UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
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Anti-circumvention Inquiry
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DATE: August 28, 2017

MEMORANDUM TO: Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations,
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance

FROM: James Maeder
Senior Director
performing the duties of Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Affirmative Determination of Circumvention of the Antidumping and Countervailing Duty Orders on Certain Uncoated Paper from Australia, Brazil, the People's Republic of China, Indonesia, and Portugal

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I. Summary

We have analyzed the case and rebuttal briefs of interested parties in the anti-circumvention inquiry of the antidumping duty (AD) and countervailing duty (CVD) orders on certain uncoated paper (uncoated paper). As a result of our analysis, we continue to find, consistent with the *Preliminary Determination*,[1] that imports of uncoated paper with a GE brightness of 83 +/- 1% (83 Bright paper), otherwise meeting the description of in-scope merchandise, constitute merchandise "altered in form or appearance in minor respects" from in-scope merchandise that are subject to the AD and CVD *Orders* on uncoated paper.[2] We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is

[1] *See Certain Uncoated Paper from Australia, Brazil, Indonesia, the People's Republic of China, and Portugal: Affirmative Preliminary Determination of Circumvention of the Antidumping and Countervailing Duty Orders*; 82 FR 26778 (June 9, 2017) (*Preliminary Determination*).

[2] *See Certain Uncoated Paper from Australia, Brazil, Indonesia, the People's Republic of China, and Portugal: Amended Final Affirmative Antidumping Determinations for Brazil and Indonesia and Antidumping Duty Orders*; 81 FR 11174 (March 3, 2016) and *Certain Uncoated Paper from Indonesia and the People's Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order (Indonesia) and Countervailing Duty Order (People's Republic of China)*; 81 FR 11187, (March 3, 2016) (collectively, the *Orders*).

the complete list of issues for which we received comments and rebuttal comments from interested parties:

Comment 1: Authority to Initiate this Anti-Circumvention Inquiry

Comment 2: Existence of 83 Bright Paper Prior to the Filing of the Petition

Comment 3: Physical Characteristics of the Merchandise

Comment 4: Expectations of the Ultimate Users

Comment 5: Uses of the Merchandise

Comment 6: Channels of Marketing

Comment 7: Cost of Modification

Comment 8: Other Case-Specific Criteria

II. Background

On June 9, 2017, the Department published the *Preliminary Determination* in the *Federal Register*.[3] In accordance with 19 CFR 351.309, we invited parties to comment on the *Preliminary Determination*. In June and July 2017, respectively, we received a timely case brief from PT. Indah Kiat Pulp and Paper Tbk and PT. Pabrik Kertas Tjiwi Kimia Tbk (collectively APP) and a timely rebuttal brief from the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union; Domtar Corporation; Finch Paper LLC; P.H. Glatfelter Company; and Packaging Corporation of America (collectively, the petitioners).[4] Based on our analysis of the comments received, we continue to find that imports of 83 Bright paper, otherwise meeting the description of in-scope merchandise, constitute merchandise "altered in form or appearance in minor respects" from in-scope merchandise that should be considered subject to the AD and CVD *Orders* on uncoated paper.

III. Scope of the *Orders*

The merchandise subject to these *Orders* includes uncoated paper in sheet form; weighing at least 40 grams per square meter but not more than 150 grams per square meter; that either is a white paper with a GE brightness level[5] of 85 or higher or is a colored paper; whether or not

[3] *See Preliminary Determination.*

[4] *See* Letter from APP entitled, "Certain Uncoated Paper from Australia, Brazil, the People's Republic of China, Indonesia, and Portugal – Case Brief," dated June 23, 2017 (Case Brief). *See also* Letter from the petitioners entitled, "Certain Uncoated Paper from Australia, Brazil, the People's Republic of China, Indonesia, and Portugal/Petitioners' Rebuttal Brief," dated July 5, 2017 (Rebuttal Brief).

[5] One of the key measurements of any grade of paper is brightness. Generally speaking, the brighter the paper the better the contrast between the paper and the ink. Brightness is measured using a GE Reflectance Scale, which

surface-decorated, printed (except as described below), embossed, perforated, or punched; irrespective of the smoothness of the surface; and irrespective of dimensions (Certain Uncoated Paper).

Certain Uncoated Paper includes (a) uncoated free sheet paper that meets this scope definition; (b) uncoated ground wood paper produced from bleached chemi-thermo-mechanical pulp (BCTMP) that meets this scope definition; and (c) any other uncoated paper that meets this scope definition regardless of the type of pulp used to produce the paper.

Specifically excluded from the scope of these *Orders* are (1) paper printed with final content of printed text or graphics and (2) lined paper products, typically school supplies, composed of paper that incorporates straight horizontal and/or vertical lines that would make the paper unsuitable for copying or printing purposes. For purposes of this scope definition, paper shall be considered "printed with final content" where at least one side of the sheet has printed text and/or graphics that cover at least five percent of the surface area of the entire sheet.

Imports of the subject merchandise are provided for under Harmonized Tariff Schedule of the United States (HTSUS) categories 4802.56.1000, 4802.56.2000, 4802.56.3000, 4802.56.4000, 4802.56.6000, 4802.56.7020, 4802.56.7040, 4802.57.1000, 4802.57.2000, 4802.57.3000, and 4802.57.4000. Some imports of subject merchandise may also be classified under 4802.62.1000, 4802.62.2000, 4802.62.3000, 4802.62.5000, 4802.62.6020, 4802.62.6040, 4802.69.1000, 4802.69.2000, 4802.69.3000, 4811.90.8050 and 4811.90.9080. While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.

IV. Merchandise Subject to the Anti-Circumvention Inquiry

As a result of its final anti-circumvention determination regarding 83 Bright paper, the Department determined that uncoated paper with a GE brightness of 83 +/- 1% is covered by the scope of these AD and CVD *Orders*.

V. Discussion of the Issues

Comment 1: Authority to Initiate this Anti-Circumvention Inquiry

APP's Arguments

- APP claims that, because the scope language of the *Orders* is not ambiguous or subject to interpretation on the issue presented by the merchandise under consideration (*i.e.*, 83 Bright paper), the Department lacked the authority to initiate a scope inquiry.[6]

measures the reflection of light off a grade of paper. One is the lowest reflection, or what would be given to a totally black grade, and 100 is the brightest measured grade. "Colored paper" as used in this scope definition means a paper with a hue other than white that reflects one of the primary colors of magenta, yellow, and cyan (red, yellow, and blue) or a combination of such primary colors.

[6] *See* Case Brief at 3.

