

# AD/CVD for Brokers

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Chicago Customs Brokers &  
Forwarders Association  
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## Ground Rules

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- > Feel free to interrupt with questions
- > We'll try to stay out of the weeds, but let me know if we get too detailed about antidumping and/or countervailing duties

# Our Agenda

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- > What is (and is not) AD/CVD
- > How to help customers avoid liability
  - > Why classification is not enough
  - > A better approach
  - > Interpreting scope
- > Determining the appropriate rate
- > Post-Importation Challenges (if any)

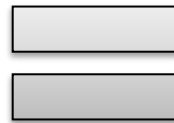
# What Countervailing Duties Are

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Specific Subsidies



Imports

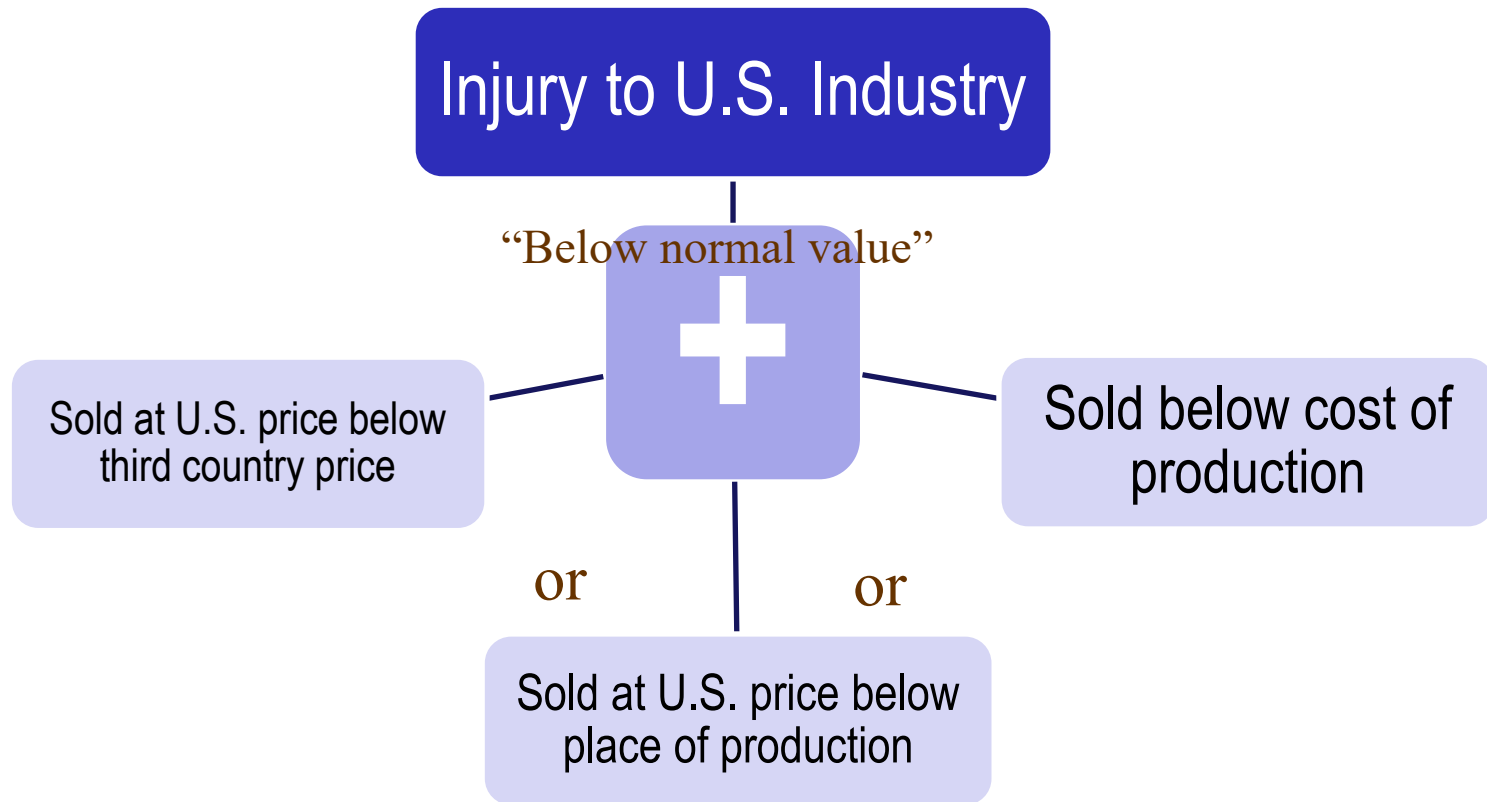


Countervailable  
subsidies



Injury to U.S.  
Industry

# What Dumping Is



## What AD/CVD Is NOT

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- > Being cheaper than the U.S. manufacturers
- > All foreign government support
- > “Illegal” or necessarily morally “wrong”
  - > AD/CV duties are remedial, rather than “punishment”



