Slip Op. 08–99

WITEX, U.S.A., INC., ET AL., Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Judge

Consol. Court No. 98–00360

[Judgment for Defendant]

Decided: September 18, 2008

Grunfeld Desiderio Lebowitz, Silverman, & Klestadt, LLP (*Curtis W. Knauss*), *Aitken Irvin, LLP* (*Bruce Aitken*, *Bruce de Grazia*, and *Virginie Lecaillon (consultant)*), for the Plaintiff.

Gregory G. Katsas, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, *Amy M. Rubin*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Yelena Slepak*, Attorney, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, for Defendant.

OPINION

Pogue, Judge: This case involves the proper meaning of the term "tileboard" as used in subheading 4411.19.30 of the harmonized Tariff Schedule of the United Stated (1997) ("HTSUS"). Plaintiffs, Witex, U.S.A., Inc. and Mannington Mills ("Witex"), challenge the United States Customs Service's[1] ("Customs" or "Government") liquidation of its laminated floor panels ("merchandise"), claiming that the merchandise should be liquidated as "tileboard" under heading 4411.19.30[2], HTSUS, and therefore duty free. The Government

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[1] Effective March 1, 2003, the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. *See* Homeland Security Act of 2002, Pub. L. No. 107–296 § 1502, 2002 U.S.C.C.A.N. (116 Stat.) 2135, 2308; Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 08–32, at 4 (2003).

[2] 4411 Fiberboard of wood or other ligneous materials, whether or not bonded with resins or other organic substances:

counters that Witex's product is not "tileboard" and therefore should be classified under the basket, "[o]ther," provision for fiberboard with a density greater than 0.8 g/cm^3, and Witex's merchandise should be assessed a duty of 6% *ad valorem*. *See* subheading 4411.19.40, HTSUS. As is apparent, both of these claimed subheadings are subheadings to heading 4411, for "[f]iberboard."

In its prior decision in this case, *Witex, U.S. Inc., et. al.v. United States*, 28 CIT 1907 353 F. Supp. 2d 1310, (2004) ("Witex I") the court held that Witex's merchandise is classifiable as fiberboard under HTSUS heading 4411, and so must be classified under either subheading 4411.19.30 or 4411.19.40. The court also rejected cross-motions for summary judgment. A trial was held on October 26–27, 2005.[3] The court has exclusive jurisdiction over this matter under 28 U.S.C. § 1581(a)(2000). For the reasons given below, the court sustains Customs' classification of the goods in question under HTSUS 4411.19.40, concluding that Witex's laminated floor panels are not tileboard.[4]

Applicable Standard

"The proper scope and meaning of a tariff classification term is a question of law . . . while determining whether the goods at issue fall within a particular tariff term as properly construed is a question of fact." *Franklin v. United States*, 289 F.3d 753, 757 (Fed. Cir. 2002) (citations omitted). A Customs' classification decision is subject to *de novo* review as to the meaning of the tariff provision, pursuant to 28 U.S.C. § 2640, but may be accorded a "respect proportional to its

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		Fiberboard of a density exceeding 0.8 g/cm^3:		
4411.11.00			Not mechanically worked or surface covered	
*	*	*		
4411.19			Other:	
4411.19.20			Not surface covered (except for oil treatment)	
*	*	*		
			Other:	
4411.19.30				Tileboard which has been continuously worked along any of its edges and is dedicated for use in the construction of walls, ceilings or other parts of buildings
4411.19.40				Other

[3] This case was stayed, prior to trial, while the parties sought to resolve the matter. That proposed resolution having failed, the court must now decide the merits of the case.

[4] The court once again notes the Government's objections as to whether Witex has sufficiently proved the identity of its merchandise, i.e., to which type of panels, or from what collection, the contested merchandise belonged. However, because the court finds that all of the merchandise that could possibly be at issue here is correctly classified under HTSUS heading 4411.19.40, we need not address this issue.

'power to persuade.' " *United States v. Mead*, 533 U.S. 218, 235 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

Discussion

The analysis of "the proper classification of merchandise entering the United States is directed by the General Rules of Interpretation ('GRIs') of the HTSUS and the Additional United States Rules of Interpretation." *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). According to the GRIs, a court must determine the appropriate heading, and then, "[o]nly after determining that a product is classifiable under the heading should the court look to the subheadings to find the correct classification for the merchandise." *Id.* at 1440 (citing GRI 1, 6, HTSUS). As the court has already determined that the proper heading for Witex's merchandise is 4411 (*Witex I* at 1319), we now turn to the question of whether the merchandise in question is properly classified under subheading 4411.19.30 or rather 4411.19.40.[5]

Both 4411.19.30 and 4411.19.40 cover fiberboard products with densities greater than 0.8 g/cm^3 which are surface covered by more than an oil treatment. Heading 4411.19.40 is the "basket provision" that applies to all products meeting these standards that do not fall under other subheadings. Subheading 4411.19.30, in turn, covers "[t]ileboard which has been continuously worked along any of its edges and is dedicated for use in the construction of walls, ceilings, or other parts of buildings." Subheading 4411.19.30, HTSUS. Thus the terms of subheading 4411.19.30 requires a product to exhibit three features: (1) it must be "tileboard"; (2) which has been continuously worked along any of its edges; and (3) is dedicated for use in the construction of walls, ceilings or other parts of buildings. Both parties essentially agree that Witex's flooring panels satisfy the last two prongs of the test: the panels are tongue-and-grooved along their edges, satisfying the second prong[6]; moreover, the panels are used on "floors" which may be included within the meaning of "other parts of buildings."[7] What remains to be determined is the meaning of "tileboard".

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[5] Under GRI 6, "the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings. . . ."

[6] This is evident from Plaintiff's exhibits 28–30.

[7] While "other parts of buildings" may include floors the exact import of this phrase is not discernable from this bare fact. "Other parts of buildings" here modifies "tileboard" and so if tileboard is not used on floors then floors are not parts of a building where "tileboard" is used. Because *ejusdem generisis* only applicable where legislative intent is unclear, *see* 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.18 at 287–88 (6th ed. 2000), if the Government had established that the clear meaning of "tileboard" required principal use on walls, then "other parts of buildings" could not be read to enlarge the definition of "tileboard." The government's proof, however, did not resolve this issue.

A. Definition of "tileboard" in HTSUS or legislative history

"The first step in properly construing a tariff classification term is to determine whether Congress *clearly defined* that term in either the HTSUS or its legislative history." *Russel Stadelman & Co. v. United States*, 242 F.3d 1044, 1048 (Fed. Cir. 2001) (emphasis added). "Tileboard" is not defined in the HTSUS and, in the court's earlier decision, it held that the legislative history of the tariff heading in question also did not resolve the issue. *Witex I* at 1321–1322.

