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John Anwesen, Crowell & Moring

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Implications for Interpreting Scope of Antidumping & Countervailing Duty Orders

Contributed by [John Anwesen](#), *Crowell & Moring*

The U.S. Department of Commerce revised its regulations which, among other things, change the interpretation of the scope of antidumping (AD) and countervailing duty (CVD) orders. See *Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws*, [86 Fed. Reg. 52,300](#) (Sept. 20, 2021) (to be codified at [19 C.F.R. pt. 351](#)) (Scope Regulations).

Determining whether imported products are subject to AD and CVD orders can be complicated and time-consuming. Commerce issues AD and CVD orders after it determines that products are being sold at less than fair value or are unfairly subsidized, and after the International Trade Commission determines that such imports injure the U.S. domestic industry. Duties apply to products that are within the scope of AD and CVD orders. AD and CVD orders have been placed on diverse products ranging from honey and garlic to activated carbon, pencils, paper, glycine, silicon, metal, solar cells, steel plates, pipes, nails, wind towers, wooden bedroom furniture, and more.

Commerce may issue a scope ruling based upon an application or its own initiative determining whether merchandise is subject to the order. Commerce gives retroactive effect to its scope rulings, stating that a “scope ruling that a product is covered by the scope of an order is a determination that the product has always been covered by the scope of that order.” See Scope Regulations, [86 Fed. Reg. at 52,312](#). As a result, Commerce may instruct Customs to collect AD and CVD duties on past entries that are not yet liquidated.

The Scope Regulations, once in effect, create an additional retroactive duty liability risk for importers. The added risk of retroactive duties is meant to incentivize importers to conduct proper due diligence and seek Commerce scope rulings when in doubt.

The legality of the retroactive effect is beyond the scope of this article. But, Commerce's premise that a product determined to be covered means that it has always been covered is likely to be challenged. The issuance of the Scope Regulations shows that interpretations can and do change, undermining the premise.

This article will summarize how Commerce defines subject merchandise, introduce the framework for interpreting scope language, and discuss how to determine whether scope language is clear, how to resolve ambiguity using various factors prescribed in the regulations, and discuss a separate framework that applies to mixed media merchandise. These sections incorporate relevant changes in Scope Regulations that affect interpretation of AD and CVD order scope language.

Importers to Seek Scope Determinations

Interested parties can request a ruling on merchandise that is either produced or is in production by submitting a scope ruling application to Commerce. Scope determinations can be very complicated and time consuming. According to Commerce, “one of the most complex, time-consuming and difficult scope determinations it has faced {} necessitated two years of research, review and analysis.” See *Timken Co. v. United States*, [972 F. Supp. 702](#), 704 (Ct. Int'l Trade 1997) (citation omitted). Under the Scope Regulations, the issuance of a final scope ruling may take up to 300 days. This article is intended to assist in assessing the risks of the merchandise being subject to AD and CVD orders before requesting a scope ruling.

Subject Merchandise

Products within the scope of an order are referred to as “subject merchandise.” [19 U.S.C. § 677\(25\)](#). AD or CVD orders, published in the Federal Register, describe subject merchandise. The orders also list codes of the Harmonized Tariff Schedule of the United States (HTSUS) applicable to the subject merchandise, but only for the convenience of U.S. Customs and Border Protection (Customs) as it collects AD and CVD duties.

The written description of subject merchandise, or “scope language,” is dispositive. Written descriptions may include dimensions of the product, physical properties, industry codes or names of the products, particular applications for the products, and manufacturing processes. Scope language usually is written in general terms which can be unclear.

Importers, exporters, and other interested parties attempting to understand and interpret the scope language should examine the original petition, records of Commerce's and Commission's investigations leading to the AD or CVD order at issue, and scope rulings or determinations concerning same or similar scope language, as well as industry standards and dictionary definitions. These parties also may need to consider the product's characteristics and uses, ultimate user expectations, channels of trade, and how the merchandise is advertised.

Commerce, domestic industry representatives, importers, foreign producers, and exporters participate in the formation of the scope language. Representatives of the petitioning U.S. domestic industry propose the initial scope language, then all interested parties have the option to comment on the proposal. Commerce reviews the proposed language and the comments, then adopts a scope language in its final form. In practice, Commerce gives significant deference to the petitioning U.S. industry to define the scope of its petition.

Virtually all scope language begins with a general description of the subject merchandise, followed by specific descriptions of physical and technical characteristics, descriptions of products excluded from the order and, sometimes, exceptions to those exclusions.

