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International Trade Administration
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Scope Inquiry
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July 29, 2009

MEMORANDUM FOR: John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

FROM: James C. Doyle
Director, Office 9
Import Administration

SUBJECT: Final Scope Ruling: Antidumping and Countervailing Duty Orders
on Laminated Woven Sacks from the People's Republic of China

Summary

On March 20, 2009, the Department of Commerce ("Department") received a request from Shapiro Packaging ("Shapiro") for a scope ruling on whether its imports of three different types of sacks are covered by the antidumping and countervailing duty orders on laminated woven sacks from the People's Republic of China ("PRC").¹ See Notice of Antidumping Duty Order: Laminated Woven Sacks From the People's Republic of China, 73 FR 45941, 45942 (August 7, 2008), and Laminated Woven Sacks From the People's Republic of China: Countervailing Duty Order, 73 FR 45955, 45956 (August 7, 2008) (collectively, "Orders").

Shapiro identifies its three imported sacks as "Manna Pro Calf Manna," "Manna Pro Horse Feed," and "Red Head Deer Corn." In accordance with 19 CFR § 351.225(d) and 19 CFR § 351.225(k)(1), the Department has determined that Shapiro's three imported sacks are not merchandise covered by the scope of the Orders.

Background

On March 20, 2009, the Department received a letter from Shapiro requesting a scope ruling on whether its imports of three different types of sacks are covered by the Orders. On April 20, 2009, the Department extended the deadline for initiating a formal scope inquiry or issuing a ruling on Shapiro's scope request by 30 days to June 3, 2009. On May 5, 2009, the Department met with counsel representing Petitioners² and counsel representing Commercial Packaging, a

¹ See Laminated Woven Sacks from the People's Republic of China; Scope Ruling Request, submitted by Shapiro Packaging on March 20, 2009 ("Shapiro's Scope Request").

² Petitioners consist of the Laminated Woven Sacks Committee and its individual members, Bancroft Bag, Inc.,



U.S. importer of subject merchandise, to allow parties to view and inspect the three sample sacks submitted by Shapiro, as requested by Petitioners. On May 13, 2009, the Department received opposition comments from Petitioners.³ On May 18, 2009, the Department extended the deadline for initiating a formal scope inquiry or issuing a ruling on Shapiro's scope request to June 22, 2009. On May 22, 2009, the Department received rebuttal comments from Shapiro⁴ and on May 29, 2009, received rebuttal comments from Commercial Packaging ("CP").⁵ On June 10, 2009, the Department received rebuttal comments from Petitioners.⁶ On June 15, 2009, the Department received surrebuttal comments from Shapiro.⁷ On June 16, 2009, the Department extended the deadline for initiating a formal scope inquiry or issuing a ruling on Shapiro's scope request to July 6, 2009. On June 24, 2009, the Department received surrebuttal comments from CP⁸ and on June 29, 2009, the Department received surrebuttal comments from Petitioners.⁹ On June 29, 2009 and July 15, 2009, the Department extended the deadline for initiating a formal scope inquiry or issuing a ruling on Shapiro's scope request to July 16, 2009 and July 27, 2009, respectively.

Shapiro's Scope Request

Shapiro requests that the Department find its imports of sacks outside the scope of the Orders. Shapiro described the merchandise in its request as three different types of sacks and referred to them as "Manna Pro Calf Manna," "Manna Pro Horse Feed," and "Red Head Deer Corn" (collectively, "Shapiro's Three Sacks"). Shapiro described its three sacks as each being printed with two colors in register, at only two print stations, and using two cylinders. See Shapiro's Scope Request at 3. Specifically, Shapiro states that its Manna Pro Calf Manna sack is printed with only two colors in register, those being: PMS 485 Red and Reflex Blue; its Manna Pro Horse Feed sack is printed with only two colors in register, those being: Pantone Red 186 and Pantone Blue 072; and its Red Head Deer Corn sack is printed with only two colors in register, those being PMS 731 Brown and PMS 7509. See Shapiro Scope Request at 3-5. Additionally,

Coating Excellence International, LLC, Hood Packaging Corporation, Mid-America Packaging, LLC, and Polytex Fibers Corporation (collectively, "Petitioners").

³ See Laminated Woven Sacks from China: Petitioners' Reply to Shapiro Packaging's Request For A Scope Ruling, submitted on May 13, 2009 ("Petitioners' Opposition Comments").

⁴ See Laminated Woven Sacks from the People's Republic of China; Rebuttal to Petitioners' Comments on the Shapiro Scope Ruling Request, submitted on May 22, 2009 ("Shapiro's Rebuttal Comments").

⁵ See Laminated Woven Sacks from the People's Republic of China: Comments On Scope Ruling Request of Shapiro Packaging, submitted on May 29, 2009 ("CP's Rebuttal Comments").

⁶ See Laminated Woven Sacks from China: Petitioners' Second Submission Concerning Shapiro Packaging's Request For A Scope Ruling, submitted on June 10, 2009 ("Petitioners' Rebuttal Comments").

⁷ See Laminated Woven Sacks from the People's Republic of China; Response to Petitioners Second Submission Concerning Shapiro Packaging's Request for a Scope Ruling, submitted on June 15, 2009 ("Shapiro's Surrebuttal Comments").

