



A-570-916

C-570-917

Anti-circumvention Inquiry

Public Document

IA/NME/9: IG

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Christian Marsh 
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Decision Memorandum for Final Determination of Circumvention
of the Antidumping and Countervailing Duty Orders: Laminated
Woven Sacks from the People's Republic of China

SUMMARY

We have analyzed the comments submitted in this anti-circumvention inquiry of laminated woven sacks from the People's Republic of China ("PRC"). As a result of our analysis, we have made no changes from the Negative Preliminary Determination and Post-Preliminary Determination.¹ The Department of Commerce ("the Department") continues to determine that the laminated woven sacks subject to this inquiry are not circumventing the antidumping and countervailing duty orders on laminated woven sacks from the PRC, as provided in section 781(d) of the Tariff Act of 1930, as amended ("the Act").²

Scope of the Anti-Circumvention Inquiry

The merchandise subject to the anti-circumvention inquiry is laminated woven sacks produced with two ink colors printed in register and using a screening process ("screening-process sacks"). The screening process at issue, as described by interested parties, only uses two ink colors printed in register at two different print stations. However, the artwork, by use of screening, allows for different shades of a single ink color to appear on the bag. Thus, when printed, the

¹ See 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) ("Negative Preliminary Determination") and "Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations to Paul Piquado, Assistant Secretary for Import Administration; Decision Memorandum for Post-Preliminary Determination of Circumvention of the Antidumping and Countervailing Duty Orders: Laminated Woven Sacks from the People's Republic of China," dated September 25, 2012 ("Post-Preliminary Determination").

² See Notice of Antidumping Duty Order: Laminated Woven Sacks From the People's Republic of China, 73 FR 45941 (August 7, 2008); see also Laminated Woven Sacks From the People's Republic of China: Countervailing Duty Order, 73 FR 45955 (August 7, 2008), (collectively, "Orders").



screening-process sacks appear to have been printed with more than two colored inks because more than two colors are visible on the finished product.

Scope of the Orders

The merchandise covered by the orders is laminated woven sacks. Laminated woven sacks are bags or sacks consisting of one or more plies of fabric consisting of woven polypropylene strip and/or woven polyethylene strip, regardless of the width of the strip; with or without an extrusion coating of polypropylene and/or polyethylene on one or both sides of the fabric; laminated by any method either to an exterior ply of plastic film such as biaxially-oriented polypropylene (“BOPP”) or to an exterior ply of paper that is suitable for high quality print graphics;³ printed with three colors or more in register; with or without lining; whether or not closed on one end; whether or not in roll form (including sheets, lay-flat tubing, and sleeves); with or without handles; with or without special closing features; not exceeding one kilogram in weight. Laminated woven sacks are typically used for retail packaging of consumer goods such as pet foods and bird seed.

Effective July 1, 2007, laminated woven sacks are classifiable under Harmonized Tariff Schedule of the United States (“HTSUS”) subheadings 6305.33.0050 and 6305.33.0080. Laminated woven sacks were previously classifiable under HTSUS subheading 6305.33.0020. If entered with plastic coating on both sides of the fabric consisting of woven polypropylene strip and/or woven polyethylene strip, laminated woven sacks may be classifiable under HTSUS subheadings 3923.21.0080, 3923.21.0095, and 3923.29.0000. If entered not closed on one end or in roll form (including sheets, lay-flat tubing, and sleeves), laminated woven sacks may be classifiable under other HTSUS subheadings including 3917.39.0050, 3921.90.1100, 3921.90.1500, and 5903.90.2500. If the polypropylene strips and/or polyethylene strips making up the fabric measure more than five millimeters in width, laminated woven sacks may be classifiable under other HTSUS subheadings including 4601.99.0500, 4601.99.9000, and 4602.90.0000. Although HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the orders is dispositive.⁴

³ “Paper suitable for high quality print graphics,” as used herein, means paper having an ISO brightness of 82 or higher and a Sheffield Smoothness of 250 or less. Coated free sheet is an example of a paper suitable for high quality print graphics.