For example, in one order, subject merchandise consists of "certain carbon steel butt-weld pipe fittings." The definitions of "carbon steel," "butt-weld," and "pipe fitting," unless they are precise terms of art, may be contested. Physical characteristics or technical details may limit the general description. In our example, butt-weld pipe fittings are limited, *inter alia*, to those with "an inside diameter of less than 14 inches, imported in either finished or unfinished form."

Scope language sometimes may identify the end use of a product, but such language is disfavored because orders that depend on end uses are difficult to enforce at importation. Scope language also may identify particular products that are excluded by providing physical characteristics and technical details of those products as well as exceptions to such exclusions.

Even when a product is not expressly included in the scope language, the product still might be included where there are concerns about circumvention of the order. Compare, e.g., *Deacero S.A. De C.V. v. United States*, [817 F.3d 1332](#) at 1337-39 (Fed. Cir. 2016) (upholding the determination that the importer circumvented the order when importing steel wire rods with a diameter of 0.25 millimeters less than the literal scope description), with *Wheatland Tube Co. v. United States*, [161 F.3d 1365](#), 1369-71 (Fed. Cir. 1998) (upholding the determination not to conduct an anticircumvention inquiry because line and dual-certified pipes were explicitly excluded from the scope covering carbon steel pipes and tubes).

Interpretive Framework

There is a three-part analytical framework for determining whether a product is covered by the scope of AD/CVD orders. The first step, previously referred to as "(k)(0)" among international trade professionals, to be codified as [19 C.F.R. 351.225\(k\)\(1\)](#), is to determine whether the scope language in the order is clear and unambiguous. If the scope language is clear, the plain meaning of the text governs. An explicit finding of ambiguity is not required to consider the "(k)(1)" factors. See *Laminated Woven Sacks Committee v. United States*, [716 F. Supp. 2d 1316](#) (Ct. Int'l Trade 2010).

As a second step, if the language itself is not dispositive, Commerce resorts to the interpretive tools under § 351.225(k)(1). The Scope Regulations list additional sources for scope language interpretation previously used by the courts, such as dictionary definitions, as well as a hierarchy for the (k)(1) factors.

If the first two steps do not resolve the question, the third step is to consider five factors under [19 C.F.R. § 351.225\(k\)\(2\)](#) (k)(2) factors). Commerce slightly modified some of the (k)(2) factors in the Scope Regulations.

A separate analytical framework which incorporates analyses under the (k)(1), (k)(2), and (k)(3) regulatory factors applies for mixed media products. Mixed media products are subject merchandise packaged and imported together with non-subject merchandise.

Two fundamental principles guide the interpretation of a scope language. First, the description of the merchandise subject to the orders must be sufficiently clear to put importers on notice about the kind of goods for which they will incur duty liability. Second, AD and CVD orders should cover merchandise found by the Commission to cause injury to the U.S. domestic industry.

K-1: Whether Scope Language Is Clear

The initial step in interpreting scope language is to determine whether the text is clear. “[A] predicate for the interpretive process is language in the order that is subject to interpretation.” *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002). A scope term is unambiguous if it has a “single clearly defined or stated meaning.” *Meridian Prods., LLC v. United States*, 851 F.3d 1375, 1381, n.7 (Fed. Cir. 2017). The threshold to find ambiguity is low. *Novosteel SA v. United States*, 284 F.3d 1261, 1270-72 (Fed. Cir. 2002). The question of ambiguity is litigated often.

In practice, courts have assessed the ambiguity of a term in scope language the same way they interpret statutes—by consulting dictionaries, scientific authorities, trade usage, and other sources. If a term is not defined in the scope language, the common meaning applies. The common meaning, however, should be consistent with the scope language. See *OMG, INC. v. United States*, 972 F.3d 1358, 1366 (Fed. Cir. 2020).

The Scope Regulations demoted the court-created interpretive tools. Under the new approach, the scope language must be considered “using no interpretive tools whatsoever.” See Scope Regulations, 86 Fed. Reg. at 52,323. This new approach leads to more frequent findings of ambiguity in practice.

K-1: Evidence for Resolving Ambiguity

Before the issuance of the Scope Regulations, Commerce and the reviewing courts considered evidence in addition to the text of the scope description, both to assess whether a term is ambiguous and to resolve that ambiguity. While courts have stressed that the scope language is the cornerstone, they also affirmed or required that Commerce consider the primary (k)(1) sources to assess ambiguity.

On the one hand, courts stated that the primary (k)(1) sources cannot substitute for the language itself. In one case the Court of International Trade held Commerce “interpreted” the order contrary to its terms by determining that beveled edges were not necessary for inclusion in the scope when that interpretation was irreconcilable with the language of the order. See *Allegheny Bradford Corp. v. United States*, 342 F. Supp. 2d 1172, 1183-93 (Ct. Int’l Trade 2004) (holding that).