⁸ See Laminated Woven Sacks from the People's Republic of China: Second Submission of Comments On The Scope Ruling Request of Shapiro Packaging, submitted on June 24, 2009 ("CP's Surrebuttal Comments").

⁹ See Laminated Woven Sacks from China: Petitioners' Third Submission Concerning Shapiro Packaging's Request For A Scope Ruling, submitted on June 29, 2009 ("Petitioners' Surrebuttal Comments").

Shapiro states that the white color on the sacks is derived from the manufacture of the woven fabric itself and is not the result of printing in register. *Id.* at 4.

Shapiro contends that it uses screens to create different shades of color on its sacks. Specifically, Shapiro states that the light blue on its Manna Pro Horse Feed sack, the light red on its Manna Pro Calf Manna sack, and the artwork on its Red Head Deer Corn sack, are achieved through the use of screens. *Id.* at 4-5. Shapiro describes the screening process as a “common methodology used by printers to give the appearance of multi-colors, when in fact only one or two color inks are being used.” *Id.* at 4. Additionally, Shapiro states that screening enables the printer to achieve different shades of the same color by adjusting the number of dots printed per square inch of the color that is applied to the fabric, and claims that screening eliminates the need to utilize a multitude of inks and printing plates. *Id.*

Shapiro rebuts Petitioners’ claim that in-scope merchandise must display, contain, or be comprised of three or more colors, arguing instead that these phrases are absent from the language of the scope of the Orders. See Shapiro Rebuttal Comments at 2. Shapiro argues that the Department found in the ADM Scope Ruling¹⁰ that the language of the Orders could only be interpreted as encompassing sacks printed with three colors in register and, as Shapiro’s sacks are printed with only two colors in register, the physical descriptions of these sacks is dispositive. See Shapiro Scope Request at 7.

Shapiro argues that Petitioners have misinterpreted Duferco Steel¹¹ by insisting that the scope of the investigations is defined solely by the plain language of the Orders and have disregarded the Department’s own regulations at 19 CFR § 351.225(k)(1), which instruct the Department to analyze not just the language of the order, but also evidence of scope manifested in other sources, such as the petition, initial investigation, and other scope determinations. See Shapiro Rebuttal Comments at 3. Shapiro rebuts Petitioners’ argument that Duferco Steel instructs the Department to limit its analysis of the scope request to only the language of the scope of the Orders, arguing instead that Duferco Steel, when there is any ambiguity in interpreting the language of an order, allows the Department to seek guidance from the antidumping petition, the investigation, the factual findings and legal conclusions. See Shapiro’s Surrebuttal Comments at 3. Shapiro further argues that, as the Orders do not plainly define the phrase, “printed with three or more colors in register,” the Department must seek further guidance from evidence adduced in the original investigation, as instructed by Duferco Steel. See Shapiro’s Surrebuttal Comments at 4. Shapiro argues, therefore, that the requirement included by Petitioners during the investigation that the exterior ply of a laminated woven sack must be, “aligned and printed at three or more separate print stations” reveals that Petitioners did not intend to include sacks printed at fewer than three print stations. *Id.*

Shapiro rebuts Petitioners’ claim that Shapiro’s Three Sacks contain three or more colors by arguing that Petitioners have employed an inappropriate tool, a spectrodensitometer, to

¹⁰ See Memorandum from James C. Doyle, Director, Office 9, Import Administration, to John M. Andersen, Acting Deputy Assistant Secretary for Antidumping and Countervailing Operations, regarding Final Scope Ruling: Antidumping and Countervailing Duty Orders on Laminated Woven Sacks from the People’s Republic of China (February 17, 2009) (“ADM Scope Ruling”).

¹¹ See Duferco Steel, Inc. v. United States, 296 F. 3d 1087, 1096 (Fed. Cir. 2002) (“Duferco Steel”).

determine the number of colors used to create its sacks. Shapiro argues that a spectrodensitometer is used to measure shades of color, as seen by the eye, but does not measure the number of independent printed colors. See Shapiro Rebuttal Comments at 4. Furthermore, Shapiro rebuts Petitioners' assertion that different shades of the same color constitute different colors for the purpose of this scope determination by arguing that the language, "printed with three colors" places the focus on the number of colors of ink that are being used in the printing process. See Shapiro Rebuttal Comments at 5. Shapiro argues that the fact that two inks can produce a variety of shades of color through the screening process does not diminish the critical fact that only two colors have been used in the production of its sacks and, therefore, these sacks do not fulfill the requirement of in-scope merchandise of being "printed with three colors or more in register." Id.

Shapiro states that, although it agrees with Petitioners that a certification process to determine whether a sack is printed with three or more colors should not be necessary, it would not object to a certification process and would cooperate fully if the Department or U.S. Customs and Border Protection ("CBP") found it appropriate. See Shapiro's Rebuttal Comments at 5; see also Shapiro's Surrebuttal Comments at 4.

Based on the physical descriptions of Shapiro's Three Sacks, and applying the criteria of a 19 CFR § 351.225(k)(1) scope analysis, Shapiro argues that the Department should find these products to be outside the scope of the Orders.

