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Remand
Slip Op. 17-70
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***Mitsubishi Polyester Film, Inc. and SKC, Inc., v. United States*, Court No. 13-00062, Slip. Op. 17-70 (CIT June 8, 2017)**

Final Results of Redetermination Pursuant to Court Remand: Polyethylene Terephthalate Film, Sheet, and Strip from Brazil

I. Summary

The Department of Commerce (Department) has prepared these remand results in accordance with the June 8, 2017, order of the United States Court of International Trade (CIT or Court) in *Mitsubishi Polyester Film, Inc. and SKC, Inc., v. United States, Court No. 13-00062, Slip. Op. 17-70 (CIT June 8, 2017)* (*Mitsubishi*). This action arises out of the final results of the Scope Review concerning Terphane's 10.21/32, 10.21/40, 10.21/48, 10.21/92, 10.81/48, 10.91/48, and 10.96/48 products copolymer surface films, (the products at issue), in the antidumping duty order on Polyethylene Terephthalate Film, Sheet, and Strip from Brazil.[1]

In *Mitsubishi*, the Court found that Department's analysis under 19 CFR § 351.225(k)(1) was unsupported by substantial evidence.[2] The Court concluded that "Commerce did not analyze the 'descriptions of the merchandise contained in the petition, {and} the original investigation' on the record, including those that fairly detract from its determination… such that its entire analysis dispositively answers the scope question in accordance with the substantial evidence standard."[3]

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[1] *See* Memorandum, "Antidumping Duty Order on PET Film, Sheet, and Strip from Brazil: Final Scope Ruling, Terphane, Inc. and Terphane Ltda.," (January 7, 2013) (Scope Ruling Memorandum).
[2] *See Mitsubishi*, at 20 to 23.
[3] *Id.* at 27 to 34. *See also* 19 CFR § 351.225(k)(1).

On September 21, 2017, the Department issued, and invited comments on, its draft remand redetermination, with a comment deadline of September 26, 2017. We timely received comments from Terphane on September 26, 2017.[4] On September 27, 2017, after the deadline for submitting comments, the petitioners filed a letter, requesting an extension of the deadline for submitting comments, based on a serious medical emergency of one of the case attorneys, resulting in petitioners not being immediately aware of the issuance of the draft remand redetermination.[5] In light of the time constraints with respect to meeting the Court's deadline for this final remand redetermination, we sent a letter to the petitioners, indicating that we were unable to grant the petitioners' request.[6] However, on October 4, 2017, the Court granted the petitioner's motion for an extension of the deadline for the Department's remand redetermination, until October 20, 2017.[7] Also, on October 5, 2017, Petitioner submitted a letter requesting that the Department reconsider its previous decision to reject the petitioner's extension request.[8] On October 5, 2017, the Department granted the petitioner's request for an extension of time to submit comments.[9] We timely received comments from the petitioner on October 10, 2017.[10]

[4] *See* Terphane's Comments on the Draft Remand Determination, dated September 26, 2017.
[5] *See* Letter from Petitioners, dated September 27, 2017.
[6] *See* Department Letter re: Extension Request, dated October 2, 2017 (the Department, October 2, 2017 Letter). Also, on October 2, 2017 Petitioners submitted a letter updating their extension request indicate a requested extended due date of "at least five days later than the date that the extension is granted." *See* Petitioner's October 2, 2017 Extension Request. However, the Department, October 2, 2017 Letter didn't address Petitioner's October 2, 2017 Extension Request.
[7] *See* Court's Order on Motion to Extend Deadline to File Remand Results, Ct. No. 13-62, ECF Docket No. 170.
[8] *See* Petitioner's October 5, 2017 Extension Request.
[9] *See* Department Letter re: Extension Request, dated October 5, 2017.
[10] *See* the Petitioner's Comments on the Draft Remand Determination, dated October 10, 2017 (Petitioner's Comments).

Upon reconsideration of the record evidence and the comments of interested parties on remand, we conclude that the descriptions of the products contained in the petition,[11] the initial investigation, and the determinations of the Department (including prior scope determinations), and the ITC (the (k)(1) factors)[12] are dispositive with respect to the products at issue. Accordingly, we continue to find that the products at issue are not covered by the scope of the *Order*.

II. Scope of the Order

The products covered by the *Order* are all gauges of raw, pre-treated, or primed PET film, whether extruded or co-extruded. Excluded are metalized films and other finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick. Also excluded is roller transport cleaning film which has at least one of its surfaces modified by application of 0.5 micrometers of SBR latex. Tracing and drafting film is also excluded. PET film is classifiable under subheading 3920.62.00.90 of the Harmonized Tariff Schedule of the United States (HTSUS). While HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this order is dispositive.[13]

III. Background

In the Terphane scope proceeding, Terphane asked the Department to determine that the products at issue were not covered by the scope of the *Order*.[14] Terphane pointed to the scope

[11] *See* Polyethylene Terephthalate Film, Sheet, and Strip from Brazil, People's Republic of China, Thailand and the United Arab Emirates; Antidumping Duty Petition (Petition), contained in Department Memorandum, "Polyethylene Terephthalate Film, Sheet and Strip from Brazil; Remand Redetermination of Scope Review of Terphane, Inc. and Terphane, Ltda.'s "Copolymer Surface Films," dated July 18, 2017 at Attachment.
[12] *See* 19 CFR § 351.225(k)(1).
[13] *See Polyethylene Terephthalate Film, Sheet, and Strip from Brazil, the People's Republic of China, and the United Arab Emirates*, 73 FR 66595 (November 10, 2008) (*the Order*).
[14] *See*, *e.g.*, Terphane's February 22, 2012 Scope Ruling Request.

language, the descriptions of the merchandise contained in the original investigations, prior scope determinations of the Department, and prior International Trade Commission (ITC) decisions in the PET film from Japan and Korea ITC Investigations, the PET Film from India and Taiwan ITC investigations, and the PET film from Brazil, Thailand, and the UAE ITC investigations,[15] and the criteria enumerated under 19 CFR § 351.225(k)(2) (the diversified products criteria),[16] arguing that the products at issue are excluded from the scope of the *Order*.[17] In their March 23, 2012 Comments and subsequent submissions, the petitioners[18] claimed that the products at issue were covered by the *Order*, pointing to the scope language, the original investigation and prior ITC decisions, and the diversified products criteria.[19]

Mitsubishi Polyester Film, Inc. and SKC, Inc. filed this action to challenge several aspects of the Department's scope ruling.[20] After review, the Court sustained the Department's conclusion that the written scope language is ambiguous as to the products at issue, and ruled that the Department's delay in completing the Terphane scope review did not invalidate the Department's ruling.[21] However, the Court remanded for further analysis the Department's

[15] The first two sentences of the scope language of the orders covering PET film from Japan, Korea, India, Taiwan, Brazil, the People's Republic of China (PRC), Thailand, and the United Arab Emirates (UAE), the parts of the scope language which are relevant to the controversial issues addressed in this case, are identical. *See, e.g., Antidumping Duty Order: Polyethylene Terephthalate Film, Sheet, and Strip from Japan*, 56 FR 25669 (June 5, 1991) (*PET Film from Japan Order)*; *Antidumping Duty Order and Amendment to Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea*, 56 FR 25669 (June 5, 1991) (*PET Film from Korea Order*); *Notice of Amended Final Antidumping Duty Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Polyethylene Terephthalate Film, Sheet, and Strip from India*, 67 FR 44175 (July 1, 2002); *Notice of Amended Final Antidumping Duty Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) from Taiwan*, 67 FR 44174 (July 1, 2002), and the *Order*. *See also* Scope Ruling Memorandum at 4.
[16] *See* 19 CFR § 351.225(k)(2)
[17] *See*, *e.g.*, Terphane February 22, 2012 Scope Ruling Request.
[18] The petitioners in this scope proceeding are Mitsubishi Polyester Film, Inc., SKC, Inc. and Toray Plastics (America), Inc. (the petitioners).
[19] *See*, *e.g.*, Petitioners' March 23, 2012 Comments.
[20] *See* Scope Ruling Memorandum.
[21] *See Mitsubishi*, at 22 to 23 and 34 to 35.

finding that the products at issue were excluded from the scope of the *Order*, ruling that Department's analysis under 19 CFR § 351.225(k)(1) was unsupported by substantial evidence.[22]

The Court noted that "{w}hile the Petition and original antidumping investigation are cited at points during the Terphane Scope Ruling, it is to the purpose of summarizing parties' arguments; nowhere in the 'Analysis and Conclusions' section do they appear."[23] The Court further found that the Department did not "analyze, rebut, or otherwise consider these elements of the record under the Scope Ruling's Analysis and Conclusions section."[24] The Court ruled that "Commerce must provide further explanation for its decisions in regard to relevant (k)(1) materials in the record, including those in the Petition and original investigation which it did not analyze in the original determination, on remand."[25]

The Court further agreed with the Department that "the 'descriptions of the merchandise' in those ITC determinations, which share language with the *Order*'s scope, should be relevant to the analysis of products in the instant case."[26] However, the Court disagreed that the reason the (k)(1) factors were not explicitly mentioned in the "Analysis and Conclusions" section of the Terphane Scope Ruling Memorandum[27] was because of the Department's focus on the "descriptions of the merchandise"[28] as "the most probative and meaningful evidence to resolve scope issues under 19 CFR § 351.225(k)(1)."[29] The Court further held that the Department nowhere justified its avoidance of the Petition and original investigation under its (k)(1) analysis,

[22] *Id.* at 27 to 34.
[23] *Id.* at 27.
[24] *Id.* at 30.
[25] *Id.* at 31.
[26] *Id*.
[27] *See* Terphane Scope Ruling Memorandum, at 11 to 14.
[28] *See* 19 CFR § 351.225(k)(1).
[29] *See Mitsubishi*, at 28.

despite the Department's obligation to analyze the "descriptions of the merchandise" contained therein.[30]

However, the Court stated that the Department's statement that the second sentence exclusion "refers to a specific category of products which the ITC identified as 'equivalent PET film,'" defined by the ITC as "including DuPont's Cronar and {Kodak's} Estar products, and those products equivalent to Cronar and Estar," and its statement that Cronar and Estar "are the paradigmatic examples of films" covered by the exclusion.[31] The Court concluded that "{a} reasonable mind would understand these categorical statements to mean that, in order to qualify for the exclusion, Terphane's Copolymer Surface Films must also be equivalent PET films, or 'equivalent to Cronar and Estar.'"[32] Noting an erroneous statement by the Department that evidence on the record shows that Cronar and Estar are produced by the co-extrusion manufacturing process as the products at issue, the Court also found that it is unclear how much this mistake of facts influenced the Department's determination.[33] The Court thus concluded: "if the second sentence exclusion applies only to equivalent PET films, then Commerce would also need to determine that Terphane's Copolymer Products are equivalent PET films in order to exclude them under the second sentence; or, if Commerce does not make that determination, then to reach the same conclusion, it would need to explain how the second sentence exclusion can apply to PET films that are not equivalent."[34]

The Court further ruled that "Commerce should…clarify whether equivalent PET refers solely to those films excluded under the second sentence exclusion, or one that is a term of art in

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[30] *Id.* at 29.
[31] *See Mitsubishi*, at 31 to 32 (citing Terphane Scope Ruling Memorandum at 4, 12, and Footnote 25). *See also* The Petitioners' March 23, 2012 Comments, at 23.
[32] *Id*. at 32.
[33] *Id*. *See also* Terphane Scope Ruling Memorandum, at 11.
[34] *See Mitsubishi*, at 32.

the industry."[35] The Court further ruled that the Department "should give consideration to petitioners' intended meaning when examining a petition's description of the subject merchandise."[36] However, the Court noted that analysis under the (k)(1) factors "may not be dispositive in either direction under a reasoned analysis, but they merit consideration."[37]

Accordingly, the Court ordered the Department to "consider the (k)(1) evidence contained in the agency record that is derived from the Petition and the original investigation, per the regulation," and "if the Department determines that the (k)(1) factors are not dispositive, it shall consider the factors listed in 19 CFR § 351.225(k)(2)."[38]

On July 18, 2017, we placed the complete public version of the Petition on the record and asked interested parties for comments.[39] We received no comments on the Petition.

IV. Analysis Concerning the (k)(1) Factors

In accordance with the Court's instructions in *Mitsubishi*, we have fully considered all of the (k)(1) factors with respect to the products at issue.[40] In the original determination, the Department considered the (k)(1) factors. In addition to specifically describing several comments related to the (k)(1) factors in the sections of the Terphane Scope Ruling Memorandum entitled "Prior Determinations of the Department and the ITC" and "Argument," the Department specifically described and addressed arguments related to the Avery Dennison and Garware scope rulings. The Department also specifically addressed arguments raised by the petitioners and Terphane concerning the extent to which products covered by the first sentence of the written scope were subject to the exclusions in the second sentence of the scope. As

[35] *Id.* at 33.
[36] *Id.* at 30.
[37] *Id.*
[38] *See Mitsubishi*, at 33 to 34.
[39] *See* Memorandum, "Polyethylene Terephthalate Film, Sheet and Strip from Brazil; Remand Redetermination of Scope Review of Terphane, Inc. and Terphane, Ltda.'s "Copolymer Surface Films," July 18, 2017.
[40] *See* 19 CFR § 351.225(k)(1).

explained in more detail below, among these arguments were several which were made by the petitioners concerning the (k)(1) factors. Thus, the Department did not adequately articulate the connection between its conclusions and the evidence, arguments, and the Department's analysis concerning the Petition, the initial investigation, and the determinations of the Department (including prior scope determinations), and the ITC.[41] Therefore, the Department's fully analyzed reasoning for each (k)(1) factor follows below.