On the other hand, courts have stated that whether language is ambiguous must be assessed in light of the primary (k)(1) factors. The Court of International Trade held that the word “pipe” lacked clarity when considering specific pressure requirements in the petition and that finding “pipe” unambiguous would unlawfully expand the scope of the order, thus requiring review of the primary (k)(1) sources. *Atkore Steel Components, Inc. v. United States*, 313 F. Supp. 3d 1374, 1381-82 (Ct. Int’l Trade 2018). Courts seem to be interested in the context when terms are in dispute, but only to the extent that such context could be reconciled with the language of the order.

Under the Scope Regulations, Commerce has the discretion to consider the (k)(1) factors. Whether the courts will approve of Commerce’s discretion envisioned in the Scope Regulations remains to be seen, although courts generally have required consideration of context to varying degrees in assessing ambiguity. It seems that once additional evidence under (k)(1) is considered that casts doubt on the plain meaning, the courts will not ignore the evidence. See Scott D. McBride, *An Inside Scoop on Scopes: An Overview of the Laws and Policies Governing the Scopes of Trade Remedy Orders*, 28 U. Miami Int’l & Comp. L. Rev. 37, 58 (2021).

But the courts have also held that the question of ambiguity is a matter of law which would not leave the discretion to Commerce. Thus, Commerce’s exercise of “discretion” and the appropriateness of resorting to the (k)(1) sources will be reviewed by the courts, which will remain guided by case precedent.

The Scope Regulations divide the (k)(1) sources into primary, (k)(1)(i), and secondary, (k)(1)(ii), groups. Here too, Commerce retains the discretion for considering secondary interpretive sources and the primary sources normally take primacy.

The primary (k)(1) sources are the following:

- Petition
- Initial investigation by Commerce
- Commerce determinations, including prior scope rulings

- Commission determinations concerning the order at issue

[19 C.F.R. § 351.225\(k\)\(1\)\(i\)](#).

Petition & Investigation

Information in a petition that may be used to interpret the scope of an order includes the initially proposed scope language, product brochures, and pictures of articles to be covered by the order. Interpretive information to look for in Commerce's investigation includes scope comments, scope-related materials placed on the record by the interested parties, Commerce's scope decision memoranda, and whether, how, and why Commerce modified the proposed scope language.

Where Commerce adopts a final scope language reciting specific HTSUS language, "that act is strong evidence that Commerce expressly addressed its focus on the HTS[US] standard." *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1385 (Fed. Cir. 2005). In such cases, CBP rulings concerning the meaning of HTSUS terms may be considered. The courts' reliance on CBP legal authorities extrinsic to the petition, however, does not mean that factual information that was not presented in the petition or during the original investigation also may be considered. See *Shenyang Yuanda Aluminum Industry v. United States*, 146 F. Supp. 3d 1331, 1351 (Ct. Int'l Trade 2016).

Commerce Determinations

Commerce's determinations under this factor normally include scope rulings in the same proceeding; determinations in other proceedings involving the same scope descriptions, for example, subject merchandise from other countries; and other similar scope determinations. Scope interpretation must be consistent with prior and similar scope determinations, or there must be a rational reason for deviating. *Novosteel*, 284 F.3d at 1271.

Commission Determinations

The Commission determines whether there is an injury to the domestic industry by reason of imports of subject merchandise. An injury finding is required prior to the imposition of duties. Expanding the scope beyond what the Commission considered for the purposes of injury determination may violate this requirement. Types of information to look for in the Commission's determination include reasons given by the Commission for excluding or including certain merchandise in the injury analysis and discussions of varying production processes and the interchangeability of merchandise. Such discussions are usually present in the Commission's hearing transcript specific to the case.

Secondary Sources

The secondary (k)(1) sources are the following:

- Any other Commerce or Commission determinations disqualified as a primary source
- Customs rulings or other determinations
- Industry usage
- Dictionaries
- Any other relevant record evidence

[19 C.F.R. § 351.225\(k\)\(1\)\(ii\)](#).

"Any other relevant record evidence" opens up an opportunity for parties to submit extrinsic evidence on the record for Commerce's consideration. For example, evidence of petitioner's intent concerning scope terms that were not part of the petition or investigation records, such as in *Shenyang Yuanda*, can now be considered.

The implications of Commerce demoting certain tools of interpretation to become secondary (k)(1) material are yet to be seen. Giving primacy to evidence in the petition, for example, could deprive the importers of adequate notice for duty liability. Consider the industry usage. The rest of the industry may use a term to have a meaning that is different from what the petitioner may have indicated in the petition. The same logic applies to dictionary definitions. No term has a plain

meaning in a vacuum. The Scope Regulations set up that vacuum around the scope terms and give primacy for interpretation to certain administrative record sources.