⁴ In the first administrative review, the Department found that due to substantial transformation, “the country-of-origin of LWS produced in the PRC from imported fabric is of PRC-origin,” thus subject to the antidumping duty order. See Laminated Woven Sacks From the People’s Republic of China: Preliminary Results of Antidumping Duty Administrative Review, 75 FR 55568 (September 13, 2010) at fn 7 referencing “Memorandum to Abdelali Elouaradia, Office Director, AD/CVD Operations, Office 4, from Zhulieta Willbrand, International Trade Analyst, AD/CVD Operations, Office 4, “Preliminary Decision Regarding the Country of Origin of Laminated Woven Sacks Exported by Zibo Aifudi Plastic Packaging Co., Ltd.,—Laminated Woven Sacks from the People’s Republic of China” (May 25, 2010), unchanged in Laminated Woven Sacks From the People’s Republic of China: Final Results of First Antidumping Duty Administrative Review, 76 FR 14906 (March 18, 2011) and accompanying Decision Memorandum at Comment 1 wherein the Department adopted the preliminary “country-of-origin” memorandum at the final results.

Applicable Statute and Methodology

Section 781(d)(1) of the Act provides that the Department may find circumvention of an antidumping or countervailing duty order when merchandise is developed after an investigation is initiated (“later-developed merchandise”). In conducting later-developed merchandise anti-circumvention inquiries, under section 781(d)(1) of the Act, the Department first determines whether the merchandise under consideration is “later-developed.”⁵ To do so, the Department examines whether the merchandise at issue was commercially available at the time of the initiation of the LTFV Investigation.⁶ We define commercial availability as “present in the commercial market or fully developed, *i.e.*, tested and ready for commercial production, but not yet in the commercial market.”⁷

If the Department determines that such merchandise was not commercially available at the time of the initiation of the LTFV Investigation, and is, thus, later-developed, the Department will consider whether the later-developed merchandise is covered by the order. In making a determination of whether the later-developed merchandise is within the scope of an order, the Department evaluates whether the general physical characteristics of the merchandise under consideration are the same as subject merchandise covered by the order⁸, whether the expectations of the ultimate purchasers of the merchandise under consideration are no different than the expectations of the ultimate purchasers of subject merchandise⁹, whether the ultimate use of the subject merchandise and the merchandise under consideration are the same¹⁰, whether the channels of trade of both products are the same¹¹, and whether there are any differences in the advertisement and display of both products.¹² The Department, after taking into account any advice provided by the United States International Trade Commission (“ITC”), under section 781(e) of the Act, may include such imported merchandise within the scope of an order.

⁵ See Later-Developed Merchandise Anticircumvention Inquiry of the Antidumping Duty Order on Petroleum Wax Candles from the People’s Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order, 71 FR 59075 (October 6, 2006) (“Candles Anticircumvention Final”), and accompanying Issues and Decision Memorandum at Comment 4; see also Erasable Programmable Read Only Memories from Japan: Final Scope Ruling, 57 FR 11599 (April 6, 1992)(“EPROMs from Japan”); Electrolytic Manganese Dioxide from Japan: Final Scope Ruling, 57 FR 395 (January 6, 1992)(“EMD from Japan”); Portable Electronic Typewriters from Japan, 55 FR 47358 (November 13, 1990).

⁶ See Laminated Woven Sacks from the People’s Republic of China: Initiation of Antidumping Duty Investigation, 72 FR 40833 (July 25, 2007) (“LTFV Investigation”); see also Candles Anticircumvention Final, 71 FR at 59077, and accompanying Issues and Decision Memorandum at Comment 4, affirmed by Target Corp. v. United States, 626 F. Supp. 2d 1285 (CIT 2009), and Target Corp. v. United States, 609 F.3d 1352, 1358-1360 (Fed. Cir. 2010) (“Target Corp. III”) (holding that the Department’s interpretation of later-developed as turning on whether the merchandise was commercially available at the time of the investigation is reasonable).

⁷ See Target Corp. III, 609 F.3d at 1358; see also Candles Anticircumvention Final, and accompanying Issues and Decision Memorandum at Comment 4.