Petitioners' Comments Regarding Shapiro's Request

Petitioners maintain that Shapiro's Three Sacks are merchandise subject to the scope of the Orders because these sacks meet the four mandatory criteria set forth in the published scope of the Orders. Petitioners state that merchandise is included within the scope of the Orders whenever the following four criteria are met: (1) the sack is made with one or more plies of fabric consisting of woven polypropylene and/or polyethylene strip; (2) the woven fabric is laminated to the exterior ply of plastic film such as biaxially-oriented polypropylene or to an exterior ply of paper that is suitable for high quality print graphics; (3) the exterior ply is printed with three colors or more in register; and, (4) the sack weighs no more than one kilogram. See Petitioners' Opposition Comments at 2-4.

Petitioners argue that the phrase, "printed with three colors or more in register" found in the scope of the Orders should be interpreted to include sacks that display three visible colors that result from printing in register. See Petitioners' Rebuttal Comments at 4. Petitioners rebut the arguments of Shapiro and CP that the Department should interpret the phrase, "printed with three colors or more in register" as meaning that the subject merchandise must be printed in register with three or more colors of inks using three or more print stations, arguing instead that the scope of the Orders does not include any mention of ink, ink type, ink color, or the number of inks used to produce subject merchandise, and it does not mention printing technique, printing technology, or the number of printing stations used. See Petitioners' Surrebuttal Comments at 3. Petitioners argue that the absence of any reference to inks and/or printing methods indicates that the Department should interpret the phrase, "printed with three colors or more in register" as meaning that the subject merchandise must be printed in register with three colors or more,

regardless of the number of inks used and without regard to the particular print technology employed. See Petitioners' Rebuttal Comments at 2. Petitioners also maintain that if the Department were to interpret the scope of the Orders as dictating a requirement of a certain number of separate printed inks or a certain printing method it would have the effect of modifying the scope of the Orders, which the Court's ruling in Duferco Steel¹² makes clear cannot be done by issuance of a scope ruling. See Petitioners' Surrebuttal Comments at 4.

Petitioners contend that, when deciding Shapiro's scope ruling request, reliance on discussions found in Petitioners' Petition Clarification¹³ is inappropriate under applicable court decisions. Id. at 8. Furthermore, Petitioners argue that none of the questions in Petitioners' Petition Clarification addressed the type, color, or number of inks used to produce subject merchandise. Id. Petitioners also argue that the positions illustrated in Petitioners' Petition Clarification demonstrate that while Petitioners were very focused on the number of colors that could be identified by visual examination of the print graphics appearing on laminated woven sacks, Petitioners were not concerned with the number of inks used to obtain those colors. Id. at 9. Therefore, Petitioners argue that the Department should not rely on Petitioners' Petition Clarification when deciding Shapiro's scope request, and since the language of the Orders provides no basis for interpreting any criteria based on printed ink or printing method, the Department should find that Shapiro's Three Sacks are within the scope of the Orders. Id. at 12.

Petitioners assert that the color criterion of the scope of the Orders requiring three or more colors printed in register is based on visible colors and not on the actual use of ink colors. Shapiro's Three Sacks, Petitioners contend, have three or more visible colors, and are therefore within the scope of the Orders. Petitioners argue that whether the visible colors were created through a screening process or with different colored inks does not make a difference with regard to whether the three color criteria of the scope language has been fulfilled because the scope of the Orders does not include exclusionary language for any printing processes. See Petitioners' Opposition Comments at 6. The ADM Scope Ruling, Petitioners argue, does not support the conclusion that Shapiro's Three Sacks are outside the scope of the Orders, as contended by Shapiro and CP, because the Department's decision says nothing about the number of inks or print stations used to produce the merchandise. See Petitioners' Rebuttal Comments at 12. Additionally, Petitioners rebut the claim by CP that Petitioners had been inconsistent and contradictory in its positions concerning the importance of the number of inks used to produce subject merchandise, arguing instead that Petitioners only referred to ink in the ADM Scope Ruling because it was necessary in arguing that the white color present on ADM's sacks was printed but that this does not contradict with Petitioners' positions in Shapiro's scope request

¹² See Duferco Steel, 296 F. 3d at 1097, citing Smith Corona Corp. v. United States, 915 F.2d 683, 686 (Fed. Cir. 1990) ("Smith Corona").

¹³ See Laminated Woven Sacks from the People's Republic of China/Petitioners' Response To The Department's July 2, 2007 Request For Clarification Of Certain Items Contained In The Petition, July 9, 2007, page 3; see also Laminated Woven Sacks from the People's Republic of China/Petitioners' Response To The Department's July 2, 2007 Request for Clarification Of Certain Items Contained In The Petition, July 12, 2007, page 3; as added to the record of the current review in the Memorandum from Blaine H. Wiltse, International Trade Compliance Analyst, Import Administration, Office 9, to the File, regarding "Laminated Woven Sacks from the People's Republic of China - Shapiro Scope Request: Adding Sections of Petition and Supplemental Petition Questionnaire Response to the Record" (June 8, 2009) at Attachment II, page 3, and Attachment III, page 3 (collectively, "Petitioners' Petition Clarification").

where all parties admit that the relevant colors are printed. See Petitioners' Surrebuttal Comments at 7.

