UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

A-570-929
Circumvention Inquiry
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September 10, 2013

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

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

SUBJECT: Anticircumvention Inquiry Regarding the Antidumping Duty Order on Small Diameter Graphite Electrodes from the People's Republic of China: Issues and Decision Memorandum for the Final Determination of the Anticircumvention Inquiry

SUMMARY:

We have analyzed the case and rebuttal briefs of interested parties in the anticircumvention inquiry of the antidumping duty order on small diameter graphite electrodes from the People's Republic of China,[1] and recommend affirming our *Preliminary Determination*.[2] We further recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum.

Scope of the Antidumping Duty Order

The merchandise covered by the order includes all small diameter graphite electrodes of any length, whether or not finished, of a kind used in furnaces, with a nominal or actual diameter of 400 millimeters (16 inches) or less, and whether or not attached to a graphite pin joining system or any other type of joining system or hardware. The merchandise covered by the order also includes graphite pin joining systems for small diameter graphite electrodes, of any length, whether or not finished, of a kind used in furnaces, and whether or not the graphite pin joining system is attached to, sold with, or sold separately from, the small diameter graphite electrode. Small diameter graphite electrodes and graphite pin joining systems for small diameter graphite electrodes are most commonly used in primary melting, ladle metallurgy, and specialty furnace

[1] *See Antidumping Duty Order: Small Diameter Graphite Electrodes from the People's Republic of China*, 74 FR 8775 (February 26, 2009) (*Order*).
[2] *See Small Diameter Graphite Electrodes From the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order and Intent To Rescind Later-Developed Merchandise Circumvention Inquiry*, 78 FR 22843 (April 17, 2013) (*Preliminary Determination*) and accompanying Decision Memorandum.

applications in industries including foundries, smelters, and steel refining operations. Small diameter graphite electrodes and graphite pin joining systems for small diameter graphite electrodes that are subject to the order are currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheadings 8545.11.0010,[3] 3801.10,[4] and 8545.11.0020.[5] The HTSUS numbers are provided for convenience and customs purposes, but the written description of the scope is dispositive.

BACKGROUND:

On April 17, 2013, the Department published the *Preliminary Determination* in the *Federal Register*. In accordance with 19 CFR 351.309, we invited parties to comment on our *Preliminary Determination*. On May 15, 2013, and May 17, 2013, SGL Carbon LLC and Superior Graphite Co. (the petitioners), Sinosteel Jilin Carbon Co., Ltd. and Jilin Carbon Import & Export Company (collectively, Jilin Carbon), and Ceramark Technology, Inc. (Ceramark) filed case briefs.[6] On May 22, 2013, the petitioners filed their rebuttal brief.[7] On June 27, 2013, we initially contacted U.S. International Trade Commission (ITC) staff via telephone to discuss our preliminary affirmative circumvention determination[8] and on August 2, 2013, we formally notified the ITC of our *Preliminary Determination*.[9] On August 16, 2013, the ITC sent a letter in reply.[10]

The issues raised by the parties and our recommended positions follow.

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[3] The scope described in the *Order* refers to the HTSUS subheading 8545.11.0000. Petitioners have informed the Department that, starting in 2010, imports of small diameter graphite electrodes are classified in the HTSUS under subheading 8545.11.0010 and imports of large diameter graphite electrodes are classified under subheading 8545.11.0020. *See* Letter from Petitioners, "Small Diameter Graphite Electrodes: Request for Scope/Circumvention Ruling" (April 5, 2012) at 5.

[4] HTSUS subheading 3801.10 was added to the scope of the order based on a determination in a prior anticircumvention proceeding. *See Small Diameter Graphite Electrodes From the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 77 FR 47596 (August 9, 2012).

[5] We have added this HTSUS subheading in order to capture the merchandise subject to this inquiry. *See* Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Import Administration, "Anticircumvention Inquiry Regarding the Antidumping Duty Order on Small Diameter Graphite Electrodes from the People's Republic of China: Issues and Decision Memorandum for the Final Determination of the Anticircumvention Inquiry" dated concurrently with this notice (Decision Memorandum) at Comment 2.

[6] *See* the petitioners' case brief dated May 17, 2013, Jilin Carbon's case brief dated May 17, 2013, and Ceramark's case brief dated May 15, 2013.