⁸ See section 781(d)(1)(A) of the Act.

⁹ See section 781(d)(1)(B) of the Act.

¹⁰ See section 781(d)(1)(C) of the Act.

¹¹ See section 781(d)(1)(D) of the Act.

¹² See section 781(d)(1)(E) of the Act.

BACKGROUND

Negative Preliminary Determination

On November 22, 2011, the Department published its Negative Preliminary Determination in the anti-circumvention inquiry to determine whether screening-process sacks are circumventing the Orders.¹³ The Negative Preliminary Determination was based on the commercial availability of a laminated woven sack imported by Shapiro¹⁴ (referred to as the “Manna Pro Horse Feed Sack”) that showed the image of a horse and was produced using a red and a blue ink and a screening process so that more than one shade of the blue ink appear on the finished product, although only a single blue ink was used.¹⁵ However, following meetings¹⁶ with Petitioners¹⁷ and Shapiro, as well as several supplemental questionnaires that were issued to Shapiro after the Negative Preliminary Determination, the Department made a post-preliminary determination.¹⁸

Post-Preliminary Determination

In the post-preliminary determination, to evaluate the commercial availability of the screening-process sacks at issue in this inquiry, the Department first examined whether it was possible to produce the merchandise that is subject to the scope of this anti-circumvention inquiry prior to the initiation of the LTFV Investigation; after which we continued to find that it was possible to manufacture the screening-process sacks at the time of initiation of the LTFV Investigation.¹⁹ This indicates that the screening process sacks were fully developed and ready for commercial production. With regard to whether the screening-process sacks were present in the market at the time of the initiation of the LTFV Investigation, Shapiro placed information on the record regarding the Manna Pro Complete Sack, stating that the Manna Pro Complete Sack was produced using black and white inks and a screening process so that the black ink printed what appears to be grey confetti in the background of the design.²⁰ Shapiro argued that this information demonstrated that this sack was produced prior to the initiation of the LTFV Investigation using only two inks and a screening process giving the appearance of three colors on the finished product.²¹

¹³ See Negative Preliminary Determination, 76 FR 72161.

¹⁴ AMS Associates d/b/a Shapiro Packaging (“Shapiro”).

¹⁵ See Negative Preliminary Determination, 76 FR at 72163.

¹⁶ See “Memorandum to the File from Jamie Blair-Walker re; Meeting with Counsel for the Laminated Woven Sacks Committee and its individual members, Coating Excellence International, LLC and Polytex Fibers Corporation,” dated December 20, 2011; see also “Memorandum to the File from Jamie Blair-Walker re; Meeting with Counsel for the Laminated Woven Sacks Committee and its individual members, Coating Excellence International, LLC and Polytex Fibers Corporation,” dated April 6, 2012; see also “Memorandum to the File from Jamie Blair-Walker re; Meeting with Counsel for the AMS Associates, Inc. d/b/a Shapiro Packaging,” dated May 17, 2012.

¹⁷ The Laminated Woven Sacks Committee and its individual members, Coating Excellence International, LLC and Polytex Fibers Corporation, (collectively, “Petitioners”).

¹⁸ See Post-Preliminary Determination, at 4.

¹⁹ See Negative Preliminary Determination, 76 FR at 72162-72163.

²⁰ See Post-Preliminary Determination, at 2

²¹ See id., at Attachment 1.

We found that this information demonstrated that the screening technology existed prior to the LTFV Investigation and had been applied to laminated woven sacks since 2005 (including with the use of only two inks). Thus, the Department found it was possible to produce screening-process sacks prior to the LTFV Investigation. Accordingly, the Department determined that that the screening process sacks were commercially available, i.e., ready for commercial production, prior to the LTFV Investigation.²² Furthermore, the Department stated that, because we determined that the screening-process sacks are not later-developed merchandise, a consideration of the criteria in section 781(d) of the Act to determine if the screening-process sacks are subject merchandise was not required.²³

DISCUSSION OF THE ISSUES

Comment 1: Commercial Availability in the U.S. Market Prior To Initiation of Investigations