- APP cites *Duferco* as support for this contention, arguing that the Court held that, unless the Department first finds that the scope language is ambiguous with respect to the merchandise subject to a scope ruling, then the language of the scope is not "subject to interpretation."[7]

- According to APP, the Court has also held that the Department may not interpret an AD or CVD order so as to change its scope, citing *Eckstrom*.[8] Therefore, APP argues that, because the scope of the *Orders* is dispositive, the Department had no authority to initiate this scope inquiry. Further, APP notes that including such pre-existing merchandise within the scope of the *Orders* would constitute an impermissible expansion of the scope.[9]

The Petitioners' Arguments

- The petitioners disagree, pointing out that the Department appropriately initiated the proceeding pursuant to section 781(c) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.225(i). The petitioners note that APP's argument is based on 19 CFR 351.225(k), which relates to "other scope determinations." According to the petitioners, this provision of the Department's regulations sets forth requirements for scope determinations not covered under sections 351.225(g) through (j) of the Department's regulations. Thus, the petitioners assert that, because this anti-circumvention inquiry has been conducted pursuant to 19 CFR 351.225(i), the requirements of 19 CFR 351.225(k) do not apply here.[10]

- Finally, the petitioners state that APP's reliance on *Duferco and Eckstrom* is misplaced because, as the Department has previously discussed, neither of those cases involved a minor alteration anti-circumvention inquiry but rather the Department's ability to interpret the scope language.[11]

Department's Position:

We disagree that the Department lacked the authority to initiate this anti-circumvention proceeding. As the Federal Circuit explained, in order to effectively combat circumvention of antidumping duty orders, the Department may determine that certain types of articles are within the scope of an order, even when the articles do not fall within the order's literal scope.[12] Section 781(c) of the Act and 19 CFR 351.225(i), "{m}inor alterations of merchandise," provide the Department with authority to prevent circumvention of antidumping and countervailing duty orders under these circumstances. Section 781(c) of the Act provides that the class or kind of the

[7] *See* Case Brief at 3 (citing 19 CFR 351.225(k)(1); and *Duferco Steel Inc. v. United States*, 296 F.3d 1087, 1097 (CAFC 2002) *(Duferco*)).
[8] *See* Case Brief at 3 (citing *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (CAFC 2001) (*Eckstrom*)).
[9] *Id*., at 2.
[10] *See* Rebuttal Brief at 6.
[11] *Id*., (citing *Affirmative Final Determination of Circumvention of the Antidumping Duty Order on Folding Metal Tables and Chairs from The People's Republic of China;* 74 FR 20920 (May 6, 2009) *(Tables and Chairs).*
[12] *See Target Corp. v. United States*, 609 F.3d 1352, 1355 (Fed. Cir. 2010) (quoting *Wheatland*, 161 F.3d at 1370).

merchandise subject to an antidumping duty order "shall include articles altered in form or appearance in minor respects," which is exactly the type of a situation that the petitioners alleged in this proceeding. Further, 19 CFR 351.225(i) provides that under section 781(c) of the Act, the Department "may include within the scope of an antidumping or countervailing duty order articles altered in form or appearance in minor respects." Accordingly, the initiation of this anti-circumvention inquiry is well within the Department's authority under the statute and its regulations.

To support its argument that the Department lacked such authority, APP incorrectly relies on 19 CFR 351.225(k) which relates to "Other scope determinations." The text of this provision is as follows:

> *(k) Other scope determinations.* With respect to those scope determinations that are not covered under paragraphs (g) through (j) of this section, in considering whether a particular product is included within the scope of an order or a suspended investigation, the Secretary will take into account the following:
>
> (1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.
> (2) When the above criteria are not dispositive, the Secretary will further consider:
> (i) The physical characteristics of the product;
> (ii) The expectations of the ultimate purchasers;
> (iii) The ultimate use of the product;
> (iv) The channels of trade in which the product is sold; and
> (v) The manner in which the product is advertised and displayed.

However, we initiated this anti-circumvention inquiry pursuant to section 781(c) of the Act and 19 CFR 351.225(i), "{m}inor alterations of merchandise." As the plain language of 19 CFR 351.225(k) quoted above states, the requirements set forth in 19 CFR 351.225(k) do not apply to scope determinations conducted under 19 CFR 351.225(i).

APP's reliance on *Duferco* and *Eckstrom* are inapposite. APP's reference to *Duferco* is not relevant, because *Duferco* involved the interpretation of scope language, rather than a minor alterations anti-circumvention inquiry.[13] The Department explained in *Tables and Chairs* that *Duferco*:

> did not involve a minor alterations inquiry but, rather, involved the Department's ability to interpret the scope language. The purpose of an anti-circumvention inquiry, in contrast, is to determine whether a product that is outside the scope should be included within the scope because it was altered in form or appearance in minor respects.[14]

[13] See *Duferco*, 296 F.3d at 1088-89.
[14] *See Tables and Chairs* at 12.

Similarly, *Eckstrom* involved the judicial review of an "other scope determination" under 19 CFR 351.225(k) and not an anti-circumvention inquiry concerning minor alterations. Accordingly, *Eckstrom* is also not relevant to the instant review.[15]

Accordingly, we find that APP's arguments provide no basis to reverse our *Preliminary Determination* that the initiation of this proceeding was lawfully initiated under the Department's authority pursuant to section 781(c) of the Act and 19 CFR 351.225(i).

Comment 2: Existence of 83 Bright Paper Prior to the Filing of the Petition

APP's Arguments

- According to APP, in order to conduct a minor alterations anti-circumvention inquiry, the Department must first conclude that the merchandise at issue has in fact been altered. APP claims that low-brightness paper, such as 83 Bright paper, existed prior to the filing of the petitions covering uncoated paper. As a result, APP contends that 83 Bright paper cannot be considered a minor alteration of the subject merchandise.

- APP notes that the petitioners did not include low-brightness paper in the scope of the petitions, despite its existence in the U.S. market at that time. Therefore, APP contends it would be illogical to consider 83 Bright paper to be an alteration of subject merchandise because doing so would mean that any preexisting product that differs from subject merchandise in minor respects subsequently could be included within the scope of an order. APP claims such a result would conflict with the dumping and injury requirements of section 731 of the Act.

- As support for its contentions, APP cites *Hylsa*[16] and *Wheatland*,[17] where the Court held that the Department may not treat a product that existed before the original antidumping investigation which was not included in the scope of the antidumping duty order as an alteration of the subject merchandise.

