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Re: Enforce and Protect Act (“EAPA”) Consolidated Case Number 7252; *Certain Hardwood Plywood Products From the People’s Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order*, 83 Fed. Reg. 504 (Jan. 4, 2018); and *Certain Hardwood Plywood Products From the People’s Republic of China: Countervailing Duty Order*, 83 Fed. Reg. 513 (Jan. 4, 2018); 19 U.S.C. § 1517

Dear Messrs. Menegaz, Van Arman, and Levy and Ms. Holdsworth and Ms. Murphy:

This is in response to the requests for *de novo* administrative review of a determination of evasion dated January 28, 2022, made by the Trade Remedy Law Enforcement Directorate (“TRLED”), Office of Trade (“OT”), U.S. Customs and Border Protection (“CBP”), pursuant to 19 U.S.C. § 1517(c), EAPA Consolidated Case Number 7252 (“January 28th Determination”).¹ Three requests for review, dated March 14, 2022, were submitted to CBP, OT, Regulations and Rulings (“RR”), by 1) Ellen Murphy, Stroock & Stroock & Lavan LLP, on behalf of Liberty Woods International, Inc. (“LWI”); 2) Frederic D. Van Arman, Barnes, Richardson & Colburn LLP, on behalf of American Pacific Plywood, Inc. (“APPI”); and 3) Judith L. Holdsworth, deKieffer & Horgan, PLLC, on behalf of Far East American, Inc. (“FEA”), pursuant to 19 U.S.C § 1517(f) and 19 C.F.R. § 165.41(a).

¹ See Notice of Determination as to Evasion in EAPA Cons. Case Number 7252, dated January 28, 2022, available at: <https://www.cbp.gov/document/publications/eapa-cons-investigation-number-7252-certain-hardwood-plywood-people-s-republic>.

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I. Background

Inasmuch as the facts in this case were fully set forth in the January 28th Determination, we will not repeat the entire factual history herein.

On July 9, 2018, Plywood Source, LLC. (“Plywood Source” or “Alleger”), a U.S. importer of Vietnamese origin hardwood plywood, filed five EAPA allegations against LWI; APPI; FEA; Ciel Group, Inc. (“Ciel”); and InterGlobal Forest (“InterGlobal”) (collectively the “Importers”). CBP acknowledged receipt of the allegations on July 25, 2018.² Plywood Source alleged that the Importers entered Chinese-origin finished hardwood plywood into the United States that was transshipped through Vietnam and falsely declared of Vietnamese origin, to evade the payment of antidumping and countervailing duties (“AD/CVD”) on hardwood plywood from the People’s Republic of China (“China”), as required in Case Nos. A-570-051 and C-570-052.³ Additionally, Plywood Source alleged that evasion is evidenced through two videos and trade data which show that the Importers’ manufacturer, Vietnam Finewood Company Limited (“Finewood”), did not have the capacity to produce the volume of hardwood plywood it shipped to the United States.⁴ On August 15, 2018, TRLED initiated a formal consolidated investigation under Title IV, Section 421 of the Trade Facilitation and Trade Enforcement Act of 2015 (“TFTEA”), in response to allegations of evasion.

The allegation of evasion pertained to the AD/CVD Orders issued by the U.S. Department of Commerce (“Commerce”) on imports of hardwood plywood from China.⁵ Commerce defined the scope of the relevant AD/CVD Orders, in pertinent part, as follows:

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

For purposes of this investigation a “veneer” is a slice of wood regardless of thickness which is cut, sliced or sawed from a log, bolt, or flitch. The face and

² See Notice of Initiation of Investigation and Interim Measures: Consolidated EAPA Case 7252, dated November 20, 2018, available at: <https://www.cbp.gov/document/user-documentation/eapa-cons-investigation-number-7252-certain-hardwood-plywood-people-s-0>.

³ See *id.*

⁴ See *id.*

⁵ See *Certain Hardwood Plywood Products From the People’s Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order*, 83 Fed. Reg. 504 (Jan. 4, 2018); and *Certain Hardwood Plywood Products From the People’s Republic of China: Countervailing Duty Order*, 83 Fed. Reg. 513 (Jan. 4, 2018) (“AD/CVD Orders”).

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back veneers are the outermost veneer of wood on either side of the core irrespective of additional surface coatings or covers as described below.

The core of hardwood and decorative plywood consists of the layer or layers of one or more material(s) that are situated between the face and back veneers. The core may be composed of a range of materials, including but not limited to hardwood, softwood, particleboard, or medium-density fiberboard (MDF).

All hardwood plywood is included within the scope of this investigation regardless of whether or not the face and/or back veneers are surface coated or covered and whether or not such surface coating(s) or covers obscures the grain, textures, or markings of the wood. Examples of surface coatings and covers include, but are not limited to: Ultra violet light cured polyurethanes; oil or oil-modified or water based polyurethanes; wax; epoxyester finishes; moisture-cured urethanes; paints; stains; paper; aluminum; high pressure laminate; MDF; medium density overlay (MDO); and phenolic film.

Additionally, the face veneer of hardwood plywood may be sanded; smoothed or given a “distressed” appearance through such methods as hand-scraping or wire brushing. All hardwood plywood is included within the scope even if it is trimmed; cut-to-size; notched; punched; drilled; or has underwent other forms of minor processing.

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

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

Imports of hardwood plywood are primarily entered under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 4412. . . . While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.⁶

On November 20, 2018, in accordance with 19 C.F.R. § 165.24, CBP issued the Notice of Initiation (“NOI”) to all parties to the investigation, and notified the parties of CBP’s decision to take interim measures based upon reasonable suspicion that the Importers

⁶ *Id.*

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entered covered merchandise into the customs territory of the United States through evasion.⁷ The entries subject to the investigation were those entered for consumption, or withdrawn from a warehouse for consumption, from July 25, 2017, one year before receipt of the allegations, through the pendency of the investigation.⁸

After learning that Finewood was importing into Vietnam, Chinese-origin two-ply panels (also referred to as “cores”) for use in its merchandise, on September 16, 2019, TRLED referred the matter to Commerce for a scope determination, pursuant to 19 U.S.C. § 1517(b)(4) and 19 C.F.R. § 165.16.⁹ Specifically, TRLED indicated it “could not determine whether two-ply panels of Chinese origin, which are further processed in Vietnam to include the face and back veneers of non-coniferous wood, are covered by the scope of the Orders.”¹⁰ In response to this referral, Commerce issued its final scope determination on January 21, 2022 and transmitted it to TRLED on January 27, 2022 (“January 27th Scope Determination”).¹¹ Commerce found that two-ply panels are “certain veneered panels” and that further processing of Chinese-origin two-ply panels in Vietnam, into hardwood plywood, did not substantially transform the Chinese two-ply panels; thus the imported panels remained of Chinese origin and subject to the AD/CVD Orders.¹²

On January 28, 2022, TRLED concluded that, based on the record evidence, there was substantial evidence to demonstrate that all five Importers entered Chinese-origin hardwood plywood, covered by AD/CVD Order Nos. A-570-051 and C-570-052, by falsely entering them as being of Vietnamese origin, under entry type “01” (consumption), as entries not subject to an AD or CVD order, instead of entry type “03” (AD/CVD).¹³ TRLED concluded: “[a]lthough the covered merchandise was likely comingled, because VN Finewood purchased most of its two-ply panels from China and because no reliable evidence exists on the record to differentiate between Vietnam-origin and Chinese-origin hardwood plywood, all covered merchandise that the Importers entered from VN Finewood during the

⁷ See Notice of Initiation.

⁸ See *id.*, and 19 C.F.R. § 165.2.

⁹ We note that, while the January 28th Determination and the January 27th Scope Determination list the date of referral as September 16, 2019, the Notice of Covered Merchandise Referral located at <https://www.cbp.gov/trade/trade-enforcement/tftea/eapa/notices-action>, is dated August 23, 2019, and available at, <https://www.cbp.gov/document/publications/scope-referral-request-merchandise-under-eapa-cons-investigation-7252>. As discussed below, there are arguments related to the actual date and timeliness of the scope referral, and whether it was commenced by CBP or self-initiated by Commerce.

¹⁰ See January 28th Determination at 5. TRLED explained that it originally referred to the products at issue as “two-ply cores,” however in its final scope determination, Commerce described the merchandise as “two-ply panels” of Chinese origin. The Notice of Covered Merchandise Referral (undated) specifically states “{i}n response to CBP requests for information, Finewood submitted documentation indicating that its production of finished plywood involved importing 2-ply panels from China under HTS subheading 4412. Finewood indicated that it outsourced the Chinese panels to tollers in Vietnam to develop the plywood core in varying sizes. Upon receipt of the developed core from the Vietnamese tollers, Finewood applied hardwood veneer to the cores and shipped the finished product to the importers, which entered the Customs territory of the United States under HTSUS subheading 4412.”

¹¹ See *id.*

¹² See *id.*; and January 27th Scope Determination at 44.

¹³ Imports that are covered by AD/CVD orders are required to be entered as type “03” entries; entries declared as type “01” are not subject to AD/CVD. See CBP Entry Summary Form 7501 and Instructions and the ACE Entry Summary Business Rules and Procedure Document <https://www.cbp.gov/trade/programs-administration/entry-summary/cbp-form-7501> (last visited Mar. 17, 2022).

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period of investigation is subject to the AD/CVD rates from hardwood plywood from China.”¹⁴

On March 14, 2022, APPI, FEA, and LWI (“the Requesters”) filed three timely Requests for Administrative Review, and on March 15, 2022, RR sent an email to all parties to the investigation, notifying them of the commencement of the administrative review process and the assignment of RR case number H323923.^{15, 16} We note that Ciel and InterGlobal did not request administrative review of the January 28th Determination. Plywood Source did not file a response to the requests for administrative review.

I. Law & Analysis

Section 517 of the Tariff Act of 1930 (“the Tariff Act”), as amended (19 U.S.C. § 1517), provides, “with respect to covered merchandise, the Commissioner shall make a determination, based on substantial evidence, with respect to whether such covered merchandise was entered into the customs territory of the United States through evasion.”¹⁷ The term evasion is defined as:

Except as provided in subparagraph (B), the term “evasion” refers to entering covered merchandise into the customs territory of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise.¹⁸

Examples of evasion include, but are not limited to, misrepresentation of the merchandise’s true country of origin (e.g., through false country of origin markings on the product itself or false sales), false or incorrect shipping and entry documentation, or misreporting of the merchandise’s physical characteristics.¹⁹

¹⁴ See January 28th Determination at 8.

