director, Office of Antidumping Compliance, to Joseph A. Spetrini, Deputy Assistant Secretary for Compliance, Scope Inquiry No. A-570-506 (Aug. 8, 1990) (concluding that an outdoor cooking set including teakettles, skillets, frypans, cups and plates, was within the scope of an anti-dumping order covering teakettles, skillets and frypans), *also cited in Walgreen*.

¹⁰ See Final Scope Ruling – Antidumping Duty Order on Certain Cased Pencils from the People's Republic of China (PRC) – Request by Fiskars Brands, Inc., dated June 3, 2005.

the order at issue. Under these circumstances, factors may arise that will necessitate the Department to exercise “its discretion under the facts and circumstances.” *Walgreen*, 620 F.3d at 1356. In such instances, the Department may find it appropriate to look to other factors as dictated by the facts of a particular case to determine whether its scope analysis should focus on the entire product incorporating the component merchandise or just the component itself. However, the fact that products may be resold or repackaged separately does not preclude the Department from examining a mix of bundled items in their entirety.¹¹

The Department’s mixed-media analysis may look to each of these factors and balance the evidence accordingly. The Department will continue to maintain a flexible approach because of the uniqueness of each product and order. No one factor listed above will be dispositive, and some factors may have less relevance to a given product.

III. Mixed-Media Analysis for Target’s Toolkits

As stated above, in the draft redetermination, the Department considers three factors when examining mixed-media set, namely practicability of repacking for resale, value, and ultimate use or function. As described below, the Department has evaluated these three factors in the redetermination to determine whether the correct focus of the scope ruling should be on toolkits or steel nails.

(1) Practicability of Repackaging for Resale

In examining whether the component merchandise could be easily repackaged or resold, the Department examined the way the steel nails were packaged within the toolkits. The toolkits at issue contain between 59 to 161 unique articles intended for home maintenance or repair, of

¹¹ *Walgreen* citing *Sango Int’l L.P. v. United States*, 567 F.3d 1356, 1363 (Fed.Cir.2009) (noting that “Commerce is not required as a matter of law to consider components separately simply because they are packaged, sold, and advertised separately”).

which the steel nails are but one article.¹² In all the toolkits subject to the review, the steel nails were packaged within a smaller case that contained several different subdivided compartments, each of which contained other types of fasteners or screws.¹³ The steel nails were not packaged in a separate, individual box by themselves.¹⁴ Because the component merchandise was packaged in the same case that contained similar non-subject fasteners, the Department finds that it would be impractical to remove the component merchandise for the purpose of reselling. Furthermore, the steel nails were packaged within a small case that also contained several other different types of fasteners and thus did not have the volume or space for large quantities of individual steel nails to be included.¹⁵ Accordingly, the small amount of steel nails contained in the toolkit could not be assumed to be a product designed for repackaging and resale. For all these reasons, the Department finds that this factor supports determining that the scope analysis should focus on the entire product, *i.e.*, the toolkit, incorporating the component merchandise.

(2) Value

In determining the value of the component merchandise compared with the total value of the mixed-media set, the Department has examined whether the component merchandise comprises a significant portion of the total value of the set. For the toolkits considered in this proceeding, Target stated that the total value of the steel nails in the toolkits was an insignificant percentage of both the retail price and the cost of manufacture.¹⁶ Additionally, at retail value, the toolkits are priced between \$25-60.¹⁷ Therefore, the Department finds that the value of the steel nails within the toolkits is very small as compared to the value of the entire toolkit. Therefore,

¹² Target's Scope Ruling Request Regarding Household Toolkits dated December 11, 2009, at 2.

¹³ Target's Diversified Products Analysis dated April 15, 2010, at 2.

¹⁴ Target's Scope Ruling Request Regarding Household Toolkits dated December 11, 2009, at 2-3.

¹⁵ *Id.*

¹⁶ For the specific amount of value accounted for by the steel nails in question, *see* Target's Scope Ruling Request Regarding Household Toolkits dated December 11, 2009, at 2-3.

¹⁷ Target's Diversified Products Analysis dated April 15, 2010, at 3.

the Department finds that this factor supports determining that the scope analysis should focus on the entire product incorporating the component merchandise.