A. The Descriptions of the Products Contained in the Petition

In accordance with the Court's instructions in *Mitsubishi* to consider and explain our analysis of the descriptions of the products contained in the Petition, the initial investigation, and the determinations of the Secretary and the ITC,[42] we have examined the complete Petition, including, in particular, the "Description of the Imported Merchandise" and "Description of the Product" sections of the Petition, and continue to find that the information contained in the Petition supports the conclusion that the products at issue are outside the scope of the *Order*.

In addition to claiming in their March 23, 2012 Comments and other submissions that the products at issue were not finished, and that the layer on the products at issue was not performance-enhancing, the petitioners claimed that the written scope of the *Order* indicated that all coextruded copolymer films would be covered, regardless of the presence or thickness of any performance-enhancing coextruded layer, provided the films had no other form of qualifying off-

[41] *See* Scope Ruling Memorandum, at 5 to 11. *See also* Terphane February 22, 2012, Scope Ruling Request at Exhibit 31 (Memorandum from Holly A. Kuga to Thomas F. Futtner, entitled "Final-Scope Ruling—Antidumping and Countervailing Duty Order on Polyethylene Terephthalate Film, Sheet And Strip from India - Request by, International Packaging Films, Inc. Regarding Tracing and Drafting Film," dated April 25, 2003 (Garware Tracing and Drafting Film Memorandum) and Exhibit 30 (Letter from Avery Dennison to the Department entitled "Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) From Brazil, the People's Republic of China, Thailand, and the United Arab Emirates: Comments on the Proposed Scope of the Investigations," dated November 15, 2007).

[42] *See* 19 CFR § 351.225(k)(1).

line or non-coextruded finishing.[43] To the contrary, Terphane claimed in its February 22, 2012 Scope Ruling Request and its other submissions, that its copolymer layer satisfied the scope requirements that excluded films must be finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer, that the product at issue satisfied the thickness requirement, and further claimed that the co-extrusion manufacturing process does not render their film covered by of the scope of the *Orders*.[44]

As explained in the analysis section of the Terphane Scope Ruling Memorandum, the Department considered Terphane's and the petitioners' assertions and arguments and the factual information on the record in the Department's scope ruling, and concluded that the first sentence of the scope, that "{t}he products covered by the order are all gauges of raw, pre-treated, or primed PET film, whether extruded or co-extruded," defines the universe of products which may be subject to the *Order*. This universe of products is limited by the subsequent sentences of the scope language, and relevantly, the second sentence of the scope language: "{e}xcluded are metallized films and other finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick."

Accordingly, we found that films are not "rendered subject merchandise merely by virtue of sharing the characteristics of primed or pre-treated PET film," and that the scope language

[43] *See* Scope Ruling Memorandum, at 5 to 11 (citing Petitioners' March 23, 2012 Comments, at 2 to 8, 13, 16 to 24, 27, and 28; Petitioners' May 7, 2012 Questionnaire Response (Petitioners' May 7, 2012 QR), at 2 to 10, 16 to 28, 30 to 31, 34 to 36, 38, and 43 to 44; Petitioners' May 17, 2012 Comments, at 3 to 7, 9 to 13 to 15, 17, 20 to 22, and 26; Petitioners' June 18, 2012 Comments, at 2 to 3, and 5 to 10).

[44] *See* Scope Ruling Memorandum, at 5 to 11 (citing Terphane February 22, 2012 Scope Ruling Request, at 2 to 3, 6, 9, 10 to 15, 17 to 19, and 22; Terphane May 7, 2012 Questionnaire Response (Terphane May 7, 2012 QR), at 3 to 5, 9, 17 to 19 and 22; Terphane May 7, 2012 Comments, at 2, 6, and 9 to 10; Terphane May 17, 2012 Comments, at 4, 7, 11 to 15, and 22 to 23; and Terphane June 7, 2012 Comments, at 4, 6, and 8).

"does not indicate that all extruded and/or co-extruded films are covered, regardless of the subsequent exclusions." Further, taking into consideration all of the (k)(1) factors, we focused on the thickness of any performance-enhancing resinous or inorganic layer, and the meaning of the terms used in the second sentence of the scope language, with respect to the products at issue.

Per the Court's instructions, the Department reconsidered the description of the subject merchandise contained in the Petition. As explained above, the Department placed the original Petition on the record and solicited comments from interested parties.

The Petition describes the general category "PET film," of which subject merchandise is a part, as follows:

> The merchandise covered by this petition is all PET film imported into the United States from Brazil, China, Thailand and the UAE. PET film is imported into the United States under subheading 3920.62.00.90 of the Harmonized Tariff Schedule ('HTS'), 'Other plates, sheets, film, foil and strip, of plastics, noncellular and not reinforced, laminated, supported or similarly combined with other materials (con.): Of polycarbonates, alkyd resins, polyallyl esters or other polyesters: Of polyethylene terephthalate: Other.' In the antidumping investigation of PET film from India and Taiwan, the Department of Commerce defined the imported product as: 'all gauges of raw, pretreated, or primed PET film, whether extruded or coextruded. Excluded are metallized films and other finished films that have had at least one of their one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick.' Thus, the Commission has already defined the domestic like product, and Petitioners believe that the ITC's established definition of the domestic like product applies in this case. Consistent with the final determination in that investigation, the proposed domestic like product in this investigation excludes 'equivalent' PET film, *i.e.*, PET film with a coating of more than 0.00001 inch thick.[45]

The Petition also notes: "PET film can be made as a single layer or can be coextruded with other polymers into a multilayer film."[46] Further, the Petition states: "PET film is 'raw,

[45] *See* Petition, at 9.
[46] *Id.* at 10.

pretreated, or primed' base film at the end of the production process. Additional treatment or processing may be done to the PET film before it reaches the customer (frequently by converters), although the film may also be sold direct to end-use customers or distributors."[47]

Our further analysis of the Petition indicates that the petitioners' description of the subject merchandise in the Petition, besides re-stating the scope language used in each of the previous PET film proceedings,[48] also places special emphasis on the thickness of any coating (*i.e.*, a performance-enhancing resinous or inorganic layer): "Consistent with the final determination in that investigation, the proposed domestic like product in this investigation excludes 'equivalent' PET film, *i.e.*, PET film with a coating of more than 0.00001 inch thick."[49]

Accordingly, having found that Terphane's products are "finished films which have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer," our further analysis of the Petition provides additional support for our conclusion that Terphane's products are outside the scope of the *Orders*.

B. **Other Information from the Petition and the Investigation**

In accordance with the Court's instructions in *Mitsubishi* to take into account the descriptions of the merchandise contained in the initial investigation,[50] we have examined the other information from the investigation, including the petitioners' references to information contained in the lost sales section of the Petition itself, the petitioners

[47] *Id.* at 10 to 11.
[48] *See PET Film from Japan Order*; *PET Film from Korea Order*; *Notice of Countervailing Duty Order: Polyethylene Terephthaate Film, Sheet, and strip (PET Film) from India*, 67 FR 44179 (July 1, 2002) (*PET Film from India AD Order*); *Notice of Countervailing Duty Order: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) from India, 67 FR 44179 (July 1, 2002)* (*PET Film from India CVD Order*)*;* and *Notice of Amended Final Antidumping Duty Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) from Taiwan*, 67 FR 44174 (*PET Film from Taiwan Order*).
[49] *See* Petition, at 9. *See also* PET Film from Japan and Korea ITC final, at 6 and 15.
[50] *See* 19 CFR § 351.225(k)(1).

arguments about the model match criteria, Terphane's reporting of production and sales of copolymer films during the investigation, and the petitioners' arguments regarding the similarity of certain of the products at issue to products which the petitioners identify as subject merchandise during the investigation. Our analysis is fully explained below.

In their March 23, 2012 Comments and the their other submissions, the petitioners claimed that Terphane's co-extruded packaging films were covered by the scope of the order in part because they were co-extruded, copolymer films.[51] The petitioners claimed that the products at issue were considered within the scope at the time of the investigation.[52] In support of this argument, the petitioners claimed that they had suffered injury specifically because of the inroads made by Terphane into the packaging market with co-extruded films.[53] The petitioners noted that they complained specifically, in the "Lost Sales" section of the Petition, about Terphane's offer of a heat-sealable film, which the petitioners claim is similar to Terphane's thermo-sealable 10.96/48 product, one of the products at issue.[54]

The petitioners also pointed to the fact that they had discussed respondents' sales of co-extruded PET film to the United States in the petitioners' Model Match Comments.[55] As noted in the Terphane Scope Ruling Memorandum, the petitioners complained about inroads made by Terphane into the packaging market with co-extruded packaging films, such as the "One Side

[51] *See e.g.*, Petitioners' March 23, 2012 Comments.
[52] *See* Petitioners' May 7, 2012 QR, at 7, 16, Footnote 4, and Footnote 55, and Petitioners' March 23, 2012 Comments, at 8, 13, 19, Exhibit 2, and Exhibit 3.
[53] *See* Petitioners' May 7, 2012 QR, at 8; *see also* Petition, at 85.
[54] *See* Petitioners' May 7, 2012 QR, at 8 and Exhibit 5 (Polyethylene Terephthalate Film, Sheet, and Strip from Brazil, People's Republic of China, Thailand and the United Arab Emirates: Antidumping Duty Petition, Sept. 28, 2007)) (Petition) at 85; and Petitioners' May 17, 2012, Comments at 8.
[55] *See* Petitioners' May 7, 2012 QR, at 4, 9, and Exhibit 8 (Letter from Wilmer Hale to Carlos Gutierrez, Sec. of Commerce, Polyethylene Terephthalate Film, Sheet, and Strip ("PET Film") from Brazil, People 's Republic of China, Thailand and the United Arab Emirates: Suggested Model Match Criteria, Nov. 6, 2007) (Petitioners' Model Match Comments) at 2 to 3.

Treated Polyester Films" and "Sealphane" product lines, which include the seven products covered by Terphane's Scope Ruling Request, as well as other products not included in Terphane' Scope Ruling Request.[56] In their May 7, 2012 QR, and their other submissions, the petitioners further claimed that they intended for all of these films to fall within the scope of the *Order* and that the Department, the petitioners, and Terphane considered all of the 10.21, 10.81, 10.91, and "Sealphane" films to be subject merchandise during the investigation.[57] In their May 7, 2012 QR, and in their other submissions, citing their comments on the proposed scope in the investigation, the petitioners claimed that they manufactured films that compete directly with the products at issue, including in-scope PET film sold by Mitsubishi Polyester Film, Inc. and DuPont Teijin Films, which they claim are commercially equivalent to Terphane's 10.21 products, 10.81 products and 10.96 products.[58]

Regarding Terphane's response to the Department's antidumping questionnaire in the investigation, the petitioners also noted the Department's inclusion of a "surface treatment" model match characteristic and the Department's request for sales and other information for films having a "one side copolymer coated" "surface treatment," and Terphane's response, which reported sales and other information for Terphane's "one side corona, one side copolymer coated" films.[59] In their May 7, 2012 QR, the petitioners further noted that during the investigation, Terphane described its co-extruded films at length, and submitted a diagram of the

[56] *See* Petitioners' March 23, 2012, Comments, at Exhibits 2 and 3; Petitioners' May 7, 2012 QR, at 9 to 10; and Petitioners' Model Match Comments, at 2 to 3.
[57] *See*, *e.g.*, Petitioners' May 7, 2012 QR, at 8.
[58] *See*, *e.g.*, Petitioners' May 7, 2012 QR, at 2, 16, Footnote 4, and Footnote 55. *See also* Terephane's February 22, 2012 Scope Ruling Request, at Exhibit 30 (Pisani & Roll's November 15, 2007 Comments on the Proposed Scope of the Investigations), Petitioners' May 7, 2012, QR at Exhibit 2 (Pisani & Roll's November 15, 2007 Comments on the Proposed Scope of the Investigations), and Petitioners' May 7, 2012, QR, at Exhibit 1 (Petitioners' December 14, 2007 Scope Comments).
[59] *See* Petitioners' May 7, 2012 QR, at 3, 4, 7, 14 and Exhibit 6 (Terphane Section B Response (Jan. 15, 2008)) at B-10.

co-extruded film production process, and submitted product sheets for its 10.21, 10.81, 10.91, and Sealphane films.[60] The petitioners thus claimed that "{i}n responding to the Section B questionnaire, Terphane took it for granted that COEX films fell within the scope.[61] Finally, the petitioners noted that Terphane's Section A Response from the investigation indicated that Terphane's commercial product codes classify the products at issue as "Thin, Plain" films, not as "coated" films.[62]

In their May 7, 2012 QR the petitioners also noted that in the questionnaire response of FLEX Middle East FZE (FLEX), a producer of subject PET film in the parallel PET film form the UAE proceeding, FLEX reported producing and selling "co-extruded film for improved adhesion." The petitioners therefore claimed that in that proceeding, "Petitioners, respondents, and the Department take it for granted that co-extruded films that are commercially identical to Terphane's are covered by the scope of the order."[63]

To support their claim that pretreated or primed films are covered by the scope, the petitioners also claimed that product sheets attached to the petitioners' comments in the Department's Avery Dennison scope ruling indicate that the petitioners considered certain films manufactured by petitioner Mitsubishi Polyester Film, Inc., which the petitioners considered to be subject merchandise, were similar to the products at issue.[64] The petitioners further claimed that Avery Dennison had submitted product sheets for Toray's Lumirror 92G PS10 as an

[60] *See* Petitioners' May 7, 2012 QR, at 3
[61] Equivalent PET films, films covered by the "0.00001-inch exclusion," were included among the foreign like product in the PET film from Japan and Korea Investigations, but were excluded from the foreign like product in the PET film from India, Taiwan, Brazil, the PRC, Thailand, and the UAE investigations. Thus, the foreign like product in the PET film from India, Taiwan, Brazil, the PRC, Thailand, and the UAE proceedings are coextensive with the scope of the orders in those proceedings.
[62] *See* Petitioners' May 7, 2012 QR, at 13 and Exhibit 4 (the public version of Terphane Section A Questionnaire Response), at Exhibit 12.
[63] *See* Petitioners' May 7, 2012 QR, at 3 and Exhibit 7.
[64] *See* Petitioners' May 7, 2012 QR, at 11, Exhibit 1 and Exhibit 9 (the Department's Avery Denison Scope Ruling). *See also* Terphane Scope Ruling Memorandum, at 7.