¹⁵ We note that, on February 25, 2022, counsel for FEA, joined by LWI, requested that CBP stay further proceedings in this case pending related litigation in *Vietnam Finewood Company Limited, et. al v. United States*, U.S. Court of International Trade (“CIT”) Ct. No. 22-00049 and *InterGlobal Forest LLC v. United States*, CIT Ct. No. 22-00053. This request was denied on February 25, 2022, as CBP explained that, in accordance with 19 C.F.R. § 165.41-46, the EAPA regulations do not authorize CBP to stay its proceeding or alter the deadline for filing a request administrative review.

¹⁶ Additionally, we note that on March 7, 2022, FEA and Finewood requested the allowance of Finewood to file a brief in support of FEA’s request for administrative review; alternatively, FEA requested the allowance of an extra 10 pages in its request. Again, RR rejected these requests, as this *de novo* review, as explained in 19 C.F.R. § 165.45, is limited to only that information found in the administrative record and timely requests for review and responses. Additionally, pursuant to 19 C.F.R. § 165.41, the request “may not exceed the thirty pages.” It is necessary for CBP to adhere to such limits in light of the strict statutory timelines set out for EAPA cases.

¹⁷ 19 U.S.C. § 1517(c)(1).

¹⁸ 19 U.S.C. § 1517(a)(5); see also 19 C.F.R. § 165.1.

¹⁹ See *Investigation of Claims of Evasion of Antidumping and Countervailing Duties, Interim Regulations*, 81 Fed. Reg. 56,477, 56,478 (Aug. 22, 2016).

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Additionally, covered merchandise is defined as “merchandise that is subject to a CVD order issued under section 706, Tariff Act of 1930, as amended (19 U.S.C. § 1671e), and/or an AD order issued under section 736, Tariff Act of 1930, as amended (19 U.S.C. § 1673e).”²⁰ While, “substantial evidence” is not defined by statute, the “substantial evidence” standard has been reviewed by the courts in relation to determinations by other agencies. “Substantial evidence requires more than a mere scintilla, but is satisfied by something less than the weight of the evidence.”²¹ Additionally, the CIT explained in *Diamond Tools Tech. LLC*, “False’ is defined as: ‘Untrue . . . Deceitful . . . Not genuine; inauthentic . . . What is false can be so by intent, by accident, or by mistake . . . Wrong; erroneous”²² Imports that are covered by AD/CVD orders are required to be entered as type “03” entries; entries declared as type “01” entries cannot be subject to AD/CVD orders.²³ It is material and false for entries to be made as type “01” when they are subject to AD/CV duties. That the material falsehood may have occurred as a result of a mistake does not mean that evasion has not occurred – a falsity within the meaning of the EAPA statute can occur as a result of a mistake.²⁴

Therefore, CBP must determine whether a party has entered merchandise that is subject to an AD or CVD order into the United States for consumption by means of any document or electronically transmitted data or information, written or oral statement, or act, that is material and false, or any omission that is material, that resulted in the reduction or avoidance of applicable AD or CVD cash deposits or duties being collected on such merchandise. Lastly, our decision herein must be supported by substantial evidence.

A. American Pacific Plywood, Inc.’s Arguments

APPI requests that we reverse the January 28th Determination of evasion, in part, arguing that not all of its merchandise entered in the United States was covered merchandise, and that the finding of evasion is not based upon substantial evidence.

First, APPI posits that the evidence was inconclusive as to evasion, showing that its plywood was manufactured by Finewood in Vietnam, and any claims of transshipment were not verified by CBP.²⁵ APPI asserts that substantial evidence is on the record to identify which of its purchases of hardwood plywood were manufactured using Chinese-origin two-ply and those which were not. Therefore, APPI believes that it has demonstrated that most of its shipments do not meet the definition of covered merchandise. APPI concedes that, based on the production records provided, three of its purchase orders, associated with three of its entries, contain a portion of hardwood plywood associated with purchase orders of

²⁰ 19 C.F.R. § 165.1.

²¹ See *Alts, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004) (internal citations and quotation marks omitted).

²² *Diamond Tools Tech. LLC v. United States*, LEXIS 155, 165, SLIP OP. 2021-151 (Ct. Int’l Trade 2021) (internal citations omitted).

²³ See, e.g., CBP Form 7501 Instructions, “Block 2) Entry Type,” available at <https://www.cbp.gov/sites/default/files/assets/documents/2019-Sep/CBP%20Form%207501.pdf>.

²⁴ See *Diamond Tools Tech. LLC v. United States*, LEXIS 155, 165, SLIP OP. 2021-151 (Ct. Int’l Trade 2021) (internal citations omitted) and 19 U.S.C. § 1517(a)(5)(A). We also note that Requestors do not assert that there were clerical errors, for which the EAPA statute does carve out an exception.

²⁵ AAPI’s Request for Administrative Review (Mar. 14, 2022) at 10.

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Chinese-origin two-ply, but asserts that the rest of its merchandise is manufactured free of Chinese-origin two-ply, as evident in the record.²⁶ Thus APPI contends that these three entries are “the only APPI entries that contain any hardwood plywood meeting the post-Commerce Scope Ruling definition of ‘covered merchandise’ because of the presence of the Chinese two-ply.”²⁷

Additionally, APPI argues that evidence on the record demonstrates that the use of tollers proves that Finewood successfully augmented its production capabilities in Vietnam.²⁸ Essentially, APPI asserts that TRLED erroneously found that all merchandise under investigation was transshipped, relying on unverified alleged videos, while ignoring evidence, including the Regulatory Audit and Agency Advisory Services (“RAAAS”) Verification report, showing that Finewood also had Vietnamese production using tollers.²⁹

Next, APPI asserts that it acted reasonably in 2018, when it ordered hardwood plywood from Finewood, and that it did so exercising reasonable due diligence into Finewood’s ability to produce its merchandise in Vietnam. Specifically, it asserts that APPI’s owner visited Finewood’s mill in April and October 2018, administered a questionnaire, and obtained certificates of origin; thus, in its “professional experience” APPI determined Finewood’s production potential, including its use of tollers.³⁰ APPI continues that the interpretation of the scope of the AD/CVD Orders in January 2022, to include Chinese two-ply, should not retroactively mean that APPI acted unreasonably, and without good faith, in 2018.³¹

APPI contends that it was not afforded its complete due process and the investigation process was arbitrary and capricious. Specifically, APPI asserts it was denied fair access to information. APPI asserts that TRLED placed a lot of weight on videos that were never shared with APPI, denying it the opportunity to respond in a meaningful manner, and TRLED only provided a redacted version of the Attaché Report, NOI, and RAAAS Verification Report, without providing a public summary of these documents, contrary to the EAPA regulations.³² APPI lastly asserts, CBP prematurely liquidated entries subject to this EAPA investigation, and thus those liquidations are null and void.³³ APPI

²⁶ *Id.* at 25.

²⁷ *Id.*

²⁸ APPI incorporates by reference FEA’s Request for Administrative Review (Mar. 14, 2022), as it pertains to Finewood’s production capacity. *See id.* at 19.

²⁹ *Id.* at 12. Generally, we note that tollers are a third party that provides manufacturing services for another entity; the toller may already have the requisite machines and molds needed to supply the manufacturing process for a fee “or toll.” *See, e.g.*, [https://www.sierracoating.com/blog/toll-manufacturing-versus-contract-manufacturing/#:~:text=What%20is%20Toll%20Manufacturing%3F,of%20the%20Services%20\(manufacturing\)\(last visited May 11, 2022\).](https://www.sierracoating.com/blog/toll-manufacturing-versus-contract-manufacturing/#:~:text=What%20is%20Toll%20Manufacturing%3F,of%20the%20Services%20(manufacturing)(last%20visited%20May%2011,%202022).)

³⁰ *Id.* at 27.

³¹ APPI argues that in 2018, toll manufacturing of platform cores using Chinese two-ply would not raise a red flag that the finished hardwood plywood was circumventing the *Orders*. If it were a clear red flag of transshipment in 2018, then why did CBP need to seek clarity on this exact subject and refer the question to Commerce in 2020? *Id.* at 28 (citing *Diamond Tools Tech. LLC v. United States*, 545 F. Supp. 3d 1324, 1355 (Ct. Int’l Trade 2021) (“neither the text of the EAPA statute nor 19 C.F.R. 165.1 supports Customs’ statement that it does not need to establish ‘any level of culpability’”).

³² APPI cites for support, *Royal Brush*, 483 F. Supp. 3d at 1308 (ordering CBP’s evasion determination remanded to comply with the public summary requirements of 19 C.F.R. § 165.4).

³³ *Id.* at 30.

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asks CBP to refund any cash deposits collected by CBP, with interest; liquidate any unliquidated entries in the normal course; and grant in part its protest number 2704-2020-142185.

B. Far East American, Inc.’s Arguments³⁴

FEA requests that we reverse the January 28th Determination of evasion, arguing that it did not enter covered merchandise into the United States through evasion and the finding is not based upon substantial evidence.

FEA posits that Alleger is not a credible source, as it is an importer of Vietnamese-manufactured hardwood plywood and is interested in eliminating competition. Specifically, FEA asserts that Alleger is currently under investigation concerning its own assembly of plywood in Vietnam with Chinese inputs, and as such, CBP should not rely on any of the Alleger’s submitted information.³⁵ FEA asserts that Finewood provided all its production records for sales to the five Importers under investigation, as well as demonstrating the wholly self-produced plywood from the toll-processed plywood, and source of raw materials.

Next, FEA contends that it was not afforded basic due process, full disclosure, transparency, and the right to defend against the allegations.³⁶ FEA asserts that TRLED’s determination—that the use of tollers to produce plywood cores and veneers, sourced from China, means it transshipped finished plywood—was irrational, arbitrary, and capricious.³⁷ FEA posits that CBP was invited to visit the production sites of the tollers, but the CBP auditors declined to do so. FEA asserts that TRLED ignored record evidence, “including its own verification report, which proves that Finewood manufactured in Vietnam all of the finished plywood it exported to the United States,” and instead relied on unverified, biased Alleger-provided data and videos.³⁸ FEA contends that CBP failed to disclose to it, under an administrative protective order (“APO”), critical parts of the evidence Alleger claims support its allegations of evasion, including narratives of the allegation, videos, and trade data.³⁹ FEA argues, CBP hid the investigation for three months, preventing the parties from defending against the allegation to avoid interim measures and mitigate financial losses.⁴⁰ Additionally, FEA contends that there were substantial issues with translation difficulties and misunderstandings during the Attaché visit,⁴¹ due to the absence of an official translator and counsel, and CBP did not provide an opportunity to clarify these issues; but yet, CBP

³⁴ FEA incorporates the arguments submitted in APPI and LWI’s Requests for Administrative Review.