[7] *See* the petitioners' rebuttal brief dated May 22, 2013.

[8] *See* Memorandum to the file, "Circumvention Inquiry of the Antidumping Duty Order on Small Diameter Graphite Electrodes from the People's Republic of China: Informal Telephone Consultation with the International Trade Commission" (August 2, 2013) (ITC Telecon Memo).

[9] *See* Letter to Irving A. Williamson, Chairman, U.S. International Trade Commission, "Small Diameter Graphite Electrodes from the People's Republic of China: Notification of Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order" (August 2, 2013) (Formal ITC Notification Letter)

[10] *See* Letter from Lisa R. Barton, "Small Diameter Graphite Electrodes from China, Commerce Anticircumvention Inquiry A-570-929" (August 16, 2013) (Letter from the ITC).

DISCUSSION OF THE ISSUES:

Comment 1: Whether Graphite Electrodes with a 17-inch Diameter Should Be Covered by the Order

In the *Preliminary Determination,* the Department found that graphite electrodes, produced and/or exported by Jilin Carbon, with an actual or nominal diameter of 17 inches, and otherwise meeting the description of in-scope merchandise, constitute merchandise altered in form or appearance in such minor respects that it should be included within the scope of the *Order*.

Jilin Carbon's and Ceramark's Arguments

- The courts have uniformly held that it is impermissible for the Department to use a scope inquiry or an anticircumvention inquiry as a means to expand or interpret the scope of an existing order to include merchandise not within the scope of the existing antidumping duty order.[11] The courts have specifically ruled that the minor alterations provision at issue here gives the Department the authority to include "within the scope of the orders products that have been altered in minor way so as to remove them from the literal scope of the orders" but that "Congress made no provision for bringing other merchandise within the scope of antidumping and countervailing duty orders that was otherwise outside the language of the orders."[12]

- Minor alterations anticircumvention inquiries are only applicable to those situations where the insignificantly altered merchandise was initially within the scope of the existing order and the minor alteration brought the subject merchandise outside the scope of the order. Minor alterations anticircumvention inquiries do not apply to situations where, as here, the product in question was "unequivocally excluded from the order in the first place,"[13] or where the product is being used as a substitute for merchandise that is within the scope of the order.[14] To constitute circumvention of an order, the merchandise in question must be the result of a "minor alteration"— *i.e.*, an insignificant change — made to in-scope merchandise so that the merchandise falls outside the literal scope of the order. [15] Graphite electrodes (GEs) with 17-inch diameters are not the result of a "minor alteration" to in-scope merchandise, because 17-inch diameter GEs are distinct and separate products. Where a separate and distinct commercially-available product is simply being used as a substitute for a product within the scope of an order, an affirmative finding of circumvention is not appropriate.[16]

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[11] *See Eckstrom Industries, Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001) (*Eckstrom*), *Ericsson GE Mobile Communications v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995) (*Ericsson*), *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1092 (Fed. Cir. 2002) (*Duferco*), and *Smith Corona Corp. v. United States*, 915 F.2d 683, 685 (Fed. Cir. 1990) (*Smith Corona*); *see also Wheatland Tube Co. v. United States*, 161 F.3d 1365 (Fed. Cir. 1998) (*Wheatland*).
[12] *See Duferco*, 296 F.3d at 1092.
[13] *See Wheatland*, 161 F.3d at 1371.
[14] *See Hylsa v. United States*, 22 C.I.T. 44, 48-49 (CIT 1998) (*Hylsa*).
[15] *See Wheatland*, 161 F.3d at 1370-71.
[16] *Id*. 161 F.3d at 1370; *Hylsa*, 22 C.I.T. at 48-49.

- In this case, the scope of the *Order* is clearly and unequivocally limited to GEs having a diameter of 16 inches or less. GEs that are 17 inches in diameter are, by the plain terms of the scope language, outside the scope of the *Order*. The courts have held that the minor alteration provision cannot be used by the Department to change, alter or expand the scope of the existing order to include products that are not covered by the scope language of the existing antidumping duty order.[17]

- In order to assess antidumping duties on a product, the statute requires an affirmative finding of material injury by the ITC with respect to that product. In this case, the ITC found that the United States industry that produced small GEs with diameters of 16 inches and less was materially injured by reason of such imports. The ITC specifically rejected the argument that the appropriate like product covered all GEs without respect to diameter. Thus, the ITC's like product and industry definitions were coextensive with the Department's scope definition and the affirmative material injury determination issued in this case was similarly limited to GEs with diameters of 16 inches and less.