B. Commercial Meaning

When the HTSUS or legislative history do not define a term, the court looks to the term's common or commercial meaning. In the summary judgment phase of this case each party asserted that "tileboard" had a commercial meaning which supported their respective positions. In its earlier decision, the court rejected these claims at that summary judgment phase. *Witex I* at 1327 (holding that neither the existence nor the absence of a commercial designation for "tileboard" had been established). In the present proceeding, however, neither side has put forward any claim that there is a commercial designation for tileboard.[8] Defendant's Post-Trial Brief at 10, Plaintiffs' Post-Trial Brief at 1. As no party now asserts that there is a commercial designation for "tileboard", we move on in our analysis to the question of the common meaning for the term.

C. Common meaning

When a term is not defined in the HTSUS, nor by legislative history, and does not have a commercial meaning distinct from the common meaning that is general, definite, and uniform, the court will look to the common meaning of the term. *August Bentkam v. United Stated*, 40 CCPA 70, 78 (1952). The common meaning of a tariff term is a matter of law to be determined by the court. *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997). In determining the common meaning of a tariff term, the court may consult lexicographic sources such as dictionaries as well as scientific authorities, industry sources, and other reliable sources of information. *Medline Indus., Inc. v. United States*, 62 F.3d 1407, 1409 (Fed. Cir. 1995). "Other reliable sources" may include documentation from the relevant domestic industry and reference sources relied upon by people working in the industry. *See Northwest Airlines, Inc. v. United States*, 22 CIT 797, 800, 17 F. Supp. 2d 1008, 1011 (1998), *S.I. Studd, Inc. v. United States*, 17 CIT 661, 666 (1993), *aff'd*, 24 F.3d

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[8] The Government, in its post-trial brief and reply brief, sometimes refers to the "common and commercial meaning" and distinguishes this from a "commercial designation". However, this can be misleading. It is clear from context that what the Government is interested in is the common meaning, albeit in commerce, of "tileboard", and not any commercial designation.

1394 (1994). *See also Boen Hardwood Flooring, Inc. v. United States* 357 F.3d 1262 (Fed. Cir. 2004) (using various technical sources to determine the common meaning of "plywood" in HTSUS 4412.)

As noted in the court's previous decision in this case, the court has located a number of dictionary definitions of "tileboard". *See Webster's Third New International Dictionary* 2393 (1986) ("1: a board used in interior finishing and made from a large sheet of any of various materials having a decorative coating simulating a tiled surface. 2: a thin large square piece (as of wood) often with beveled edges that is fitted together with other like pieces to cover ceilings or walls."); *McGraw-Hill Dictionary of Scientific and Technical Terms* 2151 (6th ed. 2003) ("[a] type of wallboard used for interior finishing in which the outer surface is a layer of hard glossy material, usually simulating tile."); *Terms of the Trade* 342 (4th ed. 2000) ("[a] hardboard panel that has been embossed with a pattern and then coated with epoxy. The resulting product is designed to look like ceramic tile, for use in kitchens, bathrooms, etc."); *Dictionary of Architecture and Construction* 939 (3rd ed. 2000)("1. A wallboard used for interior finishing; usually a base sheet material overlaid with a hard, glossy decorative facing to simulate tile. 2. Square or rectangular boards, usually made of compressed wood or vegetable fibers, often with beveled interlocking edges, used for ceiling or wall covering."); *Reed Construction Data* at http://www.rsmeans.com/dictionary/index.asp?s = tileboard)("(1) A wallboard with a factory-applied facing which is hard, glossy, and decorated to simulate tile. (2) A square or rectangular board of compressed wood or vegetable fibers, used for ceiling or wall facings.") (Access is free upon registration, which is also free.)

Unfortunately, these definitions, on their own, cannot definitively settle the question of whether Witex's product falls under the common meaning of "tileboard". The most obvious reason why these definitions are not sufficient to settle the matter is that they are too broad, potentially covering products that are not based on fiberboard or even wood. Additionally, the makeup of the surface covering is left unclear in several of the definitions, though the covering is generally defined to be "hard" and "glossy."

Here testimony by Defendant's witness, National Import Specialist ("NIS") Paul Garretto is instructive. NIS Garetto, the import specialist for wood products since 1976, testified that tileboard, as encompassed in Subheading 4411.19.30, would be "a high density fiberboard, 4 by 8 . . . or 5 by 5 sheets approximately one-eighth of an inch thick with edges bullnosed having a scoring of the face which would be embossed or grooved to imitate, once finished, ceramic tiles feel and look . . . [with] what would be called a wet finish meaning that it is applied in . . . liquid coatings." NIS Garetto also testified that one of the coatings would be a "thermosetting resin to give a tough and waterproof surface. The back would also be treated to be

moisture resistant" and the product "was designed to be applied in wet areas and in particular to bathtub and shower enclosures." Tr. II 17. Additionally, examples of tileboard submitted for the record at trial require a backing material to which they are applied with adhesive because of their thin nature and are not used on floors because they lack sufficient resistence to abrasion. Tr. II 30, 33.

From this testimony, along with the above definitions, the court can construct a working definition or paradigm example of tileboard: tileboard will consist of a fiberboard backing with density greater than 0.8 g/cm^3, sold in a sheet 4′ by 8′ or 5′ by 5′ in size, approximately 1/8th inch thick (and so needing further backing before being attached, via an adhesive, to a wall), with bullnosed (rounded) edges and covered with a water-resistant surface designed to look like a ceramic tile via a "wet" application process, and would be used on walls or ceilings but not on floors. This working definition fits the physical examples of merchandise marketed as "tileboard" and submitted for the record at trial. Defense exhibits S and T.

It is clear that Witex's products do not fall within this paradigm as they tend to be thicker, have "tongue and groove" rather than bullnosed edges, are sold in different sizes, do not usually have a surface that looks like ceramic tile, are resistant to abrasion and so are suitable to use on floors, are not applied via an adhesive to a backing, and do not have a "wet" finish but rather a laminated one.[9]

The court cannot simply end its analysis at this point, however, because, as noted by NIS Garetto, not all of these characteristics of the paradigm example of tileboard are firmly and precisely applied, even by Customs itself. A product could deviate from almost any one of these features and still be tileboard. For example, a product could have a finish that, rather than ceramic tile, looks like marble or granite, or has a floral print or a print to look like wood, or has no design at all. Tr.II 31, 64, 84. Similarly, it appears to the court, and is indirectly supported by NIS Garetto's testimony, that a product could be "worked" on the edges in a manner other than bullnosing. Tr. II 71–72. In addition, a higher thickness may sometimes be acceptable, Tr. II 84–85, 87, and, with a higher thickness, a backing board may not be needed.