³⁵ FEA’s Administrative Review Request (Mar. 14, 2022) at 9 (citing *Certain Hardwood Plywood Products From the People’s Republic of China: Initiation of Anti-Circumvention Inquiries and Scope Inquiries on the Antidumping Duty and Countervailing Duty Orders; Vietnam Assembly*, 85 Fed. Reg. 36,530 (June 17, 2020)).

³⁶ *Id.* at 8.

³⁷ *Id.* at 4.

³⁸ *Id.* at 8.

³⁹ *Id.* at 9. FEA posits that many of the same confidentiality issues arise commonly in “AD/CVD proceedings administered by the Commerce Department; and all are handled adequately through administrative protective orders or ‘APOs.’ CBP provided no rationale for not granting legal counsel access to all the information in the EAPA proceedings, particularly as they essentially result in the same consequence as a scope ruling.” *Id.* at 27.

⁴⁰ *Id.* at 28.

⁴¹ The Requesters explain that Finewood’s staff were made to serve as translators for spoken Chinese, which caused translation issues. *See id.*; *see also*, LWI’s Request for Administrative Appeal (Mar. 14, 2022) at 3; and Finewood’s Written Argument (Aug. 9, 2019) at 8.

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asserted that the RAAAS verification “was a ‘clean slate audit.’” Thus, FEA posits that the Attaché report is also unreliable and incorrect and violates the Administrative Procedure Act (“APA”).⁴²

Next, FEA asserts that TRLED misapplied the January 27th Scope Determination, incorrectly finding that Finewood commingled and transshipped Chinese hardwood plywood with Vietnamese plywood or that because the two-ply is within scope, plywood manufactured in Vietnam is also in scope.⁴³ FEA asserts “Commerce did not determine that two-ply is ‘unfinished plywood,’ but rather two-ply is a ‘certain veneered panel’ and a product distinct from plywood. Finewood exported to the U.S. only finished plywood manufactured in Vietnam.”⁴⁴ FEA continues that:

Finewood imported two-ply from China to include in its production of finished plywood, defined as requiring at least three plies of veneer. . . even if two-ply is a ‘certain veneered panel,’ as Commerce now claims, it is a product distinct from ‘hardwood plywood.’ Finewood manufactured and exported to the United States only hardwood plywood with a minimum of three plies, not certain veneer panels. Since Commerce considers the two articles distinct, it is impossible that Finewood’s finished hardwood plywood is, at the same time, ‘certain veneered panels.’⁴⁵

However, in the alternative, FEA also contends that it did not use two-ply for all of its finished products, and the January 28th Determination failed to distinguish between Finewood’s finished plywood that incorporated Chinese-origin two-ply panels with those that did not. Like AAPI, FEA asserts that Finewood provided ample production records, which documented and traced its inputs for each production run, and identified which shipments contained finished incorporated two-ply panels.⁴⁶ FEA asserts that, even though the CBP verification team verified these documents for 19 sales, TRLED failed to review the wealth of documents provided.⁴⁷ FEA concedes that some of the production of merchandise did contain two-ply inputs, as it stated “two-ply was used in some, but not all, of the production of 12mm, 15mm, and 18mm finished hardwood plywood.”⁴⁸ Nonetheless, FEA insists that RR must, at a minimum, determine that the finished plywood that did not use two-ply panels sourced from China is excluded from the January 28th Determination of evasion.

FEA claims, contrary to TRLED’s conclusion, that FEA exercised due diligence in its business relationship with Finewood, and that it visited Finewood several times, for weeks at a time, between March and September of 2018 to confirm Finewood’s production potential, including its use of tollers.⁴⁹ FEA also asserts that it maintains a strict procedure to

⁴² FEA’s Administrative Review Request at 26 (citing 5 U.S.C. § 555; and *Advanced Sys. Tech., Inc. v. United States*, 69 Fed. Cl. 474, 484 (2006)).

⁴³ *Id.* at 22.

⁴⁴ *Id.*

⁴⁵ *Id.* at 23-24.

⁴⁶ *Id.* at 21.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 18.

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verify overseas suppliers, as well as a long history of doing business with Finewood’s parent factory. FEA argues that Finewood’s outsourcing of some of its manufacturing of plywood cores does not indicate transshipment, as alleged, but instead “indisputably increased its production capacity *in Vietnam*.”⁵⁰ Specifically, FEA states that CBP’s verification team verified Finewood’s domestic purchase records as well as its production records, including this production outsourcing, demonstrating its production capacity; yet TRLED made no mention of this verification in the January 28th Determination.⁵¹ FEA continues that it is a CBP Customs Trade Partnership Against Terrorism (“CTPAT”) participant and collaborates with CBP closely as an expert in the field of importing wood products.⁵² Of note, FEA reached out to an RR, National Commodity Specialist Division (“NCSD”) National Import Specialist (“NIS”) before it started importing the plywood in 2018, and FEA claims that the NIS advised FEA specifically on the scope of the AD/CVD Orders pertaining to its specific merchandise, explaining:

the language of the scope says, ‘consisting of two or more layers or plies of wood veneers and a core’ and this product does not consist of two or more layers or plies of wood veneers and a core . . . the scope simply couldn’t be clearer that there needs to be at least 3 plies, two of which being veneers.⁵³

Thus, FEA insists that it acted without any level of culpability and TRLED has not shown it intentionally or negligently made a materially false statement, act, or omission when importing its hardwood plywood from Vietnam, as a type “01” entry.⁵⁴

Lastly, FEA contends that CBP failed to follow mandatory EAPA procedures, and untimely notified it of TRLED’s covered merchandise referral to Commerce.⁵⁵ FEA asserts that “after commencement of litigation challenging CBP’s untimely scope referral,” Commerce itself initiated a scope inquiry on January 13, 2020.⁵⁶ Additionally, on February 18, 2022, after Commerce published its Scope Determination, Finewood, FEA, and LWI initiated litigation before the CIT, challenging the scope determination. Because of these pending litigations, on February 25, 2022, FEA, joined with LWI, requested a stay of the instant administrative review process.⁵⁷

⁵⁰ *Id.* at 11 (emphasis in the original).

⁵¹ *Id.*

⁵² *Id.* at 19.

⁵³ *Id.* (quoting an e-mail between the NIS and FEA personnel, dated January 17, 2018).

⁵⁴ *Id.* (citing *Diamond Tools Tech*, 545 F. Supp. 3d at 1355 (“neither the text of the EAPA statute nor 19 C.F.R. 165.1 supports Customs’ statement that it does not need to establish ‘any level of culpability’”).

⁵⁵ FEA states that, pursuant to 19 U.S.C. § 1517(c)(4), the final determination in this case was due on September 16, 2019, and CBP must have notified the parties within five days of such date; however, FEA posits it received an incomplete e-mail regarding the stay of the determination and referral to Commerce on September 25, 2019. FEA contends that this e-mail did not provide any information regarding the scope referral, and that it was not until November 1, 2019, that it received an undated copy of the referral, which it believes was in draft form. *See* FEA’s Administrative Review Request (Mar. 14, 2022) at 4.

⁵⁶ *Id.* at 5 (citing *Certain Hardwood Plywood From the People’s Republic of China: Notice of Covered Merchandise Referral and Initiation of Scope Inquiry*, 85 Fed. Reg. 3024 (Jan. 17, 2020) (“DOC Notice”).

⁵⁷ As noted above, FEA and LWI requested a stay of this administrative review process, during the pendency of the CIT litigation, which request was denied on February 25, 2022. We note that, pursuant to the CBP regulations pertaining to administrative rulings, “[n]o ruling letter will be issued with respect to any issue which is pending before the United States Court of International Trade, the United States Court of Appeals for the Federal Circuit, or any court of appeal therefrom.” 19 C.F.R. § 177.7. However, at issue here is not a CBP

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C. Liberty Woods International, Inc.'s Arguments⁵⁸

LWI requests that we reverse the January 28th Determination of evasion, arguing that it did not enter covered merchandise into the United States through evasion and the finding is not based upon substantial evidence. Thus, LWI contends that Alleger and CBP failed to meet their burden to establish evasion based on substantial evidence.⁵⁹

LWI first provides a background into the company, as a long-time importer of hardwood plywood, who, after Commerce issued the AD/CVD Orders in 2018, began to look for an acceptable alternative to meet consumer demand. It asserts it exercised reasonable due diligence, specifically, LWI's Vice President of Purchasing and other personnel visited Finewood between January and June 2018 on at least three occasions to observe Finewood's operations and document its production capabilities and compliance with U.S. trade laws.⁶⁰ LWI further contends that, once it learned of Finewood's use of other local Vietnamese mills in its production process, LWI ceased to place any new orders, as it could not verify the local mills.^{61, 62} LWI imported plywood manufactured by Finewood between June and September 2018, and asserts there is unrefuted evidence to show Finewood had sufficient production capacity during this period.⁶³ LWI concludes, the evidence related to LWI's actions reflects that, at all times, it acted reasonably and in good faith to comply with all relevant U.S. laws and regulations, and "there is no evidence to even suggest that LWI knowingly made a material omission, or a material and false statement or act."⁶⁴

LWI repeats many of the arguments already made by APPI and FEA, asserting Alleger is a competitor who provided unverified speculative assertions and TRLED relied on this unverified evidence, while ignoring "substantial evidence in the record refuting the allegations."⁶⁵ Specifically, LWI posits that TRLED, instead of reviewing the production records provided, solely relied on the false notion that central to its determination is the Alleger's claim that Finewood lacked manufacturing capacity to produce the volume of

ruling under 19 CFR Part 177. No such stay is afforded under 19 U.S.C. § 1517(f)(2) or the EAPA regulations found at 19 CFR Part 165, Subpart D. This is because the EAPA statute outlines rigid deadlines for CBP. The statute permits a stay only in one instance – a scope referral to Commerce, which has already occurred. Hence, CBP must now proceed consistent with the statutory deadlines. Nonetheless, we note that, while litigation is pending, if the CIT issues a court order enjoining liquidation, the liquidation of any entries subject to such injunction should remain suspended during the pendency of such litigation. *See* 19 C.F.R. § 159.12.