example of films that were unquestionably covered by the scope (in contrast to the release liner at issue in its scope exclusion request). The petitioners noted that Lumirror 92G PS10, which the petitioners claimed is "practically identical" to the 10.21, 10.81, and 10.91 products covered by Terphane's February 22, 2012 Scope Ruling Request, had a "core layer" and an "adhesion layer," and was "one side modified to improve adhesion for silicon coating, and enhance adhesion with solvent and water based coatings."[65]

However, in its May 17, 2017 Comments, Terphane objected to the petitioners' claims that the Department, the petitioners, and Terphane considered the products at issue to be subject merchandise during the investigation. In its May 17, 2017 Comments, Terphane responded to the petitioners' claim that Terphane had reported coextruded copolymer packaging films among its sales of foreign like product, and that by doing so admitted that all coextruded copolymer coated films, including the products at issue, were covered by the scope. There, Terphane pointed to its 10.51 product, which coated with a copolymer other than COEX, in a layer which is less than 0.00001 inches, which Terphane sold in the home market during the investigation, and which Terphane agrees is subject merchandise.[66] Also, in its May 17, 2017 Comments, Terphane notes that the petitioners' references to the description of the co-extrusion process in Terphane's Section A response in the investigation are misleading because Terphane produces other copolymer films via the co-extrusion process, besides the products at issue, and even co-extrudes commodity films without any copolymer or performance-enhancing layers, such as commodity PET films for which virgin PET is coextruded with recycled "regrind" PET to

[65] *See* Petitioners' May 7, 2012 QR, at 16 to 17 and Avery Dennison Release Liner Comments at Attachments C through F; and Attachment D, page 1. *See also* Terphane Scope Ruling Memorandum, at 8.
[66] *See* Terphane's May 17, 2012 Comments, at 5, Footnote 15, Exhibit 1, and Exhibit 2.

encapsulate the recycled PET (for more desirable surface qualities).[67] Terphane insisted, further, in its May 7, 2012 Comments, that the petitioners never claimed during the investigation that Terphane should have reported the products at issue in this scope inquiry as subject merchandise, despite Terphane indicating it made these products.[68]

Regarding the petitioners' mention that Terphane's Section A Response from the investigation indicates that Terphane's commercial product codes classify the products at issue as "thin, plain" films, not as "coated" films, Terphane argues that although it assigned the Copolymer Surface Films the designation associated with "thin, plain" films instead of the designation associated with "thin, coated" films, Terphane insists that its commercial product codes were created for internal business purposes and were not created to relate the meaning of the terms "coated" to the terms which may be used in an antidumping proceeding.[69]

Having considered the information on the record, including information in the Petition, and Terphane's and the petitioners' arguments, as summarized above, we have concluded that the Petition and information on the record concerning the investigation do not support a finding that the products at issue are covered by the scope of the *Order*. The Petition and information from the investigation do not indicate that the petitioners intended the products at issue or copolymer coextruded films which have performance-enhancing layers greater than 0.00001 inches in thickness to be covered by the scope of the *Order*.

The petitioners' argument that Terphane offered a heat-sealable film which the petitioners claim is similar to Terphane's thermo-sealable 10.96/48 product is not compelling

[67] *See* Terphane's May 17, 2012 Comments, at 4-5. *See also* Terphane February 22, 2012 Scope Ruling Request, at Exhibit 8.
[68] *See*, *e.g.*, Terphane's May 7, 2012 Comments, at 2; Petitioners' May 7, 2012 QR, at 2, 7 to 10, and 26 to 27; Petitioners' May 17, 2012 Comments, at 8; and Petition, at 85.
[69] *See* Terphane's May 17, 2012 Comments, at 6 (citing Petitioners' May 7, 2012 QR at 13 and Exhibit 4 (Terphane's Section A Questionnaire Response) at 6 and Exhibit 14).

because the petitioners failed to provide evidence that the film in question was among the products at issue, or had the requisite performance-enhancing layer of 0.00001 inch or greater in thickness. Notably, the 10.96 Sealphane product line includes 31 coextruded copolymer products which are not subject to this scope inquiry, which Terphane never claimed are excluded from the scope of the *Order*, and which Terphane never claimed have a performance-enhancing layer greater than 0.00001 inches in thickness, while only one Sealphane product is covered by Terphane's scope ruling request.[70] Besides the fact that the film Terphane offered, which is mentioned in the Petition, was apparently heat sealable, and the fact that the "10.96/48 Sealphane" line includes a few heat sealable products, the petitioners provided no explanation of why it believes the product they had mentioned in the Petition and which Terphane offered for sale, was similar to Terphane's 10.96/48 film. Indeed, the Petition provides no further information whatsoever, beyond what is re-stated in Petitioners' May 7, 2012 QR. Therefore, the only alleged similarity between these films which record evidence appears to speak to is their heat-salability.[71] Therefore, the petitioners' complaints about a product which shares the characteristic of heat sealability with one of Terphane's products at issue is not persuasive. Heat sealability is not the only characteristic that distinguishes Terphane's products at issue from thinly-coated out-of-scope products. The fact that an allegedly in-scope product shares this one performance-enhancing characteristic does not serve to prove that the 10.96/48 product, Terphane's heat-sealable products as a whole, or any of the products at issue are covered by the scope.

Furthermore, the petitioners' statements in the Petition and during the investigation in Petitioners' Model Match Comments, and the petitioners' claim that they believed the products

[70] *See*, *e.g.*, Terphane's May 17, 2012 Comments, at 5 to 6, Footnote 15, Exhibit 1, and Exhibit 2.
[71] *See* Petitioners' March 23, 2017 Comments, at 6, and Footnote 20, Exhibit 2 and Exhibit 3.

at issue to be covered by the scope of the investigation and *Order* are not compelling. The petitioners made general statements about Terphane's and other imports of co-extruded films and packaging films in the Petition and elsewhere during the investigation, including statements that the petitioners produce products which compete with Terphane's products. However, the petitioners' statements during the investigation did not speak to the specific question of whether the products at issue were considered subject merchandise, but merely to whether co-extruded or copolymer films of any kind might be covered by the scope of the *Order*, and whether certain other coextruded copolymer products that Terphane produces, which are not the subject of this scope inquiry, might be subject to the *Order*. Furthermore, the petitioners did not specifically indicate that copolymer co-extruded films which had a performance-enhancing layer greater than 0.00001 inches in thickness, including copolymer co-extruded packaging films having the requisite layer, were covered by the scope.

By contrast, Terphane has provided evidence that it produces a much wider variety of co-extruded copolymer packaging film products, in addition to those at issue, which includes films not subject to the instant scope inquiry, and which Terphane never claimed are covered by the 0.00001-inch exclusion.[72] In fact, Terphane pointed to specific instances in the investigation where it had reported co-extruded copolymer layer films with layers thinner than 0.00001 inches and which are indisputably covered by the scope of the *Order*. Therefore, the petitioners' mention of Terphane's co-extruded copolymer packaging films as subject merchandise does not indicate that co-extruded copolymer packaging films having a performance-enhancing layer greater than 0.00001 inches thick are covered by the scope of the investigation and *Order*; that the specific models covered by this scope inquiry are covered by the scope of the investigation

[72] *See*, *e.g.*, Petitioners' March 23, 2012 Comments, at Exhibit 2, Exhibit 3, and Exhibit 4.

and *Order*; or that the petitioners were referring to these specific products at the time they made the referenced statements.

Likewise, the petitioners' argument that Terphane described its co-extruded films and co-extrusion manufacturing process in response to Department questions about subject merchandise is not compelling. As explained above, Terphane has provided evidence that it produces co-extruded copolymer films and co-extruded commodity films without copolymer or performance-enhancing layers, both of which are not the subject of the scope inquiry, and which Terphane never claimed are covered by the 0.00001-inch exclusion.[73]

Regarding the petitioners' mention that Terphane's Section A Response from the investigation indicates that Terphane's commercial product codes classify the products at issue as "Thin, Plain" films, not as "coated" films. We note that, besides relaying this fact, the petitioners do not go on to explain what significance these facts should have for our scope ruling. Terphane's description of the copolymer coextruded films in an internal commercial product code is not of overwhelming significance. Terphane's definition of what constitutes "coated" in the context of a commercial product code need not be analogous to or definitive of terms such as "finished" and "layer," as found in the scope exclusion ("finished films that have been modified by the application of performance-enhancing resinous or inorganic *layer* more than 0.00001 inches thick"). Furthermore, the Department has found, based on overwhelming evidence, that Terphane's films at issue have a co-extruded co-polymer layer, in the context of the scope of the *Order*.[74] Accordingly, we find that it would be unreasonable to infer from these facts that the

[73] *See*, *e.g.*, Terphane's May 17, 2012 Comments, at 5 Footnote 15, Exhibit 1, and Exhibit 2. *See also* Terphane Scope Ruling Request, at Exhibit 8.

[74] While the petitioners have argued that Terphane's "layer" merely represents the addition of an "additive," most of the controversies in this scope inquiry center on the nature and characteristic of this layer *vis a vis* the scope of the *Order*, not upon its existence.

products at issue, are not "coated," and therefore, do not have a "layer" and are therefore not "finished."

Regarding the petitioners' claims about the Departments inclusion of a "one side copolymer coated" surface treatment questionnaire and Terphane's reporting of a "one side corona, one side copolymer coated" surface treatment category, we find that these facts only indicate that the Department considered some copolymer products to be covered by the scope of the *Orders* and that Terphane produced certain in-scope copolymer-coated products and sold them in the home market.[75] Terphane has in fact pointed to sales in the home market of subject co-extruded copolymer films which have performance-enhancing coatings of less than 0.00001 inches. Likewise, the petitioners' reference to similar statements made by FLEX in the PET film from the UAE proceeding only show that FLEX produced and sold co-extruded films. These statements do not indicate that the Department, the petitioners, or respondents considered co-extruded copolymer films with the specific performance-enhancing, thickness, and other requisite characteristics of Terphane's products at issue to be covered by the scope.

Regarding the petitioners' arguments that Toray's Lumirror 92G PS10 and certain films manufactured by petitioner Mitsubishi Polyester Film, Inc., which the petitioners considered to be subject merchandise, were relevantly similar or identical to the products at issue, we disagree. As Terphane noted, the petitioners failed to provide relevant details about these products (which they should have, as they manufacture the products), or to explain why these products are similar or identical to the products at issue. We also note that Terphane claimed that certain of the products mentioned by the petitioners are "almost identical" to the its 10.51 product, which is not

[75] *See*, *e.g.*, Petitioners' March 23, 2012 Comments, at 5 to 6, Exhibit 2 and Exhibit 3; and Terphane May 7, 2012 QR at 6, Footnote 9, and Exhibit 4.

at issue in this scope inquiry.[76] Record evidence indicates that the 10.51 products have a "thin surface treatment."[77] Record evidence also indicates that Terphane reported in the investigation that the 10.51 products were covered by the scope of the *Order*.[78] Accordingly, the petitioners have not provided sufficient evidence to support their claim that any of the products at issue are identical or relevantly similar to films manufactured by the petitioners which the petitioners claim to be covered by the scope of the *Order*.

We likewise do not find compelling the petitioners' arguments about references made to Toray's Lumirror 92G PS10 and certain films manufactured by petitioner Mitsubishi Polyester Film, Inc. in the Avery Denison scope inquiry. Significantly, with respect to these references, other than a brief summary description, the petitioners did not provide relevant information about these products. For example, the petitioners did not provide evidence of the chemical composition or thickness of the coating for any of these films. Accordingly, without more specific descriptions or other evidence, the Department cannot rely on the petitioners' mere assertions that they are "similar" to, "practically identical" to, or have same relevant characteristics as the products in question.[79]

Furthermore, as Terphane claimed, in its May 17, 2012 Comments, the petitioners only claimed that they *believed* these products were covered by the scope of the *Order*.[80] Accordingly, we find that any similarity to the products at issue is irrelevant without further evidence that these products were properly excluded from the scope of the *Order*. We find that

[76] *See* Terphane's May 17, 2012 Comments, at 17 and Exhibit 2.
[77] *See* Petitioners' March 23, 2012 Comments, at 6 and Exhibit 2; Petitioners' May 7, 2012 QR at 13 and Exhibit 4 (the public version of Terphane Section A Questionnaire Response) at Exhibit 14; Terphane's May 17, 2012 Comments at 17 and Exhibit 2; and Petitioners' May 17, 2012 Comments at Exhibit 1.
[78] *See* Petitioners' May 7, 2012 QR, at 13 and Exhibit 4 (the public version of Terphane Section A Questionnaire Response) at Exhibit 14, Terphane's May 17, 2012 Comments, at 17 and Exhibit 1.
[79] *See* Petitioners' May 7, 2012 QR, at 11.
[80] *See* Terphane's May 17, 2012 Comments, at 17.

despite the fact that these were primed or pretreated products which were "{a}dherable {p}ackaging" films, consisting of "PET Base Film," or a "core layer" and one layer of an "Aqueous/Solvent Adherable Surface," or "adhesion layer," were "one side modified to improve adhesion for silicon coating, and enhance adhesion with solvent and water based coatings," and were described as providing "{e}nhanced adhesion of both aqueous and solvent based inks, coatings and adhesives," and "{s}ignificantly improved metal adhesion," this is not a sufficient basis upon which to conclude that these products are relevantly analogous to the products at issue.[81] Because the petitioners provided no further information about these products, it is also not clear why the petitioners might have believed, at the time of the investigation, that such films were covered by the scope of the *Orders*. It is also not clear whether the petitioners might have considered these products to be included among the category "equivalent PET films," or whether these products might have had a performance-enhancing layer which was thicker than 0.00001 inches. Therefore, without further information, it is not possible to consider whether these products are analogous to the products at issue, or what significance these products might have for this scope inquiry.