The single element that does not seem to have a tolerance for variation is in the nature of the top layer of tileboard. Several factors point to this. First, NIS Garetto, in his testimony, insisted that tileboard, in his understanding of the term, always had a "wet" finish, meaning one where the hard surface is applied in liquid form, as opposed to a laminated surface. Tr. II, 32–33, 58–63, 105–107.[10] Sec-

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[9] This is again apparent not only from Plaintiff's briefs and testimony but also from Plaintiff's exhibits 28–31.

[10] In its post-trial brief, Witex appears to misunderstand this aspect of NIS Garetto's testimony. While, on cross-examination, Mr. Garetto did testify that a melamine surface

ondly, while the various dictionary definitions and technical sources noted by the court do not explicitly rule out a laminated surface they seem more clearly compatible with a non-laminated surface than with a laminated one. Specifically, none of these definitions state or imply that tileboard has a laminated finish. Next, all manufacturers known to the court who produce a product that is clearly tileboard use a wet finish while none use a laminated finish. Finally, evidence may be gathered from the structure of the HTSUS itself. In the tariff provision immediately following the provision containing the tileboard subheading – *i.e.*, fiberboard of a density exceeding 0.5 g/cm^3 but not exceeding 0.8 g/cm^3—specific mention is made of "laminated boards". HTSUS, 4411.29.20. But, no mention of laminated boards is made in subheading 4411.19.30, the subheading for tileboard. If Congress had intended for laminated boards to be classified in subheading 4411.19.30, it could have so specified, as it did in 4411.29.20. All of these factors weigh in favor of a determination that laminated boards, like those produced by Witex, are not tileboard.

As noted above, the court may make references to various sources, including dictionaries, technical sources, trade materials, and other reliable sources (such as witnesses like NIS Garetto) in determining the common meaning of a tariff term. All of these sources, without exception, support the conclusion that tileboard, as encompassed in HTSUS 4411.19.30, must have a wet finish and may not have a laminated finish.

Conclusion

For the foregoing reasons the court sustains Customs' classification of Witex's products under heading 4411.19.40. Judgment will be entered accordingly.

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could be laminated, Tr. II, 83, and that a backing board for tileboard could be laminated, Tr. II, 105, he did not contradict his testimony that the top surface of tileboard could not be laminated.

Slip Op. 08–100

FAUS GROUP, INC., Plaintiff, v. UNITED STATES, Defendant.

BEFORE: Pogue, Judge

Court No. 03–00313

FINAL JUDGMENT

In accordance with the Court's opinion and order in this matter, it is hereby

ORDERED that this case is dismissed with prejudice. Final judgment is entered for the Government as to all of Plaintiff's claims. On this date, final judgment is also entered in case No. 98-00360. Plaintiff has reserved the right to appeal as to its claim that the subject merchandise is properly classifiable under HTSUS Heading 4418 (as "builders' joinery"), and also under Subheading 4418.30.00 or, in the alternative, under Subheading 4418.90.40 (currently 4418.90.45).

Slip Op. 08–101

TARGET CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge

Consol. Court No. 06–00383

[Commerce's anticircumvention determination remanded.]

Dated: September 18, 2008

Jochum Shore & Trossevin, P.C. (*Marguerite E. Trossevin*) for Plaintiff Target Corporation.

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Bruce M. Mitchell*, *Max F. Schutzman*, *William F. Marshall*, *Andrew T. Schutz*) for Plaintiffs Qingdao Kingking Applied Chemistry Co., Ltd., Dalian Talent Gift Co., Ltd., Shanghai Autumn Light Enterprise Co., Ltd., Home Accent International (Honghzhou) Co., Ltd., Zhongshan Zhongnam Candle Manufacturer Co., Ltd., Nantucket Distributing Co., Inc., Shonfeld's (USA), Inc., Amstar Business Company Limited and Jiaxing Moonlight Candle Art Co., Ltd.

Greenberg Traurig, LLP (*Jeffrey S. Neeley*, *David R. Amerine*) for Plaintiff Specialty Merchandise Corporation, Inc.

Gregory G. Katsas, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David S. Silverbrand*, *Michael J. Dierberg*); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Arthur D. Sidney*), of counsel, for Defendant United States.

Barnes & Thornburg LLP (*Randolph J. Stayin*, *Karen A. McGee*) for Defendant-Intervenor National Candle Association.

OPINION AND ORDER

Gordon, Judge: Plaintiffs Target Corporation ("Target"), Qingdao Kingking Applied Chemistry Co., Ltd., *et al.* ("Qingdao"), and Specialty Merchandise Corporation, Inc. ("SMC") challenge the U.S. Department of Commerce's ("Commerce") determination that petroleum wax candles with 50 percent or more palm or other vegetable-oil based waxes ("mixed-wax") are later-developed merchandise circumventing the antidumping duty order covering petroleum wax candles from China. *See Petroleum Wax Candles from the People's Republic of China*, 71 Fed. Reg. 59,075 (Dep't Commerce Oct. 6, 2006) (final determ. anticircumvention inquiry) ("*Final Determination*"), *amended by* Final Results Pursuant to Voluntary Remand, *Target Corp. v. United States*, Consol. Court No. 06–00383 (May 16, 2008) ("*Voluntary Remand*"). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(vi) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi) (2000)[1] and 28 U.S.C. § 1581(c) (2000). As discussed below, this action is remanded to Commerce for further consideration.

I. Standard of Review

When reviewing an anticircumvention determination under 19 U.S.C. § 1516a(a)(2)(B)(vi) and 28 U.S.C. § 1581(c) (2000), the U.S. Court of International Trade sustains Commerce's determinations, findings, or conclusions unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). When reviewing whether Commerce's actions are unsupported by substantial evidence, the Court assesses whether the agency action is reasonable given the record as a whole. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Additionally, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the antidumping statute. *Dupont Teijin Films USA, LP v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005).

