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Anti-Circumvention Inquiry
2018 Minor Alteration
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MEMORANDUM TO: James Maeder
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations
performing the duties of Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

THROUGH: James Doyle
Director, Office V
Antidumping and Countervailing Duty Operations

FROM: Amanda Brings
International Trade Compliance Analyst, Office V
Antidumping and Countervailing Duty Operations

RE: Certain Hardwood Plywood Products from the People's Republic
of China: Minor Alterations Anti-Circumvention Inquiry Request

Summary

Columbia Forest Products, Commonwealth Plywood Inc., States Industries, Inc., and Timber Products Company (collectively, U.S. Producers) request¹ that the Department of Commerce (Commerce) initiate a minor alterations anti-circumvention inquiry pursuant to section 781(c) of the Tariff Act of 1930, as amended (the Act), to determine whether imports of plywood with both face and back veneers of softwood from the People's Republic of China (China) are circumventing the antidumping and countervailing duty orders on certain hardwood plywood products from China.² As explained below, we recommend declining to initiate a minor alterations anti-circumvention inquiry.

¹ See Letter re: "Certain Hardwood Plywood Products from the People's Republic of China: Request for Anti-Circumvention Inquiry," dated February 15, 2018 (U.S. Producer's Anti-Circumvention Inquiry Request).

² See *Certain Hardwood Plywood Products from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order*, 83 FR 504 (January 4, 2018) and *Certain Hardwood Plywood Products from the People's Republic of China: Countervailing Duty Order*, 82 FR 513 (January 4, 2018) (Order).



Background

On February 15, 2018, U.S. Producers requested that Commerce initiate an anti-circumvention proceeding, pursuant to section 781(c) of the Act and 19 CFR 351.225(i), to determine whether plywood with both face and back veneers of softwood involves a minor alteration to subject merchandise such that it should be subject to the *Orders*.³ In their request, U.S. Producers note that the merchandise subject to this anti-circumvention inquiry request is the same merchandise that was subject to a prior scope determination request filed during the hardwood plywood investigations on behalf of the Coalition for Fair Trade in Hardwood Plywood and its individual members, the petitioners in the underlying investigations.⁴ During the underlying investigations, Commerce addressed the petitioners' scope determination request in its Final Scope Decision Memorandum, determining that the merchandise at issue, plywood with both face and back veneers of softwood, is outside of the scope of the investigations.⁵

On February 22, 2018, Masterbrand Cabinets, Inc., Liberty Woods International, Inc., USPLY LLC, Patriot Timber Products Inc., Northwest Hardwoods, Inc., Taraca Pacific, Inc., Concannon Corp., Laminate Technologies, Inc., and Fabuwood Cabinetry Corporation filed a request to reject the U.S. Producers' minor alterations anti-circumvention inquiry request.⁶ On March 6, 2018, Far East American, Inc., Linyi Sanfortune Wood Co., Ltd., Linyi Chengen Import and Export Co., Ltd., Shandong Dongfang Bayley Wood Co., Ltd., Suqian Hopeway International Trade Co., Ltd., Shanghai Futuwood Trading Co., Ltd., Xuzhou Jiangyang Wood Industries Co., Ltd., Xuzhou Longyuan Wood Industry Co., Ltd., Xuzhou Shengping Imp and Exp Co., Ltd., Suzhou Oriental Dragon Import and Export Co., Ltd., IKEA Supply AG, Linyi City Sherui International Trade Co., Ltd., Linyi Jiahe Wood Industry Co., Ltd., Shelter Forest International Acquisition, Inc., and the Importers' Coalition (collectively, U.S. Importers and Chinese

³ See U.S. Producers' Anti-Circumvention Inquiry Request.

⁴ *Id.* at 8-9.

⁵ See Letter from Masterbrand Cabinets, Inc., Liberty Woods International, Inc., USPLY LLC, Patriot Timber Products Inc., Northwest Hardwoods, Inc., Taraca Pacific, Inc., Concannon Corp., Laminate Technologies, Inc., Fabuwood Cabinetry Corporation and Elberta Crate and Box Co. (collectively, Importers' Coalition) re: "Certain Hardwood Plywood Products from the People's Republic of China: Objection to Request for Anti-Circumvention Inquiry Request for Immediate Dismissal," dated March 6, 2018 (Importers' Coalition Comments), at Exhibit 1 (Memorandum, "Certain Hardwood Plywood Products from the People's Republic of China: Final Scope Comments Decision Memorandum," dated November 6, 2017 (Final Scope Decision Memorandum), at Issue 9).

⁶ See Letter re: "Certain Hardwood Plywood Products from the People's Republic of China: Request to Reject U.S. Producers' Anti-Circumvention Filing," dated February 22, 2018.

Exporters) filed comments on U.S. Producers' minor alterations anti-circumvention inquiry request.⁷ On March 13, 2018, U.S. Producers submitted rebuttal comments.⁸

Description of Merchandise

The merchandise included in the U.S. Producers' request is plywood that otherwise meets the definition of subject merchandise, but has both a face and back veneer made of softwood suitable for decorative uses.⁹ The merchandise is classified in the Harmonized Tariff Schedule of the United States (HTSUS) under 4412.39, which is the subheading for plywood with both face and back veneers made of softwood.¹⁰

Scope of the Orders

The merchandise covered by the *Orders* is hardwood and decorative plywood, and certain veneered panels as described below. For purposes of the *Orders*, hardwood and decorative plywood is defined as a generally flat, multilayered plywood or other veneered panel, consisting of two or more layers or plies of wood veneers and a core, with the face and/or back veneer made of non-coniferous wood (hardwood) or bamboo. The veneers, along with the core may be glued or otherwise bonded together. Hardwood and decorative plywood may include products that meet the American National Standard for Hardwood and Decorative Plywood, ANSI/HPVA HP-1-2016 (including any revisions to that standard).