Petitioners' Case Brief:

- In the Negative Preliminary Determination, the Department correctly stated that it “normally considers: (1) whether it was possible, at all, to manufacture the product in question; and (2) if the technology existed, whether the product was available in the market.” For the final determination, the Department should adhere to this judicially-affirmed standard for commercial availability, clarify that a finding of commercial availability requires actual presence in the market, and make an affirmative determination of circumvention.
- The Department’s Post-Preliminary Determination incorrectly articulated the commercial availability test. Specifically, whether a product is “later-developed merchandise” turns on its “commercial availability” in the U.S. market at the time of initiation of the original investigations²⁴; whereas, in the Post-Preliminary Determination, the Department expressed the commercial availability standard as “present in the commercial market or fully developed, i.e., tested and ready for commercial production, but not yet in the commercial market.”²⁵ Thus, the Department should instead find that commercial availability is appropriately considered only when Petitioners could reasonably be expected to be aware of the product in the market, and when the demonstration of sufficient distribution in the market in the year the petition is filed to support such a finding.
- In this case, the Manna Pro Complete Sack was not subject to the prior scope ruling by the Department and was not the basis for Petitioners’ request for an anti-circumvention inquiry, as opposed to the Manna Pro Calf Manna and Red Head Deer Corn sacks. Nevertheless, the Department accepted the document submitted by Shapiro regarding the Manna Pro Complete Sack, and made a negative circumvention determination regarding this sack despite Shapiro’s prior misrepresentations regarding the timing of printing changes for the Shapiro Sacks.
- The alleged presence of the Manna Pro Complete Sack in the U.S. market does not establish that sacks displaying three or more colors but printed using fewer than three print stations

²² See id., at 5.

²³ See Post-Preliminary Determination at 5; see also Electrolytic Manganese Dioxide from Japan: Preliminary Scope Ruling, 56 FR 56977 (November 7, 1991) (“if a product is developed before an antidumping case is initiated, the later-developed product provision is clearly inapplicable”) unchanged in final EMD from Japan.

²⁴ See Petitioners’ Case Brief dated October 25, 2012, at 8.

²⁵ See id.

were commercially available in the U.S. market prior to the initiation of the investigations. Rather, the fact that the Manna Pro Complete Sack is the only example provided of such product that Shapiro can identify establishes that these types of sacks were not commercially available in the U.S. market at the time of the initiation of the investigations.

- There is no record evidence showing that Petitioners reasonably could have been aware that a black/white sack with grey flecks represented a class of merchandise that was printed on fewer than three print stations, but gave the appearance of three colors; thus, the Department should not rely on an isolated, single use of a technology that was not representative of the usual practice in the industry prior to the initiation of the investigations.

Shapiro's Rebuttal Brief:

- In 2010, the CIT upheld the Department's Final Scope Ruling (July 29, 2009) that the two-color sacks in question are not within the scope of the AD and CVD orders.
- A product outside the scope of the Orders cannot simultaneously be said to circumvent the same Orders.
- The circumvention law is not the appropriate vehicle for Petitioners to correct its error in limiting the scope to include sacks with three colors; it is not the Department's or respondents' role to inform Petitioner about products' availability in its own industry.
- Despite Petitioners' claims, the Department's application of the commercial availability test is consistent with the law.
- Petitioners acknowledged that the technology to use a screening process in sacks production was available in 2005.
- The presence of the Manna Pro Feed Sacks and the Manna Pro Complete Sack in the U.S. market prior to the investigations establishes the commercial availability of these products.