⁵⁸ LWI incorporates, by reference, the arguments submitted in the APPI and LAE Requests for Administrative Review, "to the extent relevant to LWI." *See* LWT's Request for Administrative Appeal at 12.

⁵⁹ *Id.* at 20.

⁶⁰ *Id.* at 13-16.

⁶¹ *Id.* at 15-16. While LWI asserts that the use of tollers is acceptable and helps show Finewood's production capacity, it asserts it ceased placing orders, out of an abundance of caution, due to its lack of ability to verify these mills. Of note, LWI ceased placing orders with Finewood in October 2018, prior to receiving CBP's first RFI or notification that it was under an EAPA investigation.

⁶² LWI contends that "importers who are found to have entered covered merchandise into the United States 'by means of a material and false statement or a material omission' must also have knowledge of such material and false statement or material omission." *Id.* at 24 (quoting *Diamond Tools Tech*, 545 F. Supp. 3d at 1355, to assert some level of culpability is required).

⁶³ *Id.* at 17-18.

⁶⁴ *Id.* at 25.

⁶⁵ *Id.* at 12.

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hardwood plywood; thus, it must transship covered merchandise from China through its facility, and evidence by the Alleger showing pre-packaged hardwood plywood arriving to Finewood's facility indicated that Finewood imported more than just two-ply panels from China.⁶⁶ LWI also contends the evidence clearly distinguishes between finished plywood that incorporated Chinese-origin two-ply panels versus the finished hardwood plywood that did not, which it asserts was found reliable by CBP, but ignored by TRLED.⁶⁷ "Thus, at a bare minimum, TRLED should have determined that there was no evasion with respect to those shipments of plywood that were produced without 2-ply veneers from China and ultimately entered in the United States."⁶⁸

LWI continues, as outlined above in FEA's arguments, that notwithstanding the scope determination, the record evidence establishes that finished hardwood plywood was not sourced from China. LWI asserts that TRLED incorrectly applied the scope determination and assumed, because Commerce determined that two-ply panels were within the scope of the AD/CVD Orders, that the finished plywood must also be within scope.⁶⁹ "[I]n our case, Commerce did not determine that two-ply is 'unfinished plywood,' but rather two-ply is a 'certain veneered panel'—a product distinct from plywood . . . Finewood exported to the U.S. only finished plywood manufactured in Vietnam."⁷⁰

LWI reiterates the contention that TRLED deprived the Requesters of due process during the investigation, in violation of the APA. LWI also elaborates on the other Requesters' contention that the Attaché Report is unreliable and incorrect due to issues with translation and the lack of presence of counsel.⁷¹ Additionally, LWI contends that TRLED relied on Alleger-provided evidence based on anonymous sources, unknown to the parties and CBP, and evidence that was not fully disclosed to the Requesters.⁷² Thus, LWI contends this evidence is not substantial, and the burden is on Alleger and CBP to establish evasion based on substantial evidence.⁷³ LWI also asserts that counsel for parties to the investigation should have full access to all records, including confidential information,⁷⁴ and that the Importers should have been informed of the allegation and investigation prior to the issuance of the notice of interim measures, three months after the initiation, in order to provide a meaningful opportunity to respond.⁷⁵ LWI submits that TRLED should have advised it of any perceived deficiencies in its submissions to provide it an opportunity to address or correct these deficiencies.⁷⁶

⁶⁶ *Id.* 12; 17-18.

⁶⁷ *Id.* at 19.

⁶⁸ *Id.*

⁶⁹ *Id.* at 22.

⁷⁰ *Id.* at 23.

⁷¹ *Id.* at 4.

⁷² *Id.* at 20. LWI, like APPI and FEA, takes issue with the Alleger-provided videos never made available for its review.

⁷³ *Id.*

⁷⁴ LWI also posits that an APO can address any legitimate concerns regarding the need to safeguard confidential information.

⁷⁵ *Id.* at 27-28.

⁷⁶ *Id.* at 29. LWI cites 19 U.S.C. § 1677m(d) ("providing that Commerce must advise respondents of deficiencies in their submissions and provide them with an opportunity to clarify or correct them"); and *Bowe-Passat v. United States*, 71 C.I.T. 335, 343 (1993) ("investigations should not be a game of gotcha").

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LWI recaps that TRLED untimely notified the parties of the decision to refer the matter to Commerce, and that Commerce “self-initiated” a scope inquiry on January 13, 2020, after the commencement of litigation challenging CBP’s untimely scope referral.⁷⁷ LWI elaborates that there were discrepancies in the dates and texts of three different versions of CBP’s scope referral.⁷⁸ Additionally, LWI discusses its complaint, filed jointly with FEA, challenging Commerce’s scope determination, and its request to stay these administrative proceedings. LWI also contends that TRLED misapplied the scope determination, arguing that contrary to the January 28th Determination, Finewood’s sourcing of two-ply veneer panels from China is not the same as sourcing finished hardwood plywood from China and reselling it in the United States.⁷⁹

Lastly, LWI asserts that CBP prematurely liquidated LWI’s entries of plywood; specifically, it asserts that, on March 20, 2020, CBP began liquidating LWI’s entries and assessing AD/CVD at a rate of 206% “allegedly in accordance with Commerce’s instructions.”⁸⁰

D. Plywood Source’s Arguments

Plywood Source did not submit a response to the Importers’ requests for administrative review.

E. Administrative Review Analysis

As an initial matter, pursuant to 19 U.S.C. § 1517(f)(1) and 19 C.F.R. § 165.45, upon request for administrative review, RR will apply a *de novo* standard of review under the law, based solely upon the facts and circumstances on the administrative record in the proceeding. In making our determination, we reviewed: (1) the administrative record, as provided to us by TRLED, upon which the January 28th Determination was made; and (2) the timely and properly filed requests for review.

I. Requesters’ Due Process and Evidentiary Arguments:

a. Due Process Rights:

The Requesters present many due process arguments. Specifically, they challenge: the timeliness in which TRLED notified them of the investigation and interim measures and the timeliness of the scope referral, and Final Determination; the availability of business confidential evidence; and the accuracy, relevance, and constitutionality of some evidence, such as the Attaché visit and report.

⁷⁷ *Id.* at 8.

⁷⁸ *Id.* LWI asserts that on January 21, 2020, CBP made available to the public a November 1, 2019 memorandum dated September 16, 2019, but on the cbp.gov website the notice to the public of a referral is dated August 23, 2019.

⁷⁹ *Id.* at 11.

⁸⁰ *Id.* at 9. On March 11, 2020, and March 19, 2020, Commerce issued liquidation instructions for entries of hardwood plywood manufactured by Finewood. LWI petitioned to Commerce to re-issue instructions to CBP to re-suspend the entries at issue, and under the scope inquiry; however, Commerce responded that “it had no legal authority to direct CBP to re-suspend liquidated entries.” *Id.*

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First, although the statute imposes various deadlines⁸¹ on CBP in its handling of an EAPA investigation, the statute does not provide RR with any authority regarding review as to whether these deadlines have been met. Rather, authority to review whether proper procedures have been followed by CBP is vested in the CIT.⁸² As such, these issues are outside of the purview of this *de novo* review as to whether substantial evidence of evasion exists. Thus, in this review, we do not opine on the timeliness of any of TRLED's actions.

Likewise, any arguments regarding abuse of discretion – as they relate to procedural issues -- are also outside the purview of this *de novo* review.

Requesters also make arguments regarding the relevance of certain evidence in accordance with the APA. Although procedural issues are not within our purview to review, the relevance of evidence is something that we should and will consider in determining whether the evidence on the record is sufficiently substantial to support a finding of evasion.⁸³ Thus, we will address the evidence in detail, including that which has any bearing on our finding of substantial evidence of evasion in this case.

Lastly, we briefly address Requesters' arguments concerning access to business confidential evidence. The EAPA regulations provide specific authority for parties to provide business confidential information to CBP; parties are only entitled to public summaries; thus, there is no restriction on CBP's ability to review and consider such business confidential information.⁸⁴ If, however, as the Requesters contend, TRLED failed to provide, at a minimum, public summaries of this evidence, that would be contrary to the EAPA statute. Nonetheless, again, the EAPA statute does not provide RR with any review authority regarding the availability, or lack thereof, of public summaries, and thus, this issue is also outside of the purview of this *de novo* review.⁸⁵

Thus, notwithstanding any due process concerns raised by the Requesters, the purpose of this *de novo* review is to analyze the January 28th Determination and the

⁸¹ We note that 19 U.S.C. § 1517(b) provides a 15-business day deadline to CBP, after receiving an allegation, to initiate an EAPA investigation; 19 U.S.C. § 1517(e) provides a 90-calendar day deadline to CBP, after initiating an investigation under (b), to decide to impose interim measures; 19 U.S.C. § 1517(c) provides a 300 (or 360) calendar-day deadline, after an investigation is initiated for CBP to issue a determination; and lastly 19 U.S.C. § 1517(c)(4) mandates that notification be issued no later than 5 business days after the determination is made.

⁸² See 19 U.S.C. 1517(g)(1) and (2)(A).

⁸³ "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The test requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *Butler v. Barbart* 353 F.3d 992, 999 (D.C. Cir. 2004) (internal citations omitted).

⁸⁴ See 19 C.F.R. § 165.4 and 5 U.S.C. § 552.

⁸⁵ We note that the CIT recently opined on the rights of parties in EAPA investigations to have access to business confidential information and found that the lack of access to confidential information is not a due process issue. See *Royal Brush Mfg., Inc. v. United States*, 2021 WL 5033650, at 9 (Ct. Int'l Trade Oct. 29, 2021) (rejecting a similar claim and holding that CBP's withholding of confidential information does not violate a respondent's due process rights where "CBP has complied with 19 C.F.R. § 165.4 by providing necessary public summaries of the confidential information..."). In *Royal Brush Mfg., Inc.*, the CIT found that a party is only entitled to public summaries of the business confidential information, pursuant to 19 C.F.R. § 165.4(a)(1) and (c). The parties do not otherwise have a right to review business confidential information, as the statute and regulations do not provide for such. However, the ability of RR to opine on whether procedural due process violations occurred in this case is not contemplated by the statute or implementing regulations.

