# CHAPTER 26
# SCOPE AND ANTICIRCUMVENTION DETERMINATIONS

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**References:**

The Tariff Act of 1930, as amended (the Act)
Section 781 - prevention of circumvention of ARs
Department of Commerce (DOC) Regulations
19 CFR 351.225 - scope determinations
SAA
Section C.11 - anticircumvention

## I. Scope of the Investigation

An antidumping investigation typically is initiated based on a petition filed by a domestic industry requesting that the Department conduct an investigation into possible dumping. The petition initially determines the scope of the investigation. The Department will carefully examine the scope in pre-petition counseling, or even after the petition is filed, to determine if it is administrable. The notice of initiation of investigation invites parties to comment on the scope of the petition.

The statute provides that the "petition may be amended at such time, and upon such conditions as the Department and the ITC may permit." 19 U.S.C. 1673(a)(b)(1). The Department has the "inherent power to establish the parameters of the investigation. . . .Without this inherent authority, the Department would be tied to an initial scope definition that is based on whatever information the petitioner may have had available at the time of initiating the case, and which may not make sense in light of the information available to the Department or subsequently obtained in the investigation." See Cellular Mobile Telephone and Subassemblies From Japan; Final Determination of Sales at Less Than Fair Value, 50 FR 45447, 45449 (October 31, 1985).

The role of the ITC, in an antidumping investigation, is to determine what domestic industry

produces products like the ones in the class defined by the Department and whether that industry is injured by the relevant imports. See Algoma Steel Corp. v. United States, 688 F. Supp 639, 644(CIT 1988), aff'd 865 F. 2d 240 (Fed. Cir. 1989). The ITC does not have the authority to exclude from a like product determination merchandise corresponding to that within the scope of the Department's investigation. Wheatland Tube Co. v. United States, 973 F. Supp. 149, 158 (CIT 1997) (Wheatland Tube), citing United States Steel Group v. United States, 873 F. Supp. 673, 683 n. 6 (CIT 1994).

"Commerce retains broad discretion to define and clarify the scope of an antidumping investigation in a manner which reflects the intent of the petition." Mitsubishi Heavy Indus. Ltd., v. United States, 21 CIT 1227, 1232, 986 F. Supp. 1428, 1433 (1997) (quoting Minebea Co. v. United States, 16 CIT 20, 22, 782 F. Supp. 117, 120 (1992)); but see Royal Bus. Mach., Inc. v. United States, 1 CIT 80, 87, 507 F. Supp. 1007, 1014 (1980) (discussing the constraints of prior administrative action: "Each stage of the statutory proceeding maintains the scope passed on from the previous stage."). Thus, the Department's final determination reflects the decision that has been made as to which merchandise is within the final scope of the investigation and is subject to the order. See Duferco Steel, Inc., v. United States, 296 F.3d 1087, 1095 (Fed. Cir. 2002) (Duferco).

## II. Scope of the Order

As the agency vested with authority to administer the antidumping law, the Department has the authority not only to define the scope of an antidumping investigation but also to clarify the scope of antidumping or countervailing duty orders and findings. See e.g., Diversified Products Corporation. v. United States (Diversified Products), 572 F. Supp. 883, 887 (CIT 1983) and; Wheatland Tube, 973 F. Supp 149 (CIT 1997). The Department, "not United States Customs Service (Customs), has authority to clarify the scope of antidumping or countervailing duty orders or findings." See Wirth Limited v. United States, 5 F. Supp. 2d 968 (CIT 1998) (Wirth).

Moreover, the Department is given broad discretion to administer the AD and CVD laws. The Department "enjoys substantial freedom to interpret and clarify its antidumping duty orders." See, e.g. Ericsson GE Mobile Communications, Inc. v. United States, 60 F.3d 778, 782 (Fed. Cir. 1995) (Ericsson); and Eckstrom Industries, Inc. v. United States, 27 F. Supp 2d 217 (CIT 1998) (Eckstrom). Further, the Department is granted significant deference in its interpretation of AD/CVD orders.[1] In reviewing a scope determination, the court "must sustain the Department's determination unless it is unsupported by substantial evidence on the record or otherwise not in accordance with the law." See Wirth, 5 F. Supp. 2d at 968. If the Department's interpretation is reasonable, it will be sustained and it need not be the only reasonable interpretation. The court has recognized that it "may not substitute its judgment for that of [the ITA] when the choice is between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" See Mitsubishi Electric Corp., 700 F. Supp. at 538.