- If the Department expands the scope definition in the context of this anticircumvention proceeding to include GEs with diameters of 17 inches, imposition of antidumping duties on such products would violate the statute because there would be no corresponding injury determination for the 17-inch GEs that would be subject to antidumping duties. This "would frustrate the purpose of the antidumping law because it would allow the Department to assess antidumping duties on products intentionally omitted from the ITC's injury investigation."[18]

- The Department's determination that the production of 17-inch GEs is a minor alteration of GEs 16 inches in diameter or less it is not supported by substantial evidence. The *Preliminary Determination* would lead to absurd results: if the Department finds that 17-inch GEs are a minor alteration of the merchandise covered by the *Order*, the petitioners will next allege that 18-inch GEs are a minor alteration of the clarified *Order* that covers GEs with diameters of 17 inches or less, and so on. The Department's decision rested heavily on its finding that customers appeared to be using 17-inch GEs as a "direct substitute" for in-scope merchandise, but without more, substituting one commercially-available product for another is not circumvention.[19]

- An inch difference in diameter for a GE is not an "insignificant" change given that the defining characteristic of a graphite electrode is its diameter size. It would be an entirely different situation if companies were producing and importing GEs with, as an example, a diameter of 16.1 inches. Moreover, the Department's analysis of the Senate Report circumvention factors focused too narrowly on 16- and 17-inch electrodes, and did not account for the continuum of GE diameter sizes. Many of the circumvention factors will necessarily be similar for adjacent-sized GEs and for all sizes of GEs as a whole, and thus cannot support a finding of circumvention. Jilin Carbon reported that it uses a similar blend of coke for 16-inch, 17-inch, and 18-inch GEs but the Department focused on the

[17] *See Wheatland*, 161 F.3d at 1371; *Duferco*, 296 F.3d at 1097.
[18] *See Wheatland*, 161 F.3d at 1371.
[19] *See Hylsa*, 22 C.I.T. at 48-49.

similarity of the blends only with respect to 16-inch and 17-inch GEs. GEs with a diameter of 17 inches are produced independently by forming the petroleum coke into the desired-size electrode, *i.e.*, they are not the result of machining other size electrodes. Thus, they are not a result of altering in-scope merchandise. Each size GE is a separate and distinct product from another size GE. While an inch difference may seem small, this is not an insignificant change.

- The Department's final determination must fairly take additional factors into account. The Department's *Preliminary Determination* did not give sufficient weight to the fact that the 17-inch GEs produced and exported to the United States were manufactured to National Electrical Manufacturers Association (NEMA) standards, which predate and were issued prior to the *Order*. Further, the *Preliminary Determination* gave insufficient weight to the fact that [ ]. The fact that [ ] 17-inch GEs [ ] establishes that [ ] 17-inch GEs and that Jilin Carbon [ ] 17-inch GEs.

Petitioners' Arguments

- The Department correctly determined in the *Preliminary Determination* that the increase in U.S. imports of 17-inch GEs was a direct result of Jilin Carbon and Ceramark circumventing the *Order* by selling slightly larger diameter, but otherwise identical GEs, to the same customers for the same uses through the same channels of trade as the subject GEs.

- The record evidence confirms that Jilin Carbon increased the diameter of the GEs to a level that is slightly higher than the diameter indicated in the scope language to circumvent the *Order*. Jilin Carbon sold significant volumes of those low-cost GEs to U.S. customers and only began manufacturing 17-inch GEs for sale to U.S. customers that were searching for ways to avoid payment of the antidumping duties. There is no significant commercial or technological reason for this alteration other than to evade payment of antidumping duties. Although Jilin Carbon and Ceramark argue that 17-inch GEs are a standard product in the marketplace, they do not offer 17-inch GEs for sale in any other market except the United States. In every instance, the 17-inch GEs are sold for the same application as 16-inch GEs and, if it were not for the *Order*, these customers would still be purchasing 16-inch GEs. Jilin Carbon and Ceramark provided no new factual evidence to rebut the Department's findings.