For purposes of the *Orders* a "veneer" is a slice of wood regardless of thickness which is cut, sliced or sawed from a log, bolt, or flitch. The face and back veneers are the outermost veneer of wood on either side of the core irrespective of additional surface coatings or covers as described below.

The core of hardwood and decorative plywood consists of the layer or layers of one or more material(s) that are situated between the face and back veneers. The core may be composed of a

⁷ See Letter from Far East American, Inc., Linyi Sanfortune Wood Co., Ltd., Linyi Chengen Import and Export Co., Ltd., Shandong Dongfang Bayley Wood Co., Ltd., Suqian Hopeway International Trade Co., Ltd., Shanghai Futuwood Trading Co., Ltd., Xuzhou Jiangyang Wood Industries Co., Ltd., Xuzhou Longyuan Wood Industry Co., Ltd., Xuzhou Shengping Imp and Exp Co., Ltd., and Suzhou Oriental Dragon Import and Export Co., Ltd. re: "Hardwood Plywood from the People's Republic of China- Comments In Opposition to Request for Anti-Circumvention 2018 Inquiry," dated March 6, 2018 (Far East Comments); Letter from IKEA Supply AG re: "Certain Hardwood Plywood Products from the People's Republic of China: Comments Related to Petitioners' Anti-Circumvention Inquiry Request," dated March 6, 2018 (IKEA Comments); Letter from Linyi City Shemui International Trade Co., Ltd. and Linyi Jiahe Wood Industry Co., Ltd. re: "Hardwood Plywood Products from the People's Republic of China: Comments in Opposition to Petitioners' Anti-Circumvention Inquiry Request," dated March 6, 2018 (Linyi Comments); Letter from Shelter Forest International Acquisition, Inc. re: Comment on Certain U.S. Producers' Request for Anti-Circumvention Inquiry Certain Hardwood Plywood Products from the People's Republic of China," dated March 6, 2018 (Shelter Forest Comments); and Importers' Coalition Comments.

⁸ See Letter re: "Certain Hardwood Plywood Products from the People's Republic of China: Rebuttal Comments," dated March 13, 2018 (U.S. Producers' Rebuttal Comments).

⁹ See U.S. Producers' Anti-Circumvention Inquiry Request at 9.

¹⁰ *Id.* at 10.

range of materials, including but not limited to hardwood, softwood, particleboard, or medium-density fiberboard (MDF).

All hardwood plywood is included within the scope of the *Orders* regardless of whether or not the face and/or back veneers are surface coated or covered and whether or not such surface coating(s) or covers obscures the grain, textures, or markings of the wood. Examples of surface coatings and covers include, but are not limited to: ultra violet light cured polyurethanes; oil or oil-modified or water based polyurethanes; wax; epoxy-ester finishes; moisture-cured urethanes; paints; stains; paper; aluminum; high pressure laminate; MDF; medium density overlay (MDO); and phenolic film. Additionally, the face veneer of hardwood plywood may be sanded; smoothed or given a “distressed” appearance through such methods as hand-scraping or wire brushing. All hardwood plywood is included within the scope even if it is trimmed; cut-to-size; notched; punched; drilled; or has underwent other forms of minor processing.

All hardwood and decorative plywood is included within the scope of the *Orders*, without regard to dimension (overall thickness, thickness of face veneer, thickness of back veneer, thickness of core, thickness of inner veneers, width, or length). However, the most common panel sizes of hardwood and decorative plywood are 1219 x 1829 mm (48 x 72 inches), 1219 x 2438 mm (48 x 96 inches), and 1219 x 3048 mm (48 x 120 inches).

Subject merchandise also includes hardwood and decorative plywood that has been further processed in a third country, including but not limited to trimming, cutting, notching, punching, drilling, or any other processing that would not otherwise remove the merchandise from the scope of the order if performed in the country of manufacture of the in-scope product.

The scope of the *Orders* excludes the following items: (1) structural plywood (also known as “industrial plywood” or “industrial panels”) that is manufactured to meet U.S. Products Standard PS 1-09, PS 2-09, or PS 2-10 for Structural Plywood (including any revisions to that standard or any substantially equivalent international standard intended for structural plywood), and which has both a face and a back veneer of coniferous wood; (2) products which have a face and back veneer of cork; (3) multilayered wood flooring, as described in the antidumping duty and countervailing duty orders on Multilayered Wood Flooring from the People’s Republic of China, Import Administration, International Trade Administration. See Multilayered Wood Flooring from the People’s Republic of China, 76 FR 76690 (December 8, 2011) (amended final determination of sales at less than fair value and antidumping duty order), and Multilayered Wood Flooring from the People’s Republic of China, 76 FR 76693 (December 8, 2011) (countervailing duty order), as amended by Multilayered Wood Flooring from the People’s Republic of China: Amended Antidumping and Countervailing Duty Orders, 77 FR 5484 (February 3, 2012); (4) multilayered wood flooring with a face veneer of bamboo or composed entirely of bamboo; (5) plywood which has a shape or design other than a flat panel, with the exception of any minor processing described above; (6) products made entirely from bamboo and adhesives (also known as “solid bamboo”); and (7) Phenolic Film Faced Plyform (PFF), also known as Phenolic Surface Film Plywood (PSF), defined as a panel with an “Exterior” or “Exposure 1” bond classification as is defined by The Engineered Wood Association, having an

opaque phenolic film layer with a weight equal to or greater than 90g/m³ permanently bonded on both the face and back veneers and an opaque, moisture resistant coating applied to the edges.