Overall, for the reasons stated above, we find that the information from the investigation supports our conclusion that the products at issue are outside the scope of the *Order*.

C. Previous Decisions of the Department

In accordance with the Court's instructions in *Mitsubishi*, to take into account the descriptions of the merchandise contained in the determinations of the Secretary,[82] we have further analyzed the relevant scope-related decisions of the Department, including those

[81] *See* Petitioners' May 7, 2012 QR, at 11.
[82] *See* 19 CFR § 351.225(k)(1).

decisions specifically addressed in the "Analysis and Conclusions" section of the Scope Ruling Memorandum.[83] Our analysis is fully explained below.

Garware Tracing and Drafting Film Scope Ruling

As explained in the Terphane Scope Ruling Memorandum, in PET film from India, the Department issued a scope ruling where it found that tracing and drafting film produced by Garware Polyester Limited (Garware) was outside the scope of the antidumping and countervailing duty orders on PET film from India.[84] In the Garware scope ruling, the Department found the tracing and drafting film had a performance enhancing, 0.00028 inch-thick, resinous, matte lacquer covering, which was applied to identification cards to allow them to retain the cardholder's signature.[85] In Terphane May 7, 2012 QR, it claimed that, like its own products, Garware's tracing and drafting film also had a performance enhancing layer more than 0.00001 inches thick.[86] However, the petitioners contended that Garware's tracing and drafting film was much different than Terphane's products, specifically that the layer on Garware's tracing and drafting film was much thicker and composed of material which was much more easily distinguishable from PET.[87]

In the analysis section of the Scope Ruling Memorandum, the Department concluded that, like the Garware tracing and drafting film, the products at issue in the Terphane scope

[83] *See* Terphane Scope Ruling Memorandum, at 11 to 14.
[84] *See* Terphane Scope ruling Memorandum, at 4 to 5, and 9, 11, and 13. *See also* Terphane Scope Ruling Request, at Exhibit 31 (Department Memorandum, "Final-Scope Ruling—Antidumping and Countervailing Duty Order on Polyethylene Terephthalate Film, Sheet and Strip from India - Request by, International Packaging Films, Inc. Regarding Tracing and Drafting Film," dated April 25, 2003 (Garware Tracing and Drafting Film Memorandum).
[85] *See* Garware Tracing and Drafting Film Memorandum, at 3 to 4. *See also* Terphane Scope ruling Memorandum, at 4 to 5, and 9, 11, and 13.
[86] *See* Garware Tracing and Drafting Film Memorandum, and Terphane May 7, 2012 QR, at 18. *See also* Terphane Scope Ruling Memorandum, at 4 to 5, and 9, 11, and 13.
[87] *See* Petitioners' May 17, 2012 Comments, at 15. *See also* Terphane Scope Ruling Memorandum, at 11 and 13.

inquiry had performance-enhancing layers more than 0.00001 inches thick.[88] The Department specifically addressed the petitioners' arguments that the performance enhancing layer on Garware's tracing and drafting film was much different from the layer on the products at issue and that the chemical used in the layer on Garware's tracing and drafting film was much different from PET, and the petitioners' argument that the performance enhancing layer on Garware's tracing and drafting film was much thicker than the layer on the products at issue.[89] The Department recognized the differences between the layers on these films and concluded that both the layer at issue in the Garware tracing and drafting film review, and the layer at issue, are performance enhancing resinous or inorganic layers. To the extent that they are both more than 0.00001 inches thick, the Department determined that further comparisons of the relative thickness of the films' respective layers were not necessary or relevant.[90]

Avery Dennison Release Liner Scope Ruling

As explained in the Terphane Scope Ruling Memorandum, during the investigations of PET film from Brazil, the United Arab Emirates, and the People's Republic of China, Avery Dennison Fasson Role North America (Avery Dennison) requested that the Department find silicon-coated release liner film, with specially cured silicon on one or both sides, which is made by an "inline process," to be outside the scope.[91] The Department decided, however, that Avery Dennison's films were covered by the scope of the investigation because there was no specific

[88] *See* Terphane Scope Ruling Memorandum, at 11 and 13.
[89] *See* Terphane Scope Ruling Memorandum, at 4 to 5, 7, 9, 11, and 13; Petitioners' May 17, 2012, Comments at 15 and 22 to 23; and Garware Tracing and Drafting Film Memorandum, at 1 and 4.
[90] The Department ultimately left to U.S. Customs and Border Protection (CBP) the question of whether Terphane can establish that the performance-enhancing resinous layer on Terphane's films is greater than 0.00001 inches in thickness. *See* Terphane Scope Ruling Memorandum, at 1 and 14.
[91] *See* Terphane February 22, 2012 Scope Ruling Request, at Exhibit 30 (Avery Dennison's November 15, 2017 Scope Comments).

language in the scope excluding products with a performance-enhancing resinous layer which was less than 0.00001 inches.

In its March 23, 2012 Comments and in its other submissions, the petitioners noted the Department's statements in the Avery Dennison release liner scope ruling that "PET base film is PET film prior to the application of any in-line coatings," and the Department's conclusion that the scope of the *Order* was not limited to "base PET film," the petitioners claimed that the Department accepted the premise that films with in-line coatings are not "finished films," and claimed that Department agreed that PET base films with in-line coatings and co-extrusions are subject PET film, by definition.[92]

The petitioners also point to Department's statement that Avery Dennison's release liner films, which is PET film covered with a silicon surface, shared "the chemical composition of PET film covered by the scope of the Orders."[93] The petitioners claimed that even if the silicon layer of Avery Dennison's release liner films had been thicker than 0.00001 inches, the Department would have come to the same conclusion. Therefore, in their May 7, 2012 QR, the petitioners claimed that the products at issue also share the chemical composition of PET film covered by the scope of the *Orders* because, while the coating on Avery Dennison's release liner film consisted of silicon, the coating on Terphane's products consists of COEX, a copolymer

[92] *See* Petitioners' March 23, 2012 Comments, at 2 to 3 and 23 and Exhibit 9 (Department Memorandum, "Antidumping Duty Investigations on Polyethylene Terephthalate Film, Sheet, and Strip (PET film) from Brazil, the People's Republic of China, Thailand, and the United Arab Emirates, A-351-841, A~570-924, A-549-825A-520-803 (investigations)," April 25, 2008 (Avery Dennison Scope Ruling Memorandum)) at 5 to 6; Petitioners' May 7, 2012 QR at 15 to 16; Petitioners' May 17, 2012, Comments at 15 and 22 to 23; and Garware Tracing and Drafting Film Memorandum at 4.

[93] *See* Memorandum, "Antidumping Duty Investigations on Polyethylene Terephthalate Film, Sheet, and Strip (PET film) from Brazil, the People's Republic of China, Thailand, and the United Arab Emirates, A-351-841, A~570- 924, A-549-825A-520-803 (investigations)," dated April 25, 2008 (Release Liner Memorandum) at 6.

which Terphane describes as being much more similar to PET, and which the petitioners describe as substantially the same as PET.[94]

In Terphane February 22, 2012 Scope Ruling Request, Terphane insisted that in the Departmnt's Avery Dennison Scope Ruling Memorandum, the Department focused on the thickness requirement of in the scope of the investigation,[95] and found that a PET Film product with a performance-enhancing resinous layer less than 0.00001 inch was within the scope, despite Avery Dennison's release liner product having been modified by the application of a performance-enhancing resinous silicone layer applied in-line.[96] In Terphane February 22, 2012 Scope Ruling Request, Terphane also claimed that it was the petitioners who stressed the importance of the of the thickness of the performance enhancing layer mentioned in the scope language as definitive the Department's Avery Dennison scope ruling.[97]

In the analysis section of the Scope Ruling Memorandum, the Department addressed the petitioners' arguments that the scope of the *Orders* is not limited to base PET film, and PET films without in-line coatings, but distinguished the products in the Department's Avery Dennison Scope Ruling from the products at issue by focusing on the fact that the performance-enhancing layer on Avery Dennison's Release Liner films were shown not to be greater than 0.00001 inches in thickness.[98] The Department also disagreed with the petitioners' argument that the Department based its decision in the Department's Avery Dennison scope ruling on the

[94] *See* Petitioners' May 7, 2012 QR at 4, 5, 16, 17, 30, 31, 34, 36, 43 and 44.
[95] The scope of the investigation remained unchanged in the scope of the *Order*.
[96] *See* Terphane February 22, 2012 Scope Ruling Request, at 25. *See also* Avery Dennison Scope Ruling Memorandum, at 5 to 6.
[97] *See* Terphane February 22, 2012 Scope Ruling Request, at 2 to 3, Exhibit 1 (Petitioners' December 14, 2007 Scope Comments (Petitioners' Release Liner Comments)) at 6, and Exhibit 30 (Avery Dennison's November 15, 2007 Scope Comments), Release Liner Memorandum at 5 to 6. *See also* Terphane Scope Ruling Memorandum, at 7 to 8.
[98] *See* Terphane Scope ruling Memorandum, at 13 (citing the Department's Avery Dennison Scope Ruling Memorandum, at 5 to 6).

in-line co-extrusion production method, finding that the thickness of the performance-enhancing layer was of central importance in the Department's Avery Dennison scope ruling.[99]

We continue to find that the Department's decision in the Garware Tracing and Drafting Film Memorandum and the Department's Decision in the Department's Avery Dennison Scope Ruling Memorandum support the conclusion that the products at issue are not within the scope of the *Orders*.

D. Decisions of the International Trade Commission

In accordance with the Court's instructions in *Mitsubishi* to consider the descriptions of the merchandise contained in the determinations of the ITC,[100] we have further analyzed the ITC's ruling in its original investigation on material injury and the previous decisions of the ITC. Our analysis is fully explained below.

As explained in the Terphane Scope Ruling Memorandum, the exclusion described in sentence two of the scope regarding "other finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick" refers to a specific category of products which the ITC identified in the PET film from Japan and Korea ITC Final, the PET Film from India and Taiwan ITC Final, the PET Film From India and Taiwan Staff Report, and the PET film from Brazil, Thailand, and the UAE ITC Final, as "equivalent PET film."[101]

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[99] *Id*.

[100] *See* 19 CFR § 351.225(k)(1).

[101] *See, e.g.*, Polyethylene Terephthalate Film, Sheet, and Strip from Japan and the Republic of Korea: Determinations of the Commission in Investigations Nos. 731-TA-458 and 459 (Final) Under the Tariff Act of 1930, Together With the Information Obtained in the Investigations, USITC Pub. No. 2383 (May 1991) (the PET Film Form Japan and Korea ITC Final) at 6 to 8, 12 to 16, 42; Polyethylene Terephthalate Film, Sheet, and Strip From India and Taiwan Investigations Nos. 701-TA-415 and 731-TA-933-934 (Final), USITC Publication No. 3518 (June 2002) (the India and Taiwan ITC Final) at 2, 4 to 6 and 10; PET Film from India and Taiwan, Staff Report to the Commission Investigation Nos. 70 1-TA-415 and 731-T A-933-934 (Final), (May 28, 2002) (the PET Film From India and Taiwan Staff Report); and Polyethylene Terephthalate Film, Sheet, and Strip from Brazil, China, Thailand,

As further explained in the Terphane Scope Ruling Memorandum, in the PET film from Japan and Korea Final, the ITC defined "equivalent PET film" as including DuPont's Cronar and Kodak's Estar products, and those products equivalent to Cronar and Estar: "As a secondary argument, some parties asserted that any single like product must be broader than Commerce's scope and include PET films that are thickly coated during the production process, such as Cronar®, Estar®, and other PET film equivalent to Cronar® and Estar® (hereinafter collectively referred to as equivalent PET film)."[102] The PET film from Japan and Korea Final also states: "{a}t the end of the production process, equivalent PET film is physically distinct from other PET film because it has at least one of its surfaces coated with a resinous layer more than 0.00001 inch thick."[103] Further, as noted in the Terphane Scope Ruling Memorandum, both parties seem to accept that Cronar and Estar are the paradigmatic examples of films covered by the so-called "0.00001-inch exclusion."[104]

The PET film from Brazil, Thailand, and the UAE Final further describes "equivalent PET film" as "thickly coated during the production process with a resinous layer more than 0.00001 inch thick."[105] The PET film from Brazil, Thailand, and the UAE Final also explains: "equivalent PET film differs from PET film due to its 'thick functional coating on one or both sides,' which alters the product's "surface physical properties."[106] The PET film from Brazil, Thailand, and the UAE Final further explains: "{t}he Commission has defined equivalent PET

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and the United Arab Emirates, Investigation Nos. 731-TA-1131-1134 (Final), USITC Pub. No. 4040 (October 2008) (the PET Film from Brazil, Thailand, and the UAE ITC Final) at 6, 12, I-13 to I-4, I-8, I-13 to I-14. *See also* Scope Ruling Memorandum, at 4.

[102] *See* the PET Film from Japan and Korea ITC Final, at 6.

[103] *Id*., at 15

[104] *See* Petitioners' March 23, 2012 Comments, at 24; Terphane May 7, 2012 QR, at 11; and Petitioners' June 18, 2012 Comments, at 6.

[105] *See* PET Film from Brazil ITC Final, at Footnote 7 (Page I-3).

