

Intersection of Customs And Commerce: Origin, Enforcement And Who Is In Charge?

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Part 1:

- Introduction of the draft scope language and considerations when crafting the scope language of an order.
- Gaps in the scope language that open the gateway for circumvention of the order.

Part 2:

- Initiation and conduct of a scope and an anticircumvention inquiry at Commerce.
- Commerce's and U.S. Customs and Border Protection's (CBP) roles in administration and enforcement of orders, and in preventing circumvention.

Legal and Regulatory Framework

- 19 U.S.C. § 1677j (section 781 of the Tariff Act of 1930, as amended)
- 19 C.F.R. § 351.225 – Commerce's regulation governing scope rulings
 - § 351.225(d) – scope ruling based on the requestor's application/request
 - § 351.225(e) – scope inquiry; begins with initiation of a scope proceeding, concludes with the issuance of the final ruling, and may include a preliminary ruling
 - §§ 351.225(g)-(j) – govern the anticircumvention proceedings
 - § 351.225(k) – criteria considered in Commerce's scope rulings

Other References

- Commerce Anti-dumping Manual (2015):
 - <http://enforcement.trade.gov/admanual/index.html>
 - Is for internal training and guidance of Enforcement and Compliance personnel only and is subject to change.
 - Scope/Anti-circumvention Chapter:
<http://enforcement.trade.gov/admanual/2015/Chapter%2026%20Scope%20De%20terminations%20and%20Circumvention.pdf>
- How to request a scope ruling: <http://enforcement.trade.gov/scope/Request-Scope-Ruling.pdf>

- Cargo Systems Messaging Service (CSMS):
 - Public CBP site where parties can sign up to get alerts/messages from CBP about import and export requirements:
http://apps.cbp.gov/csms/csms.asp?display_page=1
 - Commerce issues messages to CBP when an investigation is initiated, which is transmitted by the CSMS. The message contains information on the initiation date, the scope from the petition, deadline information for submitting scope comments and information on how to file those comments in ACCESS.
 - Messages available and searchable at <http://apps.cbp.gov/csms/csms.asp>
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Hypothetical Subject Merchandise and Scope Language

Certain High Carbon Light Duty Forged Hammers from the People's Republic of China

High carbon light duty forged hammers with heads weighing less than 1.5 kg (3.33 pounds), which may or may not be painted, which may or may not be finished, or which may or may not be imported with wooden handles. High carbon light duty hammers are manufactured through a hot forge operation in which high carbon steel is sheared to required length, heated to forging temperature, and formed to final shape on forging equipment using dies specific to the desired product shape and size. For purposes of this scope, high carbon steel is defined as steel with a carbon content greater than 0.25 percent. Finishing operations may include shot blasting, grinding, polishing and painting, and the insertion of handles for handled products. Finishing operations taking place in a third country do not remove the product from the scope. High carbon light duty forged hammers that are included in a kit remain within the scope, however, only the value of the hammer will be subject to duties. High carbon light duty forged hammers are provided for under the following Harmonized Tariff Schedule of the United States subheading: 8205.20.3000. While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.

Scenarios for Discussion:

1. Chinese manufacturer exports hammers fitting the scope description to a third country. A third country exporter then sells the hammers to a U.S. importer without disclosing their country of origin.
2. Chinese manufacturer exports in-scope hammers to the United States as part of larger tool kits with screw drivers, nails, hooks and levels.
3. Chinese manufacturer exports unforged hammer heads with unassembled wooden handles to an affiliate in Vietnam, where the affiliate forges the hammer heads, finishes and paints the wooden hammer handles, and attaches the hammer head to the handles. Once processed and assembled in Vietnam, the hammers fit the scope description and are exported to the United States.

4. Chinese manufacturer exports forged hammer heads to an affiliate in the United States. The U.S. affiliate manufactures the wooden hammer handles and assembles the hammers. The U.S. affiliate then sells the assembled hammers downstream to unaffiliated U.S. purchasers.
5. Chinese manufacturer exports hammers to the United States consisting of high carbon light duty steel with carbon content of 0.23 percent. The hammers otherwise fit the scope definition.