Excluded from the scope of the *Orders* are wooden furniture goods that, at the time of importation, are fully assembled and are ready for their intended uses. Also excluded from the scope of this order is “ready to assemble” (RTA) furniture. RTA furniture is defined as (A) furniture packaged for sale for ultimate purchase by an end-user that, at the time of importation, includes 1) all wooden components (in finished form) required to assemble a finished unit of furniture, 2) all accessory parts (e.g., screws, washers, dowels, nails, handles, knobs, adhesive glues) required to assemble a finished unit of furniture, and 3) instructions providing guidance on the assembly of a finished unit of furniture; (B) unassembled bathroom vanity cabinets, having a space for one or more sinks, that are imported with all unassembled hardwood and hardwood plywood components that have been cut-to-final dimensional component shape/size, painted or stained prior to importation, and stacked within a singled shipping package, except for furniture feet which may be packed and shipped separately; or (C) unassembled bathroom vanity linen closets that are imported with all unassembled hardwood and hardwood plywood components that have been cut-to-final dimensional shape/size, painted or stained prior to importation, and stacked within a single shipping package, except for furniture feet which may be packed and shipped separately.

Excluded from the scope of the *Orders* are kitchen cabinets that, at the time of importation, are fully assembled and are ready for their intended uses. Also excluded from the scope of the *Orders* are RTA kitchen cabinets. RTA kitchen cabinets are defined as kitchen cabinets packaged for sale for ultimate purchase by an end-user that, at the time of importation, includes 1) all wooden components (in finished form) required to assemble a finished unit of cabinetry, 2) all accessory parts (e.g., screws, washers, dowels, nails, handles, knobs, hooks, adhesive glues) required to assemble a finished unit of cabinetry, and 3) instructions providing guidance on the assembly of a finished unit of cabinetry.

Excluded from the scope of the *Orders* are finished table tops, which are table tops imported in finished form with pre-cut or drilled openings to attach the underframe or legs. The table tops are ready for use at the time of import and require no further finishing or processing.

Excluded from the scope of the *Orders* are finished countertops that are imported in finished form and require no further finishing or manufacturing.

Excluded from the scope of the *Orders* are laminated veneer lumber door and window components with (1) a maximum width of 44 millimeters, a thickness from 30 millimeters to 72 millimeters, and a length of less than 2413 millimeters (2) water boiling point exterior adhesive, (3) a modulus of elasticity of 1,500,000 pounds per square inch or higher, (4) finger-jointed or lap-jointed core veneer with all layers oriented so that the grain is running parallel or with no more than 3 dispersed layers of veneer oriented with the grain running perpendicular to the other layers; and (5) top layer machined with a curved edge and one or more profile channels throughout.

Imports of hardwood plywood are primarily entered under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 4412.10.0500;4412.31.0520; 4412.31.0540; 4412.31.0560; 4412.31.0620; 4412.31.0640; 4412.31.0660; 4412.31.2510; 4412.31.2520; 4412.31.2610; 4412.31.2620; 4412.31.4040; 4412.31.4050; 4412.31.4060; 4412.31.4075; 4412.31.4080; 4412.31.4140; 4412.31.4150; 4412.31.4160; 4412.31.4180; 4412.31.5125; 4412.31.5135; 4412.31.5155; 4412.31.5165; 4412.31.5175; 4412.31.5235; 4412.31.5255; 4412.31.5265; 4412.31.5275; 4412.31.6000; 4412.31.6100; 4412.31.9100; 4412.31.9200; 4412.32.0520; 4412.32.0540; 4412.32.0565; 4412.32.0570; 4412.32.0620; 4412.32.0640; 4412.32.0670; 4412.32.2510; 4412.32.2525; 4412.32.2530; 4412.32.2610; 4412.32.2630; 4412.32.3125; 4412.32.3135; 4412.32.3155; 4412.32.3165; 4412.32.3175; 4412.32.3185; 4412.32.3235; 4412.32.3255; 4412.32.3265; 4412.32.3275; 4412.32.3285; 4412.32.5600; 4412.32.3235; 4412.32.3255; 4412.32.3265; 4412.32.3275; 4412.32.3285; 4412.32.5700; 4412.94.1030; 4412.94.1050; 4412.94.3105; 4412.94.3111; 4412.94.3121; 4412.94.3141; 4412.94.3161; 4412.94.3175; 4412.94.4100; 4412.99.0600; 4412.99.1020; 4412.99.1030; 4412.99.1040; 4412.99.3110; 4412.99.3120; 4412.99.3130; 4412.99.3140; 4412.99.3150; 4412.99.3160; 4412.99.3170; 4412.99.4100; 4412.99.5115; and 4412.99.5710.

Imports of hardwood plywood may also enter under HTSUS subheadings 4412.99.6000; 4412.99.7000; 4412.99.8000; 4412.99.9000; 4412.10.9000; 4412.94.5100; 4412.94.9500; and 4412.99.9500. While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the *Orders* is dispositive.

Interested Party Comments

U.S. Producers' Comments:

- Information reasonably available to U.S. Producers indicates that certain imports of plywood with face and back veneers made of softwood from China are circumventing the *Orders* on certain hardwood plywood products.¹¹ Consequently, Commerce should find that plywood with face and back veneers of softwood is subject merchandise that has been altered in minor ways to circumvent the *Orders* and is included within the scope.¹²
- While the investigations were occurring, Chinese producers and exporters began to preemptively circumvent the anticipated *Orders*.¹³ U.S. Producers began receiving reports that domestic importers were offering subject merchandise with face and back veneers made of certain species of softwood suitable for decorative use, such as radiata pine.¹⁴ The petitioners responded to these circumvention attempts by requesting that Commerce clarify the scope of the investigations to reflect their intent to cover this product and mitigate any potential avenues for circumvention.¹⁵

¹¹ *Id.* at 2.

¹² *Id.*

¹³ *Id.* at 5.

¹⁴ *Id.*

¹⁵ *Id.* at 6.