[106] *Id.,* at I-13.

film as PET film to which has been applied a coating of more than 0.00001 inch thick. Due to these enhanced physical properties, such as barrier and heat sealability,[107] producers sell equivalent PET film for more specific applications as compared to the more general uses of PET film."[108] The PET film from Brazil, Thailand, and the UAE Final goes on to explain equivalent PET films have "specific maker unique coatings … {that are} specifically designed for particular end-use applications."[109]

As explained in the Terphane Scope Ruling Memorandum, in its March 23, 2012 Comments, the petitioners claimed that equivalent PET film is produced exclusively off-line or on dedicated machinery.[110] The petitioners also stressed that equivalent PET films are finished films with thick, value-added coatings for downstream, highly specialized end uses like graphics.[111] As further explained in the Terphane Scope Ruling Memorandum, the petitioners noted that by explaining in the ITC PET Film from Brazil Final, that equivalent PET films are films that undergo post-production manufacturing, or manufacturing on dedicated machinery, the ITC indicated that equivalent PET film excludes Terphane's films, which are produced in an in-line co-extrusion process, and according to the petitioners, not on dedicated machinery.[112] Indeed, the PET film from India and Taiwan ITC Final also states that "PET film that is coated

[107] In the Terphane Scope Ruling Memorandum, the Department noted the specific performance enhancing capabilities of Terphane's products, including, for some products, heat salability, which the Department did not consider a necessary or typical feature of all types of equivalent PET film, but which record evidence shows, is a performance-enhancing feature of some types equivalent PET films. Furthermore, contrary to the interpretation that equivalent PET films are limited to films which are identical to Cronar and Estar, there is no record evidence that Cronar and Estar are heat sealable. *See*, *e.g.*, Terphane's June 7, 2012 Comments at Exhibit 3; and Terphane May 7, 2012 QR at Exhibit 7.
[108] *See* PET Film from Brazil ITC Final, at I-13.
[109] *Id*.
[110] *See*, *e.g.*, Petitioners' March 23, 2012 Comments, at 3, 22, 24, 27 to 28; Petitioners' May 7, 2012 Comments, at 5, 18, 28 to 31, 35 to 36, 39, 43 to 44; and Petitioners' May 17, 2012 Comments, at 6; Petitioners May 18, 2012 Comments at Footnote 16 (page 6); Petitioners' June 18, 2012 Comments at 5 to 6; and Scope Ruling Memorandum, at 9.
[111] *See*, *e.g.*, Petitioners' March 23, 2012 Comments, at 3 and 24; and Scope Ruling Memorandum, at 9.
[112] *See*, *e.g.*, Petitioners' May 7, 2012 QR, at 18; and Scope Ruling Memorandum, at 9.

to less than {0.00001-inch} thickness is almost always made in a single in-line production process, while equivalent PET film is made either by applying the thicker coating in a separate offline process…or in dedicated facilities in which the line moves very slowly to allow for the thicker coating."[113]

In Terphane February 22, 2012 Scope Ruling request, however, Terphane claimed that in the India and Taiwan Staff Report, the ITC explained that while some companies that produce equivalent PET film apply the performance-enhancing layer in a separate step using different equipment (off-line), other companies elect to apply the layer as part of a continuous in-line process during the production of the PET film.[114] In its May 7, 2012 Comments, Terphane contended that the scope language does not reference the production methods used to manufacture non-subject PET film (*i.e.*, equivalent PET film).[115] In its May 7, 2012 Comments, Terphane claimed that the petitioners could have submitted scope language in the Petition which excluded only PET film with coatings applied through an off-line process, but chose not to, ensuring that films with performance-enhancing coatings applied through an in-line process would also be excluded.[116] In its May 7, 2012 Comments, Terphane further claimed that the scope of an order should be interpreted in light of the petition and the investigation findings, but "the cornerstone" remains the language of the order itself.[117] Further, in its May 7, 2017

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[113] *See* PET film from India and Thailand ITC Final, at 5.
[114] *See* Terphane Scope Ruling Request, at 22 (citing the PET Film from Brazil Thailand, and the UAE Staff Report at I-11 to I-12).
[115] *See*, *e.g.*, Terphane's May 7, 2012 Comments, at 9. *See also* Terphane Scope Ruling Memorandum, at 10.
[116] *Id*.
[117] *See* Terphane's May 7, 2012 Comments, at 9 to 10 (citing *Constantine N. Polites v. United States*, 780 F. Supp. 2d 1351, 1357 (CIT 2011) at 12, where the CIT states that "the Department has a preference for relying on physical characteristics, as opposed to end-use, when determining the scope of product coverage" (citing *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 72 FR 36663 (July 5, 2007); *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 72 FR 36668 (July 5, 2007) (initiation of CVD investigation)); and *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002)). *See also Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001).

Comments, Terphane noted that the Department generally relies on physical characteristics rather than end-use applications when interpreting the scope of an antidumping duty order.[118]

Also, as explained in Terphane May 7, 2012 QR, Kodak's website indicates that, as of April 12, 2012, Estar was produced though an in-line production process: "What differentiates Kodak from other polyester manufactures is our ability to coat multiple layers in-line as the polyester is manufactured."[119] However, there is no information on the record to indicate whether this process is the same process used during the PET film from Japan and Korea Investigation, when the ITC identified them as the paradigmatic examples of equivalent PET films, whether this production process involved dedicated machinery, or whether this production process has changed since the Japan and Korea Investigations. Nevertheless, the ITC's description of the evidence in the Japan and Korea Investigations strongly implies that this production process did involve either off-line processing or in-line processing on dedicated machinery at the time of the Japan and Korea investigations.

Discussing its production process for its "copolymer surface films," Terphane explains in its February 22, 2012 Scope Ruling Request that "{e}quivalent PET Film {*sic.*} products can be made by applying a performance-enhancing layer via post-processing extrusion coating, post-processing gravure coating, in-line extrusion coating, in-line gravure coating, or co-extruded coating," and that "Terphane Inc. and Terphane Ltda. use proprietary production technology to produce their Copolymer Surface Films with a performance-enhancing resinous layer {through co-extrusion}."[120] In Terphane February 22, 2017 Scope Ruling Request, Terphane further

[118] *See* Terphane's May 7, 2012 Comments, at 10 (citing *King Supply Co., LLC v. United States* (where the court found that "end-use restrictions do not apply to AD orders unless the AD order at issue includes clear exclusionary language")).
[119] *See* Terphane May 7, 2012, QR, at 11 and Exhibit 5.
[120] *See* Terphane February 22, 2012 Scope Ruling Request, at 8.

explains that it "makes PET film products and Equivalent PET Film products by coextruding resin {in multiple layers} pursuant to Terphane's proprietary 'recipe' for each product," resulting in different performance characteristics, depending on the resins used. In the case of its copolymer surface films, the performance-enhancing resinous "COEX" layer is co-extruded along with PET resin to form the film.[121] Further, Terphane does not indicate that the copolymer surface film products at issue are produced on dedicated machinery.[122]

However, while we look to the (k)(1) factors to clarify ambiguities in the written scope language, even in cases where consideration of the (k)(1) factors or diversified products criteria are necessary, the language of the order is given primary consideration in the Department's scope Determinations.[123] In this case, we sought to clarify ambiguities in the meaning of the written scope language itself. Thus, considerations of, for example, the petitioners' arguments concerning the historical production process of equivalent PET film were important, but because the scope does not include language specifying any particular production processes which must be used to produce films covered by the so-called "0.00001-inch exclusion," they were not the focus of our analysis.

Moreover, the PET Film from Brazil, Thailand, and the UAE ITC Final gives primary emphasis to the thickness of the performances enhancing layer.[124] The PET Film from Brazil,

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[121] *See*, *e.g.*, Terphane February 22, 2012 Scope Ruling Request, at 6 and 9-10.

[122] *Id.*, at 7 ("Both Terphane Inc. and Terphane Ltda. produce PET film, Equivalent PET Film, and other film products at their respective production facilities in New York and Brazil. In both of these facilities, Terphane makes PET film products and Equivalent PET Film products by coextruding resin through [ ] Resins are extruded through [ ] pursuant to Terphane's proprietary 'recipe' for each product. The resins can be [ ] for different products. [ ] have different performance characteristics, depending on the resins used.").

[123] *See* Terphane's May 7, 2012 Comments at 9; and *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002) (*Duferco Steel, Inc. v. United States*) (citing *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001).

[124] *See* PET Film from Brazil, Thailand, and the UAE ITC Final at I-3 ("Equivalent PET film is PET film that is thickly coated during the production process with a resinous layer more than 0.00001 inch thick (*e.g.*, Cronar® and

Thailand, and the UAE ITC Final also describes subject PET films in terms of the 0.00001-inch requirement: "{p}roducers and customers view{both subject commodity and subject specialty PET films with more advanced specialized performance-enhancing coatings, including treatments applied to the base treatments of the film, untreated base films and base films with very simple coatings} as products along the same continuum. They all involve the same base PET film containing the same essential product characteristics, as well as coatings that are less than 0.00001 inches in thickness."[125]

The PET Film from Japan and Korea ITC Final also highlights the central importance of the thickness of the performance-enhancing layer.[126] The PET Film from India and Taiwan ITC Final further echoes this emphasis on the thickness requirement.[127] In fact, the PET Film from India and Taiwan ITC Final indicates that the "only difference" between PET films and equivalent PET films is the thickness of the performance-enhancing layers: "{v}iewed in one

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Estar®)"), I-8: ("DuPont Teijin also converts subject base PET film offline at another location into non subject {*sic.*} 'equivalent PET film' having coatings exceeding 0.254 microns (0.00001 inch; ca. 1 gauge) and sells the value added film to downstream end users"), and I-13 ("{t}he Commission has defined equivalent PET film as PET film to which has been applied a coating of more than 0.00001 inch thick").

[125] *See* PET Film from Japan and Korea ITC Final, at 15.

[126] *Id.*, at 6 ("{a}s a secondary argument, some parties asserted that any single like product must be broader than Commerce' scope and include PET films that are thickly coated during the production process, such as Cronar, Estar, and other PET film equivalent to Cronar and Estar (hereinafter collectively referred to as equivalent PET film)"), 15 ("At the end of the production process, equivalent PET film is physically distinct from other PET film because it has at least one of its surfaces coated with a resinous layer more than 0.00001 inch thick"), and 41 ("Cronar and Estar are specialized PET films that are outside the scope of the Commerce Department's investigation because of the amount of coating applied during the production process.").

[127] *See* India and Taiwan ITC Final, at 4 ("{w}e considered whether to include "equivalent" PET film (that is, PET film with a coating of more than 0.00001 inch thick) in the definition of the domestic like product," and "{i}n {the investigations of PET from From Japan and Korea}, the Commission's definition of the domestic like product included PET films that are thickly coated during the production process, such as Cronar®, Estar®, and other PET film equivalent to Cronar® and Estar®"), 5 ("The thicker coatings on equivalent PET film give the film distinct physical characteristics" and "The evidence in the record of these investigations indicates that producers and purchasers of PET film perceive film with thicker and thinner coatings (with one gauge as the dividing line) as separate products."), and Footnote 16 ("Witnesses for the Indian respondents explained that the thinner coatings 'are functional coatings that allow you to do something else to the surface of the film,' while the thicker coatings 'are for specific properties such as increased barrier properties, improvement where those in-line properties [ ] are not going to do that.'").

way, the only difference in physical characteristics between PET film that has been coated and equivalent PET film is the thickness of the film's coating—film with a coating more than 0.00001 inch ("one gauge") thick is considered to be equivalent PET film,"[128] The PET Film from India and Taiwan ITC Final further indicates that there is a "bright line" distinguishing films with 0.00001-inch performance-enhancing coatings and films with thinner coatings: "testimony at the hearing in these investigations indicated that there is a bright line between films that are coated with a thickness of less than {0.00001 inch} and those that receive a thicker coating,"[129]

The PET Film From India and Taiwan Staff Report further emphasizes the importance of the thickness of the performance-enhancing layer in distinguishing subject PET film from equivalent PET film: "PET film may or may not be coated with a performance enhancing resinous or inorganic coating. Such coatings add valuable characteristics such as oxygen or moisture barrier, sealability, and photographic adhesion. The only physical distinction between PET film and equivalent PET film is the thickness of the coating-if it is 0.00001-inch thick or more, it is no longer considered PET film (the subject product) and instead is considered to be equivalent PET film."

The PET film from Japan and Korea ITC Final also places significant emphasis on the capabilities provided, specifically, by the thickness of the performance enhancing layer of equivalent PET films.[130] The PET Film from India and Taiwan ITC Final similarly describes the

[128] *See* PET Film from India and Taiwan ITC Final, at 5.
[129] *Id*.
[130] *See* PET Film from Japan and Korea ITC Final, at 5 ("At the end of the production process, equivalent PET film is physically distinct from other PET film because it has at least one of its surfaces coated with a resinous layer more than 0.00001inch thick. We find that equivalent PET film is a particularized type of PET film destined for the graphics market that contains the essential characteristics discussed above common to all PET film, in addition to its specialized adhesive characteristics.").

performance capabilities of equivalent PET film in reference to the thickness of the film's performance-enhancing layer.[131] Thus, our examination of the ITC report confirms that the existence and thickness of the performance-enhancing resinous or inorganic layer is of overwhelming importance.

In addition, we find that there is nothing in the written scope of the order or in our analysis of the (k)(1) factors which would lead to the conclusion that a particular production process is necessary for a product to be equivalent PET film, provided the product in question shared the physical, chemical, and performance characteristics of equivalent PET film. Thus, we find that the production processes which may have been used to produce Cronar and Estar are not central to our analysis, and may not properly supersede our analysis of the physical chemical, and performance properties of equivalent PET film, as so described in the written scope of the *Order*, and as further described in the Petition, the during the investigation, and by the ITC. To be clear, we find differences in production processes or methods that do not yield differences in physical characteristics to be an insufficient basis for treating products differently for purposes of applications of the dumping laws.