II. Background

Commerce issued an antidumping duty order on petroleum wax candles from China in 1986. *Petroleum Wax Candles from the People's Republic of China*, 51 Fed. Reg. 30,686 (Dep't Commerce Aug. 28, 1986) (antidumping duty order) ("Petroleum Wax Candle Order"

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[1] Further citations to the Tariff Act of 1930 are to the relevant provisions of Title 19 of the U.S. Code, 2000 edition.

or "Order"). In the less than fair value ("LTFV") proceeding Commerce defined the subject merchandise, in relevant part, as "petroleum wax candles made from petroleum wax." *Petroleum Wax Candles from the People's Republic of China*, 51 Fed. Reg. 25,085 (Dep't Commerce July 10, 1986) (final less than fair value determination). For the corresponding injury investigation, the U.S. International Trade Commission ("ITC") defined the domestic like product, in relevant part, as candles "composed of over 50 percent petroleum wax." *Candles from the People's Republic of China*, USITC Pub. 1888 at 5, Inv. No. 731–TA–282 (Aug. 1986) (final injury determination) ("*Original Injury Determination*").

subject merchandise (COMMERCE)	"petroleum wax candles **made from petroleum wax"**
domestic like product (ITC)	"candles **composed of over 50 percent petroleum wax"**

The ITC therefore interpreted Commerce's redundant qualifier "made from petroleum wax" to mean "composed of more than 50 percent petroleum wax." *See id.* This percentage benchmark proved dispositive in subsequent Commerce scope determinations involving mixed-wax candles. Commerce ruled at least seven times in a seven-year period that the ITC's percentage-based like product definition mandated that mixed-wax candles (containing less than 50 percent petroleum wax) be excluded from the scope of the Petroleum Wax Candle Order.[2]

Central to these prior scope rulings is the unstated but fundamen-

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[2] *See Petroleum Wax Candles from the People's Republic of China*, Final Scope Ruling, A–570–504, "*Costco Wholesale*" (Dec. 10, 1998) (candles composed of 19% petroleum wax and 81% beeswax excluded from Order for not satisfying Commission's like product definition of petroleum wax candles); *Petroleum Wax Candles from the People's Republic of China*, Final Scope Ruling, A–570–504, "*Et Al Imports, Inc.*" (Dec. 11, 1998) (candles composed of 20% paraffin wax and 80% beeswax excluded from Order based upon the Commission's definition of the domestic like product); *Petroleum Wax Candles from the People's Republic of China*, Final Scope Ruling, A–570–504, "*Ocean State Jobbers, Inc.*" (Dec. 18, 1998) (candles composed of 20% petroleum wax and 80% beeswax excluded from Order based upon the Commission's definition of the domestic like product); *Petroleum Wax Candles from the People's Republic of China*, Final Scope Ruling, A–570–504, "*JC Penny Purchasing, Corp.*" (May 21, 2001) (candles composed of 42% petroleum wax and 58% palm oil excluded from Order for not satisfying the Commission's definition of domestic like product); *Petroleum Wax Candles from the People's Republic of China*, Final Scope Ruling, A–570–504, "*Leader Light, Inc.*" (Dec. 12, 2002) (candles containing less than 50% petroleum wax excluded from Order for not satisfying the Commission's definition of domestic like product); *Petroleum Wax Candles from the People's Republic of China*, Final Scope Ruling, A–570–504, "*Avon Products, Inc.*" (Nov. 17, 2003) (candles containing less than 50% petroleum wax excluded from Order for not satisfying the Commission's definition of domestic like product); *Petroleum Wax Candles from the People's Republic of China*, Final Scope Ruling, A–570–504, "*Pier 1 Imports, Inc.*" (May 13, 2005) (candles with petroleum-based wax content less than 50 percent excluded from the Order pursuant to the Commission's like product definition and Commerce's treatment in prior scope rulings). All scope rulings for the Petroleum Wax Candle Order are available at http://ia.ita.doc.gov/download/candles-prc-scope/index.html.

tal tenet of antidumping law that the domestic like product must encompass the subject merchandise: "an antidumping duty order must be supported by an ITC determination of material injury covering the merchandise in question." *Wheatland Tube Co. v. United States*, 21 CIT 808, 819, 973 F. Supp. 149, 158 (1997) (citing 19 U.S.C. § 1673), *aff'd*, 161 F.3d 1365 (Fed. Cir. 1998).

Rather than have Commerce repeat another conventional scope proceeding, the domestic interested party, National Candle Association ("NCA"), tried a different approach in 2004. NCA petitioned Commerce to initiate a later-developed merchandise anticircumvention inquiry and determine whether mixed-wax candles were circumventing the Order. Commerce initiated the inquiry. *Petroleum Wax Candles from the People's Republic of China*, 70 Fed. Reg. 10,962, 10,963 (Dep't Commerce Mar. 7, 2005) (notice of initiation anticircumvention inquiry) ("*Notice of Initiation*"). A later-developed merchandise anticircumvention inquiry is a specific type of scope inquiry governed by its own statutory provision, 19 U.S.C. § 1677j(d), which codified Commerce's administrative practice for analyzing whether later-developed merchandise fell within the scope of an antidumping duty order. H.R. REP. NO. 100–576, at 601 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1634 ("This provision is intended to clarify and codify current Commerce Department authority, which has been recognized by the courts.")

As Commerce was commencing the later-developed merchandise anticircumvention inquiry, the ITC was coincidentally concluding a second five-year sunset review of the Petroleum Wax Candle Order. *See Petroleum Wax Candles from China*, USITC Pub. 3790, Inv. No. 731–TA–282 (July 2005) (second sunset review) ("*Second Sunset Review*"). The lone participant in the *Second Sunset Review*, NCA, urged the ITC to re-examine the domestic like product definition from the *Original Injury Determination* and include "all blended candles" regardless of the proportion of petroleum wax. *Second Sunset Review* at 7. The ITC obliged and redefined the domestic like product "to include all blended candles," or more simply, candles "containing any amount of petroleum wax." *Id.* at 9. In addition, the ITC concluded that revocation of the Petroleum Wax Candle Order "would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time." *Id.* at 3. No party challenged the *Second Sunset Review*.