- Commerce ultimately concluded that the scope did not cover plywood with both face and back veneers made of softwood, but made clear that it would closely review further evidence regarding circumvention or evasion if orders were imposed.¹⁶
- Although the Federal Circuit in *Wheatland* has held that minor alterations inquiries are inappropriate when the relevant order expressly excludes the merchandise at issue in an anti-circumvention inquiry, there is no such exclusion for plywood with both a softwood face and back veneer in the orders at issue here.¹⁷ Furthermore, U.S. Producers chose not to specify in the scope that hardwood and decorative plywood may have, in certain cases, both a softwood face and back veneer.¹⁸ Notwithstanding U.S. Producers' silence on this issue, U.S. Producers did not intend to exclude a potential subset of subject merchandise and there is no exclusion for such merchandise included in the scope.¹⁹
- In *Deacero*, the Federal Circuit has held that the inclusion of certain types of products in the scope of an order "cannot be read to expressly exclude for purposes of anti-circumvention inquiries all products outside that range."²⁰
- In *Deacero* and *Nippon Steel*, the courts examined scope language that included certain products, similar to the scope language here, in upholding Commerce's authority to conduct minor alterations anti-circumvention inquiries.²¹ The scope language in the antidumping duty order at issue in *Deacero* provided that the orders covered 5.00 mm to 19.0 mm wire rod and, in upholding Commerce's affirmative circumvention determination covering 4.75 to 5.00 mm wire rod, the Federal Circuit recognized that the orders contained no explicit exclusion for smaller diameter steel wire rod.²²
- In *Nippon Steel*, the Federal Circuit found that Commerce could properly initiate an anti-circumvention inquiry on steel products with more than 0.0008% boron, when the antidumping duty order at issue covered steel products not exceeding 0.0008% boron.²³
- As in *Deacero* and *Nippon Steel*, the scope language here contains no express exclusion for plywood with both face and back veneers of softwood, and, to the extent that the scope can be read not to include such merchandise, this does not place such products outside of the purview of an anti-circumvention inquiry.²⁴
- Commerce's scope determination does not preclude Commerce from conducting an anti-circumvention inquiry.²⁵ In *Target Corp.*, the Federal Circuit upheld Commerce's affirmative circumvention determination finding that petroleum wax candles with 50% or more vegetable wax, *i.e.*, mixed-wax candles, are later-developed merchandise covered by the antidumping duty order on petroleum wax candles notwithstanding the fact that

¹⁶ *Id.* at 8.

¹⁷ *Id.* at 17.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 18 (citing *Deacero v. United States*, 817 F.3d 1332, 1338 (Fed. Cir. 2016) (*Deacero*)).

²¹ See U.S. Producers' Rebuttal Comments at 10 (citing *Deacero*, 817 F.3d at 1337 and *Nippon Steel Corp. v. United States*, 219 F.3d 1348, 1356 (Fed. Cir. 2000) (*Nippon Steel*)).

²² *Id.*

²³ *Id.* at 11.

²⁴ See U.S. Producers' Anti-Circumvention Inquiry Request at 18.

²⁵ See U.S. Producers' Rebuttal Comments at 5.

Commerce had issued multiple scope rulings finding various types of mixed-wax candles with less than 50% petroleum wax to be excluded from the scope of the order.²⁶

- Plywood with softwood face and back veneers is being offered as a direct alternative to subject merchandise, and importers are emphasizing that this merchandise can enter the U.S. market without paying antidumping or countervailing duties.²⁷ Radiata pine appears to be one of the primary species of softwood being used to circumvent the *Orders*.²⁸ Radiata pine has a relatively low resin content, making it similar to hardwood species and an ideal alternative to hardwood species.²⁹ Both radiata pine and agathis pine are suitable for interior, decorative uses.³⁰
- U.S. import data provide compelling evidence of circumvention.³¹ Under HTS subheading 4412.39, which covers plywood with outer veneers of softwood, official import statistics indicate that imports of softwood-faced plywood increased by 400 percent in 2017 compared to 2016.³²
- Chinese producers and exporters who used to offer subject merchandise with at least one side composed of hardwood are now also offering plywood with face and back veneers of softwood for the same end uses and to the same customers who previously purchased subject merchandise.³³
- Plywood with face and back veneers of softwood are manufactured to the same dimensions as subject merchandise, and the same equipment can be used to peel hardwood veneers and softwood veneers to produce subject merchandise.³⁴ The cost of the minor alteration made to subject merchandise is minimal to non-existent.³⁵
- The basic expectations of the ultimate users and the ultimate use of both subject merchandise and hardwood plywood with face and back veneers of softwood is the same.³⁶ Hardwood plywood is generally chosen for its decorative and aesthetic qualities and is used in products such as furniture, kitchen cabinets, architectural woodwork, and wall paneling.³⁷ Home Depot, Lowe's, and online offers highlight the same characteristics for decorative plywood with hardwood veneers, such as maple or birch, as they do for decorative plywood with softwood veneers, such as pine.³⁸ These retailers emphasize the interior use of these products, such as cabinets, shelving, and furniture.³⁹
- The circumstances, timing, and volume surrounding the entry of plywood with softwood face and back veneers from China into the U.S. market strongly suggest that Chinese

²⁶ *Id.* at 5, Footnote 12 (citing *Target Corp. v. United States*, 609 F.3d 1352, 1362 (Fed. Cir. 2010) (*Target Corp.*)).

²⁷ See U.S. Producers' Anti-Circumvention Inquiry Request at 21.

²⁸ *Id.* at 11.

²⁹ *Id.*

³⁰ *Id.* at 12.

³¹ *Id.* at 13.

³² See U.S. Producers' Rebuttal Comments at 3.

³³ *Id.* at 21.

³⁴ *Id.* at 21-22.

³⁵ *Id.* at 26-27.

³⁶ *Id.* at 22.

³⁷ *Id.* at 22-23.