[1] See, e.g., Duferco, 296 F.3d at 1095; see also Allegheny Bradford Corporation, d/b/a Topline Process Equipment Co., v. United States, 342 F. Supp. 2d 1172, 1183 (CIT 2004) (Allegheny Bradford).

While the Department may interpret AD and CVD orders, it may not expand the scope of such orders beyond the merchandise encompassed by the final less than fair value determinations. As noted above, each segment of the proceeding maintains the scope passed on from the previous segment. A scope determination is merely a clarification of the terms of the original antidumping duty order; it does not modify the order from its terms. See Alsthom Atlantique v. United States, 787 F.2d 565 (Fed. Cir. 1986). Thus, "an expansion of the scope of the order is impermissible and not in accordance with the law." See Eckstrom, 27 F. Supp 2d at 217.

## III. Scope Determinations

As noted above, a scope determination is a clarification of what the scope of the order was at the time the order was issued. As the agency charged with administering the AD and CVD laws, the Department is responsible for interpreting the AD and CVD orders and determining whether certain products fall within the scope of the order. See Ericsson, 60 F. 3d at 784. This authority is codified in the Department's regulations (19 CFR 351.225).

The interpretive rules for scope determinations are necessary to resolve issues that arise because the descriptions of subject merchandise contained in the Department's determinations must be written in general terms. See 19 CFR 351.225(a). Thus, after an order is published, scope rulings may be necessary when interested parties need clarification as to the status of their products under the order. At other times, a domestic interested party may allege that changes to an imported product or the place where the imported product is assembled constitutes circumvention under section 781 of the Act.

A scope proceeding may be self-initiated by the Department (19 CFR 351.225(a)) or in response to a scope ruling request filed by an interested party (19 CFR 351.225(b)). Based on the information contained in the application, the Department determines whether a formal inquiry is warranted. If an inquiry is not warranted, the Department issues a final ruling as to whether the merchandise which is the subject of the request is included in the existing order. If a formal scope inquiry is warranted, the Department requests comments from all interested parties, and subsequently issues its determination.

There are two categories of scope ruling determinations. The first category is based on descriptions of products, and answers the question of whether a particular product was originally intended to be included within the scope of an order. The second category involves products which are not explicitly covered by the scope of the order, but which a petitioner believes should be covered in order to prevent circumvention.

### A. Scope Determinations Based on Descriptions of Products/Other Scope Determinations

In considering whether a particular product is included within the scope of an order, the Department will take into account the descriptions of the merchandise contained in the petition,

the initial investigation, and the determinations of the Department (including prior scope determinations) and the ITC. See 19 CFR 351.225(k)(1). However, before "taking into account" information from the sources identified in 19 CFR 351.225(k)(1), the Department must conclude that the language of the order pertaining to scope is "subject to interpretation" on the issue presented by the merchandise under consideration. See Duferco, 296 F.3d at 1097. The Court of Appeals for the Federal Circuit has directed that the Department must consult the final scope language as the primary source in making a scope ruling because "Commerce's final determination reflects the decision that has been made as to which merchandise is within the final scope of the investigation and is subject to the order." Id. at 1096. In Duferco, the Court held that "scope orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it." Id. at 1089. The Court explained that resort to sources of information other than the final scope language, such as the petition and determinations made during investigation, "...may provide valuable guidance as to the interpretation of the final order. But they cannot substitute for language in the order itself. Thus, a predicate for the interpretative process is language in the order that is subject to interpretation." Id. at 1097 and 1098. Unless the Department finds that the language of the scope of the order is ambiguous with respect to the merchandise subject to a scope ruling, then the language of the scope is not "subject to interpretation." However, if the Department considers that the scope of the order is ambiguous with regard to whether or not the product at issue is included or excluded from the order, then guidance may be sought by examining the descriptions contained in 19 CFR 351.225(k)(1). See Allegheny Bradford, 342 F. Supp. 2d at 1185.

As explained above, the applicable regulations explain how the Department will determine whether a particular product is included within the scope of an AD/CVD order. First, the Department will examine the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the ITC. Note that, in setting forth the "descriptions of the merchandise contained" in its petition, a petitioner need not "circumscribe the entire universe of articles" that might possibly fall within the order it seeks. Thus, the "absence of a reference to a particular product in the Petition does not necessarily indicate that the product is not subject to an order." See Nitta Industries Corp. v. United States, 997 F.2d 1459, 1464 (Fed. Cir. 1993) (Nitta). Indeed, as stated previously, section 19 CFR 351.225(a) recognizes that the Department must conduct scope determinations in the first place because the "descriptions of the subject merchandise. . .must be written in general terms."