## Avoiding Liability

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- > Best option is pre-emptive
  - > Identify likely cases and inform customers
- > Next best, but not good, option is post-entry remediation

## New Liability Rule

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- > Pending in regulations change
- > Liability would be for all unliquidated entries, not just from scope initiation
- > Also more aggressive about extending liquidation for possible AD/CVD entries



# Pre-Emptive Analysis

Get official FR scope language

Get ITA scope determinations


Get full product information (inc. HTS)

Compare product to scope (inc. HTS)

Document determination

## Notice Anything?

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**Relying only on  
tariff classification**

## Problematic Truth

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- > Tariff classification would be the easiest, most convenient way to evaluate scope
- > Many companies use tariff classification alone to check for AD coverage
- > Tariff classification alone is **not** an appropriate means to evaluate scope

## Why Not The Tariff?

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- > HTS classifications are listed in the scope of AD/CVD orders for convenience only
- > Every single AD/CVD notice says this or something very similar

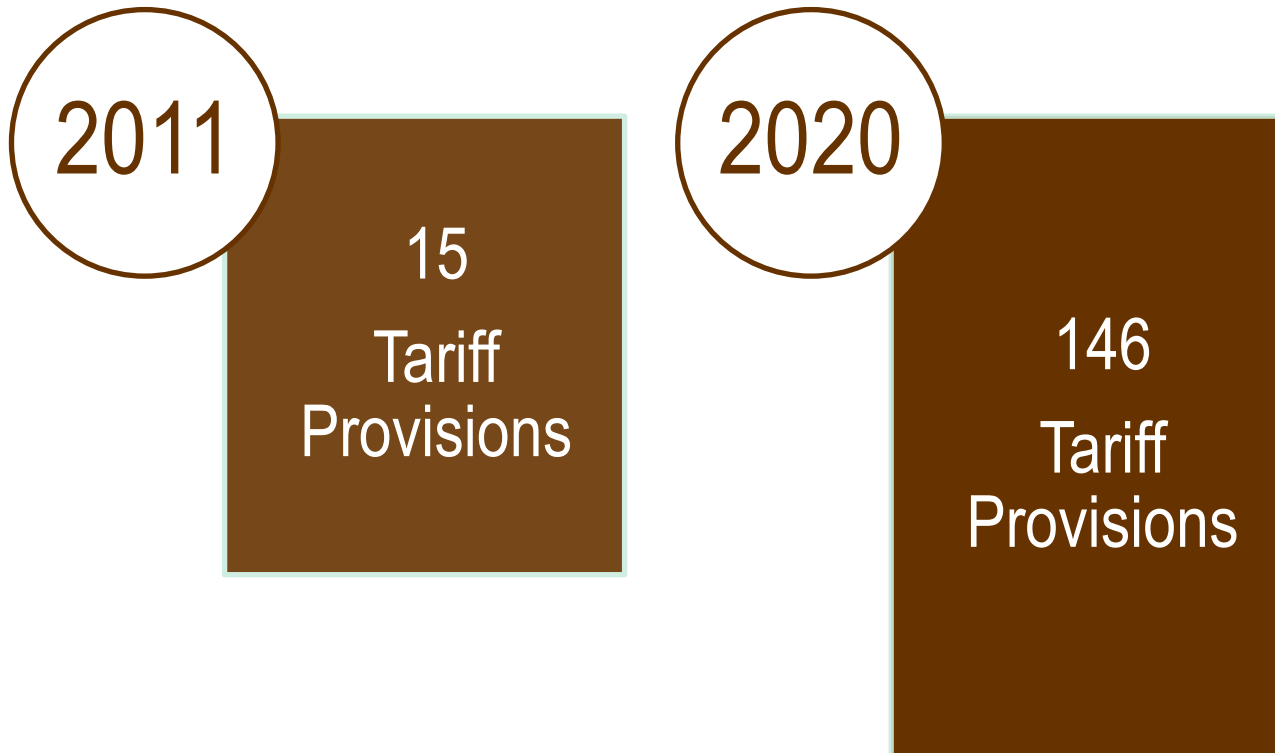
## Also Of Note . . .