- In addition, APP asserts that as 83 Bright paper is not a minor alteration of the subject merchandise, the Department cannot determine that this product is circumventing the *Orders*, consistent with *Deacero*, *Light Truck Tires*, and *Wire Rod*. Further, APP contends that the Department must first consider whether the product at issue is an alteration of the subject merchandise before conducting the five-prong analysis.[18]

[15] *See Eckstrom*, 254 F.3d at 1075.
[16] *Id.*, at 5-6 (citing *Hylsa S.A. de C.V. v. United States*, 22 CIT 44 (1998) (*Hylsa*).
[17] *Id.*, (citing *Wheatland Tube. Co. v. United States*, 973 F. Supp. 149 (CIT 1997) (*Wheatland*). *See also Nippon Steel Corp. v. United States*, 219 F.3d 1348, 1072 (Fed. Circ. 2000) (*Nippon Steel*), where the Court of Appeals for the Federal Circuit (CAFC) contrasted the facts of that case with those of *Hylsa* and *Wheatland*, which involved products "…which were well known when the order was issued…").
[18] *Id*., at 7-8 (citing *Deacero S.A. de C. V. v. United States*, 817 F.3d 1332, (Fed. Cir. 2016) (*Deacero)*, "Memorandum Declining to Initiate an Anti-Circumvention Inquiry" in *Antidumping and Countervailing Duty Orders on Certain Passenger Vehicle and Light Truck Tires from China* (June 13, 2016) (*Light Truck Tires*); and Memorandum *"Anti-Dumping Duty Order on Carbon and Certain Alloy Steel Wire Rod from Mexico: Initiation of*

- APP also cites to *Brass Sheet* in support of its proposition that, because a product existed prior to, and at the time of, the investigation, regardless of whether the product had been exported previously to the United States, there is no minor alteration, and thus no circumvention.[19]

The Petitioners' Arguments

- The petitioners state that 83 Bright paper did not exist and was not sold prior to the filing of the petitions in the underlying investigations. The petitioners assert that the timing of APP's entries of 83 Bright paper show that imports first entered the United States on February 22, 2016, after the Department's preliminary determinations. Thus, the petitioners state that APP began selling 83 Bright paper as a result of the potential consequences of its refusal to participate in the AD and CVD investigations of uncoated paper.

- Further, the petitioners point out that a product's commercial availability prior to the filing of a petition is not a bar to the Department conducting a minor alteration anti-circumvention inquiry. According to the petitioners, in order to be barred from the relief of an anti-circumvention inquiry, the petitioners must have expressly identified the product at issue and stated their intention to exclude it from the scope. However, the petitioners note that APP has cited no record evidence demonstrating the petitioners' intention to exclude 83 Bright paper from the scope at the time of the investigation.

- The petitioners also contend that APP's reliance on *Hylsa*, *Wheatland*, and *Nippon Steel* are inapposite because 83 Bright paper did not exist until APP created it in response to the *Orders*, and therefore the petitioners did not specifically exclude it from the scope.[20]

- In addition, the petitioners assert that *Deacero* and *Light Truck Tires* addressed merchandise that was explicitly excluded from the duty orders in question, while the scope in the uncoated paper *Orders* does not specifically exclude 83 Bright paper.[21]

- Moreover, the petitioners refute APP's argument that *Wire Rod* requires the Department to first determine whether the merchandise at issue is an alteration of the subject merchandise before conducting its five-prong minor alterations analysis, as they note that APP's argument is drawn from later-developed merchandise anti-circumvention inquiries. Thus, the petitioners state the Department's five-prong minor alterations

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Minor Alteration Circumvention Inquiry on Wire Rod with an Actual Diameter between 4.75 and 5.00 Millimeters (May 31, 2011) at 13-16 (*Wire Rod*). *Wire Rod* is addressed in *Deacero*. Accordingly, our discussion below with respect to *Deacero* is intended to incorporate our response to arguments related to *Wire Rod* as well.

[19] *See* Case Brief at 19-21 (citing *Brass Sheet and Strip from West Germany; Negative Preliminary Determination of Circumvention of Antidumping Duty Order*, 55 FR 32655, 32658 (August 10, 1990) (*Brass Shee*t); unchanged in *Brass Sheet and Strip from Germany; Negative Final Determination of Circumvention of Antidumping Duty Order*, 56 FR 65884 (December 19, 1991)).

[20] *Id*., at 8.

[21] *See* Rebuttal Brief at 10-11 (citing *Deacero*, 817 F.3d. at 1338, and *Light Truck Tires*).

analysis, as explained in the *Preliminary Determination*, is appropriate in reaching an anti-circumvention determination.[22]

- The petitioners add that *Brass Sheet* is inapposite because 83 Bright paper did not exist prior to the uncoated paper investigations, and it was conceived by APP to circumvent the *Orders.*[23] Specifically, *in Brass Sheet*, the Department found that the 200-series brass and 667-series brass at issue could not be substituted and that actual substitution had not occurred. In contrast, 83 Bright paper and other uncoated paper covered by the scope of the *Orders* are used in the same printers and copiers and are presented as substitutes.[24]

Department's Position:

As discussed above, this anti-circumvention proceeding was initiated pursuant to section 781(c) of the Act and 19 CFR 351.225(i). Under section 781(c) of the Act, the Department considers minor alterations of merchandise of "articles altered in form or appearance in minor respects." The Department specifically declined to conduct an inquiry based on later-developed merchandise, stating "{w}e do not find it appropriate to initiate a later-developed merchandise circumvention inquiry pursuant to section 781(d) of the Act because APP provided information demonstrating that merchandise with a brightness level comparable to 83 Bright paper was produced and sold in commercial volumes at the time of the filing of the petitions and, thus, 83 Bright paper cannot be considered later-developed merchandise."[25]

APP's argument is based on a conflation of section 781(c) of the Act (*i.e.*, "minor alterations") with 781(d) of the Act (*i.e.*, "later-developed merchandise"). APP insists that "a product that already existed in the United States prior to an original investigation and that was being sold in the United States at the time of the petition – and which petitioners did not include within the scope – cannot be considered such an alteration of subject merchandise."[26] That argument may be dispositive for an anti-circumvention inquiry concerning later developed merchandise under section 781(d) of the Act and 19 CFR 351.225(j), but as this inquiry has been conducted under 781(c) and 19 CFR 351.225(i), the existence of uncoated paper with a brightness comparable to 83 Bright paper prior to, or at the time of the investigations, does not, in and of itself, foreclose an affirmative anti-circumvention determination.

Although uncoated paper with brightness comparable to 83 Bright paper existed previously, the 83 Bright paper product at issue, with the range of physical characteristics, performance, and customer expectations discussed further below, did not exist at the time of the investigations. This distinguishes the instant anti-circumvention inquiry from *Hylsa* and *Wheatland*.

[22] *Id.*, at 11-12 (citing *Wire Rod*, and *Preliminary Determination* at 3).
[23] *See* Rebuttal Brief at 29.
[24] *Id*., at 31.
[25] *See Certain Uncoated Paper from Australia, Brazil, Indonesia, the People's Republic of China, and Portugal: Initiation of Anti-Circumvention Inquiry*; 81 FR 78117, 78120 (November 7, 2016**) (***Initiation Notice*).
[26] *See* Case Brief at 5.