Crafting of Scope

- Before petition is filed
 - AD/CVD pre-petition counseling by Enforcement and Compliance's Petition Counseling and Analysis Unit:
<http://enforcement.trade.gov/petitioncounseling/index.html>
- After petition is filed
 - Commerce seeks input from CBP regarding the administrability of the scope as well as the HTS numbers that should or should not be covered.
 - Commerce examines the scope and may consider issues such as:
 - dimensional requirements;
 - chemistry requirements;
 - whether the scope includes any end use provisions;
 - kits and "parts thereof";
 - designation of minimum requirements
 - whether the subject merchandise is a downstream product that includes major inputs (which may or may not be covered by other orders)
 - non-defined terms
 - distinguishing between sub-categories within a general type of merchandise
 - whether the merchandise is currently covered by another order, or a revoked order
 - After initiation of investigation, interested parties may submit comments and factual information concerning the scope; generally due within 20 days after initiation.
 - If a party subsequently finds that additional factual information pertaining to the scope of the investigation may be relevant, the party may contact Commerce and request permission to submit the additional information
 - Exporters/importers are sometimes interested in exclusions for specific subject merchandise and may consult with petitioner about a potential exclusion. Exclusions may be possible if petitioner consents to the exclusion.

- **Potential Enforcement Options After An Order Is Issued**

- CBP preliminary determinations at the time of entry that a product is subject to an order; leads to suspension of merchandise and collection of cash deposits.
- Country-of-origin for Customs purposes may be different than country-of-origin for Commerce purposes
- Scope proceedings/inquiries
 - Commerce does not provide advisory opinions on hypothetical products. A request for a scope ruling must concern a product that is actually in production, even if it has not been imported into the United States yet.
- Administrative reviews
 - Commerce may need to address a scope issue in an administrative review to determine whether a respondent should report certain sales.
 - Commerce may provide CBP with information for use in a potential fraud investigation; relevant information sometimes comes to light in an administrative review.
- Enforce and Protect Act of 2015 (EAPA)
 - Section 421 of the Enforce Act provides CBP the authority to investigate allegations of evasion of AD/CVD orders pursuant to the newly created section 517 of the Tariff Act of 1930, as amended (the Act) (19 U.S.C. § 1517)
 - Section 517(b)(1) and (3) of the Act – allows CBP to initiate an investigation based on information submitted to CBP by any other Federal agency, including Commerce “that reasonably suggests that a person has entered covered merchandise into the customs territory of the United States through evasion.”
 - Section 517(b)(4)(A) of the Act – allows CBP to refer the matter to Commerce to determine whether the merchandise is covered by the scope of an AD/CVD order
 - CBP’s new regulations – 19 C.F.R. § 165
 - Section 421 of the EAPA requires CBP to establish regulations and procedures for investigating claims related to the evasion of AD/CVD orders
 - Created by interim final rule (<https://www.gpo.gov/fdsys/pkg/FR-2016-08-22/pdf/2016-20007.pdf>), effective August 22, 2016.
 - Comment period on interim final rule ends on December 20, 2016 (<https://www.gpo.gov/fdsys/pkg/FR-2016-10-21/pdf/2016-25489.pdf>)
 - 19 C.F.R. § 165.16 – Referrals to Commerce

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 *Alstom 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 at 1372.

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).

**Guide on How to File for
an Antidumping/Countervailing Duty
Scope Ruling Request**

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I. Who is Eligible to Request a Scope Ruling?

A. Interested Party

1. An interested party may apply for a ruling as to whether a particular product is within the scope of an antidumping/countervailing duties (AD/CVD) order. See [19 CFR 351.225\(c\)\(1\)](#).
2. Section 771(9) of the Tariff Act of 1930 (as amended) (the Act) ([19 U.S.C. 1677\(9\)](#)) defines who qualifies as an “interested party,” including:
 - a foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise or a trade or business association a majority of the members of which are producers, exporters, or importers of such merchandise;
 - the government of a country in which such merchandise is produced or manufactured or from which such merchandise is exported;
 - a manufacturer, producer, or wholesaler in the United States of a domestic like product;
 - a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a domestic like product;
 - a trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product in the United States; and
 - an association, a majority of whose members is composed of interested parties described in subparagraph (C), (D), or (E) of the Act with respect to a domestic like product.