- The case law cited by Jilin Carbon and Ceramark is inapposite. The references to *Eckstrom* and *Duferco* are not relevant because they did not involve minor alterations inquiries but, rather, involved the Department's ability to interpret the scope language. The purpose of an anticircumvention inquiry, in contrast, is to determine whether a product that is outside the scope should be included within the scope because it was altered in form or appearance in minor respects. This proceeding is distinguishable from *Wheatland* because the Federal Circuit explained that the statement in *Wheatland* that the

minor alterations provision does not apply to products unequivocally excluded from the order was made in determining the propriety of the Department's conducting a scope rather than a minor alterations inquiry. Further, *Wheatland* involved a scope inquiry related to products which were well known when the order was issued, and not a product produced by making insignificant alterations to an existing product.[20] The record in this case clearly demonstrates that Ceramark's customers had not previously purchased 17-inch electrodes and, in fact, these same customers modified their furnaces to accommodate "less expensive" GEs that were not subject to the *Order*.

- The Department's determination in *Mexican Wire Rod* provides strong support for an affirmative determination in this case. The Department determined in *Mexican Wire Rod* that shipments of wire rod with an actual diameter of 4.75 millimeters (mm) to 5.00 mm produced in Mexico and exported to the United States were circumventing the order, which defined subject product as wire rod 5.00 mm or more, but less than 19.00 mm.[21] The Department determined that wire rod with an actual diameter of 4.75 to 5.00 mm was "indistinguishable in any meaningful sense in terms of overall physical characteristics" from subject wire rod,[22] that the 0.25 mm difference did not alter the expectations of the ultimate users of wire rod,[23] and that the costs to produce wire rod with a 0.25 mm smaller diameter were not significant.[24]

- As a factual matter, the Department's affirmative decision is correct. The Department correctly concluded that 17-inch GEs have similar overall physical characteristics to subject 16-inch GEs, that there is no significant difference in the expectations of the ultimate users of 17-inch GEs as compared to those of subject 16-inch GEs, that there is not any significant difference in the uses of 17-inch GEs and subject 16-inch GEs, that there is not any significant difference in the channels of marketing of 17-inch GEs and subject 16-inch GEs, and that the cost of modification for Jilin Carbon's 17-inch GEs relative to Jilin Carbon's 16-inch GEs is insignificant. Despite Ceramark's arguments that the Department disregarded the differences in physical characteristics that result from a change in diameter, Ceramark failed to identify any meaningful differences in its brief.

Department's Position

We continue to find that imports from the People's Republic of China of graphite electrodes, produced and/or exported by Jilin Carbon, with an actual or nominal diameter of 17 inches, and otherwise meeting the description of in-scope merchandise, constitute merchandise altered in form or appearance in such minor respects that it is properly included within the scope of the *Order*.

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[20] *See Nippon Steel v. United States*, 219 F. 3d 1348, 1356 (Fed. Cir. 2000) (*Nippon Steel*).
[21] *See Carbon and Certain Alloy Steel Wire Rod From Mexico: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 77 FR 59892 (October 1, 2012) (*Mexican Wire Rod*).
[22] *Id.*, and accompanying Issues and Decision Memorandum at 10.
[23] *Id.*, and accompanying Issues and Decision Memorandum at 11-15.
[24] *Id.*, and accompanying Issues and Decision Memorandum at 16-18.

We disagree with the contention of Jilin Carbon and Ceramark that it is impermissible for the Department to conduct an anticircumvention inquiry as a means to interpret and include within the scope of an existing order merchandise not explicitly identified as being covered by that order. To the contrary, the very nature of a minor alteration anticircumvention proceeding is to consider whether merchandise which has been altered so as to fall outside the literal scope of the order should be considered within the scope of the order.[25] Specifically, the statute directs that the Department "shall" include in the scope "articles altered in form or appearance in minor respects."[26] In addition, the Conference Report accompanying the introduction of the minor alterations provision clarifies that the provision "addresses the practice whereby a foreign producer alters merchandise in minor respects and form or appearance to circumvent an outstanding order."[27] Thus, the statute and legislative history plainly contemplate that an anticircumvention inquiry will include in the scope of an existing order merchandise not within the literal scope of the existing order in order to prevent circumvention. As a result, an affirmative determination in a minor alterations inquiry will necessarily include in the scope of an existing order merchandise not within the literal scope of that order. For example, in *Mexican Wire Rod*, we determined that certain shipments of wire rod with an actual diameter of 4.75 mm to 5.00 mm constituted merchandise altered in form or appearance in such minor respects that it should be included within the scope of the order even though the scope of the order covered wire rod with a diameter of 5.00 mm or more, but less than 19.00 mm.[28] As a result, the scope of the order in *Mexican Wire Rod* was modified to include merchandise that was altered in minor respects so as to circumvent the order. Accordingly, Jilin Carbon's and Ceramark's construction of the statute is incorrect as it would effectively nullify section 781(c) of the Tariff Act of 1930, as amended (the Act).