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- > The tariff alone does not actually work for scope
- > Even if Customs effectively uses the tariff to identify AD entries, it's OK for **them**
  - > Customs misses AD entries = essentially no consequences
  - > Importer misses AD entries = five years of unpaid AD, plus interest, penalties etc. (or disclosure)

## E.g., Aluminum Extrusions

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## E.g., Aluminum Extrusions

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- > By the written terms of the scope, no “additions” to the scope
- > By tariff provision, a ~tenfold (!) increase in scope
- > Importers in the new 131 HTSUS provisions are liable for all entries over five years



## Misclassifications

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- > Major cause of “surprise” AD/CVD liability
- > Only arises if tariff classification is used as a surrogate for scope analysis
- > Raises serious questions about culpability when “misclassification” avoids millions in AD/CVD liability



## E.g., Bearings

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- > Had “unintentional” misclassifications
  - > “Automotive parts” (but not wheel hub units, because those were included)
  - > “Parts of machines”
  - > Varieties of bearings not subject to an order
- > Only possible using HTSUS instead of description

## Conclusion: HTS Alone Doesn't Work

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- > Some cases have broad descriptions that cross many tariff provisions
- > Some cases involve easily misclassified articles
- > The law and AD/CVD notices say it doesn't work

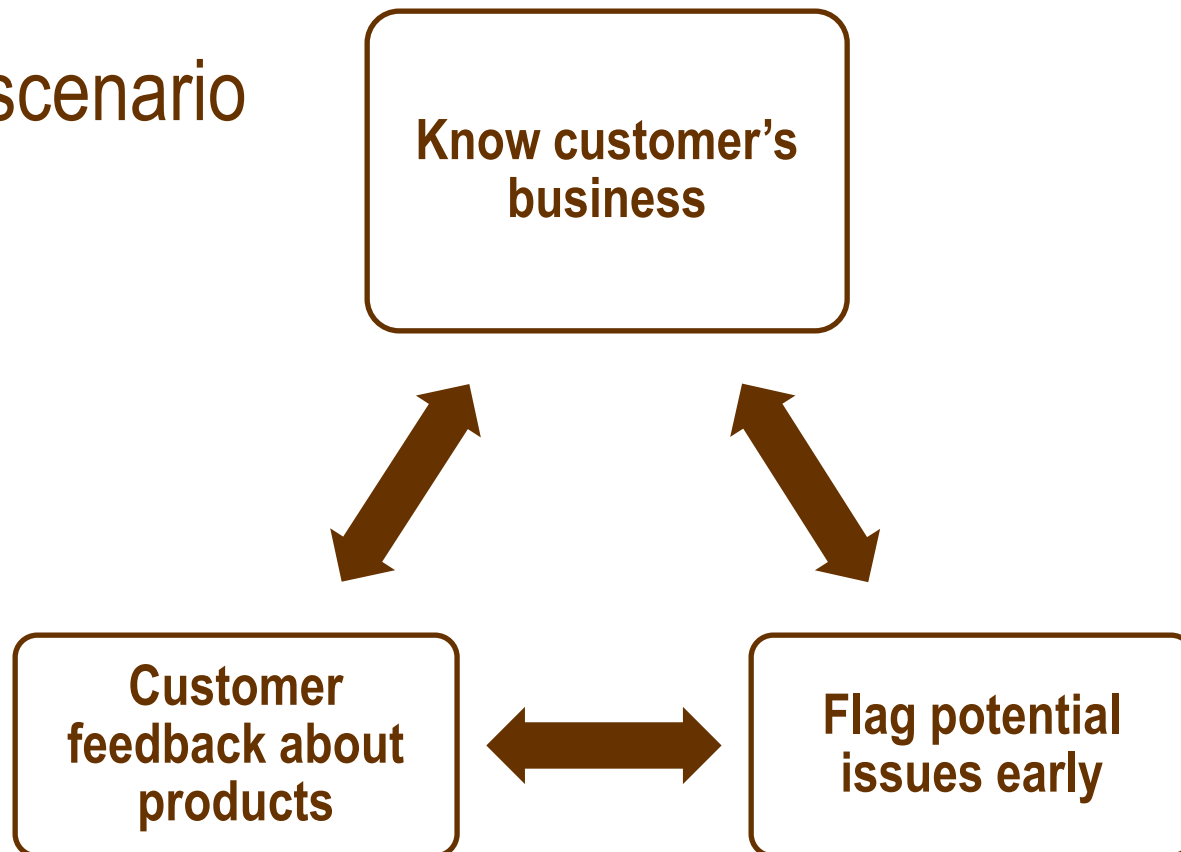
## EAPA Detour

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- > CBP investigations into AD/CVD evasion
- > <http://tinyurl.com/heormd2>
- > More opportunity for competitors to squeal (130+ investigations so far)
- > Avoiding liability is best (only) strategy
- > Call an attorney