II. Preparing a Scope Ruling Request

A. A Scope Ruling Request Must Contain the Following Information:

- a statement of interested party status (*i.e.*, identify under which interested party category (see [Section I](#)) you qualify to submit a scope ruling request);
- a detailed description of the product, including its technical characteristics and uses. Please include a photo of the product, copies of product brochures, technical specifications or any such documents that would be helpful to the process of making the ruling;
- identification of the current U.S. harmonized tariff schedule classification number for the product subject to the inquiry; and
- a statement of the interested party’s position as to whether the product is within the scope of the order (including the reasons for your position and any factual information supporting your position). See [19 CFR 351.225\(c\)](#) for a full discussion.

B. A Scope Ruling Request Must Be Served On Interested Parties On the Comprehensive Scope Service List.

- At the same time that it submits a scope ruling request, an interested party must also serve a copy of the request upon all parties on the

Comprehensive Scope Service List. See [19 CFR 351.225\(c\)](#) and [19 CFR 351.303\(f\)\(1\)](#).

- All service lists for the Department’s AD/CVD proceedings can be found at <http://enforcement.trade.gov/apo/apo-svc-lists.html>. First locate the product for which you plan to file your scope ruling request, and locate the “Comprehensive Service List for Scope Inquiries” for the product.
- Service of the scope ruling request can be made by first class mail, hand delivery or, with the consent of the recipient, by electronic mail.
- If your scope ruling request contains business proprietary information (BPI), (see [Sections IV, V and VI](#)) you will need to prepare a public version of your scope ruling request.
- **Only serve your public version scope ruling request on the Comprehensive Scope Service List.** You will be required to serve the BPI scope ruling request on authorized representatives at a later time. See [Section V](#).
- Note that your initial scope ruling request and any supplements thereto must be served on the Comprehensive Service List. After your scope ruling request is submitted, the Department will create a shorter public service list (and if applicable APO service list) for the scope ruling segment pertaining to the product on which you have requested a ruling, based on an indication from parties on the original service list that they want to be on the service list for this scope segment of the proceeding. This shorter list should be used for all other submissions regarding this scope segment.

C. A Scope Ruling Request Must Be Accompanied By the Following Required Certifications (See [Appendix 1](#)):

1. Company Certification of Accuracy
 - Department regulations require the party officially responsible for presentation of the factual information to certify the accuracy of the information that he/she submits to the Department. Please make sure that you complete the certification and include it with your scope ruling request.
2. Representative Certification of Accuracy
 - Department regulations require the legal representative filing the submission to certify the accuracy of the information that he/she submits to the Department. Please make sure that you complete the certification and include it with your scope ruling request.
3. Certificate of Service
 - Department regulations require you to include a certificate of service stating that a copy of your submission has been sent to all interested parties participating in the scope ruling segment. The certificate of service should specify the method of delivery and date, and must include the names and addresses of parties on the comprehensive scope service list for the product at issue.

Note that the Department **cannot consider your submission complete without these certifications and certificate of service.**

Once you have prepared your scope ruling request, it must be submitted electronically via ACCESS (See [Section III](#)).

For AD/CVD Document Filing, Format, Translation, Service, and Certification of Document Requirements, see [19 CFR 351.303](#), see also AD/CVD Document Filing Requirements, at <http://enforcement.trade.gov/filing/index.html>.