³⁸ *Id.* at 23.

³⁹ *Id.* at 23-24.

producers and exporters are exporting such merchandise in a concerted effort to circumvent the *Orders*.⁴⁰

U.S. Importers' and Chinese Producers' Comments:

- The U.S. Producers are attempting to game the AD/CVD laws.⁴¹ The U.S. Producers cannot now eliminate the very exclusion the petitioners relied on to show standing and obtain Commerce and International Trade Commission (ITC) determinations by claiming “circumvention.”⁴²
- The current scope was written by the petitioners as an intentional departure from the prior 2012 antidumping and countervailing duty investigations of hardwood plywood (2012 hardwood plywood investigations).⁴³ In the 2012 hardwood plywood investigations, the petitioners explicitly included plywood with both face and back veneers of softwood within the scope, and they faced a standing challenge.⁴⁴
- When the same petitioners filed the petitions in the underlying investigations, they explicitly removed any reference to plywood with both face and back veneers of softwood as being included in the scope.⁴⁵ In the petitions, the petitioners explained that “{a} hardwood and decorative plywood panel must have at least either the face or back veneer composed of one or more species of hardwood or bamboo.”⁴⁶ This is an unambiguous statement excluding products with both the face and back veneers made from softwoods.⁴⁷ This was a purposeful and explicit change in the scope between the 2012 hardwood plywood investigations and the underlying investigations.⁴⁸
- Commerce resolved the plain meaning of the scope during the underlying investigations.⁴⁹ In the underlying investigations, after the preliminary determinations, the petitioners requested that Commerce include plywood with both face and back veneers of softwood, and raised the very same arguments the U.S. Producers’ raise in their anti-circumvention inquiry request.⁵⁰ Commerce fully considered these arguments and, in its final determinations, following a full examination of this specific issue, Commerce unequivocally concluded that the plain language of the scope excludes plywood with softwood face and back veneers.⁵¹ Commerce expressly stated that the

⁴⁰ *Id.* at 30-32.

⁴¹ See Linyi Comments at 4; Shelter Forest Comments at 14.

⁴² See Linyi Comments at 3-4.

⁴³ See Linyi Comments at 3-4; Importers’ Coalition Comments at 11-12; Shelter Forest Comments at 4-8.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See Far East Comments at 5; Linyi Comments at 3; Shelter Forest Comments at 15.

⁴⁷ See Far East Comments at 5.

⁴⁸ See Far East Comments at 5; Linyi Comments at 3; Shelter Forest Comments at 15.

⁴⁹ See Far East Comments at 3-4; IKEA Comments at 2-4; Importers’ Coalition Comments at 10; Linyi Comments at 2-3; Shelter Forest Comments at 16-17.

⁵⁰ *Id.*

⁵¹ See Far East Comments at 6; Importers’ Coalition Comments at 20.

petitions did not support the petitioners' contention that it was their intent to include hardwood plywood with both a face and a back veneer of softwood within the scope.⁵²

- Commerce has already concluded that expanding the scope to include softwood plywood would be at odds with Commerce's industry support determination, which was based on Commerce's and the ITC's understanding that subject merchandise must have at least either a face or back veneer composed of hardwood or bamboo.⁵³
- According to 19 U.S.C. § 1677j(c)(2), the minor alteration provision "shall not apply with respect to altered merchandise if the administering authority determines that it would be unnecessary to consider the altered merchandise within the scope of the investigation, order, or finding."⁵⁴ Given that Commerce has already explicitly ruled that the very merchandise targeted by the circumvention request is outside the scope, a circumvention case is, by definition, unnecessary.⁵⁵
- There is no judicial precedent for finding that a product ruled to be out of the scope can be circumventing an AD or CVD order.⁵⁶
- *Wheatland* prohibits a minor alteration inquiry when the product in question is well-known prior to the imposition of the order and specifically excluded from the investigation.⁵⁷ As a matter of law, Commerce is, thus, barred from initiating a "minor alteration" anti-circumvention inquiry under 19 U.S.C. § 1677j(c) to possibly expand the scope of the AD/CVD orders to include an explicitly excluded out-of-scope product.⁵⁸
- In this case, Commerce similarly found that the plain language of the scope expressly excluded the exact product the U.S. Producers now seek to include within the scope.⁵⁹ *Wheatland*, therefore, requires an outright rejection of the U.S. Producers' circumvention request because, as in that case, Commerce has already expressly ruled that plywood with a coniferous face and back is excluded merchandise.⁶⁰
- The U.S. Producers submit that the minor alterations inquiry is appropriate, because there is no express exclusion of the merchandise.⁶¹ However, the administrative record in this case makes it clear that softwood plywood was excluded from the scope and that the petitioners had chosen to attempt to add softwood plywood to the scope during the investigations, but that Commerce expressly rejected this position.⁶² The U.S. Producers' argument is contrary to Commerce's final scope determination.⁶³
- The focus of the *Wheatland* analysis is "that a product specifically excluded from the scope of an order may not be brought back within the scope in the context of an anti-

⁵² See Linyi Comments at 6.

⁵³ See Importers' Coalition Comments at 2; Linyi Comments at 5.

⁵⁴ See Shelter Forest Comments at 18.

⁵⁵ *Id.*

⁵⁶ See Importers' Coalition Comments at 19.

⁵⁷ See Shelter Forest's Comments at 9 (citing *Wheatland Tube Company v. United States*, 161 F. 3d 1365, 1371 (Fed. Cir. 1998) (*Wheatland*)).

⁵⁸ *Id.* at 14.

⁵⁹ See Importers' Coalition Comments at 21.

⁶⁰ *Id.*

⁶¹ See IKEA Comments at 4.