Furthermore, a reference to an HTSUS number "is not dispositive" of the scope of an AD/CVD order. See Smith Corona Corp. v. United States, 915 F.2d 683, 687 (Fed. Cir. 1990). Although the regulations state that petitions must contain a "detailed description of the subject merchandise that defines the requested scope of the investigation, including. . . its current U.S. tariff classification number," (19 CFR 351.202(b)(5)), that regulation does not in turn say that failure to include a particular HTSUS number within a petition means the resulting order will

likewise exclude the product that is designated under that particular HTSUS classification number. See Novosteel SA v. United States, 284 F.3d 1261, 1272 (Fed. Cir. 2002) (Novosteel). Therefore, "the inclusion of various HTSUS headings in a petition ordinarily should not be interpreted to exclude merchandise determined to be within the scope of the antidumping or countervailing duty orders but classified under an HTSUS heading not listed in the petition." See Wirth, 5 F. Supp. 2d at 977-978.

Additionally, the court has stated that the Department's scope determinations are independent from classification determinations by CBP. "The determinations under the antidumping law may properly result in the creation of classes which do not correspond to classifications found in the tariff schedules or may define or modify a known classification in a manner not contemplated or desired by the Customs Service." See Royal Business Machines, 507 F. Supp. at 1014. Therefore, although the Department may consider the decisions of CBP, it is not obligated to follow, nor is it bound by, the classification determinations of CBP. See Wirth, 5 F. Supp. 2d at 968.

Moreover, in making a scope determination, the Court of International Trade has held that the Department must either act in accordance with its prior, similar scope determinations or else provide "rational reasons for deviating" from them. See Novosteel, 284 F.3d. at 1272. The Department's general obligation to follow prior, similar scope determinations, "is premised in part on the fact that the prior decisions are indeed determinations, with formal procedures to ensure reliable results." See Allegheny Bradford, 342 F. Supp. 2d at 1189.

**B. Analysis under 19 CFR 351.225(k)(2)**

If the Department finds that the descriptions found in 19 CFR 351.225(k)(1) are dispositive, the regulation instructs the Department to issue a final scope determination based upon these descriptions alone. See Nitta, 997 F. 2d at 1461. However, if determination of whether a product falls within the scope of an order cannot be made using the descriptions in 19 CFR 351.225(k)(1), the Department will further consider: (i) the physical characteristics of the product; (ii) the expectations of the ultimate purchasers; (iii) the ultimate use of the product; (iv) the channels of trade in which the product is sold; and (v) the manner in which the product is advertised and displayed. See 19 CFR 351.225(k)(2). As shorthand, we sometimes refer to these criteria as Diversified Products criteria. See also Diversified Products, 572 F. Supp. 889 and Kyowa Gas Chemical Industry Co., Ltd. v. United States, 582 F. Supp. 887 (CIT 1984).

In evaluating the 19 CFR 351.225(k)(2) criteria, the Department is directed to "determine whether [the contested] product is sufficiently similar [to] merchandise unambiguously within the scope of [the] order as to conclude the two are merchandise of the same class of kind." See Wirth, 5 F. Supp. 2d at 981. Under these criteria, the Department need only demonstrate that the general physical characteristics of the products under consideration are "sufficiently similar" in order to conclude that the two are of the same class or kind. Id. at 981.

## IV. Scope Determinations Based on Circumvention Inquiries

The Department is bound by the "general requirement of defining the scope of AD and CVD orders by the actual language of the orders." See Duferco, 296 F.3d at 1098. The only exception to this rule occurs in certain situations where orders might be circumvented. See Wheatland Tube Co., v. United States, 161 F.3d 1365, 1370 (Wheatland Tube Co.) (discussing Section 781 of the Act). These situations are addressed by section 781 of the Act.

A section 781 circumvention proceeding is a "clarification or interpretation" of an outstanding order to include products that may not fall within the order's literal scope. See Wheatland Tube Co., 161 F.3d at 1370. These proceedings are in contrast to those conducted under 19 CFR 351.225(k) which addresses whether the product is within the literal scope.