(3) Ultimate Use or Function

In determining the ultimate use or function of the product, the Department has examined the use of the toolkit in contrast to the use of component merchandise sold alone. The toolkits were designed to provide a convenient collection of tools and accessories for the intention of home repair and maintenance. The general purpose of steel nails, fastening two objects together, while complementary, is not the same as the purpose of a toolkit. In this regard, the toolkits hold between 59 to 161 individual tools and articles.¹⁸ Each toolkit includes a unique and different combination of tools and accessories, allowing the purchaser to choose a particular toolkit that contains the requisite tools needed.¹⁹ Indeed, most articles within the toolkits do not function together, and the majority of tools are not compatible with the function of steel nails.²⁰ Thus, purchasers of the toolkits select a toolkit based on the specialized types of home repair and maintenance made possible by the included articles. Because steel nails comprise just one of 59-161 components, the choice of the toolkit selected is not based exclusively upon the inclusion of the steel nails, which are included in each toolkit. Accordingly, the toolkits have distinct functions and uses from that of the component merchandise and the Department finds that this factor supports determining that the scope analysis should focus on the entire product incorporating the component merchandise.

(4) Other Relevant Factors

The Department has not identified any other relevant factors which it finds necessary to the mixed-media analysis for toolkits under consideration.

¹⁸ Target's Scope Ruling Request Regarding Household Toolkits dated December 11, 2009 at 2-3.

¹⁹ *Id.*

²⁰ Target's Response to Petitioner's Objection dated January 7, 2010, at 4.

Conclusion of Mixed-Media Analysis

After an analysis of the above factors the Department determines that the proper article to be examined is the toolkit. Thus, the Department's scope analysis will focus on the toolkits imported by Target.

IV. 19 CFR 351.225(k)(1) Scope Analysis

(1) Regulatory Framework

The regulations governing the Department's antidumping scope determinations can be found at 19 CFR 351.225. On matters concerning the scope of an antidumping order, our initial basis for determining whether a product is included within the scope of an order is the description of the product contained in the petition, the initial investigation, and the determinations of the Secretary and the U.S. International Trade Commission ("ITC"). 19 CFR 351.225(d) and 351.225(k)(1). If the Department determines that these descriptions are dispositive of the matter, it will issue a final scope ruling as to whether or not the merchandise in question is covered by order. 19 CFR 351.225(d).

Conversely, where the descriptions of the merchandise are not dispositive, the Department will consider the additional factors set forth at 19 CFR 351.225(k)(2). These criteria are: i) the physical characteristics of the product; ii) the expectations of the ultimate purchasers; iii) the ultimate use of the product; iv) the channels of trade in which the product is sold; and v) the manner in which the product is advertised and displayed. These factors are known commonly as the *Diversified Products* criteria. The determination as to which analytical framework is most appropriate in any given scope inquiry is made on a case-by-case basis after consideration of all record evidence before the Department.²¹

²¹ The Department only relied on those documents placed on the record of this scope proceeding in making this scope determination.

(2) Analysis

The issue presented in this remand is whether Target's toolkits are within the scope of the *Order*. Our initial basis for determining whether a product is included within the scope of an order is the description of the product contained in the petition, the initial investigation, and the determinations of the Secretary and the ITC. 19 CFR 351.225(d) and 351.225(k)(1). As described below, we find that the descriptions of merchandise listed in 19 CFR 351.225(k)(1) are dispositive and establish that toolkits are outside the scope of the *Order*.

(A) Descriptions of Merchandise in the Petition and Initial Investigation

The *Order* defines the scope as follows:

The merchandise covered by this proceeding includes certain steel nails having a shaft length up to 12 inches. Certain steel nails include, but are not limited to, nails made of round wire and nails that are cut. Certain steel nails may be of one piece construction or constructed of two or more pieces. Certain steel nails may be produced from any type of steel, and have a variety of finishes, heads, shanks, point types, shaft lengths and shaft diameters. Finishes include, but are not limited to, coating in vinyl, zinc (galvanized, whether by electroplating or hot-dipping one or more times), phosphate cement, and paint. Head styles include, but are not limited to, flat, projection, cupped, oval, brad, headless, double, countersunk, and sinker. Shank styles include, but are not limited to, smooth, barbed, screw threaded, ring shank and fluted shank styles. Screw-threaded nails subject to this proceeding are driven using direct force and not by turning the fastener using a tool that engages with the head. Point styles include, but are not limited to, diamond, blunt, needle, chisel and no point. Finished nails may be sold in bulk, or they may be collated into strips or coils using materials such as plastic, paper, or wire. Certain steel nails subject to this proceeding are currently classified under the Harmonized Tariff Schedule of the United States ("HTSUS") subheadings 7317.00.55, 7317.00.65 and 7317.00.75.

