

RESULTS OF REDETERMINATION  
PURSUANT TO COURT REMAND  
TIANJIN MACHINERY IMPORT & EXPORT CORPORATION V.  
UNITED STATES AND AMES TRUE TEMPER  
Court No. 03-00732

**SUMMARY**

The Department of Commerce (the Department) has prepared these final results of redetermination pursuant to a remand order from the Court of International Trade (the Court) in Tianjin Machinery Import & Export Corporation v. United States, and Ames True Temper, No. 03-00732, (Ct. Int'l Trade, April 8, 2004) (Tianjin Machinery). Tianjin Machinery covers the issue of whether the cast picks exported by Tianjin Machinery Import & Export Corporation (TMC) are within the scope of the antidumping duty (AD) order on picks/mattocks from the People's Republic of China (PRC), which is one of the four AD orders on heavy forged hand tools (HFHTs) from the PRC. Pursuant to a motion for remand filed by the Department, the Court remanded this matter to the Department for it to reconsider the analysis upon which it relied in making its final scope ruling. In accordance with the Court's remand instructions, we have reconsidered our analysis and find that the cast picks exported by TMC are outside the scope of the order covering picks/mattocks from the PRC.

**BACKGROUND**

On April 25, 2003, TMC requested that the Department issue a scope ruling as to whether the cast picks it exports to the United States are within the scope of the AD order on picks/mattocks from the PRC. After considering the comments and rebuttal comments that were placed on the record by interested parties, the Department, on September 22, 2003, issued a final scope ruling that TMC's cast picks are within the scope of the AD order covering picks/mattocks from the PRC (Final Scope Determination).

TMC filed a summons on October 8, 2003, and filed a complaint on October 17, 2003, challenging the Department's final scope determination. Ames True Temper (Ames), the petitioner in the AD reviews of HFHTs from the PRC and defendant-intervenor for this litigation, entered its appearance with the Court on November 17, 2003. On February 2, 2004, TMC filed its motion for judgment on the agency record with the Court. In its memorandum in support of its motion for judgment, TMC challenged the Department's finding that cast picks are within the scope of the AD order on picks/mattocks from the PRC. On March 29, 2004, the Department filed its motion requesting a remand in order to reconsider the analysis used in making the final scope determination. The Court order granting the remand was issued to the Department on April 8, 2004.

On July 13, 2004, the Department issued draft Redetermination Results (Draft Results) to the interested parties. On July 15, 2004, TMC submitted comments on the Draft Results, in which it concurred with the reasoning of the Department in its entirety. On July 16, 2004, Ames submitted

comments on the Draft Results, which the Department addresses in the Interested Party Comments section below. The Department has considered the comments submitted by the interested parties and has re-examined the facts associated with this scope inquiry. The following, with some minor corrections and clarifications, is the analysis that the Department issued in its Draft Results.

### **APPLICABLE REGULATIONS**

The regulations governing the Department's AD scope determinations can be found at 19 CFR 351.225. On matters concerning the scope of an AD order, our initial bases for determining whether a product is included within the scope of an order are the descriptions of the product contained in the petition, the initial investigation, and the prior determinations of the Secretary (such as prior scope rulings) and the International Trade Commission (ITC). See 19 CFR 351.225(d) and 351.225(k)(1). Such scope determinations may take place with or without a formal scope inquiry. See 19 CFR 351.225(d) and 351.225(e). If the Department determines that these descriptions are dispositive of the matter, it will issue a final scope ruling as to whether or not the merchandise in question is covered by the order. See 19 CFR 351.225(d) and 351.225(f)(4).

Conversely, where 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 are not dispositive, the Department will consider the additional factors set forth at 19 CFR 351.225(k)(2). These criteria are: (i) the physical characteristics of the merchandise; (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. These factors are known commonly as the Diversified Products<sup>1</sup> criteria. The determination as to which analytical framework is most appropriate in any given scope inquiry is made on a case-by-case basis after consideration of all record evidence before the Department.

Documents, or parts thereof, from the underlying investigation deemed relevant by the Department to the scope of the outstanding order were made part of the record of this scope determination and are referenced herein. Documents that were not presented to the Department, or placed by it on the record, do not constitute part of the record for this scope ruling.

### **PRODUCT DESCRIPTION**

The Department's AD orders on HFHTs from the PRC define the scope of these orders as follows:

The products covered by these investigations are HFHTs comprising the following classes or kinds of merchandise: (1) Hammers and sledges with heads over 1.5 kg.