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accompanying administrative record, including the business confidential evidence, to determine whether substantial evidence of evasion exists.⁸⁶ Additionally, we note that the CIT has held that “[o]nly after establishing that the plaintiff has been deprived of a protected interest will the court evaluate whether the afforded procedures comport with due process requirements.”⁸⁷

As discussed in more detail, below, a review of the administrative record and the Requesters’ requests for administrative review clearly indicates that all three Requesters entered, as type “01” consumption entries, hardwood plywood, and therefore, AD/CVD deposits were not paid.⁸⁸ Because they contained merchandise subject to the AD/CVD Orders, these entries should have been made as type “03” entries, indicating that they are subject to an AD/CVD order.

There is no dispute that if Chinese-manufactured finished hardwood plywood were shipped directly from China to the United States, it would fall under the AD/CVD Orders. The facts in contention are: 1) whether transshipment of finished hardwood plywood from China, via Vietnam, occurred, as it relates to the Requesters, so that TRLED properly found evasion; 2) whether the two-ply panels of Chinese origin, which were further processed in Vietnam to make hardwood plywood by adding the face and back veneers of non-coniferous wood, is merchandise covered by the AD/CVD Orders; and, 3) whether substantial evidence demonstrates that the finished hardwood plywood, manufactured in Vietnam, contained Chinese-origin two-ply panels and thus remains covered under the scope of the AD/CVD Orders. So long as the finished hardwood plywood goods are considered covered merchandise under the applicable AD/CVD Orders, their entry during the period of investigation without proper declaration as type “03” AD/CVD entries and without deposit or payment of the AD/CV duties would constitute evasion under the EAPA statute and implementing regulations.

b. Requesters’ Scope Arguments:

On October 24-25, 2018, and March 16-17, 2019, an Attaché Team⁸⁹ and RAAAS personnel conducted site visits of Finewood’s mill, respectively. The Attaché Report concluded that Finewood had “limited capacity to produce plywood using veneers” and the Attaché Team reported “a small amount of veneer stock compared to the significant amounts of semi-finished and finished plywood in stock.”⁹⁰ RAAAS also reviewed entry packets, sales invoices, and corresponding production records for all 316 entries included in

⁸⁶ See 19 U.S.C. § 1517(f); and 19 C.F.R. § 165.45.

⁸⁷ *Techsnabexport v. United States*, 795 F. Supp. 428, 435 (Ct. Int’l Trade 1992); *ITG Voma Corp. v. United States Int’l Trade Comm’n*, 253 F. Supp. 1339, 1349 (Ct. Int’l Trade 2017), *aff’d* 753 F. App’x 913 (Fed. Cir. 2019).

⁸⁸ See Requesters Written Arguments, Requests for Administrative Review, and RFI Responses; *see also*, CBP Entry Summary Form 7501 and Instructions and the ACE Entry Summary Business Rules and Procedure Document at <https://www.cbp.gov/trade/programs-administration/entry-summary/cbp-form-7501> (last visited June 6, 2022).

⁸⁹ The Attaché Team consisted of officials from CBP and U.S. Immigration and Customs Enforcement (“ICE”) Homeland Security Investigations (“HSI”). *See* CBP Attaché – VN Finewood Site Visit Report (Oct. 29, 2018).

⁹⁰ *See id.* at 5.

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this investigation.⁹¹ The primary result of both reports, combined, is that Finewood did not have the production capacity to fulfill its sales orders; but instead, in addition to Vietnamese raw materials, it purchased and imported materials, including two-ply panels and single veneer sheets, from a Chinese supplier, which it subsequently sent to “tollers” in Vietnam, to produce its finished hardwood plywood shipped to the United States.

Upon learning that Finewood imported two-ply panels from China, TRLED requested a scope determination from Commerce to determine whether the two-ply panels of Chinese origin, which are further processed in Vietnam to make hardwood plywood by adding the face and back veneers of non-coniferous wood, is merchandise covered by the AD/CVD Orders.⁹² The Requesters all assert that TRLED incorrectly misapplied Commerce’s Scope Determination.

First the AD/CVD Orders, as issued in January 2018, explain that, within the scope of the AD/CVD Orders, are hardwood and decorative plywood, and define plywood as “a generally flat, multilayered plywood or other veneered panel, consisting of two or more layers or plies of wood veneers and a core, with the face and/or back veneer made of nonconiferous wood (hardwood) or bamboo.”⁹³ In summary, as explained in the January 27th Scope Determination, Commerce conducted a substantial transformation analysis⁹⁴ to determine the proper country of origin of the merchandise for purposes of the AD/CVD Orders at issue, and ruled:

that two-ply panels are covered by the scope of the antidumping duty (AD) and countervailing duty (CVD) orders on certain hardwood plywood products (hardwood plywood) from the People’s Republic of China (China). Further, Commerce determines that the hardwood plywood Finewood Company Limited (Finewood) exported to the United States, which was assembled in the Socialist Republic of Vietnam (Vietnam) using two-ply panels imported from China, are Chinese country of origin because the two-ply panels are not substantially transformed by the processing occurring in Vietnam.⁹⁵

Additionally, Commerce explained, in the original AD/CVD Orders and the January 27th Scope Determination, that:

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

⁹¹ See RAAAS VN Finewood Onsite Verification Report (July 22, 2019) at 4. We note that, on various occasions throughout the investigation, all Importers and Finewood provided numerous responses to CBP’s requests for information (“RFI”) and written arguments.

⁹² See January 27th Scope Determination.

⁹³ 83 Fed. Reg. 504 (Jan. 4, 2018); 83 Fed. Reg. 513 (Jan. 4, 2018).

⁹⁴ Commerce normally considers the following criteria when conducting a substantial transformation analysis: “(1) whether, as a result of the manufacturing or processing, the product loses its identity and is transformed into a new product having a new name, character, and use; and (2) whether through that transformation, the new article becomes a product of the country in which it was processed or manufactured.” See *id* at 9.

⁹⁵ See *id* at 2.

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The core of hardwood and decorative plywood consists of the layer or layers of one or more material(s) that are situated between the face and back veneers. The core may be composed of a range of materials, including but not limited to hardwood, softwood, particleboard, or medium density fiberboard (MDF).⁹⁶

Finewood concedes that it was importing some Chinese-origin cores/inner two-ply panels, which were placed in the middle of Vietnamese-origin face and back veneer layers, and this finished hardwood plywood was imported into the United States as being of Vietnamese origin. However, Finewood and the Requesters argue that the original scope language, which states: “consisting of two or more layers or plies of wood and a core,” require at least three layers and merely one layer of ply is not within scope.

While we understand the Requesters’ confusion, this is exactly why TRLED was correct in its decision to obtain clarification from Commerce, which is always an option for parties, such as the Requesters and Finewood, regardless of the initiation of an EAPA investigation. Commerce explained that the scope covers “two general types of merchandise: (1) hardwood and decorative plywood; and (2) certain veneered panels.” Commerce continued to clarify that:

However, the definition in the second sentence clearly applies exclusively to ‘hardwood and decorative plywood.’ Neither a definition nor example is provided for certain veneered panels. Finewood’s argument that the only merchandise described in the hardwood plywood *Orders* is three-ply panels, regardless of whether the scope language refers to the in scope merchandise as plywood or veneered panels is unsupported . . . Thus, without a clear definition of certain veneered panels in the scope of the *Orders*, it is unclear whether all in-scope merchandise must be made of a minimum of three layers because the scope lacks a complete definition of the products covered.⁹⁷

Commerce therefore clarified the scope and determined that “Finewood’s two-ply panels were of the same class or kind of merchandise as the hardwood plywood that it produced in China using those panels.”⁹⁸ Thus, the layer and thickness of plies was not determinative as to the country of origin of the merchandise, and, specifically, “Finewood’s two-ply panels meet the definition of ‘certain veneered panels’” and, as such, this merchandise, as well as three-layer hardwood plywood, are both within scope of the AD/CVD *Orders*.⁹⁹ “For Finewood’s two-ply panels that are the subject of this scope inquiry, that process begins in China. That the product may undergo the addition of other veneers or minor processing does not substantially transform these two-ply panels into a product that is outside the scope of the *Orders*.”¹⁰⁰

⁹⁶ See *id.* at 4; see also 83 Fed. Reg. 504 and 513 (Jan. 4, 2018).

⁹⁷ January 27th Scope Determination at 12.

⁹⁸ See *id.* at 9.

⁹⁹ See *id.* at 12. “There are no specific dimensions or materials that define the characteristics of certain veneered panels, and even finished plywood or other products serving as veneer core platforms may be thinner than Finewood’s two-ply panels imported from China.” *Id.* at 30.

¹⁰⁰ *Id.* at 33.

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Despite the above-quoted language, indicating that the addition of other veneers in Vietnam, to the Chinese two-ply panels, does not take the products outside the scope of the Orders, the Requesters ask that CBP disregard Commerce’s findings. However, there is no mechanism in the applicable law or regulations permitting CBP to do so. It is well established that CBP plays a “ministerial” role in enforcing AD/CVD order-related determinations issued by Commerce—CBP’s role is to follow Commerce’s instructions in collecting deposits of estimated duties and in assessing antidumping duties.¹⁰¹ However, “Customs, incident to its ‘ministerial’ function of fixing the amount of duties chargeable, must make factual findings to determine ‘what the merchandise is, and whether it is described in an order’ and must decide whether to apply the order to the merchandise.”¹⁰² Pursuant to its ministerial function, though, CBP cannot “affect the scope of the order.”¹⁰³ Accordingly, in the context of protests filed by importers against imposition of AD/CVD, CBP has previously declined to find that merchandise is outside the scope of an AD order where that merchandise had been previously deemed by Commerce to be within the scope of an AD or CVD order.¹⁰⁴ In so doing, CBP has determined that to do otherwise “would infringe upon Commerce’s authority to determine that a particular type of merchandise is within the class or kind of merchandise described in an existing finding of dumping and would potentially cause CBP to impermissibly alter the scope.”¹⁰⁵

In the same vein, FEA’s purported reliance on an informal email from a CBP NIS, for purposes of determining whether merchandise is within the scope of Commerce’s AD/CVD Orders, was misplaced in 2018 and is misplaced now. As an initial matter, we note that this discussion appears to contain new information provided to CBP in the context of this administrative review. While some of the information might be characterized as attorney argument, some of the information is new factual information. As such, its submission at this time is improper. Thus, we do not rely on this information for purposes of reaching our determination. However, we also feel it important to address the issue as a general matter.