Excluded from the scope of this proceeding are roofing nails of all lengths and diameter, whether collated or in bulk, and whether or not galvanized. Steel roofing nails are specifically enumerated and identified in ASTM Standard F 1667 (2005 revision) as Type I, Style 20 nails. Also excluded from the scope of this proceeding are corrugated nails. A corrugated nail is made of a small strip of corrugated steel with sharp points on one side. Also excluded from the scope of this proceeding are fasteners suitable for use in powder-actuated hand tools, not threaded and threaded, which are currently classified under HTSUS 7317.00.20 and 7317.00.30. Also excluded from the scope of this proceeding are thumb tacks,

which are currently classified under HTSUS 7317.00.10.00. Also excluded from the scope of this proceeding are certain brads and finish nails that are equal to or less than 0.0720 inches in shank diameter, round or rectangular in cross section, between 0.375 inches and 2.5 inches in length, and that are collated with adhesive or polyester film tape backed with a heat seal adhesive. Also excluded from the scope of this proceeding are fasteners having a case hardness greater than or equal to 50 HRC, a carbon content greater than or equal to 0.5 percent, a round head, a secondary reduced-diameter raised head section, a centered shank, and a smooth symmetrical point, suitable for use in gas-actuated hand tools. While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.²²

With the exception of additional exclusions for certain nails, the scope adopted in the *Order* was largely unchanged from that initially proposed in the petition. *Certain Steel Nails from the People's Republic of China and the United Arab Emirates: Initiation of Antidumping Duty Investigations*, 72 Fed. Reg. 38,816 (July 16, 2007). At no time during the investigation did the scope contain language including toolkits.

During the course of the investigation, an importer noted the scope's silence on non-subject items that included small quantities of nails and requested that the Department clarify whether that importer's nails packaged with a nail gun and carrying case were within the scope of the investigation. *Certain Steel Nails from the People's Republic of China: Preliminary Determination of Sale at Less Than Fair Value*, 73 Fed. Reg. 3928, 3928-29 (Jan. 23, 2008). Mid Continent Nail Corporation ("Petitioner") opposed this request, arguing that it was their intention that the scope includes all steel nails meeting the physical description of the scope, regardless of the manner of importation. *Id.* However, the importer withdrew its request for a clarification on this question, and the Department neither addressed this issue during the investigation nor added language to the *Order* including such steel nails. *Id.*

²² The scope remained unchanged between the Petition and the *Order*. See the Petition and *Order*, 73 FR 44961, August 1, 2008, (emphasis added).

As noted above, while the domestic industry may propose the scope of an order, the Department has the “inherent power to establish the parameters of the investigation” and is not tied to a definition proposed by the domestic industry. *Cellular Mobile Telephones and Subassemblies from Japan*, 50 Fed. Reg. at 45,449 (Oct. 31, 1985). The CAFC has also confirmed that statements from the investigation, either by domestic petitioners or the Department, cannot “substitute for the language of the order itself.” *Walgreen*, 620 F.3d at 1357. Accordingly, because language covering toolkits, or other items that incorporate small numbers of steel nails, was not added to the *Order*, the *Order* cannot be interpreted to include such products, notwithstanding Petitioner’s comments during the investigation.

Because the *Order* and descriptions of merchandise from the investigation at no point included toolkits, we find that these descriptions support a finding that Target’s toolkits are outside the scope of the *Order*.