# What Does Work?

Ideal scenario



## How Do You Implement (Ideal)

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- > Long-term relationship with customer and dedicated brokerage personnel
- > Important to
  - > Ensure that broker flags potential scope issues early
  - > Ensure that customer contact has knowledge/authority to address questions

## How Do You Implement (Less Ideal)

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- > Some familiarity with customer, but not “ideal” history
- > Get information where you can (contact, Internet etc.)
- > **Document** information and communication with customer

## How Do You Implement (Not Ideal)

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- > One-off or low-communication customer
- > Find out any information you can, provide any information that might be relevant
- > Do what you can, **document** any communications or questions



## Earlier Is Always Better

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- > **\*If\*** there is hope to avoid unexpected AD/CVD it is as early in the process as possible
- > Once entry is made, everything becomes much more difficult



## Interpreting Scope

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- > Typically not written to be intuitive
- > Written by lawyers and engineers (usually) with all sorts of motives and intentions
- > Companies bringing cases (petitioners) generally get to write their own scope



## What Are We Interpreting

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- > Really two sets of scope language
  - > The order (and subsequent notices), which is normally technical and detailed
  - > Scope rulings, which relate to a single, specific article
- > Together they reflect full scope of case

## General Rule

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- > Commerce has discretion to interpret scope
  - > May not interpret in a way contrary to plain language
- > Article needs to be covered by all of the scope

## Interpretation Traps

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- > Beware of limiting language
  - > “not less than” and “no more than” are to be taken literally
- > Beware of expository language
  - > “including, but not limited to” means “this is just one example”

## Getting Scope Information

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- > Orders in effect, scope language (by country) and other useful information
- > <https://enforcement.trade.gov/stats/iastats1.html>
- > Also regular updates via Federal Register and Daily Report ([BRC web page](#))



## If In Scope, What Rate?

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- > Assuming a product is or will be in scope, most important question is the rate on the imports
- > Can be anywhere from zero to 998% (or higher)

## Essentially Three Possibilities

Company-specific rate

Separate rate  
companies

All others/NME-wide  
rate

| Company                                   | Margin (percent) |
|---|------------------|
| Advanced Technology & Materials Co., Ltd. | 0.15             |
| ASHINE Diamond Tools Co., Ltd.            | 9.55             |
| Zhejiang Wanli Tools Group Co., Ltd.      | 9.55             |
| PRC-Wide Entity                           | 164.09           |



## Company-Specific Rate

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- > Generated from data supplied by exporter/producer combinations
- > The process for getting a rate is very long and involved
- > No companies with a rate are surprised at the application of AD/CVD



## Company-Specific Rate

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- > Typically involves sale directly to U.S. between importer and producer/exporter combination
- > U.S. companies sometimes defrauded because sellers create bogus paperwork that looks like low-rate company

## Separate Rate Companies

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- > Common in China cases
- > Company proves not controlled by Chinese government in law or in fact
- > Weighted average of company-specific rates
- > Periodic renewal, and can lose if reviewed

## All Others/NME-Wide

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- > Rates applied to companies that did not have their sales and data reviewed
- > Calculation methodology varies, but typically highest available rate
- > Generally very high

# Reseller's Rule



## Reseller's Rule

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- > U.S. assumes that “discipline” of AD/CVD pricing is not present in foreign transaction
- > Third party is assumed to have unfair price advantage when selling to U.S. at producer's rate

## Reseller's Rule

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- > Typically importers must **deposit** at the company-specific rate
- > Are **assessed** final AD/CVD at all others or China-wide rate when liquidation occurs
- > Typically must also pay interest on difference between deposit and assessment

## Reseller's Rule

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- > Hard to avoid application where purchase was from, e.g., trading company
- > Some importers expect and plan to get producer's rate (bad surprise)
- > Theoretically, if you can prove that producer was aware of sale to U.S. when it sold, could avoid reseller rule application