K-2: Diversified Products Criteria

When the (k)(1) criteria are not dispositive, Commerce considers the following:

- Physical, chemical and technical characteristics of the product
- Ultimate users' expectations
- Ultimate use of the product
- Channels of trade
- How the product is advertised and displayed

[19 C.F.R. § 351.225\(k\)\(2\)](#). These factors are product-specific and fact-intensive. Each factor is considered by comparing the subject merchandise with the merchandise at issue. Court challenges to Commerce's determinations based on (k)(2) factors are rare and, even then, Commerce's determinations are reviewed under the substantial evidence standard where Commerce enjoys limited deference. The only notable change to the (k)(1) factors under the Scope Regulations is the shift in focus from the expectations of the ultimate purchasers to the expectations of the ultimate users.

K-3: Mixed Media Framework

A separate framework applies for determining whether mixed media items, meaning a combination of subject and non-subject merchandise packaged and imported together, are covered by the scope of AD/CVD orders. Duties apply to the value of the components determined to be subject merchandise in mixed media sets. However, no duties apply if the mixed media set is determined to be outside the scope of the order. Commerce and the courts must decide whether to focus the analysis on the subject merchandise component or the mixed media set.

The (k)(3) factors are:

- Practicability of separating the in-scope component for repackaging or resale, considering the relative difficulty and expense of separating the components
- Measurable value of the in-scope component relative to the measurable value of the merchandise as a whole
- Ultimate use or function of the in-scope component relative to the ultimate use or function of the merchandise as a whole

A Step Before Mixed Media Framework

Before applying the mixed media framework, Commerce must make a threshold inquiry as to whether the item is genuinely a mixed media item. A mixed media analysis could be inappropriate if the subject component, in combination with non-subject components, has lost its identity; or it could be inappropriate if the subject component is entirely distinct from the non-subject component. Compare *Maclean Power, L.L.C. v. United States*, [359 F. Supp. 3d 1367](#), 1372 (Ct. Int'l Trade 2019) (holding that pole line hardware that incorporated helical spring washers were not a mixed media item but a unique product and outside the scope of the order), with *Walgreen Co. of Deerfield, IL v. United States*, [620 F.3d 1350](#), 1356 (Fed. Cir. 2010) (upholding the determination that a gift bag, a crinkle bow and a few sheets of tissue paper were not a mixed media item because they were not a "unique product" but a mere aggregation of separate items). In both cases, the mixed media framework was not employed to resolve the issue.

Mid Continent Nail Interpretive Framework

The interpretive framework for mixed media items was set by *Mid Continent Nail Corp. v. United States*, [725 F.3d 1295](#) (Fed. Cir. 2013), which considers whether there is a component that would otherwise be subject to the order and, if so, whether there are factors that would remove the subject component out of the scope of the order by virtue of the component being combined into the mixed media set. Whether a component is subject merchandise is determined according to the rules discussed above (i.e., (k)(1), and (k)(2) analyses).

When Commerce determines that a component in a mixed media set is subject merchandise, it then must consider whether there are factors that would exclude the component from the order. Under *Mid Continent Nail*, Commerce's analysis of whether the combination of the subject and non-subject components removes the subject component from the scope of an order must be limited to evidence existing in the history of the order, i.e., the petition, original investigation, and scope language. If the text and the history of the order do not resolve whether the inclusion of the subject component into the mixed media item would remove the otherwise subject component from the scope of the order, then a presumption arises that the subject component remains subject to the order.

The court required that Commerce publish generally applicable rules for overcoming this presumption "prior to the date of the [] original order." Absent some public guidance as to any additional factors for consideration, Commerce's analysis is limited to the scope language and history of the order, i.e., the petition and Commerce's initial investigation. *Star Pipe Prods., v. United States*, [981 F.3d 1067](#), 1076-75 (Fed. Cir. 2020).

Orders Issued After Effective Date of Regulations

The Scope Regulations provide the public guidance the court sought in *Mid Continent Nail* about the factors to be used in mixed media analyses where a component would otherwise be subject to the order. First, Commerce expanded its analysis of whether the combination of the subject and non-subject components removes the subject component from the scope of an order. The analysis is no longer limited to the "history of the order" but includes the primary and secondary factors codified in (k)(1). Commerce also codified factors under § 351.225(k)(iii) to be considered when the (k)(1) factors do not resolve the issue concerning the merchandise as a whole.

This new framework and the additional factors, according to court precedent, would not apply to AD and CVD orders issued prior to the publication of the Scope Regulations.

With assistance from [Mike Snarr](#) and [Mark Lehnardt](#), BakerHostetler.