(B) The ITC

In August 2007, the ITC issued a preliminary investigation on certain steel nails from the PRC and the United Arab Emirates (“UAE”), and in July 2008, the ITC published a final investigation on certain steel nails from the PRC.²³ Both the preliminary and final investigations found indications of material injury in the United States industry for certain steel nails, coextensive with the scope of the investigation.²⁴ Neither the *ITC Preliminary Investigation Findings* nor *ITC Final Investigation Findings* discussed toolkits or stated that steel nails packaged with other items were within the scope of the ITC’s investigation. Accordingly, the

²³ *Certain Steel Nails From China and the United Arab Emirates: Investigation Nos. 731-TA-1114 and 1115 (Preliminary)* (“*ITC Preliminary Investigation Findings*”), USITC Publication 3939, dated August 2007, and *Certain Steel Nails From China: Investigation No. 731-TA-1114 (Final)* (“*ITC Final Investigation Findings*”), USITC Publication 4022, dated July 2008.

²⁴ *ITC Preliminary Investigation Findings* at page 6.

ITC's descriptions of merchandise support finding that Target's toolkits are outside the scope of the *Order*.

(C) Prior Scope Determinations

The Department has issued four prior scope rulings regarding nails alleged by requesting parties to be roofing nails. On January 13, 2010, the Department issued a final scope determination on National Nail Corp.'s ("National Nail") plastic cap steel nails.²⁵ On May 14, 2010, the Department issued a final scope determination on Itochu Building Product's ("IBP") plastic cap steel nails.²⁶ On July 21, 2010, the Department issued a final scope determination on IBP's Grip Rite fasteners.²⁷ On December 22, 2010, the Department issued a final scope determination in Mazel & Co., Inc.'s steel gap roofing nails.²⁸ None of these determinations addressed toolkits, and as such, these rulings do not provide additional guidance on the question of Target's toolkits.

(D) Conclusion

As discussed above and pursuant to 19 CFR 351.225(k)(1), the description of the merchandise in the petition and initial investigation in conjunction with the ITC's description of the merchandise establish that toolkits are not within the scope of the *Order*.

V. Comments from Interested Parties

On September 1, and September 2, 2011, the Department received comments from Target and Petitioner, respectively.

²⁵ Certain Steel Nails From the People's Republic of China: Final Scope Ruling on National Nail's Plastic Cap Steel Nails ("National Nail's Final Scope Ruling"), dated January 13, 2010.

²⁶ Certain Steel Nails From the People's Republic of China: Final Scope Ruling on Itochu Building Products' Plastic Cap Steel Nails ("Itochu Building Products' Final Scope Ruling"), dated May 14, 2010.

²⁷ Certain Steel Nails From the People's Republic of China: Final Scope Ruling on Grip Rite Nails ("IBP's Grip Rite Final Scope Ruling"), dated July 21, 2010

²⁸ Certain Steel Nails From the People's Republic of China: Final Scope Ruling on Mazel's Steel Roofing Nails ("Mazel's Final Scope Ruling"), dated December 22, 2010.

(1) Legal Authority

Petitioner's Comments

Petitioner asserts that the Department's mixed-media analysis is not supported by the legal authority cited by the Department. Petitioner states that the Roller Chain Rule was used to determine export prices for goods that were imported into the United States and were subsequently further manufactured following importation. Therefore, Petitioner maintains that the Roller Chain Rule only applies to further manufactured goods and never to a scope inquiry. Petitioner further argues that the Roller Chain Rule should not apply because it has been replaced by statute and is no longer the Department's practice. Petitioner contends that under the current statute, even insignificant further manufactured merchandise is recognized as subject merchandise.

Petitioner also notes that although *Crawfish* did properly focus on substantial transformation in a scope inquiry, the analysis applied in *Crawfish* differed because it first examined the language in the order. Petitioner argues that *Crawfish* is not applicable in this situation because the steel nails packaged within Target's toolkits are not substantially transformed.

Further, Petitioner states that the mixed-media analysis established in this redetermination simply mimics the analysis conducted under 19 CFR 351.225(k)(2). Petitioner reminds the Department that its regulations state that an analysis under 19 CFR 351.225(k)(2) is only to be used when the language of the Order and a prior analysis under 19 CFR 351.225(k)(1) are not found to be dispositive. However, Petitioner asserts that the newly defined mixed-media analysis applies a 19 CFR 351.225(k)(2) analysis before considering the language of the Order or

conducting an analysis under 19 CFR 351.225(k)(1), and is thus not supported by the Department's legal authority and does not adhere to the Court's remand instructions.