APP asserts that a product which existed prior to the investigation, sold within the United States, and not included in the scope of the investigation, cannot be considered a "minor alteration" for purposes of section 781(c) of the Act, consistent with *Hylsa* (which relied on *Wheatland*). In *Hylsa*, the CIT found that as line pipe existed at the time of the standard pipe investigation and was excluded from the scope of the order, the Department could not consider line pipe to be a "minor alteration" of standard pipe.[27] Although paper of comparable brightness existed prior to the investigation, 83 Bright paper did not exist and was not sold at the time of the investigation.[28]

This distinction is important. For years prior to the investigations, record evidence shows that the commercial standard for uncoated paper had been 85 bright or higher, and paper below 85 bright was not commercially available.[29] Thus, at the time of the investigations, there was no 83 Bright paper or equivalent product commercially available in the market. In *Brass Sheet*, the Department considered whether the antidumping duty order covering 200 series brass was being circumvented by a German producer's 667 series brass product. In making its negative preliminary determination of circumvention that the 667 series brass did not represent a minor alteration of the 200 series brass, the Department observed that the 667 series brass was "a distinct product that existed at the time the petition was filed and was recognized as a separate series of brass…even though 667 series brass existed prior to the petition being filed, petitioners never mentioned in their petition to be a possible substitute for 200 series brass products."[30] In contrast, 83 Bright paper was not commercially available in the U.S. market at the time of investigation and, thus, it would have been unreasonable to expect that a product that was not commercially available should have been included in the petition as a possible substitute for the in-scope merchandise.[31]

Contrary to APP's assertion that *Nippon Steel* supports its position that the Department may not consider a product existing prior to the original investigation as a minor alteration for purposes of an anti-circumvention inquiry, *Nippon Steel*, in fact, does not preclude this line of inquiry. In *Wheatland*, that court stated that the minor alterations provision "does not ... apply to products unequivocally excluded from the order in the first place… {thus, because the antidumping duty order} exclude[d] alloy steel containing more than 0.0008% boron, {that product} may not be brought within the scope of that order by the use of the anti-circumvention statute."[32] The court in *Nippon Steel* responded:

> The statement {in *Wheatland*} was made in determining the propriety of Commerce's conducting a scope rather than a minor alterations inquiry. The court held that because line pipe was specifically excluded from the antidumping duty order, that order could not be interpreted to cover it, and that Commerce

[27] *Id*., at 5-6 (citing *Hylsa*, 22 CIT at 49).
[28] *See*, *e.g*., Rebuttal Brief at 7-8 (citing to Letter from the petitioners entitled, "Certain Uncoated Paper from Australia, Brazil, The People's Republic of China, Indonesia, and Portugal: Petitioners' Request for Minor Alterations and Later-Developed Merchandise Anti-circumvention Inquiry or, Alternatively, for a Scope Ruling," dated July 15, 2016 (Initiation Request) at 18 and Exhibit 5).
[29] *See* Initiation Request at 18 and Exhibit 1.
[30] *See Brass Shee*t, 55 FR at 32658.
[31] *See, e.g.*, Initiation Request at Exhibit 2, and *Preliminary Determination* at 7-8, 10.
[32] *See* Wheatland, 161 F.3d at 1371.

> therefore correctly declined to conduct a minor alterations inquiry. The statement cannot be read as barring Commerce from conducting an inquiry to determine whether the addition of a small amount of boron constituted a minor alteration that still left the product subject to the antidumping duty order.[33]

In *Nippon Steel*, the Court of Appeals clarified that the holding of *Wheatland* was limited to situations in which the result of the alteration was a product which was commercially available at the time of investigation and which was explicitly excluded from the order. By contrast, the investigation at issue in *Nippon* (and similarly in this case) involves a product which was not a commercially available product during the investigation and was not "specifically excluded" from the original scope. Thus, although the boron-added carbon steel was technically outside the order at issue in *Nippon Steel*, the Court held that the circumvention inquiry could proceed.

Deacero and *Light Truck Tires* further support the Department's affirmative *Preliminary Determination*. In *Deacero*, the Federal Circuit upheld the Department's affirmative anti-circumvention finding that 4.75 to 5.00 mm diameter steel wire rod was a minor alteration of the "5.00 mm or more, but less than 19.00 mm" diameter steel wire rod covered by the antidumping duty orders at issue. Specifically, "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. That some quantity of small-diameter steel wire rod may have been in existence at some time in non-investigated countries does not limit Commerce's minor alteration analysis in the proceeding under review."[34] By the same reasoning, that some quantity of paper with brightness less than 85 may have been in existence at some time prior to the investigations underlying these *Orders* does not limit our minor alteration analysis in this anti-circumvention inquiry. There is no evidence that such paper was sold in commercial quantities in the U.S. market or in the investigated countries at the time of investigation.

In *Light Truck Tires*, the product at issue was identified in an "explicit and unambiguous exclusion" in the scope of that antidumping duty order. In contrast, the scope of these *Orders* contains no such explicit exclusion of 83 Bright paper.[35]

Finally, with respect to APP's claim that the Department must first determine whether the product at issue is an alteration of the subject merchandise before conducting our five-prong analysis, we agree with the petitioners that APP's argument is misplaced.[36] APP based its contention on later-developed merchandise, for which a circumvention inquiry is governed by section 781(d) of the Act. This inquiry is being conducted under section 781(c) of the Act. As we stated in the *Preliminary Determination*:

> 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

[33] *See Nippon Steel*, 219 F.3d at 1356.
[34] *See Deacero*, 817 F.3d at 1339.
[35] *See* Rebuttal Brief at 11 (citing *Light Truck Tires* at 5-6).
[36] *Id*., at 11-12 (citing Case Brief at 8).

before reaching a circumvention determination. Concerning the allegation of minor alteration under section 781(c) of the Act and 19 CFR 351.225(i), the Department examines such factors as: 1) overall physical characteristics; 2) expectations of ultimate users; 3) use of merchandise; 4) channels of marketing; and 5) cost of any modification relative to the value of the imported products.[37]

Comment 3: Physical Characteristics

APP's Arguments

- APP argues that there are several physical characteristics that distinguish 83 Bright paper from the uncoated paper covered by the scope of the *Orders* which the Department failed to consider in the *Preliminary Determination*. First, APP states that GE brightness is the most important physical characteristic of uncoated paper, and that the petitioners omitted uncoated paper with a GE brightness level below 85 from the scope of the *Orders* because such paper accounted for only a small share of the market. APP also argues that the Department ignored the role that paper brightness represents in customer purchase decisions, such as tax-supported bid buyers locked into specifications that require a GE brightness level of 92.[38]

- Second, APP contends that the difference in the whiteness levels between 83 Bright paper and the uncoated paper in the scope of the *Orders* is another distinguishing physical characteristic that the Department did not address.[39]

- Third, APP claims that the Department erred in its analysis of opacity with respect to the application of opacity ranges to the products in question and in comparing the opacity levels of 83 Bright paper to non-subject merchandise.[40]

- Finally, APP contests the Department's reliance on the International Trade Commission's (ITC) findings regarding physical characteristics because the findings were part of the staff report, rather than the ITC determination; the findings related to non-subject merchandise; and purpose of the ITC analysis was different than the question at issue in this inquiry.[41]

[37] *See Preliminary Determination* at 3 (internal cite omitted).
[38] *Id*., at page 9-10 (citing letter from APP entitled, "Certain Uncoated Paper from Australia, Brazil, The People's Republic of China, Indonesia, and Portugal – Response to Request for Inquiry" dated August 19, 2016 (August 19 Submission) at Exhibits 1 and 3).
[39] *Id*., at 11.
[40] *Id*., at 12-13. The details of APP's arguments concerning the opacity range are proprietary information.
[41] *Id*., at 13 (citing *Certain Uncoated Paper from Australia, Brazil, China, Indonesia, and Portugal,* Investigations Nos. 701-TA-528-529 and 731-TA-1264-1268 (Final) (February 2016) (ITC Report) at II-10 n.22).