Department's Position:

The Department disagrees with Petitioners that the record supports an affirmative finding of circumvention for the final determination. First, the Department correctly articulated the commercial availability test in the Post-Preliminary Determination. In the Post-Preliminary Determination, we provided the legal standard under section 781(d)(1) of the Act, noting specifically that the Department first determines whether the merchandise under consideration is "later-developed."²⁶ In doing so, the Department stated that it then examines whether the merchandise at issue was commercially available at the time of the initiation of the investigation.²⁷ This standard of commercial availability, interpreted by the Department in the Candles Anticircumvention Final, was later affirmed by both the CIT and the Federal Circuit, as a reasonable standard of analysis.²⁸ Therefore, we continue to define commercial availability as "present in the commercial market or fully developed, i.e., tested and ready for commercial production, but not yet in the commercial market."²⁹ Accordingly, the Department disagrees

²⁶ See Post-Preliminary Determination at 3; see Candles Anticircumvention Final, 71 FR at 59075 and accompanying Issues and Decision Memorandum at Comment 4; EPROMs from Japan, 57 FR at 11599; EMD from Japan, 57 FR at 395; Portable Electronic Typewriters from Japan, 55 FR at 47358.

²⁷ See Post-Preliminary Determination, at 3.

²⁸ See Candles Anticircumvention Final, 71 FR at 59077 and accompanying Issues and Decision Memorandum at Comment 4, affirmed by Target Corp., 626 F. Supp. 2d at 1285, and Target Corp. III, 609 F.3d at 1358-1360.

²⁹ See id.

with Petitioners that a finding of commercial availability requires actual presence in the market. We also find that this standard was properly applied in the Post-Preliminary Determination with respect to the sacks subject to the inquiry. As noted, the Department relied on the applicable statutory provision, and applied the commercial availability standard established in prior administrative determinations (including court-affirmed scope determinations) to our analysis of the sacks subject to this inquiry.³⁰ The Department therefore continues to find that the commercial availability standard articulated in the Post-Preliminary Determination is appropriately applied here. The Department reviewed the sacks subject to this inquiry, compared the sacks on the record with the other evidence provided by Shapiro, applied the commercial availability standard, and reasonably determined that the sacks were not later-developed merchandise.³¹

Secondly, we disagree with Petitioners' argument regarding the commercial availability of the Manna Pro Complete Sack. Shapiro provided evidence of two-ink, screened sacks sold in the U.S. market prior to the initiation of the investigation.³² Moreover, as stated in the Post-Preliminary Determination, "Shapiro provided an invoice for the purchase of the plates used to produce the Manna Pro Complete Sack, as well as a production report dated prior to the initiation of the LTFV Investigation that demonstrates the use of only white and black inks."³³ The documentation provided shows evidence of a two-ink, screened sack sold to a customer in the United States prior to the initiation of the investigation. As such, this evidence demonstrates that this type of sack was available in the U.S. market.

We also disagree with Petitioners' argument that an acceptable minimum of sales is required for there to be sufficient evidence of availability in the U.S. market. Neither section 781(d) of the Act, nor the Department's regulations set a minimum threshold for the number of sales required to establish commercial availability in the U.S. market. In addition, the Department has not set such a threshold in prior cases. Further, notwithstanding Petitioners' assertion that there ought to be a minimum number of sales, the actual quantity of sales of two-ink screened sacks on the record, as few as they are, is not dispositive here because Petitioners have, on the record, confirmed that the screening technology was available and in use by the domestic industry prior to the initiation of the investigation and during the investigation.³⁴ In this regard, and as stated in the Post-Preliminary Determination, "all parties agree that the screening technology used on laminated woven sacks was not new at the time of the initiation of the investigation."³⁵ While Petitioners argue that "it is not reasonable for the Department to require Petitioners to ferret out

³⁰ See Negative Preliminary Determination, 76 FR at 72162 and Post-Preliminary Determination, at 3-5.

³¹ See, e.g., Post-Preliminary Determination, at 4.

³² See Shapiro's supplemental response regarding Laminated Woven Sacks from China; Printed Inks Anti-Circumvention Inquiry: Submission of AMS's Fourth Supplemental Response dated March 12, 2012, ("March 12, 2012, Supplemental Response"), at Exhibits 1-4; see also Post-Preliminary Determination, at 4.

³³ See March 12, 2012, Supplemental Response, at Exhibit 1.