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<sup>1</sup> Diversified Products Corp. v. United States, 6 CIT 155, 572 F. Supp. 883 (1983).

(3.33 pounds) (“hammers/sledges”); (2) bars over 18 inches in length, track tools and wedges (“bars/wedges”); (3) picks and mattocks (“picks/mattocks”); and (4) axes, adzes and similar hewing tools (“axes/adzes”).

HFHTs include heads for drilling hammers, sledges, axes, mauls, bars, picks and mattocks, which may or may not be painted, which may or may not be finished, or which may or may not be imported with handles; assorted bar products and track tools including wrecking bars, digging bars and tampers; and steel woodsplitting wedges. HFHTs are manufactured through a hot forge operation in which 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. Depending on the product, finishing operations may include shot blasting, grinding, polishing and painting, and the insertion of handles for handled products. HFHTs are currently provided for under the following Harmonized Tariff System (HTS) subheadings: 8205.20.60, 8205.59.30, 8201.30.00, and 8201.40.60. Specifically excluded from these investigations are hammers and sledges with heads 1.5 kg. (3.33 pounds) in weight and under, hoes and rakes, and bars 18-inches in length and under.

See Antidumping Duty Orders: Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles From the People’s Republic of China, 56 FR 6622 (February 19, 1991) (HFHTs Orders).

## **ANALYSIS**

The issue presented by this scope inquiry is whether cast picks exported by TMC fall within the scope of the AD order on picks/mattocks from the PRC. The U.S. Court of Appeals for the Federal Circuit (CAFC) has stated, “a predicate for the interpretative process [in a scope inquiry] is language in the order that is subject to interpretation.” See Duferco Steel, Inc. v. United States, 296 F. 3d at 1087, 1097 (Fed. Cir. 2002) (Duferco). As noted above, the scope of the orders on HFHTs from the PRC includes HFHT products described as picks and mattocks. Specifically, the scope language states:

The products covered by these investigations are HFHTs comprising the following classes or kinds of merchandise: (1) Hammers and sledges with heads over 1.5 kg. (3.33 pounds) (“hammers/sledges”); (2) bars over 18 inches in length, track tools and wedges (“bars/wedges”); (3) *picks and mattocks* (“*picks/mattocks*”); and (4) axes, adzes and similar hewing tools (“axes/adzes”).

See HFHTs Orders (emphasis added). Furthermore, the scope of the orders states that, “HFHTs include heads for drilling hammers, sledges, axes, mauls, bars, *picks and mattocks*...” See HFHTs Orders (emphasis added). No party has disputed the fact that the cast picks being exported by TMC are, in fact, picks.

The scope of the HFHTs orders, however, does exclude certain products from being covered by these orders. The scope language states that, “{s}pecifically excluded from these investigations are hammers and sledges with heads 1.5 kg. (3.33 pounds) in weight and under, hoes and rakes, and bars 18-inches in length and under.” See HFHTs Orders. Since none of these exclusions pertain to picks, we conclude that the scope does not specifically exclude any picks from being subject merchandise.

Having established that picks are included in the scope of the order on picks/mattocks, and that none of the specific exclusions pertain to picks, we now turn to the fact that the picks exported by TMC are manufactured through a casting production process, rather than a forging process. The scope of the HFHTs orders states, “HFHTs are manufactured through a hot forge operation in which 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.” See HFHTs Orders. The key element of this sentence is the part that identifies the production process used to produce subject merchandise: “HFHTs are manufactured through a hot forge operation...” The remainder of the sentence, “...in which 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,” merely describes the elements generally found within a typical forging production process. The plain language of the key element of this sentence clearly indicates that the HFHTs covered by these orders are manufactured through a “hot forge operation.”

The evidence on the record of this scope inquiry indicates that hot forging and casting operations are different production processes. The plaintiff notes in its request for the scope ruling that the petition for AD orders on HFHTs from the PRC describes the process of forging steel as follows:

Essentially, in a hot forge operation fine grain special bar quality carbon steel of the required grade and cross-sectional dimension is cut to the required length using mechanical shears or saws. The steel billet is then heated to forging temperature in a fossil fuel furnace... The heated billet is formed to final shape on forging equipment such as drop hammers, mechanical forging presses or upsetters using closed dies, or a straight side forging press using open dies.