Petitioners also argue that a computerized analysis using a spectrodensitometer of Shapiro's Three Sacks divulges that each is comprised of three or more printed colors. Specifically, Petitioners state this spectrodensitometer analysis reveals that the Manna Pro Calf Manna sack has five colors, those being: Pantone 484 C, Pantone 485 C, Pantone 2736 C, Pantone 169 C, and Pantone 172 C; the Manna Pro Horse Feed sack has three colors, those being: Pantone 199 C, Pantone Blue 072 C, and Pantone 2716 C; and that the Red Head Deer Corn sack has four colors, those being: Pantone 7407 C, Pantone 483 C, Pantone 4975 C, and Pantone 175 C. See Petitioners' Opposition Comment at 7-8 and Exhibits 1-3. In addition to the spectrodensitometer analysis, Petitioners argue that its affidavits, which were not rebutted in any way by Shapiro or CP, provide evidence that industry experts consider the "shades," acknowledged by Shapiro, to be "colors" and that Shapiro's Three Sacks are printed with three or more colors. See Petitioners' Opposition Comments at Exhibits 4 and 6; see also Petitioners' Rebuttal Comments at 10-11; see also Petitioners' Surrebuttal Comments at 6 and 11. Therefore, Petitioners argue that, given the irrelevance of the process used to print these sacks, the fact that they have been printed in register and contain more than three colors, means that the Department should find Shapiro's Three Sacks to be merchandise subject to the scope of the Orders.

Petitioners argue that the scope of the investigations is defined solely by the language of the Orders and the Department is prohibited in its scope analysis from looking elsewhere. Petitioners cite to the Court's ruling in Duferco Steel that, "{T}he critical question is not whether the petition covered the merchandise or whether it was at some point within the scope of the investigation... the question is whether... the final scope orders included the subject merchandise... Thus, a predicate for the interpretative process is the language in the order that is subject to interpretation." See Petitioners' Opposition Comments at 5. Petitioners assert that Duferco Steel instructs that the Department, when deciding a scope request, must first attempt to resolve the request by reference solely to the scope language found in the order, and that this was reinforced by the Court of Appeals' statement in Tak Fat Trading¹⁴ that, "The language of the order, not the petition, controls." See Petitioners' Surrebuttal Comments at 2. Furthermore, Petitioners rebutted the arguments made by Shapiro and CP that Petitioners' interpretation of Duferco Steel was unduly restrictive, arguing instead that Petitioners have simply identified the rule of Duferco Steel, which is a restrictive rule. See Petitioners' Rebuttal Comments at 9. Petitioners also argue that the ruling in Duferco Steel unambiguously instructs the Department to begin its analysis of a scope request by reference only to the scope of the relevant orders. Id. at 8.

Petitioners also urge the Department to find Shapiro's Three Sacks within the scope of the Orders because, as Petitioners argue, to do otherwise would increase the likelihood of circumvention. Petitioners assert that if the Department were to make a determination to equate "color" with "ink" it would require CBP officials to determine whether visible colors are due to the treatment of one or several inks. See Petitioners' Opposition Comments at 10. Petitioners claim that it would be impossible for CBP officials to determine how visible colors were printed on a sack without having access to documentation that describes the actual printing technologies

¹⁴ See Tak Fat Trading Company v. United States, 396 F. 3d. 1378, 1386 (Fed. Cir. 2005) ("Tak Fat Trading").

and processes used to produce the merchandise. Id. Therefore, Petitioners urge the Department to interpret the scope of the Orders in a manner that allows for subject merchandise to be readily identified by visual inspection in the field of three or more colors. Id. at 11.

Petitioners rebut the arguments made by CP in favor of the Department adopting a certification program and argue that the Department has found past certification programs to be “burdensome” and “difficult to administer,” and that there is nothing in the history of the laminated woven sacks proceeding that suggests a certification program is warranted. See Petitioners’ Opposition Comments at 11; see also Petitioners’ Rebuttal Comments at 13.

CP’s Comments Regarding Shapiro’s Scope Request

CP argues that, while Shapiro’s Three Sacks may have the appearance of multi-color sacks, they are actually printed with only two inks, using only two cylinders, at two print stations. See CP’s Rebuttal Comments at 2. Furthermore, CP states that, during printing, the number of dots of color applied to the exterior ply can vary, which has the effect of creating lighter shades of the same printed color, however, this does not change the critical fact that a separate ink color has not been used. See CP’s Rebuttal Comments at 6. CP argues that this is the case with regard to Shapiro’s Three Sacks because these have the appearance of multiple shades of colors that are created through screening, however, these sacks are only printed in register with two colors.

CP argues that Petitioners’ interpretation of the scope language as requiring “three or more printed colors” distorts the meaning of the scope language in the Orders, the petition, and during the investigation phase. Id. at 3. CP contends that Petitioners have attempted to reinterpret the scope language to fit their argument that “colors” is the operative word in the phrase, “printed with three colors or more in register” and that the printing process is no longer relevant. Id. at 5. CP argues that the words “three colors” cannot be separated from “printed with,” and the entire phrase, “printed with three colors or more in register” must be read together as a single requirement. Id. Therefore, CP asserts that as Shapiro’s Three Sacks are printed with two colors in register only, the Department should find these outside the scope of the Orders.

CP rebuts Petitioners’ interpretation of Duferco Steel as unduly restrictive, arguing that the Department’s regulations under 19 CFR § 351.225(k)(1) instruct it to analyze evidence of scope manifested in other sources, such as the petition and initial investigation, beyond just the language of the Orders. Id. at 6-8. Additionally, CP argues that the Department may seek to clarify the meaning of the phrase “printed with three colors or more in register” from the scope of the Orders by consulting the antidumping petition, investigation, and prior scope determinations. Id. at 8; see also CP’s Surrebuttal Comments at 9.