Confirming this interpretation, the ITC's references to the production processes used to manufacture equivalent PET film are often made specifically in reference the processes technologically necessary to manufacture the 0.00001-inch thick performance-enhancing layer: "PET film that is coated to less than {0.00001-inch} thickness is almost always made in a single in-line production process; whereas equivalent PET film is made either by applying the thicker

[131] *See* PET Film from India and Taiwan ITC Final, at 5 ("PET film tends to be a more general purpose product, while the addition of coatings on equivalent PET film means that it is sold to more specific end-use markets."), and Footnote 16 ("Witnesses for the Indian respondents explained that the thinner coatings 'are functional coatings that allow you to do something else to the surface of the film,' while the thicker coatings 'are for specific properties such as increased barrier properties, improvement where those in-line properties [ ] are not going to do that'.…The witnesses characterized film with thinner and thicker coatings as 'distinctly different,'").

coating in a separate offline process…or it is made in dedicated facilities in which the line moves very slowly to allow for the thicker coating." Thus, the ITC appears not to be stating that any particular production processes is necessary for a film to be considered equivalent PET film, but rather that such productions processes were considered, at the time, technically necessary to produce the physical properties of equivalent PET film, and specifically to apply the requisite 0.00001-inch performance-enhancing layer. Moreover, we note that the language which describes equivalent PET film as being manufactured on dedicated machinery appears in the section of the PET Film From Japan and Korea ITC Final concerning the universe of foreign like products to be used for price comparison purposes, and pursuant to this purpose, to differentiate equivalent PET film products from subject PET film products: "in contrast to the production of other PET film, the majority of U.S. producers of equivalent PET film have dedicated facilities, machinery, and equipment for this product."

It is clear from the context and these statements' place in the PET Film from Japan and Korea ITC Final that these statements were not made for the purposes of defining the scope of the Japan and Korea orders,[132] much less for the purposes of defining the scope in terms of a specific range of production processes. Thus, we find that these statements by the ITC in the earlier investigations of PET film from Japan and Korea, referenced in the later PET Film from India and Taiwan ITC Final, and in the PET Film from Brazil, Thailand, and the UAE ITC Final are descriptive, not definitive or dispositive, and, thus, we conclude that it is not reasonable to interpret these statements in such a way as to necessarily contradict a plain reading written scope of the *Order* or to give these statements such weight as to supersede the plain meaning of the scope language.

[132] *See PET Film from Japan Order* and *PET Film from Korea Order*.

Further, the PET Film from Japan and Korea ITC Final describes the production processes and equipment used to produce subject PET film and equivalent PET film as being substantially the same: "We determine that the production processes and equipment for other PET film and equivalent PET film are substantially the same."[133] The PET Film from India and Taiwan ITC Final mirrors this assessment: "Some of the basic production processes and equipment used to make PET film and equivalent PET film are substantially the same."[134] Thus, it would be unreasonable to give predominant weight to a difference in the production processes between equivalent PET films and subject PET films which the ITC does not indicate is necessarily definitive of equivalent PET film, nor to a distinction between production processes which the ITC itself describes as not substantive.

Further, we note that the PET Film from India and Taiwan ITC Final makes it clear that the specialized production processes used to produce equivalent PET film were described not primarily as necessary characteristics in and of themselves, but rather as technological requirements which were generally necessary at the time to produce the films with the sufficiently thick performance-enhancing coatings and other required physical characteristics.[135]

For the reasons stated above, we continue to find that the decisions of the ITC, taken as a whole, support the conclusion that the products at issue are within the scope of the *Orders*.

[133] *See* PET Film from Japan and Korea ITC Final, at 16.
[134] *See* India and Taiwan ITC Final, at 5.
[135] *Id.*, at 5 ("testimony at the hearing in these investigations indicated that there is a bright line between films that are coated with a thickness of less than one gauge and those that receive a thicker coating. The thicker coatings on equivalent PET film give the film distinct physical characteristics….PET film that is coated to less than one gauge thickness is almost always made in a single in-line production process; whereas equivalent PET film is made either by applying the thicker coating in a separate offline process (as occurs at Dupont-Teijin Films, for example), or it is made in dedicated facilities in which the line moves very slowly to allow for the thicker coating").

V. The Court's Other Specific Directives

Regarding the Court's statement "if the second sentence exclusion applies only to equivalent PET films, then Commerce would also need to determine that Terphane's Copolymer Products are equivalent PET films in order to exclude them under the second sentence; or, if Commerce does not make that determination, then to reach the same conclusion, it would need to explain how the second sentence exclusion can apply to PET films that are not equivalent,"[136] we find that equivalent PET film is a category of PET films defined under the *Order* as finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick. Equivalent PET films are further described by the ITC as "PET films that are thickly coated during the production process, such as Cronar®, Estar®, and other PET film equivalent to Cronar® and Estar®,"[137] PET film which "has at least one of its surfaces coated with a resinous layer more than 0.00001 inch thick,"[138] and PET films which are "thickly coated during the production process with a resinous layer more than 0.00001 inch thick."[139] The ITC provides extensive further details about the typical production processes, characteristics, interchangeability, etc. of equivalent PET films, and provides the examples of DuPont's Cronar and {Kodak's} Estar products in the PET film from Japan and Korea ITC final the PET film from India and Taiwan ITC Final, the PET film from India and Taiwan ITC Staff Report, and the PET film from Brazil, PRC, Thailand, and UAE ITC final. However, we find the ITC's statements descriptive of the category of films defined in the scope language and indeed in the scope language of the previous antidumping and countervailing duty orders on PET film from Japan and Korea, and PET film from India and

[136] *See Mitsubishi*, at 32.
[137] *See* PET Film from Japan and Korea ITC Final, at 6 to 7.
[138] *Id*., at 15.
[139] *See* PET Film from Brazil ITC Final, at Footnote 7 (Page I-3).

Taiwan. Taken collectively, the ITC's statements about equivalent PET film form a more complete picture of the characteristics and range of products defined by the scope language. However, we do not find that such descriptions should be read in a way as to contradict the scope language or in way which supposes a category of "equivalent PET films" which are in the scope, or a category of inscope films which are supposed to be "equivalent PET films."[140]

Regarding the Court's statement "Commerce should…clarify whether equivalent PET refers solely to those films excluded under the second sentence exclusion, or one that is a term of art in the industry." All available evidence points to the conclusion that the term "equivalent PET film" is not an industry term of art, as there is no evidence of the phrase being used prior to its use in the Japan and Korea investigation, where it first appears on the record in the Japan and Korea ITC Final. In the Japan and Korea ITC Final, the phrase "equivalent PET films" was clearly used to mean films "other finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick,"[141] including, as the paradigmatic examples, Cronar and Estar, as well as "other PET film equivalent to Cronar and Estar."[142]

VI. Results of the Department's Analysis of the (k)(1) Factors

We determine that the (k)(1) factors are dispositive as to the question of whether the products at issue are covered by the scope of the *Order*. A consideration of the written scope of

[140] *See* Terphane Scope Ruling Memorandum, at 4 ("The exclusion described in sentence two of the scope regarding "other finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick" refers to a specific category of products which the ITC identified as "equivalent PET film."), Footnote 14 (Page 3).
[141] *See*, *e.g.*, the *Order*. *See also* PET Film from Japan and Korea ITC Final, at 6.
[142] The following statement of in the PET Film From Japan and Korea ITC Final (in May 1991) is the first use of the term "Equivalent PET Film" in any of the published documents in these proceedings: "As a secondary argument, some parties asserted that any single like product must be broader than Commerce's scope and include PET films that are thickly coated during the production process, such as Cronar®, Estar®, and other PET film equivalent to Cronar® and Estar® (hereinafter collectively referred to as equivalent PET fi1m)." *See* PET Film from Japan and Korea ITC Final, at 6 to 7.

the *Order* and all of the (k)(1) factors confirm that the products at issue are not covered by the scope of the *Order*. Accordingly, an analysis of the diversified products criteria is not warranted.

VII. Comments on the Draft Remand Results

Terphane's Comments

We timely received comments from Terphane, in which it identified a minor typographical error in the draft remand redetermination.[143] Terphane argued that the sentence in the draft remand redetermination reading, "The fact that an allegedly in-scope product shares this one performance-enhancing characteristic does not serve to prove that the 10.96/48 product, Terphane's heat-sealable products as a whole, or any of the products at issue are outside the scope," should have stated, "The fact that an allegedly in-scope product shares this one performance-enhancing characteristic does not serve to prove that the 10.96/48 product, Terphane's heat-sealable products as a whole, or any of the products at issue are covered by the scope." We agree that the sentence in the draft remand redetermination contained an inadvertent typographical error, which we have corrected, above.[144]

The Petitioner's Comments

- The draft remand determination is unsupported by substantial evidence because it fails to articulate a rationale for finding that Terphane's films are dispositively outside the scope, fails to identify any evidence that dispositively resolves the interpretive question facing it on remand or supports its preliminary conclusion that Terphane's Films are out-of-scope, and fails to discuss several pieces of evidence that also support Petitioner's interpretation of the scope language.[145]
- The draft remand redetermination ignores or misinterprets evidence from the Petition and the prior determinations of the ITC which indicate that Terphane's films are dispositively within the scope.[146]
- The Department is charged on remand with resolving the question of how the phrase "other finished films that have had at least one of their surfaces modified by the

[143] *See* Terphane's Comments.
[144] *See* page 16, above.
[145] *See* Petitioner's Comments at 2 and 7 to 8.
[146] *Id.*

application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick" from the exclusion included in the second sentence of the scope language can apply to a coextruded film.[147]

- The Department is incorrect to "find that there is nothing in the written scope of the order or in our analysis of the (k)(1) factors which would lead to the conclusion that a particular production process is necessary for a product to be equivalent PET film, provided the product in question shared the physical, chemical, and performance characteristics of equivalent PET film."[148]
- Petitioners note the Department's statement "To be clear, we find that differences in production processes or methods that do not yield differences in physical characteristics to be a sufficient basis for treating products differently for purposes of applications of the dumping laws," and argue that this statement supports their own position.[149]
- The exclusion in the second sentence of the scope language applies to "finished films that have had at least one of their surfaces modified…" Co-extrusions come into being simultaneously with PET film, so the exclusion included in the second sentence of the scope language describes post-extrusion layers, not co-extrusions.[150]
- In *Mitsubishi*, the Court found that the above interpretation of the scope language "is not unreasonable" but also "not unambiguous." The Department must resolve this ambiguity on remand.[151]
- The Department's regulations permit it to issue a scope ruling under 19 CFR § 351.225(k)(1) only if the (k)(1) evidence "dispositive{ly}" resolves any relevant ambiguity. Otherwise the Department must proceed to an analysis under 19 CFR § 351.225(k)(2).[152]
- The only reasonable way to read the descriptions of the subject merchandise contained in the petition is that they indicate dispositively that the second sentence exclusion cannot apply to coextruded layers. This evidence does not indicate that Terphane's films are out of scope.[153]
- The Department's own interpretation of the Petition is consistent with the petitioners' interpretation. The Department states that the Petition "places special emphasis on the thickness of any coating," but the petitioners do not contest the claim that a post-extrusion coating must be greater than 0.00001 inches.[154]
- The Draft Remand Redetermination discusses several pieces of evidence from the initial investigation, and finds that they "do not support a finding" that Terphane's Films are subject to the *Order*. However, the Draft Remand Determination does not identify any evidence from the initial investigation which, in its view, indicates dispositively that Terphane's Films are not subject to the *Order*.[155]

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[147] *See* Petitioner's Comments at 2 to 3.
[148] *Id.* at 3 and footnote 6.
[149] *Id.* at 3 and footnote 7 (citing Draft Remand Determination at 34). *See* also page 34, above.
[150] *Id.* at 3 to 4.
[151] *Id.* at 4.
[152] *Id.* at 5.
[153] *Id.*
[154] *Id.*
[155] *Id.*

- The Draft Remand Determination fails to discuss certain evidence confirming Petitioner's interpretation of the scope language, including Terphane's identification of co-extrusion as one of the "three basic stages" of the PET film production process, or Terphane's inclusion of line items for "COEX" labels in its section D questionnaire response from the investigation, the ITC's references to Petitioner's statements in the investigation that "the manufacturing processes of PET film and equivalent PET film differ dramatically," or Terphane's decision not to oppose Petitioner's definition of equivalent PET film in the ITC investigation (which is consistent with Petitioner's position in the instant scope proceeding).[156]
- The Garware and Avery Dennison scope rulings both involve films that were not coextruded, and, thus, they do not dispositively indicate whether the second sentence exclusion can apply to coextruded layers. Yet, the Draft Remand Redetermination does not attempt to demonstrate otherwise.[157]
- The only way to read the descriptions of the subject merchandise contained in the ITC's determination is that they indicate dispositively that the second sentence exclusion cannot apply to coextruded films, and that Terphane's films are out-of-scope.[158]
- In the Department's view, the ITC's prior determinations contain "descriptive" statements indicating that the second sentence exclusion does not apply to films, like Terphane's, which are not produced through off-line coating or on dedicated machinery. By this admission, it is impossible for the Department to reasonably conclude that Terphane's films are out-of-scope.[159]
- The Draft Remand Redetermination fails to identify any evidence that dispositively resolves the interpretive question facing it on remand (whether a co-extruded film qualifies for the second sentence exclusion) in a manner that supports its finding that Tephane's films are out-of-scope. The Draft Remand Redetermination doesn't even mention the term "dispositive" in 19 CFR 351.225(k)(1).[160]
- The fact that the Petition states, for example, that "PET film {*i.e.* subject merchandise} can be made as a single layer or can be coextruded with other polymers into a multilayer film," indicates dispositively that whether a film is coextruded is irrelevant to whether it is in scope.[161]
- The first sentence of the Petition's scope language ("the products covered by these investigations are all gauges of raw, pre-treated, or primed PET Film, *whether extruded or co-extruded.*[162]) indicates that PET film is in-scope, regardless of whether it is extruded or coextruded, and co-extrusion is irrelevant to the scope determination.[163]
- The Petition states "PET film is 'raw pretreated, or primed' base film at the end of the production process. Additional treatment or processing may be done to the film before it reached the customer (frequently by converters), although the film may also be sold