Target's Comments

Target notes that in *Walgreen*, the CAFC stated that the first step to making a scope determination on a product packaged with non-subject merchandise is to determine whether the entire package is a "unique item,"²⁹ or whether the focus should be on the product contained within the package. Furthermore, in the same case, the CAFC stated that the Department had the discretion to make that threshold determination of whether to focus on the merchandise in question on a case-by-case basis.³⁰ Therefore, Target states that based upon the precedent set in *Walgreen*, the Department not only has the legal authority, but is also required to conduct a mixed-media analysis prior to beginning a scope analysis in order to determine the proper focus of the inquiry.

Department's Position

The Department disagrees with Petitioner's assertion that the mixed-media analysis is unsupported by legal authority. The Department's general authority to evaluate the scope of an antidumping duty order stems from the statute, at section 731 of the Act, and the regulations at 19 C.F.R. 351.225. As discussed above, the Department has discretion to clarify the scope of an order.³¹ We agree, however, that the discussion of the Roller Chain Rule in the Draft Remand may have been unclear, although it is not inapposite.³² Thus, we have clarified our position as supported by a more recent case, *Walgreen* .

²⁹ *Walgreen* at 1356-57.

³⁰ *Id.* at 1355-56.

³¹ *E.g., Novosteel Sa v. United States*, 284 F.3d 1261, 1269 (CAFC 2002).

³² While the need for the Roller Chain Rule has been obviated by a statutory change, the authority invoked by the Department to promulgate the rule was upheld by reviewing courts and remains intact. *E.g., Federal Mogul Corp. v. United States*, 20 C.I.T. 234, 262 (1996) (upholding application of Roller Chain Rule in administrative review). In

The legal authority to determine the product that is the focus of a scope inquiry is confirmed by the Department's past practice as upheld by the CAFC. In *Walgreen*, the importer challenged, *inter alia*, the Department's authority to determine whether its scope inquiry should focus on a set of mixed-media as a whole or focus only on certain components of that set.³³ The CAFC held that Commerce, not the importer, has the authority to frame the issue in a scope ruling.³⁴ In its ruling, the CAFC affirmed the Department's authority to consider, prior to a (k)(1) analysis, whether "components of . . . sets . . . interact in any way or otherwise represent a unique product."³⁵ Moreover, to deny the Department's authority to determine whether a product is a mixed-media set "would undermine Commerce's discretion at the very heart of its expertise."³⁶ In this regard, the CAFC noted that the Department had not yet established a bright line rule to use in mixed-media scope rulings.³⁷ Thus, it is clear that the Department has the legal authority to establish factors to consider in a mixed media analysis which it has now done in announcing the mixed-media test.

Regarding Petitioner's comment that the *Crawfish* precedent is inapplicable, we disagree because the core question in both cases is whether merchandise is incorporated into a new unique product.³⁸ In this case, the steel nails are subsumed as a component of the tool kits, complementing the function of home maintenance and repair offered by the full collection of various household tools and accessories. *Crawfish* demonstrates that the Department has the discretion to examine whether the merchandise has been subsumed into the new product, thereby

the instant case, the Department is not applying the Roller Chain Rule, but rather citing to the *Roller Chain* decision as an example of the proper exercise of agency discretion.

³³ *Walgreen Co. v. United States*, 620 F.3d 1350, 1356-57.

³⁴ *Id.* at 1355.

³⁵ *Id.* at 1356-1357.

³⁶ *Id.* at 1355.

³⁷ *Id.* at 1356.

³⁸ *Crawfish Processors Alliance v. United States*, 483 F.3d 1358, 1360 (Fed. Cir. 2007) (citing *Freshwater Crawfish Tail Meat from the People's Republic of China*, 62 Fed. Reg. 48,218, 48,219 (Sept. 15, 1997)).

creating a new product with characteristics distinctly separate from the component merchandise.³⁹

We disagree with Petitioner's comment that the mixed-media analysis simply mimics a (k)(2) analysis. These analyses examine different factors and the purpose of each analysis is distinct. The purpose of the mixed-media analysis is not to answer the ultimate question of whether the merchandise is in scope or out of scope, but, instead, the initial question of whether the scope inquiry should focus on the whole mixed-media set as a unique item, or simply on the component merchandise found within the set.

