

4 Tips For Waging Scope Fights At Commerce

By **Alex Lawson**

Law360, New York (March 4, 2016, 4:20 PM ET) -- Foreign producers and their U.S. customers often must take decisive action to ensure the scope of hefty duty orders is not extended to include products not intended to be hit with tariffs, a task that involves navigating a complex maze of procedures and regulations at the U.S. Department of Commerce.

Scope proceedings have been on the rise as petitioners have grown frustrated with insufficient enforcement actions against the evasion and circumvention of anti-dumping and countervailing duties at U.S. ports, but crafting scope language has bedeviled the respondent bar.

"Once you do that, you immediately start putting all of this gray area into the case," Crowell & Moring LLP partner Dan Cannistra told Law360. "That's where you get all of this litigation, somebody has to come in and interpret all of this gray area."

Here, experts lay out the best strategies for grappling with scope battles at Commerce.

Get Ready for a Tough Slog

Preparing, filing and defending anti-dumping and countervailing duty claims is a costly, time-consuming endeavor for petitioners, and attorneys on that side of the bar are not eager to pour considerable resources into that effort only to see the duties undone through technical fights on scoping issues.

So importer or foreign producer looking to obtain a scope ruling that would ostensibly weaken the force of the duty orders can expect to run up against strong resistance from the other side, Cannistra said, nodding to the shifting dynamic of scope battles.

In recent years, those companies making use of the trade remedy laws have pursued scope language that can levy duties not only against imports they currently face, but on any tweaked or altered versions of the products that may come down the pike over the next several years.

"The fights are a lot more intense now," Cannistra said. "You have my desire for certainty competing with their desire to protect not just today but also tomorrow. So if they give me that certainty, they lose some of their protections for tomorrow and that's just how the scale is going to work."

Beyond the intense battle between petitioners and respondents that colors any prong of the trade remedy process, attorneys must also be mindful that Commerce's handling of the process will not be as

swift and efficient as they would like.

Gibson Dunn partner Donald Harrison said that resource constraints at Commerce have forced the agency to put many scope complaints on the back burner, which can frustrate counsel seeking to get results for their clients.

"The department is short-staffed, and these cases have a timetable in the regulations but the department takes the view that those timetables are only suggestive in completing these things," he said. "They also sometimes take a considerable amount of time to initiate a formal scope proceeding."

Act Quickly but Carefully

Though the agency offers a number of paths for shippers to pursue scope challenges or clarifications, attorneys agreed that if possible, any questions about scope are best settled in the context of the original anti-dumping and countervailing duties investigation itself.

This is because arguments about which products will and won't fit under the order are much easier to craft when the language of order itself is still taking shape, according to Cannistra.

"The most important time to deal with these scope issues is while the original investigation is taking place," he said. "It's much easier and much more effective to frame it at the beginning of the case than to try to unwind it after the case has already concluded. That's not even a close call as far as which one of those two is more effective."

Within that context, though, Cannistra explained that Commerce has provided a very narrow window for companies to act, restricting the filing of scope materials to within the first few weeks of the case being filed.

The difficulty posed by the tight time frame is compounded by another obligation in the Commerce procedures that requires any description of product made for scope purposes to be fully public, which potentially forces companies to expose sensitive portions of their manufacturing process or business models.

"Commerce has adopted a policy that any case you make must be fully public with all the technical details and specifications," Cannistra said. "Now you suddenly have importers wrestling with whether they want to disclose their proprietary data."

Clarity Is King

Scope language is written in extremely detailed industry terms, and discussions about what it does and does not apply to can quickly get bogged down in technical minutiae. That dynamic underscores the crucial need for attorneys to communicate their clients' cases as clearly as possible, while also being able to support their claims with technical expertise.

This a delicate balance to strike, particularly when dealing with high-technology products. In those cases, enlisting the help of industry experts is of critical importance, according to Perkins Coie LLP senior counsel David Christy.

"You are presenting a highly technical argument, but you also need to be able to abstract that argument

in such a way that it becomes intuitively easy to grasp," Christy said. "The lawyer is serving as an interlocutor between the experts and the decision makers who may or not have experience with the particular technology involved, but the assumption has to be that they don't."

Christy added that attorneys must make sure the experts they rely on remain available throughout the entirety of the scope proceeding, as they will likely be required to provide Commerce with continued briefing as the contentious process plows ahead.

"You have to have your experts be available and not just look at this as a one-off, like they can write you an affidavit and then they're done," he said.

Leave No Stone Unturned

Depending on how narrowly or broadly the scope of a given order is constructed, there are any number of ways respondent attorneys can go about extracting their clients' items out of the orders' purview, and it pays to be creative.

Generally speaking, attorneys should closely scrutinize both the product definition within the scope, as well as the list of specific types of products that are affirmatively excluded from the order and make an informed decision about which one presents the most logical path to victory.

"That gives you multiple ways to win the case, whether it's by getting Commerce to agree that your product doesn't fall within the affirmative language of the scope or, alternatively, that you fit into one of the exclusions that the petitioner wrote in," Perkins Coie attorney David Townsend told Law360.

While poring over the plain text of the order itself goes without saying, Harrison added that skilled attorneys must also familiarize themselves with the various statements that the petitioners and respondents made during the course of the initial investigation when the scope language was being pulled together, likening it to using legislative history in a court proceeding.

"You have to look not only at the language, but also how it was described during the process," he said. "What I've found useful is to look at those comments to see how they are consistent or not consistent the position you want to take and you bring those things to bear in your scope request."

--Editing by Katherine Rautenberg and Emily Kokoll.