Jilin Carbon and Ceramark further contend that the imposition of antidumping duties on 17-inch GEs would violate the statute because there would be no corresponding injury determination for such products. As explained above, a minor alterations anticircumvention inquiry may result in the inclusion of articles in the order to prevent circumvention.[29] In this regard, it is noteworthy that the Department is statutorily required to notify the ITC of any proposed inclusion of merchandise for all types of anticircumvention inquiries except for a minor alterations inquiry.[30] Section 781(e) of the Act provides that after receiving notification, the ITC may request consultations with the Department regarding the proposed inclusion and, if the ITC "believes, after consultation … that a significant injury issue is presented by the proposed inclusion, the {ITC} may provide written advice to the {Department} as to whether the inclusion would be inconsistent with the affirmative determination of the {ITC} on which the order or finding is based." The relevant legislative history explains that "it is the expectation of the conferees that findings by the ITC that the inclusion of merchandise is inconsistent with the prior injury determination would be relatively unusual, since the anticircumvention provisions are intended to address efforts to import the same class or kind of merchandise in slightly modified form and

[25] *See Nippon Steel*, 219 F.3d at 1357.
[26] *See* section 781(c)(1) of the Act.
[27] *See Omnibus Trade and Competitiveness Act of 1988*, Conf. Rep. 100-576, at 600 (1988) (Conference Report).
[28] *See Mexican Wire Rod*, 77 FR at 59892.
[29] *See* section 781(c)(1) of the Act and *Mexican Wire Rod*, and accompanying Issues and Decision Memorandum at 18.
[30] *See* section 781(e) of the Act.

should typically fall within the ITC's prior finding of injury."[31] The legislative history goes on to state that "{t}he conferees expect that written advice would be unnecessary in the vast majority of scope rulings," and "{f}or this reason, the provision {requiring ITC notification} does not apply to situations involving minor completion or minor assembly, or minor alterations."[32] Thus, the statute and legislative history contemplate that in the vast majority of minor alterations proceedings, the issue of whether to include a product that has been altered in minor respects would not typically raise such a significant injury issue that notification to the ITC would be necessary.

In our *Preliminary Determination*, we noted the unique circumstances presented by this inquiry regarding the cut-off between GEs at 16-inches and below and greater than 16-inches. In the investigation, the petitioners insisted that the ITC limit the industry and define the domestic like product to "{small diameter graphite electrodes} corresponding to the scope," *i.e.*, having a diameter of 16 inches or less.[33] The Chinese respondents argued to the ITC that there is a single U.S. industry producing a single like product consisting of both the small diameter GEs covered by the petition and large diameter GEs.[34] After considering the question, the ITC agreed with the petitioners to limit the industry and define the domestic like product as small diameter GEs, finding a clear dividing line between small diameter GEs and large diameter GEs at 16 inches.[35] In the *Preliminary Determination*, we noted that "{t}he ITC adopted the definition put forth by the petitioners and drew the line between {small-diameter GEs} and {large-diameter GEs}at 16 inches in diameter, however, it is unclear whether 17-inch electrodes were precisely before the ITC (*i.e.*, in considering how to define the domestic industry, the ITC looked specifically at graphite electrodes in diameters of two-inch increments, such as 14-inches, 16-inches and 18-inches, *etc*.)."[36]