³⁴ See Commercial Packaging's Supplemental Questionnaire Response dated September 16, 2011, at 3; see also Petitioners' Questionnaire Response dated May 18, 2011, at 12; see also Shapiro's Supplemental Questionnaire Response dated September 16, 2011, at 2; see also Post-Preliminary Determination, at 4 (where the Department noted that "all parties agree that the screening technology used on laminated woven sacks was not new at the time of the initiation of the LTFV Investigation.")

³⁵ See Post-Preliminary Determination, at 4; see also Commercial Packaging's Supplemental Questionnaire Response dated September 16, 2011, at 3; Petitioners' Questionnaire Response dated May 18, 2011, at 12; Shapiro's Supplemental Questionnaire Response dated September 16, 2011, at 2.

every sale of subject merchandise in crafting a proposed scope definition,”³⁶ it would also be unreasonable to require an unstated quantity of sales as proof of the commercial availability of two-ink, screened sacks in the U.S. market prior to the initiation of the investigation, absent precedent or statutory and regulatory requirements. The record evidence shows sales documentation³⁷ for the Manna Pro Complete Sack, which we determined in the Post-Preliminary Determination to be a sack produced with a two-ink, screen process, that precedes the imposition of antidumping duties. Further, as noted above, the screening technology was available and in use prior to the initiation of the investigation and during the investigation.

Third, we address Petitioners’ argument that the Department’s reliance upon the 2005 sales documents for the Manna Pro Complete Sack and an affidavit are an insufficient basis for determining commercial availability in the U.S. market. The Department’s reliance on this information is part of the overall record evidence that was submitted at our request and was found to be sufficient and reliable for the Department to make the determination that the product at issue was commercially available. In making its determination, the Department considers the record and accords the appropriate weight to each piece of evidence on the record. In this instance, the record includes sales packages including invoices, packing lists, payment confirmations, invoices to the final customer, and approved screen artwork associated with the four sales made prior to the initiation of the LTFV Investigation of the Manna Pro Complete Sack.³⁸ In addition, the record includes an affidavit from the President of Shapiro confirming a statement by Shapiro’s supplier that the screening process and only two inks were used in the production of the Manna Pro Complete Sack beginning in 2005, an invoice for the purchase of the plates used to produce the Manna Pro Complete Sack, and a production report dated prior to the initiation of the LTFV Investigation that demonstrates the use of only white and black inks.³⁹ Again, we find that the overall record evidence is substantial and sufficiently supports our conclusion that the screening process sacks were commercially available prior to the LTFV Investigation.

With respect to Petitioners’ argument that “neither the Department’s Negative Preliminary Determination nor its Post-Preliminary Determination addressed the two other Shapiro Sacks - the Manna Pro Calf Manna sack and the Red Head Deer Corn sack,” we note that the initiation of this inquiry was not specific to these particular sacks, but, specific to “laminated woven sacks produced with two ink colors printed in register and a screening process,”⁴⁰ as evidenced by the Manna Pro Complete Sack, which is on the record and duly addressed by the Department as an example of a sack subject to this inquiry. The Department also rejects Petitioners’ arguments regarding the validity of the sales documentation for the Manna Pro Complete Sack. Petitioners assert that an affidavit and sales documentation for a single sale of the Manna Pro Complete Sack are insufficient to determine commercial availability of a two-ink, screened sack in the U.S.

³⁶ See Petitioners’ Case Brief dated October 25, 2012, at 13.

³⁷ See March 12, 2012, Supplemental Response, at Exhibits 1-4; see also Post-Preliminary Determination, at 4.

³⁸ See Post-Preliminary Determination at 4; Shapiro’s supplemental response regarding Laminated Woven Sacks from China; Printed Inks Anti-Circumvention Inquiry: Submission of AMS’s Fourth Supplemental Response dated March 12, 2012, (“March 12, 2012, Supplemental Response”), at Exhibits 1-4.

³⁹ Post-Preliminary Determination at 4; Shapiro’s submission entitled “Laminated Woven Sacks from China; Printed Inks Anti-Circumvention Inquiry: Submission of a Sample Bag” dated March 19, 2012, at Exhibit 1; Shapiro’s March 12, 2012, Supplemental Response at Exhibit 1.