Subsequently, Commerce completed the anticircumvention inquiry and determined that mixed-wax candles containing "any amount" of petroleum wax are within the scope of the Petroleum Wax Candle Order. *Final Determination*, 71 Fed. Reg. at 59,077–78. Plaintiffs then commenced this action. Commerce, in turn, sought a voluntary remand which the court granted. In the *Voluntary Remand* Commerce slightly modified its legal analysis but did not change its de-

termination. *See* discussion *infra* at pp. 12–13. Plaintiffs raise a number of challenges to Commerce's determination, including:

(1) that Commerce's interpretation of the phrase "later-developed merchandise" to cover merchandise that was in existence but commercially unavailable during the original investigation is contrary to the plain meaning of 19 U.S.C. § 1677j(d), and further, that Commerce's finding that mixed-waxed candles were commercially unavailable at the time of the original investigation is unsupported by substantial evidence;

(2) that Commerce's initiation of the anticircumvention inquiry on mixed-wax candles was contrary to Commerce's scope regulation, 19 C.F.R. § 351.225 (2004),[3] the prior mixed-wax candle scope rulings, and case law governing the initiation of scope inquiries; and

(3) that Commerce's inclusion of mixed-wax candles within the scope of the Order is a legally impermissible expansion of the Petroleum Wax Candle Order contrary to the domestic like product definition.[4]

As explained more fully below, the court is not persuaded by these arguments; nevertheless, the court cannot sustain Commerce's later-developed merchandise anticircumvention determination and therefore remands the matter to Commerce for further consideration.

III. Discussion

A. Later-Developed Merchandise

1. Commercial Availability Standard

A critical legal issue for Commerce during the administrative proceeding was whether mixed-wax candles were "later-developed merchandise." This issue arose because record evidence indicated that mixed-wax candles may have existed at the time of the original investigation. Section 1677j(d)(1) defines "later-developed merchandise" as "merchandise *developed after* an [antidumping] investiga-

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[3] Further citations to Title 19 of the Code of Federal Regulations are to the relevant provisions of the 2004 edition.

[4] Plaintiffs also challenge (1) Commerce's finding that mixed-wax candles are the same class or kind of merchandise as petroleum wax candles (the subject merchandise) and specifically that four of Commerce's findings in applying the statutory factors — the physical characteristics of the product, the expectations of the ultimate purchasers, the channels of trade in which the product is sold, and the manner in which the product is advertised and displayed — are unsupported by substantial evidence; and Plaintiffs also argue that (2) Commerce's assessment of antidumping duties, pursuant to 19 C.F.R. § 351.225(l)(3), on Plaintiffs' entries made after the initiation of the anticircumvention inquiry is an impermissible retroactive application of the law. The court does not resolve these issues in this decision.

tion is initiated." 19 U.S.C. § 1677j(d)(1) (emphasis added). The question for Commerce was whether mixed-wax candles were "developed" by the time of the initiation of the investigation or "developed" sometime thereafter.

Commerce touched upon the meaning of "developed" in several prior anticircumvention proceedings. "In each case, [Commerce] addressed the 'commercial availability' of the later-developed merchandise in some capacity, such as the product's presence in the commercial market or whether the product was fully 'developed,' i.e., tested and ready for commercial production." *Final Determination*, 71 Fed. Reg. at 59,076–77 (citing *Portable Electronic Typewriters from Japan*, 55 Fed. Reg. 47,358 (Dep't Commerce Nov. 13, 1990) (final scope ruling), *Electrolytic Manganese Dioxide from Japan*, 57 Fed. Reg. 395 (Dep't Commerce Jan. 6, 1992) (final scope ruling), and *Erasable Programmable Read Only Memories from Japan*, 57 Fed. Reg. 11,599 (Dep't Commerce Apr. 6, 1992) (final scope ruling)). From these prior administrative precedents Commerce derived a commercial availability standard for the term "developed." Simply stated, to be "developed" a product must be commercially available—present in the commercial market or tested and ready for commercial production. Commerce offered a straightforward rationale for the standard: "[T]he product's actual presence in the market at the time of the LTFV investigation is a necessary predicate of its inclusion or exclusion from the scope of an antidumping duty order." *Issues and Decision Memorandum for the Later-Developed Merchandise Anticircumvention Inquiry of the Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China*, at 23, A–570–504 (Sept. 29, 2006), *available at* http://ia.ita.doc.gov/frn/summary/prc/E6-16613-1.pdf ("*Decision Memorandum*").

Plaintiffs challenge the commercial availability standard, arguing that "developed" has one and only one meaning: created. Target Mot. J. Agency R. at 15; Qingdao Mot. J. Agency R. at 25–26. It is an understandable position; if developed means created, and mixed-wax candles existed at the time of the initiation of the investigation, they cannot be "later-developed."

The two-step framework provided in *Chevron*, 467 U.S. at 842–45, governs judicial review of Commerce's interpretation of the antidumping statute. *Dupont Teijin Films USA, LP*, 407 F.3d at 1215. The court first considers whether Congressional intent on the issue is clear, and if not, the court next considers whether Commerce's interpretation is reasonable. *Id.* The word "developed" has many meanings. *See* "developed." *The American Heritage® Dictionary of the English Language, Fourth Edition*. Houghton Mifflin Company, 2004; Dictionary.com entry, http://dictionary.reference.com/browse/developed (last visited Sept. 18, 2008). Although Plaintiffs' proposed interpretation represents one possibility, Commerce's represents another. Therefore, this is not a matter of giving effect to one, clear,

Congressional intent (*Chevron* step one), but instead of reviewing the reasonableness of Commerce's proposed interpretation (*Chevron* step two). To determine whether Commerce's interpretation is reasonable, the court "may look to 'the express terms of the provisions at issue, the objectives of those provisions, and the objectives of the antidumping scheme as a whole.' " *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1361 (Fed. Cir. 2007) (citing *NSK Ltd. v. United States*, 26 CIT 650, 654, 217 F. Supp. 2d 1291, 1296–97 (2002)).

Commerce's commercial availability standard is reasonable. As Commerce explained, "the product's actual presence in the market at the time of the LTFV investigation is a necessary predicate of its inclusion or exclusion from the scope of an antidumping duty order." *Decision Memorandum* at 23. The later-developed merchandise provision is designed to prevent circumvention of an antidumping order by a comparable product (as determined by the *Diversified Products*[5] analysis) for the subject merchandise. Commerce's interpretation, which reaches products that emerge in the market after imposition of the antidumping order, accomplishes this objective.

2. Commerce's Finding of Commercial Unavailability

Qingdao challenges Commerce's determination that mixed-wax candles were commercially unavailable during the LTFV investigation. Qingdao Mot. J. Agency R. at 37–44. Implicit in Qingdao's challenge is an assumption that Commerce made a finding of commercial unavailability for mixed-wax candles, which it did in some vague sense:

> [H]aving received no information either through relevant product brochures, annual sales data, or any other information from any party demonstrating that mixed-wax candles were commercially available prior to the LTFV investigation, [Commerce] *finds that it cannot definitively conclude* that mixed-wax candles were available in the market at the time of the LTFV investigation.