See TMC’s April 25, 2003, letter to the Secretary, page 5 and Exhibit 4, citing Antidumping Petition of Woodings-Verona Tool Works, Inc., dated April 4, 1990 (the Petition), at 14. By contrast, the plaintiff states that in the casting process “the metal is heated to a molten state and then poured into a mold and hardened.” Id. at 6. Furthermore, the plaintiff notes that, “in the forging process, the raw material retains its initial physical properties (it is heated to increase malleability) while in the casting process, the raw material is transformed from solid to liquid and again back to solid and the physical properties are changed.” Id. at 7.

Ames does not dispute the evidence provided by the plaintiff that forging and casting are separate and distinct production processes. In making its arguments that cast picks are within the

scope of the order on picks/mattocks, Ames never argues that forging and casting are the same production process. Instead, Ames only argues that picks that are cast are not significantly different than from picks that are forged. For example, Ames argues that, "...cast picks differ in no way from those picks *produced via forging or other methods.*" See Ames's letter to the Secretary, dated June 13, 2003, at 7 (emphasis added). Ames also contends that, "...all consumers expect the same thing out of picks - regardless of *whether they are cast or forged.*" Id. (emphasis added). Furthermore, Ames asserts that "...there are no separate markets for picks based solely upon *production method* because customers simply do not choose picks based upon *manufacturing considerations.*" Id. (emphasis added). Through statements such as these, it is clear that Ames acknowledges that forging and casting are two separate and distinct production processes.

The CAFC has stated that "{r}eview of the petition and the investigation may provide valuable guidance as to the interpretation of the final order. But they cannot substitute for language in the order itself." See Duferco, 296 F. 3d at 1097. Thus, whereas here, the language of the scope is clear, the Department cannot interpret the order in a manner that impermissibly modifies it. Since the scope of the AD orders on HFHTs from the PRC explicitly states that the HFHTs that are covered by these orders are manufactured through a "hot forge operation," and it is undisputed that casting and forging are two separate and distinct production processes, we find that the cast picks exported by TMC are outside the scope of the AD order on picks/mattocks from the PRC.

## **INTERESTED PARTY COMMENTS**

*Comment 1: The scope of the order on picks/mattocks does not exclude cast picks specifically or cast merchandise generally*

Ames argues that, while the Department correctly found that the cast picks exported by TMC are picks and are not excluded from the scope of the order on picks/mattocks based upon size or basic physical characteristics, the Department incorrectly relied on a portion of the scope language to exclude cast picks when the scope language itself is ambiguous, if not contradictory. Ames continues, stating that the Department initially noted, citing the HFHTs Orders, that "HFHTs are manufactured through a hot forge operation in which 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," and then decreed without explanation that the scope language on HFHTs "explicitly states that the HFHTs that are covered by these orders are manufactured through a 'hot forged operation.'" See Ames's letter to the Secretary, dated July 16, 2004, at 3 (Remand Comments), citing the Draft Results at 3. Ames contends that the Department made no attempt to reconcile this conclusion with its initial scope ruling on cast picks, or with prior scope rulings, and that the Department's conclusion is contradicted and unsupported by the language of the order.

According to Ames, the Department's assertion that the "hot forge method" is the only method for producing subject merchandise is incorrect because the language within the scope reveals that other

manufacturing methods are also included. For example, Ames notes that tampers are explicitly mentioned in the scope of the HFHTs orders. Ames argues that it is a well-known industry fact that tampers are produced through a casting method. However, Ames also states that tampers can be produced through a welding method, but that this method of production is impractical. Furthermore, Ames asserts that two of the Chinese exporters in the twelfth administrative review of the HFHTs orders reported selling only cast tampers in the United States and have generally “agree{d} that tampers are within the scope of the orders.” See Remand Comments at 3, citing the section A supplemental questionnaire response by Shandong Huarong Machinery Co. Ltd., dated November 21, 2003 (public version). Ames contends that, given the longstanding experience of both the Chinese respondents and itself in producing tampers using a method other than forging, an inherent contradiction exists in the language of the HFHTs orders. Ames explains by stating that the Department, on one hand, included in the scope of the orders the statement that “HFHTs are manufactured through a hot forge operation,” and, on the other hand, explicitly included within the scope of the orders merchandise that is not produced through a hot forge method (i.e., tampers). Given this fact, Ames argues that the scope language does not unequivocally specify one production method to the exclusion of another methodology.