[156] *Id.* at 5 to 6 (citing the PET Film from Brazil, Thailand, and the UAE Final at I-13 to I-14).
[157] *See* Petitioner's Comments at 6 to 7.
[158] *Id.* at 7.
[159] *Id.*
[160] *Id.*
[161] *Id.* at 8 (citing Petition at 10).
[162] *Id.*
[163] *Id.*

direct to end-use customers or distributors." Therefore, the Petition draws a distinction between PET film as it exists at the end of the production process, after extrusion and co-extrusion, when films is raw, pre-treated, or primed, but before and PET film as it reaches the customer, by which time post-extrusion coating may have been applied in an additional step. The only reasonable interpretation is that the second sentence exclusion cannot apply to coextruded layers, but only to post-extrusion coatings. Otherwise, the Petition would not have stated that co-extrusion is part of the production process for subject merchandise, which occurs prior to "additional treatment or processing."[164]

- The descriptions of the merchandise contained in the ITC's determinations indicate that it is technologically impossible to manufacture equivalent PET film (*i.e.*, merchandise failing under the second sentence exclusion), except through off-line coating or dedicated machinery. Accordingly, the descriptions of the merchandise contained in the ITC's determination indicate dispositively that Terphane's films do not fall under the second sentence exclusion.[165]
- The of PET film from Brazil, Thailand, and the UAE ITC Final describes the manufacturing process of subject PET film and equivalent PET films" differing dramatically," notes that equivalent PET film producers have separate "coating stations," and "treatment stations" that one manufacturer manufactured equivalent PET film by applying coatings "off-site" or "off-line" from the machine used to produce the PET film substrate in a "secondary" off-line coating procedure and/or produced equivalent PET film on "dedicated assets," in part to avoid contamination.[166] Certain of Terphane's co-extruded films at issue, specifically 10.21, 10.81, and 10.91 films, were produced and marketed at the time of the ITC investigation of PET film from Brazil, Thailand, and the UAE. Therefore, Terphane's co-extruded films at issue cannot be excluded inter the second sentence exclusion (*i.e.*, as "equivalent PET film).[167]

Department's Position

Having considered Terphane's and Petitioner's Comments, we continue to find that Terphane's films are outside the scope of the *Order*, provided Terphane can establish to CBP that the requisite performance-enhancing resinous layer is greater than 0.00001 inches in thickness. The petitioners argue that the draft remand redetermination is unsupported by substantial evidence because it ignored or misinterpreted evidence and failed to respond to the Court's requirement that the Department resolve the question of how the second sentence "other

[164] *See* Petitioner's Comments at 9, citing Petition at 10.
[165] *Id*. at 10 to 12 (citing PET Film from Brazil, Thailand, and the UAE Final at 14 and Footnote 20-23, and at I-13 to I14 and Footnote 7).
[166] *See* Petitioner's Comments at 12 (citing PET Film from Brazil, Thailand, and the UAE Final at I-14).
[167] *Id*. at 11 to 12 (citing PET Film from Brazil, Thailand, and the UAE Final at I-14).

finished films…" exclusion can apply to coextruded films. The petitioners point out that the regulations provide that the Department may reach a final decision under (k)(1) only if the evidence under such an analysis dispositively resolves any relevant ambiguity. The petitioners argue that the Court held that the Department's interpretation of the scope language was "not unreasonable" but also found that it was "not unambiguous." The petitioners argue, however, that the Department has failed to explain how the (k)(1) factors dispositively establish that Terphane's films are out-of-scope.[168] The petitioners further argue that the only reasonable way to read the descriptions of the subject merchandise contained in the Petition is that the second sentence exclusion cannot apply to co-extruded layers.[169]

The petitioners note the Department's conclusion that the Petition "places special emphasis on the thickness of any coating." The petitioners acknowledge that the requisite post-extrusion coating must be greater than 0.00001 inches, but reiterate their argument that a coating applied in-line and not on dedicated equipment does not qualify for the scope's second sentence "other finished films…" exclusion.[170] Petitioners argue, therefore, that the Department has failed to identify evidence that dispositively indicates that Terphane's co-extruded films can be excluded from the *Order* scope's second sentence "other finished films…" exclusion.[171] However, as discussed above, the Petition and the ITC's Determinations consistently place principal emphasis on the thickness of the requisite performance-enhancing layer as the definitive factor differentiating between subject and non-subject films.[172] The ITC indicates how and where in the production process this layer is applied (*i.e.*, either in-line on dedicated

[168] *See* Petitioner's Comments, at 2 to 4 and 7 to 8.
[169] *Id.* at 5.
[170] *Id.*
[171] *Id.*
[172] *See*, *e.g.*, page 11, above (citing Petition, at 9 ("Consistent with the final determination in that investigation, the proposed domestic like product in this investigation excludes 'equivalent' PET film, *i.e.*, PET film with a coating of more than 0.00001 inch thick")). *See also* PET Film from Japan and Korea ITC final, at 6 and 15.

machinery or off-line), but we find that these descriptions are not meant to establish a steadfast rule regarding subject merchandise, but merely to show that subject films which have layers of sufficient thickness were, at the time, commercially and technologically distinct from films with layers of insufficient thickness.[173]

Petitioners argue that the PET film from Brazil, Thailand, and the UAE ITC Final describes the manufacturing process of subject PET film and equivalent PET films" differing dramatically," and further note that equivalent PET film producers have separate "coating stations," and "treatment stations" that one manufacturer manufactured equivalent PET film by applying coatings "off-site" or "off-line" from the machine used to produce the PET film substrate in a "secondary" off-line coating procedure and/or produced equivalent PET film on "dedicated assets," in part to avoid contamination.[174] The petitioners note that certain of Terphane's co-extruded films at issue, specifically 10.21, 10.81, and 10.91 films, were produced and marketed at the time of the ITC investigation of PET film from Brazil, Thailand, and the UAE. Therefore, the petitioners argue that Terphane's co-extruded films cannot be excluded from the second sentence exclusion (*i.e.*, as "equivalent PET film).[175]

As explained above, we note that the language in these decisions which describes equivalent PET film as being manufactured on dedicated machinery relates to the universe of foreign like products to be used for price comparison purposes, and to differentiate equivalent PET film products from subject PET film products, *not* as a rule meant to define subject merchandise. For example the PET Film From Japan and Korea ITC Final states: "in contrast to the production of other PET film, the majority of U.S. producers of equivalent PET film have

[173] *See* pages 38 to 39, above.
[174] *See* Petitioner's Comments at 12 (citing PET Film from Brazil, Thailand, and the UAE Final at I-14).
[175] *Id*. at 11 to 12 (citing PET Film from Brazil, Thailand, and the UAE Final at I-14).

dedicated facilities, machinery, and equipment for this product."[176] Moreover, the language specifically cited by the petitioners from the "Common Manufacturing Facilities, Production Processes and Production Employees" sub-section of the "Domestic Like Product and Domestic Industry" of the PET film from Brazil, Thailand, and the UAE Final does not establish any sort of rule or even definitively state that equivalent PET film must be coated or produced off-line or on dedicated machinery.[177] Rather, it simply describes the differences in the manufacturing processes that certain manufacturers use to produce equivalent PET film, compared to the manufacturing processes used to produce subject EPT film without "thick functional coating{s}."[178] In fact, just before this sub-section, in the "Physical Characteristics and Uses" sub-section of the same "Domestic Like Product and Domestic Industry" section of the PET film from Brazil, Thailand, and the UAE Final, the ITC makes a much more general and definitive statement: "PET film and equivalent PET film have different physical characteristics and uses," and that "equivalent PET film differs from PET film due to its "thick functional coating on one or both sides."[179] Terphane's co-extruded films have such a coating, applied in-line and not on dedicated machinery.

Moreover, it is clear from the context and placement of these statements in the "Domestic Like Product and Domestic Industry" sections of the PET film from Brazil, Thailand, and the UAE finals and the "like product" section of the PET Film from Japan and Korea ITC Finals that these statements were not made for the purposes of defining the scope of the Japan and Korea orders,[180] much less for the purposes of defining the scope in terms of a specific range of

[176] *See* the PET Film from Japan and Korea ITC Final at 16.
[177] *See* Petitioner's Comments at 11 to 12 (citing PET Film from Brazil, Thailand, and the UAE Final at I-14).
[178] *See* PET Film from Brazil, Thailand, and the UAE Final at I-13 to I-14.
[179] *Id.* at I-13.
[180] *See PET Film from Japan Order* and *PET Film from Korea Order*.

production processes. Thus, we find that these statements by the ITC in the earlier investigations of PET film from Japan and Korea, referenced in the later PET Film from India and Taiwan ITC Final, and in the PET Film from Brazil, Thailand, and the UAE ITC Final are descriptive, not definitive or dispositive, and, thus, we conclude that it is not reasonable to interpret these statements in such a way as to necessarily contradict a plain reading written scope of the *Order* or to give these statements such weight as to supersede the plain meaning of the scope language.

Further, the PET Film from Japan and Korea ITC Final describes the production processes and equipment used to produce subject PET film and equivalent PET film as being substantially the same: "We determine that the production processes and equipment for other PET film and equivalent PET film are substantially the same."[181] The PET Film from India and Taiwan ITC Final mirrors this assessment: "Some of the basic production processes and equipment used to make PET film and equivalent PET film are substantially the same."[182] Thus, it would be unreasonable to give predominant weight to a difference in the production processes between equivalent PET films and subject PET films where the ITC does not indicate such a difference is necessarily dispositive of equivalent PET film, nor to a distinction between production processes which the ITC itself describes as not substantive.[183]

In fact, the ITC report indicated that equivalent PET Films are exemplified by Cronar and Estar, that they have the requisite performance-enhancing resinous or inorganic layers described in the scope language, and that such performance-enhancing resinous or inorganic layers must be produced off-line or in-line on dedicated machinery. However, Terphane itself is able to produce

[181] *See* PET Film from Japan and Korea ITC Final, at 16.
[182] *See* India and Taiwan ITC Final, at 5.
[183] *See* the PET Film from Japan and Korea ITC Final, at 16 and the India and Taiwan ITC Final, at 5. *See* also our discussion of the previous decisions of the ITC with respect to Petitioner's argument that "equivalent PET films must be produced off-line or on dedicated equipment, at pages 35 to 37, above.

layers by co-extrusion which have the performance-enhancing characteristics of equivalent PET films, as so described in the ITC's rulings, using an in-line process.[184] The Department does not find that the (k)(1) factors indicate that production off-line or on dedicated machinery is absolutely necessary for exclusion from the scope, but finds that this is how excluded equivalent PET films were produced, at the time of the original investigation. The ITC report clearly indicates that that is the case. It does indicate the possibility that films with sufficiently thick performance-enhancing resinous or inorganic layers actually are produced by an in-line process (excepting layers applied on dedicated machinery). Therefore, it does not indicate that films which are physically identical to equivalent PET films, for example, would be nevertheless subject merchandise because of a difference in the production process. On the contrary, it clearly states which films are excluded, and establishes that they are excluded by virtue of having the requisite layer. The Department does not find that the ITC's descriptions of how these films are produced creates a specification that films which have layers that are produced in-line are always subject to the scope, regardless of thickness of the layers, and films which have sufficiently thick layers produced off-line or on dedicated machinery are excluded. The Department finds that drawing such a conclusion is a misreading of the purpose and context of these statements in the ITC's reports, and furthermore, is directly inconsistent with the scope language, as discussed below.

Petitioners focus on the following passage in the Petition: "PET film {*i.e.* subject merchandise} can be made as a single layer or can be coextruded with other polymers into a multilayer film,"[185] and claim that this "indicates dispositively that whether a film is coextruded

[184] *See, e.g.,* Terphane Scope Ruling Request at 1-2.
[185] *See* Petitioner's Comments at 8.

is irrelevant to whether it is in scope."[186] Petitioner further claims that "co-extrusion is irrelevant to the scope determination." We continue to find that both films that are coextruded and films that have coatings applied post-extrusion may be out-of-scope, if they are "finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick."

We continue to find that co-extruded films are not dispositively out-of-scope *because* they are coextruded, but that co-extruded films must also be "finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick" to be excluded. The Department ruled in the Terphane Scope Ruling that Terphane's films which are the subject of this inquiry are "finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick," provided they actually have a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick. The Department did not claim they are excluded because they are co-extruded. If the co-extrusion process does not disqualify Terphane's films and all co-extruded films as a whole from being excluded by the "finished films…" exclusion, that is, if the co-extrusion process is irrelevant, then the thickness of the resinous or inorganic films is the determining factor.

In support of their position, the petitioners cite the first sentence of the scope language, which states, "The products covered by these investigations are all gauges of raw, pre-treated, or primed PET film, whether extruded or co-extruded." The petitioners argue that the first sentence is sufficient to render co-extruded films subject merchandise *ipso facto*, merely because the first sentence covers them. As an initial matter, the first sentence clearly establishes the universe of

[186] *See* Petitioner's Comments at 8.

covered films. The first sentence states that films are covered "whether extruded or coextruded," but there is no specific language that indicates that this means only films which are either merely extruded as a single homogeneous layer, or merely coextruded, are covered, or that all films which have coating applied off-line are excluded.

Moreover, the first sentence must cover films with a coating applied off-line or on dedicated machinery as well, otherwise all films with coating applied off-line or on dedicated machinery would be non-subject, and the second sentence "other finished films…" exclusion would have no effect with respect to such films. If this were the case, as the petitioners argue, then the second sentence would not apply to films which have layers applied off-line or in-line on dedicated machinery, or to co-extruded films, because films which have layers applied off-line or in-line on dedicated machinery would already be excluded and co-extruded films would be covered at the outset. In that case, films with insufficient thickness applied through off-line processes would not be covered by the scope in the first place. However, the petitioners argue that the second sentence is meant to exclude equivalent PET films, films with layers of sufficient thickness applied off-line or in-line on dedicated machinery.[187] Despite the second sentence's meaning to limit the set of films covered in the first sentence, the petitioners argue that the first sentence is sufficient to indicate that co-extruded films like Terphane's, alone, are necessarily subject.