⁶² *Id.*

⁶³ *Id.*

circumvention inquiry applicable to covered merchandise.”⁶⁴ Plywood with softwood face and back veneers was specifically excluded; it was not an incidental exclusion of the petitioners trying to draw reasonable parameters around a scope.⁶⁵

- Further, the reason the scope does not contain a specific listed exclusion for plywood with “both a face and a back veneer of coniferous wood” is because the petitioners themselves found it “redundant” to do so, because the product was already expressly excluded from the affirmative language of the scope itself.⁶⁶
- The intent of section 781(c) of the Act is “to prevent foreign producers from circumventing existing findings or orders through the sale of later-developed products or of products with minor alterations that contain features or technologies not in use in the class or kind of merchandise imported in the United States at the time of the original investigation.”⁶⁷
- Here, no additional features or technologies exist in the merchandise subject to the U.S. Producers’ request.⁶⁸ This merchandise not only existed during the investigation phase of these cases, but this merchandise was also subject to critical review and submissions from all interested parties.⁶⁹
- All of the successfully initiated minor alteration anti-circumvention inquiries involved a minor adjustment to size or minor chemicals.⁷⁰ In contrast, softwood-faced plywood and hardwood-faced plywood are more significantly different products.⁷¹ Softwood plywood requires an entirely different veneer face from a different species of tree than for the subject merchandise, and the face veneer is a significant component of the product.⁷²
- Commerce should reject the argument that any increase in imports of softwood plywood shows circumvention of the *Orders*.⁷³ Because the scope language does not cover plywood with both a face and back veneer of softwood, such plywood cannot circumvent an order on a completely different product regardless of the volume of imports.⁷⁴
- Commerce should also view with skepticism U.S. Producers’ claim that plywood with both a face and back veneer of softwood is being offered for the same applications as hardwood plywood.⁷⁵ That some Chinese suppliers advertise that they sell radiata pine plywood and that it may be used for a variety of end-uses does not prove circumvention, given that the very product has been expressly ruled not to be covered by the scope.⁷⁶

⁶⁴ See Far East Comments at 7 (citing *Wheatland*).

⁶⁵ *Id.*

⁶⁶ *Id.* at 8.

⁶⁷ See IKEA Comments at 5.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See Far East Comments at 9.

⁷¹ *Id.*

⁷² *Id.*

⁷³ See Importers’ Coalition Comments at 17.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

- The ITC’s questionnaires collected data for plywood with at least one outer veneer of hardwood; the ITC’s injury determination, therefore, does not cover the type of products that U.S. Producers seek to pull into the scope.⁷⁷

Analysis

Section 781(c)(1) of the Act provides that Commerce may find circumvention of an AD and/or CVD order when products which are of the class or kind of merchandise subject to an AD and/or CVD order have been “altered in form or appearance in minor respects . . . whether or not included in the same tariff classification.” While the statute is silent as to what factors to consider in determining whether alterations are properly considered “minor,” the legislative history of this provision indicates that there are certain factors which should be considered before reaching a circumvention determination. Concerning the allegation of minor alteration under section 781(c) of the Act and 19 CFR 351.225(i), Commerce examines “such criteria as the overall characteristics of the merchandise, the expectations of ultimate users, the use of the merchandise, the channels of marketing {,} and the cost of any modification relative to the total value of the imported product.”⁷⁸ Each case is highly dependent on the facts on the record, and must be analyzed in light of those specific facts. Thus, along with the five factors enumerated above, Commerce has also considered additional factors, such as the commercial availability of the product at issue prior to the issuance of the order as well as the circumstances under which the products at issue entered the United States, and the timing and quantity of said entries.⁷⁹

However, under section 781(c)(2) of the Act, the minor alterations inquiry “shall not apply with respect to altered merchandise if the administering authority determines that it would be unnecessary to consider the altered merchandise within the scope of the investigation, order, or finding.”⁸⁰ In this case, we find, in accordance with section 781(c)(2) of the Act, that it is unnecessary to consider whether plywood products with both face and back veneers of softwood are within the scope of the *Orders* pursuant to the instant request, because we already determined during the investigations that such products are not included in the scope.⁸¹

During the underlying investigations, the petitioners requested that Commerce clarify that the scope of the investigations included plywood with both face and back veneers of softwood.⁸² We addressed this request in our Post-Preliminary Scope Decision Memorandum, finding that

⁷⁷ *Id.* at 23-24.

⁷⁸ See S. Rep. No. 100–71, at 100 (1987).

⁷⁹ See, e.g., CTL Plate from the PRC, 74 FR at 33992-33993, see also, e.g., Brass Sheet and Strip from West Germany; Negative Preliminary Determination of Circumvention of Antidumping Duty Order, 55 FR 32655 (August 10, 1990), unchanged in Brass Sheet and Strip from Germany; Negative Final Determination of Circumvention of Antidumping Duty Order, 56 FR 65884 (December 19, 1991), see also, e.g., Small Diameter Graphite Electrodes from the People’s Republic of China: Initiation of Anticircumvention Inquiry, 77 FR 37873 (June 25, 2012).

⁸⁰ See Section 781(c)(2) of the Act.

⁸¹ See Final Scope Decision Memorandum at Issue 9.