III. How to E-file a Scope Ruling Request With the Department Through ACCESS

- A. Register for ACCESS
- The Department’s electronic filing system, called the Antidumping and Countervailing Duty Centralized Electronic Service System, or ACCESS, is found at the website: <https://access.trade.gov>.
 - In the left navigator, click on “E-Filer Registration”.
 - Read the Terms of Use Agreement and click “Accept” at the bottom of the page.
 - Enter all requested information on the next screen. Click “Submit”.
 - A confirmation page will appear. You will receive a confirmation email once your registration has been reviewed and approved.
 - Once you receive confirmation of your registration, you will have to log-in to ACCESS to begin the electronic filing process.
- B. Electronically File the Scope Ruling Request with the Department Through ACCESS
- Go to the ACCESS website at <https://access.trade.gov>.
 - Type in your registered Username, Password, and the Security Code shown. Click on the box to accept the Terms and Conditions. Click “Login”.
 - Once you are logged in, click on “E-File Document”; the ACCESS Document Information webpage will appear.
 - Fill in the ACCESS Document Information fields in the form. For “Segment” from the drop-down box, select “SCO-Scope Inquiry”. For “Segment Specific Information” select “Request New Segment”.
 - Click the “browse” button to select the document(s)/file(s) to be uploaded. Note that .doc or .docx files must be converted to .pdf files or they will not be accepted by the system.
 - Once you have entered all of the requested information, click “submit.”
 - After you click the “Submit” button, an interim confirmation window will appear. You must click on the “OK” button in this window to complete your submission.
 - After you click the “OK” button, the ACCESS E-File Confirmation page will appear. Print this page or note the barcode number for future reference
- C. File Your Entry of Appearance

- In addition to filing your scope ruling request, you should also file a separate entry of appearance using ACCESS.
- The entry of appearance must explain how a party qualifies as an interested party (*e.g.*, it is an importer, exporter, or producer of the subject merchandise) and it must also include the contact information for the point of contact for the party.
- Note that certifications of accuracy are not required for an entry of appearance. As discussed in [Section II.B](#), you need only serve an entry of appearance on the shorter public service list for the scope ruling segment. If the Department has not yet set up the shorter public service list for the scope ruling segment at the time you file your entry of appearance, then you need not include a certificate of service.
- Once you have filed your entry of appearance, the Department will add you to the shorter public service list for the scope ruling segment. You will begin receiving service copies of documents filed by other interested parties as well as email notifications from the Department notifying you of Department-generated public documents and public versions submitted to the record of the scope segment.

IV. **Categories of Information**

All documents filed in the administrative proceeding are placed on the official record. For establishing which information may be protected from disclosure, and which should be part of the public record, see [19 CFR 351.105](#) sets forth the categories of information in an AD/CVD proceeding: public, business proprietary, privileged, and classified.

A. Public Information

- The Department treats all information submitted by parties in an AD/CVD proceeding as public information unless it is accompanied by a request for business proprietary treatment. The types of information which are normally regarded as public information are set forth in paragraph (b) of [19 CFR 351.105](#). This paragraph describes public information as:
 1. Factual information of a type that has been published or otherwise made available to the public by the person submitting it such as in advertisements, product brochures, or marketing displays.
 2. Factual information that is not designated as business proprietary by the person submitting it.
 3. Factual information which, although designated as business proprietary by the person submitting it, is in a form which cannot be associated with or otherwise used to identify activities of a particular person, or which the Secretary determines is not properly designated as business proprietary.
 4. Publicly available laws, regulations, decrees, orders, and other official documents of a country, including English translations.
 5. Written argument relating to the proceeding that is not designated as business proprietary.

As articulated above, the Department’s general approach is that all information submitted should be considered public information, unless and until the submitting party affirmatively demonstrates that specific information or data requires treatment as “business proprietary” and thus should not be disclosed to the public.