In recognition of these unique facts (*i.e.*, the ITC drawing a clear dividing line at the insistence of the domestic industry, only for the domestic industry to request movement of that dividing line years later in this circumvention proceeding, and the fact that 17-inch electrodes did not appear to be produced by the domestic industry for sale here at the time of the ITC's injury determination), and to ensure that an affirmative determination would not present a significant injury issue in this proceeding, we took the extraordinary step of contacting the ITC regarding our *Preliminary Determination*, despite not being statutorily required to do so.[37] Based on guidance from the legislative history, which directs that in many cases consultation with the ITC regarding a potential injury issue could be handled informally through a telephone call,[38] we initially contacted the ITC staff to discuss the issue.[39] In that conversation, the Department reiterated its finding in the *Preliminary Determination* that it was unclear whether 17-inch GEs

[31] *See* Conference Report at 602-603.
[32] *Id.* at 603-604.
[33] *See Small Diameter Graphite Electrodes from China*, Investigation No. 731-TAA-1143 (Final) (February 2009) (ITC Report) at 6.
[34] *Id.*
[35] *Id.* at 9-10.
[36] *See Preliminary Determination*, and accompanying Decision Memorandum at 10-11 and fn 59 (citing *ITC Report* at 6 and fn 26).
[37] *See* ITC Telecon Memo and Formal ITC Notification Letter.
[38] *See* Conference Report at 604.
[39] *See* ITC Telecon Memo.

were precisely before the ITC when it made its affirmative injury determination, and explained its understanding that the ITC only looked at GEs in two-inch even increments.[40] In response,

> {t}he ITC staff members stated that the original investigation scope covered graphite electrodes with a nominal or actual diameter of 16 inches or less. In making its corresponding injury determination, the ITC was asked to define the domestic industry either concurrently with the scope, or to expand its analysis to include all graphite electrodes, regardless of diameter. Based on the evidence before it, the ITC determined that the domestic industry should be defined to cover producers of electrodes at 16 inches or less in diameter. The ITC staff members clarified that the record before the ITC indicated that the domestic industry generally produced electrodes in even-number diameters (*i.e.*, 14-inch, 16-inch, 18-inch, *etc.*), that the question of electrodes of 17-inch diameters was not explicitly before the ITC when it defined the domestic like product, and that there were no known data concerning domestically produced 17-inch electrodes before the ITC in its injury investigation.[41]

Thus, the informal telephone call with the ITC staff members confirmed our finding in the *Preliminary Determination*, that there was no known domestic production of 17-inch GEs before the ITC at the time of the its injury determination, unlike 16-inch and 18-inch GEs. To gain a more clear answer to the question of whether our inclusion of the 17-inch GEs within the scope of the *Order* posed a significant injury issue, we took the additional step of formally notifying the ITC of our proposed inclusion pursuant to section 781(e) of the Act.[42] The ITC responded to this notification, stating "the statute does not contemplate that the Commission will provide advice to the Department … concerning preliminary anticircumvention determinations made pursuant to section 781(c) of the {Act}."[43] The response went on to state that "{n}evertheless, at the request of Commerce staff, the Commission staff engaged in informal consultations concerning this matter on June 27, 2013," and that "Commerce staff prepared a memorandum describing these informal consultations and placed it on the public record of the circumvention inquiry."[44] The ITC explained that "{i}n light of these informal consultations, the Commission has concluded that no further action is warranted."[45]

As noted previously, section 781(e)(3) of the Act provides that if the ITC "believes, after consultation under paragraph (2), that a significant injury issue is presented by the proposed inclusion, the Commission may provide written advice to the administering authority as to whether the inclusion would be inconsistent with the affirmative determination of the Commission on which the order or finding is based." In neither the staff-level discussions nor in the letter it sent to the Department did the ITC indicate that our preliminary determination presented a significant injury issue.[46] Nor did the ITC request consultations with the Department, or provide written advice as to whether the proposed inclusion of 17-inch GEs

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[40] *Id*.
[41] *Id.*
[42] *See* Formal ITC Notification Letter.
[43] *See* Letter from the ITC.
[44] *Id.*
[45] *Id.*
[46] *See* ITC Telecon Memo and Letter from the ITC.

would be inconsistent with its injury determination. Given this, and because the ITC determined that no further action is necessary with regard to our affirmative *Preliminary Determination*, we find that no significant injury problem is presented by an affirmative determination in this case. As a result, we reject Jilin Carbon's and Ceramark's argument that the imposition of antidumping duties on 17-inch GEs would violate the statute because there would be no corresponding injury determination for such products. That is, we find that the ITC's limitation of its injury analysis to GE with diameters of 16-inches and below does not preclude our determination that the importation of Jilin Carbon's 17-inch GEs is circumventing the *Order*.