## Reseller's Rule

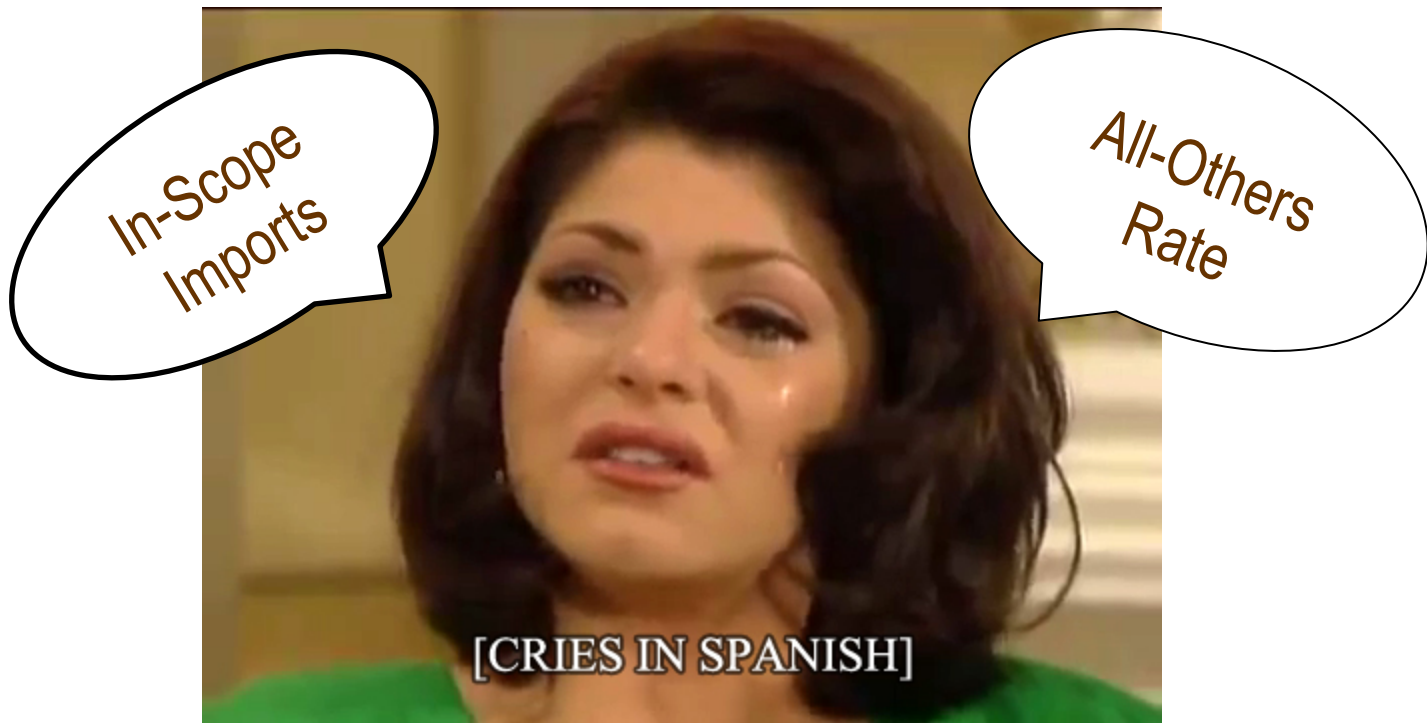
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- > Common problem where importer thinks they got a “great deal” on name-brand merchandise
- > Often deal was great because not known to be a U.S. sale
- > In that case, usually very difficult to avoid AD/CVD liability



## Now What?

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## Protests?

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- > Not usually
  - > Only if Customs took an action that was in error and contrary to what they were instructed to do (potentially scope)
  - > Very rare circumstance, since Customs generally tries to adhere closely to instructions

## Protests?

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- > If your argument is that the rates calculated by Commerce are “wrong,” no protest
- > Even if you have a protestable issue, likely that Commerce will have to act for Customs to grant the protest (see, e.g. scope request)

## Scope Request

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- > If there is a reason they thought it was not subject before entry, maybe get a scope clarification
- > Formal process by which companies argue whether specific articles are subject to AD/CVD case

## Scope Request

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- > Two-step analysis under regulations
  - > Facially outside scope, or
  - > (k)(2) factors indicate it is a different product than scope products
  - > Address and support all the factors as well as possible
  - > 19 CFR 351.225

## Scope Request

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- > Remember that petitioner gets to respond to request
- > Request and all materials are made available to the public (sometimes in redacted form)
- > Decisions are published quarterly in the FR



## Ultimately Not Many Options

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- > Either not in the scope
- > Applied the wrong rate
- > Or both for post-importation deposit requirements
- > Scope request and confirming sale from appropriate party to U.S. are only real avenues



## Wrap It Up

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- > Companies are always trying to avoid uncertainty and surprises
- > In the right circumstances, possible to help customers identify uncertainty and avoid surprises

## Wrap It Up

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- > Ultimately avoiding unexpected AD/CVD requires good communication between knowledgeable professional and importer
- > While a certain amount of automation may help flag some at-risk entries, the AD/CVD analysis simply cannot be fully automated



# Questions?

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