Decision Memorandum at 26 (emphasis added).

Note that Commerce "cannot definitively conclude." *Id.* This language creates confusion, at least for purposes of judicial review. Rather than make a straightforward finding that mixed-wax candles were commercially unavailable at the time of the LTFV, Commerce introduced an unexplained, subjective, evidentiary standard—defini-

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[5] The factors set forth in 19 U.S.C. § 1677j(d)(1) to determine whether later-developed merchandise is within the scope of an outstanding antidumping duty order are derived from the court's decision in *Diversified Prods. Corp. v. United States*, 6 CIT 155, 162, 572 F. Supp. 883, 889 (1983). They are commonly referred to as the *Diversified Products* criteria.

tive conclusiveness—and found this standard had not been met. It is a puzzling turn of phrase; it almost bespeaks an administrative presumption of commercial unavailability—rebuttable by definitively conclusive evidence (whatever that may be) of commercial availability. Commerce, though, directly contradicted such notions:

> [B]oth Respondents and Petitioners had the burden to establish whether mixed-wax candles were commercially available at the time of the LTFV investigation. All parties were given the opportunity to submit evidence that mixed-wax candles were available or evidence that mixed-wax candles were not available in the market. Accordingly, the burden did not rest on any single party.

Id. at 25. The net effect of all this is that the court cannot review Commerce's new, subjective, evidentiary standard and the associated "finding" in its present posture, and therefore must remand to Commerce for further consideration.

On remand Commerce has two choices: (1) Commerce may make a straightforward finding of commercial unavailability at the time of the LTFV, which the court can then review for reasonableness (substantial evidence review); or (2) Commerce may further explain its proposed evidentiary standard as a reasonable application and interpretation of the later-developed merchandise anticircumvention provision. Once completed, Commerce must share it with the parties and provide an opportunity to address that standard as it applies to the record evidence. Commerce can then make a factual finding based on the proposed standard. The court will then review the proposed standard for reasonableness under *Chevron* step two, and evaluate whether Commerce's factual finding is supported by substantial evidence (or more simply, for reasonableness).

3. Significant Technological Advance or Significant Alteration of the Merchandise Involving Commercially Significant Changes

During the anticircumvention proceeding, Commerce referred to the legislative history for the ITC consultation requirement of § 1677j(e) and discovered what it thought was an additional definitional requirement for "later-developed merchandise." According to Commerce, "[t]he only other source of guidance available [for the definition of 'later-developed merchandise'] is the brief discussion of later-developed products in the legislative history for section 781(d) of the Act, which although addressing later-developed products with respect to the ITC's injury analysis, we find is also relevant to [Commerce]'s analysis." *Final Determination*, 71 Fed. Reg. at 59,076. Commerce then selectively quoted the legislative history, mistakenly representing that the history defined "a later-developed product as a product that has been produced as a result of a 'significant techno-

logical advancement [sic] or a significant alteration of the merchandise involving commercially significant changes.' " *Id.* (emphasis omitted) (quoting H.R. REP. NO. 100–576, at 603 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1636). Commerce purportedly abandoned its reliance on the legislative history of the ITC consultation requirement after reconsidering its interpretation of later-developed merchandise pursuant to the voluntary remand in this matter. *Voluntary Remand* at 5. Commerce, though, did not abandon the additional definitional requirements. Commerce maintained that later-developed merchandise must have resulted from a significant technological advance or significant alteration to an earlier product. *Id.*

Not much need be said here other than that Commerce misread the ITC consultation provision and its legislative history. The full passage from which Commerce selectively quoted in the *Final Determination* reads:

> With respect to later-developed products, *a significant injury issue can arise if* there is a significant technological development or a significant alteration of the merchandise involving commercially significant changes in the characteristics and uses of the product. In providing such advice, the ITC should not focus narrowly on the product's features at the time the order was issued, but should analyze its general characteristics and uses in light of its prior determination. *Thus, a later-developed product incorporating a new technology that provides additional capability, speed, or functions would be covered by the order as long as it has the same basic characteristics and uses*.

H.R. REP. NO. 100–576, at 603 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1636 (emphasis added). Likewise, the ITC consultation provision reads:

> (e) Commission advice
>
> (1) Notification to Commission of proposed action
>
> Before making a determination—
>
> . . .
>
> (C) under subsection (d) of this section with respect to any later-developed merchandise *which incorporates a significant technological advance or significant alteration of an earlier product*,
>
> with respect to any antidumping or countervailing duty order or finding as to which the Commission has made an affirmative injury determination, the administering authority shall notify the Commission of the proposed inclusion of such merchandise in such countervailing or antidumping order or finding. Not-

> withstanding any other provision of law, a decision by the administering authority regarding whether any merchandise is within a category for which notice is required under this paragraph is not subject to judicial review.

19 U.S.C. § 1677j(e) (emphasis added).

The ITC consultation provision does not define or limit the meaning of later-developed merchandise. What it does is identify specific types of later-developed merchandise that may raise "significant injury issue[s]" and require Commerce to consult with the ITC before including those specific types of later-developed merchandise within the scope of an order. H.R. REP. NO. 100–576, at 603 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1636. Simply put, it does not limit the universe of "later-developed merchandise" to products that involve a significant technological advance or significant alteration as Commerce suggests; it identifies a subset of "later-developed merchandise" that requires consultation with the ITC. Commerce, therefore, erred by inferring from § 1677j(e) that "later-developed merchandise" under § 1677j(d) must in every instance involve a significant technological advance or significant alteration of subject merchandise. Ironically, by defining "later-developed merchandise" to require a significant alteration of the subject merchandise and then making a factual finding that mixed-wax candles involve a significant alteration of petroleum wax candles, Commerce may have created a "significant injury issue" where none otherwise exists.

In any event Commerce's interpretation is contrary to the clear Congressional intent of § 1677j(e), and correspondingly, is one to which the court cannot defer. The court must therefore remand the matter to Commerce to correct its erroneous interpretation of the statute. On remand Commerce may, of course, continue to limit what constitutes "later-developed merchandise," so long as whatever limitation Commerce divines is a reasonable interpretation of the statute.

B. Initiation of the Anticircumvention Inquiry

Qingdao challenges the initiation of the anticircumvention inquiry as contrary to (1) Commerce's regulation for scope determinations, 19 C.F.R. § 351.225, and the prior mixed-wax candle scope rulings, and (2) *Wheatland Tube*, 161 F.3d at 1371. Qingdao Mot. J. Agency R. at 10–22.