B. Business Proprietary Information (BPI)

- Only that information which can be designated as “business proprietary” (equivalent to “business confidential”) may be treated as BPI. The description of what may be classified as BPI is addressed in [19 CFR 351.105\(c\)](#). The regulation states that the following factual information will generally be regarded as BPI, if it is so designated by the submitter.
 1. Business or trade secrets concerning the nature of a product or production process.
 2. Production costs (*but not the identity of the production components unless a particular component is a trade secret*).
 3. Distribution costs (*but not channels of distribution*).
 4. Terms of sale (*but not terms of sale offered to the public*).
 5. Prices of individual sales, likely sales, or other offers (*but not components of prices, such as transportation, if based on published schedules, dates of sale, product descriptions (other than business or trade secrets described in paragraph (c)(1) of this section), or order numbers*).
 6. Names of particular customers, distributors, or suppliers (*but not destination of sale or designation of type of customer, distributor, or supplier, unless the destination or designation would reveal the name*).
 7. In an AD proceeding, the exact amount of the dumping margin on individual sales.
 8. In a CVD proceeding, the exact amount of the benefit applied for or received by a person from each of the programs under investigation or review (*but not descriptions of the operation of the programs, or the amount if included in official public statements or documents or publications, or the ad valorem countervailable subsidy rate calculated for each person under a program*).
 9. The names of particular persons from whom BPI was obtained.
 10. The position of a domestic producer or workers regarding a petition.
 11. Any other specific business information the release of which to the public would cause substantial harm to the competitive position of the submitter.When a party claims proprietary treatment for information submitted in a proceeding, it must include a statement explaining why that specific piece of information requires that treatment. Typically, the statement will cite the appropriate subsection of the regulation listed above as part of the explanation.

V. **Participation in a Scope Proceeding/Obtaining Access Under an Administrative Protective Order (APO)**

A. Access to Public Information

- After filing an entry of appearance (see [Section III](#)), the Department will place a party on the public service list of the scope segment. That party will receive all public documents and public versions filed by other parties participating in the scope segment. It will also receive email notifications of public versions and public documents issued by the Department in the scope segment.

B. Access to BPI

- Only a representative of a party to the proceeding may apply for access to BPI under APO and, once approved, receive notice and access to BPI submitted in the proceeding.
- The representative of a party to the proceeding may apply for APO access by filling out and submitting an APO application, available at <http://enforcement.trade.gov/apo/new/367-208-apo-app.pdf>. Note that an APO application is needed to view other parties' BPI. A representative does not need to file an APO application to view its own client's BPI.
- When the Department approves a representative's APO application, it will add the name, firm and contact information of that representative to the APO service list for the scope segment in which the scope ruling request was filed. All parties on the public service list will be notified of any additions or changes to the APO service list. As mentioned above, the APO service list can be found at <http://enforcement.trade.gov/apo/apo-svc-lists.html>.
- If you submitted a scope ruling request containing business proprietary information, you must serve a copy of that BPI on parties on the APO service list after the parties are added to the APO service list. Note that the APO service list is usually generated after you filed the initial scope ruling request.
- If you wish to serve the BPI scope ruling request on APO-authorized parties, you must (1) ensure that the BPI is only yours/your client's and (2) obtain the consent of the person being served. Some representatives will not consent to service of another party's BPI by email.

VI. Identifying and Disclosing Business Proprietary Information (BPI)

If a party wishes to submit BPI that may be released under APO, it must submit a BPI document and a public version of the document with the BPI redacted.

A. Preparation and Filing of a BPI document

- A party must identify the information for which it claims business proprietary treatment by:
 - enclosing the BPI within single square brackets [];
 - submitting an explanation of why each item of bracketed information is entitled to business proprietary treatment;
 - including a request for business proprietary treatment;
 - including an agreement to permit disclosure under an APO (unless the submitting party claims that there is a clear and compelling need to withhold the information from disclosure under an APO); and
 - selecting the security classification "Business Proprietary Document—May Be Released Under APO" in ACCESS at the time of e-filing.

B. Preparation and Filing a Public Version of a BPI Document

- A party filing a submission that contains information for which business proprietary treatment is claimed must file an identical public version of the submission redacting the information from the square brackets. The public version must:
 - summarize the bracketed information in sufficient detail to permit a reasonable understanding of the substance of the information; or
 - if summarization is not possible, give a full explanation of the reasons supporting that claim.
 - The party must select the security classification “Public Version” in ACCESS at the time of e-filing and also enter the barcode of the corresponding BPI document.