The regulations at 19 CFR 351.225(g)-(j) describe four types of scope inquiries corresponding to the four exceptions of Section 781(a)-(d). An interested party may petition the Department to determine whether a particular product being imported into the United States is within the scope of an outstanding antidumping order under 19 CFR 351.225(b). The decision to initiate a scope inquiry and the type of inquiry to conduct are left to the Department's discretion. Id. at 1370.

### A. Merchandise Completed or Assembled in the United States

Parts, components or subassemblies of the subject merchandise are not usually presumed to be included within the scope of an AD/CVD order unless the language of the order clearly specifies that they are. After an AD/CVD order is issued, respondents may begin to import parts or components of the subject merchandise for completion in the United States and sale to U.S. customers. Through a circumvention inquiry, those parts can be brought into the scope of an AD/CVD order if the Department finds that:

- the completed merchandise being sold in the United States is the same "class
- or kind" as the merchandise subject to the order;
- this merchandise is completed or assembled from parts produced in the foreign
- country subject to the AD/CVD order;
- the process of assembly or completion in the United States is minor or insignificant; and,
- the value of the parts or components is a significant portion of the total value
- of the merchandise.

See Section 781(a)(1) of the Act and 19 CFR 351.225(g).

In determining whether a process is "minor or insignificant," the Department will consider the level of investment in the United States necessary to perform the completion or assembly, the nature of the research or development undertaken in the United States, the nature of the production process, the extent of U.S. production facilities, and whether or not the value of the

processing performed in the United States represents a small proportion of the value of the merchandise sold. See Section 781(a)(2).

The prerequisite for an affirmative circumvention finding is that the difference in value between the imported merchandise and the finished product must be small. When comparing the value of the imported parts to the total value of the merchandise, the Act does not establish a specific value-added percentage that constitutes "significant portion." The legislative history denotes that Congress recognized that the facts of circumvention vary from case to case and intended that the Department employ wide discretion in these situations. See Ausimont USA, Inc. And Ausimont SPA, v. United States, 882 F. Supp. 1087, 1099 (CIT 1995).

Finally, the Department will take into account the relevant patterns of trade, whether the U.S. assembler is affiliated with the foreign producer, and whether imports into the United States increased after the imposition of the order. See Section 781(a)(3) and 19 CFR 351.225; see also Initiation of Anticircumvention Inquiry on Antidumping and Countervailing Duty Orders on Hot-Rolled and Bismuth Carbon Steel Products from the United Kingdom and Germany, 62 FR 34213 (June 25, 1997); Granular Polytetrafluoroethylene Resin From Italy; Final Affirmative Determination of Circumvention of Antidumping Duty Order, 58 FR 26100 (April 30, 1993).

**B. Merchandise Completed or Assembled in Other Foreign Countries**

Rather than shipping parts to the United States for completion, respondents faced with an AD/CVD order may ship parts, subassemblies or components to a third country for completion there, prior to export to the United States. Because final assembly of the merchandise is completed in a third country, the respondent may claim that such merchandise is the product of that third country, and is thus not within the scope of the order. Through a scope inquiry, such third-country imports can be brought within the scope of the AD/CVD order if the Department finds that:

- merchandise imported into the United States is the same "class or kind" as the merchandise subject to the order;
- this merchandise is completed or assembled from merchandise covered by an AD/CVD order, or from merchandise produced in the foreign country to which the order applies;
- the process of assembly or completion in the third country is minor or insignificant; and
- the value of the parts or components produced in the foreign country subject to the AD/CVD order is a significant portion of the total value of merchandise exported to the United States.

See Section 781(b)(1) and 19 CFR 351.225(h).

In the case of third country circumvention, the Department must also find it is "appropriate" to include the merchandise within the scope of the AD/CVD order to prevent evasion. See Section

781(b)(1)(E).

In determining whether a process is "minor or insignificant," the Department will consider the level of investment in the foreign country, the level of the research and development undertaken in the foreign country, the nature of the production process in the foreign country, the extent of production facilities in the foreign country, and whether the value of the processing performed in the foreign country represents a small proportion of the value of the merchandise sold. See Section 781(b)(2).

Finally, in determining whether to include merchandise assembled or completed in a foreign country within the scope of the order, the Department will consider the factors set out in section 781(b)(3) of the Act. See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Initiation of Anticircumvention Inquiry and Scope Inquiry, 69 FR 63507 (November 2, 2004).