⁸² See Importers’ Coalition Comments at Exhibit 7 (Letter re: “Certain Hardwood Plywood Products from the People’s Republic of China: Request for Scope Clarification,” dated June 20, 2017).

plywood with both face and back veneers of softwood is outside of the scope.⁸³ We explained that the “{p}etition’s references to softwood, decorative plywood, and the Hardwood Plywood Standard, and the scope’s references to decorative plywood and the Hardwood Plywood Standard, simply state that softwood *may* be included as a component in hardwood plywood, but do not support the petitioners’ contention that it was their intent to include hardwood plywood with *both* a face *and* back veneer of softwood within the scope.”⁸⁴

In the Post-Preliminary Scope Decision Memorandum, we also explained that “{e}xpanding the scope as the petitioners have proposed could also potentially be at odds with the Department’s industry support determination, which was based on the Department’s and ITC’s understanding that hardwood plywood must have at least either a face or back veneer composed of hardwood or bamboo.”⁸⁵ Accordingly, we determined that “there was no basis for making the petitioners’ requested clarification and proposed modification to the scope” because plywood with both face and back veneers of softwood “is not covered by the scope and expanding the scope to include such a product raises significant procedural concerns.”⁸⁶

In our Final Scope Comments Decision Memorandum, we affirmed our earlier findings in the Post-Preliminary Scope Memorandum, and determined that plywood with softwood face and back veneers was not included in the scope of the *Orders*. As we explained, the “the plain language of the scope, which has its genesis in the petitions, is consistent, clear, and requires subject merchandise to have at least one of the face or back veneers be made of non-coniferous wood (hardwood) or bamboo. Accordingly, it is axiomatic that the plain language of the scope excludes the products the petitioners seek to include within the scope: products with *both* a face and back veneer of coniferous wood.”⁸⁷ This final scope determination has not been challenged by any interested party.

The Court of International Trade (CIT), affirmed by the Federal Circuit in its *Wheatland* decision, has ruled that Commerce must adhere to the following standard when conducting minor alteration anti-circumvention inquiries:

{T}he intent of Congress is clear and the statutory language is unambiguous, applying only to merchandise that has been ‘altered in form or appearance in minor respects’ from that which appears to have been originally within the scope of the antidumping order...The minor alterations provision does not apply to a distinct product that is originally unambiguously outside the scope of the order and is not produced by altering subject merchandise.⁸⁸

⁸³ See Importers’ Coalition Comments at Exhibit 3 (Memorandum, “Certain Hardwood Plywood Products from the People’s Republic of China: Scope Comments Post-Preliminary Decision Memorandum,” dated October 16, 2017 (Post-Preliminary Scope Decision Memorandum) at Comment I).

⁸⁴ *Id.* (emphasis added).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See Final Scope Decision Memorandum at Issue 9.

⁸⁸ *Wheatland Tube Company v. United States*, 973 F. Supp. 149, 162 (CIT 1997).

The Federal Circuit held in *Wheatland* that a product specifically excluded from the scope of an order may not be brought back within the scope in the context of an anti-circumvention inquiry applicable to covered merchandise.⁸⁹ Here, the record shows that, pursuant to Commerce’s unchallenged final scope determination, the plain language of the scope requires that subject merchandise must have at least either the face or back veneer composed of one or more species of hardwood or bamboo, and that this requirement necessarily does not include plywood with both face and back veneers of softwood. Accordingly, consistent with *Wheatland*, it would be inappropriate to conduct a minor alterations anti-circumvention inquiry on plywood with both face and back veneers of softwood because such products are not included in the scope.

We disagree with the U.S. Producers’ argument that *Wheatland* is not applicable because the scope language does not expressly exclude plywood with softwood face and back veneers and that the petitioners did not intend to exclude a potential subset of subject merchandise by choosing to not specify in the scope that hardwood and decorative plywood may have, in certain cases, both a softwood face and back veneer.⁹⁰ Although the scope language does not list plywood with both face and back veneers of softwood on a list of marked exclusions, as explained in Commerce’s unchallenged final scope determination, the plain language of the scope, which has its genesis in the petitions, is consistent, clear, and requires subject merchandise to have at least one of the face or back veneers be made of hardwood or bamboo.⁹¹ Accordingly, during the investigations, we determined that plywood with both a softwood face and back veneer is unambiguously outside of the scope, and this finding has not been challenged.

Further, the ITC similarly understood throughout the investigations that subject merchandise must have at least either a face or back veneer composed of hardwood or bamboo, and based their injury determination upon this understanding.⁹² Sections 701 and 731 of the Act require an affirmative injury determination by the ITC, in addition to an affirmative determination by Commerce, before the imposition of antidumping duties and countervailing duties. We find this relevant here because, unlike other circumvention proceedings, Commerce need not consult with the ITC regarding injury prior to reaching an affirmative minor alteration circumvention determination.⁹³ Because the minor alteration provision only covers insignificant changes to subject merchandise, Congress did not anticipate a conflict with an ITC injury determination in this limited scenario.⁹⁴ Nonetheless, “Congress did not approve, through the minor alterations provision, wholesale changes to the scope of orders.”⁹⁵ Here, it appears that the inclusion of plywood with both face and back veneers of softwood, which was not considered in the ITC’s

⁸⁹ *Wheatland*, 161 F. 3d at 1371.

⁹⁰ See U.S. Producers’ Anti-Circumvention Inquiry Request at 17.

⁹¹ See Final Scope Decision Memorandum at Issue 9.

⁹² The ITC described hardwood plywood as follows: “{h}ardwood plywood includes at least one face or back veneer that is a hardwood species, but may have a face or back veneer and/or other layers of veneer of softwood species.” See Importers’ Coalition Comments at Exhibit 8 (*Hardwood Plywood from China*, Inv. No. 701- TA-565, 731-TA-1341, USITC Pub. 4747 at 9 (Dec. 2017) (*ITC Final Determination*)).

⁹³ See 19 U.S.C. § 1677j(e).

⁹⁴ See *Wheatland*, 973 F. Supp. at 163.

⁹⁵ *Id.*

injury analysis, could potentially create a conflict with the ITC injury determination, and impermissibly expand the scope of the *Orders*.