In order to ensure that both the first and second sentence had consistent and reasonable meaning, the Department, in its original scope ruling, interpreted the scope language to mean that if finished films have "had at least one of their surfaces modified by the application of a

[187] *See* Petitioner's March 23, 2012 Comments at 3 ("The ITC has also held that the label "equivalent PET film" (*i.e.*, films falling within the 0.00001-inch exclusion).

performance-enhancing resinous or inorganic layer more than 0.00001 inches thick," those films are out of scope, and that if finished films have a thinner layer, they are within scope.[188] The first sentence ("the products covered by these investigations are all gauges of raw, pre-treated, or primed PET Film, whether extruded or co-extruded") cannot be read to disqualify all co-extruded films from the subsequent exclusions without implying by identical reasoning that films with layers applied off-line or on dedicated machinery (and thus not "extruded or co-extruded") are out-of-scope as a whole. Instead, we continue to find that co-extruded films and films with off-line coatings are both subject to the second sentence exclusion's test.

Thus, for example, films which Terphane produces which were the subject of the Department's investigation, which are discussed in Terphane's responses as being coextruded, are not subject merchandise. The petitioners have consistently argued that the mere fact that Terphane produced in-scope co-extruded films (films which may have co-extruded layers of insufficient thickness) indicates that Terphane's films which do meet the exclusion's thickness requirement are in-scope. But the existence of in-scope co-extruded films of insufficient thickness does not indicate that Terphane's films which are "finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick," are also covered from the scope of the *Order*. The position that the petitioners propose as an alternative to the Department's scope ruling is that the scope covers all co-extruded films which are not further processed in a manner in which the further processing would itself inherently render the film out-of-scope. The petitioners argue, therefore, that the second sentence exclusion applies only to films that have a post-extrusion-applied coating.

[188] *See*, *e.g.*, Scope Ruling Memorandum at 12.

However, the Department continues to maintain that the first and second sentences of the scope language are inclusive, and restrictive, respectively. Thus, the first sentence defines a larger universe of possible subject films, and the second sentence, along with the subsequent exclusions of the scope language, limit or reduce this universe of potentially subject merchandise. If this were not the case, the second sentence would contradict the first, as the first sentence does not explicitly carve out films according to the presence or thickness of any resinous or inorganic layer, or indeed, as the petitioners argue, according to the temporal stage of the production process in which a performance-enhancing layer is applied. Thus, despite the petitioners' claims, co-extruded films are not explicitly covered as a whole, simply because the first sentence covers them, just as films which have coatings of greater that 0.00001 inches applied off-line or on dedicated machinery are not explicitly excluded by the first sentence of the scope just because the first sentence of the scope states that films are covered "whether extruded or co-extruded." Instead, the second sentence is necessary to make it clear that films which have coatings applied off-line or on dedicated machinery, as well as co-extruded films which are "finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick," are excluded, and that both types of films which fail this test are subject merchandise.

We find that there is no explicit indication in the scope language that the second sentence exclusion applies only to films which are not co-extruded. Moreover, we find insufficient indication in the Petition, the information from the investigation, or the prior rulings of the Department or the ITC to suggest that coextruded films (which lack further processing) would be covered as a whole.[189] Rather, we find that there is evidence that the Petition, the investigation,

[189] *See* pages 38 to 39, above.

and the prior rulings of the Department and the ITC indicate that no such exception is made for co-extruded films, and that the thickness requirement of the second sentence applies to all films which are "finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick," including finished films produced in a process by which the requisite layer is co-extruded.[190]

The petitioners highlight the following statement from the Petition: "PET film is 'raw pretreated, or primed' base film at the end of the production process. Additional treatment or processing may be done to the film before it reached the customer (frequently by converters), although the film may also be sold direct to end-use customers or distributors" The petitioners argue that this statement indicates that coextruded film is necessarily disqualified from being excluded under the second sentence exclusion for "other finished films…"[191] However, this sentence does not indicate that production process is limited to mere extrusion or mere co-extrusion or the production of raw, pretreated, or primed, base film and cannot include the application of off-line coatings or coatings applied in-line coatings applied in-line with dedicated machinery of the kind applied used for which the ITC describes as qualifying for the second sentence. In fact, as explained above, Kodak's website indicates that, as of April 12, 2012, Estar, one of the examples of excluded equivalent PET film, was produced though an in-line production process: "What differentiates Kodak from other polyester manufactures is our ability to coat multiple layers in-line as the polyester is manufactured."[192]

[190] *See* Petitioner's Comments at 8. *See also e.g.,* pages 31 to 37, above; the Petition at 9, the PET Film from Japan and Korea ITC Final, at 5 to 6, 15, and 41; PET Film from India and Taiwan ITC Final, at 5 and Footnote 16; and PET Film from Brazil, Thailand, the UAE ITC Final at I-3, I-18, and I-13.
[191] *See* Pages 36 to 73, above.
[192] *See* Terphane May 7, 2012, QR, at 11 and Exhibit 5.

Moreover, downstream treatment and processing described by the petitioners is common to films which are co-extruded, to films which coatings have been applied in an in-line process (whether on dedicated machinery or not), and to films for which coatings have been applied in an off-line process. For example, both Terphane's films, Kodak's Estar films, and other equivalent PET films, such as DuPont's Cronar films are specifically designed for further downstream processing. As described in the Scope Ruling Memorandum, the DuPont website describes Cronar as a film that is "excellent as a substrate" and is "ideally suited for subsequent coating" which has "{s}uperior coatablity {and} adhesion" and describes Estar as the "base" for a number of products that have been coated with different substances, such as acrylic or PVDC.[193] Therefore, we continue to find that record evidence does not support the petitioners' argument. The petitioners argue that the descriptions of the merchandise contained in the ITC's determinations indicate that it is "technologically impossible" to manufacture "equivalent PET film" (*i.e.*, merchandise failing under the second sentence exclusion), except through off-line coating or dedicated machinery. On this premise, the petitioners conclude that the descriptions of the merchandise contained in the ITC's determination indicate dispositively that Terphane's films cannot be subject to the second sentence exclusion.[194] However, if by "equivalent PET film" the petitioners mean that the film described by the ITC (*i.e.*, as "finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick") cannot be physically produced except off-line or on dedicated machinery, the petitioner's claim is easily dismissed, as it is plainly contradicted by Terphane producing the films subject to this scope inquiry, which have

[193] *See* Terphane's Questionnaire Response at Exhibits 3 and 5, Terphane's June 7, 2012, Comments at 8.
[194] *Id*. at 10 to 12 (citing PET Film from Brazil, Thailand, and the UAE Final at 14 and Footnote 20-23, and at I-13 to I-14 and Footnote 7).

the requisitely thick resinous layer. It is clear that the petitioners are merely re-stating their argument that production of excludable films must take place off-line or on dedicated machinery, which, as the Department stated above, is not supported by the record.[195] Furthermore, we note that the Department determined in its Scope Ruling that only those films for which Terphane can demonstrate the thickness of the layer to U.S. Customs and Border Protection would be excluded from the scope. If the petitioners argue that the wording of the second sentence means that some films with a "performance-enhancing resinous or inorganic layer more than 0.00001 inches thick," are subject merchandise because they are not "finished films that have had at least one of their surfaces modified by the application" of such a layer, the Department has already addressed such arguments in its scope ruling,[196] and again here. In summary, the Department found that Terphane's films are finished films, and found that the term "finished" was included to serve a definitive purpose and, as such, cannot be read so broadly as to include all films covered by the first sentence of the scope, (*i.e.*, all "raw, pre-treated, or primed PET film"), or to include all such films. Accordingly, we continue to find that Terphane's films, as so described, are "finished films." Similarly, we do not find that there is sufficient evidence to read any temporal or ordinal requirements into the terms "modified" or "have had" contained in the phrase "that have had at least one of their surfaces modified by the application."

The petitioners further argue that the Department failed to respond to their evidence that Terphane referenced the "three basic stages" of PET film production "(1) polymerization, (2) extrusion, and (3) co-extrusion", in its response to the Department during the original

[195] *See*, *e.g.*, Petitioners' March 23, 2012 Comments, at 3, 22, 24, 27 to 28; Petitioners' May 7, 2012 Comments, at 5, 18, 28 to 31, 35 to 36, 39, 43 to 44; and Petitioners' May 17, 2012 Comments, at 6; Petitioners May 18, 2012 Comments at Footnote 16 (page 6); Petitioners' June 18, 2012 Comments at 5 to 6; and Scope Ruling Memorandum, at 9.
[196] *See* Scope Ruling Memorandum at 11-12.

investigation.[197] The Department finds that Terphane included this stage of the production process in its response because it manufacturers co-extruded films which are not covered by the second sentence exclusion and therefore share the physical characteristics of subject merchandise. Furthermore, this record evidence does not prove that *only* subject PET film and not equivalent PET film is produced by this three-step process, but that subject PET film includes films which are co-extruded but are not excluded under the second sentence "other finished films…" exclusion because they do not have layers of greater than 0.00001 inches in thickness. As Terphane plainly indicated: "Terphane addressed the co-extrusion process in its Section A Questionnaire Response during the investigation because some of its in-scope films are co-extruded."[198]

The petitioners highlight the Department's statement that "we find that there is nothing in the written scope of the order or in our analysis of the (k)(1) factors which would lead to the conclusion that a particular production process is necessary for a product to be equivalent PET film, provided the product in question shared the physical, chemical, and performance characteristics of equivalent PET film." Petitioners argue, however, that the second sentence's "other finished films…" exclusion itself explicitly refers to a specific production process (*i.e.*, "other finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer…"). We disagree. As explained above, we find that the terms "modified by the application of a performance-enhancing resinous or inorganic layer" does not speak to any particular production process or method, because it speaks merely to *any* process by which the requisite layer is applied. We continue to find that the

[197] *See* Petitioner's May 7, 2016 SQR at Exhibit 4 (Terphane's Section A Response from the original investigation at A-21).
[198] *See*, *e.g.*, Terphane's May 17, 2012 Response at 5.

phrase does not require that the requisite layer be applied in an off-line process or in-line on dedicated machinery, or preclude it being applied by the co-extrusion process used by Terphane. Likewise, it does not require that this modification by application of the requisite layer occur at any particular time or stage in the production process, only that it must occur (*i.e.*, the requisite layer must be present on the film).

The petitioners also noted the Department's statement in its Draft Remand Determination, "{t}o be clear, we find that differences in production processes or methods that do not yield differences in physical characteristics to be a sufficient basis for treating products differently for purposes of applications of the dumping laws," and argue that this statement supports their own position.[199] However, this was a misstatement, not an admission. The sentence should have read and has been changed to read "To be clear, we find differences in production processes or methods that do not yield differences in physical characteristics to be an insufficient basis for treating products differently for purposes of applications of the dumping laws." We have corrected this misstatement, above.[200]

Finally, the petitioners argue that the Garware and Avery Dennison scope rulings both involve films coated with layers that were not co-extruded and, thus, that they do not dispositively indicate whether the second sentence exclusion can apply to co-extruded layers. The petitioners claim that the Department fails to demonstrate otherwise. The Department's discussion of these prior scope rulings merely serves to determine whether these prior scope rulings indicate that co-extruded films are covered by the scope or are not covered by the scope. The Department found that these prior scope rulings support, and do not detract from, the

[199] *See* Petitioner's Comments at 3 and footnote 7 (citing Draft Remand Determination at 34).
[200] *See* page 34, above.

Department's finding that Terphane's films at issue are excluded from the scope.[201] The Department did not claim that they were in and of themselves dispositive. In the Garware scope ruling, the Department found that films with matte lacquer layers much thicker than Terphane's, and composed of a material much different than Terphane's, were out of scope.[202] Yet, both Terphane's and Garware's films have performance-enhancing layers, and the Department found that even though Garware's films had much thicker layers, this did not detract from the Department's conclusion that Terphane's films, as so described, were out-of-scope.[203] In the Avery Dennison decision, the Department found that the *Order* was not limited to base PET films, and found that the Avery Dennison's silicon-coated films shared the chemical composition of subject films, but ultimately found that Avery Dennison's films were in-scope because they had a silicon layer less than 0.00001 inches.[204] In the Terphane scope ruling, the Department found that the fact that the scope of the *Order* was not limited to base PET film, and did not mean that Terphane's films were covered as a consequence, but rather that the reliance on the thickness of the performance-enhancing layer supported the Department's finding that Terphane's films were out-of-scope.[205] However, the Department did not claim that these prior scope rulings alone prove dispositively that Terphane's films are out-of-scope.[206]

Based on the above analysis, we find that the Petition, the investigation, and the prior rulings of the Department and the ITC indicate that Terphane's co-extruded films are outside the scope of the *Order*, provided Terphane can establish, to the satisfaction of CBP, that the performance-enhancing layer is greater than 0.00001 inches thick.

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[201] *See* Terphane Scope Ruing Memorandum at 12.
[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.*

VII. Final Results of Remand Determination

Consistent with *Mitsubishi* and in accordance with 19 CFR § 351.225(k)(1), we have analyzed and taken into account "the descriptions of the merchandise contained in the Petition, the initial investigation, the determinations of the Secretary (including prior scope determinations), and the Commission."[207] In addition, as explained above we have considered comments on the draft remand results submitted by Terphane and the petitioner. As a result of our analysis, we continue to find that the products at issue are not covered by the scope of the *Order*.

/S/ Carole Showers

Carole Showers
Executive Director, Office of Policy
performing the duties of the Deputy Assistant Secretary
for Enforcement and Compliance

October 20, 2017

Date

[207] *See* 19 CFR § 351.225(k)(1).