**C. Minor Alterations of Merchandise**

After an AD/CVD order is issued, a respondent producing and exporting subject merchandise may alter or modify its products so that they no longer meet the physical description contained in the order. Through a scope inquiry, the Department can determine if this merchandise should nevertheless be included within the scope of the AD/CVD order if those alterations or modifications are deemed to be minor. See Section 781(c) and 19 CFR 351.225(i); see also, Petroleum Wax Candles From the People's Republic of China: Initiation of Anticircumvention Inquires of Antidumping Duty Order, 70 FR 10962 (March 7, 2005) (Petroleum Wax Candles From the People's Republic of China).

Section 781(c) reflects the concern of Congress that foreign producers were circumventing AD duty orders by making minor alterations to products falling within the scope of an order in an effort to take these products outside of the literal scope. Senate Report No. 100-71 at 100 (1987) states that the "Committee intends this provision to prevent foreign producers from circumventing existing findings or orders through the sale of later-developed products or of products with minor alterations that contain features or technologies not in use in the class or kind of merchandise imported in the United States at the time of the original investigation."

Section 781(c)(1) of the Act provides that "the class or kind of merchandise subject to . . . an antidumping duty order. . . shall include articles altered in form or appearance in minor respects. . .whether or not included in the same tariff classifications." This provision does not apply, however, if the Department "determines that it would be unnecessary to consider the altered merchandise within the scope of the order." See section 781(c)(2) of the Act. In essence, section 781(c) includes within the scope of an antidumping duty order products that are so insignificantly changed from a covered product that they should be considered within the scope of the order even though the alterations remove them from the order's literal scope. See Wheatland Tube, 161 F.3d at1372.

**D. Later-Developed Merchandise**

Merchandise developed subsequent to an investigation can be included within the scope of an AD/CVD order, even if its physical characteristics are not the same as those described in the order, if the Department finds that:

- the later-developed merchandise has the same general physical characteristics
- as the merchandise with respect to which the order was originally issued (the
- 'earlier product');
- the expectations of the ultimate purchasers of the later-developed merchandise
- are the same as for the earlier product;
- the ultimate use of the earlier product and the later-developed merchandise is
- the same;
- the later-developed merchandise is sold through the same channels of trade as
- earlier product; and
- the later-developed merchandise is advertised and displayed in a manner
- similar to the earlier product.

See section 781(d) of the Act, and 19 CFR 351.225(j).

Later-developed merchandise can be included within the scope of an AD/CVD order even if it has different tariff classifications from the earlier product. Also, the Department will not exclude later-developed merchandise from an order simply because it has additional functionality, unless that additional functionality is the primary use of the product, and the cost of that additional functionality is high, relative to the total cost of the product. See section 781(d)(2)of the Act, and Petroleum Wax Candles From the People's Republic of China, 70 FR at 10965.

**E. Notification of ITC**

A fundamental requirement of U.S. law is that an AD duty order be supported by an ITC determination of material injury. The injury determination covers only products within the original scope of the investigation. It would follow that any expansion of the scope by the Department would extend the AD duty order beyond the limits of the ITC injury determination and would therefore violate both U.S. and international law. See Wheatland Tube, 973 F. Supp. at 159 .

Thus, in cases involving later-developed merchandise and the completion or assembly in the United States or a third country, the Department must consult with the ITC if it intends to include the merchandise within the order so that the ITC can provide its opinion on whether or not the inclusion of the merchandise would be inconsistent with the affirmative determination

issued in the original investigation. See section 781(e) of the Act, and Anti-Circumvention Inquiry of the Antidumping and Countervailing Duty Orders on Certain Pasta From Italy: Affirmative Preliminary Determinations of Circumvention of Antidumping and Countervailing Duty Orders, 68 FR 46571 (August 6, 2003).

"Commerce retains broad discretion to define and clarify the scope of an antidumping investigation in a manner which reflects the intent of the petition." Mitsubishi Heavy Indus. Ltd., v. United States, 21 CIT 1227, 1232, 986 F. Supp. 1428, 1433 (1997) (quoting Minebea Co. v. United States, 16 CIT 20, 22, 782 F. Supp. 117, 120 (1992)); but see Royal Bus. Mach., Inc. v. United States, 1 CIT 80, 87, 507 F. Supp. 1007, 1014 (1980) (discussing the constraints of prior administrative action: "Each stage of the statutory proceeding maintains the scope passed on from the previous stage."). Thus, the Department's final determination reflects the decision that has been made as to which merchandise is within the final scope of the investigation and is subject to the order. See Duferco Steel, Inc., v. United States, 296 F.3d 1087, 1095 (Fed. Cir. 2002) (Duferco).