The Petitioners' Arguments

- The petitioners state that APP fails to acknowledge that subject merchandise comes in a variety of brightness and whiteness levels, and opacities, and that variations in such attributes does not take the product out of the scope of the *Orders*.[42]

- The petitioners point out that, regarding APP's brightness argument, Exhibit 4 of APP's August 19 Submission contained a Xerox Corporation report noting that a brightness measurement alone is not sufficient to differentiate two paper products.[43] According to the petitioners, this supports the Department's conclusion in the *Preliminary Determination* that the difference in 83 Bright paper's GE brightness level does not represent a significant departure from the physical characteristics of subject merchandise.

- The petitioners assert that, regarding APP's whiteness argument, the Department identified whiteness as among the physical differences between 83 Bright paper and other uncoated paper covered by the scope of the *Orders*. However, the petitioners note that the question here is whether the difference in whiteness between 83 Bright paper and other uncoated paper covered by the scope of the *Order*s is sufficient to determine that 83 Bright paper cannot be covered by the scope of the *Orders*. According to the petitioners, subject merchandise is produced in a range of whiteness levels, and the scope of the *Orders* does not limit subject merchandise to uncoated paper with whiteness levels within any particular range. In addition, the petitioners note that the specifications and marketing of 83 Bright paper confirms the absence of a significant difference in whiteness level between 83 Bright paper and the subject merchandise.[44]

- The petitioners state that, regarding APP's opacity argument, APP has mischaracterized the Department's findings and the petitioners' submissions with respect to the opacity level range for the paper at issue, and has erroneously interpreted the record. The petitioners explain that subject merchandise is produced in a range of opacity levels, and the scope of the *Orders* does not limit in-scope merchandise to paper within a particular opacity range. The petitioners also point to record evidence which shows examples of subject merchandise with opacity levels comparable to 83 Bright paper. Additionally, the petitioners contend that APP erroneously interpreted the record by comparing the opacity level of 83 Bright paper to non-subject merchandise when, in fact, the comparisons at issue were to subject merchandise.[45]

- Finally, the petitioners assert that the Department appropriately considered the physical characteristics identified by the ITC information, calling APP's dismissal of these characteristics because they "were contained in the Staff Report, which does not

[42] *See* Rebuttal Brief at 12.
[43] *Id*., at 13 (citing August 19 Submission at Exhibit 4).
[44] *See* Rebuttal Brief at 14-15 (citing Case Brief at 11-12). Certain details concerning whiteness specifications are proprietary information.
[45] *See* Rebuttal Brief at 15-17. The petitioners include certain details from the record concerning opacity that are proprietary information.

> constitute an ITC determination" as "nonsensical." The petitioners also refute APP's contention that these physical characteristics are based on non-subject merchandise, pointing to the discussion of these characteristics in the ITC Report as related specifically to uncoated paper.[46]

Department's Position:

As in the *Preliminary Determination*, we continue to find that the overall physical characteristics of APP's 83 Bright paper are only slightly different than paper covered by the scope of the *Orders*. APP has failed to challenge our analysis of these physical characteristics, except with respect to brightness and opacity characteristics, as discussed below.

First, with respect to brightness, the scope of the *Orders* includes uncoated paper with a GE brightness level of 85, while the uncoated paper at issue has a brightness level of 83. Although we acknowledge that there may be some difference in brightness levels, we continue to conclude that the small difference between a GE brightness level of 85 as described in the scope of the *Orders* and the GE brightness level of 83 Bright paper alone does not represent a significant departure from the physical characteristics of subject merchandise when considering all the factors in our anti-circumvention analysis, as further discussed below. In addition, the brightness level is not the only consideration in selecting a paper, as discussed at length in an industry report submitted by APP.[47]

Next, with respect to whiteness, the record does not show a significant, consistent difference in the whiteness characteristic between 83 Bright paper and the subject merchandise. APP contends that 83 Bright paper has a CIE Whiteness of 107, while subject merchandise has a CIE Whiteness of 137 to 165.[48] However, as the petitioners point out, APP markets at least one type of 83 Bright paper with a CIE Whiteness of 128, with a tolerance of plus or minus 5.[49] That is, 83 Bright paper may have CIE Whiteness of 133, which is very close to the low end of 137 APP attributes to subject merchandise. Moreover, the Xerox Report notes that the CIE Whiteness is not necessarily the definitive measurement of whiteness:

> As CIE Whiteness is a single number index, it can only be a guide to relative whiteness. Very high whiteness is likely to indicate a blue white sheet, but you might perceive that the sheet has an orchid or even perhaps a grey cast. Visual comparison of samples under different lighting conditions is always a good idea to understand how the whiteness has been achieved, how the samples compare in low and high levels of UV light and whether the samples appear neutral white or more tinted in comparison to other sheets.[50]

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[46] *Id.*, at 17-18 (citing Case Brief at 13 and the ITC Report at II-10-II-11).
[47] *See* August 19 Submission at Exhibit 4 ("Demystifying Three Key Paper Properties**:** Whiteness, Brightness and Shade," Xerox Corporation Report (Xerox Report)).
[48] *See* Case Brief at 11. APP explains that CIE Whiteness is a whiteness index developed by the International Commission on Illumination, known by its initials in French as CIE.
[49] *See* Rebuttal Brief at 14 (citing Initiation Request at Exhibit 3).
[50] *See* August 19 Submission at Exhibit 4.

With respect to opacity, we agree with the petitioners that subject merchandise is produced in a range of opacity levels, as evidenced by the specifications for subject merchandise included in APP's August 19 Submission which shows opacity ranges for subject merchandise ranging from 88 to 96.[51] This range overlaps with the opacity range of 83 Bright paper.[52]

Finally, there is no basis to reject the physical characteristics identified by the ITC in our anti-circumvention analysis. APP offers no support for its contention that these characteristics in the report are separate from the ITC's final determination of injury. The ITC report specifically identifies these characteristics as "{i}mportant physical characteristics of uncoated paper." (emphasis added), and in the context of the report, it is clear that they refer to subject merchandise.[53] Although APP claims that the ITC analyzed a different question than the instant inquiry by the Department, it fails to explain why the physical characteristics the ITC considered for the subject merchandise in its injury determination are unsuitable to analyzing whether 83 Bright paper is circumventing the *Orders* on subject merchandise.