We also disagree with the U.S. Producers' argument that the initiation of an anti-circumvention inquiry is appropriate under *Deacero* and *Nippon Steel*.⁹⁶ The facts of *Deacero* and *Nippon Steel* are distinguishable from the facts of this case. First, although the products at issue in *Deacero* and *Nippon Steel* were not listed as specific exclusions in the orders, the products were also not specifically contemplated and determined to be excluded from the scope during the investigations, unlike in this case.⁹⁷ Second, the minor alterations in *Deacero* and *Nippon Steel* concerned insignificant changes to subject merchandise. In *Deacero*, the steel wire rod at issue would otherwise be covered by the order except that its diameter fell just below the cross-sectional range of 5 mm to 19 mm identified in the order.⁹⁸ In *Nippon Steel*, the minor alteration concerned alloy steel that would otherwise be covered by the order except additional boron was added to the alloy over the weight limit contained in the scope of 0.0008%.⁹⁹ Here, use of softwood veneers for both the face and back of the plywood is not an insignificant alteration of subject merchandise; rather, it results in the production of a different product, which is not covered by the scope of the *Orders*, and, thus, would not otherwise be covered by the scope but for the inclusion of an additional face or back veneer of softwood. Third, the products at issue in *Deacero* and *Nippon* were not well known at the time of the investigations.¹⁰⁰ Although not dispositive, we take into consideration the fact that plywood with both face and back veneers of softwood were well-known at the time of the investigations,¹⁰¹ and, thus, the facts of this case are similar to the scenario in *Wheatland*, which “involved two different products, both of which were well known when the order was issued....”¹⁰²

We also disagree with the U.S. Producers' claim, citing *Target Corp.*, that our prior scope determination does not preclude us from conducting an anti-circumvention inquiry. *Target Corp.* concerned a later developed merchandise anti-circumvention inquiry conducted pursuant to section 781(d) of the Act, which requires a different analysis than a minor alterations inquiry. We do note, however, that *Target Corp.* is also factually distinct from this case. In *Target Corp.*,

⁹⁶ See U.S. Producers' Rebuttal Comments at 10.

⁹⁷ See *Deacero*, 817 F.3d 1332; *Nippon Steel*, 219 F.3d 1348.

⁹⁸ See *Deacero*, 817 F.3d at 1339.

⁹⁹ See *Nippon Steel*, 219 F. 3d at 1354.

¹⁰⁰ See *Deacero*, 817 F.3d at 1339 (“substantial evidence supports Commerce’s conclusion that the smallest diameter steel wire rod produced in the investigated countries at the time the petition was filed was 5.5 mm”); *Nippon Steel*, 219 F. 3d at 1356 (“{*Wheatland*} involved two different products, both of which were well known when the order was issued, and not, as here, a product produced by making allegedly insignificant alterations to an existing product.”)

¹⁰¹ The products at issue were specifically contemplated by the petitioners in the 2012 hardwood plywood investigations. See *Hardwood and Decorative Plywood from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 58273, 58275 (September 23, 2013) (“A hardwood and decorative plywood panel must have face and back veneers which are composed of one or more species of hardwoods, *softwoods*, or bamboo.” (emphasis added)). In the underlying investigations, the petitioners removed the reference to softwood species in defining the subject merchandise. The products at issue were also specifically contemplated by the petitioners during the investigations, as evidenced by the scope determination made during the investigations.

¹⁰² See *Nippon Steel*, 219 F. 3d at 1356.

Commerce issued an antidumping duty order on petroleum wax candles from China in 1986.¹⁰³ Following the order, in a series of scope determinations, Commerce found that the ITC's percentage-based like product definition mandated that candles containing less than 50% petroleum wax be excluded from the scope.¹⁰⁴ In 2004, the National Candle Association, the domestic interested party, requested that Commerce initiate a later-developed merchandise anti-circumvention inquiry on certain mixed-wax candles, claiming that the late-1990s development of mixed-wax candles enabled importers to avoid paying duties. In March 2005, Commerce initiated the inquiry.¹⁰⁵ That year, the ITC was also conducting a second five-year sunset review of the order, a result of which is that it redefined the domestic like product "to include all blended candles."¹⁰⁶ Subsequently, Commerce completed the anti-circumvention inquiry and determined that mixed-wax candles containing "any amount" of petroleum wax were within the scope.¹⁰⁷ In *Target Corp.*, the CIT stated the order did not clearly and unambiguously exclude mixed-wax candles and that, because the later-developed merchandise was not present in the market at the time of the investigation, the order could not have addressed mixed-wax candles.¹⁰⁸ The CIT explained that, because the domestic like product now covered candles "containing any amount of petroleum wax," Commerce's inclusion of mixed-wax candles within the scope of the order did not impermissibly expand the scope.¹⁰⁹ Here, unlike the facts in *Target Corp.*, plywood with both face and back veneers of softwood were present in the market at the time of the investigations, and the ITC has not included such merchandise in its definition of the domestic like product.¹¹⁰

Accordingly, we find that it is not appropriate to initiate an anti-circumvention inquiry pursuant to section 781(c) of the Act and 19 CFR 351.225(i) because, as explained in our prior scope determination, the plain language of the scope of the *Orders* excludes the products subject to the U.S. Producers' request, *i.e.*, plywood with both face and back veneers of softwood, as a general category.

¹⁰³ See *Target Corp.*, 609 F.3d at 1356.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1363.

¹⁰⁹ *Id.*

¹¹⁰ See *ITC Final Determination* at 9 ("Hardwood plywood includes at least one face or back veneer that is a hardwood species, but may have a face or back veneer and/or other layers of veneer of softwood species.") and 10 ("Accordingly, we again define a single domestic like product corresponding to the scope.")

Recommendation: For the reasons discussed above, we recommend not initiating a minor alterations anti-circumvention inquiry pursuant to section 781(c) of the Act and 19 CFR 351.225(c) and (i) to determine whether imports of plywood with both face and back veneers of softwood are circumventing the *Orders*.

Agree

Disagree

4/2/2018

X *James Maeder*

Signed by: JAMES MAEDER
James Maeder
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations
performing the duties of Deputy Assistant Secretary
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