⁴⁰ See Negative Preliminary Determination, 76 FR at 72161-72162.

market. The Department has evaluated the information on the record, including the sales documentation, and finds that the overall record evidence is sufficient to demonstrate the commercial availability of the two-inked sacks. We have discussed, at length, and as noted in the Post-Preliminary Determination, the record evidence on which we based our determination, including other documentation accompanied by the Manna Pro Complete Sack sales documentation.⁴¹ For example, in the Post-Preliminary Determination, we noted that Shapiro provided not only “sales packages including invoices, packing lists, payment confirmations, invoices to the final customer, and approved screen artwork...of the Manna Pro Complete Sack,”⁴² but also “the corresponding artwork, signed and approved for production on February 15, 2005, in conjunction with the related paperwork discussed above.” We found that this documentation supported the conclusion that “only white and black inks along with a screen were used in production.”⁴³ Furthermore, “the statement by Shapiro’s supplier that the screening process and only two inks were used in the production of the Manna Pro Complete Sack beginning in 2005 was also confirmed in an affidavit from the President of Shapiro”⁴⁴ Shapiro also provided additional evidence supporting our negative determination with “an invoice for the purchase of the plates used to produce the Manna Pro Complete Sack, as well a production report dated prior to the initiation of the LTFV Investigation that demonstrates the use of only white and black inks.”⁴⁵ As stated by Shapiro, each plate used in production corresponds to a single ink, thus demonstrating that the two plates purchased to produce the images on the Manna Pro Complete Sack were designed to only be used with two inks.⁴⁶ Petitioners have not provided any evidence on the record contradicting the veracity or authenticity of Shapiro’s statements, affidavit, or other documentation such as sales or production documents. The Department relied on the record as a whole to support our Post-Preliminary Determination.

We also disagree with Petitioners’ contention that commercial availability is appropriately considered only when Petitioners could reasonably be expected to be aware of the product in the market including the demonstration of sufficient distribution in the market in the year the petition is filed to support such a finding. Neither the statute nor the Department’s regulations or practice require a minimum of sales or sales documentation to establish evidence of commercial availability. Even so, all interested parties, including Petitioners, have stated on the record⁴⁷ that the technology to produce two-ink, screened sacks was available prior to the initiation of the investigation, which we have already determined to fall within the definition of commercial availability: “present in the commercial market or fully developed, i.e., tested and ready for commercial production, but not yet in the commercial market.”⁴⁸ The Department is unaware of

⁴¹ See Post-Preliminary Determination, at 4-5.

⁴² See March 12, 2012, Supplemental Response, at Exhibits 1-4.

⁴³ See id., at 2 and Exhibit 2.

⁴⁴ See Post-Preliminary Determination, at 4; see also Shapiro’s submission entitled “Laminated Woven Sacks from China; Printed Inks Anti-Circumvention Inquiry: Submission of a Sample Bag” dated March 19, 2012, at Exhibit 1.

⁴⁵ See Post-Preliminary Determination, at 4; see also March 12, 2012, Supplemental Response, at Exhibit 1.

⁴⁶ See Shapiro’s January 27, 2012, Supplemental Response, at 5.

⁴⁷ See Commercial Packaging’s Supplemental Questionnaire Response dated September 16, 2011, at 3; see also Petitioners’ Questionnaire Response dated May 18, 2011, at 12; see also Shapiro’s Supplemental Questionnaire Response dated September 16, 2011, at 2; see also Post-Preliminary Determination, at 4 (where the Department noted that “all parties agree that the screening technology used on laminated woven sacks was not new at the time of the initiation of the LTFV Investigation.”)

⁴⁸ See Target Corp. III, 609 F.3d at 1358; see also Candles Anticircumvention Final, and accompanying Issues and Decision Memorandum, at Comment 4.

any legal precedent or administrative practice that requires Petitioners to have knowledge of specific sales to importers of specific products in order to for merchandise to be considered commercially available in the marketplace. Petitioners' acknowledgment of the available screening technology, and the sales documentation on the record of two-ink, screened sacks prior to the initiation of the investigation, are a sufficient basis to determine commercial availability in the U.S. market.