¹⁰¹ See *Mitsubishi Electronics America, Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994) (“Customs only applies antidumping rates determined by Commerce. Further, Customs has a merely ministerial role in liquidating antidumping duties.... Customs cannot ‘modify . . . {Commerce’s} determinations, their underlying facts, or their enforcement’”) (citing *Royal Business Machs., Inc. v. United States*, 1 C.I.T. 80, 507 F. Supp. 1007, 1014 n.18 (Ct. Int’l Trade 1980)); see also *Fujitsu Ten Corporation of America v. United States*, 21 C.I.T. 104, 107 (1997); and *American Hi-Fi International, Inc. v. United States*, 19 C.I.T. 1340, 1342-43 (1995).

¹⁰² See *LDA Incorporated v. United States*, 79 F. Supp. 3d 1331, 1339 (Ct. Int’l Trade 2015).

¹⁰³ *Id.*

¹⁰⁴ See HQ H303403 (Sep. 27, 2021). We understand that in CBP Ruling NY N146815 (Mar. 7, 2011), CBP found: (1) that substrates of only two layers are not plywood but are instead laminated panels, classifiable under HTSUS heading 4412, and (2) that lamination of a veneer onto a substrate of two layers renders plywood but does not significantly change the classification or render a new article. Finewood uses N146815 to argue that its merchandise was classifiable under HTSUS heading 4408, which is not included in the scope of the AD/CVD Orders. However, Commerce is not bound by CBP rulings, as Commerce performs a distinct substantial transformation analysis when determining scope and proper country of origin for purposes of AD/CVD orders; additionally, HTSUS classifications are not dispositive in scope determinations as to coverage by an AD/CVD order. See AD/CVD Orders and January 27th Scope Determination at 22.

¹⁰⁵ *Id.*

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A definitive determination as to the scope and coverage of an AD/CVD order cannot be provided by CBP and should be sought and obtained from Commerce – a fact that importers exercising reasonable care are required to know; informal information or guidance from CBP is not binding in such a context. Moreover, we note that the language cited by FEA (quoting in part from an email) appears to relate to a two-ply panel, whereas the products that FEA imported into the United States and that are subject to this investigation are plywood and not simply two-ply panels.

Here, after receiving the January 27th Scope Determination, TRLED received unambiguous guidance from Commerce that the finished plywood and two-ply panels as described above are indeed within the scope of the AD/CVD Orders. As such, to disregard the January 27th Scope Determination, as requested, would impermissibly affect the scope of the AD/CVD Orders, and is not within CBP's authority to do.

Thus, while we understand that Finewood and the Requesters continue to dispute Commerce's definition of the merchandise as within scope, given that Finewood and the Requesters concede to importing goods that incorporate Chinese-origin two-ply panels, we find that TRLED properly determined the merchandise under investigation to be within the scope of the AD/CVD Orders. The appropriate procedure to dispute Commerce's scope determination is via judicial review, not via the CBP administrative review process under the EAPA statute.¹⁰⁶ While we understand that LWI and FEA have commenced such CIT review, again, RR does not have the authority to stay these administrative review proceedings pending the outcome of such litigation, as we must operate under the strict statutory deadlines imposed by 19 U.S.C. § 1517(f)(2).¹⁰⁷

c. Substantial Evidence of Two-Ply Origin & Production:

We must now address whether substantial evidence supports the determination that the finished hardwood plywood, manufactured in Vietnam, and imported into the United States, contained Chinese-origin two-ply panels, and thus remained of Chinese origin for AD/CVD purposes and within the scope of the AD/CVD Orders, *i.e.*, whether the Requesters provided substantial production records and other evidence to refute TRLED's determination that covered merchandise importations were transshipped from China through Vietnam and/or made from Chinese raw materials.

The record evidence includes copies of purchase orders, contracts, bank records, invoices, financial statements, videos, and photographs, all indicating that the origin and source of raw materials was both Vietnam and China. The majority of Plywood Source's allegation is contained within two short video clips purportedly showing the unloading of covered merchandise at the manufacturer's premises. These videos lack audio and are of poor quality. It is not clear whether covered merchandise or some other goods are being unloaded. Specifically, the first video is a little over three minutes, and purports to show Finewood workers taking a paper taped to a large box that states "Made in China" off those

¹⁰⁶ See 19 U.S.C. § 1517(b)(4)(D).

¹⁰⁷ However, we note that, while litigation is pending, if the CIT issues a court order enjoining liquidation, the liquidation of any entries subject to such injunction should remain suspended during the pendency of the litigation. See 19 C.F.R. § 159.12.

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shipments. The second video is a little over five minutes, and purports to show shipping boxes, delivered from China, and labeled for InterGlobal, who we note is not a party to this administrative review. These videos do not show the location of the video, or any production activities, nor do they provide any verifiable reference to how these videos relate to the entries at issue, this investigation, or the Requesters, as purported. We cannot discern what is in these shipping boxes, where they came from, or where they are going. As such, we find that these videos do not provide any relevant evidence of transshipment or evidence of Finewood's production capacity, or lack thereof, and these videos form no part of this determination.

Disregarding the videos and considering solely the remaining record evidence, it is undisputed that Finewood used both Vietnamese-origin two-ply and Chinese-origin two-ply in its hardwood plywood operations. Specifically, RAAAS confirmed that Finewood imported, as well as sourced domestically, raw materials, which were used to produce finished plywood exported to the United States.¹⁰⁸ RAAAS also confirmed that Finewood imported two-ply panels, single-ply veneers, and coating materials from a supplier in China. Additionally, over the course of this investigation, there were 316 U.S. entries made by five Importers, in which Finewood was the manufacturer.¹⁰⁹ Finewood admitted “that they did not have the production capacity to produce the quantity of plywood needed to fulfill its sales orders.”¹¹⁰ Instead, Finewood outsourced its core production to tollers and failed to provide CBP or the Importers with the information regarding the tollers to enable CBP to conduct further verifications. Subsequently, RAAAS and TRLED concluded that “[d]ue to the outsourcing of core production (tolling), it was not possible to accurately determine the production capacity of VN Finewood’s manufacturing facility in relation to their sales orders.”¹¹¹

Nonetheless, the three Requesters assert that TRLED failed to make a distinction between which of their entries contained only Vietnamese raw materials, and which did not, and argue that substantial evidence demonstrates that some of their entries are outside of the scope of the AD/CVD Orders. These arguments mistakenly attempt to shift the burden of proof from the Importers to CBP, for CBP to disprove evasion, even though it has already been established, as discussed *supra*, through the January 27th Scope Determination and various concessions to the inclusion of Chinese-origin two-ply in the finished goods. Moreover, the Requesters misapprehend the nature of an EAPA investigation – CBP must determine if there is substantial evidence of evasion during the period of investigation, and if there is, CBP is able to take steps to preserve the entries subject to investigation from liquidation without regard to payment of AD/CV duties. Most importantly, the arguments are without substantiation in the record.

¹⁰⁸ RAAAS VN Finewood Verification Report at 7-8.

¹⁰⁹ RAAAS VN Finewood Verification Report at 4.

¹¹⁰ *See id* at 8.

¹¹¹ *See id* at 8. *See also*, January 28th Determination.

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i. APPI Production Records:

APPI concedes and argues that, based on the production records provided, only three of its purchase orders, associated with three of its entries,¹¹² contain a portion of hardwood plywood associated with purchase orders of Chinese-origin two-ply panels, and insists that the rest of its merchandise is manufactured free of Chinese-origin two-ply panels, as evidenced by the production records.¹¹³

APPI provided TRLED with its RFI response on March 4, 2019; this document is 1139 pages and contains entry and commercial documents, Lacey Declarations¹¹⁴ and other supporting evidence for APPI's entries under investigation.¹¹⁵ In this submission, APPI provided entry summary forms, Importer Security Filings ("ISF"), and Lacey Act declarations for some of its entries, as well as customer and financial information, but it did not provide any production documentation. On the Lacey Declaration documents provided, APPI declared most of the entered plywood as of Vietnamese origin, except for entry numbers [Entry No.] 567-2; [Entry No.] 768-6; and [Entry No.] 615-3, in which APPI declared both the birch and poplar imported as of Chinese origin, and declared them as plywood and as type "01" entries.¹¹⁶ Significantly, we note that these three entry numbers are included in the list of entries APPI asserts are completely devoid of Chinese-origin materials. Thus, we have identified at least six APPI entries that contained Chinese-origin materials. Lastly, in the business confidential version of the March 4, 2019 RFI submission, APPI provided commercial invoices and packing lists for its plywood. [Redacted] Specific description of commercial

[Redacted] documents and confidential supplier name. [Redacted] However, these invoices are not traceable back to any specific entry, nor do they provide the invoice or production records of source materials, *i.e.*, where the two-ply panels, cores, or veneers were sourced, to confirm that none of these underlying materials are of Chinese-origin.¹¹⁷

¹¹² APPI's concession is associated with entry numbers [No.] 447-7; [No.] 878-0; and [No.] 595-3. APPI posits that its remaining entries, subject to this investigation, do not contain covered merchandise (Entry Numbers [No.] 419-6; [No.] 516-9; [No.] 471-7; [No.] 699-0; [No.] 489-9; [No.] 488-1; [No.] 567-2; [No.] 643-1; [No.] 756-1; [No.] 612-2; [No.] 568-6; [No.] 615-3; [No.] 633-2; [No.] 707-4; [No.] 612-2; [No.] 768-6; [No.] 770-2; and [No.] 853-6). *See* AAPI's Request for Administrative Review at 25-26; *see also* APPI RFI Response and Attachments – Public Version (Mar. 4, 2019) at Exhibit 1

¹¹³ *See* AAPI's Request for Administrative Review at 25.

¹¹⁴ The Lacey Act (16 U.S.C. §§ 3371-3378) combats illegal trafficking of wildlife, fish, and plants, making it unlawful to import into the United States any plant or plant product that was illegally harvested. It also makes it unlawful to import certain products without a declaration. Thus, under the Lacey Act, the Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("USDA"), requires importers to declare certain information related to their imports of certain plant products. *See* <https://www.aphis.usda.gov/aphis/ourfocus/planthealth/import-information/lacey-act> (last visited Apr. 22, 2022).

¹¹⁵ *See* APPI RFI Response and Attachments – Public Version (Mar. 4, 2019) at 117. We note that in the public version of APPI's RFI response, it divulged its entry numbers, in their entirety, but we maintain the confidential nature of all but the last four digits of entry numbers in this FAD.

¹¹⁶ *See id.* at 117. We note that the public version of the March 4, 2019 RFI response does not contain the Entry Summary, commercial documents or ISFs as an attachment; only the business confidential version contains these records.