Comment 4: Expectations of the Ultimate Users

APP's Arguments

- APP challenges the Department's *Preliminary Determination* finding that expectations of the ultimate users of 83 Bright paper significantly overlap with those of users of uncoated paper covered by the scope of the *Orders*. APP claims that the Department failed to consider the "unrebutted testimony" from the sales manager of Charta Global, Inc., APP's sales entity in the United States. According to the sales manager's declaration, "most Tax-supported bid (TSB) buyers – as high as 95% of such buyers – are locked into bid specifications that call for paper products with a minimum GE Brightness level of 92." APP also points to the sales manager's declaration for the proposition that 83 Bright paper serves a different purpose and market segment because of its lower brightness than subject merchandise.[54]

- In addition, APP asserts that the sales manager's declaration demonstrates that the end-user expects 83 Bright Paper to minimize eyestrain.[55]

The Petitioners' Arguments

- The petitioners respond that the record rebuts APP's claim that TSB buyers are locked into bidding on 92 bright paper, citing the State of California Standard School Supply List, which includes examples of 83 Bright Paper as TSB purchases.[56]

[51] *Id.*, at Exhibit 11.
[52] *Id*., at Exhibit 1. APP has requested proprietary treatment for the paper specifications in this exhibit.
[53] *See* ITC Report at I-10.
[54] *See* Case Brief at 13-14 (citing Letter from APP entitled, "Certain Uncoated Paper from Australia, Brazil, the People's Republic of China, Indonesia, and Portugal – Response to Request for Inquiry," dated August 19, 2016 (August 19 Supplementary Exhibits) at Exhibit 1).
[55] *Id*., at 14-15 (citing August 19 Supplementary Exhibits at Exhibit 1).
[56] *See* Rebuttal Brief at 18-19 (citing Initiation Request at Exhibit 11).

- Further, the petitioners assert that the record shows no other evidence beyond the testimony cited by APP that end users base uncoated paper purchasing decisions on reducing eyestrain. According to the petitioners, Charta Global, Inc. (Charta Global), APP's exclusive sales entity in the United States, does not promote 83 Bright paper as reducing eyestrain in any of its marketing materials available to the petitioners.[57]

Department's Position:

We affirm the *Preliminary Determination* finding that the expectations of the ultimate users of 83 Bright paper significantly overlap with those of users of uncoated paper covered by the scope of the *Orders*. APP's assertions of "unrebutted testimony" by Charta Global Inc.'s sales manager are called into question by other information on the record. Aside from his statement, there is no evidence on record that as high as 95 percent of TSB buyers require 92 bright or higher paper. To the contrary, the record evidence demonstrates that, in fact, TSB buyers may accept 83 Bright paper and the California standard school supply list includes examples of 83 Bright paper as TSB purchases.[58] Similarly, as the petitioners point out, there is no evidence on the record, beyond the statement from Charta Global's manager (which is APP's sales entity) that reducing eyestrain factors into the expectations of the end user of uncoated paper. Furthermore, even assuming that Charta Global's statement is correct, there is no record evidence that the ultimate users base their purchasing decisions regarding 83 Bright paper on reducing eyestrain.

Comment 5: Uses of the Merchandise

APP's Arguments

- APP disputes the Department's finding in the *Preliminary Determination* that 83 Bright paper can be used in the same copying and printing applications as other uncoated paper covered by the scope of the *Orders*. Citing to the contrary testimony from Charta Global's sales manager, APP asserts that the Department mistakenly stated that there is no evidence the 83 Bright paper is not suitable for ink-jet or laser-jet printing.[59]

- In addition, APP contends that the Department incorrectly found that the packaging for 83 Bright paper did not indicate any limits on its suitable uses. According to APP, its marketing materials for 83 Bright paper demonstrate that it is marketed for photocopy use only.[60]

[57] *Id*., at 20 (citing Initiation Request at Exhibit 6).
[58] *See* Initiation Request at Exhibit 11.
[59] *See* Case Brief at 15 (citing the August 19 Supplementary Exhibits at Exhibit 1). APP also referred to additional statements to support its arguments in the August 19 Supplementary Exhibits at Exhibit 2. APP requested proprietary treatment for the declaration at Exhibit 2 in its entirety.
[60] *Id*., at 15-16 (citing APP's August 19 Submission at Exhibit 7).

- Citing the Department's finding in *LWS Preliminary Determination*, APP emphasizes that commercial comparability does not equate to circumvention, and that 83 Bright paper is not a substitute for high brightness paper. [61]

- APP contends that 83 Bright paper serves as a "welcoming alternative to a certain niche of customers for whom high brightness papers are over-engineered."[62]

The Petitioners' Arguments

- The petitioners rebut APP's contention that 83 Bright paper is best suited for copier applications and not suitable for ink - or - laser – jet printing by pointing to Charta Global's website which imposes no limitations in the marketing of APP's 83 Bright paper and specifically describes the product as a "multipurpose premium paper," with no limitations on using it for photocopying only.[63]

- The petitioners cite additional information on the record, which provide examples of the user expectations for 83 Bright paper from purchasers for the same features of good runability, consistent performance in different types of machines, does not cause paper jams when run at high speeds, and has good printability.[64]

- The petitioners contend that APP's reliance on *LWS Preliminary Determination* is inapposite to APP's interpretation because the Department made clear in *LWS Final Determination* that the case addressed the issue of minor alterations in an anti-circumvention inquiry concerning later-developed merchandise.[65]

- The petitioners note that there is no support in the record for APP's statement that 83 Bright paper is "a welcoming alternative to a certain niche of customers for whom high brightness papers are over-engineered."

Department's Position:

We find no basis to alter our finding in the *Preliminary Determination*, and therefore continue to find that 83 Bright paper can be used in the same copying and printing applications as other uncoated paper covered by the scope of the *Orders*. Nothing in the record shows that 83 Bright paper cannot be used for printing applications. APP's own website describes APP's 83 Bright

[61] *Id.*, at 21 *(*citing *Laminated Woven Sacks from the People's Republic of China*: *Negative Preliminary Determination of Circumvention of the Antidumping and Countervailing Duty Orders, 76 FR 72161 (November 22, 2011) (LWS Preliminary Determination),* unchanged in *Laminated Woven Sacks from the People's Republic of China: Negative Final Determination of Circumvention,* 78 FR 12716 (February 25, 2013) (*LWS Final Determination*).
[62] *Id*., at 22.
[63] *See* Rebuttal Brief at 21-22 (citing Initiation Request at Exhibit 7).
[64] *Id*., at 22-23 (citing ITC Report at II-1, and August 19 Submission at 24).
[65] *Id*., at 35-36 (citing *LWS Final Determination,* and accompanying Issues and Decision Memorandum at Comment 1).

paper as "multipurpose premium paper," without imposing a limitation on using it for photocopying only.[66] Instead, the record evidence cited by the petitioners demonstrates that the expectations of users for multipurpose paper are met by both the subject merchandise and 83 Bright paper.[67] Similarly, there is no evidence on the record for 83 Bright paper as meeting the expectations of users for papers that are not, as APP states, "over-engineered."[68]