Commerce's procedures for conventional scope inquiries are governed by 19 C.F.R. § 351.225. In determining whether a product is included within the scope of an antidumping duty order, Commerce examines the scope application and the descriptions of the merchandise set forth in the antidumping petition, the initial investigation, and all prior determinations (including prior scope determinations) of Commerce and the ITC. 19 C.F.R. § 351.225(d) & (k)(1); *Crawfish*

Processors Alliance v. United States, 483 F.3d 1358, 1362–63 (Fed. Cir. 2007). If these descriptions conclusively determine whether disputed merchandise is subject to the scope of an order, Commerce issues a final determination that the merchandise is covered, or not covered, by the order. *Id.* If these descriptions are not dispositive, Commerce initiates a scope inquiry and considers the *Diversified Products* criteria: the physical characteristics of the product, the expectations of the ultimate purchasers, the ultimate use of the product, the channels of trade in which the product is sold, and the manner in which the product is advertised and displayed. 19 C.F.R. § 351.225(e) & (k)(2); *Crawfish Processors Alliance*, 483 F. 3d at 1362.

In at least seven prior conventional scope determinations involving mixed-wax candles, Commerce found the ITC's like product definition—candles composed of over 50 percent petroleum wax—to be dispositive of whether mixed-wax candles were subject to the scope of the Petroleum Wax Candle Order. *See* final scope rulings *supra* note 2. In each instance, rather than initiating a scope inquiry, Commerce issued a final ruling excluding mixed-wax candles from the Order pursuant to 19 C.F.R. § 351.225(d) and (k)(1). Qingdao wants similar treatment here. Qingdao Mot. J. Agency R. at 12–13. Qingdao argues that Commerce should not have initiated the anticircumvention inquiry, but rather should have issued a final ruling excluding mixed-wax candles on the basis of the ITC's original domestic like product definition, which the ITC had not yet redefined in the *Second Sunset Review*. *Id.*

Commerce, though, determined that the threshold determination of 19 C.F.R. § 351.225(d) and (k)(1) for conventional scope inquiries did not apply to NCA's petition for a later-developed merchandise anticircumvention inquiry. *See Petroleum Wax Candles from the People's Republic of China*, 71 Fed. Reg. 32,033, 32,036–37 (Dep't Commerce June 2, 2006) (prelim. determ. anticircumvention inquiry) ("*Preliminary Determination*"); *see also Decision Memorandum* at 11–12. Commerce instead noted that the later-developed merchandise anticircumvention provision requires that Commerce shall consider the *Diversified Products* criteria enumerated in 19 U.S.C. § 1677j(d)(1)(A)-(E). *Preliminary Determination*, 71 Fed. Reg. at 32,036–37.

Commerce distinguished conventional scope proceedings from later-developed merchandise anticircumvention inquiries:

> [Commerce] considered its prior scope ruling finding certain mixed-wax candles outside the scope of the Order. While [Commerce] recognizes that it made previous such scope rulings, [Commerce] notes that the factors that govern [Commerce]'s analysis of whether a product is within the scope of the Order differ for anticircumvention inquiries and other scope determinations. In scope rulings under section 351.225(k)(1) of [Com-

> merce]'s regulations, [Commerce] relies upon relevant documents . . . in determining whether a particular product is included within the scope of an antidumping order. If [Commerce] finds that the descriptions are dispositive, [Commerce] will issue a final scope ruling of whether the product is within the scope of the antidumping duty order. But when the descriptions are not dispositive, [Commerce] will further consider the additional five factors, as stipulated in section 351.225(k)(2) of [Commerce]'s regulations.
>
> * * *
>
> Later-developed merchandise anticircumvention inquiries are governed by [19 U.S.C. § 1677j(d)], which instructs [Commerce] to determine whether the product in question was developed after the investigation was initiated, and, if so, whether it is within the scope of the order. If [Commerce] finds that the product subject to the inquiry is later-developed, then [19 U.S.C. § 1677j(d)(1)] instructs [Commerce] to consider [the *Diversified Products* factors]. In contrast to the prior scope rulings, in the present inquiry, [Commerce] is obligated, pursuant to [19 U.S.C. § 1677j(d)], to make a determination by explicitly analyzing these additional factors.

Preliminary Determination, 71 Fed. Reg. at 32,036–37 (citations omitted).

Plaintiffs argue that 19 C.F.R. § 351.225 "make[s] no distinction in the preliminary inquiry Commerce is required to make whether dealing with a conventional scope application or a scope application based upon alleged circumvention. In either case, the agency is first required to determine if the language of the order, etc. is dispositive [of scope]." Qingdao Mot. J. Agency R. at 16 (emphasis omitted).

When reviewing Commerce's interpretations of its own regulations, the court does not "decide which among several competing interpretations best serves the regulatory purpose." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). Rather, the court must accord Commerce's interpretation of its own regulation " 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " *Id.* (quoting *Udall v. Tallman*, 380 U.S. 1, 16–17 (1965)); *see also Viraj Group v. United States*, 476 F.3d 1349, 1355 (Fed. Cir. 2007).

Commerce's interpretation of 19 C.F.R. § 351.225 is not plainly erroneous or inconsistent with the regulation. Paragraph (j), the scope provision governing "later-developed merchandise," states that "in determining whether later-developed merchandise is within the scope of an antidumping . . . duty order, the Secretary will apply [19 U.S.C. § 1677j(d)]." 19 C.F.R. § 351.225(j). Commerce followed this directive. Rather than applying 19 C.F.R. § 351.225 (d), (e), and (k), Commerce applied 19 U.S.C. § 1677j(d).

Section 351.225(k), in turn, exempts later-developed merchandise proceedings from the conventional scope procedures set forth in subparagraphs (k)(1) and (k)(2). 19 C.F.R. § 351.225(k) (Paragraph (k) is limited to "those scope determinations that are not covered under paragraphs (g) through (j)."). Since paragraph (d) incorporates the criteria of paragraph (k)(1), the exemption language of paragraph (k) renders paragraph (d) equally inapplicable. 19 C.F.R. § 351.225(d). Thus, later-developed merchandise anticircumvention inquiries fall outside the purview of the threshold inquiry of paragraphs (d) and (k)(1). Commerce's construction of the scope regulation is therefore not plainly erroneous or inconsistent with the terms of 19 C.F.R. § 351.225.