Finally, we agree with Target that the CAFC in *Walgreen* condoned the Department's authority to establish the subject of a scope inquiry through the use of a mixed-media analysis on a case-by-case basis.⁴⁰

(2) Mixed-Media Analysis

In its comments on the draft redetermination submitted to the Department, Petitioner argues that even a mixed-media analysis demonstrates that the focus should be on the steel nails packaged within the toolkit, rather than the toolkit as a whole. Petitioner argues that the proper focus of the scope analysis should be on the component merchandise found within the toolkit, *i.e.* the steel nails as opposed to the toolkit as a unique item. Target argues that transformation/subsumption and ultimate use or function weigh in favor of examining the toolkit as a whole. All comments have been included below. After considering comments raised by interested parties, the Department has clarified the factors that it considers in a mixed-media analysis. The mixed-media analysis examines the following factors, considering the totality of the circumstances: 1) practicability of separating the component merchandise for repackaging or

³⁹ *Id.*

⁴⁰ *Walgreen*, 620 F.3d 1350, at 1353.

resale; 2) value; 3) ultimate use or function; and 4) other relevant information if appropriate under the facts of a particular case. Parties' comments below also address transformation/subsumption as it was discussed in the draft redetermination. In examining the first factor, the Department will examine whether the component merchandise can be easily separated from the imported product for the purpose of resale. For the second factor, the Department will consider whether the value of the component merchandise is insignificant relative to the overall cost of the mixed-media set. In considering the third factor, the Department will examine whether the ultimate use or function of the component merchandise was similar to the ultimate use or function of the mixed-media set as a whole. Finally, to the extent that other relevant issues may arise in the context of a unique item or situation, the Department maintains its discretion to consider other relevant facts and circumstances.

(A) Transformation/Subsumption

Petitioner's Comments

Petitioner contends that the steel nails within the toolkit have not been transformed or subsumed into the toolkit. Petitioner states that the toolkit is not a unique item, as maintained in this redetermination, but rather just a combination of non-subject and subject merchandise packaged together. Therefore, Petitioner asserts that the steel nails are neither transformed nor subsumed, just simply packaged together with non-subject merchandise in a toolkit. Petitioner argues that the character and purpose of the steel nails packaged within the toolkit does not differ from the essential characteristics and uses of component merchandise that is sold separately, as is demonstrated by the fact that the toolkits are composed of a combination of items that are not necessarily used in conjunction with one another and can be easily substituted with a different tool. Furthermore, Petitioner contends that *Crawfish* does not support the

transformation/subsumption determination applied in this redetermination, because the *étouffée* subject to that case substantially transformed the crawfish meat through the blending of the meat with spices and other food-based additions that created a new product that could not be unblended or returned to its original state in any way. In this case, as argued by Petitioner, the steel nails packaged within the toolkit maintain their original physical characteristics and are of the same class or kind as subject merchandise.

Target's Comments

Target agrees with the Department's analysis pertaining to this factor and notes that the same transformation/subsumption analysis has been applied in previous scope inquiries. However, Target clarifies that the transformation discussed in this redetermination does not have the same definition as "substantially transformed" as applied previously in some cases. Therefore, Target urges the Department to clarify its use of the term "transformation."

Department's Position

In considering interested parties' comments regarding transformation/subsumption, the Department has clarified the factors of the mixed-media analysis put forth in the draft redetermination. We have removed transformation/subsumption as a factor largely because of its similarity to the repackaging/resale factor. Moreover, if the component merchandise was significantly transformed or subsumed into the imported product, it logically follows that it would not be easily separated for the intent of repackaging or resale. Thus, the Department has decided that it should be removed from our analysis. The concepts underlying that factor, along with the repackaging/resale factor, are restated as "practicability of separating component merchandise for repackaging or resale."