CP argues that Petitioners’ position that Shapiro’s Three Sacks are covered by the scope of the Orders is inconsistent with their position during the underlying investigation and the ADM Scope Ruling. CP argues that previously Petitioners found the number of inks and print stations used in the printing process to be relevant concerns when defining in-scope materials. Id. at 8-9; see also CP’s Surrebuttal Comments at 6. CP argues that it was Petitioners’ intention to include sacks that underwent a specific printing process requiring three separate colors printed in three separate print stations in order to produce “multicolor high quality print graphics.” Id. at 10. Therefore, it is CP’s assertion that, as Shapiro’s Three Sacks used only two print stations and two

colored inks, the Department should find that these are not merchandise subject to the scope of the Orders.

CP also rebuts Petitioners' argument that if the Department ruled that Shapiro's Three Sacks were merchandise outside the scope of the Orders then this would lead to circumvention and enforcement problems, instead asserting that a simple certification can be established to prevent this. CP contends that a requirement to provide certifications stating the number of colors with which the exterior ply of a sack was printed in register will assist CBP enforcement agents in determining which imports are to be considered merchandise subject to the Orders and will not be overly burdensome or difficult to administer. *Id.* at 11; see also CP's Surrebuttal Comments at 11.

CP concludes that, based on the physical description of Shapiro's Three Sacks, which does not match the required criteria of the Orders, the Department should find these products to be outside the scope of the Orders by applying the criteria of a 19 CFR § 351.225(k)(1) scope analysis.

The Department's Position

Legal Framework

The regulations governing the Department's antidumping and countervailing duty scope determinations are found at 19 CFR § 351.225. On matters concerning the scope of an antidumping and/or countervailing duty order, the Department first examines the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the U.S. International Trade Commission ("ITC"). See 19 CFR § 351.225(k)(1). If the Department determines that these descriptions are dispositive of the matter, the Department will issue a final scope ruling as to whether these products are covered by the order. See 19 CFR § 351.225(d).

Conversely, where the descriptions of the merchandise are not dispositive, the Department will consider the five additional factors set forth at 19 CFR § 351.225(k)(2). These criteria are: (1) the physical characteristics of the product; (2) the expectations of the ultimate purchasers; (3) the ultimate use of the product; (4) the channels of trade in which the product is sold; and (5) the manner in which the product is advertised and displayed. The determination of which analytical framework is most appropriate in any given scope inquiry is made on a case-by-case basis after consideration of all evidence before the Department.

Documents and parts thereof from the underlying investigation that the Department deemed relevant to these scope rulings were made part of the record of this determination and are referenced herein. Documents that neither the Department nor the parties placed on the record do not constitute part of the administrative record for this scope determination.

The Text of the Scope of the Investigations and the Orders

In its petition, the domestic industry described the merchandise it proposed to be covered by the less-than-fair value and countervailing duty investigations as follows:

Laminated woven bags of a kind used for the packaging of goods; consisting of one or more plies of fabric consisting of woven polypropylene strip and/or woven polyethylene strip; with or without an extrusion coating of polypropylene and/or polyethylene; laminated by any method either to an exterior ply of plastic film such as biaxially-oriented polypropylene ("BOPP") or to an exterior ply of paper that is suitable for high quality print graphics;¹ printed with three colors or more in register; with or without lining; whether finished or unfinished; whether or not closed on one end; whether or not in roll form; with or without handles; with or without special closing features; not exceeding one kilogram in weight. Laminated woven bags are typically used for retail packaging of consumer goods such as pet foods and bird seed.

The scope does not include (1) woven polypropylene and/or polyethylene fabric; (2) plastic film; or (3) flexible intermediate bulk containers.

Imports of the subject merchandise are generally classified under statistical category 6305.33.0020 of the Harmonized Tariff Schedule of the United States. This statistical category also includes products that are outside the scope of the petition.

¹ "Paper suitable for high quality print graphics," as used herein, means paper having an ISO brightness of 82 or higher and a Sheffield Smoothness of 250 or less. Coated free sheet is an example of a paper suitable for high quality print graphics.

See Petition at 4-5.

In the Initiation Notices,¹⁵ changes were made to the scope of the investigations, as defined in the petition, to include additional HTSUS classifications of sacks and to delete the paragraph describing articles not included in the scope. In the Initiation Notices, the scope was published as follows:

The merchandise covered by this investigation is laminated woven sacks. Laminated woven sacks are bags or sacks consisting of one or more plies of fabric consisting of woven polypropylene strip and/or woven polyethylene strip; with or without an extrusion coating of polypropylene and/or polyethylene on one or both sides of the fabric; laminated by any method either to an exterior ply of plastic film such as biaxially-oriented polypropylene ("BOPP") or to an exterior ply of paper that is suitable for high quality print graphics;¹ printed with three colors or more in register; with or without lining; whether or not closed on one end; whether or not in roll form; with or without handles; with or without special closing features; not exceeding one kilogram in weight.

¹⁵ See Laminated Woven Sacks from the People's Republic of China: Initiation of Antidumping Duty Investigation, 72 FR 40833, 40837 (July 25, 2007); see also Laminated Woven Sacks from the People's Republic of China: Initiation of Countervailing Duty Investigation, 72 FR 40839, 40841 (July 25, 2007) (collectively, "Initiation Notices").