Ames continues by noting that the CAFC, in Duferco, held that while the petition and investigation materials “cannot substitute for the language in the order itself,” the above-referenced information “may provide valuable guidance as to the interpretation of the final order.” According to Ames, Duferco only applies if the language of the scope is clear. In this case, however, Ames argues that a portion of the scope suggests one exclusive method of production while the scope language also includes a type of merchandise that is produced using a different method of production. Since the scope of the HFHTs orders is not clear, Ames contends that Duferco alone does not control this scope proceeding and the Department cannot rely upon it. In reconciling the conflicting scope language in the instant case, Ames states that Duferco suggests that reliance upon materials gathered during the course of the underlying investigation would provide valuable guidance and interpretation in the instances where the scope language itself is ambiguous.

Ames states that the Department has found in the instant scope inquiry, and in prior scope rulings, that there is a wealth of evidence from the petition and investigative documents demonstrating that the hot-forging method was an illustrative, and not exclusionary, method of production. Ames states that it explicitly included within the scope of the original petition “all imports” of merchandise imported under the pertinent HTS classifications, not just hot-forged merchandise. Given that the Department incorrectly defined the “hot forge operation” as an exclusive element in defining the scope of the orders, Ames argues that the Department should not have unequivocally applied Duferco in interpreting the scope. Instead, Ames argues that the Department should have noted the existence of “other” production methods through the existence of tampers in the order’s scope language, and should have ultimately examined the underlying investigation documents for guidance as to the intent of the scope. If this interpretive process had been followed, Ames contends that the Department would have found TMC’s cast picks to be within the scope of the order on picks/mattocks.

## Department's Position:

We disagree with Ames. According to Ames, the scope of the HFHTs orders is ambiguous because it (1) includes the statement, "HFHTs are manufactured through a hot forge operation..." and (2) explicitly identifies tampers as subject merchandise, even though tampers are not produced through a hot forge operation. Although Ames claims that tampers are produced through a casting method, it also acknowledges that tampers can be produced through a welding process. Given this inherent contradiction in the scope language, Ames contends that Duferco does not apply and that the Department must use the petition and investigative documents in order to interpret the ambiguous scope. We are not persuaded by this argument.

In accordance with Duferco, our analysis begins with the plain language of the order. The order applies to HFHTs. Considering, *arguendo*, that Ames is correct that the scope of the HFHTs orders contains an inherent contradiction by virtue of identifying tampers (which Ames claims are produced through a casting method) as subject merchandise, this fact would not overcome the clear language of the statement that "HFHTs are manufactured through a hot forge operation..." The scope of the HFHTs orders covers many different products that are within four broad categories: axes/adzes, bars/wedges, hammers/sledges, and picks/mattocks. In order to assist interested parties, U.S. Customs and Border Protection (CBP), and the general public in identifying tools covered by the scope of these orders, the scope includes a sentence that provides several examples of various types of tools contained within the four broad classes or kinds, in addition to noting the irrelevance of whether the tool is painted, finished, or imported with a handle: "HFHTs include heads for drilling hammers, sledges, axes, mauls, bars, picks and mattocks, which may or may not be painted, which may or may not be finished, or which may or may not be imported with handles; assorted bar products and track tools including wrecking bars, digging bars and tampers; and steel woodsplitting wedges." See HFHTs Orders. The tools identified in this sentence are examples of the products covered by the broader class or kind of merchandise subject to each of the four AD orders. These examples do not actually establish the characteristics that define subject merchandise. Instead, these examples only serve to illustrate the types of products that are considered subject merchandise.

Even if one of these examples were to contradict a characteristic that defines subject merchandise, this contradiction would not overcome the actual definition itself. In this case, Ames claims that tampers are produced through a casting process and that this casting process contradicts the definition of subject merchandise as being "...manufactured through a hot forge operation." Assuming that it is true that tampers are exclusively produced through a casting process, the fact that this contradiction arises from an illustrative listing of tools covered by the AD orders, while it unfortunately may inject a degree of confusion within the order, cannot overcome a clear statement regarding a characteristic that actually defines subject merchandise; namely, that "HFHTs are manufactured through a hot forge operation." This situation, however, should be distinguished from a hypothetical scenario where scope language defines subject merchandise through the use of two contradictory characteristics. For example, if the scope of the HFHTs orders also included the statement, "HFHTs are made of

rubber...,” this statement, which establishes a certain characteristic that defines subject merchandise, would clearly contradict the other statement, “HFHTs are manufactured through a hot forge operation...,” since rubber cannot be forged. In this scenario, the scope would be ambiguous and may require the use of the petition and investigative documents in order to interpret and analyze the scope. However, in the instant case, the assumed contradiction argued by Ames does not arise from a statement that defines a characteristic of the subject merchandise. Instead, it arises only from a product used to illustrate the types of products covered by the order.