In considering the practicability of separating the component merchandise for repackaging or resale, the Department notes that although possible, it is unlikely that the steel nails would be repackaged and resold for a variety of reasons. First, the steel nails come in a fastener box along with a variety of other, non-subject, fasteners. Second, the number of the steel nails included within the toolkits is fewer than those that would be purchased typically if a purchaser were buying steel nails wholesale or in a self-contained package at retail. Third, it is unlikely that a purchaser would buy a toolkit with the idea of repackaging and/or reselling the steel nails when it is far easier and more cost-effective to buy steel nails alone without purchasing the accompanying tools and box. Therefore, the Department finds that this factor supports determining that the scope analysis should focus on the mixed-media set, *i.e.* the toolkit, as an entire product incorporating the component merchandise.

(B) Practicability of Repackaging Resale

Petitioner's Comments

Petitioner states that the Department's determination that the small amount of steel nails included in the fastener box within the toolkit could not be assumed to be intended for repackaging or reselling purposes is irrelevant because the *Order* covers all steel nails, regardless of how they are packaged or imported. Furthermore, Petitioner contends that the steel nails included in the fastener box are not transformed and could be easily removed, repackaged, and resold.

Department's Position:

As discussed above, after consideration of comments raised by interested parties, this factor has been modified as the practicability of separating the component merchandise for repackaging or resale. The Department has responded to comments raised by Petitioner in the

preceding analysis and explanation of the practicability of separating the component merchandise for repackaging or resale.

(C) Value

Petitioner's Comments

Petitioner contends that the Department erred in determining that the steel nails packaged within the toolkit were an insignificant portion of the final total cost of the toolkit, because there is no *de minimis* exclusion in the *Order* and, therefore, the relative value is irrelevant. Petitioner argues that this is supported by the CIT determination in *Walgreen* which affirmed the Department's previous decision that, when subject merchandise packaged together with non-subject merchandise can be used separately from the other non-subject components within the kit, the focus of the analysis should be on the subject merchandise, rather than the kit as a unique item.⁴¹ Additionally, when counted by piece, the number of steel nails included within each fastener box within the toolkit is a significant portion of the total number of fasteners included within the toolkit. Petitioner argues that the cost of the steel nails as reported by Target might not be considered minor when numerous toolkits are being imported and sold within the United States.

Department's Position:

The Department disagrees with Petitioner's statement regarding the value of the steel nails and the relevancy of the cost of the steel nails compared to the total cost of the toolkits at issue. The cost of the steel nails is a small portion of the total cost of the toolkits, and the value of the steel nails remains minor in comparison to the value of other articles included within the toolkits, such as a drill or even a tape measure. While a toolkit may have as many as 50 steel

⁴¹ *Walgreen Co. of Deerfield, IL v. United States and Seaman Paper Company of Massachusetts, Inc.*, Slip Op. 09-122 (October 28, 2009) at 11-12, and affirmed in *Walgreen*.

nails included within, the overall cost of the steel nails in comparison to the cost of the toolkit remains insignificant. In this regard, the Department disagrees that it is imposing a *de minimis* standard that is contrary to the language of the order. Instead, as discussed above, the Department is first determining the proper focus of the scope inquiry and then determining whether the merchandise is within the scope of the order. The determination not to focus the scope inquiry on the steel nails in the toolkit was not based on the number of steel nails in the toolkit or simply the value of the steel nails, but instead, was based on the totality of evidence and all the factors outlined herein.

(D) Ultimate Use or Function

Petitioner's Comments

Petitioner asserts that the ultimate use and function of the steel nails packaged within the toolkits is the same for subject merchandise, namely to fasten materials together. Both steel nails packaged individually and steel nails packaged with non-subject merchandise in a toolkit are intended for home maintenance purposes.

Target's Comments

Target notes that this factor is similar to the transformation/subsumption factor previously discussed. Target observes that in the mixed-media analysis, the purpose is to determine whether the imported package, as a whole, is a unique product or whether the scope analysis should focus solely on the subject merchandise contained in the package. To this end, the ultimate use or function factor that is considered in the mixed-media analysis examines whether the imported package as a whole has a particular use or function. Therefore, because of the similarity of the term to the transformation/subsumption factor and due to the fact that a

similar factor is examined in the subsequent scope analyses, Target urges the Department to clarify its definition of the ultimate use or function factor.