VII. Summary of the Department of Commerce Regulations Relevant To Filing A Scope Ruling Request

- [19 CFR 351.303](#) requires that you submit all documents to the Enforcement and Compliance’s APO/Dockets Unit.
- Please note the number of copies required under [351.303\(c\)](#) and the required format of submissions under [351.303\(d\)\(2\)](#).
- [19 CFR 351.304](#) describes the procedures for identifying and disclosing BPI.
- [19 CFR 351.225\(n\)](#) requires service upon all parties listed in the relevant scope service list.
- [19 CFR 351.303\(f\)](#) requires a certificate of service upon those parties.
- [19 CFR 351.303\(g\)](#) requires certification of factual information for each submission. Effective March 14, 2011, this certification must reflect the amended language as published in the Federal Register. See Certification of Factual Information to Enforcement and Compliance During Antidumping and Countervailing Duty Proceedings: Interim Final Rule, [76 Fed.Reg. 7491, 7499](#) (Feb.10, 2011) (refer to <http://enforcement.trade.gov/frn/index.html>).

VIII. Contact Information

If there are any questions, please contact the Call Center for the Office of AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, at (202) 482-0984.

Appendix 1

Certifications of Accuracy and Service

1. Certifications of Accuracy and Service for the Person(s) Officially Responsible for Presentation of the Factual Information.

A. Company Certification

I, (PRINTED NAME AND TITLE) , currently employed by (COMPANY NAME) , certify that I prepared or otherwise supervised the preparation of the attached submission of (IDENTIFY THE SPECIFIC SUBMISSION BY TITLE AND DATE) filed on (DATE) pursuant to SCOPE RULING OF AD/CVD ORDER ON (PRODUCT) FROM (COUNTRY) (CASE NUMBER) . I certify that the information contained in this submission is accurate and complete to the best of my knowledge. I am aware that the information contained in this submission may be subject to verification or corroboration (as appropriate) by the U.S. Department of Commerce. I am also aware that U.S. law (including, but not limited to, 18 U.S.C. 1001) imposes criminal sanctions on individuals who knowingly and willfully make material false statements to the U.S. Government. In addition, I am aware that, even if this submission may be withdrawn from the record of the AD/CVD proceeding, the Department may preserve this submission, including a business proprietary submission, for purposes of determining the accuracy of this certification. I certify that I am filing a copy of this signed certification with this submission to the U.S. Department of Commerce and that I will retain the original for a five-year period commencing with the filing of this document. The original will be available for inspection by U.S. Department of Commerce officials.

Signature: _____

Date: _____

B. Certification of Legal Counsel or Other Representative***

I, (PRINTED NAME) , with (LAW FIRM or OTHER FIRM) , counsel or representative to (COMPANY OR GOVERNMENT OR PARTY) , certify that I have read the attached submission of (IDENTIFY THE SPECIFIC SUBMISSION BY TITLE AND DATE) filed on (DATE) pursuant to the SCOPE RULING OF AD/CVD ORDER ON (PRODUCT) FROM (COUNTRY) (CASE NUMBER) . In my capacity as an adviser, counsel, preparer or reviewer of this submission, I certify that the information contained in this submission is accurate and complete to the best of my knowledge. I am aware that U.S. law (including, but not limited to, 18 U.S.C. 1001) imposes criminal sanctions on individuals who knowingly

and willfully make material false statements to the U.S. Government. In addition, I am aware that, even if this submission may be withdrawn from the record of the AD/CVD proceeding, the Department may preserve this submission, including a business proprietary submission, for purposes of determining the accuracy of this certification. I certify that I am filing a copy of this signed certification with this submission to the U.S. Department of Commerce and that I will retain the original for a five-year period commencing with the filing of this document. The original will be available for inspection by U.S. Department of Commerce officials.

Signature: _____

Date: _____

*** For multiple representative certifications, all representatives and their firms should be listed in the first sentence of the certification and all representatives should sign and date the certification. In addition, singular pronouns and possessive adjectives should be changed accordingly, *e.g.*, “I” should be changed to “we” and “my knowledge” should be changed to “our knowledge.”

C. Certificate of Service

I, **(PRINTED NAME)**, certify that on **(DATE)** I served the attached submission on the following individuals via **(SPECIFY METHOD OF DELIVERY)**.

(List Names and Addresses)

Signature: _____

Date: _____

The relevant service lists can be found on the website <http://enforcement.trade.gov/apo/apo-svc-lists.html>.