We also agree with the petitioners that *LWS Final Determination* does not support APP's position. While we agree with APP that commercial comparability does not equate to circumvention,[69] the issues under consideration in *LWS Final Determination* relate to the specific circumstances of commercial availability under a section 781(d) later-developed merchandise anti-circumvention inquiry, rather than the instant section 781(c) minor alterations anti-circumvention inquiry.[70]

Comment 6: Channels of Marketing

APP's Arguments

- APP disagrees with the Department's finding in the *Preliminary Determination* that 83 Bright paper is marketed in the same manner as uncoated paper covered by the scope of the *Orders*. APP argues that the Department inappropriately relied on information by two third-party sources (*i.e.*, an online retailer, and a public sector purchaser) instead of APP's actual advertising.[71] APP contends that the relevant inquiry is how the respondent advertises the product, not how a downstream buyer markets the product for resale.[72]

- APP states that it advertises 83 Bright paper as a low brightness photocopy paper that reduces eyestrain. Accordingly, APP contends that the Department should make its determination on APP's marketing actions, rather than third-party sales promotions.

The Petitioners' Arguments

- The petitioners state that APP's claims are rebutted by the Charta Global website promoting 83 Bright paper as a multipurpose premium paper, suitable for a variety of end

[66] *See* Rebuttal Brief at 21-22 (citing Initiation Request at Exhibit 7).
[67] *Id*., at 22 (citing Initiation Request at Exhibit 6).
[68] APP does not elaborate on the meaning of "over-engineered paper" or provide any industry accepted definitions of this concept. We understand this concept to mean that the paper quality exceeds the minimum requirements for its application.
[69] *See* Case Brief at 21.
[70] *See* LWS Final Determination at Comment 1.
[71] *See* Case Brief at 16 (citing Initiation Request at Exhibits 10 and 11).
[72] *Id.* (citing *Preliminary Determination of Circumvention of Antidumping Order: Cut-to-Length Carbon Steel Plate from Canada*, 65 FR 64926 (October 31, 2000)(*CTL Carbon Steel Plate*), unchanged in *Final Determination of Circumvention of the Antidumping Order: Cut-to-Length Carbon Steel Plate from Canada* 66 FR 7617 (January 24, 2001); and *Preliminary Results of Anti-Circumvention Review of Antidumping Order: Corrosion-Resistant Carbon Steel Flat Products* from Japan, 68 FR 19499 (April 21, 2003), unchanged in *Final Results of Anti-Circumvention Review of Antidumping Order: Corrosion-Resistant Carbon Steel Flat Products from Japan*, 68 FR 33676 (June 5, 2003)(*CRC Steel Flat Products*)).

use applications. The petitioners further observe that this website does not include any marketing of 83 Bright paper as reducing eyestrain.[73]

- The petitioners also dispute APP's reliance on previous cases to support its contention that the marketing of a product by the downstream buyer is not relevant to the Department's analysis. The petitioners state that none of the cases cited by APP support this proposition; rather, the channels of marketing criterion may be considered with respect to all relevant factors.[74]

Department's Position

We find no basis to alter our finding in the *Preliminary Determination*, and therefore continue to find that 83 Bright paper is marketed in the same manner as uncoated paper covered by the scope of the *Orders*. The Department considered all record information in making this determination. We find no discernible meaningful difference in the marketing of 83 Bright paper with the subject merchandise between the marketing on the third-party website and the Charta Global website.[75] We also find no distinction in the marketing of the products according to the State of California Standard School Supply List.[76] APP offers no other evidence to demonstrate that 83 Bright paper is marketed in a different manner than the subject merchandise.

Further, we agree with the petitioners that the cases cited by APP do not support discounting the marketing performed by parties other than the respondent. These cases do not reference how a downstream buyer might market the product. In the *CTL Carbon Steel Plat*e from Canada case there appears to be no downstream buyer; instead, the steel producers sell directly to manufacturers.[77] Furthermore, in the *CRC Steel Flat Products* from Japan case, the same channels of marketing were used between boron-added steel and the subject merchandise.[78]

Comment 7: Cost of Modification

APP's Arguments

- APP questions the relevance of the Department's *Preliminary Results* finding that the cost of modification for APP's 83 Bright paper does not increase the production cost when compared to the cost of production of uncoated paper covered by the scope of the

[73] *See* Rebuttal Brief at 24 (citing Initiation Request at Exhibit 6). As noted above, the petitioners state that Charta Global is APP's principal consignee for imports of 83 Bright paper to the United States.
[74] *Id*., at 24-25.
[75] *See* Initiation Request at Exhibits 6 and 10.
[76] *Id*., at Exhibit 11.
[77] *See CTL Carbon Steel Plate*, 65 FR at 64930.
[78] *See CRC Steel Flat Products*, 68 FR at 19503.

Orders. APP states that the Department did not explain how this finding is relevant to the minor alteration inquiry.

- APP argues that producing 83 Bright paper requires different machinery, or substantial reprocessing of the machinery used for producing subject merchandise to produce 83 Bright paper as compared to other uncoated paper covered by the scope of the *Orders.*[79]

- APP asserts that the difference in material inputs and production costs for 83 Bright paper indicate that its production cannot be considered a minor alteration of the scope merchandise. Further, citing *Brass Sheet*, APP contends that a small change in cost is not evidence of circumvention when it results in a significant difference in the physical characteristics and result in substantial differences in end use and customer expectations.[80]

The Petitioners' Arguments

- The petitioners rebut APP's challenge to this criterion by noting that the Department considers the cost of modification in order to determine whether the costs of production of the product at issue "are sufficiently large to distinguish it" from the subject merchandise. With respect to the instant inquiry, the petitioners state that the record demonstrates that the cost of the minor alterations necessary to shift the GE brightness level of 83 Bright paper is insignificant when compared to the total value of the imported product and APP's combined AD/CVD cash deposit rate.[81]

- The petitioners add that APP's claim that producing 83 Bright paper requires different machinery or substantial reprocessing of the machinery as compared to that used for the subject merchandise is irrelevant for the Department's consideration of the "cost of modification" criterion. The petitioners further note that APP's claim is contradicted by APP's own submission.[82]

Department's Position:

As we explained in the *Preliminary Results*:

> APP did not quantify the actual cost of bleaching chemicals or optical brightening agents (OBAs), but simply indicated that 83 Bright paper is less expensive to produce because it uses fewer bleaching chemicals and no OBAs. The difference in production cost of 83 Bright paper is not significantly large enough to distinguish it from other uncoated paper covered by the scope of the *Orders.*[83]

[79] *See* Case Brief, at 17. APP has claimed proprietary treatment for the information concerning the specific machinery and processes used to produce 83 Bright paper.
[80] *Id*., at 17-18 (citing *Brass Shee*t, 55 FR at 32658).
[81] *See* Rebuttal Brief at 25-26 (citing *Carbon and Certain Alloy Steel Wire Rod from Mexico: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 77 FR 19499 (October 1, 2012)).
[82] *Id*., at 26 (citing proprietary information included in the August 19 Submission at 21).
[83] *See Preliminary Determination*, and accompanying Preliminary Determination Memorandum (PDM) at 9.