Laminated woven bags are typically used for retail packaging of consumer goods such as pet foods and bird seed. Effective July 1, 2007, laminated woven sacks are classifiable under Harmonized Tariff Schedule of the United States (“HTSUS”) subheadings 6305.33.0050 and 6305.33.0080. Laminated woven sacks were previously classifiable under HTSUS subheading 6305.33.0020. If entered with plastic coating on both sides of the fabric consisting of woven polypropylene strip and/or woven polyethylene strip, laminated woven sacks may be classifiable under HTSUS subheadings 3923.21.0080, 3923.21.0095, and 3923.29.0000. If entered not closed on one end or in roll form, laminated woven sacks may be classifiable under HTSUS subheading 5903.90.2500 and 3921.19.0000. Although HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

¹ “Paper suitable for high quality print graphics,” as used herein, means paper having an ISO brightness of 82 or higher and a Sheffield Smoothness of 250 or less. Coated free sheet is an example of a paper suitable for high quality print graphics.

The scope was modified from the Initiation Notices in the Preliminary Determinations.¹⁶ In the Preliminary Determinations, changes were made to include additional descriptions of in-scope merchandise regarding the width of the strip and sacks in the forms of sheets, lay-flat tubing, and sleeves were added to both paragraphs and additional HTSUS classifications of sacks were added to the second paragraph, as follows:

The merchandise covered by this investigation is laminated woven sacks. Laminated woven sacks are bags or sacks consisting of one or more plies of fabric consisting of woven polypropylene strip and/or woven polyethylene strip, regardless of the width of the strip; with or without an extrusion coating of polypropylene and/or polyethylene on one or both sides of the fabric; laminated by any method either to an exterior ply of plastic film such as biaxially-oriented polypropylene (“BOPP”) or to an exterior ply of paper that is suitable for high quality print graphics;¹ printed with three colors or more in register; with or without lining; whether or not closed on one end; whether or not in roll form (including sheets, lay-flat tubing, and sleeves); with or without handles; with or without special closing features; not exceeding one kilogram in weight.

¹⁶ See Laminated Woven Sacks From the People’s Republic of China: Preliminary Determination of Sales at Less Than Fair Value, Partial Affirmative Determination of Critical Circumstances, and Postponement of Final Determination, 73 FR 5801, 5803 (January 31, 2008); Laminated Woven Sacks From the People’s Republic of China: Preliminary Affirmative Countervailing Duty Determination; Preliminary Affirmative Determination of Critical Circumstances, In Part; and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination, 72 FR 67893, 67893-94 (December 3, 2007) (the Department stated that any scope issues raised by Petitioners would be addressed in the preliminary determination of the antidumping duty investigation) (collectively, “Preliminary Determinations”).

Laminated woven sacks are typically used for retail packaging of consumer goods such as pet foods and bird seed. Effective July 1, 2007, laminated woven sacks are classifiable under Harmonized Tariff Schedule of the United States (“HTSUS”) subheadings 6305.33.0050 and 6305.33.0080. Laminated woven sacks were previously classifiable under HTSUS subheading 6305.33.0020. If entered with plastic coating on both sides of the fabric consisting of woven polypropylene strip and/or woven polyethylene strip, laminated woven sacks may be classifiable under HTSUS subheadings 3923.21.0080, 3923.21.0095, and 3923.29.0000. If entered not closed on one end or in roll form (including sheets, lay-flat tubing, and sleeves), laminated woven sacks may be classifiable under other HTSUS subheadings including 3917.39.0050, 3921.90.1100, 3921.90.1500, and 5903.90.2500. If the polypropylene strips and/or polyethylene strips making up the fabric measures more than 5 millimeters in width, laminated woven sacks may be classifiable under other HTSUS subheadings including 4601.99.0500, 4601.99.9000, and 4602.90.000. Although HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

¹ “Paper suitable for high quality print graphics,” as used herein, means paper having an ISO brightness of 82 or higher and a Sheffield Smoothness of 250 or less. Coated free sheet is an example of a paper suitable for high quality print graphics.

This scope description of the merchandise subject to the investigation was unchanged in the Final Determinations¹⁷ and became the language of the scope of the Orders.

The ITC referenced the scope of the investigation as published by the Department:

bags or sacks consisting of one or more plies of fabric consisting of woven polypropylene strip and/or woven polyethylene strip, regardless of the width of the strip; with or without an extrusion coating of polypropylene and/or polyethylene on one or both sides of the fabric; laminated by any method either to an exterior ply of plastic film such as biaxially-oriented polypropylene (“BOPP”) or to an exterior ply of paper that is suitable for high quality print graphics;¹ printed with three colors or more in register; with or without lining; whether or not closed on one end; whether or not in roll form (including sheets, lay-flat tubing, and sleeves); with or without handles; with or without special closing features; not exceeding one kilogram in weight. Laminated woven sacks are typically used for retail packaging of consumer goods such as pet foods and bird seed.

¹⁷ See Laminated Woven Sacks From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 35646, 35646-47 (June 24, 2008); see also Laminated Woven Sacks From the People’s Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination, in Part, of Critical Circumstances, 73 FR 35639, 35639-40 (June 24, 2008) (collectively, “Final Determinations”).