¹¹⁷ *See* APPI RFI Response and Attachments – Business Confidential Version (Mar. 4, 2019) at 1000-1111.

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APPI provided an additional submission on April 2, 2019. This submission included invoices, packing lists, a supplier list, and other commercial documents.¹¹⁸ These documents merely show that APPI purchased plywood, cores, and veneers through [REDACTED] supplier names.¹¹⁹ APPI provided a supplier list in table format, which listed cores, veneers, and other raw materials; however, while some [REDACTED] country name supplier names were included, an additional supplier of raw materials included in APPI's supplier table is [REDACTED] supplier name. Significantly, the documents provided show that [REDACTED] sourced its veneers from [REDACTED] description of suppliers and country of origin of supplied materials.¹²⁰ This submission was a compilation of commercial documents intended to support a finding that APPI's entries under investigation were devoid of Chinese materials, but actually confirms that APPI and Finewood sourced raw materials from both China and Vietnam. Moreover, the submission provides further evidence contradicting APPI's claims of limited sourcing from China.

ii. FEA Production Records

FEA contends that it did not use two-ply panels for all its finished products and the January 28th Determination failed to distinguish between Finewood's finished plywood that incorporated Chinese two-ply panels with those that did not. FEA asserts that Finewood provided ample production records, which documented and traced its inputs for each production run and identified which shipments contained finished plywood that incorporated Chinese-origin two-ply panels.¹²¹

FEA provided TRLED with RFI responses on several occasions. In the first response, dated March 1, 2019, FEA highlighted a completely different Vietnamese manufacturer, [REDACTED] manufacturer name, listed on the entry documents, bill of lading ("BOL"), and packing lists.¹²² However, Finewood, along with other suppliers, was listed on commercial documents as providing materials, such as cores, plywood, plies, and veneers. [REDACTED]

Specific description of commercial documents, supplier and manufacturer names, and country of origin of sourced materials, as found on the confidential commercial documents. [REDACTED]

[REDACTED] These documents show that, while FEA listed [REDACTED] as the manufacturer of its finished plywood, Finewood and other suppliers

¹¹⁸ See APPI- Additional Submission (Apr. 2, 2019) - Business Confidential Version. We note that the business confidential version of this submission is over 400 pages, whereas the public version is merely 16 pages. The commercial documents are only included in the confidential submission.

¹¹⁹ See *id.* at 30-300.

¹²⁰ *Id.* at 331-334; 376-378.

¹²¹ FEA's Administrative Review Request at 21.

¹²² See Far East CF-28 Responses (Mar. 1, 2019), related to Entry No. [REDACTED] No. [REDACTED] 721-1.

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provided Chinese-origin plies, veneers, and cores as inputs to be used in production of the entered merchandise.¹²³ Thus, these commercial documents and production records do not demonstrate that this entry was 100% made without Chinese plies, as FEA purports.

Next, FEA provided a 5,894-page response to CBP’s RFI, dated March 4, 2019, to demonstrate, among other things, its due diligence in vetting Finewood as a manufacturer in its plywood supply chain, as well as providing customer information, Lacey Act Declarations, and its business and financial structure. Here, in Exhibit 2, “Documentation on FEA Visits to Finewood,” and Exhibit 23, “Purchase Orders, Supplies Invoices & Sales Documents,” commercial documents show that [REDACTED] country of origin listed on documents

[REDACTED] Also in Exhibit 22, “CBP Forms and Lacey Declarations,” FEA provided the CBP Entry Summary forms and APHIS Lacey Act Declarations for 46 entries made during the period of investigation. In the CBP entry documents, FEA declared all its goods as made in Vietnam under type “01” consumption entries; however, [REDACTED]

[REDACTED] Description of Lacey Act declarations and the country of origins declared to USDA APHIS [REDACTED] 125

Nothing in this submission supports FEA’s contention that some of its entries were completely devoid of Chinese-origin cores and plies. On the contrary, these documents show that FEA declared its hardwood to CBP as being of Vietnamese origin, yet [REDACTED]

[REDACTED] Description of Lacey Act declarations and the country of origins declared to USDA APHIS [REDACTED] We find it is of great significance that FEA made contradictory declarations to two separate agencies of the U.S. government, especially given that a consistent declaration to CBP would likely trigger the imposition of additional duties.

FEA further made a “voluntary submission of factual information” on April 9, 2019.¹²⁶ In this submission, among other things,¹²⁷ FEA provided Finewood production

¹²³ *Id.* at 29; 81-97.

¹²⁴ *See* Far East – RFI Response and Exhibits 1-30 (Mar. 4, 2019) at Exhibit 2, pgs. 49-62. [REDACTED]

[REDACTED] Description of commercial documents details, [REDACTED]; and Exhibit 23 at *e.g.*, pg. 1786; 1797; 1889. [REDACTED] country of origin, and supplier names [REDACTED]

[REDACTED] *See also* Exhibit 6; Exhibit 9 at *e.g.*, pg. 291-389; and Exhibit 22.

¹²⁵ *Id.* at Exhibit 22. These Entry Summaries and Lacey Act Declarations were submitted in relation to Entry numbers

No. [REDACTED] 749-2; No. [REDACTED] 596-7; No. [REDACTED] ; 629-6 No. [REDACTED] 644-5; No. [REDACTED] 662-7; No. [REDACTED] 663-5; No. [REDACTED] 677-5; No. [REDACTED] 678-3 Specific Lacey Act declarations and country of origin information related to Entry No. 678-3. [REDACTED] 681-7; [REDACTED] 710-4; No. [REDACTED] 711-2; No. [REDACTED] 721-1; No. [REDACTED] 723-7; No. [REDACTED] 724-5; No. [REDACTED] 725-2; No. [REDACTED] 728-6; No. [REDACTED] 729-4; No. [REDACTED] 730-2; No. [REDACTED] 731-0; No. [REDACTED] 732-8; No. [REDACTED] 733-6; No. [REDACTED] 734-4; No. [REDACTED] 735-1; No. [REDACTED] 738-5; No. [REDACTED] 739-3; No. [REDACTED] 748-4; No. [REDACTED] 750-0; No. [REDACTED] 751-8; No. [REDACTED] 755-9; No. [REDACTED] 762-5; No. [REDACTED] 767-4; No. [REDACTED] 769-0; No. [REDACTED] 770-8; No. [REDACTED] 792-2; No. [REDACTED] 793-0 No. [REDACTED] 807-8; No. [REDACTED] 823-5; No. [REDACTED] 824-3; No. [REDACTED] 829-2; No. [REDACTED] 838-3; No. [REDACTED] 846-6; No. [REDACTED] 847-4; No. [REDACTED] 851-6; No. [REDACTED] 853-2; No. [REDACTED] 854-0; and No. [REDACTED] 862-3.

¹²⁶ Far East – Voluntary Submission of Factual Information (Apr. 9, 2019).

¹²⁷ *See id.*; FEA also submitted arguments and documents to support its claim that Plywood Source is a bad actor, trying to damage its competition, and evidence that FEA vetted and visited Finewood, prior to purchasing.

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capacity evidence, including employee affidavits and pictures of Finewood mills and other facilities. FEA also provided a supplemental RFI questionnaire response on April 17, 2019, admitting that FEA knew Finewood outsourced some of its production to other factories in Vietnam, as well as supplied these factories with imported poplar veneers, including two-ply panels, from China.¹²⁸ Again, nothing in these submissions supports FEA’s contention that substantial evidence shows that some of its entries were completely devoid of Chinese-origin cores and plies.

As it relates to FEA, there is nothing in its thousands of pages of submissions that supports a finding that FEA imported 100% Vietnamese-origin finished hardwood. On the contrary, while these documents show that FEA declared its hardwood to CBP as being of Vietnamese origin, the commercial documents and Lacey Declarations demonstrate that many of the raw materials were sourced from China. Additionally, FEA concedes that Finewood imported into Vietnam, two-ply panels from China to be used in the production of the finished hardwood. Thus, as none of the evidence for FEA’s 40-plus entries of goods under investigation demonstrates that Chinese-origin materials were not used in their production, and instead demonstrates the opposite, we find that FEA’s entries should have been made as type “03” entries, subject to the imposition of duties under the AD/CVD Orders.

iii. LWI Production Records

LWI contends that substantial production records distinguish between plywood that incorporated Chinese two-ply panels versus the plywood that did not.¹²⁹ “Thus, at a bare minimum, TRLED should have determined that there was no evasion with respect to those shipments of plywood that were produced without 2-ply veneers from China and ultimately entered in the United States.”¹³⁰

On March 7, 2019, LWI provided over 6,500 pages of records in support of its arguments and entries of hardwood plywood.¹³¹ LWI provided entry summaries and commercial documentation for 20 entries.¹³² The commercial invoices and packing lists state Description of commercial documents, supplier and manufacturer names, and country of origin of sourced materials, as found on the confidential commercial documents.

¹³³ LWI also provided Lacey Act declaration printouts. However, we were unable to discern the country of origin declared on those Lacey Act declarations. Many of the BOLs were for cores and plywood, and Description of commercial documents and country of origin of sourced materials

¹²⁸ Far East Supp RFI Response (Apr. 17, 2019) at 8. See also, Far East Written Arguments (Aug. 9, 2019) at 5.

¹²⁹ See LWI’s Request for Administrative Appeal at 19.

¹³⁰ *Id.*

¹³¹ See Liberty RFI Responses and Exhibits-Business Confidential Version (Mar. 17, 2019).

¹³² See *id.* at 705-739 Entry No. 479-1; No. 467-6; No. 470-0; No. 491-6; No. 523-6; No. 526-9; No. 533-5; No. 537-6; No. 542-6; No. 546-7; No. 560-8; No. 561-6; No. 580-6; No. 589-7; No. 590-5; No. 592-1; No. 593-9; No. 606-9; No. 607-7; No. 602-8. We note some of these entries state manufacturer and country of origin details

¹³³ See *id.* at 740-807.

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Description of commercial documents, supplier and manufacturer names, and country of origin of sourced materials, as found on the confidential commercial documents. Description of e-mails between suppliers and the importer, as well as descriptions of confidential photos of plywood shipments.

¹³⁶ The bulk of this submission was financial documents and commercial documents that do not trace the origin of LWI's entries of plywood, but support the fact that some cores were sourced from China. This submission does not provide substantial evidence to overcome the evidence which demonstrates that Finewood's manufactured plywood was made with Chinese-origin cores.