Department's Position:

The Department notes that this factor examines whether the degree to which the use of the mixed-media set as a whole is distinct from the use of the component merchandise alone, supports a determination that the scope analysis should focus on the mixed-media set as a whole rather than just the component merchandise. Accordingly, the Department disagrees with Petitioner's comment. The toolkit offers purchasers a collection of household tools that have a variety of uses and functions beyond simply fastening materials together. The Department therefore determines that the use and function of a toolkit differs greatly from the use and function of individual steel nails.

(3) 19 CFR 351.225(k)(1) Analysis

Petitioner's Comments

Petitioner maintains that the *Order* covers all steel nails, except for those meeting the specified exclusions, regardless of how they are packaged or imported. Petitioner argues that the steel nails packaged in the toolkits are of the same class or kind as subject merchandise and, therefore, regardless of whether they are packaged together with other non-subject items, the steel nails in the toolkits are properly determined to be subject merchandise.

Petitioner contends that a determination under 19 CFR 351.225(k)(1) is dispositive and comes to the conclusion that the steel nails packaged within the toolkits are subject merchandise. It asserts that an exclusion based upon subject merchandise packaged with non-subject merchandise is not found in the *Order*, *Petition*, or prior determinations by the Department and the ITC. Furthermore, Petitioner cites an instance at the time of the investigation when an

importer requested that collated steel finish nails should be found to be non-subject merchandise when packaged in a case with a pneumatic nail gun and assorted accessories. In response and repeatedly confirmed throughout the ITC's hearing, Petitioner stated that it had intended the *Order* to cover all certain steel nails, regardless of how they are imported, and had intentionally drafted a broad order to cover the numerous ways in which subject merchandise could be imported.

Finally, Petitioner alleges that the circumstances of this redetermination are parallel to the situation in *Walgreen*. Thus, as was determined in that case, the proper focus of a scope analysis should be on the steel nails found within the toolkit, which would then be easily found to be subject merchandise.

Target's Comments

Target agrees with the Department that the toolkit is a unique item, but emphasizes that the toolkit has an additional specific function of being able to organize and store tools, thereby making them easy to transport and more accessible. Thus, the toolkit is more than simply a package containing a random assortment of tools. However, to avoid further litigation, Target urges the Department to include the original analysis under 19 CFR 351.225(k)(2) that was issued in the final scope ruling.

Department's Position:

Although the Department agrees with Petitioner that the *Order* covers all steel nails except for those that meet the specified exclusions, the subject of the scope inquiry was the toolkit as a unique item. Furthermore, as explained above, the Department has the legal authority to make the determination of which merchandise should be the focus of the scope inquiry when the particular product at issue before the Department is not specifically enumerated

in the order. Upon examination of the toolkit under a 19 CFR 351.225(k)(1) analysis, as outlined in the redetermination, the Department concluded that toolkits are outside the scope of the *Order*. The (k)(1) analysis is dispositive because the *Order* did not specifically mention toolkits, or, indeed, any other instance where subject merchandise may be packaged with non-subject merchandise in a kit. Although a question regarding steel nails packaged with a nail gun was raised in the investigation, this request was withdrawn. Thus, the language in the *Order* was not modified to address this issue. Finally, in *Walgreen*, the CAFC upheld the Department's authority to determine the subject of a scope inquiry through the use of a mixed-media analysis.

The Department agrees with Target that the toolkits present an additional advantage and characteristic of organizing tools in a convenient box that makes them more accessible and transportable. However, because the Department was able reach a conclusion under 19 CFR 351.225 (k)(1), a 19 CFR 351.225 (k)(2) analysis is unnecessary. Furthermore, the Department notes that the original final determination for this scope ruling was made using a 19 CFR 351.225 (k)(2) analysis, and that the directions in the remand did not ask us to re-examine our original analysis.

VI. Conclusion

Based on the above mixed-media analysis, the Department has determined that the proper focus of the scope analysis should be Target's toolkits rather than the steel nails contained therein. As the mixed-media analysis demonstrates, 1) it is not practicable to separate the component merchandise for repackaging or resale; 2) the value of the component merchandise is insignificant relative to the value of the mixed-media set; and 3) the ultimate use or function of the mixed-media set as a whole differs greatly from the use or function of the component

merchandise. After applying the 19 CFR 351.225(k)(1) analysis to Target's toolkits, the Department has determined that Target's toolkits are outside the scope of the *Order*.

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

Date