APP offers no new, persuasive argument to alter this finding.

Whether or not the products at issue are produced using different machinery is inconsequential, because APP did not provide any information regarding the cost of retooling the production. More importantly, regardless of the types of machinery used in the production line, APP indicated that 83 Bright paper is less expensive to produce because it uses fewer bleaching chemicals and no OBAs.[84] Finally, we find no support in *Brass Sheet* for APP's contention that a small change in cost is not evidence of circumvention when it results in a significant difference in the physical characteristics. As discussed above under Comment 3, we do not find that there is a significant difference in the physical characteristics between 83 Bright paper and other uncoated papers covered by the scope of the *Orders*.[85]

Comment 8: Other Case-Specific Criteria

APP's Arguments

- APP contends that the Department's reliance on the timing of 83 Bright paper shipments to the United States as supporting a finding of circumvention fails to account for the significantly smaller shipment volume of 83 Bright paper, as well as other information regarding the distribution of 83 Bright paper in contrast to subject merchandise. APP claims that the timing of entry of 83 Bright paper is irrelevant to a minor alteration analysis as it only represents APP's decision to market to the existing niche market of low-brightness paper.[86]

- Citing *Brass Sheet*, APP suggests that, because 83 Bright paper existed at the time the petition was filed, even though APP had not yet exported the product to the United States, the timing of the 83 Bright paper shipments does not support a finding of circumvention.[87]

The Petitioners' Arguments

- The petitioners contend that there is a clear correlation between the timing of shipments and the respective quantities sold of 83 Bright paper and other uncoated paper covered by the scope of the *Orders*, which demonstrates that 83 Bright paper is designed to provide APP's customers with a substitute for subject merchandise.

- The petitioners assert that APP mischaracterizes *Brass Sheet* because the Department, in fact, considered the timing of entries in conducting that minor alterations anti-circumvention inquiry. However, the facts in *Brass Sheet* that led the Department to

[84] *See* Letter from APP entitled, "Certain Uncoated Paper from Australia, Brazil, The People's Republic of China, Indonesia, and Portugal – Response to Request for Inquiry" dated August 19, 2016, at 30.
[85] *Id.*, at 24.
[86] *See* Case Brief at 18-19 (citing *Brass Sheet*, 55 FR at 32658). The details of APP's arguments regarding the timing and distribution of 83 Bright paper are proprietary information.
[87] *See* Case Brief at 19 (citing *Brass Sheet*, 55 FR at 32658).

> make its negative determination differ from the facts in the instant review because in Brass Sheet, both sets of products at issue were exported to the United States before and after the period of the anti-circumvention analysis, leading the Department to conclude that there was no correlation with respect to customer purchasing behavior for the merchandise. In this case, however, the Department observed a clear correlation between the respective quantities sold of 83 Bright paper and subject merchandise shipped before and after the imposition of the *Orders*.[88]

Department's Position:

We continue to find that the timing of APP's introduction of 83 Bright paper supports a circumvention determination. In the *Preliminary Determination*, we found that:

> {w}hile APP's shipments of 83 Bright paper are in smaller quantities than its exports of uncoated paper covered by the scope of the *Orders* during January 2013 to May 2015 period, we find the timing of these shipments noteworthy, given that they coincided with the publication of the final determinations, in which the Department placed AD and CVD cash deposits of 17.39 percent and 109.15 percent, respectively, on APP's entries of uncoated paper covered by the scope of the *Orders*. We also find it significant that APP shipped a significant quantity of 83 Bright paper to the United States in March 2016, the month in which the Department issued the *Orders*.[89]

In addition, we find that APP's decision to terminate its sales of uncoated paper covered by the scope of the *Orders* and the shift of its exports to the United States to 83 Bright paper correlated with the AD and CVD investigations and imposition of the trade remedy measures. Thus, the totality of the circumstances detailed above and under which 83 Bright paper entered the United States provides further support to finding that 83 Bright paper is circumventing the *Orders*.

APP argues that the Department failed to account for different distribution channels between the two products. However, we observe that customers who purchased 83 Bright paper from APP in 2016 purchased uncoated paper covered by the scope of the *Orders* between January 2013 and May 2015.[90] Accordingly, APP continues to sell to some of the same customers as it did before the imposition of the AD and CVD *Orders*, substituting 83 Bright paper for the uncoated paper it sold to them before the issuance of the *Orders*. We find no relevance to our anti-circumvention determination in APP's other claim regarding the alleged difference in distribution channels.[91]

With respect to APP's reference to *Brass Sheet*, the case is distinguishable from the instant inquiry. In *Brass Sheet*, with respect to the products at issue in that inquiry, the Department concluded:

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[88] *See* Rebuttal Brief at 28 (citing *Brass Sheet*, 55 FR at 32658).
[89] *See Preliminary Determination*, and accompanying PDM at 9 (internal cite omitted).
[90] *See* Letter from APP entitled, "Certain Uncoated Paper from Australia, Brazil, Indonesia, Portugal, and the People's Republic of China – Questionnaire Response," dated January 11, 2017 (Questionnaire Response).
[91] The specific details of this distribution are business proprietary information. See Case Brief at 17-18.

> our review of Wieland's exports of 667 series and 200 series brass during the relevant time period indicates there is not a clear correlation between the respective quantities sold of the two types of brass; *i.e.*; there was neither a rapid decline in sales of 200 series brass, nor a rapid increase in sales of 667 series brass. Thus, it does not appear that Wieland's customers were altering their purchasing behavior.[92]

In this inquiry, however, as we noted above, there is a clear correlation between the shipments of the respective quantities sold of 83 Bright paper and other uncoated paper covered by the scope of the *Orders* centering around the issuance of the *Orders*. In this case, there was a rapid decline in the sales of uncoated paper covered by the scope of the *Orders* after the imposition of the *Orders*, which was accompanied by a significant increase in shipments of 83 Bright paper shortly after the imposition of the *Orders*.[93]

VI. Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final determination of this anti-circumvention inquiry in the *Federal Register*.

☒ ☐

Agree Disagree

8/28/2017

X 

Signed by: GARY TAVERMAN

Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations,
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance

[92] *See Brass Sheet*, 55 FR at 32658.

[93] *See* Memorandum entitled, "Accompanying Information for the Preliminary Decision Memorandum for the Affirmative Preliminary Determination on Certain Uncoated Paper from Australia, Brazil, Indonesia, the People's Republic of China, and Portugal," dated June 2, 2017, for the quantity of 83 Bright paper shipped in March 2016, as well as the average quantity of 83 Bright paper per month APP shipped between January and November 2016.