¹ “Paper suitable for high quality print graphics,” as used herein, means paper having an ISO brightness of 82 or higher and a Sheffield Smoothness of 250 or less. Coated free sheet is an example of a paper suitable for high quality print graphics.¹⁸

The product description in the ITC’s final determination¹⁹ reflected the scope used by the Department in its Final Determinations.

Analysis

For the reasons discussed below, pursuant to 19 CFR § 351.225(k)(1), the Department determines that Shapiro’s Three Sacks are outside the scope of the Orders because each of the sacks is printed with only two colors in register, thus the sacks do not fulfill the physical criteria of merchandise covered by the scope of the Orders.

As an initial matter, the Department disagrees with Petitioners’ argument that Duferco Steel instructs the Department to limit its analysis in a scope review to the language of the scope of the Orders. See Petitioners’ Rebuttal Comments at 8. In fact, Duferco Steel provides that the Department’s analysis must adhere to the scope language, but the Department may rely upon additional evidence in interpreting the meaning of specific scope language, in accordance with the methodology set forth in the Department’s regulations. Duferco Steel, 296 F. 3d at 1097-98. As stated by the appellate court:

To be sure, as we recently recognized in *Novosteel SA v. United States*, 284 F. 3d 1261, 1271 (Fed. Cir. 2002) (“Novosteel”), scope orders must necessarily be written in general terms, 19 CFR § 351.225(a) (2001), and the “Commerce Department enjoys substantial freedom to interpret and clarify its antidumping orders,” Novosteel, 284 F. 3d at 1269 (quoting *Ericsson GE Mobile Communs. v. United States*, 60 F. 3d 778, 782 (Fed. Cir. 1995), in accordance with the methodology set forth in its regulation, 19 CFR § 351.225(k). Scope orders are “interpreted with the aid of the antidumping petition, the factual findings and legal conclusions adduced from the administrative investigations, and the preliminary order.” Smith Corona, 915 F. 2d at 685. Thus, review of the petition and the investigation may provide valuable guidance as to the interpretation of the final order. It is the responsibility of the agency, not those who initiated the proceedings, to determine the scope of the final orders. Thus, a predicate for the interpretive process is language in the order that is subject to interpretation.

Id. This statement demonstrates that the Department possesses the authority to interpret specific scope language in accordance with its regulations, which includes review of the original petition

¹⁸ See Laminated Woven Sacks From China – Investigation Nos. 701-TA-450 and 731-TA-1122 (Preliminary), ITC Publication 3942 (August 2007) at 5.

¹⁹ See Laminated Woven Sacks From China – Investigation Nos. 701-TA-450 and 731-TA-1122 (Final), ITC Publication 4025 (July 2008) at 5.

and supplemental filings in support of the petition.²⁰ See 19 CFR 351.225(k)(i) (The Department will consider “descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations)...”).

Accordingly, the Department has examined the criteria set forth in its regulations under section 19 CFR § 351.225(k)(1) to assist it in determining the meaning of the phrase, “printed with three colors or more in register.”

In the instant case, Petitioners have argued that this language should be interpreted to include sacks that display three visible colors that result from printing in register. See Petitioners’ Rebuttal Comments at 4. However, in the underlying investigation of laminated woven sacks from the PRC, the Department specifically asked Petitioners to clarify its requirement that laminated woven sacks be “printed with three colors or more in register,” to which Petitioners replied:

Laminated Woven Sacks (“LWS”) normally have four or more colors in register. Many have 6 to 8 colors in register. Petitioners intend to exclude sacks that have fewer than three colors in register, because they do not have high quality print graphics. Sacks meeting the other specifications but without graphics or printing are not LWS. The printing of multi-colored high quality print graphics is a critical element to the description of LWS, since the print on these bags typically serves as point of sale advertising on the retail shelf. Thus, the exterior ply must be printed in three colors or more in register; it must be aligned and printed at three or more separate print stations, each containing a different color, creating multicolor, high quality print graphics.

See Petitioners’ Petition Clarification (emphases added). Based upon this description, the Department finds that it was the intention of Petitioners in drafting the description of the merchandise contained in the petition to include only those sacks that, while fulfilling the other physical criteria, were printed in register with three or more colors, at three or more separate print stations, each containing a different color. Additionally, the Department concludes that, given Petitioners’ requirement that laminated woven sacks be printed at “three or more separate print stations, each containing a different color,” it was the intention of Petitioners to require that each “color” be a separate colored ink that is printed in register at a separate print station.

With regard to the “in register” statement in the specific scope language at issue here, Petitioners defined the phrase “in register” to mean:

“Register” refers to “the correct positioning of an image especially when printing one color on another.” To register means to “position print in the proper position in relation to the edge of the sheet and to other printing on the same sheet.” Thus,

²⁰ The Court of Appeals for the Federal Circuit’s subsequent decision in Tak Fat Trading reinforced this rule. Specifically, in Tak Fat Trading, the appellate court upheld Commerce’s determination to interpret scope language in accordance with a Customs ruling when the scope language closely reflected language from the tariff schedule, as demonstrated in the investigation materials. See Tak Fat Trading, 396 F. 3d at 1386. Put simply, the appellate court affirmed the Department’s authority to rely upon investigation materials and related administrative rulings to interpret scope language. Id.

a bag printed in register would have the name or picture on the bag in the same position each time. When printing an American flag in register, the red lines are positioned exactly next to the white lines so that they appear as red and white lines. If the lines were out of register, the overlapping would create pink lines.