Ceramark next argues that a one-inch difference in diameter for a GE is not an "insignificant" change given that the defining characteristic of a GE is its diameter size and that it would be an entirely different situation if companies were producing and importing GEs with, as an example, a diameter of 16.1 inches. First, Ceramark provided no evidence or explanation for its assertion that a one-inch difference in the diameter of graphite electrodes is "significant" such that it cannot be considered a minor alteration. Second, and more importantly, we disagree with Ceramark's construction of the statute (*i.e.*, that the minor alteration must be "insignificant"). While the alteration must, indeed, be minor, we use the Senate Report criteria to guide our analysis of whether the difference between the subject merchandise and the allegedly circumventing merchandise is minor.[47] Our analysis of the Senate Report criteria in the *Preliminary Determination* established that the one-inch difference between a 16-inch GE and a 17-inch GE is, in fact, minor. For example, as we explained in the *Preliminary Determination*, there were no significant differences in the expectations of ultimate users and the uses to which the 17-inch GEs were put relative to those of 16-inch GEs.[48] In addition, the cost of modification for Jilin Carbon's 17-inch GEs relative to Jilin Carbon's 16-inch GEs is not significant.[49] No parties have provided evidence supporting a different conclusion. Accordingly, we continue to determine that, with respect to the GEs in question, the one-inch difference between 17-inch GEs and 16-inch GEs represents a minor difference between the subject electrodes and the electrodes alleged to be circumventing the *Order*.

Ceramark argues that findings under many of the circumvention factors will necessarily be similar for adjacent-sized GEs and for all sizes of GEs as a whole and, thus, cannot support a finding of circumvention. Ceramark provides no evidence or explanation, however, as to why findings under circumvention factors that may be necessarily similar for adjacent-sized GEs or for all sizes of GEs as a whole cannot be used to support a finding of circumvention. Whether or not findings under these criteria for electrodes under 16 inches are similar or not is irrelevant because they are clearly covered by the order. We examined all of the Senate Report criteria (*i.e.*, the overall physical characteristics of the merchandise, the expectations of the ultimate users, the use of the merchandise, the channels of marketing and the cost of any modification relative to the total value of the imported products) and other case-specific criteria (*i.e.*, circumstances under which the products enter the United States, timing of entries, and quantity

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[47] *See Omnibus Trade Act of 1987, Report of the Senate Finance Committee*, S. Rep. 100-71, at 100 (1987) (Senate Report).

[48] *See Preliminary Determination*, and accompanying Decision Memorandum at 10-13.

[49] *Id*. at 14-15. In fact, Jilin Carbon reported that "there is no separate cost calculation for 16-inch, 17-inch or 18-inch {high-power} graphite electrodes. In other words, all three electrode diameters share the same costs." *See* Jilin Carbon's supplemental response dated October 17, 2012, at 8.

of merchandise entered) in reaching our conclusion and found that *each* of these criteria supported a determination that Jilin Carbon's exports of 17-inch GEs are circumventing the *Order*.[50]

We disagree with the argument that the *Preliminary Determination* did not give sufficient weight to the fact that the 17-inch GEs produced and exported to the United States were manufactured to NEMA standards, which predate and were issued prior to the *Order* and to the fact that [ ] 17-inch GEs [ ] establishing that [ ] 17-inch GEs and that Jilin Carbon [ ] 17-inch GEs. As we explained in *Mexican Wire Rod*, the existence of the products at issue prior to the initiation of an investigation does not preclude the Department from conducting a minor alterations anticircumvention analysis.[51] Thus, the existence of the NEMA standards or the fact that [ ] prior to the *Order* has no relevance to whether Jilin Carbon has altered its merchandise in minor respects in order to circumvent the *Order*.