Ames’ argument that the scope of the HFHTs orders contains an inherent contradiction, however, also is flawed because there is evidence that tampers are not produced exclusively through a casting process. Ames acknowledges that tampers can be produced through a welding method. See Remand Comments at footnote 6. Moreover, in its comments regarding TMC’s request for a scope inquiry on bar products with handles, in which the topic of tampers was raised, Ames stated, “{t}ampers are generally cast, but can be welded or *forged*.” (Emphasis added.) See Ames’s letter to the Secretary, dated August 25, 2003, at 7. TMC responded to this statement by noting, “{t}his means that some tampers may be included, but only if forged.” See TMC’s letter to the Secretary, dated September 8, 2003, at 2.

*Comment 2: The Department’s flawed reasoning contradicts prior determinations*

Ames states that the Department’s determination in the Draft Results casts doubt on the veracity of past scope rulings. Ames contends that the Department’s Draft Results relies upon the exact scope language of the HFHTs Orders, which states that “HFHTs are manufactured through a hot forge operation in which 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.” According to Ames, relying on this sentence will force the Department “to exclude from the order any hand tool that was produced using base iron, was sheared to the required length and shape and simply heat treated to ensure product hardness, or was formed to final shape without the use of dies or dies that were not wholly specific to the desired shape and size.” See Remand Comments at 7. Ames states that a literal interpretation of this sentence would exclude from the scope forged items such as the Pulaski tool, which were deemed by the Department to be within the scope of the HFHTs orders in a prior scope inquiry.<sup>2</sup> Similarly, Ames contends that reliance upon the more general interpretation of “hot forge operation” would exclude from the scope merchandise that is either welded or stamped,

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<sup>2</sup> See Memorandum from Thomas Futtner, Acting Office Director, to Holly Kuga, Acting Deputy Assistant Secretary, “Final Scope Ruling - Antidumping Duty Orders on Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People’s Republic of China - Request by Tianjin Machinery I/E Corp. for a Ruling on Pulaski Tools,” dated March 8, 2001 (Pulaski Tools).

such as skinning axes, which were also ruled to be within the scope in a prior scope inquiry.<sup>3</sup>

Department's Position:

We disagree with Ames. The Department requested this remand redetermination from the Court in order to analyze the record of this scope inquiry consistent with the interpretive process outlined by the CAFC in Duferco. The fact that the Department followed a different interpretive process in the two scope inquiries identified by Ames (i.e., Pulaski Tools and Skinning Axes), which were completed prior to Duferco, in no way prevents the Department from finding that TMC's cast picks are outside the scope of the order on picks/mattocks. Interested parties had the opportunity to challenge the Department's decision in Pulaski Tools and Skinning Axes, but no party decided to exercise its right to file litigation.

*Comment 3: The Department's determination that cast picks are out of the scope is unenforceable*

Ames argues that the Draft Results makes it impossible for CBP to properly enforce the AD order on picks/mattocks because cast picks and forged picks are physically indistinguishable from one another in terms of weight, shape, end use, and general appearance. According to Ames, CBP will be unable to distinguish between subject and non-subject picks, which will make enforcement of the picks/mattocks order difficult, if not impossible. Ames contends that, given the Department's prior experience with fraudulent sales reporting and duty avoidance schemes by certain Chinese exporters, the ability of CBP to enforce the order is an important consideration.

Department's Position:

We disagree with Ames. Although cast picks and forged picks may be visibly similar, CBP has laboratory facilities throughout the United States at which CBP can easily test product samples in order to determine whether a particular pick was cast or forged. CBP regularly uses random sampling techniques in order to test whether an importer has correctly described the merchandise entering the United States. In the event an importer is found to be incorrectly entering merchandise into the United States, CBP has statutory authority to conduct civil and criminal investigations into such matters.

**FINAL RESULTS OF REMAND DETERMINATION**

As a result of this redetermination, we find that the cast picks exported by TMC are outside the

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<sup>3</sup> See Memorandum from Thomas Futtner, Acting Office Director, to Holly Kuga, Acting Deputy Assistant Secretary, "Final Scope Ruling - Antidumping Duty Orders on Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China - Request by Import Traders, Inc. for a Ruling on Skinning Axes," dated March 8, 2001 (Skinning Axes).

scope of the order on picks/mattocks from the PRC. If the Court sustains this remand, the Department will notify CBP of our determination, and instruct CBP to liquidate all entries of cast picks exported by TMC without regard to antidumping duties.

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Holly A. Kuga  
Acting Assistant Secretary  
for Import Administration

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Date