See Petitioners' Petition Clarification (footnotes omitted). The Department determines that, in accordance with the definition stated above, the phrase "in register" refers to those sacks which have graphics printed in this specific method. Therefore, it is the Department's conclusion that the complete phrase, "printed with three colors or more in register" can reasonably only be interpreted to mean that laminated woven sacks covered by the Orders must have three or more colors that have all been printed through the specific "in register" method of printing.

Shapiro specifically states that Shapiro's Three Sacks are "printed with only two colors applied by only two cylinders at two print stations." See Shapiro's Scope Request at 3. Therefore, given Petitioners' intended interpretation of the scope of the Orders as requiring that subject merchandise be printed at "three or more print stations, each containing a different color," as described above, Shapiro's Three Sacks do not fulfill the criteria to be considered in-scope merchandise.

Shapiro specifically states that Shapiro's Three Sacks, "give the appearance of having been printed with more than two colors, they are in fact printed with only two colors in register, using two cylinders and only two print stations." See Shapiro's Scope Request at 7. Additionally, Shapiro explains that it has created the appearance of having more than two printed colors through the use of screening to create different shades of the same printed color. Id. at 4. Therefore, given Petitioners' intended interpretation of the scope of the Orders as requiring that subject merchandise must have three or more colors that have all been printed through the specific "in register" method of printing, as described above, Shapiro's Three Sacks do not fulfill the criteria to be considered in-scope merchandise.

Further, the Department finds that Petitioners' original purpose in deciding that the language of the scope of the Orders would only include those sacks printed in register with three or more colors at three separate print stations was because this printing process was required to enable the high-quality graphics necessary in retail packaging of consumer goods such as pet foods and bird seed. See Petitioners' Petition Clarification. Accordingly, the Department disagrees with Petitioners' argument that the language of the scope of the Orders can reasonably be interpreted to include any bag with three visible colors that result from printing in register. Rather, Petitioners' submission to the Department demonstrates that this was not the originally intended interpretation of the language of the scope of the Orders.

Petitioners' use of a spectrodensitometer to measure the number of colors present in Shapiro's Three Sacks and the affidavits from members of the industry placed on the record by Petitioners are not dispositive because, the question at issue is not whether three or more different colors are visible on the sacks, as this was not the originally intended interpretation of the language of the scope of the Orders, but whether three or more colors were printed in register on the exterior ply of the sacks during the printing process. Therefore, Petitioners' spectrodensitometer analysis and affidavit evidence do not bear on the Department's determination.

With regard to Petitioners' statement that "it would have been prudent to have prefaced the print stations phrase with 'normally,'" as explained by Duferco Steel, the Department's interpretation is bound by the scope language and the methodology set forth in its regulations. See Petitioners' Surrebuttal Comments at 9. Accordingly, the Department cannot base its determination on terms that are not present in the scope or materials available under the Department's interpretive methodology, regardless of what now seems prudent to Petitioners. Moreover, with regard to Petitioners' statement that the omission of this word "cannot become the basis for a radical modification of the scope of the Orders," the Department's determination is not informed by words that are absent from the scope or materials available under the Department's interpretive methodology. See Petitioners' Surrebuttal Comments at 9. Moreover, given that the Department's analysis is rooted in the scope language and investigation materials, the Department's determination does not constitute a "modification" of the scope.

Additionally, although the Department has implemented certification programs in past cases, we generally did so only in limited circumstances, and when it had been demonstrated that such a certification program was necessary to prevent circumvention of the order.²¹ In the instant scope review, the Department finds that a certification program is neither necessary nor appropriate given the evidence on the record. Specifically, no party has provided any evidence to demonstrate that an importer has attempted to classify as non-subject merchandise its imports of laminated woven sacks that have been printed with three colors or more in register and otherwise meeting the criteria of the scope of the Orders. Therefore, the Department finds that a certification program is not warranted to administer the Orders on laminated woven sacks.

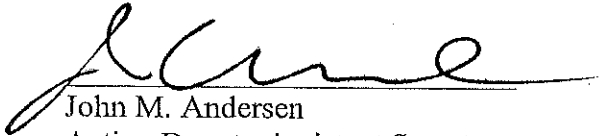
For these reasons, the Department finds that Shapiro's Three Sacks are not merchandise covered by the scope of the Orders on laminated woven sacks from the PRC, because we find that these sacks were not printed with three or more colors in register. As explained above, Petitioners included language in the description of the merchandise contained in the petition which specifically stated that three colors must be printed in register, at three separate print stations each containing a different color, to be classified as merchandise meeting the scope of the less-than-fair value and countervailing duty investigations. Shapiro's Three Sacks have only two colors that were printed in register at two separate print stations. Therefore, based on a 19 CFR § 351.225(k)(1) scope analysis, the Department finds that Shapiro's Three Sacks are not merchandise covered by the scope of the Orders.

²¹ See Certain Pneumatic Off-the-Road Tires from the People's Republic of China, 73 FR 40485 (July 15, 2008), and accompanying Issues and Decisions Memorandum at Comment 19.

Recommendation

Based on the preceding analysis, we recommend the Department find that Shapiro's Three Sacks are outside the scope of the Orders. If you agree, we will send the attached letter to the interested parties, and will notify CBP of our determination.

 / Agree Disagree



John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

 7/29/09
Date