Finally, the court rulings cited by Jilin Carbon and Ceramark are unavailing. With respect to *Wheatland*, the Federal Circuit explained in *Nippon Steel* that *Wheatland* differed from the facts of *Nippon Steel* in "critical respects," namely that *Wheatland* "involved a scope determination (whether the antidumping duty order covered a particular product) rather than, as here, a minor alterations inquiry into whether alterations in a product took it outside the scope of the order."[52] The Court in *Nippon Steel* further stated that, "{a}lthough {in *Wheatland*} the Court held that Commerce justifiably had decided to conduct a scope investigation, it did not hold that Commerce had no authority to conduct a minor alterations inquiry."[53] In addition, the Court in *Nippon Steel* held that *Wheatland* "does not cover Commerce's decision to institute a minor alterations inquiry in the present case since, as {*Wheatland*} stated, such an inquiry properly covers products that are so insignificantly changed from a covered product that they should be considered within the scope of the order even though the alterations remove them from the order's literal scope."[54] Thus, Jilin Carbon's citation to *Wheatland* is unavailing because this determination relates to an anticircumvention inquiry and not a scope determination.

Ceramark's reliance upon *Hylsa* is similarly misplaced, because it involved the Department's determination to pursue an anticircumvention inquiry years after it had conducted a scope inquiry of the same product.[55] Relying on *Wheatland*, the CIT enjoined the Department from conducting a minor alteration inquiry under these circumstances, finding that the product, line pipe, was "clearly outside the scope of the antidumping duty order."[56] However, as discussed above, the Federal Circuit later clarified in *Nippon Steel* that the Department is not barred from conducting a minor alteration inquiry even in instances in which a product is excluded from the order's literal scope.[57]

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[50] *See Preliminary Determination*, and accompanying Decision Memorandum at 8-18.
[51] *See Mexican Wire Rod*, and accompanying Issues and Decision Memorandum at Comment 1.
[52] *See Nippon Steel*, 219 F.3d at 1356.
[53] *Id*.
[54] *Id*., 219 F.3d at 1357.
[55] *See Hylsa*, 22 C.I.T. at 48.
[56] *Id*.
[57] *See Nippon Steel*, 219 F.3d at 1357.

Similarly, *Eckstrom*, *Ericsson*, *Duferco*, and *Smith Corona* all involved scope inquiries and not anticircumvention proceedings.[58] Therefore, they are not relevant to this anticircumvention proceeding.

Accordingly, for the foregoing reasons, and based on our analysis in the *Preliminary Determination*, we determine that Jilin Carbon's 17-inch GEs are circumventing the *Order*.

Comment 2: Whether the Scope of the Order Should be Updated to Reflect Subsequent Anticircumvention Determinations

Petitioners' Arguments

The petitioners argue that the Department quoted outdated scope language for the *Order* in the *Preliminary Determination*. According to the petitioners, the most recent notice with respect to this order includes updated scope language which reflects the final determination in the Department's 2012 circumvention case involving unfinished Chinese GEs that underwent minor finishing operations in the United Kingdom. While acknowledging that HTSUS numbers are not dispositive, the petitioners assert that the Department has found that the inclusion of HTSUS 3801.10 in the scope language will aid Customs and Border Protection by clarifying that products categorized under HTSUS 3801.10 should be considered merchandise subject to the order. Accordingly, the petitioners request that the Department update the scope description included in this segment of the proceeding to include this HTSUS subheading. For similar reasons, the petitioners urge the Department to include HTSUS 8545.11.0020 (covering GEs with diameters greater than 16 inches) in the scope language for its final determination.

Neither Jilin Carbon nor Ceramark responded to this argument.

Department's Position

We agree with the petitioners and have adjusted the scope language accordingly.

Rescission of Later-Developed Merchandise Anticircumvention Inquiry

As we explained in our *Preliminary Determination*,[59] because we are making an affirmative determination of circumvention under section 781(c) of the Act (relating to minor alterations), we do not find it necessary to make a determination of whether later-developed merchandise is circumventing the *Order* pursuant to section 781(d) of the Act. Accordingly, we are rescinding the later-developed-merchandise anticircumvention inquiry.

[58] *See Eckstrom*, 254 F.3d 1068; *Ericsson*, 60 F.3d 778; *Duferco*, 296 F. 3d 1087; *Smith Corona*, 915 F.2d 683.
[59] *See Preliminary Determination*, and accompanying Decision Memorandum at 19.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish the final determination of this anticircumvention inquiry in the *Federal Register*.

___✓___Agree _____Disagree

Paul Piquado
Assistant Secretary
for Import Administration

10 SEPTEMBER 2013
Date