As a practical matter, Commerce does survey the petition, the investigation, and all prior proceedings at the onset of a *later-developed* merchandise anticircumvention inquiry to assess whether a product is in fact later-developed, which common sense dictates is the more pertinent threshold issue:

> In determining whether [the merchandise] is appropriately considered a later-developed product under 19 U.S.C. 1677j(d), we evaluated the arguments raised by interested parties in light of the language of the statute, regulations, and the applicable legislative history. . . . A product developed after the petition and investigation cannot have been specifically excluded from the scope of the original investigation. Accordingly, if [the merchandise] is later-developed, the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary and the [ITC] cannot be dispositive. However, if a product is developed before an antidumping case is initiated, the later-developed product provision is clearly inapplicable.

Electrolytic Manganese Dioxide From Japan, 56 Fed. Reg. 56,977, 56,979–80 (Dep't Commerce Nov. 7, 1991) (prelim. scope ruling). *See also Erasable Programmable Read Only Memories From Japan*, 57 Fed. Reg. 11,599, 11,602 (Dep't Commerce Apr. 6, 1992) (final scope ruling).

When considering whether to initiate the anticircumvention inquiry on mixed-wax candles, Commerce reviewed the antidumping duty petition, the Petroleum Wax Candle Order, and the ITC's *Original Injury Determination* and found "no clear basis for [Commerce] to make a conclusive determination that candles with non-petroleum waxes in a different proportion are not later-developed merchandise." *See Notice of Initiation*, 70 Fed. Reg. at 10,964–65.

Plaintiffs challenge this finding. Relying on *Wheatland Tube*, 161 F.3d at 1371, Qingdao contends that the description of the merchandise subject to the Petroleum Wax Candle Order "unequivocally" excludes mixed-wax candles, and thus initiation of the inquiry was le-

gally impermissible. Qingdao Mot. J. Agency R. at 18–22. In *Wheatland Tube* the antidumping duty order expressly excluded "line pipe" and "standard pipe that is dual or triple certified/stenciled that enters the U.S. as line pipe of a kind used for oil or gas pipelines," *Wheatland Tube*, 161 F.3d at 1367 (emphasis omitted), which were known products with specific applications in the circular welded non-alloy steel pipe markets. On that basis the U.S. Court of International Trade precluded Commerce from conducting a minor alterations inquiry for the excluded products because, as a matter of law, no alteration had been made to the subject merchandise. *Wheatland Tube*, 21 CIT at 824–26, 973 F. Supp. at 162–64 ("[T]he statute is unambiguous and applies only to merchandise arguably within the scope of the antidumping duty order which is altered to be outside the order, the minor alterations provision does not apply to the present case."), *aff'd*, 161 F.3d at 1370–71.

The facts here are different. The Order covers "petroleum wax candles made from petroleum wax." Petroleum Wax Candle Order, 51 Fed. Reg. at 30,686. Commerce found that this phrase did not definitively resolve the issue of whether mixed-wax candles could be later-developed merchandise. For Commerce, that was an open question for the anticircumvention inquiry, which is a reasonable threshold determination. *See*, *e.g.*, *Nippon Steel Corp. v. United States*, 219 F.3d 1348, 1356 (Fed. Cir. 2000) (The statement in *Wheatland Tube* that the minor alterations provision does not apply to products unequivocally excluded from the order "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.").

C. Whether Commerce's inclusion of mixed-wax candles within the Order impermissibly expands the Order contrary to the domestic like product definition

Plaintiffs also argue that Commerce's inclusion of mixed-wax candles within the scope of the Order represents an impermissible expansion of the Order contrary to the domestic like product definition. Plaintiffs correctly note that the *original* like product definition, candles "composed of over 50 percent petroleum wax," *Original Injury Determination* at 5, did not cover mixed-wax candles, a fact repeatedly reinforced by Commerce's subsequent scope determinations involving mixed-wax candles. The ITC, however, changed the like product definition during the *Second Sunset Review* to include candles "containing any amount of petroleum wax," a change that ostensibly cured any potential like product issues. *Second Sunset Review* at 9.

Although the ITC's expansion of the like product definition 19 years after the *Original Injury Determination* may raise interesting issues, *see, e.g.*, *Ad Hoc Shrimp Trade Action Comm. v. United*

States, 515 F.3d 1372, 1384 (Fed. Cir. 2008) ("the ITC has no independent authority to expand the scope of an antidumping investigation"), no one challenged the *Second Sunset Review*. That decision is final and conclusive (as well as the domestic like product definition that it contains) and the court may not entertain a collateral attack to the *Second Sunset Review* within this proceeding because the jurisdictional predicates for judicial review of the *Second Sunset Review* have not been satisfied. *See* 19 U.S.C. § 1516a(a)(2)(A). As the domestic like product now covers candles "containing any amount of petroleum wax," Commerce's inclusion of mixed-wax candles within the scope of the Order does not impermissibly expand the scope of the Order contrary to the domestic like product definition.

IV. Conclusion

The court concludes that (1) Commerce's commercial availability standard is reasonable, but Commerce's finding that it could not "definitively conclude" that mixed-wax candles were commercially available during the LTFV investigation cannot be reviewed in its present posture; (2) Commerce's requirement that "later-developed merchandise" must in every instance involve a significant technological advance or significant alteration of the subject merchandise is not in accordance with 19 U.S.C. § 1677j(e); (3) Commerce's initiation of the anticircumvention inquiry was in accordance with law; and (4) Commerce's inclusion of mixed-wax candles within the scope of the Order does not impermissibly expand the scope of the Order contrary to the domestic like product definition.

Accordingly, it is hereby

ORDERED that this action is remanded to the U.S. Department of Commerce ("Commerce") to reconsider its finding that it "cannot definitively conclude that mixed-wax candles were available in the market at the time of the LTFV investigation." On remand Commerce may (a) make a straightforward finding of commercial unavailability at the time of the LTFV, or (b) further explain its proposed "definitive conclusiveness" evidentiary standard as a reasonable application and interpretation of the "later-developed merchandise" anticircumvention provision. Commerce must share the new proposed standard and accompanying explanation with the parties and provide them with an opportunity to address that standard as it applies to the record evidence. Commerce can then make a factual finding based on the proposed standard; and it is further

ORDERED that Commerce's requirement that "later-developed merchandise" must in every instance involve a significant technological advance or significant alteration of the subject merchandise is not in accordance with 19 U.S.C. § 1677j(e), and Commerce must therefore reconsider this aspect of its definition of later-developed merchandise; and it is further

ORDERED that Commerce is to file the remand results on or before November 12, 2008; and it is further

ORDERED that the parties are to file a proposed scheduling order on or before November 25, 2008, for the submission of comments with page limits on the remand results.