Finally, we disagree with Shapiro's characterization that products outside the scope of orders cannot simultaneously be said to circumvent the same orders. For example, the Department has conducted anti-circumvention proceedings dealing with products that, in a minor altered form, may not be expressly included within the scope of an order but are considered the same class or kind of merchandise that is subject to an order.⁴⁹ The anti-circumvention statutory provisions make clear that this merchandise may be the subject of an anti-circumvention proceeding and the Department may ultimately find this merchandise within the scope of the order.⁵⁰

Comment 2: The Shapiro Sacks and Complete Sack Are Commercially Comparable Merchandise

Petitioners' Case Brief:

- The Department did not consider the physical characteristics, expectations of ultimate purchasers, ultimate use, channels of distribution, and manner of sale in either the Negative Preliminary Determination or the Post-Preliminary Determination because it concluded that the Manna Pro Complete Sack was commercially available.
- For the final determination, it should address these criteria with respect to both types of sacks because the record shows that the Manna Pro Feed sacks and the Manna Pro Complete Sack are comparable to other sacks when evaluated under the criteria of physical characteristics, expectations of ultimate purchasers, ultimate use, channels of distribution, and manner of sale.
- The Manna Pro Feed sacks and the Manna Pro Complete Sack are the same as sacks previously sold to the same purchasers, for the same packaged products, and for the same purposes, differing only in the slight changes in the printed graphics. Nevertheless, sacks printed with two inks to display three or more colors are comparable subject merchandise, based on these criteria.

Shapiro's Rebuttal Brief:

- Contrary to Petitioners' insistence, the record establishes that the Manna Pro Feed sacks (or comparably-produced sacks) were present in the U.S. market at the time of initiation of the investigation and not developed specifically to avoid AD duties.

⁴⁹ See, e.g., Carbon and Certain Alloy Steel Wire Rod From Mexico: Affirmative Final Determination of Circumvention of the Antidumping Duty Order, 77 FR 59892, 59893 (October 1, 2012).

⁵⁰ See, e.g., Section 781(c) of the Act, regarding the "minor alterations" type of circumvention, that allows the Department to determine whether "class or kind of merchandise subject to an antidumping duty order issued under section 736 shall include articles altered in form or appearance in minor respects (including raw agricultural products that have undergone minor processing), whether or not included in the same tariff classification."

- Petitioner cannot dispute that the Manna Pro Complete Sack also fits the description of allegedly circumventing merchandise, and that record establishes the presence in the U.S. market of the Manna Pro Complete Sack long before investigation initiation.

Department's Position:

The Department disagrees with Petitioners that we are required to conduct an analysis of the factors under section 781(d)(1)(A) – (E) of the Act in this proceeding. As stated in the Negative Preliminary Determination,⁵¹ the Department conducts an analysis regarding the physical characteristics, expectations of ultimate purchasers, ultimate use, channels of distribution, and manner of sale of a product if it first determines that the merchandise at issue was later-developed (i.e., not commercially available prior to the date of the initiation of the investigation). As that is not the circumstance in this proceeding, it is not necessary to conduct such an analysis. Because we continue to find that the screening-process sacks are not later-developed merchandise, we find that it is not necessary for the Department to consider the criteria in section 781(d)(1)(A) – (E) of the Act to determine if the screening-process sacks are subject merchandise.

RECOMMENDATION

Based on the analysis of the interested parties' comments and the record evidence, for the reasons described above, we continue to determine that the screening-process sacks are not later-developed merchandise. Therefore, we also continue to determine that the screening-process sacks are not circumventing the Orders within the meaning of section 781(d) of the Act. We recommend adopting all of the above positions. If accepted, we will publish the final determination of this anti-circumvention inquiry in the Federal Register.

AGREE ✓ DISAGREE _____

Paul Piquado
Paul Piquado
Assistant Secretary
for Import Administration

14 February 2013
(Date)

⁵¹ See Negative Preliminary Determination, 76 FR at 72162.