On April 9, 2019, LWI submitted additional information, including an affidavit regarding the visits and preliminary discussions it had with Finewood, prior to placing an order. LWI also included photos of the facility and raw materials. This submission does not provide production evidence to demonstrate that LWI entered hardwood into the United States without the inclusion of Chinese-origin source materials. However, LWI provided e-mail discussions that were fully redacted as business confidential regarding publicly available CBP and Commerce scope rulings related to the non-substantial transformation of cores adhered to veneer.¹³⁷ These public CBP rulings bolster the general understanding, which LWI was aware of, that the country of origin of the core is determinative for the country of origin of the finished plywood.

The question before CBP in an EAPA case is not whether every entry during the period of investigation was made with false information and failure to deposit or pay antidumping and/or countervailing duties. Thus, in an EAPA administrative review, RR is not required to analyze entry by entry, line by line, and make a determination on an entry-line-specific basis, whether evasion has occurred. Rather, we have looked at the record as a whole, on which TRLED based its determination, in great detail, to determine whether substantial evidence of evasion exists or not. We find that it does. In conclusion, we find that none of the three Requesters adequately provided production evidence to allow TRLED to determine which, if any, of the Requesters' entries did not contain Chinese-origin covered materials. In contrast, we find substantial evidence exists that entries into the United States did contain Chinese-sourced covered merchandise. Additionally, we note that the argument that Finewood increased production capacity in Vietnam, through secret tollers, does not negate the evidence which shows that Finewood sourced material inputs from China. On the contrary, the inability or refusal of Finewood to provide TRLED with specific details on the tollers' processing, works against the argument that total Vietnamese production occurred. Thus, because it is evident on the record, and all parties have conceded, that Finewood sourced two-ply panels, cores, and veneers from China to use in the production of its

¹³⁴ See *id. e.g.*, at 2069-70; 2118-2131, *etc.*

¹³⁵ See *id. e.g.*, at 2357; 2397; 2451; 2589, *etc.*

¹³⁶ See *id. e.g.*, at 3954; 4349; 4366; 4416-17; 5652-67, *etc.*

¹³⁷ See Liberty Woods – Voluntary Factual Submission - Business Confidential Version (Apr. 9, 2019). While we note that the e-mail communications and company discussions regarding the rulings are confidential, the rulings themselves are publicly available on CBP's Customs Rulings Online Search System ("CROSS") at <https://rulings.cbp.gov/home>. See, e.g., N291240 (Nov. 7, 2017) ("Because no substantial transformation is effected by the application of the Chinese birch veneers to the Brazilian parica plywood core, the country of origin for the complete plywood panels is Brazil."); see also N231875 (Sep. 21, 2012).

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finished hardwood, we find substantial evidence that entries under investigation, which were made without AD/CVD cash deposits, were made through false statements, namely, declaring the entries as entry type “01” (not subject to AD/CVD orders).

II. Requester’s Lack of Culpability Arguments:

We next discuss the Requesters’ contention that they lacked, what they believe to be the requisite intent to evade. As discussed *supra*, 19 U.S.C. § 1517(a)(5) defines evasion as:

entering covered merchandise into the customs territory of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise.¹³⁸

This definition of evasion notably does not include a requirement that CBP find culpability, prior to making a determination of evasion. According to the plain text of the statute, there is no requirement that the importer have intent to defraud the United States or reckless disregard of statutory requirements when making a false statement or omission.¹³⁹ To the contrary, the statute indicates that if other elements are met, false statements or omissions would subject an importer to a finding of evasion without regard to whether the importer had any culpability.¹⁴⁰

We note that CBP enforces other statutes where Congress requires, in addition to finding whether false statements or omissions occur, a determination of whether such false statements or omissions are made with a level of culpability.¹⁴¹ In such statutes, Congress has explicitly defined levels of culpability.¹⁴² The language of these statutes, such as section 1592(a)(2) of Title 19, is very similar to the definition of evasion in section 1517(a)(5), with one important distinction; section 1517(a)(5) does not include a requirement that false statements or omissions are by fraud, gross negligence, or negligence. It is our position that if Congress had intended to require that CBP, in addition to determining whether covered merchandise was entered into the United States by means of false statements or omissions, must also determine whether the importer did so intentionally, or without exercise of reasonable care, Congress would have done so, as it did in 19 U.S.C. § 1592.

¹³⁸ 19 U.S.C. § 1517(a)(5).

¹³⁹ *See id.*

¹⁴⁰ *Id.*

¹⁴¹ 19 U.S.C. § 1592 (providing for penalties for fraud, gross negligence, and negligence); *see also* 31 U.S.C. § 3729 (False Claims Act).

¹⁴² *See* 19 U.S.C. § 1592(a) (“no person, by fraud, gross negligence, or negligence—(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—(i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false...”); *see also* 31 U.S.C. § 3729(a)(1)(G) (“knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government”).

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Therefore, we find that reading EAPA as a strict liability statute, is consistent with the purpose of the law, as the purpose of EAPA is to collect AD/CV duties that are due to the U.S. Government, and of which the U.S. Government has been deprived, because the importer failed to report its merchandise as subject to an applicable AD/CVD order. The statute only aims to collect the duties that have been unpaid, to make the U.S. Government whole, and to level the playing field for the U.S. domestic industry.¹⁴³ By comparison, under 19 U.S.C. § 1592, the importer is generally required to pay duties owed and monetary penalties calculated based on the culpability levels defined in the statute; and, whether or not a monetary penalty is assessed, to restore the lawful duties, taxes, and fees.¹⁴⁴ We note that EAPA, on its own, does not provide authority for CBP to impose a penalty or an adverse consequence upon the importer for such conduct as a punitive measure.¹⁴⁵ If EAPA provided such authority, requiring a finding of intent may be justified. But EAPA does not.

Moreover, we also find that requiring a finding of knowledge or intent in a case where CBP has made a covered merchandise referral to Commerce would be inconsistent with the covered merchandise referral process as outlined in the EAPA statute.¹⁴⁶ Importers would inevitably argue that if CBP is unable to determine whether merchandise is covered, the importers also should not be expected to have known that the merchandise was covered at the time of importation and thus did not have any intent to evade the payment of duties, thereby escaping liability for non-payment of duties on entries made during the period of investigation covered by EAPA. Consequently, by virtue of making a scope referral alone, CBP would invalidate effectively every EAPA determination of evasion involving such a referral. To the contrary, nothing in the statute precludes CBP's ability to find evasion after a covered merchandise referral is made. EAPA creates a mechanism for collecting duties when importers fail to pay AD or CV duties without regard to intent and provides a process for referral to Commerce in order to effectuate EAPA's ultimate purpose.

Thus, we disagree with Requesters' argument, that CBP must demonstrate a level of culpability to find that evasion occurred; specifically, requiring CBP to find that the importer intended to make false statements under EAPA would be duplicative of CBP's authority pursuant to section 1592, and would defeat the purpose of EAPA.

¹⁴³ H.R. Rep. No. 114-114, at 85 (2015) (“timely collection of the antidumping and countervailing duties owed on evading imports is as important or even more important than having the parties involved in evasion subject to penalties or criminal liability.”).

¹⁴⁴ 19 U.S.C. § 1592(c) (setting maximum penalty requirements based on levels of culpability) and (d)(requiring payment of duties, taxes, and fees). Under 19 U.S.C. § 1592(d), CBP may also issue a separate demand for payment of duties without assessing penalties. The duties make the government whole, and the penalty punishes the importer for the negligent or fraudulent conduct. Pursuant to section 1592(d), the government is required to prove a violation of section 1592(a) before recovery of duties would be appropriate.

¹⁴⁵ Penalty proceedings following an EAPA investigation are not automatic. While section 1517(d)(1)(E) provides that, after CBP makes a determination of evasion, CBP may initiate proceedings under 19 U.S.C. § 1592 and 19 U.S.C. § 1595a, these are separate proceedings, with separate regulatory and statutory requirements. *See* 19 U.S.C. § 1517(d)(1)(E)(i).

¹⁴⁶ 19 U.S.C. § 1517(b)(4).

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III. Premature Liquidation:

Both APPI and LWI contend that some of their entries were prematurely liquidated.¹⁴⁷ Again, this is a procedural issue and not within RR's administrative review authority.

II. Decision

We conclude that the record supports a finding of evasion as defined by EAPA; therefore, TRLED's finding of evasion stands. The record shows that the Requesters, all made type "01" entries of the plywood into the United States, declared as not subject to the AD/CVD Orders. These entries should have been made as type "03" entries, subject to the AD/CVD Orders. It was material and false for these entries to be made as type "01" entries. That the material falsehood may have occurred as a result of a mistake does not mean that evasion has not occurred – a falsity within the meaning of the EAPA statute can occur as a result of a mistake.¹⁴⁸ In our view, the record as a whole, does not support APPI, FEA, and LWI's assertions that CBP should conclude that their entries were not subject to the AD/CVD Orders.

Based upon our *de novo* review of the administrative record in this case, including the requests for administrative review, the January 28th Determination of evasion under 19 U.S.C. § 1517(c) is **AFFIRMED**.

¹⁴⁷ Liquidation "means the final computation or ascertainment of the duties . . . accruing on an entry." 19 C.F.R. § 159.1. This definition of liquidation was affirmed in *Swisher International, Inc., v. U.S.*, 27 F. Supp. 2d 234 (Ct. Int'l Trade 1998), rev'd on other grounds, 205 F.3d 1358 (Fed. Cir. 2000), reh'g en banc denied, LEXIS 12707 (Fed. Cir. May 22, 2000). The *Swisher* court found that it "is a liquidation which settles 'the amount of duties owing.'" *Id.* at 237.

¹⁴⁸ See *Diamond Tools Tech. LLC v. United States*, LEXIS 155, 165, SLIP OP. 2021-151 (Ct. Int'l Trade 2021) (internal citations omitted) and 19 U.S.C. § 1517(a)(5)(A). We also note that Requestors do not assert that there were clerical errors, for which the EAPA statute does carve out an exception.

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This decision does not preclude CBP or other agencies from pursuing additional enforcement actions or penalties. Pursuant to 19 C.F.R. § 165.46(a), this final administrative determination is subject to judicial review pursuant to Section 421 of EAPA.

Sincerely,

W. Richmond Beevers
Chief, Cargo Security, Carriers & Restricted Merchandise Branch
Regulations and Rulings, Office of Trade
U.S. Customs and Border Protection

Approved by:

for Alice A. Kipel
Executive Director,
Regulations and Rulings, Office of Trade
U.S. Customs and Border Protection